NORTH CAROLINA REPORTS

VOLUME 360

SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice
SARAH PARKER[1]

Associate Justices
MARK D. MARTIN
GEORGE L. WAINWRIGHT, JR.
ROBERT H. EDMUNDS, JR.
EDWARD THOMAS BRADY
PAUL MARTIN NEWBY
PATRICIA TIMMONS-GOODSON[2]

Former Chief Justices
RHODA B. BILLINGS
JAMES G. EXUM, JR.
BURLEY B. MITCHELL, JR.
HENRY E. FRYE
I. BEVERLY LAKE, JR.[3]

Former Justices
DAVID M. BRITT
ROBERT R. BROWNING
J. PHIL CARLTON
FRANCIS I. PARKER
HARRY C. MARTIN
JOHN WEBB
WILLIS P. WHICHARD
JAMES A. WYNN, JR.
FRANKLIN E. FREEMAN, JR.
G. K. BUTTERFIELD, JR.
ROBERT F. ORR

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CHRISTIE SPEIR CAMERON

Librarian
THOMAS P. DAVIS

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KIMBERLY WOODELL SIEREDZKI

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1. Appointed by Governor Michael F. Easley as Chief Justice and sworn in 1 February 2006.
2. Appointed by Governor Michael F. Easley and sworn in 1 February 2006.
3. Retired 31 January 2006.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	J. Richard Parker	Manteo
	Jerry R. Tillett	Manteo
2	William C. Griffin, Jr.	Williamston
3A	W. Russell Duke, Jr.	Greenville
	Clifton W. Everett, Jr.	Greenville
6A	Alma L. Hinton	Halifax
6B	Cy A. Grant, Sr.	Windsor
7A	Quentin T. Sumner	Rocky Mount
7B	Milton F. (Toby) Fitch, Jr.	Wilson
7BC	Frank R. Brown	Tarboro
	Second Division	
3B	Benjamin G. Alford	New Bern
	Kenneth F. Crow	New Bern
	John E. Nobles, Jr.	Greenville
4A	Russell J. Lanier, Jr.	Kenansville
4B	Charles H. Henry	Jacksonville
5	W. Allen Cobb, Jr.	Wilmington
	Jay D. Hockenbury	Wilmington
	Phyllis M. Gorham[1]	Wilmington
8A	Paul L. Jones	Kinston
8B	Jerry Braswell	Goldsboro
	Third Division	
9	Robert H. Hobgood	Louisburg
	Henry W. Hight, Jr.	Henderson
9A	W. Osmond Smith III	Yanceyville
10	Donald W. Stephens	Raleigh
	Abraham P. Jones	Raleigh
	Howard E. Manning, Jr.	Raleigh
	Michael R. Morgan	Raleigh
	Paul C. Gessner[2]	Raleigh
	Paul C. Ridgeway[3]	Raleigh
14	Orlando F. Hudson, Jr.	Durham
	A. Leon Stanback, Jr.	Durham
	Ronald L. Stephens	Durham
	Kenneth C. Titus	Durham
15A	J. B. Allen, Jr.	Burlington
	James Clifford Spencer, Jr.	Burlington
15B	Carl Fox	Chapel Hill
	R. Allen Baddour	Chapel Hill

DISTRICT	JUDGES	ADDRESS
	Fourth Division	
11A	Franklin F. Lanier	Buies Creek
11B	Thomas H. Lock[4]	Smithfield
12	E. Lynn Johnson	Fayetteville
	Gregory A. Weeks	Fayetteville
	Jack A. Thompson	Fayetteville
	James F. Ammons, Jr.	Fayetteville
13	William C. Gore, Jr.	Whiteville
	Ola M. Lewis	Southport
16A	Richard T. Brown[5]	Laurinburg
16B	Robert F. Floyd, Jr.	Lumberton
	Gary L. Locklear	Pembroke
	Fifth Division	
17A	Edwin Graves Wilson, Jr.	Eden
	Richard W. Stone	Wentworth
17B	A. Moses Massey	Mt. Airy
	Andy Cromer	King
18	Catherine C. Eagles	Greensboro
	Henry E. Frye, Jr.	Greensboro
	Lindsay R. Davis, Jr.	Greensboro
	John O. Craig III	Greensboro
	R. Stuart Albright	Greensboro
19B	Vance Bradford Long	Asheboro
21	Judson D. DeRamus, Jr.	Winston-Salem
	William Z. Wood, Jr.	Winston-Salem
	L. Todd Burke	Winston-Salem
	Ronald E. Spivey	Winston-Salem
23	Edgar B. Gregory[6]	North Wilkesboro
	Sixth Division	
19A	W. Erwin Spainhour	Concord
19C	John L. Holshouser, Jr.[7]	Salisbury
19D	James M. Webb	Whispering Pines
20A	Michael Earle Beale	Wadesboro
20B	Susan C. Taylor	Monroe
	W. David Lee	Monroe
22	Mark E. Klass	Lexington
	Kimberly S. Taylor	Hiddenite
	Christopher Collier	Mooresville
	Seventh Division	
25A	Beverly T. Beal	Lenoir
	Robert C. Ervin	Morganton
25B	Timothy S. Kincaid	Hickory
	Nathaniel J. Poovey	Hickory
26	Robert P. Johnston	Charlotte
	W. Robert Bell	Charlotte
	Richard D. Boner	Charlotte
	J. Gentry Caudill	Charlotte

DISTRICT	JUDGES	ADDRESS
	David S. Cayer	Charlotte
	Yvonne Evans	Charlotte
	Linwood O. Foust	Charlotte
27A	Jesse B. Caldwell III	Gastonia
	Timothy L. Patti	Gastonia
27B	Forrest Donald Bridges	Shelby
	James W. Morgan	Shelby
	Eighth Division	
24	James L. Baker, Jr.	Marshall
	Charles Phillip Ginn	Marshall
28	Dennis Jay Winner	Asheville
	Ronald K. Payne	Asheville
29A	Laura J. Bridges	Marion
29B	Mark E. Powell[8]	Rutherfordton
30A	James U. Downs	Franklin
30B	Janet Marlene Hyatt	Waynesville

SPECIAL JUDGES

Karl Adkins	Charlotte
Steve A. Balog	Burlington
Albert Diaz	Charlotte
Richard L. Doughton	Sparta
Thomas D. Haigwood	Greenville
James E. Hardin, Jr.	Durham
D. Jack Hooks, Jr.	Whiteville
Jack W. Jenkins	Morehead City
John R. Jolly, Jr.	Raleigh
Ripley Eagles Rand[9]	Raleigh
John W. Smith	Wilmington
Ben F. Tennille	Greensboro
Gary E. Trawick, Jr.	Burgaw

EMERGENCY JUDGES

W. Douglas Albright	Greensboro
Henry V. Barnette, Jr.	Raleigh
Anthony M. Brannon	Durham
Stafford G. Bullock	Raleigh
Narley L. Cashwell[10]	Raleigh
C. Preston Cornelius	Mooresville
B. Craig Ellis[11]	Laurinburg
Larry G. Ford[12]	Salisbury
Ernest B. Fullwood[13]	Wilmington
Howard R. Greeson, Jr.	High Point
Zoro J. Guice, Jr.[14]	Rutherfordton
Michael E. Helms[15]	North Wilkesboro
Clarence E. Horton, Jr.	Kannapolis

DISTRICT	JUDGES	ADDRESS
	DONALD M. JACOBS	Raleigh
	JOSEPH R. JOHN, SR.	Raleigh
	CHARLES C. LAMM, JR.	Boone
	JAMES E. LANNING	Charlotte
	JOHN B. LEWIS, JR.	Farmville
	JERRY CASH MARTIN	King
	PETER M. MCHUGH[16]	Reidsville
	JAMES E. RAGAN III	Oriental
	DONALD L. SMITH	Raleigh
	GEORGE L. WAINWRIGHT[17]	Morehead City
	RUSSELL G. WALKER, JR.[18]	Asheboro

RETIRED/RECALLED JUDGES

GILES R. CLARK	Elizabethtown
JAMES C. DAVIS	Concord
MARVIN K. GRAY	Charlotte
KNOX V. JENKINS	Smithfield
ROBERT D. LEWIS	Asheville
F. FETZER MILLS	Wadesboro
HERBERT O. PHILLIPS III	Morehead City
JULIUS ROUSSEAU, JR.	North Wilkesboro
THOMAS W. SEAY	Spencer

1. Appointed and sworn in 17 May 2007 to replace Ernest B. Fullwood who retired 31 December 2006.
2. Elected and sworn in 1 January 2007 to replace Narley L. Cashwell who retired 31 December 2006.
3. Elected and sworn in 2 January 2007.
4. Elected and sworn in 2 January 2007 to replace Knox V. Jenkins, Jr. who retired 31 December 2006.
5. Appointed and sworn in 10 January 2007 to replace B. Craig Ellis who retired 31 December 2006.
6. Elected and sworn in 1 January 2007 to replace Michael E. Helms who retired 31 December 2006.
7. Elected and sworn in 2 January 2007 to replace Larry G. Ford who retired 31 December 2006.
8. Elected and sworn in 1 January 2007 to replace Zoro J. Guice, Jr. who retired 31 December 2006.
9. Appointed and sworn in 29 December 2006.
10. Appointed and sworn in 8 January 2007.
11. Appointed and sworn in 1 January 2007.
12. Appointed and sworn in 2 January 2007.
13. Appointed and sworn in 2 January 2007.
14. Appointed and sworn in 5 January 2007.
15. Appointed and sworn in 1 January 2007.
16. Resigned 6 December 2006.
17. Appointed and sworn in 29 January 2007.
18. Resigned 6 December 2006.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	C. Christopher Bean (Chief)[1]	Edenton
	J. Carlton Cole	Hertford
	Edgar L. Barnes	Manteo
	Amber Davis	Wanchese
	Eula E. Reid[2]	Elizabeth City
2	Samuel G. Grimes (Chief)[3]	Washington
	Michael A. Paul	Washington
	Regina Rogers Parker	Williamston
	Christopher B. McLendon[4]	Williamston
3A	David A. Leech (Chief)	Greenville
	Patricia Gwynett Hilburn	Greenville
	Joseph A. Blick, Jr.	Greenville
	G. Galen Braddy	Greenville
	Charles M. Vincent	Greenville
3B	Jerry F. Waddell (Chief)	New Bern
	Cheryl Lynn Spencer	New Bern
	Paul M. Quinn	Morehead City
	Karen A. Alexander	New Bern
	Peter Mack, Jr.	New Bern
	L. Walter Mills[5]	New Bern
4	Leonard W. Thagard (Chief)	Clinton
	Paul A. Hardison	Jacksonville
	William M. Cameron III	Richlands
	Louis F. Foy, Jr.	Pollocksville
	Sarah Cowen Seaton	Jacksonville
	Carol A. Jones	Kenansville
	Henry L. Stevens IV	Kenansville
	James L. Moore, Jr.	Jacksonville
5	John J. Carroll III (Chief)	Wilmington
	J. H. Corpening II	Wilmington
	Shelly S. Holt	Wilmington
	Rebecca W. Blackmore	Wilmington
	James H. Faison III	Wilmington
	Sandra Criner	Wilmington
	Richard Russell Davis	Wilmington
6A	Harold Paul McCoy, Jr. (Chief)	Halifax
	W. Turner Stephenson III	Halifax
	Brenda G. Branch[6]	Halifax
6B	Alfred W. Kwasikpui (Chief)	Jackson
	Thomas R. J. Newbern	Aulander
	William Robert Lewis II	Winton
7	William Charles Farris (Chief)	Wilson
	Joseph John Harper, Jr.	Tarboro
	John M. Britt	Tarboro
	Pell C. Cooper	Tarboro
	Robert A. Evans	Rocky Mount
	William G. Stewart	Wilson
	John J. Covolo	Rocky Mount
8	Joseph E. Setzer, Jr. (Chief)	Goldsboro
	David B. Brantley	Goldsboro

DISTRICT	JUDGES	ADDRESS
	Lonnie W. Carraway	Goldsboro
	R. Leslie Turner	Kinston
	Timothy I. Finan[7]	Goldsboro
	Elizabeth A. Heath	Kinston
9	Charles W. Wilkinson, Jr. (Chief)	Oxford
	H. Weldon Lloyd, Jr.	Henderson
	Daniel Frederick Finch	Oxford
	J. Henry Banks	Henderson
	John W. Davis	Louisburg
	Randolph Baskerville	Warrenton
9A	Mark E. Galloway (Chief)	Roxboro
	L. Michael Gentry	Pelham
10	Joyce A. Hamilton (Chief)	Raleigh
	James R. Fullwood	Raleigh
	Anne B. Salisbury	Raleigh
	Robert Blackwell Rader	Raleigh
	Kristin H. Ruth	Raleigh
	Craig Croom	Raleigh
	Jennifer M. Green	Raleigh
	Monica M. Bousman	Raleigh
	Jane Powell Gray	Raleigh
	Shelly H. Desvouges	Raleigh
	Jennifer Jane Knox	Raleigh
	Debra Ann Smith Sasser	Raleigh
	Vinston M. Rozier, Jr.	Raleigh
	Lori G. Christian[8]	Raleigh
	Christine M. Walczyk[9]	Raleigh
	Eric craig Chasse[10]	Raleigh
11	Albert A. Corbett, Jr. (Chief)	Smithfield
	Jacquelyn L. Lee	Sanford
	Jimmy L. Love, Jr.	Sanford
	Addie M. Harris-Rawls	Clayton
	George R. Murphy	Lillington
	Resson O. Faircloth II	Lillington
	Robert W. Bryant, Jr.	Lillington
	R. Dale Stubbs[11]	Lillington
	O. Henry Willis, Jr.[12]	Smithfield
12	A. Elizabeth Keever (Chief)	Fayetteville
	Robert J. Stiehl III	Fayetteville
	Edward A. Pone	Fayetteville
	Kimbrell Kelly Tucker	Fayetteville
	John W. Dickson	Fayetteville
	Cheri Beasley	Fayetteville
	Talmadge Baggett[13]	Fayetteville
	George J. Franks[14]	Fayetteville
	David H. Hasty[15]	Fayetteville
13	Jerry A. Jolly (Chief)	Tabor City
	Napoleon B. Barefoot, Jr.	Supply
	Thomas V. Aldridge, Jr.	Whiteville
	Nancy C. Phillips	Elizabethtown
	Douglas B. Sasser	Whiteville
	Marion R. Warren	Exum
14	Elaine M. Bushfan (Chief)	Durham

DISTRICT	JUDGES	ADDRESS
	Craig B. Brown	Durham
	Ann E. McKown	Durham
	Marcia H. Morey	Durham
	James T. Hill	Durham
	Nancy E. Gordon[16]	Durham
	William Andrew Marsh III[17]	Durham
15A	James K. Roberson (Chief)	Graham
	Ernest J. Harviel	Graham
	Bradley Reid Allen, Sr.	Graham
	G. Wayne Abernathy	Graham
15B	Joseph M. Buckner (Chief)	Hillsborough
	Alonzo Brown Coleman, Jr.	Hillsborough
	Charles T. L. Anderson	Hillsborough
	M. Patricia DeVine	Hillsborough
	Beverly A. Scarlett[18]	Hillsborough
16A	William G. McIlwain (Chief)[19]	Wagram
	Regina M. Joe[20]	Raeford
	John H. Horne, Jr.[21]	Laurinburg
16B	J. Stanley Carmical (Chief)	Lumberton
	Herbert L. Richardson	Lumberton
	John B. Carter, Jr.	Lumberton
	William Jeffrey Moore	Pembroke
	James Gregory Bell	Lumberton
17A	Fredrick B. Wilkins, Jr. (Chief)	Wentworth
	Stanley L. Allen	Wentworth
	James A. Grogan[22]	Wentworth
17B	Charles Mitchell Neaves, Jr. (Chief)[23]	Elkin
	Spencer Gray Key, Jr.	Elkin
	Mark Hauser Badget	Elkin
	Angela B. Puckett[24]	Elkin
18	Joseph E. Turner (Chief)	Greensboro
	Lawrence McSwain	Greensboro
	Wendy M. Enochs	Greensboro
	Susan Elizabeth Bray	Greensboro
	Patrice A. Hinnant	Greensboro
	A. Robinson Hassell	Greensboro
	H. Thomas Jarrell, Jr.	High Point
	Susan R. Burch	Greensboro
	Theresa H. Vincent	Greensboro
	William K. Hunter	Greensboro
	Linda Valerie Lee Falls	Greensboro
	Sherry Fowler Alloway	Greensboro
	Polly D. Sizemore[25]	Greensboro
19A	William G. Hamby, Jr. (Chief)	Concord
	Donna G. Hedgepeth Johnson	Concord
	Martin B. McGee	Concord
	Michael Knox	Concord
19B	William M. Neely (Chief)	Asheboro
	Michael A. Sabiston	Troy
	Jayrene Russell Maness	Carthage
	Lee W. Gavin	Asheboro
	Scott C. Etheridge	Asheboro
	James P. Hill, Jr.	Asheboro

DISTRICT	JUDGES	ADDRESS
	Donald W. Creed, Jr.[26]	Asheboro
19C	Charles E. Brown (Chief)	Salisbury
	Beth Spencer Dixon	Salisbury
	William C. Kluttz, Jr.	Salisbury
	Kevin G. Eddinger	Salisbury
	Roy Marshall Bickett, Jr.[27]	Salisbury
20A	Tanya T. Wallace (Chief)	Albemarle
	Kevin M. Bridges	Albemarle
	Lisa D. Thacker	Wadesboro
	Scott T. Brewer	Monroe
20B	Christopher W. Bragg (Chief)	Monroe
	Joseph J. Williams	Monroe
	Hunt Gwyn	Monroe
	William F. Helms[28]	Monroe
21	William B. Reingold (Chief)	Winston-Salem
	Chester C. Davis	Winston-Salem
	William Thomas Graham, Jr.	Winston-Salem
	Victoria Lane Roemer	Winston-Salem
	Laurie L. Hutchins	Winston-Salem
	Lisa V. L. Menefee	Winston-Salem
	Lawrence J. Fine	Winston-Salem
	Denise S. Hartsfield	Winston-Salem
	George Bedsworth	Winston-Salem
22	Wayne L. Michael (Chief)	Lexington
	Jimmy L. Myers	Mocksville
	L. Dale Graham	Taylorsville
	Julia Shuping Gullett	Statesville
	Theodore S. Royster, Jr.	Lexington
	April C. Wood	Statesville
	Mary F. Covington	Mocksville
	H. Thomas Church	Statesville
	Carlton Terry[29]	Lexington
23	Mitchell L. McLean (Chief)[30]	Wilkesboro
	David V. Byrd	Wilkesboro
	Jeanie Reavis Houston	Wilkesboro
	Michael D. Duncan[31]	Wilkesboro
24	Alexander Lyerly (Chief)	Banner Elk
	William A. Leavell III	Bakersville
	Kyle D. Austin	Pineola
	R. Gregory Horne	Newland
25	Robert M. Brady (Chief)	Lenoir
	Gregory R. Hayes	Hickory
	L. Suzanne Owsley	Hickory
	C. Thomas Edwards	Morganton
	Buford A. Cherry	Hickory
	Sherrie Watson Elliott	Newton
	John R. Mull	Morganton
	Amy R. Sigmon	Newton
	J. Gary Dellinger[32]	Newton
26	Fritz Y. Mercer, Jr. (Chief)	Charlotte
	H. William Constangy	Charlotte
	Phillip F. Howerton, Jr.	Charlotte
	Rickye McKoy-Mitchell	Charlotte

DISTRICT	JUDGES	ADDRESS
	Lisa C. Bell	Charlotte
	Louis A. Trosch, Jr.	Charlotte
	Regan A. Miller	Charlotte
	Nancy Black Norelli	Charlotte
	Hugh B. Lewis	Charlotte
	Nathaniel P. Proctor	Charlotte
	Becky Thorne Tin	Charlotte
	Ben S. Thalheimer	Charlotte
	Hugh B. Campbell, Jr.	Charlotte
	Thomas Moore, Jr.	Charlotte
	N. Todd Owens	Charlotte
	Christy Townley Mann	Charlotte
	Timothy M. Smith[33]	Charlotte
	Ronald C. Chapman[34]	Charlotte
27A	Ralph C. Gingles, Jr. (Chief)[35]	Gastonia
	Angela G. Hoyle	Gastonia
	John K. Greenlee	Gastonia
	James A. Jackson	Gastonia
	Thomas Gregory Taylor	Belmont
	Michael K. Lands[36]	Gastonia
	Richard Abernethy[37]	Gastonia
27B	Larry James Wilson (Chief)	Shelby
	Anna F. Foster	Shelby
	K. Dean Black	Denver
	Ali B. Paksoy, Jr.	Shelby
	Meredith A. Shuford[38]	Shelby
28	Gary S. Cash (Chief)	Asheville
	Shirley H. Brown	Asheville
	Rebecca B. Knight	Asheville
	Marvin P. Pope, Jr.	Asheville
	Patricia Kaufmann Young	Asheville
	Sharon Tracey Barrett	Asheville
	J. Calvin Hill[39]	Asheville
29A	C. Randy Pool (Chief)	Marion
	Athena F. Brooks	Cedar Mountain
	Laura Anne Powell	Rutherfordton
	J. Thomas Davis	Rutherfordton
29B	Robert S. Cilley (Chief)	Pisgah Forest
	Mark E. Powell	Hendersonville
	David Kennedy Fox	Hendersonville
30	Danny E. Davis (Chief)	Waynesville
	Steven J. Bryant	Bryson City
	Richlyn D. Holt	Waynesville
	Bradley B. Letts	Sylva
	Monica Hayes Leslie	Waynesville
	Richard K. Walker[40]	Waynesville

EMERGENCY DISTRICT COURT JUDGES

Philip W. Allen	Reidsville
E. Burt Aycock, Jr.	Greenville
Sarah P. Bailey	Rocky Mount

DISTRICT	JUDGES	ADDRESS
	Grafton G. Beaman[41]	Elizabeth City
	Ronald E. Bogle	Raleigh
	Donald L. Boone	High Point
	James Thomas Bowen III	Lincolnton
	Narley L. Cashwell[42]	Raleigh
	Samuel Cathey	Charlotte
	Richard G. Chaney[43]	Durham
	William A. Christian	Sanford
	J. Patrick Exum	Kinston
	J. Keaton Fonvielle	Shelby
	Thomas G. Foster, Jr.	Greensboro
	Earl J. Fowler, Jr.	Asheville
	Rodney R. Goodman	Kinston
	Lawrence Hammond, Jr.	Asheboro
	James W. Hardison[44]	Williamston
	Jane V. Harper[45]	Charlotte
	James A. Harrill, Jr.	Winston-Salem
	Resa Harris	Charlotte
	Robert E. Hodges	Morganton
	James M. Honeycutt[46]	Lexington
	Robert W. Johnson	Statesville
	William G. Jones	Charlotte
	Lillian B. Jordan	Asheboro
	Robert K. Keiger	Winston-Salem
	David Q. LaBarre	Durham
	William C. Lawton	Raleigh
	C. Jerome Leonard, Jr.	Charlotte
	James E. Martin	Ayden
	Edward H. McCormick	Lillington
	Otis M. Oliver[47]	Dobson
	Donald W. Overby	Raleigh
	Warren L. Pate[48]	Raeford
	Dennis J. Redwing[49]	Gastonia
	J. Larry Senter	Raleigh
	Margaret L. Sharpe	Winston-Salem
	Russell Sherrill III	Raleigh
	Catherine C. Stevens	Gastonia
	J. Kent Washburn	Graham

RETIRED/RECALLED JUDGES

Claude W. Allen, Jr.	Oxford
Joyce A. Brown	Otto
Daphene L. Cantrell	Charlotte
Sol G. Cherry	Boone
William A. Creech	Raleigh
T. Yates Dobson, Jr.	Smithfield
Spencer B. Ennis	Graham
Robert T. Gash	Brevard
Harley B. Gaston, Jr.	Gastonia
Roland H. Hayes	Gastonia

DISTRICT	JUDGES	ADDRESS
	WALTER P. HENDERSON	Trenton
	CHARLES A. HORN, SR.	Shelby
	JACK E. KLASS	Lexington
	EDMUND LOWE	High Point
	J. BRUCE MORTON	Greensboro
	STANLEY PEELE	Hillsborough
	SAMUEL M. TATE	Morganton
	JOHN L. WHITLEY	Wilson

1. Appointed Chief Judge effective 1 January 2007.
2. Elected and sworn in 2 January 2007 to replace Grafton G. Beaman who retired 31 December 2006.
3. Appointed Chief Judge effective 1 October 2006.
4. Appointed and sworn in 19 December 2006 to replace James W. Hardison who retired 1 October 2006.
5. Appointed and sworn in 23 February 2007.
6. Appointed and sworn in 29 January 2007.
7. Appointed and sworn in 23 February 2007 to replace Rose Vaughn Williams who retired 31 December 2006.
8. Appointed and sworn in 5 February 2007.
9. Appointed and sworn in 19 February 2007 to replace Donna S. Stroud who was elected to the Court of Appeals.
10. Appointed and sworn in 5 April 2007 to replace Paul C. Gessner who was elected to the Superior Court.
11. Appointed and sworn in 15 February 2007.
12. Appointed and sworn in 3 April 2007 to replace James B. Ethridge who resigned 16 January 2007.
13. Elected and sworn in 1 January 2007 to replace Dougald Clark, Jr. who retired 31 December 2006.
14. Elected and sworn in 1 January 2007.
15. Elected and sworn in 1 January 2007.
16. Elected and sworn in 2 January 2007 to replace Richard G. Chaney who retired 31 December 2006.
17. Appointed and sworn in 14 February 2007.
18. Appointed and sworn in 8 February 2007.
19. Appointed Chief Judge effective 6 January 2007.
20. Elected and sworn in 1 January 2007 to replace Warren L. Pate who retired 31 December 2006.
21. Appointed and sworn in 16 March 2007 to replace Richard T. Brown who was appointed to the Superior Court.
22. Appointed and sworn in 26 January 2007.
23. Appointed Chief Judge effective 1 January 2007.
24. Elected and sworn in 2 January 2007 to replace Otis M. Oliver who retired 31 December 2006.
25. Appointed and sworn in 30 March 2007.
26. Appointed and sworn in 8 February 2007.
27. Appointed and sworn in 1 February 2007.
28. Appointed and sworn in 1 February 2007.
29. Elected and sworn in 1 January 2007 to replace James M. Honeycutt who retired 31 December 2006.
30. Appoointed Chief Judge effective 1 January 2007.
31. Elected and sworn in 1 January 2007 to replace Edgar B. Gregory who was elected to Superior Court.
32. Appointed and sworn in 14 February 2007.
33. Elected and sworn in 1 January 2007 to replace Jane V. Harper who retired 31 December 2006.
34. Appointed and sworn in 31 January 2007.
35. Appointed Chief Judge effective 1 January 2007.
36. Elected and sworn in 1 January 2007.
37. Appointed and sworn in 23 February 2007.
38. Appointed and sworn in 23 February 2007.
39. Appointed and sworn in 9 February 2007.
40. Appointed and sworn in 2 February 2007.
41. Appointed and sworn in 2 January 2007.
42. Appointed and sworn in 8 January 2007.
43. Appointed and sworn in 4 January 2007.
44. Appointed and sworn in 3 October 2006.
45. Appointed and sworn in 2 February 2007.
46. Appointed and sworn in 2 January 2007.
47. Appointed and sworn in 4 January 2007.
48. Appointed and sworn in 6 January 2007.
49. Appointed and sworn in 16 February 2007.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
ROY COOPER

Chief of Staff
Kristi Hyman

Deputy Chief of Staff
Nels Roseland

General Counsel
J. B. Kelly

Senior Policy Advisor
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CASES REPORTED

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ORDERS

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PETITIONS TO REHEAR

GENERAL STATUTES CITED

GENERAL STATUTES CITED

UNITED STATES CONSTITUTION CITED

CONSTITUTION OF NORTH CAROLINA CITED

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF APPELLATE PROCEDURE

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 7th day of April 2006 and said person has been issued a certificate of this Board:

Garland E. Lowe . . . . . .Southport

Given over my hand and seal of the Board of Law Examiners on this the 26th day of April 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 7th day of April 2006 and said person has been issued a certificate of this Board:

Lawrence Valery Berkovich . . . . . .Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners on this the 1st day of May 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 28th day of April 2006 and said persons have been issued a certificate of this Board:

Michael Wielechowski . . . . . .Applied from the State of Pennsylvania
Richard L. Douglas . . . . . .Applied from the State of West Virginia

Given over my hand and seal of the Board of Law Examiners on this the 22nd day of May, 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 28th day of April 2006 and said person has been issued a certificate of this Board:

Virlenys Palma . . . . . .Elizabeth City

Given over my hand and seal of the Board of Law Examiners on this the 9th day of June, 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 5th day of May 2006 and said person has been issued a certificate of this Board:

Jeffrey Clayton Foster . . . . . .Asheville

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Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 5th day of May 2006 and said persons have been issued a certificate of this Board:

William Curtis Caywood IV . . . . . .Mooresville
Brian Goodwin . . . . . .Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 28th day of June 2006.

Fred P. Parker III
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Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 6th day of June 2006 and said person has been issued a certificate of this Board:

Christopher Kennard Richardson . . . . . .Cary

Given over my hand and seal of the Board of Law Examiners on this the 30th day of June 2006.

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Executive Director
Board of Law Examiners of the
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LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 25th day of July 2006 and said person has been issued a certificate of this Board:

David Robinson . . . . . .Pittsburgh, Pennsylvania

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Fred P. Parker III
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Board of Law Examiners of the
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I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 28th day of July and said persons have been issued a certificate of this Board:

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Given over my hand and seal of the Board of Law Examiners on this the 27th day of September, 2006.

Fred P. Parker III
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I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners

on the 11th day of August 2006 and said persons have been issued a certificate of this Board:

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Fred P. Parker III
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Justin B. Greene . . . . . Bryson City
Amy N. Greenfield . . . . . Charlotte
Steven K. Griffith . . . . . Morrisville
Alicia Ann Gruenebaum . . . . . Raleigh
Nardine Mary Guirguis . . . . . Cary
Saad Gul . . . . . Raleigh
Patricia Lyons Gwinn . . . . . Raleigh
Worth Timothy Haithcock, II . . . . . Goldsboro
Kristine Zoe Gamble Hanes . . . . . Winston Salem
Carrie Arthur Hanger . . . . . Greensboro
Casey Nicole Harding . . . . . Pfafftown
Jonathan Player Harrill . . . . . Beaufort
David Grant Harris, II . . . . . Chapel Hill
Scott Crissman Harris . . . . . Raleigh
Anakah Dawn Harrison . . . . . San Diego, California
Dan McCord Hartzog, Jr. . . . . Raleigh
Aisha Hasan . . . . . Cary
Candace A. Hayden . . . . . Greensboro
Johnny R. Hayes . . . . . Charlotte
Andrew Taube Heath . . . . . Wilmington
William Tate Helms . . . . . Wrightsville Beach
Timothy Clayton Henley . . . . . Cherryville
Jessica Gadrinab Henry . . . . . Raleigh
Michael Thomas Henry . . . . . Raleigh
William Robinson Heroy . . . . . Summerfield
Jennifer L. Hillman . . . . . Knightdale
James Pete Hoffman, Jr. . . . . Salisbury
Michael Andrew Hoffman . . . . . Mandeville, Louisiana
Jonathan Philip Holbrook . . . . . Raleigh
Andrew H. Holton . . . . . Raleigh
Daniel P. Homiller . . . . . Cary
Gregory S. Horner . . . . . Cary
Scott Richard Hovey . . . . . Raleigh
Tamara Lynn Huckert . . . . . Waxhaw

LaTonya Denise Hucks . . . . . Durham
Catherine Christopher Huie . . . . . Charlotte
Courtney Smith Hull . . . . . Elizabeth City
Hilton Terry Hutchens, Jr. . . . . Dunn
Andrew Dale Irby . . . . . Winston-Salem
D. Jason Isley . . . . . Raleigh
Jay C. Jackson . . . . . Alexandria, Virginia
Jonathan Eric James . . . . . Raleigh
Elizabeth Brooke Jenkins . . . . . Laurinburg
Michael Elliot Jensen . . . . . Charlotte
Douglas Patrick Jeremiah . . . . . Hillsborough
Melody Elizabeth Jewell . . . . . Charlotte
Jang Hwan "John" Jo . . . . . Durham
Erin Elizabeth Jochum . . . . . Durham
Jessica Ashley Johnson . . . . . Ronda
Kathrine Lynne Johnson . . . . . Kernersville
Luciona Johnson . . . . . Charlotte
Rhett Hunter Johnson . . . . . High Point
Richard David Johnson, II . . . . . Elkin
Jesse Creed Jones . . . . . Huntersville
Monique Rachelle Judkins . . . . . Reidsville
Helen L. Jugovic . . . . . Winston-Salem
Lisa Alumbaugh Kamarchik . . . . . Durham
Lea Marie Keller . . . . . Kernersville
William Joseph Kennedy, III . . . . . Clemmons
Christian Parks Kennerly . . . . . Greenville, South Carolina
April Epley Kight . . . . . Greensboro
Catherine E. Kimberley . . . . . Cary
Dena Janae King . . . . . Morrisville
Israel David King . . . . . Sanford
Rebecca L. Kinlein . . . . . Winston-Salem
Townsend Bourgeois Kinsler . . . . . Durham
Jennifer Lynn Kirby . . . . . Fayetteville
Crystal M. O. Klein . . . . . Blairsville, Georgia
Jennifer Rose Kletter . . . . . Raleigh
Julie Diane Klipp . . . . . Asheville
Meghan Naomi Knight . . . . . Durham
Cassandra S. Koontz . . . . . Lexington
Jason A. Koslofsky . . . . . Hillsborough
Jeffrey Scott Koweek . . . . . Durham
Enyonam A. Kpeglo . . . . . Greensboro
Kathryn Elizabeth Kransdorf . . . . . Durham
Angela Kreinbrink . . . . . Findlay, Ohio
Kirk Anthony Kruger . . . . . Raleigh
Gregory William Kuehnle . . . . . Charlotte
Walter Eakin Kuhn . . . . . Signal Mtn., Tennessee
Amanda Smith Lacoff . . . . . Durham
Andrew Stephen Lade . . . . . Fairborn, Ohio
Zachary Forrest Lamb . . . . . Conover
Ian Mikel Larrea . . . . . Cary
Tobin Webb Lathan . . . . . New Bern

William Lee Lattimore . . . . . Lattimore
Mark David Lavender . . . . . Cary
Sophorn Lay . . . . . Charlotte
Marcus Anthony LeBeouf . . . . . Richmond, California
Robert A. Leandro . . . . . Raleigh
Susan Tobey Lecker . . . . . Charlotte
Matthew E. Lee . . . . . Bayboro
Matthew Nis Leerberg . . . . . Apex
Tessa T. Leftwich . . . . . Greensboro
Urenna Nnenna Lekwauwa . . . . . Winston-Salem
Antonio Eugene Lewis . . . . . Winston-Salem
Matthew David Lincoln . . . . . Columbia, South Carolina
Erik August Lindahl . . . . . Raleigh
Jennifer Anne Linden . . . . . Charlotte
Hannah Faith Little . . . . . Charlotte
John Charles Livingston . . . . . Raleigh
Timothy Patrick Logan . . . . . Charlotte
Lori Lynn Lorenzo . . . . . Cameron
Cody R. Loughridge . . . . . Apex
Josalyn Anderson Rae Lowrance . . . . . Charlotte
Jennifer A. Luebke . . . . . Raleigh
Jack A. Lyda . . . . . Burlington
Marsha Janelle Lyons . . . . . Charlotte
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Laura C. Manfreda . . . . . Charlotte
Amanda Leigh Maris . . . . . Durham
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Heather R. Martin . . . . . New Albany, Ohio
Jonathan Richard Marx . . . . . Winston-Salem
Rosa Mejia Matusik . . . . . Apex
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Scott Carr Mayhew . . . . . Raleigh
James Daniel McAlister . . . . . Greensboro
Christina McAlpin . . . . . Cary
Andrea Beth McGlinn . . . . . Charlotte
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Matthew Ryan McKaig . . . . . Raleigh
Joseph Garriss McKellar . . . . . Greenville
Cortney Marie McKinney . . . . . Eden
Heather Mobley McKinney . . . . . Winston-Salem
Claire Scott McMullan . . . . . Richmond, Virginia
Richard A. McNeil . . . . . Chapel Hill
Ryan Vannoy McNeill . . . . . Lexington
Morgan Ross Mehler . . . . . Durham
Jess Daniel Mekeel . . . . . Morrisville
Brenda Menard . . . . . Apex
Emma Claire Merritt . . . . . Mt. Airy
Brian M. Meyer . . . . . Coats
Allegra Milholland . . . . . Raleigh
John Locke Milholland, IV . . . . . Statesville

Grant Coleman Miller . . . . . Summerfield
Nathan Arthur Miller . . . . . Boone
Kerry Anne B. Miner . . . . . Sanford
Courtney H. Mischen . . . . . Raleigh
Emily Elizabeth Mistr . . . . . Chapel Hill
Jonathan Tate Mlinarcik . . . . . New Bern
James Harris Monroe . . . . . Chapel Hill
Maggie Delicia Moore . . . . . Greensboro
Ruby Dhaliwal Moore . . . . . Asheville
William Edward Morgan . . . . . Winston-Salem
Henry Samuel Morphis . . . . . Hickory
Jonathan Lee Morton . . . . . Durham
Michele-Ellen Morton . . . . . Durham
John Michael Moye . . . . . Atlanta, Georgia
Michael A. Muller . . . . . Charlotte
Daniel V. Mumford . . . . . Charlotte
Nicole Ashley Murphey . . . . . Cary
Daniel John Murphy . . . . . Vienna, Virginia
Dorothy Higdon Murphy . . . . . Chapel Hill
Elizabeth West Murphy . . . . . Dunn
Jeffrey Hunter Murphy . . . . . Waynesville
Matthew Royce Myers . . . . . Matthews
Michael Armstrong Myers . . . . . Wilmington
Silpa Myneni . . . . . Fayetteville
Darryl Tyler Nabors . . . . . Burlington
Kunal Nandy . . . . . Durham
Marc Joseph Nehmad . . . . . Egg Harbor Township, New Jersey
Ann Patton Nelson . . . . . Asheville
April Michelle Nelson . . . . . Durham
Christopher Nixon . . . . . Charlotte
Arathi Prabhu Nobles . . . . . Columbia, South Carolina
Donald Joseph O'Brien, III . . . . . Charlotte
Reginald DeForest O'Rourke, II . . . . . Durham
Jessica Brook Odom . . . . . Chapel Hill
Elizabeth S. Ogburn . . . . . Mooresville
Kelli Ann Ovies . . . . . Raleigh
Ashley Lee Owen . . . . . New Bern
Bruce Edward Owens, Jr. . . . . New York, New York
William David Owens . . . . . Raleigh
Athanassios Petros Panagopoulos . . . . . Charlotte
Angela G. Parrott . . . . . Charlotte
William Thomas Parrott, IV . . . . . Winston-Salem
Helen Louise Parsonage . . . . . Winston-Salem
Saurabh A. Patel . . . . . Spokane, Washington
Robert Matthew Pearson . . . . . Charlotte
Emily Bobo Peebles . . . . . Fayetteville
Kimberly D. Pellini . . . . . Moyock
Robert Sterling Perkinson . . . . . Raleigh
M. Shane Perry . . . . . Charlotte
Andrew J. Petesch . . . . . Greensboro
Robert James Pevler . . . . . Fayetteville

Jason Charles Pfister . . . . . Raleigh
Brian Dean Phillips . . . . . Carrboro
Matthew T. Phillips . . . . . Lewisville
Sarah Archer Leigh Phillips . . . . . Chapel Hill
Tia Shawnette Phillips . . . . . Charlotte
Anthony John Pijerov . . . . . Charlotte
Suzannah McKenzie Plemmons . . . . . Asheville
Lauren Elizabeth Pogue . . . . . Chapel Hill
Shannon Colleen Poore . . . . . Garner
Samuel B. Potter . . . . . Winston-Salem
Noel Dean Powell, Jr. . . . . Durham
Lynn Ann Prather . . . . . Raleigh
Meredith Rebecca Pressley . . . . . Asheville
George Braxton Price . . . . . Wallace
Meghann Maria Proie . . . . . Chapel Hill
Mary Frances Prosser . . . . . Coats
Douglas Stuart Punger, Jr. . . . . Winston-Salem
Matthew James Putnam . . . . . Raleigh
Naarah Elise Putnam . . . . . Raleigh
Sarah Rackley . . . . . Berkeley, California
Matthew McCotter Raines . . . . . N. Myrtle Beach, South Carolina
Jodi L. Ramsey . . . . . Rock Hill, South Carolina
Raven Leigh Rassette . . . . . Fuquay-Varina
John Tyler Ray . . . . . Flat Rock
Jordan G. Ray . . . . . Charlotte
Sarah Anne Miller Reamer . . . . . Wilmington
Peter Andrew Reaves . . . . . Durham
David Marshall Redmond, Jr. . . . . Chapel Hill
Tracy Regan . . . . . Winston-Salem
Eric Michael Reilly . . . . . Maple Shade, New Jersey
Todd Gregory Relue . . . . . Durham
Satara Charlene Rembert . . . . . Charlotte
Michelle Marie Reyes . . . . . Charlotte
Donald Turner Rice . . . . . Gastonia
Rebecca M. Rich . . . . . Durham
Kelly Bross Richards . . . . . Cornelius
Walter David Richardson . . . . . Ellerbe
Jesse H. Rigsby, IV . . . . . Morrisville
Elizabeth Willoughby Riley . . . . . Charlotte
Steven Daniel Ritchie . . . . . Stanley
Henry John Riva-Palacio . . . . . Raleigh
Scott Joseph Rizzo . . . . . Charlotte
Roland O. Roberts . . . . . Gahanna, Ohio
Laura Marie Robinson . . . . . Charlotte
Sasha Robinson . . . . . Charlotte
Leila Williford Rogers . . . . . Highland, Michigan
Sara Marie Root . . . . . Fayetteville
Rachel Sara Rosenthal . . . . . Greensboro
Katherine M. Royal . . . . . Winston-Salem
D. Scott Russ . . . . . Coats
Grayson Garrett Russell . . . . . Raleigh

Stephen McDaniel Russell, Jr. . . . . Chapel Hill
Aulica Lin Rutland . . . . . Winston-Salem
David Owens Rutledge . . . . . Troutman
Michelle Lea Salter . . . . . Morrisville
Jennifer Hedgecock Sanders . . . . . Durham
Rebecca Ann Scherrer . . . . . Raleigh
Trevor P. Schmidt . . . . . Carrboro
Andrea Dawn Schrag . . . . . Raleigh
Janalyn R. W. Scott . . . . . Lake Lure
Patricia Brooks Segars . . . . . Laurens, South Carolina
John David Semones . . . . . Portland, Oregon
Sarah M. Sharp . . . . . Durham
Brennan Edward Sheedy . . . . . Winston-Salem
Sudhir Narayana Shenoy . . . . . Winston-Salem
Vanita Rani Shimpi . . . . . Raleigh
Andrea Bookman Short . . . . . Morrisville
Sharon Ruth Siler . . . . . Arlington, Virginia
Joseph Jared Simms . . . . . Durham
Laura Kay Sirianni . . . . . Cary
Gregory Lee Skidmore . . . . . Memphis, Tennessee
Andrew Taylor Slawter . . . . . Hillsborough
Jonathan Thomas Small . . . . . Winston-Salem
Allison Walsh Smith . . . . . Durham
Danial Adam Smith . . . . . Huntersville
Ella-Marie Smith . . . . . Charlotte
Jeremy Barrett Smith . . . . . Goldsboro
Michael G. Soto . . . . . Winston-Salem
Elizabeth Carroll Southern . . . . . Greensboro
William Flynn Southern, III . . . . . Walnut Cove
Allen Todd Sprinkle . . . . . Charlotte
Joel Gray Stadiem . . . . . Winston-Salem
Michael John Stading . . . . . Charlotte
Kevin J. Stanfield . . . . . Sanford
Michael Benjamin Stanley . . . . . Raleigh
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Justin Scott Steinschriber . . . . . Charlotte
Kyle David Stewart . . . . . Jackson, Louisiana
Laura S. Stewart . . . . . Haymarket, Virginia
Troy Ben Stoddard . . . . . Charlotte
Amanda Spillman Stokes . . . . . Apex
Rebecca J. Streamo . . . . . Raleigh
Christopher Scott Strickland . . . . . Carrboro
Matthew Charles Suczynski . . . . . Chapel Hill
Kristine L. Sullivan . . . . . Durham
Matthew Joseph Sullivan . . . . . Durham
Jacob Everett Sutherland . . . . . Durham
Timothy D. Swanson . . . . . Buies Creek
Alan Jordan Sykes . . . . . Charlottte
Lauren Davis Tally . . . . . Raleigh
William Lockett Tally . . . . . Fayetteville
Joshua Gabriel Talton . . . . . Raleigh

Colin Jordan Tarrant . . . . . Raleigh
Melanie Caroline Tarrant . . . . . Charlotte
Crystal T. Taylor . . . . . Greensboro
Christopher Michael Theriault . . . . . Carolina Beach
Lovely Annica Thomas . . . . . Fayetteville
Cressier Adele Thompson . . . . . Durham
Erin Thompson . . . . . Leland
John Hastings Thompson . . . . . Fayetteville
Nicole Marie Thompson . . . . . Charlotte
Sean Michael Thompson . . . . . Springfield, Virginia
Peter James Timbers . . . . . Laramie, Wyoming
Kristen Lindsay Todd . . . . . Raleigh
Mary K. Tomback . . . . . Charlotte
Jason Edward Toups . . . . . Macon, Georgia
Ronnie Lamar Trimyer, Jr. . . . . Apex
Yin-Tzu (Carolyn) Tseng . . . . . Durham
Dionne Ruth Tunstall . . . . . Winston-Salem
Christy Reed Turner . . . . . Fayetteville
Patricia Ann Tutone . . . . . Charlotte
Nancy Kathryn Underwood . . . . . Fayetteville
Blake Christian Upton . . . . . Garner
William Miles Van O'Linda, Jr. . . . . Charlotte
John A. VanHook . . . . . Lincolnton
John Daniel Veazey . . . . . Chapel Hill
John Carl Vermitsky . . . . . Archdale
Melinda Lee Vervais . . . . . Chapel Hill
Long Dai Vo . . . . . Durham
Joseph L. Vukin . . . . . Charlotte
John Bowen Walker . . . . . Fuquay-Varina
Stephen Brian Walker . . . . . Greensboro
Adam Paul Wallace . . . . . Durham
Jason Thomas Waller . . . . . Chapel Hill
Wesley Brian Waller . . . . . Raleigh
Reyna Simone Walters . . . . . Greensboro
Danielle M. Walther . . . . . Charlotte
Damian John Ward . . . . . Buies Creek
Danielle Marie Ward . . . . . Holly Springs
Sara Batten Warf . . . . . Apex
Danielle E. Wasserman . . . . . Chapel Hill
Kehinde Abena Watford . . . . . Durham
Bradley D. Watson . . . . . Charlotte
Ryan Michael Watson . . . . . Charlotte
Myra Kathryn Price Weare . . . . . Raleigh
Monica Eileen Webb . . . . . Durham
David Charles Weiss . . . . . Carrboro
Aaron Bader Wellman . . . . . Pittsboro
Jennifer Elizabeth Wells . . . . . Raleigh
Brian Richard Weyhrich . . . . . Carrboro
W. Bryan White . . . . . Taylorsville
William Durham White . . . . . Chapel Hill
Joshua D. Whitlock . . . . . Huntersville

William J. Wickward, Jr. . . . . Durham
Jeffrey Bruce Widdison . . . . . Durham
Gordon Jules Wikle . . . . . Durham
Andrea Lee Davis Williams . . . . . Forest City
Heather J. Williams . . . . . Winston-Salem
LaDonna M. Williams . . . . . Winston-Salem
Syrena Nicolle Williams . . . . . Durham
Lindsay Elizabeth Willis . . . . . Gastonia
Jennifer York Wilson . . . . . Greensboro
Marcus Minter Wilson, Jr. . . . . Chapel Hill
Megan Jane Wilson . . . . . Knoxville, Tennessee
Cami Marie Winarchick . . . . . Winston-Salem
William Chad Winebarger . . . . . Charlotte
Nickole C. Winnett . . . . . Durham
Anna Tycin Wood . . . . . Chapel Hill
Seth Matthew Woodall . . . . . Eden
Christopher Jason Woodyard . . . . . Matthews
Chad Erik Wunsch . . . . . Chapel Hill
Chandra E. Wymer . . . . . Greensboro
Patrick Steven Yates . . . . . Waynesville
Patrick James Yingling . . . . . Charlotte
David Inchol Yoon . . . . . Durham
Stephen Michael Yoost . . . . . Charlotte
Aaron D. Young . . . . . Durham
Allison J. Young . . . . . Chapel Hill
Robert Nelson Young . . . . . Greensboro
Sarah Grace Zambon . . . . . Asheville
Peter D. Zellmer . . . . . Winston-Salem
Jeffrey Dean Zentner . . . . . Nashville, Tennessee
Amanda S. Zimmer . . . . . Winston-Salem
Emily D. Zimmer . . . . . Cambridge, Massachusetts
Kimberly Easter Zirkle . . . . . Salisbury

Given over my hand and seal of the Board of Law Examiners on this the 25th day of September 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 25th day of August 2006 and said persons have been issued a certificate of this Board:

John Edward Blair Jr. . . . . Charlotte
Charles Douglas Brown II . . . . . Winston-Salem
Alexa Z. Chew . . . . . Somerville, Massachusetts
Tracey R. Downs . . . . . Raleigh
Florence Mangundayao DuPalevich . . . . . Havertown, Pennsylvania

Kristie L. Ellison . . . . . .Phoenix, Arizona
Marisa B. Nye . . . . . .Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 27th day of September 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 25th day of August 2006 and said persons have been issued a certificate of this Board:

David M. Broome . . . . . .Monroe
Mary Katherine Bradford . . . . . .Ooltewah, Tennessee
Chadwick H. Crockford . . . . . .Winston-Salem
David Miller Sigmon . . . . . .Raleigh

Given over my hand and seal of the Board of Law Examiners on this the 9th day of October 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 25th day of August, 2006, and said persons have been issued a certificate of this Board:

Capresha Dawne Caldwell . . . . . .Derwood, Maryland
Cara Fox . . . . . .Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 29th day of November, 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 1st day of September 2006 and said persons have been issued a certificate of this Board:

LICENSED ATTORNEYS

Benjamin James Aitken . . . . . .Durham
Thomas Daniel Barcellona . . . . . .River Ridge, Louisiana
Nathan Angus Baskerville . . . . . .Durham
Michelle Marie Botek . . . . . .Ellicott City, Maryland
Thomas Christopher Brady . . . . . .Charlotte
Jason Patrick Burton . . . . . .Advance
Lora Christine Butler . . . . . .Pleasant Garden
David Emmett Caddigan . . . . . .Greenville
David S. Caplan . . . . . .Durham
Kevin Michael Ceglowski . . . . . .Raleigh
Holly Holdiness Clanton . . . . . .Rock Hill, South Carolina
Jonathan Tristram Coffin . . . . . .Tega Cay, South Carolina
Melissa Lynn Crosson . . . . . .Durham
Nicholas D'Alessandro . . . . . .Raleigh
Robert R. Davis . . . . . .Charlotte
John Andrew Demos . . . . . .Raleigh
Peter Morgan Garcia-Lamarca . . . . . .Durham
Angelique N. Harris . . . . . .Durham
Tracy J. Hayes . . . . . .Carrboro
Carilyn Kelly Ibsen . . . . . .Mars Hill
Trisha Leigh Dolores Jacobs . . . . . .Raleigh
Ericka Loretta Lewis . . . . . .Raleigh
Armistead Mason Long . . . . . .San Antonio, Texas
Ryan Shawn Luft . . . . . .Greensboro
Marjorie J. Maginnis . . . . . .Asheville
Ravi Manne . . . . . .Cary
Emily Marroquin . . . . . .Charlotte
Ashley Nicole McDuffie . . . . . .Durham
Elizabeth M.P. McKee . . . . . .Sanford
Gary H. Miller . . . . . .Bryson City
Marsha Leigh Mitchell-Hamilton . . . . . .Goldsboro
Michael Peter Morris . . . . . .Columbia, South Carolina
Meghan Elizabeth Nims . . . . . .Asheboro
Tina Kathleen Pearson . . . . . .Charlotte
Shannon T. Reid . . . . . .Durham
Edward F. Rudiger, Jr. . . . . .Marrero, Louisiana
Joel Schechet . . . . . .Asheville
Alba-Justina Secrist . . . . . .Charlotte
Sonal Yogendra Shah . . . . . .Raleigh
Diane M. Standaert . . . . . .Chapel Hill
Thomas Edgar Stroud, Jr. . . . . .Raleigh
Karl Stephen Tarrant . . . . . .Richmond, Virginia
Jessica Frances Taylor . . . . . .Durham
Michael Shane Truett . . . . . .Durham
Barton C. Walker . . . . . .Charlotte
Anna Elisabeth Wheeler . . . . . .Lillington
David Matthew Wilkerson . . . . . .Columbia, South Carolina
April D. Williams . . . . . .Raleigh
Jillian Elise Williams . . . . . .Durham
Scott Manning Yarbrough . . . . . .Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 25th day of September 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 1st day of September 2006 and said persons have been issued a certificate of this Board:

Steven J. Allen . . . . . Ridgeland, Mississippi
Larry Laron Archie . . . . . Virginia Beach, Virginia
Joey G. Arnold . . . . . Johnson City, Tennessee
Monica Boccia . . . . . Charlotte
Aynsley Brooke Bourne . . . . . New Orleans, Louisiana
John Vincent Cattie, Jr. . . . . Charlotte
Junius Allen Crumpler III . . . . . Raleigh
Dennis Kyle Deak . . . . . Glen Allen, Virginia
Daniel Joseph Ellowitch . . . . . Charlotte
Anita Gorecki-Robbins . . . . . Fayetteville
Emily Marisa Henshaw . . . . . Durham
E. Perry Hicks . . . . . Charlotte
Suzannah L. Hicks . . . . . Charlotte
Daniel Matthias Kincheloe . . . . . Richmond, Virginia
Robert Lewis, Jr. . . . . New Bern
Harold Quinton Lucie . . . . . Jacksonville
Bryan P. Martin . . . . . Columbia, South Carolina
Heather Leticia McMillan . . . . . Lumberton
Kevin J. O'Sullivan . . . . . Raleigh
John Elliott Rogers II . . . . . Spartanburg, South Carolina
Makisha N. Scott . . . . . Concord
Joseph Walter Thompson IV . . . . . Charlotte
Sarah Reid Ziomek . . . . . Rutherfordton

Given over my hand and seal of the Board of Law Examiners on this the 25th day of September 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 1st day of September 2006 and said persons have been issued a certificate of this Board:

Kelly Leigh Durden . . . . . .Jacksonville
Harelda Mavis Gragg . . . . . .Durham
William Paul Hart . . . . . .Raleigh
Virginia Carolina Jordan . . . . . .Chapel Hill

Given over my hand and seal of the Board of Law Examiners on this the 27th day of September 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 1st day of September 2006 and said person has been issued a certificate of this Board:

Michelle Bradford Houston . . . . . .Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 19th day of October 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 1st day of September 2006 and said person has been issued a certificate of this Board:

Steven Donald Mansbery . . . . . .Raleigh

Given over my hand and seal of the Board of Law Examiners on this the 25th day of October, 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 1st day of September 2006 and said person has been issued a certificate of this Board:

Denise Michelle Douglas . . . . . .Chantilly, Virginia

Given over my hand and seal of the Board of Law Examiners on this the 29th day of November 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 1st day of September, 2006, and said person has been issued a certificate of this Board:

Louis Graham Spencer . . . . . .New Orleans, Louisiana

Given over my hand and seal of the Board of Law Examiners on this the 23rd day of January, 2007.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 15th day of September 2006 and said persons have been issued a certificate of this Board:

James Charles Bryan . . . . . .Durham
W. Everett Lupton . . . . . .Norfolk, Virginia

Given over my hand and seal of the Board of Law Examiners on this the 27th day of September 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 15th day of September 2006 and said person has been issued a certificate of this Board:

Matt Breeding . . . . . .Winston-Salem

Given over my hand and seal of the Board of Law Examiners on this the 9th day of October 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 22nd day of September, 2006, and said person has been issued a certificate of this Board:

Atiya M. Mosley . . . . . .Applied from the State of Georgia

Given over my hand and seal of the Board of Law Examiners this the 9th day of October, 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 22nd day of September 2006, and said person has been issued a certificate of this Board:

Alesia M. Vick . . . . . .Raleigh

Given over my hand and seal of the Board of Law Examiners on this the 25th day of October 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 22nd day of September 2006 and said persons have been issued a certificate of this Board:

Sameka Felicia Battle . . . . . .Morrisville
Daniel J. Berry . . . . . .Grundy, Virginia
Shaun Christian Blake . . . . . .Charlotte
Samuel Lindsay Carrington . . . . . .Charlotte
Richard E. Cassady . . . . . .Franklin
Patrick Nicholas Dillon . . . . . .Leland
Rachel Marie Eickerman . . . . . .Huntersville
Nichole Baxter Feaster . . . . . .Lawndale
Angela Marie Heath . . . . . .Charlotte
Robert L. Lawson . . . . . .Roanoke, Virginia
Erik Robert Lowe . . . . . .Sandy, Utah
Mary Ellen Lyall-Morgan . . . . . .Buies Creek
Daniel Adam Merlin . . . . . .Raleigh
Anne M. Moukperian . . . . . .Raleigh
Vijay Nathan . . . . . .Cary
Shannon Haley O'Brien . . . . . .Charlotte

Brendan Christopher Reichs . . . . . .Charlotte
Charles R. Riney . . . . . .Raleigh
Courtney Edith Robinson . . . . . .Snow Hill
Kevin Alan Rust . . . . . .Winston-Salem
Matthew Ryan Stewart . . . . . .Charlotte
Elizabeth Kay Strickland . . . . . .Greensboro
Michael William Thomas . . . . . .Chapel Hill
Caroline Tomlinson-Pemberton . . . . . .Summerfield
Nicholas James Voelker . . . . . .Wesley Chapel, Florida

Given over my hand and seal of the Board of Law Examiners on this the 5th day of October, 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 29th day of September 2006, and said persons have been issued a certificate of this Board:

Esteban Arriaga Echeverria . . . . . .Durham
Fang Qian . . . . . .Raleigh
Idrissa Amara Smith . . . . . .Durham
Lena Watts-Robinson . . . . . .Gastonia
Lutrell Trumane Williams . . . . . .Durham

Given over my hand and seal of the Board of Law Examiners on this the 5th day of October, 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 6th day of October 2006, and said persons have been issued a certificate of this Board:

Jeffrey Larkin Nieman . . . . . .Julian
Cybil Janine Range . . . . . .Cornelius

Given over my hand and seal of the Board of Law Examiners on this the 19th day of October 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 13th day of October 2006, and said person has been issued a certificate of this Board:

David Hughes Simpkins . . . . . .Tega Cay, South Carolina

Given over my hand and seal of the Board of Law Examiners on this the 19th day of October 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 20th day of October 2006, and said person has been issued a certificate of this Board:

John Ward O'Hale . . . . . .Raleigh

Given over my hand and seal of the Board of Law Examiners on this the 26th day of October 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 20th day of October, 2006, and said person has been issued a certificate of this Board:

Thomas Leigh Old . . . . . .Applied from the State of Ohio

Given over my hand and seal of the Board of Law Examiners this the 8th day of November, 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 20th day of October 2006, and said person has been issued a certificate of this Board:

Keith William Diener . . . . . .Alexandria, Virginia

Given over my hand and seal of the Board of Law Examiners on this the 8th day of November 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 27th day of October 2006 and said persons have been issued a certificate of this Board:

Joseph Leonard Arbour . . . . . .Applied from the State of New York
Daniel Burt Arrington . . . . . .Applied from the State of Georgia
Lesley S. Craig . . . . . .Applied from the State of Colorado
Denise L. Hagemeier . . . . . .Applied from the State of Massachusetts
Theressa Maria Holland . . . . . .Applied from the State of Indiana
Robert Jerome Johnson, Jr. . . . . .Applied from the State of Ohio
Jonathan P. Miller . . . . . .Applied from the State of Pennsylvania
Stephen G. Scholle . . . . . .Applied from the State of Minnesota
Kristen Teuchert Shaheen . . . . . .Applied from the State of New York
Narcisa Woods . . . . . .Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners on this the 8th day of November 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 17th day of November 2006 and said persons have been issued a certificate of this Board:

Mark Andrew Allebach . . . . . .Applied from the State of New York
Shampa Banerji Bernstein . . . . . .Applied from the State of Georgia
Patrick James Brooks . . . . . .Applied from the State of Ohio
Melinda Alys Boyd Dressler . . . . . .Applied from the State of Texas
Richard E. Fehringer . . . . . .Applied from the State of New York
Rakesh J. Govindji . . . . . .Applied from the State of Vermont
John H. Johnston . . . . . .Applied from the State of West Virginia
Thomas Kevin Lindgren . . . . . .Applied from the State of New York
Marina Tully . . . . . .Applied from the State of Illinois
Sean C. Williams . . . . . .Applied from the State of Pennsylvania

Given over my hand and seal of the Board of Law Examiners on this the 19th day of December, 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 24th day of November 2006 and said person has been issued a certificate of this Board:

Jason Robert Whitler . . . . . .Winston-Salem

Given over my hand and seal of the Board of Law Examiners on this the 19th day of December 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 1st day of December, 2006, and said persons have been issued a certificate of this Board:

Hannah Alexandra Clare Auckland . . . . . .Tempe, Arizona
Dana Paul Boyette . . . . . .Raleigh, NC
Stephanie Ann Brennan . . . . . .Chicago, Illinois
Verlyn Chesson-Porte . . . . . .Fuquay-Varina
Kevin Barry Dowling . . . . . .Greensboro
Jonathan Samuel Feldman . . . . . .Miami Beach, Florida
Susanne K. Frens . . . . . .Summerfield
Samuel Go . . . . . .Raleigh
E. B. Davis Inabnit, Jr. . . . . .Conway, South Carolina
David Joseph Lanzotti . . . . . .Carrboro
Brett Karl Eskildsen Lund . . . . . .RTP
Ryan Z. Maltese . . . . . .Whitsett
Leslie Erin Sait . . . . . .Winston-Salem
Adam Jay Smith . . . . . .Tucson, Arizona
Matthew David Tomback . . . . . .Charlotte
David Glenn Waters, Jr. . . . . .Whiteville

Given over my hand and seal of the Board of Law Examiners on this the 19th day of December, 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 1st day of December 2006 and said person has been issued a certificate of this Board:

Jim Melo . . . . . .Raleigh

Given over my hand and seal of the Board of Law Examiners on this the 8th day of January 2007.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 1st day of December, 2006, and said person has been issued a certificate of this Board:

Glenn E. Ketner III . . . . . .Jackson, Mississippi

Given over my hand and seal of the Board of Law Examiners on this the 23rd day of January, 2007.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 22nd day of December 2006 and said persons have been issued a certificate of this Board:

Andrew David Blinkoff . . . . . .Applied from the State of New York
Matthew C. Bouchard . . . . . .Applied from the State of Massachusetts
Nancy S. Brewer . . . . . .Applied from the State of West Virginia
Theresa Marie Cameron . . . . . .Applied from the State of Illinois
Laura Mason Carey . . . . . .Applied from the State of Ohio
Matthew S. Harding . . . . . .Applied from the State of Michigan
Desmond M. McCallum . . . . . .Applied from the State of Pennsylvania
Alistair Elizabeth Newbern . . . . . .Applied from the District of Columbia
Brian William Stull . . . . . .Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners on this the 8th day of January 2007.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 22nd day of December 2006 and said person has been issued a certificate of this Board:

David Douglas Moore . . . . . .Applied from the State of Tennessee

Given over my hand and seal of the Board of Law Examiners on this the 23rd day of January 2007.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 12th day of January, 2007 and said person has been issued a certificate of this Board:

Michael Azzariti . . . . . .Applied from the State of Georgia

Given over my hand and seal of the Board of Law Examiners on this the 23rd day of January, 2007.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 26th day of January 2007 and said persons have been issued a certificate of this Board:

Richard Milton Bange III . . . . . .Applied from the State of New York
Jason Michael Wenker . . . . . .Applied from the State of Georgia

Given over my hand and seal of the Board of Law Examiners on this the 5th day of March, 2007.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 2nd day of February 2007 and said persons have been issued a certificate of this Board:

Jamie Ackerman . . . . . .Applied from the State of Illinois
Charles Ryan Cook . . . . . .Applied from the State of Washington
Cynthia Dawn Davis . . . . . .Applied from the State of Ohio
Mary Patricia Oliver . . . . . .Applied from the State of Ohio
Kevin John Powers . . . . . .Applied from the State of New York

Phillip Edward Stackhouse . . . . . .Applied from the State of Massachusetts
Zachary Brian Ward . . . . . .Applied from the State of Georgia

Given over my hand and seal of the Board of Law Examiners on this the 5th day of March, 2007.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 2nd day of March 2007 and said persons have been issued a certificate of this Board:

Keith F. Atkinson . . . . . .Applied from the State of Georgia
Warren Ballentine . . . . . .Applied from the State of Illinois
Bradley James Corsair . . . . . .Applied from the State of New York
Judith L. Curry . . . . . .Applied from the State of Georgia
Adren L. Harris . . . . . .Applied from the District of Columbia
Scott G. Hornby . . . . . .Applied from the State of Michigan
Jeremy A. Kosin . . . . . .Applied from the State of New York
Michael James Mangapora . . . . . .Applied from the State of Michigan
Jeffrey James Manning . . . . . .Applied from the State of Ohio
Carole Ann Mansur . . . . . .Applied from the State of Massachusetts
Ronald Alexander Mazariegos . . . . . .Applied from the State of New York
Linda L. Moore . . . . . .Applied from the State of Tennessee
Lawrence Clifton Morgan . . . . . .Applied from the State of New Hampshire
Edward H. Nicholson, Jr. . . . . .Applied from the State of Georgia
Jason Raymond Patomson . . . . . .Applied from the State of Texas
Randall J. Phillips . . . . . .Applied from the State of Tennessee
Clark Frank Schaffner . . . . . .Applied from the State of New York
Danae M. Schuster . . . . . .Applied from the State of New York
Stacey Lynn Riley Walters . . . . . .Applied from the State of Michigan
Heather Carty Ward . . . . . .Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners on this the 2nd day of April, 2007.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 23rd day of March 2007 and said persons have been issued a certificate of this Board:

Frank E. Arado . . . . . .Applied from the State of Illinois
James Bradford Gainer . . . . . .Applied from the State of Ohio
Justin Louis Lowenberger . . . . . .Applied from the State of New York

Aletha M. Magyaros . . . . . .Applied from the State of Ohio
Deborah Lemons Murphey . . . . . .Applied from the State of Georgia
Jennifer Brooke Schmidly . . . . . .Applied from the State of Texas
Steven G. Stancroff . . . . . .Applied from the State of Michigan
Wesley Meredith Suttle . . . . . .Applied from the State of New York
Robert Edwin Thackston . . . . . .Applied from the State of Texas

Given over my hand and seal of the Board of Law Examiners on this the 23rd day of April, 2007.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 23rd day of March 2007, and said person has been issued a certificate of this Board:

Douglas David Nydick . . . . . .Durham

Given over my hand and seal of the Board of Law Examiners on this the 4th day of May, 2007.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 31st day of March 2007 and said persons have been issued a certificate of this Board:

Suzana Stoffel Martins Albano . . . . . .Morrisville
Patrick Michael Jamison Allen . . . . . .Charlotte
Utaukwa Brown Allen . . . . . .Apex
Virginia Vaughan Allen . . . . . .Durham
Susan V. Anderson . . . . . .Blowing Rock
Owen Boyd Asplundh . . . . . .Raleigh
Brian Breslin Axelroth . . . . . .Charlotte
Jennifer M. Ball . . . . . .Raleigh
W. Brooks Barker . . . . . .Stoneville
Jeannie Pino Barrow . . . . . .Henderson
Joseph Robert Baznik . . . . . .Charlotte
Christopher L. Beacham . . . . . .Winterville
Allison Langford Bennett . . . . . .Winston-Salem
Robert Oliver Branch . . . . . .Raleigh
David L. Bury, Jr. . . . . .Greensboro
Jason P. Caccamo . . . . . .Centreville, Virginia
Oliver Carter, III . . . . . .Raleigh
Michael Edwin Catania . . . . . .Guilderland, New York

James Bradford Champion . . . . . Stanley
Lorri Maria Clark . . . . . Fort Lauderdale, Florida
Martha Elizabeth Coble-Beach . . . . . Falls Church, Virginia
Susan Williams Cope . . . . . Stem
Phillip Haskell Cowan . . . . . Raleigh
David Prince Creekman . . . . . Cary
Cheryl V. Cunningham . . . . . High Point
Charles Jeffreys Cushman . . . . . New Bern
Alicia Beth Davis . . . . . Charlotte
Cary Baxter Davis . . . . . Charlotte
Erin Cassell Davis . . . . . Durham
Shani Davis-Harrison . . . . . Raleigh
Corinne Anne DeFallo . . . . . Charlotte
Torrey Donell Dixon . . . . . Durham
Kenneth G. Dodelin . . . . . Chapel Hill
Kimberly Ann Doyle . . . . . Clayton
Catherine Rosalie Drago . . . . . Charlotte
Walter George Dusky . . . . . Fort Mill, South Carolina
Jessica Alayne Easton . . . . . Charlotte
Jeremy Michael Falcone . . . . . Durham
Henry Lee Falls, III . . . . . Charlotte
Ann Marie Ferrari . . . . . Chapel Hill
Joyce Wynne Fischer . . . . . Kittrell
Hanna Moria Frost . . . . . Raleigh
Angela W. Garcia-Lamarca . . . . . Durham
Christopher Patrick Gelwicks . . . . . Charlotte
Lori Elizabeth Gilmore . . . . . Raleigh
Julie Helene Glanzer . . . . . Morehead City
Timothy D. Gore . . . . . Charlotte
William Heyward Gorrod . . . . . Greenwich, Connecticut
Blair Patrick Graham . . . . . Durham
Brent Douglas Green . . . . . Richmond, Virginia
James Michael Chironex Green . . . . . Raleigh
LaCusia RaShae Green . . . . . Wake Forest
Scott William Grupp . . . . . Chapel Hill
Caroline Andrea Guibert . . . . . San Francisco, California
Agatha Brooke Guy . . . . . Waynesville
Emanuel Creft Haggins, III . . . . . Winterville
Stephen James Hawes, IV . . . . . Alexandria, Virginia
Amber Ivie Hayles . . . . . Cary
Mary Allison Haywood . . . . . Charlotte
Koury L. Hicks . . . . . Albuquerque, New Mexico
Bess S. Hilliard . . . . . Raleigh
Shannon Elizabeth Hoff . . . . . Charlotte
Richard Earl Hopkins, Jr. . . . . Clayton, Georgia
Andrew Thomas Houston . . . . . Charlotte
Brien Rose Hub . . . . . Wilmington
Catherine Virginia McCarth Hutasuhut . . . . . Charlotte
Sumit Kumar Jain . . . . . Raleigh
Chester C. Jeng . . . . . Raleigh
Ashley Elizabeth Johnson . . . . . Cary

Jennifer Lynn Jones . . . . . Chapel Hill
Mark Andrew Jones . . . . . Arlington, Virginia
Leigh Anne Kasias . . . . . High Point
Meredith Lyn Katz . . . . . Charlotte
Jeffrey S. Kaufman, Jr. . . . . Altamonte Springs, Florida
Mellonee Anne Kennedy . . . . . Raleigh
Thomas Daniel Kerr . . . . . Charlotte
Mitzi Yvonne Kincaid . . . . . Wilmington
John Patrick Kiser . . . . . Kings Mountain
Yelizaveta Klimova-Troxler . . . . . Charlotte
Brian Robert Knight . . . . . Raleigh
Peter M. Knize . . . . . Wake Forest
Paul Kingsbury Lachance . . . . . Raleigh
Michele L. Laski . . . . . Charlotte
Coalter Gill Lathrop . . . . . Chapel Hill
Erik C. Lattig . . . . . Louisville, Kentucky
Siyoung (Steve) Lee . . . . . Chapel Hill
Lesley Parrish Lentz . . . . . Greensboro
James C. Lesnett, Jr. . . . . Charleston, West Virginia
Christy Canali Lilley . . . . . Charlotte
C. Geyer Longenecker, Jr. . . . . Raleigh
Paige Sullivan Loper . . . . . Concord
Harrison A. Lord . . . . . Cary
Megan E. Lyman . . . . . Raleigh
Brian James Mahoney . . . . . Waxhaw
Nicole Marie Malinko . . . . . Old Forge, Pennsylvania
Nydia I. Mancini . . . . . Sanford
Lisa D. Mares . . . . . Raleigh
James William Marshall, III . . . . . Leland
Traci L. Massey . . . . . Batesville, Mississippi
Lawrence Francis McAuliffe . . . . . Goldsboro
Nancy Rhea McIntyre . . . . . Raleigh
Travis Emil Menk . . . . . Charlotte
Spencer Benjamin Merriweather, III . . . . . Durham
Melissa Kay Metz . . . . . Raleigh
Maria Funk Miles . . . . . Charlotte
Christopher D. Miller . . . . . Raleigh
William Kirk Moore . . . . . Richmond, California
Kevin John Morris . . . . . Winston-Salem
Julia Ann Mullen . . . . . Durham
Catherine M. Murphy . . . . . Mooresville
Shelley Gay Myott . . . . . Holly Springs
Michael Randolph Neece . . . . . Asheville
Jason Nelson . . . . . Mount Holly
Shayne Evers O'Reilly . . . . . Durham
Michael A. Ostrander . . . . . Apex
Cynthia McArthur Palmer . . . . . Mebane
Lyana Gia Palmer . . . . . Wilmington
Amanda Bethany Palmieri . . . . . Winston-Salem
Katherine Lewis Parker . . . . . Clayton
Susannah Lucinda Parker . . . . . Warsaw

Laura S. Parrett . . . . . Holly Springs
James Passe . . . . . Raleigh
Purvesh Dhananjay Patel . . . . . Cary
Gregory Lamarr Perry . . . . . Zebulon
April Howard Phillips . . . . . Autryville
James Thomas Pinyerd . . . . . Charlotte
Kurt T. Preston . . . . . Raleigh
Teadra Geshon Pugh . . . . . Charlotte
LeeAnne Quattrucci . . . . . Wilmington
Benjamin Michael Redding . . . . . Burlington
John Lucian Ritter . . . . . Seagrove
Jay J. Ritz . . . . . Raleigh
Nick Roknich, III . . . . . Waynesville
Peter Eldon Rosentrater . . . . . Ellisville, Missouri
Oliver Alan Ruiz . . . . . Miami, Florida
Matthew Allen Russell . . . . . West Lafayette, Indiana
Thomas Benjamin Schroeder . . . . . Winston-Salem
Tessa Shelton Sellers . . . . . Hayesville
Sergei Semirog . . . . . Charlotte
Sulaifa Habeeb Siddiqui . . . . . Raleigh
Robin Stephanie Sinton . . . . . Clayton
Joy Hanckel Skinner . . . . . Charlotte
Wendy Denise Smallwood . . . . . Durham
Carl Owen Smith, Jr. . . . . Rocky Mount
Jason Scott Smith . . . . . Kernersville
Jeremy Joseph Smuckler . . . . . Las Cruces, New Mexico
Paul James Soderberg . . . . . Burlington
Elizabeth Jasmund Soja . . . . . Washington, District of Columbia
Richard Brian Sorrell . . . . . Concord
Denapalee Star Spencer . . . . . Cary
Nathan Johnston Stallings . . . . . Asheville
Beth Anne Stanfield . . . . . Charlotte
Tera Shannon Stanley . . . . . Cramerton
Matthew F. Stauff . . . . . Raleigh
Donya Matheny Strong . . . . . Clayton
Dustin R. T. Sullivan . . . . . Wilmington
Terry Allen Swaim, Jr. . . . . Wendell
Charles Winfield Taylor, III . . . . . Wilmington
Kala C. Taylor . . . . . High Point
L. Martin Taylor . . . . . Gastonia
Katherine Ann Tenfelde . . . . . Charlotte
Regina Greene Thomas . . . . . Durham
Terry Lee Thomson . . . . . Waxhaw
Jessica Laine Tobias . . . . . Winston-Salem
Meredith Lee Tolar . . . . . Charlotte
Russell Vaughn Traw . . . . . Charlotte
Amanda Kay VanDeusen . . . . . Durham
Elizabeth Corcoran Vish . . . . . Charlotte
Anna Elizabeth Walker . . . . . Charlotte
Heather Bobbitt Warwick . . . . . Raleigh
Andrew Gregory Wight . . . . . Brighton, Massachusetts

Jeremy Christopher Williams . . . . . Wilmington
Jonathan Blanton Williams . . . . . Columbia, South Carolina
Kimberly Jo Williams . . . . . Concord
Shari Robin Gelfont Williams . . . . . Charlotte
Jonathan James Wilson . . . . . Huntersville

Given over my hand and seal of the Board of Law Examiners on this the 23rd day of April, 2007.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 5th day of April 2007 and said persons have been issued a certificate of this Board:

Peter Griffith Allen . . . . . Charlotte
Yvonne Armendariz . . . . . Cary
Judith Marie Beall . . . . . Charlotte
Raymond Michael Bennett . . . . . Raleigh
Justin Alexander Brittain . . . . . Charlotte
Rebecca Ann Brown . . . . . Charlotte
Jeffrey Matthew Connor . . . . . Charlotte
Shawn Alan Copeland . . . . . Davidson
Jessica Bree Cox . . . . . Burlington
Kathryn Batton Crews . . . . . Greensboro
Joseph Alan Davies . . . . . Charlotte
Darren Orville Day . . . . . Greenville
Jennifer Lynn Epperson . . . . . Durham
Michael Andrew Ferrante . . . . . New Bern
Patrick V. Fiel, Jr. . . . . Charlotte
Ethan John Fleischer . . . . . Wake Forest
Heather Hovanec Ford . . . . . Clayton
Steven B. Forsythe . . . . . Charlotte
Jamie Tomhave Gallimore . . . . . Winston-Salem
Erica Parham Garner . . . . . Clayton
Michele Ann Goldman . . . . . Raleigh
Alexander John Gomes . . . . . Asheville
Charles Frederick Hall, IV . . . . . Winston-Salem
Joan Wash Hartley . . . . . Batesburg, South Carolina
Dorothy Slovak Hersey . . . . . Tega Cay, South Carolina
Michael C. Hetey . . . . . Henderson, Nevada
Pearlynn Gilleece Houck . . . . . Charlotte
Michele Janette Garrett Jacobs . . . . . Knightdale
Tanya Rachelle Jones . . . . . Marietta, Georgia
Jeffrey Paul Kapp . . . . . Charlotte
Cheryl Bullard Kellogg . . . . . Stafford, Virginia
Hope Davison Koziara . . . . . Charlotte
Michael Enrico Kozlarek . . . . . Columbia, South Carolina
James W. Litsey . . . . . Mooresville

Molly Cerelda Litz . . . . . .Apex
James Wendell May . . . . . .Charlotte
Katayoon Sadre May . . . . . .Charlotte
William Hugh McAngus, Jr. . . . . .Columbia, South Carolina
David Loar McKenzie . . . . . .Durham
Nicholas Donald Naum . . . . . .Charlotte
Karen Mary Nelson . . . . . .Charlotte
Richard Alexander Nelson . . . . . .Charlotte
Tammi Senga Niven . . . . . .Charlotte
Kelly Ann Norman . . . . . .Raleigh
Jenifer L. Owens . . . . . .Raleigh
Karen Philippin . . . . . .Charlotte
Jon Robert Pierce . . . . . .Winston-Salem
Timothy Daniel Record . . . . . .Fort Mill, South Carolina
Robert Alexander Rutledge . . . . . .Walnut Cove
Florence Patricia Scarborough . . . . . .Charleston, South Carolina
Renee Alanna Sekel . . . . . .Cary
Meghan Kathleen Sheffer . . . . . .Huntersville
Yamel Haber Siesel . . . . . .Hollywood, Florida
Kelly Smith Singer . . . . . .Buffalo, New York
Thomas David Singer . . . . . .Buffalo, New York
Kristen Rigsby Smith . . . . . .Black Mountain
Katherine Abigail Soles . . . . . .Greensboro
Natalie Kae Sperry . . . . . .Mebane
Douglas B. Swan . . . . . .Oaklyn, New Jersey
Michael Christopher Thelen . . . . . .Raleigh
James Delano Tittle, Jr. . . . . .Hiawassee, Georgia
Aileen Wu Viorel . . . . . .Winnabow
David Weintraub . . . . . .Hendersonville
Angela Hardister Zimmern . . . . . .Charlotte
William Huntley Zimmern . . . . . .Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 23rd day of April, 2007.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 20th day of April 2007 and said person has been issued a certificate of this Board:

John Clifford Donovan . . . . . .Carrboro

Given over my hand and seal of the Board of Law Examiners on this the 4th day of May, 2007.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 20th day of April 2007, and said persons have been issued a certificate of this Board:

Kathy A. Brown . . . . . .Applied from the State of West Virginia
Culley Clyde Carson IV . . . . . .Applied from the State of Georgia
Michael Edward Duda . . . . . .Applied from the State of Pennsylvania
Rupinder Singh Gill . . . . . .Applied from the State of Pennsylvania
Sara Justin Palmer . . . . . .Applied from the District of Columbia
Joseph Rainer Sollee . . . . . .Applied from the State of New York
David P. Suich . . . . . .Applied from the State of Ohio
William R. Terpening . . . . . .Applied from the State of Georgia

Given over my hand and seal of the Board of Law Examiners on this the 4th day of May, 2007.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 23rd day of April 2007, and said person has been issued a certificate of this Board:

Gerald Anderson Stein II . . . . . .Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 4th day of May, 2007.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 11th day of May 2007, and said persons have been issued a certificate of this Board:

Tate Michael Bombard . . . . . .Applied from the State of Kentucky
Timothy J. Boyce . . . . . .Applied from the State of Connecticut
Ron D. Franklin . . . . . .Applied from the State of New York
Bonnie Lynn Keith Green . . . . . .Applied from the State of Georgia
Carolyn Richardson Guest . . . . . .Applied from the State of Texas
Ted Nick Kazaglis . . . . . .Applied from the State of Ohio
Marcia Joy Myers . . . . . .Applied from the State of Ohio
Gregory J. Naclerio . . . . . .Applied from the State of New York
Andrew Joseph Schwaba . . . . . .Applied from the State of Wisconsin
Frederick Harrison Sherley . . . . . .Applied from the District of Columbia

LICENSED ATTORNEYS

Robert Thomas Sonnenberg . . . . . .Applied from the State of Pennsylvania
Michel P. Vanesse . . . . . .Applied from the State of Illinois

Given over my hand and seal of the Board of Law Examiners on this the 11th day of June, 2007.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. ANGELA DEBORAH LEWIS

No. 558PA04

(Filed 7 October 2005)

1. Constitutional Law— Confrontation Clause—unavailable declarant—testimonial or nontestimonial statement

A trial court's determination of whether an unavailable witness's statements violate defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution includes: (1) an inquiry of whether the statement is testimonial or nontestimonial; (2) if the statement is testimonial, the trial court must then ask whether the declarant is available or unavailable to testify during the trial; and (3) if the declarant is unavailable, the trial court must determine whether the accused had a prior opportunity to cross-examine the declarant about this statement since, if the accused had such an opportunity, the statement may be admissible if it is not otherwise excludable hearsay, and if the accused did not have this opportunity the statement must be excluded.

2. Constitutional Law— Confrontation Clause—unavailable declarant—testimonial and nontestimonial statements

The Court of Appeals erred in an assault with a deadly weapon inflicting serious injury and felony breaking and entering case by granting defendant a new trial based on the erroneous conclusion that admission of the unavailable victim's statements to law enforcement violated defendant's rights under the

Confrontation Clause of the Sixth Amendment to the United States Constitution regarding the victim's responses to an officer's questions following the assault and robbery in the victim's home and the victim's subsequent identification of her attacker from a police photographic lineup, because: (1) under *Crawford v. Washington*, 541 U.S. 36 (2004), testimonial statements are inadmissible at trial unless the victim was unavailable and defendant had a prior opportunity to cross-examine the victim; (2) the victim's statements to the officer were nontestimonial statements and the Confrontation Clause does not prohibit their admission at trial since the officer's questioning of the victim and other witnesses was not structured police questioning when the focus of the officer's interview with the victim was to gather as much preliminary information as possible about the alleged incident, to determine if a crime had indeed been committed, to ascertain if medical attention was required, and to identify a potential perpetrator, and a person in the victim's position would not or should not have reasonably expected her statements to be used at trial; and (3) although the victim's identification of defendant to a detective was testimonial and should not have been admitted at trial unless defendant had an opportunity to cross-examine the victim based on the fact that it was made in response to structured police questioning and a reasonable person in the victim's position would expect her statements could be used at a subsequent trial, such error was harmless since there was competent overwhelming evidence of defendant's guilt.

Justice NEWBY concurring in part in a separate opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 166 N.C. App. 596, 603 S.E.2d 559 (2004), reversing judgments entered 28 January 2003 by Judge James C. Spencer, Jr. in Superior Court, Wake County and granting defendant a new trial. Heard in the Supreme Court 18 April 2005.

Roy Cooper, Attorney General, by Robert C. Montgomery, Assistant Attorney General, for the State-appellant.

Paul M. Green for defendant-appellee.

BRADY, Justice.

The dispositive issue before this Court is whether a victim's responses to an investigating police officer's questions following an

assault and robbery in the victim's home and the victim's subsequent identification of her attacker from a police photograph lineup constitute testimonial statements under *Crawford v. Washington*, 541 U.S. 36 (2004). A unanimous panel of the Court of Appeals concluded the statements were testimonial and, therefore, inadmissible at trial unless the victim was unavailable and defendant had a prior opportunity to cross-examine the victim. *State v. Lewis*, 166 N.C. App. 596, 603 S.E.2d 559 (2004). For the reasons stated below, we reverse and remand the decision of the Court of Appeals.

BACKGROUND

On 7 January 2002, Angela Deborah Lewis (defendant) was indicted for assault with a deadly weapon inflicting serious injury on Nellie Joyner Carlson (Carlson) and felony breaking and entering into Carlson's residence at 1312 Glenwood Towers, a public housing development for senior citizens located in Raleigh, North Carolina. On 7 October 2002, a subsequent grand jury indicted defendant for robbery of currency valued at approximately $3.00 from Carlson perpetrated through use of a dangerous weapon at the time of the assault. These three charges were consolidated for trial on 22 and 27 January 2003 in Wake County Superior Court.

Carlson, the only witness to the crimes, died prior to defendant's trial.[1] Because of Carlson's unavailability to testify at trial, the State called Officer Narley Cashwell and Detective Mark Utley of the Raleigh Police Department to testify regarding statements Carlson made during their investigation of the crimes. Defendant objected to the officers' testimony, but the trial court overruled defendant's objection as to each officer following *voir dire*. The trial court admitted Carlson's statements to Cashwell and Utley pursuant to N.C.G.S. § 8C-1, Rule 804(b)(5), which sets forth a hearsay exception for certain statements when the declarant is unavailable to testify at trial.

Officer Cashwell, a Line Corporal assigned to patrol downtown Raleigh, testified he responded to a call at Carlson's apartment at approximately 5:43 p.m. on 22 November 2001. Officer Cashwell was the initial officer on the scene. Upon his arrival, Officer Cashwell observed Carlson "sitting in a chair. . . . kind of hunched over." Two of Carlson's neighbors, Ida Griffin and John Woods, were in the apartment and approached Officer Cashwell before he could speak with Carlson. Officer Cashwell recorded a statement from Griffin, who

1. The parties entered into a stipulation that Ms. Carlson's death was not the result of the assault for purposes of this trial.

stated Carlson's telephone had been off the hook since at least 5:00 that afternoon. After unsuccessfully trying to call Carlson, Griffin went upstairs to Carlson's apartment where she found Carlson sitting in a chair. Griffin described the room as "tore up."

After speaking with Griffin, Officer Cashwell noted Carlson sitting in a chair, her face and arms badly bruised and swollen. He spoke with Carlson to determine whether she needed assistance and to find out what happened. Carlson complained of pain in her head, but seemed coherent and cognizant of her surroundings. She told Officer Cashwell the following:

> I was in the hall opening my door. My door was locked. I—I was at the door and she slipped up behind me. She asked me for some money. I said what do I look like, the money tree. She said—she said, you don't like me because I'm black. I told her I don't like whatever color she was. I opened the door and she pushed me inside. She grabbed my hair and pulled my hair. She hit me with her fist. She also hit me with a flashlight, phone and my walking stick. She hit me in the ribs with my walking stick. She took a small brown metal tin that I had some change in. I also had some change on the table that she took. I know her. She comes up here all the time begging for money. She visits a man at the end of the hall. I don't know her name but he might.

Officer Cashwell further testified Carlson got up from her chair and showed him the walking stick and flashlight, as well as the drawers the assailant opened apparently looking for money. She briefly described her assailant. Griffin testified at trial, mostly to corroborate Cashwell's statements regarding the sequence of events and the appearance of the apartment. Griffin also testified Carlson was visibly upset by the attack and in fact described Carlson as "in shock."

Detective Utley testified he had been one of the detectives on duty the night of the incident and was called to the scene later that evening. Officer Cashwell briefed him on the situation upon his arrival. Officer Cashwell also informed Detective Utley that one of Carlson's neighbors, Burlee Kersey, apparently knew the assailant. Detective Utley then met with Kersey, who gave defendant's name as the person Carlson had described. Detective Utley then testified he retrieved defendant's picture at the station house and printed it and the pictures of five other females with similar physical characteristics.

Detective Utley testified he interviewed Carlson later that evening at Wake Medical Center, where she was being treated for

injuries sustained during the assault. Detective Utley brought the six-person photographic lineup to the interview, which he showed to Carlson one photograph at a time. Detective Utley instructed Carlson "[T]he person that assaulted you or robbed you . . . may or may not be in this photographic lineup. This is something you would have to tell me." Carlson selected defendant's photograph, identifying defendant as the person who assaulted and robbed her. Detective Utley testified during *voir dire* he obtained the warrant for defendant's arrest based upon Carlson's identification of defendant in this photographic lineup.

On 27 January 2003, the jury found defendant guilty of assault with a deadly weapon inflicting serious injury, robbery with a dangerous weapon, and misdemeanor breaking or entering, which is a lesser included offense of felonious breaking or entering. On 28 January 2003, Judge Spencer found defendant's prior record level to be IV and also found the existence of one aggravating factor, that the victim was "very old." Judge Spencer sentenced defendant to consecutive terms of 144 months minimum to 182 months maximum imprisonment for robbery with a dangerous weapon and 48 months minimum to 67 months maximum for the remaining offenses. Defendant appealed, citing six assignments of error, two of which related to the allegedly erroneous admission into evidence of the statements Carlson made to Officer Cashwell and Detective Utley during their investigation.

On 19 October 2004, a unanimous panel of the Court of Appeals reversed defendant's conviction and awarded her a new trial. Although defendant argued on appeal that both statements the victim made to Raleigh police officers were inadmissible hearsay and did not satisfy the requirements of N.C.G.S. § 8C-1, Rule 804(b)(5), the Court of Appeals did not reach that issue; rather, pursuant to *Crawford*, 541 U.S. 36, the Court of Appeals concluded admission of Carlson's statements to law enforcement violated defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. *Lewis*, 166 N.C. App. at 600, 603 S.E.2d at 561.[2]

2. Defendant filed her appellant's brief in the Court of Appeals on 27 July 2003 and filed a reply brief in that Court on 9 February 2004. The State filed its brief on 22 August 2003. The United States Supreme Court issued its opinion in *Crawford* on 8 March 2004, well after Court of Appeals briefing in this case was completed. The following day, defendant filed a memorandum of additional authority citing *Crawford*. Defendant also filed a second memorandum of additional authority on 15 March 2004. On 17 March 2004, the instant case was argued before the Court of Appeals.

This Court must now determine whether the Court of Appeals erred by holding admission of (1) Carlson's statements to Officer Cashwell and (2) Carlson's identification of defendant from a photographic lineup administered by Detective Utley violated defendant's Sixth Amendment right to confront witnesses against her. We hold Carlson's statements to Officer Cashwell were non-testimonial statements and the Confrontation Clause does not prohibit their admission at trial. We further hold Carlson's identification of defendant to Detective Utley was testimonial and should not have been admitted at trial unless defendant had an opportunity to cross-examine Carlson; however, we hold such error was harmless.

THE RULE AGAINST HEARSAY

The modern day prohibition against admission of hearsay developed at common law and was codified in the North Carolina Rules of Evidence upon their ratification on 7 July 1983. Act of July 7, 1983, ch. 701, 1983 N.C. Sess. Laws 666 (effective 1 July 1984 and applying to "actions and proceedings commenced after that date" and "to further procedure in actions and proceedings then pending," except as specified herein). The hearsay rule is an evidentiary rule directed at preserving the accuracy and truthfulness of trial testimony. *See Queen v. Hepburn*, 11 U.S. 290, 295, 7 Cranch 290, 296 (1813) (Chief Justice Marshall observing the "intrinsic weakness" of hearsay evidence is "its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover"); *State v. Lassiter*, 191 N.C. 210, 212, 131 S.E. 577, 579 (1926) (emphasizing the "inherent vice of hearsay testimony" is "that it derives its value not from the credibility of the witness himself, but depends upon the veracity and credibility of some other person from whom the witness got his information"). Because cross-examination of a declarant is the surest method of securing truthfulness, witnesses are generally not permitted to testify to statements made by others outside the courtroom unless the statements are offered for a purpose other than proving the truth of their content. N.C.G.S. § 8C-1, Rules 801, 802 (2003); *White v. Illinois*, 502 U.S. 346, 356 (1992) (Cross-examination is " 'the greatest legal engine ever invented for the discovery of truth' "; thus, "courts have adopted the general rule prohibiting the receipt of hearsay evidence.") (quoting *California v. Green*, 399 U.S. 149, 158 (1970)) (citation omitted). However, the North Carolina Rules of Evidence set forth exceptions to the rule against hearsay when factual circumstances surrounding a statement lessen the risk of unreliability. N.C.G.S. § 8C-1, Rules 803, 804 (2003). *See also State*

v. Jefferson, 125 N.C. 504, 506, 125 N.C. 712, 715, 34 S.E. 648, 649 (1899) (regarding dying declarations, "[t]he nearness and certainty of death are just as strong an incentive to the telling of the truth as the solemnity of an oath"); *Lush v. McDaniel*, 35 N.C. 327, 328, 13 Ired. 485, 487 (1852) ("The ground of receiving [medical] declarations is that they are reasonable and natural evidence of the true situation and feelings of the person for the time being.").

The Rules of Evidence categorize exceptions to the hearsay rule into two types: (1) exceptions listed in Rule 803, which apply regardless of the declarant's availability to testify at trial, and (2) exceptions listed in Rule 804, which apply only when the declarant is unavailable to testify at trial. N.C.G.S. § 8C-1, Rules 803, 804. Rules 803 and 804 contain identical catchall provisions for statements that do not meet the requirements of an enumerated exception but which "hav[e] equivalent circumstantial guarantees of trustworthiness." *Id.* Rules 803(24), 804(b)(5). The catchall provision set forth in Rule 804(b)(5), through which the statements at issue in the instant case were admitted into evidence, provides:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

Id. Rule 804(b)(5). This residual exception "provide[s] for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions." *Id.* Rule 803(24) cmt.

There exists a tension between the defendant's right of confrontation and the State's interest in protecting society. The balance between these sometimes competing interests is a difficult one to

maintain. Justice Benjamin Cardozo offered his insight into this balance: "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

THE RIGHT TO CONFRONTATION

As explained above, the rule against hearsay is an evidentiary rule directed at preserving the accuracy and truthfulness of trial testimony. However, there exists a constitutional protection—the right to confrontation—which also restricts the admissibility of out-of-court statements at trial. This right is preserved in both the Sixth Amendment to the United States Constitution and the North Carolina State Constitution Declaration of Rights. It applies only in criminal prosecutions and may be invoked only by the accused. U.S. Const. amend. VI; N.C. Const. art. I, § 23.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This federal constitutional protection is made applicable to the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965). Because the United States Supreme Court has determined the Sixth Amendment right to confrontation is binding on the states, the Court's Sixth Amendment jurisprudence represents a "constitutional floor" guaranteeing that fundamental right to all Americans. *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998).[3]

Historical Context

"The right to confront one's accusers is a concept that dates back to Roman times." *Crawford*, 541 U.S. at 43 (citing *Coy v. Iowa*, 487 U.S. 1012, 1015-16 (1988)). The Roman Governor Festus stated: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have licence to answer for himself concerning the crime laid against him." *Acts* 25:16 (King James). Further, we note the importance of witness testi-

3. Similarly, the Declaration of Rights contained in the North Carolina State Constitution provides: "In all criminal prosecutions, every person charged with [a] crime has the right to . . . confront the accusers and witnesses with other testimony." N.C. Const. art. I, § 23. This Court has previously stated "there is no surer safeguard thrown around the person of the citizen than this guarantee contained in the Declaration of Rights." *State v. Hargrave*, 97 N.C. 354, 355, 97 N.C. 457, 458, 1 S.E. 774, 775 (1887).

mony in criminal cases dates back to the Old Testament. *See also Deuteronomy* 19:15 (King James).

Writing for the majority, Justice Scalia stated in *Crawford*: "[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50. This "civil-law mode of criminal procedure" was adopted in sixteenth and seventeenth century England, where evidence from criminal suspects, their suspected accomplices, and witnesses was taken by pretrial examination "before the Privy Council, in some cases by the judges, and in some instances by torture." 1 James Fitzjames Stephen, *A History of the Criminal Law of England* 325 (New York, Burt Franklin n.d.) (1883) [hereinafter 1 Stephen, *A History*]; *see also Crawford*, 541 U.S. at 43. At trial, "[t]he proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his 'accusers,' *i.e. the witnesses against him*, brought before him face to face." 1 Stephen, *A History* at 326 (emphasis added).

For example, in 1554 Sir Nicholas Throckmorton, a knight in the guildhall of London, was accused of "conspir[ing] and imagin[ing] the death of the queen[] [Mary's] majesty." *Trial of Throckmorton*, *in* 1 St. Trials 869, 870 (London, T.B. Howell 1816). Throckmorton was further accused of levying "war against the queen within her realm," providing "aid and comfort" to the queen's enemies, and planning to storm the Tower of London. *Id.* At Throckmorton's trial for high treason, the Crown presented the confession of Master Croftes alleging Croftes and Throckmorton, together with other accomplices, often discussed their plans against the queen. *Id.* at 875. Throckmorton responded to Croftes' confession, arguing:

> Master Croftes is yet living, and is here this day; how happeneth it he is not brought face to face to justify this matter, neither hath been of all this time? Will you know the truth? [E]ither he said not so, or he will not abide by it, but honestly hath reformed himself.

Id. at 875-76. Notwithstanding Throckmorton's demand to confront Croftes "face to face," Croftes was never produced as a witness and the jury later acquitted Throckmorton of treason, a decision for which the jurors were "severely fined." *Id.* at 899-900; *Proceedings against Throckmorton's Jury*, *in id.* at 901-02.

Similarly, the Crown tried Sir Walter Raleigh, then a knight at Winchester, for high treason against King James I in 1603. *Trial of Raleigh*, *in* 2 St. Trials 1 (London, T.B. Howell 1816) [hereinafter *Trial of Raleigh*]. Raleigh was charged with conspiring with Lord Cobham "to deprive the king of his Government; to raise up Sedition within the realm; to alter religion, to bring in the Roman Superstition and to procure foreign enemies to invade the kingdom." *Id.* The primary evidence presented by the Crown at trial was (1) the confession of Lord Cobham given in front of the Privy Counsel upon examination, and (2) a letter later written by Lord Cobham. *Id.* at 10-13, 20-24, 27-28. Both statements implicated Raleigh as a traitor against the king. *Id.* However, Lord Cobham retracted his confession before trial and sent a letter to Raleigh informing him so. *Id.* at 28-29; *see also White*, 502 U.S. at 361 (Thomas, J., concurring in part and concurring in the judgment) (stating Lord Cobham's confession was likely obtained through torture).

In his defense, Raleigh requested Lord Cobham be brought to testify in person, arguing:

> The [L]ord Cobham hath accused me, you see in what manner he hath foresworn it. Were it not for his Accusation, all this were nothing. Let him be asked, if I knew of the letter which Lawrency brought to him from Aremberg. Let me speak for my life, it can be no hurt for him to be brought; he dares not accuse me. If you grant me not this favour, I am strangely used; Campian was not denied to have his accusers face to face.

Trial of Raleigh 23. The court denied Raleigh's request, responding Lord Cobham could not be trusted to testify truthfully in person because he would desire to see "his old friend" Raleigh acquitted. *Id.* at 24. At the close of evidence, Raleigh was not acquitted; rather, after less than fifteen minutes of deliberation, the jury returned a guilty verdict. *Id.* at 29. Raleigh was confined to the Tower of London for fourteen of the fifteen years preceding his eventual execution for treason on 29 October 1618. *Id.* at 31-45; 1 Stephen, *A History* at 335.

It is with knowledge of this historical background that the Sixth Amendment was ratified in 1791 and the United States Supreme Court interpreted the Confrontation Clause in *Crawford*. *Crawford*, 541 U.S. at 43-47. Accordingly, Justice Scalia explained in *Crawford* that the Confrontation Clause safeguards a strong constitutional preference for live testimony and guarantees a criminal defendant's right

to cross-examine the witness who is the source of testimonial evidence against him. *Id.* at 54 ("[T]he common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine.").

Confrontation Clause Jurisprudence

In *Ohio v. Roberts*, the United States Supreme Court applied the Sixth Amendment Confrontation Clause to prohibit introduction of preliminary hearing testimony given by a witness not produced at the defendant's subsequent state criminal trial. 448 U.S. 56 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004). The Court explained, "The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay." *Id.* at 65. "First, in conformance with the Framers' preference for face-to-face accusation . . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Id.* Second, the proffered statement must contain " 'indicia of reliability' " that confirm the statement's trustworthiness. *Id.* (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (plurality opinion)). Six years later in *United States v. Inadi*, the United States Supreme Court limited application of the *Roberts* unavailability analysis to cases involving prior testimony, holding the Confrontation Clause does not require unavailability in every case. 475 U.S. 387, 394 (1986) (concluding "the unavailability rule, developed in cases involving former testimony, is not applicable to co-conspirators' out-of-court statements"); *see also White*, 502 U.S. at 351 ("[O]ur later decision in *United States v. Inadi* foreclosed any rule requiring that, as a necessary antecedent to the introduction of hearsay testimony, the prosecution must either produce the declarant at trial or show that the declarant is unavailable." (citation omitted)).

Thereafter, in *Idaho v. Wright*, the United States Supreme Court reviewed the trial court's admission of a two and one-half year old child victim's hearsay statements to a medical doctor during the defendant's trial for two counts of lewd conduct with a child under sixteen. 497 U.S. 805, 808-09 (1990). The State introduced the child's statements through the doctor's testimony, and the trial court admitted the statements pursuant to Idaho's residual hearsay exception. *Id.* at 809-12. On appeal, the defendant argued admission of the doctor's testimony violated her Sixth Amendment right to confront witnesses against her. *Id.* at 812. The Court applied *Roberts*, explaining "indicia of reliability" may be shown in two ways: (1) "the hearsay

statement 'falls within a firmly rooted hearsay exception,' " or (2) the statement "is supported by 'a showing of particularized guarantees of trustworthiness.' " *Id.* at 816 (quoting *Roberts*, 448 U.S. at 66). When either criterion is met, it is " 'sufficiently clear . . . that the statement offered is free enough from the risk of . . . untrustworthiness,' " and cross-examination "would be of marginal utility." *Id.* at 819-20 (quoting 5 John Henry Wigmore, *Evidence* § 1420, at 251 (James H. Chadbourn rev. 1974)). This is the "rationale for permitting exceptions to the general rule against hearsay." *Id.* at 819.

The United States Supreme Court noted Idaho's residual hearsay exception is not "firmly rooted" for Confrontation Clause purposes. *Id.* at 817. Characterizing statements not within a firmly rooted hearsay exception as " 'presumptively unreliable and inadmissible for Confrontation Clause purposes,' " the Court stated, "[U]nless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement." *Id.* at 818, 821 (quoting *Lee v. Illinois*, 476 U.S. 530, 543 (1986)). After reviewing the "totality of the circumstances," the Court found the State "failed to show that the [child's] incriminating statements to the pediatrician possessed sufficient 'particularized guarantees of trustworthiness' under the Confrontation Clause to overcome that presumption." *Id.* at 826-27.

Through *Roberts* and its progeny, the United States Supreme Court developed the constitutional rule that hearsay evidence is admissible at trial only if the evidence falls within a firmly rooted hearsay exception or the prosecution shows the evidence exhibits particularized guarantees of trustworthiness. In the case of prior testimony, the prosecution must also show the declarant was unavailable to testify at trial.

This constitutional rule, based upon the Confrontation Clause, applied in addition to state evidentiary rules governing hearsay. The United States Supreme Court has often noted the rule against hearsay and the Confrontation Clause share a common goal, which is to ensure the reliability of evidence presented at trial. *White*, 502 U.S. at 352-53; *Inadi*, 475 U.S. at 394; *Evans*, 400 U.S. at 86 (plurality opinion); *Green*, 399 U.S. at 155.

However, in *Crawford v. Washington*, the Court distinguished the Confrontation Clause from the rule against hearsay, categorizing

the right to confront witnesses as a "procedural" guarantee, not a "substantive guarantee." 541 U.S. at 61. In so doing, the Court stated,

> To be sure, the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. *It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.*

Id. (emphasis added).

In *Crawford*, the United States Supreme Court considered whether a trial court properly admitted the tape-recorded interview of a defendant's wife at the defendant's trial for assault and attempted murder. *Id.* at 38-40. The defendant maintained he stabbed the victim in self-defense during an argument. *Id.* at 38-39. The defendant's wife, who witnessed the stabbing, gave police an account of the incident that arguably conflicted with the defendant's claim of self-defense. *Id.* at 39-40. Although the defendant's wife did not testify at trial due to Washington State's marital privilege, the State introduced her earlier tape-recorded statement into evidence, and the jury convicted the defendant of assault.[4] The Washington State Court of Appeals reversed, holding the wife's statement was not reliable. *Id.* at 40. The Washington Supreme Court reinstated the conviction, concluding "although [the wife's] statement did not fall under a firmly rooted hearsay exception, it bore guarantees of trustworthiness." *Id.* at 41.

The statement at issue in *Crawford* was made at the police station house following *Miranda* warnings to the defendant and his wife during the course of police interrogation. *Id.* at 38. Thus, the United States Supreme Court concluded the statement was plainly testimonial. *Id.* at 53 n.4. Because the defendant did not have a prior opportunity to cross-examine his wife regarding her statement to police, the Court held admission of the statement violated the defendant's Sixth Amendment right to confront witnesses against him. *Id.* at 68-69. Accordingly, the Court reversed the decision of the Washington Supreme Court reinstating the defendant's conviction. *Id.* at 41, 69.

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4. In Washington, the marital privilege belongs to the defendant; thus, the defendant can prevent his or her spouse from testifying by invoking the privilege. Wash. Rev. Code Ann. § 5.60.060 (West 2005). In contrast, in North Carolina criminal actions, the marital privilege belongs to the non-defendant spouse, and that spouse may refuse to testify without fear of being compelled to do so. N.C.G.S. § 8-57 (2003).

Building on an analytical framework first set forth by Justice Thomas in his concurring opinion in *White*,[5] the Court abandoned the substantive "reliability" rule of *Roberts* in favor of a procedural test. *Id.* at 61. "Where testimonial statements are involved," the Court stated, "we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.' " *Id.* "Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68.

TESTIMONIAL EVIDENCE

Following *Crawford*, the determinative question with respect to confrontation analysis is whether the challenged hearsay statement is testimonial. As stated above, testimonial evidence is inadmissible against a criminal defendant unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Id.* Despite the late Chief Justice Rehnquist's plea to the majority in *Crawford* that "the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of 'testimony' the Court lists is covered by the new rule. They need them now, not months or years from now," *id.* at 75-76 (Rehnquist, C.J., concurring in the judgment) (citation omitted), the Supreme Court chose to "leave for another day" the task of defining the term "testimonial," *id.* at 68. This Court is faced with the task of determining whether Carlson's statements in the instant case are testimonial. Although we acknowledge that the following sections of this opinion discussing preliminary hearings, grand jury testimony, and prior trial testimony are dicta because issues relating to those proceedings are not before us in this case, we are also aware that *Crawford* represents a significant departure from the now well-established analytical framework set out in *Ohio v. Roberts*. Recognizing the cogency of the late Chief Justice Rehnquist's observations in his concurrence in *Crawford*, we offer these discussions as guidance to our trial courts and litigants. Our discussion of the doctrine of forfeiture is presented in the same spirit.

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5. In his opinion in *White v. Illinois*, 502 U.S. at 358, which concurred in part and concurred in the judgment, Justice Thomas argued United States Supreme Court case law has "confused the relationship between the constitutional right of confrontation and the hearsay rules of evidence." *Id.* Justice Thomas stated, "There appears to be little if any indication in the historical record that the exceptions to the hearsay rule were understood to be limited by the simultaneously evolving common-law right of confrontation." *Id.* at 362.

Our analysis is guided by (1) the Court's enumeration in *Crawford* of basic or "minimum" examples of testimonial evidence; (2) this Court's recent decisions applying *Crawford*, which are *State v. Bell*, 359 N.C. 1, 603 S.E.2d 93 (2004), *cert. denied*, —— U.S. ——, 125 S. Ct. 2299, 161 L. Ed. 2d 1094 (2005), and *State v. Morgan*, 359 N.C. 131, 604 S.E.2d 886 (2004); and (3) an analysis of how other jurisdictions have interpreted testimonial evidence.

"Testimonial" evidence refers to evidence produced by " 'witnesses' against" a criminal defendant. Such witnesses, who " 'bear testimony,' " are the subject of the Sixth Amendment. *Crawford*, 541 U.S. at 51 (quoting 1 N. Webster, *An American Dictionary of the English Language* (1828)). The United States Supreme Court determined in *Crawford* that "at a minimum" the term testimonial applies to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to *police interrogations*." *Id.* at 68 (emphasis added).

Preliminary Hearings

Following *Crawford*, statements made by witnesses in preliminary hearings are very likely testimonial. However, in North Carolina, not all preliminary hearings in the trial division provide for testifying witnesses. The primary function of the initial appearance before the magistrate immediately after the defendant's arrest is to initiate the judicial process and to establish, among other things, the existence of probable cause. N.C.G.S. § 15A-511 (2003). The magistrate must inform the defendant of "(1) The charges against him; (2) His right to communicate with counsel and friends; and (3) The general circumstances under which he may secure release" under the provisions regarding bail. *Id.* § 15A-511(b)(1)-(3) (2003). Although there may be an affidavit in support of the defendant's arrest, this hearing, by its very nature, would almost certainly be deemed non-testimonial.

The first appearance in district court by a criminal defendant under N.C.G.S. § 15A-601 is "not a critical stage of the proceedings against the defendant" by statute, *id.* § 15A-601(a), and there are no witnesses; its primary function is warning the defendant of his right against self-incrimination and right to counsel, as well as determining the sufficiency of the charge, *id.* § 15A-602-604. In the superior court division, the defendant's arraignment does not involve any testimony by witnesses. *See id.* § 15A-941 (2003). These hearings do not appear to implicate *Crawford*.

However, several types of preliminary hearings may afford an opportunity for witness testimony, such as the probable cause hearing provided for in N.C.G.S. § 15A-606 and 15A-611, additional pretrial hearings such as those contemplated in N.C.G.S. § 15A-952 (such as motions to continue, motions for a change of venue, motions for a special venire, and motions to dismiss), and motions to suppress under N.C.G.S. § 15A-972. Statements by witnesses at all of these hearings are likely to be testimonial under *Crawford* and, if so, are inadmissible at trial unless the defendant had an opportunity to cross-examine the witness and the witness is unavailable at the time of the trial. As a practical consideration, preliminary hearings conducted in the district court are rarely recorded.

Grand Jury Testimony

"Although '[d]ue process and notice requirements under the Sixth Amendment inure[] to state prosecutions,' this Court recently recognized 'to this date, the United States Supreme Court has not applied the Fifth Amendment indictment requirements to the states.' " *State v. Allen*, 359 N.C. 425, 438, 615 S.E.2d 256, 258 (2005) (alterations in original) (quoting *State v. Hunt*, 357 N.C. 257, 272-73, 582 S.E.2d 593, 603-04, *cert. denied*, 539 U.S. 985 (2003)). The grand jury indictment is the primary charging document for felonies in the superior court division. *See generally* N.C.G.S. § 15A-627 (2003). When a grand jury is convened, its proceedings are conducted in secret. *Id.* § 15A-623(e). The testimony of witnesses is rarely recorded. *See id.* § 15A-623(h) (allowing for grand jury witness testimony to be recorded by a court reporter only in specified circumstances). Therefore, witness statements would typically not be available at the later criminal trial, and the issue of whether these statements would be considered testimonial is not likely to arise at a subsequent trial.

Prior Trial Testimony

The Supreme Court also included former trial testimony as "testimonial" in its definition in *Crawford*. Actual witness testimony from a jury trial is the classic example of statements that would be considered "testimonial" and thus almost always certainly subject to the limitations mandated by *Crawford*. If so, such witness testimony is inadmissible at the later criminal trial of the defendant unless the witness is unavailable for the later trial and the defendant had an opportunity to cross-examine the witness at the previous trial.

Police Interrogations

Compared to the other categories, the final category of "testimonial" evidence listed in *Crawford*, "police interrogations," is a more nebulous concept. In footnote four of *Crawford*, the Court further explained its use of the term "interrogation":

> We use the term "interrogation" in its colloquial, rather than any technical legal, sense. Just as various definitions of "testimonial" exist, one can imagine various definitions of "interrogation," and we need not select among them in this case. [Defendant's wife's] recorded statement, knowingly given in response to *structured police questioning*, qualifies under any conceivable definition.

541 U.S. at 53 n.4 (emphasis added) (citation omitted).

This Court recently addressed the meaning of "structured police questioning" in *State v. Bell* and *State v. Morgan*. In *Bell*, an Onslow County jury found the defendant guilty of first-degree murder, first-degree kidnapping, and burning of personal property. 359 N.C. at 8-9, 603 S.E.2d at 100. On appeal the defendant argued the trial court erred by admitting the testimony of Newton Grove Chief of Police John Conerly during the sentencing phase of defendant's trial. *Id.* at 34, 603 S.E.2d at 115. Chief Conerly testified he recorded a statement from the victim of a common-law robbery for which the defendant had been previously convicted. *Id.* Explaining the victim was not available to testify at trial, the prosecutor stated, " '[T]he victim was a Hispanic [man] and has left, we tracked, pulled the record, he's left the state and possibly the country.' " *Id.* (alteration in original). Thereafter, Chief Conerly testified regarding the contents of the victim's statement:

> "He [Gasca] stated that he was in West Hunting and Fishing. That he had seven hundred dollars, I believe he was sending back to his sister in Mexico. That someone ran up behind him and pushed and shoved him, grabbed his money. That he chased them outside. That they jumped into a vehicle and had taken off, and that he was struggling with the fella who was getting in the vehicle. That he cut him with what he thought was a knife."

Id. (alteration in original).

Upon review, this Court determined "the statement made by Gasca was in response to *structured police questioning* by [Chief]

Conerly regarding the details of the robbery committed by defendant." *Id.* at 36, 603 S.E.2d at 116 (emphasis added). Because "[t]here can be no doubt that [Gasca's] statement was made to further [Chief] Conerly's investigation of the crime" and "Gasca's statement contributed to defendant's arrest and conviction of common-law robbery," this Court determined Gasca's statement was "testimonial in nature." *Id.*

In *Morgan*, the defendant was convicted of first-degree murder in Buncombe County. 359 N.C. at 139, 604 S.E.2d at 891. On direct appeal, the defendant argued admission of Asheville Police Sergeant Douglas Berner's testimony regarding statements made by a witness during a police interview violated defendant's Sixth Amendment right to confrontation. *Id.* at 155-56, 604 S.E.2d at 901. This Court agreed with the defendant that "[the witness'] statement to Sergeant Berner was testimonial in nature because it was 'knowingly given in response to structured police questioning.' " *Id.* (quoting *Crawford*, 541 U.S. at 53 n.4).

This is not to say all statements made to law enforcement officers are testimonial; certain factors, such as the setting of the questioning and the role or responsibility of the officer, must be taken into account to determine if the declarant has been subjected to structured police questioning or police interrogation. Unfortunately, "interrogation" has as many potential definitions as does "testimonial." One definition of interrogation is "question[ing] typically with formality, command, and thoroughness for full information and circumstantial detail." *Webster's Third New International Dictionary* 1182 (1971).[6]

The model structure of a North Carolina law enforcement organization has three divisions: Staff services, uniformed patrol or field officers, and a criminal investigations or detectives division. Ronald G. Lynch, *Law Enforcement*, *in* Municipal Government in North Carolina 619, 630-31 (David M. Lawrence & Warren Jake Wicker eds., 2d ed., Inst. Of Gov't U. Of N.C. at Chapel Hill 1995) [hereinafter Lynch]. The service division is an administrative division in the orga-

6. *See also United States v. Bordeaux*, 400 F.3d 548, 556 (8th Cir. 2005) ("A police interrogation is formal (*i.e.*, it comprises more than a series of offhand comments—it has the form of an interview), involves the government, and has a law enforcement purpose."); *Mungo v. Duncan*, 393 F.3d 327, 336 n.9 (2d Cir. 2004), *cert. denied*, —— U.S. ——, 125 S. Ct. 1936, 161 L. Ed. 2d 778 (2005). (Citing, in dictum, the above definition of "interrogate" and concluding, "We believe the Supreme Court intended this more limited meaning, which is more consistent with the other types of testimonial statements the Court mentioned.").

nization with both sworn and unsworn personnel whose function is not pertinent to this discussion. The uniformed patrol or field officer's role is to respond to reports of crimes or 911 calls for assistance and to provide traffic enforcement and crime prevention through patrolling. *Id.* at 635-36. The patrol or field officer's responsibility at an alleged crime scene is to collect preliminary information necessary to understand what purportedly took place, determine if medical attention is required, secure the crime scene, and possibly identify a perpetrator. *Id.* at 637. Considering the role of these law enforcement officers, most information obtained in relation to an incident will not be testimonial because it is not the result of structured police questioning. As the Supreme Court of Nebraska noted:

> Police who respond to emergency calls for help and ask preliminary questions to ascertain whether the victim, other civilians, or the police themselves are in danger are not obtaining information for the purpose of making a case against a suspect. [Statements made as a result of these questions are] not made in anticipation of eventual prosecution, but [are] made to assist in securing the scene and apprehending the suspect.

State v. Hembertt, 269 Neb. 840, 852, 696 N.W.2d 473, 483 (2005) (citation omitted). Statements made by witnesses or victims in response to the above described scenario, though the police are making inquiries or performing various law enforcement activities, are not testimonial because they are not, by their very nature, considered structured police questioning.

Using the preliminary information gathered by the patrol or field officers, the investigations or detectives division typically reviews and consolidates field officers' preliminary reports, follows through with a determination of the identity of the subject(s) of the investigation, and prepares the case for the prosecution when all information is gathered. Lynch at 638. An investigator or team of investigators are assigned the responsibility of investigating criminal activity by gathering additional evidence and questioning witnesses and victims with more "formality, command, and thoroughness for full information and circumstantial detail" than a patrol officer, thus producing testimonial statements. *Webster's Third New International Dictionary* 1182 (1971).

To be sure, we do not find the role of a police officer determinative as to whether a statement is testimonial. A detective may

conduct preliminary investigations, which typically produce nontestimonial statements, and a field officer may conduct an entire investigation and gather a number of testimonial statements. The determinative factor is the particular status or stage of the investigation; when the investigation goes beyond preliminary fact-gathering, the investigation will tend to become structured police questioning and will likely produce testimonial statements. The role of the officer is merely a factor to be considered in determining the stage of the investigation.

In summary, structured police questioning is a key consideration in determining whether a statement is or is not testimonial. Structured police questioning or interrogation does not occur exclusively in a police station, as was the case in *Crawford*, 541 U.S. at 38-40. The questioning might also occur in a field location, detention facility, or the North Carolina Department of Correction. This questioning is in contrast to the initial gathering of information and determination of whether a crime was actually committed. Whether structured police questioning is present may also depend on the status of the investigation, as evidenced by the role of the officer(s) asking questions of the declarant. This distinction is an important one, because the statements made as a result of a patrol officer's preliminary questioning will likely be nontestimonial, while statements resulting from investigators' questions, which are made at a later point in time, will likely be testimonial.

The point at which questioning becomes "structured police questioning" is analogous to the line crossed when police involvement changes from mere presence to effecting a seizure of a person, *see Florida v. Bostick*, 501 U.S. 429, 434 (1991), or when police questioning takes a form requiring *Miranda* rights to be read, *see Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966). So too a line is crossed when police questioning shifts from mere preliminary fact-gathering to eliciting statements for use at a subsequent trial. When this line is crossed, any statements elicited are testimonial in nature.

Declarant's State of Mind

After a comprehensive survey of other jurisdictions regarding the application of *Crawford*, it appears another classification that has been used to determine whether a statement is testimonial or nontestimonial relies heavily on the total circumstances surrounding the declarant's statement. This classification must be made on

a case-by-case basis.[7] Many courts also believe the examples of testimonial statements noted in *Crawford* share a common characteristic: The declarant's knowledge, expectation, or intent that his or her statements will be used at a subsequent trial.[8] We agree with both of these lines of thinking and thus hold an additional prong of the analysis for determining whether a statement is "testimonial" is, considering the surrounding circumstances, whether a reasonable person in the declarant's position would know or should have known his or her statements would be used at a subsequent trial. This determination is to be measured by an objective, not subjective, standard.

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7. *See United States v. Brun*, 416 F.3d 703, 707 (8th Cir. 2005) (determining that a 911 call made "under these circumstances" was nontestimonial); *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005) (looking at "[c]ertain factual circumstances surrounding an out-of-court statement . . . including formalized settings such as police interrogations" in determining whether a statement is testimonial); *United States v. Holmes*, 406 F.3d 337, 348 (5th Cir. 2005) ("[W]hether a challenged statement falls within the class of evidence deemed 'testimonial' will generally be outcome-determinative."); *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004) (considering the pertinent circumstances establishing "the declarant's position" in determining whether a statement was testimonial); *State v. Wright*, 701 N.W.2d 802, 812 (Minn. 2005) ("[S]tatements made to the police during a field investigation should be analyzed on a case-by-case basis according to the circumstances under which the statements are made."); *State v. Hembertt*, 269 Neb. 840, 851, 696 N.W.2d 473, 482-83 (2005) ("[W]hether a statement is testimonial depends on . . . the circumstances surrounding the making of the statement [which] illuminate the purpose or expectation of the declarant."); *State v. Davis*, 154 Wash. 2d 291, 302, 111 P.3d 844, 850 (2005) ("It is necessary to look at the circumstances of [the statement] in each case to determine whether the declarant knowingly provided the functional equivalent of testimony . . . .").

8. *See United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005) ("[A] statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime."); *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004) ("The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime."); *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004) ("[T]he types of statements cited by the [United States Supreme] Court as testimonial share certain characteristics; all involve a declarant's knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings."); *State v. Hembertt*, 296 Neb. 840, 851, 696 N.W.2d 473, 482 (2005) ("The determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial . . . . [W]hether a statement is testimonial depends on the purpose or expectation of the declarant in making the statement . . . ."); *State v. Davis*, 154 Wash. 2d 291, 302, 111 P.3d 844, 850 (2005) ("It is necessary to look at the circumstances of the 911 call in each case to determine whether the declarant *knowingly* provided the functional equivalent of testimony to a government agent.") (emphasis added).

The Supreme Court of Minnesota most recently articulated a number of factors to be considered and weighed in determining whether a statement is testimonial. *State v. Wright*, 701 N.W.2d 802, 812-13 (Minn. 2005). Some of these factors include "whether the declarant was a victim or an observer[,] the declarant's purpose in speaking with the officer[,] . . . the declarant's emotional state when the statements were made, [and] the level of formality and structure of the conversation between the officer and declarant[,]" among others. *Id.* at 812. The Supreme Court of Minnesota noted that its list was not entirely inclusive, but these factors were a starting point for a court to determine whether a particular statement is or is not testimonial. *Id.* at 813. We do not specifically adopt any of the above cited interpretations of "testimonial;" however, we do find them instructive and helpful to the trial court.

[1] Thus, a trial court's confrontation analysis of a statement should proceed as follows: The initial determination is whether the statement is testimonial or nontestimonial. If the statement is testimonial, the trial court must then ask whether the declarant is available or unavailable to testify during the trial. If the declarant is unavailable, the trial court must determine whether the accused had a prior opportunity to cross-examine the declarant about this statement. If the accused had such an opportunity, the statement may be admissible if it is not otherwise excludable hearsay. If the accused did not have this opportunity, the statement must be excluded.

CARLSON'S STATEMENTS TO LAW ENFORCEMENT

[2] Here, defendant challenges the trial court's admission of (1) Carlson's description to Officer Cashwell of the crimes and her attacker, and (2) Carlson's selection of defendant's picture from a photographic lineup prepared by Detective Utley. We conclude the first statement was not testimonial, but the second statement was made in response to structured police questioning and is therefore testimonial. Thus, Carlson's second statement should not have been admitted unless Carlson was unavailable to testify and defendant had a prior opportunity to cross-examine Carlson. *Crawford*, 541 U.S. at 68. However, we find the admission of the second statement to be harmless error.

The record reflects Officer Cashwell was dispatched to Carlson's apartment at approximately 5:43 p.m. on 22 November 2001 in response to a robbery call. Upon arrival, Officer Cashwell met Carlson's neighbors, Griffin and Woods, in the apartment and com-

menced his inquiries. Officer Cashwell recorded a statement from Griffin which he later included in his police report. From Griffin, Officer Cashwell learned Carlson's telephone had been off the hook since at least 5:00 that afternoon. After unsuccessfully trying to call Carlson, Griffin went upstairs to Carlson's apartment where she found Carlson sitting in a chair. Griffin described the room as "tore up" and noticed Carlson's telephone was on the floor and a nearby flashlight was broken. Thus, before speaking with Carlson, Officer Cashwell had reason to believe a crime may have been committed, but the seriousness and factual existence of a crime had not yet been established.

Officer Cashwell's questioning of Carlson and other witnesses was not "structured police questioning" as we believe the Supreme Court intended in *Crawford*. Officer Cashwell was a patrol or field officer, rather than a detective or investigator. The focus of Officer Cashwell's interview with Carlson was to gather as much preliminary information as possible about the alleged incident, to determine if a crime had indeed been committed, to ascertain if medical attention was required, and to identify a potential perpetrator. When Officer Cashwell spoke with Carlson, he did not have a substantial amount of information about the alleged incident. Officer Cashwell was the first responder to the scene, and his presence did not create the "formality, command, and thoroughness" typically found in an interrogation setting. Therefore we find Officer Cashwell did not engage in "structured police questioning" under *Crawford*.

We also find Carlson's statements to Cashwell were not testimonial because we do not believe a person in Carlson's position would or should have reasonably expected her statements to be used at trial. We first note that Carlson did not initiate the conversation with the police; the neighbors called the police without any direction from Carlson. Cashwell also interviewed Carlson at her home, and Cashwell was not the only person present when she made the statements, thus diminishing any formality that might be created by a police interview. Carlson was in a state of "shock" when Cashwell interviewed her, and she did not know the status of the investigation at the time of the interview. Although it is hard to discern Carlson's exact purpose in making her statements to Cashwell, it appears from these facts she did not know, nor should she have known, her statements would be used in a subsequent prosecution. Under these circumstances, her statements are more appropriately characterized as nontestimonial.

With respect to Carlson's photo identification of defendant, Detective Utley brought the photographic lineup to Carlson while she was being treated for her injuries at Wake Medical Center. When Detective Utley arrived at 10:15 p.m., he observed Carlson lying down "getting ready to have some type of scan done." Detective Utley then conducted the lineup stating, "[T]he person that assaulted you or robbed you . . . may or may not be in this photographic lineup. This is something you would have to tell me." At trial, Detective Utley testified he gives the same instruction every time he conducts a photographic lineup. Detective Utley then showed Carlson photographs of six women, one photograph at a time. After Carlson selected defendant's photograph, Detective Utley "went and gave probable cause to the magistrate," obtaining a warrant for defendant's arrest. The warrant named Carlson as the sole witness against defendant.

By conducting the photographic lineup, Utley crossed the line between making preliminary observations about an alleged crime and structured police questioning. The lineup served as a continued investigation, based on and occurring after the preliminary investigation conducted by Officer Cashwell. At the time of the lineup, Utley knew what allegedly happened to Carlson and had previously narrowed the scope of potential suspects. His purpose in conducting the interview was to establish probable cause to obtain a warrant specifically for Angela Deborah Lewis' arrest. Additionally, at the time of the interview, based upon the specific circumstances, Carlson knew an investigation was underway, and a reasonable person in Carlson's position would expect her statements could be used at a subsequent trial. Thus, the circumstances surrounding Utley's interview of Carlson at the hospital tip the scales in favor of the interview's being structured police questioning.

Initially, we note several distinctions between Carlson's first statements to Raleigh police and the "*ex parte* examinations" introduced pursuant to the "civil-law mode of criminal procedure" discussed in *Crawford*. 541 U.S. at 50. Specifically, the statements made by the declarant in the present case were made in the declarant's home, rather than at a police station house, as was the case in *Crawford*. *Id.* at 38. Additionally, in the present case, the declarant made her first responses to Officer Cashwell during the preliminary stages of the inquiry; in *Crawford*, the declarant made her statements to coercive law enforcement officers while she was in custody. Clearly, the investigation at issue in *Crawford* had progressed much further than Officer Cashwell's investigation when he

first spoke with Carlson. The interview by police in *Crawford* contained the "formality, command, and thoroughness" to make the interview structured police questioning, while the first interview of Carlson by Officer Cashwell lacked the requisite qualities of "structured police questioning."

More importantly, Carlson's statements in the present case are much different from this Court's analysis of structured police questioning in *Bell* and *Morgan*. In *Bell*, this Court determined the victim's statements were made pursuant to "structured police questioning." 359 N.C. at 36, 603 S.E.2d at 116. The challenged statements in *Bell* were made by a declarant to the Chief of Police of the town where the crime occurred; the Chief of Police also obtained the statements after he was briefed on the incident by the first responding patrol officer. As stated before, the role of a police officer in obtaining statements during an investigation is not determinative; however, the officer's role can serve as evidence of the stage of an investigation. Thus, because the statements in *Bell* were obtained by the town's Chief of Police after the Chief learned about the alleged incident, they show the investigation was at a more developed stage than the preliminary investigation conducted by Officer Cashwell in this case. Further, the setting created by an interview with the town's Chief of Police created the "formality" and "command" seen in structured police questioning.

Similarly, in *Morgan*, this Court found a declarant's statements were testimonial because they were produced by structured police questioning. 359 N.C. at 155-56, 604 S.E.2d at 901. The challenged statements in *Morgan* were obtained by a sergeant in the Asheville Police Department's criminal investigations division. *Id.* at 153, 604 S.E.2d at 899. The sergeant arrived approximately one hour after law enforcement had been called to the scene of the crime. After learning of the incident from a patrol officer's preliminary investigation, the sergeant interviewed one of the witnesses alone in his police car. The stage of the investigation, the role of the officer, and the location of the questioning clearly indicate that the sergeant in *Morgan* was building on previously obtained information to narrow the scope of the investigation using structured police questioning. In contrast, Officer Cashwell's investigation was preliminary and did not create an interrogation setting at Carlson's home, and a reasonable person in Carlson's position would not have believed her statements would be used at a subsequent trial. Thus, Carlson's first statements to Officer Cashwell were nontestimonial, while

statements obtained under the circumstances in *Bell* and *Morgan* are testimonial.

However, Carlson's subsequent identification of defendant from the photographic lineup prepared by Detective Utley was made at a point in the investigation beyond mere preliminary stages that reached "structured police questioning," as was the case in *Crawford*, *Bell*, and *Morgan*. Accordingly, the statements made by Carlson to Detective Utley were in response to structured police questioning and, under *Crawford*, are testimonial.

FORFEITURE OF THE RIGHT OF CONFRONTATION

Despite its importance, a defendant may forfeit the right of confrontation through wrongdoing in cases where the defendant is the cause of the witness's unavailability. The United States Supreme Court first enunciated the concept of forfeiture of a defendant's right of confrontation over 100 years ago:

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

Reynolds v. United States, 98 U.S. 145, 158 (1878). The Federal Rules of Evidence codified the doctrine in 1997: "A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" is admissible. Fed. R. Evid. 804(b)(6). In *Crawford*, the Supreme Court explicitly accepted this doctrine. 541 U.S. at 62 (stating that "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds"). In that case, the defendant caused his wife's unavailability by invoking his marital privilege, *id.* at 40, but, because of the importance society places on this privilege, exercising this privilege is not considered the type of "wrongdoing" that necessitates forfeiture of the defendant's right of confrontation.

In interpreting the concept of forfeiture, different jurisdictions have developed different rules about which actions by the defendant constitute forfeiture of his confrontation rights. Most recently, the Supreme Court of Minnesota stated that "a defendant will be found to have forfeited by his own wrongdoing his right to confront a witness against him if the state proves that the defendant engaged in wrongful conduct, that he intended to procure the witness's unavailability, and that the wrongful conduct actually did procure the witness's unavailability." *Wright*, 701 N.W.2d 802 at 814-15. The Supreme Court of Kansas dealt with the most obvious example of wrongdoing—the defendant's murder of the witness in question—and adopted the reasoning of an amicus brief filed in the case:

> "If the trial court determines as a threshold matter that the reason the victim cannot testify at trial is that the accused murdered her, then the accused should be deemed to have forfeited the confrontation right, *even though the act with which the accused is charged is the same as the one by which he allegedly rendered the witness unavailable*."

State v. Meeks, 277 Kan. 609, 615, 88 P.3d 789, 794 (2004).

Of course, not all instances of defendant wrongdoing will be so obvious, nor does the defendant need to actually cause the death of the witness in order to have forfeited his confrontation right. The Supreme Judicial Court of Massachusetts explained:

> [T]he causal link necessary between a defendant's actions and a witness's unavailability may be established where (1) a defendant puts forward to a witness the idea to avoid testifying, either by threats, coercion, persuasion, or pressure; (2) a defendant physically prevents a witness from testifying; or (3) a defendant actively facilitates the carrying out of the witness's independent intent not to testify.

Commonwealth v. Edwards, 444 Mass. 526, 541, 830 N.E.2d 158, 171 (2005) (footnote omitted). The United States Court of Appeals for the Fourth Circuit extended this idea and held a defendant may even be determined to waive his right of confrontation merely by acquiescing in the wrongdoing that procured the unavailability of the witness, even without his direct participation. *United States v. Rivera*, 412 F.3d 562, 567 (4th Cir. 2005) (citing *United States v. Thompson*, 286 F.3d 950, 963-64 (7th Cir. 2002); *United States v. Cherry*, 217 F.3d 811, 820 (10th Cir. 2000); *United States v. Mastrangelo*, 693 F.2d 269, 273-74 (2d Cir. 1982); *Olson v. Green*, 668 F.2d 421, 429 (8th Cir. 1982)).

In the instant case, whether defendant participated in procuring the unavailability of the victim and witness, Ms. Carlson, is not an issue raised on appeal. Ms. Carlson's official cause of death was pneumonia, and the State stipulated for purposes of the trial that defendant was not responsible for her death. Therefore, we do not decide whether defendant forfeited her confrontation right as guaranteed by the Sixth Amendment.

HARMLESS ERROR

Although we determined the trial court's admission of Detective Utley's testimony regarding Ms. Carlson's identification of defendant from her photograph was in error, we hold such error was harmless.

The United States Supreme Court first recognized the concept of harmless error in *Kotteakos v. United States*, 328 U.S. 750 (1946). "[T]he question is, not [was the trial court] right in [its] judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision." *Id.* at 764. "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand . . . ." *Id.* Noticing the traditional harmless error standard articulated in *Kotteakos* might "work very unfair and mischievous results when . . . the question of guilt or innocence is a close one," the United States Supreme Court recognized harmless constitutional error review must be more stringent. *Chapman v. California*, 386 U.S. 18, 22 (1967). When the error involves a defendant's constitutional right, the "error is presumed to be prejudicial unless the State can show that the error was harmless beyond a reasonable doubt, meaning that 'the error complained of did not contribute to the verdict obtained[.]' " *Allen*, 359 N.C. at 441-42, 615 S.E.2d at 267 (quoting *Chapman*, 386 U.S. at 24 (1967)). Subsequently, in *Neder v. United States*, the United States Supreme Court offered guidance on how the harmless constitutional error standard is to be analyzed: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" 527 U.S. 1, 18 (1999).

North Carolina incorporated the United States Supreme Court's rationale of *Chapman* into our own harmless constitutional error statutory scheme and jurisprudence. The applicable statute states: "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt." N.C.G.S. § 15A-1443(b)

(2003). One way for the appellate court to determine whether a constitutional error is harmless beyond a reasonable doubt is to ascertain whether there is other overwhelming evidence of the defendant's guilt; if there is such overwhelming evidence, the error is not prejudicial. *See State v. Tirado*, 358 N.C. 551, 581, 599 S.E.2d 515, 536 (2004), *cert. denied*, —— U.S. ——, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

In the case *sub judice*, the outcome of the jury trial would have been the same had Carlson's statement to Utley identifying defendant's picture not been admitted because competent overwhelming evidence of defendant's guilt existed. We have already held Carlson's initial statements to Officer Cashwell were not testimonial in nature and thus, were properly admitted by the trial court under *Crawford*. These initial statements already identified defendant as a particular woman matching defendant's age and physical description who frequently visited Kersey, one of Carlson's neighbors. Part of Carlson's initial statement to Officer Cashwell was "I know her." When Carlson made these statements to Officer Cashwell, she knew who committed the assault; she just did not know defendant's name.

Carlson's indication from the photographic lineup of defendant as her assailant merely confirmed the earlier statement, "I know her." Had the contents of Carlson's conversation with Detective Utley not been admitted by the trial court, sufficient overwhelming evidence remained in the record identifying defendant as the assailant so that the jury would have reached the same result. Detective Utley testified Kersey gave him defendant's name as the woman who visited him and matched the physical description Carlson gave to Officer Cashwell. That Carlson later confirmed defendant's picture as being a picture of the assailant did not change the initial identification of defendant as the assailant.

CONCLUSION

For these reasons, we hold Carlson's statements to Officer Cashwell were non-testimonial statements not subject to the requirements of unavailability and cross-examination set forth in *Crawford*. We further hold Carlson's statement to Detective Utley identifying defendant as her assailant was a testimonial statement subject to the requirements in *Crawford*.

There is no question Carlson, who died prior to defendant's trial, was unavailable to testify. It is also undisputed that defendant had no

prior opportunity to cross-examine Carlson regarding the statements introduced by the State at trial. Accordingly, admission of the statement Carlson made to Detective Utley violated defendant's right to confront witnesses against her.

However, this error was "harmless beyond a reasonable doubt." N.C.G.S. § 15A-1443(b); *see*, *e.g.*, *Bell*, 359 N.C. at 36-37, 603 S.E.2d at 116-17 (applying harmless error analysis to erroneous admission of victim's statement in violation of *Crawford*). Thus, we reverse the decision of the Court of Appeals granting defendant a new trial and remand the matter to the Court of Appeals for consideration of the remaining assignments of error.

REVERSED and REMANDED.

Justice NEWBY concurring in part and in the judgment.

Along with the majority, I believe the admission of Ms. Carlson's statement to Officer Cashwell comports with *Crawford v. Washington*, 541 U.S. 36 (2004). Unlike the majority, I do not think *Crawford* requires the exclusion of Ms. Carlson's photographic identification of defendant. I fear today's ruling will bar vital evidence in future criminal cases even though *Crawford* itself would not dictate such a result.

Crawford interprets the Confrontation Clause[9] to mandate the exclusion of "testimonial evidence" unless (1) the witness is unavailable at trial and (2) the defendant had a prior opportunity for cross-examination. *Id.* at 54. The principal difficulty for this Court and others is that *Crawford* leaves "testimonial" largely undefined. *Id.* at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' "); Leading Cases: I.B. Criminal Law and Procedure, 118 Harv. L. Rev. 248, 322 (2004) ("Remarkably, then, even as it held that the Confrontation Clause reflects an 'acute concern' with testimonial statements, the Court was silent as to the exact scope of the Clause's reach.") (footnotes omitted). The United States Supreme Court did offer four examples of testimonial evidence: "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to *police interrogations*." 541 U.S. at 68 (emphasis added).

9. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . . " U.S. Const. amend. VI.

While the first three of these examples involve readily identifiable legal proceedings, it is not always easy to ascertain the point at which police interaction with witnesses or suspects becomes interrogation. The Supreme Court implicitly acknowledged this problem but refused to delineate precisely where police interviews end and interrogations begin. *Id.* at 53 n.4 ("Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case."); *see also* Ralph Ruebner & Timothy Scahill, Crawford v. Washington, *the Confrontation Clause, and Hearsay: A New Paradigm for Illinois Evidence Law*, 36 Loy. U. Chi. L.J. 703, 716 (2005) ("Implicitly, not every conversation with the police will qualify as a testimonial statement.") The most guidance the Court would provide was that it applied interrogation in the term's "colloquial, rather than any technical legal, sense." 541 U.S. at 53 n.4. Thus, our review of alleged *Crawford* violations turns on whether the police interview in a given case amounts to interrogation as the term is used in ordinary conversation.[10] *See* The Oxford American College Dictionary 273 (2002) (defining "colloquial" as "used in ordinary conversation; not formal or literary").

For now, *Crawford* furnishes the only illustration of what the Supreme Court intends by "interrogation." There the defendant and his wife Sylvia went to the victim's residence after Sylvia claimed the victim had tried to rape her. 541 U.S. at 38. A fight ensued, during which the defendant stabbed the victim. *Id.* Police officers arrested the defendant and his wife. After giving Sylvia a *Miranda* warning, police detectives twice questioned her, making it clear her release " 'depend[ed] on how the investigation continue[d].' " *Id.* at 65 (first alteration in original). Sylvia eventually implicated her husband "[i]n response to often leading questions[.]" *Id.* Writing for the Supreme Court, Justice Scalia emphasized: "Sylvia Crawford made her statement while in police custody, herself a potential suspect in the case." *Id.* Hence, her "recorded statement, knowingly given in response to *structured police questioning*, qualifies under any conceivable definition [of interrogation.]" *Id.* at 53 n.4 (emphasis added).

Dramatic factual differences separate *Crawford* from Ms. Carlson's photographic identification of defendant. Never a suspect, Ms. Carlson was the elderly victim of a robbery and assault that left her with bruising over one eye, a contusion to the right frontal lobe of one lung, and three fractured ribs. Whereas Sylvia Crawford was

10. Where exactly courts are to locate an authoritative expression of interrogation's colloquial meaning remains an epistemological mystery.

interrogated at a police station, Detective Utley approached Ms. Carlson at the hospital. Specifically, he found Ms. Carlson awaiting tests and "still strapped [to] the board [on which] she was transported [from home]." The *Crawford* detectives posed leading questions and pressured Sylvia Crawford to implicate her husband. Avoiding leading questions, Detective Utley simply informed Ms. Carlson the photographs "may or may not" contain a picture of her assailant. He then showed her six photographs one at a time. Unprompted, Ms. Carlson identified defendant as her attacker.

The questioning of Sylvia Crawford manifestly satisfies the dictionary definition of interrogation, which, if not dispositive, is at least pertinent. According to *The Oxford American College Dictionary* 697 (2002), "to interrogate" is to "ask questions of (someone, esp. a suspect or a prisoner) closely, aggressively, or formally." This denotation aptly describes Sylvia's treatment at the hands of police detectives. On the other hand, the same cannot be said of Ms. Carlson's photographic identification. Detective Utley's bedside lineup was hardly formal, and nothing about it suggests the detective behaved aggressively. Moreover, the narrow scope of the examination argues against characterizing it as a detailed inquiry or structured police questioning. *See State v. Nix*, 2004-Ohio-5502 ¶77 (Ohio Ct. App.) (holding a hospitalized victim's photographic identification of his assailant was not testimonial when the victim "was not a suspect in any crime, and . . . not under any form of custody that would have led to *Miranda* warnings and the type of 'structured [police] questioning' sufficient to be called a police 'interrogation' . . . in the colloquial sense of the word.").

Many of the factors the majority isolates as relevant to recognizing interrogations seem consistent with *Crawford*. The majority advises our trial courts to consider, *inter alia*, "the setting of the questioning" and the "role or responsibility of the officer." It distinguishes "preliminary fact-gathering" from "structured police questioning;" "preliminary fact-gathering" becomes "structured police questioning," and therefore interrogation, when law enforcement employs formality and command to "elicit[] statements for . . . trial." The application of these criteria to the facts of *Crawford* would doubtless lead to the same conclusions as those reached by the Supreme Court. However, it likewise should have led the majority to determine Ms. Carlson's photographic identification was not testimonial. "[F]ormality and command" were entirely absent from Detective Utley's lineup, and, consequently, it did not constitute an interrogation.

The majority completes its analytical framework for evaluating potential *Crawford* violations with the following "additional prong:" "whether a reasonable person in the declarant's position would know or should have known his or her statements would be used at a subsequent trial." Neither Detective Utley nor Ms. Carlson had grounds to anticipate Ms. Carlson's unavailability at trial and the ensuing need to use her photographic identification. Furthermore, the conditions under which Ms. Carlson performed her identification (strapped to a board at the hospital and awaiting tests) make it doubtful she spoke with defendant's trial in mind. Of course, she realized Detective Utley hoped to apprehend her assailant, and Detective Utley certainly presented his lineup with a view toward establishing probable cause. Yet in its comments on initial appearances held pursuant to N.C.G.S. § 15A-511, the majority indicates merely acting to establish probable cause is ordinarily not enough to render evidence testimonial.

"[T]he central [aim] of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Today's unintentional extension of *Crawford* could subvert this goal by depriving juries of evidence that would otherwise aid them in their efforts to discern the truth. Such an outcome is sure to erode public respect for the judicial process. As with Ms. Carlson's statement to Officer Cashwell, I am convinced Ms. Carlson's photographic identification of defendant is not testimonial. Notwithstanding my disagreement with the majority over the status of the photographic identification, I agree the instant case should be remanded to the Court of Appeals for review of defendant's remaining assignments of error.

JAMIE REEP, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED v. THEODIS BECK, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF CORRECTION, AND JUDY SILLS, MANAGER, COMBINED RECORDS SECTION OF THE DEPARTMENT OF CORRECTION, IN THEIR OFFICIAL CAPACITIES

No. 345PA04

(Filed 7 October 2005)

Pleadings— sequence of considering motions—class certification—judgment on pleadings

The Court of Appeals erred by holding in an unpublished opinion that the trial court erred when it did not consider plaintiff's motion for class certification prior to ruling on defendants' dispositive motion for judgment on the pleadings, because: (1) the Court of Appeals considered an issue not preserved at trial to reach an erroneous result; (2) the Court of Appeals' rigid formulation could thwart judicial economy and invite abuse; (3) in determining the sequence in which motions will be considered, North Carolina judges will continue to be mindful of longstanding exceptions to the mootness rule and other factors affecting traditional notions of justice and fair play; and (4) while our Supreme Court expressed no opinion on the merits of plaintiff's appeal, it concluded that the trial court did not err as a matter of law in considering defendants' motion for judgment on the pleadings prior to ruling on plaintiff's motion for class certification.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 164 N.C. App. 779, 596 S.E.2d 906 (2004), reversing an order entered 27 February 2003 by Judge Evelyn Werth Hill in Superior Court, Wake County and remanding the case to the trial court. Heard in the Supreme Court 16 May 2005.

North Carolina Prisoner Legal Services, Inc., by J. Phillip Griffin, Jr., for plaintiff-appellee.

Roy Cooper, Attorney General, by Elizabeth F. Parsons, Assistant Attorney General, and James Peeler Smith, Special Counsel, for defendant-appellants.

EDMUNDS, Justice.

In this case, the Court of Appeals considered an issue not preserved at trial to reach a result that we find to be erroneous. Accordingly, we reverse.

On 10 August 1999, plaintiff Jamie Reep entered a plea of guilty to one count of felony assault with a dangerous weapon inflicting serious injury. Plaintiff was sentenced to a minimum term of forty months and a maximum term of fifty-seven months with credit for 255 days of pretrial confinement. While serving his minimum sentence, plaintiff received 148 days of earned time sentence reduction credit and was awarded 111 days of meritorious time reduction credit, all applied against his maximum term. Of the 259 days, 245 were applied in calculating plaintiff's minimum release date of 27 March 2002. The Department of Correction (DOC) intentionally left fourteen days uncredited in order to comply with the statutory requirement that an offender serve at least his minimum term. N.C.G.S. § 15A-1340.13(d) (2003).

Plaintiff was released from incarceration into post-release supervision on 27 March 2002. However, this post-release supervision was revoked on 20 July 2002, and plaintiff was returned to DOC to serve nine months of his original sentence. Plaintiff requested that DOC apply the previously unapplied fourteen days of sentence reduction credit to his nine month term. DOC refused, explaining later that for administrative purposes, it treats the time a defendant must serve when returned to custody under similar circumstances "as an additional, stand-alone sentence." Pursuant to this interpretation, plaintiff would be entitled only to credits earned during his reimprisonment.

On 20 December 2002, plaintiff filed in Wake County Superior Court a class action complaint on behalf of himself and all others similarly situated. Plaintiff's complaint, which named officials of the North Carolina Department of Correction as defendants, alleged that his statutory and constitutional rights were being violated as a result of defendants' refusal "to credit all earned and/or awarded sentence reduction credits to [an] inmate[']s maximum term of imprisonment" when the inmate was reincarcerated after revocation of post-release supervision. Plaintiff further alleged that defendants' practice ensures that he would be held beyond the time he was lawfully required to serve. The same day, plaintiff moved for class certification pursuant to Rule 23 of the North Carolina Rules of Civil Procedure.

On 9 January 2003, while the class action complaint and certification motion were pending, plaintiff entered a plea of guilty in Gaston County Superior Court to larceny, a Class H felony. The trial court imposed an active sentence of sixteen to twenty months, to be served concurrently with the nine month incarceration imposed on plaintiff when his post-release supervision was revoked. As a result, the larceny sentence entirely subsumed the nine month sentence for which plaintiff was claiming fourteen days of credit.

Defendants filed their answer to plaintiff's complaint on 29 January 2003. In light of plaintiff's concurrent larceny sentence, defendants the next day also filed a motion for judgment on the pleadings, arguing that plaintiff's claims were moot. The trial court conducted a hearing on 18 February 2003 at which plaintiff advised the court that defendants had stipulated during discovery that thirty-four reincarcerated individuals were in similar situations. Following the hearing, the trial court entered an order of dismissal on 27 February 2003, concluding that plaintiff's claim was "moot as a matter of fact and a matter of law" and that there was "no recognized exception to the [m]ootness [r]ule in this case." The trial court's order did not address plaintiff's motion for class certification.

Plaintiff entered notice of appeal to the North Carolina Court of Appeals. In an unpublished opinion, that court reversed and remanded, concluding that "[t]he trial court erred in considering [the] dispositive motion before ruling on plaintiff's motion for class certification." *Reep v. Beck*, 164 N.C. App. 779, 596 S.E.2d 906, 2004 N.C. App. LEXIS 1115, at *8 (June 15, 2004) (No. COA03-961). Accordingly, the Court of Appeals ordered that "[o]n remand, the trial court shall rule upon plaintiff's motion for class certification before addressing any motions respecting mootness." 2004 N.C. App. LEXIS 1115, at *8. On 14 July 2004, this Court granted defendants' motion for temporary stay, and on 2 December 2004 we allowed defendants' petitions for writ of supersedeas and for discretionary review of the Court of Appeals decision.

We begin by considering defendants' contention that the Court of Appeals erroneously asserted appellate jurisdiction when it ruled on an issue not properly before it. Defendants claim that questions pertaining to the sequence in which the motions should be addressed by the trial court were not preserved for appellate review.

Generally, except for matters set out in North Carolina Rule of Appellate Procedure 10(a), issues occurring during trial must be pre-

served if they are to be reviewed on grounds other than plain error.[1] Rule 10(b)(1) provides, in part, that to preserve a question 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(b)(1). We have observed that:

> This subsection of [Rule 10] . . . . is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal. The purpose of the rule is to require a party to call the court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal.

State v. Canady, 330 N.C. 398, 401, 410 S.E.2d 875, 878 (1991). A trial issue that is preserved may be made the basis of an assignment of error pursuant to Rule 10, and

> [t]he scope of review by an appellate court is usually limited to a consideration of the assignments of error in the record on appeal and . . . if the appealing party has no right to appeal the appellate court should dismiss the appeal *ex mero motu*. When a party fails to raise an appealable issue, the appellate court will generally not raise it for that party.

Harris v. Harris, 307 N.C. 684, 690, 300 S.E.2d 369, 373-74 (1983) (citation omitted); *see also State v. Golphin*, 352 N.C. 364, 460-61, 533 S.E.2d 168, 231 (2000) (noting that the trial court was not afforded an opportunity to rule on the pertinent issue and that the defendant's subsequent efforts to preserve the issue for review were insufficient to satisfy Rule 10), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001); *State v. Hoffman*, 349 N.C. 167, 177, 505 S.E.2d 80, 86 (1998) (holding that the defendant failed properly to preserve assignment of error for appellate review because the trial court had no opportunity to consider the defendant's contention as presented on appeal), *cert. denied*, 526 U.S. 1053, 143 L. Ed. 2d 522 (1999); *Revels v. Robeson Cty. Bd. of Elections*, 167 N.C. App. 358, 361, 605 S.E.2d 219, 221 (2004) (dismissing the plaintiff's assignment of error because the theories argued on appellate review had not been presented before the trial court).

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1. Plain error review is limited to alleged evidentiary and instructional errors in criminal cases. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

In addition, we have held that the " 'rules of this Court, governing appeals, are mandatory and not directory.' " *State v. Fennell*, 307 N.C. 258, 263, 297 S.E.2d 393, 396 (1982) (quoting *Pruitt v. Wood*, 199 N.C. 788, 789, 156 S.E. 126, 127 (1930)). Although Rule 2 allows an appellate court to address a trial issue not properly preserved and raised on appeal, this power is to be invoked by either court of the appellate division only on "rare occasions" for such purposes as to prevent manifest injustice or to expedite a decision affecting the public interest. *Blumenthal v. Lynch*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986); *see also Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999) (noting that Rule 2 should only be used in "exceptional circumstances").

Here, our review of the record reveals that the issue of the sequence in which the motions should be resolved was never raised before the trial court. When the trial court entered its order dismissing plaintiff's class action complaint on 27 February 2003, two motions were pending: (1) plaintiff's motion for class certification, and (2) defendants' motion for judgment on the pleadings. Related documents supporting and opposing the two motions had also been filed. An examination of these documents indicates that while plaintiff contended that he met the requirements for class certification and that his claim was not moot or, in the alternative, met one of the mootness doctrine exceptions, nowhere did he argue that the trial court was required to rule on his motion for class certification prior to addressing defendants' motion for judgment on the pleadings. Similarly, the transcript of the 18 February 2003 hearing indicates that while plaintiff's counsel advised the trial court that class certification was a matter within the court's discretion, counsel never argued that the court must exercise that discretion before dealing with defendants' dispositive motion. Accordingly, the trial court was not afforded an opportunity to consider and rule on questions regarding the sequence in which it should take up the pending motions. Plaintiff's failure to preserve this issue for appellate review resulted in waiver of the purported error. N.C. R. App. P. 10(b)(1); *State v. Jaynes*, 342 N.C. 249, 263, 464 S.E.2d 448, 457 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996); *see also Hoffman*, 349 N.C. at 177, 505 S.E.2d at 86.

Because the issue was not preserved, only Rule 2 of the North Carolina Rules of Appellate Procedure would permit the Court of Appeals to raise the issue *sua sponte*. However, that court's opinion addresses neither plaintiff's waiver of the issue nor that court's

election nevertheless to suspend the rules. It is apparent, then, that the Court of Appeals used Rule 2 *sub silentio* in an unpublished opinion to reach a potentially sweeping result that we determine to be incorrect.

The Court of Appeals relied on two cases in arriving at its conclusion. *See Reep*, 2004 N.C. App. LEXIS 1115, at *5-8 (discussing *Pitts v. Am. Sec. Ins. Co.*, 144 N.C. App. 1, 550 S.E.2d 179 (2001), *aff'd per curiam by an equally divided court*, 356 N.C. 292, 569 S.E.2d 647 (2002), and *Gaynoe v. First Union Corp.*, 153 N.C. App. 750, 571 S.E.2d 24 (2002), *disc. rev. denied*, 356 N.C. 671, 577 S.E.2d 118 (2003)). In *Pitts*, the Court of Appeals stated that "[d]ispositive motions . . . are not properly considered by the trial court until after ruling on a motion for class certification." 144 N.C. App. at 19, 550 S.E.2d at 193. We allowed discretionary review, and the *Pitts* decision was affirmed per curiam by an equally divided Court. As a result, the Court of Appeals decision was "left undisturbed and stands without precedential value." *Pitts*, 356 N.C. at 293, 569 S.E.2d at 647-48. Later, in *Gaynoe*, another Court of Appeals panel distinguished *Pitts* on the grounds that the plaintiff in *Pitts* had filed her complaint and her motion for class certification at the same time, while in *Gaynoe* the plaintiff's motion for class certification was filed nineteen months after the complaint. *Gaynoe*, 153 N.C. App. at 756, 571 S.E.2d at 27. In addition, the parties in *Gaynoe* stipulated that the trial court could consider both motions simultaneously. *Id.* at 756, 571 S.E.2d at 28. Based on these distinctions, the *Gaynoe* court held that the trial court did not err in allowing the defendant's motion for summary judgment before ruling on the plaintiff's pending motion for class certification. *Id.* at 756, 571 S.E.2d at 27-28.

After reviewing these cases, the Court of Appeals concluded that, absent the particular circumstances seen in *Gaynoe*, the "rule" in *Pitts* should be applied. *Reep*, 2004 N.C. App. LEXIS 1115, at *7-8. Accordingly, the Court of Appeals held that the trial court erred when it did not consider plaintiff's motion for class certification prior to ruling on defendants' dispositive motion for judgment on the pleadings. *Id.* at *8. Thus, the Court of Appeals effectively established in an unpublished opinion a rule of law applicable to trial courts in which class certification motions are pending.

We believe that the Court of Appeals' rigid formulation could thwart judicial economy and invite abuse. For instance, an incarcerated *pro se* litigant might simultaneously file a frivolous claim fashioned as a class action along with a class certification motion. In such

circumstances, we see no justification for requiring the trial court to address class certification before ruling on a dispositive motion to dismiss the frivolous claim. This Court is confident that, in determining the sequence in which motions will be considered, North Carolina judges will continue to be mindful of longstanding exceptions to the mootness rule and other factors affecting traditional notions of justice and fair play. *See*, *e.g.*, *Simeon v. Hardin*, 339 N.C. 358, 371, 451 S.E.2d 858, 867 (1994) (concluding that even assuming the named plaintiff's claims were moot, termination of the class representative's claim did not moot the claims of the unnamed members of the class because the claim was " 'capable of repetition, yet evading review' "; therefore, the plaintiff could continue to represent the interests of the class if the action were certified) (citation omitted); *see also Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 52, 114 L. Ed. 2d 49, 60 (1991) (recognizing that " '[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires' ") (alteration in original) (citation omitted). *See generally* 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.64[1][b] (3d ed. 2005) (discussing mootness, class certification, and relation-back exception).

Here, the trial court heard arguments presented by both parties concerning class certification and the mootness doctrine and its exceptions. Based on this information, the trial court concluded that "[p]laintiff has failed to show any injury" and therefore no meaningful relief was available, that plaintiff's claim in the class action complaint was "moot as a matter of fact and a matter of law," and that there was "no recognized exception to the [m]ootness [r]ule in this case." While we express no opinion on the merits of plaintiff's appeal, the trial court did not err *as a matter of law* in considering defendants' motion for judgment on the pleadings prior to ruling on plaintiff's motion for class certification. To the extent the Court of Appeals promulgated a bright-line rule regarding this issue, it is overruled.

Based on the foregoing, we reverse the decision of the Court of Appeals. The case is remanded to the Court of Appeals for consideration of plaintiff's assignments of error.

REVERSED AND REMANDED.

SANDRA J. CLARK, EMPLOYEE v. WAL-MART, EMPLOYER, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, CARRIER

No. 321PA04

(Filed 7 October 2005)

Workers' Compensation— total and permanent disability— ongoing benefits—no presumption of continuing disability

The Court of Appeals erred in a workers' compensation case by affirming the Industrial Commission's opinion and award of total and permanent disability compensation to plaintiff employee based on a presumption of continuing disability merely as a result of plaintiff's receipt of ongoing benefits arising from defendants' admission of compensability, and this case is remanded to the Court of Appeals for further remand to the Industrial Commission with instructions to find new facts and make new conclusions of law in accordance with the proper burden of proof, because: (1) the law in North Carolina is well settled that an employer's admission of the compensability of a workers' compensation claim does not give rise to a presumption of disability in favor of the employee; (2) although a presumption of disability in favor of an employee arises in limited circumstances, neither a Form 21 nor a Form 26 has been filed, nor has a prior award by the Industrial Commission been entered; and (3) the burden remained on plaintiff to prove her disability, and the Commission should not have shifted the burden to defendants to prove that plaintiff was not capable of returning to gainful employment.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 163 N.C. App. 686, 594 S.E.2d 433 (2004), affirming an opinion and award filed 31 January 2002 and an order filed 21 November 2002 by the North Carolina Industrial Commission. Heard in the Supreme Court 16 May 2005.

The Deuterman Law Group, PA, by Daniel L. Deuterman, for plaintiff-appellee.

Young Moore and Henderson P.A., by Michael W. Ballance and Jennifer T. Gottsegen, for defendant-appellants.

Jay A. Gervasi, Jr., Counsel for the North Carolina Academy of Trial Lawyers, amicus curiae.

LAKE, Chief Justice.

This case arises from proceedings before the North Carolina Industrial Commission (the Commission) and raises the issue whether the Commission erred in awarding plaintiff, Sandra J. Clark, ongoing benefits for total and permanent disability as a result of her 21 December 1998 work-related injury.

The record shows that plaintiff was employed by Wal-Mart Stores, Inc. (defendant-employer) on 16 July 1998 as a greeter. On 21 December 1998, plaintiff was straightening merchandise when she was asked to move a sled that was used for displays during the holidays. The sled was on a high shelf, and plaintiff had to use a ladder to get to it. When she began to move the sled, plaintiff found that it was heavy, and it started to slip. As plaintiff grabbed the sled to keep it from falling, she felt a sharp pain in her lower back. Plaintiff suffered compression fractures at L1 and L2, which were either caused or significantly aggravated by the incident.

Defendant-employer and Insurance Company of the State of Pennsylvania (collectively, defendants) admitted plaintiff's right to receive compensation pursuant to N.C.G.S. § 97-18(b) and completed Form 33R, "RESPONSE TO REQUEST THAT CLAIM BE ASSIGNED FOR HEARING," in response to plaintiff's request for a hearing to determine the issue of permanent total disability. Prior to the evidentiary hearing before Deputy Commissioner Kim L. Cramer, the parties entered into an agreement in which they stipulated that defendants had accepted liability for the injury and had paid temporary total disability benefits since the date of the accident. Following the hearing, the deputy commissioner awarded ongoing benefits to plaintiff, and defendants appealed. The Full Commission affirmed the award and stated: "As plaintiff has been receiving ongoing benefits, the burden is on defendants to show that she is capable of returning to gainful employment." The Full Commission also concluded that plaintiff was totally and permanently disabled and entitled to lifetime benefits. Defendants appealed to the Court of Appeals, which affirmed the opinion and award of the Full Commission by holding that defendants' admission of compensability gave rise to a presumption of continuing disability in favor of plaintiff. This Court allowed defendants' petition for discretionary review. For the reasons stated, we reverse the Court of Appeals' decision and remand with instructions.

The Commission, possessing exclusive original jurisdiction over workers' compensation cases, has the duty to hear the evidence and

file its award, "together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue." N.C.G.S. § 97-84 (2003). Appellate review of an award from the Industrial Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). If the conclusions of the Commission are based upon a deficiency of evidence or misapprehension of the law, the case should be remanded so "that the evidence [may] be considered in its true legal light." *McGill v. Town of Lumberton*, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939).

The North Carolina General Statutes and ample case law distinguish between the separate concepts of "compensability" and "disability." *See* N.C.G.S. § 97-2(9), (11) (2003). To establish "compensability" under the North Carolina Workers' Compensation Act (the Act), a "claimant must prove three elements: (1) [t]hat the injury was caused by an accident; (2) that the injury arose out of the employment; and (3) that the injury was sustained in the course of employment." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). This Court has previously held that whether an injury is "compensable" is resolved only by the question of whether an employee has an injury which would entitle her to compensation if she could also show that it had "disabled" her within the meaning of the Act. *Hendrix*, 317 N.C. at 185, 345 S.E.2d at 378.

"Disability," within the North Carolina Workers' Compensation Act, "means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C.G.S. § 97-2(9). The employee seeking compensation under the Act bears "the burden of proving the existence of [her] disability and its extent." *Hendrix*, 317 N.C. at 185, 345 S.E.2d at 378. In order to support a conclusion of disability, whether temporary or permanent, the Commission must find that the employee has shown:

> (1) that [she] was incapable after h[er] injury of earning the same wages [s]he had earned before h[er] injury in the same employment, (2) that [she] was incapable after h[er] injury of earning the same wages [s]he had earned before h[er] injury in any other employment, and (3) that [her] incapacity to earn was caused by [her] injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

In the case at hand, defendants fully admitted the compensability of the plaintiff's injury, leaving her only to prove her disability in order to receive continued compensation. However, plaintiff was relieved of this burden. Contrary to the decisions of the Commission and the Court of Appeals in the instant case, the law in North Carolina is well settled that an employer's admission of the "compensability" of a workers' compensation claim does not give rise to a presumption of "disability" in favor of the employee.

In *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 599 S.E.2d 508 (2004), this Court expressly stated that "a presumption of disability in favor of an employee arises only in limited circumstances." *Id.* at 706, 599 S.E.2d at 512. Those limited circumstances are (1) when there has been an executed Form 21, "AGREEMENT FOR COMPENSATION FOR DISABILITY"; (2) when there has been an executed Form 26, "SUPPLEMENTAL AGREEMENT AS TO PAYMENT OF COMPENSATION"; or (3) when there has been a prior disability award from the Industrial Commission. *Id.* Otherwise, the burden of proving "disability" remains with plaintiff, even if the employer has admitted "compensability."

In *Johnson*, neither a Form 21 nor a Form 26 had been filed and approved by the Commission, nor had there been a prior award by the Industrial Commission. Accordingly, this Court held that the employer's admission of compensability and payment of disability benefits to the employee did not give rise to a presumption of continuing disability in favor of the employee. *Id.* Similarly, in the present case, neither a Form 21 nor a Form 26 has been filed, nor has a prior award by the Industrial Commission been entered. Thus, plaintiff is not entitled to a presumption of continuing disability as a matter of law. The Commission erred in presuming plaintiff was disabled merely as a result of her receipt of ongoing benefits arising from defendants' admission of compensability. Accordingly, the Commission also erred in shifting the burden to defendants to prove that plaintiff was not capable of returning to gainful employment. "Because the burden remained on plaintiff to prove [her] disability, the Commission was obligated to make specific findings regarding the existence and extent of any disability suffered by plaintiff." *Id.* at 707, 599 S.E.2d at 512-13.

In affirming the decision of the Full Commission in this case, the Court of Appeals not only ignored the precedent of this Court, but also the precedent established by its own recent decisions. *See Cialino v. Wal-Mart Stores, Inc.*, 156 N.C. App. 463, 471, 577 S.E.2d 345, 351 (2003) ("Neither [the Court of Appeals] nor [the] Supreme Court has ever applied a continuing presumption of disability in a context other than an award by the Industrial Commission, a Form 21, or a Form 26 settlement agreement."); *Parker v. Wal-Mart Stores, Inc.*, 156 N.C. App. 209, 211-12, 576 S.E.2d 112, 113-14 (2003) (stating that the Commission's findings must sufficiently reflect that the employee carried the burden of proving disability by all three *Hilliard* factors in a claim in which defendants had admitted compensability under N.C.G.S. § 97-18(d) through payment of compensation beyond ninety days); *Gilberto v. Wake Forest Univ.*, 152 N.C. App. 112, 115, 566 S.E.2d 788, 791 (2002) (stating that although the employee established temporary total disability, she retained the burden of proving a continuing total disability); *Effingham v. Kroger Co.*, 149 N.C. App. 105, 108, 112, 561 S.E.2d 287, 290, 292 (2002) (stating that even though the employee was awarded temporary total disability benefits and her injury was accepted as compensable by defendants pursuant to the filing of a Form 60, she was not entitled to "a presumption of continuing disability"); *Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 159-60, 542 S.E.2d 277, 281-82, *disc. rev. denied*, 353 N.C. 729, 550 S.E.2d 782 (2001) ("[A]dmitting compensability and liability, whether through notification of the Commission by the use of a Form 60 or through paying benefits beyond the statutory period provided for in [N.C.]G.S. § 97-18(d), does not create a presumption of continuing disability as does a Form 21 agreement."); *Royce v. Rushco Food Stores, Inc.*, 139 N.C. App. 322, 330-31, 533 S.E.2d 284, 289 (2000) (stating that the employee retained the burden of proof and was not entitled to a presumption of continuing disability as a result of the Commission's earlier determination that she was temporarily and totally disabled); *Olivares-Juarez v. Showell Farms*, 138 N.C. App. 663, 666, 532 S.E.2d 198, 201 (2000) (stating that "the Commission erred in placing the initial burden on [defendants] . . . without first requiring plaintiff to establish the existence and extent of his disability" when compensation was initiated without prejudice under N.C.G.S. § 97-18(d)); *Demery v. Converse, Inc.*, 138 N.C. App. 243, 252, 530 S.E.2d 871, 877 (2000) (noting that plaintiff is not entitled to a presumption of total disability without a Form 21 agreement); *Brice v. Sheraton Inn*, 137 N.C. App. 131, 137, 527 S.E.2d 323, 327-28 (2000) (stating that

although plaintiff had met her burden of proving temporary total disability, she failed to prove permanent and total disability; thus, no burden to refute such a claim shifted to defendant).

For the foregoing reasons, we reverse the decision of the Court of Appeals affirming the Industrial Commission's opinion and award of complete and total disability compensation to plaintiff by use of presumption. This case is remanded to the Court of Appeals for further remand to the Industrial Commission with instructions to find new facts and make new conclusions of law in accordance with the proper burden of proof.

REVERSED AND REMANDED.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION v. STAGECOACH VILLAGE, A NORTH CAROLINA NON-PROFIT CORPORATION

No. 529PA04

(Filed 7 October 2005)

Appeal and Error— appealability—interlocutory order—title or area taken—substantial right

The Court of Appeals erred by dismissing plaintiff's appeal of an interlocutory order joining 106 individual condominium lot owners as necessary parties to an action to condemn a portion of the common area of the condominium development, and the decision is vacated and remanded for a determination of the appeal on its merits, because: (1) interlocutory orders concerning title or area taken must be immediately appealed as vital preliminary issues involving substantial rights adversely affected; and (2) the possible existence of an easement, the basis upon which the trial court ordered joinder of the unit owners, is a question affecting title.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 166 N.C. App. 272, 601 S.E.2d 279 (2004), dismissing as interlocutory an appeal from an order entered 27 March 2003 by Judge John O. Craig, III in Superior Court, Guilford County. Heard in the Supreme Court 13 September 2005.

Roy Cooper, Attorney General, by Hilda Burnett-Baker, Assistant Attorney General, W. Richard Moore, Special Deputy Attorney General, and James M. Stanley, Jr., Assistant Attorney General, for plaintiff-appellant.

Smith Moore LLP, by Bruce P. Ashley and Shannon R. Joseph, and Jeffrey K. Peraldo, P.A., by Jeffrey K. Peraldo, for defendant-appellee.

BRADY, Justice.

The issue in this case is whether an interlocutory order joining 106 alleged interest holders as necessary parties to a condemnation action is immediately appealable. We hold it is and therefore vacate and remand to the Court of Appeals.

Defendant, a North Carolina non-profit corporation, is the homeowners' association for a townhouse development in Guilford County. On 15 January 2002, plaintiff initiated condemnation proceedings for 41,849 square feet (less than one acre) of the 20 acres of common area owned by defendant. In its answer, defendant asserted the development's 106 individual lot owners were necessary parties to the proceedings inasmuch as each of them owned an easement in the common area. Defendant subsequently filed a motion under N.C.G.S. § 136-108 for a judicial determination of this issue. The trial court granted defendant's motion and entered an order joining as necessary parties to the condemnation action every individual record owner in the development. The order also concluded each owner held an easement in the entire common area and each owner's alleged compensable interest belonged to the lot owner, not the association. Plaintiff appealed to the Court of Appeals.

The Court of Appeals unanimously dismissed the appeal as interlocutory and not affecting a substantial right of the parties. *See N.C. Dep't of Transp. v. Stagecoach Vill.*, 166 N.C. App. 272, 601 S.E.2d 279 (2004). We allowed plaintiff's petition for discretionary review on 3 March 2005.

Interlocutory orders may be appealed immediately under two circumstances. The first is when the trial court certifies no just reason exists to delay the appeal after a final judgment as to fewer than all the claims or parties in the action. *See* N.C.G.S. § 1A-1, Rule 54(b) (2003). The second is when the appeal involves a substantial right of the appellant and the appellant will be injured if the error is not cor-

rected before final judgment. *See id.* § 1-277 (2003); *Dep't of Transp. v. Rowe*, 351 N.C. 172, 174-75, 521 S.E.2d 707, 709 (1999).

The Court of Appeals correctly read our decisions in *N.C. State Highway Comm'n v. Nuckles* and *Rowe* as holding interlocutory orders concerning title or area taken must be immediately appealed as "vital preliminary issues" involving substantial rights adversely affected. *Rowe*, 351 N.C. at 176, 521 S.E.2d at 710; *N.C. State Highway Comm'n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967), *modified by Rowe*, 351 N.C. at 176-77, 521 S.E.2d at 710. However, the court erroneously determined the order at issue does not concern title to the property condemned.

"A title is not a piece of paper. It is an abstract concept which represents the legal system's conclusions as to how the interests in a parcel of realty are arranged and who owns them." William B. Stoebuck & Dale A. Whitman, *The Law of Property* § 10.12 (3d ed. 2000). "An easement is an interest in land . . . ." *Borders v. Yarbrough*, 237 N.C. 540, 542, 75 S.E.2d 541, 542 (1953). The possible existence of an easement, the basis upon which the trial court ordered joinder of the unit owners, is a question affecting title; therefore, the trial court's order is subject to immediate review.

Accordingly, we vacate the decision of the Court of Appeals and remand to that court with instructions to determine plaintiff's appeal on the merits.

VACATED AND REMANDED.

JUSTICE FOR ANIMALS, INC. v. LENOIR COUNTY SPCA, INC.

No. 135A05

(Filed 7 October 2005)

Animals— euthanization of feral cats—"poke" procedure— language disavowed

The decision of the Court of Appeals in this case is affirmed. However, language in the Court of Appeals opinion regarding the "poke" procedure employed by defendant to determine whether a cat is feral or tame is disavowed because the issue of this proce-

dure was neither the basis of plaintiff's claim nor properly before the Court of Appeals.

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2), and cross-appeal by defendant, from the decision of a divided panel of the Court of Appeals, 168 N.C. App. 298, 607 S.E.2d 317 (2005), vacating in part and reversing and remanding in part an order entered on 18 August 2003 by Judge Elizabeth A. Heath in District Court, Lenoir County. Heard in the Supreme Court 13 September 2005.

Ward and Smith, P.A., by A. Charles Ellis and Cheryl A. Marteney, for plaintiff-appellant/appellee.

White & Allen, P.A., by David J. Fillippeli, Jr. and Gregory E. Floyd, for defendant-appellee/appellant.

PER CURIAM.

The decision of the Court of Appeals is affirmed. However, inasmuch as the issue of the "poke" procedure was not the basis of plaintiff's claim nor properly before the Court of Appeals, we specifically disavow the language in Section V. Civil Remedy for Protection of Animals in that court's opinion:

> Testimony presented at trial tended to show that defendant employs a "poke" procedure to determine whether to impound or immediately euthanize an animal. On remand, the trial court should make findings of fact and conclusions of law regarding whether plaintiff has presented sufficient evidence to show defendant's use of the "poke" test to determine whether a cat is feral or tame and defendant's subsequent immediate [euthanasia] constitutes "unjustifiable pain, suffering, or death." N.C. Gen. Stat. § 19A-1(2).

Justice for Animals, Inc. v. Lenoir Cty. SPCA, Inc., 168 N.C. App. 298, 306-07, 607 S.E.2d 317, 322-23 (2005). Thus, on remand, the trial court is not to consider the "poke" procedure.

MODIFIED AND AFFIRMED.

DAVID G. JONES v. EDWARD D. RATLEY AND BEST ROOFING COMPANY

No. 114A05

(Filed 7 October 2005)

Small Claims— de novo appeal to district court—applicable procedures—necessity for findings and conclusions

The decision of the Court of Appeals affirming a district court order requiring defendant to repay to plaintiff $2000 that plaintiff allegedly paid to defendant in error is reversed for the reasons stated in the dissenting opinion in the Court of Appeals that (1) the informal processes of the small claims court do not continue in a de novo appeal to the district court; (2) the district court erred by failing to set forth proper findings of fact and conclusions of law regarding whether plaintiff had been obligated to pay $2,000 to defendant; and (3) the district court must address the issue as to whether plaintiff should have had notice of a voluntary dismissal taken in an earlier action by the present defendant.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 168 N.C. App. 126, 607 S.E.2d 38 (2005), affirming a judgment entered on 8 August 2003 by Judge Thomas G. Foster, Jr. in District Court, Guilford County. Heard in the Supreme Court 12 September 2005.

No appearance or brief for plaintiff-appellee.

Douglas S. Harris for defendant-appellants.

PER CURIAM.

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

REVERSED AND REMANDED.

ECKARD v. SMITH

[360 N.C. 51 (2005)]

EUNICE C. ECKARD, EXECUTRIX OF THE ESTATE OF STEVEN VINCENT ECKARD, DECEASED, AND STATE OF NORTH CAROLINA, *EX REL.* EUNICE C. ECKARD, EXECUTRIX OF THE ESTATE OF STEVEN VINCENT ECKARD, DECEASED v. CHANAE EVON SMITH, MARK STEPHEN MCCOLLUM, STEVE WALLACE, PHILLIP H. REDMOND, SHERIFF OF IREDELL COUNTY, HARTFORD FIRE INSURANCE COMPANY, AND IREDELL COUNTY

No. 573A04

(Filed 7 October 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 166 N.C. App. 312, 603 S.E.2d 134 (2004), affirming orders entered on 5 June 2001 by Judge Sanford L. Steelman, Jr. and on 17 April 2002 by Judge Mark E. Klass in Superior Court, Iredell County. Heard in the Supreme Court 14 September 2005.

Wilson, Lackey & Rohr, P.C., by David S. Lackey, for plaintiff-appellant Eckard.

Kennedy Covington Lobdell & Hickman, LLP, by F. Fincher Jarrell and Wayne P. Huckel, for defendant-appellees McCollum, Wallace, Redmond, Hartford Fire Insurance Company, and Iredell County.

PER CURIAM.

AFFIRMED.

ROBERT M. MAYO, PETITIONER v. NORTH CAROLINA STATE UNIVERSITY, RESPONDENT

No. 164A05

(Filed 7 October 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 168 N.C. App. 503, 608 S.E.2d 116 (2005), affirming in part and reversing in part an order entered on 13 November 2003 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Supreme Court 14 September 2005.

Young Moore and Henderson P.A., by Christopher A. Page, for petitioner-appellee.

Roy Cooper, Attorney General, by Q. Shant-Martin, Assistant Attorney General, for respondent-appellant.

PER CURIAM.

AFFIRMED.

JOHNSON v. LUCAS

[360 N.C. 53 (2005)]

PATRICIA JOHNSON, DORIS LARYEA, LOVIE H. JONES, AND GERALDINE COLLIER
v. LYNWOOD LUCAS AND JOE PEACOCK, T/A TRIANGLE TIMBER SERVICES

No. 158A05

(Filed 7 October 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 168 N.C. App. 515, 608 S.E.2d 336 (2005), dismissing as interlocutory an appeal from a partial summary judgment entered 9 June 2003 by Judge Howard E. Manning, Jr. in Superior Court, Wake County. Heard in the Supreme Court 13 September 2005.

Hunter, Higgins, Miles, Elam & Benjamin, PLLC, by Robert N. Hunter, Jr., for plaintiff-appellees.

Ligon and Hinton, by George Ligon, Jr., for defendant-appellant Lucas.

PER CURIAM.

AFFIRMED.

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

ADAMS v. METALS USA

[360 N.C. 54 (2005)]

SAMPIE ADAMS, EMPLOYEE v. METALS USA, EMPLOYER, AMERICAN HOME ASSURANCE/AIG CLAIMS SERVICES, INC., CARRIER

No. 156A05

(Filed 7 October 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 168 N.C. App. 469, 608 S.E.2d 357 (2005), affirming an opinion and award filed 19 September 2003 by the North Carolina Industrial Commission. Heard in the Supreme Court 13 September 2005.

R. Steve Bowden & Associates, *by Jarvis T. Harris*, *for plaintiff-appellee.*

Robinson & Lawing, *L.L.P.*, *by Jolinda J. Babcock*, *for defendant-appellants.*

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. JEFFREY BOWES

No. 394A03

(Filed 7 October 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 159 N.C. App. 18, 583 S.E.2d 294 (2003), affirming an order entered 10 December 2001 by Judge Charles M. Vincent in District Court, Pitt County. On 5 February 2004, the Supreme Court retained the State's notice of appeal upon substantial constitutional questions pursuant to N.C.G.S. § 7A-30(1). Heard in the Supreme Court 8 November 2004. On 16 December 2004, the Court allowed the State's petition for discretionary review as to additional issues. Determined on the briefs without further oral argument pursuant to N.C. R. App. P. 30(f).

Roy Cooper, Attorney General, by Jeffrey R. Edwards, Assistant Attorney General, for appellant North Carolina Division of Motor Vehicles.

The Robinson Law Firm, P.A., by Leslie S. Robinson, and Law Offices of Keith A. Williams, P.A., by Keith A. Williams, for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is vacated and the appeal is dismissed as moot.

DISMISSED.

Justices MARTIN and WAINWRIGHT did not participate in the consideration or decision of this case.

JUDITH LYNN JACKSON v. FRED H. JACKSON, JR.

No. 172A05

(Filed 4 November 2005)

Divorce— separation agreement—intent of parties—ambiguities—parol evidence

The decision of the Court of Appeals upholding an order of the trial court voiding an entire separation agreement for vagueness and uncertainty is reversed for the reasons stated in the dissenting opinion in the Court of Appeals that the intent of the parties can be determined by the plain language of the separation agreement, and any ambiguities creating questions of fact may properly be resolved with the use of parol evidence.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 169 N.C. App. 46, 610 S.E.2d 731 (2005), affirming an order entered on 1 March 2004 by Judge Kimbrell Kelly Tucker in District Court, Cumberland County. Heard in the Supreme Court 17 October 2005.

Reid, Lewis, Deese, Nance & Person, LLP, by Renny W. Deese, for plaintiff-appellant.

Sullivan & Grace, P.A., by Nancy L. Grace, for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed. The case is remanded to the Court of Appeals for further remand to the trial court for further proceedings.

REVERSED AND REMANDED.

CASTLE McCULLOCH, INC. v. DONALD LEE FREEDMAN, D/B/A FREEDMAN ASSOCIATES, AND FREEDMAN ASSOCIATES, INC.

No. 241A05

(Filed 4 November 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 169 N.C. App. 497, 610 S.E.2d 416 (2005), affirming a judgment entered on 17 March 2003 and an order entered on 16 July 2003 by Judge William Z. Wood, Jr. in Superior Court, Guilford County. Heard in the Supreme Court 19 October 2005.

Douglas S. Harris for plaintiff-appellant.

Elliot Pishko Morgan, P.A., by David C. Pishko and J. Griffin Morgan, for defendant-appellees.

PER CURIAM.

AFFIRMED.

YOUNG v. YOUNG

[360 N.C. 58 (2005)]

NONA DAVIS YOUNG (LINDQUIST), PLAINTIFF v. STEVEN PAUL YOUNG, DEFENDANT, AND ALVIN YOUNG AND SHARON YOUNG, DEFENDANT-INTERVENORS

No. 213A05

(Filed 4 November 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 169 N.C. App. 31, 609 S.E.2d 795 (2005), affirming in part and vacating in part an order signed on 8 October 2003 by Judge Dougald N. Clark, Jr. in District Court, Cumberland County. Heard in the Supreme Court 17 October 2005.

Law Offices of Dale S. Morrison, by Dale S. Morrison, for plaintiff-appellee.

Mitchell, Brewer, Richardson, Adams, Burge & Boughman, by Ronnie M. Mitchell, for defendant-appellant.

PER CURIAM.

The decision of the Court of Appeals is vacated, and the appeal is dismissed as moot.

DISMISSED.

Justices MARTIN and BRADY did not participate in the consideration or decision of this case.

IN RE T.B.

[360 N.C. 59 (2005)]

IN THE MATTER OF T.B.

No. 598PA04

(Filed 4 November 2005)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 166 N.C. App. 763, 604 S.E.2d 695 (2004), affirming an order terminating respondent's parental rights filed 22 July 2003 by Judge George R. Murphy in District Court, Lee County. Heard in the Supreme Court 19 October 2005.

Tron D. Faulk for petitioner-appellee Lee County Department of Social Services.

Peter Wood for respondent-appellant mother.

