NORTH CAROLINA REPORTS

VOLUME 362

SUPREME COURT OF NORTH CAROLINA

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CITE THIS VOLUME
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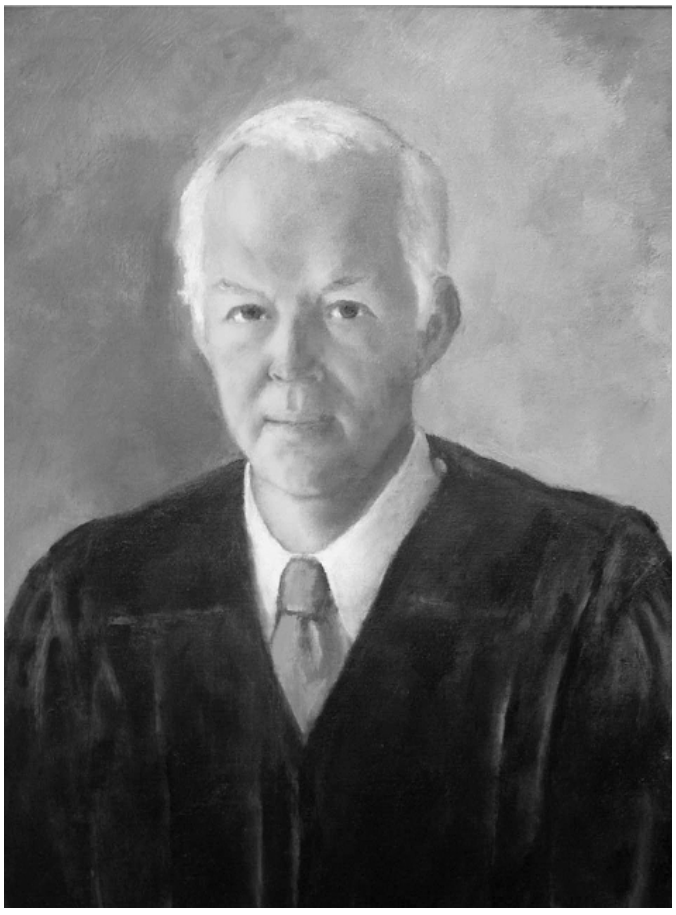
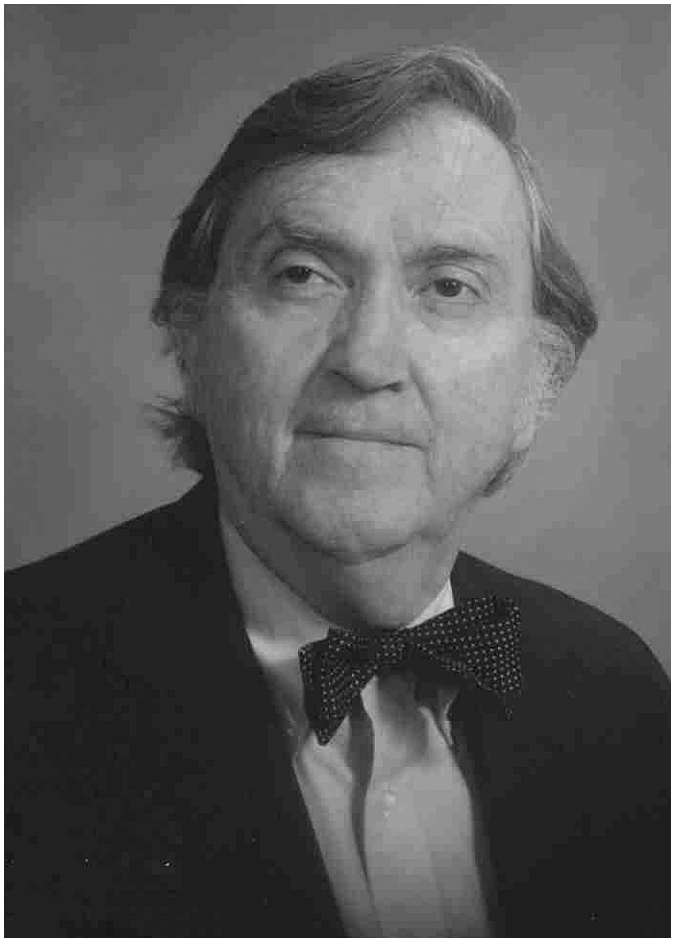
IN MEMORIAM



JUSTICE JOHN WEBB

ASSOCIATE JUSTICE
26 NOVEMBER 1986 - 30 SEPTEMBER 1998

IN MEMORIAM



JUSTICE FRANCIS I. PARKER

ASSOCIATE JUSTICE
2 SEPTEMBER 1986 - 25 NOVEMBER 1986

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THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice
SARAH PARKER

Associate Justices

MARK D. MARTIN
ROBERT H. EDMUNDS, JR.
EDWARD THOMAS BRADY
PAUL MARTIN NEWBY
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON

Former Chief Justices

RHODA B. BILLINGS
JAMES G. EXUM, JR.
BURLEY B. MITCHELL, JR.
HENRY E. FRYE
I. BEVERLY LAKE, JR.

Former Justices

DAVID M. BRITT
ROBERT R. BROWNING
J. PHIL CARLTON
FRANCIS I. PARKER[1]
HARRY C. MARTIN
JOHN WEBB[2]
WILLIS P. WHICHARD
JAMES A. WYNN, JR.
FRANKLIN E. FREEMAN, JR.
G. K. BUTTERFIELD, JR.
ROBERT F. ORR
GEORGE L. WAINWRIGHT, JR.

Clerk
CHRISTIE SPEIR CAMERON

Librarian
THOMAS P. DAVIS

ADMINISTRATIVE OFFICE OF THE COURTS

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JOHN W. SMITH[3]

Assistant Director
DAVID F. HOKE

APPELLATE DIVISION REPORTER
RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTERS
H. JAMES HUTCHESON
KIMBERLY WOODELL SIEREDZKI

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1. Deceased 6 March 2008.
2. Deceased 18 September 2008.
3. Appointed by Chief Justice Sarah Parker effective 1 January 2009 to replace Ralph A. Walker who retired 31 December 2008.

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
	Milton F. (Toby) Fitch, Jr.	Wilson
7BC	Walter H. Godwin, Jr.[1]	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	Wilmington
8A	Paul L. Jones	Kinston
8B	Arnold O. Jones II[2]	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	Raleigh
	Paul C. Ridgeway	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 R. Fox	Chapel Hill
	R. Allen Baddour	Chapel Hill

DISTRICT	JUDGES	ADDRESS
	Fourth Division	
11A	Franklin F. Lanier	Buies Creek
11B	Thomas H. Lock	Smithfield
12	E. Lynn Johnson	Fayetteville
	Gregory A. Weeks	Fayetteville
	Jack A. Thompson	Fayetteville
	James F. Ammons, Jr.	Fayetteville
13A	Douglas B. Sasser	Whiteville
13B	Ola M. Lewis	Southport
16A	Richard T. Brown	Laurinburg
16B	Robert F. Floyd, Jr.	Lumberton
	James Gregory Bell[3]	Lumberton
	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.	Wiinston-Salem
	L. Todd Burke	Winston-Salem
	Ronald E. Spivey	Winston-Salem
23	Edgar B. Gregory	North Wilkesboro
	Sixth Division	
19A	W. Erwin Spainhour	Concord
19C	John L. Holshouser, Jr.	Salisbury
19D	James M. Webb	Whispering Pines
20A	Tanya T. Wallace[4]	Rockingham
	Kevin M. Bridges[5]	Oakboro
20B	W. David Lee	Monroe
22A	Christopher Collier	Mooresville
	Joseph Crosswhite[6]	Statesville
22B	Mark E. Klass	Lexington
	Theodore S. Royster, Jr.[7]	Lexington
	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 Mims 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
	Alan Z. Thornburg[8]	Asheville
29A	Laura J. Bridges	Marion
29B	Mark E. Powell	Rutherfordton
30A	James U. Downs	Franklin
30B	Bradley B. Letts[9]	Sylva

SPECIAL JUDGES

Karl Adkins	Charlotte
Albert Diaz	Charlotte
Richard L. Doughton[10]	Sparta
Thomas D. Haigwood[11]	Greenville
James E. Hardin, Jr.	Durham
A Robinson Hassell[12]	Greensboro
D. Jack Hooks, Jr.	Whiteville
Jack W. Jenkins	Morehead City
John R. Jolly, Jr.	Raleigh
Shannon R. Joseph[13]	Raleigh
Calvin E. Murphy	Charlotte
William R. Pittman[14]	Raleigh
Ripley Eagles Rand	Raleigh
John W. Smith[15]	Wilmington
Ben F. Tennille	Greensboro
Cressie H. Thigpen, Jr.[16]	Raleigh
Gary E. Trawick, Jr.	Burgaw

EMERGENCY JUDGES

W. Douglas Albright	Greensboro
Steve A. Balog	Burlington
Michael E. Beale[17]	Rockingham
Henry V. Barnette, Jr.	Raleigh
Anthony M. Brannon	Durham
Stafford G. Bullock	Raleigh
Narley L. Cashwell	Raleigh
C. Preston Cornelius	Mooresville
B. Craig Ellis	Laurinburg
Larry G. Ford	Salisbury

DISTRICT	JUDGES	ADDRESS
	ERNEST B. FULLWOOD	Wilmington
	HOWARD R. GREESON, JR.	High Point
	ZORO J. GUICE, JR.	Rutherfordton
	THOMAS D. HAIGWOOD[18]	Greenville
	MICHAEL E. HELMS	North Wilkesboro
	CLARENCE E. HORTON, JR.	Kannapolis
	DONALD M. JACOBS	Raleigh
	JOSEPH R. JOHN, SR.	Raleigh
	CLIFTON E. JOHNSON[19]	Charlotte
	CHARLES C. LAMM, JR.	Boone
	JAMES E. LANNING	Charlotte
	JOHN B. LEWIS, JR.	Farmville
	GARY LYNN LOCKLEAR[20]	Pembroke
	JERRY CASH MARTIN	King
	JAMES E. RAGAN III	Oriental
	DONALD L. SMITH	Raleigh
	SUSAN CHANDLER TAYLOR[21]	Albemarle
	JOHN M. TYSON[22]	Fayetteville
	GEORGE L. WAINWRIGHT	Morehead City

RETIRED/RECALLED JUDGES

	FRANK R. BROWN[23]	Tarboro
	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 A. ROUSSEAU, JR.	North Wilkesboro
	THOMAS W. SEAY	Spencer
	RALPH A. WALKER, JR.[24]	Raleigh

1. Appointed and sworn in 3 November 2008 to replace Frank R. Brown who retired 31 October 2008.
2. Elected and sworn in 1 January 2009.
3. Appointed and sworn in 16 January 2009 to replace Gary L. Locklear who retired 31 December 2008.
4. Elected and sworn in 1 January 2009 to replace Michael Earle Beale who retired 31 December 2008.
5. Elected and sworn in 1 January 2009 to replace Susan C. Taylor who retired 31 December 2008.
6. Elected and sworn in 1 January 2009 to replace Kimberly S. Taylor who retired 31 December 2008.
7. Elected and sworn in 1 January 2009.
8. Appointed and sworn in 8 January 2009 to replace Ronald K. Payne who retired 31 December 2008.
9. Appointed and sworn in 31 March 2009 to replace Janet Marlene Hyatt who retired 27 February 2009.
10. Appointed and sworn in 25 February 2008.
11. Retired 30 April 2009.
12. Appointed and sworn in 27 March 2009.
13. Appointed and sworn in 8 January 2009.
14. Appointed and sworn in 8 January 2009.
15. Appointed by Chief Justice Sarah Parker as Director of the Administrative Office of the Courts effective 1 January 2009.
16. Appointed and sworn in 15 May 2008.
17. Appointed and sworn in 2 January 2009.
18. Appointed and sworn in 1 May 2009.
19. Appointed and sworn in 2 March 2008.
20. Appointed 6 January 2009.
21. Appointed and sworn in 24 March 2009.
22. Appointed and sworn in 8 January 2009.
23. Appointed and sworn in 1 November 2008.
24. Appointed and sworn in 1 January 2009.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	C. Christopher Bean (Chief)	Edenton
	J. Carlton Cole	Hertford
	Edgar L. Barnes	Manteo
	Amber Davis	Wanchese
	Eula E. Reid	Elizabeth City
2	Samuel G. Grimes (Chief)	Washington
	Michael A. Paul	Washington
	Regina Rogers Parker	Williamston
	Christopher B. McLendon	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	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	J. H. Corpening II (Chief)	Wilmington
	John J. Carroll III	Wilmington
	Rebecca W. Blackmore	Wilmington
	James H. Faison III	Wilmington
	Sandra Criner	Wilmington
	Richard Russell Davis	Wilmington
	Melinda Haynie Crouch	Wilmington
	Jeffrey Evan Noecker[1]	Wilmington
6A	Brenda G. Branch (Chief)[2]	Halifax
	W. Turner Stephenson III	Halifax
	Teresa Raquel Robinson[3]	Enfield
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[4]	Rocky Mount
	William G. Stewart	Wilson
	John J. Covolo	Rocky Mount
8	David B. Brantley (Chief)[5]	Goldsboro

DISTRICT	JUDGES	ADDRESS
	Lonnie W. Carraway	Goldsboro
	R. Leslie Turner	Kinston
	Timothy I. Finan	Goldsboro
	Elizabeth A. Heath	Kinston
	Charles P. Gaylor III[6]	Goldsboro
9	Daniel Frederick Finch (Chief)[7]	Oxford
	J. Henry Banks	Henderson
	John W. Davis	Louisburg
	Randolph Baskerville	Warrenton
	S. Quon Bridges	Oxford
	Carolyn J. Yancey[8]	Henderson
9A	Mark E. Galloway (Chief)	Roxboro
	L. Michael Gentry	Pelham
10	Robert Blackwell Rader (Chief)	Raleigh
	James R. Fullwood	Raleigh
	Anne B. Salisbury	Raleigh
	Kristin H. Ruth	Raleigh
	Craig Croom	Raleigh
	Jennifer M. Green	Raleigh
	Monica M. Bousman	Raleigh
	Jane Powell Gray	Raleigh
	Jennifer Jane Knox	Raleigh
	Debra Ann Smith Sasser	Raleigh
	Vinston M. Rozier, Jr.	Raleigh
	Lori G. Christian	Raleigh
	Christine M. Walczyk	Raleigh
	Eric Craig Chasse	Raleigh
	Ned Wilson Mangum	Raleigh
	Jacqueline L. Brewer[9]	Apex
	Anna Elena Worley[10]	Raleigh
11	Albert A. Corbett, Jr. (Chief)	Smithfield
	Jacquelyn L. Lee	Sanford
	Jimmy L. Love, Jr.	Sanford
	O. Henry Willis	Smithfield
	Addie M. Harris-Rawls	Clayton
	Resson O. Faircloth II	Lillington
	George R. Murphy	Lillington
	Robert W. Bryant, Jr.	Lillington
	R. Dale Stubbs	Lillington
	O. Henry Willis, Jr.	Smithfield
	Charles Patrick Bullock	Lillington
	Paul A. Holcomb[11]	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[12]	Fayetteville
	Talmage Baggett	Fayetteville
	George J. Franks	Fayetteville
	David H. Hasty	Fayetteville
	Laura A. Devan[13]	Fayetteville
	Toni S. King[14]	Fayetteville

DISTRICT	JUDGES	ADDRESS
13	Jerry A. Jolly (Chief)	Tabor City
	Napoleon B. Barefoot, Jr.	Supply
	Marion R. Warren	Exum
	William F. Fairley	Southport
	Scott Ussery[15]	Whiteville
	Sherry Dew Tyler[16]	Whiteville
14	Elaine M. Bushfan (Chief)	Durham
	Ann E. McKown	Durham
	Marcia H. Morey	Durham
	James T. Hill	Durham
	Nancy E. Gordon	Durham
	William Andrew Marsh III	Durham
	Brian C. Wilks[17]	Durham
15A	James K. Roberson (Chief)	Graham
	Bradley Reid Allen, Sr.	Graham
	G. Wayne Abernathy	Graham
	David Thomas Lambeth, Jr.	Graham
15B	Joseph M. Buckner (Chief)	Hillsborough
	Alonzo Brown Coleman, Jr.	Hillsborough
	Charles T. L. Anderson	Hillsborough
	Beverly A. Scarlett	Hillsborough
	Page Vernon[18]	Hillsborough
16A	William G. McIlwain (Chief)	Wagram
	Regina M. Joe	Raeford
	John H. Horne, Jr.	Laurinburg
16B	J. Stanley Carmical (Chief)	Lumberton
	Herbert L. Richardson	Lumberton
	John B. Carter, Jr.	Lumberton
	Judith Milsap Daniels[19]	Lumberton
	William Jeffrey Moore[20]	Pembroke
17A	Fredrick B. Wilkins, Jr. (Chief)	Wentworth
	Stanley L. Allen	Wentworth
	James A. Grogan	Wentworth
17B	Charles Mitchell Neaves, Jr. (Chief)	Elkin
	Spencer Gray Key, Jr.	Elkin
	Angela B. Puckett	Elkin
	William F. Southern III[21]	Elkin
18	Joseph E. Turner (Chief)	Greensboro
	Wendy M. Enochs	Greensboro
	Susan Elizabeth Bray	Greensboro
	Patrice A. Hinnant	Greensboro
	H. Thomas Jarrell, Jr.	High Point
	Susan R. Burch	Greensboro
	Theresa H. Vincent	Greensboro
	William K. Hunter	Greensboro
	Sherry Fowler Alloway	Greensboro
	Polly D. Sizemore	Greensboro
	Kimberly Michelle Fletcher[22]	Greensboro
	Betty J. Brown[23]	Greensboro
	Angela C. Foster[24]	Greensboro
	Avery Michelle Crump[25]	Greensboro
19A	William G. Hamby, Jr. (Chief)	Concord
	Donna G. Hedgepeth Johnson	Concord

DISTRICT	JUDGES	ADDRESS
	MARTIN B. MCGEE	Concord
	MICHAEL KNOX	Concord
19B	MICHAEL A. SABISTON (Chief)[26]	Troy
	JAMES P. HILL, JR.	Asheboro
	JAYRENE RUSSELL MANESS	Carthage
	LEE W. GAVIN	Asheboro
	SCOTT C. ETHERIDGE	Asheboro
	DONALD W. CREED, JR.	Asheboro
	ROBERT M. WILKINS[27]	Asheboro
19C	CHARLES E. BROWN (Chief)	Salisbury
	BETH SPENCER DIXON	Salisbury
	WILLIAM C. KLUTTZ, JR.	Salisbury
	KEVIN G. EDDINGER	Salisbury
	ROY MARSHALL BICKETT, JR.	Salisbury
20A	LISA D. THACKER (Chief)[28]	Wadesboro
	SCOTT T. BREWER	Monroe
	AMANDA L. WILSON[29]	Rockingham
	WILLIAM TUCKER[30]	Albemarle
20B	CHRISTOPHER W. BRAGG (Chief)	Monroe
	JOSEPH J. WILLIAMS	Monroe
	HUNT GWYN	Monroe
	WILLIAM F. HELMS	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
	CAMILLE D. BANKS-PAYNE[31]	Winston-Salem
22A	L. DALE GRAHAM (Chief)[32]	Taylorsville
	H. THOMAS CHURCH	Statesville
	DEBORAH BROWN[33]	Statesville
	EDWARD L. HENDRICK IV[34]	Statesville
	CHRISTINE UNDERWOOD[35]	Statesville
22B	WAYNE L. MICHAEL (Chief)	Lexington
	JIMMY L. MYERS	Mocksville
	APRIL C. WOOD	Statesville
	MARY F. COVINGTON	Mocksville
	CARLTON TERRY	Lexington
	J. RODWELL PENRY[36]	Lexington
23	MITCHELL L. MCLEAN (Chief)	Wilkesboro
	DAVID V. BYRD	Wilkesboro
	JEANIE REAVIS HOUSTON	Wilkesboro
	MICHAEL D. DUNCAN	Wilkesboro
24	ALEXANDER LYERLY (Chief)	Banner Elk
	WILLIAM A. LEAVELL III	Bakersville
	R. GREGORY HORNE	Newland
	THEODORE WRIGHT MCENTIRE[37]	Newland
25	ROBERT M. BRADY (Chief)	Lenoir
	GREGORY R. HAYES	Hickory

DISTRICT	JUDGES	ADDRESS
	L. Suzanne Owsley	Hickory
	C. Thomas Edwards	Morganton
	Buford A. Cherry	Hickory
	Sherrie Wilson Elliott	Newton
	John R. Mull	Morganton
	Amy R. Sigmon	Newton
	J. Gary Dellinger	Newton
26	Lisa C. Bell (Chief)[38]	Charlotte
	H. William Constangy	Charlotte
	Rickye McKoy-Mitchell	Charlotte
	Louis A. Trosch, Jr.	Charlotte
	Regan A. Miller	Charlotte
	Nancy Black Norelli[39]	Charlotte
	Hugh B. Lewis	Charlotte
	Becky Thorne Tin	Charlotte
	Thomas Moore, Jr.	Charlotte
	N. Todd Owens	Charlotte
	Christy Townley Mann	Charlotte
	Timothy M. Smith	Charlotte
	Ronald C. Chapman	Charlotte
	Paige B. Methenia[40]	Charlotte
	Jena P. Culler[41]	Charlotte
	William Irwin Belk[42]	Charlotte
	Kimberly Y. Best[43]	Charlotte
	Charlotte Brown-Williams[44]	Charlotte
	John Totten[45]	Charlotte
	Elizabeth Thornton Trosh[46]	Charlotte
	Donnie Hoover[47]	Charlotte
	Theofanis Xenophon Nixon[48]	Charlotte
	Tyyawdi Baker[49]	Charlotte
27A	Ralph C. Gingles, Jr. (Chief)	Gastonia
	Angela G. Hoyle	Gastonia
	John K. Greenlee	Gastonia
	James A. Jackson	Gastonia
	Thomas Gregory Taylor	Belmont
	Michael K. Lands	Gastonia
	Richard Abernethy	Gastonia
27B	Larry James Wilson (Chief)	Shelby
	Anna F. Foster	Shelby
	K. Dean Black	Denver
	Ali B. Paksoy, Jr.	Shelby
	Meredith A. Shuford	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	Asheville
29A	C. Randy Pool (Chief)	Marion
	Laura Anne Powell	Rutherfordton
	J. Thomas Davis	Rutherfordton

DISTRICT	JUDGES	ADDRESS
29B	Athena F. Brooks (Chief)[50]	Cedar Mountain
	David Kennedy Fox	Hendersonville
	Thomas M. Brittain, Jr.[51]	Hendersonville
	Peter Knight[52]	Hendersonville
30	Danny E. Davis (Chief)	Waynesville
	Steven J. Bryant	Bryson City
	Richlyn D. Holt	Waynesville
	Monica Hayes Leslie	Waynesville
	Richard K. Walker	Waynesville

EMERGENCY DISTRICT COURT JUDGES

Thomas V. Aldridge, Jr.[53]	Whiteville
Philip W. Allen[54]	Reidsville
E. Burt Aycock, Jr.[55]	Greenville
Kyle D. Austin[56]	Pineola
Sarah P. Bailey	Rocky Mount
Grafton G. Beaman	Elizabeth City
Ronald E. Bogle	Raleigh
James Thomas Bowen III	Lincolnton
Ronald W. Burris[57]	Albemarle
Hugh B. Campbell[58]	Charlotte
Samuel Cathey	Charlotte
Richard G. Chaney[59]	Durham
William A. Christian[60]	Sanford
Shelly H. Desvouges[61]	Raleigh
M. Patricia DeVine[62]	Hillsborough
J. Patrick Exum	Kinston
J. Keaton Fonvielle	Shelby
Thomas G. Foster, Jr.	Greensboro
Earl J. Fowler, Jr.	Asheville
Rodney R. Goodman	Kinston
Joyce A. Hamilton	Raleigh
Lawrence Hammond, Jr.	Asheboro
James W. Hardison	Williamston
Jane V. Harper	Charlotte
James A. Harrill, Jr.	Winston-Salem
Resa Harris	Charlotte
Robert E. Hodges	Morganton
Shelly S. Holt	Wilmington
James M. Honeycutt	Lexington
Robert W. Johnson[63]	Statesville
William G. Jones	Charlotte
Lillian B. Jordan	Asheboro
Robert K. Keiger[64]	Winston-Salem
David Q. LaBarre	Durham
William C. Lawton	Raleigh
James E. Martin	Greenville
Harold Paul McCoy, Jr.[65]	Halifax
Lawrence McSwain[66]	Greensboro
Fritz Y. Mercer, Jr.[67]	Charlotte

DISTRICT	JUDGES	ADDRESS
	William M. Neely[68]	Asheboro
	Nancy Black Norelli[69]	Charlotte
	Otis M. Oliver	Dobson
	Warren L. Pate	Raeford
	Nancy C. Phillips[70]	Elizabethtown
	Nathaniel P. Proctor[71]	Charlotte
	Dennis J. Redwing	Gastonia
	J. Larry Senter	Raleigh
	Joseph E. Setzer, Jr.[72]	Goldsboro
	Russell Sherrill III	Raleigh
	Catherine C. Stevens	Gastonia
	J. Kent Washburn	Graham
	Charles W. Wilkinson, Jr.[73]	Oxford

RETIRED/RECALLED JUDGES

Claude W. Allen, Jr.	Oxford
Donald L. Boone	High Point
Joyce A. Brown	Otto
Daphene L. Cantrell	Charlotte
Sol G. Cherry[74]	Boone
William A. Creech[75]	Raleigh
T. Yates Dobson, Jr.	Smithfield
Spencer B. Ennis	Graham
Robert T. Gash[76]	Brevard
Harley B. Gaston, Jr.	Gastonia
Roland H. Hayes	Gastonia
Walter P. Henderson	Trenton
Charles A. Horn, Sr.	Shelby
Jack E. Klass	Lexington
C. Jerome Leonard, Jr.	Charlotte
Edward H. McCormick	Lillington
J. Bruce Morton	Greensboro
Stanley Peele	Hillsborough
Margaret L. Sharpe	Winston-Salem
Samuel M. Tate	Morganton
John L. Whitley	Wilson

1. Appointed and sworn in 13 February 2008 to replace Shelly S. Holt who retired 31 December 2007.
2. Appointed Chief District Court Judge effective 1 August 2008 to replace Judge Harold Paul McCoy who retired 31 July 2008.
3. Elected and sworn in 1 January 2009.
4. Appointed as District Attorney effective 1 May 2009.
5. Appointed Chief Judge effective 1 January 2009 to replace Joseph E. Setzer, Jr. who retired 31 December 2008.
6. Elected and sworn in 1 January 2009.
7. Appointed Chief Judge effective 1 January 2009 to replace Charles W. Wilkinson, Jr. who retired 31 December 2008.
8. Elected and sworn in 1 January 2009.
9. Appointed and sworn in 21 February 2008.
10. Elected and sworn in 5 January 2009 to replace Shelly H. Desvouges who retired 31 December 2008.
11. Elected and sworn in 1 January 2009.
12. Elected and sworn in 1 January 2009 to the Court of Appeals.
13. Appointed and sworn in 18 February 2008.
14. Appointed and sworn in 6 February 2009.
15. Elected and sworn in 1 January 2009 to replace Nancy C. Phillips who retired 31 December 2008.

16. Appointed and sworn in 1 May 2009 to replace Thomas V. Aldridge, Jr. who retired 31 December 2008.
17. Appointed and sworn in 31 July 2008 to replace Craig B. Brown who retired 31 May 2008.
18. Elected and sworn in 1 January 2009 to replace M. Patricia DeVine who retired 31 December 2008.
19. Elected and sworn in 1 January 2009.
20. Appointed and sworn in 20 April 2009.
21. Appointed and sworn in 14 November 2008.
22. Appointed and sworn in 8 February 2008.
23. Elected and sworn in 1 January 2009 to replace Lawrence McSwain who retired 31 December 2008.
24. Elected and sworn in 1 January 2009.
25. Elected and sworn in 1 January 2009.
26. Appointed Chief Judge effective 1 January 2009 to replace William M. Neely who retired 31 December 2008.
27. Elected and sworn in 1 January 2009.
28. Appointed Chief Judge effective 1 January 2009 to replace Tanya T. Wallace who was elected to Superior Court.
29. Elected and sworn in 1 January 2009.
30. Appointed and sworn in 31 March 2009.
31. Appointed and sworn in 6 March 2008.
32. Appointed Chief Judge effective 1 January 2009.
33. Elected and sworn in 1 January 2009.
34. Elected and sworn in 1 January 2009.
35. Elected and sworn in 1 January 2009.
36. Appointed and sworn in 20 March 2009.
37. Elected and sworn in 1 January 2009 to replace Kyle D. Austin who retired 31 December 2008.
38. Appointed Chief Judge effective 1 January 2009.
39. Retired 31 July 2008.
40. Appointed and sworn in 9 April 2008.
41. Elected and sworn in 1 January 2009.
42. Elected and sworn in 1 January 2009.
43. Elected and sworn in 1 January 2009.
44. Elected and sworn in 1 January 2009.
45. Elected and sworn in 1 January 2009.
46. Elected and sworn in 1 January 2009.
47. Appointed and sworn in 29 February 2009.
48. Appointed and sworn in 31 March 2009.
49. Appointed and sworn in 17 April 2009.
50. Appointed Chief Judge effective 1 January 2009 to replace Robert S. Cilley who retired 31 December 2008.
51. Appointed and sworn in 30 March 2007.
52. Elected and sworn in 1 January 2009.
53. Appointed and sworn in 2 January 2009.
54. Deceased 15 August 2008.
55. Resigned 2 December 2007.
56. Appointed and sworn in 12 January 2009.
57. Appointed and sworn in 2 January 2009. Resigned 3 April 2009.
58. Appointed and sworn in 26 January 2009.
59. Resigned 20 December 2007.
60. Deceased 10 January 2008.
61. Appointed and sworn in 2 January 2009.
62. Appointed and sworn in 8 January 2009.
63. Resigned 12 September 2008.
64. Resigned 23 April 2009.
65. Appointed and sworn in 18 August 2008.
66. Appointed and sworn in 1 January 2009.
67. Appointed and sworn in 1 January 2009.
68. Appointed and sworn in 2 January 2009.
69. Appointed and sworn in 8 August 2008.
70. Appointed and sworn in 2 January 2009.
71. Appointed and sworn in 12 May 2008. Resigned 14 April 2009.
72. Appointed and sworn in 11 January 2009.
73. Appointed and sworn in 16 January 2009.
74. Deceased 10 December 2009.
75. Resigned 30 September 2007.
76. Resigned 31 October 2008.

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27B	Richard L. Shaffer	Shelby
28	Ronald L. Moore	Asheville
29A	Brad Greenway	Marion
29B	Jeff Hunt	Hendersonville
30	Michael Bonfoey	Waynesville

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DISTRICT	PUBLIC DEFENDER	ADDRESS
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3B	Debra L. Massie	Beaufort
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12	Ron D. McSwain	Fayetteville
14	Robert Brown, Jr.	Durham
15B	James E. Williams, Jr.	Carrboro
16A	Regina McKinney Joe	Laurinburg
16B	Angus B. Thompson	Lumberton
18	Wallace C. Harrelson	Greensboro
21	George R. Clary III	Winston-Salem
26	Isabel S. Day	Charlotte
27A	Kellum Morris	Gastonia
28	J. Robert Hufstader	Asheville

CASES REPORTED

ORDERS

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

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

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

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

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

PETITIONS TO REHEAR

GENERAL STATUTES CITED

UNITED STATES CONSTITUTION CITED

RULES OF EVIDENCE CITED

RULES OF APPELLATE PROCEDURE CITED

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 5th day of April 2007, and said person has been issued a certificate of this Board:

Ryan Berrard Moran . . . . . .Memphis, Michigan

Given over my hand and seal of the Board of Law Examiners on this the 8th day of May 2008.

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 18th day of January 2008, and said person has been issued a certificate of this Board:

James Wilson Key Wilde . . . . . .Applied from the State of Texas

Given over my hand and seal of the Board of Law Examiners on this the 19th day of February, 2008.

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 18th day of January 2008, and said person has been issued a certificate of this Board:

Holly Elizabeth Dowd . . . . . .Union, South Carolina

Given over my hand and seal of the Board of Law Examiners on this the 15th day of April 2008.

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 1st day of February 2008, and said person has been issued a certificate of this Board:

Robert H. Spergel . . . . . .Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners on this the 19th day of February, 2008.

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 February 2008, and said person has been issued a certificate of this Board:

Lucas Tomlinson Baker . . . . . .Concord

Given over my hand and seal of the Board of Law Examiners on this the 19th day of February 2008.

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 29th day of February 2008, and said persons have been issued a certificate of this Board:

Julia Christine Ambrose . . . . . .Applied from the District of Columbia
Anthony J. Barwick . . . . . .Applied from the State of Georgia
Andrew R. Devin . . . . . .Applied from the State of Georgia
Kurtis R. Dumaw . . . . . .Applied from the State of Michigan
Aaron Christopher Gard . . . . . .Applied from the State of Texas
Edward Demestrius Gray . . . . . .Applied from the State of Tennessee
Gregory B. Grogan . . . . . .Applied from the State of Georgia
David Ryan Heinen . . . . . .Applied from the District of Columbia
Mary Katherine Howard . . . . . .Applied from the State of Colorado
Marie Antionette Joiner-Avon . . . . . .Applied from the State of Tennessee
Stephen Randall Kleinman . . . . . .Applied from the State of Ohio
Nichelle Nicholes Levy . . . . . .Applied from the State of New York
Jeffrey Phillips MacHarg . . . . . .Applied from the State of Pennsylvania
John F. X. Morley, Jr. . . . . .Applied from the State of Pennsylvania
Lawrence Lothar Ostema . . . . . .Applied from the State of Colorado
Peter A. Pavarini . . . . . .Applied from the State of Ohio
Barbara L. Prendergast . . . . . .Applied from the State of New York
Joel M. Rudell . . . . . .Applied from the State of New York
Charles Andrew Stienecker . . . . . .Applied from the State of Ohio
Daniel Joseph Tangeman . . . . . .Applied from the State of Colorado
Lisa M. Verdino . . . . . .Applied from the State of New York
Michael Todd Whitesell . . . . . .Applied from the State of West Virginia

Given over my hand and seal of the Board of Law Examiners on this the 15th day of April, 2008.

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 28th day of March 2008, and said person has been issued a certificate of this Board:

Leigh Cohan-Verdi . . . . . .Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners on this the 15th day of April, 2008.

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 March 2008, and said persons have been issued a certificate of this Board:

Alton Luther Absher Jr. . . . . .Winston-Salem
Jamie Tennille Adams . . . . . .Statesville
Thomas Arthur Allen . . . . . .Raleigh
Andrea Anders . . . . . .Salisbury
Cheryl Denise Andrews . . . . . .Salisbury
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William Ronald Arnette . . . . . .Mooresville
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Bridget L. Baranyai . . . . . .Lewisburg, Pennsylvania
Lawrence Anthony Baratta Jr. . . . . .Charlotte
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Katherine Anne Dickson . . . . . Arlington, Virginia
Stanislav Vladimirovich Dolgopolov . . . . . Charlotte
Jan Erik Dormsjo, Jr. . . . . Charlotte
Kellie Lyn Duckering . . . . . Toledo, Ohio
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Summer Danielle Eudy . . . . . Charleston, South Carolina
Brandon Lee Evans . . . . . Raleigh
Beth Ann Faleris . . . . . Jacksonville
Erik Jon Faleski . . . . . Charlotte
Nathaniel Curtis Farmer . . . . . Anderson, South Carolina
Nancy Seay Farrell . . . . . Herndon, Virginia
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Lisa Marie Good . . . . . Columbia, South Carolina

David Leon Gore, III . . . . . Hampton, Virginia
Lindsey Dawn Granados . . . . . Morrisville
Derek Matthew Gray . . . . . Durham
Meredith Kathryn Gregory . . . . . Wilkesboro
Joshua Garland Gropp . . . . . Raleigh
Huntington Lee Guice . . . . . Charlotte
Sumit Gupta . . . . . Winston-Salem
Sarah Rees Hamilton . . . . . Charlotte
Jonathan Patrick Hammond . . . . . Greenville, South Carolina
Ja-Fana Ghita Harris . . . . . Raleigh
Erik Mosby Harvey . . . . . Concord
Amelia Pauline Hayes . . . . . Raleigh
Matthew West Haynes . . . . . Winston-Salem
Pamela Marie Henry-Mays . . . . . Bahama
J. T. Herber, III . . . . . Pine Grove, Pennslyvania
Todd Maurice Hess . . . . . Matthews
Susan Melissa Hill . . . . . Columbia, South Carolina
Christopher M. Hinsley . . . . . Charlotte
Patricia Maggio Homa . . . . . Hampstead
Rosalyn Hood . . . . . Fayetteville
Jonathan Ashley Hornbuckle . . . . . Cherokee
Elgin Dane Horne . . . . . Wadesboro
Joshua James Horton . . . . . Carrboro
Erin Suzanne Hucks . . . . . Marshville
James Donald Humphries IV . . . . . Atlanta, Georgia
Jonathan Holmes Hunt . . . . . Durham
Edward Lang Hunter . . . . . Raleigh
John David Hurst . . . . . Mount Pleasant, South Carolina
Karen Ellen Jackson . . . . . Greensboro
Jonathan Lester Jenkins . . . . . Durham
William Edward Jennetta . . . . . Durham
William Eric Johnson . . . . . Asheville
Michael Andrew Julyan . . . . . Rockville, Maryland
Stephen Mocker Kapral, Jr. . . . . Boone
Melissa Anne Kato . . . . . Charlotte
Karen Ann Keller-Cuda . . . . . Winston-Salem
Jennifer Blakely Dalrymple Kiefer . . . . . Durham
Kristen Michelle Kochekian . . . . . High Point
Tara Lynn Kozlowski . . . . . Durham
Thomas Scott Kummer . . . . . Charlotte
Jeffrey Brandt Kuykendal . . . . . Phoenix, Arizona
Robert G. Lamb III . . . . . Wilmington
Kara Ashlee Lawrence . . . . . Grundy, Virginia
Stephen Clayton Leech . . . . . Charlotte
Angela Lee Lewis . . . . . Weaverville
Harriett Matthews Liles . . . . . Charlotte
Jacqueline Yvonne Bourdon London . . . . . Miami Beach, Florida
Kenneth Love, Jr. . . . . Winston-Salem
Elizabeth Ann Lucente . . . . . Sperryville, Virginia
Ajanaclair Nicole Lynch . . . . . Pineville
Richard David Madoni II . . . . . Cary

Alicia Maya Madura . . . . . Charlotte
Tadra Marie Martin . . . . . Morganton
Angela Piccirillo Mason . . . . . Charlotte
Anita Jeanette Mason . . . . . Monroe
Leonard Marque McCall . . . . . Durham
Arlene Marie McCue . . . . . Fairfax, Virginia
Jennifer Lee McKeon . . . . . Greensboro
Brian Francis McMahon . . . . . Charlotte
Karlyn Le Shawn McManus . . . . . Charlotte
Dan Kelly McNeill . . . . . Fort Bragg
Ayanda Dowtin Meachem . . . . . Winterville
Nicola Jaye Melby . . . . . Brevard
Jeanine Michele Mitchell . . . . . Raleigh
Charles Scott Montgomery . . . . . Cary
Keith Edward Moore . . . . . Nashville
Madlyn Cathryn Morreale . . . . . Chapel Hill
Michael Simon Musante . . . . . Durham
Amanda Grice Myers . . . . . La Grange
Davidson Sidney Myers . . . . . La Grange
Sarah Elizabeth Nagae . . . . . Raleigh
Daniel Shanks Newell . . . . . West Jefferson
Elaine C. Nicholson . . . . . Bloomfield, New Jersey
Gregory Michael Nicklas . . . . . Wilmington
Carlos Alexander Osegueda, Jr. . . . . Whitsett
Mike Carson Parnell . . . . . Greensboro
John-Russell Bart Pate . . . . . Rocky Mount
Matthew Philip Pawling . . . . . Charlotte
Paul Michael Pellegrino . . . . . Middle Village, New York
Joseph Chad Perry . . . . . Louisburg
Brent Allen Peters . . . . . Winston-Salem
Albert Richard Pierce, Jr. . . . . Columbia, South Carolina
Beverly Ann Pittillo . . . . . Big Piney, Wyoming
Randall Charles Place . . . . . Whispering Pines
James Reinhard Pohlen . . . . . Chapel Hill
Ashley Catherine Powell . . . . . Burlington
Rajeev K. Premakumar . . . . . Hillsborough
Sarah Elizabeth Preston . . . . . Garner
Donna Marie Primrose . . . . . Durham
Lisa Ann Purtz . . . . . Elon
Theresa Sylvia Quinn . . . . . Cary
Brandon Grey Radford . . . . . Boone
Donald Philip Renaldo, II . . . . . Charlotte
Vaughn Kenneth Reynolds . . . . . Charlotte
Steven Paul Richards . . . . . Wilmington
Christopher Maurice Richardson . . . . . Durham
Patrick Donovan Riley . . . . . Knightdale
Lindsey Nichole Roberson . . . . . Wilmington
Raushanah Fadqua Rodgers . . . . . Durham
Heather Michelle Rogers . . . . . Greensboro
Toussaint Crosby Romain . . . . . Charlotte
Jason R. Rosser . . . . . Roanoke Rapids

Robert Christopher Miles Rountree . . . . . .Boone
Brian Michael Rowlson . . . . . .Matthews
Tiffany Dawn Russell . . . . . .Durham
Claire Joanne Samuels . . . . . .Charlotte
Thomas Reynolds Sanford . . . . . .Charlotte
Cynthia L. Schirmer . . . . . .E. Lansing, Michigan
Shilpa Vasant Sejpal . . . . . .Arlington, Virginia
David Patrick Sheehan . . . . . .Roanoke, Virginia
Mark Russell Sigmon . . . . . .Raleigh
Sara Judith Simberg . . . . . .Durham
Andrew Grayson Sloop . . . . . .Chapel Hill
Kevin Lindsay Smith . . . . . .Durham
Ryan Thomas Smith . . . . . .Charlotte
Sharon Lynn Smith . . . . . .Durham
Jeremy Nathaniel Snyder . . . . . .Virginia Beach, Virginia
Virginia Jordan Song . . . . . .Durham
Anna Kristina Stimmel . . . . . .Knoxville, Tennessee
Kristen Nichole Thompson . . . . . .Concord
William Leonard Traurig . . . . . .Morrisville
Eric Francis Wagner . . . . . .Cary
Patricia Suzanne Renfrow Walker . . . . . .Raleigh
Priscilla Leigh Walton . . . . . .Raleigh
Robert Kent Warren . . . . . .Fairway, Kansas
Chantal Camille Wentworth . . . . . .Wrightsville Beach
Natalie Sue Whiteman . . . . . .Asheville
Bradley Allen Wilkinson . . . . . .Charlotte
Renee Marie Williamson . . . . . .Atkinson
Erin Barrett Wilson . . . . . .Salt Lake City, Utah
Rhonda Gene Wilson . . . . . .Rock Hill, South Carolina
Richard Allan Wright, Jr. . . . . .Wake Forest
Va Ly Yang . . . . . .Smithfield
Angela Marie Zagami . . . . . .Cary
Carol Ann Zanoni . . . . . .Raleigh

Given over my hand and seal of the Board of Law Examiners on this the 15th day of April 2008.

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 March 2008, and said persons have been issued a certificate of this Board:

John Stewart O'Connor . . . . . .Charlotte
Wayman Antonius Newton . . . . . .Ardmore, Pennsylvania

Given over my hand and seal of the Board of Law Examiners on this the 8th day of May 2008.

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 4th day of April 2008, and said persons have been issued a certificate of this Board:

Richard Allan Barnhart . . . . . .Applied from the State of Ohio
Robert Burns Druar . . . . . .Applied from the State of New York
Linda Arlene Michler . . . . . .Applied from the State of Pennsylvania
Donald Ray Rawlins . . . . . .Applied from the State of Texas
Elizabeth T. Timkovich . . . . . .Applied from the State of Connecticut

Given over my hand and seal of the Board of Law Examiners on this the 15th day of April, 2008.

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 11th day of April 2008, and said persons have been issued a certificate of this Board:

Angela Michelle Allen . . . . . .Raleigh
Knicole C. Allen . . . . . .Raleigh
Vallisia Rena Allen . . . . . .Charlotte
Dorothee Anna Alsentzer . . . . . .Charlotte
Megan Hanley Baer . . . . . .Baltimore, Maryland
George Thomas Bartels . . . . . .Cary
Neil Thomas Bloomfield . . . . . .New York, New York
Benjamin Joseph Brummel . . . . . .Timonium, Maryland
Porsha Nicole Buresh . . . . . .Winston-Salem
Susan Dana Bushong . . . . . .Charlotte
Elisa Anne Cawood . . . . . .Altamonte Springs, Florida
Lisa Marie Crandall . . . . . .Waxhaw
Lindsey Laine Deere . . . . . .Raleigh
Adam Karl Doerr . . . . . .Charlotte
Ian Robert Feldman . . . . . .Aliso Viejo, California
Michael Scott Fradin . . . . . .Winston-Salem
Sheilah Diane Gibson . . . . . .Denver
Charles Phillips Gilliam . . . . . .Raleigh

Karen Leslie Green . . . . . Charlotte
Jason Matthew Hanflink . . . . . Greensboro
Travis M. Harper . . . . . Bronx, New York
Michael James Hoes . . . . . Charlotte
Joyce Chandler Kaneko . . . . . Denver
Matthew William King . . . . . Cary
Matthew Warren Kitchens . . . . . Asheville
Jessica Robin Lesowitz . . . . . Raleigh
Michael Kay Mabe . . . . . Charlotte
Don Errol McCown, Jr. . . . . Cullowhee
Keith Ronald Miles . . . . . Snellville, Georgia
Brian Craig Phillips . . . . . Fort Mill, South Carolina
Daniel Justin Rearick . . . . . Cary
David Eliot Rothstein . . . . . Columbia, South Carolina
Larry Ray Staton, Jr. . . . . Huntersville
Derek Kenneth Stevens . . . . . Charlotte
Matthew Scott Stevens . . . . . Charlotte
Kelly Elizabeth Street . . . . . Dallas, Texas
Maureen Elizabeth Ward . . . . . Pinehurst
Brenton Clark Woodcox . . . . . Carrboro

Given over my hand and seal of the Board of Law Examiners on this the 8th day of May 2008.

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 11th day of April 2008, and said person has been issued a certificate of this Board:

Charles Jonathon Bridgmon . . . . . Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 27th day of June 2008.

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 11th day of April 2008, and said person has been issued a certificate of this Board:

Lee Iverson Malco . . . . . Kill Devil Hills

Given over my hand and seal of the Board of Law Examiners on this the 23rd day of June 2008.

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 18th day of April 2008, and said person has been issued a certificate of this Board:

Gregory Hunt . . . . . .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, 2008.

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 16th day of May 2008, and said persons have been issued a certificate of this Board:

Giannina Margaret Bradley . . . . . .Hollywood, Florida
Andrew Beckett Fisher . . . . . .Durham
Trevor Marc Hughey . . . . . .Charlotte
Christopher William Shelburn . . . . . .Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 27th day of June, 2008.

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 16th day of May 2008, and said persons have been issued a certificate of this Board:

Tina Beth Davidson . . . . . .Applied from the State of New York
Corwin Del Toro . . . . . .Applied from the State of New York
William H. Harkins, Jr. . . . . .Applied from the State of West Virginia
Karen Ann Leahy . . . . . .Applied from the State of New York
James V. Mahon . . . . . .Applied from the State of New York

John J. Muller, III . . . . . .Applied from the State of Illinois
Margaret Mary Pasulka . . . . . .Applied from the State of Massachusetts

Given over my hand and seal of the Board of Law Examiners on this the 27th day of June, 2008.