Elizabeth Boone for appellee Guardian ad Litem.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

Armstrong v. Barnes Case Below: 171 N.C. App. 287	No. 390P05-2	Defs' (James A. Barnes, Jr., M.D. and Newton Women's Care, P.A.) PDR Under N.C.G.S. § 7A-31 (COA04-300)	Denied 10/06/05
Bersin v. Golonka Case Below: 170 N.C. App. 436	No. 310P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-695)	Denied 11/03/05
Blue Ridge Savs. Bank, Inc. v. Best & Best, P.L.L.C. Case Below: 172 N.C. App. 170	No. 494PA05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-1357)	Allowed 11/03/05
Bowles v. BCJ Trucking Servs., Inc. Case Below: 172 N.C. App. 149	No. 498P05	Def's (N.C. Ins. Guaranty Ass'n) PDR Under N.C.G.S. § 7A-31 (COA04-1059)	Denied 11/03/05
Brooks v. Capstar Corp. Case Below: 168 N.C. App. 23	No. 110A05	Plt's Motion to Dismiss Appeal (COA03-1064)	Allowed 10/03/05
Brown v. American Multimedia, Inc. Case Below: 170 N.C. App. 697	No. 357P05	1. Defs' and Third Party Plts' PDR Under N.C.G.S. § 7A-31 (COA04-1075) 2. Third-Party Defendants' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 10/06/05 2. Dismissed as moot 10/06/05
Brown v. Brown Case Below: 171 N.C. App. 358	No. 385P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-1189)	Denied 10/06/05
Brown v. City of Winston-Salem Case Below: 171 N.C. App. 266	No. 428P05	Plt's PWC to Review the Decision of the COA (COA04-1245)	Denied 10/06/05
Bryson v. Cooper Case Below: 166 N.C. App. 759	No. 640P04-3	Plts' "Motion for Ruling on Discretionary Review or Rule to Show Cause Why Not and Motion to Compel" (COA03-1484)	Dismissed 10/06/05

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

Cabaniss v. Deutsche Bank Sec., Inc. Case Below: 170 N.C. App. 180	No. 369P05-2	Plts' PWC to Review Decision of COA (COA04-530)	Denied 10/06/05
Cabarrus Cty. v. Systel Bus. Equip. Co. Case Below: 171 N.C. App. 423	No. 408P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1221)	Denied 10/06/05 **Brady, J. Recused**
Cannon v. Goodyear Tire & Rubber Co. Case Below: 171 N.C. App. 254	No. 418P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-168)	Denied 10/06/05
Capps v. NW Sign Indus. of N.C., Inc. Case Below: 171 N.C. App. 409	No. 383A05	1. Plt's Motion to Dismiss Appeal 2. Defs' Motion for Temporary Stay (COA04-1229) 3. Defs' Petition for Writ of Supersedeas	1. Denied 11/03/05 2. Denied 09/16/05 3. Denied 09/16/05
Chambers v. Transit Mgmt. Case Below: 172 N.C. App. 540	No. 527A05	1. Def's NOA (Dissent) 2. Def's Motion for Temporary Stay (COA04-677) 3. Def's Petition for Writ of Supersedeas 4. Def's PDRas to Additional Issues	1. —— 2. Allowed 11/03/05 3. Allowed 11/03/05 4. Allowed 11/03/05
Charter Med., Ltd. v. Zigmed, Inc. Case Below: 173 N.C. App. 213	No. 557A05	Plt's NOA Based Upon a Constitutional Question (COA04-1337)	Dismissed ex mero motu 11/03/05
Coker v. DaimlerChrysler Corp. Case Below: 172 N.C. App. 386	No. 532A05	1. Plts' NOA (Dissent) 2. Plts' PDR as to Additional Issues (COA04-523) 3. Def's Motion to Dismiss Appeal	1. —— 2. Denied 11/03/05 3. Denied 11/03/05

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

Cooke v. Cooke Case Below: 169 N.C. App. 455	No. 249P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-414)	Denied 10/06/05
Coremin v. Sherrill Furniture Co. Case Below: 170 N.C. App. 697	No. 406P05	Plts' PDR Under N.C.G.S. § 7A-31 (COA04-844)	Denied 10/06/05
Craven v. Demidovich Case Below: 172 N.C. App. 340	No. 497P05	Plt's PDR Under N.C.G.S. 7A-31 (COA04-1193)	Denied 11/03/05
D'Aquisto v. Mission St. Joseph's Health Sys. Case Below: 171 N.C. App. 216	No. 415PA05	Def's (Missions St. Joseph's Health System) PDR Under N.C.G.S. § 7A-31 (COA04-1259)	Allowed 10/06/05
Department of Transp. v. M.M. Fowler, Inc. Case Below: 170 N.C. App. 162	No. 305PA05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-73)	Allowed 10/06/05
Faison v. American Nat'l Can Co. Case Below: 171 N.C. App. 514	No. 461P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-1297)	Denied 10/06/05
Fakhoury v. Fakhoury Case Below: 171 N.C. App. 104	No. 395P05	1. Respondent's PDR Under N.C.G.S. § 7A-31 (COA04-714) 2. Petitioner's Motion to Dismiss PDR	1. Denied 08/18/05 2. Dismissed as moot 08/18/05
Fakhoury v. Fakhoury Case Below: 172 N.C. App. 170	No. 441P05	1. Def's PDR Under N.C.G.S. § 7A-31 (COA04-1514) 2. Def's Motion to Withdraw PDR	1. —— 2. Allowed 10/06/05

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

Goodson v. P.H. Glatfelter Co. Case Below: 171 N.C. App. 596	No. 464P05	1. Def's (P.H. Glatfelter Co.) Motion for Temporary Stay (COA04-886) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed Pending Determination of Defendant's PDR **08/25/05** Stay Dissolved **11/03/05** 2. Denied 11/03/05 3. Denied 11/03/05
Grant v. High Point Reg'l Health Sys. Case Below: 172 N.C. App. 852	No. 474P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1439)	Denied 10/06/05
Greene v. Hicks Case Below: 169 N.C. App. 455	No. 247P05	Plts' PDR Under N.C.G.S. § 7A-31 (COA04-803)	Denied 10/06/05
Hernandez v. Nationwide Mut. Ins. Co. Case Below: 171 N.C. App. 510	No. 406P05	Def's PDR under N.C.G.S. § 7A-31 (COA04-1474)	Denied 10/06/05
Hunt v. N.C. Dep't of Corr. Case Below: 173 N.C. App. 232	No. 545P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-1445)	Denied 11/03/05
Iadanza v. Harper Case Below: 169 N.C. App. 776	No. 277P05	Defendant and Counter Claimant's (Robert N. Hunter, Jr., M.D., and Digestive Diseases Diagnostic Center, P.A.) PDR Under N.C.G.S. § 7A-31 (COA04-801)	Denied 10/06/05
In re A.P.R., A.C.R. Case Below: 172 N.C. App. 591	No. 515P05	Respondent's PDR Under N.C.G.S. § 7A-31 (COA04-1372)	Denied 11/03/05
In re C.J. Case Below: 172 N.C. App. 170	No. 508P05	Juvenile's PDR Under N.C.G.S. § 7A-31 (COA04-1575)	Denied 11/03/05

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

In re H.M.L. Case Below: 173 N.C. App. 232	No. 571P05	Juvenile's PDR Under N.C.G.S. § 7A-31 (COA04-1478)	Denied 11/03/05
In re J.D.S. Case Below: 170 N.C. App. 244	No. 511P05	Respondent's (Father) PWC to Review the Decision of the COA (COA04-213)	Denied 11/03/05
In re O.C. & O.B. Case Below: 171 N.C. App. 457	No. 465P05	Respondent's (Chiquetta C.) PDR Under N.C.G.S. § 7A-31 (COA04-923)	Denied 11/03/05
In re S.W. Case Below: 171 N.C. App. 335	No. 417P05	Petitioner's (S.W.) PDR Under N.C.G.S. § 7A-31 (COA04-1138)	Denied 10/06/05
In re T.S.A. & D.S.G. Case Below: 172 N.C. App. 170	No. 487P05	Respondent's (Father) PDR Under N.C.G.S. § 7A-31 (COA04-1057)	Denied 10/06/05
Jack H. Winslow Farms, Inc. v. Dedmon Case Below: 171 N.C. App. 754	No. 466P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-1679)	Denied 10/06/05
Johnson v. Harnett Cty. Planning Bd. Case Below: 170 N.C. App. 436	No. 334P05	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA04-961) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 10/06/05 2. Dismissed as moot 10/06/05
Kegly v. City of Fayetteville Case Below: 170 N.C. App. 656	No. 342P04-3	1. Petitioners' Urgent Motion for Stay Pending Appeal (COA04-1123) 2. Petitioners' Petition for Writ of Supersedeas	1. Denied 09/13/05 2.Denied 09/13/05 **Brady, J. Recused**

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

Loredo v. CSX Transp., Inc. Case Below: 169 N.C. App. 508	No. 297A05	1. Plts' NOA (Dissent) (COA04-111) 2. Plts' PDR as to Additional Issues	1. —— 2. Denied 10/06/05 **Martin, J. Recused**
Mathewson v. Carter Case Below: 171 N.C. App. 365	No. 424P05	Def's (Stephen Carter) PDR Under N.C.G.S. § 7A-31 (COA04-1399)	Denied 11/03/05
Mayo v. Mayo Case Below: 172 N.C. App. 844	No. 529P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-1334)	Denied 11/03/05
McGladrey & Pullen, LLP v. N.C. State Bd. of Certified Pub. Accountant Exam'rs Case Below: 171 N.C. App. 610	No. 469A05	1. Plt-Appellant's NOA (Dissent) (COA04-911) 2. Plt-Appellant's NOA (Constitutional Question) 3. Plt-Appellant's PDR as to Additional Issues	1. —— 2. Dismissed Ex mero motu 10/06/05 3. Denied 10/06/05
Misenheimer v. Burris Case Below: 169 N.C. App. 539	No. 245A05	Def's (James Clayton Burris) PWC to Review Decision of COA (COA04-445)	Allowed 10/06/05
Mitchum v. Gaskill Case Below: 172 N.C. App. 171	No. 481P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-977)	Denied 10/06/05
Munn v. N.C. State Univ. Case Below: 173 N.C. App. 144	No. 567A05	1. Defendant's NOA (Dissent) (COA04-894) 2. Def's PDR as to Additional Issues	1. —— 2. Allowed 11/03/05
MW Clearing & Grading, Inc. v. N.C. Dep't of Env't & Natural Res. Case Below: 171 N.C. App. 170	No. 432A05	1. Petitioner's NOA (Dissent) (COA04-852) 2. Petitioner's PDR as to Additional Issues	1. —— 2. Denied 11/03/05

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

N.C. Med. Soc'y v. N.C. Bd. of Nursing Case Below: 169 N.C. App. 1	No. 214P05	Respondent's PDR Under N.C.G.S. § 7A-31 (COA04-682)	Denied 10/06/05
Norfolk S. Ry Co.v. Smith Case Below: 169 N.C. App. 784	No. 280P05	1. Def's NOA Based Upon a Constitutional Question (COA04-404) 2. Plt's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 11/03/05 3. Denied 11/03/05 **Martin, J. Recused**
Smythe v. Waffle House Case Below: 170 N.C. App. 361	No. 333P05	Def's (Waffle House) PDR Under N.C.G.S. § 7A-31 (COA04-225)	Denied 10/06/05
Stack v. Union Reg'l Mem'l Med. Ctr., Inc. Case Below: 171 N.C. App. 322	No. 477P05	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA04-914) 2. Def's (Union Regional Memorial Medical Center, Inc.) Motion to Dismiss Petition 3. Plt's Motion to Suspend Rules Pursuant to Rule 2 4. Plt's PWC to Review Decision of COA	1. —— 2. Allowed 10/06/05 3. Denied 10/06/05 4. Denied 10/06/05
State v. Allen Case Below: 171 N.C. App. 71	No. 137P04-2	1. Def's NOA Based Upon a Constitutional Question (COA02-1624-2) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31 4. AG's Conditional PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/06/05 3. Denied 10/06/05 4. Dismissed as moot 10/06/05
State v. Ash Case Below: 169 N.C. App. 715	No. 273P05	1. Def's NOA Based Upon a Constitutional Question (COA04-623) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/06/05 3. Denied 10/06/05

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

State v. Bates Case Below: 172 N.C. App. 27	No. 456P05	AG's Motion for Temporary Stay (COA04-777)	Allowed 08/22/05
State v. Batts Case Below: 173 N.C. App. 233	No. 565P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1083)	Denied 11/03/05
State v. Blancher Case Below: 170 N.C. App. 171	No. 309P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-260)	Denied 10/06/05
State v. Borkar Case Below: 173 N.C. App. 162	No. 502P05	1. AG's Motion for Temporary Stay (COA04-1159) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed Pending Determination of the State's PDR **09/16/05** Stay Dissolved **11/03/05** 2. Denied 11/03/05 3. Denied 11/03/05 4. Dismissed as moot 11/03/05
State v. Brewington Case Below: 170 N.C. App. 264	No. 335P05	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1654)	Denied 10/06/05
State v. Brigman Case Below: 171 N.C. App. 305	No. 453P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-563)	Denied 10/06/05
State v. Brodie Case Below: 171 N.C. App. 363	No. 371P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-308)	Denied 10/06/05
State v. Brodie Case Below: 173 N.C. App. 233	No. 568P05	Def's PDR Under N.C.G.S. § 7A-31 (COA05-9)	Denied 11/03/05

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

State v. Brown Case Below: 169 N.C. App. 457	No. 244P05	1. Def's NOA Based Upon a Constitutional Question (COA04-76) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 11/03/05 3. Denied 11/03/05
State v. Brown Case Below: 170 N.C. App. 601	No. 354P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-316)	Denied 10/06/05
State v. Burr Case Below: 168 N.C. App. 240	No. 111P05	1. Def's NOA Based Upon a Constitutional Question (COA04-422) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/06/05 3. Denied 10/06/05
State v. Cameron Case Below: 171 N.C. App. 363	No. 394P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1199)	Denied 10/06/05
State v. Campbell Case Below: 170 N.C. App. 437	No. 320P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-322)	Denied 10/06/05
State v. Caples Case Below: 173 N.C. App. 233	No. 512P05	AG's Motion for Temporary Stay	Allowed 09/13/05
State v. Cearley Case Below: 172 N.C. App. 172	No. 490P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1172)	Denied 10/06/05
State v. Chappell Case Below: 165 N.C. App. 275	No. 356P05	Def's PWC to Review Decision of COA (COA03-1190)	Denied 10/06/05
State v. Corey Case Below: 173 N.C. App. 444	No. 539P05	AG's Motion for Temporary Stay (COA04-736)	Allowed 09/29/05

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

State v. Cotten Case Below: 171 N.C. App. 366	No. 416P05	Def's PDR Under N.C.G.S. § (COA04-1112)	Denied 10/06/05
State v. Cunningham Case Below: 172 N.C. App. 172	No. 480P05	1. Def's NOA Based Upon a Constitutional Question (COA04-1052) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/06/05 3. Denied 10/06/05
State v. Cupid Case Below: 173 N.C. App. 448	No. 560P05	AG's Motion for Temporary Stay (COA04-137)	Allowed 10/06/05
State v. Dennison Case Below: 171 N.C. App. 504	No. 179P04-2	1. Def's NOA Based Upon a Constitutional Question (COA02-1512-2) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/06/05 3. Denied 10/06/05
State v. Dorton Case Below: 172 N.C. App. 759	No. 514P05	Def's Motion for "Discretionary Review Under N.C.G.S. § 7A-31" (COA04-572)	Denied 11/03/05
State v. Edwards Case Below: 172 N.C. App. 821	No. 528P05	Def's (Aegis) PDR Under N.C.G.S. § 7A-31 (COA04-1387)	Denied 11/03/05
State v. Estep Case Below: 171 N.C. App. 364	No. 388P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1580)	Denied 10/06/05
State v. Everette Case Below: 172 N.C. App. 237	No. 452A05	AG's Motion for Temporary Stay	Allowed 08/22/05
State v. Ford Case Below: 162 N.C. App. 722	No. 539P03-3	Def's Petition for Writ of Supersedeas (COA03-140)	Dismissed 11/03/05

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

State v. Gibson Case Below: 170 N.C. App. 698	No. 352P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1012)	Denied 10/06/05
State v. Gilbert Case Below: 171 N.C. App. 366	No. 425P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1227)	Denied 10/06/05
State v. Goodman Case Below: 172 N.C. App. 172	No. 495P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1411)	Denied 11/03/05
State v. Graham Case Below: 169 N.C. App. 457	No. 518P05	Def's Motion "for Discretionary Review Under N.C.G.S. § 7A-31 (a)" (COA04-784)	Denied 10/06/05
State v. Hames Case Below: 170 N.C. App. 312	No. 337P05	1. AG's Motion for Temporary Stay (COA04-968) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. 7A-31	1. Allowed **06/27/05** 359 N.C. 638 Stay Dissolved **10/06/05** 2. Denied 10/06/05 3. Denied 10/06/05
State v. Harrington & Rattis Case Below: 171 N.C. App. 17	No. 384P05	1. Def's (Chris Rattis) PDR Under N.C.G.S. § 7A-31 (c) 2. Def's Motion of Appeals as a Matter of Constitutional Right to this Higher Court Under the Strickland Standard Under N.C.G.S. § 15A-1443 A + B 3. Def's Motion to Set Aside Unconstitutional and High Sentencing 4. Def's Motion to Review Denial of Motion to Suppress	1. Denied 10/06/05 2. Dismissed ex mero motu 10/06/05 3. Dismissed 10/06/05 4. Dismissed 10/06/05 **Brady, J. Recused**
State v. Harris Case Below: 171 N.C. App. 515	No. 454P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1132)	Denied 10/06/05

State v. Harrison Case Below: 169 N.C. App. 257	No. 228A05	1. Def's NOA Based Upon a Dissent (COA04-515) 2. Def's PDR as to Additional Issues	1. —— 2. Denied 10/06/05
State v. Hawes Case Below: 165 N.C. App. 545	No. 582P05	Def's PWC to File a PDR of an Order of COA (COA03-1417) or, Alternatively, to Permit a Motion for Appropriate Relief	Denied 11/03/05
State v. Heller Case Below: 172 N.C. App. 173	No. 478P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1551)	Denied 10/06/05
State v. Hendrickson Case Below: 172 N.C. App. 593	No. 530P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-142)	Denied 10/06/05
State v. Hernandez-Madrid Case Below: 173 N.C. App. 234	No. 534P05	AG's Motion for Temporary Stay (COA04-294)	Allowed Pending Determination of State's PDR 09/21/05
State v. Hill Case Below: 172 N.C. App. 173	No. 504A05	1. Def's NOA Based Upon a Constitutional Question (COA04-1126) 2. Def's Motion for Remand to the COA 3. AG's Motion to Dismiss Appeal and Deny Motion to Remand to COA	1. —— 2. —— 3. Allowed 11/03/05 **Martin, J. Recused**
State v. Holden Case Below: 171 N.C. App. 364	No. 393P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1464)	Denied 10/06/05
State v. Holman Case Below: 171 N.C. App. 516	No. 434P05	Def's PWC to Review the Decision of the COA (COA04-962)	Denied 10/06/05
State v. Howell Case Below: 169 N.C. App. 741	No. 275P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-307)	Denied 10/06/05

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

State v. Hyde Case Below: Onslow County Superior Court	No. 529A98-2	Def's PWC to Review the Order of the Onslow County Superior Court	Denied 11/03/05 **Wainwright, J. Recused**
State v. Ivey Case Below: 171 N.C. App. 516	No. 458PA05	1. Def's NOA Based Upon a Constitutional Question (COA04-1420) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed ex mero motu 2. Allowed 11/03/05
State v. James Case Below: 140 N.C. App. 387	No. 536P00-3	Def's PWC to Review the Decision of the COA (COA00-224)	Dismissed 10/06/05
State v. Johnson Case Below: 171 N.C. App. 366	No. 419P05	1. Def's NOA Based Upon a Constitutional Question (COA04-945) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/06/05 3. Denied 10/06/05
State v. Jones Case Below: 165 N.C. App. 276	No. 399P04-3	Def's PWC to Review Decision of the COA (COA03-590)	Dismissed 10/06/05
State v. Jones Case Below: 172 N.C. App. 161	No. 435P05	1. AG's Application for Temporary Stay (COA04-967) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **08/15/05** Stay Dissolved **11/03/05** 2. Denied 11/03/05 3. Denied 11/03/05 4. Dismissed as moot 11/03/05
State v. Key Case Below: 172 N.C. App. 173	No. 491P05	1. Def's NOA (Constitutional Question) (COA04-940) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 11/03/05 3. Denied 11/03/05
State v. Laboy Case Below: Catawba County Superior Court	No. 220P05	AG's PWC to Review the Order of Catawba County Superior Court	Denied 10/06/05

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State v. Landaver Case Below: 170 N.C. App. 197	No. 311P05	1. Surety's (Aegis Security Insurance Company) PDR Under N.C.G.S. § 7A-31 (COA04-934) 2. Respondent's (Randolph Co. Bd. of Education) Motion to Deny PDR	1. Denied 10/06/05 2. Dismissed as moot 10/06/05
State v. Langley Case Below: 173 N.C. App. 194	No. 535P05	AG's Motion for Temporary Stay (COA04-1100)	Allowed 09/28/05
State v. Lattimore Case Below: 172 N.C. App. 173	No. 493A05	1. Def-Appellant's NOA Based Upon a Constitutional Question (COA04-1246) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed 10/06/05
State v. Ledwell Case Below: 171 N.C. App. 328	No. 414P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-958)	Denied 10/06/05
State v. Long Case Below: 173 N.C. App. 758	No. 610P05	AG's Motion for Temporary Stay (COA03-1712)	Allowed 11/02/05
State v. Lyles Case Below: 172 N.C. App. 323	No. 442A05	1. Def's NOA Based Upon a Constitutional Question (COA04-969) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed 10/06/05
State v. Marsh Case Below: 171 N.C. App. 516	No. 457P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-732)	Denied 10/06/05
State v. McCoy Case Below: 171 N.C. App. 636	No. 463A05	1. Def's NOA Based Upon a Dissent (COA04-209) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed 10/06/05
State v. McNeill Case Below: 170 N.C. App. 574	No. 376P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-281)	Denied 10/06/05

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State v. Meynardie Case Below: 172 N.C. App. 127	No. 446P05	AG's Motion for Temporary Stay	Allowed 08/22/05
State v. Morton Case Below: 173 N.C. App. 448	No. 536PA05	1. AG's Motion for Temporary Stay (COA04-1484) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's PDR Under N.C.G.S. § 7A-31	1. Denied 10/03/05 2. Allowed 11/03/05 3. Allowed 11/03/05 4. Denied 11/03/05
State v. Murphy Case Below: 172 N.C. App. 734	No. 485P05	AG's Motion for Temporary Stay (COA04-344)	Allowed 09/02/05
State v. Nelson Case Below: 169 N.C. App. 458	No. 298P05	Def's PWC to Review the Decision of the COA (COA04-231)	Denied 10/06/05
State v. Nobles Case Below: Sampson County Superior Court	No. 156A98-3	1. Def's Petition for Writ of Supersedeas 2. Def's Motion for Temporary Stay	1. Denied 11/03/05 2. Denied 11/03/05
State v. Norris Case Below: 172 N.C. App. 772	No. 486A05	1. AG's NOA (Dissent) (COA04-574) 2. AG's Motion for Temporary Stay 3. AG's Petition for Writ of Supersedeas 4. AG's PDR as to Additional Issues	1. —— 2. Allowed 09/06/05 3. Allowed 11/03/05 4. Denied 11/03/05
State v. Phillips Case Below: 171 N.C. App. 622	No. 459P05	1. Def's NOA Based Upon a Constitutional Question (COA04-933) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/06/05 3. Denied 10/06/05
State v. Prentice Case Below: 170 N.C. App. 593	No. 367P05	1. Def's NOA Based Upon a Constitutional Question (COA04-764) 2. AG's Motion to Dismiss Appeal 3. Def's PDR	1. —— 2. Allowed 10/06/05 3. Denied 10/06/05

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

State v. Rhodes Case Below: 172 N.C. App. 174	No. 500P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-193)	Denied 11/03/05
State v. Rios Case Below: 169 N.C. App. 270	No. 226P05	1. Def's NOA Based Upon a Constitutional Question (COA04-706) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/06/05 3. Denied 10/06/05
State v. Ripley Case Below: 172 N.C. App. 453	No. 489A05	1. AG's NOA (Dissent) 2. AG's Motion for Temporary Stay (COA04-924) 3. AG's Petition for Writ of Supersedeas	1. 2. Allowed 09/06/05 3. Allowed 10/06/05
State v. Sellars Case Below: 173 N.C. App. 235	No. 547P05	AG's Motion for Temporary Stay (COA04-289)	Allowed 09/23/05
State v. Shabazz Case Below: 171 N.C. App. 517	No. 439P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1232)	Denied 10/06/05
State v. Shearin Case Below: 170 N.C. App. 222	No. 338P05	1. Def's NOA Based Upon a Constitutional Question (COA04-394) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 11/03/05 3. Denied 11/03/05
State v. Shue Case Below: 163 N.C. App. 58	No. 103P04-2	Defendant-Appellant's Motion for Discretionary Review and NOA (COA03-133)	Dismissed 10/06/05
State v. Silas Case Below: 168 N.C. App. 627	No. 171PA05	1. AG's Motion for Temporary Stay 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 (COA04-367)	1. Allowed Pending Determination of the AG's PDR 03/29/05 359 N.C. 413 2. Allowed 10/06/05 3. Allowed 10/06/05

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

State v. Sprinkle Case Below: 173 N.C. App. 449	No. 570P05	AG's Motion for Temporary Stay (COA04-1291)	Allowed 10/11/05
State v. Stamey Case Below: 170 N.C. App. 699	No. 364P05	1. Def's NOA Based Upon a Constitutional Question (COA04-1031) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/06/05 3. Denied 10/06/05
State v. Suell Case Below: 173 N.C. App. 236	No. 541P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1183)	Denied 11/03/05
State v. Tarantino Case Below: Cherokee County Superior Court	No. 492P05	Def-Appellant's Emergency PWC to the Superior Court of Cherokee County	Dismissed Without Prejudice to Re-File in the Court of Appeals, N.C.R.App.P. 21 (b) 09/06/05
State v. Tarantino Case Below: Cherokee County Superior Court	No. 492P05-2	Def's Emergency PWC to Review Order of COA (COAP05-837)	Denied 09/09/05
State v. Walker Case Below: 167 N.C. App. 110	No. 016P05-2	AG's Motion for Temporary Stay	Allowed 08/26/05
State v. Wallace Case Below: Mecklenburg County Superior Court	No. 241A97-2	Def's PWC to Review the Order of the Mecklenburg County Superior Court	Denied 11/03/05

State v. Watkins Case Below: 169 N.C. App. 518	No. 208P05	1. AG's Motion for Temporary Stay (COA04-295)	1. Allowed **04/19/05** Stay Dissolved **11/03/05**
		2. AG's Petition for Writ of Supersedeas	2. Denied 11/03/05
		3. AG's PDR Under N.C.G.S. § 7A-31	3. Allowed for remand to COA in light of *State v. Jones*, 359 N.C. 832 (2005)
		4. Def's NOA Based Upon a Constitutional Question	4. ——
		5. AG's Motion to Dismiss Appeal	5. Allowed 11/03/05
		6. Def's Conditional PDR Under N.C.G.S. § 7A-31	6. Denied 11/03/05
State v. Watts Case Below: 172 N.C. App. 58	No. 449P05	AG's Motion for Temporary Stay	Allowed Pending Determination of the State's PDR 08/22/05
State v. Webb Case Below: 172 N.C. App. 594	No. 450P05	AG's Motion for Temporary Stay (COA04-103)	Allowed 08/24/05
State v. Wilder Case Below: 172 N.C. App. 174	No. 503P05	Def's Motion to be Allowed to Withdraw PDR Under N.C.G.S. § 7A-31 (COA04-589)	Allowed 09/16/05
State v. Windley Case Below: 173 N.C. App. 187	No. 259P05	AG's Motion for Temporary Stay (COA04-588)	Allowed Pending Determination of the State's PDR 09/26/05
State v. Wissink Case Below: 172 N.C. App. 829	No. 484P05	AG's Motion for Temporary Stay (COA04-1081)	Allowed Pending Determination of PDR 09/01/05

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

State v. Wright Case Below: 172 N.C. App. 464	No. 483A05	1. AG's NOA Based Upon a Dissent (COA04-689) 2. AG's Motion for Temporary Stay 3. AG's Petition for Writ of Supersedeas 4. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 09/02/05 3. Allowed 10/06/05 4. Denied 10/06/05
State v. Yarrell Case Below: 172 N.C. App. 135	No. 448PA05	1. AG's Motion for Temporary Stay (COA03-1454) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Dismiss State's PDR 5. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 08/30/05 2. Allowed 10/06/05 3. Allowed 10/06/05 4. Denied 10/06/05 5. Denied 10/06/05
Stroud v. Williams, Roberts, Young, Inc. Case Below: 171 N.C. App. 367	No. 420P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1302)	Denied 10/06/05
Tiber Holding Corp. v. DiLoreto Case Below: 170 N.C. App. 662	No. 368P05	Defs' PDR (COA04-1184)	Denied 10/06/05
Toomer v. Branch Banking & Tr. Co. Case Below: 171 N.C. App. 58	No. 391P05	Plts' PDR Under N.C.G.S. § 7A-31 (COA04-599)	Denied 10/06/05
Tuttle v. Greer, Inc. Case Below: 168 N.C. App. 731	No. 190P05	Defs' PDR Under N.C.G.S. § 7A-31 (COA04-90)	Denied 10/06/05
Wallace v. TLP Int'l, Inc. Case Below: 172 N.C. App. 175	No. 440P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1326)	Denied 10/06/05

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

Wilson v. Ventriglia Case Below: 172 N.C. App. 175	No. 501P05	1. Def's PDR Under N.C.G.S. § 7A-31 (COA04-885) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 10/06/05 2. Dismissed as moot 10/06/05
Yallum v. Hammerle Case Below: 172 N.C. App. 175	No. 513P05	Plts' Motion for NOA (COA04-1622)	Denied 10/06/05
Zbytnuik v. ABF Freight Sys., Inc. Case Below: 173 N.C. App. 236	No. 162P05-2	Def's PDR Under N.C.G.S. § 7A-31 (COA04-118-2)	Denied 10/06/05

STATE v. WRIGHT

[360 N.C. 80 (2005)]

STATE OF NORTH CAROLINA v. DOUGLAS SHANE WRIGHT

No. 483A05

(Filed 1 December 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 616 S.E.2d 366 (2005), finding prejudicial error in judgments entered 20 October 2003 by Judge Evelyn W. Hill in Superior Court, Alamance County, and ordering a new trial. Heard in the Supreme Court 15 November 2005.

Roy Cooper, Attorney General, by Chris Z. Sinha, Assistant Attorney General, for the State-appellant.

Robert T. Newman, Sr. for defendant-appellee.

PER CURIAM.

AFFIRMED.

LINDA JONES v. THE CITY OF DURHAM AND JOSEPH M. KELLY (IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER FOR THE CITY OF DURHAM)

No. 137A05

(Filed 16 December 2005)

Police Officers— speeding when responding to call—pedestrian injured

Plaintiff failed to demonstrate the existence of a genuine issue of material fact as to gross negligence, and defendants were entitled to summary judgment, in an action in which a pedestrian was struck and injured by a police car speeding to a call. The standard of negligence by which a law enforcement officer must be judged when acting within N.C.G.S. § 20-145 is that of gross negligence, which arises where the emergency responder recklessly disregards the safety of others. The three dispositive factors are the circumstances initiating the event, when and where the event occurred, and the conduct or actions of the officer.

Justice MARTIN dissenting.

Justice BRADY dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 168 N.C. App. 433, 608 S.E.2d 387 (2005), affirming in part and reversing in part an order and judgment entered on 6 January 2004 by Judge A. Leon Stanback, Jr. in Superior Court, Durham County. Heard in the Supreme Court 14 September 2005.

Glenn, Mills & Fisher, P.A., by Robert B. Glenn, Jr., Stewart W. Fisher, and Carlos E. Mahoney, for plaintiff-appellant.

Faison & Gillespie, by Reginald B. Gillespie, Jr., for defendant-appellees.

LAKE, Chief Justice.

The sole question presented for review in this case is whether plaintiff presented sufficient evidence to show a genuine issue of material fact in order to survive summary judgment under a law enforcement officer vehicular gross negligence standard.

The Court of Appeals reversed the trial court and held that plaintiff's forecast of evidence was insufficient to maintain a claim of

gross negligence. Furthermore, the court held that defendants were entitled to judgment as a matter of law. For the reasons set forth below, we affirm the decision of the Court of Appeals.

The following evidence was before the trial court at the time of its entry of the partial summary judgment order leading to this appeal: On 15 September 2000, at approximately 9:00 a.m., Officer Tracey Fox ("Officer Fox") was dispatched to investigate a domestic disturbance at 800 North Street in Durham. This residence was familiar to officers, because it had previously been the location of a domestic disturbance involving weapons, and this information was relayed to all officers by Dispatch. Soon after arriving at the scene, Officer Fox determined that she would need assistance and called for backup. Upon receiving her call, Dispatch issued a "signal 20" which indicated a dangerous situation requiring that all other officers give way for Officer Fox's complete access to the police radio by holding all calls. Officer Joseph M. Kelly ("Officer Kelly" or "defendants" when referred to collectively with the City of Durham) was approximately two and one-half miles from Officer Fox's location.

In response to the first call by Officer Fox, Officer Kelly and other officers began driving in their separate vehicles towards North Street. Officer Fox then made a second distress call, and stated with a noticeably shaky voice, that she needed more units. Officer Kelly and Officer H.M. Crenshaw independently activated their blue lights and sirens and increased the speed of their vehicles towards North Street.

As Officer Kelly was on his way to assist Officer Fox, Linda Jones ("plaintiff") was leaving her sister's apartment complex at the southwest corner of the intersection of Liberty Street and Elizabeth Street ("the intersection"). Plaintiff walked to a point on Liberty Street approximately ninety-five feet west of the intersection. The posted speed limit there was 35 miles per hour. Additionally, Liberty Street had three undivided lanes: two eastbound lanes with the second or middle eastbound lane designated as a turn only lane, and a westbound lane. At the curb, plaintiff observed no vehicles approaching, but heard sirens approaching from an indeterminable direction. Plaintiff began to cross Liberty Street in the middle of the block outside of any designated crosswalk and against the controlling traffic signal. Having reached the double yellow lines after crossing two-thirds of the roadway, plaintiff first saw a police vehicle heading towards her in the westbound lane. At a speed estimated between 45

and 60 miles per hour, Officer Kelly's vehicle went briefly airborne in crossing a railroad track, and he then observed plaintiff at a distance of approximately 300 to 332 feet. In an attempt to avoid striking plaintiff, Officer Kelly turned his vehicle into the eastbound lanes in order to pass behind plaintiff, who apparently was heading across the westbound lane. However, plaintiff did not continue across the westbound lane. Instead, at that moment, she abruptly turned around and began running back in the direction from which she had come, back across the two eastbound lanes. Officer Kelly's vehicle struck plaintiff on her side as she was retreating to the curb, causing plaintiff severe injuries.

In her initial complaint, plaintiff brought claims against Officer Kelly and the City of Durham for negligence, gross negligence, and obstruction of public justice and spoliation of evidence. Defendants' answer included a motion to dismiss based on N.C.G.S. § 1A-1, Rule 12(b)(6) and pled the affirmative defenses of immunity and contributory negligence. Plaintiff responded alleging the doctrine of last clear chance to defendants' defense of contributory negligence. Plaintiff then filed an amended complaint, bringing additional claims alleging that defendants' assertion of immunity in this case violated a number of plaintiff's rights under the North Carolina Constitution. This matter, with pleadings, exhibits, affidavits, and depositions of forecast evidence, was presented before the trial court in a summary judgment hearing held on 11 December 2003 pursuant to motions brought by both parties.

In an order entered 6 January 2004, the trial court concluded the following: (1) that plaintiff's ordinary negligence claim was dismissed as a matter of law; (2) that there were issues of fact as to whether Officer Kelly was grossly negligent in his emergency response to assist and apprehend the suspect threatening Officer Fox; (3) that there were issues of fact concerning plaintiff's obstruction of public justice and spoliation claim; (4) that plaintiff's claim for violation of the prohibition against exclusive emoluments based on Article I, Section 32 of the North Carolina Constitution was dismissed as a matter of law; and (5) the manner in which defendants have asserted sovereign immunity in this and other cases has been arbitrary and capricious and violates guarantees of due process and equal protection under Article I, Section 19 of the North Carolina Constitution as a matter of law. The trial court certified its order under N.C.G.S. § 1A-1, Rule 54(b) as an entry of final judgment. Both parties appealed to the Court of Appeals.

In their appeal, defendants assigned error to the trial court's finding of an issue of fact supported by forecast evidence as to whether defendants were grossly negligent and argued the trial court should have granted summary judgment as a matter of law in their favor. Additionally, defendants alleged the trial court erred when failing to rule in their favor as a matter of law on the spoliation and constitutional claims. Plaintiff's only issue on appeal to the Court of Appeals submitted that the trial court erred in dismissing her claim of ordinary negligence by finding the standard to be inapplicable as a matter of law in light of the forecast evidence.

Judge Levinson dissented from the majority opinion's reversal of the trial court's denial of defendants' motion for summary judgment on the gross negligence claim. He further dissented from the majority opinion's holding that plaintiff's constitutional claim and her claim for obstruction of justice were moot. He stated that he would affirm the trial court's dismissal of defendants' summary judgment motion on the spoliation claim. However, he would have reversed the trial court's entry of summary judgment for plaintiff on her claim of violation of her rights to due process and equal protection under Article I, Section 19 of the North Carolina Constitution.

Plaintiff filed her appeal of right based on the dissenting opinion in accordance with N.C.G.S. § 7A-30(2). Although plaintiff presented the two issues of gross negligence and obstruction of justice in her notice of appeal, her brief to this Court addressed only the gross negligence issue. Therefore, plaintiff has abandoned her appeal of right as to the obstruction of justice issue, and that assignment of error is dismissed. *See* N.C. R. App. P. 28(b)(6).

The grant of summary judgment for the moving party is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2003); *see Parish v. Hill*, 350 N.C. 231, 236, 513 S.E.2d 547, 550 (1999). In assessing whether the moving party established the absence of any genuine issue of material fact, the evidence presented should be viewed in the light most favorable to the nonmoving party. N.C.G.S. § 1A-1, Rule 56(c). If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004).

In determining whether a genuine issue of material fact exists in the case at bar, the crux of the allegations of gross negligence on the part of Officer Kelly relate to the speed of his vehicle and his maneuver to avoid hitting plaintiff. As properly stated in the majority opinion of the Court of Appeals, Officer Kelly's conduct in the case *sub judice* is governed by N.C.G.S. § 20-145. *Jones v. City of Durham*, 168 N.C. App. 433, 437-39, 608 S.E.2d 387, 390-92 (2005). N.C.G.S. § 20-145 provides the following:

> The speed limitations set forth in this Article shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances and rescue squad emergency service vehicles when traveling in emergencies, nor to vehicles operated by county fire marshals and civil preparedness coordinators when traveling in the performances of their duties. This exemption shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others.

N.C.G.S. § 20-145 (2003).

In enacting this statutory exemption to our motor vehicle speed limits, it was clearly the intent of the legislature to extend speed limit exemptions beyond mere police pursuits, to include all emergency service vehicles, including police and even "civil preparedness coordinators," "when traveling in emergencies . . . in the performances of their duties." *Id.* This Court has held that the standard of negligence by which a law enforcement officer must be judged when acting within N.C.G.S. § 20-145 is that of "gross negligence" as to the speed and operation of his vehicle. *Young v. Woodall*, 343 N.C. 459, 462, 471 S.E.2d 357, 359 (1996). *See also State v. Flaherty*, 55 N.C. App. 14, 22, 284 S.E.2d 565, 571 (1981) (focusing on defendant officer's emergency response and stating that N.C.G.S. § 20-145 applies not only to direct or immediate pursuits but also to police who receive notice of and proceed to the scene to assist in the chase or apprehension; in so doing the court required the gross negligence standard to be applied).

The statute itself states the exemption shall not apply to a driver who operates a covered vehicle in "reckless disregard of the safety of others," the definition of gross negligence. N.C.G.S. § 20-145. The quoted language is consistent with the definition of gross negligence

used by this Court. *See Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1998) (defining gross negligence as "wanton conduct done with conscious or reckless disregard for the rights and safety of others"). However, we note that N.C.G.S. § 1D-5(7) defines "willful and wanton conduct" and establishes that such conduct, necessary for the recovery of punitive damages, *see* N.C.G.S. § 1D-15(a), is more than gross negligence. In light of this distinction, we conclude that while willful and wanton conduct includes gross negligence, gross negligence may be found even where a party's conduct does not rise to the level of deliberate or conscious action implied in the combined terms of "willful and wanton." *See Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E.2d 36, 37-38 (1929).

Accordingly, while our previous decisions have conflated actions done with wicked purpose with actions done while manifesting a reckless indifference to the rights and safety of others under the rubric of "gross negligence," we conclude that the General Assembly intended to distinguish these two types of action. Reading N.C.G.S. § 20-145 and N.C.G.S. § 1B-5 together, we conclude that in the context of a response to an emergency by a law enforcement officer or other individuals named in N.C.G.S. § 20-145, gross negligence arises where the responder recklessly disregards the safety of others.

In determining whether a law enforcement officer's actions rise to the level of gross negligence, pursuant to N.C.G.S. § 20-145, our appellate courts have considered a number of factors to ascertain whether the forecast of the evidence supporting the claim was sufficient to survive a motion for summary judgment. *See*, *e.g.*, *Bray v. N.C. Dep't of Crime Control & Pub. Safety*, 151 N.C. App. 281, 564 S.E.2d 910 (2002). The three factors this Court considers to be dispositive on the issue of a law enforcement officer's gross negligence are: (1) the circumstances initiating the event or the reason why the officer became involved in an event of increased speed; (2) when and where the event of increased speed occurred; and (3) what specific conduct or actions the officer undertook during the course of the event of increased speed. Applying these factors to plaintiff's forecast of evidence and viewing such in the light most favorable to plaintiff, we conclude that plaintiff did not demonstrate the existence of a genuine issue of material fact as to gross negligence on the part of Officer Kelly, and judgment as a matter of law should have been entered by the trial court denying plaintiff's gross negligence claim against defendants.

Considering first the circumstances which prompted defendant Kelly to become involved, the evidence before the trial court clearly reflected an emergency situation in which the life or the safety of another law enforcement officer was at stake. Officer Kelly was involved in an event of increased speed in response to Officer Fox's two distress calls for assistance. The residence at which Officer Fox was requesting backup was familiar to the officers as the location of a past domestic disturbance involving weapons. Furthermore, Dispatch's declaration of a "signal 20" indicated that a fellow officer was in a dangerous situation. Finally, during Officer Fox's second call, with her voice noticeably shaky and a considerable amount of commotion audible in the background, she made a request to "send more units!" These circumstances reflected an emergency situation all too common in police work when another officer is in peril. Law enforcement officers are trained to respond to such an emergency and Officer Kelly's justifiably urgent response was in accordance with that training. As such, Officer Kelly's response refutes any indication that he was acting with conscious or reckless disregard for the rights or safety of others in becoming involved in an event calling for increased speed in order to reach the location of his fellow officer in distress.

This Court has previously held a law enforcement officer was not grossly negligent for pursuing a suspect who violated a mere safety infraction. *Young*, 343 N.C. at 460, 463, 471 S.E.2d at 358, 360 (holding no gross negligence when a law enforcement officer drove in the nighttime "at a high rate of speed" to pursue a vehicle with only one operating headlight). Certainly if the pursuit of a vehicle with only one operating headlight is sufficient reason for an officer to become engaged in an event of increased speed without a holding of gross negligence, then Officer Kelly's response to Officer Fox's two distress calls in a possible life or death situation was a justifiable event of increased speed.

Turning now to the evidence with respect to when and where defendant officer undertook the event of increased speed, the record reflects that Officer Kelly drove his vehicle at a speed of 45 to 60 miles per hour on a cool, clear, and dry morning, with his siren activated, for a distance of two and one-half miles in light traffic through a residential area. These circumstances surrounding the timing and location of Officer Kelly's event of increased speed were considerably less dangerous to others than those found in cases from this Court and the Court of Appeals in which gross negligence was held

not to be present. *See Parish*, 350 N.C. at 233-34, 246, 513 S.E.2d at 548-49, 556 (holding no gross negligence when law enforcement officer was involved in an event of increased speed for approximately six miles shortly after 2:00 a.m.); *Young*, 343 N.C. at 460, 463, 471 S.E.2d at 358, 360 (holding no gross negligence when law enforcement officer was involved in an event of increased speed at approximately 2:00 a.m. without activating his blue lights and siren); *Bullins*, 322 N.C. at 581, 584, 369 S.E.2d at 602, 604 (holding no gross negligence when law enforcement officer was involved in an event of increased speed for eighteen miles shortly after 1:00 a.m.); *Bray*, 151 N.C. App. at 282, 285, 564 S.E.2d at 911, 913 (holding no gross negligence when law enforcement officer was involved in an event of increased speed at dusk); *Norris v. Zambito*, 135 N.C. App. 288, 290, 295, 520 S.E.2d 113, 115, 117-18 (1999) (holding no gross negligence when law enforcement officer was involved in an event of increased speed at approximately 1:00 a.m.); *Clark v. Burke Cty.*, 117 N.C. App. 85, 90, 92, 450 S.E.2d 747, 749-50 (1994) (holding no gross negligence when a law enforcement officer was involved in an event of increased speed just after 4:00 a.m. within city limits); and *Fowler v. N.C. Dep't of Crime Control & Pub. Safety*, 92 N.C. App. 733, 733-34, 736, 376 S.E.2d 11, 12-13 (holding no gross negligence when a law enforcement officer was involved in an event of increased speed for over eight miles shortly before midnight and delayed activating his blue lights and siren), *disc. rev. denied*, 324 N.C. 577, 381 S.E.2d 773 (1989). Thus, when comparing the case at bar with the appellate decisions of this state, it is evident that both this Court and the Court of Appeals have found circumstances regarding the timing and location of an event of increased speed which presented substantially greater potential for danger to fall short of constituting gross negligence.

Finally, we consider defendant officer's specific conduct during the event of increased speed. When viewed in the light most favorable to plaintiff, Officer Kelly was traveling at a speed of 45 to 60 miles per hour between the railroad tracks and the point of impact, where the posted speed limit was 35 miles per hour; his vehicle became airborne when crossing the railroad tracks immediately preceding the intersection; and he performed an evasive maneuver rather then applying the brakes upon seeing plaintiff on the double yellow lines. This conduct on the part of the officer boils down to only two actions: his driving speed and the evasive maneuver. The fact that his vehicle went briefly airborne as he went over the railroad tracks is relevant only in the context of his high rate of speed, which is

acknowledged. This event occurred 300 to 332 feet prior to impact and has no separate relevance.

With regard to driving speed, Officer Kelly was traveling 10 to 25 miles per hour in excess of the 35 mile-per-hour speed limit. Traveling 10 to 25 miles per hour over the speed limit by a law enforcement officer in an emergency situation is not conduct which supports a finding of gross negligence. This Court and the Court of Appeals have examined exceeding the posted speed limit in the context of law enforcement officer gross negligence on numerous occasions and have found speed differentials similar to and far greater than that of Officer Kelly not supportive of gross negligence. *See Parish*, 350 N.C. at 234, 246, 513 S.E.2d at 549, 556 (holding no gross negligence when officer was traveling at speeds up to 130 miles per hour); *Bullins*, 322 N.C. at 582, 584, 369 S.E.2d at 602, 604 (holding no gross negligence when officer was traveling at speeds up to 100 miles per hour); *Bray*, 151 N.C. App. at 283-84, 564 S.E.2d at 911-13 (holding no gross negligence when officer was traveling 80 miles per hour on a curving rural road in a 55 mile-per-hour zone, 25 miles-per-hour differential); *Norris*, 135 N.C. App. at 291, 295, 520 S.E.2d at 115, 117-18 (holding no gross negligence when officer was traveling 65 miles per hour in a 35 mile-per-hour zone, 30 miles-per-hour differential); *Clark*, 117 N.C. App. at 90-92, 450 S.E.2d at 749-50 (holding no gross negligence when officer was traveling 70 to 80 miles per hour in a 45 mile-per-hour zone, 25 to 35 miles-per-hour differential); *Fowler*, 92 N.C. App. at 736, 376 S.E.2d at 13 (holding no gross negligence when officer was traveling at approximately 115 miles per hour). Therefore, in light of the considerable precedent of this Court and the Court of Appeals, plaintiff's contention that Officer Kelly's conduct, in exceeding the posted speed limit by 10 to 25 miles per hour, constitutes gross negligence must fail.

As to the evasive maneuver, plaintiff has forecast no evidence of "conduct done with conscious or reckless disregard for the rights and safety of others" regarding Officer Kelly's decision to perform such a maneuver, rather than attempting to stop, upon seeing plaintiff on the double yellow line two-thirds of the way across Liberty Street. Defendants' forecast of evidence showed that Officer Kelly steered his vehicle into the eastbound lanes of traffic where there was a larger area to avoid hitting plaintiff, in anticipation that she would attempt to get out of the street by continuing forward, which was the shortest distance possible. Furthermore, defendants' forecast of evidence showed that this evasive maneuver was consistent with the

Basic Law Enforcement Training Manual published by the North Carolina Justice Academy. The manual provides that one method to avoid a collision is by "[e]vasive steering or sudden lane change." This method is "[u]sually performed when the driver's intended path-of-travel is suddenly blocked by an object, pedestrian, or other vehicle." N.C. Justice Acad., *Basic Law Enforcement Training: Student* § 18F, at 48 (Jan. 2006). The North Carolina Administrative Code specifies that the manual is to be used as the curriculum for the basic training course for law enforcement officers as administered by the North Carolina Criminal Justice Education and Training Standards Commission. 12 NCAC 9B .0205(c) (June 2004). By statute, the North Carolina Criminal Justice Education and Training Standards Commission has the power to establish educational and training standards that must be met in order to qualify and be certified or recertified as a sworn law enforcement officer. N.C.G.S. §§ 17C-2(3), -6(a)(2), -6(a)(3) (2003). Officer Kelly's compliance with this authoritative training standard in this emergency situation fully supports the appropriateness of his decision to perform an evasive maneuver upon viewing plaintiff in the roadway and negates the contention of gross negligence.

In summary, we conclude that plaintiff's forecast of evidence, and all evidence available to the trial court, of Officer Kelly's reason for becoming involved, the circumstances surrounding the timing and location, and the conduct he undertook during the event of increased speed reveal the total absence of any material fact reflecting gross negligence. During a justifiable event of increased speed, Officer Kelly made a substantial and reasonable effort to avoid a collision with plaintiff, but was unsuccessful due largely to plaintiff's sudden change in direction. Thus, the Court of Appeals correctly held that plaintiff failed to demonstrate the existence of a genuine issue of material fact as to gross negligence and that defendants were entitled to summary judgment as a matter of law. Any other conclusion would have betrayed this Court's admonition against blurring the clear distinction between gross negligence and ordinary negligence established by the mature body of case law recognized in *Yancey v. Lea*, 354 N.C. 48, 57, 550 S.E.2d 155, 160 (2001). The majority opinion of the Court of Appeals is affirmed.

AFFIRMED.

Justice MARTIN dissenting.

"[N]o person shall be deprived of a trial on a genuine disputed factual issue." *Kessing v. Nat'l Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). Summary judgment in a negligence case is rarely appropriate under North Carolina jurisprudence. *Moore v. Crumpton*, 306 N.C. 618, 624, 295 S.E.2d 436, 440 (1982). As Justice (later Chief Justice) Mitchell stated for this Court in *Moore*: "Even where there is no dispute as to the essential facts, where reasonable people could differ with respect to whether a party acted with reasonable care, it ordinarily remains the province of the jury to apply the *reasonable person standard*." *Id.* at 624, 295 S.E.2d at 441 (emphasis added). More recently, we observed that "[s]ummary judgment is inappropriate where reasonable minds might easily differ as to the import of the evidence." *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 221-22, 513 S.E.2d 320, 326 (1999) (citing *Dettor v. BHI Prop. Co. No. 101*, 324 N.C. 518, 522, 379 S.E.2d 851, 853 (1989)). In ruling on a motion for summary judgment, the trial court must construe the evidence in the light most favorable to the nonmoving party. *Speck v. N.C. Dairy Found., Inc.*, 311 N.C. 679, 680, 319 S.E.2d 139, 140 (1984) (citing *Flippin v. Jarrell*, 301 N.C. 108, 270 S.E.2d 482 (1980)).

In the instant case, defendants had the burden of establishing the lack of a genuine issue of material fact on the issue of gross negligence. *See Moore*, 306 N.C. at 624, 295 S.E.2d at 441 (citing *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 225 S.E.2d 797 (1976)). Because defendants failed to meet their burden, the trial court properly denied summary judgment.

The gross negligence standard is nebulous and courts have struggled to define it. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 34, at 212 (5th ed. 1984) [hereinafter *Prosser*]; *see, e.g.*, *Supervisor of Pickens Cty., S.C. v. Jennings*, 181 N.C. 393, 400-01, 107 S.E. 312, 315-16 (1921) (discussing the difficulty of defining gross negligence and suggesting that it is indistinguishable from ordinary negligence). We have defined gross negligence as "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1988) (citing *Hinson v. Dawson*, 244 N.C. 23, 92 S.E.2d 393 (1956); *Wagoner v. N.C. R.R. Co.*, 238 N.C. 162, 77 S.E.2d 701 (1953); *Jarvis v. Sanders*, 34 N.C. App. 283, 237 S.E.2d 865 (1977)). Gross negligence, as a distinct right of action, falls somewhere on the "continuum of culpability" between ordinary negligence and recklessness.

See Prosser § 34, at 211-12 (noting that gross negligence was originally conceptualized as "the want of even slight or scant care"). Gross negligence does not require *more* egregious behavior than recklessness; it is, after all, gross *negligence*. The question is whether the defendant's actions were " 'done needlessly, manifesting a *reckless indifference* to the rights of others.' " *Parish v. Hill*, 350 N.C. 231, 239, 513 S.E.2d 547, 551-52 (1999) (quoting *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 38 (1929)), *quoted in Wagoner*, 238 N.C. at 167, 77 S.E.2d at 705 (emphasis added). An officer must balance the legitimate interests of law enforcement "with the interests of the public in not being subjected to unreasonable risks of injury." *Parish*, 350 N.C. at 236, 513 S.E.2d at 550.

Plaintiff, Linda Jones, submitted the following forecast of evidence: Defendant Kelly was traveling westbound on Liberty Street in response to a distress call from a fellow officer. He was not aware of the exact nature of the situation. He proceeded to drive his vehicle through a residential neighborhood at speeds up to 74 miles per hour, even though the posted speed limit was only 35 miles per hour.[1] He did so without properly using his emergency lights or siren. He admitted he steered his vehicle with one hand. He traveled through an intersection he knew to be dangerous. Specifically, he knew this intersection was the site of previous accidents and significant pedestrian activity. He also knew his view of the intersection would be obstructed and "it would not be feasible" to travel faster than 45 miles per hour. Despite this knowledge, he drove his vehicle into the intersection without significantly lessening his rate of speed. His vehicle went airborne, landing in the wrong lane of travel approximately 300 to 332 feet from the point of pedestrian impact.

Linda Jones saw the police vehicle traveling airborne over the railroad tracks as she was attempting to cross Liberty Street. She immediately turned around and began running back towards the curb.[2] Even though defendant saw Jones in his direct path, he did not apply his brakes. Rather, he accelerated his vehicle through the wrong lane of travel. At the point of impact, the police vehicle was

1. In so doing, defendant violated Durham Police Department procedures by exceeding the speed limit when he knew that at least four other officers were already responding to the request for backup.

2. The majority critiques plaintiff's reaction to an airborne police vehicle bearing down on her. It suffices to say, however, that plaintiff's conduct is only relevant to the question of whether she breached her own duty of care, i.e., was contributorily negligent. Contributory negligence, however, is not a defense to a gross negligence claim. David A. Logan & Wayne A. Logan, *North Carolina Torts* § 9.20, at 209 (1996).

traveling up to 60 miles per hour, striking Jones with such force that she was thrown 76 feet (a distance exceeding one-fourth the length of a football field). According to Jones, she "tried hard to get out of his way," expecting him to "stay on his side [of the road]," but "as he came down out of the air, he lost control of his car" and struck her "just before [she] had stepped up on the curb." Linda Jones landed in the gutter along the eastbound lane of Liberty Street, sustaining severe injuries.

In my view, the majority does not construe the evidence in the light most favorable to the nonmoving party, thereby depriving plaintiff Linda Jones "of a trial on a genuine disputed factual issue." *Kessing*, 278 N.C. at 534, 180 S.E.2d at 830. First, the majority's characterization of defendant's top speed as 45 to 60 miles per hour is inconsistent with the deposition testimony of Michael Sutton, an accident reconstruction expert, who testified that defendant's vehicle traveled 73 to 74 miles per hour along Liberty Street. Second, the majority claims that defendant's alleged evasive maneuver complied with basic law enforcement procedures. Plaintiff's forecast of evidence, however, includes the affidavit of Norman S. Beck, a twenty year veteran of the Durham Police Department and certified law enforcement instructor, who stated that "Officer Kelly's actions after observing the Plaintiff in the roadway were . . . inconsistent with the standards and training applicable to police officers employed by the City of Durham." Third, a reasonable juror could easily find that defendant was not aware of the circumstances of the distress call. When asked during his deposition whether either of two distress calls indicated why backup was needed, he answered "no."[3] These stark discrepancies within the instant forecast of evidence, as reflected in the majority and dissenting opinions in this Court, clearly illustrate the folly of determining the gross negligence issue as a matter of law.

The forecast of evidence in the instant case included affidavits, depositions, exhibits, pleadings, and video footage of the incident. We must construe this forecast of evidence, including video footage showing police vehicles traveling through a residential neighborhood at high speeds, in the light most favorable to plaintiff. This forecast of evidence would permit, but not require, a reasonable juror to find

3. The record indicates that emergency response situations are a routine occurrence. Officer Long testified at deposition that he personally found himself in an emergency response situation "two or three times a day." He also stated that he had never traveled faster than 45 miles per hour on the relevant segment of Liberty Street while responding to an emergency.

that defendant's conduct exposed the public to an unreasonable risk of injury.

The decisions of this Court accord considerable deference to the difficult judgments made by law enforcement officers under exigent circumstances. However, under the facts and circumstances of the present case, plaintiff's forecast of evidence creates a genuine issue of material fact as to whether defendant's actions were grossly negligent. A jury, not this Court, should decide the gross negligence issue.[4]

I respectfully dissent.

Justice BRADY dissenting.

If Officer Kelly's actions do not rise to gross negligence, then what does? Further, the majority's decision today denies an individual who was severely injured by law enforcement's willful and wanton disregard for the safety of others a forum for her claim.[5] Factually, this seems to me not a complex case; however, the majority misconstrues the basic factual circumstances giving rise to this case and compounds this error by misapplying the law. When all is said and done, the majority holds a law enforcement officer, operating a vehicle at speeds as high as seventy-four miles per hour on a city street in a densely populated urban area with a posted thirty-five mile per hour speed limit, was not grossly negligent. I cannot accept the majority's application of gross negligence to the present situation. Specifically, I dissent for two principal reasons: I. The statute, and thus the gross negligence standard of care created under the statute,

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4. Plaintiff asserts her gross negligence claim against the individual defendant in his official capacity. Thus, to the extent plaintiff recovers money damages not otherwise barred by the affirmative defense of governmental immunity, only the municipal defendant would be liable therefor. *See Meyer v. Walls*, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997) (stating that "a suit against a defendant in his official capacity means that the plaintiff seeks recovery from the entity of which the public servant defendant is an agent").

5. The majority correctly notes this Court rarely, if ever, finds a law enforcement officer's actions to be grossly negligent in the context of law enforcement vehicular collisions. However, "[a]s many as 40 percent of all motor vehicle police pursuits end in collisions and some of these result in nearly 300 deaths each year of police officers, offenders, or innocent third party individuals." Chris Pipes & Dominick Pape, *Police Pursuits and Civil Liability*, 70 FBI Law Enforcement Bull., July 2001, at 16, 16 (footnotes omitted). The majority, in continuing to uphold this Court's misapplied approach towards gross negligence with regards to law enforcement, deprives the citizens of this state a forum for redress of their civil damages in a frighteningly large number of fatalities resulting from police pursuits.

which the majority applies to the present case is not applicable because the statute covers only pursuit-related law enforcement activity and not response-related law enforcement activity; and II. Were the statute and the gross negligence standard of care applicable, Officer Kelly's actions rise to the level of gross negligence, if not recklessness, and thus the question of gross negligence should have been submitted to a jury. Accordingly, I respectfully dissent.

I. Pursuit versus Response Activities

In my view, the majority's analysis has no colorable basis and, likewise, fails to comport with basic tenets of statutory interpretation. The General Assembly, in enacting N.C.G.S. § 20-145, set out those governmental officers and the specific activities to which speed limitations shall *not* apply: (1) during law enforcement officers' "chase or apprehension" of law violators, both actual and suspected; and (2) when a fire department or fire patrol "travel[s] in *response* to a fire alarm" are codified examples. N.C.G.S. § 20-145 (2003) (emphasis added). Clearly, if the legislature intended law enforcement officers' routine *response* activities, as in the instant case, to be insulated under N.C.G.S. § 20-145, they would not have limited the statute's scope solely to "chase or apprehension" in the pursuit of suspects. The legal maxim, "Expressio unius est exclusio alterius"—the expression of one thing implies the exclusion of the other—compels this construction of the statute. *Black's Law Dictionary* 602 (7th ed. 1999).

The General Assembly did address *response* situations in the statute, but they did so only with regards to fire departments, which by their very function and responsibility respond to calls for fire services. The majority's construction of the statutory language—"when traveling in emergencies . . . in the performances of their duties"—hangs off the precipice of reason in that the quoted language is contained in a clause associated with "public or private ambulances and rescue squad emergency service vehicles," not law enforcement vehicles. The majority's rewriting of our statute directly contradicts the original legislative intent and organization of the statutory language. Further, the North Carolina Court of Appeals case cited by the majority as support for holding N.C.G.S. § 20-145 applies to law enforcement officers acting in emergency response situations, *State v. Flaherty*, 55 N.C. App. 14, 284 S.E.2d 565 (1981), concerns an officer's liability while engaged in a *pursuit* activity, and is inapplicable to this Court's analysis with regards to emergency response situations.

Each time this Court has applied the provisions of N.C.G.S. § 20-145, the law enforcement conduct in question consisted of actual pursuit of a fleeing, known suspect or violator and not a response activity. *See Parish v. Hill*, 350 N.C. 231, 513 S.E.2d 547 (1999); *Young v. Woodall*, 343 N.C. 459, 471 S.E.2d 357 (1996); *Bullins v. Schmidt*, 322 N.C. 580, 369 S.E.2d 601 (1988); *Goddard v. Williams*, 251 N.C. 128, 110 S.E.2d 820 (1959), *overruled by Young v. Woodall*, 343 N.C. 459, 471 S.E.2d 357 (1996). Thus, the majority's reliance on the pursuit scenario is flawed and the instant case is clearly distinguishable on its facts. Officer Kelly was not chasing or attempting to apprehend a suspect; instead, he, along with eight other officers, was independently *responding* to another officer's call for backup. Sergeant Willy Long, Officer Kelly's supervisor on 15 September 2000, admitted during deposition Officer Kelly was *not* engaged in a pursuit activity, but was engaged in a response activity. Officer Kelly had absolutely no information regarding the factual circumstances facing Officer Fox, nor was he aware of the nature or circumstances of the call to which Officer Fox had initially responded. In reality, Officer Kelly was blindly responding to a routine call for backup. He was not cognizant of any suspects, the presence of danger or a volatile situation, or any information to make a knowing, intelligent decision about the urgency of the response needed. To Officer Kelly, or any other responding officer that morning, Officer Fox's call was simply a precautionary, prudent call for backup. Without clarification or specific information, Officer Kelly's actions cannot be construed as a pursuit, nor was he engaged in the apprehension of a suspect; there was not even a substantiated emergency presented. The majority's reliance on such clearly distinguishable precedent is unwarranted.

The difference between "pursuit" and "response" is not merely a legal distinction, but is well-rooted in the law enforcement community and is set out in law enforcement policy and procedure guidelines. The City of Durham Police Department's General Orders, which mandate its officers' conduct by establishing non-discretionary policies and procedures, set out different criteria for response priorities, vehicle pursuits, and emergency vehicle operation. Durham Police Dep't, Gen. Orders 4001 (Dec. 15, 1995), 4019 R-2 (Nov. 1, 1998), 4051 (Dec. 15, 1995). The General Orders allow vehicular pursuits "only when the necessity of immediate apprehension outweighs the degree of danger created by the pursuit[,]" and also list an extensive number of factors to consider when participating in a pursuit, thereby limiting an individual officer's discretion. *Id.* 4019 R-2, at 1, 4-5, 7-9.

However, when an officer merely responds to a call for assistance, the Police Department's primary stated concern is for its officers "to arrive safely on the scene of the call; the second objective is to arrive as soon as possible." *Id.* 4051, at 1. The list of factors for consideration during an emergency situation is not nearly as extensive as the factors listed regarding pursuit activities. *Id.* at 2-3; *compare id. with* Durham Police Dep't, Gen. Order 4019 R-2, at 4-5, 7-9. It is abundantly clear that the Durham Police Department, as well as the General Assembly, distinguishes law enforcement pursuit from routine response activities. The majority's opinion fails to recognize this well established distinction in the law enforcement community.

As an example, the North Carolina State Highway Patrol distinguishes "Chase Procedures" from "Emergency Response." N.C. State Highway Patrol, *Pol'y Manual*, Directive B.2 §§ IV., VI. (Sept. 27, 2002) [hereinafter Highway Patrol]. The Highway Patrol defines "chase" as "[a]n active attempt by one or more officers in authorized Patrol vehicles to apprehend a suspect or violator of the law operating a motor vehicle, while that person is attempting to avoid capture by using high-speed driving or other tactics." *Id.* § II., at 2. In contrast, the Highway Patrol defines "emergency response" as "[t]he act of one or more officers operating authorized Patrol vehicles for the purpose of responding to a situation requiring immediate Police [action] due to a clear and present danger to public or officer safety, a need for immediate apprehension of a violator, or a serious crime in progress." *Id.* at 2-3. Life-threatening situations should be treated as a "high priority that justifies an emergency response[,]" Highway Patrol § III.A.3.a., while pursuits of a continuing moving violator "present a substantial continuing hazard to the public [and] are of a *higher* priority[,]" *id.* § III.A.1.c. (emphasis added). Further, the North Carolina Justice Academy's Basic Law Enforcement Training Manual (Student), cited by the majority and required to be used in all BLET courses in the State of North Carolina as mandated by the North Carolina Administrative Code, 12 NCAC 9B .0205(c) (June 2004), also distinguishes between "emergency response considerations" and "pursuit driving considerations." N.C. Justice Acad., *Basic Law Enforcement Training: Student* § 18F, at 49, 59 (Jan. 2006).

This distinction is not limited to North Carolina; rather, it is a nationwide doctrine in the law enforcement community. The International Association of Chiefs of Police recognizes this distinction between "vehicular pursuit" and "response." Int'l Ass'n of Chiefs of Police, *Manual of Police Traffic Services Policies and*

Procedures §§ 1.1 (June 1, 2004), 1.27 (July 1, 2004), *available at* http://www.theiacp.org/div_sec_com/committees/Highway_Safety.htm [hereinafter IACP]. The IACP defines "vehicular pursuit" as "[a]n active attempt by an officer in an authorized emergency vehicle to apprehend a fleeing suspect who actively is attempting to elude the police." *Id.* § 1.1, III.A. The IACP generally defines a response situation as "any call for service." *Id.* § 1.27, III. In the instant case, what the majority fails to acknowledge is the fact that Officer Kelly was engaged in simply a response situation and nothing more.

The plain language of N.C.G.S. § 20-145 addresses law enforcement personnel engaged in the "chase or apprehension" of law violators or suspects. The majority's attempt to force square pegs into round holes is incorrect, and its construction of this statute to cover both law enforcement officers' "chase or apprehension" of law violators *and* their response activities is simply judicial activism. The proper role of the Court is to interpret the law, rather than to legislate. Unlike the majority, I cannot in good conscience apply pursuit and apprehension law to a simple, routine response situation.

II. The Gross Negligence Standard

As the above analysis reflects, Officer Kelly's actions are not governed by N.C.G.S. § 20-145; his conduct in the instant case should instead be evaluated under an ordinary negligence standard. That is, Officer Kelly's negligence in this simple response activity is evidenced by his "omission of the duty to exercise due care." *Hanes v. Shapiro & Smith*, 168 N.C. 81, 87, 168 N.C. 24, 30, 84 S.E. 33, 36 (1915). However, if the instant case were a pursuit situation, N.C.G.S. § 20-145 is clear and unambiguous in its terms. The statute does not protect law enforcement officers acting in the "chase or apprehension" of law violators from "the consequence of a reckless disregard of the safety of others." N.C.G.S. § 20-145.[6] This Court has clearly interpreted N.C.G.S. § 20-145 as establishing a standard of care for law enforcement officers, rather than an exemption from the statute. *Parish v. Hill*, 350 N.C. at 238, 513 S.E.2d at 551.

Contrary to this Court's well-reasoned earlier precedent, the decision in *Young v. Woodall* violated the basic tenet of *stare decisis* in

6. The Highway Patrol requires its troopers to exercise "due regard for the safety of others" in both response and pursuit or chase situations. Highway Patrol §§ IV.A., VI.A. The IACP prohibits officers from driving in a "reckless manner or without due regard for the safety of others" in high priority response situations, IACP § 1.27, IV.B.; in pursuit situations, officers may not "drive with reckless disregard for the safety of themselves or of other road users," *id.* § 1.1, IV.B.4.

departing from the well-established, applicable, ordinary negligence standard of care when it adopted a higher gross negligence standard regarding N.C.G.S. § 20-145. 343 N.C. at 462, 471 S.E.2d at 359 ("It seems clear to us that the standard of care intended by the General Assembly involves the reckless disregard of the safety of others, which is gross negligence.").[7] Most telling of this Court's disregard for the principle of *stare decisis* in *Young* was the authoring justice's acknowledgment that the application of the earlier precedent by the Court of Appeals was "certainly reasonable." *Id.* Further, this abrupt departure lacked any comprehensive analysis or reason; nevertheless, gross negligence is now the applicable standard under N.C.G.S. § 20-145, though I would submit this interpretation is contrary to public policy.

Correspondingly, our analysis thus turns upon the seamless web of the facts of the case *sub judice* and the *corpus juris* of gross negligence. While the majority confidently states the definition of gross negligence is "reckless disregard of the safety of others," as stated in N.C.G.S. § 20-145, a survey of this Court's precedent, of various jurisdictions in the United States, and of persuasive scholarly analysis reveals the enigmatic nature of gross negligence. The difficulty in defining gross negligence is that it is "a term so nebulous" with "no generally accepted meaning." W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 34, at 212 (5th ed. 1984). The Supreme Court of South Carolina most recently defined gross negligence as

> [T]he "intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally

7. Originally, this Court applied an ordinary negligence standard to tortious actions committed by law enforcement officers acting under N.C.G.S. § 20-145. *See Goddard v. Williams*, 251 N.C. at 133-34, 110 S.E.2d at 824-25 (" 'We know of no better standard by which to determine a claim of negligence on the part of a police officer than by comparing his conduct * * * to the care which a reasonably prudent man would exercise in the discharge of official duties of like nature under like circumstances.' ") (citation omitted). This Court then modified its approach to N.C.G.S. § 20-145 in *Bullins v. Schmidt*, 322 N.C. 580, 369 S.E.2d 601, by holding the ordinary negligence standard of care established in *Goddard* should only apply to a law enforcement officer's actions under N.C.G.S. § 20-145 when the officer's vehicle actually collides with another person, vehicle, or object. *Id.* at 582, 369 S.E.2d at 603. When the officer's vehicle did not collide with another person, vehicle, or object, the applicable standard under N.C.G.S. § 20-145 was gross negligence. *Id.* at 583, 369 S.E.2d at 603. This Court abandoned the above precedent in *Young v. Woodall* by holding gross negligence to be the applicable standard of care for all incidents occurring under N.C.G.S. § 20-145. 343 N.C. at 462, 471 S.E.2d at 359. Other jurisdictions continue to apply an ordinary negligence standard to their versions of N.C.G.S. § 20-145. *See Tetro v. Town of Stratford*, 189 Conn. 601, 609-10, 458 A.2d 5, 9-10 (1983); *Haynes v. Hamilton Cty.*, 883 S.W.2d 606, 609-10 (Tenn. 1994); *Travis v. City of Mesquite*, 830 S.W.2d 94, 98-99 (Tex. 1992).

> that one ought not to do." Gross negligence is also the "failure to exercise slight care" and is "a relative term and means the absence of care that is necessary under the circumstances[,]"

which reflects the elusive nature of a workable gross negligence definition. *Clark v. S.C. Dep't of Pub. Safety*, 362 S.C. 377, 383, 608 S.E.2d 573, 576-77 (2005) (holding the question of whether a law enforcement officer's pursuit activities constituted gross negligence was for the jury) (citations omitted).

Our Court has defined gross negligence as " 'wanton conduct done with conscious or reckless disregard for the rights and safety of others.' " *Yancey v. Lea*, 354 N.C. 48, 52, 550 S.E.2d 155, 157 (2001) (quoting *Bullins*, 322 N.C. at 583, 369 S.E.2d at 603); *Parish*, 350 N.C. at 239, 513 S.E.2d at 551. In defining willful and wanton conduct, this Court stated:

> An act is done wilfully when it is done purposely and deliberately in violation of law, or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason. . . .
>
> An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.

Foster v. Hyman, 197 N.C. 189, 191, 148 S.E. 36, 37-38 (1929) (citations omitted). We note "this Court has often used the terms 'willful and wanton conduct' and 'gross negligence' interchangeably to describe conduct that falls somewhere between ordinary negligence and intentional conduct." *Yancey*, 354 N.C. at 52, 550 S.E.2d at 157. Finally, "[a]n act or conduct rises to the level of gross negligence when the *act* is done purposely and with knowledge that such act is a breach of duty to others, i.e., a *conscious* disregard of the safety of others." *Id.* at 53, 550 S.E.2d at 158.

When a law enforcement officer is engaged in a high speed vehicle operation under N.C.G.S. § 20-145, "the law enforcement officer must conduct a balancing test, weighing the interests of justice in apprehending the fleeing suspect with the interests of the public in not being subjected to unreasonable risks of injury." *Parish*, 350 N.C. at 236, 513 S.E.2d at 550; *see also Haynes v. Hamilton Cty.*, 883 S.W.2d at 613 ("[P]ublic safety is the ultimate goal of law enforcement, and . . . when the risk of injury to members of the public is high,

that risk should be weighed against the police interest in immediate arrest of a suspect.").[8]

Considering the precedent of this Court, I believe gross negligence can be found on the spectrum of liability beyond ordinary negligence while not reaching recklessness. The Supreme Court of the United States noted gross negligence and recklessness often share the same characteristics. *See Farmer v. Brennan*, 511 U.S. 825, 836 n.4 (1994) ("Between the poles [of negligence and purpose or knowledge] lies 'gross negligence' too, but the term is a 'nebulous' one, in practice typically meaning little different from recklessness as generally understood in the civil law . . . ."). However, in North Carolina, recklessness

> is distinguished from negligence by the degree of certainty that a bad outcome will occur as a result of defendant's misconduct and the ease with which it could have been avoided. The more certain the bad outcome and the easier it is to avoid, the more likely the defendant is guilty of heightened culpability.

David A. Logan & Wayne A. Logan, *North Carolina Torts*, § 6.20, at 159 (2d ed. 2004). Specifically, "reckless disregard of safety" is defined as:

> [A]n act or intentional[] fail[ure] to do an act which it is [the actor's] duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Restatement (Second) of Torts, § 500, at 587 (1965). However, the Restatement also relates that reckless misconduct differs

> from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves

8. Similarly, in accordance with the Highway Patrol, troopers are required to conduct a balancing test when deciding whether to engage in "Extraordinary Patrol Vehicle Operations," including the "nature and gravity of the offense or situation" and external physical conditions (such as the weather, nature of the neighborhood, and pedestrian or vehicular traffic density). Highway Patrol § III. The Highway Patrol also specifically states that when responding to an emergency, "[Troopers] shall not exceed the posted speed limit when . . . responding to a request for assistance unless the imminent danger to human life or the public safety outweighs the considerations above." *Id.* § VI.B.

> a risk substantially greater in amount than that which is necessary to make his conduct negligent.

Id. § 500 cmt. g. "[T]hat negligence" referenced in the above passage is gross negligence, meaning negligent behavior beyond ordinary negligence but not satisfying the definition of recklessness.

Unfortunately, the majority's attempted clarification of gross negligence jurisprudence in the instant case leaves gross negligence analysis more confusing than ever before. In relying upon a punitive damages statute which is completely inapplicable to the instant case, this Court has once again departed from precedent as to the definition of gross negligence. Gross negligence in North Carolina now encompasses actions which do not necessarily reach the level of willful and wanton conduct. The majority then blurs gross negligence further by evaluating Officer Kelly's actions using the supposedly discarded terms "wicked purpose"[9] and "wanton conduct." Where this places the already elusive definition of gross negligence remains a question unanswered by the majority in the instant case. I, therefore, submit gross negligence in North Carolina is meant to encompass actions well beyond ordinary negligence and that nearly reflect a conscious disregard for the safety of others, which is apparent in the instant case by Officer Kelly's operation of his vehicle.[10]

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9. Clearly, gross negligence cannot include an analysis of an actor's "wicked purpose" because doing so would attribute a factually reckless or malicious state of mind to gross negligence liability. This analysis would preclude recovery by an individual against a law enforcement officer unless the officer committed an act that not only subjected him or her to civil liability, but possibly to criminal responsibility as well. Surely, this could not be the intended effect of N.C.G.S. § 20-145.

10. An alternative method of evaluating gross negligence is to analyze the level of diligence owed by Officer Kelly to the public. This Court has explained:

> It is said that gross negligence is "ordinary negligence with a vituperative adjective." It would, perhaps, be more logical to apply the adjective of comparison to the term "diligence" rather than to the correlative term, "negligence." . . . Thus, where the exercise of great diligence is the duty imposed, a slight omission of care—*i.e.*, slight negligence—will be regarded as a failure to exercise commensurate care. . . . When only slight diligence is required, there must be a gross omission of diligence—an omission of almost all diligence—in order to . . . constitute negligence . . . .
>
> "Slight diligence is that which persons of less than common prudence or, indeed, of any prudence at all, take of their own concerns." . . . It is probably safe to say that the diligence shown in their own affairs by men careless in their habits, and not necessarily prudent by nature, but of ordinary intelligence, is slight diligence.

Shapiro & Smith, 168 N.C. at 87-88, 168 N.C. at 30, 84 S.E. at 36. According to this analysis, a person who owes a duty of great diligence, such as Officer Kelly in the instant case, fails to exercise the appropriate standard of care if the person

Application of Gross Negligence in the Instant Case

It is well established that on a motion for summary judgment, the trial court is required to view the evidence forecast in the light most favorable to the nonmoving party. *Parish*, 350 N.C. at 236, 513 S.E.2d at 550. Further, all inferences must be resolved against the movant. *Holley v. Burroughs Wellcome Co.*, 318 N.C. 352, 355-56, 348 S.E.2d 772, 774 (1986); *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E.2d 392, 399 (1976).

In the instant case, defendants' motion for summary judgment as to plaintiff's gross negligence claim was properly denied by the trial court after a consideration of *all* relevant evidence presented; however, the Court of Appeals erroneously reversed the trial court's denial of summary judgment. Regrettably, today's majority opinion omitted certain facts found in the record that were presented to the trial court at the time of defendants' motion for summary judgment. Therefore, in keeping with our Court's duty to consider all materials in evaluating a party's motion for summary judgment, my analysis and conclusion differ significantly from the majority's. *Dendy v. Watkins*, 288 N.C. 447, 452, 219 S.E.2d 214, 217 (1975) ("When the motion for summary judgment comes on to be heard, the court may consider the pleadings, depositions, admissions, affidavits, answers to interrogatories, oral testimony and documentary materials . . . .").

The speed with which Officer Kelly operated his vehicle during the incident in question is not an all-inclusive range of forty-five to sixty miles per hour. The record reflects the specific speed of Officer Kelly's vehicle at specific locations up until the point of impact with the pedestrian-plaintiff. This speed determination was rendered from an accident reconstruction expert's scientific calculations as to defendant's vehicular speed based upon Durham Police Department video footage reflecting the vehicle's travel over specific periods of

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makes a slight or minimal omission of care. In the alternative, this Court also equates finding an individual grossly negligent with finding an individual owed only slight diligence to the injured party. Thus, by applying a gross negligence standard in the instant case, the majority asserts Officer Kelly owed a duty of only slight diligence to the public; that is, Officer Kelly is treated as a person "of less than common prudence" or who is "careless in [his] habits." *Id.* I cannot agree that a law enforcement officer, operating his vehicle at speeds as high as seventy-four miles per hour on a populated urban road, should be held to the standard of a buffoon. Rather, Officer Kelly's occupation and actions taken in the instant case imposed upon him a duty of great diligence, and a slight omission of care by Officer Kelly should subject him to liability.

time. For example, at the time Officer Kelly approached the railroad tracks, the record reflects he was traveling approximately seventy-three miles per hour; at the point of impact with Ms. Jones, Officer Kelly was traveling between forty-five and sixty miles per hour. Disregard of such specific and reliable scientific data and subsequent use of one general range of speed is duplicitous and misconstrues the factual circumstances surrounding Officer Kelly's actions. Therefore, our analysis of Officer Kelly's operation of the vehicle with regards to speed should not be restricted solely to the point in time at which Officer Kelly struck Ms. Jones.

The majority in the instant case creates three dispositive factors for gross negligence analysis and evaluates each factor independently, rather than applying the totality of circumstances analysis which has been historically associated with negligence jurisprudence. *See* Charles E. Daye & Mark W. Morris, *North Carolina Law of Torts*, § 16.20, at 155-56 (2d ed. 1999) ("Negligence is necessarily a relative term, and every case of negligence is controlled by its own set of facts. . . . [T]hus, all surroundings or attendant circumstances must be taken into account."). Therefore, the factors in the instant case are interrelated and dependent and cannot be evaluated in isolation to determine whether gross negligence occurred. Accordingly, I would submit the totality of Officer Kelly's actions in responding—from the speeding at up to seventy-four miles per hour through a densely populated area at nine o'clock in the morning, to the loss of control of his vehicle when it went airborne at the railroad tracks, to the subsequent driving on the wrong side of the road, and through the failure to brake before striking a pedestrian—collectively reflects gross negligence and demonstrates a pattern of reckless disregard for the safety of all citizens.

As previously set out, each time this Court has applied the gross negligence standard under N.C.G.S. § 20-145, the Court addressed law enforcement pursuit activities rather than routine response calls. Thus, the majority's direct application of this precedent to the present case is misplaced. A pursuit activity entails a greater sense of urgency on the part of law enforcement personnel because of a known danger presented to society by a fleeing suspect. A response activity, especially when the responding officer is unaware of the situation to which he or she is responding, does *not* present nearly the same urgency as the pursuit of a known, fleeing law violator. Thus, because of the general lack of exigent circumstances characteristic of response activities, as compared to pursuit activities, the standard

of care as to the former should not be given the same deference as that applied to the latter.[11]

The differentiation in analysis between pursuit and response activities is not only grounded in common sense, but also in the very law enforcement policies then governing Officer Kelly's conduct. The Durham Police Department distinguishes pursuit-related officer conduct from response-related officer conduct. The different activities have separate and dissimilar lists of factors to consider when participating in such activities. For example, police pursuits in Durham are allowed only when "the police officer reasonably believes that the violator has committed a violent felony . . . **and** the officer reasonably believes that, by the nature of the crime(s) committed, the violator poses a threat of serious injury to the public or other police officers if he/she is not apprehended immediately." Durham Police Dep't, Gen. Order 4019 R-2 at 3. Even if Officer Kelly's actions were construed as a pursuit, he was in contravention of his own department's policies that were designed to regulate his conduct. He had no knowledge a crime had been committed, much less a violent felony. Once a pursuit has begun, Durham also requires its officers to consider factors such as whether the identity of the violator is known, the likelihood of a successful stop, external conditions (such as population density, road conditions, and weather), and officer-specific factors (such as an officer's driving skills, his or her familiarity with the roads, and the condition of the officer's vehicle)—all of which weigh against the actions taken by Officer Kelly. *Id.* at 4-5.

Contrary to pursuit requirements, Durham lists more general considerations for officers when engaging in routine response situations, such as the unpredictable reaction of civilian drivers, the officer's view of all lanes of traffic at intersections, road conditions, and the increased hazard of driving left of the center line. Durham Police Dep't, Gen. Order 4051, at 2-3. Most telling, the Durham Police Department has recently amended General Order 4051 governing emergency vehicle operation to include a provision directly applicable to the present case: "All officers responding to calls shall limit the speed of their vehicle to a maximum of 15 miles per hour above the posted speed." *Id.* 4051 R-1, at 3 (Jan. 10, 2005). Though this "subsequent remedial measure" could not be considered as evidence of neg-

11. While law enforcement pursuit activities present a greater sense of urgency than mere law enforcement response activities, it is the unfortunate reality that "[s]erious injury, property damage and death often result from pursuits and/or emergency responses." Keller Mark McGue & Tom Barker, *Emergency Response and Pursuit Issues in Alabama*, XV Am. J. of Police, No. 4, at 79, 79 (1996).

ligence by the City of Durham or Officer Kelly under the North Carolina Rules of Evidence, *see* N.C. R. Evid. 407; *Lowe v. Elliott*, 109 N.C. 422, 424, 109 N.C. 581, 584, 14 S.E. 51, 51-52 (1891), I commend the Durham Police Department for its recognition of the need for such an amendment mandating that their officers' routine response calls be executed consistent with their responsibility to act with due regard for the safety of others.

Further, the majority relies upon the North Carolina Justice Academy's *Basic Law Enforcement Training Manual* to justify Officer Kelly's evasive maneuver taken to avoid hitting the plaintiff. However, while "[e]vasive steering or sudden lane change" is one accepted method of collision avoidance for law enforcement vehicular operations, the acceptable method of collision avoidance listed first in the manual is "[q]uick, sudden braking." N.C. Justice Acad., *Basic Law Enforcement Training: Student* § 18F, at 48. The BLET Manual, required by the North Carolina Administrative Code, 12 NCAC 9B .0205(c) (June 2004), to be used in all North Carolina law enforcement training courses, also specifically states: "In those instances where an emergency driving response is justified, the officer should remember that excessive speeds are seldom, if ever, warranted during the response." N.C. Justice Acad., *Basic Law Enforcement Training: Student* § 18F, at 52. In the instant case, Officer Kelly's actions were not only contrary to his own department's mandate, but also statewide BLET policies.

Additionally, Officer Kelly was engaged in a response activity at approximately 9:00 in the morning. This difference in time between the instant case and the majority's cited precedent, all of which concern nighttime incidents, is crucial to the analysis of this case because of the difference in pedestrian and vehicular traffic density on public roads at the different times. I cannot agree with the majority's assertion that high speed vehicular activity is more dangerous at the quiet, desolate hour of 4:00 a.m. than it is at 9:00 a.m., during the beginning of the work day.

Evaluating the different actions or circumstances leading up to the traffic accident in the present case, and applying the facts to our jurisprudence in the light most favorable to the plaintiff, it is clear to me defendant's actions rise to the level of gross negligence, if not pure recklessness. Specifically, the record reflects that:

1. When Officer Kelly responded to Officer Fox's call for backup at about 9:00 a.m. on 15 September 2000, Officer Kelly was approximately two and one half miles away from Officer Fox's

location, and he knew or should have known of the eight additional officers who were also responding to the call;

2. Officer Fox was not alone at the scene of the domestic disturbance complaint, but was accompanied by Officer McDonough at the time she requested backup;

3. Officer Kelly knew or should have known the posted speed limit on the street where the traffic accident occurred was in fact thirty-five miles per hour. Further, he admitted during deposition any speed over forty-five miles per hour on this particular stretch of street would constitute disregard for the safety of others;

4. An accident reconstruction expert estimated Officer Kelly's speed over the course of his travel to be anywhere from forty-five miles per hour to seventy-four miles per hour;

5. Officer Kelly, based upon his familiarity with the area, knew or should have known the section of the road on which he was speeding was a densely populated urban area, especially near the railroad tracks where a tree was located and people frequently were "hanging out";

6. Officer Kelly knew or should have known there was an incline at the railroad tracks followed by a "serious dip" which he was about to cross, he could not see any pedestrians until he came over the hill, and the intersection after the railroad tracks was complex in design;

7. Due to the manner of operation and excessive speed, Officer Kelly lost control of his vehicle, causing his vehicle to go airborne after proceeding over the railroad tracks;

8. At the point of impact with the pedestrian, Officer Kelly was operating his vehicle on the wrong side of the road, had not applied his brakes, and was traveling at a speed of forty-five to sixty miles per hour; and

9. As a direct consequence of Officer Kelly's actions, the pedestrian was hit by Officer Kelly's vehicle and was thrown six feet into the air, after which she landed on the pavement and came to rest seventy-six feet away from the location where she was struck. The impact of Officer Kelly's vehicle with the pedestrian severely broke the pedestrian's shoulder and both of her legs.

As stated above, when determining whether a law enforcement officer acted willfully, the Court must consider whether the totality of the officer's actions was done purposely, knowingly, or "without yielding to reason[,]" and not consider if he intended the ensuing result. *Yancey*, 354 N.C. at 52, 550 S.E.2d at 157; *Foster*, 197 N.C. at 191, 148 S.E. at 37. Officer Kelly operated his police vehicle in the present case knowingly or "without yielding to reason." His unwarranted decision to travel at such a high speed and to take evasive action instead of applying the brakes upon seeing the pedestrian in the street evidences his failure to act without reason and is contrary to recognized law enforcement policy and procedures.

Additionally, the Court of Appeals' reversal of the trial court's order denying summary judgment was incorrect because a reasonable jury could find Officer Kelly acted wantonly or "*needlessly*, manifesting a reckless indifference to the rights of others." *Foster*, 197 N.C. at 191, 148 S.E. at 38 (emphasis added). Surely, Officer Kelly's actions, considering he was engaged in *response* and not pursuit activities, were needless and manifested a reckless indifference for the public. Officer Kelly's knowledge of the area's dense population, the characteristics of the road, his disregard for a safe speed (as high as seventy-four miles per hour in a thirty-five mile per hour zone), and subsequent airborne travel are all factors sufficient to lead a jury to find Officer Kelly acted with a "reckless disregard of the safety of others" and contrary to local and national law enforcement doctrine,[12] the intent of the General Assembly, and our established jurisprudence.

Further, in both the record and at oral argument, it was acknowledged that Officer Kelly's response to Officer Fox's call contradicted the Durham Police Department's Policy on Response Priorities. Durham Police Dep't, Gen. Order 4001. At the time Officer Kelly began his response to Officer Fox, who was accompanied by another officer at the scene, he was aware at least three, and perhaps as many as eight, other officers were independently responding to the initial call for backup. The maximum authorized number of officers permit-

12. IACP specifically requires its officers engaged in response activities to "drive at an appropriately reduced speed whenever necessary to maintain control of their vehicles, taking into account road, weather, vehicle, and traffic conditions; and [to] continually reevaluate these conditions during the response." IACP § 1.27, IV.B. There is no question that allowing one's vehicle to become airborne is a loss of vehicular control. Officer Kelly, with his knowledge of the road, should have reduced his speed to maintain control of his vehicle. His reckless lack of judgment in operating his police vehicle is an abomination to law enforcement policy and procedure.

ted by Durham Police Department Policy to respond to an initial request for backup that does not specify the number of units needed is three—two officers and one supervisor. *Id.* Accordingly, Officer Kelly's response to Officer Fox's request for assistance, even if it had been executed with due regard for the safety of others, was not in accordance with Durham Police Department Policy to which he was mandated to adhere. By ignoring established policy, Officer Kelly knowingly engaged in an unnecessary response to a call for backup. In the simplest of terms, when a call for backup is made, every officer cannot respond. If they did, the citizens of Durham would find themselves unprotected; this is why Durham limits the number of officers allowed to respond to calls for assistance, an order specifically ignored by Officer Kelly. Thus, Officer Kelly, or any other reasonably prudent police officer in this response situation, should have realized the high rate of speed he elected to operate his vehicle was not only more dangerous than beneficial to public safety, but also completely unnecessary considering the number of officers present at the scene and responding to the call for backup.

I surely do not intend to convey a lack of appreciation for the dangerous and admirable work our responsible law enforcement officers perform on a daily basis. They are truly the thin blue line that protects society from the criminal element, and they should be afforded every reasonable deference. This having been said, when an officer acts with such blatant disregard for public safety, as witnessed in the instant case, I simply cannot turn a blind eye to the resulting harm. As the Supreme Court of Tennessee recognized:

> [P]olice officers have a duty to apprehend law violators and . . . the decision to commence or continue pursuit of a fleeing suspect is, by necessity, made rapidly. In the final analysis, however, a police officer's paramount duty is to protect the public. Unusual circumstances may make it reasonable to adopt a course of conduct which causes a high risk of harm to the public. However, such conduct is not justified unless the end itself is of sufficient social value. The general public has a significant interest in not being subjected to unreasonable risks of injury as the police carry out their duties. We agree with the Texas Supreme Court's observation, that "[p]ublic safety should not be thrown to the winds in the heat of the chase."

Haynes v. Hamilton Cty., 883 S.W.2d at 611 (footnote and citation omitted).

A reasonable juror could find Officer Kelly's actions, from the beginning of his response to Officer Fox's call for backup until his collision with Ms. Jones, were grossly negligent. Officer Kelly acted "without yielding to reason," needlessly, and with a strong degree of certainty that the risk his actions posed to the public outweighed his unwarranted response. Officer Kelly's actions were arguably reckless misconduct according to our precedent, and thus his actions easily satisfy our gross negligence standard.

Regrettably, if the truth be known, Officer Kelly's behavior in total disregard for the rights and safety of others is, in reality, more than gross negligence—it is simply reprehensible conduct. On that day, Officer Kelly was the law, and he acted as he did because he could. The ultimate tragedy is the pedestrian-plaintiff, an innocent bystander, will not have her day in court. I would submit if the shoe were on the other foot, and Officer Kelly was performing his police functions and observed a citizen operating his vehicle in this manner, Officer Kelly would have not only issued a citation for the citizen's reckless behavior, but would have likely placed the citizen in handcuffs and taken him before a magistrate. Therefore, I believe whether Officer Kelly's actions were in fact grossly negligent is a question that should have been submitted to the jury for their determination. Unfortunately, the majority today unnecessarily contorts the facts of the instant case and erroneously applies an ambiguous standard. As a result, the majority's decision leaves our citizens and our courts with one question: If this case is not gross negligence, then what is gross negligence? I respectfully dissent.

STATE OF NORTH CAROLINA v. JEFFREY NEAL DUKE

No. 57A04

(Filed 16 December 2005)

1. Evidence— prior crimes or bad acts—violent behavior—opening the door to character evidence

The trial court did not err in a double first-degree murder case by overruling defendant's objection to the admission of specific acts of bad conduct during redirect examination of his half-sister concerning defendant's violent behavior, because: (1) whenever a defendant opens the door to character evidence by

introducing evidence of his own pertinent character trait, the prosecution may rebut that evidence with contrary character evidence; and (2) the prosecution's rebuttal of defendant's evidence of good character through the use of specific instances of conduct was proper.

2. Criminal Law— prosecutor's argument—judge may tell jurors that defendant acted with premeditation and deliberation

The trial court did not abuse its discretion in a double first-degree murder case by failing to intervene ex mero motu during the prosecution's closing argument stating that the judge may tell the jurors that defendant acted with premeditation, because: (1) the prosecution's statement did not directly and unambiguously tell the jury the court formed an opinion on the evidence; (2) as there was no objection, and therefore no overruling by the trial court of defendant's objection, this idea was not solidified in the jurors' minds; (3) the prosecution's argument did not travel outside the record as prohibited by N.C.G.S. § 15A-1230(a); and (4) the trial court instructed the jury the court was impartial and the jury would be mistaken to believe otherwise.

3. Criminal Law— instruction—confession—supporting evidence—invited error

The trial court did not err in a double first-degree murder case by its instruction to the jury on confession, because: (1) the instruction conformed to the North Carolina Pattern Jury Instruction on confession; (2) an instruction by the trial court stating the evidence tends to show the existence of a confession to the crime charged is not an impermissible comment invading the province of the jury and its fact-finding function; (3) considering defendant's admissions which tended to show premeditation and deliberation, the statement did support inclusion of the confession instruction; (4) the instruction left it to the jury to conclude whether the confession occurred and what weight to give it; and (5) defendant cannot show prejudice on this issue when it was defendant, not the prosecution, who requested this jury instruction.

4. Sentencing— capital—prior crimes or bad acts—threat made by defendant

The trial court did not err in a double first-degree murder case by admitting testimony during the penalty phase concerning a threat made by defendant to a witness, because: (1) it was

proper for the prosecution to attack the credibility of the witness and also to discredit the witness's contention defendant was peaceful by showing he threatened the lives of the witness, her child, and her husband after an argument concerning a funeral; (2) the prosecution simply impeached the witness with her prior inconsistent statements to a detective concerning the threats which clearly contradicted her direct testimony; (3) when a witness gives his opinion as to the character of another, the cross-examiner may test that opinion with questioning on specific acts of conduct; (4) the evidence concerning the threat, while also impeaching the witness and challenging her opinion, went directly to the heart of defendant's violent nature; and (5) the prosecution was entitled to submit evidence contrary to the assertion of defendant's proposed mitigating circumstance that defendant had a deep emotional bond with this witness.

5. Sentencing— capital—objection to statement—defendant wants to apologize to victims' families—harmless error

Any error by the trial court in a double first-degree murder case by sustaining the prosecution's objection to the statement by defendant's mother during the penalty proceeding that defendant wanted to apologize to the victims' families was harmless beyond a reasonable doubt, because: (1) any possible error was caused by defendant's failure to offer a proper foundation to ensure the reliability of the testimony from his mother; and (2) the jury heard other sufficient testimony of defendant's remorse during the penalty proceeding through a doctor who opined that defendant was remorseful for his actions.

6. Sentencing— capital—failure to allow testimony—defendant would adjust well to life in prison—harmless error

Although defendant contends the trial court erred in a double first-degree murder case by failing to allow defendant's mother to testify that defendant would adjust well to life in prison, any error was harmless beyond a reasonable doubt because three other witnesses gave testimony from which the jury could have found defendant would adjust well to prison life.

7. Sentencing— capital—testimony—defendant's mental state—harmless error

Although defendant contends the trial court erred in a capital sentencing proceeding by sustaining the prosecution's objection when defendant's sister testified that defendant was just caught

in a bad situation and that he did not intend for this to happen, any error was harmless beyond a reasonable doubt because: (1) defendant failed to lay a proper foundation for testimony concerning his mental state; (2) it appears from the context of the testimony that the witness was speaking of all the actions of the night and early morning of the murders, not the murders in particular, and the jury already decided in the guilt-innocence proceeding that defendant intended to commit these murders; (3) defendant did not submit for consideration a good character mitigating circumstance; and (4) defendant's mother, his son, and his childhood friend testified to facts and circumstances which tended to show defendant was a good person.

8. Sentencing— capital—prosecutor's argument—expert witness the $15,000 man

The trial court did not abuse its discretion in a double first-degree murder case by failing to intervene ex mero motu during the prosecution's penalty proceeding closing argument that referred to defendant's expert witness as the $15,000 man, because the statement was not grossly improper when it merely emphasized that the expert's fee in the case was $15,000 and that the jury should take that fact into account when determining the credibility of the expert and the weight it should place on his testimony.

9. Sentencing— capital—prosecutor's argument—defendant's choice to turn back on family—crap

The trial court did not abuse its discretion in a capital sentencing proceeding by failing to intervene ex mero motu during the prosecution's penalty proceeding closing argument that used the word crap, because the prosecution did not engage in any name-calling nor did the prosecutor improperly disparage defendant's argument, but instead the prosecutor discussed the choice defendant made to turn his back on his family and pursue instead a life of drug abuse, alcohol abuse, and violence, which culminated in a senseless and brutal double murder.

10. Sentencing— capital—mitigating circumstances—mental or emotional disturbance—capacity to appreciate criminality of conduct or to conform conduct to requirements of law impaired

The trial court did not err in a capital sentencing proceeding by refusing to grant defendant's request to give the jury peremptory instructions on the N.C.G.S. § 15A-2000(f)(2) mitigating cir-

cumstance that the capital felony was committed while defendant was under the influence of mental or emotional disturbance and the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, because: (1) there is nothing in the record or the transcript to indicate such a request was made in writing by defendant; and (2) even if the requested instructions had been submitted in writing the evidence supporting the (f)(2) and (f)(6) mitigating circumstances was not uncontroverted.

11. Sentencing— capital—nonstatutory mitigating circumstances—provocation

The trial court did not err in a capital sentencing proceeding by denying defendant's request to submit to the jury the nonstatutory mitigating circumstance that defendant's actions toward the victims were influenced to some degree by their behavior toward him and that he reacted to what he thought was provocation on the part of the victims, because a defendant is not entitled to place the question of his guilt of first-degree murder back onto the table for the jury to decide when the jury decided during the guilt-innocence proceeding that defendant was guilty of first-degree murder, thus rejecting his contention he acted under perceived provocation.

12. Sentencing— capital—mitigating circumstances—reinstruction to the jury

The trial court did not commit plain error in a capital sentencing proceeding by reinstructing the jury on mitigating circumstances after the jury submitted a question to the court seeking clarification, because: (1) the trial court did not instruct the jurors that the statutory mitigators were not to be found unless the jury concluded they had mitigating value; and (2) if any error occurred in the reinstruction, this error was to defendant's benefit since it implied all the listed circumstances had some mitigating value, rather than instructing the jury it should not find a nonstatutory mitigating circumstance unless it deemed that circumstance to exist and have mitigating value.

13. Sentencing— capital—aggravating circumstance not submitted in first trial—double jeopardy

Principles of double jeopardy did not prevent the trial court from submitting the N.C.G.S. § 15A-2000(e)(9) aggravating cir-

cumstance for the murder of one of the victims in this trial even though it was not submitted during the penalty proceeding of defendant's first trial, because: (1) the bar against double jeopardy does not prevent a sentence of death unless a jury finds no aggravating circumstance existed in a prior trial and thereby would have been required to recommend a sentence of life imprisonment without parole during the first trial, and in the instant case the jury in the first trial found an aggravating circumstance and recommended death for defendant's murder of the victim; and (2) contrary to defendant's assertion, the holding in *Ring v. Arizona*, 536 U.S. 584 (2002), does not change this result since it simply requires the jury, rather than the trial court, to find any aggravating circumstance which leads to the imposition of the death penalty.

14. Sentencing— capital—aggravating circumstances—especially heinous, atrocious, or cruel

Defendant's constitutional rights were not violated in a capital sentencing proceeding even though he contends the especially heinous, atrocious, or cruel aggravating circumstance is unconstitutionally vague and overbroad, because: (1) the pattern jury instruction at 1 N.C.P.I.—Crim. 150.10 is not unconstitutionally vague or overbroad with regard to the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance and our Supreme Court's appellate narrowing of the especially heinous, atrocious, or cruel aggravating circumstance has been incorporated into the pattern jury instruction; (2) contrary to defendant's assertion, our Supreme Court's conducting appellate review of a question submitted to the jury does not make it a cofinder of fact with the jury in violation of *Ring v. Arizona*, 536 U.S. 584; and (3) this argument by defendant is speculative in nature when defendant did not assert in his brief or at oral argument that the murders committed by him were not especially heinous, atrocious, or cruel or for some reason require appellate narrowing.

15. Sentencing— capital—weighing aggravating and mitigating circumstances—Issue 3

The trial court did not commit plain error in a capital sentencing proceeding by its submission of Issue 3 regarding the jury's determination of the weight of mitigating and aggravating circumstances, because: (1) a capital punishment scheme which requires a recommendation of death upon the finding of certain factors or circumstances does not violate the Constitution so

long as the jury is allowed to consider and give effect to all relevant mitigating evidence; (2) North Carolina's capital punishment scheme does not limit in any way the mitigating evidence the jury may consider in making its decision; and (3) our statute does not mandate death based solely upon the weighing of mitigating and aggravating circumstances.

16. Sentencing— death penalty—proportionate

The imposition of the death penalty was not disproportionate in a double first-degree murder case, because: (1) the jury found three aggravating circumstances for both murders including that defendant had been previously convicted of a felony involving the use of violence to the person; the murders were especially heinous, atrocious, or cruel; and the murders were part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against other persons; (2) the murders in this case were especially brutal when defendant plunged knives into the neck and chest of one victim and into the upper abdomen of the other after the victims were unconscious or dead from the violent blows of a fire extinguisher; and (3) the death sentence has never been found to be disproportionate in a double-murder case.

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing consecutive death sentences entered by Judge Timothy L. Patti on 26 September 2003 in Superior Court, Gaston County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. Heard in the Supreme Court 18 October 2005.

Roy Cooper, Attorney General, by G. Patrick Murphy and Mary D. Winstead, Special Deputy Attorneys General, for the State.

Staples S. Hughes, Appellate Defender, by Benjamin Dowling-Sendor, Assistant Appellate Defender, for defendant-appellant.

BRADY, Justice.

During the early morning hours of 20 March 1999, defendant Jeffrey Neal Duke brutally and mercilessly murdered Ralph Arthurs and Harold Grant, beating them with a fire extinguisher and stabbing both men while they were down leaving a total of four knives in the

victims' bodies. On 19 September 2003, a jury found defendant guilty of two counts of first-degree murder based on malice, premeditation, and deliberation[1], and subsequently on 26 September 2003, the jury recommended a sentence of death. We find no error in defendant's conviction or sentence.

FACTUAL BACKGROUND

As seemed to be his custom, defendant began consuming alcoholic beverages on 19 March 1999. After drinking Jim Beam bourbon whiskey and Long Island Iced Tea, defendant argued with Michelle Lancaster, a female with whom he was living. He slapped Michelle on the head, knocking her to the ground, took her money and a bottle of prescription medication, and left the residence. He eventually ended up at the apartment of Ralph Arthurs. Ralph Arthurs, Harold Grant, and defendant sat in Arthurs's apartment while defendant and Arthurs drank alcohol. Soon, Arthurs and Grant began discussing defendant's earlier beating of Robin Williams, defendant's former girlfriend. Arthurs demanded defendant leave the apartment, and defendant asked if he could finish his beer first. Grant got up and started walking towards the sink. When Grant got close to a knife block located on the counter beside the sink, defendant claims he thought Grant was going to attack him with a knife, although defendant admits Grant could have just been getting water.

Defendant stood up, grabbed a fire extinguisher, and started beating both Grant and Arthurs. At one time Grant got up from the floor and attempted to leave the apartment. Defendant dragged him back in and continued beating him. Defendant then stabbed Arthurs in the upper abdomen, and stabbed Grant in the face, chest, and neck. Defendant left the knives in Arthurs's upper abdomen, Grant's chest, and on both sides of Grant's neck. Grant's autopsy reflected the stab wounds were likely inflicted after Grant was rendered unconscious or had died. One knife recovered from Grant's neck was bent at a ninety-degree angle, indicating the force with which defendant plunged the knife into Grant's lifeless body. The cause of death for both murders was blunt force trauma to the head. Arthurs's pants were around his knees, and Grant's pants pockets were pulled out. The autopsy reports indicate Arthurs's blood alcohol content was .04, while Grant's did not register any alcohol present in his blood.

1. Additionally, the jury found defendant guilty of first-degree murder of Harold Grant under the felony murder rule.

A blood spatter and stain expert testified for the State during trial and shed further light on the brutality of the killings. A blood stain which started at the front door and extended back to the body of Grant was consistent with defendant's dragging of Grant's body back into the apartment. In addition, a blood spatter on the front porch indicated Grant's head came into contact with the porch at some point. A blood spatter near Grant's head was consistent with his body being dragged back into the apartment, dropped face down onto the floor, and then later turned on his back. The blood spatter on the wall was consistent with the swinging of a fire extinguisher which hit Grant's head. In addition, the authorities found Arthurs's body with a significant amount of blood pooled to the left side of his head and a lack of blood on the front of his clothing. In the expert's opinion, Arthurs was also at one time lying face down and then subsequently rolled over.

These killings occurred the morning of 20 March 1999 around 4:00 a.m. The noise from the struggle awoke a neighbor, Macie Randall, along with her granddaughter Angel. Later that morning, Tommy Feemster, the superintendent of the apartment building where the murders took place, went to the apartment complex to repair a leaky toilet in Arthurs's apartment. Feemster's coworker motioned for him to come to the door of Arthurs's apartment. When Feemster arrived at the door, they noticed what appeared to be blood on the area outside the door. Feemster immediately went to Macie Randall's apartment, and she informed him of the struggle she heard earlier that morning. Feemster then returned to Arthurs's apartment and pushed open the door, stepped inside, and discovered a body with a knife sticking in it. Based upon what he observed, he immediately closed the door and called the police.

The evidence reflected that after leaving the crime scene, defendant smoked some crack cocaine, and later that morning started seeking help from friends and family members. He telephoned Michelle Lancaster who told him he needed to retrieve his belongings and move out of her residence because of their recent altercation. She also told defendant she would not help him. Defendant then went to an automobile dealership where his sister Charlene McKinney worked. From there, he telephoned his half-sister Lisa Sneed and told her he needed her to pick him up at a nearby restaurant. Sneed picked him up, later that day took him to Lancaster's residence to pick up his belongings, and then they returned to Sneed's residence. After arriving at Sneed's residence, defendant put a pair of jeans and

a pair of shoes in the washing machine. Later, Sneed received a telephone call from a detective investigating the homicides who was seeking to interview defendant and Sneed. When Sneed inquired of defendant concerning this request, he informed her the detective wanted to question him about a murder.

Defendant asked Sneed to lie to the detectives and tell them defendant and Sneed were together during the time of the murders. He told her he was with some guys smoking crack, and they would not cover for him. Based upon the detective's telephone call, defendant and Sneed went to the police station along with Robin Williams. Sneed told police the lie defendant posited, and Sneed and defendant quickly departed when detectives requested consent to search her residence. Upon returning to Sneed's residence, defendant grabbed his clothes and shoes from the washing machine, and Sneed gathered some drug paraphernalia she did not want the police to find. Defendant and Sneed then drove to Clover, South Carolina and threw the clothing items and drug paraphernalia out the window.

The next day defendant and Sneed went to a grocery store where defendant asked Sneed to purchase a newspaper. After reading about the murders in the newspaper, defendant revealed to Sneed he in fact killed the two men. He claimed one of the men pulled a gun on him, and then defendant told Sneed to "[t]ake it to your [expletive deleted] grave." The very next day Sneed went to the police station, told the detectives what defendant said, and told the detectives she had lied in their prior interview. Defendant was soon arrested, and shortly thereafter invoked his right to counsel. Later defendant voluntarily requested the detectives question him—at which time he admitted killing the victims. Defendant presented no evidence in the guilt-innocence proceeding. Upon deliberation, the jury found defendant guilty of two counts of first-degree murder.

During the penalty proceeding, the State presented testimony from family members of Grant and Arthurs detailing the effects of the victims' murders on their lives. The State elicited testimony from Phyllis Williams, the mother of Robin Williams, concerning an incident in which defendant beat Robin. In addition, two law enforcement officers testified regarding this event, and the State submitted into evidence a judgment reflecting a conviction against defendant arising from his assault of Williams. Defendant served time in prison and also received probation as punishment for this beating.

Defendant submitted evidence of a difficult home life, including his father shooting his maternal grandfather shortly after his birth. He also submitted evidence he dropped out of high school, was successful in a group home, was a good father, and came from a family that consumed copious amounts of alcohol. A vocational rehabilitation counselor testified defendant had been employed as a drywall installer. However, on cross-examination the prosecution elicited testimony defendant violated his probation while being aided by the vocational rehabilitation counselor.

Defendant's forensic psychologist James H. Hilkey, Ph.D. also testified as an expert in the penalty proceeding. In his opinion, defendant suffers from longstanding depression, bipolar disorder, poly-substance abuse problems, and exhibits some characteristics of borderline personality disorder with antisocial and paranoid features. Dr. Hilkey testified defendant had been admitted numerous times to Dorothea Dix Hospital for various mental health problems, including attempted suicide, impulse control disorder, poly-substance abuse, and paranoid personality disorder. Dr. Hilkey also opined defendant suffers from attention deficit hyperactivity disorder. Dr. Hilkey believed defendant would adjust well to prison life so long as he was compliant with his medication regimen. In addition, Dr. Hilkey testified on cross-examination his fee would be $15,000 in this case.

After the trial court's instruction on the submitted mitigating and aggravating circumstances and our statutory requirements for imposition of capital punishment, the jury commenced deliberations. The jurors found unanimously and beyond a reasonable doubt the following aggravating circumstances as to both murders: (1) defendant had been previously convicted of a felony involving the use of violence to the person; (2) the murders were especially heinous, atrocious, or cruel; and (3) the murders were part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against other persons.

No juror found any statutory mitigating circumstance, but at least one juror found eleven nonstatutory mitigating circumstances. After finding the mitigating circumstances were insufficient to outweigh the aggravating circumstances beyond a reasonable doubt, and the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstances beyond a reasonable doubt, the jury returned a binding recommendation of death.

GUILT-INNOCENCE ISSUES

[1] Defendant claims the trial court committed reversible error when it overruled his objection to the admission of specific acts of bad conduct during redirect examination of Lisa Sneed. On cross-examination, defendant elicited testimony from Sneed that defendant could get violent after using drugs and alcohol, but when he is not consuming alcohol or drugs he has a heart of gold and is a good person. On redirect examination, the prosecution's questioning elicited more information on defendant's violent character, namely his violence against two other people.

Rule 404 of our Rules of Evidence provides in part:

> (a) *Character evidence generally.*—Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> > (1) *Character of accused.*—Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same; . . .

N.C.G.S. § 8C-1, Rule 404 (2003). Additionally, subsection (b) of Rule 404 provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Defendant asserts the admission on redirect examination of the prior bad acts violated Rule 404(b) and thus constitutes reversible error. We disagree.

Whenever a defendant "opens the door" to character evidence by introducing evidence of his own pertinent character trait—in this case his peacefulness—the prosecution may rebut that evidence with contrary character evidence. *See id.* Rule 404(a)(1). Defendant cannot complain when the whole story is revealed, part of which he elicited through his own questioning. *See* N.C.G.S. § 15A-1443(c) (2003) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct."). In *State v. Syriani*, we found no error in the admission of other specific acts of conduct after the defendant himself first elicited specific acts of conduct during his questioning. 333 N.C. 350, 378-80, 428 S.E.2d 118, 132-34, *cert. denied*, 510 U.S. 948 (1993).

> [T]he law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant

> himself. Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.

State v. Albert, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981). While the bad acts elicited by the prosecution on redirect of Lisa Sneed may have been inadmissible on direct examination before defendant "opened the door" during cross-examination, the prosecution's rebuttal of defendant's evidence of good character through the use of specific instances of conduct is proper. *See State v. Garner*, 330 N.C. 273, 289-90, 410 S.E.2d 861, 870 (1991). Therefore, we overrule defendant's assignment of error.

[2] Defendant also assigns as error the failure of the trial court to intervene *ex mero motu* in the prosecution's closing argument. Defendant takes exception to the following statement by the prosecutor: "The judge may tell you that the defendant acted with deliberation. Excuse me, with pre—the defendant acted with premeditation, that is, he formed the intent to kill the victim over some period of time." Defendant did not object, so we review this statement to see whether it was so grossly improper the trial court abused its discretion in failing to intervene *ex mero motu*. *See State v. Gregory*, 340 N.C. 365, 424, 459 S.E.2d 638, 672 (1995), *cert. denied*, 517 U.S. 1108 (1996). We hold this statement was not so grossly improper as to require intervention by the trial court.

Defendant's argument rests heavily on our decision in *State v. Allen*, 353 N.C. 504, 546 S.E.2d 372 (2001). In that case, we held there was an improper argument during closing statements when the prosecutor told the jury the trial judge found a statement reliable and trustworthy, and if the trial judge had found anything wrong with the testimony he would not have let the jury hear it. *Id.* at 508, 546 S.E.2d at 374. The defendant objected, and the trial court erroneously overruled the defendant's objection in *Allen*. *Id.* This case differs from *Allen* in three pointed respects: First, the argument in *Allen* conveyed plainly and clearly that the trial court had an opinion on the evidence; second, the trial court's overruling of the defendant's objection in *Allen* solidified in the minds of the jury that the trial court did hold the opinion intimated by the prosecution; and finally in *Allen* the prosecutor's argument traveled outside the record. *Id.* at 508-09, 546 S.E.2d at 374-75.

Here, the prosecution's statement did not directly and unambiguously tell the jury the court formed an opinion on the evidence. Also, because there was no objection, and therefore no overruling by the trial court of defendant's objection, this idea was not solidified in the jurors' minds. Additionally, the prosecution's argument did not travel outside the record as prohibited by N.C.G.S. § 15A-1230(a) (2003). Finally, the trial court instructed the jury the court was impartial and the jury would be mistaken to believe otherwise. The trial court instructed the jury it "may" find premeditation and deliberation, and instructed on what basis the jury could make such a finding. Therefore, this assignment of error is overruled.

[3] Defendant further contends the trial court's instruction to the jury regarding confession constitutes reversible error. Although defendant did not object to the giving of this instruction, any error is still preserved for appeal. Whenever a defendant alleges a trial court made an improper statement by expressing an opinion on the evidence in violation of N.C.G.S. §§ 15A-1222 and 15A-1232, the error is preserved for review without objection due to the mandatory nature of these statutory prohibitions. *See State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989).

In the instant case, the trial court instructed the jury as follows:

> There is evidence which tends to show that the defendant confessed that he committed the crime charged in this case. If you find that the defendant made that confession, then you should consider all of the circumstances under which it was made in determining whether it was a truthful confession and the weight that you will give it.

This instruction conforms to the North Carolina Pattern Jury Instruction on confession. 1 N.C.P.I.—Crim. 104.70 (2005). An instruction by the trial court stating the evidence tends to show the existence of a confession to the crime charged is not an impermissible comment invading the province of the jury and its fact-finding function. *See Young*, 324 N.C. at 495, 380 S.E.2d at 97; *see also State v. Allen*, 301 N.C. 489, 497, 272 S.E.2d 116, 121 (1980); *State v. Huggins*, 269 N.C. 752, 754-55, 153 S.E.2d 475, 477 (1967) (per curiam).

This Court noted in *Young*:

> The [confession] instruction should not be given in cases in which the defendant has made a statement which is only of a generally inculpatory nature. When evidence is introduced which

> would support a finding that the defendant in fact has made a statement admitting his guilt of the crime charged, however, the instruction is properly given.

324 N.C. at 498, 380 S.E.2d at 99. Considering defendant's admissions which tend to show premeditation and deliberation—such as the sheer number of blows with the fire extinguisher, the time between each blow, and the dragging of one victim back into the apartment—the statement did support inclusion of the confession instruction. The instruction given by the trial court left it to the jury to conclude whether the confession occurred and what weight to give it. *See State v. Cannon*, 341 N.C. 79, 90-91, 459 S.E.2d 238, 245-46 (1995).

In addition, defendant cannot show prejudice on this issue. It appears from the transcript it was defendant, not the prosecution, who requested this jury instruction. "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C.G.S. § 15A-1443(c) (2003). Furthermore, "[a] criminal defendant will not be heard to complain of a jury instruction given in response to his own request." *State v. McPhail*, 329 N.C. 636, 643, 406 S.E.2d 591, 596 (1991). Any error in the giving of this jury instruction was invited by defendant and we therefore overrule defendant's assignment of error on this issue.

PENALTY PROCEEDING ISSUES

[4] Defendant assigns as error the admission of testimony concerning a threat made by defendant to Charlene McKinney, contending this evidence should not have been admitted during the penalty proceeding of defendant's trial. We disagree. During direct examination by defendant, McKinney stated while defendant lived with her, it was "a big happy family," and "he's not an animal. He really is a decent, kind human being if you knew him." On cross-examination, it was proper for the prosecution to attack the credibility of the witness and also to discredit the witness's contention defendant was peaceful by showing he threatened the lives of McKinney, her child, and her husband after an argument concerning a funeral. The prosecution simply impeached the witness with her prior inconsistent statements to a detective concerning the threats which clearly contradicted her direct testimony. While the Rules of Evidence are not binding in a penalty proceeding, they do provide us with guidance. *See State v. Greene*, 351 N.C. 562, 568, 528 S.E.2d 575, 579, *cert. denied*, 531 U.S. 1041 (2000). When a witness gives his or her opinion as to the character of another, the cross-examiner may test that opinion with ques-

tioning on specific acts of conduct. *See* N.C.G.S. § 8C-1, Rule 405(a) (2003). Therefore, in addition to questioning McKinney regarding prior inconsistent statements, the prosecution could challenge her opinion by questioning her on defendant's specific acts of conduct.

Additionally, "[i]n order to prevent an arbitrary or erratic imposition of the death penalty, the [S]tate must be allowed to present, by competent relevant evidence, any aspect of a defendant's character or record and any of the circumstances of the offense that will substantially support the imposition of the death penalty." *State v. McDougall*, 308 N.C. 1, 23-24, 301 S.E.2d 308, 322, *cert. denied*, 464 U.S. 865 (1983). The evidence concerning the threat, while also impeaching McKinney and challenging her opinion, went directly to the heart of defendant's violent nature.

In like manner, the prosecution was entitled to submit evidence contrary to the assertion of one of defendant's proposed mitigating circumstances. Defendant submitted and the trial court approved a mitigating circumstance be given to the jury that defendant had a deep emotional bond with McKinney. Evidence which tends to undermine a mitigating circumstance is competent and relevant in penalty proceedings. Defendant had threatened the life of the very person he alleged a deep emotional bond with, and the prosecution's questioning made that nonstatutory mitigating circumstance less likely to be true. We therefore overrule defendant's assignment of error.

[5] Defendant's next contention is the trial court erred in sustaining the prosecution's objection to his mother's statement during the penalty proceeding that defendant wanted to apologize to the victims' families. Defense counsel asked defendant's mother if she wanted to say anything to the victims' families. Her response in part was: "I just wanted to apologize to all of you. Jeff wants to apologize." The prosecution objected and the judge ordered the last answer stricken and not considered by the jury.

Evidence a defendant harbors feelings of remorse regarding a homicide is relevant evidence to be considered by the jury in a capital sentencing proceeding. *See State v. Jones*, 339 N.C. 114, 153-54, 451 S.E.2d 826, 847 (1994), *cert. denied*, 515 U.S. 1169 (1995). In both *Jones*, *id.*, and *State v. Garcia*, 358 N.C. 382, 420, 597 S.E.2d 724, 750 (2004), *cert. denied*, ––– U.S. –––, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005), this Court found the exclusion of evidence of remorse to be error subject to constitutional harmless error review. For an error to be harmless under the constitutional harmless error review standard,

the appellate court must find the error harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (2003); *State v. Lewis*, 360 N.C. 1, 28, 619 S.E.2d 830, 847-48 (2005). In both *Jones* and *Garcia*, this Court held exclusion of evidence of remorse to be harmless beyond a reasonable doubt. We also hold any possible error as to this issue in the case *sub judice* harmless beyond a reasonable doubt.

First, any possible error was caused by defendant's failure to offer a proper foundation to ensure the reliability of the testimony from his mother. Although the prosecution did not state its basis for the objection, it is clear from the context of the objection the prosecution objected to the speculative nature of the statement, "Jeff wants to apologize." Unlike *Jones* and *Garcia*, no foundation was laid by defendant for the witness's basis of such knowledge of defendant's state of mind.

Second, the jury heard other sufficient testimony of defendant's remorse during the penalty proceeding through Dr. Hilkey, who opined defendant was remorseful for his actions. Even though the evidence of remorse was not disputed by other testimony, the jury was free to believe whom they would on the stand, and we find any error in the exclusion of this evidence harmless beyond a reasonable doubt. *See State v. Daughtry*, 340 N.C. 488, 518-19, 459 S.E.2d 747, 762-63 (1995), *cert. denied*, 516 U.S. 1079 (1996).

[6] Defendant additionally claims his mother should have been allowed to testify, in her opinion, her son would adjust well to prison life. Evidence of whether a defendant would adjust well to prison life is a relevant consideration in the imposition of the death penalty. *See Skipper v. South Carolina*, 476 U.S. 1, 6-8 (1986). "A capital defendant is permitted to introduce evidence from a disinterested witness that the defendant has adjusted well to confinement." *State v. Smith*, 359 N.C. 199, 216, 607 S.E.2d 607, 620 (2005). We note from the outset defendant's mother may not be a disinterested witness. Even if defendant's mother should have been allowed to testify as to defendant's adjustment to prison life, we find any error in its exclusion harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (2003); *Lewis*, 360 N.C. at 28-29, 619 S.E.2d at 847-48. Three other witnesses gave testimony from which the jury could have found defendant would adjust well to prison life. Tom Patterson testified defendant did well in the structured setting of a group home. Charlene McKinney testified defendant did well at the group home because of the structured environment, and Dr. Hilkey testified defendant's prior

instance of lashing out in jail would probably not be repeated in prison because of the differences in structure and the benefit of proper administration of defendant's medications. We overrule this assignment of error.

[7] Defendant argues the trial court erred in sustaining the prosecution's objection when defendant's sister, Charlene McKinney, testified, "[defendant was] just caught in a bad situation. I mean, he didn't intend for this to happen." Once again, defendant failed to lay a proper foundation for testimony concerning his mental state. Regardless, we find any error in the exclusion of this testimony to be harmless beyond a reasonable doubt.

First, it appears from the context of the testimony McKinney was speaking of all the actions of the night and early morning of the murders, and not the murders in particular. The jury already decided in the guilt-innocence proceeding defendant intended to commit these murders. Although the word "intend" was used in McKinney's testimony, the word was not used in its legal sense as an element of first-degree murder. Therefore, this testimony is not designed to raise a residual doubt as to defendant's guilt as the State suggests in its brief.

Taken in context, McKinney's testimony tended to show defendant was a good person and not a "monster." Had there been a proper foundation, defendant should have been allowed to present this testimony of his good character. *See e.g.* N.C.G.S. § 15A-1340.16(e)(12) (Supp. 2005) (good character as mitigating factor under the Structured Sentencing Act applied to non-capital cases). We need not determine whether this alleged error rises to the level of a constitutional violation because we find any error to be harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (2003); *Lewis*, 360 N.C. at 28-29, 619 S.E.2d at 847-48. First, defendant did not submit for consideration a good character mitigating circumstance. Second, defendant's mother, his son, and Matthew Forbis, a childhood friend of defendant, testified to facts and circumstances which tended to show defendant was a good person. We overrule this assignment of error.

[8] Defendant argues the trial court erred by failing to intervene *ex mero motu* in the prosecution's penalty proceeding closing argument when the prosecution referred to defendant's expert witness, Dr. Hilkey, as the "$15,000 man." The prosecution's argument was as follows:

> Let's talk about his mental state. We heard from Dr. Hilkey there, the $15,000 man. Qualified medical or psychological experts can review the same material, yet come to different opinions. We know this, because Dr. Holly Rogers we heard about—we didn't hear from her, but in 1999 or 2000 or around about that time diagnosed the defendant as having intermittent explosive disorder or rage disorder. Dr. Hilkey: No, he didn't have that, according to Dr. Hilkey. Dr. Hilkey tells us that—well, let me back up a minute. In fact, there were different diagnoses given by qualified people over the course of these years. One of them diagnosed him with schizophrenia. Dr. Hilkey says no, he's not schizophrenic. Dr. Hilkey says, well, Dr. Rogers—let me back up a minute, now—if you recall diagnosed him as having antisocial, or being—having antisocial personality, which is—which Dr. Hilkey confirms that he's got. Yes, in fact, he does have traits similar to antisocial personality disorder. Dr. Hilkey didn't specifically diagnose him with that but indicated that he has antisocial features. Well, you folks may recall that antisocial personality disorder is what used to be called psychopathic, sociopathic. It's now called antisocial. A rose, folks, by any other name is still a rose. What you and I call mean, nasty, evil, vicious, Dr. Hilkey calls antisocial. We have now sanitized all these behaviors and called them—wrapped them up in nice, neat little packages and given them psychological names. There is a psychological diagnosis for someone who drinks too much coffee: Caffeine-induced disorder. That's what we learned from the $15,000 man. Mr. Duke knows right from wrong; he's not crazy, he's not stupid. He's vicious and he's selfish.

In hotly contested cases such as this capital trial, defense counsel and the prosecution are given wide latitude in arguments, and a trial court is not required to intervene *ex mero motu* unless the argument was so grossly improper it must be said the trial court abused its discretion by not intervening. *See State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161 (1999). In fact, "[t]o establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *Id.* (citing *State v. Rose*, 339 N.C. 172, 202, 451 S.E.2d 211, 229 (1994), *cert. denied*, 515 U.S. 1135 (1995)).

We recently discussed this issue in *State v. Campbell*, in which a prosecutor stated during closing arguments:

> "Well, Doctor, don't they say you can't do that? Don't your own colleagues say you can't do that. Yes, but they're not paying my bill. That's what he wanted to say. They are. (Indicating.) . . . Enter Dr. Corvin. The best witness—well, I'm not going to say that. A witness that the defendant could buy. . . .
>
> > "[As defendant:] Well, Doctor, can't you do something? We're paying good money for this.
> >
> > "[As Dr. Corvin:] Yes. Let me think out of the box. Let me just—all right, I got it, I got it. Go with me now, go with me. I'm a doctor, we all agree, I'm a doctor.
>
> . . . .
>
> > "MR. DAVID: Let me repeat that. He's a doctor. He's a doctor. So the first thing is, twinkies defense, hyperthyroidism. That's something, that's medical, they're not going to know what that means. A Pender jury? I'm s[m]arter than them, coming from Raleigh."
>
> The prosecutor continued regarding Dr. Corvin's assessment of defendant's alcohol abuse, stating that whether defendant was in denial "depends [on] if the evidence hurts us or helps us."

359 N.C. 644, 677, 617 S.E.2d 1, 22 (2005) (brackets in original). We concluded in *Campbell* the prosecution's statements were not grossly improper. In doing so, this Court noted: " '[I]t is not improper for the prosecutor to impeach the credibility of an expert during his closing argument.' " *Id.* (quoting *State v. Norwood*, 344 N.C. 511, 536, 476 S.E.2d 349, 361 (1996), *cert. denied*, 520 U.S. 1158 (1997)).

> Although we have found grossly improper the practice of flatly calling a witness or opposing counsel a liar when there has been no evidence to support the allegation, we have also held that it is proper for a party to point out potential bias resulting from payment that a witness received or would receive for his or her services. However, where an advocate has gone beyond merely pointing out that the witness' compensation may be a source of bias to insinuate that the witness would perjure himself or herself for pay, we have expressed our unease while showing deference to the trial court.

State v. Rogers, 355 N.C. 420, 462-63, 562 S.E.2d 859, 885 (2002) (citations omitted). In *Rogers*, this Court found it improper, but not so grossly improper as to require *ex mero motu* intervention, when the

prosecutor strongly insinuated the defendant's expert would say anything to get paid. *Id.* at 464, 562 S.E.2d at 886. Additionally, we have found *ex mero motu* intervention to be required when the statements made by the prosecution were so overreaching as to shift the focus of the jury from its fact-finding function to relying on its own personal prejudices or passions. Such overreaching arguments will not be tolerated by this Court, and we would not hesitate to vacate a sentence or conviction on these grounds. *See State v. Jones*, 355 N.C. 117, 133-34, 558 S.E.2d 97, 107-08 (2002) (vacating death sentence when prosecutor made the grossly improper statement: "You got this quitter, this loser, this worthless piece of—who's mean . . . . He's as mean as they come. He's lower than the dirt on a snake's belly.").

While we do not condone the prosecution's name-calling or encourage other improper arguments, we do not believe the statement made by the prosecutor in the case *sub judice* was grossly improper. The prosecution's statement emphasized Dr. Hilkey's fee in the case was $15,000 and the jury should take that fact into account when determining the credibility of Dr. Hilkey and the weight it should place on his testimony. Considering the statements made by prosecutors in our prior cases that have found no gross impropriety requiring *ex mero motu* intervention by the trial court, we find the prosecution's closing argument in this case tame by those standards. Accordingly, we overrule defendant's assignment of error.

[9] In addition, defendant claims the trial court should have intervened *ex mero motu* when the prosecution used the word "crap" during penalty proceeding closing arguments. The prosecutor stated:

> We all have issues in our family, every one of us. Every one of us. Mr. Duke was given every opportunity, every chance to be part of a loving, warm environment, and chose not to. He chose not to be part of that. You know, I was waiting to hear from his family members, based on what we saw, that the defendant was tortured, locked in a closet, beaten severely by his mother or Mr. Fincher. Where was that? Where was any of that? On the contrary, what you heard was they did everything they could to provide for him, but he didn't care. Warm, loving home? Who needs that when there's crap?

We note first of all the word "crap" makes absolutely no sense in this context. We do not find it proper to hypothesize, however we cannot help but wonder if a transcription error in fact occurred. Regardless of any possible transcription error, we analyze this

statement as if the word "crap" was actually used by the prosecutor during the argument. Defendant relies heavily on our prior decision in *State v. Matthews*, 358 N.C. 102, 591 S.E.2d 535 (2004). This case is clearly distinguishable from *Matthews*. In *Matthews*, the prosecutor summarized all of the mitigating evidence presented by the defendant during the penalty proceeding of his trial and then dismissed it by telling the jury the evidence was "bull crap." *Id.* at 111, 591 S.E.2d at 542.

This Court noted in *Matthews* the prosecution's argument was improper because of the name-calling and scatological language. This Court "admonish[ed] the attorneys and trial courts of this State to reevaluate the need for melodrama and theatrics over civil, reasoned persuasion." *Id.* at 112, 591 S.E.2d at 542. In the case at bar, the prosecution did not engage in any name-calling nor did the prosecutor improperly disparage defendant's argument. Instead, the prosecutor took defendant's evidence as it was, and, albeit in less than professional terms, discussed the choice defendant made to turn his back on his family and pursue instead a life of drug abuse, alcohol abuse, and violence, which culminated in a senseless and brutal double murder. We cannot say this argument was so grossly improper as to require the trial court to intervene *ex mero motu*, and we therefore overrule defendant's assignment of error.

[10] Defendant contends the trial court erred in refusing to grant defendant's request to give the jury peremptory instructions on the N.C.G.S. § 15A-2000(f)(2) and (f)(6) mitigating circumstances. We disagree. It is well established a defendant is entitled to peremptory instructions on a mitigating circumstance whenever the evidence supporting the mitigating circumstance is uncontroverted. *See State v. Holden*, 338 N.C. 394, 402-03, 450 S.E.2d 878, 882 (1994). "[W]e have held that it is not error for a trial court in a capital case to refuse to give requested instructions where counsel failed to submit the instructions to the trial court in writing." *State v. White*, 349 N.C. 535, 570, 508 S.E.2d 253, 275 (1998). There is nothing in the record or the transcript to indicate such a request was made in writing by defendant. That said, even if the requested instructions had been submitted in writing the evidence supporting the (f)(2) and (f)(6) mitigating circumstances was simply not uncontroverted.

N.C.G.S. § 15A-2000(f)(2) provides a statutory mitigating circumstance of: "The capital felony was committed while the defendant was under the influence of mental or emotional disturbance." Here, defendant presented evidence he suffered from mental or emotional

disturbance through his expert witness Dr. Hilkey. Dr. Hilkey, while giving his opinion defendant committed these murders under the influence of mental or emotional disturbance, also admitted on cross-examination two clinicians could come to different conclusions. Additionally, Dr. Hilkey testified as to inconsistent diagnoses of defendant's condition determined by other mental health professionals in the past. Clearly, the evidence of defendant's mental or emotional disturbance was not uncontroverted, as established by the cross-examination made by the prosecution. Therefore, defendant was not entitled to a peremptory instruction on the (f)(2) mitigating circumstance.

Additionally, defendant was not entitled to a peremptory instruction on the (f)(6) mitigating circumstance which provides: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." While defendant submitted evidence that tended to show this mitigating circumstance existed, that evidence was not uncontroverted. In fact, during the guilt-innocence proceeding of the trial, the prosecution introduced evidence tending to show defendant knew what he did was wrong such as turning out Grant's pants pockets, pulling Arthurs's pants down to his knees, and ransacking the apartment—all to make it appear a robbery occurred. In addition, defendant fled the scene of the crime, destroyed potential evidence, attempted to destroy other evidence by discarding it across the state line, and encouraged his sister to lie in order to provide him an alibi. Surely the jury could have reasonably found from this evidence defendant knew and appreciated the criminality of his actions. Because defendant's evidence on this matter was not uncontroverted, we overrule this assignment of error.

[11] Defendant assigns as error the denial of his request to submit to the jury a non-statutory mitigating circumstance of: "Jeff's actions towards these victims were influenced to some degree by their behavior towards him and he reacted to what he thought was provocation on the part of the victims." As a general rule, a defendant is allowed to submit to the jury any mitigating circumstance that a jury could reasonably find to have mitigating value and has sufficient evidence to support it. *See State v. Daughtry*, 340 N.C. at 523, 459 S.E.2d at 765. However, this does not mean defendant is entitled to place the question of his guilt of first-degree murder back onto the table for the jury to decide. The jury decided during the guilt-innocence proceeding defendant was guilty of first-degree murder, rejecting his con-

tention he acted under perceived provocation. We therefore overrule this assignment of error.

[12] Defendant contends reversible error occurred when the trial court reinstructed the jury on mitigating circumstances after the jury submitted a question to the court seeking clarification. We note at the outset defendant did not object to the instruction given in response to the jury's question. Therefore, we analyze the instruction for plain error. *See* N.C. R. App. P. 10(b)(1); 10(c)(4); *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000) (explaining that plain error review will be applied only to matters of evidence and jury instructions), *cert. denied*, 532 U.S. 997 (2001).

The jury's question read as follows: "Please explain the way we should weigh issue 2? Ex: Does [sic] each of these questions have a direct impact on the deaths of the two victoms [sic]. OR Ex: Does [sic] each of these questions prove that Jeff Duke should live in prison or death [sic]." The trial court, after conferring with counsel and without objection, decided to reinstruct the jury on mitigating circumstances. The trial court instructed the jury as follows:

> Our law identifies several possible mitigating circumstances. However in considering Issue Number 2, it would be your duty to consider as a mitigating circumstance any aspect of the defendant's character and any of the circumstances of this murder that the defendant contends is a basis for a sentence less than death and any other circumstances arising from the evidence which you deem to have mitigating value.
>
> . . . .
>
> A juror may find that any mitigating circumstance exists by a preponderance of the evidence, whether or not that circumstance was found to exist by all the jurors. In any event, you would move on to consider the other mitigating circumstances and continue in like manner until you have considered all of the mitigating circumstances listed on the form and any others which you deem to have mitigating value.

These instructions follow the pattern jury instructions on Issue Two of the Issues and Recommendation as to Punishment Form provided to the jury for their deliberations. However, the trial court did not continue by giving specific instructions on each mitigating factor. Defendant contends the jury was therefore confused and could have believed statutorily enumerated mitigating circumstances may not be

taken into consideration unless the jury finds those circumstances to have mitigating value. We disagree.

Defendant is correct in asserting statutory mitigating circumstances have mitigating value as a matter of law, while nonstatutory mitigating circumstances require a finding of mitigating value by the jury. *See* N.C.G.S. § 15A-2000(f) (2003); *State v. Walters*, 357 N.C. 68, 92, 588 S.E.2d 344, 358, *cert. denied*, 540 U.S. 971 (2003). While defendant asserts a correct proposition of law, the instructions given by the trial court are not contrary to that law.

On the Issues and Recommendation as to Punishment Form for each murder, the final question under Issue Two is whether any juror found "[a]ny other circumstance or circumstances arising from the evidence which one or more of you deems to have mitigating value." The form contains lines after this question for the juror or jurors to write the mitigating circumstance found, if any. It is clear from the instructions given by the trial court—"any other circumstances arising from the evidence which you deem to have mitigating value"—refers to this final question. The trial court advised the jury to decide the listed mitigating circumstances as it previously instructed, and "any others which you deem to have mitigating value." The trial court did not instruct the jurors the statutory mitigators were not to be found unless the jury concluded they had mitigating value. If any error occurred in the re-instruction, this error was to defendant's benefit because it implied all the listed circumstances had some mitigating value, rather than instructing the jury it should not find a nonstatutory mitigating circumstance unless it deemed that circumstance to exist and have mitigating value.

This case is clearly distinguishable from *State v. Jaynes*, 342 N.C. 249, 464 S.E.2d 448 (1995), *cert. denied*, 518 U.S. 1024 (1996), and *State v. Howell*, 343 N.C. 229, 470 S.E.2d 38 (1996), both of which defendant cites in support of this assignment of error. In *Jaynes*, the trial court instructed the jury: "it is for you to determine from the circumstances and the facts in this case whether or not *any listed circumstance* has mitigating effect." 342 N.C. at 285, 464 S.E.2d at 470. In *Howell*, the trial court instructed the jury in a manner substantially similar to that in *Jaynes*. 343 N.C. at 239-40, 470 S.E.2d at 43-44. In the case *sub judice*, the trial court instructed the jury should *only* consider whether a mitigating circumstance had mitigating value if it found a circumstance which was not listed on the Issues and Recommendation as to Punishment Form. Defendant's assignment of error is overruled.

[13] Defendant's current appeal resulted from a new trial granted by this Court because the transcription notes and tapes in defendant's first capital trial were unavailable, thereby preventing preparation of a transcript for appellate review. *See State v. Duke*, 354 N.C. 367, 556 S.E.2d 295 (2001). Defendant argues because the trial court did not submit the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance as to the murder of Arthurs during the penalty proceeding of defendant's first trial, the trial court violated the bar against double jeopardy by submitting the circumstance in the present case. We disagree. This Court held in *State v. Sanderson* the bar against double jeopardy does not prevent a sentence of death unless a jury finds no aggravating circumstance existed in a prior trial and thereby would have been required to recommend a sentence of life imprisonment without parole. 346 N.C. 669, 679-80, 488 S.E.2d 133, 138-39 (1997). This Court wrote:

> In the present case, neither the jury at the first capital sentencing proceeding nor the jury at the second capital sentencing proceeding found that no aggravating circumstance existed. To the contrary, each of those juries found at least one aggravating circumstance to exist and recommended a sentence of death. Therefore, principles of double jeopardy did not prevent the trial court from submitting this case to the jury at defendant's third capital sentencing proceeding for its consideration of all aggravating circumstances supported by evidence adduced at that third capital sentencing proceeding for the jury's determination as to whether death or life imprisonment was the appropriate penalty in this case.

Id. at 679, 488 S.E.2d at 138. Similarly, in this case, during the first trial the jury found an aggravating circumstance and recommended death for defendant's murder of Arthurs.

We also reject defendant's argument that the holding in *Ring v. Arizona*, 536 U.S. 584 (2002), changes this result. *Ring* simply requires the jury, rather than the trial court, to find any aggravating circumstance which leads to the imposition of the death penalty. *Id.* at 587, 609. As the Supreme Court noted in *Ring*, North Carolina law required the finding of aggravating circumstances by the jury before the federal constitutional mandate to do so. *Id.* at 608 n.6. "[T]he judge's finding of any particular aggravating circumstance does not of itself 'convict' a defendant (*i.e.*, require the death penalty), and the failure to find any particular aggravating circumstance does not

'acquit' a defendant (*i.e.*, preclude the death penalty)." *Poland v. Arizona*, 476 U.S. 147, 156 (1986). In *Sattazahn v. Pennsylvania*, a post-*Ring* case, the defendant was convicted of first-degree murder and sentenced to life in prison as an operation of law due to a hung jury in his first penalty proceeding. 537 U.S. 101, 103-05 (2003). Upon retrial, after the reversal of the defendant's conviction, a second jury found the defendant guilty and sentenced him to death. *Id.* The Supreme Court rejected the defendant's claim double jeopardy barred such a result and affirmed the death sentence of the defendant. *Id.* at 109-10; *see also id.* at 117 (O'Connor, J., concurring). In the case *sub judice*, the jury in defendant's first trial recommended death, and the jury in defendant's second trial recommended death. Therefore, we overrule defendant's assignment of error.

[14] Defendant also contends his constitutional rights were violated because the especially heinous, atrocious, or cruel aggravating circumstance is unconstitutionally vague and overbroad, and this vagueness cannot be cured through appellate narrowing after *Ring v. Arizona*. We note initially defendant did not raise this specific Sixth Amendment argument at the trial court, and, as a general rule, this Court will not hear for the first time constitutional arguments on appeal. *See State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 519 (1988). Nevertheless, as a decision on this matter is in the public interest, we will address this issue to further develop our jurisprudence. *See* N.C. R. App. P. 2.

In upholding the constitutionality of Arizona's "especially heinous, cruel or depraved" aggravating circumstance in *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, the Supreme Court of the United States distinguished two of the cases cited by defendant on this issue: *Maynard v. Cartwright*, 486 U.S. 356 (1988) (Oklahoma's "especially heinous, atrocious, or cruel" standard unconstitutionally vague) and *Godfrey v. Georgia*, 446 U.S. 420 (1980) (Georgia's "outrageously or wantonly vile, horrible, or inhuman" circumstance unconstitutionally vague). In distinguishing these cases, the Court in *Walton* reasoned: "Neither jury was given a constitutional limiting definition of the challenged aggravating factor. Second, in neither case did the state appellate court, in reviewing the propriety of the death sentence, purport to affirm the death sentence by applying a limiting definition of the aggravating circumstance to the facts presented." *Id.*

We disagree with defendant's contention for two reasons. First, this Court has held the pattern jury instruction, 1 N.C.P.I.—Crim.

150.10 (2004), is not unconstitutionally vague or overbroad with regards to the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance. *See State v. Syriani*, 333 N.C. at 388-92, 428 S.E.2d at 138-41. In *State v. Syriani*, this Court stated: "Because these jury instructions incorporate narrowing definitions adopted by this Court and expressly approved by the United States Supreme Court, or are of the tenor of the definitions approved, we reaffirm that these instructions provide constitutionally sufficient guidance to the jury." *Id.* at 391-92, 428 S.E.2d at 141. As this Court held in *Syriani*, the pattern jury instruction given in the instant case was a sufficient limiting instruction which cures any vagueness or overbreadth of the especially heinous, atrocious, or cruel aggravating circumstance. This Court's appellate narrowing of the especially heinous, atrocious, or cruel aggravating circumstance has been incorporated into the pattern jury instruction.

Second, we fail to see how conducting appellate review of a question submitted to the jury somehow makes this Court a co-finder of fact with the jury in violation of *Ring*. Defendant asserts in his brief that appellate narrowing, as allowed by *Walton*, "no longer passes constitutional muster." In support of this argument, defendant cites only a footnote from a recent decision of the Supreme Court of the United States, *Bell v. Cone*, __ U.S. __, 125 S. Ct. 847, 852 n.6, 160 L. Ed. 2d 881, 891 n.6 (2005) (per curiam). This footnote merely summarizes the holding in *Ring* and states the inapplicability of *Ring* to *Bell v. Cone*, as the *Bell* case was tried before *Ring* was announced and the Court's decision in *Ring* is not retroactive. Therefore, the *Bell* Court did not have before it the issue of whether appellate narrowing of vague aggravating circumstances post-*Ring* is constitutional. We decline to make the logical jump defendant makes that a mere statement indicating an issue is not before the Court means an overruling of prior precedent.

Further, we note this argument by defendant is speculative in nature. Defendant did not assert in his brief or at oral argument that the murders committed by him were not especially heinous, atrocious, or cruel or for some reason require appellate narrowing. Therefore, we will only determine, during proportionality review, the sufficiency of the evidence in the record to determine if it supports the finding of the aggravating circumstance by the jury. In this determination, the Court merely acts as all appellate courts do and determines if the sufficiency of the evidence submitted supported the finding of the jury. Defendant's argument that such review by an

appellate court somehow makes that court a co-finder of fact with the jury in violation of *Ring* is without merit. In fact, if *Ring* imposes such a prohibition upon appellate courts, then, in any sentencing determination, defendants will no longer be allowed to request that a trial court or an appellate court determine whether a circumstance was supported by the evidence after that circumstance is found by the jury. This argument lacks merit, and therefore we overrule defendant's assignment of error on this issue.

Constitutionality of "Issue Three"

[15] Defendant claims part of the applicable jury instructions and the Issues and Recommendation as to Punishment Form, both derived from N.C.G.S. § 15A-2000(b) and (c), violate his constitutional rights because if the jury determines the mitigating circumstances are equal in weight to the aggravating circumstances, the jury must continue its analysis instead of recommending life without parole. "Issue Number Three," as it is called by many attorneys, is derived from N.C.G.S. § 15A-2000(c), which provides in part: "When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show . . . the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found." The jury recommendation form in this case reads: "Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?" This instruction and the statute on which it is based do not violate defendant's constitutional rights.

We note at the outset defendant did not object to the instruction given, nor was there any indication of equipoise in the record. Therefore, we analyze the instruction for plain error based upon defendant's facial challenge to the instruction on appeal. *See* N.C. R. App. P. 10(b)(1); 10(c)(4); *Cummings*, 352 N.C. at 613, 536 S.E.2d at 47. A reversal for plain error is only appropriate in the most exceptional cases.

> The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. *State v. Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79. In other words, the appellate court must determine that the error in ques-

> tion "tilted the scales" and caused the jury to reach its verdict convicting the defendant. *State v. Black*, 308 N.C. at 741, 303 S.E.2d at 806-07. Therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection. *Cf.* N.C.G.S. § 15A-1443(c) (defendant not prejudiced by error resulting from his own conduct).

State v. Walker, 316 N.C. 33, 39, 340 S.E.2d 80, 83-84 (1986). We do not find plain error in the trial court's instruction on "Issue Three."

The Supreme Court of the United States has held that states are free to enact and enforce the death penalty so long as (1) the jury has guided discretion that includes the ability to consider and give effect to every mitigating circumstance, and (2) the statutory scheme does not automatically impose death for any certain type of murder. *See Walton v. Arizona*, 497 U.S. at 652; *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989); *see generally Woodson v. North Carolina*, 428 U.S. 280, 289-301 (1976) (plurality) (no automatic death penalty for first-degree murder). The Supreme Court of the United States does not impose any formulaic method for imposition of the death penalty and has stated: " '[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.' " *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986) (plurality) (alterations in original) (discussing the constitutional prohibitions on imposing the death penalty on persons who are mentally retarded and noting the States will apply their own definitions of mental retardation when determining which offenders are in fact retarded). "[T]he Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances . . . ." *Zant v. Stephens*, 462 U.S. 862, 890 (1983). A capital punishment scheme which requires a recommendation of death upon the finding of certain factors or circumstances does not violate the Constitution so long as the jury is allowed to consider and give effect to all relevant mitigating evidence. *See generally Boyde v. California*, 494 U.S. 370 (1990) (upholding California's capital punishment system which mandated death upon the jury's finding that the aggravating circumstances outweighed the mitigating circumstances); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990) (upholding Pennsylvania's capital punishment scheme for the same reason).

"States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.' " *Boyde*, 494 U.S. at 377 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988) (plurality)). North Carolina has done just that by enacting a capital punishment system which allows the jury, as part of its guided discretion, to weigh the mitigating circumstances against the aggravating circumstances. *See* N.C.G.S. § 15A-2000 (2003). In addition, North Carolina's capital punishment scheme does not limit in any way the mitigating evidence the jury may consider in making its decision. *See id.* § 15A-2000(f)(9) ("Any other circumstance arising from the evidence which the jury deems to have mitigating value."); *see also Lockett v. Ohio*, 438 U.S. 586, 601 (1978) (plurality) (requiring the jury be allowed to consider all relevant mitigating evidence). In *Walton*, the Supreme Court of the United States looked at a very similar weighing process and held it was constitutionally sufficient for the legislature to require that the judge impose a sentence of death if "one or more aggravating circumstances are found and mitigating circumstances are held insufficient to call for leniency." 497 U.S. at 651. Our statute actually provides greater protection against the arbitrary imposition of death than the statute in *Walton* because our statute does not mandate death based solely upon the weighing of mitigating and aggravating circumstances. *See* N.C.G.S. § 15A-2000.

Finally, we note North Carolina's death penalty structure differs from the statute the Kansas Supreme Court recently struck down in *State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (2004), *cert. granted*, —— U.S. ——, 125 S. Ct. 2517, 161 L. Ed. 2d 1109 (2005). Under our system, should the jury answer "Issue Three" in the affirmative, the jury is required to make one last decision of guided discretion—whether the aggravating circumstances are sufficiently substantial to call for imposition of the death penalty. Unlike the Kansas statute, a North Carolina jury's decision does not rest completely on the weighing of the mitigating circumstances against the aggravating circumstances. *See* Kan. Stat. Ann. § 21-4624(e) (2003); N.C.G.S. § 15A-2000. Assuming *arguendo* a constitutional violation occurs under the Kansas statute, our statutory scheme offers an additional layer of protection against the arbitrary imposition of the death penalty.

Accordingly, as we find no plain error in the instruction or the Issues and Recommendation as to Punishment Form, we overrule defendant's assignment of error.

PRESERVATION ISSUES

Defendant contends his short-form indictment was insufficient because it failed to allege all the elements of the offense of first-degree murder. This Court has consistently ruled short-form indictments for first-degree murder are permissible under N.C.G.S. § 15-144 and the North Carolina and United States Constitutions. *See State v. Hunt*, 357 N.C. 257, 278, 582 S.E.2d 593, 607, *cert. denied*, 539 U.S. 985 (2003); *see also State v. Mitchell*, 353 N.C. 309, 328-29, 543 S.E.2d 830, 842, *cert. denied*, 534 U.S. 1000 (2001); *State v. Davis*, 353 N.C. 1, 44-45, 539 S.E.2d 243, 271 (2000), *cert. denied*, 534 U.S. 839 (2001); *State v. Braxton*, 352 N.C. 158, 173-75, 531 S.E.2d 428, 436-38 (2000), *cert. denied*, 531 U.S. 1130 (2001); *State v. Wallace*, 351 N.C. 481, 504-08, 528 S.E.2d 326, 341-43, *cert. denied*, 531 U.S. 1018 (2000). We see no compelling reason to depart from our prior precedent, and we find the indictment in this case met the requirements of N.C.G.S. § 15-144. Therefore, defendant's assignment of error is overruled.

Defendant claims the trial court committed error in failing to *sua sponte* inquire of defendant himself (instead of through counsel) whether he wanted to present evidence or testify on his own behalf during the guilt-innocence proceeding. This Court rejected this argument in *State v. Jones*, 357 N.C. 409, 417, 584 S.E.2d 751, 756-57 (2003), and decline to overrule that case. Defendant's assignment of error is overruled.

Defendant asserts the trial court erred in instructing the jury that each juror could ignore nonstatutory mitigating evidence if they found such evidence to be without mitigating value. This Court previously decided this issue contrary to defendant's position, and we find no reason now to overrule our prior precedent. *See e.g.*, *State v. Payne*, 337 N.C. 505, 533, 448 S.E.2d 93, 109-10 (1994), *cert. denied*, 514 U.S. 1038 (1995). Therefore, defendant's assignment of error is overruled.

Defendant argues the trial court committed plain error by instructing the jury that defendant must prove mitigating circumstances to the "satisfaction" of the jurors. This Court considered this issue in *State v. Payne* and found it to lack merit. *Id.* at 531-33, 448 S.E.2d at 108-09. We find no reason to overrule *Payne*, and therefore we reject defendant's assignment of error.

Defendant contends the jury instructions for Issues Three and Four of the penalty proceeding impermissibly used the word "may"

thereby permitting, but not requiring, each juror to weigh the mitigating circumstance he or she may have found by a preponderance of the evidence under Issue Two. This Court considered this argument previously in *State v. Lee*, 335 N.C. 244, 439 S.E.2d 547, *cert. denied*, 513 U.S. 891 (1994) and *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252 (1994), *cert. denied*, 513 U.S. 1134 (1995) and have found it without merit. Defendant has presented no compelling reason, nor do we find any compelling reason, to overrule our prior holdings on this issue. Therefore, we must overrule defendant's assignment of error on this issue.

Defendant claims the death penalty violates the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 19, 23, and 27 of the North Carolina Constitution. He also argues the North Carolina capital sentencing statute, N.C.G.S. § 15A-2000, is vague and overbroad; allows juries to make excessively subjective sentencing determinations; is applied arbitrarily and on the basis of race, sex, and poverty; and violates Article IV Section 2 of the United States Constitution because it violates international law. We note first defendant has abandoned all of these assignments of error because no authority or argument in support was given in defendant's brief. *See* N.C. R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."). Nonetheless, this Court has considered and rejected all these issues in past cases, and we decline to depart from our prior precedent. *See, e.g.*, *State v. Williams*, 355 N.C. 501, 586, 565 S.E.2d 609, 658 (2002) (holding N.C.G.S. § 15A-2000 does not violate the International Covenant on Civil and Political Rights), *cert. denied*, 537 U.S. 1125 (2003); *State v. Williams*, 304 N.C. 394, 409-10, 284 S.E.2d 437, 448 (1981) (rejecting argument that death penalty is cruel and unusual and applied in an arbitrary manner on the basis of race), *cert. denied*, 459 U.S. 1056 (1982). Therefore, defendant's assignments of error are overruled.

PROPORTIONALITY

[16] Pursuant to N.C.G.S. § 15A-2000(d)(2), this Court has the statutory duty to determine if:

> [T]he record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or . . . the sentence of death was imposed under the influence of passion, prejudice, or any

> other arbitrary factor, or . . . the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

N.C.G.S. § 15A-2000(d)(2).

Here the jury found three aggravating circumstances to exist beyond a reasonable doubt as to both murders: (1) defendant had been previously convicted of a felony involving the use of violence to the person; (2) the murders were especially heinous, atrocious, or cruel; and (3) the murders were part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against other persons. The trial court submitted the N.C.G.S. § 15A-2000(f)(2) and (f)(6) mitigating circumstances, along with thirty nonstatutory mitigating circumstances. No juror found either the (f)(2) or the (f)(6) mitigating circumstance as to either murder, but at least one juror found eleven nonstatutory mitigating circumstances as to each murder.

After a thorough review of the record, transcripts, briefs, and oral arguments on appeal, we conclude the jury's finding of the three aggravating circumstances is supported by the evidence. Additionally, we conclude nothing in the record, transcripts, briefs, or oral arguments suggests the sentence given defendant was imposed under the influence of passion, prejudice, or any other arbitrary factor. We will not disturb the jury's weighing of the mitigating and aggravating circumstances.

As a final matter, we must consider whether imposition of the death penalty is proportionate in this case. The decision as to whether the death sentence is disproportionate "ultimately [rests] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046 (1994). Proportionality review is intended to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Smith*, 357 N.C. 604, 621, 588 S.E.2d 453, 464 (2003) (citation omitted), *cert. denied*, 542 U.S. 941 (2004).

In our proportionality review, we compare the case at bar to cases in which this Court has found imposition of the death penalty to be disproportionate. This Court has previously determined that the death penalty was disproportionate in eight cases: *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled*

in part on other grounds by State v. Gaines, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

In none of the cases in which this Court found the death penalty disproportionate did the jury find the three aggravating circumstances the jury found in this case. In fact, in cases in which the jury found the murder to be especially heinous, atrocious, or cruel this Court has only found the death sentence to be disproportionate twice. *See State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653; and *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170. *Stokes* and *Bondurant* are easily distinguishable from this case. In *Stokes*, the defendant was only seventeen years old at the time of the killing, and he was the only one of four assailants to receive the death penalty. 319 N.C. at 3-4, 11, 352 S.E.2d at 654-55, 658. In this case, defendant was thirty years old at the time of the murders, and he committed both murders by himself. In *Bondurant*, the defendant expressed remorse immediately after the killing and even aided the victim in traveling to the hospital for treatment. 309 N.C. at 694, 309 S.E.2d at 182-83. In contrast defendant Duke plunged knives into the neck and chest of one victim and into the upper abdomen of the other after the victims were unconscious or dead from the violent blows of a fire extinguisher—a far cry from exhibiting remorse and aiding the victims in obtaining treatment.

"[W]e have never found a death sentence disproportionate in a double-murder case." *State v. Sidden*, 347 N.C. 218, 235, 491 S.E.2d 225, 234 (1997) (citing *State v. Conner*, 345 N.C. 319, 338, 480 S.E.2d 626, 635, *cert. denied*, 522 U.S. 876 (1997)), *cert. denied*, 523 U.S. 1097 (1998). We decline to do so here.

In proportionality review this Court also considers the brutality of the murders in question. *See State v. Reeves*, 337 N.C. 700, 740, 448 S.E.2d 802, 822 (1994) ("In determining proportionality, we are impressed with the cold-blooded, callous and brutal nature of this murder."), *cert. denied*, 514 U.S. 1114 (1995); *State v. Moseley*, 336 N.C. 710, 725, 445 S.E.2d 906, 915 (1994) ("In determining proportionality, we are impressed with the brutality and 'overkill' evidenced in this murder."), *cert. denied*, 513 U.S. 1120 (1995). The murders in this case were especially brutal. The evidence showed defendant brutally beat the victims with a blunt object—a fire extinguisher. Both

victims were found with their brains "smashed." The multiple blows from the fire extinguisher fractured both victims' skulls and caused immediate internal bleeding of the victims' brains. In addition, the violent blows from defendant's swings of the fire extinguisher forced Arthurs's brain into his spinal column. When Grant tried to leave the apartment, defendant grabbed him and pulled him back into the apartment so he could continue his savage beating. The autopsy showed multiple stab wounds to Grant's face and neck. The evidence showed not only did defendant stab his victims, but he moved the blades around inside their bodies, causing even more damage. To finish this brutality, defendant plunged knives into both sides of Grant's neck, into Grant's chest, and into Arthurs's upper abdomen, leaving a total of four knives in his victims' bodies.

"Although we 'compare this case with the cases in which we have found the death penalty to be proportionate . . . . we will not undertake to discuss or cite all of those cases each time we carry out that duty.' " *State v. Garcia*, 358 N.C. at 429, 597 S.E.2d at 756 (quoting *State v. McCollum*, 334 N.C. 208, 244, 433 S.E.2d 144, 164 (1993), *cert. denied*, 512 U.S. 1254 (1994)). We have no difficulty finding the sentences received are proportionate when compared with our other cases. Therefore, we hold defendant's sentences are neither disproportionate nor excessive considering the nature of defendant and the crimes he committed.

NO ERROR.

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

STATE OF NORTH CAROLINA v. VINCENT LAMONT HARRIS

No. 548A04

(Filed 16 December 2005)

1. Rape— rape shield statute—prior sexual encounter on same day

The trial court did not err in a second-degree rape case by excluding evidence of the victim's prior sexual encounter with her boyfriend earlier on the same day as the alleged rape even

though defendant presented a defense of consent, and defendant's conviction for second-degree rape is reinstated because: (1) no evidence proffered at the in camera hearing supported an inference that the victim's prior sexual activity was forced or caused any injuries; (2) where consent is the defense, evidence of the prior sexual activity is precisely the type of evidence the rape shield statute under N.C.G.S. § 8C-1, Rule 412 is intended to proscribe when in the instant case the victim described an earlier sexual encounter that was consensual and was unlikely to have produced the type and number of injuries the expert testimony verified that she suffered; (3) given the purpose of the rape shield statute, evidence of the victim's consensual attempt at sexual intercourse with her boyfriend is not probative on the issue of whether she consented to sexual activity with defendant; and (4) even assuming that the excluded evidence was probative, it was substantially outweighed by the danger of unfair prejudice to the State and the prosecuting witness.

2. Robbery— common law—sufficiency of evidence

The Court of Appeals erred in a second-degree rape and common law robbery case by holding that defendant's conviction for common law robbery should be reversed on the basis that the victim's credibility after cross-examination as to her prior sexual encounter is essential to support all charges stemming from the entire criminal transaction, because: (1) the evidence of prior sexual activity was properly excluded; and (2) viewed in the light most favorable to the State, the evidence was sufficient to support the conviction for common law robbery.

3. Sentencing— resentencing—aggravated sentence—*Blakely*

The Court of Appeals holding that a second-degree rape and common law robbery case must be remanded to the trial court for resentencing on the basis of *Blakely v. Washington*, 542 U.S. 296 (2004), is affirmed.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 166 N.C. App. 386, 602 S.E.2d 697 (2004), reversing judgments entered on 27 February 2003 by Abraham Penn Jones in Superior Court, Granville County and granting defendant a new trial. Heard in the Supreme Court 15 March 2005.

Roy Cooper, Attorney General, by David L. Elliott, Assistant Attorney General, for the State-appellant.

Thomas R. Sallenger for defendant-appellee.

PARKER, Justice.

The issues before this Court are whether the Court of Appeals erred in holding (i) that the trial court erred in excluding evidence of the victim's prior sexual encounter, and (ii) that prejudicial error occurred in defendant's conviction for common law robbery. For the reasons discussed herein, we reverse the decision of the Court of Appeals on these two issues.

Defendant Vincent Lamont Harris was indicted on 24 June 2002 for the offenses of first-degree kidnapping, second-degree rape, and common law robbery. Defendant was tried at the 24 February 2003 criminal session of Superior Court, Granville County. The jury acquitted defendant of the first-degree kidnapping charge, but found defendant guilty on the charges of second-degree rape and common law robbery. The trial court found two aggravating factors, namely, that the offenses were especially heinous, atrocious, or cruel and that defendant is a predator. Defendant was sentenced to a minimum term of 188 months and a maximum term of 235 months imprisonment for the second-degree rape conviction and to a minimum term of 26 months and a maximum term of 32 months imprisonment for the common law robbery conviction, with the sentences to run consecutively.

At trial the State's evidence tended to show that late on the night of 13 April 2002, the victim, a sixteen-year-old high school student, was approached from behind by defendant as she was walking to a friend's house in Oxford, North Carolina. Defendant was twenty-eight years old, married, and the father of three children. Defendant walked with his arm around the victim and asked if she smoked marijuana. The victim replied in the negative, indicating that she had quit. Soon afterwards defendant grabbed her by the neck and threw her into an alleyway between a house and a church. Defendant then made her get up, pulled her behind the house, threw her down again, and pulled off her pants and underwear. Defendant forced his penis into the victim's vagina. When she tried to scream, he put his hand over her mouth and told her to be quiet. Next, defendant turned the victim over and forced his penis into her rectum. The victim screamed, and defendant covered her mouth, again telling her to be quiet. Defendant

stood up and ordered the victim to pull up her pants and help him look for his lost cell phone. Then defendant again threw the victim to the ground, pulled her pants down, and forced his penis into her vagina. The victim testified that she could not scream and that defendant told her "[She] better not look at him so [she] wouldn't be able to identify him with the police."

According to the State's evidence, defendant asked the victim if she had any money. When she replied in the negative, defendant forced the victim to give him her six rings and told her that if she told anybody he would come back and kill her. The victim testified that she wore these rings all the time, that the one with her birthstone was a Christmas gift from her mother, and that two of the others were passed down from her grandmother to her mother to her. The victim further testified that defendant directed her to go around the church to leave and that the two left the scene in different directions. The victim continued on to her friend's house where she spent the night.

The next day when the victim returned home, she told her mother what had happened to her; and her mother took her to the police station. After giving her statement to Detective Shelly Chauvaux, the victim was referred to Maria Parham Hospital, where she underwent a rape kit evaluation conducted by nurse Wendy Medlin, Director of the District Nine Sexual Assault Program. At trial nurse Medlin testified as to what the victim had told her concerning the events on the night of 13 April 2002. Nurse Medlin also testified that her examination of the victim revealed that the victim had multiple lacerations, bruising, and tears in her anus and vagina and that her cervix was also "very bruised and swollen, red."

Defendant's evidence at trial tended to show that he and the victim had consensual, vaginal intercourse on 13 April 2002. Defendant testified that he first met the victim that night around 11:00 p.m. at the Texaco, where they talked and made plans to "hook up" later. Defendant did not know the victim; and in this conversation, which lasted approximately seven minutes, the victim told him that her boyfriend was angry with her because she got caught having sex in the woods. As planned, around midnight the two met up again and they walked, talked, and smoked marijuana together. According to defendant they then went behind the church where the victim took off her sweat pants and underwear and willingly had sex with defendant for approximately twenty minutes. Afterwards she gave

defendant her rings in exchange for a dime bag of marijuana, having a value of approximately twenty dollars. They then walked away in different directions.

On cross-examination of the victim, the trial court did not allow testimony regarding the victim's sexual activity with her boyfriend earlier on the day of 13 April 2002. As required under N.C.G.S. § 8C-1, Rule 412(d), the trial court heard *in camera* testimony by the victim concerning this sexual activity. In the hearing the victim testified that she and her boyfriend had "attempted to" have sex. Regarding this attempted sexual act, the victim stated that she was not hurt in any way and that they did not attempt anal intercourse:

> Q. [Victim], when you attempted to have sex with [your boyfriend], did he hurt you in any way?
>
> A. No, ma'am
>
> Q. Did you attempt any anal intercourse? Did you have anal intercourse with [your boyfriend]?
>
> A. No, ma'am.

The court then pressed for clarification on whether there had been any penetration during this earlier sexual encounter:

> THE COURT: [T]he boy with whom you tried to have sex earlier that day, did he put his penis into your vagina?
>
> A. No, not quite.
>
> THE COURT: Not quite. Did he attempt to?
>
> A. Yes, sir.

When questioned why she did not have sex, the victim responded, "Because it didn't—something told me it wasn't right. It didn't feel right. That it—something told—I had the gut instinct that it would be wrong and that something bad would happen."

Applying the rape shield law, N.C.G.S. § 8C-1, Rule 412, to this testimony, the trial court ruled the evidence of the victim's prior sexual activity on 13 April 2002 inadmissable and stated the following:

> Until I have a version that says that she was somehow just promiscuously wandering around having sex with this, that and the other all the time, I don't have that there. And even there doesn't mean necessarily that she consented in this case.

> I think the Rape Shield law is designed to protect women from the shotgun defense that if she would do it with Jack, she'd do it with Jim . . . . And I think the only time it really becomes pertinent, this prior sexual behavior if defendant testifies that she was raped and up until that time—well, there is some—something very significant about the physical activity of some prior event that could have caused the same thing.
>
> I think here, even if there's prior sex, the tearing really is a red—in some way a red herring. It's not really—whether it is tearing during consensual or nonconsensual sex, it's not really directly dispositive of whether there is a consent between her and Mr. Harris, one way or the other.

On defendant's appeal a divided panel of the Court of Appeals reversed the trial court and remanded for a new trial. *State v. Harris*, 166 N.C. App. 386, 602 S.E.2d 697 (2004). The Court of Appeals majority found error in the trial court's application of the rape shield law and determined that "the evidence of the prior sexual encounter on the day of the alleged rape should be admitted." *Id.* at 393, 602 S.E.2d at 701. The majority reasoned:

> In this case the evidence is relevant and probative as to whether or not the victim consented to having sex with defendant. Had she consented, then it is within reason that no physical evidence of vaginal injury on the victim was caused by defendant. Thus, if the jury found the lacerations on the vagina (which evidence was used by the State to prove the rape) to have been caused by the attempted sexual encounter earlier that day, they could still harbor reasonable doubt as to whether or not the victim consented to having sex with defendant.

Id. Regarding the conviction for common law robbery, the Court of Appeals majority concluded that the victim's credibility on the rape issue was essential to "all charges stemming from the entire criminal transaction." Therefore, the common law robbery conviction was also reversed and remanded. *Id.*

Judge Levinson dissented in part and concurred in part, finding no error in defendant's convictions for second-degree rape and common law robbery, but agreeing with the majority's decision to remand the case for resentencing in light of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). *Harris*, 166 N.C. App. at 396, 602 S.E.2d at 703. The State gave notice of appeal to this Court based on the dis-

senting opinion, which deemed the evidence of prior sexual activity properly excluded under N.C.G.S. § 8C-1, Rule 412.

[1] In its appeal to this Court, the State contends that the Court of Appeals erred in reversing defendant's convictions. More specifically, the State argues that evidence of the victim's prior sexual activity was properly excluded under Rule 412 of the Rules of Evidence. We agree.

In pertinent part, N.C.G.S. § 8C-1, Rule 412 provides:

> (b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
>
> . . . .
>
> (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant . . . .

N.C.G.S. § 8C-1, Rule 412(b)(2) (2003).

This Court has stated that "[t]he Rape Shield Statute provides that 'the sexual behavior of the complainant is irrelevant to any issue in the prosecution' except in four very narrow situations." *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988). The application of one of these exceptions is the basis for defendant's argument that a jury should be allowed to hear evidence of the victim's prior sexual activity. Although presenting a defense of consent, defendant also argues that a jury could infer that the victim's injuries were a result of the earlier encounter on 13 April 2002, thereby accounting for the "physical evidence of the alleged force" which was used to convict him of rape.

In construing the prior codification of the rape shield statute, N.C.G.S. § 8-58.6, this Court discussed the evolution of the admissibility of prior sexual conduct evidence and concluded that the statute was a "codification of this jurisdiction's rule of relevance as that rule specifically applies to the past sexual behavior of rape victims." *State v. Fortney*, 301 N.C. 31, 37, 269 S.E.2d 110, 113 (1980). In dicta the Court acknowledged that the predecessor to the statutory exception at issue here is "clearly intended, *inter alia*, to allow evidence showing the source of sperm, injuries or pregnancy to be someone or something other than the defendant." *Id.* at 41, 269 S.E.2d at 115. In *Fortney*, as in the present case, defendant asserted consent as a

defense. Holding that the evidence of semen stains defendant sought to have admitted was inadmissible, this Court stated:

> Such evidence is not probative of the victim's consent to the acts complained of. Indeed, the only inference such evidence raises is that the victim had had sex with two individuals other than the defendant at some time prior to the night of the rape. Without a showing of more, this is precisely the kind of evidence the statute was designed to keep out because it is irrelevant and tends to prejudice the jury, while causing social harm by discouraging rape victims from reporting and prosecuting the crime.
>
> Naked inferences of prior sexual activity by a rape victim with third persons, without more, are irrelevant to the defense of consent in a rape trial.

Id. at 43-44, 269 S.E.2d at 117 (footnote omitted).

The Court of Appeals distinguished *Fortney* from the instant case on the basis that "the sexual activity sought to be admitted before the jury relates to a sexual encounter by the victim on the day of the alleged rape." *Harris*, 166 N.C. App. at 393, 602 S.E.2d at 701. Acknowledging that "evidence of intercourse on the same day is clearly not always admissible[,]" *id.* (citing *State v. Rhinehart*, 68 N.C. App. 615, 316 S.E.2d 118 (1984)), the Court of Appeals nonetheless concluded that the evidence was "relevant and probative as to whether or not the victim consented to having sex with defendant." *Id.* Before this Court, defendant urges that the dicta in *Fortney* interpreting the statute is applicable. We do not agree.

Similarly, defendant's reliance on *State v. Ollis*, 318 N.C. 370, 348 S.E.2d 777 (1986), is misplaced. In *Ollis*, the victim testified *in camera* that on the same day the defendant raped her, another man had " 'done the samething [sic].' " *Ollis*, 318 N.C. at 376, 348 S.E.2d at 781. Arguing that the evidence was admissible under N.C.G.S. § 8C-1, Rule 412(b)(2), the defendant sought to question the victim concerning the sexual acts of this other man; but the trial court concluded the evidence was irrelevant and excluded it. *Id.*

On appeal this Court agreed with the defendant that the evidence should have been admitted. At trial, the medical doctor who examined the victim testified that the victim "did receive or has been the object of inappropriate physical and sexual abuse." *Ollis*, 318 N.C. at 375, 348 S.E.2d at 781. Accordingly, evidence regarding the sexual acts of another man, if admitted, "would have provided an alternative

explanation for the medical evidence presented . . . and falls within exception (b)(2) of Rule 412." *Id.* at 376, 348 S.E.2d at 781. We further stated that

> we are not able to say that the jury would not have had a reasonable doubt about the defendant's guilt if they had known that the only physical evidence corroborating the victim's testimony of rape was possibly attributable to the acts of a man other than the defendant. We find that exclusion of that evidence was prejudicial to the defendant in presenting his defense to the charge of rape.

Id. at 377, 348 S.E.2d at 782 (citation omitted).

Ollis, however, is distinguishable from the present case in significant ways; namely, in *Ollis*: (i) evidence of the other sexual activity that this Court ruled should be admitted, as described by the victim, involved completed sexual intercourse; (ii) the other sexual activity occurred immediately after the alleged rape by defendant; (iii) the sexual activity with the other man was not consensual; and, finally, (iv) the defendant denied any sexual activity with the alleged victim and, therefore, did not rely on consent as a defense.

In the present case, defendant's arguments for admission of the excluded evidence must fail. Defendant admitted that he had sexual intercourse with the victim but asserted that the victim consented. Hence, the critical question, as the trial court noted, was not who inflicted the injuries; but rather, did the victim consent to having sexual intercourse with defendant? The Court of Appeals majority reasoned that had the jury known that a possibility existed that the victim's boyfriend inflicted the injuries, then the jury could have had a reasonable doubt as to whether the victim consented to sexual relations with defendant. *Harris*, 166 N.C. App. at 393, 602 S.E.2d at 701. However, based on the evidence presented during the *in camera* hearing and before the jury, this analysis would have required the jury to engage in pure speculation and conjecture.

No evidence proffered at the *in camera* hearing supports an inference that the victim's prior sexual activity was forced or caused any injuries. The victim's testimony was unequivocal that her boyfriend did not penetrate her during the previous consensual attempt at sexual intercourse. Moreover, nurse Medlin, who was qualified as an expert in the field of forensic sexual assault nursing, testified that injury to the cervix was not common during consensual sex. Nurse Medlin also opined that the injuries she observed on the vic-

tim, internally and externally, "were consistent with those of others who have complained of sexual assault[,]" and she stated that "typically in a consensual act you would only have one injury to one location of the body. [This victim] had multiple injuries to numerous places in the vaginal and anal area."

In this case, where consent is the defense, evidence of the prior sexual activity is precisely the type evidence the rape shield statute is intended to proscribe. The victim described an earlier sexual encounter that was consensual and was unlikely to have produced the type and number of injuries the expert testimony verified that she suffered. On this record, given the purpose of the rape shield statute, we hold that evidence of the victim's consensual attempt at sexual intercourse with her boyfriend is not probative on the issue of whether she consented to sexual activity with defendant, and the trial court properly excluded it pursuant to N.C.G.S. § 8C-1, Rule 412. *See Fortney*, 301 N.C. at 44, 269 S.E.2d at 117. Moreover, even assuming that the excluded evidence was probative, we conclude that the probative value, if any, to defendant was substantially outweighed by the danger of unfair prejudice to the State and the prosecuting witness. N.C.G.S. § 8C-1, Rule 403 (2003). Therefore, on the issue of second-degree rape, we reverse the Court of Appeals.

[2] The State also argues that the Court of Appeals majority erred in holding that defendant's conviction for common law robbery should be reversed on the basis that "the victim's credibility after cross-examination as to her prior sexual encounter is essential to support all charges stemming from the entire criminal transaction." *Harris*, 166 N.C. App. at 393, 602 S.E.2d at 701. Having determined that the evidence of prior sexual activity was properly excluded, we agree with the State. Common law robbery is "the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear." *State v. Stewart*, 255 N.C. 571, 572, 122 S.E.2d 355, 356 (1961). In the present case the evidence tended to show that after forcing the victim behind a building and raping her twice, defendant took six rings from her and threatened to kill her if she told anyone. Viewed in the light most favorable to the State, this evidence is sufficient to support the conviction for common law robbery. *See, e.g.*, *State v. Jerrett*, 309 N.C. 239, 263, 307 S.E.2d 339, 352 (1983) (noting that in determining whether there is sufficient evidence to support every element of an offense charged, "we must be guided by the familiar rule that the evidence must be considered in the light favorable to the State").

Therefore, we reverse the Court of Appeals decision reversing defendant's conviction for common law robbery.

[3] Finally, although this issue was not briefed to this Court, we affirm the Court of Appeals holding that the case must be remanded to the trial court for resentencing on the basis of *Blakely v. Washington*, 542 U.S. at ——, 159 L. Ed. 2d at 413 (holding that the statutory maximum for any offense is the "maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant" (emphasis omitted)) and *State v. Allen*, 359 N.C. 425, 440-41, 444 & n.5, 615 S.E.2d 256, 266-67, 269 & n.5 (2005) (holding that the imposition of an aggravated sentence based on factors not found by the jury, other than facts to which a defendant has admitted or a prior conviction, is structural error and not harmless beyond a reasonable doubt).

The decision of the Court of Appeals as to defendant's convictions for second-degree rape and common law robbery is reversed, and the decision of that court as to the remand for resentencing is affirmed.

AFFIRMED IN PART; REVERSED IN PART.

Justice NEWBY, concurring.

I agree with this Court's resolution of the rape shield issue presented by the case *sub judice*. Furthermore, I acknowledge that *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005) (holding *Blakely* errors are structural errors and not harmless beyond a reasonable doubt), required the majority to affirm the decision of the Court of Appeals to remand for resentencing. I joined the opinion concurring in part and dissenting in part from *Allen*, and I continue to believe the reasoning of the concurring and dissenting opinion was correct. *Id.* at 452-73, 615 S.E.2d at 274-88 (Martin, J., Lake, C.J., Newby, J., concurring in part and dissenting in part) (arguing *Blakely* errors are subject to harmless error analysis). However, the doctrine of *stare decisis*, which compels courts to honor binding precedent absent extraordinary circumstances, demands that I now accept *Allen* as authoritative and concur in the decision of the majority in the instant case. *State v. Camacho*, 337 N.C. 224, 235, 446 S.E.2d 8, 14 (1994) (Mitchell, J. (later C.J.), concurring).

Chief Justice LAKE and Justice MARTIN join in this concurring opinion.

MOORESVILLE HOSPITAL MANAGEMENT ASSOCIATES, INC., D/B/A LAKE NORMAN REGIONAL MEDICAL CENTER, PETITIONER V. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION; ROBERT J. FITZGERALD IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE DIVISION OF FACILITY SERVICES, AND LEE B. HOFFMAN IN HER OFFICIAL CAPACITY AS CHIEF OF THE CERTIFICATE OF NEED SECTION, RESPONDENTS, AND THE PRESBYTERIAN HOSPITAL AND THE TOWN OF HUNTERSVILLE, RESPONDENT-INTERVENORS

No. 404A03-2

(Filed 16 December 2005)

Appeal and Error; Hospitals and Other Medical Facilities—certificate of need—mootness

The Court of Appeals erred in denying respondent-intervenor Presbyterian Hospital's motion to dismiss as moot petitioner's appeal from a decision of the Department of Health and Human Services upholding a certificate of need for Presbyterian Hospital to build a hospital in Huntersville where, prior to the Court of Appeals decision, construction of the hospital had been completed and the hospital was fully operational.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 169 N.C. App. 641, 611 S.E.2d 431 (2005), affirming in part, reversing in part, and remanding a final agency decision entered 20 March 2003 by the North Carolina Department of Health and Human Services. On 30 June 2005, the Supreme Court allowed petitioner's petition for discretionary review as to additional issues and a writ of certiorari filed by respondents and respondent-intervenors to review an order entered by the Court of Appeals on 4 January 2005 denying respondent-intervenors' motion to dismiss. Heard in the Supreme Court 15 November 2005.

Smith Moore LLP, by Maureen Demarest Murray and James G. Exum, Jr., for petitioner-appellant/appellee.

Roy Cooper, Attorney General, by James A. Wellons, Special Deputy Attorney General, for respondent-appellees/appellants.

Nelson Mullins Riley & Scarborough LLP, by Noah H. Huffstetler, III, for respondent-intervenor-appellees/appellants.

PER CURIAM.

Respondent Department of Health and Human Services (DHHS) issued a certificate of need (CON) to respondent-intervenor Presbyterian Hospital. Petitioner requested a contested case hearing to challenge the CON, and an administrative law judge recommended denying the CON. When respondent DHHS upheld the CON, petitioner appealed to the Court of Appeals.

While the appeal was pending, respondent-intervenor Presbyterian Hospital obtained an operating license from DHHS. On 19 November 2004, before the Court of Appeals issued its decision, respondent-intervenors filed in that court a motion to dismiss petitioner's appeal as moot because construction of Presbyterian Hospital had been completed and the hospital was fully operational. The Court of Appeals denied the motion in an order dated 4 January 2005. On 19 April 2005, in a divided opinion, the Court of Appeals affirmed the decision of respondent DHHS in part and reversed and remanded in part.

On 18 May 2005, respondents and respondent-intervenors filed an appeal based on issues raised by the dissent and a petition for writ of certiorari requesting review by this Court of the Court of Appeals 4 January 2005 order that denied respondent-intervenors' motion to dismiss the appeal as moot. On 24 May 2005, petitioner filed a notice of appeal based on the dissent and a petition for discretionary review as to additional issues. The Court allowed both petitions on 30 June 2005.

Thereafter, respondent-intervenors filed motions to take judicial notice and for sanctions. Respondents and respondent-intervenors also filed two motions in opposition to petitioner's response to their brief, one to strike portions of the reply brief and the other to disallow the entire reply brief. Respondent-intervenors' motion to take judicial notice is allowed. Respondents and respondent-intervenors' motion to strike is dismissed as moot. Respondents and respondent-intervenors' motion to disallow the reply brief is dismissed as moot. Respondent-intervenors' motion for sanctions is denied.

Arguments were heard before this Court on 15 November 2005. We conclude that the Court of Appeals erred in denying respondent-intervenors' motion to dismiss as moot. The opinion of the Court of Appeals is vacated. The appeal before this Court is dismissed as

moot. Petitioner's petition for discretionary review is dismissed as improvidently allowed.

VACATED; APPEAL DISMISSED AS MOOT; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

MICHELLE L. SAWYERS, F/K/A MICHELLE L. TURNER v. FARM BUREAU INSURANCE OF N.C., INC.

No. 264A05

(Filed 16 December 2005)

Insurance— automobile insurance—uninsured motorist carrier—Florida judgment against uninsured—carrier not bound

The decision of the Court of Appeals holding that defendant uninsured motorist carrier was bound by a judgment against the uninsured motorist in Florida if the carrier was served with a copy of the summons, complaint or other process in the action against the uninsured motorist is reversed for the reasons stated in the dissenting opinion that the uninsured motorist carrier was not bound because (1) the carrier was not a party to the Florida action at the time judgment was entered; (2) the statute of limitations had expired before plaintiff instituted this North Carolina action against the uninsured motorist carrier; (3) defendant carrier is not bound by the doctrine of res judicata; and (4) plaintiff is equitably estopped from asserting that defendant carrier is bound by the Florida judgment.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 170 N.C. App. 17, 612 S.E.2d 184 (2005), reversing and remanding in part and dismissing as interlocutory in part an appeal from an order entered 9 March 2004 by Judge Robert C. Ervin in Superior Court, Mecklenburg County. Heard in the Supreme Court 14 December 2005.

Ruff, Bond, Cobb, Wade & Bethune, L.L.P., by J.D. DuPuy and Robert S. Adden, Jr., for plaintiff-appellee.

Caudle & Spears, PA, by Harold C. Spears and C. Grainger Pierce, Jr., for defendant-appellant.

PER CURIAM.

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

REVERSED.

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

DAVID LLOYD HOFECKER v. JONATHAN COOPER CASPERSON AND GARY JAY CASPERSON

No. 92A05

(Filed 16 December 2005)

Motor Vehicles— motorist-pedestrian accident—last clear chance

The decision of the Court of Appeals is reversed for the reason stated in the dissenting opinion that the trial court properly entered summary judgment for defendant driver on the issue of last clear chance because plaintiff pedestrian failed to forecast any evidence that defendant was speeding, not paying attention, failed to maintain a proper lookout, or could reasonably have discovered plaintiff's perilous position.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 168 N.C. App. 341, 607 S.E.2d 664 (2005), affirming in part and reversing in part an order entered on 10 November 2003 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Supreme Court 12 September 2005.

Harris & Associates, PLLC, by Robert J. Harris, for plaintiff-appellee.

Brown, Crump, Vanore & Tierney, L.L.P., by O. Craig Tierney, Jr., for defendant-appellants.

PER CURIAM.

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

REVERSED.

THE CURRITUCK ASSOCIATES-RESIDENTIAL PARTNERSHIP, A NORTH CAROLINA GENERAL PARTNERSHIP v. RAY E. HOLLOWELL, JR., D/B/A SHALLOWBAG BAY DEVELOPMENT COMPANY v. KITTY HAWK ENTERPRISES, INC., THIRD-PARTY DEFENDANT

SHALLOWBAG BAY DEVELOPMENT COMPANY, LLC v. THE CURRITUCK ASSOCIATES-RESIDENTIAL PARTNERSHIP

No. 528A04

(Filed 16 December 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 166 N.C. App. 17, 601 S.E.2d 256 (2004), affirming an order entered on 22 May 2003 by Judge W. Russell Duke, Jr., in Superior Court, Dare County. Heard in the Supreme Court 20 April 2005.