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 16th day of May 2008, and said person has been issued a certificate of this Board:

Teresa Marie Weik . . . . . .Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners on this the 15th day of July, 2008.

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 May 2008, and said persons have been issued a certificate of this Board:

Christine Cagnina . . . . . .Applied from the State of Illinois
Karen Kristin Dabbs . . . . . .Applied from the District of Columbia
Thomas Laman Esper . . . . . .Applied from the State of Ohio
Jaileah Xan Huddleston . . . . . .Applied from the State of Michigan
Kimberly A. Lawrence . . . . . .Applied from the State of Ohio
Charles Howard McCreary III . . . . . .Applied from the State of Illinois

Given over my hand and seal of the Board of Law Examiners on this the 27th day of June, 2008.

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 23rd day of May 2008, and said persons have been issued a certificate of this Board:

Daniel Patrick Murphy . . . . . .Rockville, Maryland
Samuel Reid Smith . . . . . .Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 27th day of June 2008.

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 6th day of June 2008, and said person has been issued a certificate of this Board:

Phillip Azar . . . . . .Applied from the State of Tennessee

Given over my hand and seal of the Board of Law Examiners on this the 1st day of July, 2008.

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 13th day of June 2008, and said persons have been issued a certificate of this Board:

Christina Inga Apperson . . . . . .Chapel Hill
Laverne Bobbie Campese . . . . . .Euclid, Ohio
Franklin Lamont Greene . . . . . .Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 27th day of June 2008.

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 June 2008, and said persons have been issued a certificate of this Board:

Michael Jude Lawrence . . . . . .Applied from the State of Ohio
Wayne T. Marshall . . . . . .Applied from the State of New York
David Stuart Maltz . . . . . .Applied from the District of Columbia
Douglas A. Scholer . . . . . .Applied from the State of Ohio
Charles Emmett Wheelock . . . . . .Applied from the State of Georgia

Given over my hand and seal of the Board of Law Examiners on this the 4th day of August, 2008.

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 11th day of July 2008, and said person has been issued a certificate of this Board:

Frank Louis Amoroso . . . . . .Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners on this the 4th day of August, 2008.

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 1st day of August 2008, and said persons have been issued a certificate of this Board:

Sarah Elizabeth Carson . . . . . .Applied from the State of Georgia
William V. Conley . . . . . .Applied from the State of Pennsylvania
Margaret A. Draper . . . . . .Applied from the State of Ohio
Alan Ross Etkin . . . . . .Applied from the State of Texas
Tracy L. Frankel . . . . . .Applied from the State of New York
Joel Andrew Freedman . . . . . .Applied from the State of Georgia
Laurie Stride Gallagher . . . . . .Applied from the State of New York
William Todd Holleman . . . . . .Applied from the State of Georgia
Quan T. Kirk . . . . . .Applied from the State of Ohio
Naho Kobayashi . . . . . .Applied from the State of Georgia
John Thomas Morgan III . . . . . .Applied from the State of Georgia
Gwen E. Murray . . . . . .Applied from the State of Connecticut
Timothy William Nohr . . . . . .Applied from the State of Kansas
Cynthia Alison Patrick . . . . . .Applied from the State of New York
Michael P. Richter . . . . . .Applied from the State of Ohio
Lori M. Ritter . . . . . .Applied from the State of Tennessee
Mark Steven Scott . . . . . .Applied from the State of Michigan
Matthew Corey Scott . . . . . .Applied from the State of Wisconsin
Debra K. Stephens . . . . . .Applied from the State of Pennsylvania
Kristine M. Wellman . . . . . .Applied from the State of Ohio
Brian K. Widener . . . . . .Applied from the State of Georgia
Mark Kendall Williams . . . . . .Applied from the State of Tennessee

John Noel Winstead . . . . . .Applied from the State of Ohio
Jacob Christian Zweig . . . . . .Applied from the State of Tennessee

Given over my hand and seal of the Board of Law Examiners on this the 23rd day of September 2008.

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 August 2008, and said persons have been issued a certificate of this Board:

Jacalyn Denise Ackerman . . . . . .Kernersville
Laurel Corkrean Ackley . . . . . .Raleigh
Deaundrea Tanette Adams . . . . . .Greenville
Derek Louis Adams . . . . . .Danville, Virginia
Ronald Scott Adams . . . . . .Alpine, Utah
Elias W Admassu . . . . . .Raleigh
Michelle Doryce Al-Shishani . . . . . .Raleigh
Shaunterria Tuaniece Allen . . . . . .Raleigh
Robert Sean Alley . . . . . .Davidson
Matthew Frank Altamura . . . . . .Randleman
Cara Capponi Amo . . . . . .Huntersville
Brian Richard Anderson . . . . . .Browns Summit
Jonathan Wellons Anderson . . . . . .Raleigh
Melissa Mabelle Anderson . . . . . .Alexandria, Virginia
Robert James Anderson . . . . . .Wilmington
Jocelyn Torres Andino . . . . . .Columbia, South Carolina
John Augusta Apple III . . . . . .Raleigh
Ashley Elizabeth Argo . . . . . .Charlotte
Amanda Frost Armstrong . . . . . .Mars Hill
Scott Alan Armstrong . . . . . .Mars Hill
Kellie Elizabeth Army . . . . . .Vass
Tiffany Marie Arroyo . . . . . .Charlotte
Garrett Christopher Artz . . . . . .Durham
Elizabeth Harrison Asplund . . . . . .Charlotte
Robert Corey Bray Atkins . . . . . .Mount Airy
Todd Philip Atlas . . . . . .Durham
Jay Anthony Audino . . . . . .Winterville
Lucy Scott Tatum Austin . . . . . .Apex
Matthew Kessel Avery . . . . . .Knoxville, Tennessee
Joanne Badr . . . . . .Hamden, Connecticut
Brandy Fulkerson Baird . . . . . .Knightdale
James Raleigh Baker . . . . . .Raleigh
Lora Turbeville Baker . . . . . .Tabor City
Cynthia Whitley Baldwin . . . . . .Wilmington

LICENSED ATTORNEYS

Krystal Louise Balmer . . . . . Charlotte
Katherine Marie Bandy . . . . . Chapel Hill
Harvey Wayne Barbee, Jr. . . . . High Point
Michael Hugh Barker . . . . . Charlotte
Dauna Leigh Bartley . . . . . Raleigh
John Charles Bateman . . . . . Burlington
Rebecca Leigh Beach . . . . . Sims
Jennifer Marie Beatty . . . . . Wilmington
Robert Locke Beatty . . . . . Greensboro
Laura Elizabeth Beaver . . . . . Fayetteville
Aaron Thomas Beck . . . . . Charlotte
Brian Lewis Beck . . . . . Millbrae, California
Nicholas Ulrich Becker . . . . . Morresville
Jennifer Harvey Bedford . . . . . Raleigh
Steven Gregory Bell . . . . . Hillsborough
Mary Elizabeth Bennett . . . . . Winston-Salem
Stephen Mark Bennett . . . . . Marietta, South Carolina
Aimee Elizabeth Bennington . . . . . Monroe
Craig Francis Bernesser . . . . . Tega Cay, South Carolina
Randall Mark Best . . . . . Raleigh
Shelly Ann Bibb . . . . . Durham
Justin Donald Bice . . . . . Fort Mill, South Carolina
James Robert Black . . . . . Durham
Jeffrey Joseph Blick . . . . . Greenville
Ryan Taylor Bliss . . . . . Morrisville
Amy Elizabeth Bourie . . . . . Fayetteville
Kiel Anthony Bowen . . . . . Charlotte
Leslie Stafford Bowers . . . . . Durham
Erin Ruth Bradley . . . . . Morehead City
Isaac John Bradley . . . . . Pisgah Forest
Lorrie Elizabeth Bradley . . . . . Durham
Joshua Blake Branscomb . . . . . Clemmons
Elizabeth Mann Brantley . . . . . Greensboro
Ian David Brater . . . . . Jacksonville, Florida
Katherine Cary Brege . . . . . Raleigh
Jillian Elaine Brevorka . . . . . Greensboro
Jonathan Walter Bridges . . . . . Shelby
William Conor Brockett . . . . . Raleigh
Katherine Jordan Brooks . . . . . Carrboro
Christopher Michael Broome . . . . . Chapel Hill
Kristina Kathryn Brown . . . . . Cary
Nicholas Conan Brown . . . . . Raleigh
Philip Zoltan Brown . . . . . Chapel HIll
Roderick Fanniel Brown . . . . . Raleigh
Stephen Aaron Brown . . . . . Chapel Hill
Larry Donnell Brown, Jr. . . . . Mebane
William Taylor Browne . . . . . Apex
Samuel Judson Browning . . . . . Charlotte
Crystal Louise Bryson . . . . . Topton
Stephanie Lynn Buck . . . . . Sanford
Hendey Suzanne Buckley . . . . . Durham

Daiva Stankus Bulluck . . . . . Greensboro
Thomas Donald Bumgardner . . . . . Gastonia
Shawn Emery Buresh . . . . . Winston-Salem
Amber Rae Burleson . . . . . Charlotte
Colleen Louise Byers . . . . . Winston-Salem
Angela Jane Caldwell . . . . . Fayetteville
Clay Anders Campbell . . . . . Salisbury
Sarah Elizabeth Canaday . . . . . Graham
Tomas Elias Carbonell . . . . . Raleigh
Gail Elizabeth Carelli . . . . . Chapel Hill
Thomas J. Carmon . . . . . Durham
Stephanie Marie Carowan . . . . . Wilmington
Jonathan Douglass Carr . . . . . Las Vegas, Nevada
Molly Ann Carson . . . . . Raleigh
Karianne Carter . . . . . Jacksonville
David Wheatley Cartner . . . . . Asheville
Gabriela G. Castillo . . . . . Indian Trail
William Torrence Cathcart . . . . . Charlotte
Angie Elizabeth Cecil . . . . . Winston-Salem
Matthew Scott Chambers . . . . . Winston-Salem
Annette Caroline Chancy . . . . . Dunn
Adrian VáShay Chandler . . . . . Charlotte
Tanisha Darlene Chapman . . . . . Brick, New Jersey
Marina Fay Chase . . . . . Raleigh
Grayson Howard Cheek . . . . . Wilmington
Duke Chen . . . . . Raleigh
Melanie Freeman Chernoff . . . . . Durham
Kevin Davis Cheshire . . . . . Durham
Carol Charnetta Chestnut . . . . . Morrisville
Amy Chiou . . . . . Charlotte
Amanda McLaren Christie . . . . . Charlotte
Michael J. Christopher . . . . . Fort Mill, South Carolina
Thomas R. Chupkowski . . . . . Fayetteville
Winifred Catherine Cisar . . . . . Charlotte
Bradley Haynes Clark . . . . . New Bern
John Benjamin Clark . . . . . Charlotte
Mary Cabell Clay . . . . . Charlotte
Anna Sheppard Cobb . . . . . Winston-Salem
Jade Michelle Cobb . . . . . Spartanburg, South Carolina
Casey Francelyn Cogburn . . . . . Asheville
Charles Barlowe Cole . . . . . Murfreesboro
Nathaniel Thomas Coleman . . . . . Burgaw
Crista Leeann Collazo . . . . . Durham
Charles Collier III . . . . . Raleigh
Erin Elizabeth Comerford . . . . . Winston-Salem
Cameron Lynn Contizano . . . . . Ada, Michigan
Matthew Rubin Conway . . . . . Charlotte
Robert Steven Cook . . . . . Macon
Jennie Gardner Cordis . . . . . Charlotte
Boyd Alexander Correll . . . . . Charlotte
Stacy Lynn Crosier . . . . . Youngsville

Kelly Eileen D'Aprile . . . . . Cary
Matthew Victor Daly . . . . . Raleigh
Karen Gwendolyn Darlington, Jr. . . . . Charlotte
Tara Bettina Daulton . . . . . Hazlet, New Jersey
Eric Michael David . . . . . Chapel Hill
Rosetta Davidson . . . . . Greensboro
Donald Carrington Davis . . . . . Greensboro
Salena Janine Davis . . . . . Charlotte
Thomas Hill Davis, III . . . . . Raleigh
Dania Camille Davy . . . . . Loxahatchee, Florida
Emily Sherrod Day . . . . . Charlotte
Jennifer Scott DeGraw . . . . . Winston-Salem
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Bryan Mitchell Douglas . . . . . Raleigh
Mendi Shanara Drayton . . . . . Greenville, South Carolina
Christopher James Drummond . . . . . Raleigh
Jennifer Mitsuko Duffy . . . . . Raleigh
Scott Hunter Dunnagan . . . . . Raleigh
William Henry Durham . . . . . Durham
Kristen Lee Durren . . . . . Raleigh
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Reid Evan Dyer . . . . . Greensboro
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Eric David Edwards . . . . . Apex
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Matthew Charles Ennis . . . . . Charlotte
Ryan Paul Ethridge . . . . . Charlotte
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Lewis Moore Everett . . . . . Durham
Sherry Honeycutt Everett . . . . . Durham
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Jared Edward Stone . . . . . Statesville
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Adam Michael Swift . . . . . State Road
Donna Elizabeth Tanner . . . . . Lillington
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Sonya Nicole Wright . . . . . Downingtown, Pennsylvania
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Alexandra Helen Yeager . . . . . Savannah, Georgia
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Given over my hand and seal of the Board of Law Examiners on this the 23rd day of September, 2008.

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 August 2008, and said persons have been issued a certificate of this Board:

Heather Colleen McReynolds . . . . . Raleigh
Austin Chike Monu . . . . . Cornelius
Jennifer Lynn Myers . . . . . Portland, Tennessee
Jennifer Suzanne Plyler . . . . . Fayetteville
Carolyn Christianne Pratt . . . . . Morrisville
Andrew Stewart Price . . . . . Strasburg, Ohio
Kenneth Shavar Ratley . . . . . Charlotte
Vivian Michelle Redd . . . . . Burlington
Zachary Van Renegar . . . . . Charlotte
Rachael Denise Rogers . . . . . Raleigh
Russell Joseph Schonekas III . . . . . Charlotte
Ryan Gary Short . . . . . Durham
Justin P. Sievert . . . . . Schenectady, New York
Sion Carter Stone . . . . . Raleigh
Kathryn Lynn Swinkey . . . . . Conover
Robert Ted Trautman . . . . . Madison, New Jersey
Christopher Paul Tucker . . . . . Charlotte

Guillermo Arturo Velasquez . . . . . .Carrboro
Cortney Ian Walker . . . . . .Garner
Emily Suzanne Warner . . . . . .Toledo, Ohio
Monica Mai Williams . . . . . .Winston-Salem
Niki R. Woods . . . . . .Charlotte
Daniel James Worrall . . . . . .Chapel Hill
Ling Zhen . . . . . .Durham

Given over my hand and seal of the Board of Law Examiners on this the 16th day of October, 2008.

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 12th day of September 2008, and said persons have been issued a certificate of this Board:

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Jennifer Cathleen Armiger . . . . . .Leland
Jason Bernard Belk . . . . . .Raleigh
Theodore Patrick Bell . . . . . .Alabaster, Alabama
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Michael Luketich Blauvelt . . . . . .Brooklyn, New York
Gregory Albert Braun . . . . . .Chapel Hill
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Emily Smith Coward . . . . . .Jamaica Plain, Massachusetts
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Lindsey Laughridge Davis . . . . . .Raleigh
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Matias Ferrario . . . . . .Winston-Salem
Clelia Amari Fry . . . . . .Holly Springs
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Carrie Ann Porath . . . . . Charlotte
Michael Todd Pritchard . . . . . Burke, Virginia
James John Rainsford . . . . . Edgefield, South Carolina
Rebecca Dawn Rathmell . . . . . Carolina Beach
Heather Lynn Rattelade . . . . . Morrisville
Brandi Leigh Richardson . . . . . Oxford
Jennifer Ann Rutherford . . . . . Charlotte
Kimberly Diane Sanders . . . . . Woodleaf
Kirk Gloyne Saunooke . . . . . Cherokee
Ratanakorn Lucky Sayasith . . . . . Charlotte
Dean A. Scharnhorst . . . . . Raleigh
Wesley Jackson Shull . . . . . Greenville, South Carolina
Susan Carol Shumaker . . . . . Salisbury
Christina Elizabeth Simpson . . . . . Chapel Hill
Robert Anthony Singagliese . . . . . Montgomery, Alabama
Fredilyn Sison . . . . . Asheville
Joshua Robert Smith . . . . . Charlotte
Mitchell Dell Sprengelmeyer . . . . . Charlotte
Gordon Scott Stermer . . . . . Matthews
Andrea Therese Stubbs . . . . . Durham
Wayne Edwin Tumlin . . . . . Greensboro
Tiffany Ann Turner . . . . . Lansing, Michigan
Jane Leah Weatherly . . . . . El Prado, New Mexico
Ryan Thomas Webster . . . . . Fort Walton Beach, Florida
Clay Campbell Wheeler . . . . . Durham
Brandon Allen White . . . . . Chapel Hill
Matthew William Wolfe . . . . . Durham

Given over my hand and seal of the Board of Law Examiners on this the 23rd day of September, 2008.

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 12th day of September 2008, and said person has been issued a certificate of this Board:

Tamesha Nicole Bendaw . . . . . .Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 16th day of October, 2008.

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 19th day of September 2008, and said persons have been issued a certificate of this Board:

Paul R. Lucey . . . . . .Applied from the District of Columbia
Armand A. Perry . . . . . .Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners on this the 9th day of October, 2008.

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 19th day of September 2008, and said persons have been issued a certificate of this Board:

Noah Breen Abrams . . . . . .Chapel Hill
Jennifer Harris Avriett . . . . . .Greensboro
James David Horne, Jr. . . . . .Charlotte

Hunter Reynolds Ingram . . . . . .Charlotte
John Tilson Johnson III . . . . . .Winnsboro, South Carolina
Kristin Elizabeth Sams . . . . . .Nashville

Given over my hand and seal of the Board of Law Examiners on this the 9th day of October 2008.

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 3rd day of October 2008, and said person has been issued a certificate of this Board:

Meredith Catherine Marie Laughridge . . . . . .Campobello, South Carolina

Given over my hand and seal of the Board of Law Examiners on this the 17th day of November, 2008.

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 3rd day of October 2008, and said persons have been issued a certificate of this Board:

Lauren Allison Gindes . . . . . .Raleigh
Jason Earl De Hoog . . . . . .Bath
Michaela Lea Bostrom . . . . . .Morrisville
Stephen James Petroski . . . . . .Chapel Hill
William Smith Brockington III . . . . . .Aiken, South Carolina
Kristin Gabrielle Garris . . . . . .Winston-Salem
Thomas Bradford Hunter . . . . . .Raleigh
Kristin Denise Payne . . . . . .Chapel Hill
Kathleen Marianna Putiri . . . . . .Raleigh
Rebecca Ashley Nelson . . . . . .Charlotte
Stuart Michael Rigot . . . . . .Chapel Hill
Charles Harrison Sydnor . . . . . .Raleigh
Shawnea Nicole Taylor . . . . . .Charlotte
Raymond Curtis Tarlton . . . . . .Raleigh
Kimesha Wilson Thorpe . . . . . .Haw River
Joshua Mack Lockamy . . . . . .Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 16th day of October, 2008.

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 10th day of October 2008, and said person has been issued a certificate of this Board:

Michael Aaron Lay . . . . . .Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 18th day of November, 2008.

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 24th day of October 2008, and said persons have been issued a certificate of this Board:

Allison J. Boyd . . . . . .Applied from the State of New York
William Joseph Carmody . . . . . .Applied from the District of Columbia
Jodi Tamara Harrison . . . . . .Applied from the State of Washington
James Joseph Kasprzycki, Jr. . . . . .Applied from the State of Georgia
Anne-Marie McClean . . . . . .Applied from the State of New York
Peter Jackie Muchunas . . . . . .Applied from the State of Illinois
Rajsekhar Natarajan . . . . . .Applied from the State of Georgia
Leigh Arnemann Peplinski . . . . . .Applied from the State of Texas
Chadrick Ray Porter . . . . . .Applied from the State of West Virginia
Noah Sokol Rosner . . . . . .Applied from the State of Georgia
Steven L. Serck . . . . . .Applied from the State of Iowa
Jonathan J. Siebers . . . . . .Applied from the State of Michigan

Given over my hand and seal of the Board of Law Examiners on this the 17th day of November, 2008.

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 24th day of October 2008, and said person has been issued a certificate of this Board:

Frederick R. Green . . . . . .Applied from the State of Georgia

Given over my hand and seal of the Board of Law Examiners on this the 18th day of November, 2008.

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 October 2008, and said persons have been issued a certificate of this Board:

Briani Lie Bennett . . . . . .Charlotte
Susannah Lynn Brown . . . . . .Mooresville
Benjamin Michael Decker . . . . . .Winston-Salem
Mary Marjorie Earnest . . . . . .Fort Lauderdale, Florida
Jennifer Lee Kerrigan . . . . . .Winston-Salem
Jillian Elizabeth Kipp . . . . . .Port Charlotte, Florida
Bracken Juliette Mayes . . . . . .Raleigh
Kelsey Nicole Hendry Mayo . . . . . .Charlotte
Graham Rhoads Parker . . . . . .Lexington
Antonia Ameca Peters . . . . . .Raleigh
Erin Michelle Phillips . . . . . .Durham
Cody Kendall Rifkin . . . . . .Charlotte
Richard Joseph Rutledge, Jr. . . . . .Winston-Salem
Neil Christopher Stauffer . . . . . .Charlotte
Christopher Donald Tomlinson . . . . . .Dallas, Texas
Alton R. Williams . . . . . .Raleigh

Given over my hand and seal of the Board of Law Examiners on this the 18th day of November, 2008.

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 21st day of October 2008, and said person has been issued a certificate of this Board:

Joshua Thomas Brosnihan Simmons . . . . . .Fort Meyers, Florida

Given over my hand and seal of the Board of Law Examiners on this the 14th day of April, 2009.

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 4th day of November 2008, and said person has been issued a certificate of this Board:

Shaunda Colleen Lynch . . . . . .Applied from the State of Indiana

Given over my hand and seal of the Board of Law Examiners on this the 8th day of December, 2008.

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 14th day of November 2008, and said persons have been issued a certificate of this Board:

Kris Miller Dawley . . . . . .Applied from the State of Ohio
Matthew Robert Filpi . . . . . .Applied from the State of Texas
Joshua D. Lanning . . . . . .Applied from the State of Connecticut
Nigel Robin Lush . . . . . .Applied from the State of Georgia
Christopher Stewart Moorehead . . . . . .Applied from the State of West Virginia
Tess M. O'Boyle . . . . . .Applied from the State of Pennsylvania
Gerard F. Parisi . . . . . .Applied from the State of New York
Jacob Anthony Pollack . . . . . .Applied from the State of New York
Steven Michael Stancliff . . . . . .Applied from the State of Ohio
John P. Stanley . . . . . .Applied from the District of Columbia
Eric Michael Stoller . . . . . .Applied from the State of Ohio
Krisanne Corl Weimer . . . . . .Applied from the State of Nebraska

Given over my hand and seal of the Board of Law Examiners on this the 8th day of December, 2008.

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 21st day of November 2008, and said person has been issued a certificate of this Board:

Milind Kumar Dongre . . . . . .Cary

Given over my hand and seal of the Board of Law Examiners on this the 12th day of January, 2009.

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 5th day of December 2008, and said persons have been issued a certificate of this Board:

Mary Maclean Doolan Asbill . . . . . .Applied from the State of Georgia
Verna Carol Bash-Flowers . . . . . .Applied from the State of Connecticut
Anthony S. Bellino . . . . . .Applied from the State of New York
Sabrina Blain . . . . . .Applied from the State of New York
James Harold Bolin, Jr. . . . . .Applied from the State of Colorado
Jeremy Todd Browner . . . . . .Applied from the State of New York
Robert Hector Cameron II . . . . . .Applied from the State of New York
Daphne Tippens Chisolm . . . . . .Applied from the District of Columbia
Suzanne Putney Daniels . . . . . .Applied from the State of Kentucky
Gregory G. Faltin . . . . . .Applied from the State New Hampshire
Todd Eric Gonyer . . . . . .Applied from the State of Ohio
Jason Andrew Hartsough . . . . . .Applied from the State of Georgia
Stephen Michael Hladik . . . . . .Applied from the State of New York
John M. Jennings . . . . . .Applied from the State of Illinois
Kenneth J. Marino . . . . . .Applied from the State of Pennsylvania
Eric A. Montgomery . . . . . .Applied from the State of Michigan
Mark E. Nelson . . . . . .Applied from the State of Massachusetts
Wendy Lee Nolan . . . . . .Applied from the State of New York
Andrea Elizabeth Parrish . . . . . .Applied from the State of Georgia
James E. Prince . . . . . .Applied from the District of Columbia
Steven George Slawinski . . . . . .Applied from the State of New York
Sean Michael Sullivan . . . . . .Applied from the District of Columbia
Marc Julian Williams . . . . . .Applied from the District of Columbia

Given over my hand and seal of the Board of Law Examiners on this the 2nd day of January, 2009.

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 examination by the Board of Law Examiners on the 12th day of December, 2008, and said persons have been issued a certificate of this Board:

Frank Joseph Albetta . . . . . Wilmington
Jeffrey William Aldrich . . . . . Charlotte
Mark Rahen Bachara . . . . . Wilson
Amanda Marie Baxley . . . . . Raleigh
Colby Tilton Berry . . . . . Los Angeles, California
Mario Miguel Blanch . . . . . North Bergen, New Jersey
Brian David Boone . . . . . Arlington, Virginia
Jennifer Lyn Brand . . . . . Charlotte
Andrew George Croshaw . . . . . Charlotte
J. Ronald Denman . . . . . Mayodan
Doriana Vladimirova Ensley . . . . . Fayetteville
Taylor Wedge French . . . . . Charlotte
Kevin Maher Harrington . . . . . Raleigh
Emily O'Reilly Harris . . . . . Charlotte
Jonathan Mikael Hill . . . . . Atlanta, Georgia
Thomas Heller Hooper . . . . . Charlotte
Justin Alan Jernigan . . . . . Pineville, Georgia
Angela White Jolly . . . . . Charlotte
Deidra Colette Jones . . . . . Raleigh
Ryan Alan McKenzie . . . . . Charlotte
Yasmin Keiosha Morton . . . . . Raleigh
Michael John Ovsievsky . . . . . Cary
Sabah Rafek . . . . . Titusville, Florida
Charnanda Tyrone Reid . . . . . Philadelphia, Pennsylvania
Ryan Binderup Schultz . . . . . Los Angeles, California
Jeffrey Louis Steiner . . . . . Charlotte
Holly Anne Stiles . . . . . Asheville
Jason Scott Taylor . . . . . Asheville
Laura E.F. Thompson . . . . . Cornelius
William Lanier Wallis . . . . . Tallahassee, Florida
Raboteau Terrell Wilder III . . . . . Charlotte
Kelly Gene Williams . . . . . Durham

Given over my hand and seal of the Board of Law Examiners on this the 2nd day of January, 2009.

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 9th day of January 2009, and said persons have been issued a certificate of this Board:

LICENSED ATTORNEYS

Sally Anne Abel . . . . . .Applied from the State of New York
Andrew Douglas Dill . . . . . .Applied from the State of Kentucky
Joshua M. Hiller . . . . . .Applied from the State of Massachusetts
Deana Ann Labriola . . . . . .Applied from the District of Columbia
Natasha Tina McKenzie . . . . . .Applied from the District of Columbia
Loris P. Primus . . . . . .Applied from the State of New York
Peter Marshall Varney . . . . . .Applied from the State of Georgia
Steven Michael Virgil . . . . . .Applied from the State of Nebraska

Given over my hand and seal of the Board of Law Examiners on this the 6th day of February, 2009.

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 16th day of January 2009, and said person has been issued a certificate of this Board:

Daryl Vincent Atkinson . . . . . .Raleigh

Given over my hand and seal of the Board of Law Examiners on this the 20th day of February, 2009.

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 23rd day of January 2009, and said persons have been issued a certificate of this Board:

Munje Betty Foh . . . . . .Charlotte
Janelle Elizabeth Varley . . . . . .Chapel Hill

Given over my hand and seal of the Board of Law Examiners on this the 20th day of February, 2009.

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 6th day of February 2009, and said persons have been issued a certificate of this Board:

Edward J. Rojas . . . . . .Applying from the State of New York
Kevin Leigh Wingate . . . . . .Applying from the State of Illinois

Given over my hand and seal of the Board of Law Examiners on this the 30th day of March, 2009.

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 February 2009, and said persons have been issued a certificate of this Board:

Scott David Beal . . . . . .Applying from the State of Illinois
Todd Evan Bryant . . . . . .Applying from the State of Ohio
Paul Marshall Cushing . . . . . .Applying from the State of Georgia
Christopher Michael Duggan . . . . . .Applying from the State of New York
David Daniel Dzara II . . . . . .Applying from the District of Columbia
Sara Elizabeth Emley . . . . . .Applying from the District of Columbia
James B. Hernan . . . . . .Applying from the State of Georgia
Omar Kilany . . . . . .Applying from the State of Texas
John David Lance . . . . . .Applying from the State of New York
Julie Virginia Mayfield . . . . . .Applying from the State of Georgia
Robert J. McCune . . . . . .Applying from the State of Georgia
Daniel Wright McLeod . . . . . .Applying from the State of Georgia
Julie Seibels Northup . . . . . .Applying from the State of Georgia
David H. Oermann . . . . . .Applying from the State of Michigan
Pamela Jean Bickford Sak . . . . . .Applying from the State of New York
Richard Neil Sheinis . . . . . .Applying from the State of Georgia
Hesham M. Sharawy . . . . . .Applying from the District of Columbia
Keith H. Sims . . . . . .Applying from the State of Michigan
Charles Edward Symons . . . . . .Applying from the State of New York

Given over my hand and seal of the Board of Law Examiners on this the 30th day of March, 2009.

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 Exam-

iners on the 27th day of March 2009, and said persons have been issued a certificate of this Board:

Stephen Kyle Agee . . . . . Rock Hill, South Carolina
Aniruddha Agrawal . . . . . Charlotte
Khurrum Syed Ali . . . . . Raleigh
Jennifer Catherine Bakane . . . . . Greensboro
Tiffany Marie Bartholomew . . . . . Cumming, Georgia
Christopher Ervin Bazzle . . . . . Charlotte
Ryan Joseph Beadle . . . . . Arden
Jonathan Mark Berry . . . . . Charlotte
Nishant Bhatnagar . . . . . South Portland, Maine
Martha Ann Bird . . . . . Oak Ridge
Shani Jaha Bonaparte . . . . . Durham
David Charles Brown . . . . . Balsam
Nicole Judd Buntin . . . . . Greenville, South Carolina
Craig Donald Burch . . . . . Winston-Salem
Emily Jane Byrum . . . . . Valparaiso, Indiana
Harrell Gustave Canning III . . . . . Mount Holly
Sarah Townes Carmichael . . . . . Laurinburg
Sarah Ann Carr . . . . . Durham
Stephen Lacy Cash . . . . . Golden, New Mexico
Michael Robert Cashin . . . . . Winston-Salem
Charles Alexander Castle . . . . . Morristown, New Jersey
Victoria Alexis Cejas . . . . . Rougemont
Monica Coc Magnusson . . . . . Raleigh
Kathryn Gusmer Cole . . . . . Charlotte
Russell Lawrence Cole . . . . . Charlotte
Tamara Renee Cornish . . . . . Huntersville
Shednichole Marquise Cotton . . . . . Durham
Troy Michael Cronk . . . . . Cary
Stephanie Frisch Davis . . . . . Oriental
Matthew Richard Deutsch . . . . . Salisbury
Christopher Glenn Blow Dozier . . . . . Raleigh
Jonathan Adam Dunn . . . . . Charlotte
Deborah Whittle Durban . . . . . West Columbia, South Carolina
Emily Wessel Farr . . . . . Asheville
Jonathan Henry Ferry . . . . . Charlotte
Michelle Bitterman Fish . . . . . Lyndhurst, Ohio
David Blake Fisher . . . . . Chapel Hill
Anders Paul Fjellstedt . . . . . Arlington, Virginia
Guy Louis Forcucci . . . . . Charlotte
Cliff Coleman Gardner . . . . . Dover, Delaware
Antonio Frontell Gerald . . . . . Lansing, Michigan
John Charles Gilson . . . . . Charlotte
Rachael Mara Groffsky . . . . . Waynesville
Rachel Settles Gunther . . . . . Hertford
Lynell Erica Gwaltney . . . . . Rock Hill, South Carolina
Philip Keith Hackley . . . . . Raleigh
Suzanne Rouse Haley . . . . . Charlotte
Gladys Harris . . . . . Durham

Wendelyn Romesha Harris . . . . . Raleigh
Donna Ann Hart . . . . . Cary
Elizabeth Grace Hartnett . . . . . Columbus, Ohio
Daniel Adam Hatley . . . . . Chapel Hill
Rachael J. Hawes . . . . . Concord, New Hampshire
James Monroe Hawhee . . . . . Athens, Georgia
Lisa Marie Hoffman . . . . . Kernersville
Bethany Leigh Jackson . . . . . Charlotte
Angelina Holden Jennings . . . . . Mebane
Lisa Marie Johnson . . . . . Matthews
Jeffrey Thane Jones . . . . . Julian
John William Kasiski, Jr. . . . . Severna Park, Maryland
Samantha Margaret Katen . . . . . Raleigh
Kevin Philip Kearney . . . . . Charlotte
Jana Marie Kelly . . . . . Charlotte
Richard Forrest Kern . . . . . Wilmington
Tamzin Rose Kinnebrew . . . . . Durham
William Grier Kiser . . . . . Kings Mountain
William Howard Kroll . . . . . Durham
Lisa Jo Lambert . . . . . Chapel Hill
Kim Sa Le . . . . . Raleigh
Kelly Mahealani Leong . . . . . Raleigh
Mary Louise Lucasse . . . . . Chapel Hill
Patricia Guilday Lynch . . . . . Fort Mill, South Carolina
Bianca Deshera Mack . . . . . Dumfries, Virginia
Magdeline Kate McAllister . . . . . Columbus, Ohio
Tovah Nykyah McDonald . . . . . Raleigh
Matthew Scott McGonagle . . . . . West Palm Beach, Florida
Cara Brooke McNeill . . . . . Southern Pines
Marion Elizabeth McQuaid . . . . . Birmingham, Alabama
Steven Lester Meints . . . . . Orlando, Florida
Jason Michael Miller . . . . . Sarasota, Florida
Brian Timothy Mirshak . . . . . Durham
Sahana Murthy . . . . . Chapel Hill
Andrea Mae Nichols . . . . . Sneads Ferry
Jennifer Alexandra Nancarrow . . . . . Charlotte
Caleb Roger Newton . . . . . Fleetwood
Elizabeth Sublette Ostendorf . . . . . Raleigh
Leticia Mercedes de Carida Padilla-Morales . . . . . Raleigh
Minalkumari Pravinkumar Patel . . . . . Monroe
Grant Winfield Patten . . . . . Fayetteville
Rhonda Lynn Patterson . . . . . Charlotte
Rishona Monique Peace . . . . . Durham
Jeanne Ann Pennebaker . . . . . Cornelius
Thomas Edward Powers III . . . . . Lumberton
Toniann Primiano . . . . . Charlotte
Sarah Elizabeth Prince . . . . . Lake Waccamaw
Kenya Davis Rogers . . . . . Charlotte
Shaghayegh Ramezanian . . . . . Charlotte
Johanna Litaker Reimers . . . . . Charlotte
Susan Groves Renton . . . . . Wilmington

Douglas Reed Rose . . . . . .Charlotte
Marcia Ann Rowan . . . . . .Richmond, Virginia
Erin Johnson Ruben . . . . . .Raleigh
Colleen Mack Rynne . . . . . .Durham
Jon-Paul Bernard Sabbah . . . . . .Jacksonville
John Matthew Saunders . . . . . .Newport Coast, California
Rebecca McLaughlin Schaefer . . . . . .Arlington, Virginia
Katharine Leah Schaeffer . . . . . .Durham
Jesse Grant Scharff . . . . . .Holly Springs
William Hartley Schmidt, Jr. . . . . .West Orange, New Jersey
Giovonni Desiree Seawood . . . . . .Morrisville
Kristen Elizabeth Showker . . . . . .Ponte Vedra Beach, Florida
Brooke Ashley Shultz . . . . . .Charlotte
Brian Patrick Simpson . . . . . .Van Buren, Arkansas
Paris Graham Singer . . . . . .Charlotte
April Maria Smith . . . . . .Greensboro
William Samuel Smoak, Jr. . . . . .Charlotte
Jennifer Gayle Sniffen . . . . . .Fort Lauderdale, Florida
Andrew Michael Snow . . . . . .Castle Hayne
Rafal Maciej Stachowiak . . . . . .Greensboro
Clifton Ross Stancil . . . . . .Durham
Erica Lakisha Standfield . . . . . .Wake Forest
Sharleen Noy Sullivan . . . . . .Charlotte
Elizabeth Litchfield Sydnor . . . . . .Raleigh
Alexander Tsiavos . . . . . .Urbana, Illinois
Jamie Nicole Teague . . . . . .Charlotte
Richard Brent Thompkins . . . . . .Rock Hill, South Carolina
Miyan Touprong Toploi . . . . . .Greensboro
Katherine Anne Torgerson . . . . . .Midland, Michigan
Vien Minh Tran . . . . . .Raleigh
Nha-Trang Thi Truong . . . . . .Spring Lake
Cheryl Oler Tumlin . . . . . .Greensboro
Richard Wescott Turner, Jr. . . . . .Charlotte
Paul Robert Tyndall . . . . . .Wilmington
Benjamin Clark Unger . . . . . .Charlotte
Blia Vang . . . . . .Boone
Maren Elizabeth Veatch . . . . . .Cornelius
Pamela Anne Vesilind . . . . . .Burlington, Vermont
Stephen Michael Vizer . . . . . .Winter Park, Florida
Christopher H. Westrick . . . . . .Hackettstown, New Jersey
Charles Gibson Whitehead . . . . . .Raleigh
Roy Michael Woodard . . . . . .Goldsboro
Kristina Renee Wulber . . . . . .Durham

Given over my hand and seal of the Board of Law Examiners on this the 8th day of April 2009.

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 examination by the Board of Law Examiners on the 3rd day of April 2009, and said persons have been issued a certificate of this Board:

David Cox Annis . . . . . Charlotte
Ethan Owen Beattie . . . . . Chapel Hill
Edward Joseph Blocher, Jr. . . . . New Haven, Connecticut
Andrew Carlo Bonjean . . . . . Charlotte
Elizabeth Frances Bunce . . . . . Lexington
Kathleen Cunningham Clary . . . . . Charlotte
Sheena Joy Cobrand . . . . . Raleigh
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Mary Anson Horowitz . . . . . Durham
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Hanan Ahmed Javaid . . . . . Charlotte
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Robert Raymond Vass . . . . . Charlotte
Jon Barry Waldorf . . . . . Albany, New York
Timothy Jennings Wall . . . . . Raleigh
Latia Linda Ward . . . . . High Point
Theresa Marie Weber . . . . . Brevard
Karen Denise Wilson . . . . . Charlotte
Robert Anthony Young . . . . . Manhattan Beach, California

Given over my hand and seal of the Board of Law Examiners on this the 8th day of April 2009.

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 6th day of February 2009, and said person has been issued a certificate of this Board:

Adam Taylor Drye . . . . . .Lewisville

Given over my hand and seal of the Board of Law Examiners on this the 14th day of April, 2009.

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 6th day of March 2009, and said person has been issued a certificate of this Board:

Daniel Arthur Bridgman . . . . . .Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 14th day of April, 2009.

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 13th day of March 2009, and said person has been issued a certificate of this Board:

Anitra Goodman Royster . . . . . .Applying from the District of Columbia

Given over my hand and seal of the Board of Law Examiners on this the 14th day of April, 2009.

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. WILLIAM HENRY RAINES

No. 211A06

(Filed 7 December 2007)

1. Jury— selection—potential juror—remark about reading material in newspapers

The trial court did not err by not declaring a mistrial or dismissing the entire pool after a prospective juror (who was himself later dismissed for a different reason) said that he had read incriminating material about the case in the newspapers.

2. Jury— selection—voir dire limited—peremptory challenges not exhausted—no prejudice

A defendant who did not exhaust his peremptory challenges could not show prejudice from the judge's limiting of his voir dire questioning of prospective jurors, even assuming abuse of discretion.

3. Evidence— discovery of body—reaction of parent—not prejudicial

There was no prejudice from the admission of testimony about how a witness discovered her sister's death and about her mother's reaction to the news where the evidence of guilt was overwhelming.

4. Evidence— reaction of victims' son to death of parents—invited and not prejudicial

There was no prejudice from the admission of testimony about the reaction of the victims' son to the death of his parents where the exclusion of the testimony would not have changed the result. Moreover, the testimony came during a line of questioning by defendant, and any error was invited.

5. Criminal Law— prosecutor's argument—improprety—not prejudicial

The trial court did not abuse its discretion by allowing a portion of the State's closing argument which defendant asserted was a personal attack upon counsel. The prosecutor's comment was neither laudable nor appropriate, but it was not extreme, the evidence of guilt was overwhelming, and the argument was confounding as to its true meaning.

6. Criminal Law— prosecutor's argument—whether murder was provoked—not argument for jury nullification

A prosecutor's argument about whether a murder defendant was provoked (to which defendant did not object) was not so prejudicial as to require intervention ex mero motu. The prosecutor was not arguing for jury nullification as defendant contended, but that the jury should find defendant guilty of first-degree rather than second-degree murder. Moreover, the court instructed the jury that it was necessary to understand and apply the law as given.

7. Criminal Law— verdict form—not misleading

There was no error in the language in the verdict form in a first-degree murder prosecution where defendant asserted that the form suggested to the jurors that they were expected to find defendant guilty. The form was not improper or misleading, it did not nullify other options available to the jury, and there is no indication that the jury would have been confused.

8. Evidence— victim impact testimony—unfinished statement—not prejudicial

There was no prejudicial error in victim impact testimony in a first-degree murder sentencing hearing where the sister of one of the victims, who also knew defendant, began a sentence which was not finished after an objection. The jury did not hear the complete thought, and the appellate court will not

speculate that the witness was asking the jury to minimize mitigating evidence.

9. Constitutional Law— Confrontation Clause—capital sentencing—detention center reports

The Confrontation Clause rights of a first-degree murder defendant were not violated in a capital sentencing hearing where an officer at a detention center read from detention center incident reports. The reports were not testimonial in nature, nor were the statements contained therein testimonial. They were more like business records.

10. Constitutional Law— First Amendment—defendant's use of racial epithet in prison—admissible in capital sentencing

The First Amendment rights of a first-degree murder defendant were not violated in a capital sentencing hearing by the admission of a detention center report recounting defendant's use of a racial epithet toward another inmate. The context of the incident and the inflammatory nature of the word used by defendant were relevant to rebut the mitigating circumstance that defendant had demonstrated an ability to adapt to prison life.

11. Constitutional Law— effective assistance of counsel—no prejudice

Defendant was not denied the effective assistance of counsel at a capital sentencing proceeding through his attorney's failure to object to certain evidence where he could not show prejudice.

12. Sentencing— hearsay—insufficient indicia of reliability

The trial court did not err in a capital sentencing proceeding by determining that proposed hearsay about sexual abuse suffered by defendant lacked sufficient indicia of reliability. While the Rules of Evidence serve only as guidelines in capital penalty proceedings, the court may properly exclude hearsay statements which lack sufficient indicia of reliability or a sufficient foundation.

13. Sentencing— defendant's childhood—basis for opinion required—offer of proof required

The trial court did not err in a capital sentencing proceeding by insisting that defendant's witness explain the basis for her conclusion that defendant grew up in an injurious environment.

Moreover, the appellate court will not speculate about excluded answers for which no offer of proof was made.

14. Sentencing— prosecutor's argument—final moments of victims' lives—defendant shifting blame—not grossly improper

A prosecutor's closing arguments in the penalty phase of a first-degree murder prosecution concerning the final moments of the murdered victims' lives was not so grossly improper as to require intervention ex mero motu. A remark that defendant was probably blaming the prosecutor for trying to give him the death penalty was part of an argument that no one but defendant was to blame for his predicament and comes nowhere close to the level of gross impropriety.

15. Sentencing— prosecutor's argument—mitigating value

A prosecutor at a first-degree murder sentencing hearing did not argue that mitigating evidence must be connected to the crime, but that the evidence did not have mitigating value.

16. Sentencing— capital—mitigating circumstances—mental or emotional disturbance—peremptory instruction not given—no written request—evidence controverted

The trial court did not err by not giving a peremptory instruction in a capital sentencing proceeding that defendant was under the influence of mental or emotional disturbance. There is no record of defendant's written request for the instruction; even so, defendant was not entitled to it because the evidence was controverted and the jury would have been justified in rejecting it.

17. Sentencing— capital—aggravating circumstances—robbery and pecuniary gain

The trial court did not err in a capital sentencing proceeding by submitting the aggravating circumstances of pecuniary gain and that the murder was committed during the commission of a robbery where there was separate evidence of the aggravators.

18. Sentencing— death—proportionality

Sentences of death were proportionate, considering the brutality of the crimes and that the case was unlike any which have been found disproportionate, where defendant brutally beat both victims with a wrench and then fired bullets into their skulls for monetary gain.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing a sentence of death entered by Judge Ronald K. Payne on 9 September 2005 in Superior Court, Henderson County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. On 31 October 2006, 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 15 October 2007.

Roy Cooper, Attorney General, by Joan M. Cunningham, Assistant Attorney General, and Robert C. Montgomery, Special Deputy Attorney General, for the State.

Staples S. Hughes, Appellate Defender, by Benjamin Dowling-Sendor, Assistant Appellate Defender, and Center for Death Penalty Litigation, by Jonathan E. Broun, for defendant-appellant.

BRADY, Justice.

Defendant William Henry Raines was found guilty by a jury on 6 September 2005 of the first-degree murders of Phillip Lester Holder[1] and Pamela Kay Holder and robbery with a dangerous weapon of Phillip Holder. Defendant was sentenced to death for the first-degree murders. We find no error in defendant's convictions or sentences.

PROCEDURAL BACKGROUND

The Henderson County Grand Jury returned a true bill of indictment on 21 January 2003 charging defendant with robbery with a dangerous weapon and two superseding true bills of indictment on 17 March 2003 charging defendant with the first-degree murders of Phillip and Pamela Holder. Defendant was tried capitally, and on 6 September 2005 the jury returned verdicts of guilty on all counts. Following the required penalty proceeding, the jury made binding recommendations on 9 September 2005 that defendant be sentenced to death for each murder. The trial court entered judgment accordingly. The trial court also sentenced defendant to 100 to 129 months of active incarceration for the robbery with a dangerous weapon conviction. Defendant appeals the judgments of the trial court pursuant to N.C.G.S. § 7A-27(a).

1. Throughout the record Phillip Holder's name appears interchangeably as "Phillip" and "Philip."

FACTUAL BACKGROUND

Defendant first met Phillip Holder when defendant was approximately twelve years old. Defendant's father had recently died, and defendant's mother had demonstrated an inability or unwillingness to provide proper care for defendant and his siblings. After Phillip met defendant, he realized that defendant needed care and invited defendant over to the Holder residence. Eventually, the Holders encouraged defendant to live with them when defendant was a teenager. Defendant's mother told Patricia Holder, Phillip's mother, that defendant "can stay, and I don't care how long he stays."

Once defendant began living with the Holders, his life improved and he was hopeful about his future. Patricia cut defendant's hair and bought him clothes and shoes, and he began attending church with the family. Defendant and Phillip remained close friends throughout high school. Following defendant's graduation from high school, he abused alcohol, amphetamines, marijuana, and crack cocaine. From 1996 to 2001 defendant was convicted on seven different occasions of various offenses, including larceny and felony escape from prison. Following defendant's release from prison in July 2002, he resided with Phillip and his wife, Pamela Holder.