Poyner & Spruill LLP, by J. Nicholas Ellis, for appellee.

Ragsdale Liggett PLLC, by George R. Ragsdale and Walter L. Tippett, Jr., for appellants Ray E. Hollowell, Jr. and Shallowbag Bay Development Company.

PER CURIAM.

Justice MARTIN took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Crawford v. Commercial Union Midwest Ins. Co.*, 356 N.C. 609, 572 S.E.2d 781 (2002); *Robinson v. Byrd*, 356 N.C. 608, 572 S.E.2d 781 (2002).

AFFIRMED.

STATE OF NORTH CAROLINA v. ROBERT GREGORY WINSLOW

No. 201A05

(Filed 16 December 2005)

Motor Vehicles— habitual DWI—date of prior conviction—amendment of indictment—substantial alteration

The decision of the Court of Appeals affirming a sentence for habitual DWI is reversed for the reason stated in the dissenting opinion that the trial court erred in permitting the State to amend the habitual DWI indictment after the close of the State's evidence to reflect the correct date of conviction of one of defendant's prior DWI offenses rather than the date of the offense, which was eight days outside the seven-year time period for habitual DWI, because the amendment of the indictment to allege a date within the seven-year period was a substantial alteration prohibited by N.C.G.S. § 15A-923(e).

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 169 N.C. App. 137, 609 S.E.2d 463 (2005), finding no error in a judgment entered 6 November 2001 by Judge J. Richard Parker in Superior Court, Gates County. Heard in the Supreme Court 15 November 2005.

Roy Cooper, Attorney General, by Patricia A. Duffy, Assistant Attorney General, for the State.

Richard E. Jester for defendant-appellant.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for further remand to the Superior Court, Gates County, for proceedings not inconsistent with the dissenting opinion.

REVERSED AND REMANDED.

IN RE D.M.

[360 N.C. 162 (2005)]

IN THE MATTER OF D.M.

No. 379A05

(Filed 16 December 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 615 S.E.2d 669 (2005), affirming an order terminating respondent's parental rights entered 8 October 2003 by Judge Avril U. Sisk in District Court, Mecklenburg County. Heard in the Supreme Court 15 November 2005.

Mecklenburg County Attorney's Office, by J. Edward Yeager, Jr., for petitioner-appellee Mecklenburg County Department of Social Services.

David Childers for respondent-appellant father.

PER CURIAM.

AFFIRMED.

IN RE T.K., D.K., T.K., & J.K.

[360 N.C. 163 (2005)]

IN THE MATTER OF T.K., D.K., T.K., AND J.K.

No. 386A05

(Filed 16 December 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 613 S.E.2d 739 (2005), affirming a permanency planning order entered 31 October 2003 by Judge Lisa C. Bell in District Court, Mecklenburg County. Heard in the Supreme Court 12 December 2005.

Tyrone C. Wade, Associate County Attorney, for petitioner-appellee Mecklenburg County Department of Social Services.

Michael E. Casterline for respondent-appellant mother.

PER CURIAM.

AFFIRMED.

TERI HARVEY LITTLE AND FRANK DONALD LITTLE, JR. v. OMEGA MEATS I, INC., THOMAS A. CASSANO, AND RONALD LEE SMITH

No. 438A05

(Filed 16 December 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 615 S.E.2d 45 (2005), affirming a judgment entered 20 August 2003 by Judge Michael E. Helms directing a verdict in favor of defendants Omega Meats I, Inc. and Thomas A. Cassano in Superior Court, Guilford County. Heard in the Supreme Court 13 December 2005.

Schoch & Schoch, by Arch K. Schoch IV, for plaintiff-appellants.

Horton and Gsteiger, P.L.L.C., by Urs R. Gsteiger, for defendant-appellees Omega Meats I, Inc. and Thomas A. Cassano.

PER CURIAM.

AFFIRMED.

IN RE J.B.

[360 N.C. 165 (2005)]

IN THE MATTER OF J.B.

No. 462A05

(Filed 16 December 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 616 S.E.2d 385 (2005), affirming a disposition order for twelve months' supervised probation with conditions entered 16 January 2004 by Judge Jim Love, Jr. in District Court, Harnett County. Heard in the Supreme Court 12 December 2005.

Roy Cooper, *Attorney General*, *by Mabel Y. Bullock*, *Special Deputy Attorney General*, *for the State.*

Susan J. Hall for juvenile-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. MASOUD RASHIDI

No. 510A05

(Filed 16 December 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 617 S.E.2d 68 (2005), finding no prejudicial error in judgments entered 15 August 2003 by Judge Yvonne Mims Evans in Superior Court, Mecklenburg County. Heard in the Supreme Court 13 December 2005.

Roy Cooper, *Attorney General*, *by Alexandra M. Hightower*, *Assistant Attorney General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Barbara S. Blackman*, *Assistant Appellate Defender*, *for defendant-appellant.*

PER CURIAM.

AFFIRMED.

EASTWAY WRECKER SERVICE, INC. v. CITY OF CHARLOTTE

No. 467A04

(Filed 16 December 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 165 N.C. App. 639, 599 S.E.2d 410 (2004), affirming an order entered on 6 January 2003 by Judge Albert Diaz in Superior Court, Mecklenburg County. Heard in the Supreme Court 18 October 2005.

The Odom Firm, PLLC, by T. LaFontine Odom, Sr. and Thomas L. Odom, Jr., for plaintiff-appellant.

Office of the City Attorney, by Cynthia L. White, Senior Assistant City Attorney, and Moore & Van Allen, PLLC, by Daniel G. Clodfelter, for defendant-appellee.

PER CURIAM.

AFFIRMED.

ANNA YOUNG v. PRANCING HORSE, INC. AND RONNI MELTZER

No. 329PA05

(Filed 16 December 2005)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 170 N.C. App. 699, 614 S.E.2d 607 (2005), affirming an order granting summary judgment in defendants' favor entered by Judge James M. Webb in Superior Court, Moore County. Heard in the Supreme Court 14 December 2005.

Webb & Graves, PLLC, by Jerry D. Rhoades, Jr., for plaintiff-appellant.

Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A., by F. Thomas Holt, III, for defendant-appellee Prancing Horse, Inc.

Brown, Crump, Vanore & Tierney, L.L.P., by Derek M. Crump, for defendant-appellee Ronni Meltzer.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

WATTS v. BORG WARNER AUTO., INC.

[360 N.C. 169 (2005)]

DAVID NOBLE WATTS, EMPLOYEE v. BORG WARNER AUTOMOTIVE, INC., EMPLOYER, LUMBERMENS MUTUAL CASUALTY COMPANY, CARRIER

No. 359A05

(Filed 16 December 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 613 S.E.2d 715 (2005), remanding for further findings of fact an opinion and award filed 4 March 2004 by the North Carolina Industrial Commission. Heard in the Supreme Court 12 December 2005.

Law Office of David Gantt, by David Gantt, for plaintiff-appellee.

Hedrick Eatman Gardner & Kincheloe, LLP, by Hope F. Smelcer and J.A. Gardner, III, for defendant-appellants.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. MICHAEL LEE SANDERS

No. 362A05

(Filed 16 December 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 613 S.E.2d 708 (2005), reversing and remanding in part a judgment entered 9 January 2004 by Judge Mark E. Klass in Superior Court, Richmond County. Heard in the Supreme Court 12 December 2005.

Roy Cooper, *Attorney General*, *by Robert K. Smith*, *Assistant Attorney General*, *for the State-appellant.*

Anne Bleyman for defendant-appellee.

PER CURIAM.

AFFIRMED.

ELLIS v. INTERNATIONAL HARVESTER CO.

[360 N.C. 171 (2005)]

TRACY M. ELLIS v. INTERNATIONAL HARVESTER COMPANY (A DELAWARE CORPORATION) NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION (A DELAWARE CORPORATION) INTERNATIONAL TRUCK AND ENGINE CORPORATION, FORMERLY INTERNATIONAL HARVESTER COMPANY, FORMERLY NAVISTAR INTERNATIONAL CORPORATION, FORMERLY NAVISTAR INTERNATIONAL CORPORATION D/B/A AND T/A "INTERNATIONAL" D/B/A AND T/A NAVISTAR T/A AND D/B/A INTERNATIONAL FROM NAVISTAR, KILE INTERNATIONAL TRUCKS, INC. (A TENNESSEE CORPORATION), GENERAL CAR AND TRUCK LEASING SYSTEM, INC. (AN IOWA CORPORATION), NASHVILLE TRUCK COMPANY, INC. (A TENNESSEE CORPORATION), SOFA CONNECTION, INC. (A TENNESSEE CORPORATION)

No. 580PA04

(Filed 16 December 2005)

On discretionary review pursuant to N.C.G.S. § 7A-31 to review an order filed by the Court of Appeals on 1 November 2004 dismissing plaintiff's appeal from orders granting summary judgment entered on 21 May 2004 and 26 May 2004 by Judge E. Penn Dameron, Jr. in Superior Court, Buncombe County. Heard in the Supreme Court 14 December 2005.

David R. Payne, P.A., by David R. Payne and Peter U. Kanipe, for plaintiff-appellant.

Northup & McConnell, P.L.L.C., by Elizabeth E. McConnell and Isaac N. Northup, Jr., for defendant-appellee Nashville Truck Company, Inc.

Ball, Barden & Bell, P.A., by Ervin L. Ball, Jr., for defendant-appellee Sofa Connection, Inc.

PER CURIAM.

Based on our decisions in *Tinch v. Video Industrial Services, Inc.*, 347 N.C. 380, 493 S.E.2d 426 (1997) and *Pelican Watch v. United States Fire Insurance Co.*, 323 N.C. 700, 375 S.E.2d 161 (1989), the order of dismissal entered by the Court of Appeals is vacated and this case is remanded for a decision on the merits.

VACATED AND REMANDED.

NEILL GRADING & CONSTRUCTION COMPANY, INC. v. DAVID B. LINGAFELT AND NEWTON CONOVER COMMUNICATIONS, INC.

No. 112PA05

(Filed 16 December 2005)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 168 N.C. App. 36, 606 S.E.2d 734 (2005), dismissing an interlocutory appeal from an order denying summary judgment entered 17 November 2003 by Judge Robert C. Ervin in Superior Court, Catawba County. Heard in the Supreme Court 16 November 2005.

Patrick, Harper & Dixon L.L.P., by Stephen M. Thomas and Michael J. Barnett, for plaintiff-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Mark J. Prak and Charles E. Coble, for defendant-appellants.

The Bussian Law Firm, PLLC, by John A. Bussian, for North Carolina Association of Broadcasters and North Carolina Press Association, amici curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

TAYLOR v. CAROLINA REST. GRP., INC.

[360 N.C. 173 (2005)]

REBECCA S. TAYLOR, EMPLOYEE v. CAROLINA RESTAURANT GROUP, INC., EMPLOYER, THE HARTFORD, CARRIER

No. 377A05

(Filed 16 December 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 613 S.E.2d 510 (2005), affirming an Opinion and Award of the North Carolina Industrial Commission entered 2 April 2004. Heard in the Supreme Court 12 December 2005.

Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson and Fred D. Poisson, Jr., for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Jaye E. Bingham and Erin F. Taylor, for defendant-appellants.

PER CURIAM.

AFFIRMED.

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

Babb v. Graham Case Below: 171 N.C. App. 364	No. 382P05	Def's (Jerry L. Newton, III) PDR Under N.C.G.S. § 7A-31 (COA04-805)	Denied 12/01/05
Bruning & Federle Mfg. Co. v. Mills Case Below: 173 N.C. App. 641	No. 609P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-999)	Denied 12/01/05
Cater v. Barker (now McKeon) Case Below: 172 N.C. App. 441	No. 546A05	Plt's Motion to Dismiss Appeal (COA04-795)	Denied 12/01/05
Christensen v. Tidewater Fibre Corp. Case Below: 172 N.C. App. 575	No. 552P05	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA04-717) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 12/01/05 2. Dismissed as moot 12/01/05
Citifinancial Mtge. Co. v. Ruffin Case Below: 170 N.C. App. 697	No. 375P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-879)	Denied 12/01/05
City of Concord v. Stafford Case Below: 173 N.C. App. 201	No. 562P05	1. Def's PDR Under N.C.G.S. § 7A-31 (COA04-1540) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 12/01/05 2. Dismissed as moot 12/01/05
Clayton v. Branson Case Below: 170 N.C. App. 438	No. 370P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-884)	Denied 12/01/05
Garland v. Hatley Case Below: 172 N.C. App. 593	No. 561P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-1131)	Denied 12/01/05

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

Harris v. Matthews Case Below: (COA05-28)	No. 479PA05	1. Def's (Matthews) NOA Based Upon a Constitutional Question (COA05-28) 2. Plts' Motion to Dismiss Appeal 3. Def's (Matthews) PDR Under N.C.G.S. § 7A-31 4. Plts' Notice of Cross-Appeal 5. Def's (Matthews) PWC to Review Order of COA	1. —- 2. Allowed 12/01/05 3. Denied 12/01/05 4. Dismissed as moot 12/01/05 5. Allowed for purpose of remand to COA for more thorough consideration in light of *Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324, 605 S.E.2d 161 (2004), *disc. rev. denied*, 359 N.C. 326, 611 S.E.2d 853, *cert. denied*, 126 S.Ct. 350. 163 L. Ed. 2d 59 (2005) 12/01/05
Harvey v. McLaughlin Case Below: 172 N.C. App. 582	No. 553P05	1. Def's Motion for Temporary Stay (COA04-1597) 2. Def's Petition for Writ of Supersedeas	1. Denied 11/15/05 2. Denied 11/15/05
Hill v. Hill Case Below: 173 N.C. App. 309	No. 638P05	Plts' Motion for Temporary Stay (COA03-969-2)	Allowed 11/22/05
In re B.R.C. Case Below: 173 N.C. App. 447	No. 591P05	1. Respondent's (Father) PDR Under N.C.G.S. § 7A-31 (COA04-481) 2. Respondent's (Mother) PDR Under N.C.G.S. § 7A-31	1. Denied 12/01/05 2. Denied 12/01/05

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

In re Estate of Newton Case Below: 173 N.C. App. 530	No. 586P05	Respondent's (Jerry Lewis Newton III) PDR Under N.C.G.S. § 7A-31 (COA04-1508)	Denied 12/01/05
In re J.D.S. Case Below: 170 N.C. App. 244	No. 511P05	Respondant's (Father) PDR Under N.C.G.S. § 7A-31 (COA04-213)	Denied 11/03/05
In re J.W. & K.W. Case Below: 173 N.C. App. 450	No. 592A05	1. Respondent's (Mother) NOA (Dissent) (COA04-1280) 2. Respondent's (Mother) PDR as to Additional Issues	1. —- 2. Allowed 12/01/05
Joyce v. Joyce Case Below: 167 N.C. App. 371	No. 033P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-1314)	Denied 12/01/05
Keyzer v. Amerlink, Ltd. Case Below: 173 N.C. App. 284	No. 587A05	1. Plts' NOA (Dissent) (COA04-1096) 2. Plts' PDR as to Additional Issues	1. —- 2. Denied 12/01/05
Keyzer v. Amerlink, Ltd. Case Below: 172 N.C. App. 592	No. 593P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-1095)	Denied 12/01/05
Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth. Case Below: 172 N.C. App. 486	No. 549P05	Plts' PDR Pursuant to N.C.G.S. § 7A-31 (COA04-1252)	Denied 12/01/05
Peden General Contr'rs, Inc. v. Bennett Case Below: 172 N.C. App. 171	No. 499P05	Def's (Carol Bennett d/b/a Brighton Stables) PDR Under N.C.G.S. § 7A-31 (COA04-744)	Denied 12/01/05

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

Peninsula Prop. Owners Ass'n v. Crescent Res., LLC Case Below: 171 N.C. App. 89	No. 421P05	1. Plt's NOA Based Upon a Substantial Constitutional Question (COA04-796) 2. Def's Motion to Dismiss Appeal 3. Plt's PDR Under N.C.G.S. § 7A-31	1. —- 2. Allowed 12/01/05 3. Denied 12/01/05
Property Rights Advocacy Grp. v. Town of Long Beach Case Below: 173 N.C. App. 180	No. 559A05	1. Plt's NOA (Dissent) (COA04-1374) 2. Plt's NOA (Based Upon a Constitutional Question) 3. Plt's PDR as to Additional Issues	1. —- 2. Dismissed ex mero motu 12/01/05 3. Denied 12/01/05
Schenk v. HNA Holdings, Inc. Case Below: 170 N.C. App. 555	No. 365P05	1. Plt's (Donald Lee Bell) PDR Under N.C.G.S. § 7A-31 (COA03-1094-2 and COA03-1095-2) 2. Plt's (Gary Ray Schenk, Sr.) PDR Under N.C.G.S. § 7A-31	1. Denied 12/01/05 2. Denied 12/01/05
Skinner v. Preferred Credit Case Below: 172 N.C. App. 407	No. 525A05	1. Plts' NOA (Dissent) (COA04-1450) 2. Plts' PWC to Review Decision of COA as to Additional Issues	1. —- 2. Allowed 12/01/05
State v. Ball Case Below: 171 N.C. App. 515	No. 590P05	Def's PWC to Review Decision of the COA (COA04-1582)	Denied 12/01/05
State v. Boyd Case Below: Rockingham County Superior Court	No. 547A88-5	1. Def-Appellant's PWC 2. Def-Appellant's Motion for Stay of Execution	1. Denied 11/29/05 2. Denied 11/29/05
State v. Boyd Case Below: 173 N.C. App. 642	No. 588P05	1. Def's PDR Under N.C.G.S. § 7A-31 (COA05-223) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Denied 12/01/05 2. Dismissed 12/01/05
State v. Brewton Case Below: 173 N.C. App. 323	No. 589P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1127)	Denied 12/01/05

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

State v. Cummings Case Below: 172 N.C. App. 172	No. 496P05	1. Def-Appellant's NOA Pursuant to N.C.G.S. § 7A-30 (1) (COA04-1228) 2. AG's Motion to Dismiss Appeal 3. Def-Appellant's PDR Pursuant to N.C.G.S. § 7A-31 (c) 4. Def-Appellant's PWC Pursuant to N.C.G.S. § 7A-32 (b)	1. —— 2. Allowed 12/01/05 3. Denied 12/01/05 4. Denied 12/01/05
State v. Duarte Case Below: 174 N.C. App. 626	No. 653P05	AG's Motion for Temporary Stay (COA04-1455)	Allowed 12/01/05
State v. Ezzell Case Below: 172 N.C. App. 593	No. 555P05	Def's PWC to Review Decision of COA (COA04-1205)	Denied 12/01/05
State v. Hernandez Case Below: 171 N.C. App. 516	No. 455A05	1. Def's NOA Based Upon a Constitutional Question (COA04-358) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed 12/01/05
State v. Hooks Case Below: Forsyth County Superior Court	No. 089A00-2	Def's PWC to Review Order of Forsyth County Superior Court	Denied 12/01/05
State v. Jacobs Case Below: 174 N.C. App. 1	No. 617A05	AG's Motion for Temporary Stay (COA04-541)	Allowed Pending determination of the State's PDR 11/07/05
State v. Kimble Case Below: 140 N.C. App. 153	No. 605P05	Def's PWC to Review the Decision of the COA (COA99-981)	Denied 12/01/05 **Edmunds, J. Recused**
State v. Kozoman Case Below: 170 N.C. App. 698	No. 602P05	1. Def's PWC to Review the Decision of the COA (COA04-753) 2. Def's Motion for "Summary Judgment of PWC"	1. Denied 12/01/05 2. Dismissed 12/01/05
State v. Leak Case Below: 174 N.C. App. 628	No. 664P05	AG's Motion for Temporary Stay (COA05-393)	Allowed 12/06/05

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

State v. Massey Case Below: 174 N.C. App. 216	No. 637A05	AG's Motion for Temporary Stay	Allowed 11/18/05
State v. McBride Case Below: 173 N.C. App. 101	No. 564P05	Def's PDR Under N.C.G.S. § 7A-31 (COA03-740)	Denied 12/01/05
State v. McCoy Case Below: 173 N.C. App. 105	No. 620P05	AG's Motion for Temporary Stay (COA04-1336)	Allowed 11/07/05
State v. McHone Case Below: 174 N.C. App. 289	No. 639P05	AG's Motion for Temporary Stay (COA04-1605)	Allowed Pending determination of the State's PDR 11/23/05
State v. McKinney Case Below: 173 N.C. App. 138	No. 622P05	AG's Motion for Temporary Stay (COA04-1653)	Allowed 11/07/05
State v. McMahan Case Below: 174 N.C. App. 586	No. 657P05	AG's Motion for Temporary Stay (COA05-211)	Allowed 11/29/05
State v. McNeil Case Below: Wake County Superior Court	No. 037A87-6	Def's PWC to Review the Order of Wake County Superior Court	Denied 12/01/05
State v. Morton Case Below: 173 N.C. App. 448 360 N.C. 74	No. 536PA05	AG's PDR Under N.C.G.S. § 7A-31	This Court *ex mero motu* vacates its prior decision to allow the State's PDR of the decision of the COA pursuant to N.C.G.S. § 7A-31 and now denies the petition. 12/01/05

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

State v. Murphy Case Below: 173 N.C. App. 642	No. 634P05	Def's PDR Under N.C.G.S. § 7A-31 (COA05-145)	Denied 12/01/05
State v. Myers Case Below: 174 N.C. App. 526	No. 660P05	AG's Motion for Temporary Stay (COA04-567)	Allowed 11/29/05
State v. Nelson Case Below: 173 N.C. App. 235	No. 569P05	1. Def's NOA Based Upon a Constitutional Question (COA05-97) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —- 2. Allowed 12/01/05 3. Denied 12/01/05
State v. Page Case Below: Forsyth County Superior Court	No. 239A96-5	Def's PWC to Review Order of Forsyth County Superior Court	Denied 12/01/05
State v. Staten Case Below: 172 N.C. App. 673	No. 522P05	1. Def's NOA Based Upon a Constitutional Question (COA03-1216) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —- 2. Allowed 12/01/05 3. Denied 12/01/05
Wallen v. Riverside Sports Ctr. Case Below: 173 N.C. App. 408	No. 595P05	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA03-1679) 2. Defs' Motion to Dismiss PDR	1. —- 2. Allowed 12/01/05
Windman v. Britthaven, Inc. Case Below: 173 N.C. App. 630	No. 641P05	Defs' Motion for Temporary Stay (COA04-1414)	Allowed 11/21/05
Yallum v. Hammerle Case Below: 172 N.C. App. 175	No. 513P05	Plt's Motion for Notice of Appeal (COA04-1622)	Denied 12/01/05
Zaliagiris v. Zaliagiris Case Below: 164 N.C. App. 602	No. 332A04	Plt's Motion to Withdraw Appeal (COA03-649)	Allowed 11/14/05

STATE OF NORTH CAROLINA v. JASON WAYNE HURST

No. 363A04

(Filed 27 January 2006)

1. Jury— motion for mistrial—prospective juror brought newspaper article dealing with trial into jury room during jury selection—admonition to jury

The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion for a mistrial based on the fact that a prospective alternate juror brought a newspaper article dealing with the trial into the jury room during jury selection, because: (1) none of the twelve jurors selected for the sitting panel were in the jury room by the time the article appeared there, and defendant had not shown the substantial and irreparable harm required by N.C.G.S. § 15A-1061 for declaration of a mistrial; (2) the trial court's findings that the original jury was not tainted and its subsequent denial of defendant's motion for a mistrial was not so arbitrary that it could not have been the result of a reasoned decision; (3) the trial court's questioning was sufficient to support it's findings that the regular jury was not exposed to the article and was fully adequate under our law; (4) none of the alternate jurors participated in the deliberations at defendant's trial, and thus, even if alternate jurors were exposed to the article, any resulting taint was immaterial and caused defendant no prejudice; (5) a defendant claiming error in the trial court's admonitions pursuant to N.C.G.S. § 15A-1236(a) must object in order to preserve the issue for appeal, and defendant acknowledges that no such objection was raised; and (6) defendant also failed to establish that he suffered prejudice as a result of any failure of the trial court to admonish the jury when the trial court's admonition in this case specifically advised the prospective jurors that if they were selected for the jury, they were not to read media reports about the case.

2. Sentencing— capital—mitigating circumstances—no significant history of prior criminal activity—failure to give instruction

The trial court did not err by failing to submit the statutory mitigating circumstance under N.C.G.S. § 15A-2000(f)(1) that defendant has no significant history of prior criminal activity and by instead submitting a similar nonstatutory mitigating circum-

stance requested by defendant that prior to this offense the defendant had no significant history of violent criminal activity, because: (1) although a trial court's failure to submit a statutory mitigating circumstance that is supported by sufficient evidence is prejudicial error unless the State can demonstrate that the error was harmless beyond a reasonable doubt, no juror found this nonstatutory mitigating circumstance in light of the court's correct oral articulation of the mitigating circumstance, its provision to the jury of written copies of the instructions, its general instruction to answer "no" if the jury did not find the circumstance, and the additional specific wording in the verdict form that none of the jurors found this particular mitigating circumstance to exist; (2) although the doctrine of invited error does not apply, a whole record review will necessarily include consideration of the parties' positions as to whether the instruction should be given, and defendant asked the trial court not to instruct on the (f)(1) statutory mitigating circumstance; (3) the evidence presented at the trial sufficiently supported the trial court's threshold determination that no rational jury could find that defendant's criminal activity was insignificant; and (4) to the extent *State v. Rouse*, 339 N.C. 59 (1994), conflicts with other decisions on this point and our Supreme Court's holding in this case to the effect that an (f)(1) instruction may be given on the basis of any relevant evidence in the record, no matter how derived or presented, it is overruled.

3. Sentencing— capital—mitigating circumstances—age at time of offense

The trial court did not err in a first-degree murder case by failing to submit the N.C.G.S. § 15A-2000(f)(7) mitigating circumstance to the jury concerning defendant's age at the time of the offense which was twenty-three years old, because: (1) our Supreme Court will not conclude that the trial court erred in failing to submit the age mitigator where evidence of defendant's emotional immaturity is counterbalanced by other factors such as defendant's chronological age, defendant's apparently normal intellectual and physical development, and defendant's lifetime experience; and (2) the record demonstrated that defendant's maturity was consistent with his chronological age and other factors counterbalance defendant's evidence of emotional immaturity including defendant agreeing to help others financially and his polite nature.

4. Sentencing— capital—defendant's argument—premeditation and deliberation—victim's perceptions—aggravating circumstances—murder especially heinous, atrocious, or cruel

The trial court did not err in a first-degree murder case by failing to intervene ex mero motu during portions of the prosecution's closing argument in the sentencing proceeding that allegedly improperly encouraged the jurors to recommend death on the basis of evidence introduced in the guilt phase of the trial to support the elements of premeditation and deliberation, because: (1) evidence presented during the guilt phase is competent for the jury's consideration in the sentencing proceeding, and thus, the State may reargue evidence that justified the murder conviction to support the finding of an aggravating circumstance; (2) the fact that a murder was planned may be a factor in determining whether the murder was especially heinous, atrocious, or cruel; and (3) arguments addressing the victim's perceptions are relevant to the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel.

5. Sentencing— death penalty—proportionate

The trial court did not err in a first-degree murder case by sentencing defendant to death, because: (1) although defendant contends the sentence was imposed under the influence of passion, prejudice, and other arbitrary factors, this argument restates four issues previously discussed and our Supreme Court found no error as to these issues individually or considering them cumulatively; (2) the evidence indicated that defendant began planning to kill the victim as soon as their telephone conversation ended the day before the murder, that defendant urged the victim to walk into a field for the ostensible purpose of setting up targets and then shot him without provocation, that the victim asked defendant not to shoot him again, that defendant fired three spaced shots into the victim, that the third shot was fired into the victim's head as the victim lay helpless watching defendant, that defendant took the victim's keys from his body after shooting him and drove his car to West Virginia, that defendant traded or sold the victim's two guns, and that defendant acknowledged that he felt no remorse; (3) the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel is sufficient, standing alone, to affirm the death sentence; and (4) defendant was found

guilty of first-degree murder on the basis of premeditation and deliberation, and also on the basis of felony murder.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge John O. Craig, III on 17 March 2004 in Superior Court, Randolph County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 19 October 2005.

Roy Cooper, *Attorney General*, *by Valérie B. Spalding*, *Special Deputy Attorney General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Anne M. Gomez*, *Assistant Appellate Defender*, *for defendant-appellant.*

EDMUNDS, Justice.

Defendant Jason Wayne Hurst was indicted on 19 August 2002 for killing Daniel Lee Branch. Defendant was found guilty of first-degree murder both on the basis of malice, premeditation and deliberation and on the basis of felony murder. Following a capital sentencing proceeding, the jury found that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and recommended a sentence of death. The trial court entered judgment on 17 March 2004.

On 9 June 2002, Daniel Branch told his wife Barbara that he and defendant were going to travel to Asheboro. According to Barbara, defendant was an acquaintance who was supposed to help Branch sell some firearms. After loading several long guns into his 1977 blue Thunderbird, Branch left home around 11:00 or 11:30 that morning. She never saw him alive again.

The next day, Barbara filed a missing persons report and Detective Kevin Ray of the High Point Police Department began an investigation. On 11 June 2002, while pursuing a lead that defendant had been seen in West Virginia driving a Thunderbird matching the description of Branch's vehicle, Detective Ray discovered that defendant had been romantically involved with Kim Persinger in West Virginia and that she was pregnant with his child. Kim's brother indicated to Detective Ray that Branch had been killed in North Carolina and that his body was in a field near the Montgomery and Randolph County line.

Detective Ray and High Point Police Detective Lieutenant Dick Shuping searched a large, cleared tract of land at the described loca-

tion and found the body of Daniel Branch. The victim was lying on his back and one of his pockets had been pulled out. The investigators observed that he appeared to have suffered gunshot wounds to the torso and head. Two expended shotgun shell casings were found near his body.

That same day, state police and sheriffs in West Virginia began searching for defendant and the victim's blue Thunderbird. Acting on a tip, investigators located both at a convenience store near Rock Creek, where defendant was taken into custody without incident. During the arrest, defendant stated that "he was just glad that it was over" and that "he had killed a guy in North Carolina." Even though he was given his *Miranda* warnings, defendant continued to talk, repeating that he had killed a man in North Carolina with a shotgun and brought his car to West Virginia. Shortly thereafter, the arresting officers allowed defendant to visit the Persinger residence, where he spoke briefly with Kim and other members of her family. Defendant was then transported to the state police detachment in Beckley, where he again was advised of his *Miranda* rights. After waiving those rights, defendant confessed to the murder of Daniel Branch.

In his confession, defendant said that he knew Branch from having traded guns with him in the past. Defendant claimed that the victim called him the day before the murder and asked him to meet to trade some guns. Defendant said that "[he] knew [he] was going to kill [Branch]" as soon as their telephone conversation ended and "began to plan." The next day, defendant met Branch at the field where the killing occurred to purchase a twelve-gauge Mossberg pump shotgun. When defendant asked Branch if he could test-fire the weapon, the victim agreed. At defendant's urging, Branch walked into the field to set up some cans and bottles. As he did, defendant opened fire, shooting the victim three times.

After the first shot, which defendant indicated struck Branch in the ribs or stomach, the victim yelled "no, no, don't shoot," and turned to run. Defendant shot Branch again, hitting him in the side and causing him to fall. Defendant then walked toward the victim and shot him in the head. After the final shot, defendant reached into the victim's pocket, took his keys, and left the scene in Branch's car. An autopsy confirmed that Branch had suffered shotgun wounds in his lower left chest and abdominal area, in his right side, and in his right jaw.

Defendant told the officers that the Mossberg shotgun was at the house of a relative, Leon Burgess, where he had traded it for a .410 gauge shotgun. Burgess later confirmed the trade and gave the murder weapon to the investigators. A .410 gauge shotgun was recovered from the victim's Thunderbird that defendant had been driving when arrested. Defendant also stated that he had sold Branch's .22 caliber rifle.

During the interview, defendant said that the victim had not provoked or threatened him and declined to give a reason for the shooting. He said he did not know the victim that well, but that he was "an okay guy." Defendant stated that he was not sorry for killing Branch but that he felt sorry for the victim's family.

Defendant did not testify at trial. During the guilt phase of the trial, he presented instead James H. Hilkey, Ph.D., an expert forensic psychologist, who testified that defendant suffered from borderline personality disorder, traits of antisocial personality disorder, and depression. Dr. Hilkey stated that, in his opinion, defendant's psychological disorders "affected his ability to weigh and consider the consequences of his actions and to form specific intent to kill." Dr. Hilkey was also of the opinion that at the time of the shooting, defendant "was under the influence of a mental or emotional disturbance and his capacity to conform his conduct to the requirements of the law was impaired." However, Dr. Hilkey also testified that defendant's "clearly average" I.Q. was 104 and that he knew killing the victim was wrong. Dr. Hilkey found no signs that defendant suffered from neurological damage or distortions.

Additional facts will be set forth as necessary for the discussion of specific issues.

JURY SELECTION

[1] Defendant contends he is entitled to a new trial because the trial court failed to take appropriate action when it learned that a prospective alternate juror brought a newspaper article dealing with the trial into the jury room during jury selection. The record indicates that jury selection commenced on Tuesday, 2 March 2004, and by midmorning Friday, 5 March 2004, twelve jurors had been seated. After consulting with counsel for the State and for defendant, the trial court elected to select three alternate jurors. Selection of the alternates began after the morning recess that same Friday and continued into the afternoon. After one alternate was chosen, prospective alternate juror Paul Biedrzycki was called. During *voir dire*, Biedrzycki

stated that he had read a newspaper article concerning the case in the jury room "about half an hour ago." Biedrzycki was excused for cause, then questioned in greater detail as to the newspaper in the jury room. He explained that someone in the jury room had been reading a local newspaper article about the trial and he had asked if he could read it. The headline of the article was to the effect that defendant admitted guilt. Biedrzycki added that the newspaper had not been present in the room on either of the preceding days but was there when he returned to the jury room that afternoon.

Defense counsel moved for a mistrial based on the article's contents and the jury's disobedience of the trial court's prior instructions not to read any extraneous material. After hearing arguments from defendant and the State, the trial court observed that the twelve jurors already chosen had left the courthouse by the time the article appeared in the jury room, and denied the motion. Shortly thereafter, the trial court brought the remaining prospective alternate jurors into the courtroom, explicitly instructed them not to read any press accounts about the case nor bring any newspapers to court, then excused them for the weekend recess. The court also made arrangements to ensure that the prospective alternates who were scheduled to arrive the following Monday would not mix with the jurors who had already been chosen. The bailiff then retrieved the newspaper from the jury room and the court admitted into evidence as a pretrial exhibit the 5 March 2004 Randolph County edition of the *News & Record* that contained an article headlined "High Point man admits to killing."

The following Monday, sixteen prospective alternate jurors were individually questioned. Several reported that they had seen or read the article or heard it discussed in the jury room on the preceding Friday. One of the twelve admitted bringing newspapers into the jury room every day but added that the Friday paper was the only one that any other juror had borrowed and read. Of the two alternate jurors that were selected from this pool of twelve, one had read the Friday article but had heard no discussion about it and said he could disregard what he had read. The other said that he had seen but not read the newspaper and had not observed anyone else reading it.

We first address defendant's argument that the trial court erred in denying his motion for a mistrial. Upon motion by a defendant, "[t]he judge must declare a mistrial . . . if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to

the defendant's case." N.C.G.S. § 15A-1061 (2005). "The decision to grant or deny a mistrial rests within the sound discretion of the trial court" and will be reversed on appeal only upon "a clear showing that the trial court abused its discretion." *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991). Thus, a mistrial should not be allowed unless " 'there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict.' " *Id.* (citation omitted).

When the trial court initially denied defendant's motion for a mistrial on Friday, 5 March 2004, it stated:

> Well, I'm going to note that by the time according to this juror, by the time the newspaper appeared in the jury pool room there were none of the twelve jurors present, they had all been sent home. So at least as to the twelve jurors it does not taint them. We will probably have to ask the remaining ones about the newspaper, and I am going to instruct them.
>
> . . . .
>
> . . . Because we only have seated one alternate, the others were not present at the time this alleged newspaper got loose in the jury room. I do not believe at this point that the defense has shown substantial and irreparable harm under the statute, and so in my discretion I am denying the motion for a mistrial.

The following Monday, defendant twice renewed his mistrial motion during the examination of prospective alternate jurors. The trial court again denied it on similar grounds:

> The motion, in my discretion, is denied on the same grounds as I stated on Friday. We have twelve jurors that were seated who were not present in the jury room at the time these discussions took place, so they have presumably not been tainted. We have one alternate seated that was not tainted. And I'm going to continue to go through these alternate jurors, and I will allow you to ask questions, but at this point, while there certainly appears to have been some potential juror misconduct, it has not affected the twelve jurors that were seated to be the actual tryers [sic] of the facts in this case.

The court then completed selection of alternate jurors.

Although defendant argues that insufficient evidence existed to support the trial court's findings, our review of the record reveals no abuse of discretion. At the close of court on Thursday, 4 March 2004, ten jurors had been selected. The final two jurors were seated the morning of Friday, 5 March 2004, then excused until the following Monday. The court reconvened on the afternoon of that same Friday to select three alternate jurors. After alternate juror Anna Frye was chosen, prospective alternate juror Biedrzycki mentioned the newspaper in the jury room, advising the trial court that "[i]t was only there . . . the last half hour or hour" and that "[t]here was nothing in there yesterday or the day before." This testimony provided initial support for the trial court's finding that none of the twelve jurors selected for the sitting panel were in the jury room by the time the article appeared there and that defendant had not shown the substantial and irreparable harm required by N.C.G.S. § 15A-1061 for declaration of a mistrial.

As to the prospective alternates who were examined on Monday, 8 March 2004, defendant focuses on the testimony of Donald Reese, who eventually was excused for cause unrelated to the newspaper. On *voir dire*, Reese stated that he had read the article in the Friday newspaper and that he was responsible for the newspaper's appearance in the jury room. He also reported that he had brought a newspaper to court every day during jury selection and had overheard conversations about the case. However, Reese added that, except for the first day of jury selection when one juror borrowed the first page but then was "called in [the courtroom] right away," no one asked to borrow his newspaper until Friday, the day he heard the jurors' discussions. In addition, while other prospective alternate jurors questioned on Monday expressed some knowledge of the article or had overheard discussions in the jury room from the preceding Friday, none stated definitively that the newspaper was present in the room before Friday afternoon.

This evidence is consistent with the *voir dire* testimony of James Phillips and Sheila Thompson, the final two regular jurors selected on Friday morning. Both were asked whether they had read, heard, or watched any news reports or heard discussions about the case. Phillips answered the question in the negative and made no mention of the article. Thompson similarly made no comment about any newspaper article in the jury room, stating that her only familiarity with the case came through overhearing general discussions "long ago" when the crime actually happened. Thus, our review of the record

demonstrates that the trial court's findings that the original jury was not tainted and its subsequent denial of defendant's motion for mistrial was not " ' "so arbitrary that it could not have been the result of a reasoned decision." ' " *State v. Diehl*, 353 N.C. 433, 437, 545 S.E.2d 185, 188 (2001) (citation omitted).

Defendant next argues that the trial court's inquiry concerning the newspaper article was inadequate and that as a result the court had insufficient information from which to determine whether defendant had been prejudiced. This Court has held that " '[w]hen there is a substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial.' " *State v. Campbell*, 340 N.C. 612, 634, 460 S.E.2d 144, 156 (1995) (quoting *State v. Barts*, 316 N.C. 666, 683, 343 S.E.2d 828, 839 (1986)) (alteration in original), *cert. denied*, 516 U.S. 1128, 133 L. Ed. 2d 871 (1996).

Here, once the issue of the article came to the trial court's attention, it determined who had been exposed to the article. After concluding that only prospective alternate jurors might have been affected, the court and counsel questioned each subsequent prospective alternate juror individually about exposure and possible prejudice. Defendant points out that even if the article had been in the jury room only on Friday, the last two panelists seated as regular jurors that day were not asked specifically if they had seen the article. However, as detailed above, the court made findings at the outset of its inquiry that none of the regular jurors had seen the article. The record fully supports this finding. In addition, both of these jurors were asked on *voir dire* if they had seen or read any news reports about the case, and both answered in the negative. This questioning was sufficient to support the trial court's findings that the regular jury was not exposed to the article and was fully adequate under our law. *See Bonney*, 329 N.C. at 83, 405 S.E.2d at 158.

Moreover, none of the alternate jurors participated in the deliberations at defendant's trial. Thus, even if alternate jurors were exposed to the article, any resulting taint was immaterial and caused defendant no prejudice. *See State v. Blakeney*, 352 N.C. 287, 301-02, 531 S.E.2d 799, 811 (2000) (noting that when an alternate juror, who admitted to having read a newspaper article about the case, did not participate in deliberations, and when no participating juror was exposed to the article, the defendant failed to demonstrate prejudice from the trial court's denial of his motion for a continuance or that

the trial court abused its discretion), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001). Accordingly, defendant's argument that he suffered "substantial and irreparable prejudice" fails. This assignment of error is overruled.

Defendant next makes the related argument that the trial court's admonition to the prospective jurors on the second panel brought before the court was incomplete and misleading and allowed them to view the allegedly prejudicial newspaper article about the trial. On Wednesday morning, 3 March 2004, the second panel of prospective jurors was brought into the courtroom. The trial court considered requests for deferrals, administered the oath, and instructed the panel. Before excusing this panel for lunch, the trial court stated:

> I will instruct you during the jury selection process in this case that if you are selected to serve as a juror, throughout the trial you should not read, watch, or listen to any news media reports about this case. You should not discuss this case with anyone else, including other jurors, your spouses, family members, or friends, or have any contact with the lawyers, the parties, or the witnesses in this matter, and that includes me as well.

Defendant maintains that this admonition, which was the only one this panel received as prospective jurors, did not meet the requirements of N.C.G.S. § 15A-1236(a). That statute sets out the admonitions that a trial court must give jurors at appropriate times. We will assume without deciding that these admonitions apply as well to prospective jurors.

In *State v. Thibodeaux*, we observed that a defendant claiming error in the trial court's admonitions pursuant to N.C.G.S. § 15A-1236(a) "must object . . . in order to preserve [the] issue for appeal." 341 N.C. 53, 62, 459 S.E.2d 501, 507 (1995). Defendant acknowledges that no such objection was raised. In addition, the defendant also "must establish that he suffered prejudice as a result of any failure of the trial court to admonish the jury." *Id.* As detailed above, we are satisfied from our review of the record that the trial court conducted an adequate inquiry and correctly concluded that none of the seated jurors who participated in deliberations were present in the jury room when the newspaper article was read and discussed by the prospective alternate jurors. The admonition quoted above specifically advised the prospective jurors that, if they were selected for the jury, they were not to read media reports about the case. The record indicates that none of the deliberating jurors saw or

read the article. Therefore, defendant has failed to demonstrate prejudice. This assignment of error is overruled.

SENTENCING ISSUES

[2] Defendant raises several issues relating to sentencing. Defendant assigns error to the trial court's decision not to submit the statutory mitigating circumstance that "[t]he defendant has no significant history of prior criminal activity." N.C.G.S. § 15A-2000(f)(1) (2005). Defendant contends that by submitting a similar nonstatutory mitigating circumstance, the trial court violated his federal and state constitutional rights and that he is entitled to a new sentencing hearing.

At the sentencing proceeding charge conference, defendant's counsel presented to the trial court a list of requested mitigating circumstances, including instructions on the N.C.G.S. § 15A-2000(f)(2) ("[t]he capital felony was committed while the defendant was under the influence of mental or emotional disturbance") and (f)(6) ("[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired") statutory mitigating circumstances. Defendant also asked the trial court not to instruct on the (f)(1) statutory mitigating circumstance. Instead, defendant requested that the court instruct on a proposed nonstatutory mitigating circumstance, that "[p]rior to this offense, the defendant had no significant history of violent criminal activity." In addition, defendant requested that the trial court instruct as to fifteen other nonstatutory mitigating circumstances. The trial court agreed not to give the (f)(1) instruction and further agreed to instruct peremptorily as to all of defendant's proposed statutory and nonstatutory mitigating circumstances.

Although the court verbally instructed the jury that it could consider whether "[p]rior to this offense, the defendant had no significant history of violent criminal activity," the circumstance was printed in the verdict sheet as "[p]rior to this offense, did the defendant have a significant history of violent criminal activity?" Defendant argues that the discrepancy between these formulations of the mitigating circumstance makes ambiguous the answer "No" that the jury wrote on the verdict sheet. However, in light of the court's correct oral articulation of the mitigating circumstance, its provision to the jury of written copies of the instructions, its general instruction to answer "No" if the jury did not find the circumstance, and the additional specific wording in the verdict form that none of the jurors

found this particular mitigating circumstance to exist, we are satisfied that no juror found this nonstatutory mitigating circumstance.

Defendant now argues that the trial court erred when it acceded to his request not to submit the (f)(1) statutory mitigating circumstance to the jury. Defendant contends that the trial court's failure to provide this instruction was prejudicial error that entitles him to a new sentencing proceeding.

Before we address defendant's contention, we believe it appropriate to reexamine how our jurisprudence has developed around the (f)(1) mitigating circumstance. North Carolina's capital punishment statute provides that:

> In all cases in which the death penalty may be authorized, the judge *shall* include in his instructions to the jury that it *must* consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

N.C.G.S. § 15A-2000(b) (2005) (emphases added). By "unequivocally set[ting] forth the legislature's intent that in every case the jury be allowed to consider all statutory aggravating or mitigating circumstances which the jury might reasonably find supported by the evidence," this section ensures that jury consideration in capital cases is properly guided. *State v. Lloyd*, 321 N.C. 301, 312, 364 S.E.2d 316, 324, *judgment vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988).

Applying N.C.G.S. § 15A-2000(b) in the context of the (f)(1) mitigating circumstance, we have held that the trial court has no discretion and must submit the statutory circumstance when sufficient supporting evidence is presented. *See*, *e.g.*, *State v. Parker*, 354 N.C. 268, 292, 553 S.E.2d 885, 902 (2001) ("trial court must submit"), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002); *State v. Hamilton*, 351 N.C. 14, 23, 519 S.E.2d 514, 520 (1999) ("trial court has no discretion"), *cert. denied*, 529 U.S. 1102, 146 L. Ed. 2d 783 (2000); *State v. McNeil*, 350 N.C. 657, 683, 518 S.E.2d 486, 502 (1999) (" 'trial court is required to submit' ") (citation omitted), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000); *State v. Walker*, 343 N.C. 216, 223, 469 S.E.2d 919, 922 ("trial court has no discretion; the . . . circumstance must be submitted"), *cert. denied*, 519 U.S. 901, 136 L. Ed. 2d

180 (1996); *Lloyd*, 321 N.C. at 311, 364 S.E.2d at 323 ("trial court is mandated . . . to submit"); *see also State v. Hucks*, 323 N.C. 574, 579-80, 374 S.E.2d 240, 244 (1988) (holding that a court may have to act *sua sponte* to avoid a statutory violation in the absence of an objection by the parties). Sufficient supporting evidence exists to require the trial court to instruct on a statutory mitigating circumstance when the evidence is " 'substantial,' " *State v. Watts*, 357 N.C. 366, 377, 584 S.E.2d 740, 748 (2003) (addressing the (f)(4) statutory mitigating circumstance) (citation omitted), *cert. denied*, 541 U.S. 944, 158 L. Ed. 2d 370 (2004), and of such a nature that " 'a rational jury could conclude that defendant had no *significant* history of prior criminal activity,' " *State v. Barden*, 356 N.C. 316, 372, 572 S.E.2d 108, 143 (2002) (quoting *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988), *quoted in Blakeney*, 352 N.C. at 318, 531 S.E.2d at 821), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). Further, "[w]e define 'significant' within the context of N.C.G.S. § 15A-2000(f)(1) as likely to have influence or effect upon the determination by the jury of its recommended sentence." *State v. Walls*, 342 N.C. 1, 56, 463 S.E.2d 738, 767 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996).

Should the trial court find sufficient evidence to support the (f)(1) mitigating circumstance, it must give the instruction even over the defendant's objections. "If the trial court determines that a rational jury could find that defendant had no significant history of prior criminal activity, 'the statutory mitigating circumstance must be submitted to the jury, without regard to the wishes of the State or the defendant.' " *Barden*, 356 N.C. at 372, 572 S.E.2d at 143 (quoting *State v. Mahaley*, 332 N.C. 583, 597, 423 S.E.2d 58, 66 (1992), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 649 (1995)); *see also State v. Quick*, 337 N.C. 359, 361-62, 446 S.E.2d 535, 537 (1994) ("Regardless of whether defendant requests submission of this mitigating circumstance or objects to its submission to the jury, mitigating circumstance (f)(1) must be submitted to the jury where the trial court determines the mitigating circumstance is supported by the evidence."). Accordingly, the doctrine of invited error cannot apply when the instruction is withheld at the defendant's request. A trial court's failure to submit a statutory mitigating circumstance that is supported by sufficient evidence is prejudicial error unless the State can demonstrate that the error was harmless beyond a reasonable doubt. *State v. Fletcher*, 348 N.C. 292, 328, 500 S.E.2d 668, 689 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 113 (1999).

In addition, we have held that where evidence supports submission of the (f)(1) statutory mitigating circumstance, a trial court errs by substituting a similar nonstatutory mitigating circumstance. *State v. Jones*, 346 N.C. 704, 717, 487 S.E.2d 714, 722-23 (1997). The reason is that a jury may find that a nonstatutory mitigating circumstance exists but has no mitigating value, while a statutory mitigating circumstance, if found, automatically has mitigating value. *Quick*, 337 N.C. at 364, 446 S.E.2d at 538.

Application of these holdings in a manner consistent with the intent of North Carolina's capital sentencing scheme has proved to be difficult. A capital jury is obligated to weigh statutory and nonstatutory mitigating circumstances, which (at least theoretically) redound to the defendant's favor,[1] against statutory aggravating circumstances, which make the offense more grave. Only when the jury finds that the balance of circumstances goes against the defendant as set out in N.C.G.S. § 15A-2000 may it recommend a sentence of death. Something has gone awry in this carefully wrought process when the ostensibly mitigating (f)(1) circumstance, meant to draw the jurors' attention to a factor potentially favorable to a defendant, is with some frequency being given over the defendant's objections. *See generally* Ashley P. Maddox, *North Carolina's (f)(1) Mitigating Circumstance: Does It Truly Serve to Mitigate?*, 26 Campbell L. Rev. 1 (2004).

We must acknowledge that our holdings interpreting the application of N.C.G.S. § 15A-2000(f)(1) may have given rise to this unfortunate situation. Two cases stand out. In *State v. Brown*, the capital defendant previously had been convicted of six counts of felonious breaking or entering, six counts of felonious larceny, five counts of armed robbery, and one count of felonious assault. 315 N.C. 40, 62, 337 S.E.2d 808, 824 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *and overruled in part on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). *Brown* appears to be the first case in which the jury was instructed as to the (f)(1) mitigating circumstance over the defendant's objection. Noting that the convictions were approximately twenty years old, we found no error in the trial court's instructions. *Id.* at 62-63, 337 S.E.2d at 825. Later,

1. We have defined a mitigating circumstance more formally as "a fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of the crime of first-degree murder, but which may be considered as extenuating, or reducing the moral culpability of the killing, or making it less deserving of the extreme punishment than other first-degree murders." *State v. Irwin*, 304 N.C. 93, 104, 282 S.E.2d 439, 446-47 (1981).

in *State v. Lloyd*, the defendant previously had been convicted of felony " 'assault with intent to rob not being armed' " and of felony " 'breaking and entering a business place with intent to commit larceny.' " 321 N.C. at 312, 364 S.E.2d at 324. Both offenses were approximately twenty years old. The defendant also had been convicted of seven alcohol-related misdemeanors over a more recent eleven year period. *Id.* We held that despite the defendant's objection the trial court had properly found that a jury reasonably could conclude that this record did not constitute a significant history of prior criminal activity and that the (f)(1) instruction had been properly given. *Id.* at 313, 364 S.E.2d at 324.

Following our holdings in *Brown* and *Lloyd*, many trial judges have given the (f)(1) instruction even when the defendant has an extensive record. The resulting effect on our capital sentencing jurisprudence has been confusing at best and counterproductive at worst, as exemplified by *State v. Walker*, in which this Court felt obligated to admonish prosecutors not to argue that a defendant had requested a mitigating circumstance when in fact the defendant had objected to the circumstance. 343 N.C. at 223, 469 S.E.2d at 923. We went on to observe that

> the better practice when a defendant has objected to the submission of a particular mitigating circumstance is for the trial court to instruct the jury that the defendant did not request that the mitigating circumstance be submitted. In such instances, the trial court also should inform the jury that the submission of the mitigating circumstance is required as a matter of law because there is some evidence from which the jury could, but is not required to, find the mitigating circumstance to exist.

Id. at 223-24, 469 S.E.2d at 923; *see also State v. Bell*, 359 N.C. 1, 39-40, 603 S.E.2d 93, 118-19 (2004), *cert. denied*, —— U.S. ——, 161 L. Ed. 2d 1094 (2005).

We believe that *Brown*, *Lloyd*, and other similar cases have resulted in a distortion of capital sentencing as our trial courts have focused too closely on the existence, nature, and extent of a defendant's record and have correspondingly failed to consider the aspect of our holdings that allows the court to determine whether a reasonable jury would find the defendant's criminal activity to be significant. *See Blakeney*, 352 N.C. at 319, 531 S.E.2d at 821 (stating that the trial court's focus " 'should be on whether the criminal activity is such as to influence the jury's sentencing recommendation' ") (citation omit-

ted); *Wilson*, 322 N.C. at 143, 367 S.E.2d at 604 (stating that the test for giving (f)(1) instruction is whether the defendant's prior criminal activity was so significant that no rational jury could find the existence of the mitigating circumstance). *Blakeney* and *Wilson* are entirely consistent with N.C.G.S. § 15A-2000(b), which requires the trial court to make an initial determination as to which mitigating circumstances are supported by the evidence.

Our trial judges are capable of making sensible assessments. We reaffirm that the (f)(1) circumstance must be submitted whenever the trial court finds substantial evidence on which a reasonable jury could determine that a defendant has no significant history of prior criminal activity. However, when the judge makes a threshold determination supported by findings on the record that no rational jury could find a defendant's criminal history to be insignificant and declines to instruct as to (f)(1), that determination is entitled to deference. Therefore, whenever a party contends that the trial court erred in deciding not to provide an (f)(1) instruction, we will review the whole record in evaluating whether the trial court acted correctly, bearing in mind our admonition that "any reasonable doubt regarding the submission of a statutory or requested mitigating factor [should] be resolved in favor of the defendant." *Brown*, 315 N.C. at 62, 337 S.E.2d at 825. Although the doctrine of invited error does not apply, as noted above, a whole record review will necessarily include consideration of the parties' positions as to whether the instruction should be given.

Our holding today is intended to be a clarification of, not a departure from, our jurisprudence pertaining to the (f)(1) statutory mitigating circumstance. We do not foresee, and will not countenance, the replacement of this or any other statutory mitigating circumstances with somewhat similar nonstatutory circumstances. The constitutionality of North Carolina's capital sentencing scheme depends upon jurors having guided discretion as they consider the appropriate sentence to recommend. *See State v. McCarver*, 341 N.C. 364, 392, 462 S.E.2d 25, 41 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996); *State v. McKoy*, 323 N.C. 1, 42-43, 372 S.E.2d 12, 35 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). Because jurors will still be instructed as to the (f)(1) statutory circumstance whenever a defendant's criminal activity may reasonably be found not to be significant, today's holding serves only to remove the quirks that have crept into the (f)(1) aspect of capital sentencing without impinging either on the defendant's right to have all

applicable mitigating circumstances considered by the jury or on the judge's duty to instruct on all statutory and nonstatutory mitigating circumstances supported by reasonable evidence.

Turning to the case at bar, the evidence presented at trial indicated that defendant had broken into a residence in Rock Creek, West Virginia a few months before the instant murder and stolen a firearm; that in 1998 defendant had been convicted of "several" breaking and entering charges in North Carolina; that defendant abused marijuana, crack cocaine, and Oxycontin; and that a charge of driving under the influence was pending against defendant in West Virginia. Although other evidence suggested that defendant may have been involved in additional illegal activity, the information described above sufficiently supports the trial court's threshold determination that no rational jury could find that defendant's criminal activity was insignificant. Accordingly, the trial court did not err in deciding not to instruct pursuant to N.C.G.S. § 15A-2000(f)(1).

In reviewing our cases that address the (f)(1) mitigating circumstance, we note our anomalous opinion in *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995). The State cited *Rouse* in support of its argument that the trial court's (f)(1) instructions were proper. In *Rouse*, we correctly held that when the record is silent as to a defendant's criminal history, no (f)(1) instruction is appropriate. *Id.* at 100, 451 S.E.2d at 566. However, we went on to imply that if the evidence pertaining to a defendant's criminal history is offered in a context other than for the purpose of determining whether an (f)(1) instruction should be given, the defendant might not be entitled to the instruction. *Id.* This implication is inconsistent with numerous other holdings of this Court to the effect that an (f)(1) instruction may be given on the basis of any relevant evidence in the record, no matter how derived or presented. *See*, *e.g.*, *Quick*, 337 N.C. at 362, 446 S.E.2d at 537 ("Evidence in the present case, though not offered by defendant, tended to show that defendant had some history of prior criminal activity."); *Wilson*, 322 N.C. at 143, 367 S.E.2d at 604 ("Though defendant did not offer evidence supporting the submission of [the (f)(1)] mitigating circumstance, such evidence was in fact present in the record."); *State v. Stokes*, 308 N.C. 634, 652, 304 S.E.2d 184, 195-96 (1983) ("Even when a defendant offers no evidence to support the existence of a mitigating circumstance, the mitigating circumstance must be submitted when the State offers or elicits evidence from which the jury could reasonably infer that the circumstance exists."); *see also* N.C.G.S.

§ 15A-2000(a)(3) (2005) (stating that in the sentencing proceeding "there shall not be any requirement to resubmit evidence presented during the guilt determination phase . . . [and] all such evidence is competent for the jury's consideration in passing on punishment"). Accordingly, to the extent *Rouse* conflicts with other decisions on this point and our holding today, it is overruled.

[3] Defendant next contends that he is entitled to a new capital sentencing hearing because the trial court erred by failing to submit the N.C.G.S. § 15A-2000(f)(7) mitigating circumstance to the jury. This statutory mitigating circumstance calls upon the jury to consider defendant's age at the time of the offense. Although defendant did not request the submission of this circumstance, he now argues that (f)(7) was supported by evidence that defendant was twenty-three years old at the time of the crime and by evidence that he was emotionally immature.

At his sentencing proceeding, defendant presented several family members as witnesses. He also relied on Dr. Hilkey's testimony from the guilt phase of the trial. Defendant now directs us to Dr. Hilkey's diagnosis that defendant suffered from borderline personality disorder (BPD), exhibited traits associated with antisocial personality disorder, and suffered from major depressive disorder as a result of his upbringing. Defendant further notes that he presented evidence that he was raised in a "tumultuous" environment. Defendant's family history also indicated that his relationship with his parents was "extremely chaotic," that defendant's father physically abused and assaulted him and his mother, that defendant's parents suffered from mental health problems, and that defendant's father introduced defendant to alcohol and illegal drugs at an early age.

Dr. Hilkey testified that defendant's upbringing manifested itself as BPD when he grew older. Dr. Hilkey stated, *inter alia*, that defendant felt responsible for his parents' fighting; that defendant's family history was being replicated in his relationships; and that defendant felt unsure and unstable when not in a relationship, demonstrated reckless behavior and substance abuse, exhibited a "flat affect" or lack of emotional response to important events such as his role in the instant offense, and responded to events leading up to the murder by exhibiting a "transient depersonalization." Dr Hilkey added that defendant still hoped against all logic that his trial might bring his family together. According to Dr. Hilkey, defendant's slaying of Daniel Branch had no purpose other than allowing defendant to take the victim's car so he could travel to West Virginia to

reunite with Kim. In addition, defendant points to previous failed relationships with women that resulted in severe depression, instances of job truancy, and irresponsible substance abuse as evidence of emotional immaturity.

In determining whether the (f)(7) circumstance should have been submitted, "[w]e have recognized that chronological age is not the determinative factor." *State v. Meyer*, 353 N.C. 92, 100, 540 S.E.2d 1, 6 (2000), *cert. denied*, 534 U.S. 839, 151 L. Ed. 2d 54 (2001). Instead, "this Court considers age a 'flexible and relative concept.' " *State v. Thompson*, 359 N.C. 77, 99, 604 S.E.2d 850, 867 (2004) (quoting *State v. Johnson*, 317 N.C. 343, 393, 346 S.E.2d 596, 624 (1986)), *cert. denied*, —— U.S. ——, 163 L. Ed. 2d 80 (2005). Consequently, other " ' "varying conditions and circumstances" ' " must be considered, *State v. Peterson*, 350 N.C. 518, 528, 516 S.E.2d 131, 138 (1999) (citation omitted), *cert. denied*, 528 U.S. 1164, 145 L. Ed. 2d 1087 (2000), including "[t]he defendant's immaturity, youthfulness, or lack of emotional or intellectual development," *State v. Gainey*, 355 N.C. 73, 105, 558 S.E.2d 463, 483, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). Nevertheless, we do not view "evidence showing emotional immaturity . . . in isolation, particularly where other evidence shows 'more mature qualities and characteristics.' " *Thompson*, 359 N.C. at 99, 604 S.E.2d at 867 (quoting *Johnson*, 317 N.C. at 393, 346 S.E.2d at 624, *quoted in State v. Spruill*, 338 N.C. 612, 660, 542 S.E.2d 279, 305 (1994), *cert. denied*, 516 U.S. 834, 133 L. Ed. 2d 63 (1995)). "Accordingly, this Court will not conclude that the trial court erred in failing to submit the age mitigator where evidence of defendant's emotional immaturity is counterbalanced by other factors such as defendant's chronological age, defendant's apparently normal intellectual and physical development, and defendant's lifetime experience." *State v. Steen*, 352 N.C. 227, 257, 536 S.E.2d 1, 19 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001).

Although much of the evidence defendant cites to support the (f)(7) mitigating circumstance also supported the given (f)(2) and (f)(6) mitigating circumstances, the same evidence may support more than one mitigating circumstance. *State v. Zuniga*, 348 N.C. 214, 217-18, 498 S.E.2d 611, 613 (1998). If so, the jury must be instructed on all the applicable circumstances. *Id.* Nevertheless, despite defendant's arguments that his evidence establishes emotional immaturity, we believe the record demonstrates that his maturity was consistent with his chronological age. *See, e.g.*, *State v. Bonnett*, 348 N.C. 417, 444, 502 S.E.2d 563, 581 (1998) (concluding

the trial court properly declined to submit the (f)(7) circumstance when the twenty-six-year-old defendant was abandoned at birth by his mother; grew up in a dysfunctional family; and had an I.Q. of 86, a learning disability, a lack of reading skills, and a significant lack of stability and guidance), *cert. denied*, 525 U.S. 1124, 142 L. Ed. 2d 907 (1999).

Moreover, other factors counterbalance defendant's evidence of emotional immaturity. Defendant's uncle testified that when he broke his leg during the summer of 1997, defendant "was right there for [him]" and did "everything" for him while he was recovering. When defendant was seventeen years old, he went to live with his cousin Teresa Gillespie so he could be closer to his job. Gillespie testified that defendant "was great with [her] son," regularly performed household chores, and even offered to help at Gillespie's parents' house. Not long thereafter, defendant began a relationship with a woman named Benita and was "crazy about" her baby Deandre. When Benita's mother left, defendant moved in to help with the finances, working double shifts to provide for Benita and Deandre. Kim Persinger's disabled father testified that while defendant was living with his family in West Virginia, he was "[p]olite all the time" and did "whatever needed [to be] done" around the house. Shortly before the murder, defendant told his sister he was moving back to North Carolina from West Virginia to put a home together for Kim and their child, that "he was done partying and . . . had to straighten up," that he had found a job, and that he was going to start saving for expenses. These facts illustrate defendant's " ' "more mature qualities and characteristics" ' " and that defendant "functioned emotionally as an adult." *Thompson*, 359 N.C. at 99, 604 S.E.2d at 867 (citation omitted); *see also Steen*, 352 N.C. at 258, 536 S.E.2d at 19 (recognizing such counterbalancing factors as the defendant's ability to manage financial transactions, his agreeing to help his mother financially, and his polite nature); *State v. Atkins*, 349 N.C. 62, 87, 505 S.E.2d 97, 113 (1998) (noting that the trial court did not err in failing to submit the (f)(7) mitigating circumstance even though the twenty-nine-year-old defendant had presented evidence that he suffered from a dissociative identity disorder and an attention deficit disorder, because "the record reveale[d] no evidence that defendant exhibited decisional skills and understanding equivalent to an adolescent" and "defendant had an IQ of 107, was functioning in the average to high-average range of intelligence, and had a relatively good understanding of social nuances"), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999).

In light of the foregoing evidence, we conclude that the trial court did not err in declining to submit the (f)(7) mitigating circumstance. This assignment of error is overruled.

[4] Defendant next assigns error to the trial court's failure to intervene *ex mero motu* during portions of the prosecution's closing argument in the sentencing proceeding. Defendant contends that the argument improperly encouraged the jurors to recommend death on the basis of evidence introduced in the guilt phase of the trial to support the elements of premeditation and deliberation. Defendant claims that by arguing this evidence during the sentencing proceeding, the State was encouraging the jurors to act on the basis of an aggravating circumstance that is not set out in N.C.G.S. § 15A-2000(e).

At the close of the guilt phase of the trial, the State argued that defendant had premeditated and deliberated before killing the victim. In support of this theory, one prosecutor, noting that defendant had lured the "totally innocent victim" to the death scene, emphasized that defendant had decided "to kill twenty-four hours earlier" and then "carried out his plan." Another prosecutor argued in the guilt phase "that there was no provocation by Daniel Branch" and that defendant acted according to "plan" by "tak[ing] a man to a place that is secluded where there's no other witnesses."

Later, at the sentencing proceeding, the trial judge agreed to submit the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance, that "[t]he capital felony was especially heinous, atrocious, or cruel." A portion of the State's closing argument at the sentencing proceeding as to this circumstance pointed out that "Daniel Branch was an innocent man. And the murder of an innocent man . . . fits all of [the] definitions" of heinous, atrocious, or cruel. The State went on to argue that "the plan, the luring of Daniel Branch to a secluded location" was an "evil element" of the crime. The State added:

> And let me just point out that the entire time that they're driving out to that field in extreme southern Randolph County, and the entire time that he's loading that shotgun, and the entire time that he's walking out he's watching Daniel Branch walk out into this field, the entire time the motive in his mind is to kill and to murder and to take the life of Daniel Branch. How do we know that? Because from his own mouth he said that I knew I was going to do it the day before. But if he knew he was going to do it the day before, if he knows with every passing moment that he's in the

> car with Daniel Branch he knows that he's one minute closer to taking the life of this innocent man. He knows that every time he shoves a twelve-gauge shell into the gun, one, two, three, he is one step closer to killing Daniel Branch. Is that extremely wicked or shockingly evil? Is it outrageously wicked and vile?

The jury found this circumstance to exist.

Defendant concedes that he did not object to the argument at issue. Accordingly, we must determine whether " 'the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*.' " *State v. Jones*, 358 N.C. 330, 349-50, 595 S.E.2d 124, 137 (quoting *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002)), *cert. denied*, 543 U.S. 1023, 160 L. Ed. 2d 500 (2004). This Court recently noted:

> Under this standard, "the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made."

State v. Augustine, 359 N.C. 709, 723, 616 S.E.2d 515, 526 (2005) (quoting *Jones*, 355 N.C. at 133, 558 S.E.2d at 107).

In a capital sentencing proceeding, the State is entitled to present " '[a]ny competent, relevant evidence which [will] substantially support the imposition of the death penalty.' " *State v. White*, 355 N.C. 696, 705, 565 S.E.2d 55, 61 (2002) (alterations in original) (citation omitted), *cert. denied*, 537 U.S. 1163, 154 L. Ed. 2d 900 (2003); *accord Brown*, 315 N.C. at 61, 337 S.E.2d at 824. Evidence presented during the guilt phase is competent for the jury's consideration in the sentencing proceeding. N.C.G.S. § 15A-2000(a)(3). Thus, the State may reargue evidence that justified the murder conviction to support the finding of an aggravating circumstance. *Cf. State v. Brown*, 306 N.C. 151, 176-77, 293 S.E.2d 569, 585-86 (holding that when the defendant is convicted of felony murder, the underlying felony merges with the murder and cannot be used as an aggravating circumstance), *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982).

We have also held that the fact that a murder was planned may be a factor in determining whether the murder was especially heinous,

atrocious, or cruel. *State v. Gibbs*, 335 N.C. 1, 63, 436 S.E.2d 321, 357 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994). Moreover, the State argued several additional facts to support the (e)(9) aggravating circumstance, such as the manner in which the victim was killed:

> We've got the defendant tracking his target as he runs. Because we see that [he] ejected the second round far away from the first. And we know for a fact from his own statement that Daniel Branch was running for his life, which means that he's tracking him, he's running with him, he's cutting him off. Is that extremely wicked or shockingly evil after you've shot a man to track him like a dog, the[n] pump the shotgun to shoot him again? It is.
>
> Now, the final thing about the specific facts in the murder is the final shot to Daniel Branch's face. No, it is not a pretty thing to look at. But the important reason why I ask you to look at this is that Daniel Branch is in, when he looks up and he sees the final shot into his face, Daniel Branch is in the most defenseless position that a human being can be in. Daniel Branch is on his back. He has two shotgun blasts pumped into his body, and he's on his back. . . . Daniel Branch is on his back and his arms are in the surrender position. . . . And the testimony is that he's saying don't shoot me anymore. And he's shot. He's in the most defenseless position that a man can be in. And his arms are up because he's saying I surrender, I don't have a gun, I'm no longer any threat to you, don't shoot me anymore. . . . The evidence is that he [then] pulled the keys out of [the victim's] pocket after smelling the blood that he's spilled. . . . Is that extremely wicked, shockingly evil, outrageously wicked and vile? Did what he do inflict a high degree of pain with utter indifference to the suffering of Daniel Branch? Is this crime especially heinous, atrocious, and cruel?

Arguments addressing the victim's perceptions are relevant to the (e)(9) aggravator. *See State v. Golphin*, 352 N.C. 364, 480-81, 533 S.E.2d 168, 242-43 (2000) (noting that one type of murder warranting submission of the (e)(9) circumstance is that " 'which leave[s] the victim in her "last moments aware of but helpless to prevent impending death" ' " and that such facts, taken in a light most favorable to the State, existed in that case) (citations omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Accordingly, we conclude that the State's argument was proper and the trial court had no grounds to intervene *ex mero motu*. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises several additional issues that he concedes have been decided against him by this Court. First, defendant argues that he is entitled to a new capital sentencing hearing because the (e)(9) aggravating circumstance, that the murder was especially heinous, atrocious, or cruel, is unconstitutionally vague and overbroad, in violation of the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution. Although defendant does not characterize this issue as one of preservation, we treat the assigned error as such in light of our numerous decisions that have rejected a similar argument. *See*, *e.g.*, *State v. Garcia*, 358 N.C. 382, 424, 597 S.E.2d 724, 753 (2004) (noting that this Court has consistently rejected the argument that the (e)(9) circumstance is unconstitutionally vague), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005).

Defendant argues that the death penalty constitutes cruel and unusual punishment in violation of the North Carolina and United States Constitutions and the International Covenant on Civil and Political Rights, and that North Carolina's capital sentencing scheme is unconstitutionally vague and overbroad. This Court has held that the North Carolina capital sentencing scheme is constitutional, *State v. Powell*, 340 N.C. 674, 695, 459 S.E.2d 219, 230 (1995), *cert. denied*, 516 U.S. 1060, 133 L. Ed. 2d 688 (1996), and that it does not violate the International Covenant on Civil and Political Rights, *State v. Smith*, 352 N.C. 531, 566, 532 S.E.2d 773, 795 (2000), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001). Defendant argues that the trial court committed plain error in the sentencing proceeding by instructing the jury on unanimity in an ambiguous manner with respect to Issues Three and Four on the Issues and Recommendation as to Punishment form. We have resolved this issue contrary to defendant's position. *See McCarver*, 341 N.C. at 394, 462 S.E.2d at 42.

In addition, defendant assigns as plain error the trial court's instruction that the jury could reject nonstatutory mitigating circumstances on the ground that the circumstances had no mitigating value. Although defendant claims this instruction precludes the jury from considering the mitigating evidence fully, we have rejected this argument. *See*, *e.g.*, *State v. Payne*, 337 N.C. 505, 533, 448 S.E.2d 93, 109-10 (1994), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995). Defendant further contends that the trial court committed plain error by instructing the jury that each juror may only consider mitigating circumstances found by that juror rather than any mitigating circum-

stance found by any juror. We have held that the instruction given by the trial court is correct. *See*, *e.g.*, *State v. Gregory*, 340 N.C. 365, 418-20, 459 S.E.2d 638, 669 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). Defendant asserts that the trial court erred when it instructed the jury that in considering Issues Three and Four, the jurors *may*, rather than *must*, consider mitigating circumstances found in Issue Two of the Issues and Recommendation as to Punishment form. We have approved this instruction as meeting the requirements of the statute. *State v. Skipper*, 337 N.C. 1, 51-52, 446 S.E.2d 252, 280 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995).

Furthermore, defendant assigns as plain error the trial court's instructions to the jury that defendant had the burden to *satisfy* it of the existence of mitigating circumstances. These instructions have been found proper. *Payne*, 337 N.C. at 531-33, 448 S.E.2d at 108-09. Defendant contends in a separate assignment of error that his death sentence violates the International Covenant on Civil and Political Rights and principles of international law. This Court has considered identical arguments and found them to be without merit. *See*, *e.g.*, *Smith*, 352 N.C. at 566, 532 S.E.2d at 795. Defendant also contends that his constitutional rights were violated because the trial court tried him and entered judgment against him for first-degree murder when the indictment alleged only the elements of second-degree murder. This Court has held that the short-form indictment used in the present case is sufficient to charge a defendant with first-degree murder. *See*, *e.g.*, *State v. Hunt*, 357 N.C. 257, 274-75, 582 S.E.2d 593, 604-05, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003). Defendant argues that his death sentence must be vacated because the indictment did not allege elements authorizing a sentence greater than life imprisonment without parole. We have repeatedly rejected the argument that aggravating circumstances must be alleged in a murder indictment. *See*, *e.g.*, *State v. Allen*, 359 N.C. 425, 438, 615 S.E.2d 256, 265 (2005); *Hunt*, 357 N.C. at 277-78, 582 S.E.2d at 606. Defendant argues that the jury instructions were faulty because the jury was instructed to move on to Issue Four if it found in considering Issue Three that the aggravating and mitigating circumstances were in equipoise. We have rejected this argument and held that the instruction is proper. *See Golphin*, 352 N.C. at 468-69, 533 S.E.2d at 235-36.

Defendant raises these issues for the purpose of urging this Court to reconsider its prior decisions while also preserving his right to argue these issues on federal review. We have considered

defendant's arguments on these additional issues and find no compelling reason to depart from our previous holdings. These assignments of error are overruled.

PROPORTIONALITY REVIEW

[5] In accordance with our statutory duty, we next consider: (1) whether the aggravating circumstances are supported by the record in this case; (2) whether the jury recommended the death sentence under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the death sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (2005).

The jury found as aggravating circumstances that defendant committed the murder for pecuniary gain, *id.* § 15A-2000(e)(6) (2005), and that the murder was especially heinous, atrocious, or cruel, *id.* § 15A-2000(e)(9) (2005). After thoroughly reviewing and considering the transcripts, record on appeal, briefs, and oral arguments of counsel, we conclude that the jury's finding of these two aggravating circumstances was supported by the evidence.

Defendant contends in a specific assignment of error that he is entitled to have his death sentence vacated because it was imposed under the influence of passion, prejudice, and other arbitrary factors. However, this argument restates four issues discussed above, relating to the (f)(1) and (f)(7) mitigating circumstances, the newspaper found in the jury room, the prosecutors' closing arguments related to the (e)(9) aggravating circumstance, and the balancing of aggravating and mitigating circumstances. We found no error as to these issues individually and we find no error considering them cumulatively. This assignment of error is overruled. In addition, nothing else in the record suggests the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Finally, we must determine whether the death sentence was excessive or disproportionate by comparing the present case with other cases in which we have found the death sentence to be disproportionate. *State v. Smith*, 359 N.C. 199, 223, 607 S.E.2d 607, 624 (citing *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994)), *cert. denied*, —— U.S. ——, 163 L. Ed. 2d 121 (2005). This Court has found the death sentence disproportionate on eight occasions. *State v. Kemmerlin*,

356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled in part on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997) *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373; *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). We conclude that defendant's case is not substantially similar to any of these.

Several factors support the determination that the imposition of the death penalty here was neither excessive nor disproportionate. The evidence indicated that defendant began planning to kill the victim as soon as their telephone conversation ended the day before the murder; that defendant urged the victim to walk into the field for the ostensible purpose of setting up targets, then shot him without provocation; that the victim asked defendant not to shoot him again; that defendant fired three spaced shots into the victim; that the third shot was fired into the victim's head as the victim lay helpless, watching defendant; that defendant took the victim's keys from his body after shooting him and drove his Thunderbird to West Virginia; that defendant traded or sold the victim's two guns; and that defendant acknowledged that he felt no remorse. We have also held that the (e)(9) aggravating circumstance "is sufficient, standing alone, to affirm a death sentence." *State v. Morgan*, 359 N.C. 131, 174, 604 S.E.2d 886, 912 (2004), *cert. denied*, ––– U.S. –––, 163 L. Ed. 2d 79 (2005).

In addition, the jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation, indicating "a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Moreover, defendant was also convicted on the basis of felony murder. We have held that " 'a finding of first-degree murder based on theories of premeditation and deliberation and of felony murder is significant.' " *Smith*, 359 N.C. at 223, 607 S.E.2d at 624 (quoting *State v. Bone*, 354 N.C. 1, 22, 550 S.E.2d 482, 495 (2001), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002)).

During our proportionality review, "[w]e also consider cases in which this Court has found the death penalty to be proportionate." *State v. al-Bayyinah*, 359 N.C. 741, 762, 616 S.E.2d 500, 515 (2005).

After a complete and careful review of the record, we conclude this case "is more analogous to cases in which we have found the sentence of death proportionate than to those cases in which we have found the sentence disproportionate or to those cases in which juries have consistently returned recommendations of life imprisonment." *Id.*

Based upon the foregoing, we conclude that defendant received a fair trial and capital sentencing proceeding, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. STEVE LAWRENCE BERRYMAN

No. 302A05

(Filed 27 January 2006)

Appeal and Error— transcript—six-year delay in producing—not prejudicial

A six-year delay in producing a trial transcript for appeal did not violate defendant's statutory and due process rights. Appellate review in a criminal proceeding is provided and governed by the North Carolina General Statutes and Appellate Rules, and alleged violations of the right to an appeal shall be considered under the four-factor analysis of *Barker v. Wingo*, 407 U.S. 514. Here, a six-year delay was sufficient to trigger examination of the remaining factors; the record was devoid of any indication of why the delay occurred; although defense counsel made some efforts to expedite defendant's appeal, defendant did not sufficiently assert his right to appeal; and, considering the recognized protected interests, defendant has not shown prejudice.

Justice BRADY dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 170 N.C. App. 336, 612 S.E.2d 672 (2005), finding no error in the judgment entered 19 February 1998 by Judge Henry V. Barnette, Jr. in Superior Court, Wake County. Heard in the Supreme Court 17 October 2005.

Roy Cooper, Attorney General, by Thomas J. Ziko and William P. Hart, Special Deputy Attorneys General, for the State.

George E. Kelly, III for defendant-appellant.

LAKE, Chief Justice.

The issue presented for review in this case is whether a six-year delay in the preparation of a trial transcript for appellate review violates a criminal defendant's constitutional or statutory right to an appeal.

Steve Lawrence Berryman ("defendant") was indicted on 18 November 1997 for: (1) robbery with a dangerous weapon in violation of N.C.G.S. § 14-87; (2) possession of crack cocaine in violation of N.C.G.S. § 90-95(a)(3); and (3) being an habitual felon under N.C.G.S. § 14-7.1. The underlying facts of these charges are described in the Court of Appeals' opinion below, *State v. Berryman*, 170 N.C. App. 336, ——, 612 S.E.2d 672, 674-75 (2005), and are not a basis for this review.

Defendant was tried by a jury on 18 February 1998. Following presentation of evidence by the State and the defense, the jury found defendant guilty of: (1) common law robbery; (2) possession of cocaine; and (3) being an habitual felon. After determining defendant's prior record level was IV, the trial court entered judgment and sentenced defendant to a prison term of 133 months to 169 months. Defendant gave notice of appeal in open court. Defendant was designated indigent, and his trial counsel was appointed as appellate counsel in the Appellate Entries signed by the trial judge.

On 20 February 1998, the clerk's transcript order, certificate, and the Appellate Entries were personally delivered by a deputy clerk of Wake County Superior Court to Johnie L. King, III ("King"), the court reporter. The order instructed King to "[p]repare and deliver to the parties a transcript of all portions of the proceedings in the above-captioned case." The order did not specify anything to be excluded. King completed the prepared transcript on 30 January 2004 and mailed it to the trial court on 2 February 2004, almost six years after defendant's conviction. The transcript was filed with the North Carolina Court of Appeals on 23 April 2004.

Defendant argued in his appeal to the Court of Appeals: " 'The State's failure to provide a transcript of the proceedings in a timely fashion has deprived [him] of his constitutional and statutory rights

to meaningful and effective appellate review.' " *Berryman*, 170 N.C. App. at ——, 612 S.E.2d at 676. The record includes copies of a letter, a written request, and a signed affidavit drafted by defense counsel regarding the status of defendant's trial transcript. The letter, dated 3 April 2000, and the written request, dated 31 May 2000, are both addressed to King. Defense counsel's affidavit details fifteen separate inquiries concerning defendant's trial transcript:

a. 1/13/99—Phone msg. to J. King re: transcript—completed?

b. 5-17-99—Confer w/ct. reporter; phone msg. to ct. reporter.

c. 9-30-99—Phone call to court reporter.

d. 10-7-99—Confer w/court reporter re: transcript.

e. 1-14-00—Confer w/court reporter re: transcript.

f. 4-10-00—Draft letter to court reporter.

g. 4-18-00—Hand-delivered letter to court reporter; confer w/ct. reporter.

h. 5-31-00—Court Reporter Request.

i. 6-1-00—Deliver Court Reporter Request.

j. 12-18-00—Review dates/check status of transcript.

k. 11-18-03—Obtained telephone number for J. King from courthouse personnel; telephone msg. to J. King.

l. 11-19-03—Telephone call w/J. King re: transcript.

m. 11-21-03—Telephone call from J. King; mailed him copy of appeal entry.

n. 1-22-04—Telephone call to J. King re: transcript.

o. 2-10-04—Received transcript.

There is no indication in the record and defendant does not assert that the State either purposefully delayed production of the transcript or assisted with its procurement beyond the clerk's 20 February 1998 transcript order. In addition, defense counsel's inquiries concerning defendant's trial transcript as described above were all directed to King, not to the State, the trial court, the clerk of superior court, or the clerk of the Court of Appeals. There is no explanation in the record for the delay.

After reviewing defendant's arguments, the Court of Appeals' majority opinion held the nearly six-year delay did not deprive defendant of his due process rights. *Berryman*, 170 N.C. App. at ——, 612 S.E.2d at 678. Judge Timmons-Goodson dissented, concluding "the length of the delay and the disregard of defendant's assertions of his right to a speedy appeal produced a due process violation in the instant case." *Id.* at ——, 612 S.E.2d at 678. Defendant appealed to this Court as of statutory right based on the dissenting opinion. *See* N.C.G.S. § 7A-30(2) (2005). After careful review and for the reasons set forth below, we hold the approximate six-year delay did not violate defendant's constitutional rights or any statutory right and affirm the decision of the Court of Appeals.

We note at the outset defendant asserts violations of both his federal and state constitutional rights. This Court has recognized:

> State courts are no less obligated to protect and no less capable of protecting a defendant's federal constitutional rights than are federal courts. In performing this obligation a state court should exercise and apply its own independent judgment, treating, of course, decisions of the United States Supreme Court as binding and according to decisions of lower federal courts such persuasiveness as these decisions might reasonably command.

State v. McDowell, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 732 (1986), *habeas proceeding at McDowell v. Dixon*, 858 F.2d 94 (4th Cir. 1988). Thus, we shall consider defendant's contentions in both the federal and state context.

At common law, criminal defendants were not afforded appellate review of final judgments entered based upon convictions. *McKane v. Durston*, 153 U.S. 684, 687, 38 L. Ed. 867, 868 (1894); *State v. Bailey*, 65 N.C. 426, 427 (1871) ("At common law, there was no appeal from the decision of any of the Courts, high or low . . . ."). The United States Constitution does not require either the federal government or the states to provide a right to an appeal from criminal convictions. *Halbert v. Michigan*, —— U.S. ——, ——, 162 L. Ed. 2d 552, 559-60 (2005) (citing *McKane*, 153 U.S. at 687, 38 L. Ed. at 868); *Evitts v. Lucey*, 469 U.S. 387, 393, 83 L. Ed. 2d 821, 827 (1985) (citing *McKane*, 153 U.S. at 687, 38 L. Ed. at 868); *Jones v. Barnes*, 463 U.S. 745, 751, 77 L. Ed. 2d 987, 993 (1983); *Ross v. Moffitt*, 417 U.S. 600, 611, 41 L. Ed. 2d 341, 351 (1974) (citing *McKane*, 153 U.S. at 687, 38 L. Ed. at 868); *Ortwein v. Schwab*, 410 U.S. 656, 660, 35 L. Ed. 2d 572, 576 (1973) (citations omitted); *Griffin v. Illinois*, 351 U.S. 12, 18, 100

L. Ed. 891, 898 (1956) (citing *McKane*, 153 U.S. at 687, 38 L. Ed. at 868); *McKane*, 153 U.S. at 687-88, 38 L. Ed. at 868. Rather, "[i]t is wholly within the discretion of the State to allow or not to allow such a review." *McKane*, 153 U.S. at 687, 38 L. Ed. at 868; *see also Kohl v. Lehlback*, 160 U.S. 293, 299, 40 L. Ed. 432, 434 (1895) ("[T]he right of review in an appellate court is purely a matter of state concern . . . .").

Should a state provide an appeal of right, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts*, 469 U.S. at 393, 83 L. Ed. 2d at 827-28; *Ross*, 417 U.S. at 609, 41 L. Ed. 2d at 350 (" 'Due Process' emphasizes fairness between the State and the individual dealing with the State . . . ."); *North Carolina v. Pearce*, 395 U.S. 711, 724-25, 23 L. Ed. 2d 656, 669 (1969) (While no *per se* constitutional right to appeal exists, once a state establishes an appellate forum it must assure access to it upon terms and conditions equally applicable and available to all.) (citations omitted); *Rinaldi v. Yeager*, 384 U.S. 305, 310-11, 16 L. Ed. 2d 577, 581 (1966) ("This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.") (citations omitted); *Douglas v. California*, 372 U.S. 353, 355, 9 L. Ed. 2d 811, 813-14 (1963) (citing *Griffin*, 351 U.S. at 19, 100 L. Ed. at 899); *Griffin*, 351 U.S. at 17, 100 L. Ed. at 898 ("Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' " (quoting *Chambers v. Florida*, 309 U.S. 227, 241, 84 L. Ed. 716, 724 (1940))).

The North Carolina Constitution does not mandate that this state provide appellate review of criminal convictions. *See* N.C. Const. arts. I & IV; *see also Gunter v. Town of Sanford*, 186 N.C. 452, 457-58, 120 S.E. 41, 44 (1923) ("[P]laintiffs present the question whether the right of appeal is essential to due process of law. The question has frequently been considered by the courts and answered in the negative."); *State v. Pulliam*, 184 N.C. 681, 683, 114 S.E. 394, 395 (1922) (The only appeal provided by the North Carolina Constitution is Article I, Section 13: "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other means of trial for petty misdemeanors with the right of appeal."); *State v. Webb*, 155 N.C. 426, 431, 70 S.E. 1064, 1066 (1911) (overruling argument that

appeals are constitutionally provided for "under and by virtue of the first clause of [Article IV, Section 8 of the North Carolina Constitution], 'The Supreme Court shall have jurisdiction to hear, upon appeal, any decision of the court below.' ").

Similar to federal procedure, a North Carolina criminal defendant's right to appeal a conviction is provided entirely by statute. *In re Halifax Paper Co.*, 259 N.C. 589, 592, 131 S.E.2d 441, 444 (1963) ("There is no inherent or inalienable right of appeal from an inferior court to a superior court or from a superior court to the Supreme Court."); *State v. Blades*, 209 N.C. 56, 56, 182 S.E. 714, 714 (1935) ("The right of appeal to this Court is wholly regulated by statute . . . ."); *State v. China*, 150 N.C. App. 469, 473, 564 S.E.2d 64, 68 (2002) ("The right to appeal in a criminal proceeding is purely statutory.") (citations omitted), *appeal dismissed*, 356 N.C. 683, 577 S.E.2d 899 (2003); *State v. Hammonds*, 141 N.C. App. 152, 164, 541 S.E.2d 166, 175 (2000) (acknowledging the court's research did not disclose either North Carolina or United States Supreme Court precedent recognizing a constitutional right to a speedy appeal), *aff'd per curiam*, 354 N.C. 353, 554 S.E.2d 645 (2001), *cert. denied*, 536 U.S. 907, 153 L. Ed. 2d 184 (2002); *State v. Shoff*, 118 N.C. App. 724, 725, 456 S.E.2d 875, 876 (1995) ("The right to appeal in a criminal proceeding is purely statutory." (citing *Abney v. United States*, 431 U.S. 651, 656, 52 L. Ed. 2d 651, 658 (1977))), *aff'd per curiam*, 342 N.C. 638, 466 S.E.2d 277 (1996); *see* N.C. R. App. P. 4(a) ("Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal . . . .").

The authority for appellate review in criminal proceedings is found in the North Carolina General Statutes and Rules of Appellate Procedure. *See* N.C.G.S. § 15A-1444(d) (2005) ("Procedures for appeal to the appellate division are as provided in this Article, the rules of the appellate division, and Chapter 7A of the General Statutes. The appeal must be perfected and conducted in accordance with the requirements of those provisions."). Specifically, section 15A-1444 of the Criminal Procedure Act specifies "When defendant may appeal," and section 7A-27 of the Judicial Department Chapter outlines "Appeals of right from the courts of the trial divisions." N.C.G.S. § 15A-1444; N.C.G.S. § 7A-27 (2005). The Rules of Appellate Procedure "govern . . . in all appeals from the courts of the trial division to the courts of the appellate division . . . ." N.C. R. App. P. 1(a); *Pruitt v. Wood*, 199 N.C. 788, 789, 156 S.E. 126, 127 (1930) ("[T]he rules of this Court, governing appeals, are mandatory

and not directory." (citing *Calvert v. Carstarphen*, 133 N.C. 25, 27, 45 S.E. 353, 354 (1903))). A criminal defendant may appeal from entry of final judgment or order by a superior or district court in accordance with the provisions of these two statutes and the rules of appellate procedure. *See Shoff*, 118 N.C. App. at 725, 456 S.E.2d at 876-77; *see also* N.C. R. App. P. 4.

Specific to the issue at bar, Rule 7 of the North Carolina Rules of Appellate Procedure governs preparation of the trial transcript and the court reporter's duties. It states in pertinent part:

> (a) *Ordering the transcript.*
>
> . . . .
>
> (2) *Criminal cases. . . .*
>
> Where there is an order establishing the indigency of the defendant, unless the trial judge's appeal entries specify or the parties stipulate that parts of the proceedings need not be transcribed, the clerk of the trial tribunal shall order a transcript of the proceedings by serving the following documents upon either the court reporter(s) or neutral person designated to prepare the transcript: a copy of the appeal entries signed by the judge; a copy of the trial court's order establishing indigency for the appeal; and a statement setting out the number of copies of the transcript required and the name, address and telephone number of appellant's counsel. The clerk shall make an entry of record reflecting the date these documents were served upon the court reporter(s) or transcriptionist.
>
> (b) *Production and delivery of transcript.*
>
> . . . .
>
> In criminal cases where there is an order establishing the indigency of the defendant for the appeal: from the date the clerk of the trial court serves the order upon the person designated to prepare the transcript, that person shall have 60 days to procure and deliver the transcript in non-capital cases and 120 days to produce and deliver the transcript in capitally tried cases.
>
> . . . .
>
> Except in capitally tried criminal cases which result in the imposition of a sentence of death, (t)he trial tribunal, in its discretion, and for good cause shown by the appellant may extend

the time to produce the transcript for an additional 30 days. Any subsequent motions for additional time required to produce the transcript may only be made to the appellate court to which appeal has been taken. All motions for extension of time to produce the transcript in capitally tried cases resulting in the imposition of a sentence of death, shall be made directly to the Supreme Court by the appellant. Where the clerk's order of transcript is accompanied by the trial court's order establishing the indigency of the appellant and directing the transcript to be prepared at State expense, the time for production of the transcript commences seven days after the filing of the clerk's order of transcript.

(2) The court reporter, or person designated to prepare the transcript, shall deliver the completed transcript to the parties, as ordered, within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The court reporter or transcriptionist shall certify to the clerk of the trial tribunal that the parties' copies have been so delivered, and shall send a copy of such certification to the appellate court to which the appeal is taken. The appealing party shall retain custody of the original transcript and shall transmit the original transcript to the appellate court upon settlement of the record on appeal.

N.C. R. App. P. 7.

Under North Carolina Rules of Appellate Procedure 7, 9, and 11, the burden is placed upon the appellant to commence settlement of the record on appeal, including providing a verbatim transcript if available. *See State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644-45 (1983) ("It is the appellant's duty and responsibility to see that the record is in proper form and complete." (citing N.C. R. App. P. 9 and *State v. Atkinson*, 275 N.C. 288, 167 S.E.2d 241 (1969), *death sentence vacated*, 403 U.S. 948, 29 L. Ed. 2d 859 (1971))); *State v. Milby*, 302 N.C. 137, 141, 273 S.E.2d 716, 719 (1981) ("It is the duty of an appellant to see that the record on appeal is properly made up and transmitted to the appellate court." (citing *Atkinson*, 275 N.C. 288, 167 S.E.2d 241)); *Hicks v. Alford*, 156 N.C. App. 384, 389-90, 576 S.E.2d 410, 414 (2003) ("It is the duty of the appellant to ensure that the record is complete." (citing *Alston*, 307 N.C. at 341, 298 S.E.2d at 644)); *McLeod v. Faust*, 92 N.C. App. 370, 371, 374 S.E.2d 417, 418 (1988) ("Plaintiff, as appellant, bears the burden of seeing that the record on appeal is properly settled and filed with this Court." (citing

State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977))). Once the record on appeal and verbatim transcript are settled, Rule 9(c)(3)b. states the "appellant shall cause the settled, verbatim transcript to be filed, contemporaneously with the record on appeal, with the clerk of the appellate court in which the appeal is docketed." N.C. R. App. P. 9(c)(3)b. The record on appeal and verbatim transcript must be filed by the appellant within fifteen days after the record's settlement. N.C. R. App. P. 12(a); *Chamberlain v. Thames*, 130 N.C. App. 324, 327, 502 S.E.2d 631, 633 ("Defendant's failure to supervise the process of his appeal has deprived him of his right to appellate review . . . ."), *abrogated by*, 131 N.C. App. 705, 509 S.E.2d 443 (1998). In the case *sub judice*, defendant, as the appellant, bore the burden of proceeding and of ensuring that the record on appeal and verbatim transcript were complete, properly settled, in correct form, and filed with the appropriate appellate court by the applicable deadlines.

On 19 February 1998, the trial court designated defendant as indigent in the Appellate Entries following his conviction. On 20 February 1998, the deputy clerk ordered a transcript of the trial proceedings by personally serving King a copy of the Appellate Entries signed by the trial judge, which included the order designating defendant as indigent and appointing appellate counsel and indicating counsel's address. King completed defendant's trial transcript on 30 January 2004 and mailed it to the trial court on 2 February 2004. The Court of Appeals received the transcript on 23 April 2004, heard defendant's appeal on 12 January 2005, and filed its opinion on 17 May 2005. There is no evidence or indication in the record that either King or defendant requested an extension of time beyond the prescribed sixty days to complete the transcription pursuant to Rules 7 and 27 of the North Carolina Rules of Appellate Procedure. There is no indication the State, the trial court, the clerk of superior court, or the clerk of the Court of Appeals inquired of King as to the status of the trial transcript. It would be out of the ordinary for the State, the trial court, the clerk of superior court, or the clerk of the Court of Appeals to do so. There is also no indication defendant or his counsel ever requested the State or the trial court to become further involved. Nevertheless, defendant asserts this failure by the State, to make any efforts to avoid the considerable delay in completing the trial transcript and subsequently his appeal, violated his due process rights.

The United States Supreme Court established a four-factor balancing test designed to analyze alleged violations of an individual's

Sixth Amendment right to a speedy trial in *Barker v. Wingo*, 407 U.S. 514, 530, 33 L. Ed. 2d 101, 117 (1972). The four factors are: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* This Court has adopted the *Barker* factors when considering alleged violations of the right to a speedy trial. *See, e.g.*, *State v. Spivey*, 357 N.C. 114, 118, 579 S.E.2d 251, 254 (2003); *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001); *State v. Jones*, 310 N.C. 716, 721, 314 S.E.2d 529, 532-33 (1984); *State v. O'Kelly*, 285 N.C. 368, 371, 204 S.E.2d 672, 674 (1974).

When presented with the issue of whether an individual's rights were violated due to prevention or delay of an appeal, federal and state courts of this and other jurisdictions have almost uniformly applied the *Barker* test in considering appellate proceedings. *China*, 150 N.C. App. at 473-75, 564 S.E.2d at 68-69; *Hammonds*, 141 N.C. App. at 164, 541 S.E.2d at 175; *United States v. Smith*, 94 F.3d 204, 207 (6th Cir. 1996), *cert. denied*, 519 U.S. 1133, 136 L. Ed. 2d 877 (1997); *United States v. Hawkins*, 78 F.3d 348, 350-51 (8th Cir.), *cert. denied*, 519 U.S. 844, 136 L. Ed. 2d 76 (1996); *Simmons v. Reynolds*, 898 F.2d 865, 868 (2d Cir. 1990); *United States v. Antoine*, 906 F.2d 1379, 1382 (9th Cir.), *cert. denied*, 498 U.S. 963, 112 L. Ed. 2d 407 (1990); *Burkett v. Cunningham*, 826 F.2d 1208, 1222 (3d Cir. 1987); *United States v. Johnson*, 732 F.2d 379, 381-82 (4th Cir.), *cert. denied*, 469 U.S. 1033, 83 L. Ed. 2d 396 (1984); *DeLancy v. Caldwell*, 741 F.2d 1246, 1247-48 (10th Cir. 1984); *Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1980), *cert. denied*, 450 U.S. 931, 67 L. Ed. 2d 365 (1981); *Gaines v. Manson*, 194 Conn. 510, 521, 481 A.2d 1084, 1092 (1984); *People v. Sistrunk*, 259 Ill. App. 3d 40, 54, 630 N.E.2d 1213, 1223, *appeal denied*, 157 Ill. 2d 517, 642 N.E.2d 1298 (1994); *Allen v. State*, 686 N.E.2d 760, 783 (Ind. 1997), *cert. denied*, 525 U.S. 1073, 142 L. Ed. 2d 667 (1999); *State v. Harper*, 675 A.2d 495, 498 n.5 (Me. 1996); *Daniel v. State*, 2003 WY 132, ¶ 43, 78 P.3d 205, 218-19 (Wyo. 2003), *cert. denied*, 540 U.S. 1205, 158 L. Ed. 2d 127 (2004). The Court of Appeals' majority opinion below utilized the *Barker* test to analyze defendant's due process claim. *Berryman*, 170 N.C. App. at ——, 612 S.E.2d at 676-78. We agree with the use of the four *Barker* factors by both our Court of Appeals and other jurisdictions to address issues concerning whether an individual's rights to an appeal were violated.

As noted earlier, the *Barker* factors are: "(1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of his

right . . . ; and (4) prejudice to defendant resulting from the delay." *Hammonds*, 141 N.C. App. at 158, 541 S.E.2d at 172 (citing *Barker*, 407 U.S. at 530, 33 L. Ed. 2d at 116-17). "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Barker*, 407 U.S. at 533, 33 L. Ed. 2d at 118; *see also China*, 150 N.C. App. at 473, 564 S.E.2d at 68; *Hammonds*, 141 N.C. App. at 158, 541 S.E.2d at 172.

When considered in Sixth Amendment cases, the first factor, the length of delay, "is not *per se* determinative of whether defendant has been deprived of his right to a speedy trial." *Spivey*, 357 N.C. at 119, 579 S.E.2d at 255 (citing *State v. Webster*, 337 N.C. 674, 678, 447 S.E.2d 349, 351 (1994)). The length of delay is a triggering mechanism that requires further inquiry into the other *Barker* factors only after the delay is deemed presumptively prejudicial. *Hammonds*, 141 N.C. App. at 159, 541 S.E.2d at 172; *Barker*, 407 U.S. at 530, 33 L. Ed. 2d at 117 ("Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."); *State v. Hill*, 287 N.C. 207, 211, 214 S.E.2d 67, 71 (1975) ("[W]e elect to view this factor merely as the 'triggering mechanism' that precipitates the speedy trial issue. Viewed as such, its significance in the balance is not great.").

Here, over six years passed between defendant's conviction, King's production of the trial transcript, and appellate review by the Court of Appeals. Such an egregious delay is clearly sufficient to trigger examination of the remaining factors. *See China*, 150 N.C. App. at 474, 564 S.E.2d at 68 ("An approximately seven year delay in processing defendant's appeal is lengthy and sufficient to examine the remaining factors."); *Hammonds*, 141 N.C. App. at 164, 541 S.E.2d at 175 ("The length of the delay, approximately two and a half years . . . is . . . sufficient to trigger the examination of the remaining factors."); *Johnson*, 732 F.2d at 382 ("With regard to the first of [the *Barker*] factors, the two-year delay in this case is in the range of magnitude of delay as a result of which courts have indicated that due process may have been denied."); *Rheuark*, 628 F.2d at 302-03 ("[W]e assume without deciding . . . a delay of nearly two years . . . exceeds the limits of due process.").

In the instant case, defendant asserts that establishing a justifiable reason and cause of the six-year delay in completing his appeal, the second *Barker* factor, rests with the State. He argues in his brief

that "[t]hroughout this time, the State is aware of the situation and makes no effort to obtain the transcript." Contrary to defendant's assertion and consistent with analyses of delays during the trial phase of a criminal proceeding, the burden is on the defendant to show the delay resulted from intentional conduct or neglect by the State. *See Spivey*, 357 N.C. at 119, 579 S.E.2d at 255 ("[The] defendant has the burden of showing that the delay was caused by the *neglect* or *willfulness* of the prosecution." (citing *Webster*, 337 N.C. at 679, 447 S.E.2d at 351)); *State v. McKoy*, 294 N.C. 134, 141, 240 S.E.2d 383, 388 (1978) ("[T]he circumstances of each particular case must determine whether a speedy trial has been afforded or denied, and the burden is on an accused who asserts denial of a speedy trial to show that the delay was due to the neglect or wilfulness of the prosecution.").

After thorough review of the record on appeal and the parties' briefs, we agree with the majority opinion of the Court of Appeals that "[t]he record is devoid of any indication as to why the extensive delay took place." *Berryman*, 170 N.C. App. at ——, 612 S.E.2d at 677. The trial court proceeded properly and ordered a trial transcript from King on 20 February 1998 after defendant gave notice of appeal in open court. N.C. R. App. P. 7. No motions for extensions of time to complete the transcript were submitted to either the trial court or the Court of Appeals. *See* N.C. R. App. P. 7(b); *see also* N.C. R. App. P. 27(c). The only documented evidence present in the record from that six-year period is defense counsel's letter, written request, and affidavit. However, this evidence does not shed light on the cause of the delay. Thus, there is no evidence to support defendant's assertion that the State acted willfully to delay or neglected production of the transcript, a fact conceded by the Court of Appeals' dissenting opinion. *Berryman*, 170 N.C. App. at ——, 612 S.E.2d at 678 (Timmons-Goodson, J., dissenting) ("In the instant case, I recognize that the delay was not due to the fault of the prosecutor."). Defendant simply has failed to meet his burden of proof on this point. *See Spivey*, 357 N.C. at 119, 579 S.E.2d at 255; *see also McKoy*, 294 N.C. at 141, 240 S.E.2d at 388.

As to the third *Barker* factor, defendant argues he never acquiesced in the six-year delay and instead asserted his right to prompt appellate review by and through defense counsel's submission of numerous requests and inquiries. Under our Appellate Rules and case law, it is the appellant's responsibility to compile a proposed record on appeal which includes the verbatim transcript, to work with the

State towards settlement of the record on appeal, and then to submit the completed record to the Court of Appeals. N.C. R. App. P. 9, 11 & 12; *Alston*, 307 N.C. at 341, 298 S.E.2d at 644 ("It is the appellant's duty and responsibility to see that the record is in proper form and complete."); *China*, 150 N.C. App. at 474-75, 564 S.E.2d at 68 ("Defendant's failure to stay informed concerning the status of his appeal of right and to assert his rights weighs heavily against his contention that his due process rights were violated."); *McLeod*, 92 N.C. App. at 371, 374 S.E.2d at 418 ("Plaintiff, as appellant, bears the burden of seeing that the record on appeal is properly settled and filed with this Court.").

The record includes a letter, a written request, and an affidavit drafted by defense counsel which document defendant's assertions of his right to an appeal. Defense counsel made approximately nine inquiries to King regarding the transcript during 1999 and 2000. However, there is a noticeable gap between defense counsel's "Review dates/check status of transcript" on 18 December 2000 and "telephone msg. to J. King" on 18 November 2003. Defense counsel then placed two more phone calls to King between 19 November 2003 and 22 January 2004. On 21 November 2003, King telephoned defense counsel. The transcript was completed on 30 January 2004.

Defense counsel averaged two and one half inquiries per year during the six years defendant awaited appellate review. None of defense counsel's efforts were directed to the State, to the trial court, to the clerk of superior court, or to the clerk of the Court of Appeals. *See Hammonds*, 141 N.C. App. at 157, 541 S.E.2d at 171 (defendant filed three separate motions for new trial after extensions granted to court reporter expired); *Johnson*, 732 F.2d at 382 (defendant filed petitions with appellate court to obtain transcript). Instead, each effort in the instant case was addressed to King. There is no evidence that defendant, himself, asserted to anyone his right to appellate review. As the Court of Appeals noted in both this case and in *China*, defendant or his attorney could have contacted the trial court or the clerk of the Court of Appeals. *Berryman*, 170 N.C. App. at ——, 612 S.E.2d at 677; *China*, 150 N.C. App. at 474, 564 S.E.2d at 68. Although defense counsel made some efforts to expedite defendant's appeal, neither he nor defendant satisfied the mandates of the Appellate Rules and case law to compile a proposed record on appeal including the verbatim transcript, work with the State towards settlement of the record on appeal, and then submit it to the Court of Appeals. N.C. R. App. P. 9, 11 & 12; *Alston*, 307 N.C. at 341, 298 S.E.2d at 644; *China*,

150 N.C. App. at 474-75, 564 S.E.2d at 68; *McLeod*, 92 N.C. App. at 371, 374 S.E.2d at 418. Defendant did not sufficiently assert his right to an appeal.

In considering whether defendant has been prejudiced because of a delay between indictment and trial, this Court noted that a speedy trial serves: " '(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.' " *Webster*, 337 N.C. at 680-81, 447 S.E.2d at 352 (quoting *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118). Courts addressing the issue at bar have adopted the same analysis to show prejudice. *China*, 150 N.C. App. at 475, 564 S.E.2d at 69; *Johnson*, 732 F.2d at 382; *see also* N.C.G.S. §§ 15A-1442 & -1443 (2005) (Appellate courts may grant relief in criminal appeals only if defendant can prove he suffered prejudice from error.).

Initially, with respect to the prejudice factor, we note defendant's assignments of error to the Court of Appeals pertaining to his trial are not before this Court based on the dissent. *See* N.C. R. App. P. 16(b); *see also State v. Hooper*, 318 N.C. 680, 681-82, 351 S.E.2d 286, 287 (1987). The Court of Appeals' majority opinion held that defendant's assignments of error aside from his right to a timely appeal argument were without merit. *Berryman*, 170 N.C. App. at ——, 612 S.E.2d at 674-76. Accordingly, the first interest or concern cited above, prevention of oppressive pretrial incarceration, is not applicable to the case at bar.

Regarding the second interest, defendant argues:

> Waiting for the ax to fall, an inmate suffers the anxiety of uncertainty while on appeal. Once he finds out the decision, he can go on to deal with it. Only then can he turn his concentration, for example, to long term prison programs. . . . Berryman's anxiety was maximized by the extra long delay.

We agree with the Court of Appeals' majority opinion that a review of the record does not divulge any evidence to support defendant's allegation of experiencing "maximum anxiety." *Berryman*, 170 N.C. App. at ——, 612 S.E.2d at 678 (quoting *China*, 150 N.C. App. at 475, 564 S.E.2d at 69 (" 'Defendant has failed to show that he suffered any more anxiety than any other appellant.' ")).

Finally, concerning the third interest, defendant argues the delay prevented "any possibility of meaningful appellate review" of his case. He also asserts the public suffers from such delays, particularly

crime victims and other interested parties. We are not insensitive to the potential effects of a long delay in completing an appeal on a defendant, other interested parties, and the public at large. However, defendant has totally failed to provide the Court of Appeals or this Court with any specific evidence supporting these contentions relating to his case. *See Berryman*, 170 N.C. App. at ——, 612 S.E.2d at 678.

This Court has also noted in cases involving the Sixth Amendment right to a speedy trial that although a defendant's failure to assert his right to a speedy trial earlier in the process does not preclude the argument later, such failure is considered when determining whether the defendant was prejudiced. *Webster*, 337 N.C. at 680, 447 S.E.2d at 352 (citing *Barker*, 407 U.S. at 531-32, 33 L. Ed. 2d at 117-18). Having determined that defendant failed to sufficiently assert his right to an appeal, we conclude that the prejudice from which defendant allegedly suffered was not so great as to inspire him or his counsel to act. Thus, after considering the three recognized protected interests and defendant's corresponding arguments, we conclude defendant has not shown through supportive evidence, and our review of the record fails to disclose, that he was prejudiced by the six-year delay. *See* N.C.G.S. §§ 15A-1442 & -1443.

Appellate review in a criminal proceeding is provided and governed by the North Carolina General Statutes and Appellate Rules, not the United States or the North Carolina Constitutions. Alleged violations of the right to an appeal shall be considered under the four-factor analysis enunciated by the United States Supreme Court in *Barker*. After extensive review of defendant's case and arguments in light of *Barker*, we hold defendant's statutory and due process rights were not violated by the six-year delay in producing his trial transcript. The decision of the Court of Appeals is affirmed.

AFFIRMED.

BRADY, Justice dissenting.

The indefensible position of the State was announced at oral arguments by State's counsel: "Let's posit a delay of 20 years; let's posit a delay of 50 years . . . the right doesn't exist." I cannot condone, much less join, the decision of the majority in this case or acquiesce to the ideas of State's counsel at oral arguments. We have appellate rules for a reason, and those rules must be followed or the principles and policies upon which these rules are based fall to the wayside.

Because I believe this Court should promote the quick and fair administration of justice, I cannot join my colleagues in holding no violation of defendant's rights occurred when an agent of the State delayed his appeal by six years. The majority opinion extends beyond the outer limits of justice, announcing a benchmark that is constitutionally inadequate. This unenviable position merely gives lip service to an important right that is essential to our criminal justice system. As I believe justice cries out for more, I respectfully dissent.

The State's argument is: As no constitutional right exists to *appeal* one's conviction, there can be no constitutional right to a *speedy appeal*. This reasoning does not comport with our jurisprudence or the jurisprudence of the Supreme Court of the United States. While there is no federal constitutional right to an appeal of a criminal conviction, *see Abney v. United States*, 431 U.S. 651, 656 (1977), in North Carolina there is a statutory right of appeal. *See* N.C.G.S. § 15A-1444 (2005); *State v. Blades*, 209 N.C. 56, *passim*, 182 S.E. 714, *passim* (1935). When the State grants a person a property or a liberty interest, the Fourteenth Amendment to the United States Constitution requires the interest not be later deprived without due process of law, and many courts have recognized this principle as applicable to appeals. *See*, *e.g.*, *Douglas v. California*, 372 U.S. 353 (1963); *United States v. Johnson*, 732 F.2d 379 (4th Cir.), *cert. denied*, 469 U.S. 1033 (1984); *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981).

Additionally, our North Carolina Constitution provides protection for our citizens in the form of the law of the land clause: "No 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. In this State, the North Carolina Rules of Appellate Procedure are the laws of the land. *Id.* art. IV § 13(2). In fact, any statute which violates of the Rules of Appellate Procedure cannot stand because it also violates the Constitution. *See State v. Elam*, 302 N.C. 157, 160, 273 S.E.2d 661, 664 (1981). The rules provide, in non-capital criminal cases, a transcript must be procured and delivered within sixty days from the "date the clerk of the trial court serves the order upon" the court reporter. N.C. R. App. P. 7(b). Laws are meaningless if not enforced. The citizenry should not be expected to follow the law while the agents of the State disregard it. Court reporters are not totally immune from any responsibility under the law. I cannot join the majority's opinion, and I anxiously await discovery of the next

rule which will be pushed to the side to the detriment of the good will of the judiciary and the rights of our citizens.

There are compelling reasons why we should recognize a right to a speedy appeal based upon due process jurisprudence. In 1962 the Supreme Court of the United States said:

> When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged. Second, the preference to be accorded criminal appeals recognizes the need for speedy disposition of such cases. Delay in the final judgment of conviction, including its appellate review, unquestionably erodes the efficacy of law enforcement.

Coppedge v. United States, 369 U.S. 438, 449 (1962) (footnote omitted). This language is equally persuasive in this case. The very reason our appellate rules provide a sixty day period for the provision of a transcript is so the courts do not become clogged. It is important we keep our courts open and appeals speedy because "[d]elay . . . erodes the efficacy of law enforcement." *Id.* A six-year delay certainly casts doubt upon our system of appellate review and is totally unacceptable. *See Guam v. Olsen*, 462 F. Supp. 608, 613 (D. Guam App. Div. 1978) (reversing a conviction and ordering an acquittal "turning loose a presumptively guilty [d]efendant, in order to vindicate the public policies involved" because of a two-year delay in transcript preparation), *cert. denied*, 444 U.S. 1016 (1980).

I agree with the majority and other persuasive jurisdictions that the test of *Barker v. Wingo* is the proper test in speedy appeal cases. 407 U.S. 514 (1972). The Supreme Court of the United States set out three protected interests in *Barker*: Prevention of oppressive pretrial incarceration, minimization of anxiety and concern of the defendant, and impairment of the defense. 407 U.S. at 532.

In speedy appeal cases, criminal defendants wait in prison unless they are lucky enough and have the resources and circumstances to be released on bail, a rare occurrence in North Carolina. *See* N.C.G.S. § 15A-536 (2005). In prison, there is no Blackberry, there is no Internet, and there are no iPods. The inmate's liberty is significantly

curtailed. Except for capital punishment, confinement to prison is the most serious deprivation of life and liberty our law allows. Therefore, it is vital we work quickly on appeal to provide potentially wrongfully or unconstitutionally confined defendants the relief required to right the wrong in a timely manner. If a defendant's conviction should be reversed, every day spent in prison are days that can never be given back. Should a defendant be entitled to a new trial, evidence wastes away in the lockers, memories fade, and recollections become clouded while the defendant waits years for the preparation of his transcript. These are not merely hypothetical, but real situations that will occur because of the majority's failure to impose a proper sanction for the violation of defendant's rights. The United States Court of Appeals for the Fifth Circuit spoke well when it said: "The cancerous malady of delay, which haunts our judicial system by postponing the rectification of wrong and the vindication of those unjustly convicted, must be excised from the judicial process at every stage." *Rheuark*, 628 F.2d at 304.

Therefore, I agree the similarities in the interests of a speedy trial and the interests of speedy appeals are sufficiently similar to use the *Barker v. Wingo* balancing test to determine when a defendant is denied his constitutional right to a speedy appeal. This balancing test considers the following factors: (1) The length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. *See Barker*, 407 U.S. at 530. Here we have an extraordinary time of delay. Six years is longer than either of the time periods in *Rheuark* (two years) or *Johnson* (two years). Six years is longer than the five year delay before trial in *Barker*. Six years is certainly a long enough period of time to implicate the right to a speedy appeal.

As to the second prong of the *Barker* test, the reason for the delay is not exactly apparent; however, it was no fault of defendant's. At least ten inquiries were made seeking the transcript from the court reporter before the transcript was finally delivered. All we know is that for some reason, the court reporter was unable to fulfill his duties in getting the transcript to defendant in time for him to properly perfect the record on appeal.

This seems to be a systemic problem. Chief Justice Lake delivered these words to the General Assembly on 7 April 2003:

> Two years ago, in my State of the Judiciary, I gave the General Assembly one clear example of where we have been far less

> than cost-efficient, and have flat-out failed the people of North Carolina. I stated that it is not an infrequent occurrence for a superior court judge to open court on a Monday morning for the call of the calendar and then the trial of an important case. The attorneys are in place, the litigants are there, the witnesses are there, the clerk of court is there, and the courtroom is filled to overflowing with prospective jurors from throughout the county. The case is ready to proceed—with one notable exception. There is no court reporter. The entire process disintegrates, not just for that important case, but frequently for the entire session of court. This is because we did not have then and we do not have now sufficient court reporters to cover our judges in court, and the funding for any kind of reliable video or audio backup has not been forthcoming.
>
> The damage from this kind of breakdown is measured not just in the cost of wasted time and resources, but also in the enormous amount of bad will and hostility generated and directed toward our court system by all those citizens who have been made to suffer the wasteful loss of valuable time out of their lives. The cost of a court reporter is minimal compared to this. Also, the lack of sufficient court reporter resources is probably the single factor most responsible for extreme delay in appellate review of cases.

Chief Justice I. Beverly Lake, Jr., 2003 State of the Judiciary to the North Carolina General Assembly, 6-7 (April 7, 2003). The Chief Justice went on to detail certain cases before this Court in which the lack of adequate and competent court reporters severely delayed the resolution of appeals in death penalty cases. *Id.* at 7-9. In his final mention of court reporters in this speech, the Chief Justice noted:

> At the Court of Appeals level, there are motions in hundreds of cases each year for extensions of time for preparation of the transcript by court reporters, who obviously must prepare their transcripts for the appellate courts when they are not taking testimony in the trial courts. Two years ago, I asked the General Assembly to give us at least four additional court reporters as a priority matter. Today, we have a net loss of one.

Id. at 9.

This situation is no better two years later. *See* Chief Justice I. Beverly Lake, Jr., Remarks of Chief Justice I. Beverly Lake, Jr.

to the "Judicial Advocates" Meetings (Sept. 26-28 2005). The North Carolina Constitution provides: "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government." N.C. Const. art. IV, § 1. In his speeches, the Chief Justice iterated his position that the underfunding of the judiciary by the General Assembly unconstitutionally deprives the judicial department of the power to fulfill its duties in the state. I make one further contention—the vast underfunding of the judicial department insofar as it causes years-long delays in the complete resolution of criminal cases violates the Due Process Clause of the United States Constitution and the "law of the land" clause of the North Carolina Constitution. Yet, as recognized by one federal court: "We cannot hold the reporter in contempt; we cannot mandate the Superior Court to hire more reporters; we cannot mandate the Legislature to appropriate more money for that purpose." *Olsen*, 462 F. Supp. at 614. However, "[n]o administrative or budgetary problem in connection with the employment of court reporters can be allowed to take precedence over the . . . public interests at stake in this case." *Id.* at 613.

The majority asserts defendant has shown no evidence supporting his contention the State acted willfully to delay or neglect the production of the transcript. However, it is obvious that an agent of the State was neglectful in preparation of the transcript. Official court reporters are provided for by statute, and the court reporter in this case, Johnie L. King, III, was an employee of the Administrative Office of the Courts and, therefore, an agent of the State. *See* N.C.G.S. § 7A-95 (2005). "Few positions in a society governed by law are more important than that of a court reporter." *See Lanier v. State*, 684 So. 2d 93, 101 (Miss. 1996) (holding a defendant would be allowed, on retrial, to argue the court reporter's "negligence, incompetence or malfeasance" in failing to provide a transcript in three and one-half years prejudiced his defense). There is no other explanation than the reporter did not finish the transcript on time. A six-year delay in the preparation of a one hundred forty-two page transcript can come about only through willful action or neglect of the preparation of the transcript. "[D]elays caused by . . . court reporters are attributable to the government for purposes of determining whether a defendant has been deprived of due process on appeal." *United States v. Wilson*, 16 F.3d 1027, 1030 (9th Cir. 1994). I refuse to concur with a result that holds a defendant's rights were not violated merely because it was

one state actor, the court reporter, who was neglectful, as opposed to another state actor, such as the trial court or the prosecutor.[1]

The third factor here, defendant's assertion of his right, does not weigh against defendant. What else was the defendant to do in this case besides make numerous requests for transcripts? It is not essential in a speedy trial case for the defendant to assert his right to a speedy trial, and the failure to do so is not an express waiver, however, it is a factor to consider. *See Barker*, 407 U.S. at 531-32. However, as the Court noted in *Barker*, "We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.* at 532. Defendant asserted his right to a speedy appeal and its violation by both seeking quick preparation of the transcript and asserting the right before the Court of Appeals. I believe defendant did all that was required of him by obtaining an order from the trial court ordering the preparation of the transcript and by making numerous oral and written requests for the delivery of the transcript over a six-year period. This Court has historically required defendants to cross every "t" and dot every "i" in preserving issues and making arguments before this Court. While the majority acknowledges this delay is egregious, it turns a blind eye, allowing the court reporter to blatantly disregard his professional and legal duty to prepare a one hundred forty-two page transcript in a specified period, with no fear of reprisal. It is not a criminal defendant's duty to manage and supervise the court reporters of this State. *See Allen v. State*, 686 N.E.2d 760, 784 (Ind. 1997), *cert. denied*, 525 U.S. 1073 (1999). Perhaps defendant should have requested a day-pass from the warden at Central Prison to travel to the Wake County courthouse and prepare his transcript himself!

The final prong of the *Barker* test is whether the defendant suffered prejudice because of the delay. The majority uses spurious logic here to say that because the Court of Appeals found defendant's appeal without merit he suffered no prejudice. I once again draw an analogy from the realm of speedy trial cases and note the Supreme Court of the United States held in *Doggett v. United States*:

> [A]ffirmative proof of particularized prejudice is not essential to every speedy trial claim. . . . Thus, we generally have to recognize that excessive delay presumptively compromises the reliability

1. Even if the delay is in part attributable to defendant's counsel, I cannot place the responsibility for the inordinate delay upon defendant when the blame would lie with defendant's ineffective counsel. *See e.g.*, *Simmons v. Beyer*, 44 F.3d 1160 (3d Cir. 1995), *cert. denied*, 516 U.S. 905.

> of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay.

505 U.S. 647, 655-56 (1992) (citations omitted). Here, the length of delay is totally unacceptable and without excuse. Six years for the preparation of any transcript exceeds all bounds of reasonableness and decency in the quick prosecution and resolution of criminal matters.

The time allowed by our law for the preparation of a non-capital criminal transcript is sixty days. Here, it took nearly two thousand two hundred days to prepare a one hundred forty-two page transcript, or approximately thirty-six times longer than allowed. "When the Government's negligence thus causes delay six times as long as that generally sufficient to trigger judicial review, and when the presumption of prejudice, albeit unspecified, is neither extenuated as by the defendant's acquiescence, nor persuasively rebutted, the defendant is entitled to relief." *Id.* at 658 (footnotes and citations omitted). If six times the time period is sufficient to find presumptive prejudice, thirty-six times the time period allowed by law is certainly sufficient.

The majority incorrectly places the burden on defendant to prove the reason for delay and the prejudice resulting therefrom. This presumption of prejudice must be rebutted by the State and not merely by pointing to the lack of evidence of actual prejudice—for this is the exact problem the Supreme Court of the United States identified in *Doggett*: It is difficult for a defendant to demonstrate prejudice because a delay that results in the fogging of memories may benefit either side. Here, the State has presented nothing that rebuts this presumption. In addition, this presumption of prejudice should apply in speedy appeal cases because in the event a defendant is entitled to a new trial, the longer the appeal takes, the more likely prejudice will result in the clouding of witnesses' memories along with the deterioration of evidence.

Because all the *Barker* factors weigh in favor of defendant, I would hold he is entitled to relief. As the majority's decision today encourages unreasonable delay in the process of criminal justice, I respectfully dissent and would reverse and remand to the Court of Appeals with instructions to fashion a proper remedy for this constitutional violation.

STATE OF NORTH CAROLINA v. JIMMY McNEILL

No. 615A03

(Filed 27 January 2006)

1. Appeal and Error— preservation of issues—failure to present argument—failure to cite authority

Although defendant assigns multiple instances of error in the jury selection and guilt-innocence proceeding of a first-degree murder case including his conviction of discharging a firearm into occupied property, these assignments of error are abandoned because defendant has not presented any argument or cited any authority in support of these assignments.

2. Sentencing— capital—aggravating circumstances—especially heinous, atrocious, or cruel murder

The trial court did not err in a first-degree murder case by submitting the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel, because: (1) in determining the sufficiency of the evidence, the evidence is looked at as a whole and not in the piecemeal manner proposed by defendant; and (2) in this case, the victim pleaded for her life while defendant continued shooting her and he showed no mercy as she was prone on the ground, the murder was dehumanizing since defendant unloaded the capacity of his gun inflicting multiple gunshots upon his victim, defendant scarred for life the many witnesses to the murder including children, the victim was unable to retreat or flee as defendant began shooting her while she was confined to the passenger compartment of her vehicle, defendant continued to pursue the victim when she finally exited the vehicle, the victim knew she was going to die but could not do anything to prevent her impending death, and defendant kicked the victim in addition to shooting her on the very spot where her wedding ring would have been.

3. Sentencing— capital—prosecutor's argument—aggravating circumstances—especially heinous, atrocious, or cruel murder

The prosecutor's closing argument defining the especially heinous, atrocious, or cruel aggravating circumstance in a capital sentencing proceeding was not grossly improper so as to require the trial court to intervene ex mero motu where the

prosecutor used the language of the first two paragraphs of the relevant pattern jury instruction but not the latter two paragraphs, and defense counsel failed to object to this language as incomplete or misleading, because the prosecutor's failure to recite the entire pattern instruction falls within the prosecutor's latitude and does not constitute gross error, especially in light of the preceding and subsequent arguments that fully explained this aggravating circumstance.

4. Sentencing— capital—prosecutor's argument—aggravating circumstances—expecially heinous, atrocious, or cruel murder

The trial court did not abuse its discretion by denying defendant's objection to the prosecutor's argument in a capital sentencing proceeding setting forth three types of murders that would warrant submission of the especially heinous, atrocious, or cruel aggravating circumstance where the prosecutor did not make an improper comparison between the murder at hand and murders previously found to be especially heinous, atrocious, or cruel, but instead merely aided the jury in its understanding of what the Supreme Court has held to be types of murders in which this aggravating circumstance could be found by tracing the language used in the Supreme Court opinions, and continued by showing how this murder fit within the parameters defined by the law.

5. Sentencing— capital—defendant's closing argument—especially heinous, atrocious, and cruel aggravating circumstance—improper comparisons between cases and the fact of each case

The trial court did not err in a first-degree murder case by sustaining the prosecution's objections during defendant's closing argument in the penalty proceeding even though defendant contends it prevented him from fully explaining to the jury the decision it was to make concerning the especially heinous, atrocious, and cruel aggravating circumstance, because: (1) the prosecution merely set out the law and applied the facts of the present case to the law whereas defendant began to make comparisons between cases and the fact of each case which our Supreme Court has not allowed; and (2) the circumstances of other murders either actual or imagined that defense counsel believed were more heinous, atrocious, or cruel were not present in the record at the time of closing arguments, and, therefore, counsel may not introduce such evidence in closing when there

was no request for the trial court to take judicial notice of the other murders referenced.

6. Sentencing— capital—aggravating circumstances—murder especially heinous, atrocious, or cruel—not unconstitutionally vague and overbroad

Although defendant contends the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel is unconstitutionally vague and overbroad, and that this purported vagueness cannot be cured by appellate narrowing on review after *Ring v. Arizona*, 536 U.S. 584 (2002), our Supreme Court recently discussed this issue at length in *State v. Duke*, 360 N.C. 110 (2005), and there is no compelling reason to overrule this precedent.

7. Sentencing— capital—requested instruction to change language of Issue Three

The trial court did not err in a capital sentencing proceeding by denying defendant's request to change the language in the jury instructions and the Issues and Recommendation as to Punishment form regarding Issue Three to state that the jury must recommend a sentence of life imprisonment unless it found the aggravating circumstances outweighed the mitigating circumstances, because: (1) the instruction proffered by defendant was an incorrect statement of the law articulated in N.C.G.S. § 15A-2000; and (2) contrary to defendant's assertion, the instruction as given did not impermissibly shift the burden as to Issue Three to defendant by creating a presumption of an affirmative answer when all of the elements required for a jury to make a binding recommendation of death must be proved by the State beyond a reasonable doubt.

8. Constitutional Law— effective assistance of counsel—dismissal without prejudice

Defendant's claim of ineffective assistance of counsel in a first-degree murder case is dismissed without prejudice because further inquiry is required into these allegations of ineffective assistance of counsel.

9. Sentencing— capital—death penalty—proportionate

The trial court did not err in a first-degree murder case by sentencing defendant to death and defendant's suggestion to suspend consideration of death penalty cases is declined, because:

(1) defendant was convicted of first-degree murder based upon the felony murder rule and upon a theory of malice, premeditation, and deliberation; (2) the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel is sufficient, standing alone, to affirm the death sentence; and (3) defendant kicked his wife as he walked back to his pickup truck after firing every cartridge contained by his rifle, he made no attempt to apologize, no attempt to help her, nor did he check to see if she was still alive.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Jack A. Thompson on 15 July 2003 in Superior Court, Scotland County, upon a jury verdict finding defendant guilty of first-degree murder. On 21 June 2004, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of an additional judgment. Heard in the Supreme Court 17 October 2005.

Roy Cooper, *Attorney General*, *by John H. Watters*, *Special Deputy Attorney General*, *for the State.*

Paul M. Green for defendant-appellant.

BRADY, Justice.

Defendant Jimmy McNeill murdered his wife, Shirley McNeill, at a friend's home in front of numerous witnesses, a number of them children, on 10 April 2000. On 29 January 2001, a Scotland County grand jury indicted defendant for the murder of Shirley McNeill and for discharging a weapon into occupied property. Defendant was tried capitally before a jury at the 23 June 2003 Criminal Session of the Scotland County Superior Court. On 11 July 2003, the jury found defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation and additionally under the felony murder rule. The jury also found defendant guilty of discharging a firearm into occupied property, a Class E felony. On 15 July 2003, following a capital sentencing proceeding, the jury returned a binding recommendation of death for the first-degree murder conviction, and the trial court entered judgment in accordance with that recommendation. Additionally, the trial court sentenced defendant, within the presumptive range, to a term of thirty-four to fifty months for discharging a firearm into occupied property.

Defendant appealed his convictions and sentence of death to this Court. After consideration of the assignments of error raised by

defendant on appeal and a thorough review of the transcript, the record on appeal, the briefs, and oral arguments, we find no reversible error in defendant's convictions or sentences.

FACTUAL BACKGROUND

Defendant and Shirley McNeill were married in 1975, nearly twenty-five years before her murder. From the beginning, the marriage was a troubled one. By defendant's own admission, law enforcement officers were called to the marital home a number of times for domestic violence incidents prior to 10 April 2000. Defendant was convicted of assault on a female, an A1 misdemeanor, for an incident involving Shirley three years into their marriage. Defendant admitted to multiple incidents of uncharged domestic violence, one in which he poured food over his wife while she was asleep, and another incident in which he burned her clothes, "[b]ecause she was dating a man, I think." Approximately twenty years after the couple's marriage, the relationship further declined as both defendant and Shirley suffered the deaths of close family members. During this stressful time defendant substantially increased his consumption of alcohol and began smoking crack cocaine.

In early 2000, Shirley left the marital home and began residing with her niece, Yolanda Gates. Shirley retained an attorney to draft a separation agreement, claiming a separation date of 31 January 2000. By defendant's own admission, Shirley's move from the marital home caused him to "los[e] total control." This caused him to increase his consumption of alcohol and escalated his abuse of controlled substances. Additionally, he was plagued by sleep deprivation, loss of appetite, and a lethargic work ethic. Sometime in late February of 2000, Shirley began a romantic relationship with Vernon "Bun" McDougald, Shirley's supervisor and an early childhood acquaintance of defendant. When defendant learned of the adulterous relationship it completely "devastated" him. In his own words, "It ate me up. Just totally ate me up every day, day in and day out. Night and day." Defendant's obsessive behavior towards Shirley reflected his loss of control. Defendant telephoned her incessantly and showed up at locations where he believed she would be. On many occasions, defendant followed her to and from work. Additionally, defendant discussed his marital problems with several of his friends and acquaintances. For instance, he told his longtime friend Danny Monroe if Shirley didn't come back, there's no telling what he might do. Further, Defendant told Shirley's first cousin, Jerome Swindell, "if [defendant] couldn't have her, nobody else going to have her [sic]."

During the days leading up to Shirley McNeill's murder, defendant's obsessive behavior intensified. At approximately 7:45 a.m. on Friday, 7 April 2000, defendant entered the parking lot at Burlington Industries Raeford Plant, where Shirley was employed. Glenn McCutcheon, a security guard at Burlington Industries, observed defendant looking in the windows of Shirley's vehicle and then entering the vehicle. As defendant left the parking lot, McCutcheon approached defendant and inquired if he needed help, to which defendant replied that he came to see his wife. Defendant then departed the premises.

On Saturday, 8 April 2000, two days before the murder, defendant went to Yolonda Gates's residence, where Shirley was living. His purported purpose was to visit with Shirley's grandson Tyler McRae. During the visit, defendant continually prodded Shirley to come home with him, but she refused. After defendant returned home, he attempted to telephone Shirley, but Gates answered the telephone call and lied at Shirley's direction, telling defendant Shirley was not at the residence. Nevertheless, defendant continued to telephone throughout the night until Gates finally removed the phone from its cradle at 1:00 a.m., which prevented anyone from telephoning her. At Shirley's request, Gates relocated Shirley's car behind a neighbor's house so defendant could not observe it if he drove past. Approximately thirty to forty-five minutes later, defendant drove to Gates's residence, even driving into her yard and driveway. The next morning, as soon as Gates returned the phone to its cradle, defendant's telephoning resumed. Just like the night before, Gates continued to tell defendant Shirley was not there.

On Sunday, 9 April 2000, the day before her murder, Shirley attended services at Nazareth Baptist Church and a church social afterwards. Jerome Swindell, Shirley's first cousin, testified he was in the church parking lot during the social when defendant drove into the parking lot in the company of Johnny "Jail" Morrison. Swindell invited them to join the festivities, but defendant declined. Swindell later advised Shirley defendant had been there. Shirley subsequently asked Ronnie Livingston, her brother-in-law, to take Tyler to his father's residence in Fayetteville, and Livingston did so, using Shirley's car for the trip. Livingston and Tyler, accompanied by Carlton Gates, Shirley's brother, arrived at Tyler's father's residence in Fayetteville to find defendant sitting in his pickup truck, backed up near a fence at the property. When Livingston escorted Tyler into the residence, defendant departed the area. Livingston then returned the

vehicle to Shirley, advising her defendant had been waiting at Tyler's father's residence. When Shirley returned to Gates's residence, she parked her car behind a neighbor's house so defendant would not know she was there.

DAY OF THE HOMICIDE

On the morning of Monday, 10 April 2000, the day of her murder, Shirley McNeill drove to the residence of Carolyn McLeod, her best friend for over forty years. Both McLeod and Shirley were employed by Burlington Industries Raeford Plant for over twenty-six years and they often carpooled to work. Shirley arrived at McLeod's residence at about 7:20 a.m. As McLeod walked out to Shirley's vehicle, defendant drove up next to Shirley. Defendant told Shirley he was going to kill her that afternoon. Shirley and McLeod then drove to Burlington Industries. On the way, McLeod recommended Shirley take defendant's threat seriously and suggested she not drive McLeod home that afternoon alone. Shirley indicated she did not take defendant's threat seriously. Vernon "Bun" McDougald, Shirley's paramour and supervisor, testified Shirley told him about defendant's threat while she was at work that day.

While Shirley and McLeod were at Burlington Industries, defendant spent the morning consuming alcohol and napping. According to defendant's testimony, he awoke around noon and went to an acquaintance's residence to try to obtain some crack cocaine. Because his acquaintance did not have any crack cocaine, defendant traveled to another friend's house and consumed more alcohol. Later, defendant went to Massey's Grocery and purchased a pint of Lightning Creek wine.

Danny Monroe, a friend of defendant's for fifteen to twenty years, testified he went to defendant's house at approximately 4:00 p.m. to ask if he could either rent or purchase a lawnmower trailer defendant owned. Defendant "kind of smiled, and he told [Monroe] that if he do [sic] what he's thinking about doing that [Monroe] could have it." Defendant then left his residence and drove towards Massey's Grocery. By his own admission, defendant parked his truck under the tree at Massey's Grocery knowing Shirley would pass by when she took McLeod home.

Shirley and McLeod left Burlington Industries at approximately 4:00 p.m., returning to McLeod's residence. While en route, they observed defendant's truck parked at Massey's, and Shirley stopped her vehicle next to where defendant was standing. Defendant walked up

to the driver's side of Shirley's car and asked, "Are you going to do what I told you to do?" Shirley asked, "What's that?" Defendant responded, "Are you going to come back home?" Shirley said, "No," and defendant said, "Well, that's all I wanted to know." Shirley replied, "Well, you said you were going to kill me this afternoon anyway."

Shirley continued traveling to McLeod's residence and parked her vehicle in the driveway. Almost immediately, defendant arrived and parked his truck behind Shirley's vehicle. Approximately six or seven neighborhood children were playing in the area as these events unfolded.

While McLeod exited the vehicle, defendant walked toward the driver's side of Shirley's vehicle with a rifle in his hand. He told McLeod to go in the house and he "wouldn't bother [her]." Without warning, Defendant shot Shirley in the chest through the driver's side window. Shirley pleaded with him not to shoot her again. McLeod testified she heard five or six more shots as she ran behind a nearby shed. All of the eyewitnesses observed defendant pursuing Shirley around the yard, shooting her multiple times. McLeod testified Shirley was begging, "Please, Jimmy, don't kill me. Please don't kill me." Defendant continued firing his rifle and began calling Shirley, her mother, and her sister vulgar names.

At some point, Shirley collapsed face down on the ground near the driver's side of her car. Defendant shot her approximately eight more times, still calling her and her family expletives. Veronica Blue, Shirley's cousin and one of McLeod's neighbors, observed Shirley attempting to escape by crawling on her arms even as defendant continued shooting her in the back. Both McLeod and Blue shouted at defendant to stop shooting, but defendant continued to fire until expending all sixteen of the cartridges his rifle held. As a final insult, defendant kicked Shirley and left her to die. Before the arrival of first responders to the scene, Shirley's wounds rendered her unconscious.

While witnesses sought help for Shirley, defendant left the scene in his pickup truck. Defendant drove his truck to the home of Eula Mae Rogers, the mother of defendant's friend, Will Rogers. Defendant asked to use the telephone, but apparently was not able to complete the call. When Eula Mae inquired as to whom he was trying to call, defendant responded, "I was trying to call the police. I just shot Shirley." Eula Mae noted there was no emotion in Defendant's voice as he relayed this information. Defendant then told her he was going

to return a lawnmower part which belonged to Will and which he had borrowed earlier. Eula Mae testified she saw him leave toward Will's house, but because Will was not home defendant departed.

Law enforcement personnel responded to the crime scene, and immediately enlisted other officers to aid in searching for and apprehending defendant. Soon thereafter, Officer Corey Jones of the Wagram Police Department and Detective Randy Jacobs of the Scotland County Sheriff's Department stopped defendant's vehicle near the police station in downtown Wagram. The officers ordered defendant out of his vehicle at gunpoint and handcuffed him. Law Enforcement Officers recovered the murder weapon in defendant's truck incident to his arrest. At one point during defendant's transport, Deputy Eric Pate smelled alcohol, and he asked defendant how much he had drunk, to which defendant responded, "I think it's best I keep my mouth shut."

At approximately 6:30 p.m., Agent Janie Pinkston of the North Carolina State Bureau of Investigation (SBI) interviewed defendant at the Scotland County Sheriff's Department. She solicited defendant's consent to search his pickup truck, which he declined. Therefore, Agent Pinkston applied for a search warrant for the vehicle, which was granted by the magistrate. Defendant made no statements to Agent Pinkston or any other law enforcement official about the circumstances of his wife's shooting. At approximately 8:45 p.m., Agent Pinkston informed defendant his wife had died. Agent Pinkston testified defendant "did not react. What I noted was no change in his physical appearance, and no change in his demeanor."

North Carolina Chief Medical Examiner John D. Butts, M.D. testified concerning the autopsy performed on Shirley's body by Michael Ross, M.D., which Dr. Butts supervised. The autopsy revealed sixteen gunshot wounds, including wounds to Shirley's shoulder, chest, back, hip, buttocks, thigh, foot, and forearm. Additionally, the autopsy report showed defendant shot Shirley's ring finger of her left hand at the very spot where her wedding ring would have been had she been wearing it at the time of her murder.

As to the cause of death, Dr. Butts testified that Shirley died as a result of multiple gunshot wounds. Her lungs, heart, liver, spleen, and both kidneys were damaged. Several of the gunshot wounds would have been irreversibly fatal, even if medical personnel had been at the scene when the shooting began. Due to the nature of Shirley's injuries, Dr. Butts was unable to determine the sequence of the gun-

shot wounds, but he did indicate the location and trajectory of the wounds comported with the eyewitness testimony.

Through microscopic examination, an S.B.I. expert conclusively matched fifteen of the sixteen spent shell casings found at the crime scene to defendant's Marlin Model 60 .22 caliber semiautomatic rifle. Of the eleven projectile fragments recovered from Shirley's body during the autopsy, one fragment was also conclusively matched to defendant's firearm.

Based upon the above evidence, the jury convicted defendant of first-degree murder under both the felony murder rule and a theory of malice, premeditation, and deliberation, as well as a separate offense of discharging a firearm into occupied property.

CAPITAL SENTENCING PROCEEDINGS

At the capital sentencing proceeding, the State presented victim impact evidence from Shirley's sister, Maizie Quick, and her mother, Esther McLeod. Defendant presented evidence from Jeffrey McKee, Ph.D., a forensic psychologist, that defendant was under the influence of emotional disturbance at the time of the murder, specifically due to alcohol and cocaine dependence. Dr. McKee's opinion was, at the time defendant murdered his wife, his capacity to conform his conduct to the requirements of the law was impaired. Defendant's aunts, Mary McNeill, Thelma Williams, and Janice Patricia Waddell, and his uncle by marriage, Artie Bethea, testified as character witnesses for defendant. They all testified to defendant's close relationship with his extended family. His aunts testified the deaths of defendant's close family members within such a short period of time affected him deeply. His uncle testified defendant's military service during Operation Desert Storm in the Middle East affected defendant negatively as well. Additionally, four stipulations were read to the jury concerning defendant's military service, high school graduation, and his public service.

The jury unanimously found beyond a reasonable doubt as an aggravating circumstance that the murder was especially heinous, atrocious, or cruel. One or more of the jurors found nine mitigating circumstances. The jury unanimously found beyond a reasonable doubt that the mitigating circumstances were insufficient to outweigh the aggravating circumstance. The jury also found unanimously and beyond a reasonable doubt the aggravating circumstance was sufficiently substantial to call for the imposition of

the death penalty when considered with the mitigating circumstances. The jury thereby returned a binding recommendation of a sentence of death.

ANALYSIS

JURY SELECTION, MOTIONS, AND GUILT-INNOCENCE ISSUES

[1] Defendant assigns multiple instances of error in the jury selection and guilt-innocence proceeding, including his conviction of discharging a firearm into occupied property, but defendant has not presented any argument or cited any authority in support of these assignments. "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C. R. App. P. 28(b)(6); *See State v. Augustine*, 359 N.C. 709, 731 n.1, 616 S.E.2d 515, 531 n.1 (2005). As defendant has not supported in his brief any of the above assignments of error, they are taken as abandoned and dismissed.

"Especially Heinous, Atrocious or Cruel"—Sufficiency of Evidence

[2] Defendant argues the State presented insufficient evidence to support submission of the especially heinous, atrocious, or cruel aggravating circumstance (HAC) to the jury. N.C.G.S. § 15A-2000(e)(9) (2005). "In determining whether the evidence is sufficient to support the trial court's submission of the especially heinous, atrocious, or cruel aggravator, we must consider the evidence 'in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom.' " *State v. Flippen*, 349 N.C. 264, 270, 506 S.E.2d 702, 706 (1998) (quoting *State v. Lloyd*, 321 N.C. 301, 319, 364 S.E.2d 316, 328, *judgment vacated on other grounds*, 488 U.S. 807 (1988)), *cert. denied*, 526 U.S. 1135 (1999).

In his brief, Defendant lists many "fact-based propositions," which he argues are not in themselves sufficient to submit the HAC circumstance to the jury. While it is true each of these factors have been held insufficient to submit the HAC circumstance to the jury, these factors were taken in isolation and occurred in cases in which little other evidence to support submission of HAC was present. However, when all the evidence is considered in this case, the circumstance was properly submitted.

Defendant first points out a multiplicity of gunshots inflicted by the perpetrator in rapid succession is insufficient by itself to prove HAC. Additionally, defendant points out that a defendant's disregard of a victim's plea for life, a victim's realization she is about to be killed, a victim's awareness of impending death, and a defendant's calmness and lack of regret are each, taken alone, insufficient to allow the trial court to submit the HAC circumstance to the jury for consideration. Defendant's statements of the law are, at least, partially correct. *See State v. Lloyd*, 354 N.C. 76, 124-26, 552 S.E.2d 596, 629-30 (2001); *State v. Stanley*, 310 N.C. 332, 335-46, 312 S.E.2d 393, 396-401 (1984). Even so, defendant's argument is without merit for the simple reason none of the events stated here occurred in isolation. Instead, the record reflects each and every one of these events occurred in the course of this murder. We reject defendant's argument that the sum of zeros equals zero because such a proposition distorts our precedent on the sufficiency of the evidence of the HAC aggravating circumstance. In determining the sufficiency of the evidence, we look at the evidence *as a whole*, not in the piecemeal manner proposed by defendant. *See State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982).

This Court has previously characterized the types of murders in which submission of the HAC circumstance to the jury would be proper:

> One type includes killings physically agonizing or otherwise dehumanizing to the victim. A second type includes killings less violent but "conscienceless, pitiless, or unnecessarily torturous to the victim," including those which leave the victim in her "last moments aware of but helpless to prevent impending death," A third type exists where "the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder."

State v. Gibbs, 335 N.C. 1, 61-62, 436 S.E.2d 321, 356 (1993), *cert. denied*, 512 U.S. 1246 (1994) (citations omitted); *see also State v. Haselden*, 357 N.C. 1, 27, 577 S.E.2d 594, 610-11 (victim was shot while begging for her life on her knees), *cert. denied*, 540 U.S. 988 (2003); *State v. Anthony*, 354 N.C. 372, 434-35, 555 S.E.2d 557, 596-97 (2001) (victim shot a second time while already on the ground from the initial shot and begging for her life), *cert. denied*, 536 U.S. 930 (2002); *State v. Golphin*, 352 N.C. 364, 480-81, 533 S.E.2d 168, 243 (2000) (incapacitated victim shot several times while

moaning on the ground), *cert. denied*, 532 U.S. 931 (2001); *State v. Lynch*, 340 N.C. 435, 447-48, 473-74, 459 S.E.2d 679, 683-84, 698-99 (1995) (child victim shot at least seven times while attempting to flee and the defendant continued shooting even while rescuer tried to help victim, wounding the rescuer and eventually killing the victim), *cert. denied*, 517 U.S. 1143 (1996). Defendant's actions, taken as a whole, demonstrate a murder which a jury could find to be especially heinous, atrocious, or cruel.

In this case, the victim pleaded for her life while defendant continued shooting her, showing no mercy as she was prone on the ground. The murder was dehumanizing, because defendant unloaded the capacity of his gun, inflicting multiple gunshots upon his victim. In this process, defendant scarred for life the witnesses to the murder, including the many children present during this tragedy. His victim was unable to retreat or flee, as he began shooting her while she was confined to the passenger compartment of her vehicle. When she finally exited the vehicle, he continued to pursue her, shooting all along the way. As defendant shot Shirley, she knew she was going to die, but there was absolutely nothing she could do to prevent her impending death. Finally, defendant's kicking of his victim, in addition to shooting her on the very spot where her wedding ring would have been, adds to the especially cruel nature of this murder. All of this evidence, taken as a whole, was sufficient to submit the HAC aggravating circumstance to the jury.

Therefore, we hold that submission of the N.C.G.S. § 15A-2000(e)(9) especially heinous, atrocious, or cruel aggravating circumstance to the jury was proper. This assignment of error is overruled.

Prosecutor's Closing Argument

[3] Defendant next argues the trial court erred by overruling defendant's timely objection during the prosecution's closing argument, thereby allowing the prosecutor to read a statement of the law that was incorrect, incomplete, inapplicable, misleading, and prejudicial to defendant. Specifically, the prosecutor made two statements to which defendant now assigns error.

In attempting to explain HAC, the prosecutor stated:

> Judge Thompson, I believe, is going to instruct you as follows. The following is the aggravating circumstance which might be applicable to this case. Was this murder especially heinous,

> atrocious or cruel? In this context, "heinous" means extremely wicked, or shockingly evil. "Atrocious" means outrageous [sic] wicked and vile. And "cruel" means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.

Defendant contends since the prosecutor used the language of the first two paragraphs of the relevant pattern jury instruction but not the latter two paragraphs, this portion of the closing argument is incomplete and misleading. First, we note defense counsel did not object to this language as incomplete or misleading during the closing argument itself. "The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citing *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835 (1999)). " '[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.' " *State v. Warren*, 348 N.C. 80, 126, 499 S.E.2d 431, 457 (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979) (alteration in original)), *cert. denied*, 525 U.S. 915 (1998).

During a closing argument "[a]n attorney may . . . on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." N.C.G.S. § 15A-1230(a) (2005). "[T]rial counsel is allowed wide latitude in his argument to the jury and 'may argue the law and the facts in evidence and all reasonable inferences drawn from them. . . .' " *State v. Craig*, 308 N.C. 446, 454, 302 S.E.2d 740, 745 (quoting *State v. Kirkley*, 308 N.C. 196, 212, 302 S.E.2d 144, 153 (1983), *overruled in part on other grounds*, *State v. Shank*, 322 N.C. 243, 251, 367 S.E.2d 639, 644 (1988)), *cert. denied*, 464 U.S. 908 (1983). That the prosecutor did not recite the entire pattern jury instruction falls within the prosecuting attorney's latitude and does not constitute gross error, especially in light of the preceding and subsequent arguments that fully explained the aggravating circumstance. Taken in context, this argument was a correct statement of the law and is certainly not gross error. Therefore, this assignment of error is overruled.

[4] The second portion of the prosecution's argument to which defendant assigns error was:

> The North Carolina Supreme Court has defined 'especially heinous, atrocious or cruel' as follows:
>
> There are three types of murders that would warrant submission of the 'especially heinous, atrocious or cruel' aggravating circumstance. The first type—
>
> [Defense Counsel]: Your Honor, I object.
>
> THE COURT: Objection overruled.
>
> [Prosecuting Attorney]: The first type consists of those killings that are physically agonizing for the victim, or which are in some other way dehumanizing.
>
> The second type includes killings that are less violent, but involve infliction of psychological torture by leaving the victim in her last moments aware of, but helpless to prevent, impending death. And, thus, may be considered conscienceless, pitiless, or unnecessary torturous to the victim.
>
> The third type includes killings that demonstrate an unusual depravity of mind on the part of the defendant beyond that that is normally present in first degree murders.

Because there was a timely objection as to these statements, this Court must determine "whether 'the trial court abused its discretion by failing to sustain the objection.' " *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364 (quoting *Jones*, 355 N.C. at 131, 558 S.E.2d at 106), *cert. denied*, 540 U.S. 971 (2003). The inquiry is a two part one: First, this Court must determine whether the remarks were in fact improper; second, this Court must determine "if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.*

The defendant contends the prosecuting attorney's statements were a misrepresentation to the jury because "the passage read to the jury is *not* this Court's *definition* of HAC, but a shorthand summary of three 'types' of murders in which the Court has previously found the legal definition of HAC set forth in the pattern instruction to be sufficiently supported to warrant submission of those instructions to a jury." We disagree.

The prosecutor here did not make an improper comparison between the murder at hand and murders previously found to be espe-

cially heinous, atrocious, or cruel. Instead, the prosecutor merely aided the jury in its understanding of what this Court has held to be types of murders in which HAC could be found by tracing the language used in this Court's cases. *See*, *e.g.*, *State v. Bell*, 359 N.C. 1, 44, 603 S.E.2d 93, 121 (2004), *cert. denied*, —— U.S. ——, 125 S. Ct. 2299, 161 L. Ed. 2d 1094 (2005). The prosecution's use of the word "defined," while not particularly accurate, was not misleading. After setting out these types of murders, the prosecutor continued by showing how this murder fit within the parameters defined by the law. Inasmuch as we find the prosecutor's statement was not improper, we conclude the trial court did not abuse its discretion in overruling defendant's objection. We therefore overrule defendant's assignment of error.

Defendant's Closing Argument

[5] Defendant argues the trial court erred by sustaining prosecution objections during defendant's closing arguments in the penalty proceeding, thereby preventing defendant from fully explaining to the jury the decision it was to make concerning HAC. Defense counsel's argument on HAC was as follows:

> Now let's consider the aggravating circumstance tendered by the State in this particular case, which is that this murder was especially heinous, atrocious or cruel.
>
> One of the things that the Judge's instruction will tell you—first degree murder is heinous, atrocious and usually cruel. I mean, first degree murder is that. That is what we're dealing with with first degree murder. So when the District Attorney talked to you about, you know, things that would be consistent with heinousness and with atrocity and with cruelty, that is always present when you have a first degree murder.
>
> The Judge will instruct you what the statute says and what you must determine. And this, members of the jury—this is a value judgment that you make based upon the facts that you determine to exist beyond a reasonable doubt. And you must have this value judgment beyond a reasonable doubt.
>
> In other words, you must eliminate any possibility that this murder was—Yes, heinous, atrocious and cruel in the ordinary sense of first degree murder. Which all have. But that this was not the exceptional, the uniquely heinous, atrocious and cruel first degree murder.

Now let's think about the word "especially." What does it mean as we all use it now?

"The choir at church sang beautifully, but Jane's voice was especially beautiful." Now that is the way "especially" is used here, except that it's used not for "especially beautiful", but for "especially, uniquely ugly."

And I will concede to you—I will concede to you that this murder, as it was committed, was heinous, atrocious and cruel. But I would contend to you that the State has not established beyond a reasonable doubt that this murder was especially, uniquely heinous, atrocious or cruel.

. . . .

Members of the jury, let us, as we go through the mitigating circumstances, please understand, and please understand clearly, that the totality of Jimmy McNeill's life prior to April 10th of 2000—the good things that he did are something that you must consider in determining whether this murder was the worst of the worst, and whether this defendant was the worst of the worst.

Now let's consider—I mean, what would be some examples of murders that would be worse?

[Prosecuting Attorney]: Objection.

THE COURT: I'll sustain that.

[Defense Counsel]: The question is whether this murder, in the universe of murders, is the worst. And whether this defendant, in the universe of defendants convicted of first degree murder, is the worst.

I contend to you, clearly, there are worse murders than this. And I contend to you, absolutely, there are a whole lot worse defendants guilty of first degree murder than this.

. . . .

It was a tragic—it was a tragic killing. But it was a tragic killing by an individual who, if you look at it honestly, you could not understand why he did it. This is no excuse for it. But you can see, okay, this person—what he did is not the worst first degree murder. And it has not been committed by the worst defendant.

[Prosecuting Attorney]: Objection. Your Honor, it's not a comparison between cases.

THE COURT: Sustained.

Defendant contends his trial counsel was merely comparing his case to other cases in the same way the prosecutor did in her closing argument. We disagree.

Defendant claims, in essence, "what's good for the goose is good for the gander" and he should have been allowed to make comparisons of his case to previous cases in which HAC was not found, or found and reversed upon appeal, because the prosecution was able to make such a comparison. This assertion mischaracterizes the prosecution's argument. In this case, the prosecution merely set out the law and applied the facts of the present case to the law. For the reasons set out above, this argument is proper. However, defendant began to make comparisons between cases and the facts of each case, something this Court has not allowed. *See State v. Anthony*, 354 N.C. at 429-30, 555 S.E.2d at 593-94 (defendant not allowed to read facts of prior case to jury).

Furthermore, the circumstances of other murders, either actual or imagined, defense counsel believes are more heinous, atrocious, or cruel were not present in the record at the time of closing arguments, and, therefore, counsel may not introduce such evidence in closing. "During a closing argument to the jury an attorney may not . . . make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice." N.C.G.S. § 15A-1230(a). Since there was no request for the trial court to take judicial notice of the other murders referenced, defense counsel improperly argued matters outside the record. This assignment of error is therefore overruled.

Constitutionality of (e)(9) Aggravating Circumstance

[6] Defendant contends the (e)(9) HAC aggravating circumstance is unconstitutionally vague and overbroad, and that this purported vagueness cannot be cured by appellate narrowing on review after *Ring v. Arizona*, 536 U.S. 584 (2002). This Court recently discussed this issue at length in *State v. Duke*, and we find no compelling reason to overrule our precedent. 360 N.C. 110, 623 S.E.2d 11 (2005). Defendant's assignment of error is overruled.

Constitutionality of Issue Three

[7] Defendant next assigns as error the denial of his motion to change the wording of the Issues and Recommendation as to Punishment form and the correlating jury instructions regarding Issue Three. Specifically, defendant requested the trial court to instruct the jury that it must recommend a sentence of life imprisonment unless it found the aggravating circumstance outweighed the mitigating circumstances. The trial court denied this request. Utilizing the established pattern jury instruction, the trial court instructed the jury:

> Issue 3 is, "Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is or are insufficient to outweigh the aggravating circumstances found by you?"
>
> If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstance against the mitigating circumstances. When deciding this issue, each juror may consider any mitigating circumstance or circumstances that he or she deemed to exist by a preponderance of the evidence in [I]ssue 2.
>
> In so doing, you are the sole judge of the weight to be given to any individual circumstance which you find, whether aggravating or mitigating. You should not merely add up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give to each circumstance, and then weigh the aggravating circumstance, so valued, against the mitigating circumstances, so valued, and finally determine whether the mitigating circumstance[s] are insufficient to outweigh the aggravating circumstance.
>
> If you unanimously find beyond a reasonable doubt that the mitigating circumstances found are insufficient to outweigh the aggravating circumstance found, you would answer [I]ssue 3 "yes".
>
> If you unanimously fail to so find, you would answer [I]ssue 3 "no".

Defendant argues this instruction violated his constitutional rights because it impermissibly shifted the burden of proof to defendant on this issue by requiring the jury to determine whether the

mitigating circumstances found are insufficient to outweigh the aggravating circumstance found, creating a presumption the answer should be "yes." We find defendant's arguments to lack merit and therefore overrule this assignment of error.

Initially, we note it was proper for the trial court to deny defendant's request to change the language in the jury instructions and the Issues and Recommendation as to Punishment form regarding Issue Three. "[R]equested instructions need only be given in substance if correct in law and supported by the evidence." *State v. Morgan*, 359 N.C. 131, 169, 604 S.E.2d 886, 909 (2004), *cert. denied*, —— U.S. ——, 126 S. Ct. 47, 163 L. Ed. 2d 79 (2005). North Carolina's capital punishment statute requires the jury to make the following finding before imposition of the death penalty is allowed: "[T]he mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found." N.C.G.S. § 15A-2000(c)(3) (2005). A very similar instruction was upheld as constitutionally sufficient by the Supreme Court of the United States in *Walton v. Arizona*, in which a judge was required to sentence the defendant to death if "one or more aggravating circumstances are found and mitigating circumstances are held insufficient to call for leniency." 497 U.S. 639, 651 (1990) (plurality), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584. North Carolina's capital punishment statute actually provides greater protection against the arbitrary imposition of the death penalty than the statute upheld in *Walton*, as our statute does not mandate death solely on the weighing of aggravating and mitigating circumstances. *See* N.C.G.S. § 15A-2000(b), (c) (2005) (jury must also decide whether the aggravating circumstance or circumstances found are sufficiently substantial to call for imposition of the death penalty). As the instruction proffered by defendant was an incorrect statement of the law articulated in N.C.G.S. § 15A-2000, it would have been improper for the trial court to give that instruction to the jury.

Additionally, we do not believe the instruction as given impermissibly shifted the burden as to Issue Three to defendant by creating a presumption of an affirmative answer. All of the elements required for a jury to make a binding recommendation of death must be proved by the State beyond a reasonable doubt. *See generally Ring v. Arizona*, 536 U.S. 584, 609 (aggravating circumstances must be found by jury beyond a reasonable doubt); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (any fact, other than the fact of a prior conviction, that increases penalty for crime beyond prescribed

statutory maximum must be submitted to the jury and proved beyond a reasonable doubt). The instructions given by the trial court did not shift the burden of proof or persuasion on Issue Three to defendant. Specifically, the trial court instructed the jury: "For you to recommend that the defendant be sentenced to death, the State must prove three things beyond a reasonable doubt . . . . Second, that the mitigating circumstances are insufficient to outweigh any aggravating circumstances you have found." The jury was properly instructed.

INEFFECTIVE ASSISTANCE OF COUNSEL

[8] Defendant argues that because he is not in a position to adequately present an ineffective assistance of counsel claim on direct appeal, the claim should not be procedurally defaulted. Defendant asserts in his brief that defense trial counsel erred when he failed to include a stipulation about defendant's church service to the jury. Testimony was available that defendant had been named "man of the year" by his Baptist church, but defense counsel failed to elicit the testimony or submit the stipulation. Therefore, defendant's request for submission of a nonstatutory mitigating circumstance concerning defendant's service as a trustee of his church was denied.

Defendant is not arguing the substance of his ineffective assistance of counsel claims; instead, he is asking this Court to definitively state that he may raise this issue in a future motion for appropriate relief. Because we are not reviewing the substance of the ineffective assistance claim, we are not required to assess the alleged error under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (the constitutional right to effective counsel is violated when (1) counsel's performance falls below an objective standard of professional reasonableness, and (2) but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different).

N.C.G.S. § 15A-1419 provides a ground for denial of a motion for appropriate relief when, "[u]pon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." N.C.G.S. § 15A-1419(a)(3) (2005). Under *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001), *cert. denied*, 535 U.S. 1114 (2002), a defendant must raise ineffective assistance of counsel claims on direct appeal when those claims are apparent on the face of the record. However, when an appellate court determines further development of the facts would be required before application of the *Strickland* test, the Court should dismiss the

defendant's assignments of error without prejudice. *See State v. Long*, 354 N.C. 534, 539-40, 557 S.E.2d 89, 93 (2001). Here, we believe further inquiry is required into these allegations of ineffective assistance of counsel. Therefore, we dismiss without prejudice defendant's claim of ineffective assistance of counsel.

PRESERVATION ISSUE

Defendant argues the murder indictment was constitutionally inadequate because it failed to allege any capital aggravating circumstances. Defendant concedes this is a preservation issue, stating: "This Court has repeatedly held that North Carolina's short form murder indictment pursuant to N.C.G.S. § 15-144 is sufficient to allege first-degree murder and to sustain a death sentence." We previously addressed this issue in *State v. Hunt*, 357 N.C. 257, 268-78, 582 S.E.2d 593, 600-07, *cert. denied*, 539 U.S. 985 (2003); *see also State v. Mitchell*, 353 N.C. 309, 328-29, 543 S.E.2d 830, 842, *cert. denied*, 534 U.S. 1000 (2001); *State v. Davis*, 353 N.C. 1, 44-45, 539 S.E.2d 243, 271 (2000), *cert. denied*, 534 U.S. 839 (2001); *State v. Braxton*, 352 N.C. 158, 173-75, 531 S.E.2d 428, 436-38 (2000), *cert. denied*, 531 U.S. 1130 (2001). Defendant presents, and we find, no compelling reason to depart from our prior precedent. We therefore overrule defendant's assignment of error.

PROPORTIONALITY

[9] Having concluded defendant's trial and capital sentencing proceeding were free from prejudicial error, we must now determine: (1) whether the record supports the aggravating circumstance found by the jury and upon which the sentence of death was based; (2) whether the death sentence was entered under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *See* N.C.G.S. § 15A-2000(d)(2) (2005).

As to the first two of these tasks, when "there is evidence to support the aggravating factors relied upon by the State . . . the jury's balancing of aggravation and mitigation will not be disturbed unless it appears that the jury acted out of passion or prejudice or made its sentence arbitrarily." *State v. Zuniga*, 320 N.C. 233, 273, 357 S.E.2d 898, 923, *cert. denied*, 484 U.S. 959 (1987). In the instant case, defendant was convicted of first-degree murder. His conviction was based upon the felony murder rule and upon a theory of malice, premeditation, and deliberation. Following defendant's capital sentencing pro-

ceeding, the prosecution submitted only the (e)(9) aggravating circumstance for the jury's consideration: "Was this murder especially heinous, atrocious, or cruel?" The jury found that aggravating circumstance to exist.

The jury also found three enumerated statutory mitigating circumstances: The defendant has no significant history of prior criminal activity ((f)(1)); the murder was committed while the defendant was under the influence of mental or emotional disturbance ((f)(2)); and the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired ((f)(6)). Additionally, the jury found the (f)(9) mitigating circumstance: "[A]ny other circumstance or circumstances arising from evidence which the jury deems to have mitigating value." N.C.G.S. 15A-2000(f)(9) (2005). Of the ten non-statutory mitigating circumstances submitted, one or more jurors found by a preponderance of the evidence that five existed and had mitigating value.

After thoroughly reviewing the record, transcripts, and briefs in this case, we conclude the evidence fully supports the aggravating circumstance found by the jury. Further, we conclude nothing in the record suggests defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. Accordingly, we will not disturb the jury's balancing of aggravating and mitigating circumstances on appeal.

> Turning now to our final statutory duty, we recognize that proportionality review is designed to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." In conducting the proportionality review, we must determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2). This determination " 'ultimately rest[s] upon the "experienced judgments" of the members of this Court.' " (alteration in original).

State v. Garcia, 358 N.C. 382, 426, 597 S.E.2d 724, 754 (2004), *cert. denied*, —— U.S. ——, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005) (citations omitted).

Defendant argues this Court should suspend the consideration of death penalty cases because it is not in a position to make the comparisons required by N.C.G.S. § 15A-2000(d)(2). The relevant statute provides:

> The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding . . . that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

Id. Defendant contends that the "similar cases" referenced in the statute must include similar life imprisonment cases as well as similar death cases. Defendant argues that since the North Carolina General Assembly amended N.C.G.S. § 7A-27(a) in 1995 so that first-degree murder cases resulting in a life sentence would no longer come before this Court without first being decided by the Court of Appeals, the pool of available cases is unfairly skewed towards death cases to use in comparison.

Defendant's argument misconstrues our proportionality review. We consider all cases which are roughly similar in facts to the instant case, although we are not constrained to cite each and every case we have used for comparison. *See State v. Al-Bayyinah*, 359 N.C. 741, 760, 616 S.E.2d 500, 514 (2005). We decline defendant's suggestion to suspend consideration of death penalty cases, and now turn to the proportionality of the case at bar.

This Court has previously determined that the death penalty was disproportionate in eight cases. *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled in part on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). In only two of these cases, *Stokes* and *Bondurant*, did the jury find as an aggravating circumstance that the murder was especially heinous, atrocious, or cruel. Both *Stokes* and *Bondurant* are easily distinguished from the case at bar.

In *Stokes*, the seventeen-year-old defendant was the only one of four assailants to receive the death penalty, even though the other three assailants were adults. 319 N.C. at 3-4, 21, 352 S.E.2d at 654-55,

664. In the instant case, defendant was not an immature adolescent. He was forty-seven years old at the time he murdered his wife. He had been married for almost twenty-five years, had spent twenty years serving his country in the United States Army, was a combat veteran, received several promotions, was a noncommissioned officer, and had served on the governing council of his town for almost seven years. He additionally served for a time as police commissioner of the Town of Wagram. Furthermore, he had no peers encouraging him to murder his wife; in fact, several people whom he had known for years pleaded with him to stop.

In *Bondurant*, the defendant was remorseful and apologetic immediately after shooting the victim, and he directed the victim's transport to the hospital for treatment after the shooting because he did not want the victim to die. 309 N.C. at 694, 309 S.E.2d at 182-83. Unlike the defendant in *Bondurant*, defendant in the instant case showed no remorse or apology. After firing every cartridge contained by his rifle, defendant's final insult was to kick his wife as he walked back to his pickup truck. He made no attempt to apologize, no attempt to help her, or even check to see if she was still alive. Defendant was so unconcerned he had just murdered his wife he went to a friend's house to return a lawnmower part after a half-hearted attempt to notify the police of his actions. This murder does not contain any compelling reason for a finding of disproportionality when compared to cases in which we have found disproportionality.

"Although we 'compare this case with the cases in which we have found the death penalty to be proportionate. . . . we will not undertake to discuss or cite all of those cases each time we carry out that duty.' " *State v. Garcia*, 358 N.C. at 429, 597 S.E.2d at 756 (quoting *State v. McCollum*, 334 N.C. 208, 244, 433 S.E.2d 144, 164 (1993), *cert. denied*, 512 U.S. 1254 (1994)). We have compared defendant's case to other cases in which we have found the death penalty to be proportionate and find no reason to hold defendant's sentence is disproportionate.

Accordingly, we find defendant's sentence is proportionate to the crime he committed. Defendant received a fair trial and sentencing proceeding, and we find no reversible error in his convictions or his sentences.

NO ERROR.

WILLIAM J. NOLAN III AND LOUISE C. HEMPHILL-NOLAN, PETITIONERS v. VILLAGE OF MARVIN, A NORTH CAROLINA MUNICIPALITY, RESPONDENT

No. 488A05

(Filed 27 January 2006)

Cities and Towns— involuntary annexation—services extended—insufficient

The Village of Marvin did not substantially comply with statutory procedures for an involuntary annexation because the services provided simply filled needs created by the annexation itself, without conferring significant benefits on the annexed property owners and residents. Although the administrative services which the Village proposed to extend were the only services provided to existing residents, N.C.G.S. § 160A-35(3) is grounded in a legislative expectation that the annexing municipality possesses meaningful services to extend to the annexed property.

Justice EDMUNDS dissenting.

Justice PARKER 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, 172 N.C. App. 84, 615 S.E.2d 898 (2005), affirming an order affirming annexation entered 2 June 2004 by Judge Albert Diaz in Superior Court, Union County. Heard in the Supreme Court 13 December 2005.

The Brough Law Firm, by Robert E. Hornik, Jr., for petitioner-appellants.

Parker, Poe, Adams & Bernstein L.L.P., by Anthony Fox and Benjamin R. Sullivan, for respondent-appellee.

WAINWRIGHT, Justice.

Plaintiff property owners challenge the involuntary annexation of 320 lots in Union County by the Village of Marvin. Both the trial court and Court of Appeals upheld the Annexation Ordinance, which was adopted by the Village of Marvin Council on 24 July 2003. Plaintiffs appeal to this Court based on the dissent at the Court of Appeals.

This Court must determine (1) whether the Village of Marvin substantially complied with N.C.G.S. sections 160A-33 to 160A-42, which prescribe the statutory procedure for annexation by cities of less

than 5,000 residents; and (2) if the Village of Marvin has not substantially complied, whether plaintiffs will suffer material injury because of the noncompliance. In so doing, we consider whether the applicable annexation statutes require an annexing municipality to extend a threshold (quantitative) level of public services to the annexed territory.

We determine that N.C.G.S. § 160A-35, which obligates the annexing municipality to extend existing public services to the annexed area, and N.C.G.S. § 160A-33, which is a "declaration of policy" supporting annexation by cities of less than 5,000 residents, must be read *in pari materia*. We hold that N.C.G.S. sections 160A-33 and 160A-35 require meaningful extension of public services to annexed property. Because the Annexation Ordinance adopted by the Village of Marvin does not provide for meaningful extension of services to the 320 lots subject to annexation, we find that the Village of Marvin has not substantially complied with statutory procedure and that plaintiffs will suffer material injury if annexation proceeds. Accordingly, we reverse the opinion of the Court of Appeals.

Annexation is the process by which a municipality expands its corporate limits to include outlying geographic areas. N.C.G.S. § 160A-36 (2003). Municipalities receive their power to annex by delegation of legislative authority from the General Assembly. *Huntley v. Potter*, 255 N.C. 619, 627, 122 S.E.2d 681, 686 (1961) (Annexation of territory to a municipal corporation is a power conferred by the legislature and such power must be exercised " 'in strict accord with the statute conferring it.' "). Involuntary annexation is initiated by a municipality and is not subject to referendum; however, a municipality may involuntarily annex property only if the property meets strict geographical and developmental criteria set forth in N.C.G.S. § 160A-36 and the municipality follows the detailed procedures set forth in N.C.G.S. § 160A-35 and N.C.G.S. § 160A-37. These procedures include notice to the affected community, public meetings, verification that the property is eligible for annexation, and planning for the extension of existing public services to the area to be annexed. N.C.G.S. §§ 160A-35, -36, -37 (2003). This Court has previously held that municipal services must be extended to newly annexed areas in a nondiscriminatory manner, meaning that annexed residents and property owners must receive substantially the same services that existing village residents and property owners receive. *Greene v. Town of Valdese*, 306 N.C. 79, 87, 291 S.E.2d 630, 635 (1982); *see also* N.C.G.S. § 160A-37(h) (2003) (granting a cause of

action to any resident or property owner who does not receive services "on substantially the same basis and in the same manner as such services were provided within the rest of the municipality prior to the effective date of annexation").

On 11 June 2002, the Village of Marvin Town Council passed a Resolution of Consideration pursuant to N.C.G.S. § 160A-37(i), identifying 324 lots on 467.71 acres contiguous to the Village of Marvin, which the Village intended to consider for annexation.[1] On 25 April 2003, the town council adopted a Resolution of Intent pursuant to N.C.G.S. § 160A-37(a), further describing the area under consideration, setting dates for a public informational meeting and a public hearing, and making publicly available a report containing plans to extend nine categories of municipal services to the annexed area as required by N.C.G.S. § 160A-35(3): police protection, fire protection, streetlights, solid waste removal, street maintenance, administrative services, water and sewer services, animal control, and parks and recreation. The report also contained a statement of financial impact, showing how the proposed annexation would affect the Village of Marvin's finances.

With respect to public services, the Annexation Report, adopted by the Village of Marvin on 25 April 2003 and amended on 24 July 2003, shows that the Village provides only one of the nine listed categories of municipal services to its residents. That category is administrative services. According to the report, "[t]he Village's administrative staff consists of the Village Administrator, Village Clerk, and Tax Collector. All work on a part-time basis (12 hours [per person] per week.). . . . The Village also contracts for planning services, engineering services, an auditor, and an attorney." The eight remaining services are provided to Village of Marvin residents by the State, Union County, volunteer organizations, or not at all. For example, streets are maintained by the North Carolina Department of Transportation, water and sewer services are provided by the Union County Public Works Department or by privately owned wells and septic tanks, and fire protection services are provided by the Wesley Chapel Volunteer Fire Department. At the time this report was amended, the Village of Marvin lacked a contract for police protection.

With respect to Village finances, the Annexation Report states that the Village of Marvin administrative staff will work approxi-

1. On 24 July 2003, the Village of Marvin adopted an amended Annexation Report in which the area proposed for annexation was reduced to 320 lots on 465.895 acres.

mately thirty-three percent more hours following annexation. Planning services, engineering services, and costs for reproducing maps and ordinances are also expected to increase. Thus, the Village of Marvin estimates that it will incur $14,240 in additional annual administrative costs as a result of the annexation. However, the Annexation Report shows zero additional estimated costs for the remaining eight categories of public services, as these needs will continue to be met by other entities. The Village also estimates that its total annual revenues will increase by $80,395 from collection of *ad valorem* taxes, utility franchise taxes, local option sales tax, cable TV franchise tax, motor vehicle taxes, and development fees. In the first year, the Village of Marvin estimates additional net revenue of $60,155 from the annexed property owners and residents.

At the public informational meeting held by the Village of Marvin town council on 10 June 2003, "[s]everal questions were raised by the citizens in the audience regarding the additional cost of a Marvin tax with no corresponding addition of town services provided." Additional questions were asked "requesting an explanation from the council as to the reason for the annexation." Village representatives refused to answer these inquiries and closed the public informational meeting, notwithstanding the mandate of N.C.G.S. § 160A-37(c1) that at the public informational meeting all residents of the municipality and of the territory to be annexed "shall be given the opportunity to ask questions *and receive answers* regarding the proposed annexation." (Emphasis added.)

Plaintiffs challenged the Annexation Ordinance adopted on 24 July 2004 by the Village of Marvin, filing a petition for review in Union County Superior Court pursuant to N.C.G.S. § 160A-38. In their petition, plaintiffs allege that the Village of Marvin failed to substantially comply with the statutory procedure for annexation because the Annexation Report reveals that no new services will be extended to the property to be annexed; however, residents and property owners will be subject to additional real property tax liability. Plaintiffs further contend that residents were not given an adequate opportunity to ask and receive answers to questions at the public informational meeting held on 10 June 2003. The Village of Marvin responds that it will provide additional administrative services to the area to be annexed and that the sole statutory requirement is that it extend these services in a nondiscriminatory manner. Thus, the Village of Marvin, which provides minimal services to its existing residents, may annex and tax plaintiffs' property simply by offering

substantially similar minimal services to plaintiffs. Both the trial court and the Court of Appeals upheld the annexation ordinance. We reverse.

Section 160A-35(3) of the North Carolina General Statutes directs an annexing municipality to include "[a] statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation" in an Annexation Report. The statute then lists categories of municipal services that the Annexation Report must address: police protection, fire protection, solid waste removal, street maintenance, and water and sewer services. N.C.G.S. § 160A-35(3). The Annexation Report adopted by the Village of Marvin also addresses administrative services, streetlights, animal control, and parks and recreation. Because the Village of Marvin provides only administrative services to its existing residents, the Village argues that extending those services, which are generally provided by the Village Administrator, Village Clerk, and Tax Collector, fulfills the requirement of N.C.G.S. § 160A-35(3) to provide municipal services in a nondiscriminatory manner. We agree that services must be provided on a (qualitative) nondiscriminatory basis; however, we also conclude that N.C.G.S. § 160A-35(3) is grounded in a legislative expectation that the annexing municipality possesses meaningful (quantitative) services to extend to the annexed property.

The North Carolina General Assembly enacted statutory procedures for involuntary annexation in 1959, following the completion of two reports by the Municipal Government Study Commission. N.C.G.S. §§ 160A-37, -49 (2003). The Commission was convened by the Assembly "to make a detailed and comprehensive study of the problems of municipal government in North Carolina which may include . . . [t]he procedures, powers, and authority which are granted by the General Assembly and are available to municipalities that govern and limit the ability of municipal government to provide for orderly growth, expansion, and sound development." J. Res. 51, Sec. 2, 1957 N.C. Res. 1705, 1705 (June 2, 1957). In its final report, the Commission recommended involuntary annexation as a method for promoting "soundly-governed, financially stable, attractive-to-live-in cities, with a high quality of municipal services." N.C. General Assemb., *Supplementary Rep. Municipal Government Study Commission* 6 (1959). The Commission stated its "principal[] concern" as "recommending a procedure for needed extension of the corporate limits of cities that does give necessary protec-

tion to the rights of property owners." *Id.* In particular, the Commission noted:

> When a city expands its boundaries, either to take in developed land or land ripe for development, it must be prepared to provide services of a quality needed where population density is relatively high. And if the land taken in does not receive such services, at the time of annexation or very shortly thereafter, the impact of municipal taxes discriminates against the landowner.

N.C. General Assemb., *Rep. Municipal Government Study* 11 (1958).

Thereafter, the North Carolina General Assembly codified "as a matter of State policy:"

> . . . .
>
> *(2) That municipalities are created to provide the governmental services essential for sound urban development and for the protection of health, safety and welfare in areas being intensively used for residential, commercial, industrial, institutional and government purposes or in areas undergoing such development;*
>
> *(3)* That municipal boundaries should be extended, in accordance with legislative standards applicable throughout the State, to include such areas *and to provide the high quality of governmental services needed therein for the public health, safety and welfare; and*
>
> . . . .
>
> *(5) That areas annexed to municipalities in accordance with such uniform legislative standards should receive the services provided by the annexing municipality in accordance with G.S. 160A-35(3).*

N.C.G.S. § 160A-33 (2003) (emphasis added).

We determine that N.C.G.S. §§ 160A-35 and 160A-33 are *in pari materia*. The primary purpose of involuntary annexation, as regulated by these statutes, is to promote "sound urban development" through the organized extension of municipal services to fringe geographical areas. These services must provide a meaningful benefit to newly annexed property owners and residents, who are now municipal taxpayers, and must also be extended in a nondiscriminatory fashion. Our decision does not require an annexing

municipality to provide all categories of public services listed in N.C.G.S. § 160A-35(3). We conclude only that the level of municipal services proposed in the Annexation Report prepared by the Village of Marvin is insufficient. Those part-time administrative services, such as zoning and tax collection, simply fill needs created by the annexation itself, without conferring significant benefits on the annexed property owners and residents.

Because the Annexation Ordinance adopted by the Village of Marvin does not provide for meaningful extension of municipal services to the 320 lots subject to annexation, we find that the Village of Marvin has not substantially complied with the statutory procedures set forth in N.C.G.S. sections 160A-33 to 160A-42. *See id.* § 160A-38 (setting forth the procedure and grounds for appeal from an Annexation Ordinance); *Huntley*, 255 N.C. at 627, 122 S.E.2d at 686 (a challenged Annexation Ordinance and Annexation Report must show "*prima facie* complete and substantial compliance" with the statutorily prescribed procedure). We further find that plaintiffs will suffer material injury, in the form of municipal taxes, if annexation proceeds. *See* N.C.G.S. § 160A-38 (granting the right to appeal an Annexation Ordinance to any person who "will suffer material injury by reason of the failure of the municipal governing board to comply with . . . [statutory] procedure.") Accordingly, we reverse the opinion of the Court of Appeals.

REVERSED.

Justice EDMUNDS dissenting.

The majority's resolution of this case improperly interprets the applicable statutes. Accordingly, I respectfully dissent.

A municipality that is annexing a neighboring area must provide a report that includes "[a] statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation." N.C.G.S. § 160A-35(3) (2005). The trial court found as fact that the Village of Marvin's Annexation Report and Amended Annexation Report furnished information as to the services currently provided by the Village. The trial court went on to find as a fact that, after annexation, the area to be annexed would receive "services on substantially the same basis and in the same manner as services received elsewhere in the [municipality]." Based on these findings,

the trial court concluded as a matter of law that the Village had "satisfied all statutory requirements regarding the provision of services to" the area to be annexed.

Although we review the trial court's conclusions of law *de novo*, the majority appears to accept that the Village complied with the facial requirements of N.C.G.S. § 160A-35(3). The public policy set out in N.C.G.S. § 160A-33 and quoted by the majority requires no more than that the area to be annexed receive the same services as are provided within the annexing municipality. Nevertheless, the majority now relies on N.C.G.S. § 160A-33 to add a gloss to N.C.G.S. § 160A-35(3) to require that the annexing municipality provide public services that exceed to a "meaningful" degree the services the area to be annexed is already receiving.

While I fully sympathize with the plaintiffs' frustration at finding themselves involuntarily annexed, "[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). This Court does not have authority to add requirements to the statute. Plaintiffs' remedy lies with the General Assembly.

Justice Parker joins in this dissenting opinion.

O & M INDUSTRIES v. SMITH ENGINEERING COMPANY, A/K/A SMITH ENVIRONMENTAL CORPORATION; KURZ TRANSFER PRODUCTS, LIMITED PARTNERSHIP, AND KURZ AND PARTNERS, LIMITED PARTNERSHIP

No. 502PA04

(Filed 27 January 2006)

Liens— materialman—subcontractor against principal

Summary judgment was correctly granted for a subcontractor seeking payment from the principal (defendant) under a Notice of Claim of Lien after the general contractor encountered financial difficulty and stopped work on the project, and the defendant claimed a set-off for the cost of completion. Defendant

had a duty under N.C.G.S. § 44A-20 to retain funds up to the total amount of the noticed lien; any option to set off the cost of completing the project against the retained amount would not negate defendant's personal liability to plaintiff.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 165 N.C. App. 705, 601 S.E.2d 330 (2004), reversing an order granting summary judgment for plaintiff entered on 15 November 2002 by Judge Christopher M. Collier in Superior Court, Davidson County. Heard in the Supreme Court 18 October 2005.

Hendrick & Bryant, LLP, by Matthew H. Bryant and T. Paul Hendrick, for plaintiff-appellant.

Smith Currie & Hancock, LLP, by Harry R. Bivens, for defendant-appellee Kurz Transfer Products, L.P.

Erwin and Eleazer, P.A., by L. Holmes Eleazer, Jr. and Fenton T. Erwin, Jr., Counsel for American Subcontractors Association of the Carolinas, amicus curiae.

Vann & Sheridan, LLP, by James R. Vann and Nan E. Hannah, for Southeastern Association of Credit Management, Inc., amicus curiae.

PARKER, Justice.

O & M Industries ("plaintiff") instituted this action against Smith Engineering ("Smith") and Kurz Transfer Products, LP ("defendant") under N.C.G.S. § 44A-18, the materialman's statutory lien. The issue before the Court for review is whether the Court of Appeals properly reversed the trial court's entry of summary judgment for plaintiff under N.C.G.S. § 44A-20. For the reasons stated herein, we reverse the decision of the Court of Appeals and remand for consideration of additional issues.

Defendant operates a manufacturing facility in Lexington, North Carolina, on property leased from an affiliate company. On or about 14 December 2000, defendant contracted with Smith for the design and construction of a regenerative thermal oxidizer system. Smith subcontracted with plaintiff for the construction and delivery of a three canister thermal oxidizer. Plaintiff performed by shipping the oxidizer in June 2001. Believing Smith to be in financial difficulty, plaintiff served a Notice of Claim of Lien on defendant on 8

June 2001 in the amount of $113,655.00. The evidence tends to show that defendant was aware of Smith's financial position.

After receiving the Notice, defendant made two payments to Smith, one for $164,831.25 on 6 July 2001, and one for $150,000.00 on 1 August 2001. Smith ceased work on the project on 13 August 2001, and defendant's estimates of its costs to complete ranged at various times from $25,000 to over $415,000. On 22 August 2001, Smith informed defendant that it had filed for bankruptcy. Plaintiff served another Notice of Claim of Lien on defendant on 23 August 2001 in the amount of $127,392.12. Plaintiff instituted this action when it did not receive payment from either defendant or Smith. Plaintiff obtained a default judgment against Smith.

Thereafter, plaintiff moved for summary judgment, alleging that defendant was personally liable as the result of the two post-Notice payments to Smith. Defendant also moved for summary judgment, arguing *inter alia* that the additional costs necessary to complete the project barred plaintiff from recovery. The trial court denied defendant's motion, allowed plaintiff's motion, entered judgment against defendant in the amount of $113,655.00 plus interest, and awarded plaintiff attorney's fees and costs.

On appeal to the Court of Appeals, defendant argued that unsettled questions concerning the sufficiency of its retained funds and its costs to complete the project raised issues of material fact, thereby making summary judgment improper. Defendant specifically claimed that it was not obligated to pay plaintiff in that the cost to complete the project would exceed the amount otherwise owed to Smith. Defendant also argued issues of estoppel and novation based on a letter sent by plaintiff to Smith dated 15 June 2001, and on plaintiff's 23 August 2001 Notice of Claim of Lien sent to defendant, respectively. Relying upon *Lewis-Brady Builders Supply, Inc. v. Bedros*, 32 N.C. App. 209, 231 S.E.2d 199 (1977) and *Watson Electrical Construction, Co. v. Summit Cos.*, 160 N.C. App. 647, 587 S.E.2d 87 (2003), the Court of Appeals agreed with defendant that a determination of defendant's costs to complete the project was necessary to calculate the appropriate setoff amount and reversed the trial court's entry of summary judgment for plaintiff. The Court of Appeals opinion did not reach defendant's estoppel or novation arguments.

In its appeal to this Court, plaintiff contends that the Court of Appeals failed to address and properly apply the applicable lien statutes. We agree. We note, however, that we express no opinion on

defendant's estoppel or novation arguments and assume *arguendo* for purposes of our discussion herein that plaintiff's 8 June 2001 notice of lien was valid.

The North Carolina Constitution mandates that the General Assembly "shall provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject-matter of their labor." N.C. Const. art. X, § 3. To satisfy this mandate the legislature enacted statutes which are now codified in Chapter 44A of the General Statutes. In *Electric Supply Co. of Durham v. Swain Electrical Co.*, 328 N.C. 651, 403 S.E.2d 291 (1991), this Court, recognizing the central role played by credit in the construction industry, articulated the importance of an adequate lien for subcontractors and suppliers of materials and labor:

> Suppliers . . . provide labor and materials to contractors and subcontractors who perform their portion of the work on a project. Since the contractor or subcontractor is generally not paid until the job, or a portion of it, is completed (and is probably unable to pay until it, in turn, is paid), their suppliers extend labor and materials to them on credit. An adequate lien is necessary to encourage responsible extensions of credit, which are necessary to the health of the construction industry.

Id. at 659, 403 S.E.2d at 296.

The statutory provisions at issue in this case are N.C.G.S. §§ 44A-18 and 44A-20.[1] Section 44A-18 provides in relevant part:

> Upon compliance with this Article:
>
> (1) A first tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds which are owed to the contractor with whom the first tier subcontractor dealt and which arise out of the improvement on which the first tier subcontractor worked or furnished materials.
>
> . . . .
>
> (5) The liens granted under this section shall secure amounts earned by the lien claimant as a result of his having furnished labor, materials, or rental equipment at the site of the im--

1. This statute was amended effective 1 October 2005. As this action was commenced before that date, the prior statute controls. *See In re Will of Mitchell*, 285 N.C. 77, 79-80, 203 S.E.2d 48, 50 (1974).

provement under the contract to improve real property, whether or not such amounts are due and whether or not performance or delivery is complete.

(6) A lien upon funds granted under this section is perfected upon the giving of notice in writing to the obligor as provided in G.S. 44A-19 and shall be effective upon the obligor's receipt of the notice. The subrogation rights of a first, second, or third tier subcontractor to the lien of the contractor created by Part 1 of Article 2 of this Chapter are perfected as provided in G.S. 44A-23.

N.C.G.S. § 44A-18 (2003).

Section 44A-20 sets forth the duties of an owner upon receipt of a Notice of Claim of Lien:

(a) Upon receipt of the notice provided for in this Article the obligor shall be under a duty to retain any funds subject to the lien or liens under this Article up to the total amount of such liens as to which notice has been received.

(b) If, after the receipt of the notice to the obligor, the obligor shall make further payments to a contractor or subcontractor against whose interest the lien or liens are claimed, the lien shall continue upon the funds in the hands of the contractor or subcontractor who received the payment, and in addition the obligor shall be personally liable to the person or persons entitled to liens up to the amount of such wrongful payments, not exceeding the total claims with respect to which the notice was received prior to payment.

(c) If an obligor shall make a payment after receipt of notice and incur personal liability therefor, the obligor shall be entitled to reimbursement and indemnification from the party receiving such payment.

. . . .

Id. § 44A-20 (2003). In the present case defendant is an "obligor" under the statutory definition. *See id.* § 44A-17(3) (2003).

In interpreting a statute, the Court must first ascertain the legislative intent in enacting the legislation. *Elec. Supply Co. of Durham*, 328 N.C. at 656, 403 S.E.2d at 294. The first consideration in determining legislative intent is the words chosen by the legisla-

ture. *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895-96 (1998). When the words are clear and unambiguous, they are to be given their plain and ordinary meanings. *Id.* 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. *Elec. Supply Co. of Durham*, 328 N.C. at 656, 403 S.E.2d at 294.

The materialman's lien statute is remedial in that it seeks to protect the interests of those who supply labor and materials that improve the value of the owner's property. *See Elec. Supply Co. of Durham*, 328 N.C. at 659, 403 S.E.2d at 296; *see also Carolina Builders Corp. v. Howard-Veasey Homes, Inc.*, 72 N.C. App. 224, 229, 324 S.E.2d 626, 629-30, *disc. review denied*, 313 N.C. 597, 330 S.E.2d 606 (1985). A remedial statute must be construed broadly "in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained." *Puckett v. Sellars*, 235 N.C. 264, 267, 69 S.E.2d 497, 499 (1952).

Under Chapter 44A, Section 18 the first tier subcontractor is entitled to a lien upon funds owed to the contractor with whom the first tier subcontractor dealt arising out of the improvements on which the first tier subcontractor worked or furnished materials. N.C.G.S. § 44A-18(1). This lien on funds secures amounts earned by the lien claimant for labor or materials furnished, whether or not performance or delivery is complete. *Id.* § 44A-18(5). The lien upon funds is perfected upon giving of the notice of claim of lien in writing to the obligor in accordance with N.C.G.S. § 44A-19 and is effective upon the obligor's receipt of the notice. *Id.* § 44A-18(6).

The statutory scheme set out in Chapter 44A, Section 20 to protect the subcontractor's lien on funds once notice has been given provides: first, that the obligor shall retain funds up to the total amount of liens as to which notice has been given, *id.* § 44A-20(a); second, that the obligor shall be personally liable if the obligor makes further payments to a contractor or subcontractor against whose interest the lien or liens are claimed; *id.* § 44A-20(b); and third, that an obligor who makes a payment after receipt of notice and incurs personal liability is entitled to reimbursement and indemnification from the party receiving such payment; *id.* § 44A-20(c). Significantly, this section of the statute makes no provision for a setoff against the retained funds in the event the cost of completing the project exceeds the amount of retained funds.

The determinative question on this appeal is whether the payments, totaling $314,831.25, made by defendant to Smith on 6 July

2001 and 1 August 2001 triggered personal liability on the part of defendant. Based on the principles of statutory interpretation outlined above, if the notice of lien is effective, the answer to this question must be in the affirmative. After stating that the lien follows the funds into the hands of the contractor or subcontractor to whom payment is made after notice, the statute says plainly and unequivocally: "and in addition the obligor shall be personally liable to the person or persons entitled to liens." *Id.* § 44A-20(b). The parties do not dispute that defendant has retained approximately $243,713, an amount exceeding the claimed lien. However, contrary to defendant's position, the mere retention of funds equal to or in excess of the amount of the lien is not sufficient to avoid personal liability.

The "retain funds" prong of subsection 44A-20(a) and the "further" or "wrongful payments" prong of subsection 44A-20(b) are discrete. In the absence of the "wrongful payments" made subsequent to a Notice of Lien on Funds as described in N.C.G.S. § 44A-20(b), personal liability on the part of the obligor is not triggered. However, in the event of an obligor's wrongful payment, the lien continues upon the funds, and the obligor becomes personally liable to the noticing party up to the amount of the wrongful payment, not exceeding the total claims with respect to which notice was received before the payment. *Id.* § 44A-20(b).

In keeping with the mandate that mechanics and laborers be provided an adequate lien on the subject matter of their labor, the statute creates a risk shifting mechanism for subcontractors. Prior to notice to the obligor, the subcontractor bears the risk of loss or nonpayment by the general contractor. When notice is served, the risk shifts to the obligor to the extent that the obligor is holding funds. With this notice the burden of assuring payment of the subcontractor's lien shifts to the obligor who owns the project, is receiving construction funds, and receives the benefit of the subcontractor's labor and materials. The owner is, thus, put on notice of a general contractor's potential breach and is apprised of the need to take precautions necessary to protect the project and to ensure that subcontractors remain on the job.

The court below applied a setoff analysis. However, the Court of Appeals' reliance on *Lewis-Brady Builders* and *Watson Electrical* was misplaced.

In *Lewis-Brady Builders*, the plaintiff subcontractor appealed from the trial court's order, which granted relief to plaintiff against

the general contractor but denied recovery against the owner. 32 N.C. App. at 210, 231 S.E.2d at 200. The Court of Appeals affirmed the judgment, finding that because the owner spent all funds otherwise due under the contract to complete the project, no subcontractor recovery was possible. *Id.* at 212-13, 231 S.E.2d at 201. *Lewis-Brady Builders* is, however, distinguishable from the present case, in that the owner in *Lewis-Brady Builders* made no further payments to the general contractor subsequent to its receipt of the subcontractor's Notice of Claim of Lien. Rather, the owner sought new bids for completion of the project after failing to negotiate terms with the original general contractor. *See id.* at 210, 231 S.E.2d at 199-200.

The plaintiff subcontractor in *Watson Electrical* filed a Notice of Claim of Lien approximately six weeks after defendant owners' last payment to the original general contractor on the project, but several weeks before the defendant owners terminated the contractor for defaulting on the contract. 160 N.C. App. at 649, 587 S.E.2d at 90. The basis on which the Court of Appeals affirmed summary judgment in favor of the owners was a finding by an arbitrator that the setoff exceeded the amount due under the contract. *See id.* at 651-52, 587 S.E.2d at 91-92. Again, the owners made no post-Notice payments to the general contractor, but arranged completion of the project with another general contractor.

In this case, defendant had a duty under Section 44A-20 to retain funds up to the total amount of the noticed lien. Defendant made further payments to Smith, thereby triggering personal liability up to the amount of the payments, not to exceed the amount of the claims noticed. N.C.G.S. § 44A-20(b). Defendant's option, if any, to set off its cost to complete the project against the retained amount would not negate defendant's personal liability to plaintiff. *Id.* Defendant's argument that under N.C.G.S. § 44-18(1), the lien only attached to the amount owed the contractor and that nothing was owed to the contractor must fail.

The critical time for determining whether an amount is owed for purposes of N.C.G.S. § 44A-18(1) is when the obligor receives the notice of lien. *Id.* § 44A-18(6). In this case, defendant admitted making payments totaling $314,831.25 to Smith after receiving plaintiff's Notice of Claim of Lien for $113,655.00. By making the payments, defendant acknowledged that it owed money to the contractor. *See Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 505, 238 S.E.2d 607, 612 (1977).

Were this Court to adopt the Court of Appeals' analysis, the purpose of the statute, which is to protect mechanics and materialmen, would be eviscerated. The reason the obligor becomes personally liable by making a payment after receiving a notice of claim of lien is that the obligor is then on notice that a potential problem exists and, having control of the funds, is in a position to avoid or rectify the problem.

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2003).

Under our holding today, unless defendant's remaining assignments of error asserting estoppel and novation have merit, questions concerning the sufficiency of the retained funds and defendant's cost to complete are not relevant and do not raise genuine issues of material fact. Accordingly, we reverse and remand to the Court of Appeals for consideration of defendant's remaining assignments of error.

REVERSED and REMANDED.

IN RE ADOPTION OF BABY GIRL ANDERSON

No. 448PA04

(Filed 27 January 2006)

Adoption— father's consent—not required—support offered but not accepted

Respondent's consent to adoption of his biological daughter was not required because his attempts to offer financial support were rejected by the mother. The bright line rule of *In re Adoption of Byrd*, 354 N.C. 188, is not modified; attempts or offers of support will not suffice. However, the mother's refusal to accept assistance cannot defeat the father's paternal interest as long as the father makes reasonable and consistent payments for the support of the child, such as to a bank account or trust fund. N.C.G.S. § 48-3-601.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 165 N.C. App. 413, 598 S.E.2d 638 (2004), reversing and remanding an order entered on 7 March 2003 by Judge Alice C. Stubbs in District Court, Wake County. On 3 March 2005, the Supreme Court allowed respondent's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court 15 November 2005.

Herring, McBennett, Mills & Finkelstein, P.L.L.C., by Bobby D. Mills, E. Parker Herring, and Stephen W. Petersen, for petitioner-appellants/appellees.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for respondent-appellee/appellant.

NEWBY, Justice.

The issue is whether the consent of respondent Michael Avery must be obtained before petitioners' adoption of his biological daughter may proceed. Because respondent merely offered support but did not provide the actual financial support mandated under N.C.G.S. § 48-3-601, we hold his consent to the adoption is not required.

I. BACKGROUND

In autumn of 2001, Kristine Anderson and respondent began a monogamous relationship while enrolled at Onslow County's Northside High School. Anderson conceived respondent's child sometime in the spring of 2002 and confirmed her pregnancy in June or July. During July or August of 2002, Anderson informed respondent of her plan to place the baby for adoption. Although respondent initially agreed to this course of action, he withdrew his consent after discussing the matter with his mother. On 18 September 2002, respondent quit high school. Anderson subsequently gave birth to N.A. on 6 January 2003.

On 9 or 10 January 2003, respondent received notice of petitioners' petition to adopt N.A.[1] On 10 January 2003, petitioners filed a motion asking the Wake County Clerk of Court to determine whether respondent's consent to the adoption was necessary under N.C.G.S. § 48-3-601 (permitting adoptions to proceed without the

1. Section 48-9-104 of the General Statutes protects petitioners' identities from disclosure. Petitioners have had physical custody of N.A. since on or about 14 January 2003.

consent of putative fathers who fail to meet its requirements). Petitioners submitted an affidavit from Anderson, who asserted she and respondent were unwed and that respondent had never provided "financial or in-kind assistance" to her or their child. Respondent timely filed an opposition to the proposed adoption. In an order dated 27 January 2003, the Clerk of Court decided the adoption could proceed without respondent's consent. Respondent thereafter filed a notice of appeal to the district court for review *de novo*.

During its 17 February 2003 session, the district court conducted a hearing on the matter. Most of the evidence concerned whether respondent had complied with the support prong of N.C.G.S. § 48-3-601, which directs putative fathers who desire a role in the adoption process to provide, "in accordance with [their] financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy." N.C.G.S. § 48-3-601(2)(b)(4)(II) (2005). The evidence showed respondent had an employment history going back to 1999, with stints at Food Lion, Little Caesars, and Citgo. At the time of hearing, respondent worked for the International House of Pancakes. Respondent lived with his parents while Anderson was pregnant and paid nothing for rent, utilities, food, or clothing. Following testimony from Anderson, respondent, respondent's sister, and four of respondent's former classmates, the trial court entered the below findings of fact concerning respondent's efforts to furnish support to Anderson during her pregnancy:

> 15. *The Respondent acknowledges that he never provided any actual financial support to Ms. Anderson*; however, he and four high school students testified that he offered her money at school during . . . September, October, and November of 2002 but that she rejected his offers. The [testimony of] witnesses at trial . . . ranged from offers of support having been made between "three or four times" up to "six to eight times." The Respondent testified that he offered her money six to seven times at school. Ms. Anderson testified that he never offered her money at school. All the testimony regarding offers made at school is not consistent with the Respondent['s] having dropped out on September 18, 2002.
>
> 16. Considering the school calendar, the attendance records of the student witnesses and the Respondent, and the Respondent's withdrawal from school on September 18, 2002, it is unlikely that

> the Respondent made as many as six to eight offers at school. The Respondent may have offered Ms. Anderson cash at school on more than one occasion; however, . . . he failed to ever provide Ms. Anderson with any tangible or actual support.
>
> 17. Some time during the late summer of 2002, prior to September 22, 2002, the Respondent's mother told Ms. Anderson that she would be welcome to come stay with the Respondent's family . . . ; however, Ms. Anderson did not accept that offer. . . .
>
> 18. On September 22, 2002, the Respondent, Ms. Anderson, and their parents conducted a "family meeting" to discuss the pregnancy. At no time during this meeting did the Respondent or his parents make any offers to provide financial support to Ms. Anderson or the baby.
>
> 19. *During the term of the pregnancy, the Respondent had the ability to provide financial support or other tangible support to Ms. Anderson; however, he failed to do so.* The Respondent did manage to purchase a car in the amount of $1,000 for himself during the fall of 2002.
>
> 20. The Respondent did make some effort to provide support to Ms. Anderson. In December of 2002, the Respondent and his sister drove to the Andersons' residence. The Respondent went to the front door and attempted to hand deliver an envelope containing a letter and a check in the amount of $100.00. Ms. Anderson's father answered the door and refused to accept the envelope. The Respondent offered no documentary evidence of the check or letter at trial.
>
> 21. On December 22, 2002, the Respondent's attorney sent a letter to Ms. Anderson in which the Respondent acknowledged paternity, offered financial assistance to Ms. Anderson and the baby, and gave notice that he was not willing to consent to the adoption. . . .

(Emphasis added.)

Based on its findings of fact, the trial court concluded respondent's consent to adoption was not required under N.C.G.S. § 48-3-601 since respondent had "fail[ed] to provide actual support to Ms. Anderson or the baby." The court cited *In re Adoption of Byrd*, 354 N.C. 188, 552 S.E.2d 142 (2001) as controlling precedent. According to the trial court, *Byrd* holds "that [mere] offers of support by [the puta-

tive father] or by third parties are not sufficient." The court dismissed respondent's opposition with prejudice.

The Court of Appeals reversed. *In re Adoption of Anderson*, 165 N.C. App. 413, 598 S.E.2d 638 (2004). In so doing, the court distinguished between the "offers" of support at issue in *Byrd* and respondent's "tenders" of support to Anderson. *Id.* at 419 n.1, 598 S.E.2d 642 n.1 ("We use the word 'tender' . . . with great deliberateness. The[] tenders [by respondent] are distinguishable from . . . the alleged 'offers' made in [*Byrd*]."). In the opinion of the Court of Appeals, while the offers of the *Byrd* putative father fell short of "tangible support," the alleged tenders of respondent "could meet *Byrd's* requirement of tangible support." *Id.* at 417, 598 S.E.2d at 641.

> Unlike *Byrd*, all of [respondent's] attempts to impart support were made before N.A. was born. . . . [A]ssuming at least some money was tendered at school, [respondent] provided tangible money and a tangible document expressing a willingness to provide assistance. These provisions were made directly to Ms. Anderson. We hold this falls within the contemplation of *Byrd* and the statute as requiring the putative father to "provide[]" payments of support. . . . [Respondent] sufficiently tendered support in tangible form such that it had to be *directly* rebuffed. . . .

Id. at 419-20, 598 S.E.2d at 642 (citations omitted). The Court of Appeals remanded to the trial court for additional findings of fact regarding respondent's alleged schoolhouse tenders and a fresh determination of whether respondent's tenders constituted reasonable and consistent payments in fulfillment of N.C.G.S. § 48-3-601. *Id.* at 421, 598 S.E.2d at 643. We allowed petitioners' petition for discretionary review.

II. ANALYSIS

Petitioners argue the Court of Appeals' distinction between tenders and offers conflicts with this Court's decision in *Byrd*. Petitioners contend respondent never provided the actual, tangible support *Byrd* requires. Respondent maintains he proffered tangible support to Anderson in compliance with N.C.G.S. § 48-3-601 and *Byrd*. Holding to the contrary, respondent warns, would permit mothers to thwart the rights of putative fathers simply by declining to accept support.

Chapter 48 of our General Statutes governs adoption procedures in North Carolina. In enacting the Chapter, the General Assembly rec-

ognized the public interest in "establish[ing] a clear judicial process for adoptions, . . . promot[ing] the integrity and finality of adoptions, [and] structur[ing] services to adopted children, biological parents, and adoptive parents that will provide for the needs and protect the interests of all parties to an adoption, particularly adopted minors." N.C.G.S. 48-1-100(a) (2005). Section 48-3-601 makes mandatory the consent of certain individuals before a trial court may grant an adoption petition. These individuals include the minor himself whenever he is twelve or more years of age, as well as the mother of the minor and the mother's husband at the time of the minor's birth. *Id.* The consent of an unwed putative father in circumstances such as those of the instant case is not obligatory unless he has assumed some of the burdens of parenthood. Specifically, the putative father has rights under N.C.G.S. § 48-3-601 if he:

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

N.C.G.S. § 48-3-601(2)(b)(4)(II) (emphasis added).[2]

Our Court construed N.C.G.S. § 48-3-601(2)(b)(4)(II) ("the subsection") in *Byrd*. There the paternal grandmother offered O'Donnell, the expectant mother, a place to live and help with medical bills and other costs, all of which O'Donnell declined. 354 N.C. at 190, 552 S.E.2d at 144. On the day O'Donnell gave birth, the putative father purchased a $100 money order for her; however,

2. Section 48-3-601 also requires the consent of a putative father in other situations. For example, a putative father acquires the right to consent if he timely acknowledges paternity and either (1) "[i]s obligated to support the minor under written agreement or by court order" or (2) "[a]fter the minor's birth but before the minor's placement for adoption or the mother's relinquishment, has married or attempted to marry the mother of the minor by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid." N.C.G.S. § 48-3-601(2)(b)(4)(I)&(III) (2005).

the money order did not reach O'Donnell until after the petitioners had filed for adoption. *Id.* at 191, 552 S.E.2d at 145. Holding the adoption could proceed without the father's consent, the Court opined that "attempts or offers of support, made by the putative father or another on his behalf, are not sufficient for purposes of the statute;" it further observed that the money order "arrived too late, as the statute . . . provides for the relevant time period to end at the filing of the adoption petition." *Id.* at 197, 552 S.E.2d at 148-49. In arriving at the outcome of *Byrd*, the Court explained what the subsection demands of putative fathers:

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

Id. at 194, 552 S.E.2d at 146 (emphases added).

In the case *sub judice*, respondent's acknowledgment of paternity and communication with Anderson are not at issue. The sole dispute before us is whether respondent "made reasonable and consistent support payments . . . in accordance with his financial means." *Id.* If he did not, then petitioners may adopt N.A. without his consent. *Id.*

After careful consideration, we deem the Court of Appeals' distinction between offers and tenders unconvincing. A tender in this context is nothing more than "[a] valid or sufficient *offer* of performance." *Black's Law Dictionary* 1507 (8th ed. 2004) (emphasis added). Thus, the analysis of the Court of Appeals begs the question of whether mere offers can satisfy the subsection's support prong. This Court addressed precisely that question in *Byrd*:

> The "support" required under N.C.G.S. § 48-3-601(2)(b)(4)(II) is not specifically defined. *We believe, however, that "support" is best understood within the context of the statute as actual, real and tangible support, and that attempts or offers of support do not suffice.* Statutory language supports this conclusion. While

> "attempted" communication [with mother and child] satisfies the statute, there is no such language used to describe the support requirement. N.C.G.S. § 48-3-601(2)(b)(4)(II). Presumably, the General Assembly intended a different meaning for the support prong of the test because of the differing language—one that excludes attempt to provide support. The statute also states that support may include "the *payment* of medical expenses, living expenses, or other *tangible means of support*," thus reflecting actual support provided. *Id.*

Id. at 196, 552 S.E.2d at 148 (first emphasis added).

We see no reason to modify *Byrd's* bright-line rule. The rule comports with the language of the subsection and reflects the importance of "a clear judicial process for adoptions." N.C.G.S. § 48-1-100(a). *See also Byrd*, 354 N.C. at 198, 552 S.E.2d at 149 ("The interests of the child and all other parties are best served by an objective test that requires . . . tangible support.") The Court of Appeals' offer/tender approach represents a departure from *Byrd*, and we reject it.

Having reaffirmed that mere offers of support are insufficient under N.C.G.S. § 48-3-601(2)(b)(4)(II), we next determine whether the record permits a conclusion concerning respondent's compliance with the subsection's support prong. Our examination of the record shows the trial court relied on an abundance of competent evidence when making its findings of fact (something no party challenges), and consequently, those findings are binding on appeal. *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983). Quoted above, the court's findings indicate respondent could have provided support for Anderson during her pregnancy, but instead spent $1,000 on an automobile for himself. According to his own testimony, respondent made approximately $240 per week in the fall of 2002 and had practically no expenses apart from the $100 he paid each month for automobile insurance. In other words, despite possessing adequate wherewithal, respondent "never provided any actual financial [payments] to Ms. Anderson," much less the reasonable and consistent payments required under the subsection.

The trial court did find that respondent offered Anderson support on several occasions towards the end of her pregnancy. In December of 2002, respondent went to the Anderson residence in an unsuccessful effort to deliver an envelope containing a check for

$100; he likewise had his attorney send Anderson a letter declaring his willingness to furnish financial assistance to her and the baby. Additionally, respondent "may have" offered Anderson cash at school more than once during the fall of 2002. Though the Court of Appeals characterized the envelope and the letter as "tangible provisions of support," we hold that respondent's offers complied with neither the text of N.C.G.S. § 48-3-601 nor *Byrd's* interpretation of the same.

Notwithstanding respondent's arguments to the contrary, our resolution of the instant case does not grant biological mothers the power to thwart the rights of putative fathers. The subsection obliges putative fathers to demonstrate parental responsibility with reasonable and consistent payments "*for* the support of the biological mother." N.C.G.S. § 48-3-601(2)(b)(4)(II) (emphasis added). The legislature's deliberate use of "for" rather than "to" suggests the payments contemplated by the subsection need not always go directly to the mother. So long as the father makes reasonable and consistent payments *for* the support of mother or child, the mother's refusal to accept assistance cannot defeat his paternal interest. Here, respondent could have supplied the requisite support any number of ways, such as opening a bank account or establishing a trust fund for the benefit of Anderson or their child. Had he done so, Anderson's intransigence would not have prevented him from creating a payment record through regular deposits into the account or trust fund in accordance with his financial resources. By doing nothing more than sporadically offering support to Anderson, respondent left the support prong of N.C.G.S. § 48-3-601 unsatisfied and himself without standing to obstruct the adoption of N.A.

III. DISPOSITION

Pursuant to N.C.G.S. § 48-3-601, respondent's consent to petitioners' adoption of N.A. is not required. We therefore reverse the decision of the Court of Appeals and instruct that court to reinstate the judgment of the trial court. Respondent's conditional petition for discretionary review is dismissed as improvidently allowed.

REVERSED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

PATRICIA McCUTCHEN v. DEBORAH T. McCUTCHEN

No. 308A05

(Filed 27 January 2006)

1. Appeal and Error— appealability—summary judgment—interdependent claims—determination by same jury—substantial right

Damages for interdependent claims for alienation of affections and criminal conversation should be determined by the same jury, and the appeal of a summary judgment on the alienation of affections claim was interlocutory but immediately reviewable.

2. Alienation of Affections— statute of limitations—accrual

A cause of action for alienation of affections accrues upon completion of the diminution or destruction of the love and affection of the spouse, and when that occurs is often a question for the fact finder. Moreover, the couple need only be married with genuine love and affection at the time of defendant's interference; the fact that the spouses were living apart does not bar recovery, and the fact that they were living together does not preclude the possibility that the alienation had already occurred. In this case, there was a genuine issue of material fact as to whether there was love and affection following the separation, a jury could determine that the alienation did not occur until the final decision to end the marriage, and plaintiff's claim is not then facially barred by the three-year statute of limitations. N.C.G.S. § 1-52(5).

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 170 N.C. App. 1, 612 S.E.2d 162 (2005), affirming an order entered on 6 August 2003 by Judge Narley L. Cashwell in Superior Court, Wake County. Heard in the Supreme Court 17 October 2005.

The Mueller Law Firm, P.A., by Colby L. Hall, for plaintiff-appellant.

Tharrington Smith, L.L.P., by Lynn P. Burleson and Jill Schnabel Jackson, for defendant-appellee.

NEWBY, Justice.

The issue is whether the accrual of a cause of action for alienation of affections occurs as a matter of law on or before the date a married couple separates. We hold the claim accrues whenever alienation is complete, regardless of the date of separation, and that the determination of when alienation occurs is generally a question of fact for the jury.

Plaintiff and Byron McCutchen ("Byron") married on 1 June 1968 and had three children between 1969 and 1980. The couple separated on 9 September 1998 and divorced on 30 May 2002. Before the couple's separation, Byron met defendant, now his wife, and began a sexual relationship with her. Defendant admits she had actual knowledge of Byron's marriage when she entered the relationship.

On 25 April 2003, plaintiff filed suit against defendant asserting causes of action for alienation of affections and criminal conversation. In her complaint, plaintiff alleged defendant engaged in an adulterous relationship with Byron before the couple's divorce. Plaintiff further alleged defendant wrongfully and maliciously destroyed her marriage to Byron. She claimed defendant continued her relationship with Byron despite knowing that Byron and plaintiff were engaged in counseling and reconciliation efforts. Plaintiff asserted she and Byron purchased a car titled in both of their names in May 1999 using funds from a joint account and continued managing their finances together until October 2001. In addition, plaintiff maintained that on at least three occasions following the date of separation Byron expressed his desire to return to the marriage and asked plaintiff to refrain from taking legal action while they were attempting to reconcile. Plaintiff contended Byron told her at their last joint counseling session in February 2001 that "he was not heading toward divorce," but approximately two weeks later informed her the marriage was over.

Defendant responded, asserting the statute of limitations as a bar to plaintiff's alienation claim, and filed a motion for summary judgment. The trial court granted summary judgment for plaintiff on her criminal conversation claim, reserving damages for a jury determination, but granted summary judgment for defendant on plaintiff's alienation claim after concluding it was barred by the statute of limitations. A divided panel of the Court of Appeals determined plaintiff's interlocutory appeal was proper and affirmed summary judgment in favor of defendant, holding plaintiff's cause of

action for alienation accrued by the date of separation and was thus barred by the statute of limitations. *McCutchen v. McCutchen*, 170 N.C. App. 1, 4, 6-7, 612 S.E.2d 162, 164, 166 (2005). Although convinced plaintiff's interlocutory appeal was not properly before the court, the dissent argued plaintiff's alienation claim was timely filed. *Id.* at 9, 612 S.E.2d at 167 (Tyson, J., dissenting). For reasons detailed below, we affirm the majority's holding that plaintiff is entitled to an immediate appeal but reverse the ruling that plaintiff's claim is barred by the statute of limitations.

I. INTERLOCUTORY APPEAL

[1] We first consider whether the Court of Appeals properly exercised appellate jurisdiction. "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). Any order resolving fewer than all of the claims between the parties is interlocutory. *Dep't of Transp. v. Rowe*, 351 N.C. 172, 174, 521 S.E.2d 707, 708-09 (1999). Interlocutory orders are appealable before entry of a final judgment if (1) the trial court certifies there is "no just reason to delay the appeal of a final judgment as to fewer than all of the claims or parties in an action" or (2) the order " 'affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment.' " *Id.* at 175, 521 S.E.2d at 709; *see also* N.C.G.S. §§ 1-277; 1A-1, Rule 54(b); 7A-27 (2005).

In the present case, the issue of damages for plaintiff's criminal conversation claim remained unresolved when the trial court granted summary judgment for defendant on the alienation of affections claim. Plaintiff's appeal is therefore interlocutory. Since the trial court did not certify its decision, we must decide whether plaintiff has a substantial right that would be lost absent immediate review. Both plaintiff and defendant agree this case involves a substantial right warranting immediate review; however, acquiescence of the parties does not confer subject matter jurisdiction on a court.

The parties assert the substantial right at stake is the right to have the same jury hear plaintiff's claims for alienation of affections and criminal conversation. "[B]ecause the two causes of action and the elements of damages here are so connected and intertwined, only one issue of . . . damages should [be] submitted to the jury." *Sebastian v. Kluttz*, 6 N.C. App. 201, 220, 170 S.E.2d 104, 116 (1969).

If decided by separate juries, any recovery for one is reduced by that of the other. *Gray v. Hoover*, 94 N.C. App. 724, 731, 381 S.E.2d 472, 476, *disc. rev. denied*, 325 N.C. 545, 385 S.E.2d 498 (1989). In light of this legal interdependence, the same jury should determine damages for both claims. This right will be lost if plaintiff must wait to appeal summary judgment on her alienation claim until the issue of damages for criminal conversation is resolved. Accordingly, the interlocutory order granting summary judgment on plaintiff's alienation claim is subject to appeal.

II. ACCRUAL OF ALIENATION OF AFFECTIONS CLAIM

[2] We next turn to the issue of when a cause of action for alienation of affections accrues. To establish a common law claim for alienation, a plaintiff must prove " '(1) [t]hat [she and her husband] were happily married, and that a genuine love and affection existed between them; (2) that the love and affection so existing was alienated and destroyed; [and] (3) that the wrongful and malicious acts of the defendant[] produced and brought about the loss and alienation of such love and affection.' " *Litchfield v. Cox*, 266 N.C. 622, 623, 146 S.E.2d 641, 641 (1966) (citation omitted). Although the plaintiff must introduce evidence of a valid marriage, as well as marital love and affection, the plaintiff need not "prove that [her] spouse had no affection for anyone else or that [the] marriage was previously one of 'untroubled bliss.' " *Brown v. Hurley*, 124 N.C. App. 377, 380, 477 S.E.2d 234, 237 (1996); *see also* Suzanne Reynolds, *Lee's North Carolina Family Law* § 5.46(A), at 394 (5th ed. 1993).

As a general rule, the statute of limitations begins to run once a cause of action accrues. *Wilson*, 276 N.C. at 214, 171 S.E.2d at 884. Section 1-52(5) of the General Statutes requires a plaintiff to file suit within three years "[f]or criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated." N.C.G.S. § 1-52(5) (2005). Because alienation of affections is not specifically referenced in the statute, this three-year limitations period applies.

Accrual of an alienation claim occurs when the wrong is complete. *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 214, 171 S.E.2d 873, 884 (1970). The "wrong" in an alienation of affections case is the actual alienation of the spouse's affections by a third party. "Alienation connotes the destruction, or serious diminution, of the love and affection of the plaintiff's spouse for the plaintiff." Charles E. Daye & Mark W. Morris, *North Carolina Law of Torts* § 11.22.2, at

106 (2d ed. 1999). This diminution or destruction often does not happen all at once. " 'The mischief is a continuing one . . . .' " *Cottle v. Johnson*, 179 N.C. 426, 431, 102 S.E. 769, 771 (1920) (citation omitted). It is only after the diminution or, when applicable, the destruction of love and affection is complete that plaintiff's cause of action accrues and the statute of limitations begins to run. *Saunders v. Alford*, 607 So. 2d 1214, 1215 (Miss. 1992); *see also* 41 Am. Jur. 2d *Husband and Wife* § 241, at 214 (2005). The question of when alienation occurs is ordinarily one for the fact finder. *See Snyder v. Freeman*, 300 N.C. 204, 208, 266 S.E.2d 593, 596 (1980) (holding date of accrual of cause of action is question of fact); *Litchfield*, 266 N.C. at 623, 146 S.E.2d at 642 (holding fact that plaintiff and his wife continued to live together affected credibility of the evidence, but alienation "still remain[ed] a question for the jury").

Although separation may be strong evidence of alienation and may affect the damages available to the plaintiff, we have never held that plaintiff and spouse must live together at the time the cause of action arises.[1] Likewise, the fact that spouses continue living together after the alleged alienation does not preclude the possibility that alienation of affections has already occurred. *Litchfield*, 266 N.C. at 623, 146 S.E.2d at 642. Rather, for an alienation claim to arise, the couple need only be *married* with genuine love and affection at the time of defendant's interference. While still married, they may retain the requisite love and affection for one another despite separation. *See generally* 1 Homer H. Clark, Jr., *Law of Domestic Relations* § 12.2, at 656-57 (2d ed. 1987).

Commencing the statute of limitations only after alienation is complete comports with North Carolina's public policy favoring the protection of marriage. "We recognize and adhere in this state to a policy which within reason favors maintenance of the marriage. This policy militates against the application of any procedural rule which forces a spouse to file . . . any action which tends to sever the marital relation before that spouse is really desirous of pursuing such a course." *Gardner v. Gardner*, 294 N.C. 172, 180-81, 240 S.E.2d 399, 405 (1978). Mandatory accrual on the date of separation would force spouses to take prompt legal action, often to the detriment of reconciliation efforts. Such a rule would prejudice those who reasonably believe love and affection remains in their

1. Nor does the Restatement (Second) of Torts adopt this position. Restatement (Second) of Torts § 683 cmt. f (1977) ("The fact that the spouses were living apart at the time of the acts complained of . . . does not bar recovery . . . .").

marriage and postpone legal action until the chance of reconciliation no longer exists.

In holding plaintiff's claim was barred by the statute of limitations, the Court of Appeals majority relied on *Pharr v. Beck*, 147 N.C. App. 268, 554 S.E.2d 851 (2001). *Pharr* held that alienation claims must be based on pre-separation conduct and that post-separation conduct is admissible only to corroborate pre-separation events. *Id.* at 273, 554 S.E.2d at 855. *Pharr* reasoned that a common law claim for alienation of affections premised on post-separation conduct was incompatible with the alimony statute in Chapter 50 of our General Statutes, which defines marital misconduct as including only " 'acts that occur during the marriage and prior to or on the date of separation.' " *Id.*

The logic of *Pharr* fails because North Carolina's alimony statute does not govern the common law tort of alienation of affections. Although the General Assembly has the authority to modify common law torts, courts strictly construe statutes in derogation of the common law. *McKinney v. Deneen*, 231 N.C. 540, 542, 58 S.E.2d 107, 109 (1950). Even when viewed broadly, nothing in the divorce, alimony, and child support provisions of Chapter 50 pertains to alienation of affections. The restrictions established in Chapter 50 are thus irrelevant to the tort of alienation of affections.

Significantly, the holding in *Pharr* appears inconsistent with both prior and subsequent decisions of the Court of Appeals. In 1996, the court held a claim for alienation of affections was "facially plausible" although the only evidence presented involved post-separation conduct. *Brown*, 124 N.C. App. at 378-79, 381, 477 S.E.2d at 236, 238. Moreover, within weeks of issuing the *Pharr* decision, another panel of the Court of Appeals rejected *Pharr's* analysis and recognized that N.C.G.S. § 50-16.3A(b)(1) (permitting courts to consider post-separation conduct solely to corroborate marital misconduct which occurred before the date of separation) concerns only entitlement for alimony. *Johnson v. Pearce*, 148 N.C. App. 199, 201, 557 S.E.2d 189, 190-91 (2001) (declining to limit criminal conversation claims to incidents occurring before separation). We hereby overrule *Pharr* to the extent it requires an alienation of affections claim to be based on pre-separation conduct alone.

Turning to the facts of the present case, we note this appeal arises from an order granting summary judgment. Our review is therefore *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). The trial court should grant summary

judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2005). The evidence must be considered "in a light most favorable to the non-moving party." *Howerton*, 358 N.C. at 470, 597 S.E.2d at 693.

Viewed in this light, plaintiff's evidence shows she and Byron married on 1 June 1968 and had three children together. They were "happily married with genuine love and affection" before the "interference of the [d]efendant." Although the couple separated on 9 September 1998, Byron expressed his desire to return to the marriage multiple times between October 1999 and September 2000 and asked plaintiff not to take legal action during that time. The couple purchased a car together in May 1999, following Byron's indication that he had broken off his relationship with defendant. Plaintiff and Byron also maintained joint finances after their separation. Additionally, they participated in marriage counseling from July 1998 to February 2001. During their last counseling session, Byron told plaintiff "he was not heading toward divorce." In fact, Byron did not file for divorce until more than a year after the date he was legally permitted to do so under state law. Plaintiff apparently had reason to believe the couple would reconcile until Byron made a final decision in February 2001 to end their marriage.

Plaintiff's allegations in her sworn affidavit and verified complaint present a genuine issue of material fact as to whether there was love and affection following her separation from Byron. Because a jury could determine alienation did not occur until as late as February 2001, when Byron made the final decision to end the marriage, and plaintiff filed her complaint within three years of his decision, plaintiff's claim for alienation of affections is not facially barred by the statute of limitations.

III. CONCLUSION

We affirm that part of the decision of the Court of Appeals holding plaintiff was entitled to an immediate appeal. We reverse the decision of the Court of Appeals upholding summary judgment in favor of the defendant. The case is remanded to that court for further remand to the Wake County Superior Court for proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

STATE OF NORTH CAROLINA v. ABDUL JERMAINE CORBETT

No. 98A05

(Filed 27 January 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 168 N.C. App. 117, 607 S.E.2d 281 (2005), finding no error in the judgments and commitments entered 1 July 2003 by Judge A. Leon Stanback in Superior Court, Wake County. Heard in the Supreme Court 16 May 2005.

Roy Cooper, Attorney General, by Susan R. Lundberg, Assistant Attorney General, for the State.

Marilyn G. Ozer for defendant-appellant.

PER CURIAM.

AFFIRMED.

Armstrong v. Ledges Homeowners Ass'n Case Below: 174 N.C. App. 172	No. 640P05	Plts' Armstrong PDR Under N.C.G.S. § 7A-31 (COA05-88)	Allowed 01/26/06
Barber v. Burke Case Below: 174 N.C. App. 365	No. 672P05	Def's PDR Under N.C.G.S. § 7A-31 (COA05-24)	Denied 01/26/06
Beale v. Manley Case Below: 169 N.C. App. 455	No. 251P05	Plt-Appellant's PDR Under N.C.G.S. § 7A-31 (COA04-809)	Denied 01/26/06
Blue Ridge Sav. Bank v. Best & Best, PLLC Case Below: 172 N.C. App. 170	No. 494PA05	1. Plt's PWC to Review Order of Buncombe County Superior Court (COA04-1357) 2. Plt's and Def's Motion to Withdraw Appeal	1. —- 2. Allowed 01/26/06
Boggess v. Spencer Case Below: 173 N.C. App. 614	No. 632P05	Defs' PDR Under N.C.G.S. § 7A-31 (COA05-118)	Denied 01/26/06
Boice-Willis Clinic, P.A. v. Seaman Case Below: 175 N.C. App. 246	No. 002P06	Def's Motion for Temporary Stay (COA05-298)	Allowed pending determination of defendant's PDR 01/09/06
Brown v. N.C. Dep't of Corr. Case Below: 173 N.C. App. 756	No. 715P05	Plt's Motion for PDR Under N.C.G.S. § 7A-31 (COA04-1342)	Denied 01/26/06
Chavis v. T.L.C. Home Health Care Agency, Inc. Case Below: 172 N.C. App. 366	No. 531A05	Def's Motion to Dismiss Appeal (COA04-1454)	Allowed 01/03/06
Citicorp Tr. Bank, FSB v. Vaughan Case Below: 172 N.C. App. 170	No. 475P05	Def's (Randy and Sandra Hammitt) PDR Under N.C.G.S. § 7A-31 (COA04-1364)	Denied 01/26/06

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

Craven v. Demidovich Case Below: 172 N.C. App. 340	No. 497P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-1193)	Denied 11/03/05
Daniels v. Durham Cty. Hosp. Corp. Case Below: 171 N.C. App. 535	No. 554P05	Plt-Appellants' PDR Under N.C.G.S. § 7A-31 (COA04-338)	Denied 01/26/06
Dixon v. Hill Case Below: 174 N.C. App. 252	No. 667P05	Def's (Palmetto) PDR Under N.C.G.S. § 7A-31 (COA04-86)	Denied 01/26/06
Dove v. Davis Case Below: 168 N.C. App. 595	No. 140P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-810)	Denied 01/26/06
Dove v. Harvey Case Below: 168 N.C. App. 687	No. 174P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-477)	Denied 01/26/06 **Martin, J. Recused**
Harvey v. McLaughlin Case Below: 172 N.C. App. 582	No. 553P05	Def's PDR (COA04-1597)	Denied 01/26/06
In re B.D. Case Below: 174 N.C. App. 234	No. 317P05-2	Respondents' (Mother & Father) PDR Under N.C.G.S. § 7A-31 (COA03-1599-2)	Denied 01/26/06
In re C.L.C., K.T.R., A.M.R., E.A.R. Case Below: 171 N.C. App. 438	No. 467A05	1. Appellant's (Lisa Murray) NOA (Dissent) (COA04-471) 2. Appellant's (Lisa Murray) PDR as to Additional Issues	1. —- 2. Allowed 01/26/06
In re As.L.G. & Au.R.G. Case Below: 173 N.C. App. 551	No. 624PA05	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA04-1226)	Allowed 01/26/06

Jacobs v. Physicians Weight Loss Ctr. of Am. Inc. Case Below: 173 N.C. App. 663	No. 681P05	Defs' PWC to Review Decision of COA (COA04-644)	Denied 01/26/06
Javurek v. Jumper Case Below: 168 N.C. App. 718	No. 191A05	Plt's NOA Based Upon a Constitutional Question (COA04-466)	Dismissed ex mero motu 01/26/06
Johnson v. Colonial Life & Accident Ins. Co. Case Below: 173 N.C. App. 365	No. 635P05	Def's (Colonial Life & Accident Ins. Co.) PDR Under N.C.G.S. § 7A-31 (COA04-1515)	Denied 01/26/06
Lewis v. Beachview Exxon Serv. Case Below: 174 N.C. App. 179	No. 645A05	1. Defs' NOA (Dissent) (COA04-711) 2. Defs' PDR as to Additional Issues	1. —- 2. Allowed 01/26/06
Mayfield v. Hannifin Case Below: 174 N.C. App. 386	No. 699P05	Def's Motion for Temporary Stay (COA04-1646)	Denied 12/20/05
McLamb v. T.P., Inc. Case Below: 173 N.C. App. 586	No. 663P05	Plts' PDR Under N.C.G.S. § 7A-31 (COA04-1472)	Denied 01/26/06
Melton v. Tindall Corp. Case Below: 173 N.C. App. 237	No. 596P05	Plt's (Robert Christopher Melton) PDR Under N.C.G.S. § 7A-31 (COA04-1244)	Denied 01/26/06 **Martin, J. Recused**
State v. Bellamy Case Below: 172 N.C. App. 649	No. 506P05	1. Def's (Keith Lamar Bellamy) NOA Based Upon a Constitutional Question (COA04-550) 2. Def's (Keith Lamar Bellamy) PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal and Deny PDR	1. —- 2. Denied 01/26/06 3. Allowed 01/26/06

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

State v. Boulware Case Below: 173 N.C. App. 641	No. 613P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1609)	Denied 01/26/06
State v. Bradley Case Below: 175 N.C. App. 234	No. 021P06	AG's Motion for Temporary Stay (COA05-410)	Allowed 01/13/06
State v. Caudle Case Below: 172 N.C. App. 261	No. 433P05	1. AG's Motion for Temporary Stay (COA03-1576) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed 08/16/05 359 N.C. 854 2. Denied 10/06/05
State v. Celaya Case Below: 174 N.C. App. 626	No. 697P05	1. Def's NOA Based Upon a Constitutional Question (COA05-95) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed ex mero motu 01/26/06 2. Denied
State v. Copeland Case Below: 168 N.C. App. 729	No. 292P05	Def's Motion for "NOA" (COA04-534)	Dismissed ex mero motu 01/26/06
State v. Curry Case Below: 171 N.C. App. 568	No. 429P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-776)	Denied 01/26/06
State v. Davis Case Below: 173 N.C. App. 642	No. 627P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1672)	Denied 01/26/06
State v. Dierdorf Case Below: 173 N.C. App. 753	No. 618P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1685)	Denied 01/26/06
State v. Duarte Case Below: 174 N.C. App. 626	No. 653P05	1. AG's Motion for Temporary Stay (COA04-1455) 2. Def's Motion for Appeal	1. Allowed (12/01/05) 360 N.C. 178 2. Dismissed ex mero motu 01/26/06
State v. Fowler Case Below: 174 N.C. App. 627	No. 690P05	Def's PDR Under N.C.G.S. § 7A-31 (COA05-435)	Denied 01/26/06

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

State v. Golphin Case Below: Cumberland County Superior Court	No. 441A98-3	1. Def's PWC to Review the Decision of the Cumberland Co. Superior Court (97CRS47312) 2. Def's Motion to Deem PWC Timely Filed 3. Def's Motion to Hold Petition Pending The U.S. Supreme Court's Decision in *Roper v. Simmons* 4. Def's Supplemental Motion to Hold Petition Pending The U.S. Supreme Court's Decision in *Roper v. Simmons*	1. Dismissed as moot 01/26/06 2. Dismissed as moot 01/26/06 3. Dismissed as moot 01/26/06 4. Dismissed as moot 01/26/06
State v. Goode Case Below: Johnston County Superior Court	No. 10A94-6	1. Def's Motion to Deem Delivery Date of Transcript on 10 November 2005 2. Def's Motion to Hold in Abeyance the Time in Which to File the PWC 3. Def's Motion to Extend Time to File PWC on 02/09/06	1. Allowed 11/17/05 2. Denied 12/15/05 3. Allowed 12/21/05
State v. Hall Case Below: 173 N.C. App. 735	No. 644P05	1. Def's NOA Based Upon a Constitutional Question (COA04-1626) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —- 2. Allowed 01/26/06 3. Denied 01/26/06
State v. Hankins Case Below: 174 N.C. App. 627	No. 701P05	1. AG's Motion for Temporary Stay (COA04-1079) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PWC to Review Decision of the COA	1. Denied 12/27/05 2. Denied 01/26/06 3. Denied 01/26/06 4. Denied 01/26/06
State v. Harris Case Below: 175 N.C. App. 360	No. 025P06	AG's Motion for Temporary Stay (COA05-111)	Allowed 01/18/06
State v. Jackson Case Below: 165 N.C. App. 546 359 N.C. 284	No. 424P04-2	Def's Motion for Reconsideration (COA03-357)	Dismissed 01/26/06

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

State v. Jacobs Case Below: 174 N.C. App. 627	No. 702P05	1. Def's PDR Under N.C.G.S. § 7A-31 (COA04-1499) 2. Def's PWC to Review the Decision of the COA	1. Denied 01/26/06 2. Denied 01/26/06
State v. Johnson Case Below: 173 N.C. App. 642	No. 631P05	Def's PDR Under N.C.G.S. § 7A-31 (COA05-29)	Denied 01/26/06
State v. Jordan Case Below: 174 N.C. App. 479	No. 711P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1380)	Denied 01/26/06
State v. Lawson Case Below: 173 N.C. App. 270	No. 543P05	1. AG's PDR Under N.C.G.S. § 7A-31 (COA04-564) 2. AG's Petition for Writ of Supersedeas	1. Denied 01/26/06 2. Denied 01/26/06
State v. LeGrande Case Below: Stanly County Superior Court	No. 462A01-11	1. Def's PWC 2. Def's Motion for Civil Claim Against the State for Malicious and Deliberate Erroneous Convictions and Sentence of Death in Capital Case 95CRS567, 847	1. Denied 01/26/06 2. Dismissed 01/26/06
State v. Ley Case Below: 173 N.C. App. 642	No. 628P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-267)	Denied 01/26/06
State v. Locklear Case Below: 174 N.C. App. 840	No. 013P06	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1577)	Denied 01/26/06
State v. Martin Case Below: 174 N.C. App. 628	No. 665P05	Def's PDR Under N.C.G.S. § 7A-31 (COA05-366)	Dismissed 01/26/06
State v. Mason Case Below: 174 N.C. App. 206	No. 654P05	1. Def-Appellant's NOA Under N.C.G.S. § 7A-30 (COA04-1565) 2. AG's Motion to Dismiss Appeal 3. Def-Appellant's PDR Under N.C.G.S. § 7A-31 (COA04-1476)	1. —- 2. Allowed 01/26/06 3. Denied 01/26/06

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

State v. McKinney Case Below: 174 N.C. App. 138	No. 622PA05	1. AG's Motion for Temporary Stay (COA04-1653) 2. AG's Petition for Writ of Supersedeas 3. AG's NOA Based Upon a Constitutional Question 4. AG's PDR Under N.C.G.S. § 7A-31 5. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 11/07/05 2. Allowed 01/26/06 3. Dismissed ex mero motu 01/26/06 4. Allowed 01/26/06 5. Denied 01/26/06
State v. Middlebrooks Case Below: 174 N.C. App. 367	No. 669P05	1. Def's NOA Based Upon a Constitutional Question (COA04-1662) 2. AG's Motion to Dismiss Appeal 3. Def's PDR	1. —- 2. Allowed 01/26/06 3. Denied 01/26/06
State v. Oglesby Case Below: 174 N.C. App. 658	No. 683P05	AG's Motion for Temporary Stay (COA04-1534)	Allowed 12/12/05
State v. Pittman Case Below: 174 N.C. App. 745	No. 694P05	AG's Motion for Temporary Stay (COA04-417)	Allowed Pending determination of the State's PDR 12/19/05
State v. Pitts Case Below: 167 N.C. App. 372	No. 027P05	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1636)	Denied 01/26/06
State v. Roberson Case Below: 174 N.C. App. 840	No. 707P05	AG's Motion for Temporary Stay (COA04-1645)	Allowed 12/21/05
State v. Rogers Case Below: Halifax County Superior Court	No. 373A00-2	Def's PWC to Review the Order of Superior Court	Denied 01/26/06
State v. Rogers Case Below: 171 N.C. App. 367	No. 685P05	1. Def's Motion for "NOA N.C.G.S. § 7A-31 (1)" (COA04-1168) 2. Def's Motion for "PDR (N.C.G.S. § 7A-31)"	1. Dismissed ex mero motu 01/26/06 2. Denied 01/26/06

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

State v. Simpson Case Below: Halifax County Superior Court	No. 043A93-3	Def's PWC to Review Rockingham County Superior Court	Denied 01/19/06
State v. Sinclair Case Below: 174 N.C. App. 841	No. 718P05	Def's NOA Based Upon a Constitutional Question (COA05-483)	Dismissed ex mero motu 01/26/06
State v. Smith Case Below: 170 N.C. App. 437	No. 580P05	Def's Motion for PDR Pursuant to N.C.G.S. § 7A-31 (B) (1) (2) (COAP05-922, COAP05-866, COA03-1033)	Denied 01/26/06
State v. Teaster Case Below: 173 N.C. App. 643	No. 623P05	1. Defendant's NOA Based Upon a Constitutional Question (COA04-1476) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —- 2. Allowed 01/26/06 3. Denied 01/26/06
State v. Thai Case Below: 175 N.C. App. 249	No. 007P06	AG's Motion for Temporary Stay (COA05-347)	Allowed 01/10/05
State v. Verrett Case Below: 173 N.C. App. 643	No. 633P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1713)	Denied 01/26/06
State v. Walker Case Below: 167 N.C. App. 110	No. 016P05-2	AG's Motion for Temporary Stay (COA03-1426)	Allowed 08/26/05
State v. Windley Case Below: 173 N.C. App. 187	No. 259P05	1. Def's PWC (COA04-588) 2. AG's Motion for Temporary Stay 3. AG's Petition for Writ of Supersedeas 4. AG's PDR Under N.C.G.S. § 7A-31	1. Dismissed 01/26/06 2. Allowed Pending Determination of the State's PDR **09/26/05** 360 N.C. 77 Stay Dissolved **01/26/06** 3. Denied 01/26/06 4. Denied 01/26/06

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

State v. Yang Case Below: 174 N.C. App. 755	No. 705P05	1. AG's Motion for Temporary Stay (COA04-1206) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/21/05** Stay Dissolved **01/26/06** 2. Denied 01/26/06 3. Denied 01/26/06
Stegenga v. Burney Case Below: 174 N.C. App. 196	No. 642P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-1726)	Denied 01/26/06 **Martin, J. Recused**
Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C. Case Below: 174 N.C. App. 49	No. 647P05	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA04-862) 2. Defs' Motion to Dismiss Petition	1. Dismissed 01/26/06 2. Allowed 01/26/06
Ward v. Wachovia Bank, N.A. Case Below: 174 N.C. App. 368	No. 666P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-246)	Denied 01/26/06
Wendt v. Tolson Case Below: 172 N.C. App. 594	No. 544P05	1. Petitioner's NOA App. Rule 14 (b)(2) (COA03-1680) 2. AG's Motion to Dismiss Appeal	1. —- 2. Allowed 01/26/06
Windman v. Britthaven, Inc. Case Below: 173 N.C. App. 630	No. 641P05	1. Defs' Motion for Temporary Stay (COA04-1414) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Plt's Motion to Vacate Temporary Stay	1. Allowed 11/21/05 360 N.C. 180 2. Denied 01/26/06 3. Denied 01/26/06 4. Allowed 01/26/06

STATE OF NORTH CAROLINA v. SCOTT DAVID ALLEN

No. 115A04

(Filed 3 March 2006)

1. Constitutional Law— fair trial—knowing use of false testimony

There was no violation of defendant's right to a fair trial through the knowing use of false testimony where the evidence was not verifiably false or known to be false by the prosecution. There is a difference between the knowing presentation of false testimony and knowing that testimony conflicts in some manner.

2. Criminal Law— prosecutor's closing argument—inferences

There was no plain error in a closing argument in which the prosecutor's inferences from the evidence were reasonable.

3. Criminal Law— prosecutor's argument—jury's observations—size of witness

It was reasonable for a prosecutor to argue that it would be hard to imagine an accomplice shooting the victim because of the angle of the shooting and the size of the accomplice. The jury had the opportunity to observe the accomplice's characteristics when she testified; the evidence is not only what jurors hear from the stand, but what they witness in the courtroom.

4. Criminal Law— prosecutor's argument—victim firing weapon

There was sufficient evidence in a first-degree murder prosecution to support the prosecutor's argument that the victim had fired his handgun around the time of the murder. Moreover, it was a reasonable inference that the victim's handgun simply jammed.

5. Sentencing— discretion to proceed capitally—reliance on testimony of accomplice

The testimony of an accomplice is sufficient to uphold a criminal conviction, and the prosecution here did not abuse its discretion by proceeding capitally based on the testimony of accomplices after enactment of N.C.G.S. § 15A-2004(a) (2005) (which granted prosecutors discretion in determining whether to pursue the death penalty when an aggravating circumstance exists).

6. Sentencing— capital—victim impact statement—dream of victim's death

The trial court did not err by not intervening ex mero motu during a victim impact statement in a capital sentencing proceeding. Although the witness testified that she "dreamed the dream or the reality" and "knew" her brother "had been shot," there is nothing in the testimony to indicate that she was describing a supernatural experience in which she witnessed the event. Regardless, defendant presented nothing to indicate that the jury was unduly swayed by this testimony.

7. Sentencing— capital—aggravating circumstance—especially heinous, atrocious or cruel—sufficiency of evidence

There was sufficient evidence for submission of the especially heinous, atrocious, or cruel aggravating circumstance in a capital sentencing proceding where defendant first fired with buckshot from close range with a twelve-gauge shotgun; that blast would likely have been fatal, but defendant shot his victim again, in the knee, with birdshot, leaving him incapacitated and guaranteeing that he would be unable to seek assistance or defend himself; although the medical examiner testified that the victim would likely have been rendered unconscious within minutes, eyewitness testimony was that the victim was not immediately rendered unconscious; defendant crept to the victim on his stomach, throwing rocks to see if the victim was dead; the victim cried out in pain from the rocks; and the victim was aware of his impending death as he lay on the ground, unable to change the outcome.

8. Sentencing— capital—aggravating circumstance—pecuniary gain—sufficiency of evidence

There was sufficient evidence to submit the pecuniary gain aggravating circumstance in a capital sentencing proceeding where the evidence tended to show that defendant first murdered the victim and stole his truck, then sent his girlfriend to the victim's house for the victim's wallet; he directed use of the victim's ATM card to obtain cash for drugs, and finally sold the truck to finance his escape. Although he did not take nearly $2,000 which the victim had in his possession at the shooting, the victim had a firearm which he tried to fire at least once and the jury could reasonably have believed that defendant did not take the money because of fear.

9. Constitutional Law— double jeopardy—pecuniary gain aggravating circumstance—felony murder

The submission of the pecuniary gain aggravating circumstance in a capital sentencing proceeding did not violate the bar against double jeopardy where the jury had not found defendant guilty of felony murder and defendant argued that both the felony murder allegation and the pecuniary gain aggravator were based on the same evidence. Contrary to its instructions, the jury did not mark anything on the verdict form concerning felony murder; the jury's failure to follow instructions does not amount to an acquittal where the defendant was also convicted of first-degree murder on another theory.

10. Sentencing— capital—aggravating circumstances—instructions

The trial court did not err in a capital sentencing proceeding when it instructed the jury that "our law identifies the aggravating circumstances which must justify a sentence of death. Or which might justify a sentence of death." No prejudice to defendant occurred by the court's quickly corrected slip of the tongue.

11. Sentencing— capital—residual doubt instruction—refused

The trial court did not err in a capital sentencing proceeding by not giving a requested residual doubt instruction. As the U.S. Supreme Court has said, sentencing concerns how rather than whether defendant committed the crime.

12. Constitutional Law— effective assistance of counsel—further factual inquiry

A first-degree murder defendant's contentions regarding ineffective assistance of counsel were dismissed without prejudice where further factual inquiry was required.

13. Homicide— first-degree murder—short-form indictment—constitutional

A short-form indictment for first-degree murder was sufficient.

14. Homicide— first-degree murder—indictment—aggravating circumstances not listed

The trial court had jurisdiction to enter a death sentence where the indictment did not list the aggravating circumstances to be proven by the State during the penalty phase.

15. Sentencing— capital—aggravating circumstances—especially heinous, atrocious, or cruel—not unconstitutionally vague

The jury instruction on the especially heinous, atrocious, or cruel aggravating circumstance is not unconstitutionally vague and overbroad.

16. Sentencing— capital—mitigating circumstances—instruction—burden of proof

Using the word "satisfy" in an instruction on burden of proof in mitigating circumstances was not vague and subjective, and did not create a standardless standard.

17. Sentencing— capital—time for appeal—not torturous

The time for appeals in capital cases and the conditions of detention while awaiting appeal do not violate Article VII of the International Covenant on Civil and Political Rights. Article VII condemns torture; it is not torturous to allow a defendant to appeal his conviction and sentence. A defendant's rights are not violated merely because he chooses to subject himself to the rigors of judicial review. Moreover, the United States deposited a reservation to the ICCPR concerning capital punishment.

18. Sentencing— death—proportionate

A death penalty was not disproportionate when compared with other cases.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Anderson D. Cromer on 18 November 2003 in Superior Court, Montgomery County, upon a jury verdict finding defendant guilty of first-degree murder. On 6 December 2004, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of an additional judgment. Heard in the Supreme Court 14 September 2005.

Roy Cooper, Attorney General, by Robert C. Montgomery and Daniel P. O'Brien, Assistant Attorneys General, for the State.

Staples S. Hughes, Appellate Defender, by Barbara S. Blackman, Assistant Appellate Defender, for defendant-appellant.

BRADY, Justice.

On 9 July 1999, defendant Scott David Allen, his girlfriend Vanessa Smith, and Christopher Gailey entered the Uwharrie National Forest on their way to a cabin located deep therein. While in the forest, defendant shot Christopher Gailey twice, once in the back and once in the knee, with a twelve-gauge shotgun. Christopher Gailey died as a result of these wounds. On 24 January 2000, defendant was indicted by the grand jury of Montgomery County for the murder of Christopher Gailey, felonious larceny, and felonious possession of stolen goods. On 13 November 2003, a jury found defendant guilty of all charges. On 18 November 2003, the same jury returned a binding recommendation of death, and the trial court sentenced defendant accordingly. The trial court consolidated the two remaining offenses for judgment and sentenced defendant in the presumptive range to an active term of incarceration of ten to twelve months. Defendant appealed his convictions and sentence of death to this Court pursuant to N.C.G.S. § 7A-27(a). We find no error in defendant's conviction or his sentence.[1]

FACTUAL BACKGROUND

Before his 1998 escape from a North Carolina Department of Corrections work release program in which he was serving a sentence for numerous felony breaking or entering and felony larceny convictions, defendant met Vanessa Smith and they became romantically involved. Immediately following defendant's escape from the work release program, he met Smith in a parking lot, and the couple began moving around from hotel to hotel in this state, which Smith paid for with proceeds from a large settlement arising from her father's death. The couple also traveled to and resided sporadically in Chicago, Illinois; Spokane, Washington; San Diego, California; and Denver, Colorado, continuing to live primarily from the proceeds of Smith's settlement and spending large amounts of money on illegal drugs. Notably, while in Spokane, Smith paid a friend, Byron Johnson, five hundred dollars for a copy of his birth certificate and another

1. While defendant assigns error to all his convictions, he has presented no argument in his brief concerning these convictions other than his conviction of first-degree murder and the death sentence which arose from that conviction. "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C. R. App. P. 28(b)(6) (2005); *See State v. McNeill*, 360 N.C. 231, 624 S.E.2d 329, 336 (2006); *State v. Augustine*, 359 N.C. 709, 731 n.1, 616 S.E.2d 515, 531 n.1 (2005). Accordingly, the assignments of error related to defendant's non-capital convictions are taken as abandoned and dismissed.

identifying document. Defendant subsequently obtained a driver's license from the State of Washington in the name of Byron Johnson.

Defendant's travels eventually brought him back to North Carolina, and in the summer of 1999, defendant, identifying himself as Byron Johnson, moved into a mobile home near Badin Lake, and Smith soon moved in with him. This mobile home was owned by Robert Johnson. In addition to defendant and Smith, Robert Johnson, Christopher Gailey, and Danny Lanier and his family resided in the mobile home. Christopher Gailey and defendant were long-time friends, but Smith never considered Gailey a friend. Life at the mobile home consisted of heavy partying, drinking, and drug abuse. Much of the drugs were provided by Gailey.

On 9 July 1999, the day of the murder, defendant told Smith and Gailey he had stashed some firearms in a cabin in the Uwharrie Forest, and they should retrieve them to sell the firearms for drugs. Robert Johnson testified he saw the three leave in Danny Lanier's truck, while Smith testified they left in Gailey's vehicle, a GMC pickup truck valued at $16,000. The three arrived that evening at the Uwharrie Forest, after which they entered the forest and walked for what Smith described as at least an hour. Smith smoked marijuana while defendant and Gailey used cocaine. Gailey carried a .45 caliber handgun, while defendant carried Gailey's twelve-gauge shotgun with a black pistol grip.

As they walked single file down a very narrow trail, defendant pushed Smith to the ground. He then fired the shotgun twice, first delivering a heavy buckshot blast into Gailey's back, and then firing lighter birdshot into Gailey's knee. Smith testified that she and defendant then went to the nearby cabin to sit and wait for Gailey to die. According to Smith's testimony, for seven to eight hours after defendant shot Gailey, he would creep over on his stomach to Gailey's body to throw rocks at him to discover if he would make a noise. During this waiting period, defendant told Smith that Gailey would never call her a "bitch" again and that he could not believe Gailey turned on him and was going to "rat him off" by reporting his location to the authorities. Eventually, defendant and Smith left the forest. On their way out, defendant told Smith that their story would be someone in the forest shot Gailey, and that a guy named Dustin had reason to want to harm Gailey. Smith testified that she heard Gailey fire his handgun numerous times as the couple left the forest.

Next, at defendant's direction Smith drove back to the trailer to get their belongings and to steal Gailey's wallet which included Gailey's automated teller machine (ATM) card. Smith ingested eight Xanax pills and then, driving Gailey's truck picked up defendant near the Uwharrie Forest, where he had previously hid the shotgun used in the murder. The couple then drove to Shallotte, North Carolina, to see Smith's friend, Jeff Brantley. Apparently Smith and defendant talked to some of the partygoers at Brantley's residence, one of whom was Jeffrey Page. Defendant wanted to sell Gailey's truck to Page for eight hundred dollars, and he explained to Page that the truck was owned by a "fellow" he shot in the forest. Smith testified she did not remember much that occurred in Shallotte, save a few times when defendant forced her to use Gailey's ATM card, until she woke up two days later at her former lesbian lover Lilly Efird's home.

Page decided to purchase the truck, and on 12 July 1999, drove to Albemarle, North Carolina along with Brantley, and two other men, to acquire the funds for the purchase. Upon their return to Shallotte, Page purchased the truck from defendant. Page subsequently sold the truck to a junk dealer in South Carolina.

Defendant, eight hundred dollars in hand, left for Denver once again. Smith and Efird traveled to Shallotte, and Smith borrowed, or according to Efird stole, Efird's money and car in order to travel to Denver to see defendant, believing she was pregnant with defendant's baby. After she arrived in Denver, she argued with defendant and became afraid he was going to kill her. Therefore, she returned to North Carolina and turned herself into the Charlotte-Mecklenburg Police, recounting the facts of the murder. Defendant was soon arrested in Denver. He made no incriminating statements and continually denied committing the murder during his post-arrest interrogation.

Gailey's body was discovered on 11 July 1999 when Wesley Hopkins drove by it during an all-terrain vehicle expedition in the Uwharrie National Forest. John Butts, M.D., the State's Chief Medical Examiner, stated the autopsy of Gailey showed a shotgun wound to the back that exited in five different locations on the victim's right chest. This wound caused extensive bleeding and damage to his lung, ribs, and large blood vessels. According to Dr. Butts, this wound would have rendered the victim unconscious in a matter of minutes, and death would have followed relatively quickly. Additionally, the shot to the knee incapacitated Gailey such that he would have been

unable to move or seek medical assistance. Dr. Butts was of the opinion it would have been extremely unlikely, considering the amount of blood lost, a person with those wounds would have survived even one or two hours.

Law enforcement found at the scene of the crime five spent shotgun shells, numerous live .45 caliber cartridges in a pouch attached to Gailey's belt loop, a full magazine for a .45 caliber handgun, and a .45 caliber handgun with one expended .45 caliber round casing still chambered. A yellow container found on or near Gailey's body contained $1,944.05 in currency.

Defendant presented no evidence during the guilt-innocence proceeding of the trial. The jury returned verdicts of guilty of first degree murder based on a theory of malice, premeditation, and deliberation; larceny; and felonious possession of stolen goods.

In the penalty proceeding, the State presented victim impact evidence by way of Gailey's mother, father, and sister. Defendant presented testimony of family members, a former teacher's assistant, and an expert who opined defendant would adapt well to prison life. The statutory aggravating circumstances submitted to the jury for consideration were: (1) The murder was committed for the purpose of avoiding or preventing a lawful arrest; (2) the murder was committed for pecuniary gain; and (3) the murder was especially heinous, atrocious, or cruel. The jury answered all of these aggravating factors in the affirmative. The jury also found two nonstatutory mitigating factors: (1) Scott Allen was deeply affected by the death of his grandfather; and (2) Scott Allen's death would have a detrimental impact on his mother, father, daughter, and other family members. The jury found unanimously and beyond a reasonable doubt that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to impose a sentence of death. The jury therefore returned a binding recommendation of death.

ANALYSIS

GUILT-INNOCENCE PROCEEDING ISSUES

[1] Defendant alleges the prosecution violated his right to a fair trial by the knowing use of false testimony. This Court has previously stated:

> [I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must

> fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Further, with regard to the knowing use of perjured testimony, the Supreme Court has established a standard of materiality under which the knowing use of perjured testimony requires a conviction to be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Thus, [w]hen a defendant shows that testimony was in fact false, material, and knowingly and intentionally used by the [S]tate to obtain his conviction, he is entitled to a new trial.

State v. Williams, 341 N.C. 1, 16, 459 S.E.2d 208, 217 (1995) (alterations in original) (quotation marks and citations omitted), *cert. denied*, 516 U.S. 1128 (1996). We note today there is a difference between the knowing presentation of false testimony and knowing that testimony conflicts in some manner. It is for the jury to decide issues of fact when conflicting information is elicited by either party. *See*, *e.g.*, *State v. Boykin*, 298 N.C. 687, 694, 259 S.E.2d 883, 888 (1979), *cert. denied*, 442 U.S. 911 (1980). In fact, if inconsistent information is elicited from a witness, the party who called that witness may impeach him or her. *See* N.C.G.S. § 8C-1 Rule 607 (2005).

Here, defendant argues the prosecution violated defendant's constitutional rights by offering two portions of Smith's testimony. First, defendant contends Smith's testimony she and defendant waited seven to eight hours in the Uwharrie Forest for the victim to die and they left the scene while he was still alive was demonstrably false testimony and known to be so by the prosecution. Second, defendant contends Smith's testimony that she "heard, I'm assuming it was Chris empty his gun out" was also demonstrably false and known to be so by the prosecution.

As to defendant's first contention, we note the length of time it took the victim to die in this case is not easily proved. While the State Medical Examiner, Dr. John Butts, testified Gailey would not have survived as long as seven to eight hours, that testimony was his medical opinion. It cannot be said either Smith's statement or the opinion of Dr. Butts is verifiably false, much less that Smith's statement was knowingly false when elicited. In fact, during closing arguments, the prosecution admitted that Smith's perception of time "may not have been correct." Merely because inconsistent testimony is presented, it does not follow that such testimony is knowingly and demonstrably false.

Similarly, the testimony about the "emptying" of the victim's handgun, while unlikely to be accurate, cannot be said to have been known as false by the prosecution. Smith was a confessed drug addict and under the influence of drugs at the time of the murder. This, along with her prior convictions and other circumstances of her lifestyle revealed at defendant's trial, made her a witness with less-than-perfect credibility.

However, the prosecution did not violate defendant's constitutional rights by submitting conflicting testimony when nothing in the record tends to show the prosecution knew the testimony was false. The prosecution could have truly believed Smith was simply mistaken and did not hear as many shots as she thought due to her drug abuse or just plain fear. Because we are unpersuaded the prosecution knew Smith intended to make false statements, we overrule defendant's assignment of error.

CLOSING ARGUMENT ISSUES

Defendant claims the prosecution's closing arguments in both the guilt-innocence and penalty proceedings violated notions of fundamental fairness because the prosecution "plugged a crucial hole" by mentioning evidence outside the record. Defendant notes five instances in which he alleges the prosecution's argument contained facts outside the evidence presented: (1) Defendant devised a plan to lure Gailey into the woods in order to murder him; (2) a cache of firearms was never discovered in the woods; (3) the weather was hot on 9 July 1999 in the Uwharrie forest, which purportedly explained why Gailey's shirt was found lying on the ground; (4) that it would be impossible for Smith to inflict the deadly wounds upon Gailey due to the height differential between them; and (5) Gailey fired his .45 caliber handgun once, after which the handgun jammed.

In a hotly contested trial, such as a capital case, "[t]he scope of jury arguments is left largely to the control and discretion of the trial court, and trial counsel will be granted wide latitude." *State v. Call*, 349 N.C. 382, 419, 508 S.E.2d 496, 519 (1998). Counsel may argue any facts in the record and any reasonable inference that may be drawn from any facts in the record. *See id.* Here, defendant did not object to any statements now complained of during the arguments before the trial court and now argues the trial court should have intervened *ex mero motu*. However, we will not find error in a trial court's failure to intervene in closing arguments *ex mero motu* unless the remarks were so grossly improper they rendered the trial and conviction fun-

damentally unfair. *Id.* at 419-20, 508 S.E.2d at 519. We disagree with defendant's contentions, and we find no error in the trial court's decision concerning this argument.

[2] Defendant's first contention that no evidence supported the statement made by the prosecution that defendant devised a plan to lure the victim into the forest is without merit. Defendant concedes in his brief that some evidence existed in the record to draw this inference—namely Smith's testimony that the victim did not usually hike in the woods, the victim did not want to go into the woods, and defendant talked the victim into entering the woods. It is a reasonable inference both the prosecution and the jury could make that defendant previously contrived a plan to lure his long-time friend into the forest for the purpose of ending his friend's life. Therefore, the prosecution's argument was consistent with N.C.G.S. § 15A-1230(a), which allows argument of any conclusion based on counsel's analysis if the conclusion is consistent with the evidence.

Similarly, a reasonable inference could be made that no firearms existed at the site where the body was found. As stated earlier, defendant allegedly told his victim he had stashed firearms in a cabin in the forest and they should retrieve the firearms to sell them. Smith testified that while they were walking in the forest, defendant changed his story about where the firearms were located. In addition, the only testimony concerning a weapon found at the scene of the crime was testimony about the victim's .45 caliber handgun. Because of the testimony establishing the only weapon at the scene of the crime was the handgun, it is reasonable to infer that in fact no firearms existed and thus the assertion made by defendant about the firearms constituted nothing more than a ploy to lure the victim into the forest for his execution.

A reasonable inference could also be drawn that the victim removed his own shirt during the hike into the woods. This matter is relevant because a photograph of the crime scene showed a large rock atop Gailey's shirt. Smith testified "[i]t was hot" on the day of the shooting, and a crime scene photograph of the victim's body clearly shows his shirt removed. It is reasonable to infer that the victim removed his shirt before he was shot and before the rocks were thrown at him.

[3] Defendant also takes issue with the prosecution's argument asserting it "would be hard to imagine" Smith shooting the victim because of her size. The jury had the opportunity to observe Smith's

physical characteristics when she testified. *See State v. Brown*, 320 N.C. 179, 199, 358 S.E.2d 1, 15 (discussing how "evidence is not only what [jurors] hear on the stand but what they witness in the courtroom."), *cert. denied*, 484 U.S. 970 (1987). The jury also heard testimony from Dr. John Butts, the State Medical Examiner, which confirmed the wounds traveled in such a manner that one could reasonably infer the shotgun pellets traveled slightly downward. Because the jury could see Smith's height, and could infer the pellets from the shotgun blast to the back traveled in a downward motion, it is a reasonable inference that it is unlikely Smith inflicted the wound.

[4] Defendant posits no evidence existed in the record tending to show the victim fired a firearm during the altercation. However, Smith testified she heard Gailey fire his handgun multiple times. Likewise, the crime scene technician testified a spent casing remained in Gailey's .45 caliber handgun. The prosecution needed to present no further evidence on this point in order to support a reasonable inference that Gailey fired his handgun during the time frame surrounding the murder. Similarly, we find it unnecessary for the State to present expert testimony on exactly what it means for a spent casing to be found inside a semiautomatic .45 caliber handgun, as it is a reasonable inference the handgun simply jammed. Therefore, the assignments of error are overruled.

PENALTY PHASE ISSUES

[5] Defendant claims the prosecution abused its discretion by proceeding capitally in this case after enactment of N.C.G.S. § 15A-2004(a) (2005).[2] We note first that defendant did not make this argument at trial, and we generally will not consider a theory on appeal that differs from the constitutional theory argued at the trial court. *See State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 519 (1988). Nonetheless, defendant's argument before this Court lacks merit. Defendant claims because the prosecution decided to proceed capitally, based in large part upon the testimony of two accomplices, it abused the discretion granted by section 15A-2004(a). As prosecutors have often realized, "to try the devil, you have to go to hell to get your witnesses." *See e.g.*, *State v. Bell*, 359 N.C. 1, 21, 603 S.E.2d 93, 107 (2004), *cert. denied*, —— U.S. ——, 125 S. Ct. 2299, 161 L. Ed. 2d

2. The General Assembly enacted this subsection, effective in 2001, to grant prosecutors discretion in determining whether to pursue the death penalty against a defendant even if substantial evidence supporting an aggravating circumstance exists.

1094 (2005). This Court has long held the testimony of an accomplice is sufficient to uphold a criminal conviction. *See State v. Bailey*, 254 N.C. 380, 385, 119 S.E.2d 165, 169 (1961) (" 'No one can seriously doubt that a conviction is legal, though it proceed upon the evidence of an accomplice only.' ") (quoting *Rex v. Jones*, 2 Camp. 131, 132 (1809) *reprinted in* 170 Eng. Rep. 1105 (1927)). Here the prosecution could reasonably believe the story told by the accomplices to be true and believable. While eyewitness testimony is often contradictory, the record in this case establishes the witnesses were consistent as to the basic facts. Also, the collective testimony and the evidence presented at trial supported the three aggravating circumstances found by the jury, as discussed elsewhere in this opinion.

Additionally, to prevail on a claim of prosecutorial abuse of discretion, defendant must show a discriminatory purpose and a discriminatory effect. *See State v. Garner*, 340 N.C. 573, 588, 459 S.E.2d 718, 725 (1995), *cert. denied*, 516 U.S. 1129 (1996). Here there is no evidence of either. The only assertion made by defendant is that because the evidence for a conviction rested heavily on the testimony of two accomplices whose criminal charges were reduced or dismissed in exchange for their testimony, this somehow makes the decision to prosecute the case capitally an abuse of discretion. We decline to find an abuse of discretion in this case and overrule defendant's assignment of error.

[6] Defendant alleges the trial court erred by failing to intervene, without objection from defendant, during allegedly inflammatory victim impact testimony from the victim's sister. The prosecution asked: "Ms. Overstreet, would you tell us how the death of your brother has impacted your life?" She answered:

> I'm a mom of four. One being my stepchild, two my daughters, and one son. I had my life going. I was a manager for a restaurant. I always served people with pride, left them with a smile. I felt things happening that night that nobody could ever experience, and I knew that my little brother, I know that he had been shot. I had dreamed the dream or reality. They became—I couldn't handle my job. I couldn't handle being around people. I suffered such severe panic attacks that I withdrew. I sought help for four and half years [sic] to be able to stand just this little bit of strength. My brother was my sidekick. I looked at him for happiness and joy because he made me complete. . . .

Ms. Overstreet continued testifying that defendant's act "destroyed my children's life because they see their mother in so much pain that words cannot describe." She also testified her world was "devastated" and that she lost her mind and ability to function.

Because defendant did not object to the testimony when given during the penalty proceeding, we review the statements only for plain error. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). In order to prevail on a theory of plain error, " 'defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.' " *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602 (quoting *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993), quoted in *State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12, *cert. denied*, 531 U.S. 1019 (2000)), *cert. denied*, 540 U.S. 988 (2003). Therefore, in this case defendant must convince this Court that Ms. Overstreet's testimony was error and but for that error the jury probably would have recommended a sentence of life without parole. Defendant has failed to meet this burden.

Victim impact statements are relevant and admissible to aid the jury in its decision whether to recommend a sentence of death. *See Payne v. Tennessee*, 501 U.S. 808, 825 (1991). North Carolina law allows victim impact testimony by statute. *See* N.C.G.S. § 15A-833 (2005); *State v. Roache*, 358 N.C. 243, 314-15, 595 S.E.2d 381, 426-27 (2004). The admissibility of victim-impact testimony is limited by the requirement that the evidence not be so prejudicial it renders the proceeding fundamentally unfair. *See State v. Nicholson*, 355 N.C. 1, 38-40, 558 S.E.2d 109, 135-36, *cert. denied*, 537 U.S. 845 (2002).

Defendant asserts Ms. Overstreet gave testimony as a "psychic" eyewitness to the event, entering into "the realm of the fantastic." We disagree. The witness was describing the emotional and psychological effect of the victim's death on her own life. Although she "dreamed the dream or the reality" and "knew" her brother "had been shot" there is nothing in the testimony to indicate she was describing some sort of supernatural experience in which she witnessed the event. She could just as easily have been describing what happened to her after discovering her brother's untimely death. Regardless, even if this testimony were error, defendant has presented nothing which would suggest the jury was unduly swayed by this testimony. Considering the three aggravating circumstances found, we cannot say that in the absence of this testimony the jury probably would

have recommended a sentence of life without parole. Defendant's assignment of error is overruled.

[7] Defendant argues the State presented insufficient evidence to support submission of the especially heinous, atrocious, or cruel aggravating circumstance (HAC) to the jury. N.C.G.S. § 15A-2000(e)(9) (2005). "In determining whether the evidence is sufficient to support the trial court's submission of the especially heinous, atrocious, or cruel aggravator, we must consider the evidence 'in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom.' " *State v. Flippen*, 349 N.C. 264, 270, 506 S.E.2d 702, 706 (1998) (quoting *State v. Lloyd*, 321 N.C. 301, 319, 364 S.E.2d 316, 328, *sentence vacated on other grounds*, 488 U.S. 807 (1988)), *cert. denied*, 526 U.S. 1135 (1999). We have previously characterized three types of murders for which submission of HAC may be proper:

> One type includes killings physically agonizing or otherwise dehumanizing to the victim. A second type includes killings less violent but "conscienceless, pitiless, or unnecessarily torturous to the victim," including those which leave the victim in her "last moments aware of but helpless to prevent impending death." A third type exists where "the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder."

State v. Gibbs, 335 N.C. 1, 61-62, 436 S.E.2d 321, 356 (1993) (citations omitted), *cert. denied*, 512 U.S. 1246 (1994).

Defendant argues his case is more like two cases in which this Court found evidence of HAC to be insufficient. *See State v. Lloyd*, 354 N.C. 76, 552 S.E.2d 596 (2001); *State v. Stanley*, 310 N.C. 332, 312 S.E.2d 393 (1984). Both *Lloyd* and *Stanley* involved murders committed by multiple gunshots occurring in rapid succession, resulting in the victim's quick incapacitation and loss of consciousness. However, the evidence in the case *sub judice* substantially supports a finding the murder was the second type of murder described above, one "less violent but 'conscienceless, pitiless, or unnecessarily torturous to the victim,' including those [murders] which leave the victim in [his] 'last moments aware of but helpless to prevent impending death.' " *State v. Gibbs*, 335 N.C. at 61-62, 436 S.E.2d at 356 (citations omitted).

Although there was evidence presented at trial through Dr. Butts that the victim would likely have been rendered unconscious within

a number of minutes, there was also evidence presented at trial through eyewitness testimony of Vanessa Smith that the victim was not immediately rendered unconscious. Defendant's first shot with buckshot was from close range with a twelve-gauge shotgun. The blast would have likely been fatal. Yet defendant shot his victim again, this time in the knee. In doing so, defendant left the victim totally incapacitated, guaranteeing he would be unable to seek medical assistance or defend himself. Additionally, at numerous times defendant would "creep" on his stomach to the victim, throwing rocks to see if the victim was dead. According to eyewitness testimony, the victim was not dead. As defendant threw the rocks at his victim's body, the victim cried out in pain. As the victim lay incapacitated on the ground, he was aware of his impending death, but unable to change the outcome. Defendant's throwing of the rocks and the corresponding groaning by the victim demonstrate the unnecessary torture inflicted by defendant. When viewing the evidence in the light most favorable to the State, we cannot say there was insufficient evidence to support the jury's consideration of HAC. Defendant's assignment of error is overruled.

[8] Defendant argues the prosecution presented insufficient evidence to submit the (e)(6) pecuniary gain aggravating circumstance to the jury. N.C.G.S. § 15A-2000(e)(6) (2005). As with the (e)(9) circumstance discussed above, in determining whether there was sufficient evidence for submission of the pecuniary gain aggravating circumstance, we consider " 'the evidence . . . in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom.' " *State v. White*, 355 N.C. 696, 710, 565 S.E.2d 55, 64 (2002) (quoting *State v. Moore*, 335 N.C. 567, 611, 440 S.E.2d 797, 822, *cert. denied*, 513 U.S. 898 (1994)), *cert. denied*, 537 U.S. 1163 (2003). If there is substantial evidence defendant's motive in the killing was the gain of something of pecuniary value, although not necessarily his only or primary motive, the circumstance is properly submitted. *See id.*; *see also State v. Bell*, 359 N.C. at 32, 603 S.E.2d at 114.

Here, the evidence tended to show that defendant, after murdering his victim, stole the victim's truck, directed his girlfriend to return to the victim's residence to take the victim's wallet, directed use of the victim's ATM card to obtain cash primarily for drug purchases, and then sold the victim's truck to finance his escape to Colorado. Defendant argues because he did not take the nearly $2,000 the victim had in his possession, the murder could not have been for

pecuniary gain. However, considering the victim had a firearm, which he tried to fire at least once, and, according to eyewitness testimony, was still conscious, the jury could have reasonably believed defendant did not take the money because of fear of his victim. We find submission of the pecuniary gain circumstance was supported by substantial evidence, and therefore overrule defendant's assignment of error.

[9] Defendant also argues submission of the pecuniary gain aggravating circumstance violated the bar against double jeopardy because the jury did not find defendant guilty under the felony murder rule, and both the felony murder allegation and pecuniary gain aggravator were based on the same evidence. Thus, according to defendant, as the jury did not return a verdict of guilty on a theory of felony murder, the trial court was prohibited from submitting pecuniary gain as an aggravating circumstance. We note at the outset defendant did not make this argument at trial and as a general rule this Court will not consider constitutional arguments raised for the first time on appeal. *See State v. Benson*, 323 N.C. at 322, 372 S.E.2d at 519. However, even if defendant had properly preserved this argument, it is without merit.

Defendant's theory that the jury's silence is tantamount to an acquittal is not supported by the jurisprudence of this Court. Contrary to the instructions given it by the trial court, the jury did not mark anything on the verdict form concerning felony murder under either a robbery with a dangerous weapon or attempted robbery with a dangerous weapon theory; however, the jury did find defendant guilty of first-degree murder on a theory of malice, premeditation, and deliberation. We have held numerous times that the jury's failure to follow the instructions of the trial court does not amount to an acquittal when the defendant was also convicted of first-degree murder on another theory. *See State v. Guevara*, 349 N.C. 243, 259, 506 S.E.2d 711, 721-22 (1998), *cert. denied*, 526 U.S. 1133 (1999); *State v. McCollum*, 334 N.C. 208, 220-22, 433 S.E.2d 144, 150-51 (1993), *cert. denied*, 512 U.S. 1254 (1994). While in some circumstances jury silence can be taken as an acquittal for double jeopardy purposes, "[t]he failure to return a verdict does not have collateral estoppel effect, however, unless the record establishes that the issue was actually and necessarily decided in the defendant's favor." *Schiro v. Farley*, 510 U.S. 222, 236 (1994). The record in this case does not establish the jury actually and necessarily decided this issue in defendant's favor. In fact the record shows defendant "was convicted

of first-degree murder and has not been acquitted of anything." *McCollum*, 334 N.C. at 221, 433 S.E.2d at 151. Therefore, we overrule defendant's assignment of error.

[10] Defendant argues the trial court committed reversible error when it instructed the jury: "Our law identifies the aggravating circumstances which must justify a sentence of death. Or which might justify a sentence of death." Citing several cases in support of his argument, defendant contends this assignment of error was properly preserved as the trial court gave an instruction which was not agreed upon by the parties. *See State v. Keel*, 333 N.C. 52, 56-57, 423 S.E.2d 458, 461 (1992); *State v. Montgomery*, 331 N.C. 559, 570, 417 S.E.2d 742, 748 (1992); *State v. Ross*, 322 N.C. 261, 264-65, 367 S.E.2d 889, 891 (1988); *State v. Pakulski*, 319 N.C. 562, 574-75, 356 S.E.2d 319, 327 (1987). In *Keel*, the trial court added language to a first-degree murder instruction from a footnote to the pattern jury instructions which concerned the intent required to convict a defendant of second-degree murder or voluntary manslaughter. *See Keel*, 333 N.C. at 56-57, 423 S.E.2d at 461-62. In *Montgomery*, the trial court deviated completely from the tendered instruction. 331 N.C. at 570-73, 417 S.E.2d at 748-50. In *Ross* and *Pakulski*, the trial court did not give the agreed-upon instruction, omitting it entirely. *See Ross*, 322 N.C. at 263-65, 367 S.E.2d at 890-91; *Pakulski*, 319 N.C. at 574-75, 356 S.E.2d at 327.

While the instruction given by the trial court here did not deviate from the agreed upon instruction to the extent of the cases cited above, the issue of the trial court's deviation was still properly preserved by defendant. Even so, when the jury charge is considered as a whole, no prejudice to defendant occurred by the trial court's quickly corrected slip of the tongue. While the original statement by the trial court indicated that death was mandated upon the finding of certain aggravating circumstances, the trial court quickly corrected the charge by stating, "[o]r which might justify a sentence of death." The trial court later instructed the jury it must weigh the aggravating circumstances found against the mitigating circumstances found, that it must consider whether the aggravating circumstances are "sufficiently substantial to call for the imposition of the death penalty," and that it was to do so considering the aggravating circumstances "in connection with any mitigating circumstances found by one or more of you." There is absolutely no merit in the argument that the jury could have been confused or believed it would be required to recommend a sentence of death based solely upon the finding of an

aggravating circumstance. This *lapsus linguae* of the trial court did not prejudice defendant, and therefore defendant's assignment of error is overruled.

RESIDUAL DOUBT

[11] Defendant asserts the trial court erred in denying his request to have a residual doubt instruction submitted to the jury. We have previously considered this issue and held a trial court is not required to give an instruction to a sentencing jury concerning residual doubt. *See State v. Fletcher*, 354 N.C. 455, 469-75, 555 S.E.2d 534, 543-46 (2001), *cert. denied*, 537 U.S. 846 (2002). As the Supreme Court of the United States recently noted, one justification for such a rule is that "sentencing traditionally concerns *how*, not *whether*, a defendant committed the crime." *Oregon v. Guzek*, 546 U.S. ——, 2006 U.S. LEXIS 1818, at *17 (2006) (holding the State of Oregon was not constitutionally required to allow a defendant to submit new alibi evidence during a penalty proceeding).

The Supreme Court of the United States has also rejected the argument that a defendant is entitled to jury instruction on residual doubt. *See Franklin v. Lynaugh*, 487 U.S. 164 (1988) (plurality); *see also id.* at 187-88 (O'Connor, J., concurring). Even though defendant has cited two Supreme Court cases, *Florida v. Nixon* and *Wiggins v. Smith*, which he claims have implicitly overruled *Franklin*, we disagree, because in neither case was residual doubt the issue before the Court. *See Florida v. Nixon*, 543 U.S. 175, 178 (2004) ("This capital case concerns defense counsel's strategic decision to concede, at the guilt phase of the trial, the defendant's commission of murder, and to concentrate the defense on establishing, at the penalty phase, cause for sparing the defendant's life."); *Wiggins v. Smith*, 539 U.S. at 514 ("Petitioner . . . argues that his attorneys' failure to investigate his background and present mitigating evidence of his unfortunate life history at his capital sentencing proceedings violated his Sixth Amendment right to counsel."). We therefore overrule defendant's assignment of error.

INEFFECTIVE ASSISTANCE OF COUNSEL

[12] Defendant argues his counsel's representation was ineffective and deprived him of his Sixth Amendment right to counsel, along with rights guaranteed under the North Carolina Constitution. Defendant asserts his counsel was ineffective by: (1) Failing to elicit from the witness who discovered the victim's body that his driving of

a four-wheel all-terrain vehicle could have altered the position of the rocks at the crime scene; (2) failing to object during the prosecution's guilt and penalty phase closing arguments; and (3) failing to take appropriate steps when prosecutors allegedly elicited and relied on false evidence.

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also State v. Poindexter*, 359 N.C. 287, 290-91, 608 S.E.2d 761, 764 (2005). Deficient performance may be established by showing that "counsel's representation 'fell below an objective standard of reasonableness.' " *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688). Generally, "to establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Id.* at 534 (quoting *Strickland*, 466 U.S. at 694).

Under *State v. Fair*, 354 N.C. 131, 166-67, 557 S.E.2d 500, 524-25 (2001), *cert. denied*, 535 U.S. 1114 (2002), a defendant must raise ineffective assistance of counsel claims when those claims are apparent on the face of the record. However, when it appears to the appellate court further development of the facts would be required before application of the *Strickland* test, the proper course is for the Court to dismiss the defendant's assignments of error without prejudice. *See State v. Long*, 354 N.C. 534, 539-40, 557 S.E.2d 89, 93 (2001). Here, we believe further factual inquiry is required into these allegations of ineffective assistance of counsel. Therefore, we dismiss defendant's assignments of error without prejudice.

PRESERVATION ISSUES

[13] Defendant contends his short-form indictment was insufficient because it failed to allege all the elements of first-degree murder. We disagree. We have consistently ruled short-form indictments for first-degree murder are permissible under N.C.G.S. § 15-144 (2005) and the North Carolina and United States Constitutions. *See State v. Mitchell*, 353 N.C. 309, 328-29, 543 S.E.2d 830, 842, *cert. denied*, 534 U.S. 1000 (2001); *State v. Davis*, 353 N.C. 1, 44-45, 539 S.E.2d 243, 271 (2000), *cert. denied*, 534 U.S. 839 (2001); *State v. Braxton*, 352 N.C. 158,

173-75, 531 S.E.2d 428, 436-38 (2000), *cert. denied*, 531 U.S. 1130 (2001); *State v. Wallace*, 351 N.C. 481, 504-08, 528 S.E.2d 326, 341-43, *cert. denied*, 531 U.S. 1018 (2000). We see no compelling reason to depart from our prior precedent on this issue. Here the indictment read: "The jurors for the State upon their oath present that on or about the 8th day of July, 1999, and in the county named above the defendant named above unlawfully, willfully and feloniously and of malice aforethought did kill and murder Christopher Conrad Gailey. Offense in violation of G.S. 14-17." As this indictment meets the requirements of N.C.G.S. § 15-144, we overrule defendant's assignment of error.

[14] Additionally, defendant argues the trial court lacked jurisdiction to enter a death sentence because the indictment did not list the aggravating circumstances to be proven by the State during the penalty phase. This Court has rejected this argument in the past. *See State v. Hunt*, 357 N.C. 257, 268-78, 582 S.E.2d 593, 600-07, *cert. denied*, 539 U.S. 985 (2003). We see no reason to depart from our holding in *Hunt* and therefore overrule defendant's assignment of error.

[15] Defendant argues the jury instruction regarding the especially heinous, atrocious, or cruel aggravating circumstance is unconstitutionally vague and overbroad and cannot, consistent with *Ring v. Arizona*, 536 U.S. 584 (2002), be cured by appellate narrowing. We recently discussed this issue at length in *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11 (2005), and found the argument to lack merit. We are not inclined to change our recently decided precedent and therefore overrule defendant's assignment of error.

[16] Defendant argues the trial court erred in instructing the jury on the burden of proof required to find a mitigating circumstance by using the word "satisfied" instead of the more detailed instruction proposed by defendant. Defendant claims the term "satisfy" is subjective in nature, is vague, and means something beyond a preponderance of the evidence. We disagree. The term "satisfy" does not create this standardless standard defendant claims. *See State v. Payne*, 337 N.C. 505, 531-33, 448 S.E.2d 93, 108-09 (1994), *cert. denied*, 514 U.S. 1038 (1995). " '[S]atisfies' denotes a burden of proof consistent with a preponderance of the evidence." *Id.* at 533, 448 S.E.2d at 109; *see also State v. Bell*, 359 N.C. at 46, 603 S.E.2d at 122 (treating issue as preservation issue). We overrule defendant's assignment of error.

[17] Defendant contends the death penalty violates international law as it runs afoul of Article VII of the International Covenant on Civil and Political Rights (ICCPR) as that treaty prohibits the arbitrary deprivation of life. Defendant specifically argues that the length of time and the conditions under which defendant can expect to be detained while appealing his conviction and sentence violate the ICCPR. *See* International Covenant on Civil and Political Rights, art. VII, Dec. 16, 1966, S. Treaty Doc. No. 95-2, 999 U.N.T.S. 171. This Court has considered this argument in the past and rejected it.

> [W]e cannot see how any defendant's right to appeal errors alleged in his capital case, which necessarily delays his execution, or our own mandate to ascertain on appeal that the death penalty rests firmly on the law and is in no way arbitrary or in any other way "cruel or degrading" violates this treaty's provisions.

State v. Smith, 352 N.C. 531, 566, 532 S.E.2d 773, 795 (2000), *cert. denied*, 532 U.S. 949 (2001). Article VII of the ICCPR condemns torture, and we do not believe it is torturous to allow defendant to appeal his conviction and sentence. It is a basic tenant of our jurisprudence that a defendant has the right to exhaust all legal remedies, but nothing requires him to do so if he knowingly and intelligently decides to forgo those opportunities. *See*, *e.g.*, Matthew Eisley, *Killer Had Asked for Execution*, News & Observer (Raleigh, N.C.), 22 October 2004, at B1 (detailing Charles Wesley Roache's decision to forgo additional review of his first-degree murder conviction and sentence of death). We simply cannot find a violation of defendant's rights merely because he chooses to subject himself to the rigors of judicial review. Additionally, the United States deposited a reservation to the ICCPR stating, "[t]he United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment . . . ." S. Rep. No. 103-35, at 8 (1993). We decline to overrule our prior law on this issue. Defendant's assignment of error is overruled.

PROPORTIONALITY

[18] Pursuant to N.C.G.S. § 15A-2000(d)(2), this Court has the statutory duty to determine if:

> [T]he record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing

> court based its sentence of death . . . [whether] the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or . . . [whether] the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

N.C.G.S. § 15A-2000(d)(2) (2005).

The jury found the statutory aggravating circumstances of: (1) The murder was committed for the purpose of avoiding or preventing a lawful arrest, (e)(4); (2) defendant committed the murder for pecuniary gain, (e)(6); and (3) the murder was especially heinous, atrocious, or cruel, (e)(9). The trial court also submitted the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance[3] which the jury did not find, along with thirteen nonstatutory mitigating circumstances of which the jury found two: (1) Defendant was deeply affected by the death of his grandfather, and (2) defendant's death would have a detrimental impact on his mother, father, daughter, and other family members.[4]

After a thorough review of the record, transcripts, briefs, and oral arguments on appeal, we conclude the jury's finding of the three aggravating circumstances is supported by the evidence. Additionally, we conclude nothing in the record, transcripts, briefs, or oral arguments suggests the sentence given defendant was imposed under the influence of passion, prejudice, or any other arbitrary factor. We will not disturb the jury's weighing of the mitigating and aggravating circumstances.

Finally, we must determine whether capital punishment is proportionate in this case. The decision whether the death sentence is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47 (citation omitted), *cert. denied*, 513 U.S. 1046 (1994). Proportionality review is intended to " 'eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury.' " *State v. Smith*, 357 N.C. 604, 621, 588 S.E.2d 453, 464 (2003) (citation omitted), *cert. denied*, 542 U.S. 941 (2004); *see also State v. McNeill*, 360 N.C. 231, 624 S.E.2d at 344.

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3. "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." N.C.G.S. § 15A-2000(f)(6) (2005).

4. Additionally the (f)(9) "catchall" mitigating circumstance was submitted to the jury but was not found to exist.

In our proportionality review, we compare the case at bar to cases in which this Court has found imposition of the death penalty to be disproportionate. This Court previously determined capital punishment was disproportionate in eight cases. *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled in part on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

In no case in which we found capital punishment disproportionate did the jury find the three aggravating circumstances the jury found in defendant's case. In fact, when the jury has found as an aggravating circumstance the murder was especially heinous, atrocious, or cruel, we have only found the death sentence disproportionate twice. *See State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983). *Stokes* and *Bondurant* are easily distinguishable from this case. In *Stokes*, the defendant was only seventeen years old at the time of the killing, and the only one of four assailants to receive capital punishment as a sentence. 319 N.C. at 3-4, 21, 352 S.E.2d at 654-55, 664. In *Bondurant*, the defendant expressed remorse immediately after the murder and even aided the victim in traveling for treatment by directing the victim's transport to the hospital. 309 N.C. at 694, 309 S.E.2d at 182-83. However, in this case defendant is the sole defendant; he alone committed this murder. Additionally, defendant was twenty-six years old at the time he brutally murdered his victim. Moreover, defendant did not show the type of remorse present in *Bondurant*; instead defendant threw rocks at his victim's body to make sure he was dead and then left the body in the woods. In fact, defendant has shown no remorse at all for his actions.

"Although we 'compare this case with the cases in which we have found the death penalty to be proportionate . . . . we will not undertake to discuss or cite all of those cases each time we carry out that duty.' " *State v. Garcia*, 358 N.C. 382, 429, 597 S.E.2d 724, 756 (2004) (quoting *State v. McCollum*, 334 N.C. at 244, 433 S.E.2d at 164) *cert. denied*, 543 U.S. 1156 (2005). The imposition of death for this murder is proportionate when compared with our other cases. Therefore, we

hold defendant's sentence is neither disproportionate nor excessive considering the nature of defendant and the crime he committed.

Defendant received a fair trial free of reversible error in both the guilt-innocence proceeding and the penalty proceeding. Defendant's sentence of death is not disproportionate. Accordingly, we find no error.

NO ERROR.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

KATHLYN MARIE STEIN AND MICHAEL HOOTSTEIN v. ASHEVILLE CITY BOARD OF EDUCATION, COOPERATIVE LEARNING CENTER (A/K/A WOLFE CREEK SCHOOL, NOW BUNCOMBE COMMUNITY SCHOOL WEST, AT THE TIME ADMINISTERED JOINTLY BY BLUE RIDGE HUMAN SERVICES FACILITIES, INC. AND/OR BLUE RIDGE MENTAL HEALTH AND/OR ASHEVILLE CITY BOARD OF EDUCATION AND/OR BUNCOMBE COUNTY BOARD OF EDUCATION), BUNCOMBE COUNTY BOARD OF EDUCATION, BLUE RIDGE CENTER FOR MENTAL HEALTH, AND BLUE RIDGE AREA AUTHORITY

No. 128A05

(Filed 3 March 2006)

1. Negligence— per se—motion to dismiss—sufficiency of evidence

The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiffs' claims of negligence per se resulting from the off-campus shooting of plaintiff wife by students who attended defendant's school for behaviorally and emotionally handicapped juveniles, because: (1) although violation of a public safety statute generally constitutes negligence per se, the school bus driver and bus monitor were not obligated under N.C.G.S. § 115C-245(d) to report conversations they overheard by the students about robbery and homicide not specific to any time, place, or intended victim when the plain language of N.C.G.S. § 115C-245(d) reveals the General Assembly enacted the statute to ensure the safety of the pupils and employees assigned to public school buses; and (2) pupils and employees assigned to buses would constitute the protected class of persons with stand-

ing to sue for injuries proximately resulting from violations of the statute, and nothing in plaintiffs' amended complaint suggests plaintiffs belong to the relevant protected class.

2. Negligence— common law—motion to dismiss—sufficiency of evidence

The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiffs' claim of common law negligence resulting from the off-campus shooting of plaintiff wife by students who attended defendant's school for behaviorally and emotionally handicapped juveniles, because: (1) for common law negligence purposes, no special relationship exists between a defendant and a third person unless the defendant knows or should know of the third person's violent propensities and defendant has the ability and opportunity to control the third person at the time of the third person's criminal acts; (2) while plaintiffs allege violent tendencies on the part of the students, the complaint offers no basis for believing defendant had the ability or the opportunity to control the students during the attack on plaintiff when the shooting occurred about 8:15 p.m. at an intersection well after normal school hours and not on property belonging to or under the supervision of defendant, and nowhere does plaintiffs' amended complaint suggest the students were then truant due to defendant's inadequate oversight; and (3) the complaint fails to allege the special relationship necessary to render defendant liable for the harm to plaintiffs by third persons.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 168 N.C. App. 243, 608 S.E.2d 80 (2005), on orders entered 8 August 2003, 13 August 2003, and 8 September 2003 by Judge Zoro J. Guice, Jr. and an order signed by Judge James E. Lanning on 11 June 2001, all in Superior Court, Buncombe County. The Court of Appeals affirmed the 13 August 2003 order, reversed the 8 September 2003 order, and dismissed plaintiffs' appeal from the 11 June 2001 and 8 August 2003 orders. Heard in the Supreme Court 12 September 2005.

Orbock Ruark & Dillard, P.C., by Mark A. Leach, for plaintiff-appellees.

Patrick, Harper & Dixon L.L.P., by David W. Hood and Michael J. Barnett, for defendant-appellants Cooperative Learning Center, Blue Ridge Human Services Facilities, Inc., Blue Ridge Mental Health, Blue Ridge Center for Mental Health, and Blue Ridge Area Authority.

NEWBY, Justice.

The issue is whether plaintiffs have stated a claim for negligence against defendant Blue Ridge Area Authority[1] ("defendant") for damages resulting from the off-campus shooting of plaintiff Stein by students who attended defendant's school. We hold plaintiffs have not stated a valid claim, and we reverse the Court of Appeals.

I. BACKGROUND

Plaintiff Kathlyn Marie Stein ("Stein") and husband plaintiff Michael Hootstein filed suit against defendant alleging the following facts.[2] Defendant is a political subdivision of the State, organized under N.C.G.S. § 122C-101 through -200,[3] that has waived sovereign immunity through the purchase of liability insurance. At the time of Stein's shooting, defendant operated the Cooperative Learning Center ("CLC"), a special school for behaviorally and emotionally handicapped children. The CLC adhered to an unwritten policy of not reporting violent or criminal student activities unless those activities were likely to expose offending students to substantial incarceration. CLC employees were instructed "to look the other way" when students engaged in, or made plans to engage in, violent or criminal acts.

1. According to plaintiffs' amended complaint, the Blue Ridge Area Authority comprises the Blue Ridge Center for Mental Health, Cooperative Learning Center, Blue Ridge Human Services Facilities, Inc., Blue Ridge Mental Health, and the Authority itself.

2. Plaintiffs also named the Buncombe County Board of Education and the Asheville City Board of Education as defendants. The trial court eventually dismissed plaintiffs' claims against both boards. A unanimous Court of Appeals affirmed dismissal in favor of the Asheville City Board and concluded plaintiffs' appeal from dismissal in favor of the Buncombe County Board was untimely filed. *Stein*, 168 N.C. App. at 246-251, 608 S.E.2d at 83-86. These determinations are not before this Court.

3. These statutes authorize area authorities, such as defendant, which are charged with "planning, budgeting, implementing, and monitoring of . . . community-based mental health, developmental disabilities, and substance abuse services." N.C.G.S. § 122C-117 (2003).

In March 1998 J.B. (age thirteen) and C.N. (age fifteen) were behaviorally and emotionally handicapped CLC students. J.B. suffered from an "array of emotional problems" including violent outbursts, drug abuse, and fear of parental abuse. C.N. had threatened others openly and expressed homicidal thoughts. His mother and three uncles abused drugs, and C.N. had twice assaulted a CLC teacher.

Along with other CLC students, J.B. and C.N. traveled to and from the CLC on a public school bus driven by Nancy Patton and monitored by Gail Guzman, an unpaid volunteer. While on the bus the week before 17 March 1998, Guzman overheard two conversations between J.B. and C.N. ("the conversations"). During the first, C.N. told J.B. about a gun under his mattress at home. In the second, C.N. said, "Let's rob somebody," to which J.B. replied, "Okay." C.N. stated, "I have the gun." J.B. responded, "I'll kill them." Guzman repeated what she had heard to Patton, but neither adult informed school officials or law enforcement of the juveniles' comments.

On 17 March 1998, C.N. retrieved a gun from beneath his mattress. That same day, accompanied by eighteen-year-old Darryl Watkins and D.V. (age thirteen), J.B. and C.N. positioned themselves at an Asheville intersection. Between 7:00 p.m. and 8:15 p.m., the group approached three passing vehicles with the intent to rob and kill the drivers. At 8:15 p.m., using the gun C.N. had provided, J.B neared Stein's car and shot Stein in the head. The bullet entered just under her left ear, struck her second cervical vertebra, pierced an artery, and lodged in her right jaw. As a result of the shooting, Stein suffers from vascular problems, a spinal fracture, nerve damage, and post-traumatic stress disorder. All four assailants pled guilty to charges stemming from the attack.

The allegations of fact summarized above were contained in plaintiffs' initial and subsequent complaints. Plaintiffs voluntarily dismissed their initial complaint without prejudice. Thereafter plaintiffs filed a new complaint and an amended complaint. The amended complaint asserts causes of action for negligence *per se* and common law negligence;[4] as part of those claims, it alleges Patton worked for defendant and Guzman monitored the bus "within the course and scope of her duties" to defendant. The trial court dismissed plaintiffs' claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiffs sought review in the Court of Appeals.

4. The amended complaint also asserts a cause of action for plaintiff Hootstein's loss of consortium.

A divided Court of Appeals reversed the trial court's order granting defendant's motion to dismiss. *Stein v. Asheville City Bd. of Educ.*, 168 N.C. App. 243, 608 S.E.2d 80 (2005). The majority determined plaintiffs stated a claim for negligence by sufficiently alleging: (1) defendant had a legal duty to protect others from J.B. and C.N.; (2) defendant breached its duty when Patton and Guzman did not report the conversations as required by N.C.G.S. § 115C-245; and (3) defendant's breach proximately caused the injuries to Stein. *Id.* at 252-56, 608 S.E.2d at 86-89. The dissent maintained plaintiffs failed to allege a duty of care because their allegations conclusively show defendant lacked "any ability or right to control [J.B. and C.N. at the time] plaintiffs were injured." *Id.* at 260, 608 S.E.2d at 91 (Tyson, J., concurring in part and dissenting in part). Noting the conversations were "not specific to any time, place, or intended victim," the dissent also argued the majority's holding would impermissibly render defendant "liable to any victim, at any time or place, whom [J.B. and C.N.] might eventually 'rob' or 'kill.' " *Id.* at 262, 608 S.E.2d at 92.

Defendant filed a notice of appeal to this Court. As this is an appeal of right based solely on the dissent in the Court of Appeals, our review is limited to the legal sufficiency of plaintiffs' allegations against defendant. N.C. R. App. P. 16(b).

II. ANALYSIS

When reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true. *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). Taken as true, plaintiffs' allegations cause concern. Our society remains in the shadow of the Columbine High School massacre and subsequent school shootings. The educators, staff members, and volunteers who accept the challenge of working with behaviorally and emotionally handicapped juveniles undoubtedly deserve praise; nonetheless, public school personnel who overhear students discussing robbery or homicide have a moral and civic obligation to respond appropriately. The power of the judiciary does not extend to purely moral or civic shortcomings, however. Absent legal grounds for visiting civil liability on defendant, our courts cannot offer plaintiffs the requested remedy.

In their amended complaint, plaintiffs assert statutory and common law imposed a legal duty on defendant to forestall the shooting of Stein. *See generally Estate of Mullis v. Monroe Oil Co.*, 349 N.C. 196, 204, 505 S.E.2d 131, 136 (1998) (defining a legal duty as " ' "an obligation, to which the law will give recognition and effect, to con-

form to a particular standard of conduct toward another" ' "). Plaintiffs submit defendant's breach of this duty exposed defendant to civil liability under two theories: (1) negligence *per se* for a violation of N.C.G.S. § 115C-245 (detailing the responsibilities of public school bus drivers and monitors), and (2) common law negligence. *See id.* at 200, 505 S.E.2d at 134. We consider the legal sufficiency of each cause of action in turn.

A. NEGLIGENCE *PER SE*

[1] "[T]he general rule in North Carolina is that the violation of a [public safety statute] constitutes negligence *per se*." *Byers v. Standard Concrete Prods. Co.*, 268 N.C. 518, 521, 151 S.E.2d 38, 40 (1966). A public safety statute is one "impos[ing] upon [the defendant] a specific duty for the protection of others." *Lutz Indus., Inc. v. Dixie Home Stores*, 242 N.C. 332, 341, 88 S.E.2d 333, 339 (1955). Significantly, even when a defendant violates a public safety statute, the plaintiff is not entitled to damages unless the plaintiff belongs to "the class [of persons] intended to be protected by [the] statute," *Baldwin v. GTE S., Inc.*, 335 N.C. 544, 546, 439 S.E.2d 108, 109 (1994), and the statutory violation is "a proximate cause of [the plaintiff's] injury," *Hart v. Ivey*, 332 N.C. 299, 303, 420 S.E.2d 174, 177 (1992).

In the case *sub judice*, plaintiffs allege N.C.G.S. § 115C-245 obligated Patton and Guzman to report the conversations at issue to school officials. Plaintiffs contend that, had Patton or Guzman performed her statutory duty, the attack on Stein could have been thwarted. Plaintiffs further allege the acts and omissions of Patton and Guzman should be imputed to defendant. Although the Court of Appeals majority cited defendant's purported violation of N.C.G.S. § 115C-245 as an adequate allegation of breach when discussing plaintiffs' common law negligence claim, it did not directly address whether plaintiffs have successfully stated a claim for negligence *per se*.

Section 115C-245 of our General Statutes reads in pertinent part:

> (b) The driver of a school bus . . . shall have complete authority over and responsibility for the operation of the bus and the maintaining of good order and conduct upon such bus, *and shall report promptly to the principal any misconduct upon such bus* or disregard or violation of the driver's instructions by any person riding upon such bus. The principal may take such action with reference to any such misconduct upon a school bus,

> or any violation of the instructions of the driver, as he might take if such misconduct or violation had occurred upon the grounds of the school.
>
> . . . .
>
> (d) The superintendent or superintendent's designee may, in his discretion, appoint a monitor for any bus assigned to any school. *It shall be the duty of such monitor, subject to the direction of the driver of the bus, to preserve order upon the bus and do such other things as may be appropriate for the safety of the pupils and employees assigned to such bus* while boarding such bus, alighting therefrom or being transported thereon, and to require such pupils and employees to conform to the rules and regulations established by the local board of education for the safety of pupils and employees upon school buses. Such monitors shall be unpaid volunteers who shall serve at the pleasure of the superintendent or superintendent's designee.

N.C.G.S. § 115C-245 (2003) (emphasis added). Assuming *arguendo* the conversations were "misconduct" within the meaning of N.C.G.S. 115C-245(b), the question becomes whether the alleged failure of Patton and Guzman to report them was negligence *per se*.

One could plausibly argue the General Assembly intended N.C.G.S. § 115C-245 to be a public safety statute. Disorderly students can distract a bus driver, thereby imperiling the driver, other motorists, pedestrians, and themselves. By investing bus drivers with authority over, and responsibility for, good order and conduct on public school buses, subsection (b) seems designed to avoid hazards of this sort. Subsection (d) offers additional evidence that N.C.G.S. § 115C-245 is a public safety statute. This subsection fixes a "duty" on public school bus monitors "to preserve order upon the bus and do such other things as may be appropriate" to safeguard students and school system employees from injury while on the bus. *Id.* § 115C-245(d). These features are consistent with those of public safety statutes.

Regardless of whether N.C.G.S. § 115C-245 qualifies as a public safety statute, plaintiffs' claim for negligence *per se* is fatally defective. The plain language of N.C.G.S. § 115C-245(d) reveals the General Assembly enacted the statute to ensure "the safety of the pupils and employees assigned to [public] school bus[es]." Consequently, pupils and employees assigned to buses would constitute the protected

class of persons with standing to sue for injuries proximately resulting from violations of the statute. Nothing in plaintiffs' amended complaint suggests plaintiffs belong to the relevant protected class. Precedents of this Court therefore compel us to conclude plaintiffs have not stated a negligence *per se* claim. *E.g.*, *Hart*, 332 N.C. at 303, 420 S.E.2d at 177.

B. COMMON LAW NEGLIGENCE

[2] We next evaluate whether plaintiffs sufficiently allege common law negligence. To state a claim for common law negligence, a plaintiff must allege: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach. *See Kientz v. Carlton*, 245 N.C. 236, 240, 96 S.E.2d 14, 17 (1957). Thus, the threshold question is whether plaintiffs successfully allege defendant had a legal duty to avert the attack on Stein. *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 342-44, 162 N.E. 99, 99-100 (1928). "In the absence of a legal duty owed to the plaintiff by [the defendant], [the defendant] cannot be liable for negligence." *Cassell v. Collins*, 344 N.C. 160, 163, 472 S.E.2d 770, 772 (1996), *overruled on other grounds by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998). No legal duty exists unless the injury to the plaintiff was foreseeable and avoidable through due care. *Mullis*, 349 N.C. at 205, 505 S.E.2d at 137 (holding no duty when plaintiff failed to present evidence showing "defendant commercial vendors should have recognized that [plaintiff], or anyone similarly situated[,] might be injured by their conduct"). Whether a plaintiff's injuries were foreseeable depends on the facts of the particular case.[5] *Id.* at 206, 505 S.E.2d at 138.

Unlike many cases involving common law negligence claims, here plaintiffs desire damages from defendant for the actions of third persons. There is no allegation defendant or its personnel encouraged, planned, or executed the shooting; rather, plaintiffs rest their claim on the failure of Patton and Guzman, and by imputation defendant, to take reasonable steps to frustrate the plans of J.B. and C.N.

We have often remarked the law's reluctance to burden individuals or organizations with a duty to prevent the criminal acts of others. *Cassell*, 344 N.C. at 165, 472 S.E.2d at 773 ("[O]ur general rule of law . . . declines to impose civil liability upon landowners for crimi-

5. Foreseeability is also an element of proximate cause. *See Williamson v. Liptzin*, 141 N.C. App. 1, 10, 539 S.E.2d 313, 319 (2000) ("The element of foreseeability is a requisite of proximate cause."). Given that we hold no duty existed, we do not reach the question of proximate cause.

nal acts committed by third persons."); *Moore v. Crumpton*, 306 N.C. 618, 622, 295 S.E.2d 436, 439 (1982) ("[I]t is a well-established doctrine that the mere fact of parenthood does not make individuals liable for the wrongful acts of their unemancipated minor children."); *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638, 281 S.E.2d 36, 38 (1981) (Store owners are ordinarily "not liable for injuries to [their] invitees which result from the intentional, criminal acts of third persons."). Our cases typically regard such acts as unforeseeable and "independent, intervening cause[s] absolving the [defendant] of liability." *Foster*, 303 N.C. at 638, 281 S.E.2d at 38.

Notwithstanding the general rule, we have held a defendant may be liable for the criminal acts of another when the defendant's relationship with the plaintiff or the third person justifies making the defendant answerable civilly for the harm to the plaintiff. For example, we determined a common carrier must exercise reasonable care to protect its passengers from foreseeable assaults. *Smith v. Camel City Cab Co.*, 227 N.C. 572, 574, 42 S.E.2d 657, 658-59 (1947); *see Foster*, 303 N.C. at 640, 281 S.E.2d at 39 (holding plaintiff stated a claim when she alleged she was on defendant store owner's premises during business hours to transact business and there sustained injuries from reasonably foreseeable and preventable criminal acts of a third person). Similarly, we decided a parent who knows or should know of his unemancipated minor child's dangerous propensities may have a legal duty to "exercise reasonable control over the child so as to prevent injury to others." *Moore*, 306 N.C. at 622, 295 S.E.2d at 439-40.

In the instant case, plaintiffs assert liability founded on defendant's relationship with the third persons who injured them. Hence, the legal sufficiency of plaintiffs' claim hinges on whether defendant's relationship with J.B. and C.N. amounted to a "special relationship" requiring defendant to use due care to avert the attack on Stein. The amended complaint alleges defendant knew J.B. and C.N. were emotionally and behaviorally handicapped children and "had custody of [J.B. and C.N.] . . . and/or had the ability or right to control [the juveniles] at the pertinent time."

As previously mentioned, the dissent in the Court of Appeals argued that plaintiffs' amended complaint falls short of alleging negligence inasmuch as its allegations show defendant lacked custody or control of J.B. and C.N. at the time of the shooting. *Stein*, 168 N.C. App. at 260, 608 S.E.2d at 90-91 (Tyson, J., concurring in part and dissenting in part) (" '[T]he pertinent time' in a negligence action

[is] when plaintiffs suffered injury: the time of the shooting."). Conceding defendant possessed no authority over the juveniles when Stein was attacked, the Court of Appeals majority did not deem the point dispositive:

> Defendant[] contend[s] . . . no duty existed because plaintiffs cannot establish that defendant[] had custody or the ability to control the students after school hours, when the shooting occurred. This argument relates to the question of proximate cause rather than duty. Plaintiffs' complaint does not argue that defendant[] breached [its] duty by failing to control the students at the time that they were shooting plaintiff Kathlyn Stein, but rather that the breach occurred while the students were on the bus, at a time when . . . defendant[] did have custody and control over the students. In other words, the negligence occurred not at 7:00 p.m., but rather while the students were on school property and . . . defendant[] had custody and the legal right to control them.

Id. at 254-55, 608 S.E.2d at 88.

The Court of Appeals majority applied an incorrect rule of law. We have never held the ability of an otherwise legally blameless defendant to control a third person at the time of the third person's criminal acts is unrelated to the question of legal duty, and we decline to do so now.[6] For common law negligence purposes, no special relationship exists between a defendant and a third person unless (1) the defendant knows or should know of the third person's violent propensities and (2) the defendant has the ability and opportunity to control the third person at the time of the third person's criminal acts. Only after a plaintiff has sufficiently alleged and proved a special

6. Nor, apparently, has the Court of Appeals heretofore so held. In *King v. Durham Cty. Mental Health Developmental Disabilities and Substance Abuse Auth.*, 113 N.C. App. 341, 439 S.E.2d 771, *disc. rev. denied*, 336 N.C. 316, 445 S.E.2d 396 (1994), for example, seventeen-year-old Mohammed Thompson fatally shot Sherri King after escaping from the defendants' facility for youths with violent tendencies. *Id.* at 342-43, 439 S.E.2d at 772-73. The Court of Appeals held the defendants were not liable for Thompson's actions because Thompson voluntarily resided at the facility and "[i]t [could] therefore [not] be said that any of the defendants had custody of Thompson or . . . the ability or [legal] right to control him." *Id.* at 347, 439 S.E.2d at 775.

In *Pangburn v. Saad*, 73 N.C. App. 336, 326 S.E.2d 365 (1985), the Court of Appeals held the plaintiff sufficiently stated a claim against the defendant psychiatrist for the wrongful discharge of a patient who stabbed her following his release. *Id.* at 337, 326 S.E.2d at 366. Unlike Thompson's situation in *King*, the patient in *Pangburn* was *involuntarily* committed to the defendant's care. *Id.* at 347, 326 S.E.2d at 372. Thus, the defendant could have controlled the patient at the time of the stabbing but for the wrongful release.

relationship between the defendant and the third person will the finder of fact reach the issue of breach, that is, "whether the [defendant] exercised reasonable care under all of the circumstances." *Moore*, 306 N.C. at 624, 295 S.E.2d at 440.

Our holding accords with this Court's decision in *Moore v. Crumpton*. In *Moore*, the plaintiff brought a personal injury action against the defendant parents for her rape at the hands of their son, John, Jr. *Id.* at 619, 295 S.E.2d at 438. The plaintiff alleged the parents knew or should have known that their son's drug abuse and "dangerous mental state and disposition" made it foreseeable he would intentionally injure others. *Id.* at 619-20, 295 S.E.2d at 438. She alleged her rape was the proximate result of the parents' negligent failure to control John, Jr. *Id.* at 620, 295 S.E.2d at 438. The trial court granted the parents' motions for summary judgment, and the Court of Appeals affirmed. *Id.* at 622, 295 S.E.2d at 439.

On appeal, this Court held a parent may be liable for not exercising reasonable control over a child if the parent (1) had the ability and opportunity to control his child and (2) knew or should have known of the necessity for exercising such control. *Id.* at 623, 295 S.E.2d at 440. Turning to the facts of *Moore*, the Court upheld summary judgment for both parents, first reasoning that neither parent knew or should have known of the necessity for controlling John, Jr. *Id.* at 626-28, 295 S.E.2d at 441-43. Despite being aware of John, Jr.'s persistent drug problems, his impregnation of a young girl, and his assault on another person, the parents "had no recent information to indicate that another assault might occur or that John, Jr. might become involved in a forcible rape." *Id.* at 627, 295 S.E.2d at 442.

This Court further concluded neither parent had the ability to control seventeen-year-old John, Jr. at the time of the rape. It noted the parents' marital separation shortly before the incident had left John, Jr. "under the exclusive care and control of his father." *Id.* at 626, 295 S.E.2d at 441. On the night of the rape, the mother "was at the beach, far away . . . and had had no regular contact with or responsibility for" John, Jr. since the separation. *Id.* As for the father, having "total responsibility for John, Jr. and one other child [made it] almost impossible for him to watch [John, Jr.] twenty-four hours a day." *Moore*, 306 N.C. at 628, 295 S.E.2d at 443. John, Jr. "apparently left home [to rape the plaintiff] after midnight . . . when parents ordinarily would not be expected to be engaged in maintaining surveillance of their children." *Id.* at 626, 295 S.E.2d at 442. Short of "physically restraining [John, Jr.] and placing him under twenty-

four hour . . . observation," the father could not have prevented the harm to the plaintiff. *Id.* at 627, 295 S.E.2d at 442; s*ee also O'Connor v. Corbett Lumber Corp.*, 84 N.C. App. 178, 352 S.E.2d 267 (1987) (affirming summary judgment for the employer of a work release inmate who was not on the job when he broke into plaintiff's house and raped plaintiff).

Here defendant's position appears analogous to that of the mother in *Moore*. Though the conversations arguably alerted defendant to the criminal designs of J.B. and C.N., *but see Stein*, 168 N.C. App. at 262, 608 S.E.2d at 92 (Tyson, J., concurring in part and dissenting in part) (characterizing the conversations as "not specific to any time, place, or intended victim"), plaintiffs' allegations establish J.B. and C.N. were entirely outside of defendant's custody and control at the time of the shooting. Whatever authority Patton and Guzman could have otherwise wielded over J.B. and C.N. terminated once the juveniles exited the bus. The shooting occurred about 8:15 p.m. at an Asheville intersection, well after normal school hours and not on property belonging to, or under the supervision of, defendant. Nowhere does plaintiffs' amended complaint suggest J.B. and C.N. were then truant due to defendant's inadequate oversight. In sum, while plaintiffs allege violent tendencies on the part of J.B. and C.N., their complaint offers no basis for believing defendant had the ability or the opportunity to control J.B. and C.N. during the attack on Stein. The complaint therefore fails to allege the special relationship necessary to render defendant liable for the harm to plaintiffs by third persons.

III. DISPOSITION

Based on the factual allegations in plaintiffs' complaint, N.C.G.S. § 115C-245 did not require defendant to safeguard plaintiffs. Moreover, defendant had no common law duty to prevent the attack on Stein. Consistent with our case law, we regard the shooting as the regrettable, but ultimately unforeseeable, criminal act of third persons. *E.g.*, *Foster*, 303 N.C. at 638, 281 S.E.2d at 38. The trial court properly dismissed plaintiffs' claims for negligence *per se* and common law negligence. Accordingly, the decision of the Court of Appeals is reversed.

REVERSED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. ANTONIO LAMARQUISA RIPLEY

No. 489A05

(Filed 3 March 2006)

Kidnapping— second-degree—asportation of robbery victims from an entranceway into a motel lobby—inherent part of robbery with dangerous weapon

The Court of Appeals did not err by vacating defendant's four convictions of second-degree kidnapping arising from the asportation of robbery victims from an entranceway into a motel lobby during the commission of a robbery with a dangerous weapon, because defendant's actions constituted a mere technical asportation of the victims which was an inherent part of the commission of robbery with a dangerous weapon.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 172 N.C. App. ——, 617 S.E.2d 106 (2005), vacating nine of defendant's convictions for second-degree kidnapping and reversing and remanding in part judgments entered 19 March 2004 by Judge Jack W. Jenkins in Superior Court, Onslow County. Heard in the Supreme Court 13 December 2005.

Roy Cooper, Attorney General, by M. Elizabeth Guzman, Assistant Attorney General, for the State-appellant.

Thomas R. Sallenger for defendant-appellee.

BRADY, Justice.

This case requires us to determine whether the asportation of robbery victims from an entranceway into a motel lobby during the commission of a robbery with a dangerous weapon was an independent act legally sufficient to justify defendant's separate convictions of kidnapping. Because we find defendant's actions did not constitute a separate, complete act independent of the commission of the robbery with a dangerous weapon, we affirm the Court of Appeals' opinion.

FACTUAL BACKGROUND

On 18 November 2003, defendant Antonio Lamarquisa Ripley was indicted by the Onslow County Grand Jury for fifteen counts of second-degree kidnapping, nine counts of robbery with a dangerous weapon, three counts of attempted robbery with a dangerous weapon, and one count of assault by pointing a gun. Defendant and four accomplices committed the alleged offenses during a series of robberies on or about 30 May 2003.

The facts of these offenses are described in detail in the Court of Appeals' opinion below. *State v. Ripley*, 172 N.C. App. ——, 617 S.E.2d 106 (2005). Thus, we highlight only the facts most relevant to a determination of the issue now under consideration—the asportation of four of the victims. The State's evidence presented at trial consisted of testimony from numerous robbery victims and two of defendant's four accomplices. This testimony tended to show the following: On 30 May 2003, defendant, then thirty-two years old, assembled a group of four accomplices—Jonathan Battle, Jamar McCarthur, Karon Joye, and Sekou Alexander—all of whom were under the age of eighteen. Defendant then transported the group from Wilmington to Jacksonville, North Carolina. The group committed their first robbery with a dangerous weapon at the Hampton Inn in Jacksonville sometime after 9:00 p.m.

Defendant then relocated the group to the Extended Stay America Motel, also located in Jacksonville. Defendant remained in the vehicle while McCarthur, Joye, and Alexander entered the motel's lobby and approached the front desk clerk, demanding and taking the motel's money at gunpoint. Rather than fleeing the motel, the robbers hid in the lobby and ordered the front desk clerk to return to her position. Moments later, as motel patrons entered the lobby, the robbers leapt from their hiding places and robbed the newly acquired victims at gunpoint. During this robbery, one of the accomplices observed Dennis and Tracy Long and Skylar and Adrian Panter walking through the parking lot toward the motel lobby entranceway.

The most critical facts to our analysis are the following: Tracy Long testified during trial that, as her husband was opening the door to the motel lobby, she observed individuals lying on the floor and, believing a robbery was taking place, she prevented her group from entering. As she attempted to turn her party away from the motel, one of the robbers ordered the Longs and the Panters at gunpoint to enter the lobby. Once inside, the Longs and the Panters were ordered to the

floor, searched, and robbed. The robbers recovered eight dollars from Tracy Long, the only individual carrying currency. Defendant and his accomplices fled the scene, and law enforcement eventually apprehended the perpetrators.

At the close of the State's evidence, defendant made numerous motions, including one to dismiss all second-degree kidnapping charges. The trial court denied this motion. Defendant offered no evidence. After being instructed by the trial court, the jury deliberated and on 19 March 2004 returned verdicts of guilty for fifteen counts of second-degree kidnapping, seven of the nine counts of robbery with a dangerous weapon, and three counts of attempted robbery with a dangerous weapon.[1] Upon receiving these verdicts, the trial court consolidated defendant's charges and sentenced defendant in the presumptive range to four consecutive prison terms of 117 to 150 months.

Defendant appealed the trial court's denial of his motion to dismiss nine of his fifteen second-degree kidnapping charges.[2] In a divided decision, the Court of Appeals reversed the trial court's denial of defendant's motion to dismiss the nine kidnapping charges and vacated these convictions. A separate opinion concurring in part and dissenting in part found no error as to four of defendant's appealed kidnapping convictions, determining the convictions pertaining to the Longs and the Panters were separate offenses.

On 6 September 2005, the State sought a temporary stay, which was allowed on 6 September 2005, petitioned for writ of supersedeas, which was allowed on 6 October 2005, and filed its notice of appeal based upon a dissent. Therefore, pursuant to Rule 16(b) of the North Carolina Rules of Appellate Procedure, the scope of our review is restricted to the Court of Appeals' reversal of the four second-degree kidnapping charges addressed in the dissenting opinion.

HISTORICAL BACKGROUND

Kidnapping has been a recognized crime tracing back to the earliest Judeo-Christian law. *See Exodus* 21:16 (Holman Christian Standard). English common law defined kidnapping as "the forcible abduction or stealing away of a man, woman, or child, from their own country, and sending them into another." William Blackstone, 4 *Commentaries* *219.

1. The State dismissed the charge of assault by pointing a gun.

2. Defendant did not contest six of his second-degree kidnapping convictions.

Some federal courts, considering the separate states as jurisdictions foreign to each other for the purpose of kidnapping, incorporated the English common law definition of kidnapping by modifying the offense to include the asportation of an individual across state lines as well as across international boundaries. *See, e.g.*, *Collier v. Vaccaro*, 51 F.2d 17, 19 (4th Cir. 1931) ("The gist of the [kidnapping] offense is the forcible carrying out of the state . . . ."); *Gooch v. United States*, 82 F.2d 534, 537 (10th Cir.) ("[K]idnapping at common law means to forcibly abduct a person and to carry him from one state into another state . . . ."), *cert. denied*, 298 U.S. 658 (1936). So, too, did Congress, in its enactment of the Federal Kidnapping Act in 1932. 18 U.S.C. § 408(a) (1932) (currently codified at 18 U.S.C. § 1201 (2000)). The Act, often referred to as "The Lindbergh Law" because its enactment came as a result of the mysterious disappearance of Charles Lindbergh's infant son, currently follows the English common law by stating: "Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person . . . when—(1) the person is willfully transported in interstate or foreign commerce . . . [,]" shall be guilty of kidnapping. 18 U.S.C. § 1201(a) (2000).

THE EVOLUTION OF KIDNAPPING IN NORTH CAROLINA

North Carolina did not codify any criminal acts of taking an individual against his or her will until 1879, when the General Assembly made criminal the act of abducting children. 1 N.C. Code of 1883, § 973 (1883). Noteworthily, the General Assembly did not designate this offense "kidnapping" until 1901. Act of Mar. 14, 1901, ch. 699, sec. 1, 1901 N.C. Sess. Laws 923, 923. However, this statute did not specifically define the offense of kidnapping. Thus, in 1907 this Court defined "kidnapping to be 'false imprisonment aggravated by conveying the imprisoned person to some other place.' " *State v. Harrison*, 145 N.C. 295, 302, 145 N.C. 408, 417, 59 S.E. 867, 870-71 (1907) (quoting 2 Joel Prentiss Bishop, *The New Criminal Law* § 750 (8th ed. 1892)). This definition of kidnapping excluded the English common law's requirement of asportation to another country. The common law definition of kidnapping evolved in the state's jurisprudence over the years, eventually being defined as "the unlawful taking and carrying away of a human being against his will by force or fraud or threats or intimidation; or to seize and detain him for the purpose of so carrying him away." *State v. Ingland*, 278 N.C. 42, 50, 178 S.E.2d 577, 582 (1971) (emphasis omitted).

The offense of kidnapping, as it is now codified in N.C.G.S. § 14-39, did not take form until 1975, when the General Assembly amended section 14-39 and abandoned the traditional common law definition of kidnapping for an element-specific definition.[3] The 1975 amendment to N.C.G.S. § 14-39 thus defined kidnapping as the unlawful confinement, restraint, or removal from one place to another of any person sixteen years of age or over without that person's consent for the purpose of obtaining a ransom, holding the victim hostage, facilitating the commission of a felony or flight after the commission of the felony, or for doing serious bodily harm to or terrorizing the victim. N.C.G.S. § 14-39(a) (1975). In 1978, this Court recognized "it is clear that the Legislature intended to change the law [of kidnapping]" with its 1975 amendment to N.C.G.S. § 14-39 and, therefore, rejected further use of the North Carolina common law definition of kidnapping. *State v. Fulcher*, 294 N.C. 503, 522, 243 S.E.2d 338, 351 (1978). However, this Court in *Fulcher* also perceived that with this new definition came the potential for a defendant to be prosecuted twice for the same act. Accordingly, this Court noted:

> It is self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. . . . [W]e construe the word "restrain," as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony.

Id. at 523, 243 S.E.2d at 351. Additionally, this Court noted that more than one criminal offense can grow out of the same criminal transac-

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3. The element-specific definition enacted by the General Assembly is similar to that found in the Model Penal Code, which states:

> A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes:
>
> . . . .
>
> (b) to facilitate commission of any felony or flight thereafter;
>
> . . . .
>
> A removal or confinement is unlawful within the meaning of this Section if it is accomplished by force, threat or deception . . . .

Model Penal Code § 212.1 (1960)

tion, but specifically held "the restraint, which constitutes the kidnapping, [must be] a separate, complete act, independent of and apart from the other felony." *Id.* at 524, 243 S.E.2d at 352; *see also State v. Beatty*, 347 N.C. 555, 559, 495 S.E.2d 367, 369 (1998) (noting "a person cannot be convicted of kidnapping when the only evidence of restraint is that 'which is an inherent, inevitable feature' of another felony such as armed robbery") (quoting *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351).

Further, in *State v. Irwin*, this Court clarified the separate act requirement by holding the defendant's asportation of an employee at knife-point from the front to the rear of a pharmacy to open the safe and obtain drugs was "an inherent and integral part of the attempted armed robbery," and thus such asportation was legally insufficient to convict the defendant of a separate charge of kidnapping. 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981) ("To accomplish defendant's objective of obtaining drugs it was necessary that [one of the employees] go to the back of the store . . . and open the safe."). The Court also noted that the defendant did not expose the victim "to greater danger than that inherent in the armed robbery itself, nor is [the victim] subjected to the kind of danger and abuse the kidnapping statute was designed to prevent." *Id.*; *see also State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992) (explaining, "[t]he key question . . . is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping 'exposed [the victim] to greater danger than that inherent in the armed robbery itself' ") (quoting *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446). Accordingly, because the defendant's moving of the victim was "a mere technical asportation," this Court found the defendant's actions could not justify a separate conviction of kidnapping. *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446; *see also* Rollin M. Perkins, *Criminal Law*, ch. 2, § 7(A)(1), at 178 (2d ed. 1969) ("It has been held, quite properly, that where movement is merely incidental to an assault the prosecution must be for that offense and not for kidnapping.").[4]

4. A number of jurisdictions similarly define kidnapping and require the act constituting kidnapping to be a separate act which is not an inherent part of any other felony committed. *See United States v. Seay*, 60 M.J. 73, 80-81 (2004) (listing a number of factors to consider in determining whether asportation of a victim is "more than an incidental or momentary detention"); *People v. Rayford*, 9 Cal. 4th 1, 12, 884 P.2d 1369, 1374 (1994) ("Kidnapping for robbery, or aggravated kidnapping, requires movement of the victim that is not merely incidental to the commission of the robbery, and which substantially increases the risk of harm over and above that necessarily present in the crime of robbery itself."); *Carron v. State*, 427 So. 2d 192, 193 (Fla. 1983) ("[W]e hold that in order for a person to be convicted of kidnapping with intent to commit or

Thus, as it stands today, and as it relates to the case at hand, N.C.G.S. § 14-39 defines kidnapping as:

> (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 . . . 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(a) (2005) (emphasis added).

APPLICATION OF OUR JURISPRUDENCE

While the trial court's findings of fact are conclusive on appeal if supported by competent evidence, the trial court's conclusions of law are reviewed *de novo* by this Court. *State v. Hyatt*, 355 N.C. 642, 653, 566 S.E.2d 61, 69 (2002) (citing *State v. Barber*, 335 N.C. 120, 129, 436 S.E.2d 106, 111 (1993), *cert. denied*, 512 U.S. 1239 (1994)), *cert. denied*, 537 U.S. 1133 (2003). In accordance with *stare decisis*, we affirm the Court of Appeals' decision holding defendant cannot be convicted of second-degree kidnapping with regards to the Longs and the Panters.

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facilitate the commission of another felony the offending movement or confinement must not be slight, inconsequential, and merely incidental to the other felony; must not be of the kind inherent in the nature of the other crime; and must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection."); *People v. Enoch*, 122 Ill. 2d 176, 197, 522 N.E.2d 1124, 1135 (stating the court's acceptance of the logic that "an aggravated kidnapping conviction should not be sustained where the asportation or confinement may constitute only a technical compliance with the statutory definition but is, in reality, incidental to another offense"), *cert. denied*, 488 U.S. 917 (1988); *People v. Wesley*, 421 Mich. 375, 388, 365 N.W.2d 692, 696-97 (1984) (listing the elements of the crime of kidnapping to include "an asportation of the victim which is not merely incidental to an underlying crime *unless* the crime involves murder, extortion or taking a hostage. Asportation incidental to these types of crimes is sufficient asportation for a kidnapping conviction."); *People v. Riley*, 70 N.Y.2d 523, 532, 517 N.E.2d 520, 525 (1987) (holding the defendant's actions in placing his victim in the trunk of his car and driving around for approximately three hours went "well beyond the robbery and constituted the independent crime of kidnapping"); *State v. Fuller*, 172 S.W.3d 533, 536 (Tenn. 2005) ("[A] separate kidnapping conviction violates due process when 'the confinement, movement, or detention is essentially incidental to the accompanying felony' and not 'significant enough in and of itself to warrant independent prosecution.' ") (quoting *State v. Anthony*, 817 S.W.2d 299, 305, 306 (Tenn. 1991)).

To convict defendant of second-degree kidnapping of the Longs and the Panters, the State was required to prove beyond a reasonable doubt defendant, acting by himself or acting in concert, confined, restrained, or removed the victims from one place to another for the purpose of facilitating the commission of a felony. N.C.G.S. § 14-39(a), (a)(2).

Additionally, we hold a trial court, in determining whether a defendant's asportation of a victim during the commission of a separate felony offense constitutes kidnapping, must consider whether the asportation was an inherent part of the separate felony offense, that is, whether the movement was "a mere technical asportation." If the asportation is a separate act independent of the originally committed criminal act, a trial court must consider additional factors such as whether the asportation facilitated the defendant's ability to commit a felony offense, or whether the asportation exposed the victim to a greater degree of danger than that which is inherent in the concurrently committed felony offense.

Following the analysis in *Irwin*, we conclude the asportation of the Longs and Panters from one side of the motel lobby door to the other was not legally sufficient to justify defendant's convictions of second-degree kidnapping. The moment defendant's accomplice drew his firearm, the robbery with a dangerous weapon had begun. The subsequent asportation of the victims was "a mere technical asportation" that was an inherent part of the robbery defendant and his accomplices were engaged in. *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446.

The State argues defendant's asportation of the Longs and the Panters both facilitated the commission of robbery with a dangerous weapon and exposed the victims to a greater degree of danger than that inherent in the robbery with a dangerous weapon. Defendant asserts the opposite, stating the asportation had no effect on defendant's ability to complete the robbery with a dangerous weapon. Further, defendant argues the amount of danger to which the victims were exposed never exceeded the degree of harm inherent in the commission of robbery with a dangerous weapon.

While these contentions from both parties are not without merit, they are unnecessary considerations for our analysis. Because we find defendant's asportation of the victims to be a "mere technical asportation" which is an inherent part of the commission of robbery with a dangerous weapon, we cannot under our jurisprudence uphold

defendant's convictions of second-degree kidnapping as to the Longs and the Panters.

As defendant's actions constituted only a "mere technical asportation" of the victims which was an inherent part of the commission of robbery with a dangerous weapon, defendant cannot be convicted of the separate crime of second-degree kidnapping. Accordingly, we affirm the Court of Appeals' decision vacating defendant's four convictions of second-degree kidnapping.

AFFIRMED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. WILLIAM BEACH SMITH

No. 346A05

(Filed 3 March 2006)

Rape— second-degree—instruction—proof beyond a reasonable doubt that victim was sleeping

The Court of Appeals did not err in a second-degree rape case by granting defendant a new trial although the decision should have been based on the trial court's failure to instruct that the State must prove beyond a reasonable doubt that the victim was sleeping, rather than focusing on the trial court's additional instruction that force and lack of consent are implied in law if at the time of the vaginal intercourse the victim was sleeping or similarly incapacitated, because: (1) the trial court's jury instruction did not clearly emphasize the State's burden to prove beyond a reasonable doubt that the victim was asleep, thus satisfying the force and lack of consent elements of second-degree rape under N.C.G.S. § 14-27.3(a)(1); and (2) there is a reasonable likelihood that the jury applied the instruction in a manner that impermissibly and unconstitutionally lessened the State's burden of proof.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 170 N.C. App. 461, 613 S.E.2d 304 (2005), reversing a judgment entered 15 January 2004 by Judge Evelyn W. Hill in Superior Court, Wake County, and remanding for a new trial. Heard in the Supreme Court 14 November 2005.

Roy Cooper, Attorney General, by John G. Barnwell, Assistant Attorney General, for the State-appellant.

Bruce T. Cunningham, Jr. and Joseph Blount Cheshire, V, for defendant-appellee.

BRADY, Justice.

The sole question presented is whether there is a reasonable likelihood that the trial court's instruction to the jury on second-degree rape impermissibly lessened the State's burden to prove the elements of force and lack of consent beyond a reasonable doubt. Because the trial court failed to instruct the jurors that they must find the dispositive fact in this case beyond a reasonable doubt, we hold that the jury instructions were flawed and affirm the Court of Appeals order granting defendant a new trial.

After being indicted by a grand jury on 21 October 2002, defendant William Beach Smith was tried and convicted of second-degree rape in Wake County Superior Court on 15 January 2004. Evidence presented at trial showed defendant, a certified flight instructor, met the alleged victim and became friends with her during flight lessons in 2000. After the victim completed high school in the spring of 2001, a dispute erupted with her mother which forced the victim to move out of the family home and into defendant's residence for six weeks during the summer of 2001. Subsequently, the victim enrolled at the University of Illinois at Urbana-Champaign, where she relocated in the fall of 2001.

The victim returned to North Carolina for a brief visit during the weekend of 20 October 2001. On Saturday of that weekend, the victim, although under the age of twenty-one, consumed a large amount of alcohol at a friend's residence. That same evening defendant celebrated a friend's birthday at a local bar and later invited the group to continue the festivities at his residence.

In the early morning hours of Sunday, 21 October 2001, the victim arrived at defendant's residence. Not surprisingly, defendant and the victim differ as to the events which unfolded between them

from Saturday evening to Sunday morning. Defendant testified that the victim initiated contact with him by calling his cell phone and leaving a message around 4:30 a.m. Defendant returned the victim's phone call and told her everyone at his house was going to bed. According to defendant, the victim called back stating she was on her way to defendant's residence. Defendant testified that the victim let herself into defendant's residence, climbed into defendant's bed with him, and the two began kissing. Defendant testified the victim never fell asleep while their physical interaction became more intense. Defendant did not deny having vaginal intercourse with the victim, but contended the kissing, fondling, and intercourse were consensual.

The victim, however, testified that beginning late Saturday evening defendant repeatedly called her cell phone and invited her to his residence. She then drove to defendant's residence at approximately 4:00 a.m. on Sunday morning. Upon arriving, the victim was greeted by defendant and defendant's friend, John Yancy (Yancy). Defendant told the victim the party had ended; however, she was too tired to drive home and decided to sleep at defendant's residence. The only available bed was defendant's, so defendant, the victim, and Yancy all climbed into defendant's bed, with the victim between defendant and Yancy. Defendant began rubbing the victim's arm and kissing her, but she told defendant "no" and that she was only going to sleep. The victim testified she fell asleep, but awoke with defendant on top of her, pinning her down by her wrists and having vaginal intercourse with her. The victim continually told defendant to stop, but he persisted. She then positioned her legs under defendant and pushed him off of her. Defendant left the room. Yancy, having left the room prior to the alleged rape, then re-entered the room and made sexual advances toward the victim, which she rebuffed. At that point, the victim began crying and Yancy left the room, again. The victim testified she felt "paralyzed" but went back to sleep. She awoke at approximately 9:45 a.m. and left defendant's residence to pack her belongings and return to her college campus in Illinois. Before leaving the state, the victim did not report the incident to law enforcement or inform anyone in North Carolina of her encounter with defendant.

Upon returning to Illinois, the victim shared her experience with three friends, sought medical treatment, and spoke to Officer Ronald Weiss, a law enforcement officer employed by the University of Illinois. Officer Weiss encouraged the victim to file an official report,

which she eventually did. Officer Weiss also informed her that, with proper court authorization, she could tape record her phone conversations with defendant. Officer Weiss obtained the proper documentation allowing the recording, and the victim recorded two conversations with defendant regarding the sexual intercourse that took place between them. These recorded conversations were introduced at trial over defendant's objections. During the conversations, defendant expressed a fear of being arrested and remorse for his actions, but maintained he thought the sexual intercourse was consensual.

During the charge conference, as required by N.C.G.S. § 15A-1231(b), the State requested an instruction on second-degree forcible rape in accordance with the North Carolina Pattern Jury Instructions, which explain the elements of second-degree rape, codified in N.C.G.S. § 14-27.3(a)(1), as follows:

> For you to find the defendant guilty of this offense, the state must prove three things beyond a reasonable doubt:
>
> First, that the defendant engaged in vaginal intercourse with the victim. Vaginal intercourse is penetration, however slight, of the female sex organ by the male sex organ. (The actual emission of semen is not necessary.)
>
> Second, that the defendant used or threatened to use force sufficient to overcome any resistance the victim might make. (The force necessary to constitute rape need not be actual physical force. Fear or coercion may take the place of physical force.)
>
> And Third, that the victim did not consent and it was against her will. (Consent induced by fear is not consent in law.)
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the Defendant engaged in vaginal intercourse with the victim and that he did so by force . . . and that this was sufficient to overcome any resistence which the victim might make, and that the victim did not consent and it was against her will . . . it would be your duty to return a verdict of guilty. If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

1 N.C.P.I.—Crim. 207.20 (2002). Further, the State requested that additional language from this Court's holding in *State v. Moorman* be

included with the pattern jury instruction. 320 N.C. 387, 358 S.E.2d 502 (1987). Over defendant's objection, the trial court granted the State's request and gave the following instruction to the jury regarding the elements of second-degree rape:

> The Defendant has been charged with second degree rape. For you to find the Defendant guilty of this offense, the State must prove three things beyond a reasonable doubt.
>
> First, that the Defendant engaged in vaginal intercourse with the victim. Vaginal intercourse is penetration, however slight, of the female sex organ by the male sex organ. The actual emission of semen is not necessary.
>
> Second, that the Defendant used or threatened to use force sufficient to overcome any resistance the victim might make.
>
> And third, that the victim did not consent and it was against her will. ***Force and lack of consent are implied in law if at the time of the vaginal intercourse the victim is sleeping or similarly incapacitated.***
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant engaged in vaginal intercourse with the victim and that he did so by force and that this was sufficient to overcome any resistence which the victim might make, and that the victim did not consent and it was against her will, it would be your duty to return a verdict of guilty.
>
> If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

(Emphasis added).

After receiving the jury instructions and deliberating, the jury returned a verdict finding defendant guilty of second-degree rape. The trial court sentenced defendant, who had a prior record level I, at the high end of the presumptive range to a minimum of seventy-three months and a maximum of ninety-seven months imprisonment. Defendant appealed his conviction to the Court of Appeals, arguing, *inter alia*, the trial court's jury instruction shifted the burden of proof from the State to the defendant on the third element of lack of

consent for second-degree rape. The Court of Appeals, in a divided decision, agreed with defendant and ordered a new trial. The State filed its appeal of right in this Court based upon the dissenting opinion pursuant to N.C.G.S. § 7A-30(2), arguing that the trial court's jury instructions were proper. We disagree with the State and affirm the Court of Appeals' determination that the instructions in question were inadequate, albeit for different reasons, as explained below.

The elements of second-degree rape are set out in N.C.G.S. § 14-27.3, which provides in part:

> (a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.
>
> (b) Any person who commits the offense defined in this section is guilty of a Class C felony.

N.C.G.S. § 14-27.3 (2005). Because vaginal intercourse was undisputed in this case, the remaining elements of second-degree rape at issue were force and lack of consent.

"The Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' " *Francis v. Franklin*, 471 U.S. 307, 313 (1985) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)).

A trial court's jury instruction "is for the guidance of the jury." *Sugg v. Baker*, 258 N.C. 333, 335, 128 S.E.2d 595, 597 (1962). Furthermore, the purpose "is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict." *State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971). "In a criminal trial the judge has the duty to instruct the jury on the law arising from all the evidence presented." *State v. Moore*, 75 N.C. App. 543, 546, 331 S.E.2d 251, 253, *disc. rev. denied*, 315 N.C. 188, 337 S.E.2d 862-63

(1985). A judge has the obligation "to instruct the jury on every substantive feature of the case." *State v. Mitchell*, 48 N.C. App. 680, 682, 270 S.E.2d 117, 118 (1980).

In reviewing a jury instruction which may be subject to erroneous interpretation, this Court has stated that "we inquire 'whether there is a *reasonable likelihood* that the jury has applied the challenged instruction in a way that violates the Constitution.' " *State v. Jennings*, 333 N.C. 579, 621, 430 S.E.2d 188, 209 (emphasis added) (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)), quoted in *Estelle v. McGuire*, 502 U.S. 62, 72 & n.4 (1991) (reaffirming the *Boyde* reasonable likelihood standard) *cert. denied* 510 U.S. 1028 (1993). The burden upon the defendant is to "show more than a 'possibility' that the jury applied the instruction in an unconstitutional manner." *Jennings*, 333 N.C. at 621, 430 S.E.2d at 209 (citing *Boyde*, 494 U.S. at 380). In determining whether the defendant has met the reasonable likelihood standard this Court must review the trial court's instruction to the jury " 'in the context of the overall charge.' " *State v. McNeil*, 327 N.C. 388, 392, 395 S.E.2d 106, 109 (1990) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)), *cert. denied*, 499 U.S. 942 (1991).

As stated earlier, the jury instruction in the instant case followed the North Carolina Pattern Jury Instruction on second-degree forcible rape with one exception. The trial court, in an accurate statement of the law as it related to the evidence presented[1], added language from this Court's decision in *State v. Moorman*, namely: "Force and lack of consent are implied in law if at the time of the vaginal intercourse the victim is sleeping or similarly incapacitated." 320 N.C. at 392, 358 S.E.2d at 506.

The term "implied in law" means "[i]mposed by operation of law and not because of any inferences that can be drawn from the facts of the case." *Black's Law Dictionary* 770 (8th ed. 2004). Thus, in the context of the case at hand, force and lack of consent were established as a matter of law once the State proved beyond a reasonable doubt that the victim was sleeping or similarly incapacitated at the time of the vaginal intercourse.

Based upon the evidence presented, the jury was called upon to decide who was telling the truth about the victim's being asleep

1. Our decision today does not call into question this Court's well-reasoned opinion in *Moorman* which stated: "[S]exual intercourse with [a sleeping or similarly incapacitated] victim is *ipso facto* rape." 320 N.C. at 392, 358 S.E.2d at 506.

when vaginal intercourse was initiated. "[I]t is the province of the jury . . . to assess and determine witness credibility." *State v. Hyatt*, 355 N.C. 642, 666, 566 S.E.2d 61, 77 (2002), *cert. denied*, 537 U.S. 1133 (2003). We find that there is a reasonable likelihood the jury believed that if they credited the victim's testimony, then, as a matter of law, force and lack of consent existed. Consequently, the jury would then impermissibly find that the State had proved the elements of second-degree rape and that the defendant was guilty. It is critical that the jury not stop its inquiry upon finding the victim's version of the events was more believable than defendant's. A jury in a criminal prosecution finding, by the greater weight of the evidence, that the victim's account is true is inadequate. Because the burden of proof is beyond a reasonable doubt, if properly instructed, the jury could believe the victim's version of the events more likely than not transpired, yet still acquit the defendant because of a reasonable doubt.

Force and lack of consent can only be implied in law if the State proves, beyond a reasonable doubt, that the victim was sleeping at the time of the vaginal intercourse. Because, in the case at hand, the jury's determination that the victim was sleeping satisfied two elements of the crime, whether the victim was asleep is the determinative fact in question and the crux of the State's prosecution. Accordingly, when a jury's role becomes so limited in a criminal prosecution, it is imperative that the jurors be instructed that they must find the solitary fact, which satisfies multiple elements of the crime, beyond a reasonable doubt. Thus, there is a reasonable likelihood that the jury misapplied the instruction in this case because it was not informed it had to find the basic fact of sleeping beyond a reasonable doubt.

When considering the context of the instructions as a whole, we acknowledge that the trial court did instruct the jury that in order to find the defendant guilty, the State must prove the three elements of second-degree rape beyond a reasonable doubt. However, those statements were not specifically tailored to the disputed fact of sleeping.

The trial court's jury instruction did not clearly emphasize the State's burden to prove beyond a reasonable doubt that the victim was asleep, thus satisfying the force and lack of consent elements of second-degree rape under N.C.G.S. § 14-27.3(a)(1). There is a reasonable likelihood that the jury applied the instruction in a manner that impermissibly and unconstitutionally lessened the State's burden of

proof. Even if inadvertent, the trial court's failure to properly instruct the jury constitutes error and warrants a new trial.

MODIFIED AND AFFIRMED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION v. HAYWOOD COUNTY

No. 628PA04

(Filed 3 March 2006)

Eminent Domain; Witnesses— value—expert testimony—methodology—reliability

The trial court did not abuse its discretion by granting plaintiff's motion for a directed verdict on certain expert testimony in a condemnation action. The first of three steps in evaluating the admissibility of expert testimony is to determine whether the expert's method of proof is sufficiently reliable; here, the court determined that defendant's experts' method of proof was subjective and not based on reliable methodology, and the inquiry need go no further.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 167 N.C. App. 55, 604 S.E.2d 338 (2004), reversing a judgment entered 11 July 2003 by Judge Albert Diaz in Superior Court, Haywood County, and remanding for a new trial. Heard in the Supreme Court 13 December 2005.

Roy Cooper, Attorney General, by Martin T. McCracken, Assistant Attorney General, for plaintiff-appellant.

Jeffrey W. Norris & Associates, PLLC, by Jeffrey W. Norris, for defendant-appellee.

EDMUNDS, Justice.

In this land condemnation case, we must decide whether the trial court abused its discretion when it allowed plaintiff's motion for a directed verdict as to defendant's purported expert testimony regard-

ing certain elements of damage related to the value of the real property at issue. Because we conclude that the trial court reasonably determined that the testimony lacked sufficient reliability, we find no abuse of discretion. Accordingly, we reverse the Court of Appeals holding to the contrary.

Plaintiff Department of Transportation made plans to widen U.S. Highway Business 23 in defendant Haywood County. To carry out this plan, plaintiff needed to acquire additional right of way. The Haywood County Planning Building, which houses several county agencies and also provides rental space to various nonprofit organizations, is located on the property affected by the widening. Plaintiff's project would take 2,861 square feet of this 26,060 square foot tract of land. As a result, the Planning Building would lose part of its paved parking lot and the distance between the southeast corner of the Planning Building and the highway would shrink from forty-four feet to as little as two and one-half feet. In addition, plaintiff would also acquire a 1,859 square foot temporary construction easement consisting of a long narrow strip running parallel to the new right of way. This construction easement was set to expire upon completion of the highway expansion project, which at the time of condemnation was expected to take three years.

Plaintiff estimated just compensation for defendant's appropriated property to be $10,125.00. Because defendant did not agree with plaintiff's estimate, condemnation became necessary. Pursuant to N.C.G.S. § 136-103, on 22 January 2001, plaintiff filed a Complaint, Declaration of Taking, and Notice of Deposit. Plaintiff simultaneously deposited $10,125.00 with the Clerk of Haywood County Superior Court.

On 2 June 2003, the case went to trial in Haywood County Superior Court. The only issue before the jury was the amount of compensation to which defendant was entitled. Defendant, who had the burden of proof, presented the testimony of three expert witnesses regarding both the value of damages arising from the proximity of the new right of way to the building ("proximity damage") and the rental value of the temporary construction easement ("rental value"). At the close of defendant's evidence, plaintiff moved for a directed verdict as to portions of the testimony of each of these three witnesses. The trial court granted plaintiff's motion and instructed the jury not to consider defendant's evidence regarding proximity damages and rental value as factors in the damage award.

The jury returned a verdict for defendant in the amount of $21,100.00. Defendant appealed the decision to the North Carolina Court of Appeals, assigning as error the trial court's grant of the directed verdict. On 16 November 2004, the Court of Appeals reversed the trial court and remanded the case for a new trial. *N.C. Dep't of Transp. v. Haywood Cty.*, 167 N.C. App. 55, 604 S.E.2d 338 (2004). On 18 August 2005, we allowed plaintiff's petition for discretionary review to consider whether the Court of Appeals erred in reversing the trial court's judgment.

A trial court must decide preliminary questions pertaining to the qualifications of a witness and the admissibility of testimony. N.C.G.S. § 8C-1, Rule 104(a) (2005). "[A] trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

The trial court accepted defendant's tender of three expert witnesses to testify as to land values in Haywood County: Mr. Carroll Mease, Mr. James Deitz, and Mr. Bobby Joe McClure. All three testified that the permanent value of the Planning Building would depreciate because the building would be so close to the widened road. Their opinions of the amount of depreciation ranged from thirty to thirty-five percent. In addition, each appraised the rental value of the temporary construction easement, assessing it at between $500.00 and $800.00 per month over a three-year period.

Each expert was questioned in an attempt to elicit the basis of his opinion as to proximity damages. Mr. Mease's response was: "I felt like in my opinion that 30 percent damage worked well with this building." When asked, "Why isn't it 25 percent or 20 percent or 40 percent? Where does the 30 percent come from?", Mr. Mease acknowledged that he did not use any particular mathematical formula in arriving at the figure and repeated that "I just felt like that 30 percent was about what the building would be damaged . . . ." Mr. Dietz explained that his estimate that the building's value would be diminished by thirty-five percent was "my personal opinion based on experience." Although Mr. McClure said his estimate of the depreciation was derived from "my experience of dealing with the real

estate," he also testified that he did not have any comparable or similar sales to document that estimate. As to the rental value of the temporary construction easement, each expert conceded that he had not seen a lease of a similar strip of property to use for a comparison in making his appraisal.

In land condemnation cases, "mere conjecture, speculation, or surmise is not allowed by the law to be a basis of proof in respect of damages or compensation. The testimony offered should tend to prove the fact in question with reasonable certainty." *Raleigh, Charlotte & S. Ry. Co. v. Mecklenburg Mfg. Co.*, 169 N.C. 204, 208, 169 N.C. 156, 160, 85 S.E. 390, 392 (1915). The trial court granted plaintiff's motion for a directed verdict with respect to proximity damages and the rental damages as a result of its determination that opinions of the defendant's experts regarding these elements of damage were "not based on any reliable methodology that the court could ascertain, that [they were] simply based on subjective hunches and speculation." The trial court also stated that

> I'm sure [the experts] are all very well experienced and have testified to their experience, but I didn't see the necessary connection between their experience and how they arrived at these valuations, particularly with respect to the proximity damage, . . . and I had the same problem with respect to rental value, the numbers were all over the place.

"The trial court is given great latitude in determining the admissibility of expert testimony." *State v. Gainey*, 355 N.C. 73, 88, 558 S.E.2d 463, 474, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). Admissibility of expert testimony is evaluated in a three-step inquiry. *State v. Goode*, 341 N.C. 513, 527-29, 461 S.E.2d 631, 639-41 (1995). The first step requires that the trial court determine whether an expert's method of proof is sufficiently reliable as an area for expert testimony. *See Howerton*, 358 N.C. at 459, 597 S.E.2d at 686; *Goode*, 341 N.C. at 527, 461 S.E.2d at 639. Here we need go no further. The trial court heard the opinion of each expert as well as the basis of each opinion. Although each expert had experience in appraising real estate, none articulated any method used to arrive at his figures, even when closely questioned. To the contrary, these experts' testimony about feelings and personal opinions, unsupported by objective criteria, explains and justifies the trial court's concern that their opinions were based on hunches and speculation. Because the trial court's threshold determination that the experts' method of proof lacked sufficient reliability was neither arbitrary nor the result of an

unreasoned decision, we hold that the trial court's grant of plaintiff's motion for a directed verdict was not an abuse of discretion. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

HARRY E. MUNN, JR. v. NORTH CAROLINA STATE UNIVERSITY

No. 567A05

(Filed 3 March 2006)

Appeal and Error; Damages and Remedies— breach of contract—nominal damages—improper assignments of error—failure to object to instructions

A decision of the Court of Appeals awarding plaintiff university professor a new trial on the issue of damages in an action for breach of a reemployment contract in which the jury awarded plaintiff nominal damages of one dollar is reversed for the reasons stated in the dissenting opinion that plaintiff's assignments of error violated the Rules of Appellate Procedure and plaintiff neither objected to nor assigned error to the jury instructions.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 173 N.C. App. ——, 617 S.E.2d 335 (2005), vacating an order denying plaintiff's motion for judgment notwithstanding the verdict or a new trial entered 19 December 2003 by Judge J.B. Allen, Jr. in Superior Court, Wake County, and remanding for a new trial on damages only. On 3 November 2005, the Supreme Court allowed defendant's petition for discretionary review as to additional issues. Heard in the Supreme Court 15 February 2006.

Unti & Lumsden LLP, by Michael L. Unti and Sharon L. Smith, for plaintiff-appellee.

Roy Cooper, Attorney General, by John P. Scherer II and Kimberly D. Potter, Assistant Attorneys General, for defendant-appellant.

PER CURIAM.

As to the issue on direct appeal, we reverse the decision of the Court of Appeals for the reasons stated in the dissenting opinion. Further, we conclude that the petition for discretionary review as to additional issues was improvidently allowed.

REVERSED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

REUBEN LOREDO, AND J. FRANK WOOD, JR., AS GUARDIAN AD LITEM OF STACEY JAZMINE LOREDO, AND THOMAS BERKAU, AS ADMINISTRATOR OF THE ESTATE OF HENRY LOREDO, MINOR/DECEASED, AND AMELIA TORRES, ADMINISTRATRIX OF THE ESTATE OF VICTORIA TORRES, PLAINTIFFS V. CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION, NORFOLK SOUTHERN RAILWAY COMPANY, AND D.A. GILBERT, DEFENDANTS/THIRD-PARTY PLAINTIFFS V. AMELIA TORRES, AS ADMINISTRATRIX OF THE ESTATE OF VICTORIA TORRES, FAMILY HOME & GARDEN, INC. (F/K/A FAMILY FARM SUPPLY, INC.), WALTER B. HORNE AND WIFE, JANET G. HORNE, INDIVIDUALLY AND D/B/A FAMILY EGG MARKET, THIRD-PARTY DEFENDANTS

No. 297A05

(Filed 3 March 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 169 N.C. App. 508, 610 S.E.2d 225 (2005), affirming an order granting summary judgment for defendants entered on 26 June 2003 by Judge Henry W. Hight, Jr. in Superior Court, Wake County. Heard in the Supreme Court 13 February 2006.

Mast, Schulz, Mast, Mills, Johnson & Wells, P.A., by Charles D. Mast, George B. Mast, David F. Mills, and T. Marie Mobley, for plaintiff-appellants Loredo, Wood, and Berkau, and Ward & Smith, P.A., by W.L. Allen III, for plaintiff-appellant Torres.

Millberg, Gordon & Stewart, by Frank J. Gordon, for defendant-appellee CSX Transportation, Inc.

Bode, Call & Stroupe, L.L.P., by Odes L. Stroupe, Jr. and John S. Byrd, II, for defendant-appellees Norfolk Southern Corporation, Norfolk Southern Railway Company, and D.A. Gilbert.

John J. Korzen counsel for the North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

AFFIRMED.

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

STATE OF NORTH CAROLINA v. HARDIN ELI ROSS, III

No. 581A05

(Filed 3 March 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 173 N.C. App. ——, 620 S.E.2d 33 (2005), finding no error in a judgment entered 5 February 2004 by Judge Evelyn W. Hill in Superior Court, Wake County. Heard in the Supreme Court 14 February 2006.

Roy Cooper, Attorney General, by Rudy Renfer, Assistant Attorney General, for the State.

Parrish, Smith & Ramsey, LLP, by Richard D. Ramsey, for defendant-appellant.

PER CURIAM.

AFFIRMED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY v. JOHN M. BOURLON

No. 551A05

(Filed 3 March 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 172 N.C. App. ——, 617 S.E.2d 40 (2005), affirming in part and reversing in part an order entered 5 September 2003 by Judge Evelyn W. Hill in Superior Court, Wake County. Heard in the Supreme Court 15 February 2006.

Bailey & Dixon, L.L.P., by David S. Wisz, for plaintiff-appellee.

Stark Law Group, PLLC, by Thomas H. Stark and Seth A. Neyhart, for defendant-appellant.

PER CURIAM.

AFFIRMED.

Justice MARTIN and Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

CATER v. BARKER

[360 N.C. 357 (2006)]

DIANNE CATER AND LYNNE O'CONNOR v. CATHERINE BARKER (NOW McKEON)

No. 546A05

(Filed 3 March 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 172 N.C. App. 441, 617 S.E.2d 113 (2005), affirming an order granting summary judgment to plaintiffs entered 18 March 2004 by Judge Zoro J. Guice, Jr. in Superior Court, Macon County. Heard in the Supreme Court 14 February 2006 without oral argument pursuant to Rule 30(d) of the Rules of Appellate Procedure.

Ronald Stephen Patterson, P.A., by Ronald Stephen Patterson, for plaintiff-appellees.

Creighton W. Sossomon for defendant-appellant.

PER CURIAM.

AFFIRMED.

GLORIA BARHAM, ADMINISTRATRIX OF THE ESTATE OF BILLY MELVIN BARHAM, DECEASED v. RODNEY J. HAWK, M.D. AND HENDERSONVILLE EAR NOSE AND THROAT, P.A.

No. 461PA04

(Filed 3 March 2006)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 165 N.C. App. 708, 600 S.E.2d 1 (2004), vacating a judgment entered on 21 March 2002 by Judge Marlene Hyatt in Superior Court, Polk County, and remanding for a new trial. Heard in the Supreme Court 18 October 2005.

Blanchard, Jenkins, Miller, Lewis & Styers, P.A., by Robert O. Jenkins and E. Hardy Lewis, for plaintiff-appellee.

Shumaker, Loop & Kendrick, LLP, by S. Frederick Winiker, III and John D. Kocher, for defendant-appellants.

PER CURIAM.

Justice TIMMONS-GOODSON took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Crawford v. Commercial Union Midwest Ins. Co.*, 356 N.C. 609, 572 S.E.2d 781 (2002); *Robinson v. Byrd*, 356 N.C. 608, 572 S.E.2d 781 (2002).

AFFIRMED.

STATE OF NORTH CAROLINA v. ROBERT LOUISE ETHERIDGE

No. 134A05

(Filed 3 March 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 168 N.C. App. 359, 607 S.E.2d 325 (2005), affirming in part and reversing in part defendant's conviction and sentence entered 23 July 2003 by Judge Jerry Braswell in Superior Court, Lenoir County. Heard in the Supreme Court 12 September 2005.

Roy Cooper, Attorney General, by Kathleen M. Waylett, Special Deputy Attorney General, for the State.

Sue Genrich Berry for defendant-appellant.

PER CURIAM.

AFFIRMED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

IN RE P.L.P.

[360 N.C. 360 (2006)]

IN THE MATTER OF P.L.P.

No. 521A05

(Filed 3 March 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 173 N.C. App. 1, 618 S.E.2d 241 (2005), affirming a judgment terminating respondent's parental rights entered 23 March 2004 by Judge Peter L. Roda in District Court, Buncombe County. Heard in the Supreme Court 14 February 2006.

Charlotte W. Nallan for petitioner-appellee Buncombe County Department of Social Services.

M. Victoria Jayne for respondent-appellant father.

Judy N. Rudolph for appellee Guardian ad Litem.

PER CURIAM.

AFFIRMED.

IN RE J.W. & K.W.

[360 N.C. 361 (2006)]

IN THE MATTER OF J.W. AND K.W.

No. 592A05

(Filed 3 March 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 173 N.C. App. ——, 619 S.E.2d 534 (2005), affirming a judgment terminating respondent's parental rights entered 12 March 2004 by Judge Addie H. Rawls in District Court, Harnett County. On 1 December 2005, the Supreme Court allowed respondent's petition for discretionary review as to an additional issue. Heard in the Supreme Court 15 February 2006.

E. Marshall Woodall for petitioner-appellee Harnett County Department of Social Services.

Peter Wood for respondent-appellant mother.

Elizabeth Myrick Boone for appellee Guardian ad Litem.

PER CURIAM.

AFFIRMED.

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

ABL Plumbing & Heating Corp. v. Bladen Cty. Bd. of Educ. Case Below: 175 N.C. App. 164	No. 035P06	Plt's PDR Under N.C.G.S. §7A-31 (COA05-14)	Denied (03/02/06)
Barham v. Hawk Case Below: 165 N.C. App. 708	No. 461PA04	Plt's Motion to Dismiss Appeal or in the Alternative to Deem Discretionary Review Improvidently Granted (COA02-1393)	Dismissed as moot (03/02/06)
Barton v. White Case Below: 173 N.C. App. 717	No. 684P05	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA04-1604) 2. Def's (Sue Perry White) Motion to Dismiss Petition 3. Def's (Godfrey) Motion to Dismiss Petition	1. Denied (03/02/06) 2. Dismissed as moot (03/02/06) 3. Dismissed as moot (03/02/06)
Bond/Tec, Inc. v. Scottsdale Ins. Co. Case Below: 174 N.C. App. 820	No. 006P06	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1591)	Denied (03/02/06)
Bost v. Bost Case Below: 175 N.C. App. 419	No. 056P06	Respondents' (Bobbi and Keith Bruehl) PDR Under N.C.G.S. § 7A-31 (COA05-360)	Denied (03/02/06)
Capps v. NW Sign Indus. of N.C., Inc. Case Below: 171 N.C. App. 409	No. 383A05	Pt's Motion to Dismiss Appeal (COA04-1229)	Denied 02/13/06
Carpenter v. Ratliff Case Below: 174 N.C. App. 625	No. 688P05	Def's PDR Under N.C.G.S. § 7A-31 (COA05-271)	Denied (03/02/06)
Estate of Spell v. Ghanem Case Below: 175 N.C. App. 191	No. 067P06	Def's (East Carolina Health Heritage) Motion to Withdraw PDR Under N.C.G.S. § 7A-31 (COA05-353)	Allowed (03/02/06)

Goldston v. State of N.C. Case Below: 173 N.C. App. 416	No. 328P04-2	1. Plt's NOA Based Upon a Constitutional Question (COA04-593) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Plt's Alternative PDR of Constitutional Issues Pursuant to N.C.G.S. § 7A-31 4. Def's Motion to Dismiss Appeal	1. —- 2. Allowed (03/02/06) 3. Denied (03/02/06) 4. Allowed (03/02/06) **Timmons-Goodson, J. Recused**
Helsius v. Robertson Case Below: 174 N.C. App. 507	No. 698P05	1. Respondent's (County of Durham) NOA Based upon a Constitutional Question (COA05-08) 2. Petitioner's (Helsius) Motion to Dismiss Appeal 3. Respondent's (County of Durham) PDR Under N.C.G.S. § 7A-31	1.—- 2. Allowed (03/02/06) 3. Denied (03/02/06)
Hill v. Hill Case Below: 173 N.C. App. 309	No. 638P05	1. Plt's Motion for Temporary Stay (COA03-969-2) 2. Plt's Petition for Writ of Supersedeas 3. Plt's NOA Based Upon A Constitutional Question 4. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/22/05** 360 N.C. 175 Stay Dissolved **03/02/06** 2. Denied (03/02/06) 3. Dismissed Ex Mero Motu (03/02/06) 4. Denied (03/02/06) **Martin, J. Recused**
Hill v. Taylor Case Below: 174 N.C. App. 415	No. 703P05	Defendant-Appellant's PDR (COA04-1698)	Denied (03/02/06)
In re B.I. Case Below: 175 N.C. App. 246	No. 043P06	Respondent's (Hester I.) PDR Under N.C.G.S. § 7A-31 (COA05-448)	Denied (03/02/06)

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

In re D.M.W. Case Below: 173 N.C. App. 679	No. 671P05	Petitioner's (Mecklenburg County DSS) PWC To Review Decision of COA (COA05-70)	Allowed (03/02/06)
Lewis v. Craven Reg'l Med. Ctr. Case Below: 174 N.C. App. 561)	No. 693P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1656)	Denied (03/02/06) **Martin, J. Recused**
Lohrman v. Iredell Mem'l Hosp., Inc. Case Below: 174 N.C. App. 63	No. 655P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-1373)	Denied (03/02/06)
Mabee v. Onslow Cty. Sheriff's Dep't Case Below: 174 N.C. App. 210	No. 643P05	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA04-1628) 2. Defs' (Onslow County Sheriff's Dept., Ed Brown & Kirk Newkirk) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied (03/02/06) 2. Dismissed as Moot (03/02/06)
Mayfield v. Hannifin Case Below: 174 N.C. App. 386	No. 699P05	1. Def's Motion for Temporary Stay (COA04-1646) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Withdraw PDR	1. Denied 12/20/05 360 N.C. 290 2. Dismissed as moot (03/02/06) 3. —- 4. Allowed (03/02/06)
Perez v. American Airlines/AMR Corp. Case Below: 174 N.C. App. 128	No. 661P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1573)	Allowed (03/02/06)
Roberts v. McAllister Case Below: 174 N.C. App. 369	No. 686A05	Plt-Appellant's Motion to Dismiss Appeal (COA04-1045)	Allowed 02/08/06
State v. Ahmadi-Turshizi Case Below: 175 N.C. App. 783	No. 092P06	1. AG's Motion for Temporary Stay (COA05-482)	1. Allowed 02/23/06

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

State v. Allen Case Below: 175 N.C. App. 247	No. 033P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-53)	Denied (03/02/06)
State v. Artis Case Below: 174 N.C. App. 668	No. 017P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-269)	Denied (03/02/06)
State v. Blyther Case Below: 175 N.C. App. 226	No. 030P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-549)	Denied (03/02/06)
State v. Bradley Case Below: 175 N.C. App. 234	No. 021P06	1. AG's Motion for Temporary Stay (COA05-410) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/13/06** 360 N.C. 291 Stay Dissolved **(03/02/06)** 2. Denied (03/02/06) 3. Denied (03/02/06)
State v. Brisbon Case Below: 175 N.C. App. 247	No. 038P06	1. Def's NOA Based Upon A Constitutional Question (COA05-320) 2. AG's Motion To Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (03/02/06) 3. Denied (03/02/06)
State v. Buckman Case Below: 165 N.C. App. 706	No. 472P04	Def's Motion for Relief (COA03-859)	Dismissed (03/02/06)
State v. Crow Case Below: 175 N.C. App. 119	No. 045P06	Def's Motion for Temporary Stay (COA05-253)	Denied 02/10/06
State v. Derbeck Case Below: 174 N.C. App. 626	No. 704A05	1. Def's NOA Under N.C.G.S. § 7A-30 (COA05-59) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed (03/02/06)
State v. Finney Case Below: 175 N.C. App. 795	No. 093P06	AG's Motion for Temporary Stay (COA05-850)	Allowed 02/23/06

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

State v. Hammett Case Below: 175 N.C. App. 597	No. 083A06	1. AG's Notice of Appeal (**Dissent**) (COA05-377) 2. AG's Motion for Temporary Stay 3. AG's Petition for Writ of Supersedeas	1. —— 2. Allowed 02/23/06 3. Allowed 02/23/06
State v. Langley Case Below: 173 N.C. App. 194	No. 535P05	1. AG's Motion for Temporary Stay (COA04-1100) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under 7A-31	1. Allowed **09/28/05** 360 N.C. 73 Stay Dissolved **03/02/06** 2. Denied (03/02/06) 3. Denied (03/02/06) 4. Dismissed as Moot (03/02/06)
State v. Medina Case Below: 174 N.C. App. 723	No. 009P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-216)	Denied (03/02/06)
State v. Miles Case Below: 174 N.C. App. 840	No. 012P06	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1286)	Denied (03/02/06)
State v. Nickerson Case Below: 173 N.C. App. 642	No. 630P05	Def's PDR Under G.S. 7A-31 (COA04-1640)	Denied (03/02/06)
State v. Obiorah Case Below: 175 N.C. App. 248	No. 022A06	1. Def's NOA Based Upon a Constitutional Question (COA04-1567) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed (03/02/06)
State v. Owens Case Below: 175 N.C. App. 248	No. 039P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-128)	Denied (03/02/06)
State v. Robinson Case Below: 136 N.C. App. 233	No. 096P06	Def's Motion for "Petition for Plain Error Review" (COA99-852)	Dismissed (03/02/06)

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

State v. Sims Case Below: 174 N.C. App. 829	No. 016P06	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1170)	Denied (03/02/06)
State v. Smith Case Below: 175 N.C. App. 421	No. 050P06	1. Def's PDR Under N.C.G.S. § 7A-31 (COA04-1331) 2. Def's PWC	1. Denied (03/02/06) 2. Denied (03/02/06)
State v. Smith Case Below: 170 N.C. App. 461	No. 346A05	Def's Motion for Partial Remand to COA (COA04-587)	Dismissed as Moot (03/02/06)
State v. Swanson Case Below: 174 N.C. App. 628	No. 700P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1350)	Denied (03/02/06)
State v. Williams Case Below: 174 N.C. App. 629	No. 708P05	Def-Appellant's PDR Under N.C.G.S. § 7A-31 (COA04-1506)	Denied (03/02/06)
Taylor v. Abernathy Case Below: 174 N.C. App. 93	No. 646P05	1. Plt's PWC to Review the Decision of the COA (COA04-651) 2. Defs' Conditional PWC to Review the Decision of the COA	1. Denied (03/02/06) 2. Dismissed as Moot (03/02/06)
Terasaka v. AT&T Case Below: 174 N.C. App. 735	No. 696A05	1. Plt's NOA (Dissent) (COA04-1572) 2. Def's PDR As to Additional Issues	1. —— 2. Allowed (03/02/06)
Urhig v. Madaras Case Below: 174 N.C. App. 357	No. 668P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-1667)	Denied (03/02/06)

PETITIONS TO REHEAR

Currituck Assocs. Residential P'ship v. Hollowell Case Below: 360 N.C. 162	No. 528A04	Defs'/Plts' (Ray E. Hollowell, Jr. and Shallowbag Bay Development Co., LLC) Petition for Rehearing (COA03-1082) (COA03-1085)	Denied 01/31/06 **Martin, J. Recused**
Jones v. City of Durham Case Below: 360 N.C. 81	No. 137A05	Plt's Petition for Rehearing (COA04-662)	Allowed 02/15/06

STATE OF NORTH CAROLINA v. MARKEITH RODGERS LAWRENCE

No. 293A05

(Filed 7 April 2006)

Indecent Liberties; Rape— statutory rape—short-form indictment—lack of specific details and identical wording

A jury unanimously convicted defendant of three counts of taking indecent liberties with a minor and five counts of statutory rape even though the short-form indictments for each alleged crime are identically worded and lack specific details distinguishing one particular incident of a crime from another, and defendant's motion for appropriate relief is dismissed, because: (1) defendant may be unanimously convicted of indecent liberties even if the jurors considered a higher number of incidents of immoral or indecent behavior than the number of counts charged and the indictments lacked specific details to identify the specific incidents since the statute proscribing indecent liberties does not list as elements of the offense discrete criminal activities in the disjunctive; and (2) with regard to the statutory rape charges, defendant was indicted on five counts of statutory rape, the victim testified to five specific incidents of statutory rape, defendant never raised an objection at trial regarding unanimity, the jury was instructed on all issues including unanimity, separate verdict sheets were submitted to the jury for each charge, the jury deliberated and reached a decision on all counts submitted to it in less than one and one-half hours, the record reflected no confusion or questions as to jurors' duty in the trial, and when polled by the court all jurors individually affirmed that they had found defendant guilty in each individual case file number.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 170 N.C. App. 200, 612 S.E.2d 678 (2005), vacating in part and reversing and remanding in part judgments entered on 16 January 2003 by Judge Quentin T. Sumner in Superior Court, Nash County. On 10 November 2005, defendant filed a motion for appropriate relief in this Court. Heard in the Supreme Court 14 November 2005.

Roy Cooper, Attorney General, by Amy C. Kunstling, Assistant Attorney General, for the State-appellant.

Staples S. Hughes, Appellate Defender, by Barbara S. Blackman, Assistant Appellate Defender, and Stephen D. Kiess for defendant-appellee.

WAINWRIGHT, Justice.