The Crimes

On 10 December 2002, Pamela gave defendant her credit card to purchase medication. However, instead of using it to purchase medication defendant and Heath Rice attempted to use the card very early the next morning to purchase consumer electronics at Wal-Mart. Defendant intended to sell or trade these items in order to obtain cocaine. Asheville Police Officer Scott Early, who was also employed in a security guard capacity at Wal-Mart, telephoned Pamela to inquire whether defendant was authorized to use the card. Pamela and Phillip explained to Early that defendant was authorized to use the card to purchase medication, but not consumer electronics. Phillip informed Early that he did not want to prosecute defendant but rather asked Early to hold defendant until they could arrive at Wal-Mart. At approximately 3:30 a.m. on 11 December 2002, Phillip and Pamela arrived at Wal-Mart, picked up defendant, and departed. Defendant rode in Phillip's vehicle, and Pamela drove her vehicle separately.

At the State's request, defendant later related the events which transpired after they left Wal-Mart to Dr. Heidi Katrina Coppotelli, a licensed clinical psychologist. Defendant stated that Phillip was furi-

ous as they drove from Wal-Mart to the Holder residence. On the way home Phillip ran two blinking red lights in order to prevent defendant from jumping out of the vehicle. When they arrived at the residence, Phillip gave defendant a sleeping bag and instructed him to sleep in the shed and not in the family home. Defendant had already smoked a significant amount of crack cocaine that day and, after being sent to the shed, he smoked another couple of rocks of crack cocaine. Defendant stated that after smoking these rocks, he went "crazy" for more. He grabbed a wrench and went to the Holders' door to ask whether he could use the restroom. The Holders allowed him into their home, and upon leaving the restroom defendant immediately struck Phillip in the head with the wrench and then hit Pamela. Defendant struck Pamela and Phillip several more times before retrieving firearms from the victims' bedroom. Defendant considered tying them up and attempting to obtain money for crack cocaine, but instead he shot each victim several times, killing them. When asked why he shot Phillip, defendant said it was "just better to kill him." Defendant then stole money and several of Phillip's firearms and left in Phillip's truck without changing clothes.

Later in the day, Phillip's sister Jill Gilbert, along with her teenage son Austin, went to the victims' residence. Upon arrival, Gilbert and her son walked around the residence, peeking in the windows to observe whether anything was wrong because they had been unable to make contact with the victims that day. They observed ammunition strewn on the victims' son's bed, which they considered strange, given Phillip's usual tidiness. Eventually, Austin was able to gain entrance into the residence through a window. Austin found the bodies of Phillip and Pamela and then opened the front door to allow his mother to see inside, after which both of them waited outside for law enforcement to arrive.

Deputies from the Henderson County Sheriff's Office arrived at the scene and determined that a number of firearms had been removed from the residence, and that the victims' credit cards were also missing. The State's evidence described defendant's movement throughout the rest of the day. Defendant took Phillip's truck, drove to a convenience store, and unsuccessfully attempted to cash a check drawn on Phillip's account. Defendant then traveled to Asheville Auto Sales where he sold Phillip's camper cover to William Hyatt for twenty dollars. Hyatt also bought twelve to thirteen firearms from defendant, and it was later determined that all of the purchased firearms belonged to Phillip Holder.

Eventually, Sergeant Richard Lane of the Greenville County (South Carolina) Sheriff's Office was dispatched to respond to a call about a parked truck, which, because of recent publicity, the caller believed might have been involved in the murders. When Sergeant Lane arrived at the scene, he found defendant in the truck and took him into custody without incident.

Donald Jason, M.D., a physician, pathologist, and associate professor of pathology at Wake Forest University School of Medicine, performed autopsies on both Pamela and Phillip. Phillip had six linear blunt force wounds to his head that lacerated his scalp, some of which fractured his skull. He also had a gunshot wound above and between his eyes and a second gunshot wound to the back of the head. Projectiles from both of these gunshots entered his brain. A third gunshot wound was present on the palm of his hand near the base of his thumb. Dr. Jason was unable to conclude whether blunt force trauma standing alone would have caused Phillip's death, but opined that either or both gunshot wounds to the head would have been fatal. Pamela had four linear blunt force wounds on her head, but no skull fractures. She had been shot twice, once in the back of the head with the bullet eventually entering her brain and once in her right shoulder. Both gunshots were consistent with her being shot while she was seated. Dr. Jason opined that the gunshot wound to the brain was the cause of death.

Defendant presented evidence in the form of testimony from Dr. Coppotelli. Dr. Coppotelli had reviewed materials prepared by Debra Gray, a social worker, and had interviewed defendant at the State's request. Based upon her analysis, Dr. Coppotelli opined that defendant suffered from moderate depression and that when he decided to rob the Holders he had chosen to give in to his denied frustration of anger, his habitual denial of reality, and his indulgence of blaming his misery on others. She testified that defendant had an attachment disorder and a deep-seated fear of abandonment and that these issues triggered his explosive anger at the time of the murders.

After deliberating upon these facts, the jury returned verdicts of guilty of two counts of first-degree murder and one count of robbery with a dangerous weapon. The trial court then advanced to the penalty proceeding as required by statute.

Penalty Proceeding Evidence

At the penalty proceeding, the State presented victim impact evidence from various family members of the victims, including

Pamela's sister, Phillip's sister, and Phillip's mother. The State also presented evidence from Captain Charles McDonald of the Henderson County Sheriff's Office Detention Center, who testified concerning defendant's behavior while awaiting trial.

Defendant presented evidence from various witnesses concerning his childhood experiences of physical and verbal abuse. Additionally, defendant presented evidence that he had been assigned to classes for behaviorally and emotionally challenged students and that he had performed poorly in school until he began residing with the Holders. William Beal, a prison minister, testified that defendant began studying his Bible and expressed "hurt" for what had happened.

The jury found as aggravating circumstances in both murders that the murder was committed while defendant was committing or attempting to commit robbery, that the murder was committed for pecuniary gain, and that the murder was part of a course of conduct in which defendant committed other crimes of violence against other persons. Additionally, the jury found that the murder of Phillip Holder was especially heinous, atrocious, or cruel. One or more jurors found the statutory mitigating circumstances in both murders that defendant committed the murder under the influence of mental or emotional disturbance and that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. One or more jurors also found ten nonstatutory mitigating circumstances to exist. After finding that 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 when considered with the mitigating circumstances, the jury returned binding recommendations of death, and the trial court entered judgment according to those recommendations.

ANALYSIS

Pretrial Matters

Defendant and the State request that this Court review the personnel file of Lieutenant Jerry Rice of the Henderson County Sheriff's Office pursuant to *State v. Hardy*, 293 N.C. 105, 128, 235 S.E.2d 828, 842 (1977) and *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Lieutenant Rice's personnel file is under seal as directed by the trial court. This Court has reviewed Lt. Rice's personnel file and determined that there is nothing of exculpatory value contained

therein to which defendant would be entitled. Defendant's assignment of error is overruled.

Jury Selection Issues

[1] Defendant asserts the trial court erred in failing to *sua sponte* declare a mistrial or, in the alternative, dismiss all prospective jurors who heard another prospective juror comment that he had read about the murders in the newspaper and that what he had read "sounded pretty incriminating." After discovering that the prospective juror had read about the murders in the newspaper, the trial court asked the prospective juror whether he could put aside "whatever [he] had read and decide the case based on the evidence that's presented" in the trial, to which the prospective juror responded, "I think I could." Defendant contends that this case is similar to *State v. Gregory*, 342 N.C. 580, 467 S.E.2d 28 (1996). In *Gregory*, this Court found defendant was denied a fair trial because a prospective juror stated during *voir dire* that she had worked with a lawyer who had previously represented the defendant in the case currently before the trial court, and as a result of that employment, she was privy to confidential information that was helpful to the State and this information might influence her decision. *Id.* at 582-83, 467 S.E.2d at 30-31. The instant case is distinguishable. First, the information about which the prospective juror was speaking was not confidential, but was publically disseminated. Nothing in the prospective juror's statement would lead other jurors to speculate as to any secret knowledge he may have had. Additionally, the prospective juror indicated that he would follow the trial court's instructions and only consider evidence properly admitted at trial.[2] Defendant has failed to meet his burden of showing that he was prejudiced by the trial court's failure to *sua sponte* order a mistrial or excuse the prospective jurors present during the complained-of *voir dire*. Accordingly, this assignment of error is overruled.

[2] Defendant assigns multiple instances of error concerning the trial court's limiting of his *voir dire* questioning of prospective jurors during jury selection. "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. Elliott*, 360 N.C. 400, 409, 628 S.E.2d

2. The prospective juror was later excused because of his statement that he would not condemn someone to death. Therefore, the issue, as in *Gregory*, is whether defendant was prejudiced by the other jurors' exposure to the statements at issue.

735, 742 (quoting *State v. Bryant*, 282 N.C. 92, 96, 191 S.E.2d 745, 748 (1972) (alteration in original), *cert. denied*, 410 U.S. 958 (1973), and *cert. denied*, 410 U.S. 987 (1973)), *cert. denied*, —— U.S. ——, 127 S. Ct. 505, 166 L. Ed. 2d 378 (2006). Defendant asserts that he was not allowed to question certain jurors concerning whether they could consider certain types of mitigating evidence. Even assuming, *arguendo*, that defendant could demonstrate that the trial court abused its discretion, defendant cannot show prejudice as he did not exhaust his peremptory challenges. *See State v. Neal*, 346 N.C. 608, 618, 487 S.E.2d 734, 740-41 (1997) (defendant cannot show prejudice unless he has exhausted all peremptory challenges (citing *State v. Mash*, 328 N.C. 61, 64, 399 S.E.2d 307, 310 (1991))), *cert. denied*, 522 U.S. 1125 (1998). Consequently, these assignments of error are overruled.

Guilt-Innocence Phase Issues

Evidentiary Issues

[3] Defendant contends that the trial court committed plain error in failing to intervene *sua sponte* during certain portions of guilt-innocence phase testimony. Specifically, defendant argues the trial court should have intervened when Rhonda Whitaker, Pamela's sister, testified about how a member of the Sheriff's Office notified her of her sister's murder and about the reaction of Pamela's mother after being informed of her daughter's death, and when Patricia Holder testified about the reaction of the victims' son to the death of his parents. Because defendant failed to timely object to these statements, we review them only for plain error. Defendant has failed to meet his burden of showing that the statements were unduly prejudicial.

Generally, "character evidence of a victim is usually irrelevant during the guilt-innocence portion of a capital trial, as is victim-impact evidence." *State v. Maske*, 358 N.C. 40, 50, 591 S.E.2d 521, 528 (2004) (citing *State v. Abraham*, 338 N.C. 315, 352-53, 451 S.E.2d 131, 151 (1994) and *State v. Oliver*, 309 N.C. 326, 360, 307 S.E.2d 304, 326 (1983)). Because the evidence of defendant's guilt of first-degree murder was overwhelming, we cannot conclude that the jury would have reached a different verdict had the trial court excluded *sua sponte* Rhonda Whitaker's testimony concerning how she discovered her sister's death and her mother's reaction to the news.

[4] As to the testimony of Patricia Holder, she was answering a line of questioning propounded by defendant, and therefore any error as

to her testimony was invited. *See* N.C.G.S. § 15A-1443(c) (2005) ("A defendant is not prejudiced . . . by error resulting from his own conduct."); *State v. Jennings*, 333 N.C. 579, 604, 430 S.E.2d 188, 200 (defendant may not invalidate a trial by introducing evidence on cross-examination otherwise inadmissible on direct examination (citing *State v. Greene*, 324 N.C. 1, 12, 376 S.E.2d 430, 438 (1989), *judgment vacated on other grounds*, 494 U.S. 1022 (1990))), *cert. denied*, 510 U.S. 1028 (1993). Even had this not been invited error, its exclusion certainly would not have changed the result of the trial. These assignments of error are therefore overruled.

Closing Argument Issues

[5] Defendant asserts that the trial court abused its discretion in overruling his objection to a portion of the prosecution's closing argument during the guilt-innocence phase when the prosecutor argued, "And I appreciate them coming in here and saying, well, okay, we did it. Well, we wouldn't have if we didn't have that evidence. We would be in here with him saying I didn't do it."

This Court has set out a two-part analysis for determining whether the trial court abused its discretion in overruling a defendant's objection in such cases: "[T]his Court first determines if the remarks were improper. . . . Next, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *See State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citing *Coble v. Coble*, 79 N.C. 439, 79 N.C. 589 (1878)).

The State argues that the statement made by the prosecutor was not improper because he was merely expounding upon defense counsel's statement during closing arguments that he would like to "stand up here and say find him not guilty. But I'm not doing that." Defendant asserts that the argument made by the prosecutor was a personal attack that called into question the integrity and professionalism of the defense attorneys. Even assuming *arguendo* that the prosecutor's statements were improper, we conclude that such statements were not unfairly prejudicial to defendant.

This case is somewhat analogous to *State v. Rivera*, 350 N.C. 285, 514 S.E.2d 720 (1999). In *Rivera*, the prosecution told the jury that defense counsel "displayed one of the best poker faces as we introduced [a witness] in the history of this courthouse." *Id.* at 290-91, 514 S.E.2d at 723. After this Court voiced its displeasure with the state-

ment, it wrote: "Although the comment of the prosecutor in this case *was not extreme*, it did not meet the standard of 'dignity and propriety' required of all trial counsel by Rule 12 of the General Rules of Practice for the Superior and District Courts." *Id.* at 291, 514 S.E.2d at 723 (emphasis added).

Similar to *Rivera*, the prosecutor's comment in this case was neither appropriate nor laudable, but it was not extreme. Considering the overwhelming amount of evidence presented by the prosecution that defendant was guilty of first-degree murder, and given that the prosecutor's comment is confounding as to its true meaning, we conclude the trial court did not abuse its discretion in overruling defendant's objection. This assignment of error is overruled.

[6] Defendant also contends the trial court erred by failing to intervene *ex mero motu* during guilt-innocence phase closing arguments when a prosecutor stated:

> And then there's [sic] these things that the Judge will tell you that you may consider in deciding whether or not he acted in deliberate fashion. Lack of provocation by the victim. Now, what is provocation? The Defense would have you believe that when Philip Raines [sic] said, you're out of here, you're not staying here anymore, that that was provocation.
>
> Well, again, members of the jury. I hope that's not the case and that we're not going to set that sort of precedent here. Because the next guy that gets fired out there is going to say, oops, provocation, I'm going to kill the boss. You know? Hearing something you don't like is not provocation and an excuse to kill or a way to avoid a first degree murder charge. It just simply isn't.

Defendant did not make a timely objection.

In *State v. Allen*, this Court explained review of allegedly improper remarks that do not draw a defendant's objection:

> 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 fundamentally unfair. *Id.* at 419-20, 508 S.E.2d at 519.

360 N.C. 297, 306-07, 626 S.E.2d 271, 280 (alteration in original), *cert. denied*, —— U.S. ——, 127 S. Ct. 164, 166 L. Ed. 2d 116 (2006).

We determine that the prosecutor's statement was not "so grossly improper [as to] render[] the trial and conviction fundamentally unfair." *Id.* It appears from the record that the prosecution was attempting to apply the law to this case, rather than making an improper statement of the law and, contrary to defendant's assertion, the prosecutor was not encouraging jury nullification of North Carolina law on provocation. In the broader context of the prosecutor's argument, he was simply encouraging the jury to find defendant guilty of first-degree murder rather than second-degree murder because Phillip's insistence that defendant could not sleep in the house did not amount to sufficient provocation. Moreover, the trial court instructed the jury that it was necessary to "understand and apply the law as I give it to you," after which the trial court properly instructed the jury on the elements of first-degree and second-degree murder. This assignment of error is overruled.

Jury Form Issue

[7] Defendant contends the trial court erred in submitting a verdict form to the jury which stated in part:

> WE, THE MEMBERS OF THE JURY RETURN THE UNANIMOUS VERDICT AS FOLLOWS:
>
> _____ GUILTY OF FIRST DEGREE MURDER OF [VICTIM]
>
> IF YOU ANSWER "YES", IS IT: (You should answer both, and you may answer "yes" to either or both)
>
> _____ A. PREMEDITATION AND DELIBERATION?
>
> _____ B. UNDER THE FIRST DEGREE FELONY MURDER RULE?

Defendant asserts that this verdict form violated his constitutional rights as it suggested to the jurors that they were expected to find defendant guilty of first-degree murder when it told them, "You should answer both, and you may answer 'yes' to either or both" the-

ories for first-degree murder. This argument is without merit, as the verdict form was not improper or misleading. There is no indication that the jury would have been confused. It was instructed to answer under what theory it convicted defendant of first-degree murder only if it found defendant guilty of first-degree murder. Additionally, the verdict form included other options: guilty of second-degree murder and not guilty. The verdict form correctly stated that the jury must have found defendant guilty of either deliberate and premeditated murder or of felony murder to properly convict him of first-degree murder. As worded, this form did not nullify the other options available to the jury. This assignment of error is overruled.

Penalty Proceeding Issues

Evidentiary Issues

[8] Defendant asserts that the trial court erred in overruling his objection to Jill Gilbert's testimony concerning defendant's childhood. Ms. Gilbert, Phillip's sister, testified that "I don't think that anything that relates back to his childhood could have made something this—this horrible—[.]" Defendant objected to this statement, and the trial court overruled the objection.

> 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).

Allen, 360 N.C. at 310, 626 S.E.2d at 282. Victim impact testimony is admissible to show the effect the victim's death had on friends and family members; however, the victim's family members' and friends' "characterizations and opinions about the crime, the defendant, and the appropriate sentence" are inappropriate. *See Payne*, 501 U.S. at 830 n.2. We are not persuaded that Jill Gilbert's incomplete sentence was so prejudicial it rendered the proceeding fundamentally unfair. After defendant's objection, Ms. Gilbert did not complete her thought or even her sentence. Instead, she continued to talk about other matters of which defendant does not complain. The jury did not hear Ms.

Gilbert's complete thought, nor will this Court speculate whether Ms. Gilbert was attempting to ask the jurors to give little weight to defendant's mitigating evidence. This assignment of error is overruled.

[9] Defendant further contends that the trial court committed plain error in violation of his state and federal constitutional rights when it admitted evidence from Captain Charles McDonald of the Henderson County Sheriff's Office Detention Center. Defendant argues that this testimony violated his Confrontation Clause rights and his right to free speech. Because defendant failed to object on these grounds at trial, we consider only whether the trial court committed plain error. *See* N.C. R. App. P. 10(c)(4).

"A reversal for plain error is only appropriate in the most exceptional cases." *State v. Duke*, 360 N.C. 110, 138, 623 S.E.2d 11, 29 (2005), *cert. denied*, —— U.S. ——, 127 S. Ct. 130, 166 L. Ed. 2d 96 (2006). Indeed,

> [b]efore 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. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. 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) (internal citations omitted). With *Walker's* standard guiding our decision, we hold that the trial court did not commit plain error in admitting this evidence because its admission was not erroneous.

We turn first to defendant's argument that the testimony of Captain McDonald violated his Confrontation Clause rights. Defendant contends that when McDonald read from various detention center incident reports, he interjected "testimonial" statements which should have been excluded under *Crawford v. Washington*, 541 U.S. 36 (2004). The detention center incident reports at issue have little, if any, relation to testimonial evidence. Instead, these reports are more like business records, which "by their nature [are]

not testimonial." *Id.* at 56. It is not necessary that the detention center incident reports meet every requirement of an admissible business record under Rule of Evidence 803(6) because the Rules of Evidence are not controlling in a capital penalty proceeding. *See State v. Rose*, 339 N.C. 172, 200-01, 451 S.E.2d 211, 227-28 (1994), *cert. denied*, 515 U.S. 1135 (1995). However, use of the Rules is helpful in determining whether the statement has sufficient indicia of reliability. Rule 803(6) provides that the hearsay rule does not exclude records of regularly conducted activity, which are defined as:

> 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).

McDonald testified that he was in charge of the facilities at the detention center, that he was familiar with the record keeping policies, that he frequently viewed incident reports, that it was policy for an incident report to be prepared after each incident, and that disciplinary action is to be documented when it occurs. There is no indication in the record that the reports were prepared for use in later legal proceedings. Instead, the record indicates that these reports were created as internal documents concerning administration of the detention center. The statements contained in the report from detention officers and other inmates were not taken in such a manner as to be testimonial or to be used during later criminal proceedings. The detention center incident reports are not testimonial in nature, nor are the statements contained therein testimonial. As a result, their admission did not violate defendant's Confrontation Clause rights or the analogous rights under the North Carolina Constitution.

[10] Second, defendant contends that because one of these reports indicated that defendant called another inmate by a racial epithet, its

admission violated his rights under the First Amendment to the United States Constitution. Defendant asserts that this evidence was not relevant to any issue in the capital sentencing proceeding as both the victims were of the same race as defendant, and therefore admission of the evidence was improper under *Dawson v. Delaware*, 503 U.S. 159 (1992). We disagree. In *Dawson*, the Supreme Court of the United States noted that the defendant's membership in the Aryan Brotherhood, a white supremacist organization, was irrelevant to his crime as it did not involve race. *Id.* at 166. The instant case is clearly distinguishable. The report indicated that the racial epithet was used when defendant was holding a mop handle in the air and cursing at another inmate. This context and the inflammatory nature of the word used by defendant were relevant to rebut the submitted mitigating circumstance that "defendant has demonstrated an ability to adapt to prison life." Accordingly, the evidence was relevant and admissible. Because admission of these detention center reports was not erroneous, defendant cannot show plain error.

[11] Defendant additionally contends that his counsel was ineffective for failing to object on these constitutional grounds at trial. Because we hold that the evidence complained of was admissible even if defense counsel had objected, we reject defendant's claim of ineffective assistance of counsel as defendant cannot show prejudice. *See Strickland v. Washington*, 466 U.S. 668, 693 (1984) (defendant must show deficient representation and prejudice to prevail on an ineffective assistance of counsel claim). We overrule these assignments of error.

[12] Defendant contends that the trial court committed reversible error in not permitting him to introduce evidence during the sentencing proceeding that he was sexually abused by his father. Defendant had sought to introduce evidence from Debra Gray, a clinical social worker retained by the defense to prepare defendant's psychosocial history. Defense counsel submitted a proffer to the trial court, outside the presence of the jury, that Ms. Gray would testify concerning an "interview that Ms. Gray did with [defendant's sister] who related to her that she knows [the sexual abuse] happened to [defendant], that she saw it." We note initially that defendant did not raise any constitutional issue during trial in regards to the admission of this evidence. Accordingly, we will not consider the merits of defendant's constitutional arguments. *See* N.C. R. App. P. 10(b)(1); *see also State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 519 (1988).

Moreover, while the Rules of Evidence only serve as guidelines in capital penalty proceedings, the trial court may properly exclude hearsay statements which lack sufficient indicia of reliability or lack a proper foundation. *See Rose*, 339 N.C. at 200-01, 451 S.E.2d at 227. In sustaining the prosecution's objection to admission of evidence of the alleged abuse, the trial court considered that defendant had denied that any such sexual abuse had taken place and that the declarant was available to testify. We cannot say that the trial court erred in determining that the proposed hearsay statements lacked sufficient indicia of reliability. Defendant's assignment of error is thus overruled.

[13] Defendant contends that the trial court violated his federal and state constitutional rights by prohibiting the defense from presenting evidence concerning the chaotic and abusive nature of defendant's family unless defense counsel could establish that each incident directly affected defendant in some way. We note initially that defendant was allowed to present substantial evidence concerning his childhood and that of his siblings at both the guilt-innocence phase and penalty proceedings. Proposed mitigating evidence is relevant when it "sheds light on defendant's age, character, education, environment, habits, mentality, propensities, or criminal record, or on the circumstances of the offense for which defendant was being sentenced." *State v. Locklear*, 349 N.C. 118, 159, 505 S.E.2d 277, 301 (1998), *cert. denied*, 526 U.S. 1075 (1999).

Our review of the record indicates that the trial court did not exclude evidence of defendant's environment, but insisted that defendant's witness first explain the factual basis for her conclusion that defendant grew up in an injurious environment. The trial court instructed defense counsel that the evidence which led to these conclusions would have to be somehow "tied back to" defendant. We cannot say the trial court erred in requiring defense counsel to lay the proper foundation to establish that the evidence was relevant and not merely a recital of "feelings, actions, and conduct of third parties [which] have no mitigating value as to defendant and are irrelevant in capital sentencing proceedings." *State v. Smith*, 359 N.C. 199, 214-15, 607 S.E.2d 607, 619 (citing *Locklear*, 349 N.C. at 160-61, 505 S.E.2d at 302), *cert. denied*, 546 U.S. 850 (2005).

Specifically, defendant asserts that the trial court erred in prohibiting defense witnesses from testifying about the arrest of defendant's father for allegedly sexually abusing defendant's sister. We cannot discern from the record what the testimony of the witnesses

would have been had the trial court not sustained the prosecution's objection. In such cases the law is well settled:

> [I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record. We also held that the essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred.

State v. Simpson, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985) (citing *Currence v. Hardin*, 296 N.C. 95, 249 S.E.2d 387 (1978)). In both situations complained of by defendant, the trial court allowed the witness to testify that defendant's father had been arrested when defendant was a child. However, when defense counsel asked each witness why defendant's father had been arrested, the trial court sustained the prosecution's objection. Defense counsel then proceeded to other questions without making an offer of proof or requesting that the witness be allowed to answer outside the presence of the jury. We will not engage in speculation as to the answers each witness would have provided. These assignments of error are overruled.

Closing Argument Issues

[14] Defendant next argues that the trial court erred in failing to intervene *ex mero motu* during penalty proceeding closing arguments when the prosecutor created a scenario of the crime which defendant asserts could not reasonably be inferred from the evidence. One prosecutor argued that Phillip Holder was conscious, begged for his life, and attempted to reason with defendant before defendant killed his wife and him. This same prosecutor asked concerning Pamela Holder: "Do you think she begged for her life?" Another prosecutor argued that defendant often blames other people for his plights and suggested that defendant was probably blaming the prosecutor right now for "trying to give me the death penalty." Defendant failed to enter a timely objection to any of these remarks.

"Prosecutors may create a scenario of the crime committed as long as the record contains sufficient evidence from which the scenario is reasonably inferable." *State v. Bishop*, 343 N.C. 518, 543, 472 S.E.2d 842, 855 (1996) (citing *State v. Ingle*, 336 N.C. 617, 645, 445 S.E.2d 880, 895 (1994), *cert. denied*, 514 U.S. 1020 (1995)), *cert. denied*, 519 U.S. 1097 (1997). "[T]his Court has repeatedly found no

impropriety when the prosecutor asks the jury to imagine the fear and emotions of a victim." *State v. Warren*, 348 N.C. 80, 109, 499 S.E.2d 431, 447 (citations omitted), *cert. denied*, 525 U.S. 915 (1998).

Here, it was reasonable to infer from the evidence that the Holders may have pleaded for their lives. Pamela was found in a recliner, slumped with her buttocks on the edge of the chair and her legs straight out. Her hair and arm were across her face. Dr. Jason testified that she may or may not have been unconscious after being struck with the wrench. It was reasonable to infer that Pamela saw defendant approaching with the firearm and raised her arm over her face in a defensive manner. It was also reasonable to infer that she would have asked that her life be spared. Dr. Jason testified that Phillip was beaten with the wrench before being shot. It was reasonable to infer that Phillip was conscious before being shot, as Dr. Jason testified that Phillip's palm had a defensive gunshot wound and that blood found on Phillip's jeans indicated that he was upright for a significant period of time after he began bleeding. It would only be natural that a conscious Phillip would have asked that their lives be spared.

Moreover, the remark by a prosecutor that defendant might have been blaming that prosecutor for "trying to give me the death penalty," which was couched in a series of arguments that no one but defendant was to blame for his predicament, was so innocuous that it does not even come near the level of gross impropriety. It appears from the record that the prosecutor was simply arguing to jurors that they should feel no guilt or blame if they were to find that defendant's crimes were worthy of death. *See State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41 (stating that the prosecutor's duty is "to strenuously pursue the goal of persuading the jury that the facts of the particular case at hand warrant imposition of the death penalty" (citing *State v. Myers*, 299 N.C. 671, 680, 263 S.E.2d 768, 774 (1980))), *cert. denied*, 513 U.S. 1046 (1994).

While the prosecution's comments concerning the final moments of the victims' lives may have neared the edge of the latitude given counsel during closing arguments to make inferences from the evidence, we cannot say that the remarks were grossly improper so as to require the trial court to intervene *ex mero motu*. *See State v. Cummings*, 352 N.C. 600, 621-22, 536 S.E.2d 36, 52 (2000), *cert. denied*, 532 U.S. 997 (2001). Additionally, the trial court instructed jurors that "if your recollection differs from that of the Court or the lawyers, you are to rely solely upon your own recol-

lection of the evidence during your deliberations." These assignments of error are overruled.

[15] Defendant also asserts that the trial court erred in failing to intervene *ex mero motu* when a prosecutor argued during penalty proceeding closing arguments that many of the mitigating circumstances submitted by defendant had no connection to the crime. However, defendant's argument fails to take into account the prosecutor's complete statement. The prosecutor was not telling the jury that the mitigators must have a nexus to the crime. *See Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (stating that certain mental capacity evidence need not find a nexus to the crime to be relevant mitigating evidence). Instead, the prosecutor argued: "Where is the connection? Why does it make what he did to Philip and Pam Holder less deserving of the ultimate penalty? We are here to talk about and deal with what happened on December the 11th, 2002." Taken in context, it is clear that the prosecutor was not arguing that the mitigating evidence must be connected to the crime, but that the evidence did not have mitigating value in that it did not make defendant "less deserving of the ultimate penalty." This Court has stated that "prosecutors may legitimately attempt to deprecate or belittle the significance of mitigating circumstances." *State v. Basden*, 339 N.C. 288, 305, 451 S.E.2d 238, 247 (1994), *cert. denied*, 515 U.S. 1152 (1995). The prosecutor's remarks were not improper, and thus, the trial court did not err in failing to intervene *ex mero motu*. This assignment of error is overruled.

Jury Instruction Issues

[16] Defendant assigns error to the trial court's failure to submit a peremptory instruction on the N.C.G.S. § 15A-2000(f)(2) mitigating circumstance of whether defendant "was under the influence of mental or emotional disturbance" at the time of the murders.

> 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)[, cert. denied, 527 U.S. 1026 (1999)].

Duke, 360 N.C. at 131, 623 S.E.2d at 25 (first alteration in original). Neither party has pointed us to, nor can we find in the record, defendant's written request for such an instruction. However, even if defendant had submitted the proposed instruction to the trial court, he would not have been entitled to such an instruction. The evidence was not uncontroverted that defendant acted "under the influence of mental or emotional disturbance" at the time of the crime. While there was sufficient evidence for the jury to so find, there was also evidence that showed defendant created a ruse to enter the Holder residence and had the mental capacity at the time of the murders to steal various items of personal property from the residence to sell. The evidence here was not conclusive and incontrovertible, and jurors could have been justified in rejecting the mitigator, as the evidence could have been taken to show deliberation as opposed to the actions of an emotionally disturbed person. This assignment of error is overruled.

[17] Defendant contends the trial court erred in submitting the pecuniary gain aggravating circumstance in addition to the aggravating circumstance that the murder was committed during the commission of a robbery. N.C.G.S. § 15A-2000(e)(5), (6) (2005). Generally speaking, "in cases of premeditated murder in which there was also a robbery with a dangerous weapon with an underlying motive of pecuniary gain, it is only permissible to submit either the (e)(5) or (e)(6) aggravating circumstance, as 'one plainly comprises the other.' " *State v. Cummings*, 361 N.C. 438, 467, 648 S.E.2d 788, 805 (2007) (quoting *State v. Quesinberry*, 319 N.C. 228, 238, 354 S.E.2d 446, 452 (1987), *judgment vacated on other grounds*, 494 U.S. 1022 (1990)). However, this is not the case when there is separate evidence that tends to prove both aggravators. *See State v. East*, 345 N.C. 535, 553-54, 481 S.E.2d 652, 664-65, *cert. denied*, 522 U.S. 918 (1997). In the instant case, the trial court instructed the jury to consider only the theft of the firearms, credit cards, and checks in determining whether the (e)(6) pecuniary gain circumstance was present and to not consider the vehicle theft in making that determination. As to the (e)(5) aggravator, the trial court instructed the jury to consider only the evidence related to the theft of the truck. The trial court properly submitted both aggravating circumstances to the jury. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant argues that: (1) the short-form murder indictment was insufficient to charge him with first-degree murder in that it failed to

allege all the elements of first-degree murder; (2) the especially heinous, atrocious, or cruel aggravating circumstance is unconstitutionally overbroad and vague; (3) the trial court erred in instructing the jury to answer "yes" for Issue Three of the Issues and Recommendations as to Punishment Form even if the weight of the mitigating and aggravating circumstances were of equal weight; (4) the trial court erred in instructing the jury to refuse to give effect to nonstatutory mitigating circumstances if the jurors found them to have no mitigating value; (5) the trial court erred in instructing the jury that it was the defendant's burden to "satisfy" the jurors of the existence of mitigating circumstances; (6) the trial court erred in instructing the jurors that in considering Issues Three and Four of the Issues and Recommendations as to Punishment Form, they "may" consider the mitigating circumstances found in response to Issue Two; and (7) the death penalty is inherently cruel and unusual, and North Carolina's sentencing procedure is unconstitutionally vague and overbroad. We have considered all of defendant's arguments and decline to overrule our prior precedent holding these arguments to be without merit. *See Duke*, 360 N.C. at 136-42, 623 S.E.2d at 28-32.

PROPORTIONALITY

[18] As we have concluded that defendant's trial and capital sentencing proceeding were free from prejudicial error, we now consider: (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 facts of the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (2005).

The jury found three aggravating circumstances as to defendant's murder of Pamela Holder: (1) the murder was committed while defendant was committing or attempting to commit robbery, N.C.G.S. § 15A-2000(e)(5); (2) the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); and (3) 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 other persons, N.C.G.S. § 15A-2000(e)(11) (2005). In addition to the three aggravating circumstances found as to the murder of Pamela, jurors also found that Phillip's murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9) (2005).

The record indicates that defendant stole various items from the Holder residence, including firearms and credit cards. This is sufficient to support the (e)(6) aggravating circumstance. The record also shows that defendant stole Phillip's truck immediately after committing the murders. This is sufficient to support the (e)(5) aggravating circumstance. Moreover, sufficient evidence showed that defendant's actions in murdering each victim were part of the course of conduct which resulted in other crimes of violence to another person—the other victim. This is sufficient to satisfy the (e)(11) aggravating circumstance. There is also sufficient evidence to support the (e)(9) aggravating circumstance as to the murder of Phillip Holder. Defendant brutally beat Phillip with a wrench and then shot him three times because it was "just better to kill him."

There is no indication in the record that the jury was under the influence of passion, prejudice, or any other arbitrary factor in determining defendant's sentence. In such circumstances we will not disturb the jurors' weighing of aggravating and mitigating circumstances.

Our final statutory duty is to determine whether defendant's sentence is proportionate, considering defendant and his crimes. In making this determination, we consider "all cases which are roughly similar in facts to the instant case, although we are not constrained to cite each and every case we have used for comparison." *State v. McNeill*, 360 N.C. 231, 254, 624 S.E.2d 329, 344 (citing *State v. Al-Bayyinah*, 359 N.C. 741, 761, 616 S.E.2d 500, 514 (2005), *cert. denied*, 547 U.S. 1076 (2006)), *cert. denied*, —— U.S. ——, 127 S. Ct. 396, 166 L. Ed. 2d 281 (2006). "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. 208, 244, 433 S.E.2d 144, 164 (1993), *cert. denied*, 512 U.S. 1254 (1994)), *cert. denied*, 543 U.S. 1156 (2005). "[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." *State v. Chandler*, 342 N.C. 742, 764, 467 S.E.2d 636, 648, *cert. denied*, 519 U.S. 875 (1996). The determination of proportionality of an individual defendant's sentence is ultimately dependent upon the sound judgment and experience of the members of this Court. *See McNeill*, 360 N.C. at 253, 624 S.E.2d at 344 (citing *State v. Garcia*, 358 N.C. at 426, 597 S.E.2d at 754).

There have been eight cases in which this Court has determined that a defendant's sentence was disproportionate. *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 (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).

Defendant's case is unlike any case in which we have found a death sentence disproportionate. "[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 in this case. We also consider the brutality of defendant's murders in determining proportionality. *See Duke*, 360 N.C. at 144, 623 S.E.2d at 33 (citations omitted). The victims were two of the few people who ever showed any affection and concern for defendant, yet he brutally beat both of them with a wrench and then mercilessly fired bullets into their skulls for monetary gain. Defendant's sentence is not disproportionate.

CONCLUSION

Defendant has assigned other instances of error, but has not provided any argument or supporting authority for these assignments in his brief. Those assignments of error are considered abandoned and are dismissed. *See* N.C. R. App. P. 28(b)(6); *McNeill*, 360 N.C. at 241, 624 S.E.2d at 336.

We conclude defendant received a fair trial and sentencing proceeding and we find no error in his convictions or his sentences. We additionally conclude that defendant's sentence of death is not disproportionate.

NO ERROR.

MIRIAM GORE, EMPLOYEE v. MYRTLE/MUELLER, EMPLOYER, TRAVELERS INSURANCE COMPANY, CARRIER

No. 396PA06

(Filed 7 December 2007)

1. Workers' Compensation— expiration of time limitations— equitable estoppel

The Industrial Commission did not err in a workers' compensation case by concluding that it had jurisdiction even though plaintiff failed to file either alleged incident within the two-year period required by N.C.G.S. § 97-24, because: (1) the two year limitation in N.C.G.S. § 97-24 has repeatedly been held to be a condition precedent to the right to compensation and not a statute of limitations; (2) a condition precedent, unlike subject matter jurisdiction, may be waived by the beneficiary party by virtue of its conduct; (3) it was entirely plausible for both defendant employer and plaintiff to believe that the entire process in completing the forms was not an exercise in futility, and that the form would be sent to the appropriate place; (4) the employer's human resources officer candidly conceded that she could not recollect her disposition of the forms; and (5) actual fraud, bad faith, or an intent to mislead or deceive is not essential to invoke the equitable doctrine of estoppel.

2. Workers' Compensation— injury by accident—causation— medical records

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff suffered a compensable injury by accident, because: (1) plaintiff employee's medical records were stipulated into evidence by the parties, and as such, they represent competent evidence to support the Commission's findings of fact determining that there was a causal connection between plaintiff's injuries and her work; and (2) appellate courts are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law.

Chief Justice PARKER dissenting in part and concurring in part.

Justice BRADY and Justice NEWBY join in the dissenting and concurring opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 178 N.C. App. 561, 631 S.E.2d 892 (2006), reversing an Opinion and Award filed on 10 February 2005 by the North Carolina Industrial Commission. On 8 March 2007, the Supreme Court allowed defendants' conditional petition for discretionary review as to additional issues. Heard in the Supreme Court 10 September 2007.

Brumbaugh, Mu & King, P.A., by Leah L. King, for plaintiff-appellant/appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Thomas M. Morrow and Dana C. Moody, for defendant-appellees/appellants.

TIMMONS-GOODSON, Justice.

This case arises from proceedings before the North Carolina Industrial Commission ("Commission") and raises the two issues of (1) whether a party may be equitably estopped, in the absence of bad faith, from raising the two year filing requirement in N.C.G.S § 97-24 as an affirmative defense, and (2) whether the Commission's Opinion and Award is supported by competent evidence. We granted discretionary review under N.C.G.S. § 7A-31 and now answer both questions in the affirmative. The decision of the Court of Appeals is reversed.

Factual Background

Evidence before the Commission tended to show that Miriam Gore ("Plaintiff") was employed by Myrtle-Mueller ("Defendant"), a manufacturer of office furniture, from 1985 to April 2000. During her employment, plaintiff worked as a case cleaning inspector performing random inspections until January 2000. She was later transferred to a station where she performed inspections on a full time basis. The inspections entailed pushing and pulling desks. On 12 January 2000, while attempting to assist a fellow employee, plaintiff slipped and fell on a patch of ice in the parking lot of defendant's premises ("January accident"). Plaintiff did not immediately fill out a formal report. However, she testified that her supervisor was aware of the incident. Defendant's human resources worker, Vera Walker ("Walker"), testified that she was aware of the incident, but did not fill out a report at the time of the accident. She recalled subsequently completing a report in May 2000.

On 31 March 2000 ("March accident"), plaintiff, engaged in pulling a desk through large steel doors, "felt a catch in her back." She visited her primary care physician, John D. Hodgson M.D., the same day, complaining of severe back pain. Dr. Hodgson took plaintiff out of work for two weeks. In subsequent proceedings, Walker recalled completing a report for the March accident, but could not recall the specific date she filled out the report.

Plaintiff and Walker completed a Form 18 Notice of Accident, for the March accident on 25 May 2000, although neither Walker nor plaintiff filed the form with the Commission. Walker testified that after completing the form, she assured plaintiff that she would check the Form 18 and "find out where it needs to go." On 26 May 2000, defendant filed a Form 61 Denial of Workers' Compensation Claim for the January accident with the Commission. The form made no reference to the March accident.

On 18 April 2000, plaintiff returned to Dr. Hodgson with continued complaints of back pain, as well as arthritic symptoms in her knees, hips, and joints. Following his examination, Dr. Hodgson diagnosed plaintiff with severe back pain and underlying severe osteoarthritis. He took X-rays of plaintiff's back that revealed Grade II spondylolisthesis at L5-S1 with marked disc narrowing. On 2 May 2000, Dr. Hodgson diagnosed plaintiff with back pain due to degenerative disc disease and spondylolisthesis. Dr. Hodgson indicated that plaintiff was 100 percent disabled due to back pain from degenerative disc disease and listed 26 April 2000 as plaintiff's last day of work.

Plaintiff visited Stephen J. Candela M.D., for a second opinion evaluation on 12 July 2000. Dr. Candela noted that plaintiff suffered from pain on her left side and left hip. He diagnosed plaintiff with low back pain syndrome and trochanteric bursitis. Plaintiff continued to see Dr. Candela until 26 April 2001.

On 20 June 2002, plaintiff visited a third physician, Louie E. Tsiktsiris M.D., of Carolina Arthritis Associates. Dr. Tsiktsiris determined that plaintiff suffered from degenerative arthritis of her neck and back, myofascial pain, and Grade IV spondylolisthesis of her lumbar spine. Plaintiff followed up on 5 July 2002 with Thomas Melin M.D., of Coastal Neurological Associates for a neurosurgical evaluation. Dr. Melin confirmed the diagnosis of L5-S1 spondylolisthesis with resultant back and leg pain and ordered an MRI of plaintiff's lumbar spine. The MRI scan was performed on 11 July 2002, and

revealed L5 spondylolysis with Grade II L5-S1 spondylolisthesis, as well as biforaminal stenosis.

The parties subsequently appeared before a deputy commissioner, who denied plaintiff's claim on 11 December 2003. Plaintiff appealed the denial to the Commission. The Commission reviewed the matter and reversed the deputy commissioner in an Opinion and Award filed on 10 February 2005. The Commission entered the following Findings of Fact pertinent to this appeal:

> 2. . . . [P]laintiff's back condition had been relatively stable during the period preceding January 12, 2000 and March 31, 2000.
>
> 3. On January 12, 2000, after plaintiff had clocked into her station, a co-worker informed her that another co-worker had slammed her hand in the trunk of her car in the parking lot. Consequently, plaintiff went to check on the condition of the injured coworker [*sic*]. The parking lot was icy and slick and plaintiff slipped and fell on her left shoulder, wrist, head, and back. . . . Plaintiff experienced pain in her wrist and head but did not seek medical treatment or report the incident. However, the plaintiff reasonably believed that her supervisor knew about the fall because of comments he made to her that day. Ms. Vera Walker, a human resources worker for defendant-employer, testified that she was aware of the plaintiff's fall and that Ms. Walker did not fill out an accident report.
>
> . . . .
>
> 5. On 31 March 2000, the plaintiff felt a catch or pop in her back as she pulled a desk. On this date she went to Dr. Hodgson, her primary care physician and complained about back pain. Plaintiff was treated conservatively with medication and removed from work for two weeks.
>
> . . . .
>
> 8. On 25 May 2000 the plaintiff and Vera Walker completed a Form 18 and memo acknowledging notice of the accident to employer and the claim of the employee. Vera Walker recalled filling out the forms but could not recall what she did with the forms, but the Form 18 was not received by the Industrial Commission. The plaintiff was under the reasonable belief and reasonably relied on her perception that the forms would be properly filed with the Industrial Commission.
>
> . . . .

10. On 6 July 2000 plaintiff was having significant back pain and Dr. Hodgson referred plaintiff to Dr. Candella. Plaintiff reported to Dr. Candella a history of having significant back pain after moving desks. Dr. Candella treated plaintiff conservatively with injections of Depomedrol. This treatment had some success but plaintiff's back pain returned with activity.

. . . .

14. Sometime after plaintiff's retirement, approximately 5 May 2000, plaintiff reported her 31 March 2000 back injury to defendant-employer and met with Ms. Vera Walker who was acting human resources manager. Ms. Walker indicated that plaintiff would receive short-term disability, which plaintiff did receive. Ms. Walker explained that she would discuss workers' compensation benefits with the home office. Thereafter, defendant-employer filed a Form 19 with the Industrial Commission, which was dated May 24, 2000 and received by the Commission on either June 5 or 8, 2000. The Form 19 indicates a date of injury of 12 January 2000 and a mechanism of injury of a slip and fall on the ice in the parking lot.

15. Drs. Hodgson and Melin testified that the traumas described by plaintiff of 12 January 2000 and 31 March 2000 aggravated her preexisting, previously asymptomatic back condition.

16. Dr. Hodgson testified in his deposition that plaintiff's 12 January 2000 injury "could have exacerbated the—pain that [plaintiff] was experiencing or could have caused the pain."

17. The plaintiff has been unable to work since 26 April 2000.

Consequently, the Commission entered its Conclusions of Law, which stated, *inter alia*:

1. Plaintiff sustained a compensable injury by accident arising out of and as a direct result of her employment with defendant in that she suffered specific traumatic incidents on 12 January 2000 and 31 March 2000. The plaintiff has been disabled from any work since 26 April 2000 due to the compensable injury.

2. Plaintiff's workplace injuries of 12 January 2000 and 31 March 2000 aggravated a preexisting, nondisabling condition.

3. The plaintiff reasonably relied on the defendant-employer to file the Form 18 completed by the plaintiff and the defendant-

> employer's human resources worker. The defendants are thereby equitably estopped to rely on N.C.G.S. § 97-24 to bar the plaintiff's claim.

(citations omitted.) The Commission consequently awarded plaintiff disability compensation and medical treatment.

Defendants' Arguments

Defendants appealed to the Court of Appeals, raising two issues. First, defendants argued, the Commission erred by concluding that it had jurisdiction because plaintiff failed to file either alleged incident within the two year period required by statute. They argued that plaintiff did not file a complaint for the 12 January 2000 incident until 31 January 2002, more than two years after the incident. Defendants also asserted that the Commission first received notice of the 31 March 2000 accident when the parties filed a Pre-Trial agreement on 18 October 2003, also two years after the incident. Though defendants conceded that a Form 19 and a Form 61 regarding the January incident had been filed in 2000, within the time limit, they argued that this filing did not constitute a filing of the claim within the meaning of N.C.G.S. § 97-24.