Defendant was tried in Nash County Superior Court and convicted of six counts of first-degree sexual offense, five counts of statutory rape, and three counts of taking indecent liberties with a minor. The Court of Appeals vacated defendant's judgments for first-degree sexual offense, and reversed and remanded defendant's judgments for statutory rape and indecent liberties. In so doing, the court found that neither the indictments, jury instructions, nor verdict sheets identified the specific incidents of the respective statutory rape and indecent liberties charges for which the jury found defendant guilty. The court held that the jury's verdicts as to the statutory rape and indecent liberties charges may not have been unanimous because more criminal incidents were presented into evidence than were charged in the indictments. The State filed an appeal based on the dissenting opinion.[1] We reverse in part and remand defendant's case to the Court of Appeals.

The evidence presented at trial showed that in 1999 and 2000 defendant engaged in a variety of sexual acts with the victim, L.D. (Lucy). When these acts began, defendant was twenty-four years old and Lucy was eleven years old. Defendant was married to Lucy's older sister Sharlena. Lucy resided with defendant and Sharlena after Lucy's mother died in August 2000, but also spent considerable time with defendant and Sharlena before her mother's death.

Lucy testified about three specific incidents of indecent liberties with a minor. The first incident with defendant occurred in the summer of 1999 when she was eleven years old. Defendant introduced Lucy to a "game" in which Lucy lifted up her shirt for defendant and he would expose his penis to her.

Another incident occurred one evening that same summer. Defendant told Lucy to lie down on the couch in her sister's living

1. The court also identified a fatal variance between defendant's indictments for first-degree sexual offense and the jury instructions; however, this issue was not brought forward on appeal as all three members of the panel agreed on this issue.

room, after which defendant lay on top of her. Lucy testified that defendant pulled his pants down, moved her underwear and nightgown to the side, and attempted to "stick his private part into me." Defendant was unable to penetrate Lucy because she kept scooting away from him.

On a different occasion in the summer of 1999, Lucy testified that her younger sister, D.D. (Debbie), then eight years old, witnessed defendant's inappropriate behavior. Lucy and Debbie were both in their bathing suits at defendant's house before going to a neighbor's swimming pool. Defendant called the girls into the bedroom, where they found him on the bed wearing only a towel. Lucy testified that defendant kissed Debbie and her on the lips before telling Lucy to get on top of him. Defendant removed his towel and began masturbating while Lucy straddled him and Debbie stood at the edge of the bed. Debbie's testimony at trial corroborated Lucy's story. Debbie further testified that she witnessed defendant put his hand up Lucy's shirt while they were watching a pornographic movie.

Lucy testified that she had sexual intercourse with defendant thirty-two times during the years 1999 and 2000. During her testimony, Lucy recounted five specific instances in which defendant actually penetrated her vagina with his penis. All of these incidents occurred when Lucy was twelve years old, thus constituting first-degree statutory rape.

The first time Lucy had sexual intercourse with defendant, Lucy's mother was in the hospital and Lucy was staying with Sharlena and defendant. Lucy testified that while Sharlena was at work, she was in the living room when:

> [defendant] told me to lay down. And I was at the edge of the couch and he told me to lay down and he tried it again. And as he was trying he stuck it—he almost did, and it was hurting so I was scooting on the couch and then I ran out of the room.

Later that same evening, defendant entered Lucy's room, which she shared with Debbie and Sharlena's three-year-old son, C.D. (Caleb). Lucy was awakened by defendant and he again instructed her to lie on the couch.

> Q. And what happened after that?
>
> A. Then he got on top of me and he did it again, tried to have sex with me. He told me—when I was scooting up the couch again he told me, "relax,", I need to be still, and he did it.

Q. He told you to relax?

A. Yes, sir.

Q. And what do you mean when you say "he did it"?

A. He had sex with me.

Q. Did any of his body ever enter into your body?

A. Yes, sir.

Q. Please tell the ladies and gentlemen of the jury when you say he had sex with you, what do you mean? What did he do?

A. He stuck his private into mine.

The third instance of intercourse happened in the living room with defendant holding Lucy on top of him. She testified that she had sexual intercourse with defendant in the living room approximately fifteen times. The encounters occurred mainly on the couch and sometimes on the floor. These encounters occurred while Sharlena was either at work or asleep in her room.

Q. Tell—please tell the jury anything you remember about having sex with [defendant] in the living room. Do you remember where in the living room it was?

A. Most of the time it was on the couch and then sometimes on the floor.

Q. Most of the time on the couch?

A. (Nodded affirmatively.)

. . . .

Q. Do you remember any of the times that were on the couch specifically?

A. Just one time I can remember.

Q. That you remember specifically?

A. Yes, sir.

Lucy testified to another specific instance of sexual intercourse that occurred immediately following a sexual act involving a screwdriver. Lucy also testified to having sexual intercourse with defendant on the floor of the room she shared with Caleb. On this occasion Sharlena nearly caught Lucy and defendant in the act, but Lucy ran and hid in the bathroom.

Lucy further testified about incidents constituting first-degree sexual offense. On four separate occasions defendant performed sex acts with Lucy involving foreign objects. Defendant penetrated Lucy's vagina with a broom handle because "he wanted to see how far it would go." On another occasion, defendant inserted the handle of a hairbrush into Lucy to "make him hard." Once defendant pushed a large cucumber into Lucy for a couple of minutes until it began hurting. As previously mentioned, defendant "told [Lucy] to play with [her]self" with a screwdriver before having sexual intercourse with her. All of these incidents occurred when Lucy was twelve years old.

Lucy testified that almost every time they had sexual contact, fellatio was also involved, and on one occasion defendant partially inserted his penis into her anus.

> Q. Other than the times that you have described that [defendant] had sex with you, put his private in your private or put his penis in your vagina the times that you have described, did he ever put his penis in any other part of your body?
>
> A. Yes, sir.
>
> Q. What other parts of your body did he put his penis in?
>
> A. My mouth and my butt.
>
> Q. Do you remember how many times he put his penis in your butt?
>
> A. Only once but it wasn't the whole thing.
>
> . . . .
>
> Q. When did he—do you recall how many times he put his penis in your mouth?
>
> A. Almost every time we had sex.

At the close of all evidence, the jury found defendant guilty of six counts of first-degree sexual offense, five counts of statutory rape, and three counts of taking indecent liberties with a child. On appeal, the Court of Appeals vacated each of defendant's six first-degree sexual offense convictions.

Now this Court must determine whether a jury verdict may be unanimous when a defendant is tried on five counts of statutory rape and three counts of indecent liberties with a minor, when the short-form indictments for each alleged crime are identically worded and

lack specific details distinguishing one particular incident of a crime from another. This Court concludes that defendant was unanimously convicted of three counts of indecent liberties with a minor, as well as five counts of first-degree statutory rape.

Defendant was charged by short-form indictments as authorized by N.C.G.S. § 15-144.2(a). The three indictments charging defendant with indecent liberties were identical except for the case number. Each indictment stated:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did take and attempt to take immoral, improper, and indecent liberties with [Lucy] for the purpose of arousing and gratifying sexual desire and did commit and attempt to commit a lewd and lascivious act upon the body of the child named below. At the time of this offense, the child, [Lucy] was under the age of 16 years and the defendant named above was over 16 years of age and at least five years older than the child. This act was in violation of the above referenced statute.

The offense dates on each indictment were listed "May 1, 1999 thru December 6, 2000."

Similarly, the five indictments charging defendant with first-degree statutory rape listed the same dates of offense and contained the following language:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did carnally know and abuse [Lucy], a female child under the age of 13 years. This act was in violation of the above referenced statute.

Because these short-form indictments bear the same language and same time frame, defendant argues that the indictments lack specific details to link them to specific acts and incidents; thus, the court cannot be sure that jurors unanimously agreed that the State has proved each element that supports the crime charged in the indictment as required by *State v. Jordan*, 305 N.C. 274, 279, 287 S.E.2d 827, 831 (1982) (citing *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368 (1970)).

First, we will address the issue of jury unanimity on the three counts of indecent liberties with a minor. The North Carolina

Constitution and North Carolina Statutes require a unanimous jury verdict in a criminal jury trial. *See* N.C. Const. art. 1, § 24; N.C.G.S. § 15A-1237(b) (2005). In *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990), this Court considered whether disjunctive jury instructions (instructions containing mutually exclusive alternative elements joined by the conjunction "or") for charges of indecent liberties with a minor resulted in an ambiguous or uncertain verdict such that a defendant's right to a unanimous verdict might have been violated. As explained in a subsequent opinion discussing the *Hartness* line of cases, this Court held that "if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied." *State v. Lyons*, 330 N.C. 298, 303, 412 S.E.2d 308, 312 (1991). Unlike a drug trafficking statute, which may list possession and transportation, entirely distinct criminal offenses, in the disjunctive, the indecent liberties statute simply forbids "any immoral, improper, or indecent liberties." N.C.G.S. § 14-202.1(a)(1) (2005); *Lyons*, 330 N.C. at 305, 412 S.E.2d at 313 (citing *Hartness*, 326 N.C. at 564-65, 391 S.E.2d at 179). Thus, "even if some jurors found that the defendant engaged in one kind of sexual misconduct, while others found that he engaged in another, 'the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of "any immoral, improper, or indecent liberties." ' " *Lyons*, 330 N.C. at 305-06, 412 S.E.2d at 313 (quoting *Hartness*, 326 N.C. at 561, 391 S.E.2d at 177).

In this case, defendant was charged with three counts of taking indecent liberties with a minor. The jury heard testimony regarding three specific encounters that constituted indecent liberties: (1) "the game" in which defendant exposed his penis and the victim lifted her shirt; (2) when defendant touched his private part to the victim's private part; and (3) when defendant masturbated in front of the victim and her younger sister. The jury returned guilty verdicts for the three counts of indecent liberties. The Court of Appeals suggested that the jury may have also considered a fourth incident, when defendant placed his hand inside Lucy's shirt. Therefore, the jury may have considered a greater number of incidents than the three counts of indecent liberties charged in the indictments. However, this fourth incident had no effect on jury unanimity because according to *Lyons*, *Hartness* holds that while one juror might have found some incidents of misconduct and another juror might have found different incidents of misconduct, the jury as a whole found that improper sexual conduct occurred. *Lyons*, 330 N.C. at 305-06, 412 S.E.2d at 313.

Based upon our decision in *Hartness*, we find that "[t]he risk of a nonunanimous verdict does not arise in cases such as the one at bar because the statute proscribing indecent liberties does not list, as elements of the offense, discrete criminal activities in the disjunctive." *Hartness*, 326 N.C. at 564, 391 S.E.2d at 179. Therefore, with respect to the three convictions of taking indecent liberties, we hold that defendant was unanimously convicted of three counts of indecent liberties with a minor, notwithstanding that the short-form indictments charging each crime are identical. Under *Hartness* and *Lyons*, a defendant may be unanimously convicted of indecent liberties even if: (1) the jurors considered a higher number of incidents of immoral or indecent behavior than the number of counts charged, and (2) the indictments lacked specific details to identify the specific incidents.

We now review the unanimity issue as to defendant's conviction for five counts of first-degree statutory rape. The Court of Appeals majority found that confusion over which incidents supported the five rape verdicts created a risk of a verdict that was not unanimous. Even though Lucy testified that she had sexual intercourse with the defendant thirty-two separate times, the evidence presented at trial tended to show five specific instances of statutory rape: (1) partial penetration on the living room couch; (2) penetration on the couch in Caleb's room; (3) penetration on the couch in the living room; (4) penetration following the incident with the screwdriver; and (5) penetration on the floor of Caleb's room. At the conclusion of the evidence, the jury was given five separate verdict sheets for the rape offenses. The jury returned five guilty verdicts for the five counts of rape.

In *State v. Wiggins*, the victim testified that she had intercourse with defendant multiple times a week for an extended period of time, but during her testimony she only specifically recounted four incidents of intercourse with defendant. *State v. Wiggins*, 161 N.C. App. 583, 586, 593, 589 S.E.2d 402, 405, 409 (2003), *disc. rev. denied*, 358 N.C. 241, 594 S.E.2d 34 (2004). The victim also described two incidents of oral sex with defendant. *Id.* at 586, 589 S.E.2d at 405. In *Wiggins*, the court held "where seven offenses (two statutory sexual offense and five statutory rape) were charged in the indictments, and based on the evidence presented at trial, the jury returned seven guilty verdicts, there was no danger of a lack of unanimity between the jurors with respect to the verdict." *Id.* at 593, 589 S.E.2d at 409. We find the reasoning of *Wiggins* persuasive.

The present case is clearer than *Wiggins*. In *Wiggins*, the victim testified to multiple incidents of intercourse with defendant, but she testified in detail about only four specific occasions of intercourse constituting statutory rape. Here, defendant was indicted on five counts of statutory rape; Lucy testified to five specific incidents of statutory rape, and five verdicts of guilty were returned to the charge of statutory rape. We conclude that defendant was unanimously convicted by the jury.

In so holding we note: (1) defendant never raised an objection at trial regarding unanimity; (2) the jury was instructed on all issues, including unanimity; (3) separate verdict sheets were submitted to the jury for each charge; (4) the jury deliberated and reached a decision on all counts submitted to it in less than one and one-half hours; (5) the record reflected no confusion or questions as to jurors' duty in the trial; and (6) when polled by the court, all jurors individually affirmed that they had found defendant guilty in each individual case file number.

We hold that the jury unanimously convicted defendant of three counts of taking indecent liberties with a minor and five counts of first-degree statutory rape. Therefore, we reverse the Court of Appeals decision regarding the three counts of indecent liberties and five counts of statutory rape. The decision vacating defendant's judgment on the six counts of first-degree sexual offense is not properly before this Court and remains undisturbed. Defendant's motion for appropriate relief is dismissed. This case is remanded to the Court of Appeals for consideration of defendant's remaining assignments of error, including those raised in his motion for appropriate relief.

REVERSED IN PART AND REMANDED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JAMES EMANUEL SILAS

No. 171PA05

(Filed 7 April 2006)

Burglary and Unlawful Breaking or Entering; Indictment and Information— breaking or entering—intent—amended at close of evidence

There is no requirement that an indictment for felonious breaking or entering contain specific allegations of the intended felony. However, if an indictment does specifically allege the intended felony, N.C.G.S. § 15A-923(e) mandates that such allegations may not be amended. Here, an indictment for breaking or entering with intent to commit murder was orally changed by the prosecutor at the end of all of the evidence to allege an intent to commit an assault. The trial court gave the State a second bite of the apple when there was no further opportunity for defendant to prepare or present contrary evidence.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 168 N.C. App. 627, 609 S.E.2d 400 (2005), finding no error in part, arresting judgment in part, and remanding for a new sentencing hearing judgments entered 7 September 2000 by Judge Beverly T. Beal in Superior Court, Mecklenburg County. Heard in the Supreme Court 13 February 2006.

Roy Cooper, Attorney General, by William P. Hart, Senior Deputy Attorney General, for the State-appellant.

Thomas K. Maher for defendant-appellee.

BRADY, Justice.

At the close of all evidence, the trial court allowed the assistant district attorney to orally amend defendant's felony breaking or entering indictment by changing the specifically alleged intended felony to conform to the evidence presented at trial. Because we find this alteration of the indictment was prejudicial error for a reason other than that found by the Court of Appeals, we modify and affirm the opinion of the Court of Appeals.

FACTUAL BACKGROUND

On 9 July 1999, defendant James Emanuel Silas became angry with Rhonda Silas, his estranged wife from whom he had been sepa-

rated for approximately one month. Mrs. Silas had recently obtained a domestic violence restraining order against defendant, and defendant was upset about his wife's relationship with Jasper Herriott. Defendant drove to Mrs. Silas's apartment and upon arriving, forced open a latched door. When defendant entered the kitchen, he found Mrs. Silas, her daughter, and Mrs. Silas's niece present. Defendant and his wife exchanged words, whereupon defendant pulled out a .380 semiautomatic handgun and shot Mrs. Silas twice in the left thigh. Mrs. Silas escaped to an upstairs bedroom, and defendant departed the crime scene, eventually heading toward Herriott's apartment.

Upon arriving at Herriott's apartment building, defendant observed Herriott standing in front of the doorway. Defendant exited his vehicle and proceeded to fire his handgun numerous times at Herriott. Herriott quickly returned to his apartment, locked the door, and telephoned law enforcement. Meanwhile, defendant continued to fire his weapon into Herriott's apartment.

On 2 August, 8 October, and 29 November 1999, the grand jury of Mecklenburg County returned true bills of indictment against defendant for: (1) assault of Rhonda Silas with a deadly weapon with intent to kill and inflicting serious injury; (2) assault of Jasper Herriott with a deadly weapon with intent to kill; (3) discharging a weapon into property occupied by Herriott; (4) possession of a firearm by a felon; and (5) felonious breaking or entering a building occupied by Rhonda Silas.

At trial, the State presented evidence which tended to show the above facts. Defendant testified on his own behalf and asserted he was angry with Herriott and Mrs. Silas, but his intent was to harm them, not kill them. During the charge conference the assistant district attorney orally moved to amend the felonious breaking or entering indictment to conform to the evidence and the anticipated jury instructions, and the trial court allowed the motion. After instruction by the trial court, the jury deliberated and returned verdicts of guilty on all charges except for the assault of Rhonda Silas, for which the jury returned a verdict of guilty on the lesser included offense of assault with a deadly weapon inflicting serious injury. After finding defendant had a prior record level of IV, the trial court sentenced defendant in the presumptive range to consecutive terms of ten to twelve months, fifteen to eighteen months, and three terms of forty to fifty-seven months. The Court of Appeals found, *inter alia*, the man-

ner in which the trial court determined defendant's prior record level was error and unanimously remanded the case to the trial court for resentencing. The State did not seek review of this sentencing issue.

THE AMENDMENT TO THE FELONIOUS BREAKING OR ENTERING INDICTMENT

The issue which gives rise to this appeal concerns the State's oral amendment of the felonious breaking or entering indictment. The indictment prepared by the State and returned by the grand jury reads:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 9th day of July, 1999, in Mecklenburg County, James Emanuel Silas unlawfully and wilfully did feloniously break and enter a building occupied by Rhonda Silas, used as a residence, located at . . . Charlotte, North Carolina, with the intent to commit a felony therein, to wit: murder.

During the charge conference, the trial court notified the parties it intended to instruct the jurors they must find defendant intended to commit the felony of assault with a deadly weapon with intent to kill inflicting serious injury or the felony of assault with a deadly weapon inflicting serious injury in order to convict defendant of felonious breaking or entering. Because such an instruction deviated from the original indictment, which identified the felony defendant allegedly intended to commit as "murder," the assistant district attorney orally moved to amend the indictment to conform to the evidence presented at trial and the anticipated instructions of the trial court. Although the trial court expressed the opinion that such an amendment was unnecessary, it allowed the State's motion over defendant's opposition.

Defendant appealed his convictions and sentences to the Court of Appeals, which arrested judgment on defendant's felonious breaking or entering conviction and remanded to the trial court with orders to enter judgment on misdemeanor breaking or entering. *See State v. Silas*, 168 N.C. App. 627, 609 S.E.2d 400 (2005). We affirm the Court of Appeals, but our reasoning differs from the rationale articulated by that court.

ANALYSIS

In enacting Chapter 15A of the General Statutes, the Criminal Procedure Act, the General Assembly provided that "[a] bill of indict-

ment may not be amended." N.C.G.S. § 15A-923(e) (2005). This Court has interpreted that provision to mean a bill of indictment may not be amended in a manner that substantially alters the charged offense. *See State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996). In determining whether an amendment is a substantial alteration, we must consider the multiple purposes served by indictments, the primary one being " 'to enable the accused to prepare for trial.' " *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (quoting *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953)), *cert. denied*, 539 U.S. 985 (2003); *see also Apprendi v. New Jersey*, 530 U.S. 466, 478-79 (2000) (brief discussion of the historical use and requirements of indictments).

Relying on *State v. Vick*, 70 N.C. App. 338, 319 S.E.2d 327 (1984), the Court of Appeals held the alteration to defendant's indictment for felonious breaking or entering was a substantial alteration because an indictment for felonious breaking or entering is insufficient unless it alleges the particular felony which is the basis for the required element of "intent to commit any felony or larceny therein." N.C.G.S. § 14-54(a) (2005). The State argues the Court of Appeals' reliance on *Vick* was misplaced and *Vick* should be overruled consistent with this Court's opinion in *State v. Worsley*, 336 N.C. 268, 279-81, 443 S.E.2d 68, 73-74 (1994).

The State's arguments at the appellate level have been inconsistent. At the Court of Appeals, the State argued the amendment was not a substantial alteration because assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury are both lesser included offenses of the offense of first-degree murder. The Court of Appeals rejected this argument, noting

> our research has not revealed a case specifically stating assault with a deadly weapon with intent to kill inflicting serious injury or assault with a deadly weapon inflicting serious injury is a lesser included offense of first degree murder. We also note that the State has not cited any authority stating assault with a deadly weapon is a lesser included offense of first degree murder.

Silas, 168 N.C. App. at 634 n.1, 609 S.E.2d at 405 n.1. Before issuance of the mandate at the Court of Appeals, the State submitted additional authority to that court which casts doubt on whether felonious breaking or entering indictments must allege the intended felony.

Now, the State has "changed mounts in midstream," abandoning its argument presented to the Court of Appeals and instead arguing to this Court that *Vick* should be overruled. Despite these inconsistent theories, we agree with the State that *Vick* is contrary to *Worsley* and must be overruled.

In *Vick* the Court of Appeals relied on *State v. Faircloth*, 297 N.C. 388, 255 S.E.2d 366 (1979) and *State v. Allen*, 186 N.C. 302, 119 S.E. 504 (1923), in analogizing the offense of felonious breaking or entering to the offense of burglary. *See Vick*, 70 N.C. App. at 339-40, 319 S.E.2d at 328. In *Allen*, this Court noted indictments for burglary were insufficient unless they alleged the underlying felony which was intended to be committed within the dwelling by the defendant. *Allen*, 186 N.C. at 305-06, 119 S.E. at 505-06. However, as this Court noted in *Worsley*, all of this Court's opinions requiring these specific allegations "were decided prior to the enactment of N.C.G.S. § 15A-924(a)(5) . . . and are no longer controlling on this issue." 336 N.C. at 279, 443 S.E.2d at 73. This Court continued by explaining the pleading requirements of the Criminal Procedure Act are " 'more liberal' " than the " 'ancient strict pleading requirements of the common law.' " *Id.* at 280, 443 S.E.2d at 74 (quoting *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985)). Therefore, this Court held in *Worsley* an indictment for first-degree burglary was sufficient "even though it [did] not specify the felony the defendant intended to commit when he entered [the] apartment." *Id.* at 280, 443 S.E.2d at 74.

Because of the similarities between the elements and nature of felonious breaking or entering and burglary, we hold an indictment for felonious breaking or entering is not required to allege with specificity the felony a defendant intended to commit inside the building. It is sufficient for the indictment to allege, along with the other required elements of breaking or entering, that the defendant intended to commit a felony or larceny inside the building. The State could have simply sought in the original indictment allegations that defendant intended to commit a felony or larceny inside the building. Alternatively, the State could have sought a superseding indictment, after the return of the original indictment by the grand jury but before the commencement of the trial, which made only those general allegations required. *See* N.C.G.S. § 15A-646 (2005). Accordingly, we overrule *Vick* insofar as it is inconsistent with our holding today.

This, however, does not end our analysis. The State would have us reverse the Court of Appeals because the language in the indict-

ment describing the specific intended felony was nothing more than surplusage; therefore, any amendment to this surplusage is not a substantial alteration of the indictment. We disagree. As noted earlier, the primary purpose of an indictment is " 'to enable the accused to prepare for trial.' " *Hunt*, 357 N.C. at 267, 582 S.E.2d at 600 (quoting *Greer*, 238 N.C. at 327, 77 S.E.2d at 919). When the prosecution amends an indictment for felonious breaking or entering in such a manner that the defendant can no longer rely upon the statement of the intended felony in the indictment, such an amendment is a substantial alteration and is prohibited by N.C.G.S. § 15A-923(e).

The State relies on *State v. Freeman* in making the argument the amendment was made to "mere harmless surplusage" contained in the indictment and was therefore not a substantial alteration. In *Freeman*, this Court stated, "[t]he additional '[r]ape or [r]obbery' language in the indictment is mere harmless surplusage and may properly be disregarded in passing upon its validity." 314 N.C. at 436, 333 S.E.2d at 745-46. However, the issue in *Freeman* was the sufficiency of an indictment which alleged alternative underlying felonies for first-degree kidnapping. There was no allegation the defendant lacked notice of the prosecution's theory in *Freeman*, as the prosecution proceeded on a theory that the kidnapping was for the purpose of facilitating a rape and a robbery. *See id.* at 433-34, 333 S.E.2d at 744-45. This Court noted the surplusage in *Freeman* was harmless to the defendant, as he was informed of the charge and if he needed further clarification, the remedy would have been to request a bill of particulars. *Id.* at 436-37, 333 S.E.2d at 745-46 (citing N.C.G.S. § 15A-925).

In the case *sub judice*, the indictment served as notice to defendant apprising him of the State's theory of the offense. The subsequent alteration prejudiced defendant as he relied upon the allegations in the original indictment to his detriment in preparing his case upon the assumption the prosecution would proceed upon a theory defendant intended to commit murder. In its brief, the State concedes its trial theory was clearly stated in the original indictment: "The State's theory and proof was that defendant intended to kill, not assault . . . ." Because the indictment alleged defendant intended to commit murder after breaking and entering into Mrs. Silas's residence, defendant prepared his case and the theory of his defense, including his decision to testify on his own behalf, to discredit the allegation that he intended to kill Mrs. Silas. By doing so, defendant could hope to be acquitted of the charges alleged in the felonious

breaking or entering indictment, or at least be convicted of the lesser included offense of misdemeanor breaking or entering.

Defendant's preparation resulted in the jury being unable to find beyond a reasonable doubt he intended to kill Mrs. Silas, as evidenced by the jury returning a guilty verdict of assault with a deadly weapon inflicting serious injury instead of assault with a deadly weapon with intent to kill inflicting serious injury. The trial court gave the State a second bite of the apple by permitting the assistant district attorney to orally amend the indictment after the close of all evidence, when there was no further opportunity for defendant to prepare or present contrary evidence.

It is the State that draws up the indictment and crafts its language before submitting the indictment to the grand jury. If the State seeks an indictment which contains specific allegations of the intended felony, the State may not later amend the indictment to alter such allegations. Moreover, in felonious breaking or entering cases, as in burglary cases, "when the indictment alleges an intent to commit a particular felony, the State must prove the particular felonious intent alleged." *See State v. Wilkinson*, 344 N.C. 198, 222, 474 S.E.2d 375, 388 (1996). Because the State sought to indict defendant for felonious breaking or entering based upon a theory of intended murder, the State was required to prove defendant intended to commit murder upon breaking or entering Mrs. Silas's apartment; therefore, the amendment to the original indictment was a substantial alteration.

This amendment prejudiced defendant as to the one element of felony breaking or entering that differs from misdemeanor breaking or entering: The "intent to commit any felony or larceny therein." N.C.G.S. § 14-54(a). Nonetheless, there is no question the indictment properly charged defendant with misdemeanor breaking or entering. Therefore, the Court of Appeals' remedy was proper, and upon remand to the trial court judgment should be entered on misdemeanor breaking or entering.

In sum, we hold: (1) There is no requirement that an indictment for felonious breaking or entering contain specific allegations of the intended felony; only a general averment that defendant intended to commit a felony upon breaking or entering is required. We therefore overrule *State v. Vick* insofar as it is inconsistent with this opinion. (2) However, if an indictment does specifically allege the intended felony, N.C.G.S. § 15A-923(e) mandates such allegations may not be amended.

Because the amendment to the indictment was a substantial alteration which prejudiced defendant, we modify and affirm the opinion of the Court of Appeals.

MODIFIED AND AFFIRMED.

HECTOR DIAZ, PETITIONER v. DIVISION OF SOCIAL SERVICES AND DIVISION OF MEDICAL ASSISTANCE, NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. 523PA04

(Filed 7 April 2006)

Public Assistance— Medicaid—illegal alien—emergency medical treatment

Medicaid coverage was properly denied for chemotherapy for an illegal alien with acute lymphocytic leukemia after his condition stabilized and no longer constituted an emergency (although there was testimony that he would have regressed into an emergency condition without the treatments). There is an emergency treatment provision in the federal Medicaid statutes, but petitioner did not meet the statutory definition for an emergency medical condition when he received the treatments in question.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 166 N.C. App. 209, 600 S.E.2d 877 (2004), affirming a judgment and order entered on 23 May 2003 by Judge James W. Webb in Superior Court, Guilford County. On 3 March 2005, the Supreme Court allowed petitioner's conditional petition for discretionary review as to an additional issue. Heard in the Supreme Court 14 November 2005.

Ott Cone & Redpath, P.A., by Melanie M. Hamilton, Thomas E. Cone, and Wendell H. Ott, for petitioner-appellee/appellant.

Roy Cooper, Attorney General, by Richard J. Votta, Assistant Attorney General, for respondent-appellant/appellee.

BRADY, Justice.

This case requires determination of the scope of coverage and reimbursement for a nonqualifying alien's medical treatment under federal and North Carolina Medicaid law. Because we hold the relevant treatment provided to petitioner did not qualify as treatment for an emergency medical condition, we reverse the decision of the Court of Appeals.

FACTUAL BACKGROUND

Petitioner Hector Diaz, a native of Guatemala, is "an alien who is not lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law." 42 U.S.C. § 1396b(v)(1) (2000). In October of 2000, Diaz began experiencing sore throat, nausea, vomiting, bleeding gums, and increasing lethargy, which were later diagnosed as symptoms of acute lymphocytic leukemia (ALL).[1] Doctors at Moses Cone Memorial Hospital in Greensboro, North Carolina treated petitioner beginning on or about 21 October 2000. Chemotherapy treatments commenced shortly thereafter and continued intermittently until July of 2002.

At some time during his treatment, petitioner authorized the medical service provider to seek Medicaid coverage on his behalf. In the applications for Medicaid coverage relevant to this appeal, respondent Division of Medical Assistance (DMA) approved payment for emergency medical services from 21-22 October 2000 and 9-11 February 2002. DMA denied all other coverage dates relevant to this appeal as nonemergency services, and this denial was affirmed on administrative appeal by a final decision of the Chief Hearing Officer of the North Carolina Department of Health and Human Services. Consequently, none of petitioner's chemotherapy treatments at issue were reimbursed by Medicaid.

Petitioner appealed the final agency decision to the Guilford County Superior Court, which reversed respondent's decisions, finding the treatment was provided for an emergency medical condition and that "payment by Medicaid is not limited to emergency services; rather, Medicaid shall pay for all care and services as are medically necessary for the treatment of an emergency medical condition." Respondent then appealed to the North Carolina Court of Appeals, which unanimously affirmed the decision of the trial court. This

1. This disease is also referred to as "acute lymphoblastic leukemia" in medical literature and in portions of the record.

Court allowed respondent's petition for discretionary review and petitioner's conditional petition for discretionary review, and we now reverse the decision of the Court of Appeals.

ANALYSIS

STANDARD OF REVIEW

In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test. *See N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894-95 (2004).

CONSTRUCTION OF 42 U.S.C. § 1396b(v)

Medicaid is a joint program between participating states and the federal government. North Carolina chose to participate and therefore must abide by federal statutory law governing Medicaid reimbursement by the federal government. *See* 42 U.S.C. § 1396a (2000). If a state does not follow federal Medicaid statutes in providing coverage for a patient, that state risks losing Medicaid reimbursement from the federal government for that payment. The relevant statute in this case provides the federal government will not make payment to a state for "medical assistance furnished to an alien who is not lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law." *Id.* § 1396b(v)(1). There is one exception to this broad rule, and that is for treatment of an emergency medical condition, not related to an organ transplant procedure, of an alien who would qualify but for his or her immigration status. *Id.* § 1396b(v)(2) (2000). Subsection (v)(3) defines an "emergency medical condition" as:

> a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—
>
> (A) placing the patient's health in serious jeopardy,
>
> (B) serious impairment to bodily functions, or
>
> (C) serious dysfunction of any bodily organ or part.

Id. § 1396b(v)(3) (2000). The relevant federal and North Carolina administrative codes are in accord with this definition. *See* 42 C.F.R. § 440.255(b)(1) & (c)(1) (2005); 10A NCAC 21B .0302(c) (June 2004). We must now interpret this statute and determine whether petitioner's treatments were for an emergency medical condition.

When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment. *See Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) ("The best indicia of that intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish."). We find the statute in question to be clear and unambiguous; therefore, we will give effect to its plain meaning.

In the leading case on this issue, *Greenery Rehabilitation Group, Inc. v. Hammon*, the United States Court of Appeals for the Second Circuit held that continuous and regimented care provided for non-qualified aliens who "suffered sudden and serious head injuries that necessitated immediate treatment and ultimately left the patients with long-term debilitating conditions" was not covered under the Medicaid program. 150 F.3d 226, 228 (2d Cir. 1998). One of these patients, Izeta Ugljanin, was "[b]edridden and quadriplegic," requiring a feeding tube and extensive nursing care. *See id.* Another, Leon Casimir, was unable to walk and required continual monitoring and medication. He was unable to bathe, dress, eat, or use the toilet without assistance. *See id.* at 228-29. A third patient, Yik Kan, was legally blind. *See id.* at 229. The United States District Court for the Northern District of New York found Ugljanin and Casimir's treatments were for emergency medical conditions, but that Yik Kan's treatment was not. *See id.* at 231. In reversing the District Court as to the treatments for Ugljanin and Casimir, the Second Circuit wrote: "The patients' sudden and severe head injuries undoubtedly satisfied the plain meaning of § 1396b(v)(3). However, after the patients were stabilized and the risk of further direct harm from their injuries was essentially eliminated, the medical emergencies ended." *Id.* at 232.

In arriving at this "stabilization" construction of subsection 1396b(v)(3), the Second Circuit noted when determining whether a condition is an emergency medical condition, the key words are "emergency," "acute," "manifest," and "immediate." *See id.* Using the common definitions of those words, that court concluded: "[T]he statutory language unambiguously conveys the meaning that emergency medical conditions are sudden, severe and short-lived physical

injuries or illnesses that require immediate treatment to prevent further harm." *Id.* This analysis closely adheres to the clear and unambiguous language of subsection 1396b(v)(3). Accordingly, we find the *Greenery* decision persuasive.

Petitioner contends that once a patient presents with an emergency medical condition, any and all treatment necessary for the cure of the underlying cause of the emergency medical condition must be covered, even when the condition is no longer an emergency. We disagree. Petitioner's contention, in our view, is contrary to the plain meaning of the statute. Under subsection 1396b(v)(3), in order for a nonqualifying alien to be entitled to Medicaid coverage, his or her condition must require *immediate* intervention to prevent the occurrence of any of the three statutorily enumerated results. *See* 42 U.S.C. § 1396b(v)(3). The word "immediate" is commonly defined as: "occurring, acting, or accomplished without loss of time : made or done at once : INSTANT." *Webster's Third New International Dictionary* 1129 (16th ed. 1971). Therefore, treatment is not for an emergency medical condition under subsection 1396b(v)(3) unless one of the statutorily enumerated results is reasonably expected if immediate treatment is withheld.

We are cognizant the Supreme Court of Connecticut has decided a case factually similar to this one and has held contrary to our decision today. *See Szewczyk v. Dep't of Soc. Servs.*, 275 Conn. 464, 881 A.2d 259 (2005). However, in our opinion, the Connecticut decision applied a much broader interpretation of the word "immediate" than intended by Congress. The divided *Szewczyk* court seemed to rest much of its decision upon evidence in the record indicating that the nonqualifying alien in the case would have rapidly died if not provided treatment. *See id.* at 468, 881 A.2d at 262. In the case at bar, while there is no dispute Diaz received appropriate care in the standard medical course of treatment, there is nothing in the record that indicated the prolonged chemotherapy treatments must have been "immediate" to prevent the statutorily enumerated results. The record in the case *sub judice* and the record in *Szewczyk* differ as to whether immediate treatment was required to treat the respective conditions of the patients.

Additionally, while the *Szewczyk* court purported to follow the Second Circuit's decision in *Greenery* for the sake of uniformity between federal and state law in Connecticut, it added to the holding in *Greenery*: "Beyond the analysis of *Greenery* . . . we also note that the plain language of § 1936b(v) indicates that the statute encom-

passes payment for care beyond that which is immediately necessary to stabilize a patient." *Id.* at 482-83, 881 A.2d at 271. The reasoning behind this statement is the requirement that the treatment for an emergency medical condition not be "related to an organ transplant procedure." 42 U.S.C. § 1396b(v)(2)(C). Because Congress chose to not provide coverage for emergency medical services related to organ transplant procedures, the *Szewczyk* court reasoned that Congress intended for treatment under the statute to encompass more than stabilization because organ transplants are "undoubtedly . . . time-consuming and entail relatively lengthy hospitalizations." *Id.* at 483, 881 A.2d at 271. Presuming Congress would not enact superfluous legislation, the *Szewczyk* court assumed it was unnecessary to exempt coverage for organ transplant procedures if only short-term stabilization is required. *Id.* at 483-84, 881 A.2d at 271-72.

However, the construction of the statute by the Second Circuit in *Greenery* and this Court in the case *sub judice* does not render subsection (v)(2)(C) a superfluity. Congress simply provided that even if the only appropriate treatment for an emergency medical condition was an organ transplant, it had made a policy decision that the federal government would not reimburse state Medicaid payments for such a procedure. We are not persuaded the restriction found in subsection (v)(2)(C) changes the plain meaning of the word "immediate" found in (v)(3). Therefore, we follow the federal appellate court's interpretation of 42 U.S.C. § 1396b in *Greenery* and decline to follow the divided fellow state appellate court's interpretation in *Szewczyk*.

By giving effect to the plain meaning of the statute, we acknowledge " '[t]he role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials.' " *State v. Bryant*, 359 N.C. 554, 565, 614 S.E.2d 479, 486 (2005) (quoting *Henry v. Edmisten*, 315 N.C. 474, 491, 340 S.E.2d 720, 731 (1986)); *see also State v. Revis*, 193 N.C. 192, 195, 136 S.E. 346, 347 (1927) ("The Legislature alone may determine the policy of the State . . . ."). Therefore we defer to the broad public policy statement of Congress found in subsection 1396b(v): "[N]o payment may be made to a State under this section for medical assistance furnished to an alien who is not lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law." 42 U.S.C. § 1396b(v)(1). The narrow exception to this broad statement appears in subsection (v)(2), which provides for treatment of emer-

gency medical conditions if the alien would qualify but for his immigration status and the "care and services are not related to an organ transplant procedure." This exception is consistent with the public policy clearly articulated by Congress in 8 U.S.C. § 1601(6): "It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." The Second Circuit's analysis in *Greenery* follows the plain meaning of 42 U.S.C. § 1396b, and our holding is consistent with both the statute and *Greenery*.

Therefore, we hold an emergency medical condition is one which manifests itself by acute symptoms at the time of treatment and requires immediate treatment to stabilize the condition, such that the absence of this treatment would reasonably be expected to cause any of the three results listed in 42 U.S.C. § 1396b(v)(3)(A), (B), or (C). The State is not required to make payment for services provided to treat a nonqualifying alien's condition, unless it meets the definition of an emergency medical condition.

APPLICATION OF SECTION 1396b(v)

Acute lymphocytic leukemia (ALL) is an acute leukemia "characterized by replacement of normal bone marrow by blast cells of a clone arising from malignant transformation of a hematopoietic stem cell." *The Merck Manual of Diagnosis and Therapy* 946 (Mark H. Beers, M.D. & Robert Berkow, M.D., eds., 17th ed. 1999). The presenting symptoms of ALL are "fatigue, fever, malaise, weight loss," and other nonspecific symptoms. *See id.* at 947. When petitioner sought emergency treatment on or about 21 October 2000, he presented with severe symptoms, namely sore throat, nausea and vomiting, bleeding gums, and lethargy. At the time of his initial treatment in the emergency room, there is no dispute petitioner presented with an emergency medical condition. However, soon after his admission to the facility, petitioner's condition dramatically improved. During petitioner's chemotherapy treatments, his condition was stable and, therefore, he was no longer entitled to Medicaid coverage. As testified to by a medical doctor under contract to review cases for the Medicaid program, if petitioner had not received chemotherapy treatments, he would have eventually regressed into a state of an emergency medical condition. However, as also testified to by that same physician, at the time the chemotherapy treatments at issue were provided to petitioner, he did not meet the requirement of having an emergency medical condition. Thus, it was error for the trial court to reverse the final agency decision denying coverage for

the dates denied. Accordingly, we reverse the decision of the Court of Appeals and remand the case to that court with instructions to remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

ALAN CAPPS v. NW SIGN INDUSTRIES OF NORTH CAROLINA, INC., A NORTH CAROLINA CORPORATION, RONALD BRODIE, AND CHRIS REEDEL

No. 383A05

(Filed 7 April 2006)

Appeal and Error— appealability—denial of motion to dismiss—forum selection clause

The decision of the Court of Appeals dismissing defendants' appeal from the trial court's interlocutory order denying their motion to dismiss is vacated for the reason stated in the dissenting opinion that the denial of a motion to dismiss based on an alleged forum selection clause is immediately appealable, and the case is remanded to the Court of Appeals for further remand to the superior court for findings of fact sufficient for appellate review of the jurisdictional issue.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 171 N.C. App. 409, 614 S.E.2d 552 (2005), dismissing as interlocutory an appeal from an order denying both a motion for judgment on the pleadings and a motion to dismiss entered 18 February 2004 by Judge J. Gentry Caudill in Superior Court, Mecklenburg County. Heard in the Supreme Court 14 February 2006.

James, McElroy & Diehl, P.A., by Richard B. Fennell and Jared E. Gardner, for plaintiff-appellee.

Vandeventer Black LLP, by David P. Ferrell and Norman W. Shearin, Jr., for defendant-appellants.

PER CURIAM.

For the reasons stated in the dissent, the decision of the Court of Appeals is vacated, and the case is remanded with direction to the Court of Appeals to further remand to the Superior Court of Mecklenburg County for findings of fact sufficient for appellate review of the jurisdictional issue.

VACATED AND REMANDED.

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

MW CLEARING & GRADING, INC., PETITIONER v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF AIR QUALITY, RESPONDENT

No. 432A05

(Filed 7 April 2006)

Environmental Law— open burning piles—one violation

The decision of the Court of Appeals affirming a civil penalty imposed on petitioner by the Environmental Management Commission for open burnings violations is reversed for the reasons stated in the dissenting opinion that the Commission erred by finding that nine burning piles located within 1000 feet of a dwelling constituted nine violations of N.C.G.S. § 143-215.114A rather than only one violation.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 171 N.C. App. 170, 614 S.E.2d 568 (2005), affirming an order entered on 1 March 2004 by Judge Evelyn W. Hill in Superior Court, Wake County. Heard in the Supreme Court 13 March 2006.

Knox, Brotherton, Knox & Godfrey, by Allen C. Brotherton, for petitioner-appellant.

Roy Cooper, Attorney General, by Elizabeth J. Weese, Assistant Attorney General, for respondent-appellee.

PER CURIAM.

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 the Court of Appeals as to the appealable issue of right, i.e., whether the open burning in question constituted one separate violation or multiple violations under N.C.G.S. § 143-215.114A. The remaining issues addressed by the Court of Appeals are not properly before this Court and its decision as to these issues remains undisturbed. This case is remanded to the Court of Appeals for further remand to the Wake County Superior Court for further proceedings not inconsistent with this opinion.

REVERSED IN PART AND REMANDED.

STATE OF NORTH CAROLINA v. GARY LEE LAWRENCE, JR.

No. 457PA04

(Filed 7 April 2006)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 165 N.C. App. 548, 599 S.E.2d 87 (2004), reversing in part and finding no error in part in judgments entered 9 July 2002 by Judge Jerry R. Tillett in Superior Court, Camden County. On 29 August 2005, defendant filed a motion for appropriate relief in this Court. Heard in the Supreme Court 16 November 2005.

Roy Cooper, Attorney General, by Amy C. Kunstling, Assistant Attorney General, for the State-appellant.

Thomas K. Maher for defendant-appellee.

PER CURIAM.

For the reasons stated in *State v. Markeith R. Lawrence*, ––– N.C. –––, ––– S.E.2d ––– (2006), we reverse the decision of the Court of Appeals as to defendant's seven convictions for second-degree sexual offense. However, the portion of the Court of Appeals opinion finding no error in nine of defendant's convictions as specified in that opinion remains undisturbed. Pursuant to *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004) and *State v. Allen*, 359 N.C. 425, 615

S.E.2d 256 (2005), defendant's case is remanded to the Court of Appeals for further remand to the trial court for resentencing consistent with *Blakely* and *Allen*.

REVERSED IN PART AND REMANDED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. ABRAHAM HARRISON

No. 228A05

(Filed 7 April 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 169 N.C. App. 257, 610 S.E.2d 407 (2005), finding no prejudicial error in defendant's trial which resulted in a judgment entered 30 September 2003 by Judge Richard L. Doughton in Superior Court, Guilford County. Heard in the Supreme Court 13 March 2006.

Roy Cooper, Attorney General, by M. Lynne Weaver, Assistant Attorney General, for the State.

Lisa Miles and Mark Montgomery for defendant-appellant.

PER CURIAM.

Justice TIMMONS-GOODSON took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Crawford v. Commercial Union Midwest Ins. Co.*, 356 N.C. 609, 572 S.E.2d 781 (2002); *Robinson v. Byrd*, 356 N.C. 608, 572 S.E.2d 781 (2002).

AFFIRMED.

STATE OF NORTH CAROLINA v. JAMES LOVE RENFRO, JR.

No. 674A05

(Filed 7 April 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 174 N.C. App. ——, 621 S.E.2d 221 (2005), finding no error in a judgment entered 7 June 2004 by Judge Jack A. Thompson in Superior Court, Cumberland County. Heard in the Supreme Court 16 March 2006.

Roy Cooper, Attorney General, by James M. Stanley, Jr., Assistant Attorney General, for the State.

George E. Kelly, III, for defendant-appellant.

PER CURIAM.

Justice BRADY took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Crawford v. Commercial Union Midwest Ins. Co.*, 356 N.C. 609, 572 S.E.2d 781 (2002); *Robinson v. Byrd*, 356 N.C. 608, 572 S.E.2d 781 (2002).

AFFIRMED.

DAVID K. TRAYFORD, M.S., PETITIONER v. NORTH CAROLINA PSYCHOLOGY BOARD, RESPONDENT

No. 649A05

(Filed 7 April 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 619 S.E.2d 862 (2005), reversing and remanding an order signed on 8 March 2004 by Judge Orlando F. Hudson, Jr. in Superior Court, Wake County. Heard in the Supreme Court 14 March 2006.

Allen and Pinnix, P.A., by J. Heydt Philbeck and M. Jackson Nichols, for petitioner-appellee.

Roy Cooper, Attorney General, by Sondra C. Panico and Robert M. Curran, Assistant Attorneys General, for respondent-appellant.

PER CURIAM.

AFFIRMED.

KEYZER v. AMERLINK, LTD.

[360 N.C. 397 (2006)]

LUDOVICUS N. KEYZER, A/K/A LUDO KEYZER, JOSEPH KINTZ, ROBIN KINTZ, CARL W. PARKER III, AND BARRY NAKELL V. AMERLINK, LTD., RICHARD SPOOR, DEBORAH N. MEYER, JOHN MEUSER, MEYER & MEUSER, P.A., AMERICAN DETECTIVE SERVICES, INC., AND KENNETH J. JOHNSON

No. 587A05

(Filed 7 April 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 173 N.C. App. ——, 618 S.E.2d 768 (2005), affirming orders entered by Judge John R. Jolly, Jr. in Superior Court, Orange County on 22 September 2003, 29 January 2004, 22 March 2004, and 12 April 2004. Heard in the Supreme Court 13 March 2006.

Barry Nakell, pro se and for remaining plaintiff-appellants.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Steven C. Lawrence, for defendant-appellees Amerlink, Ltd. and Richard Spoor.

Cranfill, Sumner & Hartzog, L.L.P., by Richard T. Boyette, for defendant-appellees Deborah N. Meyer, John Meuser, and Meyer & Meuser, P.A.

Nexsen Pruet Adams Kleemeier, PLLC, by Patrick D. Sarsfield, II, for defendant-appellees American Detective Services, Inc. and Kenneth J. Johnson.

PER CURIAM.

AFFIRMED.

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

JAMES AND CHARLOTTE COKER, ROBERT AND REBECCA DARCONTE, AND DONALD AND BONITA SHOE V. DAIMLERCHRYSLER CORPORATION

No. 532A05

(Filed 7 April 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 172 N.C. App. ——, 617 S.E.2d 306 (2005), affirming an order and opinion dismissing plaintiffs' amended complaint entered on 5 January 2004 by Judge Ben F. Tennille in Superior Court, Rowan County. Heard in the Supreme Court 16 March 2006.

Wallace & Graham, P.A., by Cathy A. Williams and Mona Lisa Wallace; Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene; and Shipman & Wright, L.L.P., by Gary K. Shipman, for plaintiff-appellants.

Smith Moore LLP, by Sidney S. Eagles, Jr. and Allison O. Van Laningham, and Bush Seyferth Kethledge & Paige PLLC, by Raymond M. Kethledge, for defendant-appellee.

Jonathan Wall, Counsel for the North Carolina Academy of Trial Lawyers, amicus curiae.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr. and Sean E. Andrussier, for the National Association of Manufacturers and the American Tort Reform Association, amici curiae.

PER CURIAM.

AFFIRMED.

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

McGLADREY & PULLEN, LLP, PETITIONER v. NORTH CAROLINA STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS, RESPONDENT

No. 469A05

(Filed 7 April 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 171 N.C. App. 610, 615 S.E.2d 339 (2005), affirming an order entered on 18 March 2004 by Judge Orlando F. Hudson, Jr. in Superior Court, Wake County. Heard in the Supreme Court 14 March 2006.

Parker Poe Adams & Bernstein, LLP, by William L. Rikard, Jr., Jack L. Cozort, and Kristin R. Poolos, for petitioner-appellant.

Allen and Pinnix, P.A., by Noel L. Allen and M. Jackson Nichols, for respondent-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. TERRENCE RODRICUS ELLIOTT

No. 184A04

(Filed 5 May 2006)

1. Jury— selection—prospective jurors over 65

The premise that the court may excuse a juror merely for being over sixty-five is unfounded in North Carolina law; a prospective juror's age may be a compelling personal hardship, but this is not always so. Although the issue was not properly preserved for appellate review, the trial court's exercise of discretion is apparent from its discussion with prospective jurors over sixty-five and the trial court did not abuse its discretion by refusing to excuse the juror in question. N.C.G.S. §§ 9-3, 9-6(a), and 9-6.1.

2. Jury— selection—capital trial—questions—cost of life imprisonment—putting aside personal beliefs

The trial court did not abuse its discretion in a capital trial by not allowing defendant to question prospective jurors about whether they had any preconceived notions about the cost of life imprisonment verus the death penalty. Defendant was allowed to ask whether prospective jurors were inclined to vote for imposition of the death penalty automatically.

3. Appeal and Error— invited error—not considered

Defendant invited error with his motion to restore peremptory challenges after a panel of prospective jurors was dismissed for misconduct (a trial court generally has no authority to grant additional peremptory challenges). Any error in granting the motion was not considered on defendant's appeal.

4. Jury— selection—capital trial—substituting jurors for sentencing phase

The trial court did not err during jury selection for a capital trial by refusing to seat two jurors opposed to the death penalty for the guilt phase and then substitute death-qualified alternate jurors during the sentencing phase.

5. Appeal and Error— convictions for first-degree murder and burglary—no motion to bypass Court of Appeals for burglary conviction

The sufficiency of the evidence of burglary was not properly before the Supreme Court on the direct appeal of the accom-

panying first-degree murder conviction and death sentence because neither party filed a motion to bypass the Court of Appeals. The issue was considered under Appellate Rule 2 because it also concerned an aggravating circumstance.

6. Burglary and Unlawful Breaking and Entering— breaking and entering during nighttime—sufficiency of evidence—victim found near nightclothes

There was sufficient evidence of a nighttime breaking and entry in a burglary prosecution. Evidence that the victim was in or near her nightclothes when she was murdered is not dispositive, but it is relevant and can be considered with the other evidence.

7. Jury— questions for witnesses—submission through judge required

A trial judge acted within his discretion in requiring a jury to submit questions for witnesses through him in writing rather than asking the witnesses directly. The record clearly indicates that the jurors understood that they were permitted to ask questions of the witnesses by this method.

8. Discovery— failure to disclose information—defendant not at a disadvantage—no *Brady* violation

There was no *Brady v. Maryland* violation in a murder prosecution where it was learned at trial that the State had not disclosed to defendant that a witness who had identified defendant in a photo lineup and testified that she had seen a man in the victim's truck could not identify defendant in court. The State reopened its case and recalled the witness, who testified on cross-examination that she was unable to make the in-court identification. Defendant was able to use the information during trial to his advantage, and it is clear from the jury's verdicts that defendant was not adversely affected by the initial nondisclosure.

9. Sentencing— capital—murder in the course of burglary—evidence sufficiency

There was sufficient evidence to submit the aggravating circumstance that a murder was committed during the course of a burglary where it was determined elsewhere in the same opinion that the evidence of a nighttime breaking and entry was sufficient.

10. Sentencing— capital—weighing aggravating and mitigating circumstances—instructions

The trial court did not commit plain error by instructing the jury in a capital sentencing proceeding to answer Issue Three in the affirmative "if you unanimously find beyond a reasonable doubt that the mitigating circumstances found are insufficient to outweigh the aggravating circumstance or circumstances found."

11. Sentencing— capital—aggravating circumstances—especially heinous, atrocious or cruel—instructions

The trial court did not err in instructing the jury concerning the especially heinous, atrocious, or cruel aggravating circumstance by denying defendant's request to have the modifier "especially" repeated in the instruction before both "atrocious" and "cruel."

12. Criminal Law— jurors praying during recess—motion for appropriate relief denied

The trial court did not err by denying a first-degree murder defendant's motion for appropriate relief that was based upon two jurors praying together in the lobby during a recess. There is nothing to indicate a discussion or deliberation of any kind, and no evidence that the jurors talked about the case during the recess. Moreover, even if there was misconduct, defendant presented only newspaper accounts and did not present affidavits from potential witnesses, so that there was insufficient documentary evidence to show the required prejudice.

13. Criminal Law— alleged juror misconduct—motion for appropriate relief denied

There was no abuse of discretion in the denial of an evidentiary hearing on a motion for appropriate relief arising from alleged juror misconduct. A defendant is not entitled to an evidentiary hearing on a motion for appropriate relief that merely asserts constitutional violations; defendant here did not make an adequate threshold showing of juror misconduct; and defendant did not allege any of the limited matters about which jurors can testify to impeach a verdict, so that none of the jurors defendant proposed to call as witnesses would have been allowed to testify.

14. Appeal and Error— preservation of issues—state constitutional claim—not raised at trial

A state constitutional claim not raised at trial was not considered.

15. Constitutional Law— elected judges—constitutionality

There was no violation of the U.S. Constitution in the denial of a capital sentencing defendant's motion to assign his post-trial motions to a judge not subject to popular elections.

16. Sentencing— capital—proportionality

A death sentence was not disproportionate where defendant raped and strangled the victim in her own home, there was sufficient evidence to support the aggravating circumstances, nothing in the record suggested the influence of passion, prejudice or other arbitrary factors, and no death sentence has been found disproportionate with these two aggravating factors (especially heinous, atrocious, or cruel and commission in the course of a burglary). Moreover, the method of proportionality review is not arbitrary and capricious.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from an order entered on 19 February 2004 denying defendant's Motion for Appropriate Relief from a judgment imposing a sentence of death entered on 18 December 2003, upon a jury verdict finding defendant guilty of first-degree murder, both entered by Judge James M. Webb in Superior Court, Moore County. Heard in the Supreme Court 13 March 2006.

Roy Cooper, Attorney General, by G. Patrick Murphy and Mary D. Winstead, Special Deputy Attorneys General, for the State.

M. Gordon Widenhouse, Jr. for defendant-appellant.

BRADY, Justice.

On or about 28 January 2001, defendant Terrence Rodricus Elliott murdered Alice Mae McLeod McCrimmon. On 15 December 2003 a jury returned verdicts of guilty against defendant for first-degree felony murder, first-degree rape, and first-degree burglary. On 18 December 2003, the jury returned a binding recommendation of a sentence of death for defendant's first-degree felony murder conviction. Accordingly, the trial court sentenced defendant to death for the first-degree murder conviction, arrested judgment on the first-degree

rape conviction, and sentenced defendant in the presumptive range to a consecutive term of 103 to 133 months for the first-degree burglary conviction. We find defendant received a fair trial and capital sentencing proceeding free of prejudicial error and that defendant's capital sentence is proportionate.

FACTS

At approximately 10:00 p.m. on 28 January 2001, defendant left the residence of Clifford McLaughlin in Vass, North Carolina, where he had been visiting with McLaughlin and John Bandy. At that time, neither McLaughlin nor Bandy observed defendant carrying any specific items of personal property with him. Defendant then traveled to the home of the victim, Alice Mae McLeod McCrimmon. Ms. McCrimmon was a seventy-seven year old widow living in a mobile home without reliable heating. She was a woman of modest means, carefully saving coins for "wash money" in a purple Crown Royal bag.

Defendant broke a window to Ms. McCrimmon's home, entered her dwelling, and proceeded to rape, beat, and strangle her until she died. During the struggle, she lost control of her bowels, leaving feces on the electric blanket later found on her bed. Defendant's beating of Ms. McCrimmon left numerous blood spatters on the headboard and the walls of her bedroom. Additionally, defendant's beating knocked at least one of Ms. McCrimmon's teeth out of her mouth, and this tooth was later found imbedded in her back. Defendant left two used condoms on the floor and smoked a cigarette, leaving the unfinished butt at the crime scene.

After the murder, defendant returned to McLaughlin's residence, sometime before 12:00 a.m. At this time, as testified to by McLaughlin and Bandy, defendant possessed a purple bag which contained various pieces of jewelry and some change. McLaughlin and Bandy further testified defendant offered to split the money inside the bag with them, with defendant taking all the "silver" money from the bag and giving the pennies to McLaughlin and Bandy.

On 9 February 2001, Ms. McCrimmon's grandson became concerned because no one had heard from Ms. McCrimmon for days. He traveled to her mobile home to find a window broken, the inside of the mobile home in disarray, and the back door open. He entered through the back door, using his flashlight to look around. When he approached Ms. McCrimmon's bedroom, he found her lying on the

floor beside her bed. Ms. McCrimmon's body was completely nude and her left leg was bent underneath the rest of her body. He immediately called law enforcement.

Additionally, Ms. McCrimmon's 1989 Ford pick-up truck was missing from her residence. Michelle McGarrah testified she observed a man moving the truck near a Housing Authority building in Southern Pines on or about 9 February 2001. While McGarrah initially testified that she identified defendant from a police photographic lineup on 9 February 2001, she later testified she could not make an in-court identification of defendant as the man she observed in the truck.

Defendant was eventually arrested, and on 12 March 2001 a Moore County grand jury returned true bills of indictment against him for murder, first-degree rape, first-degree burglary, two counts of felonious possession of stolen goods, and felonious larceny.

Chief Medical Examiner John D. Butts, M.D., testified for the State concerning his findings and the results of an autopsy performed on Ms. McCrimmon. He detailed injuries to Ms. McCrimmon, including blunt force trauma to her face, legs, and genital area. In Dr. Butts's opinion, the autopsy findings were consistent with the perpetrator beating, raping, and strangling Ms. McCrimmon until she died. Dr. Butts also testified he was unable to determine an exact time of death.

Special Agent Christopher Parker of the North Carolina State Bureau of Investigation conducted deoxyribonucleic acid (DNA) testing, comparing samples from swabs from the condoms, bloodstains, and cigarette butt discovered at the crime scene with known DNA samples from Ms. McCrimmon and defendant. The DNA profile found in one of the condoms was consistent with only the victim's DNA profile, while the other condom contained profiles consistent with both defendant and the victim. On the cigarette butt, Special Agent Parker found the DNA profile to be consistent with defendant's DNA profile, with the profile being 463 thousand trillion times to 25.9 million trillion times more likely to be observed from defendant than another unrelated African-American, Lumbee Indian, Caucasian, or Hispanic member of the North Carolina population.

Based upon the evidence presented at trial, the trial court allowed defendant's motion to dismiss portions of one felonious possession of stolen goods indictment which alleged possession of a microwave oven, a television, and an AM-FM cassette compact disc

player. After the trial court instructed the jury on the appropriate law of the case, the jury deliberated and returned verdicts of guilty of first-degree felony murder based upon a theory of rape, first-degree rape, and first-degree burglary. Defendant was acquitted of all other charges.

During the penalty proceeding, the State presented victim impact testimony from the victim's niece and sister. A mitigation specialist testified that defendant functioned at a low level of intelligence, that his father abandoned him at birth leaving him with no male role model, and that defendant has had problems with drug and alcohol abuse.

After instruction by the trial court, the jury deliberated and found unanimously and beyond a reasonable doubt the existence of two aggravating circumstances: (1) the murder was committed while the defendant was engaged in the commission of first-degree burglary; and (2) the murder was especially heinous, atrocious, or cruel. The jury found five non-statutory mitigating circumstances, including a catchall mitigating circumstance. The jury then unanimously found beyond a reasonable doubt the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for imposition of the death penalty. Accordingly, the jury made a binding recommendation of a sentence of death.

The trial court entered judgment of a sentence of death for the first-degree murder conviction, arrested judgment on the first-degree rape conviction, and sentenced defendant in the presumptive range to a consecutive term of 103 to 133 months for the first-degree burglary conviction.

JURY SELECTION ISSUES

[1] Defendant argues the trial court erred in failing to excuse a prospective juror who was over the age of sixty-five. Thelma Tennin, a prospective juror in the case, asked during jury selection if she could pose a question to the prosecutor. The prosecutor replied that she could and she asked: "There was a form on the back of the notification that people sixty-five years and older could be exempt. I did not get any response from having sent mine in. Does that have any—." The trial court responded by reading the applicable law to Ms. Tennin and telling her that the trial court's view of the statutes was that she must show a compelling personal hardship in order to

be excused from jury service. After Ms. Tennin responded that she did not have a compelling personal hardship, "other than old age," the trial court determined that it would not excuse her from service. Eventually, defendant used a peremptory challenge to remove Ms. Tennin from the jury pool.

We note defendant did not properly preserve this error for review because defendant did not object at trial. *See* N.C. R. App. P. 10(b)(1); *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600, *cert. denied*, 540 U.S. 988 (2003). However, as a decision clarifying the law in this regard is in the public interest, we will review defendant's argument despite its procedural bar. *See* N.C. R. App. P. 2.

Defendant's argument relies upon the assumption that a trial court may excuse a juror merely because that juror is over the age of sixty-five. This premise is unfounded under North Carolina law. This Court put it well in *State v. Rogers*:

> By statute, citizens over the age of sixty-five are qualified to serve on juries. N.C.G.S. § 9-3 (2001). However, a prospective juror over that age may, when summoned, request an exemption. N.C.G.S. § 9-6.1 (2001). The judge has the option of allowing or denying the request. *Id.* Once the venire is in the courtroom, any juror, though qualified, nevertheless may ask to be excused. The General Assembly has
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> > declare[d] the public policy of this State to be that jury service is the solemn obligation of all qualified citizens, and that excuses from the discharge of this responsibility should be granted only for reasons of compelling personal hardship or because requiring service would be contrary to the public welfare, health, or safety.
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> N.C.G.S. § 9-6(a) (2001). This language gives trial courts considerable latitude to deal with the particular problems that appear with every trial, and we have recognized that the decision to excuse a prospective juror lies in the trial court's discretion. We have stated that a juror may properly be excused on the basis of age. Accordingly, we discern no abuse of discretion in the trial court's decision to grant the jurors' requests to be excused. Nevertheless, in light of the statutory admonition contained in N.C.G.S. § 9-6(a), we remind the trial courts that excusing prospective jurors present in the courtroom who are over the age

> of sixty-five must reflect a genuine exercise of judicial discretion. Defendant correctly points out that such jurors often bring to the jury pool both a wealth of experience and a willingness to serve.

355 N.C. 420, 447-48, 562 S.E.2d 859, 876-77 (2002) (citations omitted) (brackets in original).

It is clear from the text of N.C.G.S. §§ 9-3, N.C.G.S. § 9-6(a), and N.C.G.S. § 9-6.1[1] that whether a juror should be excused from jury service is a decision which rests in the sound discretion of the trial court. On many occasions, a prospective juror's age may be a compelling personal hardship. However, this is not always the case. "The adverse effects of growing old do not strike all equally or at the same time, and it is only sensible to allow trial judges to consider the individual when a prospective juror seeks to be excused because of his or her age." *Rogers*, 355 N.C. at 449, 562 S.E.2d at 877-78. That the trial court exercised its discretion in the case *sub judice* is apparent, not only from its discussion with Ms. Tennin, but also with other jurors over the age of sixty-five whom it excused from service due to compelling personal hardships.

The trial court asked Ms. Tennin: "Well, because of your age, are you able to sit and listen to the evidence as presented by the attorneys?" She answered she was able to do so and that she could listen to the attorney's arguments and the trial court's instructions. Defendant contends in his brief the trial court treated Ms. Tennin in a disparate manner because it dismissed other jurors solely on the basis of their age. Specifically, defendant asserts the trial court "merely determined each [prospective juror at issue] was over sixty-five and wished to be exempt from jury service." The record does not comport with defendant's assertion. Of the four prospective jurors defendant mentions in his brief, each one had some other hardship besides his or her age considered by the trial court. One prospective juror was seventy-nine years old and afflicted with Alzheimer's. Another was eighty-one years old and had severe arthritis and kidney problems. A third was eighty years old and had a hearing problem. The fourth prospective juror had a "slipped disk and also severe deterioration of the lumbar area . . . [and] chronic cystic fibrosis" which distorted the prospective juror's vision. The record bears out that the trial court did not merely determine the age of the prospective jurors

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1. Since the time of trial, N.C.G.S. § 9-6.1 has been amended to allow prospective jurors ages "72 years or older" to make a request to be excused, deferred, or exempted in writing without appearing in the courtroom.

at issue as defendant contends, but rather the trial court exercised discretion as required by the applicable General Statutes.

Defendant contends the trial court's failure to dismiss Ms. Tennin amounts to structural error or plain error. Because we find the trial court's actions were not erroneous as they did not constitute an abuse of discretion, it is unnecessary to address these contentions. Defendant's assignment of error is overruled.

[2] Defendant assigns as error the trial court's refusal to allow defendant to question prospective jurors as to whether they had any preconceived notions about taxpayer cost for imprisoning a defendant for life without parole versus a capital sentence. This Court has previously stated that "[i]n this jurisdiction counsel's exercise of the right to inquire into the fitness of jurors is subject to the trial judge's close supervision. The regulation of the manner and the extent of the inquiry rests largely in the trial judge's discretion." *State v. Bryant*, 282 N.C. 92, 96, 191 S.E.2d 745, 748 (1972), *cert. denied sub nom. White v. North Carolina*, 410 U.S. 958 (1973), *and cert. denied sub nom. Holloman v. North Carolina*, 410 U.S. 987 (1973). Therefore, we must determine whether the trial court's denial of defendant's request amounts to a clear abuse of discretion which prejudiced defendant. *State v. Young*, 287 N.C. 377, 387, 214 S.E.2d 763, 771 (1975) ("A defendant seeking to establish on appeal that the exercise of such discretion constitutes reversible error must show harmful prejudice as well as clear abuse of discretion."), *judgment vacated in part on other grounds*, 428 U.S. 903 (1976); *accord*, *State v. Avery*, 315 N.C. 1, 20, 337 S.E.2d 786, 796-97 (1985).

After discovering one juror's views on the cost of life imprisonment versus the cost of capital punishment, defendant requested permission to ask prospective jurors: "Do you have any preconceived notions about the cost of executing someone compared to the cost of keeping [him] in prison for the rest of [his] life?" The trial court denied defendant's request. While it is true the question posited by defendant may have been relevant as to whether prospective jurors could apply the law as given by the trial court in light of their own personal beliefs on the cost of life imprisonment versus capital punishment, the issue is not whether such a question was relevant, but whether the trial court abused its discretion in not allowing defendant to ask the proposed question.

Undoubtedly, nearly every juror questioned had at least some preconceived ideas about the death penalty. In the age of instant

information and mass media, it is nearly impossible for prospective jurors to shield themselves from every discussion about capital punishment. However, a juror is not automatically excluded from jury service merely because that juror may have an opinion about the propriety of the death penalty. Instead, a trial court's discretion is properly used to ensure that a juror can put aside any personal beliefs in the propriety of capital punishment and recommend a sentence in accordance with the trial court's instructions and the law. *See Wainwright v. Witt*, 469 U.S. 412, 419-21 (1985); *State v. Kimmerlin*, 356 N.C. 446, 468-70, 573 S.E.2d 870, 886-87 (2002). Defendant was allowed to ask whether each juror would automatically impose the death penalty or whether the juror would apply the law as given by the trial court. By allowing this question, the trial court permitted defendant to probe into the death penalty views of the prospective jurors and to determine if they were inclined to automatically vote for imposition of death without applying the law. Because we cannot say the trial court clearly abused its discretion in denying defendant's request, we overrule defendant's assignment of error.

[3] Defendant next argues the trial court committed reversible error by restoring peremptory challenges to both defendant and the State after dismissing an entire group of prospective jurors for misconduct. Contrary to the trial court's instructions, during jury selection prospective jurors discussed how to be excused from the jury and the probable length of the trial due to defendant's prior convictions. When this information came to the attention of the trial court, it granted defendant's motion to strike the entire venire present at the time of the misconduct. Because defendant and the State had used peremptory challenges to dismiss some of these prospective jurors from the venire before the discovery of the misconduct, defendant sought restoration of the peremptory challenges used against the disqualified prospective jurors. After a renewal of this motion, the trial court granted defendant's request and restored one challenge to defendant and two challenges to the State.

A trial court generally has "no authority to grant additional peremptory challenges." *State v. Smith*, 359 N.C. 199, 207-08, 607 S.E.2d 607, 615, *cert. denied*, —— U.S. ——, 126 S. Ct. 109, 163 L. Ed. 2d 121 (2005). We decline to reach the issue of whether the trial court's actions were error because defendant has invited any error which may be present from the trial court's "restoration" of the wasted peremptory challenges. "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from

his own conduct." N.C.G.S. § 15A-1443(c) (2005). *See also State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971) ("Ordinarily one who causes (or we think joins in causing) the court to commit error is not in a position to repudiate his action and assign it as ground for a new trial . . . . Invited error is not ground for a new trial."). Defendant's assignment of error is overruled.

[4] Defendant assigns as error the denial of his motion to seat two jurors opposed to the imposition of the death penalty under any circumstances during the guilt-innocence proceeding and substitute two alternate jurors who were "death qualified" during the penalty proceeding. We have previously considered whether such a request was properly denied and held:

> Selecting a jury composed both of those opposed and unopposed to capital punishment for the purpose of determining guilt and then, at the sentencing phase, replacing those opposed by alternates who are unopposed to the death penalty contravenes G.S. 15A-2000(a)(2), which contemplates that the same jury which determines guilt will recommend the sentence. General Statute 15A-2000(a)(2) permits alternate jurors to serve during the sentencing phase in extraordinary circumstances involving the death, incapacitation or disqualification of an empaneled juror, but does not provide for the exchange of jurors for the sentencing phase based upon their convictions concerning the death penalty.

State v. Bondurant, 309 N.C. 674, 682, 309 S.E.2d 170, 176 (1983). Additionally, this Court and the Supreme Court of the United States have held that death qualification of a jury is not unconstitutional. *See Lockhart v. McCree*, 476 U.S. 162, 173, 184 (1986); *State v. Avery*, 299 N.C. 126, 136-38, 261 S.E.2d 803, 809-10 (1980). Because we decline to depart from our prior precedent in *Bondurant* and *Avery*, we overrule defendant's assignment of error.

GUILT-INNOCENCE PROCEEDING ISSUES

[5] Defendant argues the trial court erred in denying his motion to dismiss the burglary charge because the evidence was insufficient to prove the breaking and entering of Ms. McCrimmon's home occurred at nighttime. As an initial matter, the issue of defendant's burglary conviction is not properly before this Court. While convictions that result in a judgment of death are automatically appealable to this Court, all other convictions are properly appealed to the Court of

Appeals. *See* N.C.G.S. § 7A-27 (2005); N.C. R. App. P. 4(d). Neither party has filed a motion requesting to bypass the Court of Appeals as to this non-capital conviction. However, because this issue also relates to one of defendant's arguments regarding an aggravating circumstance, we will, of our own initiative, consider defendant's assignments of error concerning his burglary conviction. *See* N.C. R. App. P. 2.

[6] In evaluating the sufficiency of the evidence, we must determine if there was substantial evidence of each essential element of the crime charged. *See State v. Smith*, 307 N.C. 516, 518, 299 S.E.2d 431, 434 (1983). "To warrant a conviction of burglary in either the first or second degree, the State must show *inter alia* that the crime charged occurred during the nighttime." *Id.* "In considering a motion to dismiss, the evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *State v. Lowery*, 309 N.C. 763, 766, 309 S.E.2d 232, 236 (1983). Defendant argues that there was insufficient evidence the breaking and entering occurred during the nighttime, and, therefore, the evidence did not support a conviction of burglary. Defendant asserts the evidence only amounts to mere speculation or conjecture and is not substantial. For instance, citing *State v. Forney*, defendant claims the fact Ms. McCrimmon's body was found in nightclothes is of "no moment." 310 N.C. 126, 310 S.E.2d 20 (1984) (finding insufficient evidence to prove the breaking and entering occurred at nighttime even though victim was found in pajamas and barefoot). Although defendant claims the victim was found in her nightclothes, the record is clear that Ms. McCrimmon's body was found completely nude with her nightclothes in the floor beside her bed. Regardless, while evidence of the victim's being in or near her nightclothes at the time of the murder is not dispositive of whether the breaking and entering occurred at night, such evidence is relevant and can be considered with the other evidence which tends to show the crime occurred during the nighttime. *See State v. Ledford*, 315 N.C. 599, 607-10, 340 S.E.2d 309, 314-16 (1986).

The evidence presented at trial regarding the time of the crime is as follows: (1) Ms. McCrimmon's nude body was found near her nightclothes; (2) the blood spatter indicated much, if not all, of the rape and beating occurred while Ms. McCrimmon was on the bed; (3) the feces on the electric blanket indicated Ms. McCrimmon was strangled while on her bed; (4) Ms. McCrimmon's electric blanket was turned on, suggesting she was using it at the time of the murder; and (5) two

witnesses testified defendant left their presence at night and returned later that night with possessions matching the description of items taken from Ms. McCrimmon's dwelling.

Because all this evidence, taken in the light most favorable to the State, is substantial evidence that defendant committed the breaking and entering of Ms. McCrimmon's dwelling house at nighttime, we overrule defendant's assignment of error.

[7] Defendant contends the trial court denied defendant a fair and impartial trial by consistently prohibiting the jury from asking questions of witnesses instead of exercising discretion as to particular inquiries. In making this argument, defendant points to three interactions which occurred during trial. The first interaction occurred when a juror attempted to verbally ask a witness a question, and the trial court responded by informing the juror: "Write down your question . . . . You cannot ask questions of the witness. You can ask the Court for questions." The second interaction was when the trial court asked a juror if she was writing out a question for the court. She answered that she was not, and the trial court replied, "very good." The third interaction was when the trial court stated, outside the presence of the jury, in response to concerns raised by defense counsel: "I will state as I did for the record when I admonished Juror Number Five . . . that she is not to ask the witness or the lawyers any questions as she attempted and did direct [a witness] to display an item in a certain way." These interactions, when taken in the context of the entire trial, do not show that the trial court refused to allow the jury to ask any questions. Instead, the context of the entire record shows numerous questions were propounded by the jurors in writing and that each request was given due consideration by the trial court.

"[T]he propriety of juror questioning of witnesses is within the sound discretion of the trial court." *State v. Howard*, 320 N.C. 718, 725, 360 S.E.2d 790, 794 (1987). While it may be permissible in the discretion of the trial court to allow jurors to orally ask witnesses questions, "the better practice is for the juror to submit written questions to the trial judge who should have a bench conference with the attorneys, hearing any objections they might have." *Id.* at 726, 360 S.E.2d at 795. At numerous times throughout this trial, jurors were instructed to put any questions they had in writing and give them to the trial court. Each time a juror wrote a question or a comment to the trial court, the attorneys were informed of the content of the note and appropriate action was taken.

For instance, after the first interaction which defendant contends was improper, the trial court informed counsel for defendant and the State that the juror had written a question asking: "What are the numbers and circle markings on the jacket?" Immediately after this bench conference, the State posed the following question to the witness: "[T]here appear to be some markings on or about [the jacket]. Do you know what those items are or what those markings indicate?" Therefore, the question the juror tried to ask orally was instead reduced to writing and then asked by the State after the bench conference. The record reveals another illustrative incident in which the trial court asked a juror if he had "a question you want to write out?" The juror responded that he did, and the trial court replied, "Go right ahead." When the interactions between the trial court and the jurors are viewed within context, the record clearly demonstrates the jurors' understanding they were permitted to ask questions of the witnesses by submitting those questions in writing to the trial court. The trial court employed the "better practice" as articulated by this Court in *Howard*, and was within its discretion to do so. Therefore, defendant's assignment of error is overruled.

[8] Defendant contends the trial court erred in denying defendant's motion to strike the testimony of Michelle McGarrah after defendant discovered McGarrah was unable to make an in-court identification of defendant and McGarrah had notified the State she was unable to do so. McGarrah testified she saw a man move Ms. McCrimmon's truck in front of the Housing Authority buildings where she was employed on 9 February 2001. She testified it was a black male, between five feet five inches and five feet nine inches tall. She also testified that on 9 February 2001 she identified defendant from a police photographic lineup. After direct examination of McGarrah, defendant requested a recess to prepare a cross-examination of McGarrah, but after the recess declined to cross-examine her.

After the close of the prosecution's evidence, defendant moved to dismiss the charges of larceny and felonious possession of the victim's truck, arguing the evidence was insufficient to submit the issue to the jury. During the argument surrounding the motion to dismiss, the trial court asked the State: "Is there some reason why you didn't ask [McGarrah] if she saw the person in the courtroom—if she ever saw the person in the courtroom get in the truck or get out of the truck?" The prosecutor replied: "Yes, Your Honor. I spoke with Ms. McGarrah very briefly before she was put on the stand and she advised me that she would not be able to make that in-court identifi-

cation." Defendant then moved to strike McGarrah's testimony because, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), the State failed to disclose to defendant that McGarrah could not make an in-court identification of defendant.

After voir dire examination of McGarrah, the trial court asked defendant what should be done if it denied his motion to strike her testimony. Defendant's counsel replied: "I want her to get up on the [witness] stand and tell the jury what she just told the Court, that she informed [the State] she couldn't identify the defendant, and they put her on anyway." The State then made a motion to reopen its case and call McGarrah to testify again. The trial court granted the State's motion, and on cross-examination McGarrah testified she was unable to make an in-court identification and had informed the State she was unable to do so.

As a constitutional matter, the State has "no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor." *United States v. Agurs*, 427 U.S. 97, 106 (1976). A prosecutor does have a duty, however, to provide a defendant with evidence favorable to him or her that is material as to guilt or punishment. *See Brady*, 373 U.S. at 87. To establish a *Brady* violation, defendant must show the evidence was favorable, material, and would have affected the outcome of the trial. *See State v. Alston*, 307 N.C. 321, 337, 298 S.E.2d 631, 642-43 (1983). Even if the information must be disclosed, "a *Brady* violation may not constitute error if the favorable evidence is provided in time for the defendant to make effective use of it." *State v. Berry*, 356 N.C. 490, 517, 573 S.E.2d 132, 149 (2002). In this case, when defendant discovered the evidence he had a sufficient amount of time to use it to his benefit.

When the trial court reopened the State's evidence, defendant was allowed to cross-examine McGarrah, eliciting that she was unable to make an in-court identification of defendant. Additionally, during closing argument, defendant made good use of this information and the prosecution's failure to provide it to defendant. Defendant argued that, in light of this non-disclosure, there might have been other evidence which was contrary to the State's theory that was not presented at trial. McGarrah's testimony concerning the truck, while relevant to all the charges, was most relevant to the charges of larceny and felonious possession of the truck. The jury returned verdicts of not guilty as to those charges. Because defendant was able to utilize the information during trial to his advantage, and because it is clear from the jury's verdicts defendant was not

adversely affected by the initial nondisclosure, we find no *Brady* violation. While it certainly would have been better practice for the State to disclose this information as soon as the information became known to it, we cannot say this belated disclosure amounts to reversible error. *See generally*, *State v. Smith*, 359 N.C. at 227, 607 S.E.2d at 627 (encouraging "North Carolina prosecutors to heed the paramount responsibilities which accompany their authority") (Brady, J., concurring). Accordingly, we overrule defendant's assignments of error.

CAPITAL SENTENCING PROCEEDING ISSUES

[9] Defendant argues there was insufficient evidence to submit to the jury the aggravating circumstance that he committed the murder during the course of a first-degree burglary because there was insufficient evidence to show the breaking and entering occurred at nighttime. All evidence presented during the guilt-innocence proceeding of defendant's trial was competent evidence for the jury to consider in making its sentencing determination. *See* N.C.G.S. § 15A-2000(a)(3) (2005). Because we have already determined there was sufficient evidence for the jury to return a verdict of guilty of first-degree burglary and the evidence tends to show Ms. McCrimmon was murdered contemporaneously with the burglary, there was sufficient evidence to submit this aggravating circumstance to the jury. We therefore overrule defendant's assignment of error.

[10] Defendant contends the trial court committed plain error by instructing the jury to answer Issue Three of the Issues and Recommendation as to Punishment Form in the affirmative even if the jury found the weight of the five mitigating circumstances equaled the weight of the two aggravating circumstances. Specifically, the trial court instructed the jury as to Issue Three: "If you unanimously find beyond a reasonable doubt that the mitigating circumstances found are insufficient to outweigh the aggravating circumstance or circumstances found, you would answer [I]ssue Three yes." We have recently considered at length whether such an instruction amounts to plain error and have held that it does not. *See State v. Duke*, 360 N.C. 110, 138-40, 623 S.E.2d 11, 29-31 (2005). We decline to overrule our recent jurisprudence on this matter and, therefore, overrule defendant's assignment of error.

[11] Defendant argues the trial court erred in instructing the jury concerning the especially heinous, atrocious, or cruel aggravating circumstance because the trial court denied defendant's request to

have the modifier "especially" repeated in the instruction before both "atrocious" and "cruel." Defendant contends the trial court's instruction, which followed the pattern jury instructions, was unconstitutionally vague and overbroad. We have held numerous times the pattern jury instruction on the especially heinous, atrocious, or cruel aggravating circumstance found in 1 N.C.P.I.—Crim. 150.10, is not unconstitutionally vague or overbroad. *See*, *e.g.*, *Duke*, 360 N.C. at 136-37, 623 S.E.2d 28-29; *State v. Syriani*, 333 N.C. 350, 388-92, 428 S.E.2d 118, 139-42, *cert. denied*, 510 U.S. 948 (1993). Defendant's arguments have not persuaded us to depart from our previous holdings on this matter. We therefore overrule defendant's assignments of error.

DEFENDANT'S MOTION FOR APPROPRIATE RELIEF

[12] Defendant contends the trial court erred in denying his motion for appropriate relief, which alleged that defendant's statutory and constitutional rights had been violated when two jurors met and prayed outside of the jury room during a recess from deliberations. Defendant's motion for appropriate relief alleged juror misconduct prior to the return of the sentencing recommendation while seeking to impeach the sentencing recommendation. We conclude evidentiary support submitted by defendant was insufficient to "show the existence of the asserted ground for relief" or to show the required prejudice to defendant, we hold the trial court did not err in denying defendant's motion. N.C.G.S. § 15A-1420(c)(6) (2005).

In ruling on defendant's motion for appropriate relief, the trial court found, *inter alia*, that *The Pilot* newspaper had reported that one of the jurors in the case, Andrea Seagraves, indicated she and a male juror prayed together in the lobby during an afternoon recess. Both jurors were, at the time of the prayer, undecided on whether to recommend a sentence of death. After the two returned to the deliberation room with all the other jurors, they both indicated they favored a death sentence. Neither the State nor defendant argues these findings of fact were improperly made or not supported by competent evidence. Therefore, we consider them binding upon appeal. *See State v. Freeman*, 313 N.C. 539, 544, 330 S.E.2d 465, 470 (1985) (stating that when a trial court's findings of fact are supported by competent evidence, they are binding on the appellate courts).

Article I, Section 24 of the North Carolina Constitution guarantees a criminal defendant a trial by jury and requires a unanimous

verdict for a conviction. Moreover, this Court has said on numerous occasions that the jury must be composed of twelve persons. *See*, *e.g.*, *State v. Bunning*, 346 N.C. 253, 255-56, 485 S.E.2d 290, 291-92 (1997); *State v. Hudson*, 280 N.C. 74, 79, 185 S.E.2d 189, 192 (1971). However, the documentary evidence defendant submitted to support his motion for appropriate relief was insufficient to show, by any standard, that juror misconduct occurred in the form of private deliberations outside the presence of the other jurors.

While defendant's brief characterizes the prayer between the two jurors as "deliberations" and "discussions about the case outside the presence of their ten fellow jurors," there is nothing in the record that indicates a discussion or deliberation of any kind occurred. We find no controlling case prohibiting jurors from engaging in prayer outside the presence of the other jurors or any authority which would prohibit juror contact with one another outside of the deliberation room. The only relevant requirement is that jurors not discuss the case except in the jury room and that such discussions occur only after the commencement of deliberations. *See* N.C.G.S. § 15A-1236(a)(1) (2005). Defendant has not presented any documentary evidence required by N.C.G.S. § 15A-1420(b) which suggests the jurors talked *about the case* during the recess. Due to this failure to submit sufficient documentary evidence supporting his allegations regarding the facts and significance of the prayer, defendant has failed to "show the existence of the asserted ground for relief." N.C.G.S. § 15A-1420(c)(6).

Defendant asserts this case cannot be distinguished from *State v. Bunning*. In *Bunning*, because an alternate juror was seated after the jury's sentencing deliberations had already commenced, thirteen jurors participated in reaching a verdict as to sentencing. 346 N.C. at 256, 485 S.E.2d at 292. In this case only twelve jurors deliberated concerning defendant's sentence. Defendant similarly cites *State v. Bindyke*, 288 N.C. 608, 623, 220 S.E.2d 521, 531 (1975) (improper for alternate juror to be present during the jury's deliberations), and *State v. Poindexter*, 353 N.C. 440, 440-43, 545 S.E.2d 414, 414-16 (2001) (dismissal of a juror after the verdict was rendered for misconduct which occurred before a guilty verdict was rendered violated right to trial by jury comprised of twelve *qualified* jurors). Neither case is especially helpful in resolving this matter, as neither dealt with purported extraneous discussion by members of the jury. Therefore, none of the cases cited by defendant lend support to his argument that the praying jurors somehow constituted a jury of some

number other than twelve in violation of the North Carolina Constitution or prior case law.

Additionally, even if the individual jurors' prayers constituted misconduct, there simply was insufficient documentary evidence to show the required prejudice. The documentary evidence indicates only that after the praying jurors returned to the deliberation room they favored a death sentence. Although defendant could have sought affidavits from potential witnesses to support his claim of juror misconduct raised in the motion for appropriate relief, defendant presented nothing save a few newspaper accounts which shed very little light on the alleged discussions between the two jurors concerning the case, and certainly failed to shed light on any prejudice to defendant which arose from discussions, if any, surrounding the prayer. Accordingly, we find the trial court did not err in denying defendant's inadequately supported motion for appropriate relief. Defendant's assignment of error is overruled.

[13] Defendant assigns error to the trial court's denial of his request for an evidentiary hearing on his motion for appropriate relief. When determining whether an evidentiary hearing was appropriate in this case, we note "[a]n evidentiary hearing is not required when the motion is made in the trial court pursuant to G.S. 15A-1414, but the court may hold an evidentiary hearing if it is appropriate to resolve questions of fact." N.C.G.S. § 15A-1420(c)(2) (2005). Merely because a defendant asserts constitutional violations does not entitle that defendant to an evidentiary hearing on the motion for appropriate relief. *See State v. McHone*, 348 N.C. 254, 256-58, 499 S.E.2d 761, 762-63 (1998). "Further, if the trial court can determine from the motion and any supporting or opposing information presented that the motion is without merit, it *may* deny the motion without any hearing either on questions of fact or questions of law, including constitutional questions." *Id.* at 257, 499 S.E.2d at 763 (citing N.C.G.S. § 15A-1420(c)(1)). Therefore, if a defendant files a motion for appropriate relief under N.C.G.S. § 15A-1414, the decision of whether an evidentiary hearing is held is within the sound discretion of the trial court. Defendant's motion for appropriate relief was made in the trial court pursuant to N.C.G.S. § 15A-1414 so, therefore, we review the trial court's order denying an evidentiary hearing for abuse of discretion. "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, 372 S.E.2d 523, 527 (1988).

We determine the trial court's decision was not an abuse of discretion. As determined above, defendant failed to make an adequate threshold showing of juror misconduct. As to defendant's efforts to impeach the jury's sentencing recommendation, defendant would have been unable to present any evidence which would have strengthened the claims made in the motion for appropriate relief. While a juror is competent to testify on certain matters, *see* N.C.G.S. § 8C-1, Rule 606(b) (2005), a juror may not testify "to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined." *Id.* § 15A-1240(a) (2005); *see also id.* § 8C-1, Rule 606(b). Additionally, a juror can only testify to impeach the verdict when the testimony concerns: "(1) Matters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him; or (2) Bribery, intimidation, or attempted bribery or intimidation of a juror." *Id.* § 15A-1240(c) (2005); *see also id.* § 8C-1, Rule 606(b).

During argument for an evidentiary hearing, defendant stated that he intended to call three jurors and then call newspaper reporters on rebuttal if necessary. Under N.C.G.S. §§ 15A-1240(c) and 8C-1, Rule 606(b), those jurors defendant intended to call could have only testified whether extraneous information came to their attention, or whether someone did or attempted to bribe or intimidate them. There were no allegations of bribery, intimidation, or attempted bribery or intimidation. Similarly, nothing in defendant's motion for appropriate relief indicated that the jurors considered extraneous information, which is information about the defendant or the case being tried that was not introduced into evidence. *See State v. Rosier*, 322 N.C. 826, 831-32, 370 S.E.2d 359, 362-63 (1988). Therefore, even if the trial court had granted defendant's request for an evidentiary hearing, none of defendant's proposed juror witnesses would have been allowed to testify concerning the issues raised in the motion for appropriate relief which attempted to impeach the sentencing recommendation. Therefore, we cannot say it was an abuse of the trial court's discretion to deny defendant's request for an evidentiary hearing. This assignment of error is overruled.

[14] Defendant argues the trial court erred in denying his motions to assign consideration of his post-trial motions, specifically his motion for appropriate relief, to a Superior Court judge who was not subject to popular election, but who was appointed by the governor or some

other entity. Defendant argued at trial the federal constitution required granting such a motion, but on appeal asserts that both the United States and North Carolina Constitutions required his motion be assigned to an appointed judge. As defendant did not raise the state constitutional grounds at the trial court, we decline to consider those issues. *See* N.C. R. App. P. 10(b)(1); *State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 519 (1988) ("Defendant may not swap horses after trial in order to obtain a thoroughbred upon appeal."). Therefore, we dismiss these portions of defendant's assignments of error fifty-three and fifty-four insofar as they assert error based upon the North Carolina Constitution.

[15] As to defendant's federal constitutional claims, they are without merit. The Supreme Court of the United States is the final authority on federal constitutional questions. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). In *Republican Party of Minnesota v. White*, the Supreme Court of the United States rejected the view that the due process clause prohibits an elected judge from ruling on a case that would increase or decrease his chances for reelection. 536 U.S. 765, 782-83 (2002). If that view were true, that Court noted, "then—quite simply—the practice of electing judges is itself a violation of due process." *Id.* However, this position is not "reflected in the Due Process Clause of the Fourteenth Amendment, which has coexisted with the election of judges ever since it was adopted." *Id.* at 783. We decline to adopt defendant's argument, which is in conflict with a decision of the Supreme Court of the United States, and, therefore, overrule defendant's assignments of error.

PRESERVATION ISSUES

Defendant asserts multiple assignments of error concerning the indictment charging him with first-degree murder because it failed to allege all of the elements of first-degree murder and the statutory aggravating circumstances which the State intended to submit for capital sentencing. This Court has considered whether short-form indictments are statutorily and constitutionally permissible in the past and rejected defendant's argument. *See State v. Mitchell*, 353 N.C. 309, 328-29, 543 S.E.2d 830, 842, *cert. denied*, 534 U.S. 1000 (2001); *State v. Wallace*, 351 N.C. 481, 504-08, 528 S.E.2d 326, 341-43, *cert. denied*, 531 U.S. 1018 (2000). Likewise, this Court has previously considered and rejected the argument that aggravating circumstances must be alleged in the indictment and has rejected that argument. *See State v. Hunt*, 357 N.C. 257, 268-78, 582 S.E.2d

593, 600-06, *cert. denied*, 539 U.S. 985 (2003). We decline to depart from our prior precedent.

The indictment charging defendant with first-degree murder reads: "The jurors for the State upon their oath present that on or about the 28th day of January, 2001, and in the county named above the defendant named above unlawfully, willfully and feloniously and of malice aforethought did kill and murder Alice Mae McLeod McCrimmon. Offense in violation of G.S. 14-17." As this indictment met the requirements of N.C.G.S. § 15-144, we overrule defendant's assignments of error.

Defendant argues the trial court erred in instructing the jury it must agree unanimously to answer "no" on Issues One, Three, and Four of the Issues and Recommendation as to Punishment Form. We have previously decided this matter and rejected this argument. *See State v. McCarver*, 341 N.C. 364, 390, 462 S.E.2d 25, 39 (1995), *cert. denied*, 517 U.S. 1110 (1996). We decline to overrule our precedent and, therefore, overrule defendant's assignments of error.

Defendant assigns as error the trial court's instruction that the jury had a duty to return a recommendation of death if it answered Issue Four on the Issues and Recommendation as to Punishment Form in the affirmative. We have previously decided this issue contrary to defendant's position and decline defendant's request to depart from our past precedent. *See State v. Skipper*, 337 N.C. 1, 57, 446 S.E.2d 252, 283-84 (1994), *cert. denied*, 513 U.S. 1134 (1995). Defendant's assignment of error is overruled.

Defendant argues the trial court erred in instructing the jury on the burden of proof required to find a mitigating circumstance by using the word "satisfied." Defendant claims the term "satisfy" is "too vague to be understood by jurors." We have considered this argument in the past and rejected it. *See State v. Payne*, 337 N.C. 505, 531-33, 448 S.E.2d 93, 108-09 (1994), *cert. denied*, 514 U.S. 1038 (1995). In doing so we noted " 'satisfies' denotes a burden of proof consistent with a preponderance of the evidence." *Id.* at 533, 448 S.E.2d at 109. We overrule defendant's assignment of error.

Defendant argues the trial court erred in instructing the jury it could not consider nonstatutory mitigating circumstances it found to have no mitigating value. Defendant asserts in his brief that the trial court submitted nine nonstatutory mitigating circumstances to the jury and that the jury rejected all but one. However, a review of the record in this case, specifically the Issues and Recommendation as to

Punishment Form, indicates submission of five written nonstatutory mitigators to the jury and that one or more jurors found all five to exist. As one or more jurors found all the submitted circumstances to exist and have mitigating value, this assignment of error is meritless. Additionally, this Court has previously decided this issue contrary to defendant's position, and we find no reason to overrule our precedent. *See State v. Tirado*, 358 N.C. 551, 601, 599 S.E.2d 515, 548 (2004), *cert. denied sub nom.*, *Queen v. North Carolina*, 544 U.S. 909 (2005). Therefore, defendant's assignment of error is overruled.

Defendant assigns as error the trial court's instruction on aggravation, claiming it is unconstitutionally broad. We have previously considered this issue and decline to overrule our past precedent. *See State v. Bell*, 359 N.C. 1, 46, 603 S.E.2d 93, 123 (2004), *cert. denied*, —— U.S. ——, 125 S. Ct. 2299, 161 L. Ed. 2d 1094 (2005). Defendant's assignment of error is overruled.

Defendant contends the jury instructions for Issues Three and Four of the penalty proceeding impermissibly used the word "may," thereby permitting, but not requiring, each juror to weigh any mitigating circumstances he or she may have found by a preponderance of the evidence under Issue Two. This Court considered this argument previously and found it to lack merit. *See State v. Lee*, 335 N.C. 244, 286-87, 439 S.E.2d 547, 569-70, *cert. denied*, 513 U.S. 891 (1994). Defendant has presented no persuasive argument, nor do we find any compelling reason, for overruling our prior holdings on this issue. Defendant's assignment of error is overruled.

Defendant contends the trial court erred in instructing the jury that, in deciding Issues Three and Four of the Issues and Recommendation as to Punishment Form, each juror could only consider those mitigating circumstances that particular juror found in Issue Two. The trial court instructed the jury as to this issue: "[E]ach juror may consider any mitigating circumstance or circumstances that juror determined to exist by a preponderance of the evidence." We have previously decided this issue contrary to defendant's position and decline to overrule our past precedent. *See State v. Skipper*, 337 N.C. at 49-51, 446 S.E.2d at 279-80. This assignment of error is overruled.

Defendant makes a broad assertion that the North Carolina capital punishment statute is unconstitutional because it is vague, overbroad, arbitrary, discriminatory, and inherently cruel and unusual. The constitutionality of North Carolina's capital punishment statute

has been affirmed numerous times by this Court, and we find no reason to overrule our precedent. *See*, *e.g.*, *Duke*, 360 N.C. at 142, 623 S.E.2d at 32; *State v. Williams*, 350 N.C. 1, 35, 510 S.E.2d 626, 648 (1999), *cert. denied*, 528 U.S. 880 (1999). Defendant's assignments of error are overruled.

PROPORTIONALITY

[16] Having concluded defendant's trial and capital sentencing proceeding were free from prejudicial error, we must now determine: (1) whether the record supports the aggravating circumstances found by the jury and upon which the sentence of death was based; (2) whether the death sentence was entered under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *See* N.C.G.S. § 15A-2000(d)(2) (2005).

The jury found two aggravating circumstances: (1) the murder was committed while defendant was engaged in the commission of first-degree burglary, N.C.G.S. § 15A-2000(e)(5); and (2) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). As discussed above, there was sufficient evidence to submit the (e)(5) aggravating circumstance to the jury. Likewise, there was sufficient evidence to submit to the jury that the murder was especially heinous, atrocious, or cruel ("HAC"). This Court has characterized three types of murders for which submission of HAC may be proper:

> One type includes killings physically agonizing or otherwise dehumanizing to the victim. A second type includes killings less violent but "conscienceless, pitiless, or unnecessarily torturous to the victim," including those which leave the victim in her "last moments aware of but helpless to prevent impending death." A third type exists where "the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder."

State v. Gibbs, 335 N.C. 1, 61-62, 436 S.E.2d 321, 356 (1993) (citations omitted), *cert. denied*, 512 U.S. 1246 (1994). Here, the murder was of the first and second type.

The evidence showed that defendant raped and murdered Ms. McCrimmon while she was in her own home, in the perceived safety of her own bedroom. The evidence showed she was brutally beaten,

injuring her face and leaving numerous blood spatters in her bedroom. The evidence also shows defendant killed her by strangulation, a method of murder which takes several minutes, leaving Ms. McCrimmon aware of her impending death but helpless to prevent it. While some of this evidence also tended to support submission of the (e)(5) aggravator, such overlapping of evidence "is permissible so long as there is not a complete overlap of evidence." *State v. Call*, 349 N.C. 382, 426, 508 S.E.2d 496, 523 (1998). Therefore, there was sufficient evidence for the submission of both aggravating circumstances found by the jury.

Likewise, there is nothing in the record that suggests the death sentence was entered under the influence of passion, prejudice, or any other arbitrary factor. Accordingly, we will not disturb the jury's weighing of the aggravating and mitigating circumstances.

> Turning now to our final statutory duty, we recognize that proportionality review is designed to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." In conducting the proportionality review, we must determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." This determination " 'ultimately rest[s] upon the "experienced judgments" of the members of this Court.' "

State v. Garcia, 358 N.C. 382, 426, 597 S.E.2d 724, 754 (2004) (alteration in original) (citations omitted), *cert. denied*, 543 U.S. 1156 (2005).

Defendant argues this Court's method of proportionality review is arbitrary and capricious because, defendant asserts, this Court only compares cases it has found proportionate and disproportionate to the case at bar. However, defendant's argument misrepresents our method of proportionality review. This Court's proportionality review includes not only comparison of this case with cases previously found disproportionate and proportionate as defendant contends, but also consideration of "all cases which are roughly similar in facts to the instant case, although we are not constrained to cite each and every case we have used for comparison." *State v. McNeill*, 360 N.C. 231, 254, 624 S.E.2d 329, 344 (2006). Therefore, we overrule defendant's assignment of error.

In our proportionality review, we compare the case at bar to cases in which this Court has found imposition of the death penalty

to be disproportionate. This Court has previously determined capital punishment was disproportionate in eight cases. *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870; *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled in part on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170; and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

In no case in which we have found a death sentence disproportionate has the jury found the two aggravating circumstances found by the jury in the case *sub judice*. In fact, when the jury found the murder was especially heinous, atrocious, or cruel, there have only been two instances in which this Court has found disproportionality. *See State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987) and *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983). In *Stokes*, a seventeen-year old defendant was the only one of four assailants to receive a capital sentence. 319 N.C. at 3-4, 21, 352 S.E.2d at 654-55, 664. In *Bondurant*, the defendant showed an exceptional display of remorse, even directing a driver to the hospital in the hopes of procuring medical treatment for the victim. 309 N.C. at 694, 309 S.E.2d at 182-83.

The case at bar is readily distinguishable from *Stokes* and *Bondurant*. First, defendant was not a minor at the time of the murder, nor was he the only one of multiple codefendants to receive a capital sentence. Instead, defendant was an adult and perpetrated this murder on his own with no encouragement from any cohorts. Second, defendant certainly has not shown any remorse for his actions. He did not attempt to obtain medical assistance for Ms. McCrimmon. Instead, he beat her, raped her, and squeezed his hands around her neck, literally choking the life out of her. All of this occurred at night while the victim was in the sanctity of her own abode.

"Although we 'compare this case with the cases in which we have found the death penalty to be proportionate . . . we will not undertake to discuss or cite all of those cases each time we carry out that duty.' " *State v. Garcia*, 358 N.C. at 429, 597 S.E.2d at 756 (2004) (quoting *State v. McCollum*, 334 N.C. 208, 244, 433 S.E.2d 144, 164 (1993), *cert. denied*, 512 U.S. 1254 (1994)). "[O]nly in the most clear

and extraordinary situations may we properly declare a sentence of death which has been recommended by the jury and ordered by the trial court to be disproportionate." *See State v. Chandler*, 342 N.C. 742, 764, 467 S.E.2d 636, 648, *cert. denied*, 519 U.S. 875 (1996). This case is certainly not an extraordinary situation, as this Court has found that both the (e)(5) and the (e)(9) aggravators standing alone are sufficient to sustain a death sentence. *See State v. Watts*, 357 N.C. 366, 381, 584 S.E.2d 740, 751 (2003), *cert. denied*, 541 U.S. 944 (2004). Therefore, we find the death sentence recommended by the jury in this case proportionate to the crime committed.

Defendant has assigned multiple instances of error for which there is no argument or supporting authority cited in his brief. Therefore, those assignments of error are taken as abandoned and dismissed. *See* N.C. R. App. P. 28(b)(6); *State v. McNeill*, 360 N.C. at 241, 624 S.E.2d at 336. Having dismissed or overruled all of defendant's assignments of error, we find defendant received a fair trial and capital sentencing proceeding free of prejudicial error. We also find defendant's death sentence is proportionate considering the crime and the nature of defendant.

NO ERROR.

STATE OF NORTH CAROLINA v. LINWOOD EARL FORTE

No. 20A04

(Filed 5 May 2006)

1. Constitutional Law; Evidence— right of confrontation—S.B.I. reports—preparer unavailable for cross-examination—business records—no *Crawford* violation

Defendant's right of confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004), was not violated by the admission of S.B.I. reports, containing both analysis results and chain of custody information, prepared by an S.B.I. agent who did not testify at trial and was unavailable for cross-examination by defendant because the reports are not testimonial statements that are inadmissible under *Crawford* but are purely ministerial observations that do not offend the public records exception of N.C.G.S. § 8C-1, Rule 803(8) and were properly admitted under

the business records exception to the hearsay rule set forth in N.C.G.S. § 8C-1, Rule 803(6).

2. Confessions and Incriminating Statements— custodial interrogation—no unequivocal invocation of right to silence

Defendant did not unequivocally invoke his right to silence during custodial interrogation, and his written statement was properly admitted in his capital trial, where defendant unexpectedly answered "no" when asked if he wanted to answer any more questions at that time, an officer asked defendant what he meant, defendant responded that he was tired and would answer more questions after he had a chance to sleep, and after sleeping for several hours, defendant affirmed his willingness to continue and reviewed and signed the written statement. Under these circumstances, defendant's "no" was ambiguous and the officer did not violate defendant's constitutional rights by asking for amplification.

3. Sentencing— capital—mitigating circumstances—lack of significant prior history of criminal activity—subsequent behavior—harmless error

Although the trial court erred in a capital sentencing proceeding by considering defendant's criminal behavior subsequent to the murders in its determination not to submit the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance of defendant's lack of significant prior history of criminal activity, this error was harmless because the events and behavior cited by the court that occurred before the murders by themselves adequately support its decision not to submit the circumstance.

4. Sentencing— capital—mitigating circumstances—mental or emotional disturbance—impaired capacity—peremptory instructions not required

The trial court did not err in a capital sentencing proceeding by refusing to give the requested peremptory instructions on the statutory mitigating circumstances under N.C.G.S. § 15A-2000(f)(2) that the murders were committed while defendant was under the influence of a mental or emotional disturbance and under N.C.G.S. § 15A-2000(f)(6) that the capacity of defendant to conform his conduct to the requirements of the law was impaired, because: (1) although defendant relied on the testimony of a psychologist and two psychiatrists as evidence supporting these two statutory mitigating circumstances, the tes-

timony of an expert witness who has prepared an analysis of a defendant in preparation for trial lacks the indicia of reliability based on the self-interest inherent in obtaining appropriate medical treatment and, since it is not manifestly credible, does not support a peremptory instruction; and (2) the evidence supporting the submission of the (f)(2) and (f)(6) mitigating circumstances was not uncontroverted.

5. Criminal Law; Evidence— cross-examination—prosecutor's argument—amenities of prison life—no gross impropriety

The trial court did not commit plain error in a capital sentencing proceeding by allowing one of defendant's witnesses to be cross-examined about the amenities of prison life or by not intervening *ex mero motu* when the State argued that these amenities made life without parole an inappropriate sentence.

6. Sentencing— capital—aggravating factors—failure to submit to jury—*Blakely* error

The trial court erred by increasing defendant's sentence for noncapital offenses beyond the presumptive range by finding the aggravating factor that the victim was physically infirm without submitting this aggravating factor to the jury for proof beyond a reasonable doubt.

7. Sentencing— death penalty—proportionate

The trial court did not err in a triple first-degree murder case by sentencing defendant to death, because: (1) there were multiple murder victims and multiple aggravating circumstances; (2) defendant killed elderly and defenseless victims in their own homes; (3) this Court has found that each of the N.C.G.S. § 15A-2000(e)(5), (e)(9), and (e)(11) aggravating circumstances is, standing alone, sufficient to justify the imposition of the death penalty.

Justice MARTIN concurring in a separate opinion.

Justice NEWBY joining in the concurring opinion.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing consecutive death sentences entered by Judge Thomas D. Haigwood on 8 October 2003 in Superior Court, Wayne County, upon jury verdicts finding defendant guilty of three counts of first-degree murder. On 21 December 2004, the Supreme Court

allowed defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments. Heard in the Supreme Court 14 November 2005.

Roy Cooper, Attorney General, by William B. Crumpler and Amy C. Kunstling, Assistant Attorneys General, for the State.

Thomas K. Maher for defendant-appellant.

EDMUNDS, Justice.

Defendant Linwood Earl Forte was indicted for three counts of first-degree murder, three counts of first-degree rape, three counts of first-degree burglary, attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, first-degree arson, and burning of personal property. The charges were consolidated for trial, which began on 8 September 2003. At the close of the evidence, the charges of attempted first-degree murder and burning of personal property were dismissed.

On 30 September 2003, defendant was convicted of three counts of first-degree murder. The jury recommended a sentence of death for each conviction and the trial court entered judgment accordingly. The jury also found defendant guilty of three counts of first-degree burglary and three counts of first-degree rape. The court arrested judgment on two of the first-degree burglary counts and sentenced defendant to four consecutive life sentences for the remaining burglary and rape convictions. Finally, the jury found defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury, for which he received a twenty-year consecutive sentence, and first-degree arson, on which the court arrested judgment.

Defendant appealed his capital convictions to this Court and we allowed his motion to bypass the Court of Appeals as to his other convictions. We conclude that defendant's trial and capital sentencing proceeding were free from prejudicial error and that defendant's sentences of death were not disproportionate. However, we vacate the trial court's sentencing on the non-capital charges and remand for a new sentencing hearing.

The State's evidence showed that defendant committed three sets of offenses in Goldsboro. As to the first, in the early morning of 26 May 1990, seventy-year-old Eliza Jones was found in her bed, bruised, scratched, and struggling to breathe. She was suffering from oxygen deprivation as a result of strangulation and later recalled being

choked and fondled by a man who had awakened her. Trauma to both her vagina and rectum indicated that she had been sexually assaulted after losing consciousness during the attack. Sperm was detected in vaginal and rectal smears and on the fitted sheet on Ms. Jones' bed. No perpetrator was identified at the time, so the evidence containing the sperm was placed in frozen storage at the State Bureau of Investigation (SBI) for possible future use.

As to the second offense, on the morning of 14 July 1990, police found the body of seventy-nine-year-old Hattie Bonner in her bed. She had died as a result of being both manually strangled and suffocated with a pillow. Vaginal swabs revealed the presence of sperm, and hairs and fibers were collected from the body. As in the Jones case, the evidence was retained by the SBI because investigators did not have a suspect.

Finally, on 6 October 1990, the Goldsboro Fire Department responded to the home of seventy-eight-year-old Alvin Bowen and seventy-five-year-old Thelma Bowen. The house and an automobile in an adjoining carport were burning. Firefighters discovered Mr. Bowen's body on a bed and Mrs. Bowen's naked body lying face down on the floor nearby. Although both bodies were burned, an autopsy indicated that each had been killed before the fire started. Mr. Bowen died from stab wounds to his neck and chest, while Mrs. Bowen died from strangulation. Evidence suggested that Mrs. Bowen had been raped, and sperm was present in a vaginal smear. Firefighters discovered a trail of accelerant leading from the Bowens' bedroom through the house and out to the burning vehicle, where a gasoline can was found on the front seat. Again, the evidence was preserved in the absence of a suspect.

Analysis of the DNA samples obtained in each of these incidents indicated that one person was responsible for all three attacks. During the 1990s, defendant was incarcerated on other unrelated charges and his DNA was recorded in the SBI database. In 2001, after defendant had been released, his DNA was matched with the DNA recovered from the unsolved cases.

On 30 April 2001, defendant was working at a poultry processing plant. Several SBI agents and Goldsboro police officers approached defendant at work and asked if he would accompany them to the police station for an interview. Defendant was told that he was not under arrest and could return to work after the interview was completed. When defendant agreed, the officers

gave him a ride to the police department. Defendant was not advised of his *Miranda* rights.

Once at the police station, the officers informed defendant that his DNA had been matched to the evidence in some unsolved cases and asked him to explain his involvement in the crimes. Defendant told police that during the late 1980s through 1990 he used crack cocaine heavily. He recalled going to a house he thought was his own, kicking in the door, and having "sex with the woman inside." Defendant also stated that one night in 1990, he went into a residence near a school in Goldsboro where he drank beer and smoked cigarettes. He said he did not recall having sexual intercourse with anyone or any confrontation inside the house, but he could not remember what happened because he was high on crack and had blacked out while inside the house. He added that he may have dropped a lit match on his way out, and he remembered noticing the following day that the house had burned.

Defendant then agreed to ride with several of the investigators and point out the locations he had just discussed. Defendant first directed them to Eliza Jones' former address. Once there, defendant said that this was the place where "the woman was not killed." He next took them to a vacant lot where the Bowens' home had stood before it burned and told the officers that this was where he drank beer and smoked cigarettes in the house. Finally, defendant led the officers to another vacant lot where Hattie Bonner's home had been. He explained that at this location, he entered the residence, had sexual intercourse with the lady inside, and choked her until she became unconscious. He recalled seeing yellow crime scene tape at the residence the next day.

The police returned with defendant to the police station, where defendant agreed to provide blood and hair samples. For the first time, defendant was advised of his *Miranda* rights. One of the officers who was giving the *Miranda* warnings asked defendant if he wanted to answer any more questions at that time. When defendant answered "no," the officer asked defendant what he meant. Defendant responded that he was tired and would answer more questions after he had a chance to sleep.

While defendant slept for several hours at the police station, one of the officers typed a statement based on the information defendant had already provided. When defendant awoke, he said he "felt like talking some more." The investigators re-advised defendant of his

rights, and defendant affirmed his willingness to continue. He reviewed the typed statement and signed it. Defendant then answered several additional questions asked by the officers, indicating that he knew right from wrong and that he had not been under duress at the time of the crimes, although he added that he had not been in "the right frame of mind" and "was under the influence of drugs." The blood drawn from defendant on 30 April 2001 was analyzed by the SBI laboratory and found to match the DNA from the three 1990 crime scenes.

Additional evidence will be discussed below as necessary to address specific issues.

GUILT-INNOCENCE PHASE

[1] Defendant first contends that the trial court erred in allowing the State to introduce certain SBI reports as substantive evidence because the law enforcement investigator who prepared the reports did not testify. The investigator in question, SBI Special Agent D.J. Spittle, did not participate in the investigation of the assault on victim Eliza Jones. However, as to victim Hattie Bonner, the evidence showed that Deborah Radisch, M.D. conducted an autopsy on 15 July 1990. Dr. Radisch provided vaginal swabs and smears to Officer Karen Laboard, who submitted the evidence to the SBI laboratory. As a serologist at the SBI laboratory in 1990, Agent Spittle would receive samples of blood and bodily fluids sent to the laboratory for analysis, examine the samples and identify the fluids, and then refer the material to other investigators in the laboratory for further analysis. His records reflected both the results of his investigation and his disposition of the evidence. After receiving and analyzing the serological evidence in the Bonner case, Agent Spittle on 27 November 1990 passed along to SBI Special Agent Michael Budzynski the evidence relating to sperm from the vaginal swabs and smears. Agent Budzynski determined that the DNA in the samples matched the DNA recovered in the Jones case, then preserved the evidence.

As to victim Thelma Bowen, an autopsy was conducted on 6 October 1990 by Frances Owl-Smith, M.D., who collected rectal and vaginal swabs that she provided to the police. The police submitted these samples to the SBI laboratory. Agent Spittle received and examined this evidence, then turned it over to Agent Budzynski on 27 November 1990. Agent Budzynski tested this material for DNA, noted that it matched the DNA in the samples recovered in the Jones and Bonner investigations, then preserved the evidence. In 2000, Agent

Budzynski conducted a new DNA analysis of the evidence in all three cases and entered the updated results in the SBI computer.

On 30 April 2001, the blood sample obtained from defendant by the Goldsboro police investigators was delivered to Agent Budzynski by SBI Agent Mark Nelson, who had been present when the sample was taken. Agent Budzynski determined that the DNA in defendant's blood matched to near certainty the DNA recovered from the Jones, Bonner, and Bowen crime scenes.

Agent Spittle left his employment with the SBI in 2001 and did not testify at defendant's trial. His reports were introduced into evidence through Agent Nelson, who had been Agent Spittle's supervisor in the 1990s. The court admitted the reports into evidence under the business records exception to the hearsay rule, N.C.G.S. § 8C-1, Rule 803(6). Defendant argues that the introduction of the reports, containing both analysis results and chain of custody information, violated his constitutional right of confrontation.

At trial, defendant argued only that the evidence was inadmissible under the rules relating to hearsay. After defendant's trial, the United States Supreme Court held in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), that admission at trial of testimonial evidence made by a non-testifying person violated the defendant's confrontation rights unless the declarant was currently unavailable to testify and the defendant previously had the opportunity to cross-examine the declarant. *Id.* at 53-54, 59, 158 L. Ed. 2d at 194, 197. Here, defendant was unable to cross-examine Agent Spittle. Therefore, we must determine whether his reports are testimonial statements that are inadmissible under *Crawford*.

Although the Supreme Court in *Crawford* declined to provide an overarching definition of "testimonial" evidence, it did give general guidance, along with some specific instances of evidence that is testimonial. "Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68, 158 L. Ed. 2d at 203. In enunciating its holding, the Supreme Court pointed out that an evil it was seeking to suppress was the danger inherent in having damning evidence admitted without being tested through cross-examination. "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar."

Id. at 56 n.7, 158 L. Ed. 2d at 196 n.7. The types of evidence that the Supreme Court listed as definitely being testimonial "are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* at 68, 158 L. Ed. 2d at 203.

Under the Supreme Court's analysis, the reports at issue here are not testimonial. They do not fall into any of the categories that the Supreme Court defined as unquestionably testimonial. These unsworn reports, containing the results of Agent Spittle's objective analysis of the evidence, along with routine chain of custody information, do not bear witness against defendant. *See id.* at 50-52, 158 L. Ed. 2d at 192-93. Instead, they are neutral, having the power to exonerate as well as convict. Although we acknowledge that the reports were prepared with the understanding that eventual use in court was possible or even probable, they were not prepared exclusively for trial and Agent Spittle had no interest in the outcome of any trial in which the records might be used. *See id.* at 56 n.7, 158 L. Ed. 2d at 196 n.7.

Consistent with this interpretation, the Supreme Court in *Crawford* indicated in dicta that business records are not testimonial. *Id.* at 56, 158 L. Ed. 2d at 195-96 ("Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy."). The distinction between business records and testimonial evidence is readily seen. Among other attributes, business records are neutral, are created to serve a number of purposes important to the creating organization, and are not inherently subject to manipulation or abuse.

Business records are defined under Rule 803(6), which provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .
>
> (6) Records of Regularly Conducted Activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the

> method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

N.C.G.S. § 8C-1, Rule 803(6) (2005). Agent Nelson was Agent Spittle's supervisor and was responsible for creating and implementing laboratory polices regarding record-keeping. Agent Nelson testified that Agent Spittle created the reports contemporaneously with his work as part of the regular practice of the agency and within the ordinary course of agency business. Accordingly, we agree with the trial court that the reports are business records under Rule 803(6).

However, our determination that the reports in question can be considered business records does not end our inquiry. Under Rule 803(8),

> [t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .
>
> (8) Public Records and Reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law-enforcement personnel, or (C) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Id. § 8C-1, Rule 803(8) (2005). The SBI reports in question also fall under the definition of public records set out in this rule, and "[p]ublic records and reports that are not admissible under Exception (8) are not admissible as business records under Exception (6)." *Id.* § 8C-1, Rule 803(8) Cmt.[1] As a result, we must determine whether these reports are admissible under Rule 803(8) before we can decide whether they are admissible as business records.

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1. We assume without deciding that this Comment reflects the intent of the General Assembly. 1983 N.C. Sess. Laws ch. 701, § 2; *State v. Hosey*, 318 N.C. 330, 337 n.2, 348 S.E.2d 805, 810 n.2 (1986).

Defendant contends that the provision in Rule 803(8)(C) that findings from an investigation made under authority of law are admissible "against the State" means that these laboratory reports are inadmissible when offered by the State against defendant. However, in interpreting the public records exception to the hearsay rule, the Oregon Court of Appeals held that

> in adopting FRE 803(8)(B), Congress did not intend to change the common law rule allowing admission of public records of purely "ministerial observations." Rather, Congress intended to prevent prosecutors from attempting to prove their cases through police officers' reports of their observations during the investigation of crime. *United States v. Grady*, 544 F.2d 598, 604 (2d Cir. 1976). We infer that the state legislature adopted [Oregon Evidence Code Section] 803(8)(b) with the same intent.

State v. Smith, 66 Ore. App. 703, 706, 675 P.2d 510, 512 (1984). We cited this language with approval in reaching a similar result as to business records in a case dealing with reports of breathalyzer testing. *State v. Smith*, 312 N.C. 361, 381, 323 S.E.2d 316, 327-28 (1984); *see also Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . ."). Accordingly, if Agent Spittle's reports fall under this exception for "purely 'ministerial observations,' " they are not inadmissible under either Rule 803(6) or 803(8).

Here, the reports concern routine, nonadversarial matters. Although the record is silent, common experience tells us that such reports are prepared for a number of purposes, including statistical analysis and construction of databases. *See e.g.*, http://www.ncsbi.gov/crimestatistics. Thus, potential use in court was only one purpose among several served by the creation and compilation of Agent Spittle's reports. Agent Spittle's analysis of the evidence on hand also facilitated further examination of the evidence within the SBI laboratory. Therefore, these reports are records of purely ministerial observations that do not offend the public records exception and were properly admitted as business records.

[2] Defendant next argues that the trial court erred in admitting statements he made after he asserted his Fifth Amendment right to silence. The trial court denied defendant's motion to suppress his signed written statement to police. However, the motion to suppress and the supporting arguments were based on the contention

that the officers should have read defendant his *Miranda* rights earlier in the process, before they elicited any statement from him. Only on appeal does defendant refer to the issue of defendant's purported invocation of his right to silence. "This Court will not consider arguments based upon matters not presented to or adjudicated by the trial court." *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600, *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003); *see also* N.C. R. App. P. 10(b)(1). Because the trial court did not have the opportunity to rule on this issue and defendant did not argue plain error in his brief, this issue is not properly before the Court. *See State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995) ("Defendant objected to the evidence on only one ground; thus, he failed to preserve the additional grounds presented on appeal. He also waived appellate review of those arguments by failing specifically and distinctly to argue plain error. N.C. R. App. P. 10(c)(4)."), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996).

Even if the issue had been properly preserved, we discern no error. Although custodial interrogation must cease when a suspect unequivocally invokes his right to silence, an ambiguous invocation does not require police to cease interrogation immediately. *State v. Golphin*, 352 N.C. 364, 450-52, 533 S.E.2d 168, 224-25 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Here, defendant had been cooperative from the beginning of his encounter with the police and had been forthcoming in his answers to the investigators' questions. When defendant unexpectedly answered "no" upon being asked if he wished to answer any more questions, the officer did no more than ask him what he meant. In responding, defendant explained that he was tired and would answer more questions after he slept. Under these circumstances, defendant's "no" was ambiguous, and the officer did not violate defendant's constitutional rights by asking for amplification. This assignment of error is overruled.

SENTENCING PROCEEDING ISSUES

[3] Defendant argues that the trial court erred in relying on his criminal conduct that occurred after the murders when it determined not to submit as a mitigating circumstance defendant's lack of significant prior history of criminal activity, pursuant to N.C.G.S. § 15A-2000(f)(1). Defendant also makes the related argument that the court erred in not submitting this mitigating circumstance to the jury. We agree that the trial court erred in considering defendant's criminal behavior subsequent to the murders in determining not to

submit the (f)(1) circumstance. *See State v. Coffey*, 336 N.C. 412, 418, 444 S.E.2d 431, 434 (1994) (explaining that the (f)(1) circumstance "pertains only to that criminal activity committed before the murder"). However, we find that this error was harmless in light of the other competent evidence relating to this circumstance presented to the court.

"The test governing the decision to submit the (f)(1) mitigator is 'whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity.' " *State v. Walker*, 343 N.C. 216, 223, 469 S.E.2d 919, 922 (quoting *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988)), *cert. denied*, 519 U.S. 901, 136 L. Ed. 2d 180 (1996). In making this determination, the trial court considers the number, nature, and age of the prior criminal activities. *State v. Sexton*, 336 N.C. 321, 375, 444 S.E.2d 879, 910, *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994). The evidence here showed that prior to the murders, defendant's criminal convictions included: felonious larceny and possession of stolen property in 1982, driving while impaired in 1984, resisting and assaulting a police officer during a fight in a club in 1988, and driving while license revoked in 1989.[2] Defendant had been incarcerated for the assault. In addition, testimony was presented regarding defendant's alcohol dependence and continual illegal drug use, his probation and parole violations, and his "extensive history of aggressive behavior."

We review a trial court's decision whether to submit the (f)(1) mitigating circumstance on the basis of the whole record. *State v. Hurst*, 360 N.C. 181, 197, 624 S.E.2d 309, 322 (2006). The court took into account all the evidence of defendant's criminal activity that occurred before the murders. In addition, the court noted that defendant specifically did not request the (f)(1) instruction. It then concluded that no reasonable juror could find the (f)(1) mitigating circumstance. Although the trial court erroneously included defendant's post-murder behavior in its recitation of defendant's history of criminal activity, the events and behavior cited by the court that occurred before the murders by themselves adequately support its decision not to submit the circumstance. *See id.* at 196-99, 624 S.E.2d at 321-23. Accordingly, the trial court did not commit prejudicial error as to this issue.

[4] Defendant next argues that the trial court erred in refusing to give requested peremptory instructions on the statutory mitigating

2. We cannot determine from the record the date of defendant's conviction for horse wrestling. Consequently, we do not consider that conviction in our analysis.

circumstances that the murders were committed while defendant was under the influence of a mental or emotional disturbance, pursuant to N.C.G.S. § 15A-2000(f)(2), and that the capacity of defendant to conform his conduct to the requirements of the law was impaired, pursuant to N.C.G.S. § 15A-2000(f)(6). "If requested, a trial court should give a peremptory instruction for any statutory or nonstatutory mitigating circumstance that is supported by uncontroverted and manifestly credible evidence." *State v. Bishop*, 343 N.C. 518, 557, 472 S.E.2d 842, 863 (1996), *cert. denied*, 519 U.S. 1097, 136 L. Ed. 2d 723 (1997). Here, the trial court gave non-peremptory instructions as to these issues and the jury did not find either circumstance as to any of the murders.

Defendant relied on the testimony of a psychologist and two psychiatrists as evidence supporting these two statutory mitigating circumstances. These witnesses, who were all hired by the defense, had no contact with defendant until after his arrest for these murders. We have held that "the testimony of an expert witness who has prepared an analysis of a defendant in preparation for trial 'lacks the indicia of reliability based on the self-interest inherent in obtaining appropriate medical treatment' and, because not 'manifestly credible,' does not support a peremptory instruction." *State v. Barden*, 356 N.C. 316, 377, 572 S.E.2d 108, 146 (2002) (quoting *Bishop*, 343 N.C. at 557-58, 472 S.E.2d at 863-64), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003).

In addition, the evidence supporting the submission of the (f)(2) and (f)(6) mitigating circumstances was not uncontroverted. The substance abuse counselor who saw defendant in 1990 testified that defendant seemed mentally well-oriented and did not display or report any psychotic symptoms. Several of defendant's friends and family testified that they never saw any signs that defendant had a mental or emotional disturbance. Therefore, because the evidence in support of the (f)(2) and (f)(6) mitigating circumstances was neither manifestly credible nor uncontroverted, the trial court did not err in denying the request for peremptory instructions.

These assignments of error are overruled.

[5] Defendant next contends that the trial court erred both in allowing one of his witnesses to be cross-examined about the amenities of prison life and in not intervening *ex mero motu* when the State argued that these amenities made life without parole an inappropriate sentence. Defendant argues to this Court that the State's

cross-examination and closing argument implicated his rights under the Eighth Amendment. However, because defendant failed to make this constitutional argument at trial, we will not consider it on appeal. *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.").

Moreover, defendant did not object at trial to the cross-examination in question, nor did he object to the State's closing argument. Therefore, we review the pertinent portion of the cross-examination only for plain error and the challenged portion of the closing argument to determine if it was grossly improper. *See State v. Locklear*, 349 N.C. 118, 156, 505 S.E.2d 277, 299 (1998) (applying the plain error rule to questions asked on cross-examination that were not objected to at trial), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999); *see also State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) ("The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*.").

We begin with the cross-examination of James Aiken. "Before an error by the trial court amounts to 'plain error,' we must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Waddell*, 351 N.C. 413, 419, 527 S.E.2d 644, 648 (2000). The substance of witness Aiken's testimony was that the North Carolina prison system could securely house defendant.

During the State's cross-examination of Aiken, the prosecutor elicited the following testimony:

> Q. Can you tell the jury what kind of exercise people get to do when they are in maximum security like playing basketball or other activities?
>
> A. They get to play basketball. They get to have noncontact sports but understanding is [sic] that you are playing with other dangerous people.
>
> Q. Other than basketball, what other type of exercise activities can prisoners do?
>
> A. Well, most of the weightlifting equipment have [sic] been moved out of the prison system but inmates can be involved with basketball as well as handball and sometimes volleyball.

Q. And there's the issue of entertainment. I guess the prison tries to keep prisoners entertained or distracted to some degree. Will Mr. Forte get some of that?

A. It's all in relationship to his behavior. Also what is allowed. The type of so-called recreation/entertainment is in direct relationship to his custody and supervision, which will always be in a maximum security environment.

Q. Which would include what?

A. Which would include being able to go to religious programs, that is, people coming in; singing groups, as an example.

Q. Go ahead, give us more examples. You have a lot of experience in this area.

A. It's fairly limited in a maximum security environment because you don't let everybody come in and go out.

You do have some people that come in to provide lectures in relationship to how to improve your behavior, some people that have made mistakes in the past and was [sic] able to come back and share with people. Examples of that being Chuck Colson and his religious crusade coming in and providing religious worship for the inmate population.

You will find that mostly in a maximum security environment that "entertainment" is focused more on volunteers and people from the religious environment.

Q. Television?

A. Some have television, yes.

Q. Radio?

A. Radios, yes. Of course, those are very closely supervised. And one additional thing is canteen. They can buy certain things off the canteen. That's considered as a privilege also. Visitation.

Q. So they can go to their canteen store and get them a candy treat, things like that?

A. And that can be easily taken away in relationship to behavior.

The scope of cross-examination lies within the discretion of the trial judge, and the questions must be asked in good faith. *State v.*

Williams, 279 N.C. 663, 675, 185 S.E.2d 174, 181 (1971). Here, defense counsel questioned Aiken as to the structure of the prison unit to show that defendant could be securely housed there without incident. The State responded by cross-examining Aiken about the particular conditions of that housing. The State's line of questioning was not outside the bounds of permissible cross-examination, nor was there any indication that the questions were not asked in good faith. There was no error, let alone plain error, in allowing this cross-examination to take place. This assignment of error is overruled.

We now turn to the State's closing argument regarding the prison amenities. During closing arguments the prosecutor told the jury:

> But we do know from Mr. Aiken what the defendant will have in prison. He'll have what he's constitutionally entitled to. He'll have his space, he'll have his nourishment, he'll have his recreation, whether it be basketball or handball; he'll have his television and radio.
>
> . . . .
>
> Apparently the prospects of prison don't sadden this defendant. I mean, it is a place he has spent a good portion of his adult life in. He's made choices to go back again and again and again. Ask yourself is life in prison punishment that fits these crimes?

We have held that it is not improper for the State to argue that "the defendant deserved the penalty of death rather than a comfortable life in prison." *State v. Alston*, 341 N.C. 198, 252, 461 S.E.2d 687, 717 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996); *accord State v. May*, 354 N.C. 172, 179, 552 S.E.2d 151, 156 (2001), *cert. denied*, 535 U.S. 1060, 152 L. Ed. 2d 830 (2002). The prosecutor's remarks are consistent with these prior holdings. This assignment of error is overruled.

Defendant further argues that the trial court erred in not acting to prevent the State from making other improper closing arguments during the sentencing proceeding. Specifically, defendant claims that it was improper for the State to argue that Mrs. Bowen's awareness of her husband's murder before her own death made her murder especially heinous, atrocious, or cruel. Defendant also contends that a portion of the State's argument was intended to make the jurors feel personally responsible for any injury defendant might cause if he were sentenced to life in prison instead of death. Defendant did not object to these arguments at trial.

We begin by addressing the State's comments about Mrs. Bowen. The trial court submitted to the jury various aggravating circumstances for each of the three murders at issue. In the case of Mrs. Bowen, one of the aggravating circumstances was that the murder was especially heinous, atrocious, or cruel. In support of that circumstance, the State argued that the jury should:

> [t]hink about the evidence you saw at that scene. Think about where you saw Thelma Bowen on the floor. Think about the fact that Alvin Bowen had been murdered in the bed, the way he was. He never had a chance. He was struck and struck and struck with that knife in the bed, barely able to get his hands up to defend himself. Where did this blind lady go? She didn't go right out the door, her bed right there at the door, right next to the door. She went after Linwood Forte to try to save her husband, to try to save him from the knife plunging into his body. She was blind, elderly. She's aware of what is going on to her husband. She might not know every detail but she knows he's being attacked. She can hear muffled screams with the pillow put over his face. She knows something horrible is going on. She's fully aware of impending doom that was going to be suffered by her husband and she's got to be aware of what is coming for her.

Because defendant did not object to this portion of the closing argument, we review for gross impropriety. *Jones*, 355 N.C. at 133, 558 S.E.2d at 107.

During closing arguments, "[a]n attorney may, . . . on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." N.C.G.S. § 15A-1230(a) (2005). "[C]ounsel are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence." *State v. Richardson*, 342 N.C. 772, 792-93, 467 S.E.2d 685, 697, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996). "Prosecutors may, in closing arguments, create a scenario of the crime committed as long as the record contains sufficient evidence from which the scenario is reasonably inferable." *Frye*, 341 N.C. at 498, 461 S.E.2d at 678.

Here, the State drew reasonable inferences from the evidence and presented to the jury a plausible scenario supported by that evidence. The fact that Mr. Bowen was killed in his bed suggests that he was attacked first. Apparent defensive wounds to his hands indicated that he struggled with his assailant. Mrs. Bowen's body was found on

the bedroom floor. This evidence reasonably implies that, although she was blind, Mrs. Bowen heard the attack on her husband and left her bed in a doomed attempt to help him. Consequently, the argument was not improper. This assignment of error is overruled.

We now turn to the final challenged portion of the State's closing argument. The prosecutor told the jury:

> Your responsibility is a solemn one. Your decision will take strength. You know what your duties are. Some time down the road, some time in the future, you may pick up a newspaper and may see on TV or hear some radio broadcast that today Linwood Forte, the triple murderer, serial murderer from Goldsboro, North Carolina, that killed three elderly victims in 1990 was executed in the prison system of the state of North Carolina. When you hear it, you're going to have to deal with it. You have to live with it.
>
> Let me tell you something else. By the same token, you may hear on TV or may read in the newspaper, hear it on the radio that today Linwood Forte, triple murderer, serial killer from Goldsboro, North Carolina, killed a correctional officer in the Department of Correction, killed a doctor, killed a nurse, killed a secretary, murdered an administrator. And if you hear that, you're going to have to live with that, too.

As before, defendant did not object to this argument, and we review it now only to determine if the argument was so grossly improper that the trial court erred by not intervening *ex mero motu*. Read in context, we find nothing improper about the State's argument. The prosecutor stressed to the jurors that there would be consequences no matter what they decided in this case and that they had a duty to reflect on their decision and take their responsibilities seriously. This argument did not violate the limitations of N.C.G.S. § 15A-1230(a) and did not necessitate the trial court's intervention. This assignment of error is overruled.

[6] Finally, defendant argues that, in sentencing him on the non-capital offenses, the trial court erred in considering a factor in aggravation that was not found by the jury. Specifically, defendant was convicted of burglary and assault with a deadly weapon with intent to kill inflicting serious injury in the Eliza Jones case. Sentence was imposed under the Fair Sentencing Act, which applied because the offenses were committed in 1990. The trial court found two aggravat-

ing factors, that defendant had prior convictions punishable by more than sixty days confinement and that the victim was physically infirm. The only mitigating factor found by the court was that, prior to arrest, defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer. The court found that the aggravating factors outweighed the mitigating factors and imposed aggravated sentences for each crime.

Although the trial court properly could consider defendant's prior criminal history, we conclude that it erred by increasing defendant's sentence beyond the presumptive range by finding that the victim was physically infirm. *See Blakely v. Washington*, 542 U.S. 296, 301, 159 L. Ed. 2d 403, 412 (2004) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed maximum must be submitted to the jury and proved beyond a reasonable doubt." (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435 (2000))). A *Blakely* error is a structural error requiring a new sentencing hearing. *State v. Allen*, 359 N.C. 425, 449, 615 S.E.2d 256, 272 (2005). Accordingly, we remand for a new sentencing hearing on the non-capital convictions of burglary and assault with a deadly weapon with intent to kill inflicting serious injury.

PRESERVATION ISSUES

Defendant raises three issues that he concedes have been previously decided by this Court contrary to his position. First, he contends that the death penalty statute is unconstitutional. We have rejected this argument. *See*, *e.g.*, *State v. Williams*, 350 N.C. 1, 35-36, 510 S.E.2d 626, 648, *cert. denied*, 528 U.S. 880, 145 L. Ed. 2d 162 (1999). Next, he contends that the trial court erred in not dismissing the first-degree murder indictments for failure to allege all of the required elements. We have previously upheld the use of short form indictments. *See*, *e.g.*, *State v. Wallace*, 351 N.C. 481, 504-05, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). Finally, defendant argues that the trial court erred in overruling defendant's objection to the use of the "especially heinous, atrocious, or cruel" aggravating circumstance set forth in N.C.G.S. § 15A-2000(e)(9), asserting that it is unconstitutionally vague and fails to narrow the class of persons who are eligible for the imposition of the death penalty. We have held that this aggravating circumstance is constitutional. *State v. Syriani*, 333 N.C. 350, 391-92, 428 S.E.2d 118, 141, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

Defendant raises these issues for the purposes of urging this Court to reconsider its prior decisions and preserving his right to argue these issues on federal review. We have considered his arguments on these additional issues and find no compelling reason to depart from our previous holdings. These assignments of error are overruled.

PROPORTIONALITY REVIEW

Finally, we must now determine whether the record supports the aggravating circumstances found by the jury, whether "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor," and whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (2005).

The jury found the same two aggravating circumstances as to each of the three murders: (1) the murder was committed while defendant was engaged in the commission of a burglary, pursuant to N.C.G.S. § 15A-2000(e)(5), and (2) the murder was part of a course of conduct in which defendant engaged and that course of conduct included the commission by defendant of other crimes of violence against another person or persons, pursuant to N.C.G.S. § 15A-2000(e)(11). In addition, as to the Bowens' murders, the jury found the murders were committed while defendant was engaged in the commission of arson, pursuant to N.C.G.S. § 15A-2000(e)(5), and that the murder of Thelma Bowen was especially heinous, atrocious, or cruel, pursuant to N.C.G.S. § 15A-2000(e)(9). After a careful review of the trial transcript, record on appeal, briefs, and oral arguments in this case, we conclude that the record supports all of the aggravating circumstances found by the jury for each of the murders. Moreover, there is no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

[7] We now turn to the issue of proportionality. We conduct a proportionality review in order to guard "against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 203-04, 344 S.E.2d 775, 782 (1986). In determining whether defendant's sentence of death is excessive or dispro-

portionate, we compare this case to those in which we have determined the death penalty was disproportionate. This Court has held the death penalty to be disproportionate in eight cases: *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), and by *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

We conclude that this case is not substantially similar to any of these cases. Here, there were multiple murder victims and multiple aggravating circumstances. "This Court has never found a sentence of death disproportionate in a case where a defendant was convicted of murdering more than one victim." *State v. Meyer*, 353 N.C. 92, 120, 540 S.E.2d 1, 17 (2000), *cert. denied*, 534 U.S. 839, 151 L. Ed. 2d 54 (2001). Defendant killed elderly and defenseless victims in their own homes. We have previously noted that a murder in one's home is particularly shocking, " 'not only because a life was senselessly taken, but because it was taken [at] an especially private place, one [where] a person has a right to feel secure.' " *State v. Brown*, 357 N.C. 382, 394, 584 S.E.2d 278, 285-86 (2003) (alterations in original), *cert. denied*, 540 U.S. 1194, 158 L. Ed. 2d 106 (2004). Finally, this Court has found that each of the (e)(5), (e)(9), and (e)(11) aggravating circumstances is, standing alone, sufficient to justify the imposition of the death penalty. *See State v. Bacon*, 337 N.C. 66, 110 n.8, 446 S.E.2d 542, 566 n.8 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995). As detailed above, the (e)(5) and (e)(11) aggravating circumstances were found as to all three murders and, in addition, the (e)(9) circumstance was found as to victim Thelma Bowen.

We also compare this case with cases in which we have found the death penalty to be proportionate. *State v. Al-Bayyinah*, 359 N.C. 741, 762, 616 S.E.2d 500, 515 (2005). After a careful review of the record, we conclude that this case "is more analogous to cases in which we have found the sentence of death proportionate than to those cases in which we have found the sentence disproportionate or to those cases in which juries have consistently returned recommendations of life imprisonment." *Id.* We conclude that the sentence of death in the present case is not disproportionate.

Based upon the foregoing, we conclude that defendant received a fair trial and capital sentencing proceeding, free of prejudicial error, and the death sentences in this case are not disproportionate.

NO ERROR GUILT-INNOCENCE PHASE; NO ERROR CAPITAL SENTENCING PROCEEDING; NON-CAPITAL SENTENCING VACATED AND REMANDED FOR RESENTENCING.

Justice MARTIN, concurring.

I concur in the majority's holding that the trial court erred under *Blakely* by increasing defendant's statutory sentence based upon facts which were not found by the jury beyond a reasonable doubt. Furthermore, I acknowledge that *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005) (holding *Blakely* errors are structural errors and not harmless beyond a reasonable doubt), requires remand of this case for resentencing. I dissented from the majority opinion in *Allen* and maintain that the reasoning of the concurring and dissenting opinion was correct. *Id.* at 452-73, 615 S.E.2d at 274-88 (Martin, J., Lake, C.J., and Newby, J., concurring in part and dissenting in part) (stating that *Blakely* errors are subject to harmless error analysis). Nonetheless, in light of the doctrine of *stare decisis*, I accept *Allen* as controlling and concur in the decision of the majority in the instant case. *See State v. Camacho*, 337 N.C. 224, 235, 446 S.E.2d 8, 14 (1994) (Mitchell, J. (later C.J.), concurring).

Justice NEWBY joins in this concurring opinion.

IN THE MATTER OF A.K.

No. 139PA05

(Filed 5 May 2006)

Appeal and Error; Child Abuse and Neglect— return of child to parent during pendency of appeal—mootness—live controversy—collateral legal consequences

The Court of Appeals erred by dismissing as moot respondent's appeal from a trial court order adjudicating his daughter as neglected after the trial court reinstated parental custody during

the pendency of the appeal challenging the child's neglect adjudication, and the case is remanded to the Court of Appeals for consideration of the remaining assignments of error, because the adjudication may result in adverse collateral legal consequences for the parent under sections of the Juvenile Code related to child custody and parental rights including that: (1) in determining whether a child is a neglected juvenile under Chapter 7B, it is well within the trial court's discretion to assign more weight to multiple prior neglect adjudications than it would to just one, and thus, evidence of more than one prior neglect adjudication would not be merely cumulative but could have an additional effect on a trial court's determination of whether a juvenile is neglected; and (2) it is permissible for a trial court in a termination of parental rights hearing to weigh a prior adjudication of neglect more heavily than mere evidence of neglect, and the adjudication at issue in respondent's appeal would be evidence of neglect in any future proceeding concerning termination of respondent's parental rights in relation to this minor child. Further, a neglect adjudication can result in not only negative legal consequences, but also may detrimentally impact societal and interpersonal relationships.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 168 N.C. App. 595, 608 S.E.2d 415 (2005), dismissing respondent's appeal from an adjudication judgment dispositional order entered 17 February 2004 by Judge Gary S. Cash in District Court, Buncombe County. Heard in the Supreme Court 14 November 2005.

Richard Croutharmel for respondent-appellant father.

Michael N. Tousey for appellee Guardian ad Litem.

MARTIN, Justice.

Respondent appeals from the Court of Appeals' decision dismissing as moot his appeal from a trial court order adjudicating his daughter as neglected. We address whether a parent's appeal from a neglect adjudication is rendered moot if the minor child is returned to the parent's custody during the pendency of the appeal.

Respondent is the father of two young daughters: A.K. and C.A.K. The older daughter, C.A.K., was born 11 January 2002. Several weeks after the child's birth, both parents brought her to the emergency room with injuries that, according to her treating physicians, were likely inflicted by a "major force." Respondent and his wife denied they were responsible for C.A.K.'s injuries. Hospital staff reported C.A.K.'s condition to the Buncombe County Department of Social Services (BCDSS or the Department) in accordance with statutory reporting requirements. *See* N.C.G.S. § 7B-301 (2005) ("Any person . . . who has cause to suspect that any juvenile is abused, neglected, or dependent . . . shall report the case of that juvenile to . . . social services.").

On 6 February 2002, BCDSS filed a petition alleging C.A.K. was an abused and neglected juvenile, and custody of C.A.K. was granted to the Department. On 4 September 2002, the trial court adjudicated C.A.K. as neglected and ordered the parents to comply with various conditions to regain custody of C.A.K. The trial court conducted five subsequent review hearings in C.A.K.'s case. At the fifth review hearing on 5 February 2003, the trial court awarded legal guardianship of C.A.K. to her paternal grandparents and released BCDSS from any further responsibility for C.A.K.

Respondent's younger daughter, A.K., was born on 10 May 2003. When BCDSS learned of A.K.'s birth, it filed a petition alleging A.K was a neglected juvenile. The allegation of neglect was based entirely on the Department's file on C.A.K. The trial court placed A.K. in BCDSS custody on 14 May 2003. A series of custody proceedings concerning A.K. were held between May 2003 and November 2003. In a 17 February 2004 Adjudication and Dispositional Order, the trial court adjudicated A.K. as neglected. The order also provided that although BCDSS would retain legal custody of A.K., her physical placement would be with her parents. Respondent gave written notice of appeal from the Adjudication and Dispositional Order on 26 February 2004.

On 22 November 2004, while respondent's appeal was pending, the trial court restored full custody of A.K. to her parents. The Court of Appeals took judicial notice of the trial court's 22 November 2004 order and dismissed respondent's appeal as moot.

This Court allowed respondent's petition for discretionary review on 30 June 2005. Respondent contends that although he has regained full custody of A.K., there are collateral legal conse-

quences that may arise from a neglect adjudication and, accordingly, this case should not have been dismissed as moot. We agree and therefore reverse and remand.

The principal function of the judicial branch of government is to resolve cases or controversies between adverse parties. *See generally* U.S. Const. art. III, § 2; N.C. Const. art. I, § 18 *and* art. IV. When a legal controversy between opposing parties ceases to exist, the case is generally rendered moot and is no longer justiciable. *See*, *e.g.*, *State ex rel. Rhodes v. Gaskill*, 325 N.C. 424, 425-26, 383 S.E.2d 923, 924-25 (1989) (per curiam) (holding case was moot because all disputed issues between the parties had been resolved through consent judgment). Ordinarily, an appellate court will decide a case only if the controversy which gave rise to the action continues at the time of appeal. *See In re Peoples*, 296 N.C. 109, 148, 250 S.E.2d 890, 912 (1978) ("[T]he issue of mootness is not determined solely by examining facts in existence at the commencement of the action. If the issues . . . become moot at any time during the course of the proceedings, the usual response should be to dismiss the action."), *cert. denied*, 442 U.S. 929 (1979). This Court explained the general rule as follows:

> When, pending an appeal to this Court, a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed [because] this Court will not . . . proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court.

Benvenue Parent-Teacher Ass'n v. Nash Cty. Bd. of Educ., 275 N.C. 675, 679, 170 S.E.2d 473, 476 (1969).

Usually, when the terms of a challenged trial court judgment have been carried out, a pending appeal of that judgment is moot because an appellate court decision "cannot have any practical effect on the existing controversy." *Roberts v. Madison Cty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996). In certain cases, however, the continued existence of the judgment itself may result in collateral legal consequences for the appellant. *See*, *e.g.*, *In re Hatley*, 291 N.C. 693, 694-95, 231 S.E.2d 633, 634-35 (1977) (involuntary commitment order); *Smith ex rel. Smith v. Smith*, 145 N.C. App. 434, 436-37, 549 S.E.2d 912, 913-14 (2001) (domestic violence protective order). Possible adverse consequences flowing from a judgment preserve an appellant's substantial stake in the outcome of the case and

the validity of the challenged judgment continues to be a "live" controversy. As a result, an appeal from a judgment which creates possible collateral legal consequences for the appellant is not moot. *Hatley*, 291 N.C. at 694, 231 S.E.2d at 634.

The relationship of "collateral legal consequences" to the mootness doctrine often arises during the pendency of criminal appeals when the defendant has completed his or her sentence. In such cases, the appellate court decision would presumably have no effect on the punishment already carried out, and the appeal would, pursuant to the general rule, appear to be moot. The effects of a criminal conviction, however, extend far beyond the sentence imposed. The mere fact of conviction may result in various adverse consequences for the individual, including loss of citizenship rights, impeachment if called as a witness, and enhancement of sentencing if convicted of another crime. *See*, *e.g.*, *Carafas v. LaVallee*, 391 U.S. 234, 237 (1968) ("In consequence of [the defendant's] conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union . . . ; he cannot vote . . . ; he cannot serve as a juror." (footnotes omitted)). Accordingly, these collateral legal consequences give the defendant-appellant "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Fiswick v. United States*, 329 U.S. 211, 222 (1946).

The continued justiciability of appeals involving collateral legal consequences is not limited to criminal cases. A civil appeal is not moot when the challenged judgment may cause collateral legal consequences for the appellant. *See*, *e.g.*, *In re Hatley*, 291 N.C. 693, 231 S.E.2d 633 (1977). In *Hatley*, we considered "whether an appeal from an involuntary commitment order is rendered moot by the discharge of the patient." *Id.* at 695, 231 S.E.2d at 634. The state contended the appellant's appeal was "moot in light of the fact that the 90-day commitment order under which [the appellant] was institutionalized [had] expired." *Id.* at 694, 231 S.E.2d at 634. The Court in *Hatley* noted the challenged commitment order was based in part on a finding the appellant had previously been committed. *Id.* at 695, 231 S.E.2d at 635. It was therefore possible the challenged commitment order "might likewise form the basis for a future commitment, along with other obvious collateral legal consequences." *Id.* The Court held the case was not moot, explaining "even when the terms of the judgment below have been fully carried out, if collateral legal consequences of an adverse nature can reasonably be expected to result therefrom, then the issue is not moot and the appeal has continued

legal significance." *Id.* at 694, 231 S.E.2d at 634 (citing *Sibron v. New York*, 392 U.S. 40 (1968)).

This Court recently indicated a parent may reasonably expect "collateral legal consequences of an adverse nature" to result from an adjudication of his or her minor child as neglected. *In re Barbosa*, 357 N.C. 160, 580 S.E.2d 359 (2003). In *Barbosa*, a mother appealed the trial court's order adjudicating her daughter as neglected to the Court of Appeals. *See In re Barbosa*, 160 N.C. App. 595, 587 S.E.2d 681, 2003 WL 22289871 (Oct. 7, 2003) (No. COA02-736) (per curiam). While the appeal was pending at the Court of Appeals, the mother regained custody of her daughter. 2003 WL 22289871, at *1. After the change in custody, the Court of Appeals dismissed the case as moot and the mother sought further review in this Court. *See id.* We remanded the case to the Court of Appeals "for reconsideration of its order dismissing respondent's appeal as moot, in light of this Court's decision in *In re Hatley*." *In re Barbosa*, 357 N.C. 160, 580 S.E.2d 359 (emphasis added). On remand, the Court of Appeals vacated the adjudication order for other reasons, but not before it acknowledged that an adjudication of neglect creates " 'collateral consequences' . . . which could 'frequently be revived . . .' and could damage the appellant's credibility." 2003 WL 22289871, at *1 (quoting *Hatley*, 291 N.C. at 695, 231 S.E.2d at 634-35 (citation omitted)).

Barbosa applied the cardinal principal recognized in *Hatley* to abuse, dependency, and neglect adjudications. It is axiomatic, therefore, that reinstatement of parental custody during the pendency of an appeal challenging a child's neglect or abuse adjudication does not render a case moot as the adjudication may result in collateral legal consequences for the parent.

In North Carolina, juvenile abuse, neglect, and dependency actions are governed by Chapter 7B of the General Statutes, commonly known as the Juvenile Code. Such cases are typically initiated when the local department of social services (DSS) receives a report indicating a child may be in need of protective services. *See* N.C.G.S. §§ 7B-301, -302 (2005). DSS conducts an investigation, and if the allegations in the report are substantiated, it files a petition in district court alleging abuse, dependency, or neglect. *See Id.* §§ 7B-302, -400, -403 (2005). The first stage in such proceedings is the adjudicatory hearing. *See Id.* § 7B-807 (2005). If DSS presents clear and convincing evidence of the allegations in the petition, the trial court will adjudicate the child as an abused, neglected, or dependent juve-

nile. *Id.* § 7B-807(a). If the allegations in the petition are not proven, the trial court will dismiss the petition with prejudice and, if the juvenile is in DSS custody, returns the juvenile to the parents. *Id.*

Immediately following adjudication, the trial court must conduct a dispositional hearing. *Id.* § 7B-901 (2005). At the hearing, the trial court receives evidence and enters a written order specifying an appropriate plan to meet the needs of the juvenile. *See Id.* §§ 7B-900, -901, -905 (2005). If the trial court finds it is in the juvenile's best interests, it may place the juvenile in out-of-home care. *Id.* § 7B-903(a)(2)(c) (2005). If custody of the child is removed from the parent, the trial court must hold a custody review hearing within ninety days and then again within six months. *Id.* § 7B-906(a) (2005).

Under certain circumstances in abuse, neglect and dependency actions, DSS may file a motion for termination of parental rights. *See Id.* § 7B-1102(a) (2005). Chapter 7B sets out nine grounds for terminating parental rights, including that "[t]he parent has abused or neglected the juvenile." *Id.* § 7B-1111(a)(1) (2005).

Respondent contends that A.K.'s neglect adjudication could subject him to various collateral legal consequences under the Juvenile Code. First, respondent asserts that A.K.'s adjudication could be used to support a judicial determination that another child with whom he resides is neglected. "In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." *Id.* § 7B-101(15) (2005). Pursuant to this section, if DSS again alleges that a child in respondent's household is neglected, A.K.'s existing neglect adjudication will be relevant to the court's determination of whether that child is a "neglected juvenile" under Chapter 7B.

The instant case vividly illustrates the significance of a prior adjudication of neglect in finding another child in the same home to be a neglected juvenile. Specifically, the allegation (and adjudication) of neglect regarding A.K. was based entirely on the trial court's previous adjudication of neglect involving respondent's other child, C.A.K.

Guardian ad Litem responds that by virtue of C.A.K.'s uncontested adjudication, any child living with respondent would necessarily be living "in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home."

Thus, according to the Guardian ad Litem, A.K.'s neglect adjudication would have no further effect on the application of the Juvenile Code to respondent.

N.C.G.S. § 7B-101(15) provides that, in determining whether a juvenile is neglected, it is relevant that a caretaker in the juvenile's home has previously neglected another child. The statute neither dictates how much weight should be given to a prior neglect adjudication, nor suggests that a prior adjudication is determinative. *See*, *e.g.*, *In re Nicholson*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994) (holding that "evidence of abuse of another child in the home is relevant in determining whether a child is a neglected juvenile" but noting that the statute "affords the trial judge some discretion in determining the weight to be given such evidence").

Furthermore, the trial court in child custody proceedings is generally vested with broad discretion as to which facts to consider and how much weight to accord them. *See*, *e.g.*, *In re Montgomery*, 311 N.C. 101, 112, 316 S.E.2d 246, 253 (1984) (stating that the trial judge's "observation of the parties and the witnesses provided him with an opportunity to evaluate the situation that cannot be revealed on printed page"). Thus, in determining whether a child is a "neglected juvenile" under Chapter 7B, it is well within the trial court's discretion to assign more weight to multiple prior neglect adjudications than it would to just one. Consequently, we reject the Guardian ad Litem's assertion that evidence of more than one prior neglect adjudication would be merely cumulative and would therefore have no additional effect on a trial court's determination of whether a juvenile is neglected.

In the instant case, A.K.'s neglect adjudication would be relevant in any future judicial determination of whether another child in respondent's home is a "neglected juvenile." A.K.'s neglect adjudication could therefore operate to respondent's legal detriment, i.e., "collateral legal consequences of an adverse nature can reasonably be expected to result" from A.K.'s adjudication as neglected. *Hatley*, 291 N.C. at 694, 231 S.E.2d at 634.

A.K.'s neglect adjudication also creates potential collateral legal consequences for respondent under the Juvenile Code's procedure for termination of parental rights. The trial court is authorized to terminate parental rights when "[t]he parent has abused or neglected the juvenile." N.C.G.S. § 7B-1111(a)(1). "[E]vidence of neglect by a parent prior to losing custody of a child—*including an adjudication of*

such neglect—is admissible in subsequent proceedings to terminate parental rights." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984) (emphasis added). "[I]n ruling upon a petition for termination of parental rights for neglect, the trial court may consider neglect of the child by [his or her] parents which *occurred before the entry of a previous order taking custody from them*." *Id.* at 713, 319 S.E.2d at 231 (emphasis added) (citing *In re Moore*, 306 N.C. 394, 293 S.E.2d 127 (1982)). Thus, in a future termination of parental rights proceeding involving A.K., the adjudication at issue in the instant case would constitute evidence of neglect supporting termination of respondent's parental rights.

The Guardian ad Litem contends that A.K.'s neglect adjudication would have no effect in any future proceeding to terminate respondent's parental rights regarding A.K. Under *Ballard*, any evidence of neglect by the parent is admissible. 311 N.C. at 715, 319 S.E.2d at 232. Therefore, as the Guardian ad Litem notes, the evidence that led to A.K.'s adjudication as neglected could still be considered in a subsequent hearing to terminate respondent's parental rights, regardless of whether the neglect adjudication itself remained. This assertion echoes the Guardian ad Litem's argument with respect to N.C.G.S. § 7B-101(15), and is equally unavailing. We reject the suggestion that a trial court would necessarily view a prior neglect adjudication as merely cumulative in light of other evidence of parental neglect. It is permissible, indeed logical, for a trial court in a termination of parental rights hearing to weigh a prior adjudication of neglect more heavily than mere evidence of neglect.

The adjudication at issue in respondent's appeal would be evidence of neglect in any future proceeding concerning termination of respondent's parental rights in relation to A.K. Again, the adjudication would work to respondent's legal detriment. These potential "collateral legal consequences" for respondent demonstrate that his challenge to A.K.'s adjudication "is not moot and . . . has continued legal significance." *Hatley*, 291 N.C. at 694, 231 S.E.2d at 634.

In summary, the neglect adjudication at issue in the instant case could have adverse consequences for respondent under sections of the Juvenile Code related to child custody and parental rights. The right to parent one's children is a fundamental right, and, thus, determining the validity of a court order that could negatively impact that right is critically important. *See, e.g.*, *In re R.T.W.*, 359 N.C. 539, 543, 614 S.E.2d 489, 491 (2005) ("Parents have a fundamental right to the custody, care, and control of their children."); *Owenby v. Young*,

357 N.C. 142, 144, 579 S.E.2d 264, 266 (2003) ("[T]he 'Due Process Clause . . . protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.' This parental liberty interest 'is perhaps the oldest of the fundamental liberty interests' . . . ") (quoting *Troxel v. Granville*, 530 U.S. 57, 65, 66 (2000) (plurality)).

An order that, left undisturbed, could later affect a constitutionally-protected liberty interest necessarily involves collateral legal consequences. *See*, *e.g.*, *Smith*, 145 N.C. App. at 436, 549 S.E.2d at 914 ("Defendant may suffer collateral legal consequences as a result of the entry of the order . . . *includ[ing] consideration of the order by the trial court in any custody action* involving Defendant.") (emphasis added); *see also Williams v. Ragaglia*, 261 Conn. 219, 225, 230 n.12, 802 A.2d 778, 782, 785 n.12 (2002) (noting that "even an unsubstantiated allegation [of child abuse] would be treated more seriously based on the plaintiff's record of having had her foster care license revoked" and determining that the plaintiff's appeal was not moot because the court could provide "practical relief" to the plaintiff if it overturned the [foster care] license revocation).

A neglect adjudication not only can result in negative legal consequences, but also may detrimentally impact societal and interpersonal relationships. In an analogous case, which held that an appeal from an expired domestic violence protective order was not moot, the Court of Appeals observed:

> In addition to the collateral legal consequences, there are numerous non-legal collateral consequences to entry of a domestic violence protective order that render expired orders appealable. . . . [A]ppeals from expired domestic violence protective orders are not moot because of the "stigma that is likely to attach to a person judicially determined to have committed . . . [domestic] abuse."

Smith, 145 N.C. App. at 437, 549 S.E.2d at 914 (quoting *Piper v. Layman*, 125 Md. App. 745, 753, 726 A.2d 887, 891 (1999) (alteration in original)). Similarly, a stigma is likely to attach to a person who abuses or neglects his or her child. An adjudication under Chapter 7B is a judicial determination that a parent has abused or neglected his or her child. Thus, the consequences of such a determination are considerable, and they give a parent (and indeed the affected child) a continuing stake in determining the validity of the adjudication, even after the parent has regained custody of the child.

This case is readily distinguishable from *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489 (2005), in which respondent-mother's appeal from a custody review order was deemed moot based on the trial court's termination of her parental rights during the pendency of the appeal. *Id.* at 553, 614 S.E.2d at 498. The *R.T.W.* Court pointed out that if respondent "believe[d] the trial court improperly relied on [the] custody order [at issue in the mooted appeal] during termination proceedings[, she was] free to raise the issue in an appeal of the order terminating parental rights." *Id.* In the instant case, there is no subsequent termination order through which respondent may collaterally attack A.K.'s adjudication as neglected. As such, respondent's only opportunity to cast off the scarlet letter of A.K.'s adjudication is by prevailing in the instant appeal. Furthermore, in *R.T.W.*, failure to moot the appeal would have allowed "parents [to] indefinitely evade termination proceedings[,] . . . a result completely repugnant to [the children's] best interests." *Id.* at 552, 614 S.E.2d at 497. In contrast, the continued vitality of respondent's instant appeal does not compromise A.K.'s best interests.

In summary, we hold that because a juvenile neglect adjudication can reasonably result in collateral legal consequences, a parent's appeal from such an adjudication is not rendered moot simply because the minor child is returned to his or her parent's custody during the pendency of the appeal.

It is the province of this Court to decide questions of justiciability, but our holding is limited to determining that respondent's appeal is not moot: We express no opinion as to the merits of respondent's appeal or the substantive allegations of neglect in this case. Accordingly, we reverse the Court of Appeals' dismissal of respondent's appeal as moot and remand the case to that court for consideration of the remaining assignments of error.

REVERSED AND REMANDED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

GAIL M. MYERS, ANCILLARY ADMINISTRATRIX OF THE ESTATE OF DARRYL MYERS, PLAINTIFF v. SHIRLEY McGRADY, THOMAS W. HIGGINS, MICHAEL P. MURPHY, JAMES F. FOUST, WILLIAM A. SPENCER, JR., AND VERIAN LADSON, SUCCESSOR REPRESENTATIVE FOR THE ESTATE OF J.C. MYERS, JR., DEFENDANTS, AND SHIRLEY McGRADY, THOMAS W. HIGGINS, JAMES F. FOUST, WILLIAM A. SPENCER, JR., AND VERIAN LADSON, SUCCESSOR REPRESENTATIVE FOR THE ESTATE OF J.C. MYERS, JR., THIRD-PARTY PLAINTIFFS v. NORTH CAROLINA DIVISION OF FOREST RESOURCES, A DIVISION OF THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, THIRD-PARTY DEFENDANTS

No. 391A04-2

(Filed 5 May 2006)

Immunity— public duty doctrine—state agency—management of forest fires

The public duty doctrine applies to negligence claims filed under the Tort Claims Act against the North Carolina Department of Environment and Natural Resources (NCDENR) for alleged mismanagement of forest fires, and the trial court should have allowed NCDENR's motion to dismiss in an action arising from an automobile accident in the smoke on a highway adjacent to a forest fire. The statutory powers and duties of NCDENR and appointed forest rangers are designed to protect the citizens of North Carolina as a whole; NCDENR does not owe a specific duty to plaintiff or to third-party plaintiffs.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 170 N.C. App. 501, 613 S.E.2d 334 (2005), affirming orders entered 24 February 2004 by Judge Donald W. Stephens and 23 March 2004 by Judge Abraham Penn Jones in Superior Court, Durham County. On 18 August 2005, the Supreme Court allowed third-party defendants' petition for discretionary review as to an additional issue. Heard in the Supreme Court 13 February 2006.

Twiggs, Beskind, Strickland & Rabenau, P.A., by Jerome P. Trehy, Jr., for plaintiff-appellee.

Kennedy Covington Lobdell & Hickman, LLP, by F. Fincher Jarrell, for defendant/third-party plaintiff-appellees James F. Foust and William A. Spencer, Jr.

Law Offices of Douglas F. DeBank, by Douglas F. DeBank, for defendant/third-party plaintiff-appellee Verian Ladson.

Roy Cooper, Attorney General, by Christopher G. Browning, Jr., Solicitor General, Robert T. Hargett and Amar Majmundar, Special Deputy Attorneys General, and Laura J. Gendy, Assistant Attorney General, for third-party defendant-appellants.

WAINWRIGHT, Justice.

This negligence action arises from a four-vehicle collision on Interstate Highway 95 (I-95) in Northampton County, North Carolina. At the time of the collision on 9 June 2002, thick smoke from a nearby forest fire combined with fog to obscure the southbound lanes of I-95. Two individuals, Darryl Myers and J.C. Myers, were killed in the collision.

Plaintiff Gail Myers is the administratrix of Darryl Myers' estate. Defendants Shirley McGrady, Thomas Higgins, Michael Murphy, James Foust, and William Spencer, Jr. drove and/or owned vehicles involved in the collision. J.C. Myers, Jr. drove the vehicle in which Darryl Myers rode as a passenger, and defendant Verian Ladson is a representative for J.C. Myers, Jr.'s estate.

On 1 August 2003, plaintiff filed suit against defendants in Durham County Superior Court alleging that the negligence of each driver proximately caused Darryl Myer's death. Plaintiff's complaint states that at approximately 4:40 a.m. on 9 June 2002, defendant McGrady stopped the vehicle she was driving in the southbound travel lane of I-95 to switch seats with defendant Higgins, the owner of the vehicle. Defendant McGrady allegedly did not want to drive more because her vision was obscured by smoke and fog. Defendant Murphy then collided with the rear of defendant Higgins' vehicle; defendant Foust drove a tractor-trailer into the rear of defendant Murphy's vehicle; and J.C. Myers, Jr. drove into the rear of the Foust tractor-trailer, killing himself and Darryl Myers. Plaintiff alleged that defendant Foust's liability was imputed to the owner of the tractor-trailer, defendant Spencer.

Defendants impleaded Forest Ranger Michael Bennett and the North Carolina Division of Forest Resources (NCDFR), a division of the Department of Environment and Natural Resources (NCDENR), pursuant to North Carolina Rule of Civil Procedure 14(a) and (c). Ranger Bennett, an employee of NCDFR, responded to the forest fire on 7 June 2002 at the request of the Gaston Volunteer Fire Department. Defendants' third-party complaints alleged that the fire

adjacent to I-95 smoldered in three to five acres of woodland for approximately two days before the accident, that Ranger Bennett visited the scene three times before the collision and was aware of the fire, and that Ranger Bennett knew or should have known that the fire produced open flames and dense smoke dangerous to motorists in the southbound lanes of I-95. Defendants' third-party complaints further alleged that Ranger Bennett failed to control the fire; failed to warn approaching motorists; failed to monitor the weather, wind, and smoke conditions; and failed to protect the traveling public.

On 9 January 2004, third-party defendants Ranger Bennett and NCDFR filed a motion to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief may be granted pursuant to the public duty doctrine and public officer immunity. On 23 February 2004, the trial court allowed the motion to dismiss as to third-party defendant Ranger Bennett and denied the motion as to NCDFR. Plaintiff subsequently sought and received permission to amend her original complaint to include a direct negligence claim against NCDFR as well. The Court of Appeals agreed to hear NCDFR's interlocutory appeal, and, in a divided opinion, affirmed the orders of the trial court.

The determinative question before this Court is whether NCDFR, a state agency, may be liable in negligence for failure to control a naturally occurring forest fire or failing to make safe a public highway adjacent to the fire.[1] We observe that the alleged negligence arises

1. Before 1979, N.C.G.S. § 143-291 authorized the North Carolina Industrial Commission to hear tort claims in which the plaintiff alleged injury resulting from a "negligent act" of a state employee or agent. N.C.G.S. § 143-291 (1978). Based upon this statutory language, this Court consistently held that N.C.G.S. § 143-291 did not waive sovereign immunity with respect to suits alleging injury from negligent omissions or failures to act. *Ayscue v. N.C. State Highway Comm'n*, 270 N.C. 100, 153 S.E.2d 823 (1967) (per curiam); *Midgett v. N.C. State Highway Comm'n*, 265 N.C. 373, 144 S.E.2d 121 (1965); *Wrape v. N.C. State Highway Comm'n*, 263 N.C. 499, 139 S.E.2d 570 (1965); *Flynn v. N.C. State Highway & Pub. Works Comm'n*, 244 N.C. 617, 94 S.E.2d 571 (1956).

In 1977 the General Assembly amended N.C.G.S. § 143-291 by substituting the word "negligence" for the phrase "negligent act." Act of June 10, 1977, Ch. 529, sec. 1, 1977 N.C. Sess. Laws 627, 627 (amending the Tort Claims Act to provide coverage for negligence) (effective 1 July 1979). To date, this Court has not considered the effect of the 1977 amendment on its pre-existing case law. Although the North Carolina Court of Appeals has recognized that the amendment "enlarges the rights of persons seeking to recover for injuries resulting from State employees' negligence," *Watson v. N.C. Dep't of Corr.*, 47 N.C. App. 718, 721, 268 S.E.2d 546, 549, *disc. rev. denied*, 301 N.C. 239, 283 S.E.2d 135-36 (1980), that court subsequently stated that N.C.G.S. § 143-291(a) does not allow recovery for injuries resulting from negligent omissions, *Isenhour v. Hutto*, 129 N.C. App. 596, 601, 501 S.E.2d 78, 82 (1998) ("It appears to be well established that,

from the agency's purported failure to perform a statutory duty owed to the general public and that this duty is generally unenforceable by individual plaintiffs in tort. Thus, we apply the common law public duty doctrine to the powers and duties conferred upon NCDENR by N.C.G.S. §§ 113-51, -52, -54, and -55 to prevent, control and extinguish forest fires. Because NCDENR does not owe a specific duty to this individual plaintiff and these third-party plaintiffs, but a general duty to the public at large, the trial court should have granted NCDFR's motion to dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(6) and motion for judgment on the pleadings pursuant to Rule 12(c).

A civil plaintiff seeking to sue a state agency for negligence for failure to carry out statutorily delegated responsibilities must overcome two limitations that are not present in suits against private individuals: (1) the State must have waived sovereign immunity as to the plaintiff's claim, and (2) the duty alleged by the plaintiff may not be a public duty previously recognized by this Court. If the State has not waived sovereign immunity, then it is immune from the plaintiff's suit in North Carolina courts. *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm'n*, 336 N.C. 200, 207, 443 S.E.2d 716, 721 (1994) ("The doctrine of sovereign immunity—that the state cannot be sued in its own courts without its consent—is firmly established in North Carolina law."), *superseded by statute on other grounds*, Act of April 19, 1993, ch. 679, sec 2.3, 1993 N.C. Sess. Laws 394, 397-99, *as recognized in Carolina Med. Ctr. v. Employers & Carriers Listed in Exhibit A*, —— N.C. App. ——, 616 S.E.2d 588 (2005). If the plaintiff alleges negligence by failure to carry out a recognized public duty, and the State does not owe a corresponding special duty of care to the plaintiff individually, then the plaintiff has failed to state a claim in negligence. *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 196, 499 S.E.2d 747, 749-50 (1998) ("Without any distinct duty to any specific individual, the [governmental] entity cannot be held liable."); *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 482, 495 S.E.2d 711, 716 (stating that when a "governmental entity owes no particular duty to any individual claimant, it cannot be held liable for negligence for

under the Tort Claims Act, recovery may be had for injuries resulting from negligent action but not for negligent omissions . . . ."), *aff'd in part and rev'd in part on other grounds*, 350 N.C. 601, 517 S.E.2d 121 (1999).

The parties *sub judice* have not raised the distinction between negligent act and negligent omission on appeal. Thus, our decision today expresses no opinion as to whether the facts alleged by plaintiff are properly classified as alleging negligent acts or negligent omissions. Further, we make no statement concerning the effect of the 1977 amendment on our existing case law.

failure to carry out its statutory duties"), *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449 (1998). This is so because governmental agencies, which serve the public at large, do not generally owe enforceable duties to specific individuals. *Hunt*, 348 N.C. at 196, 499 S.E.2d at 749 ("The general rule is that a governmental entity acts for the benefit of the general public . . . .").

The North Carolina General Assembly has enacted a limited waiver of sovereign immunity for negligence actions filed against the State and its agents and employees:

> The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina. If the Commission finds that there was negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority that was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages that the claimant is entitled to be paid, including medical and other expenses, and by appropriate order direct the payment of damages as provided in subsection (a1) of this section, but in no event shall the amount of damages awarded exceed the amounts authorized in G.S. [§] 143-299.2 cumulatively to all claimants on account of injury and damage to any one person arising out of a single occurrence. Community colleges and technical colleges shall be deemed State agencies for purposes of this Article. The fact that a claim may be brought under more than one Article under this Chapter shall not increase the foregoing maximum liability of the State.

N.C.G.S. § 143-291(a) (2005). This waiver is set forth in its entirety in N.C.G.S. §§ 143-291 to -300.1 and is commonly known as the North Carolina State Tort Claims Act. Although the Tort Claims Act estab-

lishes the North Carolina Industrial Commission as the appropriate forum to decide direct negligence actions against the State and its agents, N.C.G.S. § 1A-1, Rule 14(c) explicitly provides that the State may be impleaded by defendants in any tort action, including actions filed in superior court: "Notwithstanding the provisions of the Tort Claims Act, the State of North Carolina may be made a . . . third-party defendant . . . in any tort action."

Here, defendants impleaded Ranger Bennett and NCDFR as permitted by N.C.G.S. § 1A-1, Rule 14(c). Plaintiff then amended her complaint to include a direct negligence action against NCDFR pursuant to N.C.G.S. § 1A-1, Rule 14(a), which provides that "[t]he plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff." However, NCDFR argues that the General Assembly has not waived sovereign immunity with respect to direct negligence actions in superior court because the Tort Claims Act requires direct negligence actions against state agencies to be determined by the North Carolina Industrial Commission; thus, the superior court lacks jurisdiction with regard to plaintiff's amended negligence complaint against NCDFR.[2] Because we hold that each negligence claim alleged against NCDFR arises from the agency's performance of a statutorily defined public duty, which claim is unenforceable by plaintiff or third-party plaintiffs individually, we do not reach the merits of the State's sovereign immunity argument.

The public duty doctrine is a separate rule of common law negligence that may limit tort liability, even when the State has waived sovereign immunity. The rule provides that when a governmental

2. In *Teachy v. Coble Dairies, Inc.*, the Department of Transportation of the State of North Carolina (NCDOT) was impleaded by the defendants into a wrongful death action arising from a car accident. 306 N.C. 324, 293 S.E.2d 182 (1982). Defendants alleged that NCDOT was negligent in maintaining a traffic light at the intersection where the accident occurred. *Id.* at 326, 293 S.E.2d at 183. NCDOT filed a motion to dismiss defendants' third-party complaint for lack of jurisdiction based upon the doctrine of sovereign immunity. *Id.* This Court held that "the doctrine of sovereign immunity does not prevent the State from being joined as a *third-party defendant* to a tort action brought in the courts of North Carolina." *Id.* (emphasis added). In so doing, the Court considered, but did not decide, whether sovereign immunity is a matter of personal or subject matter jurisdiction. *Id.* at 326-28, 293 S.E.2d at 183-84. The Court did recognize that the distinction may determine whether the State can immediately appeal a trial court order denying its motion to dismiss on sovereign immunity grounds. *Id.* Following *Teachy*, this Court has simply referred to the sovereign immunity bar as fatal to "jurisdiction" without further specification. *See Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 524 n.1, 539-40, 299 S.E.2d 618, 619 n.1, 628 (1983).

entity owes a duty to the general public, particularly a statutory duty, individual plaintiffs may not enforce the duty in tort. *See Hunt*, 348 N.C. 192, 499 S.E.2d 747; *Stone*, 347 N.C. 473, 495 S.E.2d 711; *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991). By limiting liability, the rule recognizes that the legislative and executive branches must often allocate limited resources for the benefit of the public at large and permits governmental entities to carry out statutory responsibilities without incurring risk of overwhelming liability. *Stone*, 347 N.C. at 481, 495 S.E.2d at 716. *Cf. Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901 (applying the public duty doctrine to limit the liability of local government law enforcement while recognizing the limited resources of local governmental entities). " '[A] government ought to be free to enact laws for the *public protection* without thereby exposing its supporting taxpayers . . . to liability for failures of omission in its attempt to enforce them. It is better to have such laws, even haphazardly enforced, than not to have them at all.' " *Stone*, 347 N.C. at 481, 495 S.E.2d at 716 (quoting *Grogan v. Commonwealth*, 577 S.W.2d 4, 6 (Ky.) (alterations in original), *cert. denied*, 444 U.S. 835, 62 L. Ed. 2d 46 (1979)).

In *Stone v. North Carolina Department of Labor*, this Court determined that the General Assembly incorporated the public duty doctrine into the Tort Claims Act. 347 N.C. at 482, 495 S.E.2d at 716. In so doing, the Court emphasized that the plain language of N.C.G.S. § 143-291(a) waives immunity only " 'under circumstances where [the State], *if a private person*, would be liable to the claimant in accordance with the laws of North Carolina.' " *Id.* at 478, 495 S.E.2d at 714 (emphasis added) (quoting N.C.G.S. § 143-291). Because "[p]rivate persons do not possess public duties," the Court reasoned that the General Assembly intended the public duty doctrine to apply to negligence actions filed against state governmental entities pursuant to the Tort Claims Act. *Id.* at 478-79, 495 S.E.2d at 714. "If the State were held liable for performing or failing to perform an obligation to the public at large, the State would have liability when a private person could *not*." *Id.* at 479, 495 S.E.2d at 714.

In two previous negligence cases filed against the North Carolina Department of Labor under the Tort Claims Act, this Court has held that the public duty doctrine limits the State's liability. *Stone*, 347 N.C. 473, 495 S.E.2d 711; *Hunt*, 348 N.C. 192, 499 S.E.2d 747. In *Stone* and *Hunt* the plaintiffs alleged injuries resulting from the agency's failure to carry out inspections and ensure compliance with the North

Carolina Administrative Code.[3] *Hunt*, 348 N.C. 192, 499 S.E.2d 747 (plaintiff alleged injury arising from negligent failure of the Department of Labor to inspect an amusement park ride to ensure compliance with the administrative code); *Stone*, 347 N.C. 473, 495 S.E.2d 711 (plaintiffs alleged injury resulting from negligent failure of the Occupational Safety and Health Division of the Department of Labor to inspect their workplace and ensure compliance with North Carolina Occupational Safety and Health Act standards). Today, we apply the public duty doctrine to the powers and duties conferred upon NCDENR by N.C.G.S. §§ 113-51, -52, -54, and -55 to prevent, control and extinguish forest fires.

N.C.G.S. § 113-51 defines the fire control powers of NCDENR, stating:

> The Department of Environment and Natural Resources *may take such action as it may deem necessary to provide for the prevention and control of forest fires in any and all parts of this State*, and it is hereby authorized to enter into an agreement with the Secretary of Agriculture of the United States for the protection of the forested watersheds of streams in this State.

N.C.G.S. § 113-51(a) (2005) (emphasis added). N.C.G.S. § 113-52 permits the Secretary of Environment and Natural Resources to "appoint one county forest ranger and one or more deputy forest rangers in each county of the State in which, after careful investigation, the amount of forestland and the risks from forest fires shall, *in his judgment*, warrant the establishment of a forest fire organization." *Id.* § 113-52 (2005) (emphasis added). N.C.G.S. § 113-54, which sets forth the duties of forest rangers, provides in part:

> *Forest rangers shall have charge of measures for controlling forest fires*, protection of forests from pests and diseases, and the development and improvement of the forests for maximum production of forest products; shall post along highways and in

3. In *Braswell*, 330 N.C. 363, 410 S.E.2d 897, this Court applied the public duty doctrine to limit the liability of a county when plaintiff alleged that the sheriff negligently failed to protect the wife of a deputy sheriff from fatal spousal abuse. *But see Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652 (2000) (declining to extend the public duty doctrine to plaintiff's claim against a municipality for negligent dispatch of fire-fighting personnel to plaintiff's home). However, we note that the Tort Claims Act does not apply to local governments and their agents. In such cases, waiver of sovereign immunity is generally accomplished through the purchase of liability insurance. *See* N.C.G.S. § 153A-435 (2005); *id.* § 160A-485 (2005).

> other conspicuous places copies of the forest fire laws and warnings against fires, which shall be supplied by the Secretary [of Environment and Natural Resources]; shall patrol and man lookout towers and other points during dry and dangerous seasons under the direction of the Secretary; *and shall perform such other acts and duties as shall be considered necessary by the Secretary in the protection, development and improvement of the forested area of each of the counties within the State.*

Id. § 113-54 (2005) (emphasis added). Finally, N.C.G.S. § 113-55 directs that "[f]orest rangers shall prevent and extinguish forest fires and shall have *control and direction* of all persons and equipment while engaged in the extinguishing of forest fires." (Emphasis added.)

The General Assembly has vested NCDENR with broad powers to protect the health and well-being of the general public and North Carolina's forests. Pursuant to N.C.G.S. §§ 113-51, -52, -54 and -55, NCDENR and the Secretary of Environment and Natural Resources possess discretion to evaluate the risks posed by forest fires to North Carolina counties, appoint forest rangers in response to those risks, and direct rangers in the control and prevention of forest fires. Fire fighting decisions made by NCDENR, NCDFR, and state forest rangers concern the allocation of limited resources to address statewide needs and are made in furtherance of a statutory duty to the citizens of North Carolina at large. These decisions are not generally the type of decisions for which the State is liable to private citizens in tort. Accordingly, this Court will not judicially impose overwhelming liability on NCDENR and NCDFR for failure to prevent personal injury resulting from forest fires.

We hold that the public duty doctrine applies to negligence claims filed under the Tort Claims Act against NCDENR for alleged mismanagement of forest fires. Because N.C.G.S. §§ 113-51, -52, -54, and -55, which set forth the powers and duties of NCDENR and appointed state forest rangers, are designed to protect the citizens of North Carolina as a whole, NCDENR does not owe a specific duty to plaintiff or to third-party plaintiffs; thus, these parties have failed to state a negligence claim for which relief may be granted, and the trial court should have allowed NCDFR's motion to dismiss and motion for judgment on the pleadings.

Although this Court has recognized two common law exceptions to the public duty doctrine known as the "special duty" and "special relationship" exceptions, plaintiff and third-party plaintiffs have not

raised the exceptions in this case. *See Hunt*, 348 N.C. at 197, 499 S.E.2d at 750; *Stone*, 347 N.C. at 482, 495 S.E.2d at 717. We further note that N.C.G.S. §§ 113-51, -52, -54, and -55 are readily distinguishable from statutes which create a special duty or specific obligation to a particular class of individuals and to which the North Carolina Court of Appeals and courts in other states have declined to apply the public duty doctrine. Our decision today expresses no opinion regarding application of the public duty doctrine to statutes that are arguably designed to protect a narrower class of individuals.

For the reasons stated above, we reverse and remand the decision of the North Carolina Court of Appeals. The Court of Appeals shall further remand this case to Durham County Superior Court for proceedings consistent with this opinion.

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

RANDY R. LEWIS, EMPLOYEE v. BEACHVIEW EXXON SERVICE, EMPLOYER, PENN NATIONAL INSURANCE COMPANY, CARRIER

No. 645A05

(Filed 5 May 2006)

Workers' Compensation— pulmonary condition not compensable—remand on estoppel issue

The decision of the Court of Appeals in this workers' compensation case is reversed for the reason stated in the dissenting opinion that plaintiff's pulmonary condition was not compensable because evidence supported the Industrial Commission's findings that it was not the result of his surgery for a work-related hernia and that the hernia surgery did not materially aggravate or exacerbate his pre-existing pulmonary condition, and the case is remanded to the Court of Appeals for remand to the Industrial Commission for findings and conclusions on the issue of whether defendant employer is estopped from contesting the compensability of plaintiff's pulmonary condition.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 619 S.E.2d

881 (2005), reversing and remanding an opinion and award filed on 30 January 2004 by the North Carolina Industrial Commission. On 26 January 2006, the Supreme Court allowed defendants' petition for discretionary review as to additional issues. Heard in the Supreme Court 20 April 2006.

Wilson & Ratledge, PLLC, by Perry J. Pelaez, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P, by Buxton S. Copeland and Meredith T. Black, for defendant-appellants.

PER CURIAM.

As to the issue on direct appeal, we reverse the decision of the Court of Appeals for the reasons stated in the dissenting opinion. Further, we conclude that the petition for discretionary review as to additional issues was improvidently allowed. This case is remanded to the Court of Appeals for remand to the North Carolina Industrial Commission for further findings of fact and conclusions of law on the issue of estoppel.

REVERSED AND REMANDED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

OSETEK v. JEREMIAH

[360 N.C. 471 (2006)]

JEAN MARIE OSETEK v. JASON LEE JEREMIAH

No. 687A05

(Filed 5 May 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 174 N.C. App. —, 621 S.E.2d 202 (2005), affirming a judgment entered on 14 August 2003 and an order entered on 11 December 2003 by Judge Henry W. Hight, Jr. in Superior Court, Wake County. Heard in the Supreme Court 20 April 2006.

E. Gregory Stott for plaintiff-appellant.

Hall, Rodgers, Gaylord, Millikan & Croom, by Jonathan E. Hall and Kathleen M. Millikan, for defendant-appellee.

PER CURIAM.

AFFIRMED.

JAMES CREECH HERRING v. FOOD LION, L.L.C.

No. 28A06

(Filed 5 May 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 175 N.C. App. —, 623 S.E.2d 281 (2005), affirming in part and reversing in part an order granting a new trial entered 9 August 2004 by Judge Russell J. Lanier, Jr. in Superior Court, Lenoir County. Heard in the Supreme Court 20 April 2006.

White & Allen, P.A., by Gregory E. Floyd, for plaintiff-appellant.

Poyner & Spruill LLP, by Timothy W. Wilson and Gregory S. Camp, for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. RASHAWN DREAN YARRELL

No. 448PA05

(Filed 5 May 2006)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 172 N.C. App. 135, 616 S.E.2d 258 (2005), finding no error in defendant's trial but remanding for resentencing two judgments entered on 10 December 2002 by Judge Jerry Cash Martin in Superior Court, Randolph County. Heard in the Supreme Court 18 April 2006.