Second, defendants contended, the Commission erred by concluding that plaintiff suffered from a compensable injury by accident under the Workers' Compensation Act. The Court of Appeals agreed with defendants' contentions and set aside the Opinion and Award of the Commission in a unanimous, unpublished opinion entered on 18 July 2006. *Gore v. Myrtle/Mueller*, 178 N.C. App. 561, 631 S.E.2d 892 (2006) (2006 N.C. App. LEXIS 1577 (July 18, 2006)) (unpublished) (No. COA05-988). Pursuant to N.C.G.S. § 7A-31, we granted discretionary review to plaintiff and allowed defendants' conditional petition for discretionary review. *Gore v. Myrtle/Mueller*, 361 N.C. 352, 644 S.E.2d 7 (2007).

Questions Presented

Upon granting plaintiff's petition for discretionary review and defendant's conditional petition for discretionary review, we address the same issues decided by the Court of Appeals. First, we review our jurisprudence to determine if estoppel can be invoked to prevent a party from asserting the two year filing requirement of N.C.G.S. § 97-24 in proceedings before the Commission where no bad faith has been shown. Second, we review the record to determine if the Opinion and Award of the Commission was supported by competent evidence. We answer both questions in the affirmative.

I. Equitable Estoppel

[1] To determine whether equitable estoppel is applicable in this case, we begin by reviewing our general equitable estoppel jurisprudence. We then proceed to review case law in the specific context of workers' compensation. Finally, we evaluate this case in the light of our estoppel jurisprudence.

A. Estoppel in General

We have previously defined equitable estoppel as "the effect of the voluntary conduct of a party whereby he is absolutely precluded . . . from asserting rights which might perhaps have otherwise existed . . . as against another person who in good faith relied upon such conduct." *Washington v. McLawhorn*, 237 N.C. 449, 454, 75 S.E.2d 402, 405 (1953) (internal quotation marks omitted) (quoting *Am. Exch. Nat'l Bank v. Winder*, 198 N.C. 18, 20, 150 S.E. 489, 491 (1929) (citations omitted)).

Equitable estoppel arises when one party, by his acts, representations, or silence when he should speak, intentionally, or through culpable negligence, induces a person to believe certain facts exist, and that person reasonably relies on and acts on those beliefs to his detriment. *Long v. Trantham*, 226 N.C. 510, 513, 39 S.E.2d 384, 387 (1946) (citations omitted). There need not be actual fraud, bad faith, or an intent to mislead or deceive for the doctrine of equitable estoppel to apply. *Duke Univ. v. Stainback*, 320 N.C. 337, 341, 357 S.E.2d 690, 692 (1987) (citing *Watkins v. Cent. Motor Lines, Inc.*, 279 N.C. 132, 181 S.E.2d 588 (1971)).

As we have recently reiterated, "the party whose words or conduct induced another's detrimental reliance may be estopped to deny the truth of his earlier representations in the interests of fairness to the other party." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 17, 591 S.E.2d 870, 881 (2004) (citations omitted). "Equitable estoppel prevents one party from taking inconsistent positions in the same or different judicial proceedings, and 'is an equitable doctrine designed to protect the integrity of the courts and the judicial process.' " *State v. Taylor*, 128 N.C. App. 394, 400, 496 S.E.2d 811, 815, *aff'd per curiam*, 349 N.C. 219, 504 S.E.2d 785 (1998) (citation omitted).

> [T]he essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or at least, which is reasonably calculated to convey the impression that the facts are

> otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially

Hawkins v. M & J Fin. Corp., 238 N.C. 174, 177-78, 77 S.E.2d 669, 672 (1953) (citations omitted). In evaluating the merits of the estoppel argument in the instant case against these criteria, we begin by examining the statutory framework under which plaintiffs bring workers' compensation claims.

B. Estoppel In Workers' Compensation

The time limitation at issue is set out in N.C.G.S. § 97-24. The statute provides in pertinent part:

> (a) The right to compensation under this Article shall be forever barred unless (i) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or (ii) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article.

N.C.G.S. § 97-24(a) (2005). We have previously explained the context of the workers' compensation claim: "The claim is the right of the employee, at his election, to demand compensation for such injuries as result from an accident." *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 663, 75 S.E.2d 777, 780 (1953). In order to invoke this right, however, the worker "must notify his employer within thirty days after the accident, and if they cannot agree on compensation, he, or someone on his behalf, must file a claim with the Commission within [the statutory period] after the accident, in default of which his claim is barred." *Id.* (internal citations omitted) If the employee follows this

procedure, "the jurisdiction of the Commission, as a judicial agency of the State, is invoked." *Id.* (citations omitted).

If the jurisdiction is not invoked in this manner, then the employee has limited options. In the general context of workers' compensation, this Court for several decades expressly left unresolved the question of "whether under all circumstances a party to a proceeding before the Industrial Commission can, or cannot, be estopped to attack its jurisdiction over the subject matter. . . ." *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 89, 92 S.E.2d 673, 677 (1956). In the particular context of the time requirement set forth in N.C.G.S. § 97-24 however, this Court has expressly held that the employer's conduct can waive the statute's timing restrictions. *See Biddix*, 237 N.C. at 665, 75 S.E.2d at 781. An examination of *Biddix* is instructive in outlining the particular parameters of the equitable estoppel doctrine in the context of our workers' compensation jurisprudence.

1. *Biddix*

The employee in *Biddix* was injured on the job. *Id.* at 661, 75 S.E.2d at 778. The employer, on its own volition, paid some of the medical bills. *Id.* at 661, 75 S.E.2d at 779. Consequently, the employee delayed bringing the matter before the Industrial Commission. When the employee finally did so, the deputy commissioner held that the claim was time barred. *Id.* The Commission reversed "on the ground that the defendants, by their conduct, lulled plaintiff into a sense of security and are now estopped to plead the statute, G.S. § 97-24." *Id.*

We reversed, citing the example of the Good Samaritan, and explaining that the employer's willingness to assist the employee with his bills should not be held against it for public policy reasons. The Court reasoned that "if a court should so hold, it would tend to stop, instead of encourage, one injuring another from giving aid to the sufferer. It would be a brutal holding, contrary to all sense of justice and humanity." 237 N.C. at 664, 75 S.E.2d at 781 (citations and internal quotation marks omitted).

However, we then specifically went on to explain that the reversal was predicated on the factual backdrop of the case and that the general rule was that the law of estoppel applied:

> It must not be understood that we hold an employer may not by his conduct waive the filing of a claim within the time required

> by law. *The law of estoppel applies in compensation proceedings as in all other cases*. We merely hold that the facts here appearing, including those found by the full Commission, are insufficient to invoke the doctrine in this case.

Id. at 665, 75 S.E.2d at 781 (emphasis added) (citations omitted).

Therefore, since *Biddix*, we have upheld the principle that estoppel may be invoked to prevent the employer from asserting the time limitation in N.C.G.S. § 97-24 as an affirmative defense. This principle is consistent with the general guideline that the Workers' Compensation Act requires liberal construction to accomplish the legislative purpose of providing compensation for injured employees, and that this overarching purpose is not to be defeated by the overly rigorous "technical, narrow and strict interpretation" of its provisions. *Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 452, 85 S.E.2d 596, 599 (1955) (quoting *Johnson v. Asheville Hosiery Co.*, 199 N.C. 38, 153 S.E. 591 (1930)). It is also consistent with the rule followed in the overwhelming majority of jurisdictions that employer fault, regardless of whether it is intentional, will excuse the untimely filing of a workers compensation claim. *See Larson's Workers' Compen-sation Law*, 7 § 126.09D[1], and cases cited therein; *id.* at 126.09[1] (explaining that when a claimant is "lulled into a sense of security by statements of employer . . . that the claimant 'will be taken care of' . . . . the lateness of the claim has ordinarily been excused"); Blair, *Workmen's Compensation Law*, § 18-2 (noting that a "misleading statement which lulls an employee into a false sense of security that what must be done . . . will be taken care of for him[] will also, in most instances, excuse his failure to act timely").

2. Estoppel Since *Biddix*

After *Biddix*, the Court of Appeals addressed the issue of whether the principle of estoppel could prevent a party from invoking the statutory two year provision in *Belfield v. Weyerhaeuser Co.*, 77 N.C. App. 332, 335, 335 S.E.2d 44, 46 (1985).

The plaintiff had worked at Weyerhaeuser's sawmill for thirty years until his workplace injury. *Id.* at 332-33, 335 S.E.2d at 44-45. Following the accident, his health declined. *Id.* at 333, 335 S.E.2d at 45. As his health declined, the plaintiff sought help from Brenda Howell, a secretary at the mill. *Id.* Ms. Howell told the plaintiff she

would take care of his paperwork.[1] *Id.* However, she never took any action, and the plaintiff never received any benefits. *Id.* The plaintiff finally obtained counsel and filed suit six years after the accident. *Id.* In affirming the Commission's order that the defendants were estopped from pleading the absence of jurisdiction pursuant to Section 97-24, *Belfield* laid down the general rule which has since governed: "We hold that a party may be equitably estopped from asserting the time limitation in G.S. 97-24 as a bar to jurisdiction." *Id.* at 335, 335 S.E.2d at 46.

For over twenty-two years, the *Belfield* rule has permeated North Carolina workers' compensation jurisprudence.[2] We have been particularly reluctant to interfere with past precedents when, as here, litigants have arranged their affairs and "rights have become vested which will be seriously impaired if the rule thus established is reversed." *Hill v. Atlantic & N.C. R. Co.*, 143 N.C. 542, 573, 143 N.C. 408, 529, 55 S.E. 854, 866 (1906). *See e.g.*, *State v. Holmes*, 361 N.C. 410, 413, 646 S.E.2d 353, 355 (2007) (noting that the holding was "consistent with three decades of Court of Appeals precedent").

Belfield and its model of equitable estoppel have acquired similar gravity in the area of workers' compensation. *See*, *e.g.*, *Craver v. Dixie Furn. Co.*, 115 N.C. App. 570, 578, 447 S.E.2d 789, 794 (1994) (quoting *Belfield*, 77 N.C. App. at 337, 335 S.E.2d at 47); *Reinhardt v. Women's Pavilion, Inc.*, 102 N.C. App. 83, 87, 401 S.E.2d 138, 141 (1991) (citing *Belfield*)).

Craver explained the underlying policy rationale for the *Belfield* rule:

> The commonest type of case is that in which a claimant, typically not highly educated, contends that he was lulled into a sense of security by statements of employer or carrier representatives that 'he will be taken care of' *or that his claim has been filed for him* or that a claim will not be necessary because he would be paid compensation benefits in any event. When such

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1. We note that Ms. Walker's verbal assurances that she would "find out where it [the form] needs to go," combined with the Form 61 bearing the notation that "[t]he original of this form shall be sent to: Industrial Commission" are at least as persuasive in this case as Ms. Howell's words in *Belfield* that she would "take care of" the plaintiff's paperwork.

2. As of 10 September 2007, the Commission had cited *Belfield* in thirty-seven opinions.

> facts are established by the evidence, the lateness of the claim has ordinarily been excused.

115 N.C. App. at 578, 447 S.E.2d at 794 (quoting *Belfield*, 77 N.C. App. at 336, 335 S.E.2d at 49) (citation omitted) (emphasis added).[3]

In contrast, defendants urge this Court to resurrect an antiquated approach extinguished by modern estoppel principles in all but a few jurisdictions. As a leading treatise explains, modern application of estoppel and waiver in the present context serves "as an antidote to the earlier approach, which was the highly conceptual one of saying that timely claim (and sometimes even notice) was 'jurisdictional[.]' " *Larson's*, 7 § 126.13[1]. Defendants' argument tracks this "jurisdictional" approach, and relies entirely on cases decided before the adoption of modern principles of waiver and estoppel designed to ameliorate its harsh effects. The overwhelming majority of modern cases "belie[] the present validity of the ['jurisdictional'] idea," however, which continues to survive in only a tiny minority of jurisdictions amidst strong criticism. *See*, *e.g.*, *id.* (describing the minority rule as "curious word-magic" designed to exalt the statutory claims' filing requirement as "a defense outside the reach of waiver, estoppel, or anything else"). To be sure, *Biddix* and *Belfield* have made clear that this outdated procedural hurdle has no place in our modern jurisprudence.

In this context, we underscore that the two year limitation in N.C.G.S. § 97-24 has repeatedly been held to be a condition precedent to the right to compensation and not a statute of limitations. *Montgomery v. Horneytown Fire Dep't*, 265 N.C. 553, 555, 144 S.E.2d 586, 587 (1965) (per curiam) (citations omitted). We have long held that a condition precedent, unlike subject matter jurisdiction, may be waived by the beneficiary party by virtue of its conduct. *See*, *e.g.*, *Johnson & Stroud v. R.I. Ins. Co.*, 172 N.C. 190, 195-96, 172 N.C. 142, 147-48, 90 S.E. 124, 127 (1916); *see also Larson's*, 7 § 126, Scope ("The right to assert the statutory bar [as to the filing of a claim for compensation] can, in most jurisdictions, be lost by waiver[.]"). Therefore, by their actions, defendants could waive the two year condition precedent laid out in N.C.G.S. § 97-24.

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3. We also observe that it is undisputed that the forms concern the March accident were filed in a timely manner. However, since the Commission did not rely on this for its ruling, we do not address the issue.

C. Application of Estoppel to the Case at Bar

Having established the general permissibility of estoppel under our workers' compensation law, we now address its applicability in the instant case. The essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must (1) lack the knowledge and the means of knowledge as to the real facts in question; and (2) have relied upon the conduct of the party sought to be estopped to his prejudice. *In re Will of Covington*, 252 N.C. 546, 549, 114 S.E.2d 257, 260 (1960). In challenging the applicability of estoppel to the case at bar, defendants raise two main arguments.

First, defendants argue that they made no representation that they would take care of the claim for plaintiff and that plaintiff could therefore not rely on their conduct to her detriment. In the instant case, plaintiff specifically argued, and the Commission agreed, that she had filled out the forms with defendant's human resources officer, who subsequently lost them, to plaintiff's detriment. This is reflected in the Commission's Finding of Fact Number 8:

> On 25 May 2000 the plaintiff and Vera Walker completed a Form 18 and memo acknowledging notice of the accident to employer and the claim of the employee. Vera Walker recalled filling out the forms but could not recall what she did with the forms, but the Form 18 was not received by the Industrial Commission. The plaintiff was under the reasonable belief and reasonably relied on her perception that the forms would be properly filed with the Industrial Commission.

This finding of fact is supported by, among other competent evidence, testimony and a contemporaneous letter from Ms. Walker. It fulfills the requirements of equitable estoppel, and is conclusive and binding. *See Forbis v. Neal*, —— N.C. ——, ——, 649 S.E.2d 382, 387-88 (2007) (citations omitted) (Whether representations were "reasonably calculated to deceive", "made with intent to deceive"; whether they did "in fact deceive"; and whether reliance upon the representation was reasonable are questions of fact to be determined by the fact finder).

Though determining reliance is an issue of fact, *id.*, we note in passing that it was entirely plausible for both defendant-employer

and plaintiff to believe that the entire process in completing the forms was not an exercise in futility, and that the form would be sent, in Ms. Walker's words, "where it needs to go." Indeed, Ms. Walker candidly conceded that she could not recollect her disposition of the forms. These facts satisfy the requirements outlined above to invoke equitable estoppel, thereby resolving the first issue.

Next, defendants argue that estoppel is inapplicable because there is no showing that they acted maliciously or in bad faith. In applying the doctrine of equitable estoppel however, as noted above, we have explicitly held that "[a]ctual fraud, bad faith, or an intent to mislead or deceive is not essential to invoke the equitable doctrine of Estoppel." *Watkins v. Central Motor Lines, Inc.*, 279 N.C. 132, 139, 181 S.E.2d 588, 593 (1971). Indeed, to the contrary:

> [A] party may be estopped to deny representations made when he had no knowledge of their falsity, or which he made without any intent to deceive the party now setting up the estoppel. . . . [T]he fraud *consists in the inconsistent position subsequently taken*, rather than in the original conduct. It is the subsequent inconsistent position, and not the original conduct that operates to the injury of the other party.

Hamilton v. Hamilton, 296 N.C. 574, 576-77, 251 S.E.2d 441, 443 (1979) (emphasis added) (alterations in original) (citation omitted) (internal quotation marks omitted). The lack of bad faith is therefore not a bar to invoking equitable estoppel.

In light of these principles, we hold that (1) the requirements of equitable estoppel are met here, even without a showing of bad faith or malice, and (2) the doctrine of equitable estoppel can override the two year time period enunciated in N.C.G.S. § 97-24.

II. Competent Evidence

[2] We next determine whether the Opinion and Award of the Commission was adequately supported by competent evidence. Appellate review of an award from the 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. *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006) (citations omitted). Under our Workers' Compensation Act, "the Commission is the fact finding body." *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962). "The Commission is the sole judge of the credibility

of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965). Thus, on appeal, appellate courts do "not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.* at 434, 144 S.E.2d at 274. Reviewing courts do not function as appellate fact finders. *Rose v. City of Rocky Mt.*, 180 N.C. App. 392, 399, 637 S.E.2d 251, 256 (2006), *disc. rev. denied*, 361 N.C. 356, 644 S.E.2d 232 (2007).

Since we have previously analyzed the factual and procedural background of plaintiff's claim, the only outstanding issue is whether there is a causal connection between the workplace incidents and plaintiff's subsequent illnesses. The Court of Appeals' concerns were premised entirely on its assessments of the deposition testimonies of the doctors involved. Its opinion states: "Upon review of the record, the deposition testimonies of Dr. Hodgson and Dr. Melin were based merely upon speculation and conjecture, and were not sufficiently reliable to qualify as competent evidence on issues of medical causation." *See Gore v. Myrtle/Mueller*, 178 N.C. App. 561, 631 S.E.2d 892 (2006) (2006 N.C. App. LEXIS 1577 (July 18, 2006)) (unpublished) (No. COA05-988).

However, our review of the evidence in the record reveals that it contains considerable medical records in addition to the testimony referenced by the Court of Appeals. These records were stipulated into evidence by the parties. As such, they represent competent evidence to support the Commission's findings of fact determining that there was a causal connection between plaintiff's injuries and her work. An examination of the records shows that they include, among other materials, the following indicia supporting the Industrial Commission's determination:

1. A 2 May 2000 note by Dr. Hodgson noting that plaintiff's "back pain began @ work in January of 2000."

2. A second note indicating that plaintiff is "100% disabled due to back pain."

3. A progress note showing plaintiff's diagnosis as "BACK PAIN DUE TO DEGENERATIVE DISC DISEASE AND SPONDYLOLISTHESIS, DEFINITELY WORK RELATED ONSET WITH UNDERLYING CHRONIC ETIOLOGY." The note also indicated that: "She

does relate that her back was not bothering her until January, 2000 when she was put on heavier duty work at the plant."

The Commission's findings of fact may only be set aside in the complete absence of competent evidence to support them. *Click v. Pilot Freight Carriers Inc.*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980). We hold that the above materials constitute competent evidence to support the Commission's findings that plaintiff "sustained a compensable injury by accident arising out of and as a direct result of her employment with defendant in that she suffered specific traumatic incidents" and that her workplace injuries "aggravated a preexisting, nondisabling condition." Since appellate courts are "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law," *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998)), our review must stop there.

For the foregoing reasons, the Court of Appeals decision reversing the Commission's Opinion and Award is reversed.

REVERSED.

Chief Justice PARKER dissenting in part; concurring in part.

In my view the majority's reliance on *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 75 S.E.2d 777 (1953), to support its holding that estoppel is applicable is misplaced. In *Biddix*, the accident giving rise to the plaintiff's claim for benefits occurred on 15 June 1950. *Id.* at 661, 75 S.E.2d at 778. On 12 September 1951, the plaintiff wrote a letter to the Industrial Commission requesting a hearing; the letter was received by the Commission on 14 September 1951. *Id.* at 661, 75 S.E.2d at 779. Prior to this letter, the plaintiff had filed no claim with the Commission. *Id.* Defendant employer had paid for the plaintiff's medical treatment, and it was stipulated that the last payment was made 16 January 1951. *Id.* The hearing commissioner found as fact and concluded as a matter of law that the plaintiff's claim was barred by N.C.G.S. § 97-24(a), which at that time required that the claim be filed within one year of the injury. *Id.* On appeal to the Full Commission, the majority of the Commission concluded the following:

> (1) "that by the enactment of Chapter 823, Session Laws of 1947, it was the legislative intent to give an injured employee twelve months from the date of the last payment of bills for medical or other treatment, in cases in which only medical or other treatment bills are paid, within which to request a review of his case for the purpose of ascertaining his rights under the Compensation Act;" (2) that the payment of the medical bills, the reports thereof, and the failure to enter any formal denial of liability "constitute waiver of the requirement for making or filing timely claim, such recognition of liability by the employer eliminating the question of whether a claim for compensation on (*sic*) has been made;" and, (3) "in all events, payment of medical bills under the provisions of the Compensation Act over an extended period of time under circumstances revealed by this record is calculated to lull an injured employee into a false sense of security, and lapse of time ought not to bar the employee's claim unless such be the clear mandate of the law."

Biddix, 237 N.C. at 661-62, 75 S.E.2d at 779. The Full Commission reversed the deputy commissioner and set the matter for hearing on its merits. On appeal by the defendants to the superior court, the trial court affirmed the order of the Industrial Commission. *Id.* at 662, 75 S.E.2d at 779.

On appeal by the defendants to this Court, the Court noted that the Commission, in reaching its conclusion that the defendants were estopped to plead the bar of N.C.G.S. § 97-24, "had resort[ed] to matters appearing in the files of the Commission which constitute no part of the evidence in the case or the record in the cause." *Id.* After discussing the jurisdiction of the Industrial Commission, this Court noted that "[r]ecourse may not be had to records, files, evidence, or data not . . . presented to the court for consideration" and held that the Commission erred "in basing its decision on information it says its files do or do not disclose." *Id.* at 663, 75 S.E.2d at 780. This Court then discussed the medical payments, holding that the voluntary payment of medical expenses did not constitute an admission of liability. "It cannot be said that when an employer does what the Act requires or permits him to do, he thereby perforce admits liability and waives the protective provisions of a statute enacted in his behalf. G.S. 97-25." *Id.* at 664, 75 S.E.2d at 780. The Court then addressed what it calls the crux of the controversy, namely whether the Session Law referenced by the Commission, which amended N.C.G.S. § 97-47, had any applicability to the plaintiff's claim. The

Court concluded that the "amendatory Act has no relation to the filing of original claims for compensation or the time within which such claims are to be filed. It amends G.S. 97-47 and it relates exclusively to the time within which an employee may file a petition for a review of an award theretofore made." *Id.* at 665, 75 S.E.2d at 781 (citations omitted). This Court reversed the trial court. *Id.* at 666, 75 S.E.2d at 782.

In the discussion of the payment of medical bills, this Court analogized the employer's voluntary payment of medical bills to the act of mercy by the Good Samaritan and noted that no one has suggested that by his conduct the Good Samaritan impliedly admitted that he was liable for the injuries the beaten man sustained. This Court then made the following statement, which in the context of the decision is *obiter dictum*:

> It must not be understood that we hold an employer may not by his conduct waive the filing of a claim within the time required by law. The law of estoppel applies in compensation proceedings as in all other cases. We merely hold that the facts here appearing, including those found by the full Commission, are insufficient to invoke the doctrine in this case. *Wilson v. Clement Co.*, *supra*; *Lilly v. Belk Brothers*, *supra*; *Jacobs v. Manufacturing Co.*, 229 N.C. 660, 50 S.E.2d 738; *Lineberry v. Town of Mebane*, *supra*; *Whitted v. Palmer-Bee Co.*, *supra*.

Id. at 665, 75 S.E.2d at 781.

Interestingly, *Lineberry v. Town of Mebane*, 218 N.C. 737, 12 S.E.2d 252 (1940), and *Whitted v. Palmer-Bee Co.*, 228 N.C. 447, 46 S.E.2d 109 (1948), do not mention estoppel. Each of the other cases, *Wilson*, *Lilly*, and *Jacobs*, determined that the evidence and facts found by the Commission did not support application of the doctrine. However, language in *Wilson v. E.H. Clement Co.*, 207 N.C. 541, 177 S.E. 797 (1935) is instructive.

In *Wilson*, the plaintiff argued that C.S., 8081 (ff), current N.C.G.S. § 97-24, is a statute of limitations that could be waived by the defendants and that by their conduct the defendants lulled the plaintiff into inaction and were thereby estopped to assert the bar of the statute. *Id.* at 543, 177 S.E. at 798. The defendants argued that the statute is not a statute of limitations, but a condition annexed to the cause of action which cannot be waived by the parties. *Id.* The Court stated the following:

> It is unnecessary to decide whether C.S., 8081 (ff), is a condition precedent or a statute of limitations.
>
> Of course, if it is a condition annexed to the cause of action of similar character to C.S., 160, obviously the claimant was entitled to no compensation. Conceding, but not deciding, that the statute is one of limitations, is there any evidence upon which to base the doctrine of equitable estoppel? The nature of such estoppel and the elements thereof, as heretofore declared and applied, were stated in *Franklin v. Franks*, 205 N.C. 96, [170 S.E. 113 (1933)]. The Court said: "The general rule is that a party may either by agreement or conduct estop himself from pleading the statute of limitations as a defense to an obligation. . . . To constitute such estoppel, there must be more than a mere delay or indulgence at the request of the debtor. There must be an express agreement not to plead the statute, or such conduct on the part of the debtor as would make it inequitable for him to do so.

Id. (citations omitted).

Two years later in *Winslow v. Carolina Conference Ass'n of The Seventh Day Adventists & Lumbermen's Mutual Casualty Co.*, 211 N.C. 571, 191 S.E. 403 (1937), this Court put the condition precedent versus statute of limitations debate under N.C.G.S. § 97-24 to rest. The Court said:

> After careful consideration of the question, which has not been heretofore decided by this Court, we are of the opinion and hold that the provisions of section 24 constitute a condition precedent to the right to compensation, and not a statute of limitation. For this reason, where a claim for compensation under the provisions of the North Carolina Workmen's Act has not been filed with the Industrial Commission within one year after the date of the accident which resulted in the injury for which compensation is claimed, or where the Industrial Commission has not acquired jurisdiction of such claim within one year after the date of such accident (see *Hardison v. Hampton*, 203 N.C. 187, 165 S.E. 355), the right to compensation is barred.

Id. at 582, 191 S.E. at 410. This holding has not been overruled and has been consistently repeated in this Court's opinions applying N.C.G.S. § 97-24. *In McCrater v. Stone & Webster Engineering Corp.*, 248 N.C. 707, 104 S.E.2d 858 (1958), this Court, quoting from 34 Am. Jur., *Limitation of Actions* § 7, stated:

> "A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right."

Id. at 709, 104 S.E.2d at 860. The Court then said:

> And so it is, under application of the principles discussed and applied in *Winslow v. Carolina Conference Association*, *supra* and *Lineberry v. Mebane*, *supra*, that the plaintiff's inchoate right to compensation arose by operation of law on the date of the accident. But his substantive right to compensation was not fixed by the simple fact of injury arising out of and in the course of his employment. The requirement of filing claim within the time limited by G.S. 97-24 was a condition precedent to his right to compensation. Necessarily, then, the element of filing claim within the time limited by the statute was of the very essence of the plaintiff's right to recover compensation.

Id. As a condition precedent, application of the statute is not subject to avoidances available in the enforcement of an ordinary statute of limitation. *See Wilson*, 207 N.C. at 543, 177 S.E. at 798. By filing a claim with the Industrial Commission within the time prescribed by N.C.G.S. § 97-24, the injured worker invokes the jurisdiction of the Industrial Commission.

> If he wishes to claim compensation, he must notify his employer within thirty days after the accident, G.S. 97-22, 23, and if they cannot agree on compensation, he, or someone on his behalf, must file a claim with the Commission within twelve months [now twenty-four months] after the accident, in default of which his claim is barred. G.S. 97-24. Thus the jurisdiction of the Commission, as a judicial agency of the State, is invoked.

Biddix, 237 N.C. at 663, 75 S.E.2d at 780 (citations omitted). Filing of the claim is a condition precedent to jurisdiction of the Industrial Commission over the claim; thus, jurisdiction over the claim "cannot be obtained by consent of the parties, waiver, or estoppel." *Hart v.*

Thomasville Motors, Inc., 244 N.C. 84, 88, 92 S.E.2d 673, 676 (1956) (citations omitted). In the fifty-four years since the *dictum* in *Biddix* was published, this Court has never applied estoppel in the context of N.C.G.S. § 97-24. Admittedly, this Court has quoted the language from *Biddix* that estoppel is applicable in workers' compensation cases, but in reference to another statute or another issue. *See, e.g.*, *Willis v. J.M. Davis Indus.*, 280 N.C. 709, 186 S.E.2d 913 (1972) (review of award based on changed conditions under N.C.G.S. § 97-47); *Watkins v. Cent. Motor Lines, Inc.*, 279 N.C. 132, 181 S.E.2d 588 (1971) (same); *Aldridge v. Foil Motor Co.*, 262 N.C. 248, 136 S.E.2d 591 (1964) (question of whether plaintiff employee was covered under the employer's workers' compensation insurance policy); and *Ammons v. Z.A. Sneeden's Sons, Inc.*, 257 N.C. 785, 127 S.E.2d 575 (1962) (change of conditions under N.C.G.S. § 97-47).

Moreover, the majority's reliance on *Belfield v. Weyerhaeuser Co.*, 77 N.C. App. 332, 335 S.E.2d 44 (1985), is, in my opinion, similarly misplaced. This Court is not bound by the decisions of the Court of Appeals. Contrary to the assertion in that opinion, (one in which I must share blame), the distinction between a condition precedent and a statute of limitations with respect to the application of the doctrine of estoppel to the filing requirement in N.C.G.S. § 97-24 had not resulted in judicial uncertainty, nor had this Court left the issue specifically unresolved. *Id.* at 334-35, 335 S.E.2d at 45-46. In *Winslow*, this Court's opinion set out the Commission's findings of fact and conclusions of law in full, 211 N.C. at 573-75, 191 S.E. at 404-05, which clearly raised the issue and explained that if the filing requirement was a condition precedent, then estoppel would not apply, but if the filing requirement was a statute of limitations, estoppel would be applicable. The trial court in *Winslow* had similarly stated that if the filing requirement was a statute of limitations, the defendant would be estopped to attack the jurisdiction of the Industrial Commission. *Id.* at 581, 191 S.E. at 409. As noted above, this Court held that the filing requirement was a condition precedent. *Id.* at 582, 191 S.E. at 410. The question of whether estoppel could be applied to overcome the bar of a statute of limitations but not to overcome the failure to satisfy a condition precedent was settled law. 37 C.J. *Limitations of Actions* § 5, p. 686 (1925). The language from *Hart* that "[i]t is not necessary for us to decide whether under all circumstances a party to a proceeding before the Industrial Commission can, or cannot, be estopped to attack its jurisdiction over the subject matter, for the reason that under the facts of this case no such estoppel arises" did not leave unresolved the question of the application of estoppel in the

context of N.C.G.S. § 97-24. *Hart*, 244 N.C. at 89, 92 S.E.2d at 677. The determinative jurisdictional issue in *Hart* was whether the injured party was an employee or an independent contractor, thereby bringing into question the Industrial Commission's authority to approve the settlement agreement between the plaintiff and the defendant.

The fact that the Court of Appeals' *Belfield* opinion has been published for twenty-two years and cited by the Industrial Commission is not, in my view, adequate reason for this Court to accept that decision and disregard our prior precedent that jurisdiction cannot be conferred by consent of the parties, waiver, or estoppel. *Id.* at 88, 92 S.E.2d at 676, *see also Morse v. Curtis*, 276 N.C. 371, 375, 172 S.E.2d 495, 498 (1970). In my view equitable estoppel is not applicable in this case.

Finally, on the question of jurisdiction, the Court of Appeals' majority in this case was, in my judgment, correct in its determination that plaintiff had, by sending the 26 November 2001 letter and Form 33 request for hearing, satisfied the filing requirement of N.C.G.S. § 97-24. Plaintiff testified that she mailed the letter and form in an envelope with proper postage addressed to the Industrial Commission. While the Commission made no finding on this point, the law is that evidence of the mailing of a letter, properly addressed and with proper postage, raises a rebuttable presumption that the letter was received by the intended recipient. *Beard v. Southern Ry. Co.*, 143 N.C. 136, 140, 55 S.E. 505, 506 (1906). Defendant presented no evidence to refute plaintiff's testimony on this point. Whether this letter and form were mailed is a jurisdictional fact. As this Court has said:

> Findings of jurisdictional fact by the Industrial Commission . . . are not conclusive upon appeal even though supported by evidence in the record. A challenge to jurisdiction may be made at any time. When a defendant employer challenges the jurisdiction of the Industrial Commission, any reviewing court, including the Supreme Court, has the duty to make its own independent findings of jurisdictional facts from its consideration of the entire record.

Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 705, 304 S.E.2d 215, 218 (1983) (citations omitted). In her 26 November 2001 letter and on her Form 33, plaintiff stated that she is seeking benefits for the incident in March 2000, not the January 2000 accident. Of note, on the Form 33, plaintiff indicates that she had consulted an attorney. As of 26

November 2001, plaintiff was still within the two-year filing period for her claim arising out of the 12 January 2000 fall on the ice. Plaintiff having failed to file a claim for this incident within the required time period, the Industrial Commission did not have jurisdiction over the 12 January 2000 accident. The Industrial Commission did, however, have jurisdiction over plaintiff's claim for injuries arising out of the 31 March 2000 incident.

On the issue of causation, with respect to the 31 March 2000 incident, I am of the opinion that plaintiff's testimony that while pushing or moving a desk she experienced a catch in her back and that she consulted her doctor that day for back pain was sufficient to support a finding that she experienced a "specific traumatic incident" within the meaning of N.C.G.S. § 97-2(6). *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) (pulled 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) (helped carry 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 v. E.B. Sportswear, Inc.*, 77 N.C. App. 450, 451-52, 335 S.E.2d 52, 52-53 (1985) ("squatted down," preparing to lift box off floor). Further, the testimony of her physicians, Drs. Hodgson and Melin, that experiencing such an incident could in their opinions, to a reasonable degree of medical certainty, exacerbate and render her preexisting degenerative back condition symptomatic was sufficient to support a finding of a causal relationship between the work-related incident and her disabling back pain.

For the foregoing reasons I respectfully dissent in part and concur in part with the majority opinion.

Justice BRADY and Justice NEWBY join in this dissenting and concurring opinion.

STATE OF NORTH CAROLINA v. TIMOTHY STONE

No. 505A06

(Filed 7 December 2007)

Search and Seizure— traffic stop—exceeding scope of generic consent to search for weapon and drugs—flashlight search of underwear

The trial court erred in a possession with intent to sell or deliver cocaine case by denying defendant's motion to suppress cocaine found during a routine traffic stop of a vehicle after an officer's flashlight search inside defendant's underwear even though defendant gave consent to a generic search for weapons or drugs, and defendant is entitled to a new trial, because: (1) the Fourth Amendment protects citizens from unreasonable searches and seizures; (2) the scope of a general consent search does not include consent for the officer to move clothing in order to observe directly the genitals of a clothed suspect; and (3) a reasonable person in defendant's circumstances would not have understood that his general consent to search included allowing the law enforcement officer to pull his pants and underwear away from his body and shine a flashlight on his genitals.

Justice NEWBY dissenting.

Chief Justice PARKER joins in the dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 179 N.C. App. 297, 634 S.E.2d 244 (2006), finding error in an order denying defendant's motion to suppress entered 16 December 2004 by Judge Albert Diaz in Superior Court, Mecklenburg County, reversing a judgment entered 22 March 2005 by Judge J. Gentry Caudill, also in Superior Court, Mecklenburg County, and ordering a new trial. Heard in the Supreme Court 10 January 2007.

Roy Cooper, Attorney General, by William B. Crumpler, Assistant Attorney General, for the State-appellant.

Jarvis John Edgerton, IV for defendant-appellant.

HUDSON, Justice.

We examine today whether a passenger in a vehicle who gave consent to a generic search for weapons or drugs during a routine

traffic stop subjected himself to an officer's flashlight search inside his underwear. Under the circumstances here, we conclude he did not. We hold that this intrusion violated the defendant's rights under the Fourth Amendment to the United States Constitution, which protects all persons from unreasonable searches and seizures, and entitles defendant Stone to a new trial.

Defendant was indicted for possession with intent to sell or deliver cocaine. Before trial, he moved to suppress the cocaine seized on three grounds: (1) that the original stop was unlawful, (2) that the officer's search exceeded the scope of his consent, and (3) that the officer seized the pill bottle without probable cause.

The only issue before us is the one addressed by the dissent in the Court of Appeals, to wit, whether the search exceeded the scope of defendant's consent. "When an appeal is taken pursuant to N.C.G.S. [§] 7A-30(2), the scope of this Court's review is properly limited to the issue upon which the dissent in the Court of Appeals diverges from the opinion of the majority." *State v. Hooper*, 318 N.C. 680, 681-82, 351 S.E.2d 286, 287 (1987) (citing N.C. R. App. P. 16(b)); *Blumenthal v. Lynch*, 315 N.C. 571, 577-78, 340 S.E.2d 358, 361 (1986)).

In denying defendant's motion to suppress, the trial court made the following findings of fact, which have not been challenged on appeal:

> 1. At approximately 3:30 a.m. on October 7, 2002, Charlotte-Mecklenburg Police Officer R.E. Correa ("Correa") was on routine patrol in the Nations Ford area of Charlotte, North Carolina.
>
> 2. Correa has been a CMPD officer for over six years. The Nations Ford area is part of the Steel Creek Division, where he has worked for three years. This particular area has a high incidence of drug and prostitution offenses.
>
> 3. On this date, Correa noticed a burgundy Oldsmobile leaving the Villager Lodge motel. Correa recalled seeing the same vehicle in and around this particular motel on prior occasions. Correa has made numerous drug and prostitution arrests in and around the Villager Lodge motel.
>
> 4. Correa began following the Oldsmobile. The Oldsmobile accelerated and turned right onto Farmhurst Drive. Correa estimated that the car was traveling at 50 mph, approximately 15

mph over the speed limit. Correa, however, did not activate his blue lights or make any effort to stop the car.

5. The Oldsmobile pulled into the parking lot of an apartment complex on Farmhurst Drive. Correa pulled in directly behind the car and shone his spot light on the vehicle.

6. Correa saw two people in the car. He also saw that the vehicle's license plate was displayed on the rear window instead of the bumper. Finally, he noticed that the passenger (in this case, the Defendant) was moving from side to side.

. . . .

10. Correa then turned his attention to the Defendant, who was not wearing a seatbelt. Correa recognized the Defendant, having previously received an anonymous tip that Defendant was a drug dealer. He asked Defendant for identification, but he could not produce one.

11. Correa asked Defendant to step to the back of the vehicle. Defendant complied. Correa asked Defendant if he had any drugs or weapons on his person. Defendant said no, which prompted Correa to ask for consent to search. Defendant gave consent.

12. Defendant was wearing a jacket and a pair of drawstring sweat pants.

13. During the initial search, Correa found $552.00 in cash in the lower left pocket of Defendant's sweat pants. After advising Defendant that it was not safe to carry such a large amount of cash in that manner as it could easily fall out, Correa again asked Defendant if he had anything on him. Once again, Defendant denied having drugs or weapons and authorized Correa to continue the search. By this time, Officer Gerson Herrera ("Herrera") had arrived as the backup officer.

14. Correa checked the rear of Defendant's sweat pants and then moved his hands to the front of Defendant's waistband. At that point, Correa pulled Defendant's sweat pants away from his body and trained his flashlight on the Defendant's groin area. Defendant objected, but by that time, both Correa and Herrera had already seen the white cap of what appeared to be a pill bottle tucked in between Defendant's inner thigh and testicles.

The trial court thereupon concluded that although the search was "intrusive," it was reasonable under the circumstances. Defendant was convicted as charged, and he appealed both the order denying his motion to suppress and the judgment.

On 5 September 2006, the Court of Appeals held that the trial court erred by denying defendant's motion to suppress and ordered a new trial. The panel held unanimously that the officer had grounds to stop the vehicle in which defendant was riding, and that asking defendant to step out of the vehicle was lawful. A majority held that the flashlight search inside defendant's pants exceeded the scope of defendant's consent. The dissent concluded that because a reasonable person would expect a search under these circumstances to include actions like those taken by this officer, the search was not beyond the scope of defendant's consent.

On appeal, the State maintains that the dissent correctly determined that the search did not exceed the scope of the consent. The defendant argues that it did. We agree.

The Fourth Amendment protects citizens from unreasonable searches and seizures, but permits searches to which a suspect consents. *See Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585 (1967) (stating that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions" (footnote call number omitted)). This Court has also held that by waiver and consent to search "free from coercion, duress or fraud, and not given merely to avoid resistance," a defendant relinquishes the protection of the Fourth Amendment, against an unlawful search and seizure. *State v. Little*, 270 N.C. 234, 239, 154 S.E.2d 61, 65 (1967) (citations omitted).

"The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 250-51, 114 L. Ed. 2d 297, 302 (1991) (citations omitted). The United States Supreme Court has recently affirmed that passengers searched during traffic stops may challenge the constitutionality of those searches. *Brendlin v. California*, —— U.S. ——, ——, 127 S. Ct. 2400, 2406, 168 L. Ed. 2d 132, 139 (2007) (noting that the Court has never indicated "any distinction between driver and passenger that

would affect the Fourth Amendment analysis" of standing to challenge a search of one's person).

To determine whether defendant's general consent to be searched for weapons or drugs encompassed having his pants and underwear pulled away from his body so that his genital area could be examined with a flashlight, we consider whether a reasonable person would have understood his consent to include such an examination. *Jimeno*, 500 U.S. at 251, 114 L. Ed. 2d at 302.

This Court has not written an opinion specifically addressing a similar consent search, but it has adopted a dissent from the Court of Appeals in a factually similar case involving a search based on probable cause. *State v. Smith*, 342 N.C. 407, 407, 464 S.E.2d 45, 46 (1995). In *State v. Smith*, the Court of Appeals granted a new trial, holding a search based on probable cause and exigent circumstances unreasonable because the scope and manner of the search were "intolerable." 118 N.C. App. 106, 116, 454 S.E.2d 680, 686, *rev'd per curiam on other grounds*, 342 N.C. 407, 464 S.E.2d 45 (1995), *cert. denied*, 517 U.S. 1189, 134 L. Ed. 2d 779 (1996). Although the defendant in *Smith* did not give consent, the officers had probable cause and exigent circumstances, as well as a specific tip from an informant that defendant "would have the cocaine concealed in his crotch or under his crotch." *Id.* at 112-13, 454 S.E.2d at 684-85. This Court reversed the Court of Appeals for the reasons stated in the dissenting opinion, holding that the scope of the search was not unreasonable. *Smith*, 342 N.C. at 407, 464 S.E.2d at 46. We conclude that *Smith* is inapposite in our evaluation of this search based on consent.

Several cases from other jurisdictions, while not binding upon this Court, have discussed the reasonableness of similar consent searches. "A suspect's consent can impose limits on the scope of a search in the same way as do the specifications of a warrant." *United States v. Milian-Rodriguez*, 759 F.2d 1558, 1563 (11th Cir.) (citation omitted), *cert. denied*, 474 U.S. 845, 88 L. Ed. 2d 112 (1985). Even when an individual gives a general consent without express limitations, the scope of a permissible search has limits. It is constrained by the bounds of reasonableness: what the reasonable person would expect. *United States v. Blake*, 888 F.2d 795, 800-01 (11th Cir. 1989). In *Blake*, the court affirmed the trial court's ruling that "the consent given by the defendants allowing the officers to search their 'persons' could not, under the circumstances, be construed as authorization for the officers to touch their genitals in the middle of a public area." *Id.* at 800. The court went on to explain that "it cannot be said that a rea-

sonable individual would understand that a search of one's person would entail an officer touching his or her genitals." *Id.* at 800-01. *See also Justice v. City of Peachtree*, 961 F.2d 188, 191 (11th Cir. 1992) (citing *Doe v. Calumet City, Ill.*, 754 F. Supp. 1211, 1218 (N.D. Ill. 1990) ("[D]eeply imbedded in our culture . . . is the belief that people have a reasonable expectation not to be unclothed involuntarily, to be observed unclothed or to have their 'private' parts observed or touched by others." (footnote call number omitted)).

The United States Supreme Court has said that the "constant element in assessing Fourth Amendment reasonableness in consent cases is the great significance given to widely shared social expectations." *Georgia v. Randolph*, 547 U.S. 103, 111, 164 L. Ed. 2d 208, 220 (2006). The search of these intimate areas would surely violate our widely shared social expectation; these areas are referred to as "private parts" for obvious reasons.

Although the individual's subjective understanding of the scope of his or her general consent to search is not controlling, we note that defendant evidently did not expect this search by flashlight to occur. Defendant said "Whoa" when the officer pulled out his waistband to look, and the court found as fact that defendant objected when the officer "pulled Defendant's sweatpants away from his body and trained his flashlight on Defendant's groin area." His subjective response, while not dispositive of the reasonableness of the search, is an indication that it exceeded his expectations.

The State and the dissent cite *United States v. Rodney*, 956 F.2d 295, 298 (D.C. Cir. 1992), for the proposition that, in a search for drugs, a suspect could reasonably expect some search of his genital area, such as "a continuous sweeping motion over [the suspect's] outer garments." The State and the dissent contend that such touching is no less intrusive than the flashlight-illuminated visual search conducted here.

In *Jimeno*, the United States Supreme Court observed that "the scope of a search is generally defined by its expressed object." 500 U.S. at 251, 114 L. Ed. 2d at 303 (citing *United States v. Ross*, 456 U.S. 798, 72 L. Ed. 2d 572 (1982)). The following year in *Rodney*, the D.C. Circuit noted that drug dealers frequently hide contraband in the genital area, and thus, a "request to conduct a body search for drugs reasonably includes a request to conduct some search of that area." 956 F.2d at 298. The *Rodney* court specifically held "only that [the defendant's] generalized consent authorized the kind of 'traditional frisk

search' undertaken here." *Id.* The court noted that it "express[ed] no view on questions involving putatively consensual searches of a more intrusive nature," such as a search involving "direct 'frontal touching' " of a suspect's genitals as disapproved in *Blake*. *Id.* However, *Rodney*, a federal case, is not binding on this Court, and we have never addressed the issue of whether a deliberate touching of a suspect's genitals through clothing exceeds the scope of a permissive search. Accordingly, we are considering for the first time the question of whether the scope of a general consent search necessarily includes consent for the officer to move clothing in order to observe directly the genitals of a clothed suspect.

We conclude here that a reasonable person in defendant's circumstances would not have understood that his general consent to search included allowing the law enforcement officer to pull his pants and underwear away from his body and shine a flashlight on his genitals. *See Jimeno*, 500 U.S. at 251, 114 L. Ed. 2d at 302. Although these events occurred at 3:30 a.m., the search occurred in the parking lot of an apartment complex, as opposed to a secluded area or police station. Both Officers Correa and Herrera were present during the search. The record does not indicate that the officers asked defendant to step behind a car door, used their bodies to screen defendant from public view, or took other action to shield defendant during the search, as the officers did in *Smith*. 118 N.C. App. at 109, 454 S.E.2d at 682. Nor did they ask defendant to clarify the scope of his consent. Officer Correa testified that he was "not really expecting to find anything, honestly" during his search of defendant, unlike in *Smith* where the officers had specific information that cocaine was hidden in the defendant's crotch. *Id.* at 112-13, 454 S.E.2d at 684.

We conclude defendant's general consent to search did not authorize the officer to employ the very intrusive measures undertaken here. In concluding otherwise and denying defendant's motion to suppress, the trial court focused on reasonableness from the officer's perspective, rather than on the reasonable expectations of the person in defendant's circumstances. *Jimeno*, 500 U.S. at 251, 114 L. Ed. 2d at 302 ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?").

Because today's decision is necessarily predicated on its facts, *see United States v. Drayton*, 536 U.S. 194, 201, 153 L. Ed. 2d 242, 252 (2002) ("per se rules are inappropriate in the Fourth Amendment con-

text," as "the proper inquiry necessitates a consideration of 'all the circumstances surrounding the encounter.' ") (quoting *Florida v. Bostick*, 501 U.S. 429, 439, 115 L. Ed. 2d 389, 402 (1991)), we observe that different actions by the officer could have led to a different result. We conclude that the defendant, acting as a "reasonable person," would not have understood that his general consent to a search permitted the officer to pull his pants away and look into his genital area with a flashlight. Accordingly, the Court of Appeals correctly decided that the trial court erred by denying defendant's motion to suppress and correctly held that, as a result, defendant should receive a new trial.

AFFIRMED.

Justice NEWBY dissenting.

The issue presented in this case is whether the trial court reasonably determined that a brief and discreet look into defendant's pants by a law enforcement officer of the same sex was within the scope of defendant's second general consent to a search of his person for drugs. Federal constitutional law requires this decision to be made using a case by case factual analysis, such as the one conducted by the trial court. Although the majority agrees a case by case approach is appropriate, its analysis implies a general consent can never be sufficient. United States Supreme Court precedent does not permit such a general prohibition. The majority also wrongly applies that Court's test by focusing on defendant's perspective rather than that of a third party observer and incorrectly compares the consent search in this case to a probable cause search. Because the record supports the trial court's conclusion that the visual inspection was within the scope of the second consent given in this case, I respectfully dissent.

As defendant has not objected to the trial court's findings of fact, our review of this evidentiary ruling is limited to determining whether those factual findings support the trial court's conclusions of law. *State v. Cooke*, 306 N.C. 132, 291 S.E.2d 618 (1982). This Court "accords great deference to the trial court in this respect because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision." *Id.* at 134, 291 S.E.2d at 619-20. In contrast, " '[t]he appellate court is much less favored because it sees only a cold, written record.' " *Id.* at 135, 291 S.E.2d at 620 (quoting

State v. Smith, 278 N.C. 36, 41, 178 S.E.2d 597, 601, *cert. denied*, 403 U.S. 934, 91 S. Ct. 2266, 29 L. Ed. 2d 715 (1971)).

"The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S. Ct. 1801, 1803-04, 114 L. Ed. 2d 297, 302 (1991) (citations omitted). In *Jimeno*, the United States Supreme Court addressed whether a search of a closed container found within the defendant's vehicle was within the scope of defendant's general consent to search the vehicle. *Id.* at 249-50, 111 S. Ct. at 1803, 114 L. Ed. 2d at 301-02. After noting that "[t]he scope of a search is generally defined by its expressed object," the Court examined the exchange between the police officer and the defendant. *Id.* at 251, 111 S. Ct. at 1804, 114 L. Ed. 2d at 303 (citing *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982)). The Court specifically observed that the defendant "did not place any explicit limitation on the scope of the search," that the officer informed the defendant he would be looking for narcotics in the defendant's vehicle, and that "[a] reasonable person may be expected to know that narcotics are generally carried in some form of a container." *Id.* In light of this exchange, the Court determined "it was objectively reasonable for the police to conclude that the general consent to search [the defendant's] car included consent to search containers within that car which might bear drugs." *Id.* No additional, specific consent was necessary.

As indicated by the trial court's findings of fact, all of the factors the Supreme Court found relevant in *Jimeno* are present in this case. Officer Correa sought consent to search defendant for drugs, and defendant provided a general consent without any limitation. Moreover, just as "[a] reasonable person may be expected to know that narcotics are generally carried in some form of a container," *id.*, a reasonable person may be expected to understand that drug "[d]ealers frequently hide drugs near their genitals," *United States v. Rodney*, 956 F.2d 295, 297 (D.C. Cir. 1992) (citations omitted).

Additional aspects of the exchange between Officer Correa and defendant indicate that Officer Correa's search was within the scope of defendant's consent. Officer Correa recognized defendant because he had previously received an anonymous tip that defendant was a drug dealer. The search occurred shortly after 3:30 a.m. in an area known for illegal drugs, and the apartment complex parking lot was

dark enough that Officer Correa needed to shine his spotlight on the car and use a flashlight to look inside defendant's pants. As a result, the search was conducted in relative privacy.

Finally, defendant had opportunities to limit or withdraw his consent that were not present in *Jimeno*. After Officer Correa finished his initial pat-down and frisk of defendant, he talked to defendant about the large amount of money he found in defendant's pocket. When Officer Correa requested permission to search defendant for a second time, defendant was given another opportunity to deny or limit consent, but did not. Officer Correa began his second search by looking in the back of defendant's pants, then moved his hands from back to front along defendant's waistband before looking in the front of defendant's pants. Although he chose not to, defendant was free to withdraw or limit his consent for the second search at any time before Officer Correa noticed the pill bottle in defendant's genital area. The majority asserts that defendant's verbal response to the search shows Officer Correa's action was unexpected. However, the trial court's undisputed finding of fact states that defendant objected to the search only *after* the police officers spotted the container of drugs, not *when* Officer Correa began looking in defendant's pants. As the trial court noted, "[d]efendant's attempt to retract his consent to search occurred only after [Officer] Correa and [Officer] Herrera found the pill bottle hidden in [d]efendant's underwear."

In short, after examining the exchange between Officer Correa and defendant, the trial court correctly determined that the search performed by Officer Correa was within the scope of defendant's consent. It was objectively reasonable for Officer Correa to conclude defendant's unlimited, general consent permitted a brief look into defendant's pants during the second search. Under *Jimeno*, reasonableness must be determined based on an objective standard. 500 U.S. at 250-51, 111 S. Ct. at 1803-04, 114 L. Ed. 2d at 302; *see Rodney*, 956 F.2d at 297 (treating the "typical reasonable person" referenced in *Jimeno* as an observer instead of the officer or the suspect). The majority incorrectly asserts that *Jimeno* requires the scope of consent to be determined from the perspective of the suspect. Asking what *defendant*, *acting as a reasonable person*, would have *understood that his general consent to a search permitted* is different from asking "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Jimeno*, 500 U.S. at 251, 111 S. Ct. at 1803-04, 114 L. Ed. 2d at 302. Indeed, because a defendant who objects to a search as beyond the scope of

his consent will always argue he did not understand his consent included the challenged search, it is difficult to comprehend how the majority's standard is objective at all. The majority admits that its test includes consideration of defendant's "subjective response" to the finding of drugs on his person. On the other hand, it could be readily maintained that, as a third party observer, the trial court is in the best position to determine the reasonableness of the search in light of the exchange. *See Cooke*, 306 N.C. at 134-35, 291 S.E.2d at 619-20.

Subsequent cases applying *Jimeno* confirm that the evidence is sufficient to support the trial court's conclusion that the search conducted here was within the scope of defendant's general consent. In *Rodney*, the United States Court of Appeals for the D.C. Circuit applied *Jimeno* to a fact pattern involving the defendant's general consent to search his body for drugs. The officer's search, which was conducted outside a Washington, D.C. bus station, "involved a continuous sweeping motion over [the defendant's] outer garments, including the trousers covering his crotch area." *Rodney*, 956 F.2d at 296, 298. The officer felt "small, rock-like objects" in the defendant's genital area which were eventually determined to be a cocaine base. *Id.* at 296. Although the court indicated a reluctance to apply *Jimeno* "unflinchingly" in the context of a search of a person, it concluded the defendant's general consent to a body search for drugs authorized the search performed by the officer because "[d]ealers frequently hide drugs near their genitals" and the search was "no more invasive than the typical" *Terry* pat-down frisk for weapons. *Id.* at 297-98; *see Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The majority distinguishes *Rodney* because that case involved a pat-down and frisk instead of a visual look. However, *Rodney* did not hold that only searches involving a thorough pat-down and frisk could be within the scope of a general consent. Instead, *Rodney* listed three types of searches that might fall into a more intrusive category requiring specific consent: full body cavity searches, searches involving "direct ' "frontal touching" ' " of the suspect's genitals, and searches by police officers who are not of the same sex as the suspects. 956 F.2d at 298. *Rodney* did not conclude a search like the one conducted here should be considered intrusive enough to require specific consent.

The majority does not suggest that *Rodney* was incorrectly decided. Accordingly, the question arises whether looking into a suspect's pants is more or less intrusive than touching a suspect's genitals through clothing. The United States Court of Appeals for the

Eleventh Circuit has addressed this issue. That court held that a search in a public airport terminal beginning with a frontal touching of a defendant's genitals through clothing exceeded the scope of the general consent. *United States v. Blake*, 888 F.2d 795, 801 (11th Cir. 1989). However, in a later case, that court, bound by its precedent in *Blake*, concluded that "a brief and discreet look into the pants of a suspect by an officer of the same sex" did not exceed the scope of a general consent to search for drugs. *Hudson v. Hall*, 231 F.3d 1289, 1298 (11th Cir. 2000). Instead, *Hudson* distinguished the search in *Blake* as more intrusive than a quick look into a suspect's pants. *Id.* Although *Hudson* was a 42 U.S.C. § 1983 civil suit, it directly addressed the question at issue in this case: whether a suspect's general consent to a body search for drugs may include a consent to a brief look into the suspect's pants. *See Thirty-First Annual Review of Criminal Procedure*, 90 Geo. L.J. 1087, 1176 n.246 (2002) (citing *Hudson* as applicable in the criminal context for the proposition that "when no limit [is] placed on consent to search [a] person for drugs or weapons, police can search where drugs and weapons [are] kept on [the] person, including inside defendant's pants"); *see also Kidd v. Commonwealth*, 38 Va. App. 433, 447, 565 S.E.2d 337, 344 (2002) (finding a suspect's general consent to a search of his body permitted the officer to pull away the suspect's underwear and look inside).

The majority opinion provides no application of the facts of this case to the factors found relevant in *Jimeno* and the federal cases applying it. Instead, it compares Officer Correa's search with the search conducted in *State v. Smith*, 342 N.C. 407, 464 S.E.2d 45 (1995), *rev'g per curiam* 118 N.C. App. 106, 454 S.E.2d 680 (1995), *cert. denied* 517 U.S. 1189, 116 S. Ct. 1676, 134 L. Ed. 2d 779 (1996), a case involving a probable cause search. This comparison is not useful because as the majority correctly contends elsewhere in its opinion, *Smith* is inapposite. Resolution of this case hinges on whether there was sufficient evidence to support the trial court's conclusion that Officer Correa's search of defendant was within the scope of defendant's consent, not whether the search would have been reasonable if based on probable cause.[1]

1. Moreover, assuming arguendo that it is helpful to compare Officer Correa's search to the search in *Smith*, the majority incorrectly suggests the search in *Smith* was more private. In *Smith*, the officer initially used his own body and a car door to shield the defendant from public view. 118 N.C. App. at 109, 454 S.E.2d at 682. However, when the defendant refused to cooperate, the officer " 'walked to the front of [defendant] and held open his underwear . . . and slid it down.' " *Id.* (alterations in original). After noticing a small paper towel under the defendant's scrotum the officer " 'pulled his underwear farther.' " *Id.* More importantly, the search this Court found

The majority also implies its decision is limited to the facts of this case. In actuality, the majority's analysis is far reaching and effectively dictates that a brief and discreet look into a suspect's pants can never be within the scope of that suspect's general consent to a search for drugs. The majority states "different actions by the officer could have led to a different result" and then suggests several different actions Officer Correa could have taken. The majority believes Officer Correa should have taken steps to shield defendant from onlookers or taken defendant to a "secluded area" or a police station even though there is no evidence that anyone was present during the search besides the two male officers, the defendant, and the driver; and the trial court specifically stated there was "no opportunity for onlookers." Further, the majority believes Officer Correa should have asked defendant to clarify the scope his consent. Finally, the majority might have reached a different result if Officer Correa had specific information that drugs were hidden in defendant's genital area.

It appears the majority believes a brief and discreet look into a suspect's pants would be within the scope of a *general consent* to a search for drugs only if: 1) the officer obtains the suspect's *specific consent* to go to a secluded area or police station; 2) the officer obtains the suspect's *specific consent* to conduct a visual inspection; or 3) the officer has probable cause to search the suspect. Rather than conducting a case by case factual analysis of the scope of the general consent given by defendant, the majority has determined that in all cases involving a brief and discreet look into a suspect's pants, the United States Constitution requires specific consent or probable cause. This approach is inconsistent with federal precedent.

In conclusion, the trial court's findings of fact support its conclusion of law that Officer Correa's search of defendant was within the scope of defendant's consent.

Chief Justice PARKER joins in this dissenting opinion.

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reasonable in *Smith*, when it reversed the Court of Appeals opinion to the contrary, occurred at 1:30 a.m. in the left turn lane of an intersection. *Id.* I cannot agree with the majority that a 3:30 a.m. search in a private apartment complex parking lot is less private than a 1:30 a.m. search in a street intersection. Especially when the first search involves a look into the suspect's pants, but the second search involves sliding down the suspect's underwear.

RAY WALKER AND BETTY STATEN v. FLEETWOOD HOMES OF NORTH CAROLINA, INC., A NORTH CAROLINA CORPORATION

No. 223A06

(Filed 7 December 2007)

1. Unfair Trade Practices— purchase of mobile home for daughter—standing of daughter

The daughter of the purchaser of a mobile home had standing to bring an unfair and deceptive trade practices claim where the father made the down payment and financed the remaining amount with a "buy for" transaction. As the person who selected the interior details for the home, who planned to live in it, and who was going to make the monthly installment payments, she was the consumer and suffered the resulting injury when the home was defective.

2. Unfair Trade Practices— violation of regulations—not automatically an unfair practice

A regulatory violation may offend N.C.G.S. § 75-1.1, but does not automatically result in an unfair or deceptive trade practice. Where a violation of statutes pertaining to the N.C. Manufactured Housing Board would not be an unfair trade practice as a matter of law, neither would violation of a licensing regulation promulgated by the Department of Insurance based upon those statutes.

3. Unfair Trade Practices— findings—violation of regulation—insufficient basis for finding unfair practice

An unfair and deceptive trade practices claim arising from a defective mobile home was remanded for additional findings where the trial initially submitted to the jury questions concerning repair of the home drawn from a licensure regulation. Violation of that regulation is not a sufficient basis for conclusions as to whether defendant's actions were deceptive, immoral, unethical, oppressive, unscrupulous, or substantially injurious.

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. 668, 627 S.E.2d 629 (2006), affirming in part and dismissing in part an appeal from an order entered 15 March 2004 by Judge Charles H. Henry in Superior Court, Craven County, and remanding for a new trial on damages. On

29 June 2006, the Supreme Court allowed defendant's petition for discretionary review as to additional issues. Heard in the Supreme Court 8 January 2007.

William F. Ward, III, P.A., by William F. Ward, III, for plaintiff-appellees.

Womble Carlyle Sandridge & Rice PLLC, by Clayton M. Custer and Philip J. Mohr, for defendant-appellant.

EDMUNDS, Justice.

Defendant Fleetwood Homes of North Carolina manufactured and delivered a defective mobile home to plaintiffs Ray Walker and Betty Staten. We affirm the Court of Appeals determination that Staten had standing to bring an unfair and deceptive trade practices claim under N.C.G.S. § 75-1.1 (2005). However, we modify the Court of Appeals opinion to hold that while defendant's violations of a licensure regulation may constitute violations of N.C.G.S. § 75-1.1, those violations are not *per se* unfair or deceptive trade practices. Accordingly, we remand this matter for additional findings of fact as to plaintiffs' claims.

In August 2001, plaintiff Ray Walker purchased a new mobile home from New Way Housing (New Way), a retailer in New Bern, North Carolina. New Way specially ordered the construction and delivery of the home from defendant Fleetwood Homes of North Carolina (Fleetwood). Walker supplied a down payment of $9,620.00 and financed the remaining $36,605.00 with a retail installment contract from a Delaware loan corporation. Although the contract recorded Walker as the borrower for the home, his purchase was a "buy for" transaction on behalf of his adult daughter, plaintiff Betty Staten, who was receiving Social Security disability benefits as a result of panic attacks. In such a "buy for" arrangement, the customer purchases a home on behalf of a beneficiary, who may be responsible for subsequent installment payments. As Walker's beneficiary, Staten planned to live in the home and make the monthly installment payments. When the home was purchased, she selected its interior furnishings and amenities.

Defendant delivered the newly-manufactured mobile home to New Way in September 2001, and New Way installed it soon thereafter. Defendant provided a two-year manufacturer's warranty: "Your new home, including the steel structure beneath the floor of the home, plumbing, heating, electrical systems, appliances, and all

equipment installed by the Fleetwood Manufacturing Center, is warranted, under normal use, to be free from defects in materials and/or workmanship for two years." (Emphasis omitted.) New Way contracted with and relied upon defendant to provide all service and warranty work.

Plaintiffs discovered numerous defects in the construction and installation of the home. Deficiencies included uneven floors, twisted walls, missing front steps, an unsafe fireplace, used kitchen cabinets, gaps in the floor exposing the bathroom plumbing, and partially or fully inoperable windows. Because of these defects, Staten never moved into her new home.

Through New Way, plaintiffs repeatedly requested repairs to the home, and at the beginning of October 2001, one of defendant's employees telephoned Staten. Because she had already arranged to meet with counsel the next Thursday, Staten asked the caller to schedule an appointment to come see the home after that day. It is not apparent from the record whether Staten advised the caller that she was consulting with an attorney, but, at any rate, defendant never called back to reschedule and failed to perform any repairs on the home prior to the filing of plaintiffs' complaint. Plaintiffs attempted to rescind the contract later that month, but New Way refused because the purchase contract allowed for rescission only within three business days after the agreement was signed.

In March 2002, plaintiffs brought claims against New Way, the loan corporation, and defendant Fleetwood. Plaintiffs settled their claims against both New Way and the loan corporation before trial, and in accordance with the settlement, the loan corporation repossessed the home. Plaintiffs proceeded to trial against defendant, and on 6 October 2003, a jury found in favor of plaintiff Walker on his claim for breach of warranty. In addition, on the verdict sheets, the jury found that defendant failed to perform repairs completely and in a workmanlike and competent manner, and also repeatedly failed to respond promptly to plaintiffs' complaints regarding the mobile home. Based on the jury's findings, the trial court determined that defendant committed acts that were defined as unfair and deceptive commercial acts or practices by a regulatory rule of the North Carolina Department of Insurance, 11 NCAC 8.0907 (June 2006). The trial court concluded that as a matter of law, those acts constituted unfair or deceptive trade practices pursuant to N.C.G.S. § 75-1.1. Accordingly, plaintiffs recovered on their claims of unfair and deceptive trade practices (UDTP). The trial court denied defendant's

motions for judgment notwithstanding the verdict and a new trial, and defendant appealed.

On 21 March 2006, a divided Court of Appeals affirmed in part, dismissed in part, and remanded for a new trial on damages. Although the Court of Appeals unanimously affirmed the trial court's denial of defendant's post-verdict motions, the panel split as to whether Staten, as Walker's beneficiary, had standing to bring a UDTP claim. *Walker v. Fleetwood Homes of N.C., Inc.*, 176 N.C. App. 668, 627 S.E.2d 629 (2006). The Court of Appeals majority concluded that Staten had standing, while the dissenting judge argued that Staten did not fall within the term "any person" as used in N.C.G.S. § 75-16. Defendant appealed by right to this Court based on the dissent, and also filed a petition for discretionary review. We allowed review of two issues: first, whether violation of a regulation issued by the North Carolina Department of Insurance, 11 NCAC 8.0907, constitutes a *per se* unfair or deceptive trade practice; and second, whether the jury's findings of fact were sufficient for the trial court to conclude that a UDTP occurred as a matter of law. *Walker v. Fleetwood Homes of N.C., Inc.*, 360 N.C. 545, 635 S.E.2d 61 (2006).

[1] Defendant initially contends that Staten lacks standing to maintain a UDTP claim because she was not a "buyer" of the home under Article 9A of Chapter 143 of the North Carolina General Statutes ("North Carolina Manufactured Housing Board—Manufactured Home Warranties").[1] Defendant cites N.C.G.S. § 143-143.12(c) (2005), which provides that "[a]ny buyer of a manufactured home who suffers any loss or damage by any act of a licensee that constitutes a violation of this Article may institute an action to recover against the licensee and the surety." This statutory section, titled "Bond Required," governs surety bonds that a manufacturer, dealer, or set-up contractor must furnish as licensees of the North Carolina Manufactured Housing Board and allows a buyer of a manufactured home who suffers "any loss or damage by any act of a licensee that constitutes a violation of this Article" to bring an action against those surety bonds for recovery. *Id.* A "buyer" is defined under the Article as "[a] person who purchases at retail from a dealer or manufacturer a manufactured home for personal use as a residence or other related

1. Article 9A was rewritten by the General Assembly effective 1 April 2006 and 1 July 2006. Act of Aug. 23, 2005, ch. 451, sec. 7, 2005 N.C. Sess. Laws 1796, 1803. Because the instant action was filed before the effective dates of the revision, the previous version of Article 9A applies to this case.

use." N.C.G.S. § 143-143.9(2) (2005).[2] Defendant argues that only Walker was the "buyer" of the mobile home and that his "buy for" arrangement on behalf of his daughter Staten did not bring her within the statutory definition. Defendant argues that, as a result, Staten lacks standing to bring a claim.

As the Court of Appeals majority correctly noted, however, N.C.G.S. § 143-143.12 is not an exclusive remedy. *Walker*, 176 N.C. App. at 673, 627 S.E.2d at 633. An injured buyer can bring a suit against the surety bond under that statute, but other injured parties are not precluded from proceeding under other statutes. Chapter 75 of our General Statutes, which prohibits unfair and deceptive trade practices, provides that: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C.G.S. § 75-1.1(a). Any consumer injured by unfair or deceptive trade practices can bring a UDTP claim:

> If *any person* shall be injured . . . by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person . . . so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

Id. § 75-16 (2005) (emphasis added); *see also Marshall v. Miller*, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981) ("In enacting G.S. 75-16 . . . , our Legislature intended to establish an effective private cause of action for *aggrieved consumers* in this State." (emphasis added)).

The majority cited *Hyde v. Abbott Laboratories, Inc.*, 123 N.C. App. 572, 473 S.E.2d 680, *disc. review denied*, 344 N.C. 734, 478 S.E.2d 5 (1996), an antitrust class action lawsuit, in which the Court of Appeals discussed the term "any person" as used in N.C.G.S. § 75-16. Before that statute was revised in 1969, it began: "If the business of any person, firm or corporation shall be broken up, destroyed or injured . . . ." *Id.* at 576, 473 S.E.2d at 683 (emphasis omitted). After the revision, the statute began with the formulation that remains current: "If any person shall be injured or the business

2. Although the definition of "buyer" in this section was amended by the General Assembly effective 1 April 2006, for the reason stated in Footnote 1, the amendment does not affect our analysis.

of any person, firm or corporation shall be broken up, destroyed or injured . . . ." *Id.* at 577, 473 S.E.2d at 683 (emphasis omitted). Comparing the two, the Court of Appeals in *Hyde* concluded that "[a]s it is currently written, N.C.G.S. § 75-16 provides standing to *any person* who suffers any injury, as well as for any business injury." *Id.* at 578, 473 S.E.2d at 684. Accordingly, the *Hyde* plaintiffs, who bought infant formula from parties other than the defendant manufacturer, had standing to sue as "indirect purchasers." *Id.* at 577, 473 S.E.2d at 684.

Although we acknowledge that *Hyde* deals with an antitrust class action lawsuit and thus is not directly applicable to the case at bar, we agree with the analysis conducted by the Court of Appeals majority and its interpretation of "any person" in N.C.G.S. § 75-16. Therefore, as the person who selected the interior details for the home, who planned to live in the home, and who was going to make the monthly installment payments, Staten was a consumer of the mobile home supplied by defendant. When defendant supplied a defective home, Staten suffered a resulting injury. Accordingly, she has standing as a "person . . . injured" under N.C.G.S. § 75-16.

[2] Defendant next contends that its violation of a Department of Insurance regulation, 11 NCAC 8.0907, does not constitute a *per se* unfair or deceptive trade practice. The regulation at issue was promulgated under statutory authority conferred by N.C.G.S. §§ 143-143.10 and 143-143.13 (2005), both of which pertain to the North Carolina Manufactured Housing Board. Section 143-143.10 addresses the creation, composition, powers, and duties of the Manufactured Housing Board. Section 143-143.11(a) (2005) provides that it is unlawful for "any manufactured home manufacturer, dealer, salesperson, or set-up contractor" to conduct business without obtaining a license from the Board, and § 143-143.13 sets out grounds for denying, suspending, or revoking these licenses. In particular, § 143-143.13(a)(7) directs that a license may be denied, suspended, or revoked if a licensee uses "unfair methods of competition or commit[s] unfair or deceptive acts or practices."

Applying this statutory authority, Department of Insurance regulation 11 NCAC 8.0907 delineates unfair methods of competition or unfair or deceptive commercial acts or practices for purposes of licensure penalties. These methods, acts, and practices include but are not limited to:

(1) Failure to perform repairs, alterations and/or additions completely or in a workmanlike and competent manner.

(2) Repeated failure to give timely notice of inability to appear for a scheduled repair.

(3) Representing used manufactured homes, appliances, or fixtures as new or failure to identify used appliances, fixtures and/or equipment in new manufactured homes.

(4) Repeated failure to respond promptly to consumer complaints and inquiries.

11 NCAC 8.0907(1)-(4).

The trial court submitted special interrogatories to the jury concerning plaintiffs' UDTP claims. Several of the interrogatories were based upon subsections (1) and (4) of 11 NCAC 8.0907:

Issue Four: Did the defendant fail to perform repairs completely and in a workmanlike and competent manner?

Issue Five: Was the defendant's failure to perform repairs completely and in a workmanlike and competent manner caused by the conduct of the plaintiffs?

Issue Six: Did the defendant repeatedly fail to respond promptly to the plaintiffs' complaints regarding the manufactured home?

Issue Seven: Was the defendant's repeated failure to respond promptly to the plaintiffs' complaints about the manufactured home caused by the conduct of the plaintiffs?

The jury found for plaintiffs on the interrogatories, and on the bases of these findings, the trial judge entered an order concluding that defendant committed unfair or deceptive trade practices in violation of N.C.G.S. § 75-1.1:

1. The acts so found by the jury in Issues Four and Six to have been done by the defendant Fleetwood are specifically delineated and defined as unfair and deceptive commercial acts or practices in the Regulatory Rules for the North Carolina Manufactured Housing Board as set out in Section 11 N.C.A.C. 8.0907 in the Administrative Code.

2. North Carolina General Statute § 143-143.13(a)(7) sets out using unfair and deceptive acts or practices as defined in 11

N.C.A.C. 8.0907 as a ground for denying, suspending or revoking the license of a manufacturer of manufactured housing.

3. The Manufacturing Housing Board is the regulatory licensing agency within the N.C. Department of Insurance governing manufacturers of manufactured housing charged with the application of these regulations.

4. The acts so found by the jury in Issues Four and Six occurred in the commerce of and affecting commerce in the State of North Carolina.

5. The acts so found constitute, as a matter of law, unfair or deceptive acts or practices in violation of North Carolina General Statute § 75-1.1.

In affirming the trial court, the Court of Appeals stated " 'that the violation of regulatory statutes which govern business activities may also be a violation of N.C. Gen. Stat. § 75-1.1 whether or not such activities are listed specifically in the regulatory act as a violation of N.C. Gen. Stat. § 75.1-1.' " *Walker*, 176 N.C. App. at 672, 627 S.E.2d at 632 (quoting *Drouillard v. Keister Williams Newspaper Servs., Inc.*, 108 N.C. App. 169, 172, 423 S.E.2d 324, 326 (1992), *disc. review denied and cert. dismissed*, 333 N.C. 344, 427 S.E.2d 617 (1993)). In *Walker*, the Court of Appeals concluded that "the trial court properly decided that defendant's violations of the Board's regulation regarding UDTP constitute factors sufficient to support a claim under N.C. Gen. Stat. § 75-1.1." *Id.*

Defendant contends the Court of Appeals erroneously concluded that a violation of the North Carolina Administrative Code constitutes a *per se* unfair or deceptive trade practice under N.C.G.S. § 75-1.1. Defendant argues that its violations of subsections (1) and (4) of 11 NCAC 8.0907, regulations which pertain to the licensing of mobile home manufacturers and dealers, do not necessarily establish a Chapter 75 claim. We agree. As the Court of Appeals recognized in *Drouillard*, a violation of a regulatory statute which governs business activities "may also be a violation of N.C. Gen. Stat. § 75-1.1." 108 N.C. App. at 172, 423 S.E.2d at 326. While such a regulatory violation *may* offend N.C.G.S. § 75-1.1, the violation does not automatically result in an unfair or deceptive trade practice under that statute.

Although this Court has previously held that violations of some statutes, such as those concerning the insurance industry, can constitute unfair and deceptive trade practices as a matter of law, *see*,

e.g., *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 71, 529 S.E.2d 676, 683 (2000) (holding that "conduct that violates subsection (f) of N.C.G.S. § 58-63-15(11) constitutes a violation of N.C.G.S. § 75-1.1, as a matter of law"), we decline to hold that a violation of a licensing regulation is a UDTP as a matter of law. In *Gray*, the insurance statute at issue defined in detail unfair methods of setting claims and unfair and deceptive acts or practices in the insurance industry, thereby establishing the General Assembly's intent to equate a violation of that statute with the more general provision of § 75-1.1. In contrast, the regulation at issue here was promulgated by the Department of Insurance pursuant to N.C.G.S. §§ 143-143.10 and 143-143.13. Because a violation of these statutes would not constitute a UDTP as a matter of law, we do not believe that a violation of a licensing regulation based upon those statutes is necessarily a UDTP.

Nevertheless, a regulatory licensure violation may be evidence of a UDTP. Thus, even though defendant's violations of subsections (1) and (4) of 11 NCAC 8.0907 are not unfair or deceptive trade practices *per se*, those violations are potentially relevant to any claim that defendant violated § 75-1.1.

[3] Defendant next contends that the facts found by the jury in its interrogatories were insufficient to demonstrate that defendant committed a UDTP. "Whether an act found by the jury to have occurred is an unfair or deceptive practice which violates N.C.G.S. § 75-1.1 is a question of law for the court." *Ellis v. N. Star Co.*, 326 N.C. 219, 226, 388 S.E.2d 127, 131 (1990) (citing *Hardy v. Toler*, 288 N.C. 303, 308-09, 218 S.E.2d 342, 345-46 (1975)). "Ordinarily, once the jury has determined the facts of a case, the court, based on the jury's findings, then determines, as a matter of law, whether the defendant engaged in unfair or deceptive practices in or affecting commerce." *Gray*, 352 N.C. at 68, 529 S.E.2d at 681.

Here, the jury's answers to interrogatories based upon subsections (1) and (4) of 11 NCAC 8.0907 indicated that defendant failed to perform repairs completely and in a workmanlike and competent manner, and that defendant repeatedly failed to respond promptly to plaintiffs' complaints regarding those repairs. On the basis of these findings of fact by the jury, the trial court determined as a matter of law that defendant committed unfair or deceptive trade practices under § 75-1.1.

However, "[i]n order to establish a violation of N.C.G.S. § 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2)

in or affecting commerce, and (3) which proximately caused injury to plaintiffs." *Id.*; *see also* N.C.G.S. § 75-1.1(a). Only the first element is at issue here. "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. "[A] practice is deceptive if it has the capacity or tendency to deceive." *Id.*

The jury determined that Fleetwood breached its express warranty with Walker and awarded Walker $475.00 in damages. Defendant does not appeal the jury's determination. However, defendant contends that the jury's answers to interrogatories four through seven demonstrate nothing more than this breach of warranty. Because a breach of warranty, standing alone, does not constitute a violation of N.C.G.S. § 75-1.1, *see Mitchell v. Linville*, 148 N.C. App. 71, 74, 557 S.E.2d 620, 623 (2001) ("Neither an intentional breach of contract nor a breach of warranty, however, constitutes a violation of Chapter 75."), defendant argues that plaintiffs' UDTP claim fails.

In light of our resolution of this case, we need not reach this issue. As to defendant's pertinent behavior, the jury interrogatories asked only whether defendant failed to perform repairs completely and in a workmanlike and competent manner, and whether defendant repeatedly failed to respond promptly to plaintiffs' complaints. These interrogatories were derived nearly verbatim from a licensure regulation, and violations of this regulation by themselves are insufficient to prove a UDTP claim. On these limited findings of fact, the court had an insufficient basis on which to reach conclusions of law required under § 75-1.1 as to whether defendant's actions were deceptive, immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.

As explained above, the findings by the jury on those interrogatories can be evidence of unfair or deceptive practices and, in combination with other facts, might be sufficient to prove a UDTP claim. The Court of Appeals unanimously ordered a new trial on damages. At this new trial, the trial court may submit to the jury additional interrogatories seeking information which, if found by the jury, may be sufficient to support a finding of fact that defendant committed a UDTP. Accordingly, we remand this case to the Court of Appeals for further remand to the trial court for additional findings of fact on plaintiffs' claims of unfair and deceptive trade practices.

We affirm the Court of Appeals in part, modify in part, and remand this case to that court for further remand to the trial court for additional proceedings not inconsistent with this opinion.

AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED.

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

IN RE: INQUIRY CONCERNING A JUDGE, NOS. 06-083, 06-091, 06-099, AND 06-104
STANLEY L. ALLEN, RESPONDENT

No. 463A07

(Filed 7 December 2007)

Judges— censure of district court judge—violations of Code of Judicial Conduct

A district court judge is censured for violations of the Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute based upon his actions in (1) verbally ordering county magistraties to set unsecured bond for a former client in the amount of $500.00 in each of three cases, (2) requesting that the Chief District Court Judge "go easy" on his former client when setting bond because he had arranged for a bail bond firm to post bond for the former client and needed the former client out of jail to perform air conditioning work for him, and (3) signing an ex parte order granting the former client emergency temporary custody of three minor children in a pending case.

This matter is before the Court pursuant to N.C.G.S. § 7A-376 upon a recommendation by the Judicial Standards Commission entered 5 September 2007 that respondent Stanley L. Allen, a Judge of the General Court of Justice, District Court Division, State of North Carolina Judicial District Seventeen-A, be censured for conduct in violation of Canons 1, 2A, 2B, 3A(4), 3C(1)(a), and 3D of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376. Calendered for argument in the Supreme Court on 15 November 2007, but determined on the

record without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure and Rule 2(c) of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission.

No counsel for Judicial Standards Commission or respondent.

ORDER OF CENSURE

In a letter dated 18 May 2006, the Judicial Standards Commission (Commission) notified Judge Stanley L. Allen (respondent) that it had ordered a preliminary investigation to determine whether formal proceedings under Commission Rule 9 should be instituted against him. On 24 April 2007, Special Counsel for the Commission filed a complaint alleging in pertinent part:

> 3. The respondent engaged in conduct inappropriate to his judicial office in legal proceedings involving Timothy Dwayne Carter (Carter), who was a former client of the respondent's, and with whom the respondent maintained both a "father-like" and business relationship, as follows:
>
> a) The respondent verbally ordered Rockingham County Magistrate J. Michael Austin, on April 2, 2006, to set bond for Carter in the amount of $500.00 unsecured, in file number 06CR051223;
>
> b) The respondent verbally ordered Rockingham County Magistrate Jason O. Lawrence, on April 3, 2006, to set bond for Carter in the amount of $500.00 unsecured, in file number 06CR051250;
>
> c) The respondent verbally ordered Rockingham County Magistrate William L. Rumley, on April 12, 2006, to set bond for Carter in the amount of $500.00 unsecured, in file number 06CR051420;
>
> d) On April 28, 2006, the [r]espondent approached Chief District Court Judge Frederick B. Wilkins, Jr., in Judge Wilkins's chambers immediately prior to Judge Wilkins opening court, and requested Judge Wilkins "go easy" on Carter when setting bond. The respondent stated he had counseled Carter and that he believed Carter would behave. The respondent stated he had arranged for the bail bond firm, Bond U Out, which rented office space from the respondent, to post bond for Carter. The respond-

ent further stated that Carter was to perform some air conditioning work for the respondent, and the respondent really needed to have Carter out of jail;

e) The respondent signed an Ex Parte Emergency Order And Notice of Hearing, granting emergency temporary custody of three minor children to Timothy Dwayne Carter on April 3, 2006, in the matter of Timothy Dwayne Carter vs. Regina Aileen Carter, Rockingham County file number 06CVD579.

4. The actions of the respondent are in violation of Canons 1, 2A, 2B, 3A(4), 3C(1)(a) and 3D of the North Carolina Code of Judicial Conduct, constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b), and constitute willful misconduct in violation of N.C.G.S. § 7A-376(b).

After serving respondent with a notice of formal hearing concerning the allegations, the Commission conducted a hearing on 10 August 2007, at which respondent waived formal hearing and stipulated to the relevant conduct alleged in the complaint. Respondent further stipulated that such conduct violated Canons 1, 2A, 2B, 3A(4), 3C(1)(a), and 3D of the North Carolina Code of Judicial Conduct and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

On 5 September 2007, the Commission issued its recommendation, concluding on the basis of clear and convincing evidence that respondent's conduct violated Canons 1, 2A, 2B, 3A(4), 3C(1)(a), and 3D of the North Carolina Code of Judicial Conduct and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b). The Commission recommended that this Court censure respondent.

"In reviewing the Commission's recommendations pursuant to N.C.G.S. §§ 7A-376 and 7A-377, this Court acts as a court of original jurisdiction, rather than in its typical capacity as an appellate court." *In re Daisy*, 359 N.C. 622, 623, 614 S.E.2d 529, 530 (2005) (per curiam) (citing *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929 (1979)). We have previously observed that "[s]uch proceedings are not meant 'to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice.' " *Id.* at 624, 614 S.E.2d at 531 (quoting *In re Nowell*, 293 N.C. 235, 241, 237 S.E.2d 246, 250 (1977)).

We conclude that respondent's actions constitute conduct in violation of Canons 1, 2A, 2B, 3A(4), 3C(1)(a), and 3D of the North Carolina Code of Judicial Conduct. Therefore, pursuant to N.C.G.S. §§ 7A-376 and 7A-377 and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, it is ordered that respondent, Stanley L. Allen, be and is hereby censured for violations of the Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

By order of the Court in Conference, this 6th day of December, 2007.

Hudson, J.
For the Court

JAMES WILLIAMS v. CHRISTOPHER VONDERAU

No. 18A07

(Filed 7 December 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 181 N.C. App. 18, 638 S.E.2d 644 (2007), dismissing as moot an appeal from an order entered 25 August 2005 by Judge Shelly S. Holt in District Court, New Hanover County. Heard in the Supreme Court 12 April 2007.

James E. Williams, pro se, plaintiff-appellee.

Bruce Mason and Associates, by James F. Rutherford and Bruce A. Mason, for defendant-appellant.

PER CURIAM.

On the issue of whether more than one incident of harassment is required before a trial court can enter a civil no-contact order under N.C.G.S. § 50C-1(6), the members of the Court are equally divided, with three members voting to affirm and three members voting to reverse. Accordingly, the decision of the Court of Appeals is affirmed without precedential value. *See State v. Harrison*, 360 N.C. 394, 627 S.E.2d 461 (2006); *Crawford v. Commercial Union Midwest Ins. Co.*, 356 N.C. 609, 572 S.E.2d 781 (2002).

The decision of the Court of Appeals that an appeal related to a civil no-contact order is moot once the order expires is reversed. *See In re A.K.*, 360 N.C. 449, 628 S.E.2d 753 (2006).

AFFIRMED IN PART; REVERSED IN PART.

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

MARY NICOLE BOONE VOGLER, WIDOW; MARILYN "SUE ANN" CLYMER, GUARDIAN AD LITEM FOR KRISTIN DAKOTA VOGLER, MINOR CHILD; AND MARK BOONE, GUARDIAN AD LITEM FOR MEGAN NICOLE BOONE, MINOR STEPCHILD; OF BILLY CHARLES VOGLER, DECEASED EMPLOYEE v. BRANCH ERECTIONS COMPANY, INC., EMPLOYER, RELIANCE NATIONAL INSURANCE COMPANY (NOW INSOLVENT), CARRIER, NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, CAMBRIDGE INTEGRATED SERVICES, THIRD-PARTY ADMINISTRATOR, STERLING ADMINISTRATIVE SERVICES AND THE GOFF GROUP, SERVICING AGENTS

No. 128A07

(Filed 7 December 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 181 N.C. App. 457, 640 S.E.2d 419 (2007), affirming an opinion and award filed on 27 July 2005 by the North Carolina Industrial Commission. On 27 June 2007, the Supreme Court allowed defendant-employer's petition for discretionary review of additional issues. Heard in the Supreme Court 14 November 2007.

J. Randolph Ward for defendant-appellee/appellant Branch Erections Company, Inc.

Nelson Mullins Riley & Scarborough LLP, by Christopher J. Blake, for defendant-appellant/appellee North Carolina Insurance Guaranty Association.

PER CURIAM.

As to all issues, the members of the Court are equally divided. Therefore, the Court of Appeals opinion is left undisturbed without precedential value. *See, e.g., Barham v. Hawk*, 360 N.C. 358, 625 S.E.2d 778 (2006).

AFFIRMED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

CB&H BUSINESS SERVICES, L.L.C. v. J.T. COMER CONSULTING, INC. AND CBH PENSIONS, INC.

No. 365A07

(Filed 7 December 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 184 N.C. App. 720, 646 S.E.2d 843 (2007), reversing in part an order entered on 28 July 2006 by Judge Robert P. Johnston in Superior Court, Mecklenburg County granting summary judgment in favor of defendants, and remanding for entry of judgment in plaintiff's favor. Heard in the Supreme Court 15 November 2007.

Hamilton Moon Stephens Steele & Martin, P.L.L.C., by T. Jonathan Adams, for plaintiff-appellee.

Arthurs & Foltz, by Douglas P. Arthurs, for defendant-appellants.

PER CURIAM.

AFFIRMED.

DEVENDRA PATEL, EMPLOYEE v. THE STANLEY WORKS CUSTOMER SUPPORT, EMPLOYER, CONSTITUTION STATE SERVICE COMPANY, CARRIER

No. 445PA06

(Filed 7 December 2007)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 178 N.C. App. 562, 631 S.E.2d 892 (2006), affirming an opinion and award filed on 21 December 2004 by the North Carolina Industrial Commission. Heard in the Supreme Court 16 October 2007.

Charles G. Monnett III & Associates, by Charles G. Monnett, III, for plaintiff-appellee.

Hedrick Eatman Gardner & Kincheloe, L.L.P., by M. Duane Jones, for defendant-appellants.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

DUNN v. STATE

[362 N.C. 80 (2007)]

LESSIE J. DUNN AND ERWIN W. COOK, JR., INDIVIDUALLY AND ON BEHALF OF A CLASS OF ALL OTHERS SIMILARLY SITUATED v. THE STATE OF NORTH CAROLINA, THE NORTH CAROLINA DEPARTMENT OF REVENUE, AND E. NORRIS TOLSON, AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE

No. 605PA06

(Filed 7 December 2007)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 179 N.C. App. 753, 635 S.E.2d 604 (2006), affirming an order certifying a class of taxpayers and appointing the named plaintiffs as class representatives entered 14 June 2005 by Judge Lindsay R. Davis, Jr. in Superior Court, Forsyth County. Heard in the Supreme Court 14 November 2007.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, and Futterman Howard Watkins Wylie & Ashley, CHTD., by John R. Wylie, for plaintiff-appellees.

Roy Cooper, Attorney General, by Gregory P. Roney, Assistant Attorney General, for defendant-appellants.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

STATE OF NORTH CAROLINA v. SAMPSON BRUNSON

No. 623A06

(Filed 7 December 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 180 N.C. App. 188, 636 S.E.2d 202 (2006), finding no error in judgments entered 22 April 2005 by Judge Catherine C. Eagles in Superior Court, Guilford County. Heard in the Supreme Court 13 November 2007.

Roy Cooper, *Attorney General*, *by Richard A. Graham*, *Assistant Attorney General*, *for the State.*

Paul F. Herzog for defendant-appellant.

PER CURIAM.

AFFIRMED.

IN RE E.P., M.P.

[362 N.C. 82 (2007)]

IN THE MATTER OF E.P., M.P., MINOR CHILDREN

No. 298A07

(Filed 7 December 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 183 N.C. App. 301, 645 S.E.2d 772 (2007), affirming an order filed on 6 January 2006 by Judge Wayne L. Michael in District Court, Alexander County. Heard in the Supreme Court 14 November 2007.

Thomas R. Young for petitioner-appellant Alexander County Department of Social Services, and Melanie Cranford for Guardian ad Litem.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for respondent-appellee mother, and Hartsell & Williams, P.A., by Christy E. Wilhelm, for respondent-appellee father.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. TAMON JACOBY LEGINS

No. 310A07

(Filed 7 December 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 184 N.C. App. 156, 645 S.E.2d 835 (2007), finding no error in defendant's trial which resulted in a judgment entered 4 January 2006 by Judge William Z. Wood, Jr. in Superior Court, Forsyth County. Heard in the Supreme Court 15 November 2007.

Roy Cooper, *Attorney General*, *by LaToya B. Powell*, *Associate Attorney General*, *for the State.*

J. Clark Fischer for defendant-appellant.

PER CURIAM.

AFFIRMED.

IN THE MATTER OF T.J.D.W. AND J.J.W.

No. 202A07

(Filed 7 December 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 182 N.C. App. 394, 642 S.E.2d 471 (2007), affirming an amended order signed on 31 July 2006 by Judge Shelly S. Holt in District Court, New Hanover County. Heard in the Supreme Court 13 November 2007.

Dean W. Hollandsworth for petitioner-appellee New Hanover County Department of Social Services.

Elizabeth Boone for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellant mother.

PER CURIAM.

AFFIRMED.

O'MARA v. WAKE FOREST UNIV. HEALTH SCIENCES

[362 N.C. 85 (2007)]

JOSEPH O'MARA, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, LARRY REAVIS; AND JANELLA O'MARA	)	
v.	)	ORDER
WAKE FOREST UNIVERSITY HEALTH SCIENCES; ET AL	)	

No. 414P07

The Court allows plaintiffs' petition for discretionary review as to plaintiffs' issues Number 1 and Number 2:

(1) Does a medical malpractice expert's reliance on a national standard of care automatically disqualify the witness from testifying under G.S. § 90-21.12?; and

(2) When a medical malpractice expert testifies to the existence of a national standard of care, and no evidence is presented regarding the congruity between that national standard and the community standard under G.S. § 90-21.12, should it be presumed that the community standard differs from, or instead conforms to, the national one?

Plaintiffs' petition for discretionary review as to the remaining issues is denied.

By order of the Court in Conference, this 6th day of December 2007.