Roy Cooper, *Attorney General*, *by Christopher W. Brooks*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Daniel Shatz*, *Assistant Appellate Defender*, *for defendant-appellee.*

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

PROPERTY RIGHTS ADVOCACY GROUP, ON BEHALF OF ITS MEMBERS AND OTHER SIMILARLY SITUATED REAL PROPERTY OWNERS AND TAXPAYERS OF AND IN THE TOWN OF OAK ISLAND, NORTH CAROLINA, AND HONORABLE JAMES W. BETTER, INDIVIDUALLY v. TOWN OF LONG BEACH, A FORMER NORTH CAROLINA MUNICIPAL CORPORATION AND BODY POLITIC, NOW KNOWN AND REFERRED TO AS TOWN OF OAK ISLAND, A NORTH CAROLINA MUNICIPAL CORPORATION AND BODY POLITIC, AND SUCCESSOR IN INTEREST TO THE FORMER TOWN OF LONG BEACH; TOWN OF OAK ISLAND, A NORTH CAROLINA MUNICIPAL CORPORATION AND BODY POLITIC; AND THE STATE OF NORTH CAROLINA

No. 559A05

(Filed 5 May 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 173 N.C. App. ——, 617 S.E.2d 715 (2005), dismissing an appeal from an order entered 28 May 2004 by Judge Robert F. Floyd, Jr. in Superior Court, Brunswick County. Heard in the Supreme Court 18 April 2006.

Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., for plaintiff-appellants.

Roger Lee Edwards, P.A., by Roger Lee Edwards, for defendant-appellee Town of Long Beach, now Town of Oak Island.

Roy Cooper, Attorney General, by V. Lori Fuller, Assistant Attorney General, for defendant-appellee State of North Carolina.

PER CURIAM.

AFFIRMED.

IN RE C.L.C., K.T.R., A.M.R., & E.A.R.

[360 N.C. 475 (2006)]

IN THE MATTERS OF C.L.C., K.T.R., A.M.R., AND E.A.R.

No. 467A05

(Filed 5 May 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 171 N.C. App. 438, 615 S.E.2d 704 (2005), affirming a judgment terminating respondent's parental rights signed on 15 October 2003 by Judge Marvin P. Pope in District Court, Buncombe County. On 26 January 2006, the Supreme Court allowed respondent's petition for discretionary review as to additional issues. Heard in the Supreme Court 19 April 2006.

Charlotte W. Nallan and John Adams for petitioner-appellee Buncombe County Department of Social Services.

Charlotte Gail Blake for respondent-appellant mother.

Judy N. Rudolph for appellee Guardian ad Litem.

PER CURIAM.

As to the appeal of right based on the dissenting opinion, we affirm the majority decision of the Court of Appeals. We conclude that the petition for discretionary review as to additional issues was improvidently allowed.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

IN THE MATTERS OF AS.L.G. AND AU.R.G.

No. 624PA05

(Filed 5 May 2006)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 173 N.C. App. ——, 619 S.E.2d 561 (2005), affirming orders terminating respondent's parental rights entered 14 April 2004 by Judge David V. Byrd in District Court, Wilkes County. Heard in the Supreme Court 19 April 2006.

Charlotte Gail Blake for respondent-appellant mother.

Tracie M. Jordan for appellee Guardian ad Litem, and Paul W. Freeman, Jr. for petitioner-appellee Wilkes County Department of Social Services.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

STATE v. BERRY

[360 N.C. 477 (2006)]

STATE OF NORTH CAROLINA	)
	)
v.	)
	)
KYLE O'BRIAN BERRY	)

No. 389A01-3

ORDER

On 13 February 2006, defendant filed a Motion for Appropriate Relief with this Court pursuant to N.C.G.S. § 15A-1418. Upon consideration of defendant's Motion to Hold Oral Argument in Abeyance, also filed with this Court 13 February 2006, the Court allows the Motion to Hold Oral Argument in Abeyance and orders pursuant to N.C.G.S. § 15A-1418(b) that the Motion for Appropriate Relief be remanded to the trial court for consideration of the issues raised in Part I of defendant's Motion for Appropriate Relief. The trial court may order an evidentiary hearing if that court deems such a hearing advisable.

By order of the Court in Conference, this the 7th day of March, 2006.

Edmunds, J.
For the Court

BellSouth Carolinas PCS v. Henderson Cty. Zoning Bd. of Adjust. Case Below: 174 N.C. App. 574	No. 706P05	Def-Appellant's (Henderson Co.) PDR Under N.C.G.S. § 7A-31 (COA05-31)	Denied 01/26/06
Billings v. Rosenstein Case Below: 174 N.C. App. 191	No. 648P05	Def's (Mascenik) PDR Under N.C.G.S. § 7A-31 (COA04-1647)	Denied (04/06/06) **Newby, J., Recused**
Blake v. Parkdale Mills Case Below: 175 N.C. App. 419	No. 114P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-75)	Denied (04/06/06)
Boice-Willis Clinic, P.A. v. Seaman Case Below: 175 N.C. App. 246	No. 002P06	1. Def's Motion for Temporary Stay (COA05-298) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed pending Determination of defendant's PDR **01/09/06** 360 N.C. 288 Stay Dissolved **04/06/06** 2. Denied (04/06/06) 3. Denied (04/06/06)
Campbell v. Bowman Case Below: 174 N.C. App. 625	No. 714P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-16)	Denied (04/06/06) **Timmons-Goodson, J., Recused**
CDC Pineville, LLC v. UDRT of N.C. Case Below: 174 N.C. App. 644	No. 001P06	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1505)	Denied (04/06/06)

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

Chatmon v. N.C. Dep't of Health & Human Servs. Case Below: 175 N.C. App. 85	No. 042P06	1. Def's PDR Under N.C.G.S. § 7A-31 (COA05-112) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied (04/06/06) 2. Dismissed as Moot (04/06/06)
Cline v. Black Case Below: 173 N.C. App. 447	No. 597P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-1527)	Denied (05/04/06)
Croom v. Humphrey Case Below: 175 N.C. App. 765	No. 133P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-318)	Denied (04/06/06)
Eugene Tucker Builders, Inc. v. Ford Motor Co. Case Below: 175 N.C. App. 151	No. 086P06	Plt's PWC to Review Decision of COA (COA05-72)	Denied (04/06/06)
Forbis v. Neal Case Below: 175 N.C. App. 455	No. 079A06	1. Plt's NOA (Dissent) (COA04-1495) 2. Plt's PDR as to Additional Issues 3. Def's Motion to Dismiss Appeal	1. Treated as PWC-allowed (04/06/06) 2. Allowed (04/06/06) 3. Allowed (04/06/06)
Good Hope Health Sys. v. N.C. Dep't of Health & Human Servs. Case Below: 175 N.C. App. 296	No. 057A06	1. Petitioners' NOA (Dissent) (COA05-123) 2. Petitioners' PDR Under N.C.G.S. § 7A-31 3. Petitioners' PDR as to Additional Issues 4. Petitioner's PWC to Review Order of COA 5. Petitioners' PWC to Review Order of COA 6. Petitioners' Motion to Expedite Consideration	1. —— 2. Allowed (05/04/06) 3. Allowed (05/04/06) 4. Denied (05/04/06) 5. Denied (05/04/06) 6. Denied (05/04/06)

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

Good Hope Health Sys. v. N.C. Dep't of Health & Human Servs. Case Below: 175 N.C. App. 309	No. 058A06	1. Petitioners' NOA (Dissent) (COA05-183) 2. Petitioners' PDR Under N.C.G.S. § 7A-31 3. Petitioners' PDR as to Additional Issues 4. Petitioners' PWC to Review Order of COA 5. Petitioners' PWC to Review Order of COA 6. Petitioners' Motion to Expedite Consideration	1. —— 2. Denied (05/04/06) 3. Denied (05/04/06) 4. Denied (05/04/06) 5. Denied (05/04/06) 6. Denied (05/04/06)
Hair v. Melvin Case Below: 175 N.C. App. 793	No. 094P06	Defs' (James D. Melvin, Jr., Jane H. Melvin, James D. Melvin, III, Melvin Motor Co. and Melvin Finance, Inc.) PDR Under N.C.G.S. § 7A-31 (COA05-572)	Denied (04/06/06) **Martin, J., Brady, J., Timmons-Goodson, J., Recused**
Harding v. Lowe's Food Stores, Inc. Case Below: 175 N.C. App. 793	No. 150P06	Plaintiff-Appellants' PDR Under N.C.G.S. § 7A-31 (COA05-675)	Denied (05/04/06)
Honacher v. Everson Case Below: 176 N.C. App. 407	No. 174P06	1. Defs' NOA Based Upon a Constitutional Question (COA05-719) 2. Defs' PDR Under N.C.G.S. § 7A-31 (Timely Filed) 3. Defs' Motion for Leave to Amend Petition for Discretionary Review	1. Dismissed *Ex mero motu* (05/04/06) 2. Denied (05/04/06) 3. Allowed (05/04/06)
In re A.C.J. & P.A.G.S. Case Below: 174 N.C. App. 625	No. 713P05	1. Petitioners' (Durham County DSS & GAL) NOA Based Upon a Constitutional Question (COA05-159) 2. Petitioners' (Durham County DSS & GAL) PDR Under N.C.G.S. § 7A-31 3. Respondent's (Claretta Cook) Motion to Dismiss	1. —— 2. Denied (04/06/06) 3. Allowed (04/06/06)
In re B.A.T. Case Below: 174 N.C. App. 365	No. 104P06	Petitioner's (B.A.T.) PWC to Review Decision of COA (COA05-186)	Denied (04/06/06)

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

In re C.I.B., J.J.P., L.H.P. Case Below: 175 N.C. App. 309	No. 109P06	Respondent's (Mother) PWC to Review the Decision of the COA (COA04-1613)	Denied (04/06/06)
In re Election Protest of Wade Case Below: Wake County Superior Court	No. 717P05	1. Petitioner's (Trudy Wade) Motion for Temporary Stay (COAP05-1116) 2. Petitioner's (Trudy Wade) Petition for Writ of Supersedeas 3. Petitioner's (Trudy Wade) PDR (Prior to Determination) Under N.C.G.S. § 7A-31 4. Petitioner's (Trudy Wade) Motion to Suspend the Rules 5. Respondent's (Board of Elections) Motion to Vacate Temporary Stay 6. Petitioner's (Trudy Wade) PWC	1. Allowed 12/27/05 2. Denied (05/04/06) 3. Denied (05/04/06) 4. Denied (05/04/06) 5. Allowed (05/04/06) 6. Denied (05/04/06) **Parker, C.J., Martin, J. Edmunds, J., Recused**
In re Foreclosure of Hunt Case Below: 176 N.C. App. 407	No. 173P06	1. Def's (Martina Clark) NOA Based Upon a Constitutional Question (COA05-178) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex mero motu* (05/04/06) 2. Denied (05/04/06)
Karger v. Wood Case Below: 174 N.C. App. 703	No. 008A06	Def's Motion to Withdraw Appeal (COA05-251)	Allowed 03/13/06
Kornegay v. Robinson Case Below: 176 N.C. App. 19	No. 153A06	1. Def's NOA (Dissent) (COA05-131) 2. Plt's NOA (Dissent) 3. Plt's PDR as to Additional Issues 4. Plt's Motion to Strike 5. Def's Response to Plt's Motion to Strike and, in the Alternative, PWC	1. —— 2. —— 3. Denied (05/04/06) 4. Allowed (05/04/06) 5. Denied (05/04/06)

Lambeth v. N.C. Farm Bureau Mut. Ins. Co. Case Below: 175 N.C. App. 794	No. 126P06	Plaintiff-Appellant's PDR Under N.C.G.S. § 7A-31 (COA05-287)	Denied (04/06/06)
Leary v. N.C. Forest Prods., Inc. Case Below: 173 N.C. App. 232	No. 572P05	Def's (Oliver Wright Leary) PDR Under N.C.G.S. § 7A-31 (COA04-1470)	Denied (04/06/06)
MacEachern v. MacEachern Case Below: 175 N.C. App. 420	No. 048P06	1. Def's NOA (COA04-1453) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion for "Petition to Review after Remand"	1. Dismissed ex mero motu (04/06/06) 2. Denied (04/06/06) 3. Dismissed (04/06/06)
May v. Down East Homes of Beulaville, Inc. Case Below: 175 N.C. App. 416	No. 064P06	Plt's PWC to Review the Decision of the COA (COA05-547)	Denied (05/04/06)
McComb v. Phelps Case Below: 175 N.C. App. 247	No. 029P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-362)	Denied (05/04/06)
Navistar Fin. Corp. v. Tolson Case Below: 176 N.C. App. 217	No. 164P06	1. Plt's NOA Based Upon a Constitutional Question (COA05-352) 2. Def's Motion to Dismiss Appeal 3. Plt's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (05/04/06) 3. Denied (05/04/06)

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

N.C. Bd. of Pharm. v. Rules Review Comm'n Case Below: 174 N.C. App. 301	No. 673A05	1. Plt's NOA (Dissent) (COA04-929) 2. Plt's PDR as to Additional Issues 3. Plt's NOA Based Upon a Constitutional Question 4. Def's (RRC) Motion to Dismiss Appeal (Constitutional Question)	1. —— 2. Allowed (04/06/06) 3. —— 4. Allowed (04/06/06) **Timmons-Goodson, J., Recused**
N.C. Dep't of Transp. v. Stagecoach Village Case Below: 174 N.C. App. 825	No. 529P04-2	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-1026-2)	Denied (04/06/06)
Payne v. Charlotte Heating & Air Conditioning Case Below: 172 N.C. App. 496	No. 526A05	1. Defs' (Ross & Witmer and Travelers Insurance) NOA Pursuant to N.C.G.S. § 7A-30 (COA03-1651) 2. Defs' Motion to Withdraw Appeal 3. Plt's Motion to Dismiss Appeal 4. Defs' (Ross & Witmer and Travelers Insurance) Motion to Amend NOA	1. —— 2. Allowed (05/04/06) 3. Dismissed as Moot (05/04/06) 4. Dismissed as Moot (05/04/06) **Timmons-Goodson, J., Recused**
Rainey v. St. Lawrence Homes, Inc. Case Below: 174 N.C. App. 611	No. 010P06	Def's (St. Lawrence Homes) PDR Under G.S. 7A-31 (COA04-1571)	Denied (04/06/06)
Ritter v. Ritter Case Below: 176 N.C. App. 181	No. 205P06	1. Plt's NOA Based Upon a Constitutional Question (COA05-530) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Plt's Motion for "Petition for Waiver of Docketing Fees and Costs for this Petition Due to Indigency"	1. Dismissed *Ex mero motu* (05/04/06) 2. Denied (05/04/06) 3. Allowed (05/04/06)

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

State v. Ahmadi-Turshizi Case Below: 175 N.C. App. 783	No. 092P06	1. AG's Motion for Temporary Stay (COA05-482) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/23/06** Stay Dissolved **04/06/06** 2. Denied (04/06/06) 3. Denied (04/06/06)
State v. Anderson Case Below: 175 N.C. App. 444	No. 080P06	1. Def's NOA Based Upon a Constitutional Question (COA04-1537) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (05/04/06) 3. Denied (05/04/06)
State v. Blount Case Below: 174 N.C. App. 840	No. 004A06	AG's Motion to Dismiss Appeal Based Upon a Constitutional Question (COA05-134)	Allowed (04/06/06)
State v. Branch Case Below: 177 N.C. App. 104	No. 095P04-2	AG's Motion for Temporary Stay (COA03-350-2)	Denied 04/20/06
State v. Brewer Case Below: 171 N.C. App. 686	No. 468P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1160)	Denied (05/04/06) **Timmons-Goodson, J., Recused**
State v. Brown Case Below: 175 N.C. App. 593	No. 098P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-702)	Denied (05/04/06)
State v. Brown Case Below: 161 N.C. App. 348	No. 159P06	Def's Motion for Discretionary Review (COA03-96)	Denied (05/04/06)
State v. Brown Case Below: Martin County Superior Court	No. 565A83-5	1. Def's PWC to Review Order of Martin County Superior Court 2. Def's Petition for Writ of Supersedeas 3. Def's Petition for Stay of Execution	1. Denied 04/13/06 2. Denied 04/13/06 3. Denied 04/13/06

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

State v. Bryant Case Below: 176 N.C. App. 190	No. 117A06	1. AG's Notice of Appeal (Dissent) (COA05-514) 2. AG's Motion for Temporary Stay 3. AG's Petition for Writ of Supersedeas	1. —— 2. Allowed 3/13/06 3. Allowed 3/13/06
State v. Burks Case Below: 175 N.C. App. 593	No. 065P06	1. Def's PDR Under N.C.G.S. § 7A-31 (COA05-138) 2. Def's PWC to Review Decision of COA	1. Denied (04/06/06) 2. Denied (04/06/06)
State v. Byers Case Below: 175 N.C. App. 280	No. 069P06	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1035)	Denied (04/06/06)
State v. Cameron Case Below: 175 N.C. App. 248	No. 031P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-415)	Denied (04/06/06)
State v. Chapman Case Below: 176 N.C. App. 767	No. 179P06	AG's Motion for Temporary Stay (COA05-254)	Allowed 04/07/06
State v. Crow Case Below: 175 N.C. App. 119	No. 045P06	1. Def's NOA Based Upon A Constitutional Question (COA05-253) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion for Temporary Stay 4. Def's Petition for Writ of Supersedeas 5. AG's Motion to Deem State's Response Timely Filed	1. Dismissed *Ex mero motu* (05/04/06) 2. Denied (05/04/06) 3. Denied 02/10/06 360 N.C. 365 4. Denied (05/04/06) 5. Allowed (05/04/06)
State v. Cupid Case Below: 175 N.C. App. 795	No. 107P06	1. Def's NOA Based Upon a Constitutional Question (COA05-331) 2. State's Motion to Dismiss Appeal 3. Def's PDR	1. —— 2. Allowed (04/06/06) 3. Denied (04/06/06)

State v. Dickens Case Below: 161 N.C. App. 742	No. 015P04-4	Def's Motion for "Petition for Discretionary Review" (COA02-1395)	Dismissed (04/06/06) **Timmons-Goodson, J., Recused**
State v. Dozier Case Below: 175 N.C. App. 421	No. 024P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-15)	Dismissed (04/06/06)
State v. Edmondson Case Below: 175 N.C. App. 795	No. 125P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-673)	Denied (04/06/06)
State v. Edwards Case Below: 176 N.C. App. 190	No. 160P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-785)	Denied (05/04/06)
State v. Ford Case Below: 176 N.C. App. 768	No. 539P03-4	Def's Motion for "Petition for Discretionary Review-Appellant's New Brief" (COA05-774)	Dismissed (05/04/06)
State v. Gibson Case Below: 175 N.C. App. 223	No. 034P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-548)	Denied (04/06/06)
State v. Gilbert Case Below: 175 N.C. App. 593	No. 088P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-133)	Denied (04/06/06)
State v. Gladden Case Below: 176 N.C. App. 190	No. 151P06	1. Def's NOA Based Upon a Constitutional Question (COA05-174) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex mero motu* (05/04/06) 2. Denied (05/04/06)
State v. Hadden Case Below: 175 N.C. App. 492	No. 102P06	1. Def's PWC to Review Decision of COA (COA04-1606) 2. AG's Motion to Dismiss PWC	1.Denied (04/06/06) 2. Dismissed as Moot (04/06/06)

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

State v. Hall Case Below: 175 N.C. App. 248	No. 063P06	Def's PWC to Review Decision of COA (COA05-161)	Denied (05/04/06)
State v. Harden Case Below: Mecklenburg County Superior Court	No. 427A94-2	Def's PWC to Review Order of Mecklenburg County Superior Court	Denied (05/04/06)
State v. Hardy Case Below: Mecklenburg County Superior Court	No. 169A99-2	AG's PWC to Review the Mecklenburg County Superior Court	Denied (04/06/06)
State v. Harley Case Below: 176 N.C. App. 190	No. 167P06	Def's Motion for Temporary Stay (COA05-575)	Denied 04/19/06
State v. Hendricks Case Below: 175 N.C. App. 594	No. 091P06	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1539)	Denied (05/04/06)
State v. Hillier Case Below: 175 N.C. App. 248	No. 032P06	1. Def's NOA Based Upon a Constitutional Question (COA04-1654) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (05/04/06) 3. Denied (05/04/06)
State v. Hinton Case Below: 176 N.C. App. 191	No. 113P06	1. AG's Motion for Temporary Stay (COA05-241) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed 03/08/06 2. Allowed (04/06/06) 3. Allowed (04/06/06)

State v. Hoover Case Below: 174 N.C. App. 596	No. 370P04-2	1. Def's Motion for "Petition for Writ of Certiorari" (COA05-64) 2. Def's Motion for "Petition for Project Release Summary" 3. Def's Motion for "Petition for Writ of Mandamus" 4. Def's Motion for "Petition for Writ Appropriate Relief Order Appeal" 5. Def's Motion for "Petition for a Writ Virtually Request and Order" 6. Def's Motion for "Petition for a Writ on Constitutional Violation on Adjudication Processing" 7. Def's Motion for "Petition for a Writ to Amendment for Motion for Appropriate Relief Certiorari" 8. Def's "Notice of Appealable"	1. Denied (05/04/06) 2. Dismissed (05/04/06) 3. Denied (05/04/06) 4. Dismissed (05/04/06) 5. Dismissed (05/04/06) 6. Dismissed (05/04/06) 7. Dismissed (05/04/06) 8. Dismissed *Ex mero motu* (05/04/06)
State v. Ivey Case Below: 176 N.C. App. 768	No. 182P06	AG's Motion for Temporary Stay (COA05-456)	Allowed 04/11/06
State v. Johnson Case Below: 177 N.C. App. 122	No. 210P06	AG's Motion for Temporary Stay (COA05-758)	Allowed 04/24/06
State v. Jones Case Below: Duplin County Superior Court	No. 497A93-8	Def's Motion for Competency Hearing	Denied (05/04/06)

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

State v. Leak Case Below: 174 N.C. App. 628	No. 664P05	1. AG's Motion for Temporary Stay (COA05-393) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's NOA Based Upon a Constitutional Question	1. Allowed **12/06/05** 360 N.C. 178 **Stay Dissolved 04/06/06** 2. Denied (04/06/06) 3. Denied (04/06/06) 4. Dismissed ex mero motu (04/06/06)
State v. Lewis Case Below: 176 N.C. App. 191	No. 558PA04	AG's Motion for Temporary Stay (COA03-785-2)	Allowed 03/10/06
State v. Martin Case Below: 176 N.C. App. 409	No. 197P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-717)	Denied (05/04/06)
State v. McGee Case Below: 175 N.C. App. 586	No. 077P06	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1338)	Denied (05/04/06)
State v. Mitchell Case Below: 175 N.C. App. 248	No. 041P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-260)	Denied (04/06/06)
State v. Moore Case Below: 175 N.C. App. 421	No. 051P06	1. Def's PDR Under N.C.G.S. § 7A-31 (COA04-1727) 2. AG's Motion to Strike	1. Denied (04/06/06) 2. Dismissed as Moot (04/06/06)
State v. Myers Case Below: 174 N.C. App. 526	No. 660P05	1. AG's Motion for Temporary Stay (COA04-567) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. AG's Motion for Summary Disposition of PDR	1. Allowed 11/29/05 360 N.C. 180 2. Allowed (04/06/06) 3. Allowed (04/06/06) 4. Denied (04/06/06)

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

State v. Peguse Case Below: 173 N.C. App. 642	No. 625P05	1. Def's (Burch) NOA Based Upon a Constitutional Question (COA04-1231) 2. Def's (Burch) PDR Under N.C.G.S. § 7A-31 3. Def's (Hickmon) NOA Based Upon a Constitutional Question 4. Def's (Hickmon) PDR Under N.C.G.S. § 7A-31 5. Def's (Peguse) NOA Based Upon a Constitutional Question 6. Def's (Peguse) PDR Under N.C.G.S. § 7A-31 7. AG's Motion to Dismiss Appeal (Peguse) 8. AG's Motion to Dismiss Appeal (Hickmon) 9. AG's Conditional PDR Under N.C.G.S. § 7A-31 (Peguse) 10. AG's Conditional PDR Under N.C.G.S. § 7A-31 (Hickmon)	1. Dismissed ex mero motu (04/06/06) 2. Denied (04/06/06) 3. —— 4. Denied (04/06/06) 5. —— 6. Denied (04/06/06) 7. Allowed (04/06/06) 8. Allowed (04/06/06) 9. Dismissed as Moot (04/06/06) 10. Dismissed as Moot (04/06/06)
State v. Penland Case Below: Stokes County Superior Court	No. 139A94-2	1. AG's PWC to Review Stokes County Superior Court Order 2. Def's Motion to Dismiss Petition	1. —— 2. Allowed (05/04/06)
State v. Sanders Case Below: 177 N.C. App. 150	No. 226P06	Def's PDR Uunder N.C.G.S. § 7A-31 (COA05-608)	Denied (05/04/06)
State v. Stanley Case Below: 150 N.C. App. 717	No. 376P02-4	Def's Motion for "Petition for Writ of Certiorari" (COA01-651)	Denied (04/06/06)
State v. Stephens Case Below: Johnson County Superior Court	No. 010A96-3	Def's PWC to Review Order of Johnston County Superior Court	Denied (05/04/06)
State v. Terry Case Below: 168 N.C. App. 409	No. 100P06	1. Def's PDR Under N.C.G.S. § 7A-31 (COA04-959) 2. Def's PWC to Review Order of Forsyth County Superior Court	1. Dismissed (04/06/06) 2. Denied (04/06/06)

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

State v. Watson Case Below: 175 N.C. App. 796	No. 120P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-144)	Denied (04/06/06)
State v. Williams Case Below: 175 N.C. App. 596	No. 105P06	1. Def's PDR Under N.C.G.S. § 7A-31 (COA05-375) 2. Def's Motion to Stay the Mandate	1. Dismissed (04/06/06) 2. Dismissed 03/06/06
State v. Williams Case Below: 174 N.C. App. 629	No. 710P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-824)	Denied (04/06/06)
State v. Williamson Case Below: 175 N.C. App. 796	No. 139P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-290)	Denied (05/04/06)
State ex rel. Utilities Comm'n v. Carolina Power & Light Co. Case Below: Utilities Comm'n	No. 649A03-2	1. Appellants' (Duke Power & N.C. Electric Membership Corp.) Motion to Dismiss Appeal (Utilities Comm'n) 2. Appellants' (NCMPA#1 and NCEMPA) Motion to Dismiss Appeal	1. Allowed 04/20/06 2. Allowed 04/20/06
Van Reypen Assocs. v. Teeter Case Below: 175 N.C. App. 535	No. 084P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-515)	Allowed (04/06/06)
Walker v. Walker Case Below: 174 N.C. App. 778	No. 053P06	Def's (Wayne Charles Walker) PDR Under N.C.G.S. § 7A-31 (COA04-1601)	Denied (05/04/06)
Willen v. Hewson Case Below: 174 N.C. App. 714	No. 011P06	1. Def's PDR Under N.C.G.S. § 7A-31 (COA05-81) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Denied (04/06/06) 2. Denied (04/06/06)
Williams v. CSX Transp., Inc. Case Below: 176 N.C. App. 330	No. 190P06	1. Def's PDR Under N.C.G.S. § 7A-31 (COA05-488) 2. Def's Motion to Withdraw PDR	1. —— 2. Allowed (05/04/06)

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

Williams v. Nationwide Mut. Ins. Co. Case Below: 174 N.C. App. 601	No. 712P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-995)	Allowed (04/06/06) **Martin, J., Recused**
Woodlief v. Mecklenburg Cty. Case Below: 176 N.C. App. 205	No. 161P06	1. Plt's PDR Uunder N.C.G.S. § 7A-31 (COA05-564) 2. Plt's Motion to Dismiss PDR	1. —— 2. Allowed (05/04/06)

PETITION TO REHEAR

Nolan v. Village of Marvin Case Below: 360 N.C. 256	No. 488A05	Respondent's Petition for Rehearing	Denied (04/06/06) **Martin, J., Edmunds, J., Recused**

COLEY v. STATE

[360 N.C. 493 (2006)]

DIANA L. COLEY, GERALD L. BASS, JOHN WALTER BRYANT, RONALD C. DILTHEY, AND ALL OTHER TAXPAYERS SIMILARLY SITUATED v. STATE OF NORTH CAROLINA AND NORRIS TOLSON, SECRETARY OF REVENUE

No. 607A05

(Filed 30 June 2006)

Taxation— mid-year income tax change—other act—not retrospective

The imposition of a tax on income is a tax on an "other act" under Article I, Section 16 of the North Carolina Constitution, which forbids the retrospective taxation of sales, purchases, or other acts previously done. However, the mid-year income tax increase at issue here is not retrospective because plaintiffs' taxable income was not fixed until the end of the tax year, so that the tax operated prospectively from the date of enactment.

Justice BRADY 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, 173 N.C. App. 481, 620 S.E.2d 25 (2005), affirming an order and judgment allowing defendants' motion to dismiss entered 6 August 2004 by Judge Henry V. Barnette, Jr. in Superior Court, Wake County. Heard in the Supreme Court 13 March 2006.

Boyce & Isley, PLLC, by G. Eugene Boyce and Philip R. Isley, for plaintiff-appellants.

Roy Cooper, Attorney General, by Kay Linn Miller Hobart, Special Deputy Attorney General, for defendant-appellees.

EDMUNDS, Justice.

In this case, we consider whether the provision of the North Carolina Constitution that forbids a retrospective tax on "acts previously done" applies to a midyear tax increase on income. For the reasons given below, we hold that Article I, Section 16 of the North Carolina Constitution applies to such an increased tax but that the increase here is not unconstitutionally retrospective. Accordingly, we modify and affirm the opinion of the Court of Appeals.

On 26 September 2001, Governor Michael Easley signed into law Session Law 2001-424, titled the "Current Operations and Capital

Improvements Appropriations Act of 2001." Current Operations and Capital Improvements Act, ch. 424, 2001 N.C. Sess. Laws 1670. Section 34.18.(a) of this Session Law rewrote portions of N.C.G.S. § 105-134.2(a) and enacted a temporary new income tax bracket for individuals with high incomes, increasing the highest marginal tax rate from 7.75 percent to 8.25 percent. *Id.*, sec. 34.18.(a) at 2108-10. Pursuant to Section 34.18.(b), the new bracket became "effective for taxable years beginning on or after January 1, 2001" and, at the time of its passage, was scheduled to expire "for taxable years beginning on or after January 1, 2004." *Id.*, sec. 34.18.(b) at 2110.

Plaintiffs filed their 2001 personal income tax returns under protest, then on 25 April 2003 filed suit under N.C.G.S. § 105-267 in Wake County Superior Court as "citizens and taxpayers of the State of North Carolina." Plaintiffs' complaint was a purported class action on behalf of themselves and all persons similarly situated. They sought a judgment declaring that the above-cited portion of Section 34.18.(b) of Session Law 2001-424 violates the provision of Article I, Section 16 of the North Carolina Constitution that states: "No law taxing retrospectively sales, purchases, or other acts previously done shall be enacted." In addition, plaintiffs prayed for refunds on all "taxes paid on wages, earnings and other taxable income . . . for the 271 day period [from] January 1, 2001 through September 28, 2001" or, in the alternative, "refunds for all excess taxes paid on acts done during the entire year." The matter was designated as exceptional by the Chief Justice pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts.

Defendants filed consolidated motions to dismiss and to strike portions of the complaint. Plaintiffs subsequently filed motions for judgment on the pleadings and for summary judgment. Following a hearing on all these motions, the trial court filed a memorandum of decision and on 6 August 2004 entered an order denying plaintiffs' motion for summary judgment and allowing defendants' motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). Plaintiffs entered notice of appeal to the Court of Appeals and, on 4 October 2005, a divided panel affirmed the trial court's ruling. *Coley v. State*, 173 N.C. App. 481, 620 S.E.2d 25 (2005). Plaintiffs appeal to this Court on the basis of the dissent.

We review the trial court's dismissal of plaintiffs' suit to determine "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Thompson v. Waters*, 351 N.C. 462, 463, 526 S.E.2d

650, 650 (2000). Plaintiffs contend that Section 34.18 of Session Law 2001-424 is retrospective because it requires payment of taxes on income earned from 1 January 2001 to the date of the law's signing on 26 September 2001, thereby taxing income-producing "acts previously done." Defendants respond that the legislation taxes income, not "acts," and thus falls outside the purview of the constitutional prohibition. Accordingly, we must make two related inquiries. First, is Session Law 2001-424 a tax upon acts, or, phrased differently, does Article I, Section 16 apply to an increase in income tax rates? Second, if so, does Session Law 2001-424 tax retrospectively? *See Unemployment Comp. Comm'n v. Wachovia Bank & Tr. Co.*, 215 N.C. 491, 501, 2 S.E.2d 592, 599 (1939).

The genesis of the constitutional provision in question was legislation creating criminal liability for failure to pay taxes on previous purchases. *See* John V. Orth, *The North Carolina State Constitution: A Reference Guide* 53 (1993) [hereinafter Orth, *State Constitution*] (noting that the rationale for the ban on retrospective tax laws "would seem to be similar to that for . . . retrospective criminal laws"). Specifically, in *State v. Bell*, this Court upheld the conviction of the defendant, a merchant who refused to pay a tax levied on all purchases made by those "buying or selling goods, wares or merchandise of whatever name or description." 61 N.C. 78, 81, 61 N.C. (Phil.) 76, 80 (1867). Although the statute was ratified on 18 October 1865, it "was to apply and operate during the twelve months next preceding the first of January, 1866." *Id.* at 82, 61 N.C. (Phil.) at 80. The defendant offered to pay the tax on his purchases made after 18 October 1865, but he refused to pay taxes on purchases before that date and was convicted of a misdemeanor. *Id.* at 82, 61 N.C. (Phil.) at 81.

On appeal, the defendant argued that the tax was unconstitutional and void either as an *ex post facto* law or as a retrospective law "against the spirit . . . of the Constitution." *Id.* at 82-83, 61 N.C. (Phil.) at 81-82. We observed that *ex post facto* laws apply only "to matters of a criminal nature" and held that the law was prospective "in respect to [the defendant's] criminality" because the defendant could avoid all criminal liability by paying the tax. *Id.* at 83, 61 N.C. (Phil.) at 81-82. We then discussed the State's "large and essential power" to tax, *id.* at 85, 61 N.C. (Phil.) at 86, and reasoned that without some particular "repugnancy to the Constitution of the United States or of the State," *id.* at 84, 61 N.C. (Phil.) at 83, we could "see nothing to prevent the people from taxing themselves [retrospectively], either

through a convention or a legislature," *id.* at 85-86, 61 N.C. (Phil.) at 86. Accordingly, the defendant's conviction was affirmed.

Shortly after we issued our opinion in *Bell*, the North Carolina Constitutional Convention of 1868 convened. The Journal from the Convention illustrates that preliminary versions of the draft Constitution contained in the Declaration of Rights a provision against *ex post facto* laws. *Journal of the Constitutional Convention of the State of North Carolina* 168, 213 (Raleigh, Joseph W. Holden 1868) [hereinafter *Convention Journal*]. However, the provision did not include a prohibition against retrospective taxation until delegate William B. Rodman,[1] an attorney, moved to add the following language: "No law taxing retrospectively sales, purchases, or other acts previously done ought to be passed." *Id.* at 216. As detailed below, plaintiffs argue that Rodman's personal papers[2] indicate that he was aware of the *Bell* decision and suggest that the holding in that case influenced his motion. Rodman's amendment was adopted, and the final version, "Retrospective laws, punishing acts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore, no *ex post facto* law ought to be made. No law taxing retrospectively, sales, purchases, or other acts previously done, ought to be passed[,]" appeared in Article I, Section 32 of the Constitution approved in April of 1868. *Id.* at 216, 230; *see also* Orth, *State Constitution* 13.

In November of 1970, North Carolina voters ratified a revised and amended state constitution generally known as the 1971 Constitution. *See Stephenson v. Bartlett*, 355 N.C. 354, 367, 562 S.E.2d 377, 387 (2002) (citing John L. Sanders, *Our Constitutions: An Historical Perspective*, *in* Elaine F. Marshall, N.C. Dep't of Sec'y of State, *North Carolina Manual 1999-2000*, at 125, 134). Article I, Section 32, while remaining in the Declaration of Rights, was renumbered as Section 16 and the language slightly altered, with the word "shall" replacing "ought to." N.C. Const. art. I, § 16.

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1. Rodman later served as an Associate Justice on this Court and authored at least two opinions concerning taxation. *See Young v. Town of Henderson*, 76 N.C. 420 (1877); *Pullen v. Comm'rs of Wake Cty.*, 66 N.C. 361 (1872).

2. Plaintiffs' complaint included as exhibits copies of Rodman's papers. Later, with plaintiffs' consent, the trial court struck portions of these exhibits. Plaintiffs cite us to these exhibits in their brief and arguments. Because our review of the issue of constitutional interpretation at bar is *de novo*, *see Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001), *cert. denied*, 535 U.S. 971, 152 L. Ed. 2d 381 (2002), we will review all parts of the record that might assist our analysis.

Plaintiffs contend that the increased income tax imposed in Session Law 2001-424 violates this provision. They take an historical approach, arguing that Rodman's papers demonstrate that he proposed amendments to the 1868 Constitutional Convention relating to retrospective taxation. According to plaintiffs, under Rodman's leadership, the Convention initially considered an amendment to Article I, Section 32 stating that "sales, purchases and other transactions previously done" could not be taxed retrospectively, but ultimately chose to use the broader term "other acts" in lieu of "other transactions." Plaintiffs then maintain that the Convention's decision to use the more expansive term "acts" signals the Framers' intent that the earning of income is an "other act[]" that cannot be taxed retrospectively.

Although the papers cited by plaintiffs are provocative and may well reflect the evolution of Rodman's thoughts as he experimented with alternative versions of his amendment, the Journal of the Convention does not indicate that the term "transactions" was ever proposed or that the delegates in session ever considered it. The strongest implication of the papers, read in light of the *Bell* opinion, is that Rodman was more concerned with the retrospective nature of a tax than with the subject of a tax. *See also* Henry G. Connor & Joseph B. Cheshire, Jr., *The Constitution of The State of North Carolina Annotated* 105 (1911) ("Before the adoption of this clause by the Convention of 1868, laws, taxing retrospectively acts previously done, were valid."). Ultimately, we are able to conclude with confidence no more than that Rodman proposed an amendment to then-Article I, Section 32 containing a ban on retrospective taxation on "sales, purchases, or other acts previously done" and that the amendment was adopted. *Convention Journal* 216.

Plaintiffs also argue that *Young v. Town of Henderson*, 76 N.C. 420 (1877), written by Rodman after he joined this Court, supports their position. However, the tax involved in *Young* was levied on "merchandise *purchased*" in the approximately twelve months prior to the enactment of the tax, and such a tax was expressly forbidden by Article I, Section 32. *Id.* at 423-24 (emphasis added). Accordingly, *Young* is inapposite to the present case.

Although we decline to adopt plaintiffs' historical analysis, we nevertheless must determine the proper interpretation of this constitutional provision. The principles governing constitutional interpretation are generally the same as those " ' "which control in ascertaining the meaning of all written instruments." ' " *Stephenson*, 355

N.C. at 370, 562 S.E.2d at 389 (citation omitted). In determining the will or intent of the people as expressed in the Constitution, " 'all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument.' " *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) (quoting *State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944)); *see also Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953) ("Constitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption."). *See generally* 5A Strong's North Carolina Index 4th: *Constitutional Law* §§ 8-9 (2000).

If the meaning of the language of Article I, Section 16 is plain, we must follow it. *Martin v. State*, 330 N.C. 412, 416, 410 S.E.2d 474, 476 (1991); *see also Preston*, 325 N.C. at 449, 385 S.E.2d at 479 ("In interpreting our Constitution[,] . . . where the meaning is clear from the words used, we will not search for a meaning elsewhere."). Here, the second sentence of Article I, Section 16 states: "No law taxing retrospectively sales, purchases, *or other acts* previously done shall be enacted." N.C. Const. art. I, § 16 (emphasis added). While the language is straightforward enough, we cannot in good faith find that the phrase "other acts" is unambiguous on its face and that it unquestionably covers an increase in income tax. Accordingly, we will consider both the context in which this language appears and our precedent. *See Preston*, 325 N.C. at 449, 385 S.E.2d at 478 (" 'The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected.' " (quoting *Emery*, 224 N.C. at 583, 31 S.E.2d at 860)); *Elliott v. State Bd. of Equalization*, 203 N.C. 749, 753, 166 S.E. 918, 921 (1932) ("[W]e may have recourse to former decisions, among which are several dealing with the subject under consideration.").

As to the phrase "other acts" in the context of Article I, Section 16, while we are not persuaded by plaintiffs' interpretation of the historical record, we agree with their observation that the phrase "other acts" is broader than the preceding terms in the sentence, "sales" and "purchases." N.C. Const. art I, § 16. The drafters did not choose a limiting term, but instead used language that can encompass a range of conduct. *See Elliott*, 203 N.C. at 753, 166 S.E. at 921 ("[W]e may resort to the natural significance of the words employed and if they embody a definite meaning and involve no absurdity or contradiction we are at liberty to say that the meaning apparent on the face of the instru-

ment is the one intended to be conveyed."). Thus, we are satisfied that the use of the expansive term "other acts" in the Constitution indicates that the drafters intended an inclusive interpretation of the phrase. Accordingly, we believe that the earning of income is such an "other act[]" covered by Article I, Section 16.

Our contextual interpretation is supported by one of the few other cases from this Court construing the language of Article I, Section 16. In *Unemployment Compensation Commission v. Wachovia Bank & Trust Co.*, we addressed the meaning of "other acts" in the context of the North Carolina Unemployment Compensation Law. 215 N.C. at 499-501, 2 S.E.2d at 598-99; *see also* Unemployment Compensation Law, ch. 1, 1936 N.C. Pub. [Sess.] Laws 1 (Extra Sess. 1936). Ratified by the General Assembly on 16 December 1936, this public law required "contributions" from employers "with respect to wages payable for employment" beginning with the 1936 calendar year. Ch. 1, sec. 7.(a), 1936 N.C. Pub. [Sess.] Laws (Extra Sess. 1936) at 8. Employers affected were those that on or subsequent to 1 January 1936, "had in [their] employ one or more individuals performing services for [them] within this State." *Id.*, sec. 19(e) at 24. In addition, employers were subject to the tax if "in each of twenty different weeks within either the current or the preceding calendar year . . . [they] had in employment, eight or more individuals." *Id.*, sec. 19(f) at 25.

The defendant bank argued that the tax was unconstitutionally retrospective because the public law, while not ratified until 16 December 1936, required that each employer make contributions for all of 1936. *Unemployment Comp. Comm'n*, 215 N.C. at 499-500, 2 S.E.2d at 598. Although we agreed with the defendant's argument, *Unemployment Compensation Commission* is now particularly pertinent because of the nature of the arguments made to us in that case.

The defendant in *Unemployment Compensation Commission* maintained that the public law then at issue, the Unemployment Compensation Law, impermissibly imposed a retrospective tax on "other acts previously done." In response, the plaintiff state agency argued in its brief to this Court that, in construing the predecessor to Article I, Section 16, "[u]nder the rule of statutory construction, EJUSDEM GENERIS, where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable to persons and things of the same general nature or class as those specifically enumerated" and therefore the term "acts" had a meaning that conformed to the definitions of

"sales" and "purchases." Based on this canon, the plaintiff contended that the tax in question was not imposed on an "other act[]" and accordingly that language in Article I, Section 32 did not even apply to the public law.

Defendants here similarly argue that, under the doctrine of *ejusdem generis*, the term "other acts" should be read restrictively because it appears in a series with the terms "sales" and "purchases" and therefore is not applicable to a tax on income. In the following discussion, we assume without deciding that the canon of *ejusdem generis* extends to constitutional interpretation. *See Baker v. Martin*, 330 N.C. 331, 337, 410 S.E.2d 887, 891 (1991).

We apparently concluded that the canon was not applicable in *Unemployment Compensation Commission* because the doctrine is not mentioned in the opinion. Instead, we held in that case that Article I, Section 32 applied to the public law in question, observing that the required "contributions [were] in the nature of a tax . . . based upon the act of contracting for employment and the payment of wages for services rendered." *Unemployment Comp. Comm'n*, 215 N.C. at 501, 2 S.E.2d at 599. Moreover:

> [T]he requirement that employers make contributions "in respect to employment" is *in effect a tax upon an act or acts*. If it be considered a tax upon the maintenance of the status of an employer, *even then it is essentially a tax upon an act*. To maintain the status of an employer one must employ and pay wages.

Id. (emphases added). Thus, in 1939, we declined the express opportunity to limit the phrase "other acts" as similarly proposed here by defendants. We will follow our lead from that case and conclude that if "the maintenance of the status of an employer" constitutes an act that falls within the scope of Article I, Section 16, the term "other acts" applies equally to income-producing activities.

In sum, the Constitution should be given an interpretation "based upon broad and liberal principles designed to ascertain the purpose and scope of its provisions." *Elliott*, 203 N.C. at 753, 166 S.E. at 920-21; *see also Perry*, 237 N.C. at 444, 75 S.E.2d at 514. Accordingly, consistent both with the intent of the drafters and with our own precedent, we hold that the imposition of a tax on income is a tax on an "other act[]" under Article I, Section 16.

We next address whether Session Law 2001-424 impermissibly enacted a law "taxing retrospectively." N.C. Const. art. I, § 16. Plain-

tiffs point out that Section 34.18.(b) of Session Law 2001-424 states that the "section becomes effective for taxable years beginning on or after January 1, 2001, and expires for taxable years beginning on or after January 1, 2004." Ch. 424, sec. 34.18.(b), 2001 N.C. Sess. Laws at 2110. Plaintiffs contend that for the nine months between the beginning of 2001 and the enactment of the statute on 26 September 2001, they paid the then-required 7.75 percent "tax on income from their sales and purchases of capital assets and on their income earned from labor," but that the higher tax rate in "Session Law 2001-424 imposed a new duty on taxpayers with respect to these past transactions." Defendants respond that the law operated prospectively because the taxable period had not closed as of the date of enactment and therefore the taxpayers' "net income" did not yet exist.

"The power to tax is the highest and most essential power of the government, and is an attribute of sovereignty, and absolutely necessary to its existence." *New Hanover Cty. v. Whiteman*, 190 N.C. 332, 334, 129 S.E. 808, 809 (1925); *see also Pullen v. Comm'rs of Wake Cty.*, 66 N.C. 361, 362 (1872). Article V, Section 2 of the North Carolina Constitution addresses state and local taxation. The income tax provision, found in subsection (6), limits the rate of tax on incomes to a maximum of ten percent and provides that "there shall be allowed personal exemptions and deductions so that only *net incomes* are taxed." N.C. Const. art. V, § 2(6) (emphasis added).

Section 105-134.2 of the North Carolina General Statutes imposes the individual income tax authorized by the Constitution and sets out the applicable percentages of the taxpayer's North Carolina taxable income to be used in computing the tax. N.C.G.S. § 105-134.2 (2005). Section 34.18.(a) of Session Law 2001-424 rewrote a substantial portion of N.C.G.S. § 105-134.2(a) by substituting tables that reflected a new upper income tax bracket and marginal rate increase. Ch. 424, sec. 34.18.(a), 2001 N.C. Sess. Laws at 2108-10. Otherwise, relevant portions and language of the Individual Income Tax Act generally remained the same and continue in force. *Compare* N.C.G.S. §§ 105-134 to -134.7 (2001) (superseded) *with* N.C.G.S. §§ 105-134 to -134.7 (2005).

The State individual income tax "is imposed upon the North Carolina taxable income of every individual" and is "levied, collected, and paid annually." N.C.G.S. § 105-134.2(a). According to N.C.G.S. § 105-134.1(16), the definition of "taxable income" is found in section 63 of the Internal Revenue Code ("the Code"). In general, the Code defines taxable income as "gross income minus the deductions

allowed by [that] chapter," I.R.C. § 63(a) (2000), or, for the "individual who does not elect to itemize his deductions for the taxable year, . . . [as] adjusted gross income, minus . . . the standard deduction . . . and . . . the deduction for personal exemptions," *id.* § 63(b) (2000); *see also id.* § 61 (2000) (defining "gross income"); *id.* § 62 (2000) (defining "adjusted gross income"). A resident taxpayer's "North Carolina taxable income" is one's federal taxable income determined under the Code as adjusted by N.C.G.S. §§ 105-134.6 and 105-134.7. *See* N.C.G.S. § 105-134.5 (2005) ("North Carolina taxable income defined.").

North Carolina taxable income is calculated "on the basis of the *taxable year* used in computing the taxpayer's income tax liability under the Code." *Id.* § 105-134.4 (2005) (emphasis added); *see also id.* § 105-134.1(17) (2005) (defining "taxable year" as provided in section 441(b) of the Code); *id.* § 105-134.3 (2005) (stating that except as provided in Article 4A, the income tax imposed "shall be assessed, collected, and paid in the taxable year following the taxable year for which the assessment is made"). Section 441(b) of the Code indicates that the term "taxable year" can assume several meanings, including, *inter alia*, "the taxpayer's annual accounting period" if the period is either a calendar or fiscal year, or "the calendar year" if subsection (g) applies to the taxpayer. I.R.C. § 441(b) (2000). *See generally* Boris I. Bittker et al., *Federal Income Taxation of Individuals* ¶ 39.01[1]-[2], at 39-3 to -5 (3d ed. 2002) (introducing the basic principles of tax accounting methods and discussing the "taxable year"). These statutes demonstrate that the concepts of "income" and "taxable year" are intertwined and that income is determined and the North Carolina tax thereon is imposed on an annual basis. *See* N.C.G.S. § 105-134 (2005) ("The general purpose of this Part is to impose a tax for the use of the State government upon the taxable income collectible annually . . . ."); *id.* § 105-134.2(a) ("The tax shall be levied, collected, and paid annually . . . .").

Citing portions of Articles 4 ("Income Tax") and 4A ("Withholding; Estimated Income Tax for Individuals") in The Revenue Act, plaintiffs argue that income taxes are not paid annually upon the filing of the April 15 tax return. *See id.* §§ 105-133 to -163.24 (2005). Plaintiffs instead point out that many taxpayers either have taxes withheld from their wages or make estimated quarterly payments and often overpay so that they are due a refund when they file their April 15 tax returns. Plaintiffs contend that these and other similarly situated taxpayers are paying their income taxes as the income is earned.

Consequently, according to plaintiffs, the tax in question is retrospective because it increases the tax on income that has already been earned and for which the tax was due when earned.

However, a close reading of Article 4A reveals that a taxpayer's final income tax liability is not fixed until the taxpayer's annual income is determined. For example, while N.C.G.S. § 105-163.2(a) mandates that employers withhold "from the wages of each employee the State income taxes payable by the employee on the wages," the amount withheld by the employer is an "approximat[ion] [of] the employee's income tax liability under Article 4." *Id.* § 105-163.2(a). In addition, this statute advises employers how to calculate "an employee's *anticipated* income tax liability." *Id.* (emphasis added). We do not necessarily disagree with plaintiffs' labeling of such withholding and estimated tax provisions as "pay-as-you-go" tax collection, but this characterization does not trump the language of either our prior opinions or the pertinent statutes in Chapter 105, Article 4, Part 2 of the North Carolina General Statutes. *See* N.C.G.S. § 105-163.24 (requiring that Article 4A "be liberally construed in pari materia with Article 4"). As we previously observed:

> The withholding of taxes by the employer is based on an estimate of the employee's ultimate tax liability; an employee's *tax liability is not established until the employee files a tax return for the particular tax year*. The actual tax liability may vary depending on numerous factors, such as, the amount of any itemized deductions, the number of the taxpayer's dependents, and the amount of any other income.

Evans v. AT&T Techs., Inc., 332 N.C. 78, 89, 418 S.E.2d 503, 510 (1992) (emphasis added). While we acknowledge that this statement was made in the context of a discussion of deductions and credits allowed to employers for payments to injured employees and that the issue of when income taxes are due was not then before us, the quoted language is consistent with our holding that a taxpayer's North Carolina taxable income and ultimate tax liability or overpayment are indeterminate until the close of the taxable year.

Accordingly, we agree with defendants that Session Law 2001-424 as codified in N.C.G.S. § 105-134.2(a) does not tax plaintiffs retrospectively. The subject of the enacted tax is the "North Carolina taxable income" of the individual taxpayer which, by statutory definition, is computed "on the basis of the taxable year." N.C.G.S. § 105-134.4. Regardless of whether one's taxable year pursuant to

section 441(b) of the Code is determined by the taxpayer's annual accounting period or by the calendar year, a citizen's taxable income and corresponding tax liability or overpayment are not fixed until the close of that year. *See United States v. Consol. Edison Co. of N.Y.*, 366 U.S. 380, 384, 6 L. Ed. 2d 356, 360 (1961) ("It is settled that each 'taxable year' must be treated as a separate unit, and all items of gross income and deduction must be reflected in terms of their posture at the *close of such year*." (emphasis added)), *superseded by statute on other grounds as stated in Consol. Freightways, Inc. v. Comm'r*, 708 F.2d 1385, 1392 (9th Cir. 1983). Because plaintiffs' taxable income was not fixed at the date of enactment, the midyear tax rate increase implemented by Session Law 2001-424 was not levied until the conclusion of the taxable year. Consequently, the tax at issue operated prospectively from the date of enactment and does not violate Article I, Section 16 of the North Carolina Constitution.

Based on the foregoing, the opinion of the Court of Appeals affirming the trial court's grant of defendants' motion to dismiss is affirmed as modified.

MODIFIED AND AFFIRMED.

Justice BRADY, concurring in part and dissenting in part.

While I fully concur with the majority's conclusion that income taxation is encompassed by Article I, Section 16 of the North Carolina Constitution, I am compelled to dissent as to the majority's determination that the tax increase at issue is not retrospective. The majority holds a tax rate increase on previously completed income-producing acts is a prospective tax. The necessary conclusion which emanates from the majority's opinion is that the act of earning income does not occur until the end of the taxable year. This result defies logic.

An "act" is defined as "a thing done or being done." *Webster's Third New International Dictionary* 20 (16th ed. 1971). The definition of "retrospective" is "contemplative of or relative to past events." *Id.* at 1941. Thus, to retrospectively tax an act means to tax a completed "thing" done in the past. The plain language of Article I, Section 16 prohibits the subsequent taxation of completed acts which either produce some sort of profit or entitle an individual to the receipt of income.

It is instructive to note the provision prohibiting retrospective taxation appears in the same section as the North Carolina constitutional prohibition against the enactment of ex post facto laws. While it is clear the prohibition on ex post facto laws applies only to criminal law, and not to civil laws, the concept behind the ban on both retrospective taxation and ex post facto criminal laws is strikingly similar. As a preeminent North Carolina constitutional law scholar has noted: "The rationale [for the Article I, Section 16 prohibition on retrospective taxation] would seem to be similar to that for the ban on retrospective criminal laws. To the extent one could have avoided the event that is taxed, it is unjust not to give the taxpayer the chance." John V. Orth, *The North Carolina State Constitution with History and Commentary* 53 (1995). Following this analysis, it would seem "unjust not to give the taxpayer the chance" to avoid an income-producing activity before imposing an increased tax on that activity. *Id.* Unless the majority has access to H.G. Wells's time machine, the acts performed by plaintiffs before the passage of this tax rate increase cannot be undone. Adherence to Article I, Section 16 allows the citizen to plan his or her dealings based upon the tax structure as it exists at the time the income-producing act is performed. An arbitrary definition of "earning income" created for administrative convenience robs the citizen of the opportunity to plan and shackles the taxpayer with an increased financial burden. I cannot turn a blind eye, as the majority does, to the lengthy nine month period covering this retrospective tax rate increase, which blatantly ignores the people's expectation of stable and predictable taxation.

This Court's precedent surrounding Article I, Section 16 strongly supports the proposition that this provision's purpose is to prohibit the retrospective taxation of *finite* acts—epitomized by mercantile activities. One need look no further than the origin of the Article I, Section 16 prohibition on retrospective taxation to understand which activities the drafters meant to protect through this constitutional provision. Article I, Section 16 was amended in direct response to *State v. Bell*, 61 N.C. 78, 61 N.C. (Phil.) 76 (1867). In *Bell*, the Court was compelled to hold a retrospective tax on merchant activity constitutionally permissible because the Court found nothing in the North Carolina Constitution to prevent such legislation. *Id.* at 82-86, 61 N.C. (Phil.) at 81-86.

The finite merchant activities in *Bell* which prompted the amendment were very similar to those activities being retrospectively taxed

in *Young v. Town of Henderson*, 76 N.C. 420, 423-24 (1877). Yet, the outcome was very different in *Young*. The Court, applying the then new Article I, Section 16 prohibition on retrospective taxation for the first time, found the retrospective taxation of the finite merchant activities to be unconstitutional. *Id.* at 424. We can confidently rely, from this Court's precedent interpreting Article I, Section 16, that merchant-like activities, which are complete the moment they occur, cannot be retrospectively taxed.

The earning of income is very similar to the merchant activities subjected to what is now unconstitutional retrospective taxation as addressed in *Bell* and *Young*. North Carolinians are all merchants of their labor, and therefore the completion of a commercial mercantile transaction is essentially the same as the completion of one month, one day, or one hour of an individual's toil and labor. Whether a merchant sells a product or an individual supplies eight hours of manual labor, an act has been completed. In both cases someone is entitled to, if not immediately presented with, some sort of compensation and incurs a corresponding tax obligation. The retrospective tax rate increase on completed income-producing activities, like the retrospective taxation of completed merchant transactions, violates Article I, Section 16.

In this regard, it seems illogical to cast aside the true definition of an income-producing act in favor of the General Assembly's annual perspective on income-producing activities, as the majority does today. Were the General Assembly to tax income on a twelve year basis, would the public be subject to new taxes on income-producing acts that were completed nine years ago? In the simplest terms, the majority condones the General Assembly's unconstitutional increase of the tax rate on income-producing activities up to nine months after completion of the activities subject to taxation. Simply because the State chooses to tax income on an annual basis does not negate the fact that income is truly earned moment by moment. I do not believe the General Assembly's use of the word "annual" with regards to taxing income magically relieves the Assembly of its constitutional duty to refrain from retrospectively taxing acts. I respectfully dissent.

STATE v. NORRIS

[360 N.C. 507 (2006)]

STATE OF NORTH CAROLINA v. NATHAN NORWOOD NORRIS, JR.

No. 486A05

(Filed 30 June 2006)

1. Appeal and Error— appealability—*Blakely* issue—dissent in Court of Appeals—presentation in Court of Appeals brief

The State's appeal of a *Blakely* issue was properly before the Supreme Court even though defendant raised his *Blakely* claim through a motion for appropriate relief filed with the Court of Appeals because (1) the State had a right to appeal when there was a dissent on the issue in the Court of Appeals, N.C.G.S. § 7A-30; and (2) defendant pressed his *Blakely* claim in the Court of Appeals both in the motion for appropriate relief and in his appellate brief, and nothing in N.C.G.S. § 15A-1422 prohibits the Supreme Court from addressing issues presented in a party's brief in the Court of Appeals.

2. Sentencing— presumptive sentence—failure to submit aggravating factors to jury

A trial court did not violate defendant's Sixth Amendment right to a jury trial in a first-degree arson case, as construed in *Blakely v. Washington*, 542 U.S. 296 (2004), and *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), when it found an aggravating factor but sentenced defendant within the presumptive range, because: (1) judicial fact-finding does not trigger the Sixth Amendment right to jury trial so long as trial courts sentence inside the presumptive or, a fortiori, the mitigated range; and (2) although the Structured Sentencing Act directed the trial court to find aggravating and mitigating factors only if sentencing outside the presumptive range, the court's actions did not jeopardize the values underlying the Sixth Amendment since the trial court in finding aggravating and mitigating factors merely exercised the discretion our legal system has always demanded of individuals charged with passing judgment on their fellow citizens.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 172 N.C. App. 722, 617 S.E.2d

298 (2005), finding no prejudicial error in defendant's trial, which resulted in a judgment imposing a sentence of fifty-one to seventy-one months imprisonment entered by Judge Gary L. Locklear on 3 October 2003 in Superior Court, Robeson County, but remanding the case for resentencing. Heard in the Supreme Court 15 February 2006.

Roy Cooper, Attorney General, by Christopher W. Brooks, Assistant Attorney General, for the State-appellant.

Nora Henry Hargrove for defendant-appellee.

NEWBY, Justice.

The issue is whether the trial court violated the defendant's Sixth Amendment right to jury trial, as construed in *Blakely v. Washington*, 542 U.S. 296 (2004), and *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), when it found an aggravating factor but imposed a sentence within the presumptive range. Because we hold these facts do not implicate the Sixth Amendment, we reverse the Court of Appeals.

I. BACKGROUND

Following his indictment for first-degree arson, defendant was tried during the 30 September 2003 Criminal Session of Robeson County Superior Court. Evidence introduced at trial showed that, on 29 January 2003, defendant's wife, Jessica Wood ("Jessica"), informed defendant she no longer loved him. Defendant thereafter drove Jessica to a mobile home in St. Pauls where Jessica's mother, Peggy Wood ("Ms. Wood"), lived with her son (age twelve) and other daughter (age seventeen). The couple argued during the drive, and as Jessica left the automobile, defendant said, "If I was you, I'd sleep light tonight." Defendant made his way to a service station, where he partially filled a twenty-ounce bottle with gasoline. Defendant returned to Ms. Wood's residence and poured the gasoline onto one of its walls. He used a lighter to ignite the fuel and then fled the scene. Hearing an explosion, Ms. Wood awoke and saw flames through her bedroom window. She roused her children, and the family escaped outside. The mobile home sustained fire and smoke damage to its exterior.

On 3 October 2003, a jury convicted defendant of first-degree arson. Explaining it planned to sentence in the presumptive range, the trial court expressed uncertainty as to whether it should find

aggravating and mitigating factors. After the prosecutor recommended making findings, the trial court found as a statutory aggravating factor that defendant had "knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." N.C.G.S. § 15A-1340.16(d)(8) (2005). The court also found multiple statutory mitigating factors: (1) prior to arrest defendant had "voluntarily acknowledged [his] wrongdoing to a law enforcement officer"; (2) defendant enjoyed a "support system in the community"; and (3) he possessed a "positive employment history or [was] gainfully employed." *Id.* § 15A-1340.16(e)(11), (18), (19). The court weighed the one aggravating factor against the three mitigating factors and sentenced defendant to imprisonment for fifty-one to seventy-one months, a sentence within the presumptive range.

In 2004, while defendant's appeal to the Court of Appeals was pending, the United States Supreme Court announced its decision in *Blakely v. Washington*. There, the Supreme Court held that a trial court violates a defendant's Sixth Amendment right to jury trial if it finds any fact, other than the fact of a prior conviction, which increases the penalty for a crime beyond the prescribed statutory maximum.[1] 542 U.S. at 301. According to *Blakely*, unless the defendant admits to them, such facts must be submitted to a jury and proved beyond a reasonable doubt. *Id.* This Court first applied *Blakely* in *State v. Allen*, concluding therein that *Blakely* errors entail mandatory resentencing.[2] 359 N.C. at 449, 615 S.E.2d at 272 ("We further hold that the harmless-error rule does not apply to sentencing errors which violate a defendant's *Sixth Amendment* right to jury trial pursuant to *Blakely*. [These] errors are structural and, therefore, reversible *per se*.").

1. The Sixth Amendment guarantees criminal defendants "the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. *See Duncan v. Louisiana*, 391 U.S. 145, 152-54 (1968) (holding the Due Process Clause of the Fourteenth Amendment extends the right to jury trial to defendants in serious criminal cases in state courts). More explicit than the Sixth Amendment, the North Carolina Constitution provides that, except when the crimes alleged are misdemeanors, "[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.

2. Subsequent to the decision of the Court of Appeals in the case *sub judice*, and contrary to *Allen*, the United States Supreme Court held that *Blakely* errors are not structural errors. *Washington v. Recuenco*, 2006 WL 1725561 (U.S. June 26, 2006). Accordingly, such errors do not require reversal if harmless beyond a reasonable doubt. *Id.* Because we conclude the trial court's conduct did not constitute *Blakely* error, *Recuenco* has no bearing on our resolution of the instant case.

In response to *Blakely*, defendant argued on appeal that the trial court erred by not submitting the aggravating factor to the jury.[3] On 16 August 2005, a divided Court of Appeals agreed and characterized the trial court's failure to refer the aggravating factor to the jury as *Blakely* error even though the court sentenced defendant in the presumptive range. *State v. Norris*, 172 N.C. App. 722, 729, 617 S.E.2d 298, 303 (2005). Relying on *Allen*, the majority remanded the case to the trial court with instructions to submit any aggravating factor to the jury before resentencing. *Id.* at 731, 617 S.E.2d at 304. The dissent maintained no new sentencing hearing was needed inasmuch as "neither *Blakely* nor *Allen* [is] implicated unless the trial judge imposes a sentence in excess of the statutory maximum based upon facts which were neither admitted by defendant nor found by a jury." *Id.* at 733, 617 S.E.2d at 305 (Steelman, J., concurring in part and dissenting in part).

On 1 September 2005, the State filed a motion for temporary stay, a petition for writ of supersedeas, and a notice of appeal with this Court. We allowed the motion for temporary stay on 6 September 2005 and the petition for writ of supersedeas on 3 November 2005. On 15 February 2006, defendant filed a motion to dismiss the State's appeal.

II. MOTION TO DISMISS

[1] We review the decision of the Court of Appeals solely to determine whether the trial court violated defendant's Sixth Amendment right to jury trial. N.C. R. App. P. 16(b) ("Where the sole ground of the appeal of right is . . . a dissent in the Court of Appeals, review by the Supreme Court is limited to . . . those questions which are . . . specifically set out in the dissenting opinion . . . ."). Before continuing, however, we first consider defendant's motion to dismiss. Defendant alleges he raised his *Blakely* claim through a motion for appropriate relief filed with the Court of Appeals. Since N.C.G.S. § 15A- 1422(f) provides that most Court of Appeals decisions on motions for appropriate relief are final and not subject to further review, defendant insists this Court is barred from entertaining the State's appeal.

We have previously noted that N.C.G.S. § 15A-1422 cannot circumscribe this Court's "constitutionally granted power to 'issue any

3. Defendant also argued the trial court erred by denying his motion to dismiss the charge of first-degree arson and his request for a jury instruction on attempted arson. The Court of Appeals unanimously affirmed the trial court on both counts, and those issues are not before us. N.C. R. App. P. 16(b).

remedial writs necessary to give it general supervision and control over the proceedings of the other courts.' " *Allen*, 359 N.C. at 429, 615 S.E.2d at 260 (quoting N.C. Const. art. IV, § 12, cl. 1). Yet we need not take the unusual step of invoking our supervisory authority under Article IV of the North Carolina Constitution. Section 7A-30 of the General Statutes clearly affords the State an appeal of right. N.C.G.S. § 7A-30(2) (2005) (providing an appeal of right when there is a dissent in the Court of Appeals). Furthermore, defendant pressed his *Blakely* claim at the Court of Appeals both in a motion for appropriate relief *and* in his appellate brief. *Norris*, 172 N.C. App. at 729, 617 S.E.2d at 303 ("In his brief as well as in a motion for appropriate relief . . . . [d]efendant asserts that his sentence should be remanded due to the trial court's failure to submit the aggravating factor to the jury for proof beyond a reasonable doubt."). Nothing in N.C.G.S. § 15A-1422 prohibits us from addressing issues presented in a party's brief to the Court of Appeals. Thus, the State's appeal is properly before this Court.

III. ANALYSIS

Along with other state legislatures, our General Assembly has enacted laws intended to produce consistency in criminal sentencing. *Allen*, 359 N.C. at 430, 615 S.E.2d at 260 (observing North Carolina's move away from indeterminate sentencing resulted from " 'a perceived evil of disparate sentencing, and . . . a perceived problem in affording trial judges and parole authorities unbridled discretion in imposing sentences' " (citations omitted)). *See generally* Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 Colum. L. Rev. 1233, 1245 (2005) (discussing various motives behind states' abandonment of indeterminate sentencing). The North Carolina Structured Sentencing Act ("the Structured Sentencing Act" or "the Act") was crafted, at least in part, to ensure "punishment [is] commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability." N.C.G.S. § 15A-1340.12 (2005).

The Act attempts to achieve its objectives by requiring that trial courts specify minimum and maximum terms of imprisonment for felony convictions. *See id.* § 15A-1340.13(c) (2005). A sentencing chart makes the potential minimum sentences available in a given case contingent on the offense class of the felony (A-I) and the defendant's prior record level (I-VI). *Id.* § 15A-1340.17(c) (2005). For each combination of offense class and prior record level, the chart

sets forth potential minimum sentences in aggravated, presumptive, and mitigated ranges. *Id.* The trial court must select a minimum sentence from the presumptive range unless it determines aggravating factors justify a more severe sentence or mitigating factors warrant a less severe sentence. N.C.G.S. § 15A-1340.16(b) (2005). Once the trial court has settled on a minimum punishment, it must ordinarily refer to a separate chart for the corresponding maximum. *Id.* § 15A-1340.17(d), (e), (e1) (2005).

Notwithstanding the provisions described above, trial courts retain considerable discretion during sentencing. The range of potential sentences for some combinations of offense class and prior record level is quite large. For example, the presumptive range of minimum punishments for a defendant who stands convicted of a Class C felony, such as first-degree kidnapping, and who has a prior record level of VI is 135 to 168 months imprisonment. *Id.* § 15A-1340.17(c). Depending on the presumptive minimum sentence imposed, the statutory maximum for the same defendant could be as low as 171 or as high as 211 months. *Id.* § 15A-1340.17(e). Although sentences in the aggravated range require findings of aggravating factors and those in the mitigated range findings of mitigating factors, the trial court is free to choose a sentence from anywhere in the presumptive range without findings other than those in the jury's verdict. Even assuming evidence of aggravating or mitigating factors exists, the Act leaves the decision to depart from the presumptive range "in the discretion of the trial court." *Id.* § 15A-1340.16(a) (2005). Moreover, and despite the advice the trial court received, while the Act directs trial courts to consider evidence of aggravating or mitigating factors in every case, it further instructs the courts to make findings of the aggravating and mitigating factors "only if, in [their] discretion, [they] depart[] from the presumptive range."[4] *Id.* § 15A-1340.16(c) (2005).

[2] In the case *sub judice*, a jury convicted defendant of first-degree arson, a Class D felony. *Id.* § 14-58 (2005). Since defendant had a prior record level of I, the Act capped his maximum presumptive sentence at eighty-six months. Having found an aggravating factor, the trial court nonetheless imposed a sentence of fifty-one to seventy-one months, punishment at the bottom of the presumptive range. The Court of Appeals majority ruled the sentence unconstitutional inas-

4. For this reason, AOC form CR-601 (Rev. 3/02), "Judgment and Commitment Active Punishment Felony (Structured Sentencing)," indicates trial courts need not make written findings "if sentencing is within the presumptive range."

much as the judge, not the jury, found the aggravating factor.[5] To resolve this case, we must decide whether a trial court contravenes a defendant's Sixth Amendment right to jury trial when it finds an aggravating factor but sentences within the presumptive range.

In *Blakely v. Washington*, the United States Supreme Court evaluated the constitutionality of a statutory scheme allowing trial courts to enhance a defendant's sentence upon finding certain facts. The *Blakely* defendant pleaded guilty to second-degree kidnapping involving domestic violence and a firearm. 542 U.S. at 298-99. Washington State's Sentencing Reform Act specified a " 'standard range' " of forty-nine to fifty-three months for the offense; however, the Sentencing Reform Act authorized the trial court to exceed the standard range if it found " 'substantial and compelling reasons justifying an exceptional sentence.' " *Id.* at 299 (quoting Wash. Rev. Code Ann. § 9.94A.120(2) (West 2000)). Finding the defendant had acted "with 'deliberate cruelty,' a statutorily enumerated ground for departure in domestic-violence cases," the trial court imposed an exceptional sentence of ninety months imprisonment. *Id.* at 300.

The Supreme Court reversed, holding Washington's sentencing procedure violated the defendant's Sixth Amendment right to jury trial. In so doing, the Court cited *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for the proposition that a trial court violates the Sixth Amendment if it finds any fact, other than the fact of a prior conviction, and relies on that fact to impose a sentence "greater than the [statutory] maximum." 542 U.S. at 303. The Court defined "statutory maximum" as the most severe sentence a judge may impose based entirely on facts admitted by the defendant or found by a jury beyond a reasonable doubt. *Id.* The Court went on to hold the trial court had impermissibly inflicted punishment beyond the statutory maximum without first submitting the fact warranting enhancement to the jury. 542 U.S. at 303-05.

Our Court confronted its first *Blakely* challenge to the Structured Sentencing Act in *State v. Allen*. There, a jury convicted the defendant of felony child abuse inflicting serious bodily injury. 359 N.C. at

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5. A different panel of the Court of Appeals reached the opposite conclusion in *State v. Garcia*, —— N.C. App. ——, 621 S.E.2d 292 (2005). The trial court in that case found both aggravating and mitigating factors but imposed sentence inside the presumptive range. *Id.* at ——, 621 S.E.2d at 298. The Court of Appeals held this action did not constitute *Blakely* error. *Id.* at ——, 621 S.E.2d at 298 ("[S]ince [d]efendant's sentence falls within the presumptive range, the trial court's findings of aggravating factors not admitted by [d]efendant or submitted to the jury did not violate *Blakely*.").

427, 615 S.E.2d at 258. The Act capped the defendant's presumptive sentence at 129 months. *Id.* at 427, 615 S.E.2d at 259. Pursuant to the version of the Act then in effect, the trial court found as a statutory aggravating factor that the crime was especially heinous, atrocious, or cruel and imposed an aggravated sentence of 115 to 147 months imprisonment. *Id.* at 427, 615 S.E.2d at 258-59.

On appeal, this Court determined that the presumptive range for a given offense and prior record level constitutes the "statutory maximum" under *Blakely*. We thus deemed unconstitutional those portions of N.C.G.S. § 15A-1340.16(a)-(c) which permitted judges to find aggravating factors and rely on those factors to sentence above the presumptive range.[6] *Id.* at 438-39, 615 S.E.2d at 265. We stressed, though, that our ruling did not impair provisions of N.C.G.S. § 15A-1340.16 governing a trial court's ability to find mitigating factors and allowing the judge to balance them against aggravating factors. *Id.* at 439, 615 S.E.2d at 266. Having also concluded *Blakely* errors are structural errors not susceptible to harmless error analysis, this Court remanded for a new sentencing hearing. *Id.* at 449, 615 S.E.2d at 272. *But see Washington v. Recuenco*, 2006 WL 1725561 (U.S. June 26, 2006) (holding *Blakely* errors are subject to harmless error analysis).

While neither *Blakely* nor *Allen* addresses the precise issue presented here, *Blakely* does establish a bright-line rule for appellate courts tasked with deciding whether an instance of judicial fact-finding contravenes the Sixth Amendment. The dispositive question for *Blakely* purposes is whether the "jury's verdict alone . . . authorize[d] the sentence." 542 U.S. at 305. Put differently, could the trial court have pronounced the same sentence without the judicial finding? Contrary to the opinion of the Court of Appeals majority, *Blakely* stands for the proposition that a judge does not "exceed his proper authority" until he "inflicts [enhanced] punishment . . . the jury's verdict alone does not allow." *Id.* at 304; *see also United States v. Booker*, 543 U.S. 220, 232 (2005) (stating the right to jury trial "is implicated whenever a judge seeks to impose a sentence that is not solely based on 'facts reflected in the jury verdict or admitted by the

6. The General Assembly has attempted to make the Structured Sentencing Act *Blakely* compliant. *See* Act of July 21, 2005, ch. 145, 2005 N.C. Sess. Laws 225. As amended, the Act generally permits a trial court to sentence a defendant in the aggravated range only if (1) the defendant has admitted to the existence of an aggravating factor or (2) a jury has found the existence of an aggravating factor beyond a reasonable doubt. N.C.G.S. § 15A-1340.16(a1), (a3) (2005).

defendant' " (quoting *Blakely*, 542 U.S. at 303 (emphasis deleted))). Hence, the Supreme Court ruled in favor of the *Blakely* defendant, not because the trial judge made the disputed finding, but because he relied on the finding to impose an exceptional sentence of ninety months. *Blakely*, 542 U.S. at 304.

The Supreme Court's treatment of the antecedent *Apprendi* decision confirms this reading of *Blakely*. Some of *Apprendi's* language arguably suggests that judicial findings violate the Sixth Amendment if they expose a defendant to a sentence above the statutory maximum, regardless of the actual punishment inflicted. *See*, *e.g.*, *Apprendi*, 530 U.S. at 482-83 (criticizing "legislative scheme[s] that remove[] the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the [statutory] maximum" (emphasis deleted)). Perhaps recognizing this, the Court used *Blakely* to clarify the holding of *Apprendi*: "In [*Apprendi*], we concluded that the defendant's constitutional rights had been violated *because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding*." 542 U.S. at 303 (emphasis added).

Like *Apprendi*, *Allen* contains wording one could quote to bolster the position of the Court of Appeals. *See*, *e.g.*, 359 N.C. at 439, 615 S.E.2d at 266 (holding unconstitutional those portions of the Structured Sentencing Act "which *permit* the judge to impose an aggravated sentence after finding . . . aggravating factors by a preponderance of the evidence" (emphasis added)). *But see* 359 N.C. at 444 n.5, 615 S.E.2d at 269 n.5 (noting the Sixth Amendment demands that a jury find aggravating factors "only when the defendant is sentenced beyond the statutory maximum defined by *Blakely*"). Just as the Supreme Court refined the holding of *Apprendi* in *Blakely*, however, this Court has honed its approach to alleged *Blakely* errors in a line of cases following *Allen*.

In *State v. Speight*, 359 N.C 602, 614 S.E.2d 262 (2005), filed the same day as *Allen*, a jury convicted the defendant of two counts of involuntary manslaughter and one count of driving while impaired. 359 N.C. at 604, 614 S.E.2d at 263. The trial court sentenced the defendant in the aggravated range after finding statutory and nonstatutory aggravating factors. *Id.* This Court affirmed the decision of the Court of Appeals remanding for a new sentencing hearing and articulated exactly when *Allen* will be invoked to invalidate a sentence.

> [T]he rationale in *Allen* applies to all cases in which (1) a defendant is constitutionally entitled to a jury trial, and (2) a trial court has found one or more aggravating factors *and [has] increased a defendant's sentence beyond the presumptive range without submitting the aggravating factors to a jury.*

359 N.C. at 606, 614 S.E.2d at 264 (emphasis added).

Consistent with *Speight*, in *State v. Blackwell*, 359 N.C. 814, 618 S.E.2d 213 (2005), we declared the judge ran afoul of *Blakely* "by imposing an aggravated sentence . . . after making a unilateral finding that defendant was on pretrial release for another charge when he committed the instant offense." 359 N.C. at 819, 618 S.E.2d at 217. Likewise, in *State v. Hurt*, 359 N.C. 840, 616 S.E.2d 910 (2005), this Court remanded for resentencing "[b]ecause [the] sentence exceed[ed] the 'statutory maximum' and the increased penalty [was] supported only by the judicial findings of fact." 359 N.C. at 845, 616 S.E.2d at 913. Most recently, we ordered a new sentencing hearing in *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137 (2006), upon concluding the trial court had "erred by increasing [the] defendant's sentence beyond the presumptive range [based on its] finding that the victim was physically infirm." 360 N.C. at 446, 629 S.E.2d at 149. Our precedents, then, have interpreted *Blakely* and *Allen* to mean judicial fact-finding does not trigger the Sixth Amendment right to jury trial so long as trial courts sentence inside the presumptive or, *a fortiori*, the mitigated range. Here, the court inflicted punishment within the presumptive range, and consequently, its finding of an aggravating factor did not implicate the Sixth Amendment.

Our holding comports with the concerns that led the Framers to enshrine the right to jury trial in the Bill of Rights. Far from viewing the right as a "mere procedural formality," the Framers considered it "a fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 305-06. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Id.* at 306. The *Blakely* decision advances this design "by ensuring that the judge's authority to sentence derives wholly from the jury's verdict." *Id.* This Court in *Allen* and subsequent cases has followed *Blakely* in holding that trial courts are limited to whatever punishment the jury's verdict authorizes.

Although the Structured Sentencing Act directed the trial court to find aggravating and mitigating factors only if sentencing outside the

presumptive range, the court's actions did not jeopardize the values underlying the Sixth Amendment. By expressly identifying those factors before sentencing defendant, the court made explicit what judges do anytime part of a punishment is reserved to their discretion, namely, review the evidence for facts warranting leniency or severity. The Supreme Court has emphasized the right to jury trial is not imperiled when a trial court exercises discretion to punish within the statutory range corresponding to the jury's verdict.

> We should be clear that nothing in th[e] history [of the right to jury trial] suggests that it is impermissible for judges to . . . tak[e] into consideration various factors relating both to offense and offender [] in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case.

Apprendi, 530 U.S. at 481; *see also Booker*, 543 U.S. at 233 ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.") We believe the trial court in finding aggravating and mitigating factors merely exercised the discretion our legal system has always demanded of individuals charged with passing judgment on their fellow citizens. Furthermore, we are persuaded the General Assembly expected judges would weigh all evidence relevant to punishment when it established a range of potential sentences for defendant's offense class and prior record level.

IV. DISPOSITION

Defendant's motion to dismiss is denied. The trial court did not violate defendant's Sixth Amendment right to jury trial when it found a statutory aggravating factor but sentenced defendant within the presumptive range. Accordingly, the decision of the Court of Appeals is reversed.

REVERSED.

Justice TIMMONS-GOODSON took no part in the consideration or decision of this case.

DEBRA M. DAVIS v. JOHN BERNARD DAVIS

No. 571PA04

(Filed 30 June 2006)

1. Appeal and Error— appealability—domestic violence protective orders—timeliness

The Court of Appeals did not err by dismissing defendant's appeal from three domestic violence protective orders, and discretionary review of this issue was improvidently allowed, because: (1) on 22 April 2004 the Court of Appeals dismissed defendant's appeal with respect to the three protective orders, and thus, any language in the Court of Appeals' 5 October 2004 opinion pertaining to the protective orders was mere surplusage; (2) defendant did not file his petition for discretionary review of the Court of Appeals' dismissal of the appeal until 5 November 2004; and (3) under Rule 15(b) of the North Carolina Rules of Appellate Procedure, defendant's petition for discretionary review as to the protective orders was not timely filed.

2. Divorce— equitable distribution—motions to dismiss—Rules 59 and 60

The Court of Appeals did not err in an equitable distribution case by affirming the trial court's denial of defendant's motions pursuant to N.C.G.S. § 1A-1, Rules 59 and 60 of the North Carolina Rules of Civil Procedure, because: (1) defendant failed to preserve his right to pursue a Rule 59(a)(8) motion since a defendant must show a proper objection at trial to the alleged error of law giving rise to the Rule 59(a)(8) motion, and neither defendant's post-trial motion nor the remaining record before us shows a proper objection at trial to any of the rulings at issue; (2) it cannot be concluded from the record that the trial court abused its discretion in ruling on defendant's Rule 59(a)(9) motion; (3) defendant based his Rule 60 motion on alleged errors of law, but Rule 60(b) provides no specific relief for errors of law; and (4) defendant has failed to demonstrate that the trial court abused its discretion in denying defendant's Rule 60(b) motion.

3. Divorce— equitable distribution—partial summary judgment—timely notice of appeal

The Court of Appeals erred by dismissing defendant's appeal from partial summary judgment, dealing only with a portion of

the property that was eventually to be allocated following a hearing on plaintiff's claim for equitable distribution, and from the equitable distribution judgment based on failure to file a timely notice of appeal, because: (1) the partial summary judgment order was interlocutory and was, therefore, subject to appeal following entry of the final equitable distribution judgment; (2) until the trial court's final distribution order, defendant could not know how or if the real property in question would be valued when the parties' assets were distributed; (3) any immediate appeal of the partial summary judgment would have been premature since a full accounting and division of the parties' assets was still pending before the trial court; and (4) defendant's appeal of the partial summary judgment after the trial court's entry of the equitable distribution judgment was consistent with the policy of promoting judicial economy since a substantial right was not at stake.

4. Divorce— equitable distribution—marital property—gift

The Court of Appeals erred by upholding the equitable distribution judgment, because: (1) the two tracts of real property dealt with in the partial summary judgment on 11 March 2003 should have been considered marital property when on the date of separation the property in question was owned by plaintiff and defendant as tenants by the entirety; (2) the court's 20 August 2003 final equitable distribution judgment does not disclose what value, if any, was placed on the disputed tracts of real property; and (3) the record contains no evidence that the properties were a gift from defendant to plaintiff, and the trial court did not find the conveyances to be a gift.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 166 N.C. App. 516, 603 S.E.2d 585 (2004), affirming a judgment dated 20 August 2003 and an order dated 20 November 2003 entered by Judge Mitchell L. McLean and dismissing defendant's appeal from a judgment dated 13 July 2001 entered by Judge Jeanie R. Houston, an order dated 22 July 2002 entered by Judge Jeanie R. Houston, an order dated 14 July 2003 entered by Judge Edgar B. Gregory, and an order entered 11 March 2003 by Judge Mitchell L. McLean, all in District Court, Wilkes County. Heard in the Supreme Court 16 November 2005.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by H.C. Colvard, Jr. and Daniel S. Johnson, for plaintiff-appellee.

Theodore M. Molitoris and Michelle D. Reingold for defendant-appellant.

PARKER, Chief Justice.

This case presents the issues of whether the Court of Appeals erred in (i) dismissing defendant's appeal from three domestic violence protective orders and from a partial summary judgment for failure to file a timely notice of appeal, (ii) affirming the trial court's denial of defendant's motions pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure, and (iii) upholding the equitable distribution judgment. We affirm in part and reverse and remand in part the decision of the Court of Appeals and conclude that discretionary review was improvidently allowed in part.

Plaintiff and defendant were married on 14 October 1979. One child was born of the marriage. The parties separated on 11 June 2001. On 25 June 2001 plaintiff filed a complaint in Wilkes County District Court for temporary and permanent protective orders, a divorce from bed and board, and equitable distribution of the marital estate. An *ex parte* temporary protective order was entered on that date.

On 13 July 2001 the trial court signed a judgment (i) awarding plaintiff a divorce from bed and board and sole possession of the former marital residence and (ii) converting the temporary protective order into a permanent protective order. The findings of fact in the judgment stated that defendant left the marital home without telling plaintiff, "causing the [p]laintiff to file a missing persons report," and that defendant quit both of his jobs. The trial court also found that plaintiff "is actually and substantially in fear of serious and imminent bodily injury at the hands of [defendant]." On 15 July 2002 plaintiff filed a motion to renew the protective order. The motion was allowed on 22 July 2002.

Approximately one month later, on 20 August 2002, a judgment of absolute divorce was entered. The divorce judgment did not address the parties' equitable distribution claims, which remained pending until further action by the trial court.

On 6 or 7 February 2003, plaintiff filed a motion for partial summary judgment on the issue of title to two tracts of land she claimed

were conveyed to her in fee simple absolute by defendant. Attached to the motion were two general warranty deeds, executed by defendant on or about 19 July 2001. Plaintiff's motion alleged defendant "executed two (2) general warranty deeds conveying to [p]laintiff all of his right title and interest to certain tracts of real property." These conveyances occurred approximately one month after the date of separation and one year before entry of the parties' absolute divorce decree. Plaintiff filed an affidavit in support of the motion for partial summary judgment on 11 March 2003. That same day the trial court granted plaintiff's motion. Defendant did not respond or appear at the hearing.

On 1 July 2003 plaintiff filed a motion to renew the protective order, stating that she still felt threatened in light of the pending equitable distribution action. The trial court allowed the motion on 14 July 2003. The 14 July 2003 order found that defendant objected to continuance of the protective order. Specifically, defendant asserted that the order was unnecessary, and he expressed concern that it was interfering with the operation of certain committees of the Ruritan Club of which both parties were members.

On 20 August 2003 the trial court entered an equitable distribution judgment concluding that equal distribution of the property was equitable. The two tracts of land subject to the 11 March 2003 summary judgment were excluded from consideration at the equitable distribution hearing.

On or about 26 August 2003, defendant filed motions to set aside the prior domestic violence protective orders, the partial summary judgment covering the two tracts of real property, and the equitable distribution judgment. Defendant claimed that these rulings were invalid on account of errors of law, and he sought to have them vacated pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure. Plaintiff responded on 30 September 2003, moving to deny defendant's motions and to "[c]ancel [d]efendant's Notice of Lis Pendens filed as to the tracts of real property involved in this matter." On 20 November 2003 the trial court denied all of defendant's motions and granted plaintiff's motion to remove the notice of *lis pendens*. That same day defendant gave notice of appeal to the Court of Appeals, appealing all three permanent domestic violence protective orders, the partial summary judgment, the equitable distribution judgment, and the order denying his motions for relief pursuant to Rules 59 and 60.

On 7 April 2004 plaintiff filed a motion to dismiss defendant's appeal. On 22 April 2004 the Court of Appeals allowed plaintiff's motion to dismiss defendant's appeals as to the domestic violence protective orders and denied the motion to dismiss as to the remaining order and judgments being appealed.

On 5 October 2004 the Court of Appeals held that defendant's appeals of the three protective orders and of the partial summary judgment order were untimely filed and that the trial court did not abuse its discretion in denying defendant's Rule 59 and Rule 60 motions.

[1] With regard to the domestic violence protective orders, plaintiff received the first permanent protective order against defendant on 13 July 2001. The trial court renewed this order on 22 July 2002 and again on 14 July 2003. Defendant did not file his notice of appeal of these orders until 20 November 2003. On 22 April 2004 the Court of Appeals dismissed defendant's appeal with respect to the three protective orders. Thus, any language in the Court of Appeals' 5 October 2004 opinion pertaining to the protective orders is mere surplusage. Defendant did not file his petition for discretionary review of the Court of Appeals' dismissal of the appeal until 5 November 2004. Under Rule 15(b) of the North Carolina Rules of Appellate Procedure, defendant's petition for discretionary review as to the protective orders was not timely filed. Accordingly, discretionary review of this issue was improvidently allowed.

[2] We now address defendant's Rule 59 and Rule 60 motions. On or about 26 August 2003, six days after entry of the final equitable distribution judgment, defendant filed a Motion to Set Aside Prior Orders for Errors of Law under North Carolina Civil Procedure Rules 59(a)(8) ("[e]rror in law occurring at the trial and objected to by the party making the motion") and (a)(9) ("[a]ny other reason heretofore recognized as grounds for [a] new trial") and under Rules 60(b)(4) ("The judgment is void."), (b)(5) ("[A] prior judgment upon which [the judgment] is based has been reversed or otherwise vacated . . . ."), and (b)(6) ("[a]ny other reason justifying relief from the operation of the judgment"). *See* N.C. R. Civ. P. 59, 60. Defendant sought to have the three protective orders and the partial summary judgment vacated and requested a new equitable distribution proceeding.

In order to obtain relief under Rule 59(a)(8), a defendant must show a proper objection at trial to the alleged error of law giving rise to the Rule 59(a)(8) motion. Neither defendant's post-trial motion nor

the remaining record before us shows a proper objection at trial to any of the rulings at issue. Nothing else appearing, from the record before us, defendant failed to preserve his right to pursue a Rule 59(a)(8) motion.

This determination leaves defendant's Rule 59(a)(9) motion, termed the "catch-all." A trial court's ruling on a motion for a new trial under Rule 59 is usually subject to an abuse of discretion standard. *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). A trial court may be reversed for abuse of discretion only upon a showing that its actions are "manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980); *see also Welch v. Kearns*, 261 N.C. 171, 172, 134 S.E.2d 155, 156 (1964). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington*, 305 N.C. at 482, 290 S.E.2d at 602.

We are unable to conclude from the record before us that the trial court abused its discretion in ruling on defendant's Rule 59(a)(9) motion. Accordingly, we affirm the Court of Appeals' ruling on this issue.

Defendant based his Rule 60 motion on alleged errors of law. However, Rule 60(b) provides no specific relief for errors of law. *See Hagwood v. Odom*, 88 N.C. App. 513, 519, 364 S.E.2d 190, 193 (1988). "The appropriate remedy for errors of law committed by the [trial] court is either appeal or a timely motion for relief under N.C.G.S. Sec. 1A-1, Rule 59(a)(8)." *Id.* "Motions pursuant to Rule 60(b) may not be used as a substitute for appeal." *Jenkins v. Richmond Cty.*, 118 N.C. App. 166, 170, 454 S.E.2d 290, 293, *disc. rev. denied*, 340 N.C. 568, 460 S.E.2d 318 (1995). As with Rule 59 motions, the standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion. *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

Again, defendant has failed to demonstrate that the trial court abused its discretion in denying defendant's Rule 60(b) motion. Therefore, we affirm the Court of Appeals on this issue.

[3] Having found no abuse of discretion in the trial court's denial of defendant's Rule 59 and Rule 60 motions, the question then becomes whether defendant's notice of appeal from the entry of partial summary judgment was timely filed. As discussed below, we conclude that, as required by Rule of Appellate Procedure 3(c), defendant timely filed notice of appeal with respect to the order granting partial summary judgment and the final equitable distribution judgment. Thus, this Court may review these underlying orders for errors of law.

We turn then to the timeliness of defendant's notice of appeal from the partial summary judgment order and the equitable distribution judgment.

The Court of Appeals concluded that "defendant failed to timely perfect his appeal of the three domestic violence protective orders and summary judgment under Rule 3(c)." *Davis v. Davis*, 166 N.C. App. 516, 603 S.E.2d 585, 2004 WL 2238759, at *3 (Oct. 5, 2004) (No. COA03-1657) (unpublished), citing N.C. R. App. P. 3(c). As noted above, review of the domestic violence orders is not properly before us. As to defendant's appeal of the partial summary judgment order, we hold that it was timely filed.

The partial summary judgment order was interlocutory and was, therefore, subject to appeal following entry of the final equitable distribution judgment. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). In the present case the 11 March 2003 partial summary judgment order dealt only with a portion of the property that was eventually to be allocated following a hearing on plaintiff's claim for equitable distribution. The parties and the trial court undoubtedly knew that further action related to the parties' other assets would be needed. Until the trial court's final distribution order, defendant could not know how, or if, the real property in question would be valued when the parties' assets were distributed.

Generally, a party cannot immediately appeal from an interlocutory order unless failure to grant immediate review would "affect[] a substantial right" pursuant to N.C.G.S. sections 1-277 and 7A-27(d).

A party may appeal an interlocutory order under two circumstances. First, the trial court may certify that there is no just rea-

> son to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action. N.C.G.S. § 1A-1, Rule 54(b) (1990). Second, a party may appeal an interlocutory order that "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment."

Dep't of Transp. v. Rowe, 351 N.C. 172, 174-75, 521 S.E.2d 707, 709 (1999) (quoting *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381); *see also Pelican Watch v. U.S. Fire Ins. Co.*, 323 N.C. 700, 702, 375 S.E.2d 161, 162 (1989).

This Court has acknowledged that "the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context . . . ." *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). Under the facts and in the procedural context of this case, we conclude that neither party had a "substantial right" in jeopardy that necessitated immediate appeal of the partial summary judgment. Any immediate appeal of the partial summary judgment would have been premature since a full accounting and division of the parties' assets was still pending before the trial court.

Moreover, even "where a party is entitled to an interlocutory appeal based on a substantial right, that party may appeal but is not required to do so." *Dep't of Transp. v. Rowe*, 351 N.C. at 176, 521 S.E.2d at 710. "The reason for these rules is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division." *Waters*, 294 N.C. at 207, 240 S.E.2d at 343.

Defendant's appeal of the partial summary judgment after the trial court's entry of the equitable distribution judgment was consistent with the policy of promoting judicial economy. *See Harrell v. Harrell*, 253 N.C. 758, 761, 117 S.E.2d 728, 730 (1961). Since a substantial right was not at stake, defendant properly waited until after the trial court's final judgment before filing his appeal.

[4] For these reasons we conclude that defendant's notice of appeal from the partial summary judgment and the equitable distribution judgment was timely. Defendant's Rule 59 motion to set aside prior orders was filed within ten days of entry of the final equitable distribution judgment, and the notice of appeal was filed within thirty

days of the trial court's order denying that motion. *See* N.C. R. App. P. 3(c)(3).

Although defendant gave notice of appeal from the equitable distribution judgment, the Court of Appeals reviewed the judgment only in conjunction with its review of the trial court's denial of defendant's Rule 59 motion. Appellate review of a denial of a Rule 59 motion for a new trial is distinct from review of the underlying judgment or order upon which such a motion may be based. *See Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990). Like a Rule 60 motion, a Rule 59 motion is not a substitute for an appeal. An aggrieved party is not required to file a Rule 59 motion to preserve the right to appeal, but upon timely motion under Rule 59, the thirty day period for taking an appeal is tolled until an order disposing of the motion is entered. N.C. R. App. P. 3(c)(3). Thus, in addition to obtaining review of the denial of a Rule 59 motion, an aggrieved party who gives proper and timely notice of appeal from the underlying ruling may have the underlying judgment or order reviewed on appeal.

The Court of Appeals stated that it could "see no reason why the trial court's findings of distribution factors and subsequent equal distribution should be disturbed." *Davis*, 2004 WL 2238759, at *3. We disagree.

Based on the plain language of the equitable distribution statute, the two tracts of real property dealt with in the partial summary judgment on 11 March 2003 should have been considered marital property. Marital property is defined as

> all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with subdivision (2) or (4) of this subsection. . . . It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property under subdivision (2) of this subsection. This presumption may be rebutted by the greater weight of the evidence.

N.C.G.S. § 50-20(b)(1) (2005). As the Court of Appeals stated in *Sharp v. Sharp*: "G.S. 50-20(a) effectively provides for the 'freezing' of the marital estate as of the date of the parties' separation. Marital assets, distributed thereafter, are valued as of that date." *Sharp v. Sharp*, 84

N.C. App. 128, 130, 351 S.E.2d 799, 800 (1987). On the date of separation, the property in question was owned by plaintiff and defendant as tenants by the entirety and was, thus, marital property.

Section 50-20(c) requires that the trial court make "an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable." N.C.G.S. § 50-20(c) (2005). Furthermore, N.C.G.S. § 50-20(j) states that "the court shall make written findings of fact that support the determination that the marital property and divisible property has been equitably divided." *Id.* § 50-20(j) (2005). In this case the trial court decided that an equal division was equitable, but the court's 20 August 2003 final equitable distribution judgment does not disclose what value, if any, was placed on the disputed tracts of real property.

> [T]o enter a proper equitable distribution judgment, prior to distributing the assets the trial court must classify and value all property owned by the parties at the date of separation. "And in doing all these things the court must be specific and detailed enough to enable a reviewing court to determine what was done and its correctness."

Dalgewicz v. Dalgewicz, 167 N.C. App. 412, 422, 606 S.E.2d 164, 171 (2004) (quoting *Carr v. Carr*, 92 N.C. App. 378, 379, 374 S.E.2d 426, 427 (1988)); *see also Stanley v. Stanley*, 118 N.C. App. 311, 314, 454 S.E.2d 701, 703-04 (1995).

In *Beroth v. Beroth*, even though the plaintiff executed six quitclaim deeds in favor of the defendant approximately a year before the parties' separation, effectively dissolving the tenancy by the entirety in those properties, the trial court nevertheless correctly held that the property involved was not removed "from the ambit of the Equitable Distribution Act." *Beroth v. Beroth*, 87 N.C. App. 93, 94, 359 S.E.2d 512, 513, *disc. rev. denied*, 321 N.C. 296, 362 S.E.2d 778 (1987), *disapproved on other grounds by Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988). In the instant case the tenancy by the entirety was not dissolved until after the date of separation.

Plaintiff argues that the two tracts of land were given to her as gifts and that, pursuant to the partial summary judgment, defendant has no right, title, or interest in the property. However, the pertinent statute precisely states that "property acquired by gift from the other spouse during the course of the marriage shall be considered

separate property only if such an intention is stated in the conveyance." N.C.G.S. § 50-20(b)(2) (2005). Both deeds at issue were worded thusly:

> This deed is executed for the purpose of conveying the Grantor's one-half (1/2) undivided interest in the above described premises to the Grantee, pursuant to N.C.G.S. [§] 39-13.3(c). The Grantor waives and quitclaims any right, title and interest in the above described premises by reason of his marriage with the Grantee, and waives any and all rights he may have to claim an interest in the above described property, should the Grantee die before the parties hereto have obtained a legal divorce.

This language does not indicate that plaintiff initially received the properties as a gift nor do the deeds expressly convey a gift. The record contains no evidence that the properties were a gift from defendant to plaintiff, and the trial court did not find the conveyances to be a gift.

We cannot determine whether the properties recorded in Deed Book 862, Pages 341 and 342 of the Wilkes County Registry were properly classified, valued, and distributed or whether the trial court properly valued and took into consideration the parties' separate estates when determining that an equal distribution of the marital property was equitable. Therefore, we reverse the decision of the Court of Appeals as to the 11 March 2003 summary judgment and the 20 August 2003 equitable distribution judgment and remand those matters to the Court of Appeals for further remand to the trial court for proceedings consistent with both N.C.G.S. § 50-20 and this opinion.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

PAMMY AUSTIN EZELL AS GUARDIAN AD LITEM OF MICHELLE LYNN MORLAND, AND NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE, INTERVENOR v. GRACE HOSPITAL, INC., JOHN F. WHALLEY, M.D., AND MOUNTAIN VIEW PEDIATRICS, P.A.

No. 44A06

(Filed 30 June 2006)

Public Assistance— Medicaid lien—recipient's settlement with medical provider—amount of subrogation right

The decision of the Court of Appeals in this case is reversed for the reason stated in the dissenting opinion that the Division of Medical Assistance (DMA) is subrogated to the entire amount of plaintiff's $100,000 settlement with a pediatrician for medical malpractice pursuant to its statutory Medicaid lien for payments made on plaintiff's behalf, not just to the amount the DMA paid for medical treatment that corresponded to defendant pediatrician's alleged negligence. Therefore, the DMA is entitled to receive one-third of the $100,000 settlement as partial payment of its $86,540 Medicaid lien. N.C.G.S. § 108A-57(a).

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 623 S.E.2d 79 (2005), vacating an order signed on 22 January 2004 by Judge Robert C. Ervin in Superior Court, Burke County, and remanding for further findings. Heard in the Supreme Court 18 April 2006.

Elam & Rousseaux, P.A., by Michael J. Rousseaux and William H. Elam, for plaintiff-appellee.

Roy Cooper, Attorney General, by Belinda A. Smith, Assistant Attorney General, and Gayl M. Manthei, Special Deputy Attorney General, for plaintiff-intervenor-appellant North Carolina Department of Health and Human Services, Division of Medical Assistance.

Christopher R. Nichols, Counsel for the North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed. This case is remanded to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE v. CONNER

[360 N.C. 530 (2006)]

STATE OF NORTH CAROLINA	)
	)
v.	)
	)
JERRY WAYNE CONNER	)

No. 219A91-5

ORDER

Defendant's motion for stay of execution is allowed. Defendant's petition for writ of certiorari is allowed for the limited purpose of reversing the trial court's denial of DNA testing and remanding this case to Gates County Superior Court for entry of an order requiring that biological evidence in the possession of the State be DNA tested pursuant to N.C.G.S. 15A-269. Except as otherwise allowed herein, defendant's petition for writ of certiorari and supplemental petition for writ of certiorari are denied.

By order of the Court in Conference, this 10th day of May, 2006.

s/Timmons-Goodson, J.
For the Court

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

Armstrong v. W.R. Grace & Co. Case below: 175 N.C. App. 528	No. 082P06	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA04-581) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied (06/29/06) 2. Dismissed as Moot (06/29/06)
Bald Head Ass'n v. Curnin Case below: 176 N.C. App. 766	No. 270P06	1. Defendant's Motion for Temporary Stay (COA04-1682), (COA05-639) 2. Defendant's Petition of Writ of Supersedeas	1. Denied 05/19/06 2. Denied (06/29/06)
Batts v. Batts Case below: 176 N.C. App. 407	No. 237P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-1044)	Denied (06/29/06)
Beroth Oil Co. v. Whiteheart Case below: 173 N.C. App. 89	No. 575P05	1. Def's NOA Based Upon a Constitutional Question (COA03-1608) 2. Plt's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (06/29/06) 3. Denied (06/29/06) **Martin, J., Recused**
Bob Timberlake Collection, Inc. v. Edwards Case below: 176 N.C. App. 33	No. 169P06	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1434)	Denied (06/29/06)
Carillon Assisted Living, LLC v. N.C. Dep't of Health & Human Servs. Case below: 175 N.C. App. 265	No. 054A06	1. Respondents' NOA (Dissent) (COA05-135) 2. Respondents' PDR as to Additional Issues 3. Petitioner's NOA Based Upon a Constitutional Question 4. Petitioner's Alternative PDR Under N.C.G.S. § 7A-31 5. Petitioner's PDR as to Additional Issues	1. —— 2. Denied (06/29/06) 3. Dismissed Ex Mero Motu (06/29/06) 4. Denied (06/29/06) 5. Denied (06/29/06)

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Central Telephone Co. v. Tolson Case below: 174 N.C. App. 554	No. 695P05	1. Petitioner's (Tel. Co.) NOA Based Upon a Constitutional Question (COA04-1224) 2. Respondent's Motion to Dismiss Appeal 3. Petitioner's (Tel. Co.) PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (06/29/06) 3. Denied (06/29/06)
Chambliss v. Health Sciences Found., Inc. Case below: 176 N.C. App. 388	No. 194P06	1. Defs' PDR Under N.C.G.S. 7A-31 (COA04-1687) 2. Defs' Motion to Withdraw PDR	1. Dismissed as Moot (06/29/06) 2. Allowed (06/29/06)
Cherney v. N.C. Zoological Park Case below: 166 N.C. App. 684	No. 606A04-2	Plt's Petition for Writ of Mandamus (COA03-1615)	Allowed (06/29/06) **Newby, J., and Timmons-Goodson, J., Recused**
Concord Eng'g & Surveying, Inc. v. Freeman Case below: 176 N.C. App. 407	No. 176P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-550)	Denied (06/29/06)
Cook v. Erect All Case below: 176 N.C. App. 407	No. 185P06	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA05-861) 2. Def's Conditional PDR	1. Denied (06/29/06) 2. Dismissed as Moot (06/29/06)
Durham Land Owners Ass'n. v. County of Durham Case below: 177 N.C. App. 629	No. 343P05-2	1. Def's Motion for Temporary Stay (COA05-736) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Denied 06/15/06 2. Denied (06/29/06) 3. Denied (06/29/06)
Early v. County of Durham Dep't of Soc. Servs. Case below: 172 N.C. App. 344	No. 524P05	Respondent's (DSS) PDR Under N.C.G.S. § 7A-31 (COA04-35)	Allowed (06/29/06)
Foster-Long v. Durham Cty. Case below: 177 N.C. App. 462	No. 303P06	Def's (Durham County) PDR Under N.C.G.S. § 7A-31 (COA05-1287)	Denied (06/29/06)

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Frost v. Salter Path Fire & Rescue Case below: 176 N.C. App. 482	No. 181A06	1. Def's NOA (Dissent) (COA05-445) 2. Def's PDR as to Additional Issues	1. —— 2. Allowed (06/29/06)
Grayson v. High Point Dev. Ltd. P'ship Case below: 175 N.C. App. 786	No. 066P06	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA05-555) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied (06/29/06) 2. Dismissed as Moot (06/29/06)
Harris-Offutt v. N.C. Bd. of Licensed Prof'l Counselors Case below: 172 N.C. App. 170	No. 003P06	1. Plt's "Motion for Discretionary Review" (COA04-1417) 2. Def's Conditional PDR	1. Denied (06/29/06) 2. Dismissed as Moot (06/29/06)
Helsius v. Robertson Case below: 174 N.C. App. 507	No. 698P05	1. Respondent's (County of Durham) NOA Based Upon a Constitutional Question (COA05-08) 2. Petititioner's (Helsius) Motion to Dismiss Appeal 3. Respondent's (County of Durham) PDR Under N.C.G.S. § 7A-31 4. Respondent's (County of Durham) Motion for Reconsideration	1. —— 2. Allowed 03/02/06 360 N.C. 363 3. Denied 03/02/06 360 N.C. 363 4. Denied (06/29/06)
Helton v. N.C. Dep't of Corr. Case below: 174 N.C. App. 839	No. 046P06	1. Plt's NOA Based Upon a Constitutional Question (COA05-235) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed Ex Mero Motu (06/29/06) 2. Denied (06/29/06)
Hodge v. N.C. Dep't of Transp. Case below: 175 N.C. App. 110	No. 036P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-1657)	Denied (06/29/06)
Hughes v. Webster Case below: 175 N.C. App. 726	No. 124P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-551)	Denied (06/29/06)

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In re Foreclosure of Hunt Case below: 176 N.C. App. 407	No. 173P06	1. Def"s (Martina Clark) NOA Based Upon a Constitutional Question (COA05-178) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed Ex Mero Motu 05/04/06 2. Denied 05/04/06
In re H.S.F. Case below: 175 N.C. App. 189	No. 168P06	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA05-586)	Denied (06/29/06)
In re K.M. Case below: 177 N.C. App. 286	No. 261P06	Respondent's PDR Under N.C.G.S. § 7A-31 (COA05-1284)	Denied (06/29/06)
In re L.W. Case below: 175 N.C. App. 387	No. 059P06	1. Petitioner's (Person Co. DSS) NOA Based Upon a Constitutional Question (COA05-192) 2. Respondent's (Mother) Motion to Dismiss Appeal 3. Petitioner's (Person Co. DSS) PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (06/29/06) 3. Denied (06/29/06)
In re S.L.H. Case below: 175 N.C. App. 420	No. 040P06	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA05-594)	Denied (06/29/06)
In re S.M.S. & E.M.S. Case below: 175 N.C. App. 591	No. 090P06	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA05-137)	Denied (06/29/06)
In re S.W. Case below: 175 N.C. App. 719	No. 101P06	Respondent's (Phyllis W.) PDR Under N.C.G.S. § 7A-31 (COA05-596)	Denied (06/29/06)
In re Will of Kersey Case below: 176 N.C. App. 748	No. 221P06	Propounder's (Mary DeBlanc Norfleet) PDR Under N.C.G.S. § 7A-31 (COA05-832)	Denied (06/29/06)
McClennahan v. N.C. School of the Arts Case below: 177 N.C. App. 806	No. 339P06	Defendant-Appellants' Motion for Temporary Stay (COA05-790)	Allowed 06/23/06

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N.C. State Bar v. Culbertson Case below: 177 N.C. App. 89	No. 244P06	1. Def's NOA Based Upon a Constitutional Question (COA05-1076) 2. Plt's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (06/29/06) 3. Denied (06/29/06)
Pate v. N.C. Dep't of Transp. Case below: 176 N.C. App. 530	No. 188P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-609)	Denied (06/29/06)
Perry v. U.S. Assemblies Case below: 175 N.C. App. 420	No. 062P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-83)	Denied (06/29/06)
Renfro v. Richardson Sports Ltd. Partners Case below: 172 N.C. App. 176	No. 537P05	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA04-1407) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Remand 4. Defs' Motion to Dismiss Plt's PDR	1. Denied (06/29/06) 2. Dismissed as Moot (06/29/06) 3. Denied (06/29/06) 4. Dismissed as Moot (06/29/06) **Timmons-Goodson, J., Recused**
Ripellino v. N.C. School Bds. Ass'n Case below: 176 N.C. App. 443	No. 180A06	1. Def's (The Johnston County Bd. of Educ.) NOA (Dissent) (COA04-1681) 2. Def's (The Johnston County Bd. of Educ.) NOA Based Upon a Constitutional Question 3. Def's (The Johnston County Bd. of Educ.) PDR as to Additional Issues 4. Defs' (The N.C. School Boards Ass'n, et al.) NOA (Dissent) 5. Defs' (The N.C. School Boards Ass'n, et al.) PDR as to Additional Issues	1. —— 2. Dismissed Ex Mero Motu (06/29/06) 3. Allowed (06/29/06) 4. —— 5. Allowed (06/29/06)

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Smith v. Richardson Sports Ltd. Partners Case below: 172 N.C. App. 200	No. 566P05	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA03-1130-2) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Remand 4. Defs' Motion to Dismiss Plt's PDR	1. Denied (06/29/06) 2. Dismissed as Moot (06/29/06) 3. Denied (06/29/06) 4. Dismissed as Moot (06/29/06) **Timmons-Goodson, J., Recused**
Stark v. Ratashara Case below: 177 N.C. App. 449	No. 353P04-3	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1119)	Denied (06/29/06)
State v. Anderson Case below: 177 N.C. App. 148	No. 249P06	1. Def's NOA Based Upon a Constitutional Question (COA05-259) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (06/29/06) 3. Denied (06/29/06)
State v. Autry Case below: 176 N.C. App. 408	No. 193P06	1. Def's NOA Based Upon a Constitutional Question (COA05-839) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed Ex Mero Motu (06/29/06) 2. Denied (06/29/06)

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State v. Bates Case below: 172 N.C. App. 27	No. 456P05	1. AG's Motion for Temporary Stay (COA04-777)	1. Allowed **08/22/05** 360 N.C. 67 Stay Dissolved **06/29/06**
		2. AG's Petition for Writ of Supersedeas	2. Denied (06/29/06)
		3. AG's PDR Under N.C.G.S. § 7A-31	3. State's PDR is treated as a PWC and is allowed for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of *State v. Lawrence*, 360 N. C. 368, 627 S.E.2d 609 (2006) (06/29/06)
		4. Def's Conditional PDR Under N.C.G.S. § 7A-31	4. Denied (06/29/06)
		5. Def's Motion to Stay Proceedings	5. Dismissed as Moot (06/29/06)
State v. Bauberger Case below: 176 N.C. App. 465	No. 172A06	1. Def's NOA (Dissent) (COA04-1368)	1. –––
		2. Def's PDR as to Additional Issues	2. Denied (06/29/06)
State v. Branch Case below: 177 N.C. App. 104	No. 095P04-2	1. AG's Motion for Temporary Stay (COA03-350-2)	1. Denied 04/20/06
		2. AG's Petition for Writ of Supersedeas	2. Denied (06/29/06)
		3. AG's PDR Under N.C.G.S. § 7A-31 (COA03-350-2)	3. Denied (06/29/06)
		4. Def's Cross PDR	4. Denied (06/29/06)
State v. Brayboy Case below: 175 N.C. App. 592	No. 089P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-437)	Denied (06/29/06)

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State v. Brown Case below: 176 N.C. App. 72	No. 147P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-136)	Denied (06/29/06)
State v. Brown Case below: 176 N.C. App. 408	No. 192P06	1. Def's NOA Based Upon a Constitutional Question (COA05-17) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A -31	1. —— 2. Allowed (06/29/06) 3. Denied (06/29/06)
State v. Bryant Case below: 176 N.C. App. 190	No. 117A06	1. AG's NOA (Dissent) (COA05-514) 2. AG's Motion for Temporary Stay 3. AG's Petition for Writ of Supersedeas 4. Defendant-Appellants' PDR	1. —— 2. Allowed 03/13/06 360 N.C. 485 3. Allowed 03/13/06 360 N.C. 485 4. Denied (06/29/06)
State v. Bullock Case below: 176 N.C. App. 190	No. 142P06	Def's Motion for PDR (COA05-470)	Denied (06/29/06)
State v. Bullock Case below: 177 N.C. App. 462	No. 308P06	1. Def's NOA Based Upon a Constitutional Question (COA05-859) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed Ex Mero Motu (06/29/06) 2. Denied (06/29/06)
State v. Cao Case below: 175 N.C. App. 434	No. 087P06	1. Def's NOA Based Upon a Constitutional Question (COA05-191) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (06/29/06) 3. Denied (06/29/06)

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State v. Carter Case below: 177 N.C. App. 539	No. 290A06	1. AG's NOA (Dissent) (COA05-1214) 2. AG's Motion for Temporary Stay 3. AG's Petition for Writ of Supersedeas	1. —— 2. Allowed 06/01/06 3. Allowed (06/29/06)
State v. Coleman Case below: 176 N.C. App. 408	No. 287P06	Def's PWC to Review the Decision of the COA (COA05-716)	Denied (06/29/06)
State v. Cromartie Case below: 177 N.C. App. 73	No. 240P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1126)	Denied (06/29/06)
State v. Fuller Case below: 177 N.C. App. 149	No. 248P06	1. Def's NOA Based Upon a Constitutional Question (COA04-1022) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (06/29/06) 3. Denied (06/29/06)
State v. Harley Case below: 176 N.C. App. 190	No. 167P06	1. Def's PDR Under N.C.G.S. § 7A-31 (COA05-575) 2. Def's Motion for Temporary Stay 3. Def's Petition for Writ of Supersedeas	1. Denied (06/29/06) 2. Denied 04/19/06 3. Denied (06/29/06)
State v. Helms Case below: 174 N.C. App. 627	No. 273P06	Def's PWC to Review the Decision of the COA (COA05-19)	Denied (06/29/06)
State v. Hernandez Case below: 176 N.C. App. 191	No. 57P06	Respondent's PDR Under N.C.G.S. § 7A-31 (COA05-475)	Denied (06/29/06)
State v. Herndon Case below: 177 N.C. App. 353	No. 088P04-2	1. Def's NOA Based Upon a Constitutional Question (COA05-724) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (06/29/06) 3. Denied (06/29/06)

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State v. Holifield Case below: 175 N.C. App. 421	No. 049P06	1. Def's NOA Based Upon a Constitutional Question (COA04-1513) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (06/29/06) 3. Denied (06/29/06)
State v. Holmes Case below: 177 N.C. App. 565	No. 283P06	AG's Motion for Temporary Stay (COA05-986)	Allowed 05/24/06
State v. Hoover Case below: 174 N.C. App. 596	No. 370P04-3	Def's Motion for "Petition for All Writ for Appeal to a En-Banc Review" (COA05-64)	Dismissed (06/29/06)
State v. Hyatt Case below: Buncombe County Superior Court	No. 402A00-3	1. Defendant-Appellant's Motion to Defer Consideration of PWC 2. Defendant-Appellant's Motion to Allow Supplemental Memorandum	1. Allowed 06/28/06 2. Allowed 06/28/06
State v. Ivey Case below: 176 N.C. App. 768	No. 182P06	1. AG's Motion for Temporary Stay (COA05-456) 2. AG's Petition for Writ of Supersedeas 3. AG's PWC to Review Order of Remand Entered by COA 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/11/06** 360 N.C. 488 Stay Dissolved **06/29/06** 2. Denied (06/29/06) 3. Denied (06/29/06) 4. Denied (06/29/06)

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State v. Johnson Case below: 177 N.C. App. 122	No. 210PA06	1. AG's Motion for Temporary Stay (COA05-758) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/24/06** 360 N.C. 178 Stay Dissolved **06/29/06** 2. Denied (06/29/06) 3. AG's PDR is allowed for limited purpose of entering this order. Portion of COA opinion concerning probable cause is vacated for remand to trial court (06/29/06)
State v. Jones Case below: 177 N.C. App. 269	No. 238P06	AG's Motion for Temporary Stay (COA05-901)	Allowed 05/08/06
State v. Jones Case below: 177 N.C. App. 565	No. 309P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-959)	Denied (06/29/06)
State v. Kelly Case below: 175 N.C. App. 421	No. 199P06	Def's Motion for "Notice of Appeals" (COA05-486)	Denied (06/29/06)
State v. Lasiter Case below: 176 N.C. App. 768	No. 222PA06	Defendant-Appellant's PDR Under N.C.G.S. § 7A-31 (COA05-777)	Allowed (06/29/06)
State v. Mack Case below: 177 N.C. App. 566	No. 294P06	1. Def's Motion for Temporary Stay (COA05-1099) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Denied 06/05/06 2. Denied (06/29/06) 3. Denied (06/29/06)

State v. Mathis Case below: 176 N.C. App. 191	No. 145P06	1. Def's PDR Under N.C.G.S. § 7A-31(c)(1)-(3) (COA05-454) 2. Def's NOA Under N.C.G.S. § 7A-30-1 (Constitutional Question) 3. AG's Motion to Dismiss Appeal	1. Denied (06/29/06) 2. —— 3. Allowed (06/29/06)
State v. McGee Case below: 175 N.C. App. 421	No. 060P06	1. Def's NOA Based Upon a Constitutional Question (COA05-301) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (06/29/06) 3. Denied (06/29/06)
State v. Melton Case below: 175 N.C. App. 733	No. 121A06	1. Def's NOA Based Upon a Constitutional Question (COA05-108) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed (06/29/06)
State v. Melvin Case below: 176 N.C. App. 768	No. 214P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-531)	Denied (06/29/06)
State v. Moore Case below: 175 N.C. App. 795	No. 137P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-419)	Denied (06/29/06)
State v. Morton Case below: 175 N.C. App. 795	No. 116P06	1. Def's NOA Based Upon A Constitutional Question (COA05-257) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (06/29/06) 3. Denied (06/29/06)
State v. Noble Case below: 175 N.C. App. 248	No. 037P06	Def's PDR Under N.C.G.S. §. 7A-31 (COA05-249)	Denied (06/29/06)

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State v. Pendergraph Case below: 177 N.C. App. 150	No. 207P06	1. Def's NOA Based Upon a Constitutional Question (COA05-799) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (06/29/06) 3. Denied (06/29/06)
State v. Pinch Case below: Guilford County Superior Court	No. 043A81-3	AG's Petition for Writ of Certiorari to Review the Guilford County Superior Court	Denied (06/29/06) **Edmunds, J., Recused**
State v. Pugh Case below: 177 N.C. App. 150	No. 257P06	1. Defendant's NOA (COA05-354) 2. AG's Motion to Dismiss Appeal 3. Defendant's PDR Under N.C.G.S. § 7A-31	1. —— 2. Denied (06/29/06) 3. Allowed (06/29/06)
State v. Reese Case below: 177 N.C. App. 288	No. 282P06	1. Def's NOA Based Upon A Constitutional Question (COA05-558) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (06/29/06) 3. Denied (06/29/06)
State v. Ridley Case below: 177 N.C. App. 463	No. 272P06	AG's Motion for Temporary Stay (COA03-1543)	Allowed 05/18/06
State v. Royster Case below: 173 N.C. App. 643	No. 230P06	Def's PWC to Review Decision of COA (COA04-70)	Denied without Prejudice to File in Trial Court (06/29/06)
State v. Scanlon Case below: 176 N.C. App. 410	No. 195P06	1. Def's NOA Based Upon a Constitutional Question (COA05-119) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (06/29/06) 3. Denied (06/29/06)
State v. Shue Case below: 175 N.C. App. 796	No. 103P04-3	Def's PDR Under N.C.G.S. § 7A-31 (COA05-244)	Denied (06/29/06)

State v. Wade Case below: 176 N.C. App. 769	No. 200P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1276)	Denied (06/29/06)
State v. Wall Case below: 157 N.C. App. 143	241P03-3	Def's Petition for Plain Error Review N.C.G.S. § 7A-28(B)(1)(2)(3)(4) (COA02-115)	Denied (06/29/06)
State v. Wilson Case below: Randolph County Superior Court	No. 217P06-2	Def's Motion for "Petition for All Writ for Appeal to a En-Banc Review"	Dismissed (06/29/06)
State v. Woodbury Case below: 177 N.C. App. 150	No. 255P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-459)	Denied (06/29/06)
Stephenson v. Bartlett Case below: 177 N.C. App. 239	No. 094P02-5	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA05-793) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied (06/29/06) 2. Dismissed as Moot (06/29/06) **Martin, J., Recused**
Strickland v. Lawrence Case below: 176 N.C. App. 656	No. 224P06	Plaintiff-Appellants' PDR Under N.C.G.S. § 7A-31 (COA05-823)	Denied (06/29/06)
Summit Lodging, LLC. v. Jones, Spitz, Moorhead, Baird & Albergotti, P.A. Case below: 176 N.C. App. 697	No. 215P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-248)	Denied (06/29/06)

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

Swift v. Richardson Sports Ltd. Partners Case below: 173 N.C. App. 134	No. 598P05	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA04-302-2) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Remand 4. Defs' Motion to Dismiss Plt's PDR	1. Denied (06/29/06) 2. Dismissed as Moot (06/29/06) 3. Denied (06/29/06) 4. Dismissed as Moot (06/29/06) **Timmons-Goodson, J., Recused**
Walker v. Fleetwood Homes of N.C. Case below: 176 N.C. App. 668	No. 223A06	1. Def's NOA (Dissent) (COA04-1466) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Plts' PWC to Review Orders of the COA 4. Plts' Conditional PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (06/29/06) 3. Denied (06/29/06) 4. Denied (06/29/06)
Whittaker v. Todd Case below: 176 N.C. App. 185	No. 163P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-361)	Denied (06/29/06)
Widenhouse v. Crumpler Case below: 177 N.C. App. 150	No. 247P06	1. Plt's Motion for Temporary Stay (COA05-805) 2. Plt's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Denied 05/12/06 2. Denied 05/12/06 3. Denied (06/29/06)
Wilcox v. Bankers Ins. Co. Case below: 175 N.C. App. 596	No. 233P06	Plts' Petition for Writ of Certiorari to Review Decision of COA (COA05-436)	Denied (06/29/06)
Wright v. Smith Case below: 177 N.C. App. 289	No. 266P06	Appellant's (Buncombe County DSS) PDR Under N.C.G.S. § 7A-31 (COA05-775)	Denied (06/29/06)

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

PETITION TO REHEAR

Stein v. Asheville City Bd. of Educ. Case below: 360 N.C. 321	No. 128A05	Plts' Petition for Rehearing	Denied (06/29/06) **Timmons-Goodson, J., Recused**

ARMSTRONG v. LEDGES HOMEOWNERS ASS'N

[360 N.C. 547 (2006)]

ROBERT LOUIS ARMSTRONG AND WIFE, VIVIAN B. ARMSTRONG; L.A. MOORE AND WIFE, E. ANN MOORE; AND WILLIAM B. CLORE AND WIFE, RAE H. CLORE, PETITIONERS V. THE LEDGES HOMEOWNERS ASSOCIATION, INC. AND THE OWNERS OF LOTS IN THE LEDGES OF HIDDEN HILLS SUBDIVISION: VIOLET M. MYERS, C. DONALD LARSSON/TRUSTEE, MARILYN BARNWELL, CHARLES S. AND CATHRYN A. HARRELL, THOMAS REIN LUGUS, JACK H. AND ROBERTA M. CRABTREE, DOROTHY LOIS SHIMON, TRUST, WILLIAM V. AND JOANN K. PHILLIPS, RICHARD AND ELIZABETH C. COOMBES, GUIDO D. AND EILEEN J. MIGIANO, EUGENE M. AND LUCRETIA B. WAGNER, JACQUELINE W. EADIE, ELIZABETH H. SCHAD, TRUST, SUNNIE TAYLOR, SUE EDELL AND T. HILLIARD STATON, ALBERT W. AND URSULA K. JENRETTE, THERESA M. WUTTKE, JOHN FITZGERALD AND ROBIN RENEE HOLSHUE, ADRIAN R. AND MARILYN B. ADES, LINDA N. ROSS, J.D. AND EDWINA S. MILLER, RUSSELL L. AND LAUNA L. SHOEMAKER, PAUL E. AND DEBORAH H. PARKER, WILLIAM SCOTT AND ELIZABETH A. CHOVAN, DAVID N. AND MELANIE D. HUTTO, TEDD M. AND JEANNIE PEARCE, JIMMIE J. AND BETTY J. REMLEY, TERRY N. AND MICHELLE L. MCADOO, JOSEPH A. AND MARGARET K. DINKINS, CARLTON W. AND FRANCES A. DENCE, CLIFTON F. AND DONNA GRUBBS SAPP, MARVIN G. AND E. JOYCE KATZ, JOY N. PARISIEN, LEWIS EDWIN AND HELEN BOOKMAN, AND DENNIS R. AND DONDRA C. SETSER, RESPONDENTS

No. 640PA05

(Filed 18 August 2006)

Deeds–restrictive covenants–amendments

Amendments to a declaration of restrictive covenants must be reasonable; reasonableness may be ascertained from the language of the declaration, deeds, and plats, together with other objective circumstances surrounding the parties' bargain, including the nature and character of the community. The amendment in this case granted the Association practically unlimited power to assess lot owners, is contrary to the original intent of the contracting parties, and is unreasonable.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 620 S.E.2d 294 (2005), affirming a judgment granting summary judgment for respondents and denying petitioners' requests for injunctive relief signed on 20 October 2004 by Judge J. Marlene Hyatt in Superior Court, Henderson County. Heard in the Supreme Court 20 April 2006.

Kennedy Covington Lobdell & Hickman, by Roy H. Michaux, Jr., for petitioner-appellants Robert and Vivian Armstrong.

Gray, Layton, Kersh, Solomon, Sigmon, Furr & Smith, P.A., by Ted F. Mitchell, for respondent-appellee The Ledges Homeowners Association, Inc., and Dungan & Associates, P.A., by Robert E. Dungan, for respondent-appellees Owners of Lots in The Ledges of Hidden Hills.

Jordan Price Wall Gray Jones & Carlton, PLLC, by Henry W. Jones, Jr., Hope Derby Carmichael, and Brian S. Edlin, and Wyrick Robbins Yates & Ponton, LLP, by Roger W. Knight, Counsel for Research Triangle Chapter of the Community Associations Institute, Inc., amicus curiae.

WAINWRIGHT, Justice.

This is a declaratory judgment action brought by subdivision property owners against their homeowners' association. The dispositive question before the Court is to what extent the homeowners' association may amend a declaration of restrictive covenants. The parties agree that a declaration may be amended and that the subdivision in question is not subject to North Carolina's Planned Community Act, which is codified in Chapter 47F of the North Carolina General Statutes. There are no disputed questions of fact.

We hold that amendments to a declaration of restrictive covenants must be reasonable. Reasonableness may be ascertained from the language of the declaration, deeds, and plats, together with other objective circumstances surrounding the parties' bargain, including the nature and character of the community. Because we determine that the amendment to the declaration *sub judice*, which authorizes broad assessments "for the general purposes of promoting the safety, welfare, recreation, health, common benefit, and enjoyment of the residents of Lots in The Ledges as may be more specifically authorized from time to time by the Board," is unreasonable, we conclude that the amendment is invalid and unenforceable.

Petitioners own lots in The Ledges of Hidden Hills subdivision (the Ledges) in Henderson County. The Ledges was developed in 1988 by Vogel Development Corporation (Vogel) pursuant to a plat recorded in the Henderson County Public Registry. Forty-nine lots are set out along two main roads that form a Y shape. There are four *cul de sacs*. The plat designates the roads as "public roads,"

which are maintained by the State, and shows no common areas or amenities.

Before selling any lots, Vogel recorded a Declaration of Limitations, Restrictions and Uses (Declaration). The Declaration contained thirty-six provisions which restricted the lots to single family residential use; established setbacks, side building lines, minimum square footage, and architectural controls; and otherwise ensured a sanitary and aesthetically pleasing neighborhood. The Declaration emphasized that roads in the Ledges are "dedicated to public use . . . forever" and that Vogel may "dedicate the roads . . . to the North Carolina Department of Transportation." Finally, the Declaration provided for the establishment of a homeowners' association:

> The Developer [Vogel] intends to establish a non-profit corporation known as THE LEDGES OF THE HIDDEN HILLS HOMEOWNERS [sic] ASSOCIATION, and said Homeowner's [sic] Association, upon the recording of its Articles of Incorporation in the office of the Register of Deeds for Henderson County, North Carolina, shall have the right, together with the lot owners of lots within this Subdivision, either acting individually or as a group, to administer and enforce the provisions of this Declaration of Restrictive Covenants as the same now exists or may hereafter from time to time be amended.

(Emphasis added.) The Declaration did not contain any provision for the collection of dues or assessments, and it appears that formation of a homeowners' association was primarily intended to relieve Vogel from the ongoing responsibility to enforce the architectural control covenants.

Vogel began conveying lots in the Ledges after recording the Declaration and plat. Later, Vogel decided to construct a lighted sign on private property in the Sunlight Ridge Drive right of way. Sunlight Ridge Drive is the entry road to the Ledges. Because lighting the sign required ongoing payment of a utility bill, Vogel included the following additional language in subsequent conveyances:

> The grantor herein contemplates the establishment of a non-profit corporation to be known as The Ledges of Hidden Hills Homeowners Association, and by acceptance of this deed the grantees agree to become and shall automatically so become members of said Homeowners Association when so formed by

> said grantor; and said grantees agree to abide by the corporate charter, bylaws, and rules and regulations of said Homeowners Association and agree to pay prorata [sic] charges and assessments which may be levied by said Homeowners Association when so formed. Until the above contemplated Homeowners Association is formed or in the event the same is not formed, the grantor reserves the right to assess the above-described lot and the owners thereof an equal pro-rata [sic] share of the common expense for electrical street lights and electrical subdivision entrance sign lights and any other common utility expense for various lots within the Subdivision.

(Emphasis added.) This language appears in each petitioner's deed, together with a reference to the previously recorded Declaration. Because specific language in a deed governs related general language, we determine that assessments for "common expense" for "electrical" service are the kind of assessments that the deed provides "may be levied by the Homeowners Association." *See Smith v. Mitchell*, 301 N.C. 58, 67, 269 S.E.2d 608, 614 (1980) (applying the maxim "the specific controls the general" to construction of a restrictive deed covenant). Our conclusion is supported by the deposition of Edward T. Vogel, President of Vogel Development Corporation, taken during this action. In his deposition, Mr. Vogel agreed that the assessment provision was added so that Vogel would not be responsible for paying the electric bill indefinitely.

Articles of Incorporation for the Ledges Homeowners' Association (Association) were not filed with the Secretary of State until 20 September 1994. The Articles provide that the Association is incorporated for the purposes of "upkeep, maintenance and beautification of the common amenities of [the Ledges]," "enforcement of the restrictive covenants of [the Ledges]," and "engag[ing] in any other lawful activities allowed for non-profit corporations under the laws of the State of North Carolina."

Sometime before the Association's first annual meeting in 1995, the Association's three-member Board of Directors adopted by-laws. These by-laws set forth the Association's powers and duties, which included the operation, improvement, and maintenance of common areas; determination of funds needed for operation, administration, maintenance, and management of the Ledges; collection of assessments and common expenses; and employment and dismissal of personnel.

Such bylaws are "administrative provisions" adopted for the "internal governance" of the Association. *Black's Law Dictionary* 193 (7th ed. 1999) [hereinafter *Black's*]. "The bylaws [of a nonprofit corporation] may contain any provision for "regulating and managing the affairs of the corporation," but no bylaw may be "inconsistent with law." N.C.G.S. § 55A-2-06 (2005). As explained below, in a community that is not subject to the North Carolina Planned Community Act, the powers of a homeowners' association are contractual and limited to those powers granted to it by the declaration. Therefore, to be consistent with law, an association's by-laws must necessarily also be consistent with the declaration.

At the first annual meeting, the by-laws were amended to provide that the Association would have a lien on the lot of any owner who failed to pay an assessment. Thereafter, the Association began assessing lot owners for the bills incurred for lighting the Ledges entrance sign. Additionally, the Association assessed owners for mowing the roadside on individual private lots along Sunlight Ridge Drive, for snow removal from subdivision roads, and for operating and legal expenses. By affidavit submitted in support of petitioners' motion for summary judgment, petitioner Vivian Armstrong stated that the annual electrical bill for the sign is less than sixty cents per lot per month or approximately seven dollars and twenty cents per year; however, the Association has billed lot owners total assessments of approximately eighty to one hundred dollars per year.

On 18 June 2003, Armstrong sent an e-mail to the President of the Association, Marvin Katz, challenging the validity of these assessments:

> Since purchasing property here, we've received two invoices from the Ledges homeowner's [sic] association. In good faith, we relied upon the representation that the money was legitimately owed. We've recently learned that the nature of the homeowner's [sic] association has been misrepresented. Therefore, we ask for a full and immediate refund of $160.

Armstrong requested that the matter be placed on the agenda of the officers' next meeting.

At a meeting held on 16 July 2003, the board amended the Association by-laws again, greatly expanding the entity's enumerated powers and duties. In particular, the amended by-laws provided that the Association shall have the power to "[i]mpose charges for late

payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines not to exceed One Hundred Fifty Dollars ($150.00) per violation (on a daily basis for continuing violations) of the Restrictive Covenants, Bylaws, and Rules and Regulations of the Association pursuant to Section 47F-3-107.1 of the North Carolina Planned Community Act." Several additional amended provisions also referenced the Planned Community Act.

On 1 August 2003, petitioners Robert and Vivian Armstrong sent a letter to the Association requesting termination of their membership. On 8 August 2003, petitioners L.A. and E. Ann Moore requested termination of their Association membership as well. In their letter, the Moores stated:

> We chose this particular property last year for several reasons. After a thorough search of Western North Carolina and the Hendersonville/Brevard area, in particular, we decided expressly against living in a gated community with "all the amenities." Golf courses, swimming pools and clubhouses are not our choice for daily living. Walking trails, while enjoyable and convenient, are but another source of assessment we don't need.
>
> The Ledges appeared to be the answer to our desires, and until recent events we've been sure of it. The current Covenants are more restrictive than any other area in which we've resided, but not unreasonably so. While receptive to OPEN discussion of a small change or two, we are adamant in our opposition to the expressed plan of The Board to turn us into a Planned Community.

(Emphasis added.)

On 17 October 2003, petitioners filed a declaratory judgment action in Superior Court, Henderson County, seeking, among other relief, a declaration that the Ledges is not a "planned community" as defined by N.C.G.S. § 47F-1-103 (23) and that the amended by-laws are unenforceable. Thereafter, on 20 November 2003, the Ledges' Board of Directors amended the Association by-laws to omit any reference to North Carolina's Planned Community Act.

On 24 November 2003, a majority of the Association members adopted "Amended and Restated Restrictive Covenants of the Ledges of the Hidden Hills" (Amended Declaration). The Amended Declaration contains substantially different covenants from the originally recorded Declaration, including a clause requiring Association

membership, a clause restricting rentals to terms of six months or greater, and clauses conferring powers and duties on the Association which correspond to the powers and duties previously adopted in the Association's amended by-laws.

Additionally, the Amended Declaration imposes new affirmative obligations on lot owners. It contains provisions authorizing the assessment of fees and the entry of a lien against any property whose owner has failed to pay assessed fees for a period of ninety days. According to the Amended Declaration, such fees are to be "assessed for common expenses" and "shall be used for the general purposes of promoting the safety, welfare, recreation, health, common benefit, and enjoyment of the residents of Lots in The Ledges as may be more specifically authorized from time to time by the Board." Special assessments may be made if the annual fee is inadequate in any year; however, surplus funds are to be retained by the Association. Unpaid assessments bear twelve percent interest per annum.

Petitioners amended their complaint in early December 2003 to reflect the November changes to the Association by-laws and original Declaration. Petitioners asserted five claims for relief, seeking: (1) a declaration that the Ledges is not subject to the Planned Community Act, (2) a declaration that the amended Association by-laws are invalid and unenforceable, (3) a declaration that lot owners are not required to join the Association or otherwise be bound by actions of the Association, (4) a declaration that the Amended Declaration is invalid and unenforceable, and (5) a permanent injunction preventing the Association from enforcing the amended by-laws or recording the Amended Declaration. In their answer to the amended complaint, respondents admitted that neither the amended by-laws nor the Amended Declaration subjected the Ledges to North Carolina's Planned Community Act.[1]

Both petitioners and respondents moved for summary judgment, submitting multiple affidavits and exhibits in support of their positions. Following a hearing, the trial court granted respondents' motion for summary judgment, denied petitioners' motion for summary judgment, and dismissed petitioners' claims with prejudice. In

1. N.C.G.S. § 47F-1-103(23) (2005) defines a planned community as "real estate with respect to which any person, by virtue of that person's ownership of a lot, is expressly obligated by a declaration to pay real property taxes, insurance premiums, or other expenses to maintain, improve, or benefit other lots or other real estate described in the declaration." The Planned Community Act does not apply to any community that does not meet this definition.

so doing, the court found that the Amended Declaration was valid and enforceable. Petitioners then appealed to the North Carolina Court of Appeals.

The Court of Appeals determined that the plain language of the Declaration is sufficient to support any amendment thereto made by a majority vote of Association members, noting "the declaration provides, 'that any portion of the restrictive covenants may be released, changed, modified or amended by majority vote of the then property owners within this Subdivision.' " *Armstrong v. Ledges Homeowners Ass'n*, ––– N.C. App. ––, ––, 620 S.E.2d 294, 297 (2005). The court further concluded that

> [p]roviding for mandatory membership in the [A]ssociation and permitting the [A]ssociation to assess and collect fees from the [A]ssociation's members is not clearly outside the intention of the original restrictive covenants and is generally consistent with the rights and obligations of lot owners of subdivisions subject to restrictive covenants and homeowners' associations.

Id. at ––, 620 S.E.2d at 298. Accordingly, the Court of Appeals affirmed the trial court's order of summary judgment in favor of respondents.

Robert and Vivian Armstrong then filed a petition for discretionary review in this Court, arguing that the Court of Appeals erred by determining that the scope of the disputed amendment does not exceed the authority granted to the Association in the covenants contained in the original Declaration. Petitioners did not seek discretionary review of remaining issues resolved by the Court of Appeals. This Court granted the Armstrongs' petition on 26 January 2006.

The word covenant means a binding agreement or compact benefitting both covenanting parties. *See generally Black's* 369; *The American Heritage Dictionary of the English Language* 432 (3rd ed. 1992) [hereinafter *Heritage*]; *Random House Webster's College Dictionary* 314 (1991) [hereinafter *Webster's*]. A covenant represents a meeting of the minds and results in a relationship that is not subject to overreaching by one party or sweeping subsequent change.

Covenants accompanying the purchase of real property are contracts which create private incorporeal rights, meaning non-possessory rights held by the seller, a third-party, or a group of people, to use or limit the use of the purchased property. *See Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 401, 584 S.E.2d 731,

735-36 (2003) (stating that courts will enforce a real covenant in the same manner as any other contract); *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 436, 527 S.E.2d 40, 42 (2000) (stating that covenants create incorporeal rights); Robert G. Natelson, *Law of Property Owners Associations* §§ 2.1, 2.3.3.1 (1989) (discussing the characteristics of servitudes and contractual servitudes) [hereinafter *Law of Associations*]. Real covenants "run with the land," creating a servitude on the land subject to the covenant. *Runyon v. Paley*, 331 N.C. 293, 299-300, 416 S.E.2d 177, 182-83 (1992) (explaining that a restrictive covenant is a real covenant if "(1) the subject of the covenant touches and concerns the land, (2) there is privity of estate between the party enforcing the covenant and the party against whom the covenant is being enforced, and (3) the original covenanting parties intended the benefits and burdens of the covenant to run with the land") (emphasis added). An enforceable real covenant is made in writing, properly recorded, and not violative of public policy. *J. T. Hobby & Son, Inc. v. Family Homes of Wake Cty, Inc.*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981) (Real covenants may not offend "articulated considerations of public policy or concepts of substantive law."); *Cummings v. Dosam, Inc.*, 273 N.C. 28, 32, 159 S.E.2d 513, 517 (1968) (stating that real covenants must be in writing); *Hege v. Sellers*, 241 N.C. 240, 248, 84 S.E.2d 892, 898 (1954) (stating that real covenants must be recorded).

Real covenants are either restrictive or affirmative. Classic restrictive covenants include covenants limiting land use to single family residential purposes and establishing setback and side building line requirements. Affirmative covenants impose affirmative duties on landowners, such as an obligation to pay annual or special assessments for the upkeep of common areas and amenities in a common interest community.

Because covenants originate in contract, the primary purpose of a court when interpreting a covenant is to give effect to the original intent of the parties; however, covenants are strictly construed in favor of the free use of land whenever strict construction does not contradict the plain and obvious purpose of the contracting parties. *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967) ("[T]he fundamental rule is that the intention of the parties governs" construction of real covenants.). *But see Wise*, 357 N.C. at 404, 584 S.E.2d at 737 (When a covenant infringes on common law property rights, " '[a]ny doubt or ambiguity will be resolved against the validity of the restriction.' " (quoting *Cummings*, 273 N.C. at 32, 159

S.E.2d at 517)); *J. T. Hobby & Son, Inc.*, 302 N.C. at 71, 274 S.E.2d at 179 ("The rule of strict construction 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."). Moreover, the North Carolina Court of Appeals has held that affirmative covenants are unenforceable "unless the obligation [is] imposed in clear and unambiguous language which is sufficiently definite to guide the courts in its application." *Beech Mountain Prop. Owner's Ass'n v. Seifart*, 48 N.C. App. 286, 288, 295-96, 269 S.E.2d 178, 179-80, 183 (1980) (concluding that covenants requiring an assessment for " 'road maintenance and maintenance of the trails and recreational areas,' " " 'road maintenance, recreational fees, and other charges assessed by the Association,' " and " 'all dues, fees, charges, and assessments made by that organization, but not limited to charges for road maintenance, fire protection, and security services' " were not sufficiently definite and certain to be enforceable); *see also Allen v. Sea Gate Ass'n*, 119 N.C. App. 761, 764-65, 460 S.E.2d 197, 199-200 (1995) (holding that a covenant requiring an assessment " 'for the maintenance, upkeep and operations of the various areas and facilities by Sea Gate Association, Inc.' " was void because there was no standard by which a court could assess how the Association chooses the properties to maintain); *Snug Harbor Prop. Owners Ass'n v. Curran*, 55 N.C. App. 199, 203-04, 284 S.E.2d 752, 755 (1981) (holding that covenants requiring owners to pay an annual fee for the " '[m]aintenance and improvement of Snug Harbor and its appearance, sanitation, easements, recreation areas and parks' " and " '[f]or the maintenance of the recreation area and park' " were not enforceable because there was "no standard by which the maintenance [was] to be judged"), *disc. rev. denied*, 305 N.C. 302, 291 S.E.2d 151 (1982). *But see Figure Eight Beach Homeowners' Ass'n v. Parker*, 62 N.C. App. 367, 371, 377, 303 S.E.2d 336, 339, 342 (concluding that a covenant authorizing an assessment for " '[m]aintaining, operating and improving the bridges; protection of the property from erosion; collecting and disposing of garbage, ashes, rubbish and the like; maintenance and improvement of the streets, roads, drives, rights of way, community land and facilities, tennis courts, marsh and waterways; employing watchmen; enforcing these restrictions; and, in addition, doing any other things necessary or desirable in the opinion of the Company to keep the property in neat and good order and to provide for the health, welfare and safety of owners and residents of Figure Eight Island' " was enforceable because the purpose of the assessment was described with sufficient particularity), *disc. rev.*

denied, 309 N.C. 320, 307 S.E.2d 170 (1983). The existence of definite and certain assessment provisions in a declaration does not imply that subsequent additional assessments were contemplated by the parties, and courts are " 'not inclined' " to read covenants into deeds when the parties have left them out. *See Wise*, 357 N.C. at 407, 584 S.E.2d at 739-40 (quoting *Hege*, 241 N.C. at 249, 84 S.E.2d at 899).

Developers of subdivisions and other common interest communities establish and maintain the character of a community, in part, by recording a declaration listing multiple covenants to which all community residents agree to abide. *See generally* Law of Associations, § 2.4 (discussing servitudes and the subdivision declaration). Lot owners take their property subject to the recorded declaration, as well as any additional covenants contained in their deeds. Because covenants impose continuing obligations on the lot owners, the recorded declaration usually provides for the creation of a homeowners' association to enforce the declaration of covenants and manage land for the common benefit of all lot owners, thereby preserving the character of the community and neighborhood property values. *Id.* § 3.1 (discussing distinguishing characteristics of the property owners' association). In a community that is not subject to the North Carolina Planned Community Act, the powers of a homeowners' association are contractual and are limited to those powers granted to it by the declaration. *Wise*, 357 N.C. at 401, 584 S.E.2d at 736 ("[U]nder the common law, developers and lot purchasers were free to create almost any permutation of homeowners association the parties desired."). *Cf.* N.C.G.S. § 47F-3-102 (2005) (enumerating the powers of a planned community's homeowners association); *id.* § 47F-1-102, N.C. cmt. (2005) (naming powers that may apply retroactively to planned communities created before the effective date of the Act). Although individual lot owners may voluntarily undertake additional responsibilities that are not set forth in the declaration, or undertake additional responsibilities by mistake, lot owners are not contractually bound to perform or continue to perform such tasks.

Declarations of covenants that are intended to govern communities over long periods of time are necessarily unable to resolve every question or community concern that may arise during the term of years. *See* 2 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 18-10, at 858 (Patrick K. Hetrick & James B. McLaughlin, Jr., eds., 5th ed. 1999) (noting that a homeowners' association often takes over service and maintenance responsibilities from the developer in a planned transfer to ensure continuation of

these operations in the future). This is especially true for luxury communities in which residents enjoy multiple common areas, private roads, gates, and other amenities, many of which are staffed and maintained by third parties. *See* Patrick K. Hetrick, Wise v. Harrington Grove Community Association, Inc.*: A Pickwickian Critique: The North Carolina Planned Community Act Revisited*, 27 Campbell L. Rev. 139, 171-73 (2005) (comparing the administrative and legal needs of a modest subdivided hypothetical neighborhood, "Homeplace Acres," with those of a hypothetical "upscale residential land development," "Sweet Auburn Acres"). For this reason, most declarations contain specific provisions authorizing the homeowners' association to amend the covenants contained therein.

The term amend means to improve, make right, remedy, correct an error, or repair. *See generally Black's* at 80; *Heritage* at 44; *Webster's* at 59. Amendment provisions are enforceable; however, such provisions give rise to a serious question about the permissible scope of amendment, which results from a conflict between the legitimate desire of a homeowners' association to respond to new and unanticipated circumstances and the need to protect minority or dissenting homeowners by preserving the original nature of their bargain. *See Wise*, 357 N.C. at 401, 584 S.E.2d at 736 ("A court will generally enforce [real] covenants ' "to the same extent that it would lend judicial sanction to any other valid contractual relationship." ' " (quoting *Karner*, 351 N.C. at 436, 527 S.E.2d at 42 (citation omitted)); *see also* 2 Restatement (Third) of Property: Servitudes § 6 Introductory Note at 71 (2000) ("The law should facilitate the operation of common interest communities at the same time as it protects their long-term attractiveness by protecting the legitimate expectations of their members.") (emphasis added). In the same way that the powers of a homeowners' association are limited to those powers granted to it by the original declaration, an amendment should not exceed the purpose of the original declaration.

In the case *sub judice*, petitioners argue that the affirmative covenants contained in their deeds authorize only nominal assessments for the maintenance of a lighted sign at the subdivision entrance; thus, the Association's subsequent amendment of the Declaration to authorize broad general assessments to "promot[e] the safety, welfare, recreation, health, common benefit, and enjoyment of the residents of Lots in The Ledges as may be more specifically authorized from time to time by the Board" is invalid and unenforceable. Respondents contend that the Declaration of Restrictive

Covenants expressly permits the homeowners' association to amend the covenants; thus, any amendment that is adopted in accordance with association by-laws and is neither illegal nor against public policy is valid and enforceable, regardless of its breadth or subject matter. We hold that a provision authorizing a homeowners' association to amend a declaration of covenants does not permit amendments of unlimited scope; rather, every amendment must be reasonable in light of the contracting parties' original intent.[2]

A disputing party will necessarily argue that an amendment is reasonable if he believes that it benefits him and unreasonable if he believes that it harms him. However, the court may ascertain reasonableness from the language of the original declaration of covenants, deeds, and plats, together with other objective circumstances surrounding the parties' bargain, including the nature and character of the community. For example, it may be relevant that a particular geographic area is known for its resort, retirement, or seasonal "snowbird" population. Thus, it may not be reasonable to retroactively prohibit rentals in a mountain community during ski season or in a beach community during the summer. Similarly, it may not be reasonable to continually raise assessments in a retirement community where residents live primarily on a fixed income. Finally, a homeowners' association cannot unreasonably restrict property rental by implementing a garnishment or "taking" of rents (which is essentially an assessment); although it may be reasonable to restrict

2. A number of other states considering amendments to the founding documents of common interest communities have also applied a reasonableness standard. *See Hutchens v. Bella Vista Vill. Prop. Owners' Ass'n*, 82 Ark. App. 28, 37, 110 S.W.3d 325, 330 (2003) (concluding "the power of . . . [a] homeowner's [sic] association . . . to make rules, regulations, or amendments to its declaration or bylaws is limited by a determination of whether the action is unreasonable, arbitrary, capricious, or discriminatory"); *Holiday Pines Prop. Owners Ass'n v. Wetherington*, 596 So. 2d 84, 87 (Fla. Dist. Ct. App. 1992) (per curiam) ("In determining the enforceability of an amendment to restrictive covenants, the test is one of reasonableness."); *Zito v. Gerken*, 225 Ill. App. 3d 79, 81, 587 N.E.2d 1048, 1050 (1992) ("A restrictive covenant which has been modified, altered or amended will be enforced if it is clear, unambiguous and reasonable."); *Buckingham v. Weston Vill. Homeowners Ass'n*, 1997 ND 237, ¶10, 571 N.W.2d 842, 844 (A condominium association's amendment to the declaration or bylaws "must be reasonable" and "a rule which is unreasonable, arbitrary, or capricious is invalid."); *Worthinglen Condo. Unit Owners' Ass'n v. Brown*, 57 Ohio App. 3d 73, 75-76, 566 N.E.2d 1275, 1277 (1989) (adopting "the reasonableness test, pursuant to which the validity of condominium rules is measured by whether the rule is reasonable under the surrounding circumstances"); *Shafer v. Bd. of Trs. of Sandy Hook Yacht Club Estates, Inc.*, 76 Wash. App. 267, 273-74, 883 P.2d 1387, 1392 (1994) (a covenant amendment "respecting the use of privately-owned property is valid, provided that such power is exercised in a reasonable manner consistent with the general plan of the development"), *disc. rev. denied*, 127 Wash. 2d 1003, 898 P.2d 308 (1995).

the frequency of rentals to prevent rented property from becoming like a motel.

Correspondingly, restrictions are generally enforceable when clearly set forth in the original declaration. Thus, rentals may be prohibited by the original declaration. In this way, the declaration may prevent a simple majority of association members from turning established non-rental property into a rental complex, and vice-versa.

In all such cases, a court reviewing the disputed declaration amendment must consider both the legitimate needs of the homeowners' association and the legitimate expectations of lot owners. A court may determine that an amendment is unreasonable, and, therefore, invalid and unenforceable against existing owners who purchased their property before the amendment was passed; however, the same court may also find that the amendment is binding as to subsequent purchasers who buy their property with notice of a recorded amended declaration.

Here, petitioners purchased lots in a small residential neighborhood with public roads, no common areas, and no amenities. The neighborhood consists simply of forty-nine private lots set out along two main roads and four *cul de sacs*. Given the nature of this community, it makes sense that the Declaration itself did not contain any affirmative covenants authorizing assessments. Neither the Declaration nor the plat shows any source of common expense.

Although petitioners' deeds contain an additional covenant requiring lot owners to pay a pro rata share of the utility bills incurred from lighting the entrance sign, it is clear from the language of this provision, together with the Declaration, the plat, and the circumstances surrounding installation of the sign, that the parties did not intend this provision to confer unlimited powers of assessment on the Association. The sole purpose of this additional deed covenant was to ensure that the developer did not remain responsible for lighting the entrance sign after the lots were conveyed. Payment of the utility bill is the single shared obligation contained in petitioners' deeds, and each lot owner's pro rata share of this expense totals approximately seven dollars and twenty cents per year.

For these reasons, we determine that the Association's amendment to the Declaration which authorizes broad assessments "for the general purposes of promoting the safety, welfare, recreation, health, common benefit, and enjoyment of the residents of Lots in The

Ledges as may be more specifically authorized from time to time by the Board" is unreasonable. The amendment grants the Association practically unlimited power to assess lot owners and is contrary to the original intent of the contracting parties. Indeed, the purposes for which the Association has billed additional assessments of approximately eighty to one hundred dollars per year are unrelated to all other provisions of the deeds, Declaration, and plat: for example, assessments for mowing land that the plat clearly designates as private property and assessments for snow removal from roads that the plat clearly designates as public.

For the reasons stated above, we conclude that the disputed amendment is invalid and unenforceable. In so doing, we echo the rationale of the Supreme Court of Nebraska in *Boyles v. Hausmann*, 246 Neb. 181, 191, 517 N.W.2d 610, 617 (1994): "The law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes in existing covenants." Here, petitioners purchased their lots without notice that they would be subjected to additional restrictions on use of the lots and responsible for additional affirmative monetary obligations imposed by a homeowners' association. This Court will not permit the Association to use the Declaration's amendment provision as a vehicle for imposing a new and different set of covenants, thereby substituting a new obligation for the original bargain of the covenanting parties. Accordingly, we reverse the opinion of the North Carolina Court of Appeals and remand this case to that court for further remand to the trial court for additional proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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

STATE OF NORTH CAROLINA v. TWANPRECE NESHAWN IVEY

No. 458PA05

(Filed 18 August 2006)

Search and Seizure—failure to signal turn–not a violation under circumstances—no probable cause

Defendant's failure to signal his turn at a T-intersection did not violate N.C.G.S. § 20-154(a) because no other traffic was affected, the officer who stopped defendant lacked probable cause to stop defendant's vehicle, and the firearm seized in the resulting search should have been excluded from evidence.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 171 N.C. App. 516, 615 S.E.2d 738 (2005), affirming a judgment entered on 25 May 2004 by Judge David S. Cayer in Superior Court, Mecklenburg County. Heard in the Supreme Court 18 April 2006.

Roy Cooper, *Attorney General*, *by Clinton C. Hicks*, *Assistant Attorney General*, *for the State.*

Isabel Scott Day, *Mecklenburg County Public Defender*, *by Julie Ramseur Lewis*, *Assistant Public Defender*, *for defendant-appellant.*

BRADY, Justice.

On 11 September 2002, Charlotte-Mecklenburg Police Officer Christopher Rush (Officer Rush) stopped a sport utility vehicle driven by defendant Twanprece Neshawn Ivey after defendant made a right turn without using a turn signal. Officer Rush subsequently obtained defendant's consent and searched the vehicle, recovering a firearm. The fruit of this search was the basis of defendant's convictions of possession of a firearm by a felon and carrying a concealed weapon. We must determine the constitutionality of the traffic stop by ascertaining whether Officer Rush had probable cause to believe defendant's operation of his vehicle violated any applicable traffic statute.

Before the trial court, defendant made a motion *in limine* to exclude the firearm from evidence, arguing Officer Rush lacked probable cause to believe a traffic violation had occurred. The trial court denied defendant's motion, and defendant then pleaded guilty to both

offenses, which were consolidated under the possession of a firearm by a felon charge. The trial court sentenced defendant, who had a prior record level of II, at the maximum of the presumptive range to a term of fifteen to eighteen months imprisonment.

Defendant appealed the denial of his motion to suppress to the Court of Appeals, which unanimously affirmed the trial court's decision in an unpublished opinion. *State v. Ivey*, 171 N.C. App. 516, 615 S.E.2d 738, 2005 WL 1669023 (July 19, 2005) (No. COA04-1420). We hold a reasonable officer, under the circumstances presented, would not have had probable cause to believe that a traffic violation occurred and, thus, the seizure and subsequent search of defendant's vehicle were unreasonable and violated defendant's rights under the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution. Therefore, we reverse the decision of the Court of Appeals and remand with instructions to vacate defendant's convictions and remand to the trial court for proceedings not inconsistent with this opinion.

FACTUAL BACKGROUND

On 11 September 2002, while on routine patrol of an urban area, Officer Rush observed defendant driving a white Chevrolet Tahoe sport utility vehicle with "tinted windows and expensive, fancy chrome wheels" on Monument Street in Charlotte, North Carolina. There is no indication that any other automobile or pedestrian traffic which might have been in the area would have been affected by defendant's operation of the vehicle. Officer Rush, some distance directly behind the automobile, saw defendant come to a complete stop at a T-intersection and then make a right turn without signaling. A concrete median at the T-intersection blocked a left turn, so that, as Officer Rush confirmed at the suppression hearing, defendant had no choice but to turn right. After observing defendant's turn, Officer Rush initiated a traffic stop of the sport utility vehicle and issued a uniform citation to defendant for unsafe movement under N.C.G.S. § 20-154(a) for failure to signal. During this traffic stop, Officer Rush solicited and received defendant's consent to a warrantless search of the automobile. During this search, Officer Rush discovered a firearm, which was the basis for defendant's convictions of possession of a firearm by a felon and carrying a concealed weapon.

ANALYSIS

As a general rule, "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic

violation has occurred." *Whren v. United States*, 517 U.S. 806, 810 (1996). In examining the legality of a traffic stop, the proper inquiry is not the subjective reasoning of the officer, but whether the objective facts support a finding that probable cause existed to stop the defendant. *See State v. McClendon*, 350 N.C. 630, 635, 517 S.E.2d 128, 132 (1999). Probable cause exists when there is a fair probability or substantial chance a crime has been committed and that the defendant committed it. *See Illinois v. Gates*, 462 U.S. 213, 245-46 (1983). Thus, the United States and North Carolina Constitutions require an officer who makes a seizure on the basis of a perceived traffic violation to have probable cause to believe the driver's actions violated a motor vehicle law. *See McClendon*, 350 N.C. at 635-36, 517 S.E.2d at 132 (adopting the reasoning of *Whren v. United States* in interpreting Article I, Section 20 of the North Carolina Constitution). The standard of probable cause is a basic tenet that applies regardless of whether the action is taken by a deputy sheriff, a city police officer, a state Alcohol Law Enforcement agent, or a wildlife enforcement officer.

Although neither party briefed the issue, there was discussion at oral argument concerning whether this traffic stop was a case of "driving while black." " 'Driving while black' refers to the charge that police stop, question, warn, cite or search African American citizens because of their race." Matthew T. Zingraff et al., *Evaluating North Carolina State Highway Patrol Data: Citations*, *Warnings*, *and Searches in 1998*, at 2 (Nov. 1, 2000) (report submitted to North Carolina Department of Crime Control & Public Safety). From the record in the instant case, we cannot determine whether the stop of defendant, a black male, was a selective enforcement of the law based upon race. Regardless, this Court will not tolerate discriminatory application of the law based upon a citizen's race. As espoused by the Supreme Court of the United States, "the Constitution prohibits selective enforcement of the law based on considerations such as race," because such enforcement violates the Fourteenth Amendment's Equal Protection Clause. *Whren*, 517 U.S. at 806. However, such "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.*

In making a determination of whether Officer Rush had probable cause to stop defendant, we must consider the alleged violation of North Carolina traffic law. Our General Statutes provide:

> The driver of any vehicle upon a highway or public vehicular area before starting, stopping or turning from a direct line shall first

> see that such movement can be made in safety, and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement. The driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic.

N.C.G.S. § 20-154(a) (2005). Consistent with subsection 20-154(a), "[t]he duty to give a statutory signal of an intended . . . turn does not arise in any event unless the operation of some 'other vehicle may be affected by such movement.' " *Cooley v. Baker*, 231 N.C. 533, 536, 58 S.E.2d 115, 117 (1950) (quoting N.C.G.S. § 20-154(a)); *accord Clarke v. Holman*, 274 N.C. 425, 429-30, 163 S.E.2d 783, 786-87 (1968).

Therefore, unless a reasonable officer would have believed, under the circumstances of the stop, that defendant's actions violated subsection 20-154(a), Officer Rush lacked probable cause to stop defendant's vehicle. More specifically, unless a reasonable officer would have believed that defendant's failure to use his turn signal at this intersection might have affected the operation of another vehicle, then Officer Rush's stop and subsequent search were unconstitutional.

The record in the case *sub judice* simply does not support a finding of probable cause. The record does not indicate that any other vehicle or any pedestrian was, or might have been, affected by the turn. Therefore, the only question is whether Officer Rush's vehicle may have been affected by the turn. Officer Rush was traveling at some distance behind the sport utility vehicle and observed defendant come to a complete stop at the stop sign. Defendant then turned right, the only legal movement he could make at the intersection. Regardless of whether defendant used a turn signal, Officer Rush's vehicle would not have been affected. Officer Rush's only option was to stop at the intersection. Accordingly, Officer Rush's vehicle could not have been affected by defendant's maneuver.

This case is readily distinguishable from *Whren*, in which the officers observed

> a dark Pathfinder truck with temporary license plates and youthful occupants waiting at a stop sign, the driver looking down into the lap of the passenger at his right. The truck remained stopped

> at the intersection for what seemed an unusually long time—more than 20 seconds. When the police car executed a U-turn in order to head back toward the truck, the Pathfinder turned suddenly to its right, without signaling, and sped off at an "unreasonable" speed.

517 U.S. at 808. As noted by the United States Court of Appeals for the District of Columbia in *Whren*, the officers observed three violations of District of Columbia motor vehicle laws committed by the defendant: failure to give " 'full time and attention' " to his driving, turning without signaling, and driving away at an unreasonable speed. *See United States v. Whren*, 53 F.3d 371, 376 (D.C. Cir. 1995), *aff'd*, 517 U.S. 806 (1996). Because failure to give a signal, in and of itself, does not constitute a violation of N.C.G.S. § 20-154(a), nothing in the record suggests Officer Rush had probable cause to believe any traffic violation occurred.

We conclude that Officer Rush's stop violated defendant's rights under the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution. Because the fruit of Officer Rush's search of the vehicle arose from the illegal stop, all evidence seized during the search should have been excluded by the trial court, and it was therefore error to deny defendant's motion to suppress. *See Wong Sun v. United States*, 371 U.S. 471, 484-87 (1963) ("The exclusionary prohibition extends as well to the indirect as the direct products of such invasions."); *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961) (applying the exclusionary rule to the states, thereby barring admission of evidence obtained in violation of the Fourth Amendment in state criminal trials).

Accordingly, we reverse the decision of the Court of Appeals and remand to that court with instructions to vacate defendant's convictions and remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

CAROLINE D'AQUISTO, EMPLOYEE v. MISSION ST. JOSEPH'S HEALTH SYSTEM, EMPLOYER, CAMBRIDGE INTEGRATED SERVICES, SERVICING AGENT

No. 415PA05

(Filed 18 August 2006)

Workers' Compensation–defense of claims—reasonable grounds–sanctions improper

Defendant employer's defense of plaintiff's workers' compensation claims was not without reasonable grounds, and the Industrial Commission erred in imposing sanctions on defendant under N.C.G.S. § 97-88.1.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 171 N.C. App. 216, 614 S.E.2d 583 (2005), affirming an opinion and award filed on 20 May 2004 by the North Carolina Industrial Commission. Heard in the Supreme Court 18 April 2006.

The Sumwalt Law Firm, by Vernon Sumwalt, and Ganly & Ramer, PLLC, by Thomas F. Ramer, for plaintiff-appellee.

Van Winkle Buck Wall Starnes & Davis, PA, by Allan R. Tarleton, for defendant-appellant Mission St. Joseph's Health System.

PER CURIAM.

As to whether the Court of Appeals erred by affirming the imposition of sanctions against defendant under N.C.G.S. § 97-88.1, we hold that based upon the specific facts of this case, defendant's defense of plaintiff's claims was not without reasonable grounds. We further conclude that the petition for discretionary review as to additional issues was improvidently allowed.

Thus we reverse that portion of the Court of Appeals opinion affirming the imposition of sanctions and remand this case to the Court of Appeals for remand to the Industrial Commission for further proceedings not inconsistent with this opinion.

REVERSED IN PART AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

IN RE K.H. & P.D.D.

[360 N.C. 568 (2006)]

IN THE MATTER OF:	)	
	)	From Buncombe County
K.H AND P.D.D.	)	

No. 204A06

ORDER

Respondent's motion to dismiss the appeal as moot is allowed, the opinion of the Court of Appeals is vacated, respondent's motion for extension of time to file brief is dismissed as moot, and the guardian ad litem's petition for discretionary review is denied.

By Order of the Court in Conference, this 17th day of August 2006.

Timmons-Goodson, J.
For the Court

STATE v. ALLEN

[360 N.C. 569 (2006)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Gaston County
	)	
LEVAR JAMEL ALLEN	)	
	)	

No. 485PA04

ORDER

WHEREAS the Supreme Court of North Carolina issued an opinion in *State v. Allen*, 359 N.C. 425 (2005), and whereas the Supreme Court of the United States issued an opinion in *Washington v. Recuenco*, —— U.S. ——, 126 S. Ct. 2977 (2006).

NOW THEREFORE, this Court, *ex mero motu*, withdraws the opinion filed on 1 July 2005 in *State v. Allen*, reported at 359 N.C. 425.

Upon consideration of the order of the Supreme Court of the United States vacating the judgment of this Court in *North Carolina v. Speight*, 126 S. Ct. 2977 (2006) and remanding that cause for further consideration in light of its decision in *Washington v. Recuenco*, —— U.S. ——, 126 S. Ct. 2977 (2006), the following order is entered:

The State shall have 20 days from the filing of this order to file and serve a supplemental brief with this Court, limited to the questions of whether there was error in this case pursuant to *Washington v. Recuenco* and, if so, whether any error can be found to be harmless beyond a reasonable doubt. *State v. Allen*, 359 N.C. 425 (2005). Defendant may file his brief in response within 20 days after service of the State's brief upon him. Each side will be allowed up to 20 minutes of oral argument.

By Order of the Court in Conference, this 17th day of August 2006.

Timmons-Goodson, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Durham County
	)	
TIMOTHY EARL BLACKWELL	)	

No. 490PA04

ORDER

Upon consideration of the order of the Supreme Court of the United States vacating the judgment of this Court in *North Carolina v. Speight*, 126 S. Ct. 2977 (2006) and remanding that cause for further consideration in light of its decision in *Washington v. Recuenco*, —— U.S. ——, 126 S. Ct. 2977 (2006), the following order is entered:

The State shall have 20 days from the filing of this order to file and serve a supplemental brief with this Court, limited to the questions of whether there was error in this case pursuant to *Washington v. Recuenco* and, if so, whether any error can be found to be harmless beyond a reasonable doubt. *State v. Blackwell*, 359 N.C. 814 (2005). Defendant may file its brief in response within 20 days after service of the State's brief upon him. Each side will be allowed up to 20 minutes of oral argument.

By Order of the Court in Conference, this 17th day of August 2006.

Timmons-Goodson, J.
For the Court

STATE v. FORREST

[360 N.C. 571 (2006)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Wake County
	)	
WILLIE FORREST, III	)	

No. 270A04

ORDER

Upon consideration of the order of the Supreme Court of the United States vacating the judgment of this Court and remanding this cause for further consideration in light of its decision in *Davis v. Washington*, 547 U.S. ——, 126 S. Ct. 2266 (2006), the following order is entered:

Defendant shall have 20 days from the filing of this order to file and serve a supplemental brief with this Court, limited to the question of whether there was error in this case pursuant to *Davis v. Washington*. *State v. Forrest*, 359 N.C. 424 (2005). The State may file its brief in response within 20 days after service of the defendant's brief. Each side will be allowed up to 20 minutes of oral argument.

By Order of the Court in Conference, this 17th day of August 2006.

Timmons-Goodson, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Caldwell County
	)	
DAVID FRANKLIN HURT	)	

No. 192A04

ORDER

Upon consideration of the order of the Supreme Court of the United States vacating the judgment of this Court in *North Carolina v. Speight*, 126 S. Ct. 2977 (2006) and remanding that cause for further consideration in light of its decision in *Washington v. Recuenco*, —— U.S. ——, 126 S. Ct. 2977 (2006), the following order is entered:

The State shall have 20 days from the filing of this order to file and serve a supplemental brief with this Court, limited to the questions of whether there was error in this case pursuant to *Washington v. Recuenco* and, if so, whether any error can be found to be harmless beyond a reasonable doubt. *State v. Hurt*, 359 N.C. 840 (2005). Defendant may file its brief in response within 20 days after service of the State's brief upon him. Each side will be allowed up to 20 minutes of oral argument.

By Order of the Court in Conference, this 17th day of August 2006.

Timmons-Goodson, J.
For the Court

STATE v. LEWIS

[360 N.C. 573 (2006)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Wake County
	)	
ANGELA DEBORAH LEWIS	)	

No. 558PA04

ORDER

Upon consideration of the order of the Supreme Court of the United States vacating the judgment of this Court and remanding this cause for further consideration in light of its decision in *Davis v. Washington*, 547 U.S. ——, 126 S. Ct. 2266 (2006), the following order is entered:

Defendant shall have 20 days from the filing of this order to file and serve a supplemental brief with this Court, limited to the question of whether there was error in this case pursuant to *Davis v. Washington*. *State v. Lewis*, 360 N.C. 1 (2005). The State may file its brief in response within 20 days after service of the defendant's brief. Each side will be allowed up to 20 minutes of oral argument.

By Order of the Court in Conference, this 17th day of August 2006.

Timmons-Goodson, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Pitt County
	)	
TIMMY WAYNE SPEIGHT	)	

No. 491PA04

ORDER

Upon consideration of the order of the Supreme Court of the United States vacating the judgment of this Court and remanding this cause for further consideration in light of its decision in *Washington v. Recuenco*, —— U.S. ——, 126 S. Ct. 2977 (2006), the following order is entered:

The State shall have 20 days from the filing of this order to file and serve a supplemental brief with this Court, limited to the questions of whether there was error in this case pursuant to *Washington v. Recuenco* and, if so, whether any error can be found to be harmless beyond a reasonable doubt. *State v. Speight*, 359 N.C. 602 (2005). Defendant may file its brief in response within 20 days after service of the State's brief upon him. Each side will be allowed up to 20 minutes of oral argument.

By Order of the Court in Conference, this 17th day of August 2006.

Timmons-Goodson, J.
For the Court

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

American Gen. Fin. Servs., Inc. v. Barnes Case below: 175 N.C. App. 406	No. 052P06	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA05-478) 2. Def's (Pennsylvania National Mut. Cas. Ins. Co.) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 8/17/06 2. Dismissed as Moot 8/17/06
Azalea Garden Bd. & Care, Inc. v. Blackwell & Assocs. Mgmt., Inc. Case below: 176 N.C. App. 766	No. 219P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-770)	Denied 8/17/06
Brown v. City of Winston-Salem Case below: 176 N.C. App. 497	No. 198P06	Plt's PWC to Review Decision of COA (COA05-464)	Denied 8/17/06
C&S Realty Corp. v. Blowe Case below: 175 N.C. App. 591	No. 081P06	1. Def's PDR Under N.C.G.S. § 7A-31 (COA05-461) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 8/17/06 2. Dismissed as Moot 8/17/06
Carter-Hubbard Publ'g Co. v. WRMC Hosp. Operating Corp. Case below: 178 N.C. App. 621	No. 411P06	Def's Motion for Temporary Stay (COA05-420)	Allowed 08/11/06
Ellen v. A.C. Schultes of Maryland, Inc. Case below: 172 N.C. App. 317	No. 505P05	1. Defendant-Appellants' PWC to Review Order of Superior Court (COA04-1320) 2. Defendant-Appellants' PDR to review COA decision	1. Denied 8/17/06 2. Denied 8/17/06 **Timmons-Goodson, J., Recused**
Frances L. Austin Family Ltd. P'ship v. City of High Point Case below: 177 N.C. App. 753	No. 352P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-1514)	Denied 8/17/06

Gibboney v. Wachovia Bank, N.A. Case below: 174 N.C. App. 834	No. 005P06	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA04-1636) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 8/17/06 2. Dismissed as Moot 8/17/06 **Martin, J., Recused**
Gilreath v. N.C. Dep't Health & Human Servs. Case below: 177 N.C. App. 499	No. 310A06	1. Def's NOA (Dissent) (COA05-940) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Plt's PWC to Review Decision of COA	1. —- 2. Denied 8/17/06 3. Denied 8/17/06
Hammonds v. Lumbee River Elec. Membership Corp. Case below: 178 N.C. App. 1	No. 385P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-733)	Denied 8/17/06
Harco Nat'l Ins. Co. v. BDO Seidman, LLP Case below: 178 N.C. App. 234	No. 374P06	1. Def's PDR Under N.C.G.S. § 7A-31 (COA05-1429) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 8/17/06 2. Dismissed as Moot 8/17/06
Harris v. Matthews Case below: 176 N.C. App. 189	No. 479P05-2	1. Def's (Clifford J. Matthews, Jr.) NOA Based Upon a Constitutional Question (COA05-28-2) 2. Plts' Motion to Dismiss Appeal 3. Def's (Clifford J. Matthews, Jr.) PDR Under N.C.G.S. § 7A-31	1. —- 2. Allowed 8/17/06 3. Allowed 8/17/06 **Martin, J., Recused**

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

Hill v. Hill Case below: 173 N.C. App. 309	No. 638P05	1. Plt's Motion for a Temporary Stay During the Pendency of Appellant's Motion to Renew the Stay Previously Entered by the Court (COA03-969-2) 2. Plt's Motion for Reconsideration of Appeal of Right and PDR, and Alternatively Motion for Summary Remand 3. Plt's Motion for Reconsideration of Petition for Writ of Supersedeas, Including Motion to Review the Temporary Stay 4. Plt's Motion for Consistency in Recusal Determinations	1. Denied 07/28/06 2. Denied 8/17/06 3. Denied 8/17/06 4. Dismissed 8/17/06 **Martin, J. and Timmons-Goodson, J., Recused**
In re Foreclosure of Hunt Case below: 175 N.C. App. 407	No. 173P06	1. Def's (Martina Clark) NOA Based Upon a Constitutional Question (COA05-178) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Defendant's (Martina Clark) Motion to Vacate Order 4. Def's Alternative Motion to Modify Order	1. Dismissed *Ex Mero Motu* 05/04/06 360 N.C. 534 2. Denied 05/04/06 360 N.C. 534 3. Denied 06/29/06 4. Denied 8/17/06
In re M.B. Case below: 176 N.C. App. 766	No. 216P06	Respondent's (Niamalikia R.) PDR Under N.C.G.S. § 7A-31 (COA05-843)	Denied 8/17/06
In re Will of Yelverton Case below: 178 N.C. App. 267	No. 376P06	Caveator's (Mansel Yelverton) PDR Under N.C.G.S. § 7A-31 (COA05-771 & 772)	Denied 8/17/06

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In re Y.Q.M. Case below: 177 N.C. App. 148	No. 260P06	Respondent's (Shanita Fryar) PDR Under N.C.G.S. § 7A-31 (COA05-989)	Denied 8/17/06
Nello L. Teer Co. v. N.C. Dep't of Transp. Case below: 175 N.C. App. 705	No. 128P06	1. Def's PDR Under N.C.G.S. § 7A-31 (COA04-1615) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 8/17/06 2. Dismissed as Moot 8/17/06
Revels v. Miss N.C. Pageant Org., Inc. Case below: 176 N.C. App. 730	No. 189P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-618)	Denied 8/17/06
Russell v. Russell Case below: 177 N.C. App. 462	No. 325P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-1261)	Denied 8/17/06
Sable v. Sable Case below: 177 N.C. App. 811	No. 351P06	Plt's Motion for Temporary Stay (COA05-664)	Denied 07/11/06
State v. Anderson Case below: 177 N.C. App. 54	No. 250P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1038)	Denied 8/17/06
State v. Bethea Case below: 176 N.C. App. 767	No. 362P06	Defendant-Appellant's Petition for Writ of Habeas Corpus (COA05-866)	Denied 07/25/06
State v. Browning Case below: 177 N.C. App. 487	No. 334P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-831)	Denied 8/17/06
State v. Campbell Case below: 177 N.C. App. 520	No. 316P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-942)	Denied 8/17/06
State v. Cartwright Case below: 177 N.C. App. 531	No. 326P06	1. Defendant-Appellant's NOA Based Upon a Constitutional Question (COA04-1688) 2. Defendant-Appellant's PDR	1. Dismissed Ex Mero Motu 8/17/06 2. Denied 8/17/06

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State v. Cloninger Case below: 177 N.C. App. 564	No. 342P06	Def's PWC (COA05-1039)	Denied 8/17/06
State v. Corday Case below: 177 N.C. App. 564	No. 288P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-759)	Denied 8/17/06
State v. Esquivel-Lopez Case below: 177 N.C. App. 565	No. 337P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1096)	Denied 8/17/06
State v. Everett Case below: 178 N.C. App. 44	No. 350A06	1. AG's NOA (Dissent) (COA05-1197) 2. AG's Motion for Motion for Temporary Stay 3. AG's Petition for Writ of Supersedeas	1. —— 2. Allowed 07/10/06 3. Allowed 8/17/06
State v. Green Case below: Forsyth County Superior Court	No. 345P06	Defendant-Appellant's Motion for Temporary Stay (Forsyth County)	Denied 06/30/06
State v. Hammond Case below: 177 N.C. App. 812	No. 349P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-993)	Denied 8/17/06
State v. Johnson Case below: 162 N.C. App. 181	No. 053P04-2	Def's Motion for "Petition for Plain Error Review N.C.G.S. 7A-28B(1) (2) (3) (4)" (COA03-341)	Dismissed 8/17/06
State v. Jones Case below: 177 N.C. App. 565	No. 333P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1264)	Denied 8/17/06

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State v. Jones Case below: 177 N.C. App. 269	No. 238P06	1. AG's Motion for Temporary Stay (COA05-901) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/08/06** 360 N.C. 541 Stay Dissolved **08/17/06** 2.Denied 8/17/06 3. Denied 8/17/06
State v. Locklear Case below: 175 N.C. App. 795	No. 108P06	1. Def's (Locklear, Sr.) PDR Under N.C.G.S. § 7A-31 (COA05-479) 2. Def's (Locklear, Jr.) PDR Under N.C.G.S. § 7A-31	1. Denied 8/17/06 2. Denied 8/17/06
State v. Locklear Case below: 178 N.C. App. 732	No. 430P06	AG's Motion for Temporary Stay (COA05-509)	Allowed 08/17/06
State v. Love Case below: 177 N.C. App. 614	No. 353P06	1. Def's (Toby Love) PDR Under N.C.G.S. § 7A-31 (COA05-1237) 2. Def's (Ronnie Love) PDR Under N.C.G.S. § 7A-31 3. Def's (Tino Love) PDR Under N.C.G.S. § 7A-31	1. Denied 8/17/06 2. Denied 8/17/06 3. Denied 8/17/06
State v. Moore Case below: 174 N.C. App. 367	No. 670P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1482)	Denied 8/17/06
State v. Moore Case below: 173 N.C. App. 494	No. 253P06-2	Motion by Defendant for Petition of Habeas Corpus in Motion to Resubmit Petition of Motion for Appropriate Relief/Certiorari (COA04-642)	Denied 07/26/06
State v. Page Case below: 169 N.C. App. 127	No. 373P06	Def's Petition for Writ of Habeas Corpus (COA04-452)	Denied 07/14/06
State v. Porter Case below: 178 N.C. App. 235	No. 341P06	Defendant-Appellant's PWC to Review Decision of the COA (COA05-1288)	Denied 8/17/06
State v. Ridley Case below: 177 N.C. App. 463	No. 272P06	AG's Motion for Temporary Stay (COA03-1543)	Allowed 05/18/06

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State v. Ross Case below: 177 N.C. App. 566	No. 335P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1256)	Denied 8/17/06
State v. Sink Case below: 178 N.C. App. 217	No. 347P06	1. Def's Motion for Temporary Stay (COA05-874) 2. Def's Petition for Writ of Supersedeas (COA05-874) 3. Def's PDR Under N.C.G.S. § 7A-31	1. Denied 07/10/06 2. Denied 8/17/06 3. Denied
State v. Stroud Case below: Durham County Superior Court	No. 162A95-4	Def's PWC to Review Order of Durham County Superior Court	Denied 8/17/06
State v. Thompson Case below: 173 N.C. App. 449	No. 177P06	1. Def's PDR Under N.C.G.S. § 7A-31 (COA04-1268) 2. Def's PWC to Review Decision of COA	1. Dismissed 8/17/06 2. Denied 8/17/06
State v. Titus Case below: 177 N.C. App. 567	No. 321P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1195)	Denied 8/17/06
State v. Williams Case below: 177 N.C. App. 725	No. 369P06	Def's "Requests for Review" (COA05-978)	Denied 8/17/06
State v. Wissink Case below: 172 N.C. App. 829	No. 484P05	AG's Motion for Temporary Stay (COA04-1081)	Allowed Pending Determination of the State's PDR 09/01/05
Teague v. N.C. Dep't of Transp. Case below: 177 N.C. App. 215	No. 281P06	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA05-522)	Denied 8/17/06
Terrell v. Chatham Cty. Case below: 177 N.C. App. 567	No. 319P06	1. Petitioner's (Bonnie Terrell) Motion to Substitute Party Pursuant to Rule 38 (COA05-851) 2. Petitioner's (Bonnie Terrell) PDR Under N.C.G.S. § 7A-31 3. Petitioner's (Bonnie Terrell) Alternative PWC to Review Decision of COA	1. Dismissed as Moot 8/17/06 2. Denied 8/17/06 3. Denied 8/17/06

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

Ward v. New Hanover Cty. Case below: 175 N.C. App. 671	No. 127P06	Plts' PDR Under N.C.G.S. § 7A-31 (COA05-423)	Denied 8/17/06

PETITION TO REHEAR

Coley v. State Case below: 360 N.C. 493	No. 607A05	Plaintiffs' Petition for Rehearing	Denied 8/17/06

IN RE D.M.W.

[360 N.C. 583 (2006)]

IN RE D.M.W.

No. 671PA05

(Filed 6 October 2006)

Termination of Parental Rights— neglect—failure to comply with DSS case plan

The Court of Appeals decision reversing an order terminating respondent mother's parental rights on the ground of neglect is reversed for the reason stated in the dissenting opinion in the Court of Appeals that there was clear, cogent and convincing evidence in the record to support the trial court's finding that respondent failed to complete substance abuse treatment, domestic violence counseling and parenting classes required by her case plan with DSS even though she took some classes while incarcerated.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) and N.C. Rule of Appellate Procedure 21(a)(2) to review a decision of a divided panel of the Court of Appeals, 173 N.C. App. 679, 619 S.E.2d 910 (2005), reversing an order terminating respondent's parental rights entered 26 August 2004 by Judge Avril U. Sisk in District Court, Mecklenburg County. Heard in the Supreme Court 11 September 2006.

Mecklenburg County Attorney's Office, by J. Edward Yeager, Jr., for petitioner-appellant Mecklenburg County Department of Social Services, and Matt McKay, Attorney Advocate, for appellant Guardian ad Litem.

Richard Croutharmel for respondent-appellee mother.

PER CURIAM.

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

REVERSED.

TERASAKA v. AT&T

[360 N.C. 584 (2006)]

AMY TERASAKA, EMPLOYEE v. AT&T, EMPLOYER, SELF-INSURED (GATES MCDONALD, SERVICING AGENT)

No. 696A05

(Filed 6 October 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 174 N.C. App. 735, 622 S.E.2d 145 (2005), reversing an opinion and award filed on 5 August 2004 by the North Carolina Industrial Commission. On 2 March 2006, the Supreme Court allowed defendant's petition for discretionary review as to additional issues. Heard in the Supreme Court 12 September 2006.

Frederick R. Stann for plaintiff-appellant/appellee.

Brooks, Stevens & Pope, P.A., by Joy H. Brewer and Kimberley A. D'Arruda, for defendant-appellee/appellant.

PER CURIAM.

As to the appeal of right based on the dissenting opinion, we affirm the majority decision of the Court of Appeals. We conclude that the petition for discretionary review as to additional issues was improvidently allowed.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

LEE v. N.C. DEP'T OF TRANSP.

[360 N.C. 585 (2006)]

RICHARD W. LEE, PETITIONER v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RESPONDENT

No. 119A06

(Filed 6 October 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 176 N.C. App. ——, 625 S.E.2d 567 (2006), affirming in part and reversing in part an order signed 10 June 2004 by Judge Abraham Penn Jones in Superior Court, Wake County. Heard in the Supreme Court 11 September 2006.

Alan McSurely for petitioner-appellee.

Roy Cooper, Attorney General, by Tina A. Krasner, Assistant Attorney General, for respondent-appellant.

PER CURIAM.

The decision of the Court of Appeals is affirmed. We remand to the Court of Appeals for further remand to the trial court with instructions to determine the appropriate remedy for petitioner's discrimination claim.

AFFIRMED AND REMANDED.

DEBBIE C. WILLIAMS AND ASHLEY NICOLE WILLIAMS v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 712PA05

(Filed 6 October 2006)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 174 N.C. App. 601, 621 S.E.2d 644 (2005), affirming an order granting summary judgment entered 27 May 2004 by Judge Russell J. Lanier, Jr. in Superior Court, Lenoir County. Heard in the Supreme Court 13 September 2006.