Hudson, J.
For the Court

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

Badrock v. Pickard Case below: 185 N.C. App. 543	No. 457P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-1581)	Denied 12/06/07 **Hudson, J., Recused**
Ball v. Maynard Case below: 184 N.C. App. 99	No. 352P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-1545)	Denied 12/06/07
Bio-Medical Applications of N.C., Inc. v. Electronic Data Sys. Corp. Case below: 183 N.C. App. 489	No. 391P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1249)	Denied 12/06/07 **Martin, J., Recused**
Britt v. State Case below: 185 N.C. App. 610	No. 488A07	1. Plt's NOA (Dissent) (COA06-714) 2. Plt's NOA Based Upon a Constitutional Question	1. —— 2. Dismissed *Ex Mero Motu* 12/06/07
Bruning & Federle Mfg. Co. v. Mills Case below: 185 N.C. App. 153	No. 471P07	Defs' PWC to Review Decision of COA (COA06-1047)	Denied 12/06/07
Department of Transp. v. Fernwood Hill Townhome Homeowners' Ass'n Case below: 185 N.C. App. 633	No. 492P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-964)	Denied 12/06/07
In re B.M. Case below: 186 N.C. App. 304	No. 509P07	1. Petitioner's Motion for Temporary Stay (COA07-525) 2. Petitioner's Petition for Writ of Supersedeas 3. Petitioner's PDR Under N.C.G.S. 7A-31	1. Allowed 10/16/07 361 N.C. 693 Stay Dissolved 12/06/07 2. Denied 12/06/07 3. Denied 12/06/07

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

In re D.Z.F. Case below: 184 N.C. App. 187	No. 328P07	Respondent's (Father) PDR Under N.C.G.S. § 7A-31 (COA06-995)	Denied 12/06/07
In re M.M. Case below: 185 N.C. App. 730	No. 476P07	Respondent's (Father) PDR Under N.C.G.S. 7A-31 (COA07-323)	Denied 12/06/07
In re S.L.H. Case below: 183 N.C. App. 155	No. 267P07	Respondent's (Mother) PDR Under N.C.G.S. 7A-31 (COA06-1049)	Denied 12/06/07
In re S.L.M., T.S.M. Case below: 184 N.C. App. 377	No. 387P07	Respondent's (Mother) PDR Under N.C.G.S. 7A-31 (COA07-163)	Denied 12/06/07
In re S.M.S. Case below: 182 N.C. App. 765	No. 247P07	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA06-229)	Denied 12/06/07
In re T.M.H. Case below: 186 N.C. App. 451	No. 530P07	1. Respondent (Father's) Motion for Temporary Stay (COA07-609) 2. Respondent (Father's) Petition for Writ of Supersedeas 3. Respondent (Father's) PDR Under N.C.G.S. § 7A-31	1. Allowed 11/01/07 361 N.C. 694 Stay Dissolved 12/06/07 2. Denied 12/06/07 3. Denied 12/06/07
In re Z.D.H. Case below: 184 N.C. App. 183	No. 358P07	Petitioner's (New Hanover DSS) PDR Under N.C.G.S. 7A-31 (COA06-945)	Denied 12/06/07
Kimbrell v. Roberts Case below: 186 N.C. App. 68	No. 516P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1110)	Denied 12/06/07
Litvak v. Smith Case below: 180 N.C. App. 202	No. 622P06	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA06-116) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 12/06/07 2. Dismissed as Moot 12/06/07

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

McDowell v. Forsyth Motosports, LLC Case below: 184 N.C. App. 378	No. 396P07	1. Plt's NOA (Substantial Constitutional Question) (COA06-1360) 2. Plt's PDR Under N.C.G.S. 7A-31	1. Dismissed *Ex Mero Motu* 12/06/07 2. Denied 12/06/07
O'Mara v. Wake Forest Univ. Health Sciences Case below: 184 N.C. App. 428	No. 414P07	Plt's PDR Under N.C.G.S. 7A-31 (COA06-1067)	See Special Order Page 85
Purcell Int'l Textile Grp., Inc. v. Algemene AFW N.V. Case below: 185 N.C. App. 135	No. 450P07	Defs' PDR Under N.C.G.S. § 7A-31 (COA06-1075)	Denied 12/06/07
Standley v. Town of Woodfin Case below: 186 N.C. App. 134	No. 531A07	1. Plt-Appellant's NOA (Dissent) (COA06-1449) 2. Plt-Appellant's NOA Based Upon a Constitutional Question	1. —— 2. Dismissed *Ex Mero Motu* 12/06/07
State v. Bethea Case below: 167 N.C. App. 215	No. 555P07	Def's PWC to Review Decision of COA (COA03-1108)	Denied 12/06/07
State v. Bryant Case below: 186 N.C. App. 305	No. 542P07	1. Def-Appellant's NOA (Constitutional Question) (COA06-1555) 2. State's Motion to Dismiss Appeal 3. Def-Appellant's Petition for Writ of Certiorari	1. —— 2. Allowed 12/06/07 3. Denied 12/06/07
State v. Campbell Case below: 186 N.C. App. 132	No. 487P07	1. AG's Motion for Temporary Stay (COA06-1043) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed 10/04/07 361 N.C. 697 Stay Dissolved 12/06/07 2. Denied 12/06/07 3. Denied 12/06/07

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

State v. Carter Case below: 185 N.C. App. 731	No. 483P07-2	Def's Motion for Court Appointed Experts Pursuant to N.C.G.S. Sec. 8C-1 Rule 706 (COA07-324)	Dismissed as Moot 12/06/07
State v. Cherry Case below: 186 N.C. App. 472	No. 546P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1384)	Denied 12/06/07
State v. Colson Case below: 186 N.C. App. 281	No. 512P07	1. AG's Motion for Temporary Stay (COA07-107) 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	1.Allowed 10/19/07 Stay Dissolved 12/06/07 2. Denied 12/06/07 3. Dismissed *Ex Mero Motu* 12/06/07 4. Denied 12/06/07
State v. Daniels Case below: 181 N.C. App. 150	No. 074P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-282)	Denied 12/06/07 **Hudson, J., Recused**
State v. Davis Case below: 186 N.C. App. 242	No. 527P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-1558)	Dismissed Without Prejudice 12/06/07
State v. Edwards Case below: 185 N.C. App. 701	No. 501P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-1415)	Denied 12/06/07
State v. Greene Case below: Cabarrus County Superior Court	No. 544P07	1. Def's Motion for Temporary Stay 2. Def's PWC to Review Order of Cabarrus County Superior Court	1. Denied 11/13/07 2. Denied 11/13/07
State v. Hall Case below: 184 N.C. App. 189	No. 548P07	Def's PWC to Review Decision of COA (COA06-1436)	Denied 12/06/07
State v. Harris Case below: 185 N.C. App. 285	No. 025P06-2	Def's PDR Under N.C.G.S. § 7A-31 (COA05-111-2)	Denied 12/06/07 **Hudson, J., Recused**

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

State v. Hatley Case below: 185 N.C. App. 93	No. 431P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-817)	Denied 12/06/07
State v. Heinricy Case below: 183 N.C. App. 585	No. 325P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1068)	Denied 12/06/07
State v. Hess Case below: 185 N.C. App. 530	No. 465P07	1. Def's NOA Based Upon a Constitutional Question (COA06-1413) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 12/06/07 2. Allowed
State v. Hyatt Case below: Buncombe County Superior Court	No. 402A00-3	1. Def's PWC to Review Order of Buncombe County Superior Court 2. Def's Motion to Hold Petition in Abeyance (filed 12/12/05) 3. Def's Motion to Hold Petition in Abeyance (filed 6/27/06) 4. Def's Motion to Allow Supplemental Memorandum in Support of Petition (filed 6/27/06) 5. Def's Motion to Hold Petition in Abeyance (filed 7/25/06) 6. Def's Motion to Allow Supplemental Memorandum in Support of PWC (filed 1/18/07) 7. Def's Motion to Hold Petition in Abeyance (filed 3/5/07) 8. Def's "Second" Motion to Hold Petition in Abeyance (filed 5/2/07)	1. Denied 12/06/07 2. Dismissed as Moot 12/06/07 3. Allowed 6/28/06 4. Allowed 6/28/06 5. Dismissed as Moot 12/06/07 6. Allowed 12/06/07 7. Dismissed as Moot 12/06/07 8. Dismissed as Moot 12/06/07
State v. Manning Case below: 184 N.C. App. 130	No. 346P07	1. Def's PDR Under N.C.G.S. 7A-31 (COA06-1314) 2. Def's PDR Under N.C.G.S. 7A-31	1. Dismissed 12/06/07 2. Denied 12/06/07
State v. McPhail Case below: 184 N.C. App. 379	No. 378P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-1177)	Denied 12/06/07

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

State v. Minton Case below: 186 N.C. App. 306	No. 540P07	Def-Appellant's PDR Under N.C.G.S. § 7A-31 (COA06-1566)	Denied 12/06/07
State v. Mueller Case below: 184 N.C. App. 553	No. 519P07	Def's PWC to Review Decision of COA (COA05-1524)	Denied 12/06/07
State v. Parker Case below: 185 N.C. App. 437	No. 462P07	1. Defs' Motion for Stay of Execution of the Judgment of Imprisonment (COA06-870) 2. Defs' Petition for Writ of Supersedeas 3. Def's NOA Based Upon a Constitutional Question 4. AG's Motion to Dismiss Appeal 5. Def's PDR Under N.C.G.S. 7A-31	1. Allowed 09/21/07 361 N.C. 701 Stay Dissolved 12/06/07 2. Denied 12/06/07 3. —— 4. Allowed 12/06/07 5. Denied 12/06/07
State v. Rahman Case below: 181 N.C. App. 176	No. 182P07	Def's Motion for "Petition for Discretionary Review Under G.S. 7A-31" (COA06-272)	Denied 12/06/07
State v. Ryals Case below: 179 N.C. App. 73	No. 593P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1479)	Denied 12/06/07
State v. Smith Case below: 169 N.C. App. 459	No. 534P02-2	Def's PWC to Review the Decision of the COA (COA04-660)	Denied 12/06/07 **Timmons-Goodson, J., Recused**
State v. Teachey Case below: 183 N.C. App. 492	No. 534P07	Def's PWC to Review Decision of COA (COA06-1471)	Denied 12/06/07

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

State v. Thai Case below: 185 N.C. App. 544	No. 007P06-2	1. Def's NOA Based Upon a Constitutional Question (COA05-347-2) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 12/06/07 3. Denied 12/06/07 **Hudson, J., Recused**
State v. Vann Case below: 181 N.C. App. 151	No. 524P07	1. Def's NOA (Constitutional Question) (COA06-584) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 12/06/07 2. Denied
Walker v. Walker Case below: 174 N.C. App. 778	No. 053P06-2	1. Def's (Wayne Walker) PWC to Review Decision of COA (COA04-1601) 2. Plt's Motion for Sanctions	1. Dismissed 12/06/07 2. Denied 12/06/07
Wilson v. Wilson Case below: 183 N.C. App. 267	No. 253P07	1. Appellant's (Aylward at Fenton Place) NOA Based upon a Constitutional Question(COA06-1147) 2. Appellant's (Aylward at Fenton Place) PDR Under N.C.G.S. 7A-31	1. Dismissed *Ex Mero Motu* 12/06/07 2. Denied 12/06/07

TILLMAN v. COMMERCIAL CREDIT LOANS, INC.

[362 N.C. 93 (2008)]

FANNIE LEE TILLMAN AND SHIRLEY RICHARDSON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED v. COMMERCIAL CREDIT LOANS, INC.; COMMERCIAL CREDIT CORPORATION; CITIGROUP, INC.; CITICORP, INC.; CITIFINANCIAL, INC.; AND CITIFINANCIAL SERVICES, INC.

No. 360A06

(Filed 25 January 2008)

Arbitration and Mediation— arbitration clause in standard loan contract—unconscionable

In a majority decision that relied upon two Justices concurring in the result only, the Court of Appeals was reversed and the decision of the trial court to deny a motion to compel arbitration was upheld. Both majority opinions agreed that the arbitration clause in a standard loan contract was unconscionable.

Justice EDMONDS concurring in the result only.

Justice MARTIN joins in this concurring opinion.

Justice NEWBY dissenting.

Chief 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, 177 N.C. App. 568, 629 S.E.2d 865 (2006), reversing an order denying defendants' motion to compel arbitration entered on 20 January 2005 by Judge Ronald L. Stephens in Superior Court, Vance County, and remanding for entry of an order granting that motion. Heard in the Supreme Court 13 February 2007.

Jones Martin Parris & Tessener Law Offices, P.L.L.C., by John Alan Jones and G. Christopher Olson, for plaintiff-appellants.

Moore & Van Allen, PLLC, by Jeffrey M. Young, and Rogers & Hardin LLP, by Richard H. Sinkfield and Christopher J. Willis, for defendant-appellees.

North Carolina Justice Center, by Carlene McNulty, for North Carolina Justice Center, Financial Protection Law Center, and Trial Lawyers for Public Justice, amici curiae.

Ellis & Winters LLP, by Wendy I. Sexton, for American Financial Services Association, Chamber of Commerce of the United States of America, and Consumer Bankers Association, amici curiae.

TIMMONS-GOODSON, Justice.

The question chiefly presented is whether the arbitration clause contained in the loan agreements that serve as the basis for the instant case is unconscionable. Because the clause is one-sided, prohibits joinder of claims and class actions, and exposes claimants to prohibitively high costs, we hold that the trial court did not err in concluding as a matter of law that the clause is unconscionable.

I. BACKGROUND

Plaintiffs Fannie Lee Tillman and Shirley Richardson ("plaintiffs") are North Carolina residents who obtained loans from defendant Commercial Credit Loans, Inc. (n/k/a CitiFinancial Services, Inc.). On 22 September 1998, Fannie Lee Tillman obtained a loan for a term of 120 months with a principal amount of $18,253.68. In connection with the loan, Commercial Credit sold Mrs. Tillman single premium credit life and disability insurance with premiums of $1,058.80 and $1,005.95, respectively. On 4 June 1999, Shirley Richardson obtained a loan for a term of 180 months with a principal amount of $20,935.57. In connection with the loan, Commercial Credit sold Mrs. Richardson single premium credit life, disability, and involuntary unemployment insurance with premiums of $1,871.54, $1,109.49, and $1,227.72, respectively. Plaintiffs' loan principal amounts included their insurance premiums, which were financed over the life of the loan.

Credit life insurance pays off a borrower's loan if the borrower dies; credit disability pays off the loan if the borrower becomes disabled; and credit involuntary unemployment pays the loan if the borrower becomes involuntarily unemployed. The insurance is referred to as single premium because "the borrower is charged the entire insurance premium at the time the underlying loan is originated, with the premium being financed into and over the life of the loan." In July 1999 the North Carolina General Assembly outlawed single premium credit insurance for loans made or entered into on or after 1 July 2000. Act of July 15, 1999, ch. 332, sec. 5, 1999 N.C. Sess. Laws 1202, 1216 (codified at N.C.G.S. § 24-10.2(b) (2005)).

It is undisputed that both plaintiffs have limited financial resources. Mrs. Tillman's weekly after-tax take-home pay is approximately $258.00. Her husband is deceased, and as a result, Mrs. Tillman also receives $285.60 per month in pension benefits and $1063.00 per month in Social Security benefits. Mrs. Richardson works two jobs where she earns $12.70 per hour and $12.00 per hour. For both plaintiffs, their home is their most significant asset.

Plaintiffs' loan agreements contained the standard arbitration clauses that defendants have included in their loan agreements since 12 February 1996. The arbitration clause was drafted by defendants, and plaintiffs were given no opportunity to negotiate regarding the clause. The clause contains the following relevant provisions:

> **Agreement to Arbitrate Claims.** Upon written request by either party that is submitted according to the applicable rules for arbitration, any Claim, except those specified below in this Provision, shall be resolved by binding arbitration in accordance with (i) the Federal Arbitration Act; (ii) the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association ("Administrator"); and (iii) this Provision, unless we both agree in writing to forgo arbitration. The terms of this Provision shall control any inconsistency between the rules of the Administrator and this Provision. . . .
>
> . . . .
>
> **Claims Excluded from Arbitration.** The following types of matters will not be arbitrated. This means that neither one of us can require the other to arbitrate:
>
> - Any action to effect a foreclosure to transfer title to the property being foreclosed; or
> - Any matter where all parties seek monetary damages in the aggregate of $15,000.00 or less in total damages (compensatory and punitive), costs, and fees.
>
> . . . .
>
> Appeal. Either You or We may appeal the arbitrator's award to a three-arbitrator panel selected through the Administrator, which shall reconsider de novo any aspect of the initial award requested by the appealing party. The expedited procedures of the Administrator shall not govern any appeal. An appeal will be governed by Rule 23 of the Comprehensive Arbitration Rules and Procedures of J*A*M*S/Endispute, Inc.
>
> . . . .
>
> No Class Actions/No Joinder of Parties. You agree that any arbitration proceeding will only consider Your Claims. Claims by or on behalf of other borrowers will not be arbitrated in any proceeding that is considering Your Claims. Similarly,

> You may not join with other borrowers to bring claims in the same arbitration proceeding, unless all of the borrowers are parties to the same Credit Transaction.
>
> . . . .
>
> Costs. The cost of any arbitration proceeding shall be divided as follows:
>
> - The party making demand upon the Administrator for arbitration shall pay $125.00 to the Administrator when the demand is made.
> - We will pay to the Administrator all other costs for the arbitration proceeding up to a maximum of one day (eight hours) of hearings.
> - All costs of the arbitration proceeding that exceed one day of hearing will be paid by the non-prevailing party.
> - In the case of an appeal, the appealing party will pay any costs of initiating an appeal. The non-prevailing party shall pay all costs, fees, and expenses of the appeal proceeding and, if applicable, shall reimburse the prevailing party for the cost of filing an appeal.
> - Each party shall pay his/her own attorney, expert, and witness fees and expenses, unless otherwise required by law.
>
> . . . .
>
> **Severability.** If the arbitrator or any court determines that one or more terms of this Provision or the arbitration rules are unenforceable, such determination shall not impair or affect the enforceability of the other provisions of this Agreement or the arbitration rules.

In June 2002 plaintiffs commenced this suit[1] against defendants Commercial Credit Loans, Inc., Commercial Credit Corporation, Citigroup, Inc., CitiFinancial, Inc., CitiFinancial Services, Inc., and Citicorp, Inc.,[2] asserting claims for violations of North Carolina's

1. Plaintiffs filed this suit as a class action, but the record contains no indication that the trial court certified the class.

2. Commercial Credit Corp., Citigroup, Inc., CitiFinancial, Inc., and Citicorp, Inc. are corporate parents or affiliates of Commercial Credit Loans, Inc. (n/k/a CitiFinancial Services, Inc.). While Commercial Credit Corp., Citigroup, Inc., CitiFinancial, Inc., and Citicorp, Inc. remain as defendants in the underlying case,

Unfair and Deceptive Trade Practices Act, N.C.G.S. § 75-1.1, unjust enrichment, and breach of the duties of good faith and fair dealing. The claims rest on plaintiffs' contention that they did not want or need single premium credit insurance and that Commercial Credit did not tell them that the insurance was optional. In addition, plaintiffs claim that Commercial Credit was the sole beneficiary of the insurance policies. Plaintiffs' complaint specifically alleges that "Commercial Credit violated North Carolina law by failing to provide Plaintiffs with requisite disclosures regarding the credit insurance sold to them and by charging fees that were deceptive, unfair, duplicative, imposed without adequate commercial justification or disclosure, and in excess of the fees permitted by North Carolina law." Plaintiffs seek money damages based on the amount of credit insurance premiums collected by defendants.

Beginning in May 2003, defendants filed a series of motions to compel arbitration pursuant to the arbitration clause contained in plaintiffs' loan agreements. In an order entered on 20 January 2005, the trial court denied defendants' motion to compel arbitration dated 17 June 2004. The order included the following findings of fact:

> 9. The Commercial Credit arbitration clause is a standard-form contract of adhesion. The borrower is given no opportunity to negotiate out of the arbitration provision, and CitiFinancial Services, Inc. would not make a loan if the loan agreement did not include the arbitration provision. The loan documents, including the arbitration provision at issue, were drafted by Defendant.
>
> 10. Since the time CitiFinancial Services, Inc. began including an arbitration clause in its loan agreements, the lender has made more than 68,000 loans in North Carolina. During that time, CitiFinancial Services has pursued lawsuits in civil court against more than 3,700 borrowers in North Carolina, including over 2,000 collection actions and more than 1,700 foreclosure actions. Defendant has been able to pursue claims in civil court by virtue of two exceptions within the arbitration clause, which Defendant drafted, for (1) foreclosure actions and (2) matters in which less than $15,000.00 in damages, including costs and fees, are sought. The average amount in dispute in matters in which CitiFinancial

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for purposes of the issue on appeal before this Court, the term "defendants" will refer only to Commercial Credit Loans, Inc. (n/k/a CitiFinancial Services, Inc.) and CitiFinancial, Inc.

Services, Inc. pursued legal action against North Carolina borrowers is under $7,000.00.

11. Since the time CitiFinancial Services, Inc. began including an arbitration provision in its loan agreements, there have been no arbitration proceedings in North Carolina involving CitiFinancial Services, Inc. and any of its borrowers. Since introduction of the arbitration clause, no North Carolina borrower has requested arbitration of any dispute with CitiFinancial Services, Inc., nor has CitiFinancial Services, Inc. demanded arbitration of any dispute involving any North Carolina borrower. The only legal redress sought has been the collection and foreclosure actions pursued in civil court by Defendant against its borrowers.

12. The only persons present at the loan closings involving Plaintiffs Tillman and Richardson were Plaintiffs and a Commercial Credit loan officer. [Mrs.] Tillman and [Mrs.] Richardson were rushed through the loan closings, and the Commercial Credit loan officer indicated where [Mrs.] Tillman and [Mrs.] Richardson were to sign or initial the loan documents. There was no mention of credit insurance or the arbitration clause at the loan closings.

13. The compensation rates for American Arbitration Association ("AAA") arbitrators in North Carolina range from $500.00 to $2,380.00 per day. The average daily rate of AAA arbitrator compensation in North Carolina is $1,225.00.

14. Plaintiffs Fannie Lee Tillman and Shirley Richardson entered into contingency fee contracts with the attorneys representing them. The contingency fee contract is typical of such agreements. The contingency fee agreement entered into by Plaintiffs provides that their attorneys will not be entitled to any fee unless there is some monetary recovery obtained on behalf of Plaintiffs, either by way of settlement or verdict. The agreement further provides that the law firm representing Plaintiffs shall advance the costs and expenses incurred in prosecuting the action.

15. Based upon the 1998 North Carolina Bar Association Economic Survey, the most recent survey published, the average hourly rate for attorneys working on litigation matters such as this is between $150.00-$250.00 per hour.

16. Based upon the limited financial resources of Plaintiffs and other similarly situated borrowers, they could not afford to hire an attorney to be paid on an hourly basis. The only realistic means by which persons in the position of Plaintiffs can prosecute their claims is by entering into a contingency fee agreement with lawyers willing to advance the costs and expenses of the litigation and with the law firm assuming the risk that there might be no recovery.

17. Plaintiffs asserted claims for relief under Chapter 75 of the North Carolina General Statutes, contending that Defendant['s] sale of single-premium credit insurance in connection with real estate loans constituted an unfair or deceptive trade practice or act in or affecting commerce. Plaintiffs seek damages based upon the amount of premiums charged for those credit insurance products. In most cases, the premium charges for single-premium credit insurance sold by CitiFinancial Services, Inc. were under $5,000.00 per loan. Plaintiff Fannie Lee Tillman was charged $2,064.75 in single-premium credit insurance premiums in connection with her September 22, 1998 loan; Plaintiff Shirley Richardson was charged $4,208.75 for single-premium credit insurance with her June 4, 1999 loan. The relatively modest damages claimed by Plaintiffs make it unlikely that any attorneys would be willing to accept the risks attendant to pursuing claims against one of the nation's largest lenders, even with the prospect of a treble damages award and statutory attorney's fees. It would not be feasible to prosecute the claims of the named Plaintiffs and of putative class members on an individual basis.

18. Defendant's arbitration clause contains features which would deter many consumers from seeking to vindicate their rights. These features include the cost-shifting ("loser pays") provision with respect to the initial arbitration proceeding to the extent it exceeds eight hours, the cost-shifting provision associated with the de novo appeal from that initial arbitration proceeding, and the prohibition on joinder of claims and class actions. The prohibition on class actions and the cap of $15,000.00 on the value of claims that can be pursued outside of the arbitration process designed by Defendant make[] it unlikely that borrowers would be able to retain lawyers willing to pursue litigation against a large commercial entity, such as CitiFinancial Services, Inc.

> 19. To successfully prosecute a complex case, including a class action such as this one, a law firm would likely need the assistance of expert witnesses. The hourly fees of experts in the fields of economics, lending practices, and credit insurance can range from $150.00 to $300.00 per hour, plus expenses. In complex cases, litigation costs and expenses, including deposition costs, travel expenses, and expert witness fees, can easily run into thousands of dollars. The class action mechanism allows persons with relatively small claims to pool their resources and have those litigation expenses and costs shared among all class members. The class action device provides a means by which consumers with modest damages claims can obtain representation by competent counsel with sufficient resources to afford protracted litigation in complex cases.

Ultimately, the trial court denied the motion to compel arbitration based on its conclusion that the arbitration clause contained in plaintiffs' loan agreements is unconscionable and unenforceable

> due to the prohibitively high arbitration costs borrowers might face in pursuing claims through arbitration, the fee-shifting ("loser pays") provisions which expose borrowers to excessive arbitration and appeal costs . . . , and because the arbitration clause is excessively one-sided and lacks mutuality in that it preserves access to the courts for the lender while prohibiting joinder of claims and class actions on the part of borrowers and restricts what claims of borrowers can be pursued in civil court.

Defendants appealed, and a divided panel of the Court of Appeals reversed the trial court's order and remanded to the trial court for entry of an order granting defendants' motion to compel arbitration. *Tillman v. Commercial Credit Loans, Inc.*, 177 N.C. App. 568, 629 S.E.2d 865 (2006). The COA majority held that the provisions of the arbitration agreement, "[v]iewed separately or together," do not render it unconscionable. *Id.* at 582, 629 S.E.2d at 875. The dissenting opinion concluded that the trial court's unconscionability finding was supported by the evidence and by North Carolina law, *id.* at 595, 629 S.E.2d at 883 (Hunter, J., dissenting), and plaintiffs filed an appeal of right as to that issue.

II. ANALYSIS

The standard governing our review of this case is that "findings of fact made by the trial judge are conclusive on appeal if supported

by competent evidence, even if . . . there is evidence to the contrary." *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983) (citation omitted). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004). Because unconscionability is a question of law, this Court will review *de novo* the trial court's conclusion that the arbitration agreement contained in plaintiffs' loan agreements is unconscionable. *See Rite Color Chem. Co. v. Velvet Textile Co.*, 105 N.C. App. 14, 21, 411 S.E.2d 645, 649 (1992) (citations omitted); 17A Am. Jur. 2d *Contracts* § 327 (2004); John N. Hutson, Jr. & Scott A. Miskimon, *North Carolina Contract Law* § 9-14, at 556 (2001).

In the instant case, many of the trial court's findings are uncontested. Furthermore, after extensive review of the record, we conclude that the eight findings of fact contested by defendant are supported by competent evidence. We review several of the contested findings here. While defendants assign error to finding of fact number sixteen, *supra*, both plaintiffs testified they could not afford to hire an attorney to be paid on an hourly basis. In addition, contested finding of fact number nine, *supra*, is clearly supported by the deposition of Debra Hovatter, CitiFinancial's General Counsel for Litigation, who testified that "[t]he company does not make loans without an arbitration provision." Contested finding of fact number thirteen, *supra*, is supported by the affidavit of AAA Assistant Vice President Gerald Strathmann, who testified regarding the average compensation rates for AAA arbitrators in North Carolina. Based on our review of the record, the trial court's findings of fact are supported by competent evidence and are therefore conclusive.

We now review the trial court's conclusions of law *de novo*. Arbitration is favored in North Carolina. *Cyclone Roofing Co. v. David M. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984). As with any contract, however, "equity may require invalidation of an arbitration agreement that is unconscionable." *Murray v. United Food & Commercial Workers Int'l Union*, 289 F.3d 297, 302 (4th Cir. 2002). A court will find a contract to be unconscionable

> only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.

Brenner v. Little Red Sch. House Ltd., 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981) (citations omitted). An inquiry into unconscionability requires that a court "consider all the facts and circumstances of a particular case," and "[i]f the provisions are then viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable." *Id.*

The Court of Appeals has held that unconscionability is an affirmative defense, and the party asserting it has the burden of proof. *Rite Color Chem. Co.*, 105 N.C. App. at 20, 411 S.E.2d at 649. We agree. In the instant case, plaintiffs argue that defendants, because they are seeking to compel arbitration, have the burden of showing that the parties agreed to the arbitration provision. In support of this argument, plaintiffs rely on *King v. Owen*, 166 N.C. App. 246, 248, 601 S.E.2d 326, 237 (2004); *Milon v. Duke University*, 145 N.C. App. 609, 617, 551 S.E.2d 561, 566 (2001), *rev'd per curiam*, 355 N.C. 263, 559 S.E.2d 789, *cert. dismissed*, 536 U.S. 979 (2002); and *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 272, 423 S.E.2d 791, 794 (1992), but the instant case is distinguishable. Each of those cases involved a dispute about whether an arbitration agreement had been properly executed. Here, there is no question that plaintiffs signed the agreement. Rather, the question is whether the agreement is unconscionable.

A party asserting that a contract is unconscionable must prove both procedural and substantive unconscionability. *See Martin v. Sheffer*, 102 N.C. App. 802, 805, 403 S.E.2d 555, 557 (1991); *see also* 1 James J. White & Robert S. Summers, *Uniform Commercial Code* § 4-7, at 315 (5th ed. 2006) [hereinafter White & Summers] ("Most courts take a 'balancing approach' to the unconscionability question, and . . . seem to require a certain quantum of procedural, plus a certain quantum of substantive, unconscionability."). While this Court has never explicitly adopted this framework, we conclude that it is supported by the Court's case law and adopt it here. In *Brenner*, for example, this Court determined that a contract between a parent and a private school was not unconscionable. 302 N.C. at 214, 274 S.E.2d at 211. The Court so held after considering whether there was inequality of bargaining power between the parties, whether plaintiff was "forced to accept defendant's terms," and whether the contract itself "was one that a reasonable person of sound judgment might accept." *Id.* at 213-14, 274 S.E.2d at 211. Thus, the Court considered both the procedural and substantive aspects of the contract at issue.

According to *Rite Color Chemical Co.*, procedural unconscionability involves "bargaining naughtiness" in the form of unfair sur-

prise, lack of meaningful choice, and an inequality of bargaining power. 105 N.C. App. at 20, 411 S.E.2d at 648. Substantive unconscionability, on the other hand, refers to harsh, one-sided, and oppressive contract terms. *Id.* at 20, 411 S.E.2d at 648-49. Of course, unconscionability is ultimately "a determination to be made in light of a variety of factors not unifiable into a formula." White & Summers, § 4-3, at 296 (emphasis omitted). Therefore, we note that while the presence of both procedural and substantive problems is necessary for an ultimate finding of unconscionability, such a finding may be appropriate when a contract presents pronounced substantive unfairness and a minimal degree of procedural unfairness, or vice versa. *See Tacoma Boatbuilding Co. v. Delta Fishing Co.*, 28 U.C.C. Rep. Serv. (CBC) 26, 37 n.20 (W.D. Wash. 1980) ("[T]he substantive/procedural analysis is more of a sliding scale than a true dichotomy. The harsher the clause, the less 'bargaining naughtiness' that is required to establish unconscionability.").

We conclude that, taken together, the oppressive and one-sided substantive provisions of the arbitration clause at issue in the instant case and the inequality of bargaining power between the parties render the arbitration clause in plaintiffs' loan agreements unconscionable.

A. PROCEDURAL UNCONSCIONABILITY

In the instant case, the trial court did not explicitly conclude that the facts supported a finding of procedural unconscionability. We note, however, that the trial court made the following finding of fact, which is supported by evidence in the record: "[Mrs.] Tillman and [Mrs.] Richardson were rushed through the loan closings, and the Commercial Credit loan officer indicated where [Mrs.] Tillman and [Mrs.] Richardson were to sign or initial the loan documents. There was no mention of credit insurance or the arbitration clause at the loan closings." In addition, defendants admit that they would have refused to make a loan to plaintiffs rather than negotiate with them over the terms of the arbitration agreement. Finally, the bargaining power between defendants and plaintiffs was unquestionably unequal in that plaintiffs are relatively unsophisticated consumers contracting with corporate defendants who drafted the arbitration clause and included it as boilerplate language in all of their loan agreements. We therefore conclude that plaintiffs made a sufficient showing to establish procedural unconscionability.

B. SUBSTANTIVE UNCONSCIONABILITY

The trial court found the arbitration clause to be substantively unconscionable because (1) the arbitration costs borrowers may face are "prohibitively high"; (2) "the arbitration clause is excessively one-sided and lacks mutuality"; and (3) the clause prohibits joinder of claims and class actions. We agree that here, the collective effect of the arbitration provisions is that plaintiffs are precluded from "effectively vindicating [their] . . . rights in the arbitral forum." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000).

In *Green Tree*, the United States Supreme Court recognized that "the existence of large arbitration costs" could serve as the basis for holding an arbitration clause to be unenforceable. *Id.* The Court ultimately held that the plaintiff in that case had not sufficiently demonstrated "the likelihood of incurring such costs" because the arbitration clause in question did not specify who would bear the costs of arbitration. 531 U.S. at 91-92. The Court disregarded evidence presented by the plaintiff about the average arbitral fees of the American Arbitration Association ("AAA") because there was no factual showing that AAA would be conducting the arbitration or that the plaintiff would be required to pay the fees. *Id.* at 90 n.6.

Similarly, the Fourth Circuit has held that any inquiry into arbitration costs must be "a case-by-case analysis that focuses . . . upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims." *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001). In *Bradford,* the court found that costs were not prohibitive because the plaintiff "offered no evidence that he was unable to pay the $4,470.88 [fee], or that the fee-splitting provision deterred him from pursuing his statutory claim or would have deterred others similarly situated." *Id.* at 558. Indeed, the court noted that the plaintiff's base salary at the time of the actions which led him to instigate the lawsuit in question was $115,000 per year. *Id.* at 558 n.6.

The instant case is distinguishable. In terms of ability to pay, the evidence of plaintiffs' limited financial means is uncontested. Plaintiffs live paycheck to paycheck and usually have very little money left in their bank accounts after paying their monthly bills. The arbitration clause specifies that AAA will administer any arbitration between the parties to the loan agreement, and evidence in the

record indicates that the average daily rate of AAA arbitrator compensation in North Carolina is $1,225.00. According to the arbitration clause, when an arbitration lasts more than eight hours, the loser will be charged with costs. Moreover, the clause provides for a *de novo* appeal before a panel of three arbitrators, and again, the loser pays the costs. For example, at the average rate, a two-day appeal would cost the losing party $7,350.00 in arbitrator fees. Plaintiffs simply do not have the resources to risk facing these kinds of fees. *See Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Or. App. 553, 574, 152 P.3d 940, 952 (2007) (concluding that a cost-sharing provision in an arbitration clause was "sufficiently onerous to act as a deterrent to [the] plaintiffs' vindication of their claim").

Bradford also rightly notes that the cost of arbitration must be compared with the cost of litigation. *Id.* at 556. As demonstrated above, paying for arbitrators is a significant cost that is simply not faced in filing a lawsuit in court. *See Vasquez-Lopez*, 210 Or. App. at 574, 152 P.3d at 952 ("regardless of whether filing fees are relatively equal in court and arbitration, the fact remains that most of the cost involved in an arbitration will be the arbitrator's fees; in court, by contrast, neither party has to pay for the judge"). The trial court also found that

> [t]he only realistic means by which persons in the position of Plaintiffs can prosecute their claims is by entering into a contingency fee agreement with lawyers willing to advance the costs and expenses of the litigation and with the law firm assuming the risk that there might be no recovery.

Because plaintiffs' damage amounts are so low (under $4,500 each), the trial court found that it is "unlikely that any attorneys would be willing to accept the risks attendant to pursuing [these] claims." The likelihood that an attorney would take a case controlled by the arbitration clause at issue here is even less because the arbitration clause prohibits the joinder of claims and class actions. Therefore, neither attorneys nor plaintiffs are able to share the risks attendant to pursuing this litigation.

Bradford finally instructs that in order to find unenforceability due to excessive costs, the cost differential between litigation and arbitration must be so great that it deters individuals from bringing claims under the arbitration clause. *Id.* at 556. Evidence in the record indicates that no arbitrations have been brought under the clause that defendant has included in over 68,000 loan agreements

in North Carolina. Based on this evidence and the above analysis, it appears that the combination of the loser pays provision, the *de novo* appeal process, and the prohibition on joinder of claims and class actions creates a barrier to pursuing arbitration that is substantially greater than that present in the context of litigation. We agree with the trial court that "[d]efendant's arbitration clause contains features which would deter many consumers from seeking to vindicate their rights."

Defendants argue that the costs analysis is irrelevant because the terms of the arbitration agreement have been superceded by AAA's Consumer Rules, which became effective on 1 March 2002. More specifically, defendants state that they are "willing to arbitrate [plaintiffs'] claims under [these rules]." This argument is unpersuasive. First, the arbitration clause itself provides that "[t]he terms of this Provision shall control any inconsistency between the rules of the [AAA] and this Provision." Second, this Court, the Fourth Circuit, and other courts have held that it is inappropriate to rewrite an illegal or unconscionable contract. *See Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 676 (6th Cir. 2003) ("In considering the ability of plaintiffs to pay arbitration costs under an arbitration agreement, reviewing courts should not consider after-the-fact offers by employers to pay the plaintiff's share of the arbitration costs where the agreement itself provides that the plaintiff is liable, at least potentially, for arbitration fees and costs."); *Murray*, 289 F.3d at 304 ("The arbitration agreement is unenforceable as written and [the union] may not rewrite the arbitration clause and adhere to unwritten standards on a case-by-case basis in order to claim that it is an acceptable one."); *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 13-14, 857 N.E.2d 250, 259 (2006) ("[A] defendant's after-the-fact offer to pay the costs of arbitration should not be allowed to preclude consideration of whether the original arbitration clause is unconscionable."); *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989) ("The courts will not rewrite a contract if it is too broad but will simply not enforce it."). We agree with the Sixth Circuit's observation that because the underlying concern is whether individuals, upon reading an arbitration agreement, will be deterred from bringing a claim, courts must consider the agreement as drafted. *See Morrison*, 317 F.3d at 676-77.

The second concern plaintiffs raise is the one-sidedness of the arbitration clause contained in their loan agreements. In *Brenner*, this Court held that when "the provisions [of a contract] are . . .

viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable." 302 N.C. at 213, 274 S.E.2d at 210.

In the instant case, the clause excepts from arbitration foreclosure actions and actions in which the total damages, costs, and fees do not exceed $15,000. Plaintiffs argue that the arbitration clause preserves defendants' ability to pursue its claims in court while denying plaintiffs that same option. Evidence in the record indicates that since 1996, defendants have brought over 2,000 collection actions with an average "payoff" of under $7,000. In addition, it appears that defendants have not initiated arbitration in North Carolina. In other words, every time defendants have taken legal action against a borrower, they have managed to avoid application of the arbitration clause. This arbitration clause is not as egregious as some that specifically carve out an exception for the corporate drafter of the clause to pursue collection actions in court. *See*, *e.g.*, *Arnold v. United Cos. Lending Corp.*, 204 W. Va. 229, 233, 235-37, 511 S.E.2d 854, 858, 860-62 (1998). Practically speaking, however, the exceptions appear to be designed far more for the benefit of defendants than for plaintiffs. The one-sidedness of the clause therefore contributes to our overall conclusion that it is unconscionable.

Plaintiffs finally argue that the arbitration clause is unconscionable because it prohibits joinder of claims and class actions. Plaintiffs correctly note that an increasing number of courts have found class action waivers in arbitration clauses substantively unconscionable. *See*, *e.g.*, *Scott v. Cingular Wireless*, 160 Wn.2d 843, 850-51, 161 P.3d 1000, 1004 (2007) (citing such cases from sixteen jurisdictions). Taken alone, such a prohibition may be insufficient to render an arbitration agreement unenforceable, *see*, *e.g.*, *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002), but *Brenner* instructs that an unconscionability analysis must consider all of the facts and circumstances of a particular case, 302 N.C. at 213, 274 S.E.2d at 211. Therefore, the trial court correctly concluded that a prohibition on joinder of claims and class actions "is a factor to be considered in determining whether an arbitration provision is unconscionable." *Accord Kristian v. Comcast Corp.*, 446 F.3d 25, 53-61 (1st Cir. 2006); *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003), *cert. denied*, 540 U.S. 811 (2003); *Leonard v. Terminix Int'l Co.*, 854 So. 2d 529, *passim* (Ala. 2002) (per curiam); *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 562-64, 567 S.E.2d 265, 278-80, *cert. denied*, 537 U.S. 1087 (2002).

In the instant case, the prohibition on joinder of claims and class actions affects the unconscionability analysis in two specific ways. First, the prohibition contributes to the financial inaccessibility of the arbitral forum as established by this arbitration clause because it deters potential plaintiffs from bringing and attorneys from taking cases with low damage amounts in the face of large costs that cannot be shared with other plaintiffs. Second, the prohibition contributes to the one-sidedness of the clause because the right to join claims and pursue class actions would benefit only borrowers. *See*, *e.g.*, *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101, 118 Cal. Rptr. 2d 862, 867 (2002), *cert. denied*, 537 U.S. 1226 (2003); *Vasquez-Lopez*, 210 Or. App. at 569, 152 P.3d at 949-50 (quoting Anatole France's observation in *The Red Lily* that " 'the majestic equality of the laws forbid[s] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread' " and noting that "[a]lthough the arbitration rider with majestic equality forbids lenders as well as borrowers from bringing class actions, the likelihood of the lender seeking to do so against its own customers is as likely as the rich seeking to sleep under bridges.").

In conclusion, we hold that the provisions of the arbitration clause, taken together, render it substantively unconscionable because the provisions do not provide plaintiffs with a forum in which they can effectively vindicate their rights. *See Green Tree*, 531 U.S. at 90.

At oral argument, defendants asserted that any provisions of the arbitration clause found to be unconscionable could be stricken because the clause includes a severability provision. Severing the unenforceable provisions of the arbitration clause at issue in the instant case would require the Court to rewrite the entire clause, and we decline to do so here.

Ultimately, based on the facts and circumstances of this case, we hold that the arbitration clause in plaintiffs' loan agreements is unconscionable and therefore unenforceable. The inequality of bargaining power between the parties and the oppressive and one-sided nature of the clause itself lead us to this conclusion. Through the arbitration clause at issue in this case, defendants have not only unilaterally chosen the forum in which they want to resolve disputes, but they have also severely limited plaintiffs' access to the forum of their choice. Defendants argue that finding this clause to be unconscionable would be "hostile to arbitration." We disagree but at the same time reaffirm this Court's previous statements acknowledg-

ing the State's strong public policy favoring arbitration. However, this particular arbitration clause simply does not allow for meaningful redress of grievances and therefore, under *Green Tree*, must be held unenforceable.

For the foregoing reasons, the Court of Appeals decision reversing the trial court's order denying defendants' motion to compel is reversed.

REVERSED.

Justice EDMUNDS concurring in the result only.

I concur in the result only and agree that the trial court properly denied defendants' motion to compel arbitration. I write separately because I believe that this Court should apply the totality of the circumstances test set out in *Brenner v. Little Red School House, Ltd.*, 302 N.C. 207, 274 S.E.2d 206 (1981).

In *Brenner*, we considered whether a contract between a noncustodial parent and a private school was unconscionable. *Id.* at 213-14, 274 S.E.2d at 210-11. The contract required the school to enroll the plaintiff's son during the upcoming school year in exchange for payment of a confirmation fee and tuition. *Id.* at 208-09, 274 S.E.2d at 208. The contract further provided that tuition was "payable in advance on the first day of school, no portion refundable." *Id.* at 208, 274 S.E.2d at 208. The plaintiff paid the confirmation fee and tuition as required, but the child's custodial parent refused to allow the child to attend the school. *Id.* at 208-09, 274 S.E.2d at 208. When the defendant denied the plaintiff's subsequent request for a refund, the plaintiff filed suit in district court alleging, in part, unconscionability of the contract. *Id.* at 209, 274 S.E.2d at 208. The trial court granted summary judgment for the plaintiff. *Id.*

On review, we explained that "a court must consider all the facts and circumstances of a particular case" to "determin[e] whether a contract is unconscionable." *Id.* at 213, 274 S.E.2d at 210. If the court, after examining the totality of the circumstances, determines that "the inequality of the bargain is so manifest as to shock the judgment of a person of common sense" and that "the terms are so oppressive that no reasonable person would make them on the one hand" or "accept them on the other," then the court may "refuse to enforce [a] contract on the ground of unconscionability." *Id.* Circumstances this Court considered in *Brenner* included equality of bargaining power,

availability of other schools, and reasonableness of the disputed term. *Id.* at 213-14, 274 S.E.2d at 211. We found that "[t]he bargain was one that a reasonable person of sound judgment might accept" and concluded that the contract was "enforceable as written." *Id.* at 214, 274 S.E.2d at 211.

Applying *Brenner* here, I am persuaded that the facts and circumstances found by the trial court establish that the arbitration clause is unconscionable. Particularly compelling circumstances include the cost-shifting ("loser pays") provision for arbitration proceedings exceeding eight hours, the cost-shifting provision for de novo appeal from the initial arbitration, the prohibitions against joinder of claims and class actions, the $15,000.00 cap on the value of claims that can be pursued outside of arbitration, and the exclusion of foreclosure claims from arbitration. The cost-shifting provisions are particularly onerous because the trial court found that "compensation rates for American Arbitration Association ("AAA") arbitrators in North Carolina range from $500.00 to $2,380.00 per day," that "[t]he average daily rate of AAA arbitrator compensation in North Carolina is $1,225.00," that "the average hourly rate for attorneys working on litigation matters such as this is between $150.00-$250.00 per hour," and that "[t]o successfully prosecute a complex case . . . such as this one[] a law firm would likely need the assistance of expert witnesses. . . . in the fields of economics, lending practices, and credit insurance" whose rates "can range from $150.00 to $300.00 per hour, plus expenses."

Taken together, these circumstances effectively prevented plaintiffs from vindicating their rights under the contract in any forum. At the same time, the exclusionary clause allows defendants to pursue claims against borrowers in superior court. Perhaps the lopsided effect of the arbitration clause is best demonstrated by defendant CitiFinancial Services, Inc.'s (CitiFinancial) 68,000-to-0 record. Since it began including this arbitration clause in its loan agreements, CitiFinancial has made more than 68,000 loans in North Carolina. While no North Carolina borrower has ever requested arbitration of any dispute with CitiFinancial, CitiFinancial has pursued lawsuits in civil court against more than 3,700 borrowers in North Carolina, including more than 2,000 collection actions and 1,700 foreclosures. CitiFinancial has never requested arbitration of any dispute involving a North Carolina borrower.

Based on the preceding circumstances found by the trial court, I would hold that the inequality of the bargain represented by the arbi-

tration clause is so manifest as to shock the judgment of a person of common sense, and that the term is so oppressive that no reasonable person would offer it on the one hand or accept it on the other.

This Court has long held that "findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary." *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983); *see also Cardwell v. Cardwell*, 64 N.C. 528, 528, 64 N.C. 621, 622 (1870) ("We can no more review the finding of a Judge when it is his province to find facts than we can review the finding of a jury."). The form or manner in which a trial court receives evidence has never controlled the standard of review an appellate court applies to the trial court's findings of fact. *See, e.g.*, *State v. Elliott*, 360 N.C. 400, 417, 628 S.E.2d 735, 747 (applying a deferential standard to the trial court's findings of fact when those findings were based upon a newspaper article), *cert. denied*, —— U.S. ——, 166 L. Ed. 2d 378 (2006); *Stephenson v. Bartlett*, 357 N.C. 301, 309, 582 S.E.2d 247, 252 (2003) (applying a deferential standard of review to the trial court's findings of fact when those findings were based upon written redistricting plans); *Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 47, 442 S.E.2d 45, 52 (1994) (applying a deferential standard of review to the trial court's findings of fact when those findings were based upon uncontradicted affidavits).

We should not hasten to abandon century-old precedent applying a deferential standard of review to a trial court's findings of fact, especially when the issue has not been raised, briefed, or argued by any party.

For the reasons stated above, I concur in the result only.

Justice MARTIN joins in this separate opinion.

Justice NEWBY dissenting.

I recognize that subprime lenders are under close scrutiny and that our General Assembly decided to outlaw the sale of single premium insurance some time after the execution of the contracts at issue. This case, however, is not about regulating subprime loans. Instead, the Court's decision today implicates bedrock principles of contract law which should not be disturbed in response to policy concerns over a disfavored industry. For the first time in our

history, a North Carolina appellate court has found a contract to be unconscionable.

Although the majority[3] ostensibly applies general principles of state contract law to render this arbitration agreement unconscionable, in effect the majority finds it unconscionable precisely because it is an agreement to arbitrate. By holding that the collective effect of provisions unique to arbitration agreements renders the instant agreement unconscionable, the majority treats this contract differently from other contracts. Such an approach is precluded by federal law. *See* 9 U.S.C. § 2 (2000) (making arbitration agreements "valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of *any contract*." (emphasis added)); *Perry v. Thomas*, 482 U.S. 483, 493 n.9, 107 S. Ct. 2520, 2527 n.9, 96 L. Ed. 2d 426, 437 n.9 (1987) ("Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot."); *Gay v. Credit*Inform, —— F.3d ——, ——, 2007 WL 4410362, at *21 (3d Cir. Dec. 19, 2007) (No. 06-4036) (rejecting a plaintiff's challenge to an arbitration agreement in which she "relie[d] on the uniqueness of the arbitration provision in framing her unconscionability argument" and "contende[d] that the provision is unconscionable because of what it provides, i.e., arbitration of disputes on an individual basis in place of litigation possibly brought on a class action basis").

Because I believe that today's holding is neither compelled by the facts under our state law nor complies with federal law, I respectfully dissent.

I. FEDERAL LAW

The contract in this case provides for a means of alternative dispute resolution, arbitration, which is favored in North Carolina. *See, e.g.*, *Cyclone Roofing Co. v. David M. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984). Our state's policy is consistent with "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765, 785 (1983). The Federal Arbitration Act ("FAA") makes all arbitration agreements "valid, irrevocable, and enforceable,

3. The "majority" refers to those members of this Court embracing the principal opinion or the concurring opinion. The "principal opinion" refers to the opinion of Justice Timmons-Goodson. The "concurring opinion" refers to the opinion of Justice Edmunds.

save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The purpose of the FAA was "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S. Ct. 1647, 1651, 114 L. Ed. 2d 26, 36 (1991); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27, 105 S. Ct. 3346, 3354, 87 L. Ed. 2d 444, 455 (1985) ("[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."). "The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Cone Mem'l Hosp.*, 460 U.S. at 24-25, 103 S. Ct. at 941, 74 L. Ed. 2d at 785. Accordingly, the United States Supreme Court has recognized that arbitration can be an appropriate forum for the resolution of federal statutory claims and has enforced agreements to arbitrate such claims. *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989) (Securities Act of 1933); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987) (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi*, 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (Sherman Act).

Likewise, in *Burke County Public School Board of Education v. Shaver Partnership*, this Court held that agreements to arbitrate disputes arising under any contract involving "substantial interstate activity" are enforceable under the FAA "notwithstanding conflicting state law." 303 N.C. 408, 420, 422, 279 S.E.2d 816, 823, 824 (1981). There, we recognized the benefit of "uniformity" in the enforcement of arbitration agreements in state and federal courts. *Id.* at 422, 279 S.E.2d at 824.

It is important to note the interplay between state and federal law with respect to arbitration agreements: federal law makes an arbitration agreement enforceable except when common law principles, such as unconscionability, make it unenforceable. The common law defense must apply to contracts generally and not arise because the subject is an arbitration agreement. *See Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 1656, 134 L. Ed. 2d 902,

909 (1996) ("Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status . . . ."); *Perry*, 482 U.S. at 493 n.9, 107 S. Ct. at 2527 n.9, 96 L. Ed. 2d at 437 n.9 ("A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.").

Because this case is the first time this Court has held a contract unconscionable, and since the majority agrees that this arbitration agreement is unconscionable because of the collective effect of the arbitration agreement's terms, today's holding creates a preemption issue. The majority finds the agreement unconscionable based on provisions that would only exist in an arbitration agreement. Further, the principal opinion's finding of unconscionability involves a misapplication of a United States Supreme Court test specifically applicable to arbitration costs. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-92, 121 S. Ct. 513, 521-23, 148 L. Ed. 2d 373, 382-84 (2000).

In short, the majority concludes this arbitration agreement is unconscionable because it contains provisions common to many arbitration agreements. This result is precisely the one rejected recently by the United States Court of Appeals for the Third Circuit. In *Gay v. Credit*Inform, the Third Circuit specifically warned that state court analysis of an arbitration agreement cannot focus on the uniqueness of an arbitration agreement as grounds for unconscionability. 2007 WL 4410362, at *21. Additionally, the Eleventh Circuit has recently upheld an arbitration agreement in the face of challenges similar to those raised in this case, particularly in reference to the class action prohibition and the exceptions to arbitration. *See Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877 (11th Cir. 2005), *cert. denied*, 546 U.S. 1214, 126 S. Ct. 1457, 164 L. Ed. 2d 132 (2006). These decisions by federal courts of appeals in cases factually analogous to the instant case further underscore the federal preemption issues involved here.

II. STATE LAW

A. General Principles of Contract Law

This Court has emphasized the vital role contracts play in our free society:

> "The right to contract is recognized as being within the protection of the Fifth and Fourteenth Amendments to the Constitution of the United States; and protected by state constitutions. It has been held that the right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution."

Alford v. Textile Ins. Co., 248 N.C. 224, 227, 103 S.E.2d 8, 10-11 (1958) (internal citations and internal quotation marks omitted) (quoting *Morris v. Holshouser*, 220 N.C. 293, 17 S.E.2d 115 (1941)). Like any freedom, the liberty to contract is coupled with corresponding responsibility: "Liberty to contract carries with it the right to exercise poor judgment as well as good judgment. It is the simple law of contracts that 'as a man consents to bind himself, so shall he be bound.' " *Troitino v. Goodman*, 225 N.C. 406, 414, 35 S.E.2d 277, 283 (1945) (citations omitted).

Equally well settled is the role courts should play in interpreting and enforcing contracts: "There can be no dispute that [a] contract between [private parties] . . . there being no mistake or fraud, both being *sui juris*, is a valid and binding one." *Peoples Bank & Tr. Co. v. Mackorell*, 195 N.C. 741, 744, 143 S.E. 518, 520 (1928); *see also id.* at 745, 143 S.E. at 520 (noting further, by way of example, that even " 'though [a] contract was a foolish one, it would hold in law' " (citation omitted)). "The principle is generally conceded, and it is certainly equitable, that when the benefit and the burden of a contract are inseparably connected, both must go together, and liability to the burden is a necessary incident to the right to the benefit. *Qui sentit commodum sentire debet et onus.*" *Norfleet v. Cromwell*, 70 N.C. 510, 516, 70 N.C. 634, 641 (1874) (citations omitted).

We have also recognized that the mere fact that one party to a contract is a large, heavily regulated commercial entity does not, per se, destroy the arm's-length nature of the transaction. In considering enforcement of provisions of an insurance policy, we noted:

> The insured and the defendant [insurance company] had the legal right to enter into the contract, and the parties are bound by its terms. In the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please, upon their obligations, not inconsistent with public policy; and the courts have no right to add anything to their contracts or to take anything from them.

> . . . We must decide the case, therefore, not by what we may think would have been a wiser and more discreet contract on the part of the plaintiff, if he could have procured such a one, but by what is written in the contract actually made by them. Courts are not at liberty to rewrite contracts for the parties. We are not their guardians, but the interpreters of their words. We must, therefore determine what they meant by what they have said—what their contract is, and not what it should have been.

Powers v. Travelers Ins. Co., 186 N.C. 336, 337-38, 119 S.E. 481, 481-82 (1923) (internal citations and internal quotation marks omitted). Our jurisprudence counsels us to exercise caution in undertaking any judicial inquiry into the wisdom of a contract's terms, such as the one plaintiffs ask us to do here.

B. Unconscionability Under *Brenner*

On one occasion alone, this Court has addressed the issue of whether a contract should be enforced because of unconscionability. In *Brenner v. Little Red School House, Ltd.*, we recognized that it is only in the exceptional case that a contract will be found unconscionable:

> A court will generally refuse to enforce a contract on the ground of unconscionability only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other. In determining whether a contract is unconscionable, a court must consider all the facts and circumstances of a particular case. If the provisions are then viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable.

302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981) (citations omitted). Applying this rigorous standard, no appellate court in North Carolina has held a contract unenforceable based on unconscionability.

In *Brenner*, the plaintiff sought to recover tuition paid in advance to a private school when his former wife refused to allow the plaintiff's child to attend the school and the child did not attend a single day. *Id.* at 208-09, 274 S.E.2d at 208. Under the terms of the contract between the plaintiff and the school, tuition for the entire school year

was "payable in advance on the first day of school, no portion refundable." *Id.* at 208, 274 S.E.2d at 208.

Applying the articulated unconscionability test to "all the facts and circumstances" in *Brenner*, we found that there was no inequality of bargaining power because the plaintiff had other choices of schools, *id.* at 213-14, 274 S.E.2d at 210-11, and that the clause making advance tuition payments on the first day of school nonrefundable "[was] reasonable when considered in light of the expense to defendant in preparing to educate the child and in reserving a space for him," *id.* at 213-14, 274 S.E.2d at 211.

As the majority correctly notes, plaintiffs have the burden to prove unconscionability since they have raised it as an affirmative defense to enforceability of this contract. *Rite Color Chem. Co. v. Velvet Textile Co.*, 105 N.C. App. 14, 20, 411 S.E.2d 645, 649 (1992).

III. STANDARD OF REVIEW

Preliminarily, I question whether the majority applies the correct standard of review by deferring to the trial court's findings of fact.[4] We apply the deferential "competent evidence" standard to the trial court's findings of fact in cases like *Lumbee River Electric Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 309 S.E.2d 209 (1983), relied upon by the majority, when the trial judge sits as jury and takes live evidence. *Id.* at 740-41, 309 S.E.2d at 218-19. However, when as here, the trial court merely hears arguments on a motion and reviews the same cold record we review now, there is less reason to defer to the trial court as fact finder. For example, we review de novo the trial court's rulings on summary judgment motions, which are argued on a record similar to the one in this case. *Builders Mut. Ins. Co. v. N. Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004)). Federal appellate courts apply de novo review to district court denials of motions to compel arbitration. *See, e.g.*, *Gay*, 2007 WL 4410362, at *2; *Safer v. Nelson Fin. Grp., Inc.*, 422 F.3d 289, 293 (5th Cir. 2005); *Jenkins*, 400 F.3d at 873; *Kidd v. Equitable Life Assurance Soc'y*, 32 F.3d 516, 518 (11th Cir. 1994), *cert. denied*, 522 U.S. 1028, 118 S. Ct. 626, 139 L. Ed. 2d 606

4. Despite contentions to the contrary, the parties did brief the standard of review issue. Both parties included "Standard of Review" sections in their briefs to this Court, with plaintiffs arguing that the Court of Appeals majority did not defer adequately to the trial court and defendants arguing that the deference was appropriate. I believe that this adequately preserves the issue for appellate review. Nonetheless, I do not find the standard of review to be dispositive in this case.

(1997). Additionally, a number of federal courts liken the standard of review for a motion to compel arbitration to the standard for a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *See, e.g.*, *Par-Knit Mills Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 & n.9 (3d Cir. 1980); *Hughes v. CACI, Inc.—Commercial*, 384 F. Supp. 2d 89, 92-93 (D.D.C. 2005).[5]

However, even applying the competent evidence standard, I conclude that the facts, as found by the trial court, do not support the legal conclusion that this contract is unconscionable.

IV. PROCEDURAL UNCONSCIONABILITY

The principal opinion acknowledges that "procedural unconscionability involves 'bargaining naughtiness' in the form of unfair surprise, lack of meaningful choice, and an inequality of bargaining power." *Rite Color Chem. Co.*, 105 N.C. App. at 20, 411 S.E.2d at 648. Applying this test, it finds the following to be sufficient to establish procedural unconscionability: the closings were rushed and the arbitration clause not mentioned; the terms were non-negotiable; and the parties' relative status, business and consumer, reflected inequality in bargaining power. Quite frankly, these factors exist in most, if not all, consumer contracts.[6]

Under federal case law interpreting the FAA, there is a question regarding this Court's jurisdiction over plaintiffs' argument that the arbitration agreement is a contract of adhesion. As noted by the principal opinion, the trial court did not extensively address the procedural unconscionability question, but did label the arbitration agreement "a standard-form contract of adhesion." More than four

5. It appears that an intermediate option we could have pursued in this case was remanding to the trial court, where any disputed facts revealed by the record could have been addressed in an evidentiary hearing with the opportunity to test statements through cross-examination; this Court has remanded for such hearings in a variety of contexts. *See, e.g.*, *Stephenson v. Bartlett*, 355 N.C. 354, 381, 562 S.E.2d 377, 395 (2002) (legislative redistricting); *State v. McHone*, 348 N.C. 254, 259, 499 S.E.2d 761, 764 (1998) (criminal defendant's motion for appropriate relief); *Meiselman v. Meiselman*, 309 N.C. 279, 306, 307 S.E.2d 551, 567 (1983) (minority shareholder suit to dissolve corporation).

6. In the overall unconscionability analysis, the concurring opinion agrees with the principal opinion in concept, but not terminology. The concurring opinion collapses the procedural and substantive analyses under what it labels as *Brenner's* "totality of the circumstances" test. While not using the term "procedural unconscionability," the concurring opinion's analysis does analyze inequality of bargaining power and the parties' status as business and consumer. In substance, the majority of the members of this Court agree that these factors contribute to a finding of unconscionability.

decades ago, the United States Supreme Court held that claims challenging the making of an arbitration agreement specifically are distinguishable from those challenging the contract, in which the arbitration agreement is included, generally. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04, 87 S. Ct. 1801, 1806, 18 L. Ed. 2d 1270, 1277 (1967). The former are reviewable by a court, while the latter are for the arbitrator to decide. *See id.* ("[A] federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the [FAA] but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448-49, 126 S. Ct. 1204, 1210, 163 L. Ed. 2d 1038, 1045-46 (2006) ("[T]he *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. . . . We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.").

In this case, neither plaintiffs' arguments nor the majority's analysis regarding procedural unconscionability clearly distinguishes between challenges to the loan agreements and the arbitration agreements contained therein. They emphasize what happened at the loan closing, preparation of the documents by defendants, and the lack of sophistication of these subprime loan applicants. Addressing similar arguments, the United States Court of Appeals for the Eleventh Circuit found that claims regarding the absence of consumer bargaining power, the types of consumers targeted, and the consumers' inability to change the contract terms related to allegations that the consumer loan contract as a whole was adhesive, and thus, those claims were to be decided by an arbitrator, not a court. *Jenkins*, 400 F.3d at 877.

However, even under this state's contract law, the arbitration agreement is not procedurally unconscionable. Many of the factors highlighted by the majority were present in *Brenner*, but did not result in the contract being declared unenforceable. In *Brenner*, there was no discussion whether the defendant explained to the plaintiff the no refund policy; there was no indication the policy was negotiable; and presumably the provider of the service drafted the form agreement and held the keys to the schoolhouse. In our analy-

sis of "inequality of bargaining power," we did not focus on who drafted the agreement or whether any of the specific terms were negotiable. *Id.* at 213-14, 274 S.E.2d at 211. Instead, we equated "bargaining power" with choices in the marketplace: "Plaintiff was not forced to accept [the] defendant's terms, for there were other private and public schools available to educate the child." *Id.* at 213, 274 S.E.2d at 211. Unlike compulsory schooling for children, borrowing funds is optional. Plaintiffs had the choice of whether to borrow. Further, although the trial court did not address the availability of loans from other lenders, one can assume other borrowing options existed in the subprime market. Under our controlling precedent, "[t]here was no inequality of bargaining power between the parties" since plaintiffs had other options. *Id.* They were "not forced to accept defendant[s'] terms." *Id.*

It is also important to note that the arbitration agreement was not hidden or minimized. As the principal opinion observes, this is not a case questioning "whether an arbitration agreement had been properly executed" and "there is no question that plaintiffs signed the agreement." The arbitration agreement alerted each plaintiff to its significance in a number of ways. Although contained in the loan document, the agreement was set off in a separate box and entitled "ARBITRATION PROVISION," which was bolded, capitalized, and underlined. The provision was introduced by the following bold, capitalized font: "READ THE FOLLOWING ARBITRATION PROVISION CAREFULLY. IT LIMITS CERTAIN OF YOUR RIGHTS, INCLUDING YOUR RIGHT TO OBTAIN REDRESS THROUGH COURT ACTION." As the provision comprised a portion of two pages, plaintiffs initialed the page transition. Directly above the borrower's signature line for the arbitration agreement, the following bold, capitalized statement appeared: "READ THE ABOVE ARBITRATION PROVISION CAREFULLY. IT LIMITS CERTAIN OF YOUR RIGHTS, INCLUDING YOUR RIGHT TO OBTAIN REDRESS THROUGH COURT ACTION." Both plaintiffs signed their respective arbitration agreements separately from the signatures required on the loan agreements—a fact that carries considerable legal significance. *See Leonard v. S. Power Co.*, 155 N.C. 8, 11, 155 N.C. 10, 14, 70 S.E. 1061, 1063 (1911) ("[T]he law will not relieve one who can read and write from liability upon a written contract, upon the ground that he did not understand the purport of the writing, or that he has made an improvident contract, when he could inform himself and has not done so.").

Defendants took steps to ensure plaintiffs would be aware of the provision by separating the arbitration agreement from other portions of the loan agreement; employing capitalization, bolding, and underlining; and requiring a separate signature. Furthermore, the loan closing was not the last opportunity plaintiffs had to review the documents and decline the loans. Contained within the arbitration provision is the borrower's right to rescind the loan within three business days. Even if plaintiffs were rushed through the closing, they had three business days to read the documents and rescind the loans if desired.

In sum, the majority's analysis criticizes aspects common to all consumer transactions and fails to find the "bargaining naughtiness" required for finding procedural unconscionability.

V. SUBSTANTIVE UNCONSCIONABILITY

The principal opinion describes substantive unconscionability as pertaining to whether the terms of the contract are harsh, one-sided, and oppressive.[7] *See Rite Color Chem. Co.*, 105 N.C. App. at 20, 411 S.E.2d at 648-49. The majority determines that the arbitration agreement here is substantively unconscionable based on the collective effect of its "prohibitively high" and "onerous" arbitration costs, one-sidedness and lack of mutuality, and prohibition of class actions and joinder of claims. I cannot agree. An arbitration costs provision would not be found in any type of contract except an arbitration agreement. Plaintiffs also challenge the exceptions to arbitration, which again, would only be found in an arbitration provision. Finally, plaintiffs' arguments in this case focus on the class action waiver's interaction with the other two provisions that are unique to arbitration. Thus, the unconscionability analysis in this case not only fails under the exceedingly high substantive standard prescribed by our state case law, but also risks preemption by federal law to the extent it relies on features of the instant agreement that would not be found in contracts generally.

To prove substantive unconscionability under *Brenner*, plaintiffs must show that the "inequality of the bargain is so manifest as to shock the judgment" and that the terms of the arbitration agreement "are so oppressive that no reasonable person would make them on

7. While not using the term "substantive unconscionability," the concurring opinion criticizes the same arbitration terms as the principal opinion. The concurring opinion proceeds solely under *Brenner*, whereas the principal opinion uses federal case law in its analysis.

the one hand, and no honest and fair person would accept them on the other." 302 N.C. at 213, 274 S.E.2d at 210. In *Brenner*, we evaluated substantive unconscionability, as we had with procedural unconscionability, in the context of the marketplace. We found the school's "no refund" policy was reasonable in light of what the student's parent received in return: preparation for his child's education and a reserved place in the class. *Id.* at 213-14, 274 S.E.2d at 211. In this case, considering all the facts and circumstances, the terms of the arbitration agreement are "reasonable when considered in light of" the overall transaction. *See id.*[8]

Generally speaking, the loan agreements executed between plaintiffs and defendants included a common exchange. Plaintiffs, who had impaired credit, received a loan. Defendants received a promise by each plaintiff to pay back the loan under terms that would minimize defendants' risk of loss. These terms, including the interest rate, were less favorable than what was available in the conventional market, but defendants were assuming more risk by lending to plaintiffs based on their lower credit ratings. The terms of each agreement, like many other loan agreements in both the conventional and subprime markets, included an agreement to arbitrate claims. There is no question in this case whether it was reasonable for defendants to include an agreement to arbitrate in their extension of credit to plaintiffs. Plaintiffs merely challenge certain terms of that agreement: (1) the costs provisions; (2) the enumerated exceptions to arbitration; and (3) the prohibition on class actions and joinder of claims. Taken together or separately, these terms do not render the arbitration provision unconscionable.

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8. Contracts for the sale of goods governed by North Carolina's Uniform Commercial Code ("UCC") are subject to the doctrine of unconscionability. *See* N.C.G.S. § 25-2-302 (2007). Although the arbitration agreement here is governed by common law, not the UCC, the UCC's doctrine of unconscionability grew out of the common law. *See Rite Color Chem. Co.*, 105 N.C. App. at 18, 411 S.E.2d at 647-48. The official comment to the statute states:

> The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. [The statute] makes it clear that it is proper for the court to hear evidence upon these questions. *The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.*

N.C.G.S. § 25-2-302 cmt. 1 (emphasis added) (citation omitted). Consistent with *Brenner*, the UCC makes clear that the key inquiry is more about the commercial reasonableness of the contract terms than it is about the relative bargaining positions of the parties.

A. Arbitration Costs

The focal point of the majority's analysis is the conclusion that the hypothetical arbitration costs, as stated in the agreement, prevent plaintiffs from vindicating their rights. The principal opinion determines that the costs provision of this arbitration agreement presents a prohibited "barrier" under decisions by the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit. However, the record in this case does not establish that the potential costs of arbitration will deter plaintiffs from "effectively vindicating" their claims of more than $15,000 each.[9] This arbitration fee structure withstands the tests of *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000), and *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549 (4th Cir. 2001).

In *Green Tree*, the United States Supreme Court addressed the issue of arbitration costs when the purchaser of a mobile home brought a purported class action against her lenders, asserting violations of the federal Truth in Lending Act for the lenders' alleged failure to disclose certain finance charges. 531 U.S. at 82-83, 121 S. Ct. at 517-18, 148 L. Ed. 2d at 378-79. With respect to the plaintiff's challenge to the arbitration agreement, the Supreme Court framed the issue as "whether [the plaintiff's] agreement to arbitrate is unenforceable because it says nothing about the costs of arbitration, and thus fails to provide her protection from potentially substantial costs of pursuing her federal statutory claims in the arbitral forum." *Id.* at 89, 121 S. Ct. at 521, 148 L. Ed. 2d at 382. Because of the scant record with respect to arbitration costs in *Green Tree*, the Court found plaintiff had failed to prove the costs were prohibitively expensive. *Id.* at 90-91, 121 S. Ct. at 522, 148 L. Ed. 2d at 383-84. The Court

9. Neither party has contested the fact that each plaintiff's claim satisfies the $15,000 threshold triggering the arbitration agreement. The majority focuses on the insurance premiums paid instead of the values of the claims. Both plaintiffs alleged three causes of action seeking compensatory damages, costs, and attorney's fees: (1) unfair and deceptive trade practices ("UDTP") under N.C.G.S. § 75-1.1, (2) unjust enrichment, and (3) breach of duties of good faith and fair dealing. A brief review of the smaller claim, that of Tillman, reveals the value of the claim surpasses the threshold. Tillman's compensatory damages are the amount she paid for the disputed insurance ($2,064.75) plus interest at her contract rate from the date the charges began until judgment, which amounts to approximately $5,000.00. The trebling of the compensatory damages under the UDTP statute meets the $15,000 threshold, even before adding costs and attorney's fees and other potential recoveries. Richardson, having paid disputed insurance premiums of $4,208.75, would have a substantially higher claim.

concluded that "[t]he 'risk' that [the plaintiff] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." *Id.* at 91, 121 S. Ct. at 522, 148 L. Ed. 2d at 384. Ultimately, *Green Tree* clarified that: (1) costs are "prohibitive" if they preclude effective vindication of rights in the arbitral forum, *id.* at 90, 121 S. Ct. at 522, 148 L. Ed. 2d at 383, and (2) a party challenging an arbitration agreement must show "the likelihood of incurring [prohibitive] costs," *id.* at 92, 121 S. Ct. at 522, 148 L. Ed. 2d at 384.

In *Bradford*, the United States Court of Appeals for the Fourth Circuit followed these two directives from *Green Tree* when it considered whether a fee-splitting provision rendered an arbitration agreement unenforceable. 238 F.3d at 552. The plaintiff sought redress for his age discrimination claims simultaneously through arbitration and in federal district court. *Id.* at 551-52. In reviewing the costs issue, the Fourth Circuit stated that part of the key inquiry was whether "the expected cost differential between arbitration and litigation in court . . . is so substantial as to deter the bringing of claims." *Id.* at 556. As to the particular case before it, the Fourth Circuit found that the plaintiff had not been deterred from vindicating his rights because he had in fact utilized the arbitral forum. *Id.* at 558.

Initially, I note that defendants argue plaintiffs cannot prove prohibitive costs because the arbitration agreement requires arbitration under the AAA's Consumer Rules enacted subsequent to the execution of plaintiffs' arbitration agreements. Under changes to the rules, if plaintiffs (or any consumers) arbitrate, they will be liable for at most $375 in arbitration costs. The majority rejects this argument by stating "it is inappropriate to rewrite an illegal contract."[10] However, this is not a situation in which defendants are attempting to rewrite a contract provision. Rather, to use AAA as mandated by the arbitration agreement, defendants are required to comply with the new rules by paying most of the arbitration fees. As a result, plaintiffs cannot show they will actually incur prohibitive costs. *Green Tree*, 531 U.S. at 92, 121 S. Ct. at 522, 148 L. Ed. 2d at 384. Other courts have held that an after-the-fact offer from a defendant "to bear the costs of arbitration that [the plaintiff] is unable to afford" prevented the plaintiff from "demonstrat[ing] that arbitration would be prohibitively expensive." *Anders v. Hometown Mortgage Servs., Inc.*,

10. The principal opinion addresses defendants' argument directly. While the concurring opinion is silent, it simply assumes the stated contract terms are the only ones to be considered.

346 F.3d 1024, 1029 (11th Cir. 2003); *see Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 56 (1st Cir. 2002) (holding that "[the defendant's] offer to pay the costs of arbitration and to hold the arbitration in the [plaintiffs'] home state . . . mooted the issue of arbitration costs").

The principal opinion also notes in response to defendants' offer to apply the AAA's Consumer Rules that the arbitration agreement provides that "[t]he terms of this Provision shall control any inconsistency between the rules of [AAA] and this Provision." However, the arbitration agreement contains a severability clause, which should be used to excise this particular sentence. We construe contracts as a whole, give effect to the intent of the parties, and enforce contracts when unenforceable provisions can be severed. *See*, *e.g.*, *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989); *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 658-59, 194 S.E.2d 521, 531-32 (1973); *In re Receivership of Port Pub. Co.*, 231 N.C. 395, 397-98, 57 S.E.2d 366, 367-68 (1950). By severing this sentence, the intent of the contract is effectuated through permitting AAA to conduct the arbitration and thereby allowing AAA's Consumer Rules to apply. *See*, *e.g.*, *State v. Philip Morris USA*, *Inc.*, 359 N.C. 763, 773, 618 S.E.2d 219, 225 (2005). I do not believe severing this one sentence amounts to rewriting the entire agreement. *See Whittaker Gen. Med. Corp.*, 324 N.C. at 528, 379 S.E.2d at 828 ("If the contract is separable . . . and one part is reasonable, the courts will enforce the reasonable provision."); *see also Vecellio & Grogan*, *Inc. v. Piedmont Drilling & Blasting*, *Inc.*, 183 N.C. App. 66, 73, 644 S.E.2d 16, 21 ("By striking the offending language [in the indemnification clause] the Court does not rewrite the contract or substitute its own terms in the provision for those of the parties." (citing *Int'l Paper Co. v. Corporex Constructors*, *Inc.*, 96 N.C. App. 312, 316, 385 S.E.2d 553, 555 (1989))), *disc. rev. denied*, 361 N.C. 575, 651 S.E.2d 564 (2007).

This Court's refusal to save this arbitration agreement through incorporating the AAA Consumer Rules or applying its severability clause raises the specter of preemption, because it appears we are treating this contract differently from other contracts. The FAA, as interpreted by the United States Supreme Court, does not permit this. *See Doctor's Assocs.*, 517 U.S. at 687, 116 S. Ct. at 1656, 134 L. Ed. 2d at 909; *see also Kristian v. Comcast Corp.*, 446 F.3d 25, 64-65 (1st Cir. 2006) (finding an arbitration agreement's limitation on the recovery of attorney's fees and costs and its class arbitration bar unenforce-

able in an antitrust case, but severing those provisions so that arbitration could proceed).

Even if the costs provisions were applied as written, plaintiffs have not offered more than speculation that they would incur costs. The written terms of the arbitration provision in this case provide that the costs are shifted to the non-prevailing party under two circumstances: when the initial arbitration proceeding exceeds eight hours and after a de novo appeal. The trial court's findings cited by the principal opinion do not address the likelihood that: (1) plaintiffs' initial arbitration hearings would last more than eight hours; (2) the arbitration of plaintiffs' claims would involve an appeal; or (3) plaintiffs would not prevail. The trial court's finding that "the average daily rate of AAA arbitrator compensation in North Carolina is $1,225.00" is not probative of whether the costs are prohibitive without corresponding findings that plaintiffs' arbitration would actually last more than eight hours and plaintiffs are likely to lose. Under the arbitration agreement, plaintiffs must pay $125 to initiate arbitration. In civil court, plaintiffs must pay a $95 filing fee. N.C.G.S. § 7A-305 (2007). Thus, the initial financial hurdle to use both forums is marked by a difference of only $30. Because the trial court did not make any findings as to the likely length of plaintiffs' arbitrations or their likelihood of success, it could not fairly determine the costs plaintiffs would incur beyond the filing fee.

The principal opinion correctly states that *Bradford* requires a comparison of the costs of litigation with the costs of arbitration. However, in this case, the trial court did not perform such an analysis. The evidence presented and relied upon by the trial court compares the costs of litigating a class action and arbitrating as an individual. In actuality, the evidence at issue compares the costs of winning a class action and losing an individual arbitration. Clearly, this is not the proper analysis. The record in this case does not offer proof from which a court can make the correct comparison: the cost to litigate an individual claim in court versus the cost to arbitrate the same claim.

B. Exceptions to Arbitration

The agreement requires arbitration for all actions in which, as here, a claim exceeds $15,000, except for foreclosure actions. The majority holds this provision unconscionable under *Brenner* because it is "so one-sided that the contracting party is denied any opportunity for a meaningful choice." The majority bases this conclusion on

a finding that since 1996, defendants have pursued about 2,000 collection actions in court (of the 68,000 loans made), with an average claim of $7,000, but have pursued no claims in arbitration. The majority concludes the exceptions were "specifically carve[d] out" for the corporate drafter to avoid arbitration. I do not agree.

The arbitration agreement's exclusion from arbitration of claims under $15,000 is not manifestly unreasonable; it was not even designed by this lender. As defendants point out, the American Arbitration Association ("AAA"), which would administer any arbitration between these parties, requires that claims under $15,000 be excluded from arbitration. The $15,000 threshold for arbitration is not arbitrary or specifically designed to favor defendants. This policy of the third-party administrator is intended to benefit consumers by allowing access to the courts for small claims. *See Jenkins*, 400 F.3d at 879 (noting that a "provision providing access to small claims tribunals was intended to benefit, not injure, consumers"). Here, plaintiffs have the option of pursuing their individual claims in civil court by limiting their damages to $15,000 each or seeking a larger recovery in arbitration.

Additionally, the arbitration agreement's exclusion of foreclosure actions is not unreasonable because our statutes give North Carolina superior courts "exclusive jurisdiction" over any action affecting the title to land located in this state. *See* N.C.G.S. § 43-1 (2007). Moreover, our foreclosure statutes contain provisions protecting homeowners. *E.g.*, *id. §* 45-21.16 (2007) (outlining specific requirements for notice and hearing prior to sale); *id.* § 45-21.20 (2007) (allowing satisfaction of mortgage after notice and before sale is completed); *id.* § 41-21.34 (2007) (permitting application to enjoin sale on equitable grounds).

C. Prohibition on Class Actions and Joinder of Claims

The majority affirms the trial court's conclusion that the prohibition on class actions and joinder of claims is a factor to consider in the overall unconscionability analysis. The majority reasons that the prohibition hinders access to a tribunal for "cases with low damages" and benefits only the lender. This analysis ignores the facts of this case in which each plaintiff's claim is greater than $15,000 and arbitration provides an expedient forum for plaintiffs to pursue their remedies.

The principal opinion states that plaintiffs' damages total less than $4,500, but this amount does not take into account accrued

interest and trebling, N.C.G.S. § 75-16 (2007), or that plaintiffs may recover attorney's fees, *id.* § 75-16.1 (2007); *see* note 7 above. Moreover, the mandatory arbitration provision was only triggered in this case because each plaintiff claims damages in excess of $15,000. The "modesty" of the damages sought by plaintiffs is doubtful. When federal courts have held arbitration agreements unconscionable based in part on class action prohibitions, the damages at issue were considerably less than those at issue in this case. *See, e.g.*, *Dale v. Comcast Corp.*, 498 F.3d 1216, 1220 (11th Cir. 2007) ($11 per plaintiff); *Ting v. AT&T*, 319 F.3d 1126, 1134 (9th Cir.) (declaratory and injunctive relief), *cert. denied*, 540 U.S. 811, 124 S. Ct. 53, 157 L. Ed. 2d 24 (2003); *see also Kristian*, 446 F.3d at 54 (damages which if trebled would range "from a few hundred dollars to perhaps a few thousand dollars" in a complex antitrust case); *Leonard v. Terminix Int'l Co.*, 854 So. 2d 529, 535 (Ala. 2002) (per curiam) (less than $500 per plaintiff); *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 562, 567 S.E.2d 265, 278 ($8.46 for one named plaintiff), *cert. denied*, 537 U.S. 1087, 123 S. Ct. 695, 154 L. Ed. 2d 631 (2002).

The trial court's conclusion that it would be unlikely that attorneys would be willing to represent plaintiffs in the absence of a class action option, while labeled a factual finding, is essentially a legal argument that has been rejected by federal courts. Federal courts of appeals have concluded that the availability of attorney's fees provides sufficient incentive for attorneys to represent clients raising claims similar to those of plaintiffs in this case. *See Jenkins*, 400 F.3d at 878 (recognizing that the availability of attorney's fees provides plaintiffs with adequate access); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir.) (rejecting challenge to a class action waiver based on the plaintiffs' argument that the small amount of individual damages sought would make them unable to obtain legal representation when attorney's fees were available), *cert. denied*, 537 U.S. 1087, 123 S. Ct. 695, 154 L. Ed. 2d 631 (2002); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000) (finding that class action waivers in arbitration proceedings do not "necessarily choke off the supply of lawyers willing to pursue claims on behalf of debtors"), *cert. denied*, 531 U.S. 1145, 121 S. Ct. 1081, 148 L. Ed. 2d 957 (2001); *see also Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003) (enforcing an arbitration provision specifically prohibiting class action arbitration).

Further, apart from plaintiffs' attorney's own averments, there is no evidence in the record that other attorneys would refuse to take

the case of a client seeking more than $15,000 in damages.[11] Many cases seeking damages lower than those sought here are litigated through our appellate court system. *See*, *e.g.*, *Wright v. Murray*, —— N.C. App. ——, ——, 651 S.E.2d 913, 914 (2007) (finding no abuse of discretion when trial court ordered $25,000 in attorney's fees following the jury's award of $7,000 to the plaintiff); *Dysart v. Cummings*, 181 N.C. App. 641, 645, 640 S.E.2d 832, 835 (seeking $10,500 in damages plus costs and attorney's fees), *aff'd per curiam*, 361 N.C. 580, 650 S.E.2d 593 (2007). While it is uncontested that plaintiffs cannot afford to hire an attorney on an hourly basis, there is nothing in the arbitration agreement itself that precludes an attorney from taking a consumer's case in arbitration on a contingency basis. The very fact that plaintiffs retained counsel on a contingency fee basis in this matter weighs against a finding that representation would be unavailable.

VI. APPLICATION OF RECENT FEDERAL CASES

The majority upholds the trial court, which concluded that the three provisions taken together made the arbitration agreement unconscionable. Implicit in this conclusion is that none of these provisions standing alone would result in unconscionability. Not only does state law not support the trial court's conclusion, but the majority's approach is inconsistent with federal decisions interpreting the FAA. As illustrated by two recent federal court of appeals cases with similar facts, when reviewing elements of an arbitration agreement

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11. In several of its findings of fact, the trial court relies on information contained in the affidavit of plaintiffs' attorney. Reliance on the affidavit raises two concerns. First, under Rule 3.7 of the North Carolina Rules of Professional Conduct, "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client." N.C. St. B. Rev. R. Prof. Conduct 3.7 (Lawyer as Witness), 2007 Ann. R. N.C. 717, 812. In this case, the propriety of plaintiffs' own counsel providing an affidavit concerning not merely "services rendered in [this] case" but also regarding his opinion whether it would be "feasible to pursue claims such as this on an individual basis" is questionable under the rule.

Second, defendants moved to compel discovery on matters related to litigation and arbitration costs. The trial court denied this motion. Subsequently, two days before the hearing on defendants' motion to compel arbitration, plaintiffs' counsel submitted the affidavit at issue addressing the same information counsel had refused to disclose during discovery. Defendants moved to strike this affidavit. The trial court did not rule on the motion to strike, but relied on the affidavit in its findings of fact regarding the costs of litigation. Given this reliance, at a minimum, defendants should have been given the opportunity to probe the substance of the affidavit.

that are unique to arbitration agreements, state law must defer to federal principles.

In *Jenkins v. First American Cash Advance of Georgia, LLC*, the Eleventh Circuit considered whether an arbitration agreement between a consumer and a payday lender was unconscionable. 400 F.3d at 870-71. The terms of the agreement were similar to, but more strident than, those found in this case. Costs for arbitration were advanced by the lender only upon a consumer's request, and then the arbitrator had complete discretion to award attorney's fees and costs to the prevailing party, if applicable law allowed. *Id.* at 872. The arbitration agreement contained a small claims exception similar to the one in this case, with one important difference: small claims decisions could be appealed to an arbitrator. *Id.*

The trial court in *Jenkins* found that the agreement was substantively unconscionable because it prohibited class actions and because it lacked mutuality of obligation in that its small claims exception would only benefit the lender. *Id.* at 876. The trial court noted that individually these provisions might be insufficient, but "considered together," they made the arbitration agreement unconscionable. *Id.* The Eleventh Circuit disagreed. As to the class action waiver, even though none of the loans was greater than $500, *id.* at 871, the appeals court concluded that the availability of attorney's fees was sufficient incentive for lawyers to represent consumers under the applicable arbitration agreement, *id.* at 878. Further, the court concluded that the class action prohibition would not have the practical effect of immunizing the lenders because the arbitration agreement permitted the consumer to vindicate all of her substantive rights. *Id.* Regarding the exception allowing small claims actions to be brought in a judicial forum, the court noted that this option was equally applicable to both consumer and lender. *Id.* at 879. The court found the exception was intended to benefit, not injure, consumers as part of a larger Consumer Due Process Protocol developed by AAA. *Id.* Moreover, the Eleventh Circuit concluded that the arbitral forum itself does not unfairly favor the lender because the arbitrator was permitted to award the consumer the full range of relief available under the applicable statute. *Id.* at 880.

Likewise, in *Gay v. Credit*Inform, the Third Circuit considered whether an arbitration agreement between a consumer and a credit repair services company was unconscionable. 2007 WL 4410362, at *1. The court's analysis focused on the class action waiver contained

in the agreement, *id.* at *18-20, noting the "competing interests" at play: "the promotion of arbitration agreements and the protection of class actions prohibited by such agreements," *id.* at *20. Quoting from an earlier decision, the Third Circuit observed " '[w]hatever the benefits of class actions, the FAA *requires* piecemeal resolution when necessary to give effect to an arbitration agreement.' " *Id.* (quoting *Johnson*, 225 F.3d at 375 (alteration in original) (citation and internal quotation marks omitted)). The court specifically noted that state court analysis cannot focus on the uniqueness of an arbitration agreement. *Id.*[12] It further found that such "reasoning if applied logically could result in a significant narrowing of the application of the FAA." *Id.* at *21. The Third Circuit in *Gay* concluded: "[O]ur obligation is to honor the intent of Congress and that is what we are doing. If the reach of the FAA is to be confined then Congress and not the courts should be the body to do so." *Id.*

These cases highlight the important principles implicated by today's decision. *Jenkins*, with its similar facts, supports a conclusion that the instant arbitration agreement's terms do not cross the high bar of unconscionability. *Gay* underscores the difficulty a state court has in attempting to parse an arbitration agreement's terms under the FAA. Both decisions undercut the majority's conclusion here, which finds an arbitration agreement unconscionable based upon the very terms that make it an arbitration agreement.

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12. In *Gay*, the Third Circuit specifically criticized two Pennsylvania state court decisions, one of which involved the same arbitration clause used by defendants in this case. 2007 WL 4410362, at *18-21. In *Lytle v. CitiFinancial Services, Inc.*, 2002 PA Super. 327, 810 A.2d 643, the Pennsylvania Superior Court vacated the trial court's order dismissing the plaintiffs' complaint and remanded for the trial court to hold a hearing on whether there existed "a business reality which precluded CitiFinancial from agreeing to be bound by the arbitration provisions." *Id.* at ¶ 44, 810 A.2d at 668. If CitiFinancial were able to prove "a compelling basis for the one-sided arbitration clause," then the trial court was to allow the plaintiffs to offer proof on the issues of costs of arbitration as contrasted to court proceedings and the feasibility of obtaining relief in the absence of a class action mechanism. *Id.* at ¶ 45, 810 A.2d at 668. The Third Circuit specifically stated that *Lytle* violated section 2 of the FAA "[t]o the extent . . . that [it held] that the inclusion of a waiver of the right to bring judicial class actions in an arbitration agreement constitutes an unconscionable contract." *Gay*, 2007 WL 4410362, at *20.

Notably, the Pennsylvania Supreme Court, when reviewing a question on certification from the Third Circuit, disavowed *Lytle's* holding: "While we believe that *Lytle* was well intentioned in its effort to guard against pernicious lending practices, our conclusion here is that it swept too broadly. Under Pennsylvania law, the burden of establishing unconscionability lies with the party seeking to invalidate a contract, including an arbitration agreement . . . ." *Salley v. Option One Mortgage Corp.*, 592 Pa. 323, 347, 925 A.2d 115, 129 (2007).

VII. CONCLUSION

At its core, this case is about plaintiffs' challenge to an arbitration agreement that substitutes individual arbitration for class action litigation in court. Federal law does not permit plaintiffs to challenge this agreement simply because it designates an alternative forum for dispute resolution. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, 94 S. Ct. 2449, 2457, 41 L. Ed. 2d 270, 280 (1974) (recognizing that arbitration agreements are essentially forum selection clauses).

Further, under this Court's case law, a plaintiff seeking to prove a contract unconscionable must show its terms "shock the judgment of a person of common sense" and "are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." *Brenner*, 302 N.C. at 213, 274 S.E.2d at 210. Since 1996, 68,000 loans were made containing this arbitration provision. Having considered "all the facts and circumstances of [this] particular case," I do not believe the provisions of this agreement are shocking or so oppressive that a reasonable, honest, and fair person would not offer or agree to them. I believe "[t]he bargain was one that a reasonable person of sound judgment might accept." *Id.* at 214, 274 S.E.2d at 211. Beyond that, we are not allowed to inquire " 'as to whether the contract was good or bad, whether it was wise or foolish.' " *Id.* (citation omitted).

Because plaintiffs have failed to prove procedural and substantive unconscionability as required by *Brenner*, I do not believe this case presents the landmark occasion for invalidating a bargain due to unconscionability. Justice Oliver Wendell Holmes warned of cases such as this:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

N. Sec. Co. v. United States, 193 U.S. 197, 400-01, 24 S. Ct. 436, 468, 48 L. Ed. 679, 726 (1904) (Holmes, J., Fuller, C.J., & White & Peckham, JJ., dissenting). I fear that certain "well settled principles of law"

have been bent, not to straighten again. Accordingly, I would affirm the Court of Appeals.

Chief Justice PARKER joins in this dissenting opinion.

WILLIAM DAVIS, EMPLOYEE v. HARRAH'S CHEROKEE CASINO, EMPLOYER, LEGION INSURANCE COMPANY (NOW ASSIGNED TO THE NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION), CARRIER

No. 456A06

(Filed 25 January 2008)

1. Workers' Compensation— findings of fact—sufficiency of evidence

The Industrial Commission did not err in a workers' compensation case by its findings of fact 14 and 15 supporting the conclusion that plaintiff's ongoing disability and medical treatment were the result of a compensable injury, and that plaintiff's fall at home in November 2001 did not amount to an intervening event that broke the chain of causation from the original injury, because: (1) with regard to finding of fact 14, the surgical note quoted within the finding itself supports the final sentence, which determines that plaintiff's second surgery involved removal of scar tissue from the first surgery; (2) with regard to finding of fact 15, there was evidence in the record to support the Commission's more specific finding as to plaintiff's propensity to develop degenerative changes; and (3) the evidence recited above, as well as the portion of plaintiff's surgeon's testimony and records quoted in finding 14 itself, supports findings 14 and 15.

2. Workers' Compensation— conclusions of law—causation—intervening cause

The Industrial Commission did not err in a workers' compensation case by its conclusions of law numbers 3, 4 and 6 that plaintiff's ongoing disability and medical treatment were the result of a compensable injury, and that plaintiff's fall at home in November 2001 did not amount to an intervening event that broke the chain of causation from the original injury, because: (1) the finding that plaintiff injured his back moving a monitor from a slot machine at work, and required surgery in September 2001 as

a result, support the Commission's conclusions; (2) the finding that the original injury and surgery led to scar tissue and made him more prone to degenerative changes, which in turn necessitated the second surgery in April 2002, supports conclusions 3 and 4; (3) in light of these conclusions that plaintiff's medical treatments for his back, including both surgeries, as well as his ongoing disability resulted from his May 2001 injury at work, the award of benefits including all compensation for medical treatment and ongoing total disability was entirely appropriate; and (4) although defendants contend the Commission misapplied the legal principles of causation in conclusion number 6, the Commission addressed the issue of intervening cause since defendants raised it, but given conclusions 1, 3 and 4, conclusion 6 was simply unnecessary when the Commission properly found and concluded that plaintiff's injury in May 2001 is compensable and that all of plaintiff's medical treatments and ongoing disability have resulted therefrom.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 178 N.C. App. 605, 632 S.E.2d 576 (2006), affirming an opinion and award filed on 20 June 2005 by the North Carolina Industrial Commission. On 5 October 2006, the Supreme Court allowed defendants' petition for discretionary review of additional issues. Heard in the Supreme Court 15 February 2007.

Law Offices of Lee and Smith, P.A., by D. Andrew Turman, for plaintiff-appellee.

Hedrick Eatman Gardner & Kincheloe, L.L.P., by Allen C. Smith, Andrew S. Culicerto, and Margaret M. Kingston, for defendant-appellants.

Sumwalt Law Firm, by Vernon Sumwalt, for the North Carolina Academy of Trial Lawyers, amicus curiae.

HUDSON, Justice.

Defendant employer challenges the Industrial Commission's determination that plaintiff's ongoing disability and medical treatment were the result of a compensable injury. We hold that the Commission properly found and concluded that plaintiff's ongoing disability and medical treatment were related to and resulted from his compensable injury. We affirm the award.