Wyrick, Robbins, Yates, & Ponton, LLP, by K. Edward Greene, and White & Allen, P.A., by Matthew S. Sullivan, for plaintiff-appellees.

George L. Simpson, III, for defendant-appellant.

Larcade, Heiskell & Askew, PLLC, by Roger A. Askew and Jodee S. Larcade, for the North Carolina Association of Defense Attorneys, amicus curiae.

Maynard & Harris Attorneys At Law, PLLC, by C. Douglas Maynard, Jr., and Holly M. Bryan for the North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

LORI PEREZ, EMPLOYEE v. AMERICAN AIRLINES/AMR CORPORATION, EMPLOYER, AIG VENDOR SERVICES, CARRIER (ADMINISTERED BY SPECIALTY RISK SERVICES)

No. 661PA05

(Filed 6 October 2006)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 174 N.C. App. 128, 620 S.E.2d 288 (2005), affirming an opinion and award filed on 31 August 2004 by the North Carolina Industrial Commission. Heard in the Supreme Court 11 September 2006.

Scudder & Hedrick, by John A. Hedrick and Samuel A. Scudder, for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Joy H. Brewer and Kimberley A. D'Arruda, for defendants-appellants.

Young Moore and Henderson P.A., by Joe E. Austin, Jr. and Jennifer T. Gottsegen, for the North Carolina Association of Defense Attorneys, amicus curiae.

Teague, Campbell, Dennis & Gorham, L.L.P., by Bruce A. Hamilton and Julia S. Hooten, for North Carolina Citizens for Business and Industry, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

IN RE T.R.P.

[360 N.C. 588 (2006)]

IN THE MATTER OF T.R.P.

No. 629A05

(Filed 17 November 2006)

Child Abuse and Neglect— juvenile petition—verification required—subject matter jurisdiction

The district court could not exercise subject matter jurisdiction over an allegedly neglected juvenile in a custody review hearing where the petition that initiated the case was not verified as required by N.C.G.S. § 7B-403(a). Verification of a juvenile petition is a vital link in an integrated chain of proceedings designed to protect children while avoiding undue interference with families. Subject matter jurisdiction is established over all stages of the process with a properly verified petition and may not be waived. Jurisdiction here was absent ab initio; concerns about this child's welfare are speculative and can be resolved by the trial court and the parties.

Justice NEWBY dissenting.

Chief Justice Parker and Justice Brady 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, 173 N.C. App. 541, 619 S.E.2d 525 (2005), vacating an order entered 16 June 2004 by Judge Edgar B. Gregory in District Court, Wilkes County, and dismissing the case. Heard in the Supreme Court 14 March 2006.

Paul W. Freeman, Jr. for petitioner-appellant Wilkes County Department of Social Services.

Robert W. Ewing for respondent-appellee mother.

EDMUNDS, Justice.

In this case we consider whether the trial court lacked jurisdiction to enter a review order when the juvenile petition that initiated the case was not verified as mandated by N.C.G.S. § 7B-403(a). Because we hold that the district court could not exercise subject matter jurisdiction here in the absence of the verification, we conclude that the trial court's order was void ab initio. Accordingly, we affirm the decision of the Court of Appeals vacating the custody review order and dismissing the case.

On 22 August 2003, petitioner Wilkes County Department of Social Services (WCDSS) filed a juvenile petition alleging that respondent-mother's daughter, T.R.P., was a neglected juvenile. When the petition was filed, T.R.P. had been living for approximately four months with her maternal aunt, with whom respondent had placed her. The petition alleged that respondent and her boyfriend were manufacturing methamphetamine in respondent's home and that respondent had not cooperated with WCDSS in establishing a safety plan for her children.[1] Although the juvenile petition setting forth these allegations was notarized, it was neither signed nor verified by the Director of WCDSS or any authorized representative thereof.

In an order signed 6 November 2003, the trial court granted temporary legal and physical custody of T.R.P. and her siblings to WCDSS. After several hearings, the trial court on 15 March 2004 signed an order adjudicating T.R.P. and her siblings as neglected and continuing custody of the children with WCDSS. On 24 May 2004, the trial court held a custody review hearing as required by N.C.G.S. § 7B-906(a). The trial court's resulting order, announced in open court and later filed on 16 June 2004, continued legal custody of T.R.P. with WCDSS and, although the trial court found respondent had "been cooperative with [WCDSS] since the initial adjudication," placed T.R.P. in her father's physical custody when school began, provided he met several specified conditions.

On 3 June 2004, respondent gave written notice of appeal of the custody review order to the Court of Appeals. In her brief to that court, respondent contended for the first time that the trial court lacked jurisdiction to enter the challenged review order because the juvenile petition was not verified as required by law. In a divided opinion, the Court of Appeals vacated the custody review order and dismissed the case, holding that the trial court lacked subject matter jurisdiction over the action. *In re T.R.P.*, 173 N.C. App. 541, 619 S.E.2d 525 (2005).

On 8 November 2005, petitioner filed notice of appeal with this Court based on the dissenting opinion in the Court of Appeals. Petitioner contends that because respondent failed to challenge the trial court's subject matter jurisdiction before appealing the custody review order, she is barred from presenting that issue in the instant appeal. Petitioner also argues that under N.C.G.S. § 7B-906, the trial

1. Although respondent-mother has three children, only the custody of T.R.P. is at issue in this case.

court had jurisdiction to conduct a review hearing that was independent of its jurisdiction to hear the original juvenile petition.

Jurisdiction is "[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." *Black's Law Dictionary* 856 (7th ed. 1999) (defining "judicial jurisdiction"). A court must have personal jurisdiction over the parties to "bring [them] into its adjudicative process." *Id.* at 857. More importantly for our purposes, the court must also have subject matter jurisdiction, or "[j]urisdiction over the nature of the case and the type of relief sought," in order to decide a case. *Id.*; *see also Boyles v. Boyles*, 308 N.C. 488, 491, 302 S.E.2d 790, 793 (1983) (noting that subject matter jurisdiction is "the power to pass on the merits of the case"); 6A Strong's North Carolina Index 4th: *Courts* § 7 (2000) (discussing generally subject matter jurisdiction). "A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964). Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act:

> A judgment is void, when there is a want of jurisdiction by the court over the subject matter . . . .
>
> "A void judgment is in legal effect no judgment. No rights are acquired or divested by it. It neither binds nor bars any one, and all proceedings founded upon it are worthless."

Hart v. Thomasville Motors, Inc., 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956) (quoting *Stafford v. Gallops*, 123 N.C. 43, 44, 123 N.C. 19, 21-22, 31 S.E. 265, 266 (1898)).

Our General Assembly "within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State." *Bullington v. Angel*, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941). "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982). Thus, for certain causes of action created by statute, the requirement that pleadings be signed and verified "is not a matter of form, but substance, and a defect therein is jurisdictional." *Martin v. Martin*, 130 N.C. 19, 20, 130 N.C. 27, 28, 40 S.E. 822, 822 (1902) (discussing an

unverified amendment to a complaint in a divorce action). In such cases, the filing "is not complete or operative" until certified. *Alford v. McCormac*, 90 N.C. 151, 152-53 (1884); *see In re Green*, 67 N.C. App. 501, 504, 313 S.E.2d 193, 195 (1984) ("[T]he failure of the petitioner to sign and verify the petition before an official authorized to administer oaths render[s] the petition fatally deficient and inoperative to invoke the jurisdiction of the court over the subject matter.").

Abuse, neglect, and dependency actions are statutory in nature and are governed by Chapter 7B of the North Carolina General Statutes (the Juvenile Code). Such actions are typically initiated when the local department of social services (DSS) files a petition making appropriate allegations. *See* N.C.G.S. § 7B-405 (2005) ("An action is commenced by the filing of a petition . . . ."); *see also id.* § 7B-401 (2005) ("The pleading in an abuse, neglect, or dependency action is the petition."). The Juvenile Code sets out the specific requirements for a valid juvenile petition: "[T]he petition shall be drawn by the [DSS] director, verified before an official authorized to administer oaths, and filed by the clerk, recording the date of filing." *Id.* § 7B-403(a) (2005).

Although petitioner and the dissenters argue that requiring a verification to invoke the trial court's subject matter jurisdiction elevates form over substance, verification of a juvenile petition is no mere ministerial or procedural act. The dissent cites *Alford v. Shaw*, a stockholder derivative suit, for the proposition that a failure to verify a complaint is not a jurisdictional defect. *Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990). However, a shareholder derivative suit "appears to be the only situation where a specific requirement that the pleadings be verified is not considered jurisdictional in nature." *State v. Moraitis*, 141 N.C. App. 538, 541, 540 S.E.2d 756, 758 (2000) (quoting *In re Triscari Children*, 109 N.C. App. 285, 288, 426 S.E.2d 435, 437 (1993)). In contrast, a review of the Juvenile Code reveals that, unlike the routine clerical information that must be included in a petition pursuant to N.C.G.S. § 7B-402, verification of the petition in an abuse, neglect, or dependency action as required by N.C.G.S. § 7B-403 is a vital link in the chain of proceedings carefully designed to protect children at risk on one hand while avoiding undue interference with family rights on the other.

A juvenile abuse, neglect, or dependency action under Chapter 7B may be based on an anonymous report, *see, e.g.*, *In re Stumbo*, 357 N.C. 279, 280, 582 S.E.2d 255, 256 (2003), and, however based, frequently results in DSS' immediate interference with a respondent's

constitutionally-protected right to parent his or her children. *See In re R.T.W.*, 359 N.C. 539, 543, 614 S.E.2d 489, 491 (2005) ("Parents have a fundamental right to the custody, care, and control of their children."), *superseded by statute on other grounds*, Act of Aug. 23, 2005, ch. 398, sec. 12, N.C. Sess. Laws 1455, 1460-61; *Owenby v. Young*, 357 N.C. 142, 144, 579 S.E.2d 264, 266 (2003) ("[T]he 'Due Process Clause . . . protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.' This parental liberty interest 'is perhaps the oldest of the fundamental liberty interests' . . . ." (quoting *Troxel v. Granville*, 530 U.S. 57, 65-66, 147 L. Ed. 2d 49, 56-57 (2000) (plurality))). Accordingly, the relevant statutes require a prompt and thorough assessment of any report of abuse, neglect, or dependency. *See*, *e.g.*, N.C.G.S. § 7B-302(a) (2005). The gravity of a decision to proceed and the potential consequences of filing a petition are acknowledged in the official manual of the North Carolina Division of Social Services:

> Determining whether a child is abused, neglected, or dependent requires careful assessment of all information . . . . The case decision-making process involves, at a minimum, the worker and supervisor or supervisor's designee or staffing team. A broader team approach to decision-making . . . . allows for shared liability and responsibility. Making a decision to substantiate or not can have far-reaching implications for children and families, and it is not a decision that can be taken lightly. . . .
>
> The names of those individuals participating in making the case decision should be documented as well as the basis for the case decision.
>
> . . . Extensive delay in making a case decision can be seen as an unwarranted intrusion in a family and sometimes increases risk for children.

Div. of Soc. Servs., N.C. Dep't of Health & Human Servs., Family Services Manual § 1408, at 36 (Jan. 18, 2002), *available at* http://info.dhhs.state.nc.us/olm/manuals/dss/csm-60/man/CS1408.pdf. Therefore, given the magnitude of the interests at stake in juvenile cases and the potentially devastating consequences of any errors, the General Assembly's requirement of a verified petition is a reasonable method of assuring that our courts exercise their power only when an identifiable government actor "vouches" for the validity of the allegations in such a freighted action.

Petitioner nevertheless argues that, even in the absence of a verified petition, the trial court had subject matter jurisdiction over the instant proceeding pursuant to section 7B-906, which authorizes a review hearing within ninety days and again within six months "[i]n any case where custody is removed from a parent, guardian, custodian, or caretaker." N.C.G.S. § 7B-906(a) (2005). This statute further states that "[t]he director of social services shall make a timely request to the clerk to calendar each review . . . . The clerk shall give 15 days' notice of the review and its purpose to the parent . . . ." *Id.*

Petitioner's argument fails to recognize the integrated nature of the statutes constituting the Juvenile Code. Not only did the General Assembly provide that a properly verified juvenile petition would invoke the jurisdiction of the trial court, it further provided that jurisdiction would extend through all subsequent stages of the action. *See* N.C.G.S. § 7B-201(a) (2005) ("[J]urisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated . . . ."). Chapter 7B sets out a sequential process for abuse, neglect, or dependency cases, wherein each required action or event must occur within a prescribed amount of time after the preceding stage in the case. For example, "[t]he adjudicatory hearing shall be held . . . no later than 60 days from the filing of the petition," *id.* § 7B-801(c) (2005), and "[t]he dispositional hearing shall take place immediately following the adjudicatory hearing," *id.* § 7B-901 (2005). Similarly, a custody review hearing under section 7B-906 "shall [be] conduct[ed] . . . within 90 days from the date of the dispositional hearing," *id.* § 7B-906(a), and the resulting "order must be reduced to writing, signed, and entered within 30 days of the completion of the hearing," *id.* § 7B-906(d) (2005). Thus, a custody review hearing is mandatory only after a dispositional hearing, which, in turn, must be preceded by the filing of a petition and an adjudication.

Because the provisions in Chapter 7B establish one continuous juvenile case with several interrelated stages, not a series of discrete proceedings, we are unpersuaded by petitioner's assertion that the trial court had subject matter jurisdiction over the custody review hearing regardless of whether the original petition invoked the court's jurisdiction over the juvenile proceeding. A trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition.

Petitioner and the dissenters further contend that allowing a litigant to raise a jurisdictional challenge in a juvenile action long after

the proceeding is commenced could disrupt an established program of placement. We must acknowledge that such a strategy is possible in any case where a court lacks subject matter jurisdiction. Nevertheless, we believe the unambiguous statutory language mandates our holding. Faced with similar language pertaining to divorce proceedings, *see* N.C.G.S. § 50-8 (2005) ("In all actions for divorce the complaint shall be verified in accordance with the provisions of Rule 11 of the Rules of Civil Procedure and G.S. 1-148."), we have held that the trial court did not have jurisdiction in the absence of a verified complaint, *Hodges v. Hodges*, 226 N.C. 570, 571, 39 S.E.2d 596, 597 (1946). Moreover, while this Court has not previously addressed the jurisdictional effect of verification of a juvenile petition, for more than twenty years our Court of Appeals has consistently held that subject matter jurisdiction over juvenile actions is contingent upon verification of the petition. *See In re Triscari Children*, 109 N.C. App. 285, 426 S.E.2d 435 (vacating a termination of parental rights order for lack of subject matter jurisdiction because the petition was not verified); *In re Green*, 67 N.C. App. 501, 313 S.E.2d 193 (vacating and dismissing a juvenile abuse and neglect case for want of subject matter jurisdiction because the DSS representative failed to verify the petition).

When the General Assembly recodified and amended the Juvenile Code in 1998, it chose not to modify the mandatory language relating to verification of the juvenile petition. *See* Act of Oct. 22, 1998, ch. 202, sec. 6, 1998 N.C. Sess. Laws 695, 742-869; Act of Oct. 27, 1998, ch. 229, secs. 18-28, 1998 N.C. Sess. Laws 1543, 1573-93; *see also* Act of July 21, 1999, ch. 456, sec. 60, 1999 N.C. Sess. Laws 1865, 1892. "The legislature's inactivity in the face of the [judiciary's] repeated pronouncements [on this issue] can only be interpreted as acquiescence by, and implicit approval from, that body." *Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 9, 418 S.E.2d 648, 654 (1992); *see also State v. Jones*, 358 N.C. 473, 484, 598 S.E.2d 125, 132 (2004) ("We presume, as we must, that the General Assembly had full knowledge of the judiciary's long-standing practice. Yet, during the course of *multiple* clarifying amendments . . . at no time did the General Assembly amend [the relevant] section . . . ."). As a result, we are satisfied that we have interpreted correctly the intent of the General Assembly when it imposed a verification requirement in the Juvenile Code. *See Wells v. Consol. Jud'l Ret. Sys. of N.C.*, 354 N.C. 313, 319, 553 S.E.2d 877, 881 (2001) ("The legislature is presumed to act with full knowledge of prior and existing law. When the legislature chooses not to

amend a statutory provision that has been interpreted in a specific way, we assume it is satisfied with the administrative interpretation." (citation omitted)).

We now turn to petitioner's contention that respondent waived any jurisdictional challenge by submitting to the original adjudicatory and dispositional order of the trial court and thus should not be permitted to challenge the trial court's subject matter jurisdiction in the instant appeal. We disagree. "Jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties." *Feldman v. Feldman*, 236 N.C. 731, 734, 73 S.E.2d 865, 867 (1953). Subject matter jurisdiction " 'cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to . . . object to the jurisdiction is immaterial.' " *In re Sauls*, 270 N.C. 180, 187, 154 S.E.2d 327, 333 (1967) (quoting 1 Strong's North Carolina Index: *Courts* § 2, at 645-46 (1957) (footnotes omitted)); *see also Anderson v. Atkinson*, 235 N.C. 300, 301, 69 S.E.2d 603, 604 (1952) ("A defect in jurisdiction over the subject matter cannot be cured by waiver, consent, amendment, or otherwise."); *Reid v. Reid*, 199 N.C. 740, 743, 155 S.E. 719, 720 (1930) ("Jurisdiction, withheld by law, may not be conferred on a court, as such, by waiver or consent of the parties.").

Because litigants cannot consent to jurisdiction not authorized by law, they may challenge "jurisdiction over the subject matter . . . at any stage of the proceedings, even after judgment." *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961), *appeal dismissed and cert. denied*, 371 U.S. 22, 9 L. Ed. 2d 96 (1962); *see also State ex rel. Hanson v. Yandle*, 235 N.C. 532, 535, 70 S.E.2d 565, 568 (1952) ("A lack of jurisdiction or power in the court entering a judgment always avoids the judgment, and a void judgment may be attacked whenever and wherever it is asserted . . . ." (citations omitted)). Arguments regarding subject matter jurisdiction may even be raised for the first time before this Court. *See Wood v. Guilford Cty.*, 355 N.C. 161, 164, 558 S.E.2d 490, 493 (2002); *Askew v. Leonard Tire Co.*, 264 N.C. 168, 171, 141 S.E.2d 280, 282 (1965).

Petitioner nevertheless asserts that respondent "consented, at least implicitly" to subject matter jurisdiction by "acquiesc[ing] in the actions of the [trial c]ourt." According to petitioner, because respondent "had prior opportunities to raise the issue [of jurisdiction], but didn't," she "should [be] prevent[ed] . . . from now being able to challenge the [c]ourt's authority." However, we have never found that a party can waive the fundamental requirement that a court have subject matter jurisdiction.

Although petitioner cites *Pulley v. Pulley*, that case does not support its position. In *Pulley*, the defendant-husband in a divorce action confessed judgment for payment of alimony. 255 N.C. at 425-26, 121 S.E.2d at 877-78. Several years later, the defendant claimed that his confession of judgment was void. *Id.* at 427, 121 S.E.2d at 878-79. We reaffirmed that "[a]n absolute want of jurisdiction over the subject matter may be taken advantage of at any stage of the proceedings, even after judgment," *id.* at 429, 121 S.E.2d at 880, then found that "the superior court . . . had jurisdiction over the subject matter of the proceeding here, the payment of alimony," *id.* at 430, 121 S.E.2d at 881. We then considered whether defendant was estopped[2] from making challenges on other grounds. *Id.* at 431-32, 121 S.E.2d at 882. Thus, *Pulley* does not stand for the proposition that a party may be estopped to argue that a court lacked subject matter jurisdiction. *Cf. Stroupe v. Stroupe*, 301 N.C. 656, 659-62, 273 S.E.2d 434, 436-38 (1981) (holding that a judgment entered by a court that "was utterly without jurisdiction to proceed" did not constitute a "mere informality" but was instead void, even when the parties "fail[ed] to object in apt time and . . . acquiesc[ed] in the judgment so rendered").

Petitioner also cites *Sloop v. Friberg*, 70 N.C. App. 690, 320 S.E.2d 921 (1984), and *Ward v. Ward*, 116 N.C. App. 643, 448 S.E.2d 862 (1994), as persuasive authority for its argument that respondent waived her right to challenge subject matter jurisdiction. Neither opinion is binding on this Court, of course, and each fails upon close reading to support petitioner's claim.

In *Sloop*, after a mother of three children died in 1978, the children's custody was awarded to the deceased mother's sister and her husband in 1980. 70 N.C. App. at 692, 320 S.E.2d at 923. Two years later, when the custodians petitioned for payment of overdue child support owed by the father, the father responded by petitioning for custody of the children. *Id.* The trial court ordered that custody remain with the mother's family and that the father pay support. *Id.* On appeal, the father argued that the trial court lacked subject matter jurisdiction in 1980 when it entered its original custody order. *Id.* Although the Court of Appeals discussed the father's acquiescence in the original judgment, it held that the trial court in 1980 properly exercised subject matter jurisdiction in accordance with the statutory prerequisites. 70 N.C. App. at 693, 320 S.E.2d at 923.

2. Estoppel and waiver are distinct doctrines. Although petitioner argues only waiver in its brief, some of the cases cited by petitioner address the issue in terms of estoppel. In our analysis, we will echo the terminology used in the opinion under discussion.

In *Ward*, the plaintiff challenged for the first time on appeal the trial court's jurisdiction to enter orders involving equitable distribution and alimony. 116 N.C. App. at 645, 448 S.E.2d at 863. The Court of Appeals noted that the plaintiff withdrew or failed to perfect his initial appeals from both orders and for several years "accepted the benefits of [the equitable distribution] judgment." *Id.* at 645, 448 S.E.2d at 864. Although the Court of Appeals concluded that the plaintiff "failed to preserve his objection" to the entry of both orders, *id.*, it went on to determine that the trial court had subject matter jurisdiction and that both orders were valid, 116 N.C. App. at 645-47, 448 S.E.2d at 864-65. Thus, we conclude that in both *Sloop* and *Ward*, the Court of Appeals' discussion of acquiescence is dicta that is not necessary to the resolution of either case.

In its final argument, petitioner suggests that T.R.P.'s welfare would be jeopardized by vacating the district court's order. We do not discount this concern, but believe that it is speculative and can be resolved by the trial court and the parties. While no statute we have found addresses the situation at bar, the absence of jurisdiction ab initio logically implies that the matter reverts to the status quo ante. *See*, *e.g.*, N.C.G.S. § 7B-201(b) (2005) (stating that when jurisdiction of a juvenile court terminates, "[t]he legal status of the juvenile and the custodial rights of the parties shall revert to the status they were before the juvenile petition was filed"). Although a social history included in the record indicates that T.R.P. had been placed by her mother with an aunt prior to the filing of the petition in this case, the record is unclear as to T.R.P.'s legal custody at the time the instant petition was filed. Accordingly, we remand this matter to the Court of Appeals for further remand to the trial court for determination of the status quo ante.

However, because dismissal of this case has no res judicata effect, and recognizing that the circumstances affecting the best interest of T.R.P. may well have changed while this case has been in litigation, we note that any party, including WCDSS, can file a new petition in this matter. *Cf. Boyd v. Boyd*, 61 N.C. App. 334, 336, 300 S.E.2d 569, 571 (1983) (affirming the trial court's dismissal of the plaintiff's divorce action because the complaint was not properly verified, but noting that nothing prevented plaintiff from refiling the action). Unless such a new action is brought, T.R.P. shall remain in the care of her current custodian during the pendency of the hearing on remand.

Long-established public policy disfavoring disruption of the family underlies the verification requirement in the Juvenile Code. This Court observed in *In re R.T.W.* that the Juvenile Code has numerous purposes, including protection of children by constitutional means that respect both the right to family autonomy and the needs of the child. 359 N.C. at 544, 614 S.E.2d at 492-93. The inherent power of the government to act through its agencies and subdivisions, in this case WCDSS, is subject to restraint in order to preserve and maintain a proper balance between the State's interest in protecting children from mistreatment and the right of parents to rear their children without undue government interference. *See In re Stumbo*, 357 N.C. at 286, 582 S.E.2d at 260 ("While acknowledging the extraordinary importance of protecting children from abuse, neglect, or dependency . . . we likewise acknowledge the limits within which governmental agencies may interfere with or intervene in the parent-child relationship."). The interpretation urged by petitioner and by the dissenters would upset this balance by allowing a child to be taken from its parents even in the absence of a sworn verification by a Department of Social Services official that the allegations in the petition are true. The statutory requirement for verification of juvenile petitions is a minimally burdensome limitation on government action, designed to ensure that a department of social services intervention that has the potential to disrupt family bonds is based upon valid and substantive allegations before the court's jurisdiction is invoked. Without such a verification, the trial court has no power to act.

We noted above that the verification requirement in a juvenile abuse, neglect, or dependency action is a matter of first impression for this Court. However, because the highest court in North Carolina to address this issue specifically held in 1984 that failure to verify a juvenile petition is a fatal defect, *In re Green*, 67 N.C. App. at 504, 313 S.E.2d at 195, our holding today should not affect existing practice in these actions. We affirm the decision of the Court of Appeals vacating the custody review order and dismissing this case for lack of subject matter jurisdiction. We also remand this case to the Court of Appeals for further remand to the trial court so that additional proceedings may be held not inconsistent with this opinion.

AFFIRMED and REMANDED.

Justice NEWBY dissenting.

The dispositive question is whether the North Carolina General Assembly designed the verification requirement of N.C.G.S. § 7B-403 as a jurisdictional prerequisite in abuse, neglect, and dependency proceedings. Put simply, did the legislature intend to jeopardize the well-being of a child due to a clerical error by a Department of Social Services ("DSS") employee? The majority determines the legislature crafted N.C.G.S. § 7B-403 with a view towards making a trial court's subject matter jurisdiction in such proceedings contingent on verification of the juvenile petition. This conclusion cannot be reconciled with the principles the General Assembly has directed should govern interpretations of the Juvenile Code, and it is not compelled by our case law addressing the relationship between verification requirements and subject matter jurisdiction. The majority's preference for form over substance in juvenile proceedings threatens to introduce additional instability into the lives of at-risk children. Accordingly, I respectfully dissent.

Before April 2003 respondent-mother obtained temporary custody of T.R.P. and a protective order against T.R.P.'s father. Along with her three minor children, respondent-mother was living at the home of her new boyfriend when police discovered a methamphetamine laboratory there on 21 April 2003. Respondent-mother was charged with child endangerment and felony drug offenses.

Wilkes County Department of Social Services ("WCDSS") intervened at the request of the police and determined the laboratory created a dangerous situation for the three children. Respondent-mother complied with WCDSS's suggestion that her two sons be placed with their father and that T.R.P. be placed with respondent-mother's sister. By 22 August 2003, the voluntary nature of the placement and respondent-mother's refusal to sign and comply with the family service case plan made it necessary for WCDSS to file a petition alleging T.R.P. to be a neglected juvenile. Although the petition identified the petitioner and properly stated the factual allegations of neglect, the WCDSS director failed to sign and verify the petition. WCDSS took no affirmative action when it filed the petition.

Following a hearing on 15 September 2003, the trial court granted temporary legal and physical custody to WCDSS, but continued the adjudication because T.R.P.'s father was in a drug rehabilitation facility and could not be present. Hearings occurred on 16 and 23 February 2004 in which WCDSS presented evidence substantiating

the allegations in the petition. The trial court, after finding it had subject matter jurisdiction and WCDSS had shown neglect by clear and convincing evidence, ordered physical and legal custody of T.R.P. to remain with WCDSS. Respondent-mother did not appeal the trial court's decision. T.R.P. continued to reside with her aunt throughout this process.

At a statutorily required custody review hearing on 24 May 2004, the court again received testimony concerning the best interest of T.R.P. It ordered continued legal and physical custody of T.R.P. with WCDSS and future placement, supervised by WCDSS, with T.R.P.'s father. Objecting to the placement of T.R.P. with her father, respondent-mother appealed. For the first time, she argued the trial court lacked subject matter jurisdiction because the petition was not verified.

The majority concludes the General Assembly intended the verification requirement of N.C.G.S. § 7B-403(a) to be jurisdictional and affirms the Court of Appeals decision vacating the custody review order and dismissing the case because the juvenile petition was not verified. However, this result is not required by the Juvenile Code; indeed, such a reading contradicts the directives of the General Assembly.

In matters of statutory construction, our task is to determine the intent of the General Assembly. *Person v. Garrett*, 280 N.C. 163, 165, 184 S.E.2d 873, 874 (1971) ("The intent of the legislature controls the interpretation of a statute."). Subchapter I of the Juvenile Code governs abuse, neglect, and dependency actions. In Article 1 of Subchapter I, the legislature specifically prescribed that Subchapter I be "interpreted and construed so as to implement the following purposes and policies:"

(1) To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents;

(2) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family[;]

(3) To provide for services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence; []

(4) To provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents[; and]

(5) To provide standards, consistent with the Adoption and Safe Families Act of 1997, P.L. 105-89, for ensuring that the best interests of the juvenile are of paramount consideration by the court and that when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a safe, permanent home within a reasonable amount of time.

N.C.G.S. § 7B-100 (2005).

This Court has recognized "that N.C.G.S. § 7B-100 stresses the paramount importance of the child's best interest and the need to place children in safe, permanent homes within a reasonable time. Whenever possible, [courts should] construe the provisions in Subchapter I to effectuate this intent." *In re R.T.W.*, 359 N.C. 539, 549-50, 614 S.E.2d 489, 496 (2005), *superseded by statute on other grounds*, Act of Aug. 23, 2005, ch. 398, sec. 12, N.C. Sess. Laws 1455, 1460-61.; *see also In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984) ("[T]he fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody [is] that the best interest of the child is the polar star.").

Taken together, the provisions of N.C.G.S. § 7B-100 compel reaching the merits of allegations of child abuse, neglect, and dependency. Such claims are to be fairly heard (subdivision (1)) and decided on the merits (subdivision (2)). The courts are to provide protection for children, recognizing the need for safety, continuity, and permanence (subdivision (3)), and remove children from their homes when necessary (subdivision (4)). Finally, "when reunification is against the child's best interest, subdivision (5) favors placing the child 'in a safe, permanent home within a reasonable amount of time.' . . . [because] interminable custody battles do not serve the child's best interest." *R.T.W.*, 359 N.C. at 545, 614 S.E.2d at 493.

After the stated purposes and definitions contained in Article 1, Subchapter I immediately addresses the subject raised by this appeal. Containing two sections, Article 2 ("Jurisdiction") specifies the jurisdictional parameters of the courts to consider allegations of juvenile abuse, neglect, and dependency. The first section grants district

courts "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C.G.S. § 7B-200(a) (2005). The second section provides, "When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated." *Id.* § 7B-201(a) (2005). Significantly, no provision of Article 2 makes jurisdiction contingent upon verification of the petition.

We must assume the General Assembly understands the fundamental concepts of jurisdiction and subject matter jurisdiction cited by the majority. Therefore, when the legislature expressly dedicates part of a statutory scheme to jurisdiction, the courts should resist creating jurisdictional requirements elsewhere. The General Assembly could have included a verification requirement in the "Jurisdiction" Article. Instead, consistent with the purposes enumerated in Article 1, the General Assembly chose to provide district courts with broad subject matter jurisdiction over any matter in which a juvenile is "alleged to be abused, neglected, or dependent." *Id.* § 7B-200(a). The majority's imposition of an additional jurisdictional requirement undermines the comprehensive statutory scheme the legislature designed to protect at-risk children. Since a party may raise a trial court's want of subject matter jurisdiction at any time, our Court should be reluctant to declare a provision jurisdictional unless the plain language of the statute compels such a conclusion.

The verification requirement of N.C.G.S. § 7B-403, on which the majority relies, does not appear in Subchapter I until Article 4 ("Venue; Petitions"). Article 4 nowhere indicates that any of its elements are jurisdictional in nature. Rather, N.C.G.S. § 7B-402 specifies certain requirements of a petition:

> The petition shall contain the name, date of birth, address of the juvenile, the name and last known address of the juvenile's parent, guardian, or custodian, and *allegations of facts sufficient to invoke jurisdiction over the juvenile.* A person whose actions resulted in a conviction under G.S. 14-27.2 or G.S. 14-27.3 and the conception of the juvenile need not be named in the petition. The petition may contain information on more than one juvenile when the juveniles are from the same home and are before the court for the same reason.

Id. § 7B-402(a) (2005) (emphasis added). Tellingly, N.C.G.S. § 7B-402 indicates that it is the "allegations of facts" of the child's situation

which must be "sufficient to invoke jurisdiction over the juvenile." *Id.* The factual allegations, not the form of the petition, determine the question of jurisdiction. Here, respondent-mother does not contend the petition lacks any of the specified information.

Plainly, had it intended verification to be a jurisdictional prerequisite, the General Assembly could have included a verification requirement in Article 2. Not only did the legislature choose not to do this, it did not even deem verification worthy of inclusion among the substantive juvenile petition elements detailed in N.C.G.S. § 7B-402. Instead the legislature placed the verification requirement in N.C.G.S. § 7B-403 ("Receipt of reports; filing of petition") a statute devoted to procedural matters:

> All reports concerning a juvenile alleged to be abused, neglected, or dependent shall be referred to the director of the department of social services for screening. Thereafter, if it is determined by the director that a report should be filed as a petition, the petition shall be drawn by the director, verified before an official authorized to administer oaths, and filed by the clerk, recording the date of filing.

N.C.G.S. § 7B-403(a) (2005). The obvious conclusion we should draw is that verification of juvenile petitions is a procedural, not a jurisdictional requirement. While the majority rightly opines that the purpose of verification is to ensure DSS thoroughly investigates allegations of abuse, neglect, and dependency before seeking judicial intervention, it does not follow that the requirement is jurisdictional. Nothing in N.C.G.S. § 7B-403 suggests its provisions should be construed as jurisdictional in nature. The majority simply holds the verification requirement to be so.

Significantly, unlike with other governmental actors, the General Assembly specifically allows the drafting and filing of a juvenile petition by a non-lawyer DSS director. *See id.* § 84-4 (2005); *see also id.* § 7B-403(a). This unique authority recognizes the need to seek promptly the supervision of the trial court. Nonetheless, without attorney involvement, procedural errors could be more likely to occur.

The General Assembly anticipated procedural miscues and thus included a remedy in Subchapter I for mistakes like the one that occurred in this case. Errors in the form of a petition, such as a verification omission, can be cured through amendment. N.C.G.S. § 7B-800 provides: "The court may permit a petition to be amended

when the amendment does not change the nature of the conditions upon which the petition is based." *Id.* § 7B-800 (2005). This provision specifically allows the correction of mistakes which do not change the "nature" of the allegations contained in a juvenile petition. Hence, if as the majority opines, the "provisions in Chapter 7B establish one continuous juvenile case with several interrelated stages," WCDSS should be allowed to amend its petition by adding a verification.

Treating the verification requirement as procedural is consistent with the North Carolina Rules of Civil Procedure. Rule 11 ("Signing and verification of pleadings") requires all filings to be made in good faith. *Id.* § 1A-1, Rule 11(a) (2005). The rule specifically permits a party to sign an unsigned filing, provided he does so promptly after the omission is called to his attention. *Id.* In juvenile petitions, the DSS director confirms verification by signing the petition. Since Rule 11 allows signatures to be added after filing, the omission of a signature from a juvenile petition is not jurisdictional.

Although there appear to be no North Carolina cases applying Rule 11 to verification requirements, there are many federal ones. As North Carolina's Rule 11 is substantially similar to the federal rule, the decisions of the federal courts are instructive. *See Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992); *Turner v. Duke Univ.*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989). The federal cases hold that failure to comply with a statutory verification requirement is a procedural error subject to waiver. *E.g.*, *Rosaly v. Gonzalez*, 106 F.2d 169, 171 (1st Cir. 1939) (per curiam) ("The law is definite and well settled that any objections to the lack of verification in a petition must be raised immediately or not at all.").

Like the structure of the Juvenile Code, our legal precedents counsel viewing the verification requirement of N.C.G.S. § 7B-403 as procedural and not jurisdictional. In *Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990), the plaintiffs commenced a shareholders' derivative action alleging fraudulent merger and other unfair acts by the defendants. *Id.* at 530, 398 S.E.2d at 447. Contrary to N.C.G.S. § 1A-1, Rule 23(b), the plaintiffs did not verify their complaint prior to filing. *Id.* at 530-31, 398 S.E.2d at 447. More than seven years into the litigation and during the fourth appeal in the case, the defendants argued for the first time that the absence of the statutorily required verification deprived the trial court of subject matter jurisdiction. *Id.* at 531, 398 S.E.2d at 447. This Court disagreed, holding: (1) the plaintiffs' failure to verify their complaint was a procedural, not a jurisdictional, defect; and (2) the defendants had waived their verification objection

by failing to raise the issue earlier. *Id.* Our Court reasoned that the verification requirement of Rule 23(b) was not jurisdictional but specified the procedure to be followed. *Id.* Additionally, after noting the verification requirement was crafted to discourage shareholders from pursuing worthless claims in hopes of obtaining nuisance settlements, this Court concluded dismissal in favor of the defendants would be inappropriate since "the vigor with which [the parties] have litigated this case over the span of seven years[] and the massive amount of discovery conducted . . . indicat[e] that the purposes behind the verification rule have been met." 327 N.C. at 532, 398 S.E.2d at 448.

Thus, under *Alford*, this Court assumes the General Assembly did not intend a verification requirement to be jurisdictional if it is included among the procedures to be followed. *Id.* at 531-32, 398 S.E.2d at 447-48. Moreover, when verification is not a jurisdictional prerequisite, a party may waive the right to object by failing to raise lack of verification in a timely manner. *Id.* Had it properly applied the reasoning of *Alford* to the instant case, the majority would have been compelled to conclude the verification requirement of N.C.G.S. § 7B-403 is not jurisdictional and that respondent-mother waived her objection.

This Court's reluctance to deem procedural matters jurisdictional in *Alford* is consistent with our prior holding in *Pulley v. Pulley*, 255 N.C. 423, 121 S.E.2d 876 (1961), *appeal dismissed and cert. denied*, 371 U.S. 22, 83 S. Ct. 120, 9 L. Ed. 2d 96 (1962). There, the defendant entered a judgment by confession for alimony under N.C.G.S. § 1-247 (repealed 1967). *Id.* at 428, 121 S.E.2d at 879. The defendant later argued that he was not bound by the judgment because he had not verified his confession pursuant to N.C.G.S. § 1-248 (repealed 1967). *Id.* As in the present case, he argued the verification requirement was jurisdictional. However, this Court determined the trial court had general subject matter jurisdiction over alimony actions under N.C.G.S. § 50-1 (repealed 1971), and hence, the defendant was "estopped to question the validity of his own confessed judgment for alimony." 255 N.C. at 430-32, 121 S.E.2d at 881-82.

The majority's reliance on our divorce jurisprudence is misplaced. Chapter 50 ("Divorce and Alimony") has no Article expressly devoted to jurisdiction. Unlike the verification required in N.C.G.S. § 7B-403 or N.C.G.S. § 1A-1, Rule 23(b), the verification requirement for divorce proceedings appears in a statute containing the substantive elements of divorce complaints. *See* N.C.G.S. § 50-8 (2005); *see*

also Eudy v. Eudy, 288 N.C. 71, 74, 215 S.E.2d 782, 785 (1975) ("[T]he allegations required by G.S. 50-8 are indispensable, constituent elements of a divorce action and must be established either by the verdict of a jury or by a judge, as the pertinent statute may permit."), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982).

Notably, most of the divorce cases relied upon by the majority were decided well before North Carolina made the fundamental change from code pleading to notice pleading. *See generally Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970) (acknowledging North Carolina's transition to a notice pleading system through revision of the North Carolina Rules of Civil Procedure). The majority's holding rests upon vestiges of our code pleading jurisprudence. Notice pleading is designed to have matters evaluated on the merits. *See Mangum v. Surles*, 281 N.C. 91, 99, 187 S.E.2d 697, 702 (1972) ("[I]t is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities."); 1 G. Gray Wilson, *North Carolina Civil Procedure* § 1-2, at 2 (2d ed. 1995) ("It was the intent of the General Statutes Commission that drafted the civil rules to develop a scheme under which cases could be disposed of on the merits and not on the basis of procedural errors."). North Carolina modeled its notice pleading approach after that of the federal system. *Sutton*, 277 N.C at 99, 176 S.E.2d at 164. The U.S. Supreme Court has declared that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80, 86 (1957). Gamesmanship, which is to be avoided in general, should never be allowed to interfere with custody determinations concerning the best interests of at-risk children.

The majority also relies on a Court of Appeals decision, *In re Green*, 67 N.C. App. 501, 313 S.E.2d 193 (1984), which held the verification requirement in juvenile neglect cases to be jurisdictional. *Id.* at 504, 313 S.E.2d at 195. As a decision from a lower court, *Green* is not controlling. In *Green*, the Court of Appeals rigidly applied a nineteenth-century affidavit case, *Alford v. McCormac*, 90 N.C. 151, 152-53 (1884), and failed to engage in statutory construction. The opinion presents no compelling reasoning for us to follow.

Although I agree with the majority that the General Assembly attempted to balance the rights of parents and children, the majority

decision does little to protect parents and much to harm children. The majority suggests verification protects parents by having an identifiable government actor "vouch" for the validity of the allegations in a juvenile petition to ensure that a "department of social services intervention . . . is based upon valid and substantive allegations." While these goals may be advanced if the omission were intentional and the missing verification noticed before a custody hearing, they are not furthered by vacating custody orders entered after evidence has been received at a hearing.

Here, there is no hint that WCDSS acted improperly. In fact, WCDSS showed considerable restraint by attempting to resolve the situation without judicial intervention, and the trial court found that WCDSS was entirely justified in filing a petition to have T.R.P. adjudicated a neglected juvenile. The petition identified the petitioner, and the failure to verify it appears to be a mere administrative oversight. To ignore an adjudication on the merits because of inadvertence hardly promotes the best interest of T.R.P. As such, the majority's interpretation of N.C.G.S. § 7B-403 cannot be reconciled with the principles of construction set out in N.C.G.S. § 7B-100.

Nor is verification the vital safeguard portrayed by the majority. The goal is to initiate court intervention only into meritorious cases in which evidence exists to support the allegations. Once the process is begun, however, it is the in- court testimony, not the original verification, that determines the need and degree of DSS intervention. In fact, in an emergency situation, DSS is authorized to act without a petition. N.C.G.S. § 7B-500 (2005). Whether or not the petition is verified, DSS intervention could still be inappropriate. Were a petition to be filed because of ill motives, the trial court could address the problem by issuing sanctions against the responsible party. Such a tailored response is preferable to dismissing all juvenile cases that originated with unverified petitions.

In this case, the petition contained sufficient allegations of neglect to invoke the trial court's jurisdiction. *Id.* § 7B-200(a). As envisioned by N.C.G.S. § 7B-100(2), the trial court has entered a judgment "that reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family." *Id.* § 7B-100(2). The majority admits the court properly found T.R.P. to be neglected and developed a placement plan in her best interest. Nonetheless, after more than two years, the majority would now disrupt the placement of the child and return her to the status quo ante. This outcome clearly contradicts the statutory directive "that when it

is not in the juvenile's best interest to be returned home, the juvenile [should] be placed in a safe, permanent home within a reasonable amount of time." *Id.* § 7B-100(5). Absent a clear statutory mandate, I cannot agree with the majority that careful consideration of a child's best interest by a court with general subject matter jurisdiction over abuse, neglect, and dependency actions should be disregarded because of a technical omission that in no way affected the court proceedings or harmed anyone involved.

Moreover, the majority's decision is not limited to the facts of this case; its potential disruptive effect on abused, neglected, or dependent children is staggering. Children are often placed with persons who have no legal right to custody apart from a court order. Even after the passage of considerable time, a biological parent who finds a procedural defect in the DSS petition could completely undermine years of stability and healing by setting aside all the court's orders addressing the merits and demanding a return to the status quo ante without regard to the child's welfare. Children on the doorstep of adoption might be returned to their biological parents only to be removed again. In short, the majority's approach will potentially "result in protracted custody proceedings that leave . . . the child in legal limbo. . . . thwart[ing] the legislature's wish that children be placed 'in . . . safe, permanent home[s] within a reasonable amount of time.' " *R.T.W.*, 359 N.C. at 547, 614 S.E.2d at 494 (alterations in original) (quoting N.C.G.S. § 7B-100(5)).

At its core, this case is about two different types of neglect. T.R.P.'s mother neglected her daughter; a DSS employee neglected to sign the petition. By holding that an administrative oversight in failing to verify the petition is jurisdictional, the majority has made the child the victim of both.

Chief Justice PARKER and Justice BRADY join in this dissenting opinion.

HUBERT CHAMBERS, EMPLOYEE v. TRANSIT MANAGEMENT, EMPLOYER, SELF INSURED (COMPENSATION CLAIMS SOLUTIONS, SERVICING AGENT)

No. 527A05

(Filed 17 November 2006)

Workers' Compensation— occupational disease—specific traumatic event

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff employee bus driver's ulnar nerve entrapment neuropathy and cervical spine condition were compensable occupational diseases and that the injury to the cervical spine qualified as a specific traumatic incident, and the case is remanded for further proceedings consistent with this opinion, because: (1) the Commission applied an incorrect legal standard in finding plaintiff's ulnar neuropathy and cervical spine condition to be compensable occupational diseases pursuant to N.C.G.S. § 97-53(13) and the cervical spine condition to be a specific traumatic incident pursuant to N.C.G.S. § 97-2(6); (2) plaintiff failed to establish that his employment placed him at a greater risk of contracting either his ulnar nerve entrapment or his cervical spine condition than the general public; and (3) the evidence is not sufficient to satisfy the requirements enunciated by the General Assembly in N.C.G.S. § 97-2(6) that a specific traumatic incident occurred when plaintiff presented evidence that he experienced pain on a particular date but he presented no evidence linking that pain to the occurrence of an injury, and none of plaintiff's evidence establishes a specific traumatic incident of the work assigned that can be construed as an injury by accident to plaintiff's back.

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

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 172 N.C. App. 540, 616 S.E.2d 372 (2005), affirming an opinion and award filed 3 February 2004 by the North Carolina Industrial Commission. On 3 November 2005, the Supreme Court allowed defendant's petition for discretionary review as to additional issues. Heard in the Supreme Court 14 March 2006.

Sellers, Hinshaw, Ayers, Dortch & Lyons, P.A., by Robert A. Whitlow and John F. Ayers III, for plaintiff-appellee.

Smith Law Firm, P.C., by John Brem Smith; and Hedrick Eatman Gardner & Kincheloe, LLP, by Jennifer Ingram Mitchell and M. Duane Jones, for defendant-appellant.

Samuel A. Scudder, S. Neal Camak, George W. Lennon, and Charles R. Hassell, Jr., Counsel for the North Carolina Academy of Trial Lawyers, amicus curiae.

PARKER, Chief Justice.

This case arises from proceedings before the North Carolina Industrial Commission (the Commission) and raises the issues of whether the Court of Appeals erred in affirming the Commission's opinion and award concluding (i) that plaintiff's ulnar neuropathy was a compensable occupational disease pursuant to N.C.G.S. § 97-53(13), (ii) that plaintiff suffered a cervical spine injury as a result of a specific traumatic incident pursuant to N.C.G.S. § 97-2(6), (iii) that plaintiff's cervical spine condition was a compensable occupational disease pursuant to N.C.G.S. § 97-53(13), and (iv) that plaintiff was entitled to continuing disability benefits pursuant to N.C.G.S. § 97-29. Because we determine that the Commission applied an incorrect legal standard in finding plaintiff's ulnar neuropathy and cervical spine condition to be compensable occupational diseases pursuant to N.C.G.S. § 97-53(13) and the cervical spine condition to be a specific traumatic incident pursuant to N.C.G.S. § 97-2(6), we reverse the decision of the Court of Appeals. We do not reach the question whether the Court of Appeals erred in affirming the Commission's award of continuing disability benefits under N.C.G.S. § 97-29.

The record shows that on 4 December 2000 plaintiff was employed by Transit Management of Charlotte (defendant) as a bus driver. Plaintiff had been so employed for approximately thirty years. Plaintiff drove two types of buses, the Flexible bus and the Nova bus; during the course of his routes plaintiff used both hands approximately ninety percent to one hundred percent of the time. On 4 December 2000 plaintiff was assigned a new bus route. At some point during his shift, plaintiff experienced severe pain in his left arm, shoulder, and neck. Plaintiff requested a relief driver approximately six hours into his shift.

Plaintiff did not notify defendant's director of safety and administration until 14 December 2000 and did not file an Employee Injury

and Illness Report until 18 December 2000. Plaintiff initially was unsure whether his conditions were related to his employment or arose from other factors, including yard work. An initial diagnosis stated that plaintiff noted no specific "inciting event" causing injury.

Following visits to his family physician and several orthopedists, plaintiff was referred to Tim E. Adamson, M.D., a neurosurgeon, who diagnosed plaintiff with a "double crush syndrome," which he described as a relationship between two injuries: a left ulnar nerve entrapment affecting the elbow and a cervical spine condition affecting the neck. Dr. Adamson performed two surgeries on plaintiff. Following a functional capacity evaluation indicating plaintiff's level of function at sedentary to light physical demand, Dr. Adamson gave plaintiff a thirty percent permanent partial impairment rating for his left arm.

Plaintiff's claim was heard by Deputy Commissioner Nancy W. Gregory, who filed an opinion and award on 24 February 2003 denying plaintiff's claim for workers' compensation benefits. Plaintiff appealed to the Full Commission, which filed an opinion and award on 3 February 2004 reversing the deputy commissioner and concluding that plaintiff's ulnar nerve entrapment neuropathy and cervical spine condition were compensable occupational diseases and that the injury to the cervical spine qualified as a specific traumatic incident. The Commission also awarded plaintiff continuing disability benefits. The Court of Appeals concluded that the record sufficiently supported the Commission's findings of fact and conclusions of law.

Standard of Review

The Commission has exclusive original jurisdiction over workers' compensation cases and has the duty to hear evidence and file its award, "together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue." N.C.G.S. § 97-84 (2005). Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact. *Clark v. Wal-Mart*, 360 N.C. 41, 42-43, 619 S.E.2d 491, 492 (2005) (citing *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986)). If the conclusions of the Commission are based upon a deficiency of evidence or misapprehension of the law, the case should be remanded so " 'that the evidence [may] be considered in its true legal light.' " *Id.* at 43, 619 S.E.2d at 492 (quoting *McGill v.*

Town of Lumberton, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939) (alteration in original)).

N.C.G.S. § 97-53(13)

Section 97-53(13) defines an occupational disease as: "Any disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." N.C.G.S. § 97-53(13) (2005).

For an occupational disease to be compensable under N.C.G.S. § 97-53(13) it must be

> (1) characteristic of persons engaged in the particular trade or occupation in which the [plaintiff] is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be "a causal connection between the disease and the [plaintiff's] employment."

Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 105-06 (1981)) (citing *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 468, 475, 256 S.E.2d 189, 196, 200 (1979)).

This Court stated in *Rutledge*:

> To satisfy the first and second elements it is not necessary that the disease originate exclusively from or be unique to the particular trade or occupation in question. All ordinary diseases of life are not excluded from the statute's coverage. Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded.

Id. (citing *Booker*, 297 N.C. at 472-75, 256 S.E.2d at 198-200). In cases where the employment exposed the worker to a greater risk of contracting the disease than the general public, the first two elements are satisfied. *Rutledge*, 308 N.C. at 93-94, 301 S.E.2d at 365. "The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workman's compensation." *Booker*, 297 N.C. at 475, 256 S.E.2d at 200.

The holding in *Rutledge*, which arose in the context of a claim for chronic obstructive lung disease, *see* 308 N.C. at 87, 301 S.E.2d at 362,

also applies where other diseases are at issue. In *Futrell v. Resinall Corporation* the Court of Appeals applied the *Rutledge* test where a plaintiff contended that he contracted carpal tunnel syndrome as the result of his employment. 151 N.C. App. 456, 458-59, 566 S.E.2d 181, 183 (2002), *aff'd per curiam*, 357 N.C. 158, 579 S.E.2d 269 (2003).

The Court of Appeals correctly noted

> there is no authority from this State which allows us to ignore the well-established requirement that a plaintiff seeking to prove an occupational disease show that the employment placed him at a greater risk for *contracting* the condition, even where the condition may have been aggravated but not originally caused by the plaintiff's employment.

Id. at 460, 566 S.E.2d at 184. The court explained that

> if the first two elements of the *Rutledge* test were meant to be altered or ignored where a [plaintiff] simply argued aggravation or contribution as opposed to contraction, then our courts would not have consistently defined the third element of the *Rutledge* test as being met where the [plaintiff] can establish that the employment caused him to contract the disease, *or* where he can establish that it significantly contributed to or aggravated the disease. *Rutledge* and subsequent case law applying its three-prong test make clear that evidence tending to show that the employment simply aggravated or contributed to the employee's condition goes only to the issue of causation, the third element of the *Rutledge* test. Regardless of how an employee meets the causation prong . . . , the employee must nevertheless satisfy the remaining two prongs of the *Rutledge* test by establishing that the employment placed him at a greater risk for contracting the condition than the general public.

Id. (citing *Norris v. Drexel Heritage Furnishings, Inc.*, 139 N.C. App. 620, 622, 534 S.E.2d 259, 261 (2000), *cert. denied*, 353 N.C. 378, 547 S.E.2d 15 (2001); *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 354, 524 S.E.2d 368, 371, *disc. rev. denied*, 351 N.C. 473, 543 S.E.2d 488 (2000)).

In the instant case the Commission applied an incorrect standard of the law when it stated: "Where, as here, there is evidence of both causation and aggravation connected to particular aspects of an employee's job duties . . . to which the general public is not exposed, compensability is logically and legally warranted." The Commission

cites to this Court's decision in *Walston v. Burlington Industries*; however, the relevant language in *Walston* indicates that a disability caused by disease is compensable when "the disease is an occupational disease, or is aggravated or accelerated by causes and conditions characteristic of and peculiar to [plaintiff's] employment." 304 N.C. 670, 680, 285 S.E.2d 822, 828, *amended on rehearing*, 305 N.C. 296, 285 S.E.2d 822 (1982). In *Walston* this Court concluded that the plaintiff did not prove a causal connection between his diseases and his employment. *Id.* While *Walston* holds that the aggravation of a preexisting condition by an occupational disease is compensable, it does not alter the evidentiary burden that a plaintiff must meet to establish that his employment exposed him to a greater risk of *contracting* his disease relative to the general public.

Based on the record before us, plaintiff has failed to establish that his employment placed him at a greater risk of contracting either his ulnar nerve entrapment or his cervical spine condition than the general public.

In a 20 June 2002 letter to plaintiff's attorney, Dr. Adamson wrote:

> 2. . . . I feel that [plaintiff's] occupation as a bus driver did place him slightly at higher risk than the general public.
>
> . . .
>
> 4. I am not familiar with any study depicting foraminal stenosis or ulnar entrapment neuropathy as direct occupational risks of bus drivers. I believe ulnar entrapment neuropathy is correlated to some degree with repetitive use of the arm and elbow and as a bus driver I would think [plaintiff] would be at risk for this. . . .
>
> 5. I am not aware of any particular factors of bus driving that would place [plaintiff] at any greater risk for developing spondylotic disease of the cervical spine and subsequent foraminal stenosis.
>
> 6. It is possible that [plaintiff's] job activities did aggravate foraminal stenosis although it is impossible to know this for certain.
>
> . . . I feel that bus driving . . . could be a causative or aggravating factor related to ulnar entrapment neuropathy.

Nowhere in this letter does Dr. Adamson satisfactorily distinguish between the risk faced by plaintiff of *contracting* his conditions and

the risk of *aggravating* a preexisting condition relative to the general public; rather his statement obscures this distinction by suggesting that plaintiff's employment "could be a causative or aggravating factor" relating to his elbow condition. Dr. Adamson's statement in heading 2 does correspond to a question asked by plaintiff's attorney in a 6 June 2002 letter regarding whether "the job duties performed by [plaintiff] place him at increased risk for developing ulnar entrapment neuropathy in the left arm as opposed to this occurring to someone in the general public," but this statement is contradicted by Dr. Adamson's later deposition testimony.

At deposition, plaintiff's attorney asked Dr. Adamson: "Would the type of physical activity [plaintiff] performed in his job as a bus driver . . . place him at an increased risk of either aggravating or developing a left ulnar neuropathy which you diagnosed and treated?" Dr. Adamson responded, "The statement of aggravation of the ulnar neuropathy I believe is very accurate. . . . There is some debate now medically . . . about whether the actual repetitive nature actually causes the entrapment neuropathy, but I think that isn't as clear cut as we would like it to be." Plaintiff's attorney then repeated the question, to which Dr. Adamson responded, "I would believe so, yes." From this testimony alone, it is not clear whether Dr. Adamson believed that plaintiff's employment placed him at a greater risk of *contracting* his condition than the general population.

The ambiguity of Dr. Adamson's testimony on direct was clarified on cross-examination when the following exchange occurred:

> Q. . . . I want to make sure I'm clear on what you have indicated, am I correct in understanding that in your opinion, you're not able to say that the bus driving activities caused the ulnar neuropathy, but that it could have aggravated the ulnar neuropathy?
>
> A. I think that's correct.
>
> Q. And the same thing was basically true for the neck condition, the condition as treated there?
>
> A. Sure.

Much of Dr. Adamson's testimony is speculation. Although "[d]octors are trained not to rule out medical possibilities no matter how remote[,]" a "mere possibility has never been legally competent to prove causation." *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581

S.E.2d 750, 754 (2003) (citations omitted). To establish the necessary causal relationship for compensation under the Act, "the evidence must be such as to take the case out of the realm of conjecture and remote possibility." *Gilmore v. Hoke Cty. Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942). Dr. Adamson's statements are insufficient to establish the necessary causal relationship for plaintiff's conditions to be compensable as occupational diseases.

The Full Commission relied on Dr. Adamson's testimony in its findings of fact, determining plaintiff's "job duties with defendant caused or aggravated the conditions for which treatment was rendered and that plaintiff's job placed him at an increased risk of developing these conditions." Dr. Adamson made relevant statements on both direct and cross-examination as well as in his correspondence with plaintiff's attorney. The Commission appears to have relied solely on Dr. Adamson's direct examination testimony to the exclusion of his clarifying testimony on cross-examination. Considering Dr. Adamson's testimony on cross-examination, plaintiff produced no evidence that his employment exposed him to a greater risk of contracting an occupational disease relative to the general public.

The Commission's emphatic reliance on the ambiguous portions of Dr. Adamson's testimony, together with its inconsistent statement of the law under *Rutledge*, indicates that the Commission acted under a misapprehension of the law. If Dr. Adamson was ambiguous with respect to plaintiff's risk of contracting his ulnar neuropathy relative to the general public, he was absolutely clear in his 20 June 2002 letter that plaintiff faced no greater risk of contracting his cervical spine condition than did the general public. The Commission incorrectly applied the law and did not rely upon competent evidence in its findings that plaintiff's ulnar neuropathy and spondylotic disease of the cervical spine were compensable occupational diseases. Accordingly, we conclude that the Commission erred in concluding that plaintiff sustained a compensable occupational disease within the meaning of N.C.G.S. § 97-53(13).

N.C.G.S. § 97-2(6)

The Workers' Compensation Act provides in pertinent part:

> "Injury and personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident. With respect to back injuries,

> however, where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident.

N.C.G.S. § 97-2(6) (2005).

In the instant case the Commission's findings of fact stated that plaintiff suffered compensable injury and "was unable to return to work because of his occupational disease and specific traumatic incident." The Commission found that "[t]he sudden pain to plaintiff's neck on December 4, 2000, qualifies under North Carolina law as a specific traumatic incident of the work assigned."

The Court of Appeals noted that it is well settled that its review of the Commission's decisions "is limited to the determination of whether there is competent evidence to support the Commission's Findings of Fact and whether those findings support the Conclusions of Law." *Chambers v. Transit Mgmt.*, 172 N.C. App. 540, 542-43, 616 S.E.2d 372, 374 (2005) (citations omitted). In affirming the Commission the Court of Appeals held that the "record contains sufficient evidence to support the facts found by the Commission" and its "conclusion . . . that plaintiff is entitled to disability income as compensation for his injury resulting from a specific traumatic incident." *Id.* at 544, 616 S.E.2d at 375. We disagree.

The plain language of the statute requires that the injury be "the direct result of a specific traumatic incident." N.C.G.S. § 97-2(6). The Commission concluded there was evidence of a specific traumatic incident, but only supported that conclusion by a finding that the "sudden pain to plaintiff's neck on December 4, 2000, qualifies . . . as a specific traumatic incident of the work assigned." Plaintiff, however, described a gradual onset of pain. Daniel B. Murrey, M.D., an orthopedist who treated plaintiff before Dr. Adamson, noted that plaintiff described a "gradual onset of left arm pain while he was driving" and knew of "no particular inciting event." In fact, plaintiff revealed that he might have injured himself doing yard work. Randy Mullenex, director of safety and administration for defendant, testified that he asked plaintiff whether his injury could have resulted from yard work and plaintiff replied, "I don't know." When asked why he believed his job caused or contributed to this flare-up, plaintiff replied, "Because I had no prior problems, none at all with my left arm or my hand or anything of that nature. And—but I

still couldn't be a hundred percent sure that it wasn't coming from something else."

We conclude that the evidence is not sufficient to satisfy the requirements enunciated by the General Assembly in N.C.G.S. § 97-2(6) and that the Court of Appeals erred in finding that the Commission relied on competent evidence in determining that a specific traumatic incident occurred.

Previous decisions of the Court of Appeals are inconsistent with the holding in *Chambers*. In *Livingston v. James C. Fields & Co.*, 93 N.C. App. 336, 377 S.E.2d 788 (1989) the court addressed a similar situation where an employee experienced a gradual onset of back pain. The court noted that "[a] 'specific traumatic incident' means the 'injury must not have developed gradually but must have occurred at a cognizable time.' *Bradley v. E.B. Sportswear, Inc.*, 77 N.C. App. 450, 452, 335 S.E.2d 52, 53 (1985). In this context, 'cognizable' means capable of being judicially known and determined." *Livingston*, 93 N.C. App. at 337, 377 S.E.2d at 788.

The court expounded on its view of judicially cognizable time in *Fish v. Steelcase, Inc.*, 116 N.C. App. 703, 449 S.E.2d 233 (1994), *cert. denied*, 339 N.C. 737, 454 S.E.2d 650 (1995).

> *Judicially cognizable* does not mean "ascertainable on an exact date." Instead, the term should be read to describe a showing by plaintiff which enables the Industrial Commission to determine when, within a reasonable period, the specific injury occurred. The evidence must show that there was some event that caused the injury, not a gradual deterioration.

Id. at 709, 449 S.E.2d at 238. In the instant case no competent evidence in the record supports a finding that plaintiff experienced an event within a judicially cognizable time causing his back injury. Plaintiff must demonstrate a causal connection between the specific traumatic event and the injury. *See Livingston*, 93 N.C. App. at 337, 377 S.E.2d at 789. *Contra Zimmerman v. Eagle Elec. Mfg. Co.*, 147 N.C. App. 748, 754, 556 S.E.2d 678, 681 (2001) (stating that "a worker must only show that the injury occurred at a 'judicially cognizable' point in time"), *disc. rev. improvidently allowed*, 356 N.C. 425, 571 S.E.2d 587 (2002).

Here, plaintiff presented evidence that he experienced pain on a particular date but he presented no evidence linking that pain to the occurrence of an injury. The statute defines an "injury by accident" to

an employee's back to be an injury that is "the direct result of a specific traumatic incident" and "causally related to such incident." N.C.G.S. § 97-2(6). The onset of plaintiff's pain on 4 December 2000, without more, does not establish evidence of a specific traumatic incident. The Court of Appeals has held that "[t]he onset of pain is not a 'specific traumatic incident' that will determine whether compensation will be allowed pursuant to the act; pain is, rather, as a general rule, the *result* of a 'specific traumatic incident.' " *Roach v. Lupoli Constr. Co.*, 88 N.C. App. 271, 273, 362 S.E.2d 823, 824 (1987).

None of plaintiff's evidence establishes a specific traumatic incident of the work assigned that can be construed as an "injury by accident" to plaintiff's back as required by N.C.G.S. § 97-2(6) and prior decisions of the Court of Appeals. *See*, *e.g.*, *Moore v. Fed. Express*, 162 N.C. App. 292, 294, 298, 590 S.E.2d 461, 463-64, 465-66 (2004) (loading a box into a vehicle); *Whitfield v. Lab. Corp. of Am.*, 158 N.C. App. 341, 344, 352, 581 S.E.2d 778, 781, 785-86 (2003) (slipped on rainwater); *Ruffin v. Compass Grp. USA*, 150 N.C. App. 480, 481, 482-84, 563 S.E.2d 633, 635, 636-37 (2002) (lifted a forty pound box of syrup out of truck); *Beam v. Floyd's Creek Baptist Church*, 99 N.C. App. 767, 769, 394 S.E.2d 191, 192 (1990) (carried a heavy spotlight backwards up a flight of stairs); *Kelly v. Carolina Components*, 86 N.C. App. 73, 76-77, 356 S.E.2d 367, 369 (1987) (carried a door on head while climbing down a ladder); *Bradley*, 77 N.C. App. at 451-52, 335 S.E.2d at 52-53 (lifted box off floor). Plaintiff having failed to produce competent evidence of a specific incident that caused his injury, we hold that the Court of Appeals erred when it affirmed the Commission's opinion and award.

For the foregoing reasons, we reverse the decision of the Court of Appeals affirming the Industrial Commission's opinion and award. This case is remanded to the Court of Appeals for further remand to the Industrial Commission for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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

DONALD EUGENE MISENHEIMER v. JAMES CLAYTON BURRIS AND RANDALL BURRIS

No. 245A05

(Filed 17 November 2006)

Criminal Conversation— statute of limitations—tolling by discovery rule

The discovery rule of N.C.G.S. § 1-52(16) applies to actions for criminal conversation. Therefore, the three-year statute of limitations for criminal conversation set forth in N.C.G.S. § 1-52(5) is tolled by N.C.G.S. § 1-52(16) and begins to run only when the extramarital affair is discovered or should have been discovered by the aggrieved party, not upon the completion of the last act constituting the tort. However, an action for criminal conversation remains subject to the ten-year statute of repose provision in N.C.G.S. § 1-52(16).

Chief Justice PARKER dissenting.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 169 N.C. App. 539, 610 S.E.2d 271 (2005), reversing a judgment entered 20 May 2003 by Judge Michael E. Beale in Superior Court, Stanly County. On 6 October 2005, the Supreme Court allowed defendant's petition for a writ of certiorari to review additional issues not addressed by the Court of Appeals. Heard in the Supreme Court 13 February 2006.

Walker & Bullard, P.A., by Daniel S. Bullard and James F. Walker, for plaintiff-appellant/appellee.

Tucker & Singletary, P.A., by William C. Tucker, for defendant-appellee/appellant.

BRADY, Justice.

The question presented is an issue of first impression: Whether, in an action for criminal conversation, the applicable statute of limitations is tolled until discovery of the extramarital affair by the aggrieved party. Because we hold that the discovery rule of N.C.G.S. § 1-52(16) applies to actions for criminal conversation, we reverse the Court of Appeals.

FACTUAL BACKGROUND

Donald Eugene Misenheimer (plaintiff) and his wife, Rebecca Misenheimer (Mrs. Misenheimer) were married in February 1971. Plaintiff met James Clayton Burris (defendant) in the 1970s. Defendant frequented plaintiff's automotive and equipment repair shop located on the property with the Misenheimer family home, and the two became friends. Defendant began working for plaintiff in the mid-1980s and was at the Misenheimers' home working or visiting five to ten times per week through the early 1990s. Their families also grew close, going on trips together and visiting each other frequently.

Unbeknownst to plaintiff, Mrs. Misenheimer and defendant began an extramarital affair in 1991, which did not end until 1994 or 1995. During 1995 and 1996, plaintiff and defendant had a business dispute that damaged their relationship, although they continued to have contact with each other. In February of 1996, Mrs. Misenheimer informed plaintiff that she wanted a divorce. Plaintiff and Mrs. Misenheimer received counseling through their church to no avail, and in early 1997 Mrs. Misenheimer communicated to plaintiff that she still wished to separate.

Plaintiff was uncertain whether any type of romantic or sexual relationship existed between defendant and Mrs. Misenheimer. In October 1996, plaintiff confronted defendant about any possible sexual activity with Mrs. Misenheimer. Plaintiff believed defendant's statement that "[he] may have done some things that [he] shouldn't have, but [he] didn't sleep with [Mrs. Misenheimer]." Finally, on 15 March 1997, Mrs. Misenheimer separated from plaintiff by leaving the family home.

Plaintiff first confirmed defendant's extramarital affair with Mrs. Misenheimer in July of 1997 during a marital counseling session. Immediately after this session, Mrs. Misenheimer acknowledged that she and defendant engaged in "an affair of the hands and the heart." The Misenheimers' divorce was final in early 2000, and plaintiff filed an action for criminal conversation on 12 April 2000, within three years of his discovery of the affair.

The matter came on for hearing, and after the close of plaintiff's evidence the trial court denied defendant's motion to dismiss the criminal conversation claim, finding that the discovery rule codified in N.C.G.S. § 1-52(16) applies to criminal conversation actions. At the close of all evidence, the trial court instructed the jury that the bur-

den of proof was on the plaintiff to satisfy the jury, by the greater weight of the evidence, that he brought the action before the expiration of the three year statute of limitations. With regard to application of the discovery rule codified in N.C.G.S. § 1-52(16), the trial court instructed the jury that the statute of limitations is tolled until harm to the claimant becomes apparent or reasonably should have become apparent. The jury returned a verdict finding defendant engaged in criminal conversation with Mrs. Misenheimer and that plaintiff's action was commenced within the statute of limitations. The jury awarded plaintiff $100,001 in actual damages and $250,000 in punitive damages, and the trial court entered judgment consistent with that verdict.

Defendant appealed this judgment to the Court of Appeals, arguing, *inter alia*, that the trial court committed reversible error in ruling that the statutory discovery rule of N.C.G.S. § 1-52(16) applies to actions for criminal conversation. In a divided decision, the Court of Appeals agreed with defendant, reversed the trial court's order denying him a directed verdict, and remanded the case to the trial court. On 10 May 2005, plaintiff filed his appeal of right to this Court based upon the dissenting opinion. On 6 October 2005, this Court allowed defendant's petition for writ of certiorari to consider additional issues not addressed by the Court of Appeals.

ANALYSIS

The pertinent statute of limitations provides that a plaintiff must file an action within three years "[f]or criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated." N.C.G.S. § 1-52(5) (2005). N.C.G.S. § 1-52(16) establishes what is commonly referred to as the discovery rule, which tolls the running of the statute of limitations for torts resulting in certain latent injuries. The discovery rule provides that:

> Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action . . . shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

Id. § 1-52(16) (2005).

In construing this statutory language, we are guided by long-standing rules of statutory interpretation. First, if a statute is clear and unambiguous, no construction of the legislative intent is required and the words are applied in their normal and usual meaning. *See Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). "However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment." *Diaz*, 360 N.C. at 387, 628 S.E.2d at 3 (citing *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) ("The best indicia of [legislative] intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish."")). Additionally, if a statute is remedial in nature, seeking to "advance the remedy and repress the evil" it must be liberally construed to effectuate the intent of the legislature. *DiDonato v. Wortman*, 320 N.C. 423, 430 n.2, 358 S.E.2d 489, 493 n.2 (1987) (internal quotation marks omitted).

We find N.C.G.S. § 1-52(16) to be ambiguous on its face. The statute provides a discovery rule for actions in "personal injury." The term personal injury has a wide range of meanings. In the context of the statute in question, personal injury could be defined as either: "[A]ny harm caused to a person, such as a broken bone, a cut, or a bruise; bodily injury," or "[a]ny invasion of a personal right, including mental suffering and false imprisonment." *Black's Law Dictionary* 802 (8th ed. 2004). The statute is ambiguous as to what is intended by the use of the words "personal injury." Certainly an action for criminal conversation falls under the latter definition of personal injury as it concerns an invasion of a individual's personal right. Similarly, in many cases the first definition of personal injury could be applicable to claims of criminal conversation as "the mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter." *Young v. W. Union Tel. Co.*, 107 N.C. 287, 297, 107 N.C. 370, 385, 11 S.E. 1044, 1048 (1890) (internal quotation marks omitted). The language and the spirit of the statute suggest the legislature intended to allow an otherwise qualified plaintiff to recover damages after the normal expiration of the statute of limitations if the injury was latent. We also find this statute to be remedial in nature and will construe it liberally to give effect to that intent. Although we hold that the discovery rule tolls the statute of limitations in cases of criminal conversation, we observe that such actions remain subject to the statute of repose provision in N.C.G.S.

§ 1-52(16), which states that "no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action."

Defendant argues that plaintiff should have been required to show severe emotional distress before the discovery rule was applied to his action. We find nothing in our case law or any other authority cited by defendant that mandates such a holding. Nevertheless, while severe emotional distress is not an element of criminal conversation, damages for mental anguish are recoverable in cases of criminal conversation. *See Cottle v. Johnson*, 179 N.C. 426, 429, 102 S.E. 769, 770 (1920). " 'Wounding a man's feelings is as much actual damages as breaking his limb. The difference is that one is internal and the other external; one mental, the other physical. At common law compensatory damages include, upon principle, and . . . upon authority, salve for wounded feelings . . . .' " *Carmichael v. S. Bell Tel. and Tel. Co.*, 157 N.C. 17, 20-21, 157 N.C. 21, 25, 72 S.E. 619, 621 (1911) (quoting *Head v. Ga. Pac. Ry. Co.*, 79 Ga. 358, 360, 7 S.E. 217, 218 (1887)).

Moreover, plaintiff presented substantial evidence at trial of severe emotional distress. Testimony at trial showed, for example, that plaintiff cried easily, lost weight, appeared sickly, and lost his self respect, and that this emotional distress made him unable to work effectively for a period of time. Most significantly, plaintiff testified that the actions of his wife and defendant "broke [his] heart very badly." As Blackstone described the civil injury in cases of criminal conversation, "surely there can be no greater." William Blackstone, 3 Commentaries *139.

Defendant argues that the cause of action for criminal conversation is specifically identified in the three-year statute of limitations contained in N.C.G.S. § 1-52(5), and therefore the discovery rule does not apply to criminal conversation cases. In this argument defendant focuses on the language in N.C.G.S. § 1-52(16) which applies the discovery rule to certain cases "[u]nless otherwise provided by statute."

Defendant's interpretation is both inaccurate and inequitable, unduly preventing recovery by an injured spouse. N.C.G.S. § 1-52(5)'s reference to criminal conversation does not bar the application of N.C.G.S. § 1-52(16) when the injury is latent. Instead, we interpret N.C.G.S. §§ 1-52(5) and 1-52(16) together to mean that the three year statute of limitations for criminal conversation begins to run when the tort is discovered or should have been discovered, not upon com-

pletion of the last act constituting the offense. We have rejected and continue to reject defendant's approach. This Court has applied the discovery rule to other subsections of N.C.G.S. § 1-52. *See*, *e.g.*, *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 492-94, 329 S.E.2d 350, 353-55 (1985) (applying N.C.G.S § 1-52(16) to claims of liability arising out of a contract enumerated in N.C.G.S. § 1-52(1)). Furthermore, although decisions of the Court of Appeals are clearly not binding on this Court, both this Court and the Court of Appeals have applied N.C.G.S. § 1-52(16) to other actions embraced by N.C.G.S. § 1-52(5)—the statutory section that explicitly lists actions for criminal conversation. *See Wilson v. McLeod Oil Co.*, 327 N.C. 491, 511, 398 S.E.2d 586, 596 (1990) (applying N.C.G.S. § 1-52(16) to bar statutorily created claims of liability referenced in N.C.G.S. § 1-52(2) and negligence claims controlled by 1-52(5)); *Zenobile v. McKecuen*, 144 N.C. App. 104, 108, 548 S.E.2d 756, 759 (2001) (noting the applicability of N.C.G.S. § 1-52(16) to actions for intentional infliction of emotional distress covered by N.C.G.S § 1-52(5)); *Johnson v. Podger*, 43 N.C. App. 20, 25, 257 S.E.2d 684, 688 (applying predecessor discovery rule now codified in N.C.G.S. § 1-52(16) to medical malpractice action governed by N.C.G.S. § 1-52(5) at that time), *cert. denied*, 298 N.C. 806, 261 S.E.2d 920 (1979).

Construing the phrase "unless otherwise provided by statute" to prohibit application of the discovery rule to actions listed in N.C.G.S. § 1-52 would render the remainder of N.C.G.S. § 1-52(16) meaningless. Personal injuries are covered in N.C.G.S. § 1-52(5), and therefore, under defendant's argument, the discovery rule would not toll the running of the statute of limitations in personal injury actions even though N.C.G.S. § 1-52(16) specifically applies to "personal injury." *See* N.C.G.S. § 1-52(5) ("For criminal conversation, or for any other *injury to the person* . . . .") (emphasis added); *id.* § 1-52(16) ("Unless otherwise provided by statute, for *personal injury* . . . .") (emphasis added).

Application of the discovery rule to claims for criminal conversation accords with North Carolina's demonstrated interest in protecting the sanctity of marriage and preserving the institution of the family. *See McCutchen v. McCutchen*, 360 N.C. 280, 284, 624 S.E.2d 620, 624 (2006) (discussing, in an alienation of affections case, how "[c]ommencing the statute of limitations only after alienation is complete comports with North Carolina's public policy favoring the protection of marriage"); *see also* N.C.G.S. § 8-56 (2005) (providing that in civil actions, "[n]o husband or wife shall be compellable in any

event to disclose any confidential communication made by one to the other during their marriage"); N.C.G.S. § 8-57(c) (2005) (providing that in criminal actions, "[n]o husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage"); *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985) (per curiam) (order vacating Court of Appeals decision purporting to abolish causes of action for criminal conversation and alienation of affections in North Carolina).

Failure to apply the discovery rule to actions for criminal conversation has the unacceptable consequence of rewarding a defendant, as in the present case, for deceptive and clandestine behavior that successfully prevents discovery of the extramarital conduct until after the three year statute of limitations has expired. "Until plaintiff discovers the wrongful conduct of defendant, [he] is unaware that [he] has been injured in the legal sense." *Black v. Littlejohn*, 312 N.C. 626, 639, 325 S.E.2d 469, 478 (1985). It is contrary to notions of fundamental fairness to suggest the statute of limitations barred plaintiff's claim before he became aware of defendant's tortious conduct—especially because defendant's deceptive denial, even in the face of direct confrontation, delayed plaintiff's discovery.

We reverse the decision of the Court of Appeals as to the applicability of the discovery rule of N.C.G.S. § 1-52(16) to claims for criminal conversation. However, as to the additional assignments of error raised by defendant at the Court of Appeals but not addressed by that court, this case is remanded to that court for consideration of those issues. Consequently, we conclude that defendant's petition for writ of certiorari as to additional issues was improvidently allowed.

REVERSED AND REMANDED; CERTIORARI IMPROVIDENTLY ALLOWED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

Chief Justice PARKER dissenting.

In my view the Court of Appeals' majority correctly determined that because "the cause of action for criminal conversation is specifically identified in the three-year statute of limitations contained in § 1-52(5), the discovery exception does not apply to criminal conver-

sation cases." *Misenheimer v. Burris*, 169 N.C. App. 539, 542, 610 S.E.2d 271, 273 (2005).

The elements necessary to support a claim for criminal conversation are marriage and sexual intercourse between the defendant and the plaintiff's spouse during the existence of the marriage. *See Bryant v. Carrier*, 214 N.C. 191, 194-95, 198 S.E. 619, 621 (1938); *see also* 1 Suzanne Reynolds, *Lee's North Carolina Family Law* § 5.46(B), at 402 (5th ed. 1993) [hereinafter *Family Law*]. Criminal conversation is frequently described as a strict liability tort in that a plaintiff may prevail even if the defendant was unaware of the marriage. A plaintiff is not required to prove love and affection in the marriage or any negative effect on the marriage by the sexual intercourse. *See*, *e.g.*, *Family Law* § 5.46(B), at 403-04.

A plaintiff must file an action within three years for "criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated." N.C.G.S. § 1-52(5) (2005). The discovery rule provides an exception for latent injuries or damages:

> Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action . . . shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs.

Id. § 1-52(16).

By its very terms, the discovery rule exception excludes from its scope those actions provided for elsewhere in the statutes and includes only those claims involving "personal injury or physical damage to claimant's property." The tort of criminal conversation is specifically provided for in section 1-52(5); hence, the exception does not apply.

Contrary to the assertions of the majority, the language of the discovery rule is unambiguous with respect to its use of the term "personal injury." Immediately after the term "personal injury," the statute refers to the accrual of a cause of action upon a claimant's discovery of "bodily harm." Thus, the type harm contemplated by the General Assembly in laying out the exception to the three year statute of limitations that would otherwise apply is latent, physical, "bodily" harm: in other words, the type harm that would give rise to an action for personal injury. The effect of the majority's opinion would be to pro-

vide, in essence, a claim for personal injury to an aggrieved spouse seeking damages for the separate strict liability tort of criminal conversation. The injury giving rise to a cause of action for criminal conversation is to the spousal relationship; any particular harm suffered by the plaintiff may be considered on the issue of damages but is not an element of the tort of criminal conversation. *See*, *e.g.*, *Bryant*, 214 N.C. at 194, 198 S.E. at 621; *Cottle v. Johnson*, 179 N.C. 426, 428-29, 102 S.E. 769, 770 (1920).

I would vote to affirm the majority opinion of the Court of Appeals below; therefore, I respectfully dissent.

DONALD J. PATRONELLI v. CARRIE PATRONELLI

No. 55A06

(Filed 17 November 2006)

Divorce— counsel fees for dependent spouse—represented pro bono—denied

The trial court did not err by denying defendant's request for counsel fees under N.C.G.S. § 50-16.4 in a domestic proceeding where she was represented pro bono. Payment of fees to her counsel would not have been for her benefit.

Justice NEWBY dissenting.

Justice Patricia Timmons-Goodson 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, 175 N.C. App. 320, 623 S.E.2d 322 (2006), affirming an order denying defendant's claim for counsel fees entered on 6 January 2004 by Judge Anne B. Salisbury in District Court, Wake County. Heard in the Supreme Court 12 September 2006.

Oliver & Oliver, PLLC, by John M. Oliver, for plaintiff-appellee.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendant-appellant.

Legal Aid of North Carolina, Inc., by Celia Pistolis, and Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., for

Legal Aid of North Carolina, the North Carolina Justice Center, Legal Services of Southern Piedmont, Legal Aid Society of Northwest North Carolina, Carolina Legal Assistance, and the North Carolina Association of Women Attorneys, amici curiae.

Maupin Taylor, P.A., by John I. Mabe, Jr., for North Carolina Bar Association, amicus curiae.

BRADY, Justice.

In enacting N.C.G.S. § 50-16.4, the General Assembly provided:

> At any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A, or postseparation support pursuant to G.S. 50-16.2A, the court may, upon application of such spouse, enter an order for reasonable counsel fees *for the benefit of such spouse*, to be paid and secured by the supporting spouse in the same manner as alimony.

N.C.G.S. § 50-16.4 (2005) (emphasis added). Because any counsel fees ordered paid to defendant's *pro bono* counsel would not be for the benefit of defendant, we hold she was not entitled to counsel fees pursuant to N.C.G.S. § 50-16.4. Accordingly, we affirm the decision of the Court of Appeals.

BACKGROUND

Donald J. Patronelli (plaintiff) and Carrie Patronelli (defendant) married in 1997 and separated in 2001. On 14 August 2001, plaintiff filed a complaint seeking child custody, child support, and equitable distribution. Defendant counterclaimed and was awarded primary physical custody of the child, child support, postseparation support, and alimony. Pertinent to this appeal, the trial court set a hearing on the issues of alimony and related counsel fees. After the hearing, the trial court denied defendant's request for an award of counsel fees, finding in a written order:

> The defendant is represented on a *pro bono* basis by her counsel through the Volunteer Lawyers Program. The defendant has an arrangement with her counsel that her counsel will not charge her any fees for representation of her in this matter. Defendant's counsel proffered to the court that he had incurred expenses and fees in the amount of approximately $2,500.00 in bringing the defendant's permanent alimony case to trial. However, the defendant has not incurred any of these expenses

> as she is not personally liable to her counsel for the same. As such, there is no basis for an award of attorney's fees in this matter.

Based upon this finding of fact, the trial court concluded as a matter of law: "The defendant has not incurred any attorney's fees under N.C.G.S. § 50-16.4, and thus her claim for attorney's fees should be denied."

Defendant appealed to the Court of Appeals, assigning error to the trial court's conclusion she was not entitled to counsel fees under N.C.G.S. § 50-16.4. The Court of Appeals affirmed the trial court's order, and Judge Wynn filed a dissent asserting defendant was entitled to counsel fees. Defendant appealed as of right to this Court.

ANALYSIS

Pro bono publico legal services are provided for the public good without compensation. *See Black's Law Dictionary* 1240-41 (8th ed. 2004) ("Being or involving uncompensated legal services performed esp. for the public good."). The American Bar Association's Model Rules of Professional Conduct recommend each attorney perform at least fifty hours of *pro bono* service per year, with the majority of those services provided "without fee or expectation of fee." *See* Model Rules of Prof'l Conduct R. 6.1 (2003). It is commendable when an attorney, although under no compulsion to do so, agrees to represent a client of little means with no expectation of a fee. Law is one of the three learned professions, the others being medicine and the clergy. *See* Letter IV from J. Orton Smith to A Solicitor Commencing Business *in The Lawyer and His Profession* 35, 46 (London, V. & R. Stevens & Sons, S. Sweet & W. Maxwell 1860). *Pro bono* representation exemplifies the difference between a trade and a profession. As one writer put it, in a trade "a man has simply to consider . . . the best way of securing large profits to himself." *Id.* However, "a man should enter [a profession] with the consciousness that his own profit, though his immediate object, is to be a secondary consideration, his *first* being always the advantage of those who place their confidence in him." *Id.*

Defendant spends much of her brief arguing that the standard for awarding fees under N.C.G.S. § 50-16.4 is not whether counsel fees were *incurred* by the dependent spouse but whether any fees awarded would be for the *benefit* of such spouse. In this argument,

defendant objects to the lower courts' "engrafting" into N.C.G.S. § 50-16.4 the requirement that counsel fees must have been incurred by the dependent spouse. We do not decide, as did the Court of Appeals and the trial court, whether a dependent spouse must incur counsel fees before an award would be proper, because in this case we are unpersuaded that any fees ordered would have been for the benefit of defendant.

"When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006). The language of N.C.G.S. § 50-16.4 is clear and without ambiguity. Therefore, we will give effect to its plain meaning. The statute permits a trial court to award "reasonable counsel fees" if, among other things, the award is for the benefit of the dependent spouse. There is no provision in N.C.G.S. § 50-16.4 which would allow a trial court to award counsel fees to a dependent spouse unless such award is for that spouse's benefit.

In the case *sub judice*, defendant would have not benefitted in any way from an award of counsel fees. Defendant was not obligated in any manner to her counsel for professional services provided pursuant to their agreement. Additionally, by the time the fees were requested, defendant's case was for the most part completed, and therefore no fee award would have assisted in financing further litigation. Simply put, only defendant's counsel stood to benefit from any fees awarded by the trial court; and there is no statutory authority permitting a trial court to enter an order of counsel fees for the benefit of counsel. *See* N.C.G.S. § 50-16.4 (stating that "the court may . . . enter an order for reasonable counsel fees for the benefit of such spouse").

We are unpersuaded that such a result is impermissible because it would allow plaintiff to reap a windfall from his wife's choice of counsel. Such an argument does not take into account the purpose of the statute, which is to prevent requiring "a dependent spouse to meet the expenses of litigation through the unreasonable depletion of her separate estate where her separate estate is considerably smaller than that of the supporting spouse . . . ." *Clark v. Clark*, 301 N.C. 123, 137, 271 S.E.2d 58, 68 (1980); *see also Hudson v. Hudson*, 299 N.C. 465, 473-74, 263 S.E.2d 719, 724-25 (1980) (discussing the purpose of domestic fee-shifting statutes). The purpose of N.C.G.S. § 50-16.4 is not to punish a supporting spouse for having a larger estate than that

of the dependent spouse. Rather, it is to level the playing field so that both parties have suitable representation.

Because we are unpersuaded that any counsel fees awarded to defendant in this matter would have been for her benefit, the trial court was without statutory authority to enter such an order. Accordingly, the trial court did not err in denying defendant's request for counsel fees. Therefore, the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice NEWBY dissenting.

As a prerequisite to an award of attorney's fees under N.C.G.S. § 50-16.4, the majority determines the statutory language "for the benefit of such spouse" requires the dependent spouse to have a personal financial obligation to her attorney. Since I am not convinced the General Assembly intended this result, I respectfully dissent.

The General Assembly enacted N.C.G.S. § 50-16.4 with the goal of "enabl[ing] the dependent spouse, as litigant, to meet the supporting spouse, as litigant, on substantially even terms by making it possible for the dependent spouse to employ adequate counsel." *Hudson v. Hudson*, 299 N.C. 465, 473, 263 S.E.2d 719, 724 (1980). The statute, which furthers the legislature's purpose by authorizing fee-shifting in appropriate circumstances, reads:

> At any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A, or postseparation support pursuant to G.S. 50-16.2A, the court may, upon application of such spouse, enter an order for reasonable counsel fees *for the benefit of* such spouse, to be paid and secured by the supporting spouse in the same manner as alimony.

N.C.G.S. § 50-16.4 (2005) (emphasis added).

Indisputably, defendant meets the threshold requirements of being a dependent spouse with inadequate financial means. *See Hudson*, 299 N.C. at 473, 263 S.E.2d at 724. The only question is whether the trial court "may" award reasonable fees when the attorney is providing *pro bono* services.

Finding the statute to be "clear and unambiguous," the majority effectively holds N.C.G.S. § 50-16.4 sanctions fee shifting only when a

dependent spouse is financially "obligated" to counsel and will receive a direct pecuniary benefit from the award. I believe this restrictive reading imposes a requirement not anticipated by the legislature. Under this approach, even attorney's fees paid by a friend or family member would not form the basis of an award, because the dependent spouse would not directly benefit from payment of the attorney.

Yet, the phrase "for the benefit of such spouse" could be read in other ways. A more natural reading is that the phrase "for the benefit of" is synonymous with "on behalf of." Hence, I believe the General Assembly employed the phrase as it is often used in reference to payments made to third parties on behalf of or for the benefit of others. *See generally* William C. Burton, *Legal Thesaurus* 572-73 (2d ed. 1992) (listing "behalf," "accommodate," and "advantage," among others, as synonymous with "benefit"). Given this reading, "for the benefit of" simply indicates the legislature's decision to allow attorney's fees to be paid directly to counsel, a non-party, on behalf of the dependent spouse. This interpretation is consistent with the portion of N.C.G.S. § 50-16.4 that allows for collection of attorney's fees "in the same manner as alimony" by the non-party attorney. *Id.* § 50-16.4.[1]

Likewise, a broader reading of the term "benefit" is warranted because a pecuniary benefit is but one of many possible benefits. *See generally Black's Law Dictionary* 166-67 (8th ed. 2004) (defining benefit as an "[a]dvantage; privilege" and providing definitions for six different types of benefits including "pecuniary benefit"). As part of the vast group of North Carolinians who cannot afford legal representation, *see generally* N.C. Legal Servs. Planning Council, *North Carolina Statewide Legal Needs Assessment* (2003), *available at* http://www.lri.lsc.gov, defendant derives direct benefit from fee-shifting statutes that increase the amount of *pro bono* representation in the market. Moreover, defendant, who may again find herself in need of legal representation, has developed an attorney-client relationship with her *pro bono* counsel. Allowing an award in this case may permit the relationship to continue for subsequent litigation involving matters such as collections, child custody, or unrelated issues.

1. This view is also consistent with the U.S. Supreme Court's holding that fees should be awarded based on their fair market value, not their cost to the client. *See generally Blum v. Stenson*, 465 U.S. 886, 104 S. Ct. 1541, 79 L. E. 2d 891, (1984) (calculating fee awards to nonprofit legal service organizations based on fair market value).

Fee awards to *pro bono* counsel also benefit dependent spouses by allowing attorneys rather than dependent spouses to assume the risk that fees will not be awarded. The lawyer can retain the possibility of payment under the statute, while relieving the dependent spouse of the additional stress of potential responsibility for legal bills. In addition, a dependent spouse may not wish to receive "charity" and may sense a moral obligation to repay the attorney. The fee award would free the spouse of this concern. Thus, even when the attorney does not undertake additional *pro bono* representation, the dependent spouse receives a benefit.

This disparity of interpretation is understandable in view of the different definitions of "benefit." *See The American Heritage Dictionary of the English Language* 123 (William Morris ed., New College ed. 1979). The majority embraces the concept of "[a] payment or series of payments to one in need." *Id.* (definition 3). I prefer the broader definition: "Anything that promotes or enhances well-being; advantage." *Id.* (definition 1).

At best the statute is ambiguous whether "for the benefit of" requires the dependent spouse to receive a direct pecuniary benefit, demands only that the dependent spouse be advantaged, or merely indicates that payments can be made directly to counsel. "[W]here 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, 388 S.E.2d 134, 136-37 (1990). Additionally, if a statute is remedial in nature, seeking to "advance the remedy and repress the evil," it must be liberally construed to effectuate the intent of the legislature. *DiDonato v. Wortman*, 320 N.C. 423, 430 n.2, 358 S.E.2d 489, 493 n.2 (1987) (citation and internal quotation marks omitted).

On the one hand, determining that the phrase sanctions payments directly to *pro bono* counsel permits attorneys to accept additional *pro bono* work, furthering the legislative purpose by enabling more dependent spouses to meet their supporting spouses on equal footing in litigation. On the other hand, concluding that the phrase requires that the award provide a direct pecuniary benefit to the dependent spouse hinders the legislature's goal by limiting the amount of work that will originally be taken on a *pro bono* basis.

Certainly, public policy considerations weigh in favor of such awards. Without the threat of fee-shifting, supporting spouses have less incentive to settle cases in which their spouses are represented

by *pro bono* counsel. Supporting spouses will also be tempted to provide dependent spouses with little or no support before litigation, because a destitute spouse is more likely to face a choice of *pro bono* counsel or no counsel at all, with either option benefitting the supporting spouse.

In its brief to this Court, amicus curiae contends there is a "direct link between the urgent need to provide people of modest means with access to the civil justice system and statutes such as [N.C.G.S.] § 50-16.4," which are designed "not just to level the playing field[, but to] open the gates to the field." I agree. Unfortunately, our decision today will reduce the availability of legal counsel to dependent spouses, effectively closing the gates. Because N.C.G.S. § 50-16.4 does not preclude benefitting dependent spouses by providing fee awards to *pro bono* counsel, neither should we.

Justice TIMMONS-GOODSON joins in this dissenting opinion.

GOOD HOPE HEALTH SYSTEM, L.L.C., PETITIONER, AND TOWN OF LILLINGTON, PETITIONER-INTERVENOR v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT, AND BETSY JOHNSON REGIONAL HOSPITAL, INC., AND AMISUB OF NORTH CAROLINA, INC. D/B/A CENTRAL CAROLINA HOSPITAL, RESPONDENT-INTERVENORS

No. 57A06

(Filed 17 November 2006)

Hospitals and Other Medical Facilities— certificate of need— appeal not mooted by subsequent application

A hospital's appeal from the denial of a 2003 application for a certificate of need (CON) was not mooted by the hospital's submission of another CON application in 2005 where the 2003 CON review process was noncompetitive in that the hospital was the sole applicant proposing the particular project, which was ostensibly intended to replace an existing facility; the 2005 CON application, which arose out of an amended State Medical Facilities Plan designating a need for a new hospital in Harnett County, involved additional applicants; the 2005 application would be subject to comparison with others, including any submitted by respondent-intervenors, and would be evaluated in that context;

and although the hospital's 2003 and 2005 applications proposed substantially similar projects, the character of the review process for each distinguishes them.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 175 N.C. App. 296, 623 S.E.2d 307 (2006), dismissing an appeal from a final agency decision issued 10 September 2004 by the North Carolina Department of Health and Human Services. On 4 May 2006, the Supreme Court allowed petitioners' petitions for discretionary review of the Court of Appeals decision and for review as to additional issues. Heard in the Supreme Court on 18 October 2006.

Smith Moore LLP, by Maureen Demarest Murray, for petitioner-appellant, and Morgan, Reeves and Gilchrist, by C. Winston Gilchrist, for petitioner-intervenor-appellant.

Roy Cooper, Attorney General, by Melissa L. Trippe, Special Deputy Attorney General, for respondent-appellee.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, and Nelson Mullins Riley & Scarborough LLP, by Noah H. Huffstetler, III, for respondent-intervenor-appellee Betsy Johnson Regional Hospital, Inc.; and Bode Call & Stroupe, L.L.P., by S. Todd Hemphill, for respondent-intervenor-appellee Amisub of North Carolina, Inc. d/b/a Central Carolina Hospital.

PER CURIAM.

This case concerns respondent North Carolina Department of Health and Human Service's (NCDHHS's) denial of petitioner Good Hope Health System's (GHHS's) Certificate of Need (CON) application filed in 2003. After the CON Section of NCDHHS's Division of Facility Services initially denied the application, GHHS proceeded to a contested case hearing after which an administrative law judge recommended that the CON be approved. NCDHHS thereafter issued a final agency decision denying the CON. GHHS and petitioner-intervenor Town of Lillington appealed to the Court of Appeals. In a divided opinion, the Court of Appeals dismissed the appeal as mooted by GHHS's submission of a CON application in 2005. *Good Hope Health Sys., L.L.C. v. N.C. Dep't of Health & Human Servs.*, 175 N.C. App. 296, 623 S.E.2d 307 (2006).

Upon full consideration of the briefs submitted by the parties and cases cited therein and their arguments before this Court, we conclude GHHS's appeal is not moot, and thereby reverse the opinion of the Court of Appeals and remand the case to that court for consideration on the merits.

Our decision is primarily directed by the fundamental differences between the criteria used to evaluate GHHS's 2003 and 2005 CON applications. The 2003 CON review process was non-competitive in that GHHS was the sole applicant proposing that particular project, which was ostensibly intended to replace an existing facility. In contrast, the 2005 CON application process, which arose out of an amended State Medical Facilities Plan designating a need for a new hospital in Harnett County, involved additional applicants. Therefore, GHHS's 2005 application would be subject to comparison with others, including any submitted by respondent-intervenors, and would be evaluated in that context. Thus, although the 2003 and 2005 CON applications proposed substantially similar projects, the character of the review process for each distinguishes them. Likewise, we reject respondent-intervenors' argument that GHHS's cessation of operations at the Erwin site moots this controversy. Accordingly, we conclude that GHHS has a right to substantive review of NCDHHS's denial of its 2003 CON application.

In summary, as to the appeal of right based on the dissenting opinion in the court below, we find that GHHS's appeal of the denial of its 2003 CON application is not moot, and accordingly, we reverse the decision of the Court of Appeals as to the appealable issue of right and remand the case to that court for a review on the merits. We conclude that both the petition for discretionary review of the Court of Appeals opinion and for review as to additional issues were improvidently allowed.

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

NORTH CAROLINA BOARD OF PHARMACY v. THE RULES REVIEW COMMISSION *ET AL.*

No. 673A05

(Filed 17 November 2006)

Pharmacists— limit on working hours—validity of rule

The Court of Appeals decision in this case is reversed for the reason stated in the dissenting opinion in the Court of Appeals that the statute allowing the Board of Pharmacy to "adopt rules governing the filling, refilling and transfer of prescription orders" authorized the Board to adopt a rule limiting the number of continuous hours that a licensed pharmacist may work. N.C.G.S. § 90-85.32(a).

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 174 N.C. App. 301, 620 S.E.2d 893 (2005), affirming orders entered on 6 February 2004 and 5 April 2004 by Judge Evelyn W. Hill in Superior Court, Wake County. On 6 April 2006, the Supreme Court allowed plaintiff's petition for discretionary review as to additional issues. Heard in the Supreme Court 18 October 2006.

Ellis & Winters LLP, by Matthew W. Sawchak, Julia F. Youngman, and Stephen D. Feldman, for plaintiff-appellant.

McMillan, Smith & Plyler, by William W. Plyler and Stephen T. Smith, for defendant-appellees.

Roy Cooper, Attorney General, by Christopher G. Browning, Jr., Solicitor General, and Gary R. Govert, Special Deputy Attorney General, for defendant-intervenor-appellee.

Smith Moore LLP, by Robert R. Marcus and Angela L. Little, for the National Association of Boards of Pharmacy, amicus curiae.

Southern Environmental Law Center, by Amy E. Pickle, for the North Carolina Coastal Federation, North Carolina Shellfish Growers Association, Environmental Defense, and North Carolina Trout Unlimited, amici curiae.

Everett, Gaskins, Hancock & Stevens, LLP, by C. Amanda Martin, for the American Pharmacists Association and North Carolina Association of Pharmacists, amici curiae.

Kennedy Covington Lobdell & Hickman, L.L.P., by Stanford D. Baird, Ann M. Anderson, and Daniel J. Palmieri, for North Carolina Citizens for Business and Industry, North Carolina Home Builders Association, North Carolina Pork Council, Inc., North Carolina Retail Merchants Association, North Carolina Association of Realtors, Inc., North Carolina Forestry Association, North Carolina Aggregates Association, Carolinas Associated General Contractors, National Federation of Independent Businesses Legal Foundation, North Carolina Farm Bureau, and Manufacturers & Chemical Industry Council of North Carolina, amici curiae.

Broughton Wilkins Smith Sugg & Thompson, PLLC, by Benjamin E. Thompson, III, for the North Carolina Retail Merchants Association, amicus curiae.

PER CURIAM.

As to the appeal of right based on the dissenting opinion, we reverse the Court of Appeals for the reasons stated in the dissent. We further conclude that the petition for discretionary review as to additional issues was improvidently allowed.

This case is remanded to the Court of Appeals for further remand to the Wake County Superior Court for further proceedings not inconsistent with this opinion.

REVERSED IN PART AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

JO ANN OUTLAW KORNEGAY v. BONNIE R. ROBINSON, ADMINISTRATRIX OF THE ESTATE OF BYARD G. KORNEGAY, JIMMY B. KORNEGAY, BYARD G. KORNEGAY, JR., GERALD CLAY KORNEGAY, RICKY THOMAS KORNEGAY, LINDA KAY K. LANE, AND MARY HAZEL K. MANUEL

No. 153A06

(Filed 17 November 2006)

Husband and Wife— prenuptial agreement—voluntariness—summary judgment

The decision of the Court of Appeals that the existence of a genuine issue of material fact as to the voluntariness of plaintiff widow's execution of a prenuptial agreement precluded summary judgment for her deceased husband's estate is reversed for the reason stated in the dissenting opinion in the Court of Appeals that plaintiff failed to show the existence of a genuine issue of material fact where the agreement stated and plaintiff testified by deposition that she "voluntarily" signed the agreement, that it was "fair and equitable," and that it was not the result of "duress or undue influence."

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 176 N.C. App. ——, 625 S.E.2d 805 (2006), reversing an order entered 25 October 2004 by Judge Thomas D. Haigwood in Superior Court, Duplin County, granting summary judgment in favor of all defendants. Heard in the Supreme Court 16 October 2006.

Warren, Kerr, Walston, Taylor & Smith, LLP, by John Turner Walston and Henry C. Smith, for plaintiff-appellee.

Turner Law Offices, by W. Carroll Turner, for defendant-appellant Jimmy B. Kornegay.

Harris, Creech, Ward and Blackerby, P.A., by Thomas M. Ward, Charles E. Simpson, Jr., and Jay C. Salsman, for defendant-appellants Byard G. Kornegay, Jr., Gerald Clay Kornegay, and Linda Kay K. Lane; and Burrows & Hall, by Richard L. Burrows, for defendant-appellants Ricky T. Kornegay and Mary Hazel K. Manuel.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals.

REVERSED.

GOOD HOPE HOSPITAL, INC. AND GOOD HOPE HEALTH SYSTEM, L.L.C., PETITIONERS, AND TOWN OF LILLINGTON, PETITIONER-INTERVENOR v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT, AND BETSY JOHNSON REGIONAL HOSPITAL, INC., AND AMISUB OF NORTH CAROLINA, INC. D/B/A CENTRAL CAROLINA HOSPITAL, RESPONDENT-INTERVENORS

No. 58A06

(Filed 17 November 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 175 N.C. App. 309, 623 S.E.2d 315 (2006), affirming a final agency decision issued 1 November 2004 by the North Carolina Department of Health and Human Services. Heard in the Supreme Court 18 October 2006.

Smith Moore LLP, by Maureen Demarest Murray and William W. Stewart, Jr., for petitioner-appellants, and Morgan, Reeves and Gilchrist, by C. Winston Gilchrist, for petitioner-intervenor-appellant.

Roy Cooper, Attorney General, by Melissa L. Trippe, Special Deputy Attorney General, for respondent-appellee.

Nelson Mullins Riley & Scarborough LLP, by Noah H. Huffstetler, III, and Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, for respondent-intervenor-appellee Betsy Johnson Regional Hospital, Inc.

Bode, Call & Stroupe, L.L.P., by S. Todd Hemphill, for respondent-intervenor-appellee Amisub of North Carolina, Inc. d/b/a Central Carolina Hospital.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Forrest W. Campbell, Jr., for North Carolina Hospital Association, amicus curiae.

PER CURIAM.

AFFIRMED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. WILLIE FORREST, III

No. 270A04-2

(Filed 17 November 2006)

On order of the United States Supreme Court entered 30 June 2006 granting defendant's petition for a writ of certiorari to review our decision reported in 359 N.C. 424, 611 S.E.2d 833 (2005), vacating said judgment and remanding the case to this Court for further consideration in light of *Davis v. Washington*, 547 U.S. ——, 165 L. Ed. 2d 224 (2006). Heard on remand in the Supreme Court 17 October 2006.

Roy Cooper, Attorney General, by Kevin L. Anderson, Assistant Attorney General, for the State.

Irving Joyner for defendant-appellant.

Robert P. Mosteller, Cooperating Attorney for the American Civil Liberties Union of North Carolina and the North Carolina Academy of Trial Lawyers, amici curiae.

PER CURIAM.

Having reconsidered this case on remand from the Supreme Court of the United States in light of *Davis v. Washington*, 547 U.S. ——, 165 L. Ed. 2d 224, the opinion of the Court of Appeals reported at 164 N.C. App. 272, 596 S.E.2d 22 (2004) is vacated. We further conclude that this matter is now moot due to defendant's death and thus allow the State's motion to dismiss defendant's appeal.

VACATED AND DISMISSED AS MOOT.

STATE OF NORTH CAROLINA v. THOMAS HENRY MYERS AND JESSE WARREN COLEMAN

No. 660PA05

(Filed 17 November 2006)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 174 N.C. App. 526, 621 S.E.2d 329 (2005), affirming orders entered 20 November 2003 by Judge Robert F. Floyd, Jr., in Superior Court, Cumberland County. Heard in the Supreme Court 16 October 2006.

Roy Cooper, *Attorney General*, *by William B. Crumpler*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Daniel K. Shatz*, *Assistant Appellate Defender*, *for defendant-appellee Myers; and Brian Michael Aus for defendant-appellee Coleman.*

PER CURIAM.

The decision of the Court of Appeals is reversed, and this case is remanded to that court for reconsideration on the issue of sufficiency of the evidence in light of *State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987).

REVERSED AND REMANDED.

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

Armstrong & Armstrong, P.A. v. Rhodes Case below: 176 N.C. App. 407	No. 186P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-146)	Denied 10/05/06
Barnes v. Kochhar Case below: 178 N.C. App. 489	No. 506P06	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA05-1452) 2. Defs' (Kochhar & Outcomes, Inc.) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 11/16/06 2. Dismissed as Moot 11/16/06
Baxley v. Jackson Case below: 179 N.C. App. —— (3 October 2006)	No. 548P06	1. Def's PDR Under N.C.G.S. § 7A-31 (COA05-1428) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 11/16/06 2. Dismissed as Moot 11/16/06
Bio-Medical Applications of N.C., Inc. v. N.C. Dep't of Health & Human Servs. Case below: 179 N.C. App. —— (19 September 2006)	No. 549A06	1. Plaintiff's NOA Based Upon a Dissent (COA05-294) 2. Plaintiff's Motion for Temporary Stay 3. Plaintiff's Petition for Writ of Supersedeas 4. Plt's PDR as to Additional Issues	1. —— 2. Allowed 10/25/06 3. Allowed 11/16/06 4. Denied 11/16/06
Booker-Douglas v. J&S Truck Service, Inc. Case below: 178 N.C. App. 174	No. 375P06	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA05-1026) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 10/05/06 2. Dismissed as Moot 10/05/06
Chestnut Branch, L.L.C. v. Public Interest Projects, Inc. Case below: 177 N.C. App. 148	No. 291P06	1. Def's (Public Interest Projects) PDR Under N.C.G.S. § 7A-31 (COA04-1406) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 10/05/06 2. Dismissed as Moot 10/05/06
City of Charlotte v. Hurlahe Case below: 178 N.C. App. 144	No. 387P06	1. Defs' (John and Linda Hurlahe) PDR Under N.C.G.S. § 7A-31 (COA05-1074) 2. Defs' (Hurlahe) Motion to Withdraw PDR	1. —— 2. Allowed 10/05/06

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

Collins v. UNIFI, Inc. Case below: 179 N.C. App. —— (5 September 2006)	No. 539P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-1673)	Denied 11/16/06
Davis v. Harrah's Cherokee Casino Case below: 178 N.C. App. 605	No. 456A06	1. Defs' NOA (Dissent) (COA05-1153) 2. Defs' Motion for Temporary Stay 3. Defs' Petition for Writ of Supersedeas 4. Defs' PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/30/06 3. Allowed 10/05/06 4. Allowed 10/05/06
Davis v. Macon Cty. Bd. of Educ. Case below: 179 N.C. App. —— (1 August 2006)	No. 476P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-1337)	Denied 11/16/06
Diggs v. Novant Health, Inc. Case below: 177 N.C. App. 290	No. 299P06	Def's (Forsyth Memorial Hosp.) Motion for Temporary Stay (COA04-1415)	Allowed 10/30/06
Estate of Quesenberry v. Big Creek Underground Case below: 178 N.C. App. 389	No. 405P06	Defs' PDR Under N.C.G.S. § 7A-31 (COA05-1356)	Denied 11/16/06
Gannett Pac. Corp. v. City of Asheville Case below: 179 N.C. App. —— (1 August 2006)	No. 415P06	Plt's (Gannett Pacific Corp.) PDR Under N.C.G.S. § 7A-31 (COA05-1304)	Denied 11/16/06
Gant v. State Case below: 179 N.C. App. —— (15 August 2006)	No. 458P06	Plt's Motion for "Petition for Plain Error Review N.C.G.S. § 7A-28(B)(1)(2)(3)(4)" (COA05-1573)	Denied 10/05/06

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

Good Hope Health Sys. v. N.C. Dep't of Health & Human Servs. Case below: 175 N.C. App. 296	No. 057A06	7. Petitioner and Petitioner-Intervenor's Motion to Take Judicial Notice (COA05-123) 8. Respondent-Intervenors' Motion to Take Judicial Notice 9. Respondent-Intervenors' Motion to Dismiss Petitioners' Appeal as Moot 10. Petitioners' and Petitioners-Intervenors' Motion to Take Judicial Notice	7. Allowed 08/17/06 8. Allowed 08/17/06 9. Denied 11/16/06 10. Allowed 08/17/06
Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs. Case below: 175 N.C. App. 309	No. 058A06	7. Petitioner and Petitioner-Intervenor's Motion to Take Judicial Notice (COA05-183) 8. Respondent-Intervenors' Motion to Take Judicial Notice 9. Respondent-Intervenors' Motion to Dismiss Petitioners' Appeal as Moot 10. Petitioners' and Petitioners-Intervenors' Motion to Take Judicial Notice	7. Allowed 08/17/06 8. Allowed 08/17/06 9. Denied 11/16/06 10. Allowed 08/17/06
Hamby v. Profile Prods., L.L.C. Case below: 179 N.C. App. ––– (15 August 2006)	No. 507A06	1. Def's (Profile Products) NOA (Dissent) (COA05-1491) 2. Def's (Profile Products) PDR as to Additional Issues	1. ––– 2. Allowed 11/16/06
Hedingham Cmty. Ass'n v. GLH Builders, Inc. Case below: 178 N.C. App. 635	No. 482P06	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA05-1320) 2. Plt's Motion to Suspend or Vary Rules of Appellate Procedure and Substitute Counsel of Record Under N.C. Rules of Appellate Procedure 2 and 33 3. Brent E. Wood's Motion to Withdraw as Counsel	1. Denied 10/05/06 2. Dismissed as Moot 10/05/06 3. Dismissed as Moot 10/05/06
Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res. Case below: 176 N.C. App. 594	No. 218A06	1. Petitioner's NOA (Dissent) (COA03-1686) 2. Petitioner's PDR Under N.C.G.S. § 7A-31 3. Petitioner's PDR as to Additional Issues 4. Respondent-Intervenor's Motion to Dismiss Appeal	1. ––– 2. Denied 11/16/06 3. Denied 11/16/06 4. Denied 11/16/06

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

In re A.P. Case below: 179 N.C. App. —— (5 September 2006)	No. 534A06	Petitioner's (Forsyth DSS) Motion for Temporary Stay (COA05-1105)	Allowed 10/11/06
In re A.R.G. Case below: 178 N.C. App. 205	No. 378A06	1. Respondent's (Father) NOA (Dissent) (COA05-1268) 2. Respondent's (Father) PDR as to Additional Issues	1. —— 2. Denied 11/16/06
In re C.D.A.W. Case below: 175 N.C. App. 680	No. 110A06	1. Respondent Mother's Notice of Appeal Based Upon a Dissent (COA04-1610) 2. Guilford County Department of Social Services' PDR Under N.C.G.S. § 7A-31	1. —— 2. Denied 11/16/06
In re C.N.R. Case below: 177 N.C. App. 810	No. 368P06	1. Petitioners' (Mary Margaret J. and Brandon J.) PDR Under N.C.G.S. § 7A-31 (COA05-1159) 2. Respondent's (Mother) Motion to Dismiss Petition	1. Denied 11/16/06 2. Dismissed as Moot 11/16/06
In re K.H. & P.D.D. Case below: 177 N.C. App. 110	No. 204A06	1. Respondent's (Father) Motion to Dismiss Appeal (COA05-655) 2. Respondent's (Father) Motion for Extension of Time to File Brief on 7-19-06 3. Guardian ad Litem's PDR Under N.C.G.S. § 7A-31	1. Allowed, COA opinion vacated 08/17/06 2. Dismissed as moot 08/17/06 3. Denied 08/17/06
In re T.S. & S.M Case below: 178 N.C. App. 110	No. 384A06	1. Respondent's (Mother) NOA Based Upon a Dissent (COA05-765) 2. Respondent's (Mother) PDR as to Additional Issue	1. —— 2. Denied 10/05/06
In re W.R. Case below: 179 N.C. App. —— (3 October 2006)	No. 560P06	AG's Motion for Temporary Stay (COA05-1602)	Allowed 10/26/06
In re Will of Yelverton Case below: 178 N.C. App. 267	No. 376P06-2	Motion by Caveator, Mansel Yelverton, for Temporary Stay (COA05-771 & 772)	Denied 09/12/06

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

Kennedy v. Speedway Motorsports, Inc. Case below: 178 N.C. App. 314	No. 469P06	1. Plts' PWC to Review Decision of COA (COA05-1369, 05-1370, 05-1371, 05-1372) 2. Defs' (Charlotte Motor Speedway, Inc. And Charlotte Motor Speedway, LLC) Motion to Dismiss PWC	1. Denied 10/05/06 2. Dismissed as Moot 10/05/06 **Martin, J., Recused**
Morgan v. Steiner Case below: 173 N.C. App. 577	No. 626P05	1. Plaintiff-Appellant's PDR (COA04-1187) 2. Def's Condtional PDR Under N.C.G.S. § 7A-31	1. Denied 10/05/06 2. Dismissed as Moot 10/05/06 **Timmons-Goodson, J., Recused**
Ocean Hill Joint Venture v. Currituck Cty. Case below: 178 N.C. App. 182	No. 382P06	1. Respondents' (Currituck County Board of Commissioners and Ocean Hill I Property Owners Association) NOA Based Upon a Constitutional Question (COA05-1405) 2. Petitioners' (Ocean Hill Joint Venture, et al.) Motion to Dismiss Appeal 3. Respondents' (Currituck County Board of Commissioners and Ocean Hill I Property Owners Association) PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/05/06 3. Allowed 10/05/06
Patel v. Stanley Works Customer Support Case below: 178 N.C. App. 182	No. 445P06	Defs' Motion for Temporary Stay (COA05-462)	Allowed 08/23/06
Queen v. Penske Corp. Case below: 174 N.C. App. 814	No. 015P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-03)	Denied 10/05/06 **Timmons-Goodson, J., Recused**
Rhew v. Felton Case below: 178 N.C. App. 475	No. 453P06	1. Plt's NOA Based Upon a Constitutional Question (COA05-402) 2. Def's Motion to Dismiss Appeal 3. Plt's PDR Under N.C.G.S. § 7A-31 4. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/05/06 3. Denied 10/05/06 4. Denied 10/05/06

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

Russell v. Russell Case below: 177 N.C. App. 462	No. 325P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-1261)	Denied 11/16/06
Sable v. Sable (now Knight) Case below: 177 N.C. App. 811	No. 351P06	Plt's Motion for Temporary Stay (COA05-664)	Denied 07/11/06
Sea Ranch Owners Ass'n v. Sea Ranch, II, Inc. Case below: 180 N.C. App. —— (7 November 2006)	No. 338P06	Plt's Motion for Temporary Stay (COA05-1528, 05-1559, 05-1593)	Allowed 06/26/06 **Martin, J., Recused**
State v. Agnew Case below: 178 N.C. App. 234	No. 388P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1078)	Allowed 11/16/06
State v. Allen Case below: 166 N.C. App. 139	No. 485PA04-2	Defendant's Motion to Declare Motion Moot Based on Trial Court's Compliance with Mandate (COA03-1369)	Allowed 09/05/06
State v. Atkins Case below: Buncomb County Superior Court	No. 009A94-5	Def's PWC to Review Order of Buncombe County Superior Court (Buncomb County Superior Court)	Denied 10/05/06
State v. Austin Case below: 176 N.C. App. 190	No. 165P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-85)	Denied 10/05/06
State v. Berghello Case below: 178 N.C. App. 742	No. 478P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-944)	Denied 10/05/06
State v. Bethea Case below: 176 N.C. App. 767	No. 362P06	Defendant-Appellant's Petition for Writ of Habeas Corpus (COA05-866)	Denied 07/25/06
State v. Boone Case below: 179 N.C. App. —— (15 August 2006)	No. 516P06	Def's Motion for PDR Under N.C.G.S. § 7A-31 (COA06-306)	Denied 10/05/06

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

State v. Brigman Case below: 178 N.C. App. 78	No. 389P06	1. Def's NOA Based Upon a Constitutional Question (COA05-712) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/05/06 3. Denied 10/05/06
State v. Castano Case below: 178 N.C. App. 390	No. 397P06	1. Def's NOA Based Upon a Constitutional Question (COA05-1352) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/05/06 3. Denied 10/05/06
State v. Davis Case below: 178 N.C. App. 391	No. 473P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1056)	Denied 10/05/06
State v. Denny Case below: 179 N.C. App. —— (17 October 2006)	No. 572P06	AG's Motion for Temporary Stay (COA05-1419)	Allowed 11/06/06
State v. Farmer Case below: 177 N.C. App. 710	No. 365P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1406)	Dismissed 10/05/06
State v. Farrar Case below: 179 N.C. App. —— (19 September 2006)	No. 527P06	AG's Motion for Temporary Stay (COA05-1319)	Allowed 10/05/06
State v. Finney Case below: 175 N.C. App. 795	No. 093P06	AG's Motion for Temporary Stay (COA05-850)	Allowed 02/23/06
State v. Fitzgerald Case below: 178 N.C. App. 391	No. 407P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-732)	Denied 10/05/06
State v. Forrest Case below: 164 N.C. App. 272	No. 270A04	AG's Motion to Dismiss Appeal (COA03-806)	Allowed 11/16/06

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

State v. Frazier Case below: 178 N.C. App. 742	No. 461P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-800)	Denied 10/05/06
State v. Fuller Case below: 179 N.C. App. —— (1 August 2006)	No. 451A06	1. Def's NOA Based Upon a Constitutional Question (COA05-769) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed 10/05/06
State v. Glynn Case below: 178 N.C. App. 689	No. 480P06	1. Def's NOA Based Upon a Constitutional Question (COA05-1460) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/05/06 3. Denied 10/05/06
State v. Green Case below: Forsyth County Superior Court	No. 345P06	Defendant-Appellant's Petition for Writ of Supersedeas	Dismissed as Moot 10/05/06
State v. Hairston Case below: 176 N.C. App. 408	No. 404P06	Def's PWC to Review Decision of COA (COA04-1620)	Denied 10/05/06
State v. Hairston Case below: 167 N.C. App. 109	No. 515P06	Def's PWC to Review Decision of COA (COA04-181)	Denied 10/05/06
State v. Harris Case below: 178 N.C. App. 723	No. 472P06	AG's PDR Under N.C.G.S. § 7A-31 (COA05-1031)	Allowed 10/05/06
State v. Hart Case below: 179 N.C. App. —— (1 August 2006)	No. 446A06	1. Def's NOA Based Upon a Dissent (COA05-1488) 2. Def's PDR as to Additional Issues 3. Def's Counsel Motion for Leave to Withdraw as Counsel Due to Medical Condition	1. —— 2. Denied 10/05/06 3. Allowed 10/05/06
State v. Herring Case below: 176 N.C. App. 395	No. 178P06	1. Def's NOA Based Upon a Constitutional Question (COA05-265) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/05/06 3. Denied 10/05/06

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

State v. Howell Case below: 176 N.C. App. 191	No. 542P06	Defendant-Appellant's "Petition for Discretionary Review" (COA05-189)	Denied 11/16/06
State v. Inman Case below: 174 N.C. App. 567	No. 709P05	Def's PDR Under N.C.G.S. § 7A-31 (COA05-150)	Denied 11/16/06
State v. King Case below: 178 N.C. App. 393	No. 409P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1447)	Denied 10/05/06
State v. Kirby Case below: 178 N.C. App. 742	No. 475P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1179)	Denied 10/05/06
State v. Lowery Case below: 178 N.C. App. 563	No. 425P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1150)	Denied 10/05/06
State v. Mewborn Case below: 178 N.C. App. 281	No. 380P06	1. Def's NOA Based Upon a Constitutional Question (COA05-1127) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/05/06 3. Denied 10/05/06
State v. Morrison Case below: 156 N.C. App. 217	No. 400P06	Def's PWC to Review the Decision of the COA (COA02-57)	Dismissed 10/05/06
State v. Moses Case below: Forsyth County Superior Court	No. 574A97-4	Def's Petition for Writ of Certiorari (Forsyth County Superior Court)	Denied 11/16/06
State v. Moss Case below: 178 N.C. App. 393	No. 421P06	1. Def's NOA Based Upon a Constitutional Question (COA05-1281) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/05/06 3. Denied 10/05/06
State v. Myers Case below: 179 N.C. App. —— (5 Spetember 2006)	No. 519P06	Def's Motion for "Letter of Request to Review N.C. Court of Appeals Opinion" No. (COA05-1432)	Denied 10/05/06

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

State v. Nguyen Case below: 178 N.C. App. 447	No. 424P06	1. Def's NOA Based Upon a Constitutional Question (COA05-907) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/05/06 3. Denied 10/05/06
State v. Nipper Case below: 177 N.C. App. 794	No. 346P06	Defendant's PDR Under N.C.G.S. § 7A-31 (COA05-909)	Allowed 10/05/06
State v. Ross Case below: 178 N.C. App. 393	No. 414P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1476)	Denied 10/05/06
State v. Sellers Case below: 178 N.C. App. 563	No. 438P06	Def's (Kisha Wynn) PDR Under N.C.G.S. § 7A-31 (COA05-1498)	Denied 10/05/06
State v. Sharpe Case below: 177 N.C. App. 566	No. 327P06	1. Def's NOA Based Upon a Constitutional Question (COA05-1273) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/05/06 3. Denied 10/05/06
State v. Shuford Case below: 178 N.C. App. 742	No. 433P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1381)	Denied 10/05/06
State v. Simpson Case below: 176 N.C. App. 719	No. 220P06	Deft's PDR Under N.C.G.S. § 7A-31 (COA05-632)	Dismissed 10/05/06
State v. Summers Case below: 177 N.C. App. 691	No. 358P06	1. Def's NOA Based Upon a Constitutional Question (COA05-1248) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/05/06 3. Denied 10/05/06

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

State v. Upshur Case below: 176 N.C. App. 174	No. 124P04-2	1. Def's NOA Based Upon a Constitutional Question (COA04-397) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31 4. Defendant-Appellant's Motion to Withdraw Petition from Review	1. —— 2. Allowed 11/16/06 3. Denied 11/16/06 4. Dismissed as Moot 11/16/06
State v. Verbal Case below: 177 N.C. App. 289	No. 280A06	1. Def's NOA Based Upon a Constitutional Question (COA05-1000) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed 10/05/06
State v. Walker Case below: Guilford County Superior Court	No. 076A95-5	AG's PWC to Review Order of Guilford County Superior Court (Guilford County Superior Court)	Denied 10/05/06
State v. Wilson Case below: 178 N.C. App. 563	No. 427P06	1. Def's NOA Based Upon a Constitutional Question (COA05-729) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/05/06 3. Denied 10/05/06
State v. Witham Case below: 178 N.C. App. 564	No. 452P06	1. Def's NOA Based Upon a Constitutional Question (COA05-1350) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/05/06 3. Denied 10/05/06
State v. Younger Case below: 132 N.C. 586	No. 148P06	Def's PWC to Review the Decision of the COA (COA98-324)	Denied 11/16/06 **Edmunds, J., Recused**
State ex rel. Utilities Comm'n v. Cooper Case below: Utilities Comm'n	No. 196A06	Appellant's (Attorney General) Motion for Dismissal of Appeal Pursuant to Settlement	Allowed 11/16/06
Swiney v. Arvin Meritor, Inc. Case below: 176 N.C. App. 409	No. 235P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-913)	Denied 10/05/06

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

Treat v. Roane Case below: 179 N.C. App. —— (5 September 2006)	No. 511P06	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA05-1234) 2. Defs' (Watson and Wake Med. Center) Conditional PDR Under N.C.G.S. § 7A-31 3. Def's (Karen Roane) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 11/16/06 2. Dismissed as Moot 11/16/06 3. Dismissed as Moot 11/16/06
Wilkins v. N.C. State Univ. Case below: 178 N.C. App. 377	No. 403P06	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA05-1253) 2. Petitioner's PWC Review Decision of COA	1. Denied 10/05/06 2. Denied 10/05/06
Zubaidi v. Earl L. Pickett Enters., Inc. Case below: 179 N.C. App. —— (15 August 2006)	No. 494P06	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA05-1582) 2. Plts' Motion for Temporary Stay 3. Plts' Petition for Writ of Supersedeas	1. Denied 10/05/06 2. Denied 10/05/06 3. Denied 10/05/06

PETITIONS TO REHEAR

D'Aquisto v. Mission St. Joseph's Health Sys. Case below: 360 N.C. 567	No. 415PA05	Def's (Health Systems) Petition to Rehear (COA04-1259)	Denied 11/08/06
Perez v. American Airlines/AMR Corp. Case below: 360 N.C. 587	No. 661PA05	Def's Petition to Rehear (COA04-1573)	Denied 11/16/06
State v. Ivey Case below: 360 N.C. 562	No. 458PA05	1. AG's Motion to Suspend the Rules (COA04-1420) 2. AG's Motion to Stay Mandate 3. AG's Motion to Reconsider or Rehear the Case	1. Denied 09/05/06 2. Denied 09/05/06 3. Denied 09/05/06

APPENDIXES

ORDER ADOPTING AMENDMENTS TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

SUPREME COURT HISTORIAN AND CHIEF OF PROTOCOL

THE CHIEF JUSTICE'S ACTUAL INNOCENCE COMMISSION

CHIEF JUSTICE SPECIAL ORDER CONCERNING JUDGE EVELYN HILL

EQUAL ACCESS TO JUSTICE COMMISSION

RURAL COURTS COMMISSION

ORDER ADOPTING AMENDMENTS TO THE NORTH CAROLINA CODE OF JUDICIAL CONDUCT

ORDER ADOPTING AMENDMENTS TO THE STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

ORDER ADOPTING AMENDMENTS TO THE RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

ORDER ADOPTING RULES IMPLEMENTING MEDIATED SETTLEMENT CONFERENCES IN TERRITORIAL DISPUTES BETWEEN CERTAIN ELECTRIC SUPPLIERS

ORDER ADOPTING AMENDMENTS TO THE RULES OF THE NORTH CAROLINA SUPREME COURT FOR THE DISPUTE RESOLUTION COMMISSION

ORDER ADOPTING RULES IMPLEMENTING MEDIATION IN MATTERS BEFORE THE CLERK OF SUPERIOR COURT

ORDER ADOPTING RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS

ORDER ADOPTING AMENDMENTS TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE RULES OF PROFESSIONAL CONDUCT

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CERTIFICATION OF PARALEGALS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

AMENDMENTS FO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING PARALEGAL EDUCATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING ATTORNEYS APPEARING *PRO HAC VICE*

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATIVE COMMITTEE

ORDER ADOPTING AMENDMENTS TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

CLIENT SECURITY FUND

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE STANDING COMMITTEES OF THE COUNCIL

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATIVE COMMITTEE

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE LAWYER ASSISTANCE PROGRAM

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PLAN OF LEGAL SPECIALIZATION

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

Order Adopting Amendments to the North Carolina Rules of Appellate Procedure

I. Rule 3 of the North Carolina Rules of Appellate Procedure is amended as described below:

Rule 3(b) is amended to read:

(b) Special Provisions. Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes and appellate rules sections noted:

(1) ~~Termination of Parental Rights, G.S. 7B-1113.~~ Juvenile matters, G.S. 7B-2602.

(2) ~~Juvenile matters, G.S. 7B-1001 or 7B-2602.~~ Appeals pursuant to G.S. 7B-1001 shall be subject to the provisions of N.C. R. App. P. 3A.

For appeals filed pursuant to these provisions and for extraordinary writs filed in cases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced by the use of initials only in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). Appeals filed pursuant to these provisions shall specifically comply, if applicable, with Rules 9(b), 9(c), 26(g), 28(d), 28(k), 30, 37, 41 and Appendix B.

II. Rule 3A is added to the North Carolina Rules of Appellate Procedure as described below:

Rule 3A is added to read:

Rule 3A. APPEAL IN QUALIFYING JUVENILE CASES—HOW AND WHEN TAKEN, SPECIAL RULES

(a) Filing the Notice of Appeal. Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to G.S. 7B-1001, may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of

the General Statutes of North Carolina. Trial counsel or an appellant not represented by counsel shall be responsible for filing and serving the notice of appeal in the time and manner required. If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal, and the appellant shall cooperate with counsel throughout the appeal. All such appeals shall comply with the special provisions set out in subsection (b) of this rule and, except as hereinafter provided by this rule, all other existing Rules of Appellate Procedure shall remain applicable.

(b) Special Provisions. For appeals filed pursuant to this rule and for extraordinary writs filed in cases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced only by the use of initials in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to subdivision (b)(1) below or Rule 9(c).

In addition, appeals filed pursuant to these provisions shall adhere strictly to the expedited procedures set forth below:

(1) **Transcripts.** Within one business day after the notice of appeal has been filed, the clerk of superior court shall notify the court reporting coordinator of the Administrative Office of the Courts of the date the notice of appeal was filed and the names of the parties to the appeal and their respective addresses or addresses of their counsel. Within two business days of receipt of such notification, the court reporting coordinator shall assign a transcriptionist to the case. Within thirty-five days from the date of the assignment, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the office of the Clerk of the Court of Appeals and provide copies to the respective parties to the appeal at the addresses provided. Motions for extensions of time to prepare and deliver transcripts are disfavored and will not be allowed by the Court of Appeals absent extraordinary circumstances.

(2) **Record on Appeal.** Within twenty days after the notice of appeal has been filed, the appellant shall prepare and serve upon all other parties a proposed record on appeal constituted in accordance with Rule 9, except there shall be no requirement to

set out references to the transcript under the assignments of error. Trial counsel for the appealing party, together with appellate counsel if separate counsel is appointed or retained for the appeal, shall have joint responsibility for preparing and serving a proposed record on appeal. Within ten days after service of the proposed record on appeal upon an appellee, the appellee may serve upon all other parties: (1) a notice of approval of the proposed record; (2) specific objections or amendments to the proposed record on appeal, or (3) a proposed alternative record on appeal.

If the parties agree to a settled record on appeal within thirty days after notice of appeal has been filed, the appellant shall file three legible copies of the settled record on appeal in the office of the Clerk of the Court of Appeals within five business days from the date the record was settled. If all appellees fail within the times allowed them either to serve notices of approval or to serve objections, amendments, or proposed alternative records on appeal, the appellant's proposed record on appeal shall constitute the settled record on appeal, and the appellant shall file three legible copies thereof in the office of the Clerk of the Court of Appeals within five business days from the last date upon which any appellee could have served such objections, amendments, or proposed alternative record on appeal. If an appellee timely serves amendments, objections, or a proposed alternative record on appeal and the parties cannot agree to the settled record within thirty days after notice of appeal has been filed, each party shall file three legible copies of the following documents in the office of the Clerk of the Court of Appeals within five business days after the last day upon which the record can be settled by agreement: (1) the appellant shall file his or her proposed record on appeal, and (2) an appellee shall file his or her objections, amendments, or proposed alternative record on appeal.

No counsel who has appeared as trial counsel for any party in the proceeding shall be permitted to withdraw, nor shall such counsel be otherwise relieved of any responsibilities imposed pursuant to this rule, until the record on appeal has been filed in the office of the Clerk of the Court of Appeals as provided herein.

(3) **Briefs.** Within thirty days after the record on appeal has been filed with the Court of Appeals, the appellant shall file his or her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Within thirty days after the appellant's brief has been served on an appellee, the appellee shall file his or her brief in the office of the Clerk of the

Court of Appeals and serve copies upon all other parties of record. Motions for extensions of time to file briefs will not be allowed absent extraordinary circumstances.

(c) Calendaring priority. Appeals filed pursuant to this rule will be given priority over other cases being considered by the Court of Appeals and will be calendared in accordance with a schedule promulgated by the Chief Judge. Unless otherwise ordered by the Court of Appeals, cases subject to the expedited procedures set forth in this rule shall be disposed of on the record and briefs and without oral argument.

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 1st day of March, 2006.

Adopted by the Court in Conference this the 3rd day of November, 2005. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

s/Lake, C.J.
For the Court

SUPREME COURT HISTORIAN AND CHIEF OF PROTOCOL

IN THE SUPREME COURT OF NORTH CAROLINA
BY ORDER OF THE COURT

In recognition that all sessions of this Court need to be conducted in accordance with dignity and proper decorum, the Court hereby creates the office of HISTORIAN AND CHIEF OF PROTOCOL OF THE SUPREME COURT OF NORTH CAROLINA AND DOES HEREBY APPOINT DANNY G. MOODY TO THE POSITION OF HISTORIAN AND CHIEF OF PROTOCOL FOR THE COURT.

Section 1. Duties of the Historian of the Court.

The duties of the Historian of the Court are:

1.1 Serve as liaison between the Court and other agencies in matters pertaining to historical portraits, artifacts, and all other materials of an historical nature;

1.2 Maintain a log of all important dates, activities, and events in the Court's history; and

1.3 Have custody and control of the antiquities and other historical material of the Court and shall maintain an inventory of all such items.

Section 2. Duties of the Chief of Protocol.

The primary duty of the Chief of Protocol is to assure that proper protocol is evident in all sessions of the Court. These duties shall include:

2.1 During sessions of the Court, ensure that seating assignments, processionals, and recessionals are in accordance with established rules of protocol;

2.2 Ensure that invitations and responses to special sessions of the Court are handled in an efficient and orderly manner;

2.3 Advise newly appointed or elected justices of the established guidelines for the Administration of Oaths or investiture ceremonies and be available to assist such justices in planning their ceremony;

2.4 Assure any receiving lines are arranged in an orderly manner;

2.5 Coordinate sessions of the Court held in locations other than the Justice Building;

2.6 Advise families or others who might present portraits or other gifts to the Court of the guidelines for such ceremonies and be available to aid such persons in the planning of such ceremonies;

2.7 Assure that guests of the Court are extended every courtesy; and

2.8 Assume such other duties as the Court may assign.

2.9 All above responsibilities and duties shall be executed in conjunction and cooperation with the Clerk of the Court.

This position shall inform the Court of any changes that may be necessary to carry out the above listed duties.

So ordered by the Court in Conference this 18th day of August, 2005.

s/I. Beverly Lake, Jr.
I. BEVERLY LAKE, JR.
Chief Justice
For the Court

THE CHIEF JUSTICE'S ACTUAL INNOCENCE COMMISSION

IN THE SUPREME COURT OF NORTH CAROLINA BY ORDER OF THE COURT

In recognition of the need to provide a continuing forum for education and dialogue regarding the causes of wrongful conviction of the innocent and, where appropriate, to recommend and assist in the implementation of justice system enhancements which will increase the reliability of convictions in North Carolina, the Court hereby establishes, as successor to the North Carolina Actual Innocence Commission, THE CHIEF JUSTICE'S ACTUAL INNOCENCE COMMISSION.

SECTION 1: STRUCTURE AND COMPOSITION OF THE COMMISSION

The structure and composition of the Commission shall be:

1.1. Commission Membership and Officers:

The Commission shall consist of no more than thirty members. The officers of the Commission shall include a Chair, an Executive Director, and a Secretary. The Chair of the Commission shall be the Chief Justice or his or her designee. The remaining officers shall be considered upon recommendation of the Chair and shall be elected by a majority of the Commission members.

1.2. Selection and Term of Members:

The Chair shall appoint the Commission's other members in his or her discretion, but representation shall include at least two members from each of the following constituencies: (a) district attorneys, (b) defense attorneys, (c) trial court judges, (d) appellate court judges, (e) police, (f) sheriffs, (g) legal scholars, (h) legislators, (i) the office of the Attorney General, (j) the SBI, and (k) victim advocates.

Persons currently serving on the North Carolina Actual Innocence Commission when this Order is promulgated shall constitute the initial membership of the Commission. Additional members shall be appointed by the Chair as necessary.

The members of the Commission shall serve a term of two years, except for the Executive Director, who shall serve at the discretion of the Chair. Initial terms shall begin at the time this order is promulgated. The term of any member may be extended for one additional year in the discretion of the Chair.

SECTION 2: RESPONSIBILITIES OF THE COMMISSION

The Commission's major responsibilities shall include raising awareness of the issues surrounding wrongful convictions and studying and providing recommendations regarding the following:

2.1. Causes of Conviction of the Innocent:

The Commission shall seek to identify the common causes of conviction of the innocent, both nationally and in North Carolina.

2.2. Implicated Procedures:

The Commission shall seek to identify law enforcement, prosecutorial, and trial and judicial procedures which may cause or increase the likelihood of the conviction of the innocent.

2.3. Remedial Strategies and Procedures:

The Commission shall work to implement remedial strategies designed to reduce or lessen the possibility of conviction of the innocent, including, but not limited to, procedural and educational remedies; and to develop procedures to identify and expedite release of persons wrongly convicted.

2.4. Implementation Plans:

The Commission shall develop plans to implement remedial strategies, such plans to include, but not be limited to, analysis of implementation expenses, ongoing costs, projected effectiveness of proposed plans, and any potential negative impact of proposed plans on the conviction of guilty persons.

SECTION 3: ADDITIONAL RESPONSIBILITIES OF THE COMMISSION

The Commission shall provide periodic interim reports of its findings and recommendations to the Chief Justice and shall provide annual reports to the Chief Justice and the North Carolina Judicial Council not later than 31 December of each year.

This Order shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This Order shall also be published on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Adopted by the Court in Conference this the 6th day of October, 2005.

s/I. Beverly Lake, Jr.
I. BEVERLY LAKE, JR.
Chief Justice
For the Court

OFFICE OF THE

CHIEF JUSTICE OF THE SUPREME COURT

OF THE

STATE OF NORTH CAROLINA

ORDER

As Chief Justice of the Supreme Court of North Carolina, by virtue of authority vested in me by the Constitution of North Carolina, specifically, Article IV, Section 11, I hereby order that Superior Court Judge Evelyn W. Hill is relieved of all existing and future assignments and sessions of Superior Court and that all such assignments be reassigned to other superior court judges, effective 5 December 2005, until further notice.

The immediate suspension of Judge Hill is necessary for the proper administration of justice in that it appears her persistent intemperance demonstrates a continuous, habitual pattern of misconduct in office, in violation of N.C.G.S. § 7A-376. See, e.g., State v. Wright, 172 N.C. App. 464, 616 S.E.2d 366 (numerous negative comments to defense counsel, both in and out of the presence of the jury, created negative atmosphere at trial to the prejudice of defendant), aff'd per curiam, 360 N.C. 80, —– S.E.2d —–, slip op. at 1 (Dec. 1, 2005) (No. 483A05); In re Hill, 359 N.C. 308, 609 S.E.2d 221 (2005) (censure for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of Canons 1, 2A, 3A(2), and 3A(3) of the N.C. Code of Judicial Conduct); In re Hill, 357 N.C. 559, 591 S.E.2d 859 (2003) (censure for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of Canons 2A and 3A(3) of the N.C. Code of Judicial Conduct); State v. Brinkley, 159 N.C. App. 446, 583 S.E.2d 335 (2003) (inappropriate comments in the presence of the jury to the prejudice of defendant and his counsel); see also, Complaint, In re: Inquiry Concerning a Judge, Nos. 04-248 and 05-160 Evelyn W. Hill, Respondent (Jud. Standards Comm'n, filed Nov. 22, 2005) (alleging willful misconduct for repeated gestures and comments demonstrating disdain for defense counsel). This suspension serves to maintain the honor and dignity of the judiciary and the proper administration of justice.

In Witness Whereof, I have hereunto signed my name as Chief Justice of the Supreme Court of North Carolina, on this 1st day of December, 2005.

s/I. Beverly Lake, Jr.
I. Beverly Lake, Jr.
Chief Justice, Supreme Court of North Carolina

IN THE SUPREME COURT OF NORTH CAROLINA

BY ORDER OF THE COURT

In recognition of the need to expand access to civil legal representation for people of low income and modest means in North Carolina, the Court hereby creates the **EQUAL ACCESS TO JUSTICE COMMISSION**.

BY THIS ORDER, the Court charges this Commission with the following goals, purposes, and responsibilities:

(1) Identify and assess current and future needs of low-income North Carolinians for access to justice in civil matters by conducting a study to determine the full range and volume of such unmet legal needs. The study shall: (a) determine and document how unrepresented people with legal disputes are attempting to meet these needs without attorneys, the extent to which these efforts are successful, and the consequences of the lack of attorney representation; (b) recognize the enormous efforts currently being made by attorneys to serve low-income North Carolinians; (c) analyze the need for funding and other resources to close the gap; and (d) address any other matters related to the delivery of equal access to justice in civil matters to all North Carolinians.

(2) Develop and publish a strategic plan for delivery of civil legal services to low-income North Carolinians throughout the state that will (in part) educate the public about the large gap between the ideal of equal access to the legal system and the reality of lack of representation.

(3) Foster coordination within the civil legal services delivery system and between legal aid organizations and other legal and non-legal organizations.

(4) Increase resources and funding for access to justice in civil matters and ensure both are applied to the greatest need so that all possibilities for additional state, local, and other non-Legal Services Corp. funding are examined, the most feasible options analyzed, and a strategy for pursuing such funding implemented.

(5) Ensure wise and efficient use of available resources through collaboration among legal aid and other organizations (such as other legal advocacy groups, non-legal advocacy groups, providers of social services, law schools, the court system, corporate and government law departments, and other state and local agencies) and through the use of local, regional, and statewide coordination systems.

(6) Develop and implement other initiatives designed to expand civil access to justice, such as increasing community education, enhancing technology, developing assisted *pro se* programs, and encouraging greater voluntary participation of the private bar in *pro bono* legal assistance to low-income people in North Carolina.

(7) Monitor the effectiveness of the statewide system and services provided, as well as periodically evaluate the progress made by the Commission in fulfilling the civil legal needs of low-income North Carolinians.

(8) Consider the legal needs and access to the civil justice system of persons whose income and means are such that they do not qualify under existing assistance programs and whose access to civil justice is limited either by the actual or perceived cost of legal services; and develop and implement initiatives designed to meet these needs, such as limited representation and limited appearances by attorneys and identification of types of services that could be provided by non-lawyers.

The Equal Access to Justice Commission shall consist of twenty-five members who reflect the diversity of ethnic, gender, legal, and geographic communities of North Carolina. The Chief Justice or his or her designee shall serve as Chair of the Commission. The day-to-day management and operation of the organization shall be conducted by an Executive Director who works with and reports regularly to the Commission. Members shall serve three-year staggered terms. A member may not be reappointed to serve a successive three-year term.

Members will be appointed as follows:

(1) Judiciary:

The Chief Justice will appoint the following representatives of the judiciary:

(a) The Chief Justice or an Associate Justice;

(b) A Judge from the North Carolina Court of Appeals;

(c) A Judge from the Superior Court;

(d) A Judge from the District Court;

(e) A representative of the North Carolina Administrative Office of the Courts (AOC) or from the North Carolina Clerks of Superior Court.

(2) Practicing Lawyers:

(a) The North Carolina State Bar president will appoint two members;

(b) The North Carolina Bar Association/Foundation (NCBA) president will appoint two members;

(c) The North Carolina IOLTA Board of Trustees chair will appoint one member;

(d) The Chief Justice will appoint three members from voluntary bar associations.

(3) Legal Aid Programs:

In consultation with the North Carolina Legal Services Planning Council, the Chief Justice will appoint four members to represent the interests of legal aid programs as follows: one board member from Legal Aid of North Carolina, Inc. (LANC), one LANC staff member, one board or staff member from the North Carolina Justice Center, and one board or staff member from another unrestricted legal aid program that either serves a particular geographic area or provides specific services or serves a particular client base.

(4) Law Schools:

In consultation with the deans, the Chief Justice will appoint one representative from the accredited law schools in North Carolina.

(5) Public Members:

(a) Governmental Representatives: The Chief Justice will invite the Governor, the President of the Senate, and the Speaker of the House to serve on the Commission or to recommend someone to serve in his or her stead.

(b) North Carolina Philanthropy Community Representative: In consultation with the North Carolina Network of Grantmakers, the Chief Justice will appoint one member to the Commission.

(c) Client Representative: In consultation with the North Carolina Clients Council and the North Carolina Legal Services Planning Council, the Chief Justice will appoint one client representative member to the Commission.

(d) North Carolina Business Community Representatives: The Chief Justice will appoint two members to the

Commission from the business community in North Carolina.

The terms of Commission members shall be:

To implement a staggered term system, Commission members will be appointed in classes, designated Class I, Class II, and Class III. The initial appointments of Class I members will end one year from the date their terms begin; the initial appointments of Class II members will end two years from the date their terms begin; and the appointments of Class III members will end three years from the date their terms begin.

(1) Class I members are: one appointee each from the NCBA, voluntary bar associations, IOLTA, the Court of Appeals, and the business community; the representatives from the LANC board and the North Carolina Justice Center.

(2) Class II members are: one appointee each from the NCBA, the North Carolina State Bar, the Superior Courts, voluntary bar associations, the business community, and law schools; the representative from the unrestricted, undesignated legal aid program, and the client representative.

(3) Class III members are: one appointee each from the North Carolina State Bar, the District Courts, voluntary bar associations, and the AOC or Clerks of Superior Court; the LANC staff member, and the philanthropy community representative.

(4) Governmental representatives will rotate by the terms of their offices.

The Commission will meet quarterly and will file an annual written report on the status and progress of its activities. The Commission will send a copy of the report to this Court, the North Carolina State Bar, and the North Carolina Bar Association. The Commission will provide oral progress reports to North Carolina Bar Association board meetings and to North Carolina State Bar Council meetings.

Adopted by the Court in Conference this the 3rd day of November, 2005.

s/I. Beverly Lake, Jr.
I. BEVERLY LAKE, JR.
Chief Justice
For the Court

IN THE SUPREME COURT OF NORTH CAROLINA

BY ORDER OF THE COURT

In recognition of the need to improve the delivery of court system services to North Carolinians living in rural counties, to enhance public safety in rural court facilities, and to address particular needs shared by rural courts across the state, the Supreme Court of North Carolina hereby creates the **RURAL COURTS COMMISSION**.

BY THIS ORDER, the Court charges this Commission with the following purposes and responsibilities:

(1) Continue the work of the North Carolina Rural Courts Initiative by coordinating with court and county officials to identify and address current and future needs and concerns of courts located in rural jurisdictions.

(2) Foster communication regarding rural court needs among and between court officials, county officials, law enforcement officials, the North Carolina General Assembly, the Administrative Office of the Courts, and the Executive Branch of State Government.

(3) Develop and implement initiatives within all eight judicial divisions designed to enhance security and safety measures, storage and recordkeeping capability, court space, technology, capital improvements, adequate funding, and the effective delivery of court system services in rural jurisdictions.

(4) Monitor the effectiveness of the delivery of court system services provided in rural jurisdictions; develop and submit semi-annual reports to the Chief Justice which include specific plans for improvement of court services, including the evaluation of the progress made by the Commission in improving delivery of court system services to the public in rural jurisdictions.

The Rural Courts Commission shall consist of fifteen members, appointed by the Chief Justice, who will represent geographically rural jurisdictions throughout the eight judicial divisions of North Carolina. The Chief Justice or his/her designee shall serve as Chair of the Commission. Members shall serve three-year terms, which shall be staggered. In order to implement a staggered term system, the initial appointments of five members will end one year from the date their terms begin; the initial appointments of five members will end two years from the date their terms begin; and the initial appoint-

ments of five members will end three years from the date their terms begin. A member may not be reappointed to serve a successive three-year term.

Adopted by the Supreme Court of North Carolina in Conference, this the 26th day of January, 2006. This Order shall be promulgated by publication in the Advance Sheets of the Supreme Court. This Order shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

I. Beverly Lake, Jr., Chief Justice
Supreme Court of North Carolina

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendments to the North Carolina Code of Judicial Conduct

The North Carolina Code of Judicial Conduct is hereby amended to read as follows:

Preamble

An independent and honorable judiciary is indispensable to justice in our society, and to this end and in furtherance thereof, this Code of Judicial Conduct is hereby established. A violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or willful misconduct in office, or otherwise as grounds for disciplinary proceedings pursuant to Article 30 of Chapter 7A of the General Statutes of North Carolina. No other code or proposed code of judicial conduct shall be relied upon in the interpretation and application of this Code of Judicial Conduct.

Canon 1

A judge should uphold the integrity and independence of the judiciary.

A judge should participate in establishing, maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved.

Canon 2

A judge should avoid impropriety in all the judge's activities.

A. A judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow the judge's family, social or other relationships to influence the judge's judicial conduct or judgment. The judge should not lend the prestige of the judge's office to advance the private interest of others; nor should the judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge may, based on personal knowledge, serve as a personal reference or provide a letter of recommendation. A judge should not testify voluntarily as a character witness.

C. A judge should not hold membership in any organization that practices unlawful discrimination on the basis of race, gender, religion or national origin.

Canon 3

A judge should perform the duties of the judge's office impartially and diligently.

The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

A. Adjudicative responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before the judge.

(3) A judge should be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity, and should require similar conduct of lawyers, and of the judge's staff, court officials and others subject to the judge's direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should abstain from public comment about the merits of a pending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law and should encourage similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties; from explaining for public information the proceedings of the Court; from addressing or discussing previously issued judicial decisions when serving as faculty or otherwise participating in educational courses or programs; or from addressing educational, religious, charitable, fraternal, political, or civic organizations.

(7) A judge should exercise discretion with regard to permitting broadcasting, televising, recording, or taking photographs in the

courtroom and areas immediately adjacent thereto during civil or criminal sessions of court or recesses between sessions, pursuant to the provisions of Rule 15 of the General Rules of Practice for the Superior and District Courts.

B. Administrative responsibilities.

(1) A judge should diligently discharge the judge's administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require the judge's staff and court officials subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

(4) A judge should not make unnecessary appointments. A judge should exercise the judge's power of appointment only on the basis of merit, avoiding nepotism and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

C. Disqualification.

(1) On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where:

(a) The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;

(b) The judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) The judge knows that he/she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself/herself about the judge's personal and fiduciary financial interests, and make a reasonable effort to inform himself/herself about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) The degree of relationship is calculated according to the civil law system;

(b) "Fiduciary" includes such relationships as executor, administrator, trustee and guardian;

(c) "Financial interest" means ownership of a substantial legal or equitable interest (*i.e.*, an interest that would be significantly affected in value by the outcome of the subject legal proceeding), or a relationship as director or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, cultural, historical, religious, charitable, fraternal or civic organization is not a "financial interest" in securities held by the organization.

D. Remittal of disqualification.

Nothing in this Canon shall preclude a judge from disqualifying himself/herself from participating in any proceeding upon the judge's own initiative. Also, a judge potentially disqualified by the terms of Canon 3C may, instead of withdrawing from the proceeding, disclose on the record the basis of the judge's potential disqualification. If, based on such disclosure, the parties and lawyers, on behalf of their clients and independently of the judge's participation, all agree in writing that the judge's basis for potential disqualification is immaterial or insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all

lawyers, shall be incorporated in the record of the proceeding. For purposes of this section, *pro se* parties shall be considered lawyers.

Canon 4

A judge may participate in cultural or historical activities or engage in activities concerning the legal, economic, educational, or governmental system, or the administration of justice.

A judge, subject to the proper performance of the judge's judicial duties, may engage in the following quasi-judicial activities, if in doing so the judge does not cast substantial doubt on the judge's capacity to decide impartially any issue that may come before the judge:

A. A judge may speak, write, lecture, teach, participate in cultural or historical activities, or otherwise engage in activities concerning the economic, educational, legal, or governmental system, or the administration of justice.

B. A judge may appear at a public hearing before an executive or legislative body or official with respect to activities permitted under Canon 4A or other provision of this Code, and the judge may otherwise consult with an executive or legislative body or official.

C. A judge may serve as a member, officer or director of an organization or governmental agency concerning the activities described in Canon 4A, and may participate in its management and investment decisions. A judge may not actively assist such an organization in raising funds but may be listed as a contributor on a fund-raising invitation. A judge may make recommendations to public and private fund-granting agencies regarding activities or projects undertaken by such an organization.

Canon 5

A judge should regulate the judge's extra-judicial activities to ensure that they do not prevent the judge from carrying out the judge's judicial duties.

A. Avocational activities. A judge may write, lecture, teach, and speak on legal or non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not substantially interfere with the performance of the judge's judicial duties.

B. Civic and charitable activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the

judge's impartiality or interfere with the performance of the judge's judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal or civic organization subject to the following limitations.

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge.

(2) A judge may be listed as an officer, director or trustee of any cultural, educational, historical, religious, charitable, fraternal or civic organization. A judge may not actively assist such an organization in raising funds but may be listed as a contributor on a fund-raising invitation.

(3) A judge may serve on the board of directors or board of trustees of such an organization even though the board has the responsibility for approving investment decisions.

C. Financial activities.

(1) A judge should refrain from financial and business dealings that reflect adversely on the judge's impartiality, interfere with the proper performance of the judge's judicial duties, exploit the judge's judicial position or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage the judge's own personal investments or those of the judge's spouse, children, or parents, including real estate investments, and may engage in other remunerative activity not otherwise inconsistent with the provisions of this Code but should not serve as an officer, director or manager of any business.

(3) A judge should manage his/her investments and other financial interests to minimize the number of cases in which the judge is disqualified.

(4) Neither a judge nor a member of the judge's family residing in the judge's household should accept a gift from anyone except as follows:

(a) A judge may accept a gift incident to a public testimonial to the judge; books supplied by publishers on a complimentary basis for official or academic use; or an invitation to the judge and the judge's spouse to attend a bar-related function, a cultural or historical activity, or an event related to the economic, educational, legal, or governmental system, or the administration of justice;

(b) A judge or a member of the judge's family residing in the judge's household may accept ordinary social hospitality; a gift, favor or loan from a friend or relative; a wedding, engagement or other special occasion gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) Other than as permitted under subsection C.(4)(b) of this Canon, a judge or a member of the judge's family residing in the judge's household may accept any other gift only if the donor is not a party presently before the judge and, if its value exceeds $500, the judge reports it in the same manner as the judge reports compensation in Canon 6C.

(5) For the purposes of this section "member of the judge's family residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household.

(6) A judge is not required by this Code to disclose his/her income, debts or investments, except as provided in this Canon and Canons 3 and 6.

(7) Information acquired by a judge in the judge's judicial capacity should not be used or disclosed by the judge in financial dealings or for any other purpose not related to the judge's judicial duties.

D. Fiduciary activities. A judge should not serve as the executor, administrator, trustee, guardian or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of the judge's judicial duties. "Member of the judge's family" includes a spouse, child, grandchild, parent, grandparent or any other relative of the judge by blood or marriage. As a family fiduciary a judge is subject to the following restrictions:

(1) A judge should not serve if it is likely that as a fiduciary the judge will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversarial proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to the judge in his/her personal capacity.

E. Arbitration. A judge should not act as an arbitrator or mediator. However, an emergency justice or judge of the Appellate

Division designated as such pursuant to Article 6 of Chapter 7A of the General Statutes of North Carolina, and an Emergency Judge of the District Court or Superior Court commissioned as such pursuant to Article 8 of Chapter 7A of the General Statutes of North Carolina may serve as an arbitrator or mediator when such service does not conflict with or interfere with the justice's or judge's judicial service in emergency status. A judge of the Appellate Division may participate in any dispute resolution program conducted at the Court of Appeals and authorized by the Supreme Court.

F. Practice of law. A judge should not practice law.

G. Extra-judicial appointments. A judge should not accept appointment to a committee, commission, or other body concerned with issues of fact or policy on matters other than those relating to cultural or historical matters, the economic, educational, legal or governmental system, or the administration of justice. A judge may represent his/her country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

Canon 6

A judge should regularly file reports of compensation received for quasi-judicial and extra-judicial activities.

A judge may receive compensation, honoraria and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, subject to the following restrictions:

A. Compensation and honoraria. Compensation and honoraria should not exceed a reasonable amount.

B. Expense reimbursement. Expense reimbursement should be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse. Any payment in excess of such an amount is compensation.

C. Public reports. A judge shall report the name and nature of any source or activity from which the judge received more than $2,000 in income during the calendar year for which the report is filed. Any required report shall be made annually and filed as a public document as follows: The members of the Supreme Court shall file such reports with the Clerk of the Supreme Court; the members of the Court of Appeals shall file such reports with the Clerk of the Court of Appeals; and each Superior Court Judge, regular, special, and emergency, and each District Court Judge, shall file such report with the Clerk of the Superior Court of the county in which the judge resides.

For each calendar year, such report shall be filed, absent good cause shown, not later than May 15th of the following year.

Canon 7

A judge may engage in political activity consistent with the judge's status as a public official.

The provisions of Canon 7 are designed to strike a balance between two important but competing considerations: (1) the need for an impartial and independent judiciary and (2) in light of the continued requirement that judicial candidates run in public elections as mandated by the Constitution and laws of North Carolina, the right of judicial candidates to engage in constitutionally protected political activity. To promote clarity and to avoid potentially unfair application of the provisions of this Code, subsection B of Canon 7 establishes a safe harbor of permissible political conduct.

A. Terminology. For the purposes of this Canon only, the following definitions apply.

(1) A "candidate" is a person actively and publicly seeking election to judicial office. A person becomes a candidate for judicial office as soon as the person makes a public declaration of candidacy, declares or files as a candidate with the appropriate election authority, authorizes solicitation or acceptance of contributions or public support, or sends a letter of intent to the chair of the Judicial Standards Commission. The term "candidate" has the same meaning when applied to a judge seeking election to a nonjudicial office.

(2) To "solicit" means to directly, knowingly and intentionally make a request, appeal or announcement, public or private, oral or written, whether in person or through the press, radio, television, telephone, Internet, billboard, or distribution and circulation of printed materials, that expressly requests other persons to contribute, give, loan or pledge any money, goods, labor, services or real property interest to a specific individual's efforts to be elected to public office.

(3) To "endorse" means to knowingly and expressly request, appeal or announce publicly, orally or in writing, whether in person or through the press, radio, television, telephone, Internet, billboard or distribution and circulation of printed materials, that other persons should support a specific individual in that person's efforts to be elected to public office.

B. Permissible political conduct. A judge or a candidate may:

(1) attend, preside over, and speak at any political party gathering, meeting or other convocation, including a fund-raising function for himself/herself, another individual or group of individuals seeking election to office and the judge or candidate may be listed or noted within any publicity relating to such an event, so long as he/she does not expressly endorse a candidate (other than himself/herself) for a specific office or expressly solicit funds from the audience during the event;

(2) if a judge is a candidate, endorse any individual seeking election to any office or conduct a joint campaign with and endorse other individuals seeking election to judicial office, including the solicitation of funds for a joint judicial campaign;

(3) identify himself/herself as a member of a political party and make financial contributions to a political party or organization; provided, however, that he/she may not personally make financial contributions or loans to any individual seeking election to office (other than himself/herself) except as part of a joint judicial campaign as permitted in subsection B(2);

(4) personally solicit campaign funds and request public support from anyone for his/her own campaign or, alternatively, and in addition thereto, authorize or establish committees of responsible persons to secure and manage the solicitation and expenditure of campaign funds;

(5) become a candidate either in a primary or in a general election for a judicial office provided that the judge should resign the judge's judicial office prior to becoming a candidate either in a party primary or in a general election for a non-judicial office;

(6) engage in any other constitutionally protected political activity.

C. Prohibited political conduct. A judge or a candidate should not:

(1) solicit funds on behalf of a political party, organization, or an individual (other than himself/herself) seeking election to office, by specifically asking for such contributions in person, by telephone, by electronic media, or by signing a letter, except as permitted under subsection B of this Canon or otherwise within this Code;

(2) endorse a candidate for public office except as permitted under subsection B of this Canon or otherwise within this Code;

(3) intentionally and knowingly misrepresent his/her identity or qualifications.

D. Political conduct of family members. The spouse or other family member of a judge or a candidate is permitted to engage in political activity.

Limitation of Proceedings

Disciplinary proceedings to redress alleged violations of Canon 7 of this Code must be commenced within three months of the act or omission allegedly giving rise to the violation. Disciplinary proceedings to redress alleged violations of all other provisions of this Code must be commenced within three years of the act or omission allegedly giving rise to the violation; provided, however, that disciplinary proceedings may be instituted at any time against a judge convicted of a felony during the judge's tenure in judicial office.

Scope and Effective Date of Compliance

The provisions of Canon 7 of this Code shall apply to judges and candidates for judicial office. The other provisions of this Code shall become effective as to a judge upon the administration of the judge's oath to the office of judge; provided, however, that it shall be permissible for a newly installed judge to facilitate or assist in the transfer of the judge's prior duties as legal counsel but the judge may not be compensated therefor.

Adopted unanimously by the Court in Conference this the 31st day of January 2006. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court.

I. Beverly Lake, C.J.
For the Court

Order Adopting Amendments to the Standards of Professional Conduct for Mediators

WHEREAS, section 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission under the Judicial Department and charges it with administration of mediator certification and regulations of mediator conduct and decertification, and

WHEREAS, N.C.G.S. § 7A-38.2(a) provides for this Court to adopt standards for the conduct of mediators and of mediator training programs participating in the proceedings conducted pursuant to N.C.G.S. § 7A-38.1, 7A-38.3, 7A-38.4A 7A-38.3B, and 7A-38.3C.

NOW THEREFORE, pursuant to N.C.G.S. § 7A-38.2(a), the Standards of Professional Conduct for Mediators are hereby amended to read as in the following pages. These amended Standards shall be effective on the 1st of March, 2006.

Adopted by the Court in conference the 26th day of January, 2006. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Standards of Profession Conduct for Mediators amended through this action in the advance sheets of the Supreme Court.

Newby, J.
For the Court

STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

PREAMBLE

These standards are intended to instill and promote public confidence in the mediation process and to be a guide to mediator conduct. As with other forms of dispute resolution, mediation must be built on public understanding and confidence. Persons serving as mediators are responsible to the parties, the public, and the courts to conduct themselves in a manner which will merit that confidence. These standards apply to all mediators participating in mediated settlement conferences in the State of North Carolina pursuant to NCGS 7A-38.1, NCGS 7A-38.3, NCGS 7A-38.4A, NCGS 7A-38.3B, NCGS 7A-38.3C or who are certified ~~to do so~~ by the NC Dispute Resolution Commission. These Standards~~, however,~~ shall not apply in instances where a mediator is participating in a mediation program or process which is governed by other statutes, program rules, and/or Standards

of Conduct and there is a conflict between these Standards and the statutes, rules, or Standards governing the other program. In such instance, the mediator's conduct shall be governed by the conflicting statutory provision, rule, or Standard applicable to the program or process in which the mediator is participating.

Mediation is a process in which an impartial person, a mediator, works with disputing parties to help them explore settlement, reconciliation, and understanding among them. In mediation, the primary responsibility for the resolution of a dispute rests with the parties.

The mediator's role is to facilitate communication and recognition among the parties and to encourage and assist the parties in deciding how and on what terms to resolve the issues in dispute. Among other things, a mediator assists the parties in identifying issues, reducing obstacles to communication, and maximizing the exploration of alternatives. A mediator does not render decisions on the issues in dispute.

I. Competency: A mediator shall maintain professional competency in mediation skills and, where the mediator lacks the skills necessary for a particular case, shall decline to serve or withdraw from serving.

A. A mediator's most important qualification is the mediator's competence in procedural aspects of facilitating the resolution of disputes rather than the mediator's familiarity with technical knowledge relating to the subject of the dispute. Therefore a mediator shall obtain necessary skills and substantive training appropriate to the mediator's areas of practice and upgrade those skills on an ongoing basis.

B. If a mediator determines that a lack of technical knowledge impairs or is likely to impair the mediator's effectiveness, the mediator shall notify the parties and withdraw if requested by any party.

C. Beyond disclosure under the preceding paragraph, a mediator is obligated to exercise his/her judgment as to whether his/her skills or expertise are sufficient to the demands of the case and, if they are not, to decline from serving or to withdraw.

II. Impartiality: A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute.

A. Impartiality means absence of prejudice or bias in word and action. In addition, it means a commitment to aid all parties,

as opposed to a single party, in exploring the possibilities for resolution.

B. As early as practical and no later than the beginning of the first session, the mediator shall make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's impartiality.

C. The mediator shall decline to serve or shall withdraw from serving if:

(1) a party objects to his/her serving on grounds of lack of impartiality or

(2) the mediator determines he/she cannot serve impartially.

III. Confidentiality: A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

A. A mediator shall not disclose, directly or indirectly, to any ~~non-party~~ non-participant, any information communicated to the mediator by a ~~party~~ participant within the mediation process.

B. A mediator shall not disclose, directly or indirectly, to any ~~party to the mediation~~ non-participant, information communicated to the mediator in confidence by any ~~other party~~ participant in the mediation process, unless that ~~party~~ participant gives permission to do so. A mediator may encourage a ~~party~~ participant to permit disclosure, but absent such permission, the mediator shall not disclose.

C. The confidentiality provisions set forth in A. and B. above notwithstanding, a mediator has discretion to report otherwise confidential conduct or statements made in preparation for, during, or as a follow-up to ~~a~~ mediation ~~mediated settlement conference~~ to a ~~party~~ participant, ~~non party~~ non-participant, ~~or~~ law enforcement personnel, or other officials or to give an affidavit, or to testify about such conduct or statements in the following circumstances:

(1) A statute requires or permits a mediator to testify, ~~or~~ to give an affidavit; , or to tender a copy of any agreement reached in mediation to the official designated by the statute.

(2) Where public safety is an issue:

(i) a party to the mediation has communicated to the mediator a threat of serious bodily harm or death to be inflicted on any person, and the mediator has rea-

son to believe the party has the intent and ability to act on the threat; or

(ii) a party to the mediation has communicated to the mediator a threat of significant damage to real or personal property and the mediator has reason to believe the party has the intent and ability to act on the threat; or

(iii) a party's conduct during the mediation results in direct bodily injury or death to a person.

D. Nothing in this Standard prohibits the use of information obtained in a mediation for instructional purposes, or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.

E. Nothing in this Standard shall prohibit a mediator from revealing communications or conduct occurring prior to, during, or after a mediation in the event that a party to or a participant in a mediation has filed a complaint regarding the mediator's professional conduct, moral character, or fitness to practice as a mediator and the mediator reveals the communication or conduct for the purpose of defending him/herself against the complaint. In making any such disclosures, the mediator should make every effort to protect the confidentiality of non-complaining parties to or participants in the mediation and avoid disclosing the specific circumstances of the parties' controversy. The mediator may consult with non-complaining parties or witnesses to consider their input regarding disclosures.

IV. Consent: A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator, and the party's options within the process.

A. A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require. A mediator shall also inform the parties of the following:

(1) that mediation is private;

(2) that mediation is informal;

(3) that mediation is confidential to the extent provided by law;

(4) that mediation is voluntary, meaning that the parties do not have to negotiate during the process nor make or accept any offer at any time;

(5) the mediator's role; and

(6) what fees, if any, will be charged by the mediator for his/her services.

B. A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator may and shall encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

C. Where a party appears to be acting under undue influence, or without fully comprehending the process, issues, or options for settlement, a mediator shall explore these matters with the party and assist the party in making freely chosen and informed decisions.

D. If after exploration the mediator concludes that a party is acting under undue influence or is unable to fully comprehend the process, issues or options for settlement, the mediator shall discontinue the mediation.

E. In appropriate circumstances, a mediator shall encourage the parties to seek legal, financial, tax or other professional advice before, during or after the mediation process. A mediator shall explain generally to *pro se* parties that there may be risks in proceeding without independent counsel or other professional advisors.

V. Self Determination: A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute, and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.

A. A mediator is obligated to leave to the parties full responsibility for deciding whether and on what terms to resolve their dispute. He/She may assist them in making informed and thoughtful decisions, but shall not impose his/her judgment or opinions for those of the parties concerning any aspect of the mediation.

B. A mediator may raise questions for the participants to consider regarding their perceptions of the dispute as well as the acceptability of proposed options for settlement and their impact on third parties. Furthermore, a mediator may suggest for consideration options for settlement in addition to those conceived of by the parties themselves.

C. A mediator shall not impose his/her opinion about the merits of the dispute or about the acceptability of any proposed option for settlement. A mediator should resist giving his/her opinions about the dispute and options for settlement even when he/she is requested to do so by a party or attorney. Instead, a mediator should help that party utilize his/her own resources to evaluate the dispute and the options for settlement.

   This section prohibits imposing one's opinions, advice and/or counsel upon a party or attorney. It does not prohibit the mediator's expression of an opinion as a last resort to a party or attorney who requests it and the mediator has already helped that party utilize his/her own resources to evaluate the dispute and options.

D. Subject to Standard IV. E. above, if a party to a mediation declines to consult an independent counsel or expert after the mediator has raised this option, the mediator shall permit the mediation to go forward according to the parties' wishes.

E. If, in the mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, inequality of bargaining power or ability, unfairness resulting from non-disclosure or fraud by a participant, or other circumstance likely to lead to a grossly unjust result, the mediator shall inform the parties. The mediator may choose to discontinue the mediation in such circumstances but shall not violate the obligation of confidentiality.

VI. Separation of Mediation from Legal and Other Professional Advice: A mediator shall limit himself or herself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.

A mediator may, in areas where he/she is qualified by training and experience, raise questions regarding the information presented by the parties in the mediation session. However, the mediator shall not provide legal or other professional advice. Mediators may respond to a party's request for an opinion on the merits of the case or suitability of settlement proposals only in accordance with Section V.C. above.

VII. Conflicts of Interest: A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.

A. The mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.

B. Where a party is represented or advised by a professional advocate or counselor, the mediator shall place the interests of the party over his/her own interest in maintaining cordial relations with the professional, if such interests are in conflict.

C. A mediator who is a lawyer or other professional shall not advise or represent any of the parties in future matters concerning the subject of the dispute, an action closely related to the dispute, or an out growth of the dispute.

D. A mediator shall not charge a contingent fee or a fee based on the outcome of the mediation.

E. A mediator shall not use information obtained during a mediation for personal gain or advantage.

F. A mediator shall not knowingly contract for mediation services which cannot be delivered or completed as directed by a court or in a timely manner.

G. A mediator shall not prolong a mediation for the purpose of charging a higher fee.

H. A mediator shall not give or receive any commission, rebate, or other monetary or non-monetary form of consideration from a party or representative of a party in return for referral of clients for mediation services.

VIII. Protecting the Integrity of the Mediation Process. A mediator shall encourage mutual respect between the parties, and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

A. A mediator shall make reasonable efforts to ensure a balanced discussion and to prevent manipulation or intimidation by either party and to ensure that each party understands and respects the concerns and position of the other even if they cannot agree.

B. When a mediator discovers an intentional abuse of the process, such as nondisclosure of material information or fraud, the mediator shall encourage the abusing party to alter the conduct in question. The mediator is not obligated to reveal the conduct to the other party, (and subject to Standard V. D. above) nor to discontinue the mediation, but may discontinue without violating the obligation of confidentiality.

Order Adopting Amendments to the Rules of the North Carolina Supreme Court Implementing Settlement Procedures In Equitable Distribution and other Family Financial Cases

WHEREAS, section 7A-38.4A of the North Carolina General Statutes establishes a statewide system of court-ordered mediated settlement conferences to facilitate the settlement of equitable distribution and other family financial cases, and

WHEREAS, N.C.G.S. § 7A-38.4A(o)enables this Court to implement section 7A-38.4A by adopting rules and amendments to rules concerning said mediated settlement conferences.

NOW THEREFORE, pursuant to N.C.G.S. § 7A-38.4A(o), the The Rules of the North Carolina Supreme Court Implementing Settlement Procedures In Equitable Distribution And Other Family Financial Cases are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st of March, 2006, except that districts that have not yet implemented the Family Financial Settlement Program may have up until one year from the above effective date of these amendments to comply with Rule 1.C.(1) mandating referral of all eligible family financial cases to mediated settlement.

Adopted by the Court in conference the 26th day of January, 2006. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules of the North Carolina Surpeme Court Implementing Settlement Procedures In Equitable Distribution And Other Family Financial Cases amended through this action in the advance sheets of the Supreme Court.

Newby, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

RULE 1. INITIATING SETTLEMENT PROCEDURES

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to G.S. 7A-38.4A, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on

trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party to a district court case involving family financial issues, including equitable distribution, child support, alimony, post-separation support action, or claims arising out of contracts between the parties under G.S. 50-20(d), 52-10, 52-10.1 or 52 B shall advise his or her client regarding the settlement procedures approved by these Rules and, at or prior to the scheduling conference mandated by G.S. 50-21(d), shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. ORDERING SETTLEMENT PROCEDURES.

(1) Equitable Distribution Scheduling Conference. At the scheduling conference mandated by G.S. 50-21(d) in an all equitable distribution actions <u>in all judicial districts</u>, or at such earlier time as specified by local rule, the Court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to these rules, unless excused by the Court pursuant to Rule 1.C.(6) or by the Court or mediator pursuant to Rule 4.A.(2). <u>The court shall dispense with the requirement to attend a mediated settlement conference or other settlement procedure only for good cause shown.</u>

(2) Scope of Settlement Proceedings. All other financial issues existing between the parties when the equitable distribution settlement proceeding is ordered, or at any time thereafter, may be discussed, negotiated or decided at the proceeding. In those districts where a child custody and visitation mediation program has been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules only in those cases in

which the parties and the mediator have agreed to include them and in which the parties have been exempted from, or have fulfilled the program requirements. In those districts where a child custody and visitation mediation program has not been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules with the agreement of all parties and the mediator.

(3) Authorizing Settlement Procedures Other Than Mediated Settlement Conference. The parties and their attorneys are in the best position to know which settlement procedure is appropriate for their case. Therefore, the Court shall order the use of a settlement procedure authorized by Rules 10-12 herein or by local rules of the District Court in the county or district where the action is pending if the parties have agreed upon the procedure to be used, the neutral to be employed and the compensation of the neutral. If the parties have not agreed on all three items, then the Court shall order the parties and their counsel to attend a mediated settlement conference conducted pursuant to these Rules.

The motion for an order to use a settlement procedure other than a mediated settlement conference shall be submitted on an AOC form at the scheduling conference and shall state:

(a) the settlement procedure chosen by the parties;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral;

(d) that all parties consent to the motion.

(4) Content of Order. The Court's order shall (1) require the mediated settlement conference or other settlement proceeding be held in the case; (2) establish a deadline for the completion of the conference or proceeding; and (3) state that the parties shall be required to pay the neutral's fee at the conclusion of the settlement conference or proceeding unless otherwise ordered by the Court. Where the settlement proceeding ordered is a judicial settlement conference, the parties shall not be required to pay for the neutral.

The order shall be contained in the Court's scheduling order, or, if no scheduling order is entered, shall be on an AOC form. Any scheduling order entered at the completion of a scheduling conference held pursuant to local rule may be signed by the parties or their attorneys in lieu of submitting the forms referred to hereinafter relating to the selection of a mediator.

(5) Court-Ordered Settlement Procedures in Other Family Financial Cases. Any party to an action involving family financial issues not previously ordered to a mediated settlement conference may move the Court to order the parties to participate in a settlement procedure. Such motion shall be made in writing, state the reasons why the order should be allowed and be served on the non-moving party. Any objection to the motion or any request for hearing shall be filed in writing with the Court within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion and notify the parties or their attorneys of the ruling. If the Court orders a settlement proceeding, then the proceeding shall be a mediated settlement conference conducted pursuant to these Rules. Other settlement procedures may be ordered if the circumstances outlined in subsection (3) above have been met.

(6) Motion to Dispense With Settlement Procedures. A party may move the Court to dispense with the mediated settlement conference or other settlement procedure. Such motion shall be in writing and shall state the reasons the relief is sought. For good cause shown, the Court may grant the motion. Such good cause may include, but not be limited to, the fact that the parties have participated in a settlement procedure such as nonbinding arbitration or early neutral evaluation prior to the court's order to participate in a mediated settlement conference or have elected to resolve their case through arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq.) or that one of the parties has alleged domestic violence. The Court may also dispense with the mediated settlement conference for good cause upon its own motion or by local rule.

RULE 2. SELECTION OF MEDIATOR

A. SELECTION OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY AGREEMENT OF THE PARTIES. The

parties may select a certified family financial mediator certified pursuant to these Rules by agreement by filing with the Court a Designation of Mediator by Agreement at the scheduling conference. Such designation shall: state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules.

In the event the parties wish to select a mediator who is not certified pursuant to these Rules, the parties may nominate said person by filing a Nomination of Non-Certified Family Financial Mediator with the Court at the scheduling conference. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience, or other qualifications of the mediator; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation, if any. The Court shall approve said nomination if, in the Court's opinion, the nominee is qualified to serve as mediator and the parties and the nominee have agreed upon the rate of compensation.

Designations of mediators and nominations of mediators shall be made on an AOC form. A copy of each such form submitted to the Court and a copy of the Court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

~~**B. APPOINTMENT OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY THE COURT.** If the parties cannot agree upon the selection of a mediator, they shall so notify the Court and request that the Court appoint a mediator. The motion shall be filed at the scheduling conference and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall be on an AOC form.~~

~~Upon receipt of a motion to appoint a mediator, or in the event the parties have not filed a designation or nomination of mediator, the Court shall appoint a certified family financial mediator certified pursuant to these Rules under a procedure established by said Judge and set out in local order or rule.~~

~~The Dispute Resolution Commission shall furnish for the consideration of the District Court Judges of any district where mediated settlement conferences are authorized to be held a list of those certified family financial mediators who request appointments in said district. Said list shall contain the mediators' names, addresses and phone numbers and shall be provided in writing or on the Commission's web site.~~

B. APPOINTMENT OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY THE COURT. If the parties cannot agree upon the selection of a mediator, they shall so notify the Court and request that the Court appoint a mediator. The motion shall be filed at the scheduling conference and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree on a mediator. The motion shall be on a form approved by the Administrative Office of the Courts.

Upon receipt of a motion to appoint a mediator, or failure of the parties to file a Notice of Selection with the court, the Court shall appoint a family financial mediator, certified pursuant to these Rules, who has expressed a willingness to mediate actions within the Court's district.

In making such appointments, the Court shall rotate through the list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. Certified mediators who do not reside in the judicial district, or a county contiguous to the judicial district, shall be included in the list of mediators available for appointment only if, on an annual basis, they inform the Judge in writing that they agree to mediate cases to which they are assigned. The District Court Judges shall retain discretion to depart in a specific case from a strict rotation when, in the judge's discretion, there is good cause to do so.

The Dispute Resolution Commission shall furnish to the District Court Judges of each judicial district a list of those certified family financial mediators requesting appointments in that district. That list shall contain the mediators' names, addresses and telephone numbers and shall be provided both in writing and electronically through the Commission's website. The Commission shall promptly notify the District Court Judges of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

C. MEDIATOR INFORMATION DIRECTORY. To assist the parties in the selection of a mediator by agreement, the Chief District Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all mediators certified pursuant to these Rules who wish to mediate in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Court in such county and the office of the Chief District Court Judge or Trial Court Administrator in such county or, in a single county district, in the office of the Chief District Court Judge or said judge's designee.

D. DISQUALIFICATION OF MEDIATOR. Any party may move a Court of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. WHERE CONFERENCE IS TO BE HELD. The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree to a location, the mediator shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date. The mediator is authorized to assist the parties in establishing a discovery schedule and completing discovery.

The Court's order issued pursuant to Rule 1.C.(1) shall state a deadline for completion of the conference which shall be not more than 150 days after issuance of the Court's order, unless extended by the Court. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. A party, or the mediator, may move the Court to extend the deadline for completion of the conference. Such motion shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the motion, said party shall promptly communicate its objection to the Court.

The Court may grant the request by entering a written order setting a new deadline for completion of the conference, which date may be set at any time prior to trial. Said order shall be delivered to all parties and the mediator by the person who sought the extension.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set during the conference, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(b) Attorneys. At least one counsel of record for each party whose counsel has appeared in the action.

(2) Any person required to attend a mediated settlement conference shall physically attend until such time as an agreement has been reached or the mediator, after conferring with the parties and their counsel, if any, declares an impasse. No mediator shall prolong a conference unduly.

Any such person may have the attendance requirement excused or modified, including allowing a person to par-

ticipate by phone, by agreement of both parties and the mediator or by order of the Court. Ordinarily, attorneys for the parties may be excused from attending only after they have appeared at the first session.

(3) Scheduling. Participants required to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator, and a scheduling conflict with another court proceeding thereafter arises, participants shall promptly attempt to resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina June 20, 1985.

B. FINALIZING AGREEMENT.

(1) If an agreement is reached on any or all issues at the conference, t~~T~~he essential terms of the parties' agreement shall be reduced to writing as a summary memorandum at the conclusion of the conference unless the parties have reduced their agreement to writing, have signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to its terms. In the event the parties fail to agree on the wording or terms of a final agreement or court order, the mediator may schedule another session if the mediator determines that it would assist the parties.

(2) If the agreement is upon all issues at the conference, the person(s) responsible for filing closing documents with the court shall also sign the mediator's report to the court. The parties shall give a copy of their signed memorandum of agreement, agreement, consent judgment or voluntary dismissals to the mediator and all parties at the conference and shall file their consent judgment or voluntary dismissal with the court within thirty (30) days or

before expiration of the mediation deadline, whichever is longer.

(3) If an agreement is reached upon all issues prior to the conference or finalized while the conference is in recess, the parties shall reduce its terms to writing, sign it along with their counsel and file the consent judgment or voluntary dismissal(s) with the court within thirty (30) days or before the expiration of the mediation deadline, whichever is longer.

(4) When a case is settled upon all issues, all attorneys of record must notify the Court within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal(s), *and when*.

E. PAYMENT OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule 7.

DRC Comments to Rule 4.

DRC Comment to Rule 4.B.

N.C.G.S. § 7A-38.4A(j) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which agreement on all issues has been reached should be disposed of as expeditiously as possible. This rule is intended to assure that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep confidential the terms of their settlement, they may timely file with the court closing documents which do not contain confidential terms, i.e., voluntary dismissal(s) or a consent judgment resolving all claims. Mediators will not be required by local rules to submit agreements to the court.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES

If any person required to attend a mediated settlement conference fails to attend without good cause, the Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of attorneys fees, mediator fees,

expenses and loss of earnings incurred by persons attending the conference.

A party to the action seeking sanctions, or the Court on its own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law. (See also Rule 7.F. and the Comment to Rule 7.F.)

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) Private Consultation. The mediator may communicate privately with any participant during the conference. However, there shall be no *ex parte* communication before or outside the conference between the mediator and any counsel or party on any matter touching the proceeding, except with regard to scheduling matters. Nothing in this rule prevents the mediator from engaging in *ex parte* communications, with the consent of the parties, for the purpose of assisting settlement negotiations.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.4A(j);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) Reporting Results of Conference.

(a) The mediator shall report to the court on an A.O.C. form within 10 days of the conference whether or not an agreement was reached by the parties.

The mediator's report shall inform the court of the absence of any party or attorney known by the mediator to be absent from the mediated settlement conference without permission. If partial agreements are reached at the conference, the report shall state what issues remain for trial. The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

(b) If an agreement upon all issues was reached, the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dis-

missal(s), when it shall be filed with the court, and the name, address and telephone number of the person(s) designated by the parties to file such consent judgment or dismissal(s) with the court as required by Rule 4.B.2. If an agreement upon all issues is reached at the conference, the mediator shall have the person(s) designated sign the mediator's report acknowledging acceptance of the duty to timely file the closing documents with the court.

Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the court and sanctions.

(5) Scheduling and Holding the Conference. The mediator shall schedule the conference and conduct it prior to the conference completion deadline set out in the Court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless changed by written order of the Court.

(6) Informational Brochure. Before the conference, the mediator shall distribute to the parties or their attorneys a brochure prepared by the Dispute Resolution Commission explaining the mediated settlement conference process and the operations of the Commission.

(7) Evaluation Forms. At the mediated settlement conference, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per party with additional copies distributed upon request. The evaluation is intended for purpose of self-improvement and the mediator shall review returned evaluation forms.

RULE 7. COMPENSATION OF THE MEDIATOR AND SANCTIONS

A. BY AGREEMENT. When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator.

B. BY COURT ORDER. When the mediator is appointed by the Court, the parties shall compensate the mediator for media-

tion services at the rate of $125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $125, which accrues upon appointment and shall be paid if the case settles prior to the mediated settlement conference or if the court approves the substitution of a mediator selected by the parties for a court appointed mediator.

C. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the parties or ordered by the Court, the mediator's fee shall be paid in equal shares by the parties. Payment shall be due and payable upon completion of the conference.

D. INABILITY TO PAY. No party found by the Court to be unable to pay a full share of a mediator's fee shall be required to pay a full share. Any party required to pay a share of a mediator fee pursuant to Rule 7.B. and C. may move the Court to pay according to the Court's determination of that party's ability to pay.

In ruling on such motions, the Judge may consider the income and assets of the movant and the outcome of the action. The Court shall enter an order granting or denying the party's motion. In so ordering, the Court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a settlement conference pursuant to these rules shall accept as payment in full of a party's share of the mediator's fee that portion paid by or on behalf of the party pursuant to an order of the Court issued pursuant to this rule.

E. POSTPONEMENTS AND FEES.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for a session of the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A conference session may be postponed by the mediator for good cause beyond the control of the moving participant(s) only after notice by the movant to all parties of the reasons for the postponement and a finding of good cause by the mediator.

(3) Without a finding of good cause, a mediator may also postpone a scheduled conference session with the con-

sent of all parties. A fee of $125 shall be paid to the mediator if the postponement is allowed, or if the request is within five (5) business days of the scheduled date the fee shall be $250. The postponement fee shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

(4) If all parties select or nominate the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

F. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status or the inability to pay his or her full share of the fee to promptly move the Court for a determination of indigency or the inability to pay a full share, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by the court.

DRC COMMENTS TO RULE 7

DRC Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

DRC Comment to Rule 7.C.

If a party is found by the Court to have failed to attend a family financial settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 7.E.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover,

mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rule 7.F.

If the Family Financial Settlement Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. FFS Rule 7.F. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.E. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as family financial mediators. For certification, a person must have complied with the requirements in each of the following sections.

A. Training and Experience.

1. Be an Advanced Practitioner member of the Association for Conflict Resolution who is subject to requirements equivalent to those in effect for Practitioner Members of the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution~~; or~~ and possess a four-year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to January 1, 2005.

2. Be an attorney and/or judge for at least five years who is either:

(a) a member in good standing of the North Carolina State Bar, pursuant to Title 27, N.C. Administrative Code. The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000; or

(b) a member similarly in good standing of the Bar of another state and a graduate of a law school recognized as accredited by the North Carolina Board of Law Examiners; demonstrates familiarity with North

Carolina court structure, legal terminology and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney;

and who has completed either:

(c) a 40 hour family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9; or

(d) a 16 hour supplemental family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9, after having been certified as a Superior Court mediator by that Commission.

B. If not licensed to practice law in one of the United States, have completed a six hour training on North Carolina legal terminology, court structure and civil procedure provided by a trainer certified by the Dispute Resolution Commission; and have observed with the permission of the parties as a neutral observer two mediated settlement conferences ordered by a Superior Court, the North Carolina Office of Administrative Hearings, Industrial Commission or the US District Courts for North Carolina, and conducted by a certified Superior Court mediator.

C. Be a member in good standing of the State Bar of one of the United States as required by Rule 8.A. or have provided to the Dispute Resolution Commission three letters of reference as to the applicant's good character and experience.

D. Have observed with the permission of the parties two mediated settlement conferences as a neutral observer which involve custody or family financial issues and which are conducted by a mediator who is certified pursuant to these rules, who is an Advanced Practitioner Member of the Association for Conflict Resolution and subject to requirements equivalent to those in effect for Practitioner Members of the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution, or who is an A.O.C. mediator.

E. Demonstrate familiarity with the statutes, rules, and standards of practice and conduct governing mediated settlement conferences conducted pursuant to these Rules.

F. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. Applicants for certification and recertification and all certified family financial mediators shall report to the Commission any criminal convictions, disbarments or other disciplinary complaints and actions as soon as the applicant or mediator has notice of them. Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule.

G. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission.

H. Pay all administrative fees established by the Administrative Office of the Court in consultation with the Dispute Resolution Commission.

I. Agree to accept as payment in full of a party's share of the mediator's fee as ordered by the Court pursuant to Rule 7.

Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include advanced divorce mediation training, attendance at conferences or seminars relating to mediation skills or process, and consultation with other family and divorce mediators about cases actually mediated. Mediators seeking recertification beyond one year from the date of initial certification may also be required to demonstrate that they have completed 8 hours of family law training, including tax issues relevant to divorce and property distribution, and 8 hours of training in family dynamics, child development and interpersonal relations at any time prior to that recertification.) Mediators shall report on a Commission approved form.

Certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

Certification of mediators who have been certified as family financial mediators by the Dispute Resolution Commission prior to the adoption of these Rules may not be revoked or not

renewed solely because they do not meet the experience and training requirements in Rule 8.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators certified pursuant to Rule 8.A.2.(c) shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the subjects in each of the following sections:

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques typical of family and divorce mediation.

(3) Communication and information gathering skills.

(4) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct adopted by the Supreme Court.

(5) Statutes, rules, and practice governing mediated settlement conferences conducted pursuant to these Rules.

(6) Demonstrations of mediated settlement conferences with and without attorneys involved.

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty.

(8) An overview of North Carolina law as it applies to custody and visitation of children, equitable distribution, alimony, child support, and post separation support.

(9) An overview of family dynamics, the effect of divorce on children and adults, and child development.

(10) Protocols for the screening of cases for issues of domestic violence and substance abuse.

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing family financial settlement procedures in North Carolina.

B. Certified training programs for mediators certified pursuant to Rule 8.A.2.(d) shall consist of a minimum of sixteen hours

of instruction. The curriculum of such programs shall include the subjects listed in Rule 9.A. There shall be at least two simulations as specified in subsection (7).

C. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states or approved by the Association for Conflict Resolution (ACR) with requirements equivalent to those in effect for the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule. The Dispute Resolution Commission may require attendees of an ACR approved program to demonstrate compliance with the requirements of Rule 9.A.(5) and 9.A.(8). either in the ACR approved training or in some other acceptable course.

D. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES.

Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Court may order the use of those procedures listed in Rule 10.B. unless the Court finds: that the parties did not agree upon the procedure to be utilized, the neutral to conduct it, or the neutral's compensation; or that the procedure selected is not appropriate for the case or the parties. Judicial settlement conferences may be ordered only if permitted by local rule.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES.

In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) Neutral Evaluation (Rule 11), in which a neutral offers an advisory evaluation of the case following summary presentations by each party.

(2) Judicial Settlement Conference (Rule 12), in which a District Court Judge assists the parties in reaching their own settlement, if allowed by local rules.

(3) Other Settlement Procedures described and authorized by local rule pursuant to Rule 13.

The parties may agree to use arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq.) which shall constitute good cause for the court to dispense with settlement procedures authorized by these rules (Rule 1.C.6).

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) When Proceeding is Conducted. The neutral shall schedule the conference and conduct it no later than 150 days from the issuance of the Court's order or no later than the deadline for completion set out in the Court's order, unless extended by the Court. The neutral shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the neutral shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(2) Extensions of Time. A party or a neutral may request the Court to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. The Court may grant the extension and enter an order setting a new deadline for completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(3) Where Procedure is Conducted. Settlement proceedings shall be held in any location agreeable to the parties. If the parties cannot agree to a location, the neutral shall be responsible for reserving a neutral place and making arrangements for the conference and for giving

timely notice of the time and location of the conference to all attorneys and pro se parties.

(4) No Delay of Other Proceedings. Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

(5) Inadmissibility of Settlement Proceedings. Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

(a) ~~i~~In proceedings for sanctions under this section;

(b) ~~or~~ In proceedings to enforce or rescind a settlement of the action.~~:~~;

(c) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or others neutrals,; or

(d) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this subsection, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at ~~a settlement conference or settlement~~ the proceeding conducted under this section or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties and in all other respects complies with the requirements of Chapter 50 of the General Statutes. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, ~~or other neutral conducting a settlement procedure~~ other neutral, or neutral observer present at a settlement proceeding under this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement ~~procedure~~ proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any ~~of these~~ agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators~~,~~ or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(6) No Record Made. There shall be no stenographic or other record made of any proceedings under these Rules.

(7) Ex Parte Communication Prohibited. Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(8) Duties of the Parties.

(a) Attendance. All parties and attorneys shall attend other settlement procedures authorized by Rule 10 and ordered by the Court.

(b) Finalizing Agreement.

(i) If agreement is reached on all issues at the neutral evaluation, judicial settlement conference, or other settlement procedure, the essential terms of the agreement shall be reduced to writing as a summary memorandum unless the parties have reduced their agreement to writing, signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary

memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to its terms. Within thirty (30) days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate.

(ii) If an agreement is reached upon all issues prior to the neutral evaluation, judicial settlement conference, or other settlement procedure or finalized while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel, shall comply in all respects with the requirements of Chapter 50 of the General Statutes, and shall file a consent judgment or voluntary dismissals(s) disposing of all issues with the Court within thirty (30) days, or before the expiration of the deadline for completion of the proceeding, whichever is longer.

(iii) When a case is settled upon all issues, all attorneys of record must notify the Court within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s), *and when*.

(c) Payment of Neutral's Fee. The parties shall pay the neutral's fee as provided by Rule 10.C.(12), except that no payment shall be required or paid for a judicial settlement conference.

(9) Sanctions for Failure to Attend Other Settlement Procedures. If any person required to attend a settlement proceeding fails to attend without good cause, the Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, neutral fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action, or the Court on its own motion, seeking sanctions against a party or attorney, shall do so in a written motion stating the grounds for the motion

and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

(10) Selection of Neutrals in Other Settlement Procedures.

Selection By Agreement. The parties may select any person whom they believe can assist them with the settlement of their case to serve as a neutral in any settlement procedure authorized by these rules, except for judicial settlement conferences.

Notice of such selection shall be given to the Court and to the neutral through the filing of a motion to authorize the use of other settlement procedures at the scheduling conference or the court appearance when settlement procedures are considered by the Court. The notice shall be on an AOC form as set out in Rule 2 herein. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

If the parties are unable to select a neutral by agreement, then the Court shall deny the motion for authorization to use another settlement procedure and the court shall order the parties to attend a mediated settlement conference.

(11) Disqualification of Neutrals. Any party may move a Court of the district in which an action is pending for an order disqualifying the neutral; and, for good cause, such order shall be entered. Cause shall exist, but is not limited to circumstances where, if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) Compensation of Neutrals. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding, and making and reporting the award

shall be compensable time. The parties shall not compensate a settlement judge.

(13) Authority and Duties of Neutrals.

(a) Authority of Neutrals.

(i) Control of Proceeding. The neutral shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the Proceeding. The neutral shall make a good faith effort to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral. In the absence of agreement, the neutral shall select the date and time for the proceeding. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(b) Duties of Neutrals.

(i) The neutral shall define and describe the following at the beginning of the proceeding:

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(l) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral and the participants.

(ii) Disclosure. The neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(iii) Reporting Results of the Proceeding. The neutral evaluator, settlement judge, or other neutral shall report the result of the proceeding to the Court in writing within ten (10) days in accordance with the provisions of Rules 11 and 12 herein on an AOC form.

The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the neutral to provide statistical data for evaluation of other settlement procedures.

(iv) Scheduling and Holding the Proceeding. It is the duty of the neutral to schedule the proceeding and conduct it prior to the completion deadline set out in the Court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral unless said time limit is changed by a written order of the Court.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. NATURE OF NEUTRAL EVALUATION. Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of the merits of the case, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case, after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. PRE-CONFERENCE SUBMISSIONS. No later than twenty (20) days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than ten (10) days prior to the date established for the neutral evaluation conference to begin, any party may, but is not required to, send additional written information to the evaluator responding to the submission of an opposing party. The response furnished to the evaluator shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator, if he or she deems it necessary, may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) Evaluator's Opening Statement. At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

(2) Oral Report to Parties by Evaluator. In addition to the written report to the Court required under these rules, at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of the merits of the case, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefor. The evaluator shall not reduce his or her oral report to writing and shall not inform the Court thereof.

(3) Report of Evaluator to Court. Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, and the names of any party or attorney known to the evaluator to have been absent from the neutral evaluation without permission. The report shall also inform the court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the evaluation conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state the name of the person(s) designated to file the consent judgment or voluntary dismissals with the court. Local rules shall not require the evaluator to send a copy of any agreement reached by the parties to the court.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties at the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions. If the parties do not reach a settlement during such discussions, however, the evaluator shall complete the neutral evaluation conference and make his or her written report to the Court as if such settlement discussions had not occurred. If the parties reach agreement at the conference, they shall reduce their agreement to writing as required by Rule 10.C.(8)(b).

RULE 12. JUDICIAL SETTLEMENT CONFERENCE

A. Settlement Judge. A judicial settlement conference shall be conducted by a District Court Judge who shall be selected by the Chief District Court Judge. Unless specifically approved by the Chief District Court Judge, the District Court Judge who presides over the judicial settlement conference shall not be assigned to try the action if it proceeds to trial.

B. Conducting the Conference. The form and manner of conducting the conference shall be in the discretion of the settlement judge. The settlement judge may not impose a settlement on the parties but will assist the parties in reaching a resolution of all claims.

C. Confidential Nature of the Conference. Judicial settlement conferences shall be conducted in private. No stenographic or other record may be made of the conference.

Persons other than the parties and their counsel may attend only with the consent of all parties. The settlement judge will not communicate with anyone the communications made during the conference, except that the judge may report that a settlement was reached and, with the parties' consent, the terms of that settlement.

D. Report of Judge. Within ten (10) days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, and the names of any party or attorney known to the settlement judge to have been absent from the settlement conference without permission. The report shall also inform the court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the settlement conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state the name of the person(s) designated to file the consent judgment or voluntary dismissals with the court. Local rules shall not require the settlement judge to send a copy of any agreement reached by the parties to the court.

RULE 13. LOCAL RULE MAKING

The Chief District Court Judge of any district conducting settlement procedures under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.4, implementing settlement procedures in that district.

RULE 14. DEFINITIONS

A. The word, Court, shall mean a judge of the District Court in the district in which an action is pending who has administrative responsibility for the action as an assigned or presiding judge, or said judge's designee, such as a clerk, trial court administrator, case management assistant, judicial assistant, and trial court coordinator.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by AOC. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

C. The term, Family Financial Case, shall refer to any civil action in district court in which a claim for equitable distribution, child support, alimony, or post separation support is made, or in which there are claims arising out of contracts between the parties under GS 50-20(d), 52-10, 52-10.1 or 52B.

RULE 15. TIME LIMITS

Any time limit provided for by these rules may be waived or extended for good cause shown. Time shall be counted pursuant to the Rules of Civil Procedure.

Order Adopting Rules Implementing Mediated Settlement Conferences in Territorial Disputes Between Certain Electric Suppliers

WHEREAS, section 7A-38.3C of the North Carolina General Statutes provides for a system of mediated settlement conferences to facilitate the settlement of disputes between electric membership corporations and municipalities that own, operate, and maintain electric systems, and

WHEREAS, N.C.G.S. § 7A-38.3C(f) enables this Court to implement section 7A-38.3C by adopting rules implementing said mediated settlement conferences.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3C(f), Rules Implementing Mediated Settlement Conferences in Territorial Disputes Between Certain Electric Suppliers are hereby adopted to read as in the following pages. These Rules shall be effective on the 1st of March, 2006.

Adopted by the Court in conference the 26th day of January, 2006. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules Implementing Mediated Settlement Conferences in Territorial Disputes Between Certain Electric Suppliers through this action in the advance sheets of the Supreme Court.

Newby, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING THE ELECTRIC SUPPLIER TERRITORIAL DISPUTE MEDIATION PROGRAM

RULE 1. SUBMISSION OF DISPUTE TO ELECTRIC SUPPLIER TERRITORIAL DISPUTE MEDIATION.

A. Mediation shall be initiated by the filing of a Request for Electric Supplier Mediation of Territorial Dispute (Request) with the Clerk of Superior Court in a county in which an action may have been brought but for the provisions of G.S.7A-38.3C[1]. The Request shall be on a form prescribed by the Administrative Office of the Courts and be available through the Clerk of Superior Court. The party filing the Request shall mail a copy of the Request by certified mail, return receipt requested, to each party to the dispute. Copies of the Request

1. Enacted as G.S. 7A-38.3B, but codfied as G.S. 7A38.3C.

also shall be filed with the North Carolina Utilities Commission and served on the Executive Director of the Public Staff of the North Carolina Utilities Commission.

B. The Clerk of Superior Court shall file the Request and shall open a Special Proceeding under the name of the requesting party. The provisions set forth herein in Rules 1 through 10 shall apply to all Electric Supplier Territorial Dispute Mediations in lieu of any other rules applicable to Special Proceedings.

RULE 2. EXEMPTION FROM G.S. 7A-38.1.

A dispute mediated pursuant to G.S. 7A-38.3C shall be exempt from an order referring the dispute to a mediated settlement conference entered pursuant to G.S. 7A-38.1 should a voluntary or mandatory mediation be unsuccessful.

RULE 3. SELECTION OF MEDIATOR.

A. Time period for selection.

The parties to the dispute shall have seven (7) days from the date of the filing of the Request to select by agreement a mediator to conduct their mediation and to file a Notice of Selection of Mediator by Agreement.

B. Selection of certified mediator by agreement.

The Clerk shall make available to each party to the dispute named in the Request a list of mediators certified by the Dispute Resolution Commission to conduct mediated settlement conferences in Superior Court civil actions. If the parties are able to agree in writing on a mediator from that list to conduct their mediation, the party who filed the Request shall notify the Clerk by filing with the Clerk a Notice of Selection of Mediator by Agreement and the Clerk shall appoint the mediator selected by the parties. Such notice shall state the name, address and telephone number of the certified mediator selected; state the rate of compensation to be paid the mediator; and state that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation. The notice shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the Clerk of Superior Court in the county in which the Request was filed.

C. Court appointment of mediator.

If the parties to the dispute cannot agree on selection of a mediator within the required time period, the party who filed the Request shall file with the Clerk a Motion for Court Appointment of Mediator

and the Senior Resident Superior Court Judge shall appoint a certified mediator. The Motion shall be filed with the Clerk within 10 days of the date of the filing of the Request. The motion shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the Clerk of Superior Court in the county in which the Request was filed.

D. Mediator information directory.

To assist parties in learning more about the qualifications and experience of mediators, the Clerk of Superior Court in the county in which the Request was filed shall make available to the disputing parties named in the Request a central directory of information on all persons certified to conduct mediated settlement conferences in Superior Court civil actions who wish to mediate cases in that county, including those who wish to mediate electric supplier territorial disputes. The Dispute Resolution Commission shall be responsible for distributing and updating the directory.

E. Disqualification of mediator.

Any party may move the Senior Resident Superior Court Judge of the district where the mediation is pending for an order disqualifying the mediator, regardless of whether the mediator was selected by agreement or was appointed by the Court. For good cause and after a hearing, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to this Rule 3. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 4. THE ELECTRIC SUPPLIER TERRITORIAL DISPUTE MEDIATION.

A. When mediation is to be completed.

The mediation shall be convened and completed within thirty (30) days of the Notice of Selection of Mediator by Agreement or the date of entry of the order appointing a mediator to conduct the mediation.

B. Extensions.

A party or the mediator may file a motion with the Clerk seeking to extend the 30 day period set forth in subpart A above. Such request shall state the reasons the extension is sought and explain why the mediation cannot be completed within thirty (30) days of the mediator's appointment. The Senior Resident Superior Court Judge may grant the motion by entering a written order establishing a new date, which date shall be not more than thirty (30) days after

the original date for completion of the mediation as provided for in subpart A above.

C. Where the conference is to be held.

Unless all parties and the mediator agree otherwise, the mediation shall be held in the courthouse or other public or community building in the county where the Request was filed. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the date, time and location of the mediation to all parties named in the Request or their attorneys.

D. Recesses.

The mediator may recess the mediation at any time and may set a time for reconvening, except that such time for reconvening shall fall within the original thirty (30) day period provided for in subpart A above, or if extended pursuant to subpart B above, within the sixty (60) day period after the filing of the Notice of Selection of Mediator by Agreement or the date of entry of the order appointing a mediator. No further notification is required for persons present at the recessed mediation session.

E. Duties of parties, attorneys and other participants.

Rule 4 of the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

F. Sanctions for failure to attend.

Rule 5 of the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

RULE 5. AUTHORITY AND DUTIES OF THE MEDIATOR.

A. Authority of mediator.

(1) Control of mediation.

The mediator shall at all times be in control of the mediation and the procedures to be followed. The mediator's conduct is governed by standards of conduct promulgated by the Supreme Court and governing the conduct of persons certified to conduct mediated settlement conferences in Superior Court civil actions.

(2) Private consultation.

The mediator may communicate privately with any participant or counsel prior to and during the mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) Scheduling the conference.

The mediator shall make a good faith effort to schedule the conference at a time that is convenient for the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. Duties of mediator.

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of mediation;

(d) The fact that the mediation is not a trial, the mediator is not a judge and that the parties may not pursue their dispute in court if mediation is not successful because, pursuant to the provisions of G.S. 7A-38.3C(i), it will be decided by a member of the Public Staff of the North Carolina Utilities Commission in a decision that is binding on the parties named in the Request;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether or under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.3C and G.S. 7A-38.1(1);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) Disclosure.

The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) Declaring impasse.

It is the duty of the mediator to determine timely that an impasse exists and that the mediation should end.

(4) Scheduling and holding the conference.

It is the duty of the mediator to schedule the mediation and to conduct it within the time frame established by Rule 4 above. Rule 4 shall be strictly observed by the mediator.

RULE 6. COMPENSATION OF THE MEDIATOR.

A. By agreement.

When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. By court order.

When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $125.00 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of $125.00, which is due upon appointment.

C. Change of appointed mediator.

Pursuant to Rule 3.A., the parties have seven (7) days to select a mediator. Parties who fail to select a mediator within that time frame and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. If the court approves the substitution, the parties shall pay the court's original appointee the $125.00 one time, per case administrative fee provided for in Rule 6.B.

D. Postponements and Fees.

(1) As used herein, the term "postponement" shall mean rescheduling or not proceeding with a mediation conference once a date for a mediation session has been scheduled by the mediator. After a mediation conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A conference session may be postponed by the mediator for good cause beyond the control of the moving participant(s) only after notice by the movant to all parties of the reasons for the postponement and a finding of good cause by the mediator.

(3) Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of $125.00 shall be paid to the mediator if the postponement is allowed, or if the request is within five (5) business days of the scheduled date the fee shall be $250.00. The postponement fee shall be paid by the party requesting the postponement unless otherwise agreed to

between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 6.B.

(4) If all parties select or nominate the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

E. Payment of compensation by parties.

Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties or their counsel. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the mediation. Mediators may be compensated for travel time, mileage, or any other out-of-pocket expenses regardless of whether they are appointed by the court or selected by the parties.

F. Sanctions for failure to pay mediator's fee.

Willful failure of a party or their counsel to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) shall constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by a Resident or Presiding Superior Court Judge.

NOTES:

DRC Comment to Rule 6.D.

Though Rule 6.D. provides that mediators "shall" assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, unexpected and unavoidable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.

Non-essential requests for postponements work a hardship on parties and mediators, and potentially members of the public, and serve only to inject delay into a process and program designed to expedite the resolution of electric supplier territorial disputes. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to

postponements in instances where, in their judgment, the mediation could be held as scheduled, or the public interest likely will be adversely affected.

DRC Comment to Rule 6.E.

If a party is found by a Senior Resident Superior Court Judge to have failed to attend a mediated settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 6.F.

If the Mediated Settlement Conference Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. Rule 6.F. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce agreements as to fees which exceed the caps set forth in 6.B. (hourly fee and administrative fee) and 6.D. (postponement/cancellation fee).

RULE 7. WAIVER OF MEDIATION.

All parties to a territorial dispute, acting jointly, may waive voluntary or mandatory mediation pursuant to N.C. Gen. Stat. § 7A-38.3C by informing the mediator of their waiver in writing. The Waiver of Mediation in Electric Supplier Territorial Disputes shall be on a form prescribed by the Administrative Office of the Courts and available through the Clerk. The party who requested mediation shall be responsible for obtaining the written consent to waiver from all parties named in the Request, and shall file the waiver with the Clerk and mail a copy to the mediator and all parties named in the Request.

RULE 8. MEDIATOR'S CERTIFICATION THAT MEDIATION CONCLUDED.

A. Contents of certification.

Following the conclusion of mediation or the receipt of a joint waiver of mediation signed by all parties named in the Request, the mediator shall prepare a Mediator's Certification in Electric Supplier Territorial Dispute on a form prescribed by the Administrative Office of the Courts. If a mediation conference was convened, the certification shall state the date on which the mediation was concluded by impasse or settlement, and report the general results. If a mediation conference was not held, the certification shall state why the mediation was not held and identify any parties named in the Request who failed to attend or participate in mediation or shall state that all parties waived mediation in writing pursuant to Rule 7 above.

B. Deadline for filing mediator's certification.

The mediator shall file the completed certification with the Clerk within five (5) days of the completion of the mediation, the failure of the mediation to be held or the receipt of a jointly signed waiver of mediation. If the certification reports an impasse, a waiver, or a failure of the mediation to be held, the mediator shall also file, by mail or delivery, a copy of the completed certification with the Clerk of the North Carolina Utilities Commission and serve, by mail or delivery, a copy on the Executive Director of the Public Staff of the North Carolina Utilities Commission within five (5) days of the completion of the mediation, the receipt of the joint waiver, or the failure to hold the mediation within the applicable period of time provided for in Rule 4. The mediator also shall serve a copy of the certification on each of the parties named in the Request.

RULE 9. RESOLUTION OF THE TERRITORIAL DISPUTE BY A MEMBER OF THE PUBLIC STAFF.

A. Nomination or appointment of a member of the Public Staff to hear the territorial dispute.

Within five (5) days of receipt by the Clerk of the North Carolina Utilities Commission of the certification from the mediator reporting an impasse, a waiver, or a failure of the mediation to be held, the parties shall agree on the selection of a member of the Public Staff to hear and decide the territorial dispute (the "Hearing Officer") pursuant to the provisions of G.S. 7A-38.3C(i), file with the Clerk of the North Carolina Utilities Commission a Notice of Selection of Hearing Officer by Agreement, and serve a copy of said Notice on the Executive Director of the Public Staff. In the event the parties do not agree on a member of the Public Staff within such five (5) day period, the Executive Director of the Public Staff shall appoint a member of the Public Staff as the Hearing Officer, and shall file a Notice of Appointment of Hearing Officer with the Clerk of the North Carolina Utilities Commission, who shall serve a copy of said Notice on each of the parties. The Notice of Selection of Hearing Officer and the Notice of Appointment of Hearing Officer shall be on a form prescribed by the Administrative Office of the Courts and be available through the Clerk of Superior Court.

B. Scheduling and location of the hearing.

The Hearing Officer shall make a good faith effort to schedule the hearing at a time that is convenient for the participants, attorneys and the Hearing Officer. In the absence of the agreement of all parties, the

Hearing Officer shall select the date for the hearing. Unless the parties otherwise agree, the location of the hearing shall be at a place in Raleigh, North Carolina designated by the Hearing Officer.

C. Duties of the member of the Public Staff.

(1) The Hearing Officer shall have such powers as are conferred upon arbitrators under Article 45C of Chapter 1 of the General Statutes not inconsistent with the provisions of G.S.§ 7A-38.3C or these Rules. The Hearing Officer shall meet in person or by phone with counsel for the parties at least five (5) working days before the hearing is scheduled to convene to determine the procedures that will be followed in the hearing and the remainder of the proceeding. The Hearing Officer also shall define and describe the following at the beginning of the hearing:

(a) The procedure to be followed at the hearing;

(b) The fact that the Hearing Officer will make a decision that will be binding on the participants; and

(c) The time allotted to each party to present its position on the territorial dispute and the extent to which the Hearing Officer will review documentation or other evidence submitted by the parties.

(2) Disclosure.

The Hearing Officer has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) Issuance of a binding opinion.

It shall be the duty of the Hearing Officer to issue a written opinion resolving the territorial dispute as soon as practicable, but not later than forty-five (45) days of receipt by the Clerk of the Utilities Commission of the certification from the mediator. The opinion issued by the Hearing Officer shall be binding on the participants.

(4) Written opinion of the Hearing Officer.

The Hearing Officer shall prepare a written opinion resolving the territorial dispute, file it with the Clerk of Superior Court in the county in which the Request was filed, file it with the Clerk of the North Carolina Utilities Commission, and deliver it to all of the participants and their counsel.

(5) Modification or correction and enforcement of the opinion.

The opinion of the Hearing Officer shall be considered in the nature of an arbitration award and may be modified or corrected

and enforced only in the manner of an arbitrator's award under G.S. 1-569.24 and 1-569.25.

RULE 10. CERTIFICATION AND DECERTIFICATION OF MEDIATORS OF ELECTRIC SUPPLIER TERRITORIAL DISPUTES.

Mediators who conduct mediation of Electric Supplier Territorial Disputes shall be subject to all rules and regulations regarding certification, conduct, discipline and decertification applicable to mediators serving the Mediated Settlement Conferences Program and any such additional rules and regulations as adopted by the Dispute Resolution Commission and applicable to mediators certified to conduct mediated settlement conferences in Superior Court civil actions.

RULE 11. CERTIFICATION OF MEDIATION TRAINING PROGRAMS.

The Dispute Resolution Commission may specify a curriculum for an Electric Supplier Territorial Dispute Mediation training program and may set qualifications for trainers.

Order Adopting Amendments to the Rules of the North Carolina Supreme Court For The Dispute Resolution Commission

WHEREAS, section § 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission to provide for the certification and qualification of mediators, other neutrals, and mediation and other neutral training programs and the regulation of mediators, other neutrals, and trainers and managers affiliated with certified or qualified programs, and

WHEREAS, N.C.G.S. § 7A-38.2(a) provides for this Court to implement section 7A-38.2 by adopting rules,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(a), Rules of the North Carolina Supreme Court For The Dispute Resolution Commission and are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st of March, 2006.

Adopted by the Court in conference the 26th day of January, 2006. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules of the North Carolina Supreme Court For The Dispute Resolution Commission amended through this action in the advance sheets of the Supreme Court.

Newby, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT FOR THE DISPUTE RESOLUTION COMMISSION

I. OFFICERS OF THE COMMISSION.

A. Officers. The Commission shall establish the offices of Chair, Vice-Chair, and Secretary/Treasurer.

B. Appointment; Elections.

1. The Chair shall be appointed for a two year term and shall serve at the pleasure of the Chief Justice of the North Carolina Supreme Court.

2. The Vice-Chair and Secretary/Treasurer shall be elected by vote of the full Commission and shall serve two year terms.

C. Committees.

1. The Chair may appoint such standing and *ad hoc* committees as are needed and designate Commission members to serve as committee chairs.

2. The Chair may, with approval of the full Commission, appoint ex-officio members to serve on either standing or *ad hoc* committees. Ex-officio members may vote upon issues before committees but not upon issues before the Commission.

II. COMMISSION OFFICE; STAFF.

A. Office. The Chair, in consultation with the Director of the Administrative Office of the Courts, is authorized to establish and maintain an office for the conduct of Commission business.

B. Staff. The Chair, in consultation with the Director of the Administrative Office of the Courts, is authorized to appoint an Executive Secretary and to: (1) fix his or her terms of employment, salary, and benefits; (2) determine the scope of his or her authority and duties and (3) delegate to the Executive Secretary the authority to employ necessary secretarial and staff assistants, with the approval of the Director of the Administrative Office of the Courts.

III. COMMISSION MEMBERSHIP.

A. Vacancies. Upon the death, resignation or permanent incapacitation of a member of the Commission, the Chair shall notify the appointing authority and request that the vacancy created by the death, resignation or permanent incapacitation be filled. The appointment of a successor shall be for the former member's unexpired term.

B. Disqualifications. If, for any reason, a Commission member becomes disqualified to serve, that member's appointing authority shall be notified and requested to take appropriate action. If a member resigns or is removed, the appointment of a successor shall be for the former member's unexpired term.

C. Conflicts of Interest and Recusals. All members and ex-officio members of the Commission must:

1. Disclose any present or prior interest or involvement in any matter pending before the Commission or its committees for decision upon which the member or ex-officio member is entitled to vote.

2. Recuse himself or herself from voting on any such matter if his or her impartiality might reasonably be questioned; and

3. Continue to inform themselves and to make disclosures of subsequent facts and circumstances requiring recusal.

D. Compensation. Pursuant to N. C. Gen. Stat. § 138-5, ex-officio members of the Commission shall receive no compensation for their services but may be reimbursed for their out-of-pocket expenses necessarily incurred on behalf of the Commission and for their mileage, subsistence and other travel expenses at the per diem rate established by statutes and regulations applicable to state boards and commissions.

IV. MEETINGS OF THE COMMISSION.

A. Meeting Schedule. The Commission shall meet at least twice each year pursuant to a schedule set by the Commission and in special sessions at the call of the Chair or other officer acting for the Chair.

B. Quorum. A majority of Commission members shall constitute a quorum. Decisions shall be ma~~k~~de by a majority of the members present and voting except that decisions to dismiss complaints or impose sanctions ~~discipline or decertify a mediator or mediator training program~~ pursuant to Rule VIII of these Rules or to deny certification or certification renewal or to revoke certification pursuant to Rule IX of these Rules shall require an affirmative vote ~~of 8 members~~ consistent with those Rules.

C. Public Meetings. All meetings of the Commission for the general conduct of business and minutes of such meetings shall be open and available to the public except that meetings, ~~or~~ portions of meetings or hearings ~~involving potentially adverse actions against mediators or mediation training programs may be treated as confidential~~ conducted pursuant to Rules VIII and IX of these Rules may be closed to the public in accordance with those Rules.

D. Matters Requiring Immediate Action. If, in the opinion of the Chair, any matter requires a decision or other action before the next regular meeting of the Commission and does not warrant the call of a special meeting, it may be considered and a vote or other action taken by correspondence, telephone, facsimile, or other practicable method; provided, all formal Commission decisions taken are reported to the Executive Secretary and included in the minutes of Commission proceedings.

V. COMMISSION'S BUDGET.

The Commission, in consultation with the Director of the Administrative Office of the Courts, shall prepare an annual budget. The budget and supporting financial information shall be public records.

VI. POWERS AND DUTIES OF THE COMMISSION.

The Commission shall have the authority to undertake activities to expand public awareness of dispute resolution procedures, to foster growth of dispute resolution services in this State and to ensure the availability of high quality mediation training programs and the competence of mediators. Specifically, the Commission is authorized and directed to do the following:

A. Review and approve or disapprove applications of (1) persons seeking to have training programs certified; (2) persons seeking certification as qualified to provide mediation training; (3) attorneys and non-attorneys seeking certification as qualified to conduct mediated settlement conferences and (4) persons or organizations seeking reinstatement following a prior suspension or decertification.

B. Review applications as against criteria for certification set forth in the *Rules Implementing Mediated Settlement Conferences* (*Rules*) and as against such other requirements of the North Carolina Supreme Court Dispute Resolution Commission or the Commission which amplify and clarify those *Rules*. The Commission may adopt application forms and require their completion for approval.

C. Compile and maintain lists of certified trainers and training programs along with the names of contact persons, addresses, and telephone numbers and make those lists available upon request.

D. Institute periodic review of training programs and trainer qualifications and re-certify trainers and training programs that continue to meet criteria for certification. Trainers and training programs that are not re-certified, shall be removed from the lists of certified trainers and certified training programs.

E. Compile and keep current a list of certified mediators, which specifies the judicial districts in which each mediator wishes to practice. Periodically disseminate copies of that list to each judicial district with a mediated settlement conferences pro-

gram, and make the list available upon request to any attorney, organization, or member of the public seeking it.

F. Prepare and keep current biographical information on certified mediators who wish to appear in the Mediator Information Directory contemplated in the *Rules.* Periodically disseminate updated biographical information to Senior Resident Superior Court Judges, in districts in which mediators wish to serve, and

G. Make reasonable efforts on a continuing basis to ensure that the judiciary, clerks of court, court administration personnel; attorneys; and to the extent feasible, parties to mediation, are aware of the Commission and its office and the Commission's duty to receive and hear complaints against mediators and mediation trainers and training programs.

VII. MEDIATOR CONDUCT.

The conduct of all mediators, mediation trainers and managers of mediation training programs must conform to the Standards of Professional Conduct for Mediators adopted by the ~~Commission~~ Supreme Court and enforceable by the Commission and the standards of any professional organization of which such person is a member that are not in conflict nor inconsistent with the ~~Commission's~~ Standards. A certified mediator shall inform the Commission of any criminal conviction, any complaint filed against or disciplinary action imposed upon the mediator by any other professional organization, or any judicial sanction. Failure to do so is a violation of these Rules. Violations of the ~~Commission's~~ Standards or other professional standards or any conduct otherwise discovered reflecting a lack of moral character or fitness to conduct mediations or which discredits the Commission, the courts or the mediation process may subject a mediator to disciplinary proceedings by the Commission. ~~The Commission may, through a standing committee, render advisory opinions on questions of ethics submitted by certified mediators.~~

~~VIII. COMPLAINT AND HEARING PROCEDURES~~

~~A. Initiation of Complaints.~~

~~1. By the Commission. Any member of the Commission or its Executive Secretary may bring to the attention of the full Commission any matter concerning the character, conduct or fitness to practice as a mediator or any matter concerning a certified mediation training program. The Commission may authorize the Executive Secretary to conduct an inquiry, including gathering information and interviewing persons. The Executive Secretary shall seek to resolve the matter in~~

~~a manner acceptable to all parties. After reviewing the report of the Executive Secretary, the Commission may authorize a complaint against a mediator, trainer or training program. The Chair of the Commission shall appoint a panel to conduct a hearing if a complaint is filed. Such hearing shall be conducted in accordance with procedures set forth in subsection D.~~

~~2. By a Citizen~~ Any person, including mediation participants, attorneys for participants, and interested third parties such as insurance company representatives, may file with the Commission a complaint involving the character, conduct or the fitness to practice of a mediator. Any person, including a training program participant, may file a complaint with the Commission against a certified mediation training program or against any individual responsible for conducting, administering or promoting such a training program.

~~B.~~ **Form.**

~~All complaints shall be reduced to writing on a form approved by the Commission.~~

~~C.~~ **Preliminary Inquiry; Resolution; Action.**

~~1. The Executive Secretary of the Commission shall seek to resolve the issues raised by complaints authorized by subsection A.(2), through contacts with the complaining party, the mediator, trainer, representative of the training program or others. The Executive Secretary may consult with the chair or any member of the Commission for guidance or assistance in the informal resolution of complaints. In the event the Executive Secretary is unable to resolve a complaint in a manner acceptable to all parties, the Executive Secretary shall forward a copy of the complaint and the written results of any investigation to the Chair for further consideration.~~

~~2. The Chair or a member of the Commission appointed by the Chair shall determine whether a formal hearing is warranted or what other means or procedures should be followed to resolve the issues raised by the complaint.~~

~~**D. Hearings.**~~

~~1. Hearing Panel. If a hearing is to be held, the Chair of the Commission shall appoint a panel of three Commissioners to conduct the hearing. The three Commissioners appointed shall make such disclosures as required by Section III.C. The panel shall elect one of its members to serve as Chair.~~

~~2. Notice. The Executive Secretary shall serve a copy of the written complaint on all parties along with notice of a date, time, location~~

~~of the hearing and the names of panel members appointed to conduct the hearing. The hearing shall be held within sixty (60) days after the date notice is served.~~

~~3. Challenges. Any challenge to the membership of the panel shall be addressed to the Chair who shall take appropriate action.~~

~~4. Response. Within twenty (20) days after service of the complaint and notice of hearing, the person(s) or organization(s) that are the subject(s) of the complaint (designated as "respondents"), may file a written response, by hand delivery or registered or certified mail, with the Executive Secretary at the office established by the Commission. The Chair of the Commission and the Chair of the panel may grant an extension of time for response for an additional ten (10) days if good cause therefor is shown in a written application filed within the twenty (20) days allowed for response. Failure to file a timely response may be considered by the hearing panel.~~

~~E.~~ **Hearing Procedures.**

~~1. By appointment with the Executive Secretary, parties may examine all relevant documents and evidence in the Commission office prior to the hearing. With the approval of the Executive Secretary, copies of relevant documents and evidence may be mailed to a requesting party or parties.~~

~~2. The specific procedure to be followed in a hearing shall be determined by the panel with the primary objective being a just, fair and prompt resolution of all issues raised in a complaint. The Rules of Evidence shall be relied on as a guide to that end but need not be considered binding. The panel shall be the judge of the relevance and materiality and weight of the evidence offered.~~

~~3. Neither the complainant nor any party shall have any *ex parte* communications with the members of the panel, except with respect to scheduling matters.~~

~~4. The panel may, in special circumstances and for good cause (especially, when there is no objection), permit an attorney to represent a party by telephone or receive evidence by telephone with such limitations and conditions as it may find just and reasonable.~~

~~5. No official transcript of the proceedings need be made. The panel may permit any party to record a hearing in any manner that does not interfere with the proceeding.~~

~~6. If the complainant fails to appear at a hearing or provide evidence in support of the complaint, it may be dismissed for want of prosecution and reinstated only on a showing of good cause for the default.~~

~~7. If a person or organization, the subject of a complaint, fails to appear at a scheduled hearing or to participate in good faith or to otherwise respond, the panel may proceed to a decision on the evidence before it.~~

~~F. **Panel Decision.**~~

~~1. A panel may dismiss a complaint at any point in the proceedings and file a written report stating the reason for the dismissal.~~

~~2. If after a hearing, a majority of the panel finds there is substantial and competent evidence to support the imposition of sanctions against a mediator or any person or organization, the panel may recommend to the full Commission imposition of one or more appropriate sanctions, including the following:~~

~~a. written admonishment;~~

~~b. additional training to be completed;~~

~~c. restriction on types of cases to be mediated in the future;~~

~~d. suspension for a specified term;~~

~~e. decertification; or~~

~~f. imposition of costs of the proceeding.~~

~~3. If there is a finding that the complaint was frivolous or made with the intent to vex or harass the person or training program complained about, the Commission may assess costs of the proceeding against a complaining party.~~

~~4. The Chair of the panel shall promptly forward a written report of the panel's decision and recommendation, if any, to the Executive Secretary who shall, in turn, mail copies to the Chair and to the parties by registered or certified mail.~~

VIII. INVESTIGATION AND REVIEW OF MATTERS OF ETHICAL CONDUCT, CHARACTER, AND FITNESS TO PRACTICE; CONDUCT OF HEARINGS; SANCTIONS.

A. Establishment of the Standing Committee on Standards, Discipline, and Advisory Opinions.

1. **Establishment of Committee.** The Chair of the Commission shall appoint a standing Committee on Standards, Discipline, and Advisory Opinions (Committee) to review the matters set forth in Section 2 below. Members of the Committee shall recuse themselves from deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest.

2. Matters to Be Considered by Committee. The Committee shall review and consider the following matters:

a. appeals of staff decisions to deny an application filed by a person seeking certification as a mediator or filed by a person seeking recertification as a mediator based upon the person's conduct, character, or fitness to practice;

b. appeals of staff decisions to deny an application filed by a person or entity seeking certification or recertification as a mediator training program based upon the person's conduct, character, or fitness to practice or that of a trainer or program manager of the mediator training program;

c. complaints which are filed by a member of the Commission, its staff, or any member of the public about a mediator, an applicant for mediator certification or renewal of certification, a mediation trainer, or a mediator training program manager (affected person) based upon the affected person's conduct, character, or fitness to practice; and

d. the drafting of advisory opinions pursuant to the Commission's Advisory Opinion Policy.

3. The Investigation of Violations of the Standards of Conduct.

a. Information obtained during the process of certification or renewal. Commission staff shall review all pending grievances, disciplinary matters, judicial sanctions, and convictions reported by certified mediators, by applicants for mediator certification or certification renewal and by trainers or managers affiliated with mediator training programs applying for certification or certification renewal. Commission staff may contact those reporting to request additional information and may consider any other information acquired during the investigation process that bears on the applicant, mediator, or training program's eligibility for certification or certification renewal. Staff shall forward all such matters of eligibility to the Committee for review except those matters expressly exempted from review by the *Guidelines for Reviewing Pending Grievances/Complaints, Disciplinary Actions Taken*

and Convictions (Guidelines) adopted by the Committee and approved by the Commission.

b. Complaints of mediator misconduct filed with the Commission. The staff of the Commission shall forward written complaints about the conduct of an applicant, mediator, trainer, or training program manager filed by any member of the general public, the Commission, or its staff to the committee for investigation. Copies of such complaints shall be forwarded by certified U.S. mail, return receipt requested, to the affected person.

However, in instances where Commission staff believes a complaint to be wholly without merit, the Executive Director shall refer the matter to the committee's chair rather than to the committee as set forth above. If after giving the complaint due consideration, the chair also believes that the complaint is wholly without merit, the complaint shall be dismissed with notification to the complaining party. The complaining party shall have thirty (30) days from the date of notification to appeal the chair's determination to the full Committee on Standards, Discipline, and Advisory Opinions.

c. Investigation by the Standing Committee. The Committee shall investigate all matters brought before it by staff pursuant to the provisions of subsection a. or b. and may contact the following persons and entities for information concerning such application or complaint: the affected person or applicant, State Bar officials, officials of other professional licensing bodies to whom the affected person is subject, parties or other individuals who brought complaints against the mediator or applicant, court officials, and any other person or entity who may have additional information about the matters reported or facts alleged. The Chair or his/her designee may issue subpoenas for the attendance of witnesses and for the production of books, papers, or other documentary evidence deemed necessary or material to any such investigation.

All information in Commission files pertaining to the initial certification of a mediator or mediation training program or renewals of such certifications, to requests for informal or formal guidance from the Commission

pursuant to the Advisory Opinion Policy, and to pending complaints shall be confidential.

d. Probable Cause Determination. The Committee on Standards, Discipline, and Advisory Opinions shall deliberate to determine whether probable cause exists to believe that the conduct of the affected person or applicant:

i) is inconsistent with good moral character (MSC Rule 8.E., FFS Rule 8.F. and Rule VII above);

ii) is a violation of the Supreme Court's Standards of Professional Conduct for Mediators or any other standards of professional conduct that are not in conflict with nor inconsistent with the Supreme Court's Standards and to which the mediator, applicant, trainer, or manager is subject (Rule VII above);

iii) is a violation of the rules for the Mediated Settlement Conference, Family Financial Settlement, or Pre-litigation Farm Nuisance Mediation Programs;

iv) is a violation of MSC Rule 9 or FFS Rule 9 or guidelines and other policies adopted by the Commission that amplify those rules;

v) reflects a lack of fitness to conduct mediations or to serve as a trainer or training program manager and/or (Rule VII above); or

vi) discredits the Commission, the courts, or the mediation process (Rule VII above).

If there is a finding of probable cause, that the affected person or applicant shall be sanctioned pursuant to these rules.

4. Authority of Committee to Dismiss Complaints or Propose Sanctions.

a. If a majority of Committee members reviewing a matter finds no probable cause pursuant to Section A.3.d. above, Commission staff shall certify or recertify the affected person or applicant without conditions or, if the investigation were initiated by the filing of a written complaint, shall dismiss the complaint and notify the complaining party and the affected person by certi-

fied U.S. mail, return receipt requested, that no further action will be taken and that the matter is dismissed. There shall be no right of appeal from the Committee's decision to dismiss a complaint or certify an affected person or applicant.

b. If a majority of Committee members reviewing a matter finds probable cause pursuant to Section A.3.d. above, the Committee shall propose sanctions on the affected person or applicant as set forth in Section B.10. of these rules, except that if the Committee determines that the violation of the Standards or rules is technical or minor in nature, that the complaining party was not significantly harmed and that the Commission, courts or programs were not discredited, the Committee may elect to caution the affected person or applicant rather than imposing sanctions. The Committee's findings, conclusions, and proposed sanctions or any letter of caution shall be in writing and forwarded to the affected person or applicant by U.S. mail, return receipt requested.

c. If sanctions are proposed, the affected person or applicant may appeal the findings and/or proposed sanctions to the Commission within thirty (30) days from the date of the letter transmitting the Committee's findings and its proposed sanctions. Notification of appeal must be in writing. If no appeal is filed within thirty (30) days, the affected person or applicant shall be deemed to have accepted the Committee's findings and proposed sanctions and said sanctions shall commence.

5. Disputes Between Mediators and Complainants. Commission staff may attempt to resolve any disputes between a complaining party and an affected person in which the conduct of the affected person does not constitute a violation of the grounds set out in Section A.3.d. above.

B. Appeal to the Commission.

1. The Commission Shall Meet to Consider Appeals. An appeal of the Committee's determination pursuant to Section A.3.d. above shall be heard by the members of the Commission, except that all members of the Committee who participated in issuing the determination that is on

appeal shall be recused and shall not participate in the Commission's deliberations. No matter shall be heard and decided by less than three Commission members. Members of the Commission shall recuse themselves when they cannot act impartially. Any challenges raised by the appealing party or any other party questioning the neutrality of a member shall be decided by the Commission's chair.

2. Conduct of the Hearing.

a. At least thirty (30) days prior to the hearing before the Commission, Commission staff shall forward to all parties, special counsel to the Commission, and members of the Commission who will hear the matter, copies of all documents considered by the Committee and summaries of witness interviews and/or character recommendations.

b. Hearings conducted by the Commission pursuant to this rule shall be a *de novo* review of the Committee's decision.

c. Complainants, applicants, and affected persons may appear at the hearing with or without counsel.

d. All hearings will be open to the public except that for good cause shown the presiding officer may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing will be closed to the public over the objection of an applicant or affected person.

e. In the event that the complainant, affected person, or applicant fails to appear without good cause, the Commission shall proceed to hear from those parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.

f. Proceedings before the Commission shall be conducted informally but with decorum.

g. The Commission, through its counsel, and the applicant or affected person may present evidence in the form of sworn testimony and/or written documents. The Commission, through its counsel, and the applicant or affected person may cross-examine any witness called to testify by the other. Commission members may ques-

tion any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The Commission shall consider all evidence presented and give it appropriate weight and effect.

h. The Commission's chair or designee shall serve as the presiding officer. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and speedy investigation and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers, or other documentary evidence.

3. Date of Hearing. An appeal of any sanction proposed by the Committee shall be heard by the Commission within ninety (90) days of the date the sanction is imposed.

4. Notice of Hearing. The Commission's office shall serve on all parties by certified U.S. mail, return receipt requested, notice of the date, time, and place of the hearing no later than sixty (60) days prior to the hearing.

5. *Ex Parte* Communications. No person shall have any *ex parte* communication with members of the Commission concerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to Commission staff.

6. Attendance. All parties, including complaining parties, applicants and parties against whom sanctions are proposed, shall attend in person. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or to allow witnesses to testify by telephone or through video conference with such limitations and conditions as are just and reasonable. If an attorney or witness appears by telephone or video conference, the Commission's staff must be notified at least twenty (20) days prior to the proceeding. At least five (5) days prior to the proceeding, the Commission's staff must be provided with contact information for those who will participate by telephone or video conference.

7. Witnesses. The presiding officer shall exercise discretion with respect to the attendance and number of wit-

nesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office at least ten (10) days prior to the hearing the names of all witnesses who will be called to testify.

8. **Transcript.** The Commission shall retain a court reporter to keep a record of the proceeding. Any party who wishes to obtain a transcript of the record may do so at his/her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of tapes alone, non-certified transcripts therefrom, or a record made by a court reporter retained by a party are not part of the official record.

9. **Commission Decision.** After the hearing, a majority of the Commission members hearing the appeal may: (i) find that there is not clear and convincing evidence to support the imposition of sanctions and, therefore, dismiss the complaint or direct the Commission staff to certify or recertify the mediator or mediator training program, or (ii) find that there is clear and convincing evidence that grounds exist to impose sanctions and impose sanctions. The Commission shall set forth its findings, conclusions, and sanctions, or other action, in writing and serve its decision on the parties within sixty (60) days of the date of the hearing.

10. **Sanctions.** The sanctions that may be proposed by the Committee or imposed by the Commission include, but are not limited to, the following:

    a. Private, written admonishment;

    b. Public, written admonishment;

    c. Completion of additional training;

    d. Restriction on types of cases to be mediated in the future;

    e. Reimbursement of fees paid to the mediator or training program;

    f. Suspension for a specified term;

    g. Probation for a specified term;

    h. Certification or renewal of certification upon conditions;

i. Denial of certification or certification renewal;

j. Decertification; and/or

k. Prohibition on participation as a trainer or manager of a certified mediator training program either indefinitely or for a period of time.

11. Publication of Committee/Commission Decisions.

a. Names of mediators who are reprimanded privately or applicants who have never been certified and have been denied certification shall not be published in the Commission's newsletter and on its web site.

b. Names of mediators who are sanctioned under any other provision of Section B.10. above and who have been denied reinstatement under Section B.13. below shall be published in the Commission's newsletter and on its web site along with a short summary of the facts involved and the discipline imposed. For good cause shown, the Commission may waive this requirement.

c. Chief District Court Judges and/or Senior Resident Superior Court Judges in districts which the mediator serves, the NC State Bar and any other professional licensing/certification bodies to which the mediator is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any sanction imposed upon a mediator except those named in Subsection a. above.

d. If the Commission imposes sanctions as a result of a complaint filed by a third party, the Commission's office shall, on request, release copies of the complaint, response, counter response, and Commission/Committee decision.

12. Appeal. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions imposing sanctions or denying applications for mediator or mediator training program certification. An order imposing sanctions or denying applications for mediator or mediator training program certification shall be reviewable upon appeal where the entire record as submitted shall be reviewed to

determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within thirty (30) days of the date of the Commission's decision.

13. Reinstatement. A mediator, trainer, or manager who has been sanctioned under this rule may be reinstated as a certified mediator or as an active trainer or manager pursuant to Section B.13.g. below. Except as otherwise provided by the Standing Committee or Commission, no application for reinstatement may be tendered within two years of the date of the sanction or denial.

a. A petition for reinstatement shall be made in writing, verified by the petitioner, and filed with the Commission's office.

b. The petition for reinstatement shall contain:

i) the name and address of the petitioner;

ii) the offense or misconduct upon which the suspension or decertification or the bar to training or program management was based; and

iii) a concise statement of facts claimed to justify reinstatement as a certified mediator or a trainer or program manager.

c. The petition for reinstatement may also contain a request for a hearing on the matter to consider any additional evidence which the petitioner wishes to put forth, including any third party testimony regarding his or her character, competency, or fitness to practice as a mediator, trainer, or manager.

d. The Commission's staff shall refer the petition to the Commission for review.

e. If the petitioner does not request a hearing, the Commission shall review the petition and shall make a decision within sixty (60) days of the filing of the petition. That decision shall be final. If the petitioner requests a hearing, it shall be held within ninety (90) days of the filing of the petition. The Commission shall conduct the hearing consistent with Section B above. At the hearing, the petitioner may:

i) appear personally and be heard;

ii) be represented by counsel;

iii) call and examine witnesses;

iv) offer exhibits; and

v) cross-examine witnesses.

f. At the hearing, the Commission may call witnesses, offer exhibits, and examine the petitioner and witnesses.

g. The burden of proof shall be upon the petitioner to establish by clear and convincing evidence:

i) that the petitioner has rehabilitated his/her character, addressed and resolved any conditions which led to his/her suspension or decertification, completed additional training in mediation theory and practice to ensure his/her competency as a mediator, trainer, or manager, and/or taken steps to address and resolve any other matter(s) which led to the petitioner's suspension, decertification, or prohibition from serving as a trainer or manager; and

ii) the petitioner's certification will not be detrimental to the Mediated Settlement Conference and/or Family Financial Settlement Programs, the Commission, the courts, or the public interest; and

iii) that the petitioner has completed any paperwork required for reinstatement and paid any required reinstatement and/or certification fees.

h. If the petitioner is found to have rehabilitated him or herself and is fit to serve as a mediator, trainer, or manager, the Commission shall reinstate the petitioner as a certified mediator or as an active trainer or manager. However, if the suspension or decertification or the bar to training or management has continued for more than two years, the reinstatement may be conditioned upon the completion of additional training and observations as needed to refresh skills and awareness of program rules and requirements.

i. The Commission shall set forth its decision to reinstate a petitioner or to deny reinstatement in writing, making findings of fact and conclusions of law, and

serve the decision on the petitioner by U.S. mail, return receipt requested, within thirty (30) days of the date of the hearing.

j. If a petition for reinstatement is denied, the petitioner may not apply again pursuant to this section until two years have lapsed from the date the denial was issued.

k. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions to deny reinstatement. An order denying reinstatement shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within thirty (30) days of the date of the Commission's decision.

~~**IX. COMMISSION DECISION.**~~

~~A. Final action on any panel recommendation for discipline or adverse personnel action is reserved for Commission decision.~~

~~B. If a decision is made or an agreement reached limiting a mediator's service to specified types of cases or to suspend or decertify a mediator, trainer or training program, the Executive Secretary shall notify, appropriate judicial districts in writing of the sanction. If a training program's certification is suspended or revoked, the Executive Secretary shall remove that program from the list of certified training programs.~~

~~C. All decisions of the Commission are public records.~~

RULE IX. INVESTIGATION AND REVIEW OF APPLICATIONS FOR CERTIFICATION DENIED OR REVOKED FOR REASONS OTHER THAN THOSE PERTAINING TO ETHICS AND CONDUCT.

A. Establishment of the Standing Committee on Certification of Mediators and Mediator Training Programs.

1. Establishment of Committee. The Chair of the Commission shall appoint a standing Committee on Certification of Mediators and Mediator Training Programs (Committee) to review the matters set forth in Section 2 below. Members of the Committee shall recuse themselves from deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest.

2. **Matters to Be Considered by Committee.** The Committee shall review and consider the following matters:

   a. Appeals of staff decisions to deny an application filed by a person seeking mediator certification or recertification or by a mediator training program seeking certification or recertification, because of deficiencies that do not relate to conduct or ethics. The latter deficiencies shall be considered pursuant to Rule 8.

   b. Complaints which are filed by a member of the Commission, its staff, or any member of the public about a certified mediator or certified mediator training program or an applicant for certification or certification renewal; except that, complaints relating to applicant, mediator, trainer or manager conduct or ethics shall be considered only pursuant to Rule 8.

3. **The Investigation of Qualifications.**

   a. **Information obtained during the process of certification or renewal.** Commission staff shall review all pending applications for certification and recertification to determine whether the applicant meets the non-ethics related qualifications set out in the MSC Rules 8 and 9 and FFS Rules 8 and 9 and any guidelines or other policies adopted by the Commission amplifying those rules. Commission staff may contact those reporting to request additional information and may consider any other information acquired during the investigation process that bears on the applicant's eligibility for certification or certification renewal.

   b. **Complaints about mediator or mediator training program qualifications filed with the Commission.** The staff of the Commission shall forward written complaints about the qualifications of a certified mediator or certified mediator training program or any trainer or manager affiliated with such program (affected person/program) that do not pertain to ethics or conduct filed by any member of the general public, the Commission, or its staff to the Committee for investigation. Copies of such complaints shall be forwarded by certified U.S. mail, return receipt requested, to the affected person.

      However, in instances where Commission staff believes a complaint to be wholly without merit, the Executive

Director shall refer the matter to the Committee's chair rather than to the Committee as set forth above. If after giving the complaint due consideration, the chair also believes that the complaint is wholly without merit, the complaint shall be dismissed with notification to the complaining party. The complaining party shall have thirty (30) days from the date of notification to appeal the chair's determination to the full Committee on Certification of Mediators and Mediator Training Programs. The appeal shall be in writing and directed to the Commission's office.

c. **Investigation by the Standing Committee.** The Committee shall investigate all matters brought before it by staff pursuant to the provisions of Sections a. or b**.** The Chair or designee may issue subpoenas for the attendance of witnesses and for the production of books, papers, or other documentary evidence deemed necessary or material to any such investigation. The Chair or designee may contact the following persons and entities for information concerning such application or complaint:

   i) all references, employers, colleges, and other individuals and entities cited in applications for mediator certification, including any and all other professional licensing or certification bodies to which the applicant is subject.

   ii) all proposed trainers cited in training program applications and in the case of applications for certification renewal, participants who have completed the training program.

   iii) all parties bringing complaints about a mediator or a mediator training program's qualifications for certification or certification renewal and any other person or entity with information about the subject of the complaint.

   All information in Commission files pertaining to the initial certification of a mediator or mediation training program or to renewals of such certifications shall be confidential.

d. **Probable Cause Determination.** The Committee on Certification of Mediators and Mediator Training Programs shall deliberate to determine whether probable cause exists to believe that the affected person/program or the applicant:

i) does not meet the qualifications for mediator certification set out in MSC Rule 8 and/or FFS Rule 8 or guidelines and other policies adopted by the Commission that amplify those rules; or

ii) does not meet the qualifications for mediator training program certification as set out in MSC rule 9 and/or FFS Rule 9 or guidelines and other policies adopted by the Commission that amplify those rules.

If probable cause is found, that the application for certification or re-certification should be denied or the affected person/program's certification should be revoked.

4. Authority of Committee to Deny Certification or Certification Renewal or to Revoke Certification.

a. If a majority of Committee members reviewing a matter finds no probable cause pursuant to Section A.3.d. above, Commission staff shall certify or recertify the affected person/program or applicant. If the investigation were initiated by the filing of a written complaint, the Committee shall dismiss the complaint and notify the complaining party and the affected person/program or applicant in writing by certified U.S. mail, return receipt requested, that the complaint has been dismissed and that the affected person/program or applicant will be certified or re-certified. There shall be no right of appeal from the Committee's decision to dismiss a complaint or to certify or re-certify an affected person/program or applicant.

b. If a majority of Committee members reviewing a matter finds probable cause pursuant to Section A.3.d. above, the Committee shall deny certification or re-certification or revoke certification. The Committee's findings, conclusions, and denial shall be in writing and forwarded to the affected person/program or applicant by U.S. mail, return receipt requested.

c. If the Committee denies certification or re-certification or revokes certification, the affected person/program or applicant may appeal the denial or revocation to the Commission within thirty (30) days from the date of the letter transmitting the Committee's findings, conclusions, and denial. Notification of appeal must be in writing and directed to the Commission's office. If no appeal is filed within thirty (30) days, the affected person/program or applicant shall be

deemed to have accepted the committee's findings and denial or revocation.

B. Appeal of the Denial to the Commission.

1. The Commission Shall Meet. An appeal of a denial or revocation by the Committee pursuant to Section A.3.d. above shall be heard by the members of the Commission, except that all members of the Committee who participated in issuing the determination that is on appeal shall recuse themselves from participating. No matter shall be heard and decided by less than three Commission members. Members of the Commission shall recuse themselves when they cannot act impartially. Any challenges raised by the appealing party or any other party questioning the neutrality of a member shall be decided by the Commission's chair.

2. Conduct of the Hearing.

a. At least thirty (30) days prior to the hearing before the Commission, Commission staff shall forward to all parties; special counsel to the Commission, if appointed; and members of the Commission who will hear the matter, copies of all documents considered by the Committee and summaries of witness interviews and/or character recommendations.

b. Hearings conducted by the Commission will be a *de novo* review of the Committee's decision.

c. The Commission's chair or his/her designee shall serve as the presiding officer. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and speedy investigation and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers, or other documentary evidence.

d. Special counsel supplied either by the Attorney General at the request of the Commission or employed by the Commission may present the evidence in support of the denial or revocation of certification. Commission members may question any witnesses called to testify at the hearing.

e. The Commission, through its counsel, and the applicant or affected person/program may present evidence in the form of sworn testimony and/or written documents. The Commission, through its counsel, and the applicant or

affected person/program, may cross-examine any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The Commission shall consider all evidence presented and give it appropriate weight and effect.

f. All hearings shall be conducted in private, unless the applicant or affected person/program requests a public hearing.

g. In the event that the complainant, affected person/program, or applicant fails to appear without good cause, the Commission shall proceed to hear from those parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.

h. Proceedings before the Commission shall be conducted informally but with decorum.

3. Date of Hearing. An appeal of any denial by the Committee shall be heard by the Commission within ninety (90) days of the date of the letter transmitting the Committee's findings, conclusions, and denial or revocation.

4. Notice of Hearing. The Commission's office shall serve on all parties by certified U.S. mail, return receipt requested, notice of the date, time, and place of the hearing no later than sixty (60) days prior to the hearing.

5. *Ex Parte* Communications. No person shall have any *ex parte* communication with members of the Commission concerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to Commission staff.

6. Attendance. All parties, including complaining parties and applicants, or their representatives in the case of a training program, shall attend in person. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or to allow witnesses to testify by telephone or through video conference with such limitations and conditions as are just and reasonable. If an attorney or witness appears by telephone or video conference, the Commission's staff must be notified at least twenty (20) days prior to the proceeding. At least five (5) days prior to the proceeding, the Commission's staff must be provided with contact information for those who will participate by telephone or video conference.

7. **Witnesses.** The presiding officer shall exercise his/her discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office at least ten (10) days prior to the hearing the names of all witness who will testify for them.

8. **Transcript.** The Commission shall retain a court reporter to keep a record of the proceeding. Any party who wishes to obtain a transcript of the record may do so at his or her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of tapes alone, non-certified transcripts therefrom, or a record made by a court reporter retained by a party are not part of the official record.

9. **Commission Decision.** After the hearing, a majority of the Commission members hearing the appeal may: (i) find that there is not clear and convincing evidence to support the denial or revocation and, therefore dismiss the complaint or direct the Commission staff to certify or recertify the mediator or mediator training program; or (ii) find that there is clear and convincing evidence to affirm the committee's findings and denial or revocation. The Commission shall set forth its findings, conclusions, and denial in writing and serve it on the parties within sixty (60) days of the date of the hearing.

10. **Publication of Committee/Commission Decisions.**

    a. Names of applicants for mediator certification or names of mediator training programs that are denied certification or recertification or who have had their certification revoked pursuant to this rule shall not be published in the Commission's newsletter or on its web site and the fact of that denial or revocation shall not be generally publicized.

    b. Chief District Court Judges and/or Senior Resident Superior Court Judges in districts which the mediator serves**,** the NC State Bar and any other professional licensing/certification bodies to which the mediator is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any denial or revocation of certification.

11. **Appeals.** The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of

Commission decisions denying an application or revoking a certification**.** An order denying or revoking certification pursuant to this rule shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within thirty (30) days of the date of the Commission's decision.

12. Reinstatement of Certification. A mediator or training program whose certification renewal has been denied or whose certification has been revoked under this rule may be re-certified or reinstated as a certified mediator or mediation training program pursuant to Section B.12.g. below. An application for reinstatement may be tendered at any time the applicant believes that he/she/it is qualified to be reinstated.

a. A petition for reinstatement shall be made in writing, verified by the petitioner, and filed with the Commission's office.

b. The petition for reinstatement shall contain:

i) the name and address of the petitioner;

ii) the qualification upon which the denial or revocation was based; and

iii) a concise statement of facts claimed to justify certification or recertification as a certified mediator or mediator training program.

c. The petition for reinstatement or certification may also contain a request for a hearing on the matter to consider any additional evidence that the petitioner wishes to put forth.

d. The Commission's staff shall refer the petition to the Commission for review.

e. If the petitioner does not request a hearing, the Commission shall review the petition and shall make a decision within sixty (60) days of the filing of the petition. That decision shall be final. If the petitioner requests a hearing, it shall be held within ninety (90) days of the filing of the petition. The Commission shall conduct the hearing consistent with Section B above. At the hearing, the petitioner may:

i) appear personally and be heard;

ii) be represented by counsel;

iii) call and examine witnesses;

iv) offer exhibits; and

v) cross-examine witnesses.

f. At the hearing, the Commission may call witnesses, offer exhibits, and examine the petitioner and witnesses.

g. The burden of proof shall be upon the petitioner to establish by clear and convincing evidence:

i) that the petitioner has satisfied the qualifications that led to the denial or revocation; and

ii) that the petitioner has completed any paperwork required for reinstatement and paid any required reinstatement and/or certification fees.

h. If the petitioner is found to have met the qualifications and is entitled to be certified as a mediator or mediator training program, the Commission shall so certify.

i. If a petition for reinstatement is denied, the petitioner may apply again pursuant to this section at any time after the qualifications are met.

j. The Commission shall set forth its decision to certify a mediator or mediator training program or to deny certification in writing, making findings of fact and conclusions of law, and serve the decision on the petitioner by U.S. mail, return receipt requested, within thirty (30) days of the date of the hearing.

k. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions to deny reinstatement. An order denying reinstatement shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of review shall be filed with the Superior Court in Wake County within thirty (30) days of the date of the Commission's decision.

X. INTERNAL OPERATING PROCEDURES.

A. The Commission may adopt and publish internal operating procedures and policies for the conduct of Commission business.

B. The Commission's procedures and policies may be changed as needed on the basis of experience.

Order Adopting Rules Implementing Mediation In Matters Before The Clerk Of Superior Court

WHEREAS, section 7A-38.3B of the North Carolina General Statutes establishes a statewide system of mediations to facilitate the settlement of matters pending before Clerks of Superior Court, and

WHEREAS, N.C.G.S. § 7A-38.3B(b) enables this Court to implement section 7A-38.3B by adopting rules and amendments to rules concerning said mediations.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3B(b), Rules Implementing Mediation In Matters Before The Clerk Of Superior Court are hereby adopted. These amended Rules shall be effective on the 1st of March, 2006.

Adopted by the Court in conference the 26th day of January, 2006. The Appellate Division Reporter shall promulgate by publication as soon as practicable the Rules Implementing Mediation In Matters Before The Clerk Of Superior Court adopted through this action in the advance sheets of the Supreme Court.

Newby, J.
For the Court

RULES IMPLEMENTING MEDIATION IN MATTERS BEFORE THE CLERK OF SUPERIOR COURT

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RULE 1. INITIATING MEDIATION IN MATTERS BEFORE THE CLERK.

A. PURPOSE OF MANDATORY MEDIATION.

These Rules are promulgated pursuant to G.S. 7A-38.3B to implement mediation in certain cases within the Clerk's jurisdiction. The procedures set out here are designed to focus the parties' attention on settlement and resolution rather than on preparation for contested hearings and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in other settlement efforts voluntarily either prior to or after the filing of a matter with the Clerk.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent a party to a matter before the Clerk, shall discuss the means available to the parties through mediation and other settlement procedures to resolve their disputes without resort to a contested hearing. Counsel shall also discuss with each other what settlement procedure and which neutral third party would best suit their clients and the matter in controversy.

C. INITIATING THE MEDIATION BY ORDER OF THE CLERK.

(1) **Order by The Clerk of Superior Court.** The Clerk of Superior Court of any county may, by written order, require all persons and entities identified in Rule 4 to attend a mediation in any matter in which the Clerk has original or exclusive jurisdiction, except those matters under NCGS Chapters 45 and 48 and those matters in which the jurisdiction of the Clerk is ancillary.

(2) **Content of Order.** The order shall be on an AOC form and shall:

(a) require that a mediation be held in the case;

(b) establish deadlines for the selection of a mediator and completion of the mediation;

(c) state the names of the persons and entities who shall attend the mediation;

(d) state clearly that the persons ordered to attend have the right to select their own mediator as provided by Rule 2;

(e) state the rate of compensation of the court appointed mediator in the event that those persons do not exercise their right to select a mediator pursuant to Rule 2; and

(f) state that those persons shall be required to pay the mediator's fee in shares determined by the Clerk.

(3) **Motion for Court Ordered Mediation.** In matters not ordered to mediation, any party, interested persons, or fiduciary may file a written motion with the Clerk requesting that mediation be ordered. Such motion shall state the reasons why the order should be allowed and shall be served in accordance with Rule 5 of the N.C.R.C.P. on non-moving parties, interested persons, and fiduciaries designated by the Clerk or identified by the petitioner in the pleadings. Objections to the motion may be filed in writing within 5 days after the date of the service of the motion. Thereafter, the Clerk shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(4) **Informational Brochure.** The Clerk shall serve a brochure prepared by the Dispute Resolution Commission explaining the mediation process and the operations of the Commission along with the order required by Rule 1.C.(1) and 1.C.(3).

(5) **Motion to Dispense With Mediation.** A named party, interested person, or fiduciary may move the Clerk of Superior Court to dispense with a mediation ordered by the Clerk. Such motion shall state the reasons the relief is sought and shall be served on all persons ordered to attend and the mediator. For good cause shown, the Clerk may grant the motion.

(6) **Dismissal of Petition For the Adjudication of Incompetence.** The petitioner shall not voluntarily dismiss a petition for adjudication of incompetence after mediation is ordered.

RULE 2. SELECTION OF MEDIATOR.

A. SELECTION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES. The parties may select a mediator cer-

tified by the Dispute Resolution Commission by agreement within a period of time as set out in the Clerk's order. However, the parties may only select mediators certified for estate and guardianship matters pursuant to these Rules for estate or guardianship matters.

The petitioner shall file with the Clerk a Notice of Selection of Mediator by Agreement within the period set out in the Clerk's order; however, any party may file the notice. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and persons ordered to attend have agreed upon the selection and rate of compensation; and state under what Rules the mediator is certified. The notice shall be on an AOC form.

B. APPOINTMENT OF MEDIATOR BY THE CLERK. In the event a notice of selection is not filed with the Clerk within the time for filing stated in the Clerk's order, the Clerk shall appoint a mediator certified by the Dispute Resolution Commission. The Clerk shall appoint only those mediators certified pursuant to these Rules for estate and guardianship matters to those matters. The Clerk may appoint any certified mediator who has expressed a desire to be appointed to mediate all other matters within the jurisdiction of the Clerk.

Except for good cause, mediators shall be appointed by the Clerk by rotation from a list of those certified mediators who wish to be appointed for matters within the Clerk's jurisdiction, without regard to occupation, race, gender, religion, national origin, disability, or whether they are an attorney.

C. MEDIATOR INFORMATION DIRECTORY. The Dispute Resolution Commission shall maintain for the consideration of the Clerks of Superior Court and those selecting mediators for matters within the Clerk's jurisdiction a directory of certified mediators who request appointments in those matters and a directory of those mediators who are certified pursuant to these Rules. Said directory shall be maintained on the Commission's web site.

D. DISQUALIFICATION OF MEDIATOR. Any person ordered to attend a mediation pursuant to these Rules may move the Clerk of Superior Court of the county in which the matter is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed

pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATION.

A. WHERE MEDIATION IS TO BE HELD. The mediation may be held in any location to which all the persons ordered to attend and the mediator agree. In the absence of such an agreement, the mediation shall be held in the courthouse or other public or community building in the county where the matter is pending. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the time and location of the mediation to all persons ordered to attend.

B. WHEN MEDIATION IS TO BE HELD. The Clerk's order issued pursuant to Rule 1.C.(3) shall state a deadline for completion of the mediation. The mediator shall set a date and time for the mediation pursuant to Rule 6.B.(5) and shall conduct the mediation before that date unless the date is extended by the Clerk.

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. The mediator or any person ordered to attend the mediation may request the Clerk of Superior Court to extend the deadline for completion of the mediation. Such request shall state the reasons the extension is sought and shall be delivered to all persons ordered to attend and the mediator. The Clerk may grant the request without hearing by setting a new deadline for the completion of the mediation, which date may be set at any time prior to the hearing. Notice of the Clerk's decision shall be delivered to all persons ordered to attend and the mediator by the person who sought the extension and shall be filed with the court.

D. RECESSES. The mediator may recess the mediation at any time and may set times for reconvening which are prior to the deadline for completion. If the time for reconvening is set before the mediation is recessed, no further notification is required for persons present at the mediation.

E. THE MEDIATION IS NOT TO DELAY OTHER PROCEEDINGS. The mediation shall not be cause for the delay of other proceedings in the matter, including the completion of discovery, the filing or hearing of motions, or the hearing of the matter, except by order of the Clerk of Superior Court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATIONS.

A. ATTENDANCE.

(1) Persons ordered by the Clerk to attend a mediation conducted pursuant to these Rules shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.B. or an impasse has been declared. Any such person may have the attendance requirement excused or modified, including the allowance of that person's participation by telephone or teleconference:

(a) By agreement of all persons ordered to attend and the mediator; or

(b) By order of the Clerk of Superior Court, upon motion of a person ordered to attend and notice of the motion to all other persons ordered to attend and the mediator.

(2) Any person ordered to attend a mediation conducted pursuant to these Rules that is not a natural person or a governmental entity shall be represented at the mediation by an officer, employee or agent who is not such person's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the matter.

(3) Any person ordered to attend a mediation conducted pursuant to these Rules that is a governmental entity shall be represented at the mediation by an employee or agent who is not such entity's outside counsel and who has authority to decide on behalf of such entity whether and on what terms to settle the matter; provided, however, if under law proposed settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.

(4) An attorney ordered to attend a mediation pursuant to these Rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.

(5) Other persons may participate in the mediation at the discretion of the mediator.

(6) Persons ordered to attend shall promptly notify the mediator after selection or appointment of any signifi-

cant problems they may have with dates for mediation sessions before the completion deadline and shall keep the mediator informed as to such problems as may arise before an anticipated session is scheduled by the mediator.

B. FINALIZING AGREEMENT.

(1) If an agreement is reached at the mediation, in matters that, as a matter of law, may be resolved by the parties by agreement, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. The parties shall designate a person who will file a consent judgment or one or more voluntary dismissals with the Clerk and that person shall sign the mediator's report. If agreement is reached in such matters prior to the mediation or during a recess, the parties shall inform the mediator and the Clerk that the matter has been settled and, within 10 calendar days of the agreement being reached, file a consent judgment or voluntary dismissal(s).

(2) In all other matters, including guardianship and estate matters, if an agreement is reached upon some or all of the issues at mediation, the persons ordered to attend shall reduce its terms to writing and sign it along with their counsel, if any. Such agreements are not binding upon the Clerk but they may be offered into evidence at the hearing of the matter and may be considered by the Clerk for a just and fair resolution of the matter. Evidence of statements made and conduct occurring in a mediation where an agreement is reached is admissible pursuant to NCGS 7A-38. 3B(g)(3).

All written agreements reached in such matters shall include the following language in a prominent place in the document:

"This agreement is not binding on the Clerk but will be presented to the Clerk as an aid to reaching a just resolution of the matter."

C. PAYMENT OF MEDIATOR'S FEE. The persons ordered to attend the mediation shall pay the mediator's fee as provided by Rule 7.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATION.

If a person ordered to attend a mediation pursuant to these Rules fails to attend without good cause, the Clerk may impose upon the person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the mediation.

A person seeking sanctions against another person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all persons ordered to attend. The Clerk may initiate sanction proceedings upon its own motion by the entry of a show cause order. If the Clerk imposes sanctions, the Clerk shall do so, after notice and a hearing, in a written order making findings of fact and conclusions of law. An order imposing sanctions is reviewable by the superior court in accordance with G.S. 1-301.2 and G.S. 1-301.3, as applicable, and thereafter by the appellate courts in accordance with G.S. 7A-38.1(g).

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS.

A. AUTHORITY OF MEDIATOR.

(1) **Control of the Mediation.** The mediator shall at all times be in control of the mediation and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court that shall contain a provision prohibiting mediators from prolonging a mediation unduly.

(2) **Private Consultation.** The mediator may communicate privately with any participant or counsel prior to, during, and after the mediation. The fact that private communications have occurred with a participant before the conference shall be disclosed to all other participants at the beginning of the mediation.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) The costs of the mediation and the circumstances in which participants will not be taxed with the costs of mediation;

(c) That the mediation is not a trial, the mediator is not a judge, and the parties retain their right to a hearing if they do not reach settlement;

(d) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(e) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(f) The inadmissibility of conduct and statements as provided by G.S. 7A-38.3B;

(g) The duties and responsibilities of the mediator and the participants; and

(h) That any agreement reached will be reached by mutual consent and reported to the Clerk as provided by rule.

(2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) **Declaring Impasse.** It is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediation should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

(4) **Reporting Results of Mediation.**

(a) The mediator shall report to the court on an AOC form within 5 days of completion of the mediation whether or not the mediation resulted in a settlement or impasse. If settlement occurred prior to or during a recess of a mediation, the mediator shall file the report of settlement within 5 days of learning of the settlement and, in addition to the other information required, report who informed the mediator of the settlement.

(b) The mediator's report shall identify those persons attending the mediation, the time spent in and fees charged for mediation, and the names and contact information for those persons designated by the parties to file such consent judgment or dismissal(s) with the Clerk as required by Rule 4.B. Mediators

shall provide statistical data for evaluation of the mediation program as required from time to time by the Dispute Resolution Commission or the Administrative Office of the Courts. Mediators shall not be required to send agreements reached in mediation to the Clerk, except in Estate and Guardianship matters and other matters which may be resolved only by order of the Clerk.

(c) Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the court and sanctions.

(5) **Scheduling and holding the mediation.** It is the duty of the mediator to schedule the mediation and conduct it prior to the mediation completion deadline set out in the Clerk's order. The mediator shall make an effort to schedule the mediation at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the mediation. Deadlines for completion of the mediation shall be strictly observed by the mediator unless said time limit is changed by a written order of the Clerk of Superior Court.

(6) **Distribution of mediator evaluation form.** At the mediation, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per person with additional copies distributed upon request. The evaluation is intended for purposes of self-improvement and the mediator shall review returned evaluation forms.

RULE 7. COMPENSATION OF THE MEDIATOR.

A. BY AGREEMENT. When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. BY ORDER OF THE CLERK. When the mediator is appointed by the Clerk, the parties shall compensate the mediator for mediation services at the rate of $125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $125 that is due upon appointment.

C. PAYMENT OF COMPENSATION. In matters within the Clerk's jurisdiction that, as a matter of law, may be resolved by the parties by agreement, the mediator's fee shall be paid in equal shares by the parties unless otherwise agreed to by

the parties. Payment shall be due upon completion of the mediation.

In all other matters before the Clerk, including guardianship and estate matters, the mediator's fee shall be paid in shares as determined by the Clerk. A share of a mediator's fee may only be assessed against the estate of a decedent, a trust or a guardianship or against a fiduciary or interested person upon the entry of a written order making specific written findings of fact justifying the taxing of costs.

D. CHANGE OF APPOINTED MEDIATOR. Parties who fail to select a mediator within the time set out in the Clerk's order and then desire a substitution after the Clerk has appointed a mediator, shall obtain the approval of the Clerk for the substitution. If the Clerk approves the substitution, the parties shall pay the Clerk's original appointee the $125 one time, per case administrative fee provided for in Rule 7.B. unless the Clerk determines that to do so would be unnecessary or inequitable.

E. INDIGENT CASES. No person ordered to attend a mediation found to be indigent by the Clerk for the purposes of these rules shall be required to pay a share of the mediator's fee. Any person ordered by the Clerk of Superior Court to attend may move the Clerk for a finding of indigence and to be relieved of that person's obligation to pay a share of the mediator's fee. The motion shall be heard subsequent to the completion of the mediation or, if the parties do not settle their matter, subsequent to its conclusion. In ruling upon such motions, the Clerk shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the matter and whether a decision was rendered in the movant's favor. The Clerk shall enter an order granting or denying the person's request. Any mediator conducting a mediation pursuant to these rules shall waive the payment of fees from persons found by the court to be indigent.

F. POSTPONEMENTS.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with mediation once the mediator has scheduled a date for a session of the mediation. After mediation has been scheduled for a specific date, a person ordered to attend may not unilaterally postpone the mediation.

(2) A mediation session may be postponed by the mediator for good cause beyond the control of the movant only after notice by the movant to all persons of the reasons for the postponement and a finding of good cause by the mediator. A postponement fee shall not be charged in such circumstance.

(3) Without a finding of good cause, a mediator may also postpone a scheduled mediation session with the consent of all parties. A fee of $125 shall be paid to the mediator if the postponement is allowed or if the request is within two (2) business days of the scheduled date the fee shall be $250. The person responsible for it shall pay the postponement fee. If it is not possible to determine who is responsible, the Clerk shall assess responsibility. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B. A mediator shall not charge a postponement fee when the mediator is responsible for the postponement.

(4) If all persons ordered to attend select the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE.

Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Clerk of Superior Court for a finding of indigency, shall constitute contempt of court and may result, following notice and a hearing, in the imposition of any and all lawful sanctions by the Superior Court pursuant to G.S. 5A.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION.

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as Clerk of Court mediators.

A. For appointment by the Clerk as mediator in all cases within the Clerk's jurisdiction except guardianship and estate matters, a person shall be certified by the Dispute Resolution

Commission for either the superior or district court mediation programs;

B. For appointment by the Clerk as mediator in guardianship and estate matters within the Clerk's jurisdiction, a person shall be certified as a mediator by the Dispute Resolution Commission for either the superior or district court programs and complete a course, at least 10 hours in length, approved by the Dispute Resolution Commission pursuant to Rule 9 concerning estate and guardianship matters within the Clerk's jurisdiction;

C. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;

D. Pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission; and

E. Agree to accept, as payment in full of a party's share of the mediator's fee, the fee ordered by the Clerk pursuant to Rule 7.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any county in which he or she has served as a mediator or the Standards of Conduct. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS.

A. Certified training programs for mediators seeking certification pursuant to these Rules for estate and guardianship matters within the jurisdiction of the Clerk of Superior Court shall consist of a minimum of 10 hours instruction. The curriculum of such programs shall include:

(1) Factors distinguishing estate and guardianship mediation from other types of mediations;

(2) The aging process and societal attitudes toward the elderly, mentally ill, and disabled;

(3) Ensuring full participation of Respondents and identifying interested persons and nonparty participants;

(4) Medical concerns of the elderly, mentally ill and disabled;

(5) Financial and accounting concerns in the administration of estates and of the elderly, mentally ill and disabled;

(6) Family dynamics relative to the elderly, mentally ill, and disabled and to the families of deceased persons;

(7) Assessing physical and mental capacity;

(8) Availability of community resources for the elderly, mentally ill and disabled;

(9) Principles of guardianship law and procedure;

(10) Principles of estate law and procedure;

(11) Statute, Rules, and forms applicable to mediation conducted under these Rules; and

(12) Ethical and conduct issues in mediations conducted under these Rules.

The Commission may adopt Guidelines for trainers amplifying the above topics and set out minimum time frames and materials that trainers shall allocate to each topic. Any such Guidelines shall be available at the Commission's office and posted on its web site.

B. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.B. Certification need not be given in advance of attendance. Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

C. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

RULE 10. PROCEDURAL DETAILS.

The Clerk of Superior Court shall make all those orders just and necessary to safeguard the interests of all persons and may supplement all necessary procedural details not inconsistent with these Rules.

RULE 11. DEFINITIONS.

A. The term, Clerk of Superior Court, as used throughout these rules, shall refer both to said Clerk or Assistant Clerk.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the Administrative Office of the Courts. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

RULE 12. TIME LIMITS.

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the Rules of Civil Procedure.

Order Adopting Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions

WHEREAS, section 7A-38.1 of the North Carolina General Statutes establishes a statewide system of court-ordered mediated settlement conferences to facilitate the settlement of superior court civil actions, and

WHEREAS, N.C.G.S. § 7A-38.1(c) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said mediated settlement conferences.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.1(c), the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Actions are hereby amended to read as in the following pages. These Rules shall be effective on the 1st of March, 2006.

Adopted by the Court in conference the 26th day of January, 2006. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions amended through this action in the advance sheets of the Supreme Court.

Newby, J.
For the Court

REVISED RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

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RULE 1. INITIATING SETTLEMENT EVENTS.

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to G.S. 7A-38.1, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party to a superior court case, shall advise his or her client(s) regarding the settlement procedures approved by these Rules and shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. INITIATING THE MEDIATED SETTLEMENT CONFERENCE IN EACH ACTION BY COURT ORDER.

(1) **Order by Senior Resident Superior Court Judge.** The Senior Resident Superior Court Judge of any judicial district ~~may~~ shall, by written order, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in ~~a~~ all civil actions except ~~an~~ those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his/her order upon motion of a party pursuant to Rule 1.C.6 only for good cause shown.

(2) **Motion to authorize the use of other settlement procedures.** The parties may move the Senior Resident

Superior Court Judge to authorize the use of some other settlement procedure allowed by these rules or by local rule in lieu of a mediated settlement conference, as provided in G.S. 7A-38.1(i). Such motion shall be filed within 21 days of the order requiring a mediated settlement conference on an AOC form, and shall include:

(a) the type of other settlement procedure requested;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral;

(d) that the neutral and opposing counsel have agreed upon the selection and compensation of the neutral selected;

(e) that all parties consent to the motion.

If the parties are unable to agree to each of the above, then the Senior Resident Superior Court Judge shall deny the motion and the parties shall attend the mediated settlement conference as originally ordered by the Court. Otherwise, the court may order the use of any agreed upon settlement procedures authorized by Rules 10-12 herein or by local rules of the Superior Court in the county or district where the action is pending.

(3) **Timing of the order.** The Senior Resident Superior Court Judge shall issue the order requiring a mediated settlement conference as soon as practicable after the time for the filing of answers has expired. Rules 1.C.(4) and 3.B. herein shall govern the content of the order and the date of completion of the conference.

(4) **Content of order.** The court's order shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on an AOC form.

(5) **Motion for court ordered mediated settlement conference.** In cases not ordered to mediated settlement conference, any party may file a written motion with the Senior Resident Superior Court Judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing with the Senior Resident Superior Court Judge within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(6) **Motion to dispense with mediated settlement conference.** A party may move the Senior Resident Superior Court Judge to dispense with the mediated settlement conference ordered by the Judge. Such motion shall state the reasons the relief is sought. For good cause shown, the Senior Resident Superior Court Judge may grant the motion.

D. INITIATING THE MEDIATED SETTLEMENT CONFERENCE BY LOCAL RULE.

(1) **Order by local rule.** In judicial districts in which a system of scheduling orders or scheduling conferences is utilized to aid in the administration of civil cases, the Senior Resident Superior Court Judge of said districts ~~may~~ shall, by local rule, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in ~~any~~ all civil actions except ~~an~~ those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his/her order upon motion of a party pursuant to Rule 1.D.6. only for good cause shown.

(2) **Scheduling orders or notices.** In judicial districts in which scheduling orders or notices are utilized to manage civil cases and for all cases ordered to mediated settlement conference by local rule, said order or notice shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed

mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(3) **Scheduling conferences.** In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to mediated settlement conferences by local rule, the notice for said scheduling conference shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(4) **Application of Rule 1.C.** The provisions of Rule 1.C.(2), (5) and (6) shall apply to Rule 1.D. except for the time limitations set out therein.

(5) **Deadline for completion.** The provisions of Rule 3.B. determining the deadline for completion of the mediated settlement conference shall not apply to mediated settlement conferences conducted pursuant to Rule 1.D. The deadline for completion shall be set by the Senior Resident Superior Court Judge or designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline shall be well in advance of the trial date.

(6) **Selection of mediator.** The parties may select and nominate, or the Senior Resident Superior Court Judge may appoint, mediators pursuant to the provisions of Rule 2., except that the time limits for selection, nomination, and appointment shall be set by local rule. All other provisions of Rule 2. shall apply to mediated settlement conferences conducted pursuant to Rule 1.D.

(7) **Use of other settlement procedures.** The parties may utilize other settlement procedures pursuant to the provisions of Rule 1.C.(2) and Rule 10. However, the time

limits and method of moving the court for approval to utilize another settlement procedure set out in those rules shall not apply and shall be governed by local rule.

RULE 2. SELECTION OF MEDIATOR.

A. SELECTION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES. The parties may select a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Notice of Selection of Mediator by Agreement within 21 days of the court's order, however, any party may file the notice. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on an AOC form.

B. ~~NOMINATION AND COURT APPROVAL OF A NON-CERTIFIED MEDIATOR.~~ ~~The parties may select a mediator who does not meet the certification requirements of these Rules but who, in the opinion of the parties and the Senior Resident Superior Court Judge, is otherwise qualified by training or experience to mediate the action and who agrees to mediate indigent cases without pay.~~

~~If the parties select a non-certified mediator, the plaintiff's attorney shall file with the court a Nomination of Non-Certified Mediator within 21 days of the court's order. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and opposing counsel have agreed upon the selection and rate of compensation.~~

~~The Senior Resident Superior Court Judge shall rule on said nomination without a hearing, shall approve or disapprove of the parties' nomination and shall notify the parties of the court's decision. The nomination and approval or disapproval of the court shall be on an AOC form.~~

B. APPROVAL OF PARTY NOMINEE ELIMINATED. As of January 1, 2006, the former Rule 2.B.rule allowing the approval of a non-certified mediator is rescinded. Beginning on that date, the Senior Resident Superior Court Judge shall

appoint mediators certified by the Dispute Resolution Commission, pursuant to Rule 2.C. which follows.

C. APPOINTMENT OF MEDIATOR BY THE COURT. If the parties cannot agree upon the selection of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the Senior Resident Superior Court Judge appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree upon a mediator. The motion shall be on a~~n AOC~~ form approved by the Administrative Office of the Courts.

~~Upon receipt of a motion to appoint a mediator, or in the event the plaintiff's attorney has not filed a Notice of Selection or Nomination of Non-Certified Mediator with the court within 21 days of the court's order, the Senior Resident Superior Court Judge shall appoint a mediator, certified pursuant to these Rules, under a procedure established by said Judge and set out in Local Rules. Only mediators who agree to mediate indigent cases without pay shall be appointed.~~

Upon receipt of a motion to appoint a mediator, or failure of the parties to file a Notice of Selection with the court within 21 days of the court's order, the Senior Resident Superior Court Judge shall appoint a mediator, certified pursuant to these Rules, who has expressed a willingness to mediate actions within the Judge's district.

In making such appointments, the Senior Resident Superior Court Judge shall rotate through the list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. Certified mediators who do not reside in the judicial district, or a county contiguous to the judicial district, shall be included in the list of mediators available for appointment only if, on an annual basis, they inform the Judge in writing that they agree to mediate cases to which they are assigned. The Senior Resident Superior Court Judge shall retain discretion to depart in a specific case from a strict rotation when, in the judge's discretion, there is good cause to do so.

~~The Dispute Resolution Commission shall furnish for the consideration of Senior Resident Superior Court Judge(s) a list of~~

~~those certified superior court mediators who request appointments in said district. Said list shall contain the mediators' names, addresses and telephone numbers and shall be provided in writing or on the Commission's web site.~~

The Dispute Resolution Commission shall furnish to the Senior Resident Superior Court Judge of each judicial district a list of those certified superior court mediators requesting appointments in that district. Said list shall contain the mediators' names, addresses and telephone numbers and shall be provided both in writing and electronically through the Commission's website. The Commission shall promptly notify the Senior Resident Superior Judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

D. MEDIATOR INFORMATION DIRECTORY. To assist the parties in the selection of a mediator by agreement, the Senior Resident Superior Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all certified mediators who wish to mediate cases in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Superior Court in such county.

E. DISQUALIFICATION OF MEDIATOR. Any party may move the Senior Resident Superior Court Judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE.

A. WHERE CONFERENCE IS TO BE HELD. Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for

giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The court's order issued pursuant to Rule 1.C.(1) shall state a deadline for completion for the conference which shall be not less than 120 days nor more than 180 days after issuance of the court's order. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. A party, or the mediator, may request the Senior Resident Superior Court Judge to extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the office of the Senior Resident Superior Court Judge.

The Senior Resident Superior Court Judge may grant the request by setting a new deadline for the completion of the conference, which date may be set at any time prior to trial. Notice of the Judge's action shall be served immediately on all parties and the mediator by the person who sought the extension and shall be filed with the court.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES.

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) **Parties.**

(i) All individual parties;

(ii) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action;

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(b) **Insurance company representatives.** A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each such carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(c) **Attorneys.** At least one counsel of record for each party or other participant, whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C. or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(a) By agreement of all parties and persons required to attend and the mediator; or

(b) By order of the Senior Resident Superior Court Judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

(3) Scheduling. Participants required to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator, and a scheduling conflict with another court proceeding thereafter arises, participants shall promptly attempt to resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina June 20, 1985.

B. NOTIFYING LIEN HOLDERS. Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request said lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

C. FINALIZING AGREEMENT.

(1) If an agreement is reached at the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electroni-

cally recorded. If an agreement is upon all issues, a consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

(2) If the agreement is upon all issues at the conference, the person(s) responsible for filing closing documents with the court shall also sign the mediator's report to the court. The parties shall give a copy of their signed agreement, consent judgment, or voluntary dismissal(s) to the mediator and all parties at the conference and shall file a consent judgment or voluntary dismissal(s) with the court within ~~fourteen (14)~~ thirty (30) days or within ninety days (90) days if the State or a political subdivision thereof is a party to the action, or before expiration of the mediation deadline, whichever is longer. In all cases, consent judgments or voluntary dismissals shall be filed prior to the scheduled trial.

(3) If an agreement is reached upon all issues prior to the conference or finalized while the conference is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the court ~~within fourteen (14)~~ thirty (30) days or within ninety (90) days if the State or a political subdivision thereof is a party to the action, or before ~~the~~ expiration of the mediation deadline, whichever is longer.

(4) When a case is settled upon all issues, all attorneys of record must notify the Senior Resident Judge within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal(s), *and when*.

D. PAYMENT OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule 7.

E. RELATED CASES. Upon application by any party or person, the Senior Resident Superior Court Judge may order that an attorney of record or a party in a pending Superior Court Case or a representative of an insurance carrier that may be liable for all or any part of a claim pending in Superior Court shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance

ordered pursuant to this rule. Any such attorney, party or carrier representative that properly attends a mediation conference pursuant to this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issues concerning an order entered pursuant to this rule shall be determined by the Senior Resident Superior Court Judge who entered the order.

DRC COMMENTS TO RULE 4

DRC Comment to Rule 4.C.

N.C.G.S. § 7A-38.1(1) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which agreement upon all issues has been reached should be disposed of as expeditiously as possible. This rule is intended to assure that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep confidential the terms of their settlement, they may timely file with the court closing documents which do not contain confidential terms, i.e., voluntary dismissal(s) or a consent judgment resolving all claims. Mediators will not be required by local rules to submit agreements to the court.

DRC Comment to Rule 4.E.

Rule 4.E. was adopted to clarify a Senior Resident Superior Court Judge's authority in those situations where there may be a case related to a Superior Court case pending in a different forum. For example, it is common for there to be claims asserted against a third-party tortfeasor in a Superior Court case at the same time that there are related workers' compensation claims being asserted in an Industrial Commission case. Because of the related nature of such claims, the parties in the Industrial Commission case may need an attorney of record, party, or insurance carrier representative in the Superior Court case to attend the Industrial Commission mediation conference in order to resolve the pending claims in that case. Rule 4.E. specifically authorizes a Senior Resident Superior Court Judge to order such attendance provided that all parties in the related Industrial Commission case consent and the persons ordered to attend receive reasonable notice. The Industrial Commission's Rules for Mediated Settlement and Neutral Evaluation Conferences contain

a similar provision that provides that persons involved in an Industrial Commission case may be ordered to attend a mediation conference in a related Superior Court Case.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES.

If a party or other person required to attend a mediated settlement conference fails to attend without good cause, a resident or presiding Superior Court Judge, may impose upon the party or person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law. (See also Rule 7.G. and the Comment to Rule 7.G.)

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS.

A. AUTHORITY OF MEDIATOR.

(1) **Control of conference.** The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) **Private consultation.** The mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(3) **Scheduling the conference.** The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1;

(h) The duties and responsibilities of the mediator and the participants; and

(i) That any agreement reached will be reached by mutual consent.

(2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) **Declaring impasse.** It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) **Reporting results of conference.**

(a) The mediator shall report to the court on an AOC form within 10 days of the conference whether or not an agreement was reached by the parties. The mediator's report shall inform the court of the absence of any party, attorney, or insurance repre-

sentative known to the mediator to have been absent from the mediated settlement conference without permission. The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

(b) If an agreement upon all issues is reached, the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal(s), when it shall be filed with the court, and the name, address and telephone number of the person(s) designated by the parties to file such consent judgment or dismissal(s) with the court as required by Rule 4.C.(1). If an agreement upon all issues is reached at the conference, the mediator shall have the person(s) designated sign the mediator's report acknowledging acceptance of the duty to timely file the closing documents with the court.

Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the court and sanctions.

(5) **Scheduling and holding the conference.** It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

(6) **Distribution of mediator evaluation form.** At the mediated settlement conference, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per party with additional copies distributed upon request. The evaluation is intended for purposes of self-improvement and the mediator shall review returned evaluation forms.

RULE 7. COMPENSATION OF THE MEDIATOR.

A. BY AGREEMENT. When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. BY COURT ORDER. When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $125 that is due upon appointment.

C. CHANGE OF APPOINTED MEDIATOR. Pursuant to Rule 2.A., the parties have twenty-one (21) days to select a mediator. Parties who fail to select a mediator within that time frame and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. If the court approves the substitution, the parties shall pay the court's original appointee the $125 one time, per case administrative fee provided for in Rule 7.B.

D. INDIGENT CASES. No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the Senior Resident Superior Court Judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subsequent to the trial of the action. In ruling upon such motions, the Judge shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

E. POSTPONEMENTS AND FEES.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for a session of the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A conference session may be postponed by the mediator for good cause beyond the control of the moving participant(s) only after notice by the movant to all parties of the reasons for the postponement and a finding of good cause by the mediator.

(3) Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of $125 shall be paid to the mediator if the postponement is allowed, or if the request is within five (5) business days of the scheduled date the fee shall be $250. The postponement fee shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

(4) If all parties select or nominate the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

F. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the conference.

G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Senior Resident Superior Court Judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by a Resident or Presiding Superior Court Judge.

DRC COMMENTS TO RULE 7

DRC Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

It is not unusual for two or more related cases to be mediated collectively. A mediator shall use his or her business judgment in assessing the one time, per case administrative fee when two or more cases are mediated together and set his/her fee according to the amount of time s/he spent in an effort to schedule the matter for mediation. The mediator may charge a flat fee of $125.00 if scheduling was relatively easy or multiples of that amount if more effort was required.

DRC Comment to Rule 7.E.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rule 7.F.

If a party is found by a Senior Resident Superior Court Judge to have failed to attend a mediated settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 7.G.

If the Mediated Settlement Conference Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. MSC Rule 7.G. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.E. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION.

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as Superior Court mediators. For certification, a person shall:

A. Have completed a minimum of 40 hours in a trial court mediation training program certified by the Dispute Resolution Commission, or have completed a 16 hour supplemental trial court mediation training certified by the Commission after having been certified by the Commission as a family financial mediator;

B. Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she:

(a) is either:

(i) a member in good standing of the North Carolina State Bar, pursuant to Title 27, N.C. Administrative Code, The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000, or

(ii) a member similarly in good standing of the Bar of another state and a graduate of a law school recognized as accredited by the North Carolina Board of Law Examiners; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney; and

(b) has at least five years of experience as a judge, practicing attorney, law professor and/or mediator, or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8.B.(1) or Rule 8.B.(2).

(2) A non-attorney may be certified if he or she has completed the following:

(a) a six hour training on North Carolina court organization, legal terminology, civil court procedure, the attorney-client privilege, the unauthorized practice of law, and common legal issues arising in Superior Court cases, provided by a trainer certified by the Dispute Resolution Commission;

(b) provide to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience claimed in Rule 8.B.(2)(c);

(c) one of the following; (i) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Dispute Resolution Commission; and after completing the 20 hour training, mediating at least 30 disputes, over the course of at least three years, or equivalent experience, and ~~either~~ possess a four-year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to January 1, 2005 ~~or~~ and have four years of professional, management or administrative experience in a professional, business, or governmental entity; or (ii) ten years of professional, management or administrative experience in a professional, business, or governmental entity and possess a four-year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to January 1, 2005.

(d) Observe three mediated settlement conferences meeting the requirements of Rule 8.C. conducted by at least two different certified mediators, in addition to those required by Rule 8.C.

(3) Any person who has not been certified as a mediator pursuant to these rules may be certified without compliance with Rule 8.A., Rule 8.C., and the other provisions of Rule 8.B. if :

(a) the applicant for certification applies for certification before September 1, 2006, and

(b) the applicant has, by selection of the parties, mediated at least ten cases in the North Carolina Superior Court, North Carolina Industrial Commission, North Carolina Office of Administrative Hearings, North Carolina Court of Appeals, or United States District Courts for North Carolina before September 1, 2005, as shown by proof satisfactory to the Dispute Resolution Commission.

C. Observe two mediated settlement conferences conducted by a certified Superior Court mediator;

(1) at least one of which must be court ordered by a Superior Court,

(2) the other may be a mediated settlement conference conducted under rules and procedures substantially similar to those set out herein ~~,~~ in cases pending in the North Carolina Court of Appeals, North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, the North Carolina Superior Court or the United States District Courts for North Carolina.

D. Demonstrate familiarity with the statute, rules, and practice governing mediated settlement conferences in North Carolina;

E. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. Applicants for certification and re-certification and all certified Superior Court mediators shall report to the Commission any criminal convictions, disbarments or other disciplinary complaints and actions as soon as the applicant or mediator has notice of them;

F. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;

G. Pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission;

H. Agree to accept as payment in full of a party's share of the mediator's fee, the fee ordered by the Court pursuant to Rule 7; and,

I. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include completion of training or self-study designed to improve a mediator's communication, negotiation, facilitation or mediation skills; completion of observations; service as a mentor to a less experienced mediator; being mentored by a more experienced mediator; or serving as a trainer. Mediators shall report on a Commission approved form.)

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS.

A. Certified training programs for mediators seeking only certification as Superior Court mediators shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of trial court mediation;

(3) Communication and information gathering skills;

(4) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct adopted by the Supreme Court;

(5) Statutes, rules, and practice governing mediated settlement conferences in North Carolina;

(6) Demonstrations of mediated settlement conferences;

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(8) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. Certified training programs for mediators who are already certified as family financial mediators shall consist of a minimum of sixteen hours. The curriculum of such programs shall include the subjects in Rule 9.A. and discussion of the mediation and culture of insured claims. There shall be at least two simulations as specified in subsection (7).

C. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

D. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES.

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES. Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Senior Resident Superior Court Judge may order the use of the procedure requested under these rules or under local rules unless the court finds that the parties did not agree upon all of the relevant details of the procedure, (including items a-e in Rule 1.C.(2)); or that for good cause, the selected procedure is not appropriate for the case or the parties.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES. In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) **Neutral Evaluation (Rule 11).** Neutral evaluation in which a neutral offers an advisory evaluation of the case following summary presentations by each party,

(2) **Arbitration (Rule 12).** Non-Binding Arbitration, in which a neutral renders an advisory decision following summary presentations of the case by the parties and Binding Arbitration, in which a neutral renders a binding decision following presentations by the parties.

(3) **Summary Trials (Jury or Non-Jury) (Rule 13).** Nonbinding summary trials, in which a privately procured jury or presiding officer renders an advisory verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer; and binding summary trials, in which a privately procured jury or presiding officer renders a binding verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer.

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) **When proceeding is conducted.** Other settlement procedures ordered by the court pursuant to these rules shall be conducted no later than the date of completion set out in the court's original mediated settlement conference order unless extended by the Senior Resident Superior Court Judge.

(2) **Authority and duties of neutrals.**

(a) **Authority of neutrals.**

(i) **Control of proceeding.** The neutral evaluator, arbitrator, or presiding officer shall at all times be in control of the proceeding and the procedures to be followed.

(ii) **Scheduling the proceeding.** The neutral evaluator, arbitrator, or presiding officer shall attempt to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral(s). In the absence of agreement, such neutral shall select the date for the proceeding.

(b) **Duties of neutrals.**

(i) The neutral evaluator, arbitrator, or presiding officer shall define and describe the following at the beginning of the proceeding.

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(l) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral(s) and the participants.

(ii) **Disclosure.** Each neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice, or partiality.

(iii) **Reporting results of the proceeding.** The neutral evaluator, arbitrator, or presiding officer shall report the result of the proceeding to the court on an AOC form. The Administrative Office of the Courts may require the neutral to provide statistical data for evaluation of other settlement procedures on forms provided by it.

(iv) **Scheduling and holding the proceeding.** It is the duty of the neutral evaluator, arbitrator, or presiding officer to schedule the proceeding and conduct it prior to the completion deadline set out in the court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral evaluator, arbitrator, or presiding officer unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

(3) **Extensions of time.** A party or a neutral may request the Senior Resident Superior Court Judge to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. If the court grants the motion for an extension, this order shall set a new deadline for the completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(4) **Where procedure is conducted.** The neutral evaluator, arbitrator, or presiding officer shall be responsible for reserving a place agreed to by the parties, setting a time, and making other arrangements for the proceeding, and for giving timely notice to all attorneys and unrepresented parties in writing of the time and location of the proceeding.

(5) **No delay of other proceedings.** Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

(6) Inadmissibility of settlement proceedings. Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except ~~in~~:

(a) In proceedings for sanctions under this section;

(b) ~~or~~ In proceedings to enforce or rescind a settlement of the action~~.~~;

(c) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or

(d) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this section, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No ~~such~~ settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediated settlement conference or other settlement proceeding.

No mediator, other neutral, or neutral observer present at a settlement proceeding shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any ~~such~~ agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or

other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(7) No record made. There shall be no record made of any proceedings under these Rules unless the parties have stipulated to binding arbitration or binding summary trial in which case any party after giving adequate notice to opposing parties may record the proceeding.

(8) Ex parte communication prohibited. Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(9) Duties of the parties.

(a) Attendance. All persons required to attend a mediated settlement conference pursuant to Rule 4 shall attend any other settlement procedure which is nonbinding in nature, authorized by these rules, and ordered by the court except those persons to whom the parties agree and the Senior Resident Superior Court judge excuses. Those persons required to attend other settlement procedures which are binding in nature, authorized by these rules, and ordered by the court shall be those persons to whom the parties agree.

Notice of such agreement shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the Order requiring a mediated settlement conference. The notice shall be on an AOC form.

(b) Finalizing agreement.

(i) If an agreement is reached on all issues at the neutral evaluation, arbitration, or summary trial, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate within fourteen (14) days of the conclusion of the proceeding or before the expiration

of the deadline for its completion, whichever is longer. The person(s) responsible for filing closing documents with the court shall also sign the report to the court. The parties shall give a copy of their signed agreement, consent judgment, or voluntary dismissal(s) to the neutral evaluator, arbitrator, or presiding officer and all parties at the proceeding.

(ii) If an agreement is reached upon all issues prior to the evaluation, arbitration, or summary trial or while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the court within fourteen (14) days or before the expiration of the deadline for completion of the proceeding whichever is longer.

(iii) When a case is settled upon all issues, all attorneys of record must notify the Senior Resident Judge within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s), *and when*.

(c) **Payment of neutral's fee.** The parties shall pay the neutral's fee as provided by Rule 10.C.(l2).

(10) **Selection of neutrals in other settlement procedures.** The parties may select any individual to serve as a neutral in any settlement procedure authorized by these rules. For arbitration, the parties may select either a single arbitrator or a panel of arbitrators. Notice of such selection shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the Order requiring a mediated settlement conference.

The notice shall be on an AOC form. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

(11) **Disqualification.** Any party may move a Resident or Presiding Superior Court Judge of the district in which

an action is pending for an order disqualifying the neutral; and for good cause, such order shall be entered. Cause shall exist if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) **Compensation of the neutral.** A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparing for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time.

Unless otherwise ordered by the court or agreed to by the parties, the neutral's fees shall be paid in equal shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented by the same counsel. The presiding officer and jurors in a summary jury trial are neutrals within the meaning of these Rules and shall be compensated by the parties.

(13) **Sanctions for failure to attend other settlement procedures.** If any person required to attend a settlement procedure fails to attend without good cause, a Resident or Presiding Judge may impose upon the person any appropriate monetary sanction including but not limited to, the payment of fines, reimbursement of a party's attorney fees, expenses, and share of the neutral's fee and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against a person, or a Resident or Presiding Judge upon his/her own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 11. RULES FOR NEUTRAL EVALUATION.

A. NATURE OF NEUTRAL EVALUATION. Neutral evaluation is an informal, abbreviated presentation of facts and

issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing candid assessment of liability, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. PRE-CONFERENCE SUBMISSIONS. No later than twenty (20) days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, shall not be more than five (5) pages in length, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than ten (10) days prior to the date established for the neutral evaluation conference to begin any party may, but is not required to, send additional written information not exceeding three (3) pages in length to the evaluator, responding to the submission of an opposing party. The response shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) **Evaluator's opening statement.** At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the Parties.

(2) **Oral report to parties by evaluator.** In addition to the written report to the Court required under these rules at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of liability, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefore. The evaluator shall not reduce his or her oral report to writing, and shall not inform the Court thereof.

(3) **Report of evaluator to court.** Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form. The evaluator's report shall inform the court when and where the evaluation was held, the names of those who attended, and the names of any party, attorney, or insurance company representative known to the evaluator to have been absent from the neutral evaluation without permission. The report shall also inform the court whether or not an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the evaluator to

send a copy of any agreement reached by the parties to the court.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties to the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions.

RULE 12. RULES FOR ARBITRATION.

In this form of settlement procedure the parties select an arbitrator who shall hear the case and enter an advisory decision. The arbitrator's decision is made to facilitate the parties' negotiation of a settlement and is non-binding, unless neither party timely requests a trial *de novo*, in which case the decision is entered by the Senior Resident Superior Court Judge as a judgment, or the parties agree that the decision shall be binding.

A. ARBITRATORS.

(1) **Arbitrator's Canon of Ethics.** Arbitrators shall comply with the Canons of Ethics for Arbitrators promulgated by the Supreme Court of North Carolina. Arbitrators shall be disqualified and must recuse themselves in accordance with the Canons.

B. EXCHANGE OF INFORMATION.

(1) **Pre-hearing exchange of information.** At least 10 days before the date set for the arbitration hearing the parties shall exchange in writing:

(a) Lists of witnesses they expect to testify.

(b) Copies of documents or exhibits they expect to offer into evidence.

(c) A brief statement of the issues and contentions of the parties.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing. Each party shall bring to the hearing and provide to the arbitrator a copy of these materials. These materials shall not be filed with the court or included in the case file.

(2) **Exchanged documents considered authenticated.** Any document exchanged may be received in the hearing

as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian, or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(3) **Copies of exhibits admissible.** Copies of exchanged documents or exhibits are admissible in arbitration hearings, in lieu of the originals.

C. ARBITRATION HEARINGS.

(1) **Witnesses.** Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(2) **Subpoenas.** Rule 45 of the North Carolina Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(3) **Motions.** Designation of an action for arbitration does not affect a party's right to file any motion with the court.

(a) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions referred to the arbitrator in the exchange of information required by Rule 12.B.(1).

(b) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.

(4) **Law of evidence used as guide.** The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(5) **Authority of arbitrator to govern hearings.** Arbitrators shall have the authority of a trial Judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all matters involving contempt to the Senior Resident Superior Court Judge.

(6) **Conduct of hearing.** The arbitrator and the parties shall review the list of witnesses, exhibits and written statements concerning issues previously exchanged by the parties pursuant to Rule 12.B.(1), above. The order of the hearing shall generally follow the order at trial with regard to opening statements and closing arguments of counsel, direct and cross examination of witnesses and presentation of exhibits. However, in the arbitrator's discretion the order may be varied.

(7) **No Record of hearing made.** No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(8) **Parties must be present at hearings; Representation.** Subject to the provisions of Rule 10.C.(9), all parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator. All parties may be represented by counsel. Parties may appear *pro se* as permitted by law.

(9) **Hearing concluded.** The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing has been concluded.

D. THE AWARD.

(1) **Filing the award.** The arbitrator shall file a written award signed by the arbitrator and filed with the Clerk of Superior Court in the County where the action is pending, with a copy to the Senior Resident Superior Court Judge within twenty (20) days after the hearing is concluded or the receipt of post-hearing briefs whichever is later. The award shall inform the court of the absence of

any party, attorney, or insurance company representative known to the arbitrator to have been absent from the arbitration without permission. An award form, which shall be an AOC form, shall be used by the arbitrator as the report to the court and may be used to record its award. The report shall also inform the court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the arbitrator to send a copy of any agreement reached by the parties to the court.

(2) **Findings; Conclusions; Opinions.** No findings of fact and conclusions of law or opinions supporting an award are required.

(3) **Scope of award.** The award must resolve all issues raised by the pleadings, may be in any amount supported by the evidence, shall include interest as provided by law, and may include attorney's fees as allowed by law.

(4) **Costs.** The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.

(5) **Copies of award to parties.** The arbitrator shall deliver a copy of the award to all of the parties or their counsel at the conclusion of the hearing or the arbitrator shall serve the award after filing. A record shall be made by the arbitrator of the date and manner of service.

E. TRIAL DE NOVO.

(1) **Trial d*e novo* as of right.** Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial *de novo* as of right upon filing a written demand for trial *de novo* with the court, and service of the demand on all parties, on an AOC form within 30 days after the arbitrator's award has been served. Demand for jury trial pursuant to N.C.R.Civ.P. 38(b) does not preserve the right to a trial *de novo*. A demand by any party for a trial *de novo* in accordance with this section is sufficient to preserve the right of all other parties to a trial *de novo*. Any trial *de novo* pursuant to this section shall include all claims in the action.

(2) No reference to arbitration in presence of jury. A trial *de novo* shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the court's approval.

F. JUDGMENT ON THE ARBITRATION DECISION.

(1) Termination of action before judgment. Dismissals or a consent judgment may be filed at any time before entry of judgment on an award.

(2) Judgment entered on award. If the case is not terminated by dismissal or consent judgment, and no party files a demand for trial *de novo* within 30 days after the award is served, the Senior Resident Superior Court Judge shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be served on all parties or their counsel.

G. AGREEMENT FOR BINDING ARBITRATION.

(1) Written agreement. The arbitrator's decision may be binding upon the parties if all parties agree in writing. Such agreement may be made at any time after the order for arbitration and prior to the filing of the arbitrator's decision. The written agreement shall be executed by the parties and their counsel, and shall be filed with the Clerk of Superior Court and the Senior Resident Superior Court Judge prior to the filing of the arbitrator's decision.

(2) Entry of judgment on a binding decision. The arbitrator shall file the decision with the Clerk of Superior Court and it shall become a judgment in the same manner as set out in G.S. 1-567.1 ff.

H. MODIFICATION PROCEDURE.

Subject to approval of the arbitrator, the parties may agree to modify the procedures required by these rules for court ordered arbitration.

RULE 13. RULES FOR SUMMARY TRIALS.

In a summary bench trial, evidence is presented in a summary fashion to a presiding officer, who shall render a verdict. In a summary jury trial, evidence is presented in summary fashion to a privately pro-

cured jury, which shall render a verdict. The goal of summary trials is to obtain an accurate prediction of the ultimate verdict of a full civil trial as an aid to the parties and their settlement efforts.

Rule 23 of the General Rules of Practice also provide for summary jury trials. While parties may request of the Court permission to utilize that process, it may not be substituted in lieu of mediated settlement conferences or other procedures outlined in these rules.

A. PRE-SUMMARY TRIAL CONFERENCE.

Prior to the summary trial, counsel for the parties shall attend a conference with the presiding officer selected by the parties pursuant to Rule 10.C.(10). That presiding officer shall issue an order which shall:

(1) Confirm the completion of discovery or set a date for the completion;

(2) Order that all statements made by counsel in the summary trial shall be founded on admissible evidence, either documented by deposition or other discovery previously filed and served, or by affidavits of the witnesses;

(3) Schedule all outstanding motions for hearing;

(4) Set dates by which the parties exchange:

(a) A list of parties' respective issues and contentions for trial;

(b) A preview of the party's presentation, including notations as to the document (e.g. deposition, affidavit, letter, contract) which supports that evidentiary statement;

(c) All documents or other evidence upon which each party will rely in making its presentation; and

(d) All exhibits to be presented at the summary trial.

(5) Set the date by which the parties shall enter a stipulation, subject to the presiding officer's approval, detailing the time allowable for jury selection, opening statements, the presentation of evidence, and closing arguments (total time is usually limited to one day);

(6) Establish a procedure by which private, paid jurors will be located and assembled by the parties if a summary jury trial is to be held and set the date by which the parties shall submit agreed upon jury instructions, jury

selection questionnaire, and the number of potential jurors to be questioned and seated;

(7) Set a date for the summary jury trial; and

(8) Address such other matters as are necessary to place the matter in a posture for summary trial.

B. PRESIDING OFFICER TO ISSUE ORDER IF PARTIES UNABLE TO AGREE. If the parties are unable to agree upon the dates and procedures set out in Section A. of this Rule, the presiding officer shall issue an order which addresses all matters necessary to place the case in a posture for summary trial.

C. STIPULATION TO A BINDING SUMMARY TRIAL. At any time prior to the rendering of the verdict, the parties may stipulate that the summary trial be binding and the verdict become a final judgment. The parties may also make a binding high/low agreement, wherein a verdict below a stipulated floor or above a stipulated ceiling would be rejected in favor of the floor or ceiling.

D. EVIDENTIARY MOTIONS. Counsel shall exchange and file motion in limine and other evidentiary matters, which shall be heard prior to the trial. Counsel shall agree prior to the hearing of said motions as to whether the presiding officer's rulings will be binding in all subsequent hearings or non-binding and limited to the summary trial.

E. JURY SELECTION. In the case of a summary jury trial, potential jurors shall be selected in accordance with the procedure set out in the pre-summary trial order. These jurors shall complete a questionnaire previously stipulated to by the parties. Eighteen jurors or such lesser number as the parties agree shall submit to questioning by the presiding officer and each party for such time as is allowed pursuant to the Summary Trial Pre-trial Order. Each party shall then have three peremptory challenges, to be taken alternately, beginning with the plaintiff. Following the exercise of all peremptory challenges, the first twelve seated jurors, or such lesser number as the parties may agree, shall constitute the panel.

After the jury is seated, the presiding officer in his/her discretion, may describe the issues and procedures to be used in presenting the summary jury trial. The jury shall not be informed of the non-binding nature of the proceeding, so as not to diminish the seriousness with which they consider

the matter and in the event the parties later stipulate to a binding proceeding.

F. PRESENTATION OF EVIDENCE AND ARGUMENTS OF COUNSEL. Each party may make a brief opening statement, following which each side shall present its case within the time limits set in the Summary Trial Pre-trial Order. Each party may reserve a portion of its time for rebuttal or surrebuttal evidence. Although closing arguments are generally omitted, subject to the presiding officer's discretion and the parties' agreement, each party may be allowed to make closing arguments within the time limits previously established.

Evidence shall be presented in summary fashion by the attorneys for each party without live testimony. Where the credibility of a witness is important, the witness may testify in person or by video deposition. All statements of counsel shall be founded on evidence that would be admissible at trial and documented by prior discovery.

Affidavits offered into evidence shall be served upon opposing parties far enough in advance of the proceeding to allow time for affiants to be deposed. Counsel may read portions of the deposition to the jury. Photographs, exhibits, documentary evidence and accurate summaries of evidence through charts, diagrams, evidence notebooks, or other visual means are encouraged, but shall be stipulated by both parties or approved by the presiding officer.

G. JURY CHARGE. In a summary jury trial, following the presentation of evidence by both parties, the presiding officer shall give a brief charge to the jury, relying on predetermined jury instructions and such additional instructions as the presiding officer deems appropriate.

H. DELIBERATION AND VERDICT. In a summary jury trial, the presiding officer shall inform the jurors that they should attempt to return a unanimous verdict. The jury shall be given a verdict form stipulated to by the parties or approved by the presiding officer. The form may include specific interrogatories, a general liability inquiry and/or an inquiry as to damages. If, after diligent efforts and a reasonable time, the jury is unable to reach a unanimous verdict, the presiding officer may recall the jurors and encourage them to reach a verdict quickly, and/or inform them that they may return separate verdicts, for which purpose the presiding officer may distribute separate forms.

In a summary bench trial, at the close of the presentation of evidence and arguments of counsel and after allowing time for settlement discussions and consideration of the evidence by the presiding officer, the presiding officer shall render a decision. Upon a party's request, the presiding officer may allow three business days for the filing of post-hearing briefs. If the presiding officer takes the matter under advisement or allows post-hearing briefs, the decision shall be rendered no later than ten days after the close of the hearing or filing of briefs whichever is longer.

I. JURY QUESTIONNING. In a summary jury trial the presiding officer may allow a brief conference with the jurors in open court after a verdict has been returned, in order to determine the basis of the jury's verdict. However, if such a conference is used, it should be limited to general impressions. The presiding officer should not allow counsel to ask detailed questions of jurors to prevent altering the summary trial from a settlement technique to a form of pre-trial rehearsal. Jurors shall not be required to submit to counsels' questioning and shall be informed of the option to depart.

J. SETTLEMENT DISCUSSIONS. Upon the retirement of the jury in summary jury trials or the presiding officer in summary bench trials, the parties and/or their counsel shall meet for settlement discussions. Following the verdict or decision, the parties and/or their counsel shall meet to explore further settlement possibilities. The parties may request that the presiding officer remain available to provide such input or guidance as the presiding officer deems appropriate.

K. MODIFICATION OF PROCEDURE. Subject to approval of the presiding officer, the parties may agree to modify the procedures set forth in these Rules for summary trial.

L. REPORT OF PRESIDING OFFICER. The presiding officer shall file a written report no later than ten (10) days after the verdict. The report shall be signed by the presiding officer and filed with the Clerk of the Superior Court in the County where the action is pending, with a copy to the Senior Resident Court Judge. The presiding officer's report shall inform the court of the absence of any party, attorney, or insurance company representative known to the presiding officer to have been absent from the summary jury or summary bench trial without permission. The report may be used to record the verdict. The report shall also inform the court in the event that an agreement upon all issues was reached by the parties and, if

so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the presiding officer to send a copy of any agreement reached by the parties.

RULE 14. LOCAL RULE MAKING.

The Senior Resident Superior Court Judge of any district conducting mediated settlement conferences under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.1, implementing mediated settlement conferences in that district.

RULE 15. DEFINITIONS.

A. The term, Senior Resident Superior Court Judge, as used throughout these rules, shall refer both to said judge or said judge's designee.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the Administrative Office of the Courts. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

RULE 16. TIME LIMITS.

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the Rules of Civil Procedure.

Order Adopting Amendments to the North Carolina Rules of Appellate Procedure

I. Rule 3 of the North Carolina Rules of Appellate Procedure is amended as described below:

Rule 3(b) is amended to read:

(b) Special Provisions. Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes and appellate rules sections noted:

(1) ~~Termination of Parental Rights, G.S. 7B-1113.~~ Juvenile matters, G.S. 7B-2602.

(2) ~~Juvenile matters, G.S. 7B-1001 or 7B-2602.~~ Appeals pursuant to G.S. 7B-1001 shall be subject to the provisions of N.C. R. App. P. 3A.

For appeals filed pursuant to these provisions and for extraordinary writs filed in cases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced by the use of initials only in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). Appeals filed pursuant to these provisions shall specifically comply, if applicable, with Rules 9(b), 9(c), 26(g), 28(d), 28(k), 30, 37, 41 and Appendix B.

II. Rule 3A is added to the North Carolina Rules of Appellate Procedure as described below:

Rule 3A is added to read:

Rule 3A. APPEAL IN QUALIFYING JUVENILE CASES—HOW AND WHEN TAKEN, SPECIAL RULES

(a) Filing the Notice of Appeal. Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to G.S. 7B-1001, may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of

the General Statutes of North Carolina. Trial counsel or an appellant not represented by counsel shall be responsible for filing and serving the notice of appeal in the time and manner required. If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal, and the appellant shall cooperate with counsel throughout the appeal. All such appeals shall comply with the special provisions set out in subsection (b) of this rule and, except as hereinafter provided by this rule, all other existing Rules of Appellate Procedure shall remain applicable.

(b) Special Provisions. For appeals filed pursuant to this rule and for extraordinary writs filed in cases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced only by the use of initials in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to subdivision (b)(1) below or Rule 9(c).

In addition, appeals filed pursuant to these provisions shall adhere strictly to the expedited procedures set forth below:

(1) **Transcripts.** Within one business day after the notice of appeal has been filed, the clerk of superior court shall notify the court reporting coordinator of the Administrative Office of the Courts of the date the notice of appeal was filed and the names of the parties to the appeal and their respective addresses or addresses of their counsel. Within two business days of receipt of such notification, the court reporting coordinator shall assign a transcriptionist to the case. Within thirty-five days from the date of the assignment, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the office of the Clerk of the Court of Appeals and provide copies to the respective parties to the appeal at the addresses provided. Motions for extensions of time to prepare and deliver transcripts are disfavored and will not be allowed by the Court of Appeals absent extraordinary circumstances.

(2) **Record on Appeal.** Within ~~twenty~~ ten days after ~~the notice of appeal has been filed~~ receipt of the transcript, the appellant shall prepare and serve upon all other parties a proposed record on appeal constituted in accordance with Rule

9. ~~, except there shall be no requirement to set out references to the transcript under the assignments of error.~~ Trial counsel for the appealing party~~, together with~~ shall have a duty to assist appellate counsel, if separate counsel is appointed or retained for the appeal, ~~shall have joint responsibility for~~ in preparing and serving a proposed record on appeal. Within ten days after service of the proposed record on appeal upon an appellee, the appellee may serve upon all other parties: (1) a notice of approval of the proposed record; (2) specific objections or amendments to the proposed record on appeal, or (3) a proposed alternative record on appeal.

If the parties agree to a settled record on appeal within ~~thirty~~ twenty days after ~~notice of appeal has been filed,~~ receipt of the transcript, the appellant shall file three legible copies of the settled record on appeal in the office of the Clerk of the Court of Appeals within five business days from the date the record was settled. If all appellees fail within the times allowed them either to serve notices of approval or to serve objections, amendments, or proposed alternative records on appeal, the appellant's proposed record on appeal shall constitute the settled record on appeal, and the appellant shall file three legible copies thereof in the office of the Clerk of the Court of Appeals within five business days from the last date upon which any appellee could have served such objections, amendments, or proposed alternative record on appeal. If an appellee timely serves amendments, objections, or a proposed alternative record on appeal and the parties cannot agree to the settled record within thirty days after notice of appeal has been filed, each party shall file three legible copies of the following documents in the office of the Clerk of the Court of Appeals within five business days after the last day upon which the record can be settled by agreement: (1) the appellant shall file his or her proposed record on appeal, and (2) an appellee shall file his or her objections, amendments, or proposed alternative record on appeal.

No counsel who has appeared as trial counsel for any party in the proceeding shall be permitted to withdraw, nor shall such counsel be otherwise relieved of any responsibilities imposed pursuant to this rule, until the record on appeal has been filed in the office of the Clerk of the Court of Appeals as provided herein.

(3) **Briefs.** Within thirty days after the record on appeal has been filed with the Court of Appeals, the appellant shall file his or her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Within thirty days after the appellant's brief has been served on an appellee, the

appellee shall file his or her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Motions for extensions of time to file briefs will not be allowed absent extraordinary circumstances.

(c) Calendaring priority. Appeals filed pursuant to this rule will be given priority over other cases being considered by the Court of Appeals and will be calendared in accordance with a schedule promulgated by the Chief Judge. Unless otherwise ordered by the Court of Appeals, cases subject to the expedited procedures set forth in this rule shall be disposed of on the record and briefs and without oral argument.

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 1st day of ~~March~~ May, 2006, and shall apply to cases appealed on or after that date.

Adopted by the Court in Conference this the ~~3rd~~ ~~26th~~ 28th day of ~~November, 2005~~ ~~January~~ February, 2006. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

~~Lake~~ Parker, C.J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 21, 2005.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, Rule 1.13, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Revised Rules of Professional Conduct

Rule 1.13, Organization As Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is en-

gaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law. ~~In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:~~

~~(1) asking for reconsideration of the matter;~~

~~(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and~~

~~(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.~~

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may reveal such information outside the organization to the extent permitted by Rule 1.6 and may resign in accordance with Rule 1.16.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee, or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under these Rules, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

~~(e)~~ (f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

~~(e)~~ (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] . .

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. ~~However, different considerations arise~~ Paragraph (b) makes clear, however, that when the lawyer knows that the organization may be substantially injured by action of an officer or other ~~a~~ constituent that violates a legal obligation to the organization or is ~~in~~ a violation of the law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(g), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. ~~In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization.~~

~~Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.~~

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

~~[4]~~ [5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be

referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

~~[5]~~ [6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3, or 4.1. If the lawyer reasonably believes that disclosure of information protected by Rule 1.6 is necessary to prevent the commission of a crime by an organizational client, for example, disclosure is permitted by Rule 1.6(b)(2).

If the lawyer's services are being or have been used by an ~~organization~~ organizational client to further a crime or fraud by the organization, Rule 1.6(b)(4) permits the lawyer to disclose confidential information to prevent, mitigate, or rectify the consequences of such conduct. In such circumstances, Rule 1.2(d) ~~can~~ may be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee, or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) and (c), or who withdraws in circumstances that require or permit the lawyer to take action under these Rules, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

~~[6]~~ [9] . . .

Dual Representation

~~[9]~~ [12] Paragraph ~~(e)~~ (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder, director, employee, member, or other constituent.

[renumbering remaining paragraphs]

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules of Professional Conduct were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 21, 2005.

Given over my hand and the Seal of the North Carolina State Bar, this the 20th day of February, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules of Professional Conduct as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 2nd day of March, 2006.

s/ Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules of Professional Conduct be spread upon the minutes of the Supreme Court and that they be published in the Advance Sheets of the Supreme Court and in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 2nd day of March, 2006.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 21, 2005.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, be amended by adding the following section:

27 N.C.A.C. 1D, The Plan of Legal Specialization

Section .2800, Certification Standards for the Social Security Disability Law Specialty

.280l Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates Social Security disability law as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

.2802 Definition of Specialty

The specialty of Social Security disability law is the practice of law relating to the analysis of claims and controversies arising under Title II and Title XVI of the Social Security Act and the representation of claimants in those matters before the Social Security Administration and/or the federal courts.

.2803 Recognition as a Specialist in Social Security Disability Law

If a lawyer qualifies as a specialist in Social Security disability law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Social Security Disability Law."

.2804 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in Social Security disability law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

.2805 Standards for Certification as a Specialist in Social Security Disability Law

Each applicant for certification as a specialist in Social Security disability law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in Social Security disability law:

(a) Licensure and Practice—An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement—An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of Social Security disability law.

(1) "Substantial involvement" shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 600 hours a year to the practice of Social Security disability law, but not less than 500 hours in any one year. "Practice" shall mean substantive legal work done primarily for the purpose of providing legal advice or representation, or a practice equivalent.

(2) "Practice equivalent" shall mean:

(A) Service as a law professor concentrating in the teaching of Social Security disability law for one year or more may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2805(b)(1) above;

(B) Service as a Social Security administrative law judge, Social Security staff lawyer, or assistant United States attorney involved in cases arising under Title II and Title XVI may be substituted for three of the five years necessary to satisfy the requirement set forth in Rule .2805(b)(1) above;

(3) The board may require an applicant to show substantial involvement in Social Security disability law by providing information regarding the applicant's participation, during his or her legal career, as primary counsel of record in the following:

(A) Proceedings before an administrative law judge;

(B) Cases appealed to the appeals council of the Social Security Administration; and

(C) Cases appealed to federal district court.

(c) Continuing Legal Education—An applicant must earn no less than 36 hours of accredited continuing legal education (CLE) credits in Social Security disability law and related fields during the three years preceding application, with not less than six credits earned in any one year. Of the 36 hours of CLE, at least 18 hours shall be in Social Security disability law, and the balance may be in the following related fields: trial skills and advocacy; practice management; medical injuries, medicine, or anatomy; ERISA; labor and employment law; elder law; workers' compensation law; and the law relating to long term disability or Medicaid/Medicare claims.

(d) Peer Review—An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice law in a jurisdiction in the United States and have substantial practice or judicial experience in Social Security disability law. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms mailed by the board to each reference. These forms shall be returned directly to the specialty committee.

(e) Examination—An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of Social Security disability law to justify the representation of special competence to the legal profession and the public. The examination shall be given annually in written form and shall be administered and graded uniformly by the specialty committee.

(1) Subject Matter—The examination shall cover the applicant's knowledge and application of the law relating to the following:

(A) Title II and Title XVI of the Social Security Act;

(B) Federal practice and procedure in Social Security disability cases;

(C) Medical proof of disability;

(D) Vocational aspects of disability;

(E) Workers' compensation offset;

(F) Eligibility for Medicare and Medicaid;

(G) Eligibility for Social Security retirement and survivors benefits;

(H) Interaction of Social Security benefits with employee benefits (e.g., long term disability and back pay);

(I) Equal Access to Justice Act; and

(J) Fee collection and other ethical issues in Social Security practice.

.2806 Standards for Continued Certification as a Specialist

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2806(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement. The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2805(b) of this subchapter.

(b) Continuing Legal Education. The specialist must earn no less than 60 hours of accredited continuing legal education credits in Social Security disability law and related fields during the five years preceding application. Not less than six of the credits may be earned in any one-year. Of the 60 hours of CLE, at least 20 hours shall be in Social Security disability law, and the balance may be in the following related fields: trial skills and advocacy; practice management; medical injuries, medicine or anatomy; ERISA; labor and employment law; elder law; workers' compensation law; and the law relating to long term disability or Medicaid/Medicare claims.

(c) Peer Review. The specialist must comply with the requirements of Rule .2805(d) of this subchapter.

(d) Time for Application. Application for continued certification shall be made not more than 180 days nor less than 80 days prior to the expiration of the prior period of certification.

(e) Lapse of Certification. Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2805 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification. If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2805 of this subchapter.

.2807 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in Social Security disability law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 21, 2005.

Given over my hand and the Seal of the North Carolina State Bar, this the 20th day of February, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 2nd day of March, 2006.

s/ Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the Advance Sheets of the Supreme Court and in the

forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 2nd day of March, 2006.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CERTIFICATION OF PARALEGALS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 21, 2005.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Certification of Paralegals

Section .0100, The Plan for Certification of Paralegals

.0104 Size and Composition of Board

The board shall have nine members, five of whom must be lawyers in good standing and authorized to practice law in the state of North Carolina. One of the members who is a lawyer shall be a program director at a qualified paralegal studies program. Four members of the board shall be paralegals certified under the plan provided, however, that the paralegals appointed to the inaugural board shall be exempt from this requirement during their initial and successive terms but each such member shall be eligible, during the shorter of such initial term or the alternative qualification period, for certification by the board upon the board's determination that the member meets the requirements for certification in Rule .0119(b).

.0115 Powers and Duties of the Board

Subject to the general jurisdiction of the council and the North Carolina Supreme Court, the board shall have jurisdiction of all matters pertaining to certification of paralegals and shall have the power and duty

(1) . . .

(7) to evaluate and approve continuing legal education courses for the purpose of meeting the continuing legal education requirements established by the board for the certification of paralegals; ~~and~~

(8) to cooperate with other organizations, boards, and agencies engaged in the recognition, education, or regulation of paralegals; and

(9) to set fees, with the approval of the council, and to, in appropriate circumstances, waive such fees.

.0118 Certification Committee

(a) The board shall establish a separate certification committee. The certification committee shall be composed of seven members appointed by the board, one of whom shall be designated annually by the chairperson of the board as chairperson of the certification committee. At least two members of the committee shall be lawyers, licensed and currently in good standing to practice law in this state, and two members of the committee shall be certified paralegals. The remaining members of the committee shall be either lawyers, licensed and currently in good standing to practice law in this state, or certified paralegals. The paralegals appointed to the inaugural committee shall be exempt from the certification requirement during their initial term but each such member shall be eligible, during the shorter of such initial term or the alternative qualification period, for certification by the board upon the board's determination that the committee member meets the requirements for certification in Rule .0119(b).

(b) . . .

.0119 Standards for Certification of Paralegals

(a) To qualify for certification as a paralegal, an applicant must pay any required fee, and comply with the following standards:

(1) Education. The applicant must have earned one of the following:

(A) an associate's, bachelor's, or master's degree or post-baccalaureate certificate from a qualified paralegal studies program; or

(B) an associate's or bachelor's degree in any discipline from any institution of post-secondary education that is accredited by an

accrediting body recognized by the United States Department of Education; and successfully completed at least the equivalent of 18 ~~or more~~ semester credits at a qualified paralegal studies program, any portion of which credits may also satisfy the requirements for the associate's or bachelor's degree.

~~A qualified paralegal studies program is a program of paralegal or legal assistant studies that is approved by the House of Delegates of the American Bar Association, or that offers at least the equivalent of 18 semester credits of coursework in paralegal studies as prescribed by the American Bar Association Guidelines for the Approval of Paralegal Education and is an institutional member of the Southern Association of Colleges and Schools or other regional accrediting agency recognized by the United States Department of Education.~~

(2) Examination. The applicant must achieve a satisfactory score on a written examination designed to test the applicant's knowledge and ability. The board shall assure that the contents and grading of the examinations are designed to produce a uniform minimum level of competence among the certified paralegals.

(b) Alternative Qualification Period. For a period not to exceed two years after the date that applications for certification are first accepted by the board, an applicant may qualify by satisfying one of the following:

(1) earned a high school diploma, or its equivalent, worked as a paralegal and/or a paralegal educator in North Carolina for not less than 5000 hours during the five years prior to application, and, during the 12 months prior to application, completed three hours of continuing legal education in professional responsibility, as approved by the board;

(2) obtained and maintained at all times prior to application the designation Certified Legal Assistant (CLA)/Certified Paralegal (CP), PACE-Registered Paralegal (RP), or other national paralegal credential approved by the board and worked as a paralegal and /or a paralegal educator in North Carolina for not less than 2000 hours during the two years prior to application; or

(3) fulfilled the educational requirements set forth in Rule .0119(a)(1)A or B and worked as a paralegal and/or a paralegal educator in North Carolina for not less than 2000 hours during the two years prior to application.

(c) . . .

(e) Qualified Paralegal Studies Program. A qualified paralegal studies program is a program of paralegal or legal assistant studies that is an institutional member of the Southern Association of Colleges and Schools or other regional accrediting agency recognized by the United States Department of Education, and is either

(1) approved by the American Bar Association;

(2) an institutional member of the American Association for Paralegal Education; or

(3) offers at least the equivalent of 18 semester credits of coursework in paralegal studies as prescribed by the American Bar Association Guidelines for the Approval of Paralegal Education.

(f) Designation as a Qualified Paralegal Studies Program. The board shall determine whether a paralegal studies program is a qualified paralegal studies program upon submission by the program of an application to the board provided, however, a paralegal studies program is not required to submit an application for qualification as long as the program satisfies the requirements of Rule .0119(e)(1) or (2).

(1) A program designated by the board as a qualified paralegal studies program shall renew its application for designation every five years.

(2) An applicant for certification who lists on a certification application a paralegal studies program that does not satisfy the requirements of Rule .0119(e)(1) or (2) or that has not been designated by the board as a qualified paralegal studies program shall be responsible for obtaining a completed application for designation from the program or shall submit the information required on the application for determination that the program is a qualified paralegal studies program.

(3) Designation of a paralegal studies program as a qualified paralegal studies program under this section does not constitute an approval or an endorsement of the program by the board or the North Carolina State Bar.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were

duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 21, 2005.

Given over my hand and the Seal of the North Carolina State Bar, this the 20th day of February, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 2nd day of March, 2006.

s/ Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the Advance Sheets of the Supreme Court and in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 2nd day of March, 2006.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 21, 2005.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the continuing legal education program, as particularly set forth in 27 N.C.A.C. 1D, Section .1600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1600, Regulations Governing the Administration of the Continuing Legal Education Program

Rule .1602, Course Content Requirements

(a) . . .

(d) In-House CLE and Self-Study. No approval will be provided for in-house CLE or self-study by attorneys, except those programs exempted by the board under Rule .1501(~~b~~ c)(10) of this subchapter or as provided in Rule .1604(e) of this subchapter.

(e) . . .

Rule .1604, Accreditation of Prerecorded, Simultaneous Broadcast, and Computer-Based Programs

(a) . . .

(d) Minimum ~~Attendance~~ Registration and Verification of Attendance. A minimum of ~~five~~ three active members must ~~physically attend~~ register for the presentation of a prerecorded program. This requirement does not apply to ~~participation from a remote location in~~ the presentation of a live broadcast by telephone, satellite, or video conferencing equipment. Attendance at a prerecorded or simultaneously broadcast (by telephone, satellite, or video conferencing) program must be verified by (1) the sponsor's report of attendance or (2) the execution of an affidavit of attendance by the participant.

(e) . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 21, 2005.

Given over my hand and the Seal of the North Carolina State Bar, this the 20th day of February, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the

same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 2nd day of March, 2006.

s/ Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the Advance Sheets of the Supreme Court and in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 2nd day of March, 2006.

s/Timmons-Goodson, J.
or the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 20, 2006.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1B, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

.0114 Formal Hearing

(a) . . . .

(d) Within ~~14~~ 20 days of the receipt of return of service of a complaint by the secretary, the chairperson of the commission will designate a hearing committee from among the commission members. The chairperson will notify the counsel and the defendant of the composition of the hearing committee. Such notice will also contain the time and place determined by the chairperson for the hearing to com-

mence. The commencement of the hearing will be initially scheduled not less than ~~60~~ 90 nor more than ~~90~~ 150 days from the date of service of the complaint upon the defendant, unless one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint. When one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint, the chairperson of the commission may consolidate the cases for hearing, and the hearing will be initially scheduled not less than ~~60~~ 90 nor more than ~~90~~ 150 days from the date of service of the last complaint upon the defendant. By agreement between the parties and with the consent of the chair, the date for the initial setting of the hearing may be set less than 90 days after the date of service on the defendant.

(e) . . . .

.0117 Surrender of License While Under Investigation

(a) . . . .

(d) If a defendant against whom a formal complaint has been filed before the commission wishes to consent to disbarment, the defendant may do so by filing an affidavit with the chairperson of the commission. If the chairperson determines that the affidavit meets the requirements set out in .0117(a)(1), (2), (3), and (4) above, the chairperson will accept the surrender and issue an order of disbarment. The order of disbarment becomes effective ~~30 days after service~~ upon entry of the order ~~upon the defendant~~ with the secretary. If the affidavit does not meet the requirements set out above, the consent to disbarment will not be accepted and the disciplinary complaint will be heard pursuant to Rule .0114 of this subchapter.

(e) After a member tenders his or her license or consents to disbarment under this section the member may not undertake any new legal matters. The member may complete any legal matters which were pending on the date of the tender of the affidavit or consent to disbarment which can be completed within 30 days of the tender or consent. The member has 30 days from the date on which the member tenders the affidavit of surrender or consent to disbarment in which to comply with all of the duties set out in Rule .0124 of this subchapter.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments

to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 20, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 2nd day of March, 2006.

s/ Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the Advance Sheets of the Supreme Court and in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 2nd day of March, 2006.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING PARALEGAL EDUCATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 20, 2006.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing paralegal education, as particularly set forth in 27 N.C.A.C. 1G, Section .0200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Section .0200, Rules Governing Continuing Paralegal Education

.0202 Accreditation Standards

The Board of Paralegal Certification shall approve continuing education activities in compliance with the following standards and provisions.

(1) . . . .

(3) A certified paralegal may receive credit ~~Credit may be given~~ for continuing education activities where live instruction is used or mechanically or electronically recorded or reproduced material is used, including videotape or satellite transmitted programs. A minimum of ~~five~~ three certified paralegals must ~~physically attend~~ register to attend the presentation of a prerecorded program. This requirement does not apply to participation from a remote location in the presentation of a live broadcast by telephone, satellite, or video conferencing equipment.

(4) A certified paralegal may receive credit for participation in a course on CD-ROM or on-line. A CD-ROM course is an educational seminar on a compact disk that is accessed through the CD-ROM drive of the user's personal computer. An on-line course is an educational seminar available on a provider's website reached via the internet. To be accredited, a computer-based CLE course must be interactive, permitting the participant to communicate, via telephone, electronic mail, or a website bulletin board, with the presenter and/or other participants.

(5) ~~(4)~~ . . . [renumbering the remaining paragraphs].

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 20, 2006.

Given over my hand and the Seal of the North Carolina State Bar, this the 20th day of February, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the

Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 2nd day of March, 2006.

s/ Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the Advance Sheets of the Supreme Court and in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 2nd day of March, 2006.

s/Timmons-Goodson, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 20, 2006.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the continuing legal education program, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

.1522 Annual Report and Compliance Period

(a) Annual Written Report. Commencing in 1989, each active member of the North Carolina State Bar shall provide an annual written report to the North Carolina State Bar in such form as the board shall prescribe by regulation concerning compliance with the continuing legal education program for the preceding year or declaring an exemption under Rule .1517 of this subchapter. The annual report

form shall be corrected, if necessary, signed by the member, and promptly returned to the State Bar. Upon receipt of a signed annual report form, appropriate adjustments shall be made to the member's continuing legal education record with the State Bar. No further adjustments shall thereafter be made to the member's continuing legal education record unless, on or before July 31 of the year in which the report form is mailed to members, the member shows good cause for adjusting the member's continuing legal education record for the preceding year.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 20, 2006.

Given over my hand and the Seal of the North Carolina State Bar, this the 20th day of February, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 2nd day of March, 2006.

s/ Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the Advance Sheets of the Supreme Court and in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 2nd day of March, 2006.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING ATTORNEYS APPEARING *PRO HAC VICE*

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 20, 2006.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar be amended by adding a new subchapter as follows to provide for the registration of attorneys admitted *pro hac vice*:

27 N.C.A.C. 1H, Section .0100 Registration Procedure

.0101 Registration

(a) Whenever an out-of-state attorney (the admittee) is admitted to practice *pro hac vice* pursuant to G.S. 84-4.1, it shall be the responsibility of the member of the North Carolina State Bar who is associated in the matter (the responsible attorney) to file with the secretary a complete registration statement verified by the admittee. This registration statement must be submitted within 30 days of the court's order admitting the admittee upon a form approved by the Council of the North Carolina State Bar.

(b) Failure of the responsible attorney to file the registration statement in a timely fashion shall be grounds for administrative suspension from the practice of law in North Carolina pursuant to the procedures set forth in Rule .0903 of subchapter D of these rules.

(c) Whenever it appears that a registration statement required by paragraph (a) above has not been filed in a timely fashion, notice of such apparent failure shall be sent by the secretary to the court in which the admittee was admitted *pro hac vice* for such action as the court deems appropriate.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 20, 2006.

Given over my hand and the Seal of the North Carolina State Bar, this the 20th day of February, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 2nd day of March, 2006.

s/ Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the Advance Sheets of the Supreme Court and in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 2nd day of March, 2006.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATIVE COMMITTEE

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 20, 2006.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the Administrative Committee, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0900 Procedures for Administrative Committee

.0903 Suspension for Nonpayment of Membership Fees, Late Fee, Client Security Fund Assessment, or Assessed Costs, or Failure to File Certificate of Insurance Coverage or *Pro Hac Vice* Registration Statement

(a) Notice of Overdue Fees, Costs, ~~or~~ Certificate of Insurance Coverage, or *Pro Hac Vice* Registration Statement. Whenever it appears that a member has failed to comply, in a timely fashion, with the rules regarding payment of the annual membership fee, late fee, the Client Security Fund assessment, and/or any district bar annual membership fee, or that the member has failed to pay, in a timely fashion, the costs of a disciplinary, disability, reinstatement, show cause, or other proceeding of the North Carolina State Bar as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, or a notice of the secretary or the council of the North Carolina State Bar or that the member has failed to file, in a timely fashion, a certificate of insurance coverage as required in Rule .0204 of subchapter A of these rules or a *pro hac vice* registration statement as required in Rule .0101 of subchapter H of these rules, the secretary shall prepare a written notice

(1) directing the member to show cause, in writing, within 30 days of the date of service of the notice why he or she should not be suspended from the practice of law, and

(2) when appropriate, demanding payment of a $30 late fee for the failure to pay the annual membership fee to the North Carolina State Bar and/or Client Security Fund assessment in a timely fashion, and/or failure to submit a certificate of insurance coverage in a timely fashion.

(b) Service of the Notice

. . . .

(c) Entry of Order of Suspension Upon Failure to Respond to Notice to Show Cause. Whenever a member fails to respond in writing within 30 days of the service of the notice to show cause upon the member, and it appears that the member has failed to comply with the rules regarding payment of the annual membership fee, any late fees imposed pursuant to Rule .0203(b) or Rule .0204(c) of subchapter A, the Client Security Fund assessment, and/or any district bar annual membership fee, and/or it appears that the member has failed to pay any costs assessed against the member as required by a notice of the chairperson of the Grievance Committee, an order of the

Disciplinary Hearing Commission, and/or a notice of the secretary or council of the North Carolina State Bar, and/or it appears that the member has failed to file a certificate of insurance coverage, and/or a *pro hac vice* registration statement, the council may enter an order suspending the member from the practice of law. The order shall be effective when entered by the council. A copy of the order shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(d) Procedure Upon Submission of a Timely Response to a Notice to Show Cause

(1) Consideration by Administrative Committee. If a member submits a written response to a notice to show cause within 30 days of the service of the notice upon the member, the Administrative Committee shall consider the matter at its next regularly scheduled meeting. The member may personally appear at the meeting and be heard, may be represented by counsel, and may offer witnesses and documents. The counsel may appear at the meeting on behalf of the State Bar and be heard, and may offer witnesses and documents. The burden of proof shall be upon the member to show cause by clear, cogent, and convincing evidence why the member should not be suspended from the practice of law for the apparent failure to comply with the rules regarding payment of the annual membership fee, late fee, Client Security Fund assessment, and/or any district bar annual membership fee, and/or the apparent failure to pay costs assessed against the member as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, and/or a notice of the secretary or council of the North Carolina State Bar, and/or the apparent failure to file a certificate of insurance coverage and/or a *pro hac vice* registration statement.

. . . .

(e) Late Tender of Membership Fees, Assessed Costs, or Certificate of Insurance Coverage.

If a member tenders to the North Carolina State Bar the annual membership fee, the $30 late fee, Client Security Fund assessment, any district bar annual membership fee, and/or any costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar and/or overdue certificate of insurance coverage and/or the *pro hac vice* registration statement before

a suspension order is entered by the council, no order of suspension will be entered.

.0904 Reinstatement After Suspension for Failure to Pay Fees or Assessed Costs, or to File Certificate of Insurance Coverage or *Pro Hac Vice* Registration Statement

(a) Reinstatement Within 30 Days of Service of Suspension Order. A member who has been suspended for nonpayment of the annual membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, and/or costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar, and/or failure to file a certificate of insurance coverage as required by Rule .0204 of subchapter A, and/or a *pro hac vice* registration statement as required by Rule .0101 of subchapter H, may petition the secretary for an order of reinstatement of the member's license at any time up to 30 days after service of the suspension order upon the member. The secretary shall enter an order reinstating the member to active status upon receipt of a timely written request and satisfactory showing by the member of certification of insurance coverage, registration of *pro hac vice* admission, and/or payment of the membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, assessed costs, and the costs of the suspension and reinstatement procedure, including the costs of service. Such member shall not be required to file a formal reinstatement petition or pay a $125 reinstatement fee.

(b) Reinstatement More than 30 Days After Service of Suspension Order. At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for nonpayment of the membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, and/or costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar and/or failure to file a certificate of insurance coverage, and/or file a *pro hac vice* registration statement, may petition the council for an order of reinstatement.

(c) Contents of Reinstatement Petition

The petition shall set out facts showing the following:

(1) . . . .

(5) that the member has filed a certificate of insurance coverage for the current year; and

(6) that the member has filed any overdue *pro hac vice* registration statement for which the member was responsible.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 20, 2006.

Given over my hand and the Seal of the North Carolina State Bar, this the 20th day of February, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 2nd day of March, 2006.

s/ Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the Advance Sheets of the Supreme Court and in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 2nd day of March, 2006.

s/Timmons-Goodson, J.
For the Court

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendments to the North Carolina Rules of Appellate Procedure

I. Rule 3 of the North Carolina Rules of Appellate Procedure is amended as described below:

Rule 3(b) is amended to read:

(b) Special Provisions. Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes and appellate rules sections noted:

(1) ~~Termination of Parental Rights, G.S. 7B-1113.~~ Juvenile matters, G.S. 7B-2602.

(2) ~~Juvenile matters, G.S. 7B-1001 or 7B-2602.~~ Appeals pursuant to G.S. 7B-1001 shall be subject to the provisions of N.C. R. App. P. 3A.

For appeals filed pursuant to these provisions and for extraordinary writs filed in cases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced by the use of initials only in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). Appeals filed pursuant to these provisions shall specifically comply, if applicable, with Rules 9(b), 9(c), 26(g), 28(d), 28(k), 30, 37, 41 and Appendix B.

II. Rule 3A is added to the North Carolina Rules of Appellate Procedure as described below:

Rule 3A is added to read:

Rule 3A. APPEAL IN QUALIFYING JUVENILE CASES—HOW AND WHEN TAKEN, SPECIAL RULES

(a) Filing the Notice of Appeal. Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to G.S. 7B-1001, may take appeal by filing notice of appeal

with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of the General Statutes of North Carolina. Trial counsel or an appellant not represented by counsel shall be responsible for filing and serving the notice of appeal in the time and manner required. If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal, and the appellant shall cooperate with counsel throughout the appeal. All such appeals shall comply with the special provisions set out in subsection (b) of this rule and, except as hereinafter provided by this rule, all other existing Rules of Appellate Procedure shall remain applicable.

(b) Special Provisions. For appeals filed pursuant to this rule and for extraordinary writs filed in cases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced only by the use of initials in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to subdivision (b)(1) below or Rule 9(c).

In addition, appeals filed pursuant to these provisions shall adhere strictly to the expedited procedures set forth below:

(1) **Transcripts.** Within one business day after the notice of appeal has been filed, the clerk of superior court shall notify the court reporting coordinator of the Administrative Office of the Courts of the date the notice of appeal was filed and the names of the parties to the appeal and their respective addresses or addresses of their counsel. Within two business days of receipt of such notification, the court reporting coordinator shall assign a transcriptionist to the case. Within thirty-five days from the date of the assignment, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the office of the Clerk of the Court of Appeals and provide copies to the respective parties to the appeal at the addresses provided. Motions for extensions of time to prepare and deliver transcripts are disfavored and will not be allowed by the Court of Appeals absent extraordinary circumstances.

(2) **Record on Appeal.** Within ~~twenty~~ ten days after ~~the notice of appeal has been filed~~ receipt of the transcript, the

appellant shall prepare and serve upon all other parties a proposed record on appeal constituted in accordance with Rule 9. ~~, except there shall be no requirement to set out references to the transcript under the assignments of error.~~ Trial counsel for the appealing party~~, together with~~ shall have a duty to assist appellate counsel, if separate counsel is appointed or retained for the appeal, ~~shall have joint responsibility for~~ in preparing and serving a proposed record on appeal. Within ten days after service of the proposed record on appeal upon an appellee, the appellee may serve upon all other parties: (1) a notice of approval of the proposed record; (2) specific objections or amendments to the proposed record on appeal, or (3) a proposed alternative record on appeal.

If the parties agree to a settled record on appeal within ~~thirty~~ twenty days after ~~notice of appeal has been filed,~~ receipt of the transcript, the appellant shall file three legible copies of the settled record on appeal in the office of the Clerk of the Court of Appeals within five business days from the date the record was settled. If all appellees fail within the times allowed them either to serve notices of approval or to serve objections, amendments, or proposed alternative records on appeal, the appellant's proposed record on appeal shall constitute the settled record on appeal, and the appellant shall file three legible copies thereof in the office of the Clerk of the Court of Appeals within five business days from the last date upon which any appellee could have served such objections, amendments, or proposed alternative record on appeal. If an appellee timely serves amendments, objections, or a proposed alternative record on appeal and the parties cannot agree to the settled record within thirty days after ~~notice of appeal has been filed~~, receipt of the transcript, each party shall file three legible copies of the following documents in the office of the Clerk of the Court of Appeals within five business days after the last day upon which the record can be settled by agreement: (1) the appellant shall file his or her proposed record on appeal, and (2) an appellee shall file his or her objections, amendments, or proposed alternative record on appeal.

No counsel who has appeared as trial counsel for any party in the proceeding shall be permitted to withdraw, nor shall such counsel be otherwise relieved of any responsibilities imposed pursuant to this rule, until the record on appeal has been filed in the office of the Clerk of the Court of Appeals as provided herein.

(3) **Briefs.** Within thirty days after the record on appeal has been filed with the Court of Appeals, the appellant shall file his or

her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Within thirty days after the appellant's brief has been served on an appellee, the appellee shall file his or her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Motions for extensions of time to file briefs will not be allowed absent extraordinary circumstances.

(c) Calendaring priority. Appeals filed pursuant to this rule will be given priority over other cases being considered by the Court of Appeals and will be calendared in accordance with a schedule promulgated by the Chief Judge. Unless otherwise ordered by the Court of Appeals, cases subject to the expedited procedures set forth in this rule shall be disposed of on the record and briefs and without oral argument.

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 1st day of ~~March~~ May, 2006, and shall apply to cases appealed on or after that date.

Adopted by the Court in Conference this the ~~3rd~~ ~~26th~~ 28th 27th day of ~~November, 2005~~ ~~January~~ ~~February~~, April, 2006. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

_____

~~Lake~~ Parker, C.J.
For the Court

IN RE CLIENT SECURITY FUND OF) ORDER
THE NORTH CAROLINA STATE BAR)

This matter coming on to be considered before the North Carolina Supreme Court in conference duly assembled on the 16 day of November, 2006, upon request of the North Carolina State Bar, and it appearing from information submitted by the Board of the Client Security Fund and the officers of the North Carolina State Bar that a $25.00 assessment of the active members of the North Carolina State Bar will be needed in the year 2007 and each year thereafter in order to properly support and maintain the Client Security Fund;

Now, therefore, it is hereby ordered that there be a $25.00 assessment of the active members of the North Carolina State Bar to support the Client Security Fund in the year 2007 and each year thereafter until further order of this Court.

This the 16th day of November 2006.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2006.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1A, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, Discipline and Disability Rules, Section .0100 Discipline and Disability of Attorneys

.0128 Trust Accounts; Audit

(a) For reasonable cause, the chairperson of the Grievance Committee is empowered to issue an investigative subpoena to a member compelling the production of any records required to be kept relative to the handling of client funds and property by the Rules of Professional Conduct for inspection, copying, or audit by the counsel or any auditor appointed by the counsel. For the purposes of this rule, circumstances that ~~any of the following will~~ constitute reasonable cause, include, but are not limited to:

(1) any sworn statement of grievance received by the North Carolina State Bar alleging facts which, if true, would constitute misconduct in the handling of a client's funds or property;

(2) any facts coming to the attention of the North Carolina State Bar, whether through random review as contemplated by Rule .0128(b) below or otherwise, which if true, would constitute a probable violation of any provision of the Rules of Professional Conduct concerning the handling of client funds or property;

(3) two or more grievances received by the North Carolina State Bar over a twelve month period alleging facts which, if true, would indicate misconduct for neglect of a client matter or failure to communicate with a client;

(4) any failure to respond to any notices issued by the North Carolina State Bar with regard to a grievance or a fee dispute;

(5) any information received by the North Carolina State Bar which, if true, would constitute a failure to file any federal,

state, or local tax return or pay an federal, state, or local tax obligation; or

(6~~3~~) any finding of probable cause, indictment, or conviction relative to a criminal charge involving moral turpitude.

The grounds supporting the issuance of any such subpoena will be set forth upon the face of the subpoena.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2006.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of October, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of November, 2006.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 16th day of November, 2006.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 21, 2006.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the continuing legal education program, as particularly set forth in 27 N.C.A.C. 1D, Section .1600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1600 Regulations Governing the Administration of the Continuing Legal Education Program

Rule .1605 Computation of Credit

(a) Computation Formula . . .

(c) Teaching—As a contribution to professionalism, credit may be earned for teaching in an approved continuing legal education activity or a continuing paralegal education activity held in North Carolina and approved pursuant to Section .0200 of Subchapter G of these rules. Presentations accompanied by thorough, high quality, readable, and carefully prepared written materials will qualify for CLE credit on the basis of three hours of credit for each thirty minutes of presentation. Repeat presentations qualify for one-half of the credits available for the initial presentation. For example, an initial presentation of 45 minutes would qualify for 4.5 hours of credit.

(d) Teaching ~~at a Law School~~ Law Courses

(1) Law School Courses. If a member is not a full-time teacher at a law school in North Carolina who is eligible for the exemption in Rule .1517(b) of this subchapter, the member may earn ~~up to 12 hours of~~ CLE credit for teaching courses at an ABA accredited law school. A member may also earn CLE credit by teaching courses at a law school licensed by the Board of Governors of the University of North Carolina, provided the law school is actively seeking accreditation from the ABA. If ABA accreditation is not obtained by a law school so licensed within three years of the commencement of classes, CLE credit will no longer be granted for teaching courses at the school.

(2) Courses at Paralegal Schools or Programs. Effective January 1, 2006, a member may earn CLE credit by teaching paralegal or substantive law courses at an ABA approved paralegal school or program.

(3) Credit Hours. Credit for teaching courses described in Rule .1605(d)(1) and (2) above may be earned without regard to whether the course is taught on-line or in a classroom. ~~Two hours of CLE credit shall be earned for each hour of academic credit awarded to a law school course taught by the member.~~ Credit will be calculated according to the following formula:

3.5 Hours of CLE credit for every quarter hour of credit assigned to the course by the educational institution, or

5.0 Hours of CLE credit for every semester hour of credit assigned to the course by the educational institution.

(For example: a 3-semester hour course will qualify for 15 hours of CLE credit). ~~Two hours of CLE credit shall be earned for each hour of academic credit awarded to a law school course taught by the member.~~

(4) Other Requirements. The member shall also complete the requirements set forth in Rule .1518(b) of this subchapter.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 21, 2006.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of October, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of October, 2006.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 16th day of November, 2006.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE STANDING COMMITTEES OF THE COUNCIL

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 21, 2006.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the standing committees of the Council, as particularly set forth in 27 N.C.A.C. 1A, Section .0700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0700, Standing Committees of the Council

Rule .0701 Standing Committees and Boards

(a) Standing Committees . . .

(1) Executive Committee. It shall be the duty of the Executive Committee to ~~examine the books and financial records of the State Bar at each regular meeting of the council; to make recommendations to the council on the budget, finances, and annual audit of the State Bar; to~~ receive reports and recommendations from standing committees, boards, and special committees; to nominate individuals for appointments made by the council; to make long range plans for the State Bar; and to perform such other duties and consider such other matters as the council or the president may designate.

. . . .

(9) Finance and Audit Committee. It shall be the duty of the Finance and Audit Committee to superintend annually the preparation of the State Bar's operational budget and to make recommendations to the Executive Committee concerning that budget and the budgets for the boards listed in subsection (b) below; to make recommendations to the Executive Committee regarding the State Bar's financial policies; to examine the financial records of the State Bar at each regular meeting of the council and report its findings to the Executive Committee; to recommend to the Executive Committee annually the retention of an independent auditor; to direct the work of the independent auditor in accordance with the policies and procedures adopted by the council and

the state auditor; and to review the results of the annual audit and make recommendations concerning the audit to the Executive Committee.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 21, 2006.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of October, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of November, 2006.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 16th day of November, 2006.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATIVE COMMITTEE

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2006.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the Administrative Committee, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar

Section .0900 Procedures for the Administrative Committee

.0903 Suspension for Nonpayment of Membership Fees, Late Fee, Client Security Fund Assessment, or Assessed Costs, or Failure to File Certificate of Insurance Coverage

(a) Notice of Overdue Fees, Costs, or Certificate of Insurance Coverage

. . .

(c) Entry of Order of Suspension Upon Failure to Respond to Notice to Show Cause Whenever a member fails to respond in writing within 30 days of the service of the notice to show cause upon the member, and it appears that the member has failed to comply with the rules regarding payment of the annual membership fee, any late fees imposed pursuant to Rule .0203(b) or Rule .0204(c) of Subchapter A, the Client Security Fund assessment, and/or any district bar annual membership fee, and/or it appears that the member has failed to pay any costs assessed against the member as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, and/or a notice of the secretary or council of the North Carolina State Bar, and/or it appears that the member has failed to file a certificate of insurance coverage, the council may enter an order suspending the member from the practice of law. The order shall be effective ~~when entered by the council~~ 30 days after proof of service on the member. A copy of the order shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(d) Procedure Upon Submission of a Timely Response to a Notice to Show Cause

(1) Consideration by Administrative Committee

. . .

(3) Order of Suspension

Upon the recommendation of the Administrative Committee, the council may enter an order suspending the member from the practice of law. The order shall be effective ~~when entered by the council~~ 30 days after proof of service on the member. A copy of the order shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(e) Late Tender of Membership Fees, Assessed Costs, or Certificate of Insurance Coverage

. . .

.0904 ~~Reinstatement~~ Compliance After Suspension for Failure to Pay Fees or Assessed Costs, or to File Certificate of Insurance Coverage

(a) Reinstatement Within 30 Days of Service of Suspension Order

A member who ~~has been suspended~~ receives an order of suspension for nonpayment of the annual membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, and/or costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar, and/or failure to file a certificate of insurance coverage as required by Rule .0204 of Subchapter A, and/or a *pro hac vice* registration statement as required by Rule .0101 of subchapter H may ~~petition the secretary for an order of reinstatement of the member's license at any time up to 30 days after service of the suspension order upon the member. The secretary shall enter an order reinstating the member to active status upon receipt of~~ preclude the order from becoming effective by submitting a ~~timely~~ written request and satisfactory showing within 30 days after service of the suspension order ~~by the member~~ of certification of insurance coverage, registration of *pro hac vice* admission, and/or payment of the membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, assessed costs, and the costs of the suspension and reinstatement procedure, including

the costs of service. Such member shall not be required to file a formal reinstatement petition or pay a $125 reinstatement fee.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2006.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of October, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of November, 2006.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 16th day of November, 2006.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE LAWYER ASSISTANCE PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2006.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the Lawyer Assistance Program, as particularly set forth in 27 N.C.A.C. 1D, Section .0600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar

Section .0600 Rules Governing the Lawyer Assistance Program

.0604 Size of Board

The board shall have nine members. Three of the members shall be councilors of the North Carolina State Bar at the time of appointment; three of the members shall be non-lawyers or lawyers with experience and training in the fields of mental health, substance abuse, or addiction; and three of the members shall be lawyers who are currently volunteers to the lawyer assistance program. In addition, the board may have the dean of a law school in North Carolina, or the dean's designee, appointed by the council as an ex officio member. No member of the Grievance Committee shall be a member of the board.

.0606 Term of Office and Succession

The members of the board shall be divided into three classes of equal size to serve in the first instance for terms expiring one, two and three years, respectively, after the first quarterly meeting of the council following creation of the board . . . Members of the board serving ex officio shall serve one-year terms and may serve up to three consecutive terms.

.0614 ~~Referral to the Grievance Committee~~ Reserved

~~If an investigation and evaluation clearly indicate that a lawyer's impairment due to substance abuse or mental condition is detrimental to the public, the courts, or the legal profession, the board shall take appropriate action, including, if warranted, the filing of a grievance. Notwithstanding the foregoing, no grievance shall be filed by~~

~~the board or any member thereof against a lawyer using information received by the board or one of its committees if the lawyer, or a member of the lawyer's family, initially sought the assistance of a program administered by the board or the lawyer is cooperating in good faith with a program administered by the board.~~

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2006.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of October, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of November, 2006.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 16th day of November, 2006.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PLAN OF LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2006.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the legal specialization program, as particularly set forth in 27 N.C.A.C. 1D, Sections .1700, .1800, and .2200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar

Section .1700 The Plan of Legal Specialization,

Section .1800 Hearing and Appeal Rules of the Board of Legal Specialization

Section .2200 Certification Standards for the Bankruptcy Law Specialty

.1716 Powers and Duties of the Board

Subject to the general jurisdiction of the council and the North Carolina Supreme Court, the board shall have jurisdiction of all matters pertaining to regulation of certification of specialists in the practice of law and shall have the power and duty

(1) to administer the plan;

. . .

(10) to cooperate with other organizations, boards, and agencies engaged in the recognition of legal specialists or concerned with the topic of legal specialization <u>including, but not limited to, utilizing appropriate and qualified organizations that are ABA accredited, to prepare and administer the written specialty examinations for specialties based predominantly on federal law</u>; . . .

.1801 Reconsideration of Applications, Failure of Written Examinations, and Appeals

(a) Applications Incomplete and/or Applicants Not in Compliance with Standards for Certification

. . .

(b) Failure of a Written Examination Prepared and Administered by a Certification Committee.

. . .

(c) Failure of a Written Examination Prepared and Administered by a Testing Organization on Behalf of the Board.

The applicant shall comply with the review and appeal procedures of any testing organization retained by the board to prepare and administer the certification examination.

.2205 Standards for Certification as a Specialist in Bankruptcy Law

Each applicant for certification as a specialist in bankruptcy law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification as a specialist in bankruptcy law:

(a) Licensure and Practice

. . .

(e) Examination—The applicant must pass a written examination designed to test the applicant's knowledge and ability in bankruptcy law.

~~(1) Terms—The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.~~

~~(2) Subject Matter—The examination shall cover the applicant's knowledge and application of the law in the following topics in the subspecialty or subspecialties that the applicant has elected:~~

~~(A)all provisions of the Bankruptcy Reform Act of 1978, as amended, and legislative history related thereto, except subchapters III and IV of Chapter 7 and Chapter 9 of Title II, United States Code;~~

~~(B) the Rules of Bankruptcy Procedure effective as of August 1, 1983, as amended;~~

~~(C) bankruptcy crimes and immunity;~~

~~(D) state laws affecting debtor-creditor relations, including, but not limited to, state court insolvency proceedings; Chapter 1C of the North Carolina General Statutes; the cre-~~

~~ation, perfection, enforcement, and priorities of secured claims; claim and delivery; and attachment and garnishment;~~

~~(E) judicial interpretations of any of the above.~~

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2006.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of October, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of November, 2006.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 16th day of November, 2006.

s/Timmons-Goodson, J.
For the Court

AMENDMENT TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendment to the Rules of Professional Conduct of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2006.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, 0.1 Preamble, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rules of Professional Conduct

0.1 Preamble: A Lawyer's Professional Responsibilities

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice. . .

[13] Although a matter is hotly contested by the parties, a lawyer should treat opposing counsel with courtesy and respect. The legal dispute of the client must never become the lawyer's personal dispute with opposing counsel. A lawyer, moreover, should provide zealous but honorable representation without resorting to unfair or offensive tactics. The legal system provides a civilized mechanism for resolving disputes, but only if the lawyers themselves behave with dignity. A lawyer's word to another lawyer should be the lawyer's bond. As professional colleagues, lawyers should encourage and counsel new lawyers by providing advice and mentoring; foster civility among members of the bar by acceding to reasonable requests that do not prejudice the interests of the client; and counsel and assist peers who fail to fulfill their professional duties because of substance abuse, depression, or other personal difficulties . . .

[Renumbering remaining paragraphs.]

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2006.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of October, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 16th day of November, 2006.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 16th day of November, 2006.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 21, 2005.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, Rule 3.8, Special Responsibilities of a Prosecutor, be amended as follows (additions are underlined, deletions are interlined):

N.C.A.C. 2, Rules of Professional Conduct

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) . . .;

(d) after reasonably diligent inquiry, make timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions including all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unpriv-

ileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) . . . .

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. See the ABA Standards of Criminal Justice Relating to the Prosecution Function. A systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] . . . .

[4] Every prosecutor should be aware of the discovery requirements established by statutory law and case law. *See*, *e.g.*, N.C. Gen. Stat. §15A-903 et. seq, *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. U.S.*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419 (1995). The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[5] . . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 21, 2005.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of October, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of

the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of November, 2006.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 16th day of November, 2006.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2006.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, Rule 7.3, Direct Contact with Potential Clients, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 7.3 Direct Contact with Potential Clients

(a) . . .

(c) Targeted Communications. Unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), ~~E~~every written, recorded, or electronic communication from a lawyer soliciting professional employment from a potential client known to be in need of legal services in a particular matter shall include the ~~words~~ statement, in capital letters, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES" ~~"This is an advertisement for legal services"~~ (the advertising notice) subject to the following requirements:

(1) Written Communications. Written communications shall be mailed in an envelope. The advertising notice shall be printed on the front of the ~~outside~~ envelope, ~~if a written communication sent by mail~~, in font that is as large as any other printing on the envelope. The front of the envelope shall contain no printing other than the name of the lawyer or law firm and return address, the name and address of the recipient, and the advertising notice. The advertising notice shall also be printed ~~and~~ at the beginning of the body of the ~~written or electronic communication~~ letter in ~~print~~ font as large or larger than the lawyer's or law firm's name in the letterhead or masthead.

(2) Electronic Communications. The advertising notice shall appear in the "in reference" block of the address section of the communication. No other statement shall appear in this block. The advertising notice shall also appear, ~~and~~ at the beginning and ending of ~~any recorded or~~ the electronic communication, in a font as large or larger than the lawyer's or law firm's name in any masthead on the communication.~~, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).~~

(3) Recorded Communications. The advertising notice shall be clearly articulated at the beginning and ending of the recorded communication.

(d) . . .

Comment

[1] . . .

[7] Paragraph (c) of this rule requires that all direct mail solicitations of potential clients must be mailed in an envelope on which the statement, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES," appears in capital letters. The statement must appear on the front of the envelope with no other distracting extraneous written statements other than the name and address of the recipient and the name and return address of the lawyer or firm. Postcards may not be used for direct mail solicitations. No embarrassing personal information about the recipient may appear on the back of the envelope. The advertising notice ~~disclosure statement~~ must also appear at the beginning of an enclosed letter or electronic communication in a font that is ~~print~~ at least as large as the font ~~print~~ used for the lawyer's or law firm's name in the letterhead or masthead. It must also appear in the "in reference to" section of an email communication. The requirement that certain communications be marked, "This is an advertisement for legal serv-

ices," does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2006.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of October, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of November, 2006.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 16th day of November, 2006.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 21, 2006.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, Rule 1.17, Sale of a Law Practice, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 1.17 Sale of a Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, from an office that is within a one-hundred (100) mile radius of the purchased law practice ~~in North Carolina~~, except the seller may work for the purchaser as an independent contractor and may provide legal representation at no charge to indigent persons or to members of the seller's family;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) . . .

Comment

. . .

Termination of Practice by the Seller

[2] The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as an independent con-

tract lawyer for the purchaser. Permitting the seller to continue to work for the practice will assist in the smooth transition of cases and will provide mentoring to new lawyers. The requirement that the seller cease private practice also does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business. Similarly, the Rule allows the seller to provide *pro bono* representation to indigent persons on his own initiative and to provide legal representation to family members without charge.

[4] The Rule permits a sale attendant upon ~~retirement from~~ discontinuing the private practice of law from an office that is within a one-hundred (100) mile radius of the purchased practice. ~~in North Carolina~~. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another part of North Carolina or to another state.

. . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 21, 2006.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of October, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of November, 2006.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as

provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 16th day of November, 2006.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 21, 2006.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, Rule 5.5, Unauthorized Practice of Law, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 5.5 Unauthorized Practice of Law

(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

(b) . . .

(c) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction if the lawyer's conduct is in accordance with these Rules and:

(1) the lawyer is authorized by law or order to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or

(2) other than engaging in conduct governed by paragraph (1):

(A) . . .

(F) the lawyer is the subject of a pending application for admission to the North Carolina State Bar by comity, having never previously been denied admission to the North Carolina State Bar for any reason, and

(i) is licensed to practice law in a state with which North Carolina has comity in regard to admission to practice law;

(ii) is a member in good standing in every jurisdiction in which the lawyer is licensed to practice law;

(iii) has satisfied the educational and experiential requirements prerequisite to comity admission to the North Carolina State Bar;

(iv) is domiciled in North Carolina;

(v) has established a professional relationship with a North Carolina law firm and is actively supervised by at least one licensed North Carolina attorney affiliated with that law firm; and

(vi) gives written notice to the secretary of the North Carolina State Bar that the lawyer intends to begin the practice of law pursuant to this provision, provides the secretary with a copy of the lawyer's application for admission to the State Bar, and agrees that the lawyer is subject to these rules and the disciplinary jurisdiction of the North Carolina State Bar.

A lawyer acting pursuant to this provision is not subject to the prohibition in Paragraph (b) (1), may not provide services for which *pro hac vice* admission is required, and shall be ineligible to practice law in this jurisdiction immediately upon being advised that the lawyer's application for comity admission has been denied.

(d) . . .

Comment

[1] . . .

[2] There are occasions in which lawyers admitted to practice in another jurisdiction, but not in this jurisdiction, will engage in conduct in this jurisdiction under circumstances that do not create significant risk to the interests of their clients, the courts, or the public. Paragraph (c) identifies ~~five~~ six situations in which the lawyer may engage in such conduct without fear of violating this Rule. All such conduct is subject to the duty of competent representation. *See* Rule 1.1. Rule 5.5 does not address the question of whether other conduct constitutes the unauthorized practice of law. The fact that conduct is not included or described in this Rule is not intended to imply that such conduct is the unauthorized practice of law. With the exception of paragraphs (c)(2)(A) and (F), nothing in this Rule is intended to authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice here. Presence may be systematic and continuous even if the

lawyer is not physically present in this jurisdiction. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. *See also* Rules 7.1(a) and 7.5(b). However, a lawyer admitted to practice in another jurisdiction who is partner, shareholder, or employee of an interstate or international law firm that is registered with the North Carolina State Bar pursuant to 27 N.C.A.C. 1E, Section .0200, may practice, subject to the limitations of this Rule, in the North Carolina offices of such law firm.

[3] . . .

[8] Paragraph (c)(2)(F) permits a lawyer who is awaiting admission by comity to practice on a provisional and limited basis if certain requirements are met. As used in this paragraph, the term "professional relationship" refers to an employment or partnership arrangement.

[Existing paragraphs 8, 9, 10, and 11 are renumbered 9, 10, 11, and 12, respectively.]

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 21, 2006.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of October, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of November, 2006.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they

be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 16th day of November, 2006.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 21, 2006.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, Rule 3.4, Fairness to Opposing Party and Counsel, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) . . .;

(c) knowingly disobey or advise a client or any other person to disobey an obligation under the rules of a tribunal, except a lawyer acting in good faith may take appropriate steps to test the validity of such an obligation;

(d) in pretrial procedure,

(1) make a frivolous discovery request, ~~or~~

(2) fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party or

(3) fail to disclose evidence or information that the lawyer knew, or reasonably should have known, was subject to disclosure under applicable law, rules of procedure or evidence, or court opinions;

(e) . . .

Comment

[1] . . .

[5] Paragraph (d) makes it clear that a lawyer must be reasonably diligent in making inquiry of the client, or third party, about information or documents responsive to discovery requests or disclosure requirements arising from statutory law, rules of procedure, or caselaw. "Reasonably" is defined in Rule 0.1, *Terminology*, as meaning "conduct of a reasonably prudent and competent lawyer." Rule 0.1(i). When responding to a discovery request or disclosure requirement, a lawyer must act in good faith. The lawyer should impress upon the client the importance of making a thorough search of the client's records and responding honestly. If the lawyer has reason to believe that a client has not been forthcoming, the lawyer may not rely solely upon the client's assertion that the response is truthful or complete.

[Paragraphs 5 and 6 renumbered as 6 and 7, respectively.]

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 21, 2006.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of October, 2006.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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This the 16th day of November, 2006.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 16th day of November, 2006.

s/Timmons-Goodson, J.
For the Court

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WORD AND PHRASE INDEX

HEADNOTE INDEX

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Appealability—domestic violence protective orders—timeliness—The Court of Appeals did not err by dismissing defendant's appeal from three domestic violence protective orders, and discretionary review of this issue was improvidently allowed, because: (1) on 22 April 2004 the Court of Appeals dismissed defendant's appeal with respect to the three protective orders, and thus, any language in the Court of Appeals' 5 October 2004 opinion pertaining to the protective orders was mere surplusage; (2) defendant did not file his petition for discretionary review of the Court of Appeals' dismissal of the appeal until 5 November 2004; and (3) under Rule 15(b) of the North Carolina Rules of Appellate Procedure, defendant's petition for discretionary review as to the protective orders was not timely filed. **Davis v. Davis, 518.**

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Breach of contract—nominal damages—improper assignments of error—failure to object to instructions—A decision of the Court of Appeals awarding plaintiff university professor a new trial on the issue of damages in an action for breach of a reemployment contract in which the jury awarded plaintiff nominal damages of one dollar is reversed for the reasons stated in the dissenting opinion that plaintiff's assignments of error violated the Rules of Appellate Procedure and plaintiff neither objected to nor assigned error to the jury instructions. **Munn v. N.C. State Univ., 353.**

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NEGLIGENCE—Continued

Per se—motion to dismiss—sufficiency of evidence—The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiffs' claims of negligence per se resulting from the off-campus shooting of plaintiff wife by students who attended defendant's school for behaviorally and emotionally handicapped juveniles, because: (1) although violation of a public safety statute generally constitutes negligence per se, the school bus driver and bus monitor were not obligated under N.C.G.S. § 115C-245(d) to report conversations they overheard by the students about robbery and homicide not specific to any time, place, or intended victim when the plain language of N.C.G.S. § 115C-245(d) reveals the General Assembly enacted the statute to ensure the safety of the pupils and employees assigned to public school buses; and (2) pupils and employees assigned to buses would constitute the protected class of persons with standing to sue for injuries proximately resulting from violations of the statute, and nothing in plaintiffs' amended complaint suggests plaintiffs belong to the relevant protected class. **Stein v. Asheville City Bd. of Educ., 321.**

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Speeding when responding to call—pedestrian injured—Plaintiff failed to demonstrate the existence of a genuine issue of material fact as to gross negligence, and defendants were entitled to summary judgment, in an action in which a pedestrian was struck and injured by a police car speeding to a call. The standard of negligence by which a law enforcement officer must be judged when acting within N.C.G.S. § 20-145 is that of gross negligence, which arises where the emergency responder recklessly disregards the safety of others. The three dispositive factors are the circumstances initiating the event, when and where the event occurred, and the conduct or actions of the officer. **Jones v. City of Durham, 81.**

PUBLIC ASSISTANCE

Medicaid—illegal alien—emergency medical treatment—Medicaid coverage was properly denied for chemotherapy for an illegal alien with acute lym-

PUBLIC ASSISTANCE—Continued

RAPE

SENTENCING—Continued

SENTENCING—Continued

heinous, atrocious, and cruel aggravating circumstance because the circumstances of other murders either actual or imagined that defense counsel believed were more heinous, atrocious, or cruel were not present in the record at the time of closing arguments, and, therefore, counsel may not introduce such evidence in closing when there was no request for the trial court to take judicial notice of the other murders referenced. **State v. McNeill, 231.**

Capital—failure to allow testimony—defendant would adjust well to life in prison—harmless error—Although defendant contends the trial court erred in a double first-degree murder case by failing to allow defendant's mother to testify that defendant would adjust well to life in prison, any error was harmless beyond a reasonable doubt because other witnesses gave testimony from which the jury could find that defendant would adjust well to prison life. **State v. Duke, 110.**

Capital—mitigating circumstances—age at time of offense—The trial court did not err in a first-degree murder case by failing to submit the N.C.G.S. § 15A-2000(f)(7) mitigating circumstance to the jury concerning defendant's age at the time of the offense which was twenty-three years old because the record showed that defendant's maturity was consistent with his chronological age and other factors counterbalance defendant's evidence of emotional immaturity. **State v. Hurst, 181.**

Capital—mitigating circumstances—instruction—burden of proof—Using the word "satisfy" in an instruction on burden of proof in mitigating circumstances was not vague and subjective, and did not create a standardless standard. **State v. Allen, 297.**

Capital—mitigating circumstances—lack of significant prior history of criminal activity—subsequent behavior—harmless error—Although the trial court erred in a capital sentencing proceeding by considering defendant's criminal behavior subsequent to the murders in its determination not to submit the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance of defendant's lack of significant prior history of criminal activity, this error was harmless because the events and behavior cited by the court that occurred before the murders adequately supported its decision not to submit this circumstance. **State v. Forte, 427.**

Capital—mitigating circumstances—mental or emotional disturbance—impaired capacity—peremptory instructions not required—The trial court did not err in a double first-degree murder case by refusing to grant defendant's request to give the jury peremptory instructions on the N.C.G.S. § 15A-2000(f)(2) mitigating circumstance that the capital felony was committed while defendant was under the influence of mental or emotional disturbance and the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. **State v. Duke, 110.**

Capital—mitigating circumstances—mental or emotional disturbance—impaired capacity—peremptory instructions not required—The trial court did not err in a capital sentencing proceeding by refusing to give the requested peremptory instructions on the statutory mitigating circumstances under N.C.G.S. § 15A-2000(f)(2) that the murders were committed while defendant was

SENTENCING—Continued

SENTENCING—Continued

WORD AND PHRASE INDEX