In May 2001 plaintiff injured his back while removing a monitor from a slot machine at work. Initially, he sought treatment from his chiropractor, Dr. Guy Karcher, who referred plaintiff to a neurosurgeon, Jon M. Silver, M.D., in August of that year. On 7 September 2001, Dr. Silver performed a microlumbar discectomy. Although plaintiff returned to work in October 2001 because he was afraid of being fired if he did not, he continued to have back and leg pain. In early November 2001, plaintiff called Dr. Silver due to ongoing symptoms of pain, which were similar to those he had experienced before the surgery. Dr. Silver ordered an MRI, which was performed on 20 December 2001, and which showed scar tissue and degenerative changes. At a follow-up visit late in December 2001, plaintiff reported that he had felt significant pain in his back and legs since he fell at home in late November. Dr. Silver ordered more tests including a CAT scan performed on 2 April 2002, which revealed degenerative and "postoperative changes," and he performed another surgery later that month. Plaintiff was unable to return to work after the second surgery.

Eventually, Harrah's fired plaintiff for not returning to work. Defendants denied plaintiff's workers' compensation claim for medical treatment and ongoing disability in their Form 19 (report of employee's injury or occupational disease), by Form 61 ("Denial of Workers' Compensation Claim"), in their Form 33R (response to request for hearing), and in multiple assignments of error in the record on appeal. However, although defendants have brought forward assignments of error challenging the entire award to plaintiff, as they did not bring forward to the Court of Appeals any challenges to the compensability of the original work-related injury, those challenges are abandoned. Defendants contended that plaintiff's fall at home broke the chain of causation related to the original injury. The Commission found and concluded otherwise.

The Commission found as fact, *inter alia*, that as a result of plaintiff's original injury, he had "more of a propensity to develop degenerative changes at that level over time" and that he would have more difficulty recovering from any further injury. The Commission also found that any further injury would be "likely to result in worse symptoms" than if plaintiff had not had the surgery required by the previous work-related injury and that as of the date of the hearing, plaintiff remained totally disabled due to severe back pain radiating down his legs. Thus, the Commission concluded that plaintiff's ongoing pain and disability, as well as the April 2002 surgery and follow-

up treatment, were related to his compensable injury and awarded benefits accordingly. The Court of Appeals affirmed the award in a divided opinion.

The majority in the Court of Appeals upheld all but one of the Commission's factual findings, all of its conclusions of law, and its award, based on the overall determination that plaintiff's current medical condition and disability resulted from his injury at work. *Davis*, 178 N.C. App. at 609-16, 632 S.E.2d at 579-83. The majority also held that plaintiff's fall at home in November 2001 did not amount to an intervening event that broke the chain of causation from the original injury. *Id.* at 610, 632 S.E.2d at 580. The dissenter would have held that the critical findings of fact in favor of plaintiff were not supported by the medical evidence, and would have reversed the Commission. *Id.* at 616, 632 S.E.2d at 583. Defendants filed a notice of appeal on the basis of the dissenting opinion in the Court of Appeals, and we granted defendants' petition for discretionary review of additional issues.

[1] In their New Brief, defendants identify sections "I.-B" and "II" as being before this Court based upon the dissenting opinion in the Court of Appeals. Defendants frame these issues as follows:

> I.B. THE COURT OF APPEALS ERRED IN RELYING UPON HORNE [*Horne v. Universal Leaf Tobacco Processors*, 119 N.C. App. 682, 459 S.E.2d 797, *disc. rev. denied*, 342 N.C. 192, 463 S.E.2d 237 (1995)], AS THERE WAS NO COMPETENT EVIDENCE IN THE INSTANT CASE THAT THE INJURY FOLLOWING THE SLIP AND FALL WAS CAUSALLY RELATED TO THE COMPENSABLE INJURY OF MAY 2001.
>
> II. THE COURT OF APPEALS ERRED IN AFFIRMING THE FULL COMMISSION'S OPINION AND AWARD WHICH CONCLUDED THAT PLAINTIFF-APPELLEE'S SURGERY IN APRIL OF 2002 WAS CAUSALLY RELATED TO THE COMPENSABLE INJURY OF MAY 2001 WHERE NO MEDICAL EVIDENCE ESTABLISHED THE SLIP AND FALL INJURY PRECEDING THE SURGERY WAS AN AGGRAVATION OF THE COMPENSABLE INJURY.

In both of these sections of the brief defendants argue, in essence, that the evidence is insufficient to support the findings underpinning the award in favor of plaintiff, particularly the findings connecting plaintiff's second surgery and ongoing symptoms to the original com-

pensable injury. Although defendants discuss at some length testimony that would have supported different findings, they do not argue that any particular findings of the Commission were unsupported by the evidence. In both arguments I and II, defendants bring forward assignments of error to findings 4 (in part) and 14, 15, and 18. For purposes of our analysis, we consider the evidence in support of findings 14 and 15, which appear to be the primary focus of defendants' arguments here, as in the Court of Appeals. In pertinent part, these findings state:

> 14. While Dr. Silver opined at his deposition that the second surgery was primarily to correct degenerative changes, he did indicate that changes seen on the MRI relating to scarring and fibrosis around the nerve were related to plaintiff's first surgery. . . .[long quotation from surgical note omitted].
>
> It is clear from this description that in addition to the degenerative changes to plaintiff's ligamentous flavum, the second surgery involved removal of scar tissue from the first surgery.
>
> 15. As has already been found as fact [in finding 13] above, plaintiff's first surgery would have made him more prone to develop degenerative changes, specifically ligamentous changes. The ligamentum flavum Dr. Silvers [sic] removed is a primary spinal ligament, and was identified, along with the scarring, as a primary cause of the stenosis seen on the April 1, 2002, MRI.

The Workers' Compensation Act provides that the Industrial Commission is the sole judge of the credibility of the witnesses and the weight of the evidence. N.C.G.S. § 97-84,-85,-86 (2005); *Adams v. AVX Corp.*, 349 N.C. 676, 680-81, 509 S.E.2d 411, 413 (1998) (citing *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). We have repeatedly held that the Commission's findings of fact "are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *E.g. Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965) (per curiam). Further, "[t]he evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (citation omitted); *accord Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 553 (2000). Appellate review

of an opinion and award from the Industrial Commission is generally limited to determining "(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." *Clark v. Wal-Mart*, 360 N.C. 41, 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)).

After careful review, we conclude that the evidence fully supports these findings of fact. Referring to finding of fact 14, the surgical note quoted within the finding itself supports the final sentence, which determines that plaintiff's second surgery involved removal of scar tissue from the first surgery. The Court of Appeals noted that the finding contains extensive "recitations of Dr. Silver's testimony and written surgery notes," but that in light of the last sentence, the finding is "adequate." *Davis*, 178 N.C. App. at 612, 632 S.E.2d at 580. We agree with this analysis.

In finding 15, the Commission determined that plaintiff's first surgery made him more prone to develop degenerative changes, which in turn were a "primary cause" of the second surgery. The Court of Appeals first noted that finding 15 refers back to and relies upon finding 13, which was not challenged on appeal. *Id.* at 612, 632 S.E.2d at 581. The court then held that finding 15 was not supported by the evidence, to the extent it found that the plaintiff specifically (as opposed to "someone" in general) was more prone to develop degenerative changes. *Id.* This part of the court's analysis includes a misapplication of the standard of review on appeal, which we must address.

In his deposition, Dr. Silver testified that he saw plaintiff on 29 October 2001, for a regularly scheduled six-week followup visit after his discectomy. Dr. Silver allowed plaintiff to return to work so he would not lose his job, but advised him to avoid heavy lifting to the extent possible. Dr. Silver also explained that plaintiff called him on 7 November 2001, before his reported slip and fall at home, to report that he was experiencing pain "similar to that before surgery." In response to a question from plaintiff's counsel about whether "the first procedure that you performed, the discectomy" would "make someone more susceptible to injury from a fall," Dr. Silver responded in part:

> I think it would make people more—I think it does two things.

> First, in someone that has what might otherwise be a relatively minor injury . . . having scar tissue in there . . . I think makes it more difficult for them to get over a strain type injury.
>
> . . . .
>
> The other thing it does is, by taking down part of the joint and by disrupting ligaments, there is also *more of a propensity to develop degenerative changes* at that level over time just as any injury to the joint space would be; a football injury or fall. So over time I think they are *more prone to develop degenerative changes*.
>
> The long answer to your question is, yeah, I think there are two ways and the answer is yes. (Emphasis added.)

Dr. Silver's entire answer to this question specifically asking about the discectomy he performed on plaintiff was incorporated into finding of fact 13, which has not been challenged on appeal, and is thus binding. Later in his deposition, Dr. Silver answered the specific question, "Does Mr. Davis have a greater likelihood of continued degenerative changes . . . ?", by saying in part that plaintiff is "certainly . . . more prone to further and more rapid advanced degenerative changes." The Court of Appeals erred in its statement that "there is no evidence in the record to support the Commission's more specific finding as to plaintiff's propensity to develop degenerative changes." *Id.* at 612, 632 S.E.2d at 581. Because the evidence above unequivocally shows otherwise, we explicitly disavow this statement and hold that finding 15 is supported by the evidence when the standard of review is properly applied.

Taking the evidence in the light most favorable to plaintiff, as the decisions of this Court require, the Commission made the findings and reached the conclusions above. The evidence recited above, as well as the portion of Dr. Silver's testimony and records quoted in finding 14 itself, supports findings 14 and 15. In those findings, the Commission determined that the second surgery was necessitated by degenerative changes and scar tissue resulting from the original injury and first surgery.

[2] Because the findings of fact, including numbers 4, 14, 15 and 18, are thus conclusive, we turn to the arguments defendants have brought forward directed at the related conclusions of law. The critical conclusions of law are numbers 1, 3, 4 and 6, which read as follows:

1. On or about May 26, 2001, plaintiff sustained a specific traumatic incident, arising out of and in the course of his employment with Harrah's Cherokee Casino. As a consequence, he injured his lower back, sustaining a herniated disc. N.C. Gen. Stat. § 97-2(6).

. . . .

3. As a consequence of his back injury, plaintiff required medical treatment, including the surgery performed by Dr. Silver on September 7, 2001, and the second surgery, performed on April 22, 2002. Defendants are responsible for payment of all such reasonably necessary medical treatment incurred by plaintiff for the lower back injury, including said surgeries, and follow-up to those surgeries. N.C. Gen. Stat. §§ 97-2(19) and 97-25.

4. As a consequence of his back injury, plaintiff was unable to earn wages in any employment and was temporarily totally disabled from June 26, 2001, through October 31, 2001, and from December 27, 2001, and continuing until plaintiff is able to earn the same or greater wages as he was earning when first injured. Defendants are responsible for payment to plaintiff of wage loss compensation at the rate of $283.09 per week during this period. N.C. Gen. Stat. § 97-29.

. . . .

6. Also at issue is whether the fall that plaintiff suffered outside his home in late November or early December 2001 was an intervening causal event sufficient to bar plaintiff from further compensation. For this to be the case, any injury resulting from his fall would have to be entirely independent of the compensable injury. . . . The slip and fall on ice aggravated the earlier injury and the pain and medical consequences were a natural progression of the earlier injury.

As noted above, conclusion 1 has not been challenged on appeal, but 3, 4 and 6 have been assigned as error. In argument II, defendants contend that the findings above, based on Dr. Silver's testimony, do not support conclusions of law that the second surgery (conclusion 3) and plaintiff's resulting disability (conclusion 4) are related to the original injury.

We hold that the findings discussed above support the Commission's conclusions. Plaintiff injured his back moving a monitor from

a slot machine at work and required surgery in September 2001 as a result. The Commission found and concluded that this injury was compensable under the Workers' Compensation Act. The original injury and surgery led to scar tissue and made him more prone to degenerative changes, which in turn necessitated the second surgery in April 2002. Thus, conclusions 3 and 4 are fully supported by the Commission's findings. In light of these conclusions—that plaintiff's medical treatments for his back, including both surgeries, as well as his ongoing disability resulted from his May 2001 injury at work—the award of benefits including all compensation for medical treatment and ongoing total disability is entirely appropriate.

Defendants argue, as they did in the Court of Appeals, that the Commission and Court of Appeals misapplied the legal principles of causation to this workers' compensation case. This argument is directed at conclusion 6 quoted above. The majority in the Court of Appeals disagreed, noting that "uncontested findings" of fact 5 and 6 (pertaining to plaintiff's symptoms between early November 2001 and his second surgery in April 2002) support this conclusion. *Davis*, 178 N.C. App. at 610, 632 S.E.2d at 580. The Court of Appeals relied on its decision in *Horne* to justify the conclusion that aggravation of a primary injury is compensable unless due to an independent intervening event resulting from plaintiff's own intentional conduct. *Id.* (citing *Horne*, 119 N.C. App. at 685, 459 S.E.2d at 799). The dissenter agreed with the legal principles set forth in *Horne*, but did not agree that the medical evidence here established an aggravation of the original injury. *Id.* at 618, 632 S.E.2d at 584.

This issue is before this Court on discretionary review. Defendants state the issue in their new brief as follows:

> I.A. THE COURT OF APPEALS ERRED IN RELYING UPON HORNE, AS THE HORNE COURT MISAPPLIED THE CAUSATION PRINCIPLES OF AGGRAVATION OF A COMPENSABLE INJURY.

We conclude that application of these principles is not necessary to the disposition of this case.

Here, the evidence supports the Commission's findings that the first surgery was necessitated by the work-related injury of May 2001 and that the second surgery and ongoing disability resulted directly from the original injury and first surgery. These findings, in turn, sup-

port the Commission's conclusions that defendants are responsible for payment for all "such reasonably necessary medical treatment incurred by plaintiff for the lower back injury, including said surgeries, and follow-up to those surgeries." We recognize that the Commission addressed the issue of intervening cause because defendants raised it, but given conclusions 1, 3 and 4, conclusion 6 is simply unnecessary. Neither the Commission nor the Court of Appeals needed to consider whether any intervening cause occurred because the Commission properly found and concluded that plaintiff's injury in May 2001 is compensable and that all of plaintiff's medical treatments and ongoing disability have resulted therefrom. In so finding and concluding, the Commission by implication declined to attribute causation to any intervening event.

For the reasons stated above, the opinion of the Court of Appeals affirming the Commission's opinion and award is modified and affirmed.

MODIFIED AND AFFIRMED.

RICHARD HARRELL v. MELVIN BOWEN, ADMINISTRATOR OF THE ESTATE OF CHELSON EARL PERRY

No. 587PA06

(Filed 25 January 2008)

1. Damages— punitive—no assertion against personal representative

Punitive damages may not be asserted against a defendant's estate on the basis of his alleged egregiously wrongful acts (driving while impaired). N.C.G.S. § 1D-1, which provides for the award of punitive damages, states as a purpose the punishment and deterrence of defendant and others; contrary to plaintiff's arguments, a legislative intent to treat disjunctively the purposes of punishment and deterrence or the deterrence of defendant and others could not be discerned. Neither could an obvious legislative intent to read N.C.G.S. § 1D-1 disjunctively be inferred from N.C.G.S. § 1D-26.

2. Estates— personal representatives—punitive damages claims

The survival statute of N.C.G.S. § 28A-18-1, which allows claims to be asserted against a personal representative, does not apply to punitive damages. Chapter 1D (which has provisions for punitive damages) by its terms prevails over any law to the contrary, and N.C.G.S. § 1D-1 precludes a claim for punitive damages against an estate.

Justices NEWBY and HUDSON dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 179 N.C. App. 857, 635 S.E.2d 498 (2006), affirming an order dismissing plaintiff's punitive damages claim entered on 7 November 2005 by Judge William C. Griffin, Jr. in Superior Court, Martin County. Heard in the Supreme Court 15 October 2007.

Keel O'Malley, LLP, by Joseph P. Tunstall, III, for plaintiff-appellant.

Valentine, Adams, Lamar, Murray, Lewis & Daughtry, L.L.P., by Kevin N. Lewis, for defendant-appellee.

BRADY, Justice.

In this case we determine whether, as a matter of law, a claim for punitive damages may be asserted against a decedent's estate on the basis of his alleged "egregiously wrongful acts." We hold that it may not and therefore affirm the decision of the Court of Appeals.

BACKGROUND

On 19 May 2005, plaintiff Richard Harrell filed a summons and complaint initiating a civil action against Melvin Bowen (defendant) in his capacity as administrator of Chelson Earl Perry's (decedent's) estate. In his complaint, plaintiff stated that he was operating a passenger vehicle traveling westbound on U.S. Highway 64 on 6 June 2002, at approximately 9:45 p.m. He asserted that decedent, who was operating another passenger vehicle traveling eastbound at the time, veered across the median and struck plaintiff's vehicle. Plaintiff further alleged that decedent was under the influence of alcohol at the time of the incident and otherwise acted negligently and was grossly negligent in violation of several North Carolina motor vehicle safety laws. In his complaint, plaintiff sought compensatory damages for

pain and suffering, medical bills, lost wages, and property damage, and he additionally prayed for punitive damages.

Defendant moved to dismiss plaintiff's punitive damages claim, pursuant to Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief could be granted. On 7 November 2005, the trial court conducted a hearing on defendant's motion and subsequently ordered plaintiff's claim for punitive damages dismissed with prejudice.

Plaintiff appealed the trial court's order to the North Carolina Court of Appeals, which unanimously affirmed the order on 17 October 2006. Plaintiff then petitioned this Court for discretionary review, and we allowed the petition on 3 May 2007.

ANALYSIS

The dispositive question before the Court is whether plaintiff is barred *as a matter of law* from asserting a claim for punitive damages against defendant in his capacity as the administrator of decedent's estate. *See Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) ("A motion to dismiss under N.C. R. Civ. P. 12(b)(6) 'is the usual and proper method of testing the legal sufficiency of the complaint.' " (quoting *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970))). As the Court stated in *Newberne*, our task in reviewing the trial court's order dismissing this claim pursuant to Rule 12(b)(6) is to inquire "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Id.* (citations and internal quotation marks omitted).

I. "The Purpose of Punitive Damages" in N.C.G.S. § 1D-1

[1] Plaintiff contends that N.C.G.S. § 1D-1 sets forth the controlling legal theory upon which his claim for punitive damages may rest. This statute provides: "Punitive damages may be awarded, in an appropriate case and subject to the provisions of this Chapter, to punish a defendant for egregiously wrongful acts *and* to deter the defendant *and* others from committing similar wrongful acts." N.C.G.S. § 1D-1 (2005) (emphasis added). Plaintiff asserts that punitive damages may be awarded to deter others from similar wrongful acts, even though it is obvious that decedent could neither be punished for any wrongdoing nor deterred from committing similar wrongful acts in the future.

It is axiomatic that "[w]hen 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 Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citation omitted). This Court has also stated that "[o]rdinarily, when the conjunctive 'and' connects words, phrases or clauses of a statutory sentence, they are to be considered jointly." *Lithium Corp. of Am. v. Town of Bessemer City*, 261 N.C. 532, 535, 135 S.E.2d 574, 577 (1964) (citation omitted). In *Sale v. Johnson*, this Court recognized a limited number of circumstances in which the conjunctive "and" and the disjunctive "or" could be interchanged by a court when applying a statute, one of which is "*to effectuate the obvious intention of the legislature.*" 258 N.C. 749, 755-56, 129 S.E.2d 465, 469 (1963) (citations and internal quotation marks omitted).

Contrary to plaintiff's assertions, we can discern no obvious legislative intent to treat the purposes of punishment and deterrence disjunctively in N.C.G.S. § 1D-1. The same must be said for the purpose of deterring a defendant and that of deterring others. As this Court has clearly stated, "Chapter 1D reinforces the common-law purpose behind punitive damages." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004) (citing N.C.G.S. § 1D-1). Plaintiff cites no authority preceding the enactment of Chapter 1D in 1995 in which this Court held that the purpose of deterring others, standing alone, was sufficient to support an award of punitive damages. In fact, when this Court has identified the purpose of deterring others, that purpose has consistently been coupled with the purpose of punishing a wrongdoer. *See*, *e.g.*, *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 113, 229 S.E.2d 297, 302 (1976) ("North Carolina has consistently allowed punitive damages solely on the basis of its policy to punish intentional wrongdoing *and* to deter others from similar behavior." (emphasis added) (citations omitted)); *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 134, 225 S.E.2d 797, 807 (1976) (stating that punitive damages "are usually allowed to punish defendant *and* deter others" (emphasis added)). Nor has this Court interpreted N.C.G.S. § 1D-1 as abrogating the pre-existing common law. *See*, *e.g.*, *Rhyne*, 358 N.C. at 176, 594 S.E.2d at 12 ("A plaintiff's recovery of punitive damages is fortuitous, as such damages are assessed *solely* as a means to punish the willful and wanton actions of defendants and, unlike compensatory damages, do not vest in a plaintiff upon injury." (citation omitted)).

Plaintiff contends this obvious legislative intent to have courts read "and" as a disjunctive "or" in N.C.G.S. § 1D-1 is found in N.C.G.S. § 1D-26. This statute exempts from the "statutory cap" on punitive damages claims established by N.C.G.S. § 1D-25 any punitive damages sought "for injury or harm arising from a defendant's operation of a motor vehicle if the actions of the defendant in operating the motor vehicle would give rise to an offense of driving while impaired under G.S. 20-138.1 [impaired driving generally], 20-138.2 [impaired driving while operating a commercial vehicle], or 20-138.5 [habitual impaired driving]." N.C.G.S. § 1D-26 (2005). We certainly acknowledge the General Assembly's intent in section 1D-26 to punish individuals more severely for driving while impaired than for other tortious conduct by exempting such claims from section 1D-25(b). However, we cannot infer from section 1D-26 an obvious intent to have courts read "and" as a disjunctive in section 1D-1, which governs *all* punitive damages claims.

Because we discern no obvious legislative intent to the contrary, we are constrained to apply the plain meaning of N.C.G.S. § 1D-1 to plaintiff's claim for punitive damages. Plaintiff concedes that decedent can no longer be punished or deterred for whatever "egregiously wrongful acts" he may have committed before his death. As a consequence, plaintiff is precluded as a matter of law from asserting his claim for punitive damages under N.C.G.S. § 1D-1.

II. Survival of Actions Against Personal Representative

[2] Plaintiff argues, in the alternative, that N.C.G.S. § 28A-18-1 allows any claims he may have asserted against decedent to survive against defendant as the administrator of decedent's estate, including his claim for punitive damages. This statute provides:

> (a) Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of his estate.
>
> (b) The following rights of action in favor of a decedent do not survive:
>
> (1) Causes of action for libel and for slander, except slander of title;
>
> (2) Causes of action for false imprisonment;

(3) Causes of action where the relief sought could not be enjoyed, or granting it would be nugatory after death.

N.C.G.S. § 28A-18-1 (2005). Although punitive damages claims are not expressly excepted by this statute, the General Assembly has mandated that Chapter 1D prevails over "any other law to the contrary" with respect to such claims. N.C.G.S. § 1D-10 (2005). Thus, since N.C.G.S. § 1D-1 precludes plaintiff from asserting a claim for punitive damages against defendant, plaintiff cannot rely upon the "survival statute" to procure a different result.

CONCLUSION

Accordingly, we hold that plaintiff's claim for punitive damages against defendant must fail as a matter of law. Thus, the trial court did not err when it ordered plaintiff's claim for punitive damages dismissed, and the decision of the Court of Appeals is hereby affirmed.

AFFIRMED.

Justice NEWBY dissenting.

I agree with the majority that our common law has traditionally viewed punitive damages as valuable for punishing a wrongdoer and deterring others and that Chapter 1D reinforces the common law in this regard. However, I believe the majority misconstrues the framework for punitive damages enacted by the General Assembly. When Chapter 1D is examined in its entirety, the intent of the legislature becomes clear: a jury is permitted to award punitive damages despite the death of the tortfeasor. Therefore, I respectfully dissent.

Chapter 1D has several sections which are typical of other chapters in the North Carolina General Statutes. Section 1D-1 describes the broad policy of punitive damages. Section 1D-5 provides definitions applicable to the Chapter. Section 1D-10 details the scope of the Chapter, and section 1D-15 delineates the "[s]tandards for recovery of punitive damages."

In particular, section 1D-15 states: "Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors[: (1) fraud, (2) malice, or (3) willful or wanton conduct] was present and was related to the injury for which compensatory damages were awarded." N.C.G.S. § 1D-15(a) (2007). Moreover, "[t]he claimant must prove the existence of an aggravating factor by clear

and convincing evidence." *Id.* § 1D-15(b) (2007). Once the plaintiff meets the requirements of this section, the jury must determine in its discretion whether or not to award punitive damages. *See id.* § 1D-35 (2007). Notably, neither section 1D-15 nor any other section of Chapter 1D limits punitive damages to situations in which a plaintiff can establish the presence of every stated statutory purpose for the award of punitive damages. Instead, with regard to the statutory purposes of punitive damages, Chapter 1D requires only that, once plaintiff has established eligibility under section 1D-15, the jury "consider" those purposes when "determining the amount of punitive damages, if any, to be awarded." *Id.* § 1D-35(1).

The North Carolina Pattern Jury Instructions illustrate the approach intended by the legislature. First, the jury must answer, "Is the defendant liable to the plaintiff for punitive damages?" 2 N.C.P.I.—Civ. 810.96, at 1 (gen. civ. vol. May 2001). "On this issue the burden of proof is on the plaintiff to prove three things." *Id.* The plaintiff must first prove the existence of an aggravating factor by clear and convincing evidence. *Id.*, at 2. The plaintiff also must prove by the greater weight of the evidence that the aggravating factor was related to the injury and that the defendant participated in the wrongful conduct. *Id.*, at 2-3. If the plaintiff satisfies its burden of proof on these three issues, it is the jury's duty to answer "Yes" and find the defendant liable to the plaintiff for punitive damages. *Id.*, at 3.

If the jury determines the defendant is liable to the plaintiff for punitive damages, it must then answer a second question: "What amount of punitive damages, if any, does the jury in its discretion award to the plaintiff?" 2 N.C.P.I.—Civ. 810.98, at 1 (gen. civ. vol. May 1996). At this point, the jury is instructed to consider the purposes of punitive damages because any amount awarded should bear a rational relationship to those purposes. *Id.*, at 2-3.

Thus, neither Chapter 1D nor the Pattern Jury Instructions make plaintiff's eligibility for an award contingent upon satisfying all of the statutory purposes of punitive damages. Rather, they give the jury discretion to determine the appropriate amount of an award with reference to the statutory purposes. The jury is free to consider a defendant's death when using its discretion to determine the award amount, just as the jury would be permitted to consider that a living defendant should be punished even though it believed any deterrent effect would be small or nonexistent. *See Hofer v. Lavender*, 679 S.W.2d 470, 474-75 (Tex. 1984) (concluding punitive, or exemplary,

damages could be collected from the estate of a deceased tortfeasor after discussing the "equally important considerations other than punishment of the wrongdoer" recognized in Texas as purposes for punitive damages); *Perry v. Melton*, 171 W. Va. 397, 401, 299 S.E.2d 8, 12 (1982) (holding punitive damages could be collected from the estate of a deceased tortfeasor because "[p]unitive damages in [West Virginia] serve other equally important functions and are supported by public policy interests going beyond simple punishment of the wrongdoer").

In contrast to the statutory structure and the Pattern Jury Instructions, the majority incorporates the statutory purposes of punitive damages into section 1D-15. The majority holds that punitive damages cannot be awarded unless the plaintiff meets the criteria in section 1D-15 and establishes that the punitive damages will punish the defendant, deter the defendant, and deter others. If the legislature intended the purposes of punitive damages to be treated as prerequisites for an award, it would have included those purposes in section 1D-15.

The General Assembly's use of the word "purposes" in Chapter 1D is equally significant. Although the title of section 1D-1 is "[p]urpose of punitive damages," language in other sections of the Chapter indicates there are several "purposes" for awarding punitive damages. *See* N.C.G.S. §§ 1D-5(6) (2007) (" 'Punitive damages' means extracompensatory damages awarded for the purposes set forth in G.S. 1D-1."), -35(1) ("In determining the amount of punitive damages, if any, to be awarded" the jury "[s]hall consider the purposes of punitive damages set forth in G.S. 1D-1."); *see also Town of Blowing Rock v. Gregorie*, 243 N.C. 364, 371, 90 S.E.2d 898, 903 (1956) (stating that a statute's caption cannot control the unambiguous text of the statute). Viewing Chapter 1D in its entirety reveals the legislature's intent that section 1D-1 be interpreted as a broad policy statement that includes the three purposes of punitive damages recognized in North Carolina: (1) punishing defendants, (2) deterring defendants, and (3) deterring others. When section 1D-1 is viewed as a list of purposes to be considered in determining the amount of an award rather than a list of prerequisites, the General Assembly's use of the conjunctive rather than the disjunctive becomes irrelevant.

In addition, unlike the majority's interpretation, concluding that Chapter 1D permits a punitive damages award against a deceased defendant is consistent with North Carolina's survival statute. *See* N.C.G.S. § 28A-18-1 (2007). A punitive damage award against a

deceased defendant is permitted under the survival statute which states that "all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against" a deceased person "shall survive to and against the personal representative or collector of his estate." *Id.* § 28A-18-1(a). Although certain rights of action in favor of a decedent do not survive, *see id.* § 28-18-1(b), no actions or demands against a decedent are excepted from section 28A-18-1(a).

Here, plaintiff's allegations, treated as true, are sufficient to satisfy the eligibility requirements for a claim for punitive damages under section 1D-15. As such, this claim should not have been dismissed. Plaintiff is not required to prove that all three statutory purposes of punitive damages will be furthered by an award. Rather, should it determine plaintiff's allegations are true, the jury should decide the appropriate size of an award, if any, taking into consideration the death of the tortfeasor as it relates to the purposes of punitive damages stated in section 1D-1.

Justice HUDSON joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. MARION PRESTON GILLESPIE

No. 2PA07

(Filed 25 January 2008)

Criminal Law— discovery—sanctions—trial court exceeded authority—punishment based on actions of nonparties

The trial court in a first-degree murder case exceeded its authority under N.C.G.S. § 15A-910 when it sanctioned defendant by excluding the testimony of two of defendant's mental health experts, and defendant is entitled to a new trial, because: (1) although N.C.G.S. § 15A-910 authorizes a trial court to impose sanctions on the parties in addition to exercising the court's inherent contempt powers, nothing in the language of the statute indicates that this authority extends so far as to punish either the State or a criminal defendant for the actions of nonparties; and (2) the trial court based its decision to sanction defendant solely upon the conduct of defendant's expert witnesses, thus acting under a misapprehension of law that the actions of a nonparty in

a criminal proceeding can trigger a trial court's authority under N.C.G.S. § 15A-910 to sanction a party.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 180 N.C. App. 514, 638 S.E.2d 481 (2006), awarding defendant a new trial after finding error in a judgment entered 8 December 2004 by Judge W. Erwin Spainhour in Superior Court, Rowan County. Heard in the Supreme Court 16 October 2007.

Roy Cooper, Attorney General, by Norma S. Harrell, Special Deputy Attorney General, for the State-appellant.

James R. Glover for defendant-appellee.

BRADY, Justice.

Defendant Marion Preston Gillespie was found guilty of the first-degree murder of Linda Faye Patterson Smith and sentenced to life imprisonment without parole. The sole issue before this Court is whether the trial court exceeded its authority under N.C.G.S. § 15A-910 in its order sanctioning defendant by excluding the testimony of two of defendant's mental health experts. We hold that it did and in so doing modify and affirm the decision of the Court of Appeals awarding defendant a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Murder

In the early morning hours of 15 June 2003, defendant approached Deputy Sheriff Bradley Bebber of the Rowan County Sheriff's Office as Deputy Bebber was walking from that office to a nearby parking lot. Defendant, who appeared to have blood on his shirt and jeans, informed Deputy Bebber that the blood was his girlfriend's. He further stated that he and his girlfriend, Linda Faye Patterson Smith, had been arguing about money at their shared residence in Cleveland, North Carolina, when Smith charged at defendant with a knife in her hand. Defendant then took the knife from her and "began cutting her with it," which he stated had likely caused her serious injury. He informed Deputy Bebber that Smith and the knife would probably be found in the bathroom of the residence.

Law enforcement was dispatched to the residence, wherein the deceased victim was discovered in the rear bathroom, lying on her

side in the bathtub. There was a large amount of blood in the bathtub and on the nearby walls, and a knife was discovered on the edge of the bathtub.

Defendant subsequently waived his *Miranda* rights and consented to a search of the residence and his vehicle. Additionally, he provided a statement to investigators, containing the following: During an argument which took place in the bathroom of their residence, the victim had threatened to have her brothers kill defendant. In response, defendant threatened to leave. The victim then tried to kill him with a knife that defendant had placed on the toilet after attempting to repair it. Defendant managed to wrest control of the knife from the victim, pushed her, and inadvertently cut her on the arm.

Defendant further stated that he had diabetes and was taking cancer medication. He indicated that he had taken his medicine between midnight and 1:00 a.m. on 15 June 2003, an unspecified amount of time before the altercation with the victim. Defendant was not sure whether the medication affected his memory of the incident.

On 23 June 2003, the Rowan County Grand Jury returned a true bill of indictment charging defendant with first-degree murder of Linda Faye Patterson Smith. Initially, the case was set to be tried capitally, but on 1 March 2004, the State elected to try the case noncapitally. On 21 June 2004, the trial court issued a scheduling order with the consent of both parties setting 29 November 2004 as the trial date.

II. Trial Court's Pre-trial Order Sanctioning Defendant

On 14 October 2004, pursuant to N.C.G.S. § 15A-959, defendant gave the State written notice of his mental health defense, stating his intent to raise defenses of insanity and diminished capacity at trial. On 21 October 2004, the trial court held a hearing to resolve discovery motions filed by both the State and defendant. The State moved for notice of defendant's intent to offer at trial any of a specific list of defenses, including insanity, mental infirmity, diminished capacity, and voluntary or involuntary intoxication. The State also moved that defendant provide, *inter alia*, specific information as to the nature and extent of a number of these defenses and discoverable information pertaining to any expert witness defendant reasonably expected to call at trial. The trial court entered an order allowing the State's motion and orally instructed defendant to comply by 15 November

2004. However, this deadline does not appear in the written order later signed by the trial court and filed on 8 December 2004.

Also on 21 October 2004, the trial court allowed defendant's motion to order the State to turn over a number of discoverable items, including "exculpatory material from all doctors, social workers, law enforcement personnel, state's witnesses, or other persons or sources, which are available to the State." This order was similarly entered by the trial court with the directive that the State comply by 15 November 2004, which was reflected in a written order later signed by the trial court and filed on 8 December 2004. Finally, on 21 October 2004, the trial court issued an order committing defendant to Dorothea Dix Hospital, a provider under the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, within the North Carolina Department of Health and Human Services, for evaluation of his mental condition.

On 16 November 2004, the trial court allowed the State's motion for access to defendant's medical records. The following day, defendant filed a motion for continuance and on 23 November 2004, filed a supplemental motion for continuance on the bases that: (1) defense counsel continued to receive discovery documents from the district attorney; (2) neither the State nor defense counsel had received any reports from Dorothea Dix Hospital staff or from any other experts; and (3) defendant was still at Dorothea Dix Hospital but needed to be transported to Rowan County Detention Center so that he could meet with counsel in order to prepare his case for trial.

On 22 November 2004, Charles Vance, M.D., Ph.D., a forensic psychiatrist at Dorothea Dix Hospital, wrote a letter to the Rowan County Clerk of Court stating that "[t]he medical staff of the Forensic Psychiatry Division has completed their forensic evaluation and observation of [defendant] and found him to be capable to proceed to trial." However, neither Dr. Vance nor the hospital staff provided a report of defendant's mental status at the time of the offense, in part because the State had not received any mental health reports from defendant. On 23 November 2004, the State moved to prohibit defendant from presenting any mental health defense or, in the alternative, to require him to provide requested documentation to Dorothea Dix Hospital staff so that they could evaluate defendant's mental condition at the time of the offense.

On 29 November 2004, the day defendant's trial was set to begin, the trial court held a hearing on the State's and defendant's motions.

After hearing arguments from both sides, the trial court entered an order prohibiting defendant from introducing testimony from Nathan Strahl, M.D., Ph.D., a private practice psychiatrist and consultant associate to Duke University Medical Center, and from Jerry W. Noble, Ph.D., a private practice clinical psychologist and instructor for the Wake Forest University School of Medicine's department of psychiatry, concerning any mental health defense to be offered by defendant. Thereafter, the trial court heard arguments on defendant's motion to continue and then denied the motion.

III. Defendant's Conviction and Appeal

On 8 December 2004, the jury returned its verdict finding defendant guilty of first-degree murder. The trial court entered judgment accordingly and sentenced defendant to life imprisonment without parole.

Defendant appealed to the Court of Appeals, which held unanimously that the trial court abused its discretion when it precluded defendant from introducing the testimony of his mental health experts. The State filed a motion with this Court for a temporary stay, which was allowed on 8 January 2007, along with a petition for writ of supersedeas and a petition for discretionary review, both of which were allowed on 3 May 2007.

ANALYSIS

We now consider whether, as a matter of law, the trial court exceeded its statutory authority under the North Carolina Criminal Procedure Act when it sanctioned defendant pursuant to N.C.G.S. § 15A-910. This statute provides in pertinent part:

> (a) If at any time during the course of the proceedings the court determines that a *party* has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may
>
> . . . .
>
> (3) Prohibit the party from introducing evidence not disclosed . . . .

N.C.G.S. § 15A-910(a)(3) (2005) (emphasis added). By its plain meaning, the statute ensures that in criminal proceedings, the trial court has the authority to require both the State and defendants to com-

ply with North Carolina's discovery statutes and any orders entered pursuant to those statutes. To this end, N.C.G.S. § 15A-910 authorizes a trial court to impose sanctions on the parties in addition to exercising the court's inherent contempt powers. However, nothing in the language of the statute indicates that this authority extends so far as to punish either the State or a criminal defendant for the actions of non-parties. For this reason, the record demonstrates that the trial court in this case exceeded its statutory authority to sanction defendant.

Conclusion of law number four of the trial court's order prohibiting defendant from introducing the expert testimony at issue reads in part:

> The defendant should not be permitted to compel the court to continue the case from the 29 November 2004 session because of the failure of the defendant to obey the discovery statutes and the Order of this court of 21 October 2004 and the intentional, inexcusable conduct of the defendant's mental health witnesses.

This conclusion of law is, at best, ambiguous as to whether defendant's compliance, or lack thereof, factored into the trial court's decision to impose its sanction. This ambiguity is resolved, however, by the transcript of the trial court's hearing on the State's motion:

> THE COURT: And I will prepare my own order. And of course, I'll be happy to have any further input anybody else wishes to. But the Court's going to find, basically, *that Doctor Strahl and Doctor Noble have violated the Court's order*, *violated the discovery statute*. And that pursuant to N.C.G.S. [§] 15A-910[(a)](3), that the Court finds that the defendant, *again*, *not through counsel*, *but through these physicians*, that is Doctor Strahl is a medical doctor, Doctor Noble is a clinical psychologist, not a medical doctor, *that those persons have failed to comply with the discovery statute*, *and/or—and/or with the orders of this Court issued pursuant to the statutes*, and the Court therefore prohibits the defendant from introducing evidence relating to a mental health or insanity defense, or whatever you described, whatever it's been described as.

(Emphasis added.) It is readily apparent from this portion of the transcript that the trial court based its decision to sanction defendant solely upon the conduct of defendant's expert witnesses, thus acting under a misapprehension of law that the actions of a non-party in a

criminal proceeding can trigger a trial court's authority under N.C.G.S. § 15A-910 to sanction a party.

The trial court therefore erred as a matter of law when it entered its order sanctioning defendant, and defendant is entitled to a new trial. In light of our holding, we believe it was unnecessary for the Court of Appeals to address conclusions of law numbers one through three in the trial court's order. Nor was it necessary for that court to address defendant's federal constitutional argument under *Taylor v. Illinois*, 484 U.S. 400 (1988). *See State v. Crabtree*, 286 N.C. 541, 543, 212 S.E.2d 103, 105 (1975) ("It is well established that appellate courts will not pass upon constitutional questions, even when properly presented if there is some other ground upon which the case can be decided . . . ." (citations omitted)).

For the reasons stated above, the opinion of the Court of Appeals granting defendant a new trial is modified and affirmed.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA v. JANE BROCK WHALEY

No. 440PA06

(Filed 25 January 2008)

Evidence— cross-examination—exclusion of testimony and evidence—credibility of victim

The trial court erred in a simple assault case when it excluded certain testimony and evidence during cross-examination of the victim regarding her written responses to inquiries contained in a questionnaire completed by the victim during a visit to a place called Wellspring in preparation for civil litigation arising from the same alleged assault, including her response that she had difficulty recalling whether certain events actually occurred, and defendant is entitled to a new trial, because: (1) the excluded testimony went to the credibility of the victim and should have been admitted under N.C.G.S. § 8C-1, Rule 611(b), and the trial court abused its discretion by excluding such testimony under N.C.G.S. § 8C-1, Rule 403; (2) although the

State contends the excluded testimony here is insufficient to constitute past mental problems or defects, testimony must be allowed when it may bear upon credibility in other ways, such as to cast doubt upon the capacity of a witness to observe, recollect, and recount; and (3) the victim's testimony was crucial to the State's case, and attacking her credibility represented the primary theory of the defense.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 178 N.C. App. 563, 631 S.E.2d 893 (2006), finding no error in a judgment entered 9 February 2005 by Judge Dennis J. Winner in Superior Court, Polk County. Heard in the Supreme Court 15 October 2007.

Roy Cooper, Attorney General, by Christopher G. Browning, Jr., Solicitor General, and Elizabeth Leonard McKay, Special Deputy Attorney General, for the State.

Long Parker Warren & Jones, P.A., by Robert B. Long, Jr. and William A. Parker; Dameron, Burgin, Parker, Lorenz & Jackson, P.A., by Phillip T. Jackson; and Rabinowitz Boudin Standard Krinsky & Lieberman, P.C., by Eric Lieberman, for defendant-appellant.

BRADY, Justice.

The sole issue before us is whether the Court of Appeals erred when it concluded the trial court properly excluded certain testimony and evidence during cross-examination intended to call into question the credibility of the victim. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On 19 December 2003, a criminal summons was issued charging defendant, Jane Brock Whaley, with committing simple assault in violation of N.C.G.S. § 14-33(a) in Rutherford County on 24 February 2002. As set out in the criminal summons, the Magistrate found probable cause to believe that defendant "did assault and strike Lacy Wein [the victim] by grabbing her neck, choking her and beating her head against a wall." The charge arose from an incident in which defendant physically touched the eighteen-year-old victim during a confrontation at a church facility. The parties agree that defendant touched the victim, but differ on the extent and nature of the physical contact involved.

Defendant was found guilty following a district court bench trial and appealed her conviction to Superior Court for a trial de novo. The case was tried at the 7 February 2005 criminal session of Polk County Superior Court. On direct examination, the victim described the alleged assault and resulting injury. During cross-examination, the jury heard the victim testify that she had visited "a place called Wellspring" in June 2003 in preparation for civil litigation resulting from the same alleged incident, that "[i]t wasn't mental treatment; it was an educational place," and that she spoke with "some form of counselor." The trial court thereafter sustained the State's objection to cross-examination regarding the victim's written responses to inquiries contained in a questionnaire completed by the victim during her visit to Wellspring. Ms. Wein had previously acknowledged her responses to the questionnaire under oath during a deposition taken as part of the parallel civil proceedings. During the subsequent *voir dire*, outside the presence of the jury, the following colloquy ensued between defense counsel and the victim:

Q. [Defense counsel, reading from the questionnaire] "Some people sometimes have the experience of feeling as though they were standing next to themselves or watching themselves do something, and they actually see themselves as if they were looking at another person. What percentage of the time does this happen to you?" . . . .

. . . .

And I believe your answer there in your handwriting was 50 percent of the time?

A. [Victim] That's what it says, yes.

. . . .

Q. And "Some people have the experience of not being sure whether things that they remember happening really did happen or whether they just dreamed them. What percentage of the time does this happen to you?" . . . .

. . . .

A. Twenty percent.

. . . .

Q. "And some people sometimes feel they hear voices inside their head that tell them to do things or comment on things

that they are doing. What percentage of the time does this happen to you?" . . . .

A. I wrote 30 percent.

. . . .

THE COURT: What she answered in June 2003 about her mental state at that time is not relevant to what her mental state is today, or is it relevant to what her mental state was in February of 2002. The objection is sustained to all those questions.

The trial court excluded this and similar lines of questioning on grounds that there was no evidence that the victim actually suffered from a mental defect and knowledge of the victim's responses would "put[] the jury in the position of making some diagnosis." The trial court further stated that "the Court of Appeals may decide that I'm wrong, although I never related this to Rule 603 [sic]; but the Court finds it more prejudicial to the State than it is probative, and I'm still going to exclude it all."

On 9 February 2005, a jury returned a verdict finding defendant guilty of simple assault and the trial court entered judgment accordingly. The trial court sentenced defendant to a thirty-day term of imprisonment, suspended for one year with unsupervised probation, imposed a $468.00 fine, and ordered defendant to pay court costs.

Defendant appealed. On 18 July 2006, the Court of Appeals filed an unpublished opinion finding no error in defendant's trial. On 3 May 2007, we allowed defendant's petition for discretionary review.

ANALYSIS

Defendant contends that the excluded testimony went to the credibility of the victim and should have been admitted under North Carolina Rule of Evidence 611(b), citing *State v. Williams*, 330 N.C. 711, 412 S.E.2d 359 (1992), in support of that position. We agree and hold that the trial court abused its discretion in excluding such testimony under Rule 403. *See* N.C.G.S. § 8C-1, Rule 403 (2005).

North Carolina Rule of Evidence 611(b) provides that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." *Id.*, Rule 611(b) (2005). However, such evidence may nonetheless be excluded under Rule 403 if the trial court determines "its probative value is substantially out-

weighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*, Rule 403. We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion. *State v. Peterson*, 361 N.C. 587, 602-03, 652 S.E.2d 216, 227 (2007) (citing *State v. Al-Bayyinah*, 359 N.C. 741, 747-48, 616 S.E.2d 500, 506-07 (2005), *cert. denied*, 547 U.S. 1076 (2006)). An abuse of discretion results when "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record." *Id.* (citations and internal quotation marks omitted).

In *Williams*, the trial court precluded defense counsel's cross-examination of a key witness about his past suicide attempts, psychiatric history, and drug habit. *See* 330 N.C. at 713, 412 S.E.2d at 361. Although the trial court in that case based its ruling on Rule of Evidence 608(b), governing admissibility of specific instances of conduct bearing on truthfulness or untruthfulness, this Court held "that the trial court erred in excluding [the] evidence because it was admissible impeachment evidence under Rule 611(b)." *Id.* The Court explained:

> Where, as here, the witness in question is a key witness for the State, this jurisdiction has long allowed cross-examination regarding the witness' past mental problems or defects. As stated by Chief Justice Stacy: "The denial of any impeachment [as to mental defects] of the State's only eye-witness . . . necessitates another hearing. It is always open to a defendant to challenge the credibility of the witnesses offered by the prosecution . . . against him." *State v. Armstrong*, 232 N.C. 727, 728, 62 S.E.2d 50, 51 (1950). It is beyond dispute that [the witness'] testimony here was essential to the State's case. No other evidence linked defendant directly to the [crime].

330 N.C. at 723, 412 S.E.2d at 367 (first alteration in original). This Court held the error prejudicial and awarded the defendant a new trial. *Id.* at 713, 412 S.E.2d at 361. Both the holding and the rationale of *Williams* dictate that same result in the instant case.

The State contends, and the trial court reasoned, that *Williams* is inapposite, as the excluded testimony here is insufficient to consti-

tute "past mental problems or defects." *See id.* at 723, 412 S.E.2d at 367. Such a finding is unnecessary, however, as this Court made clear that testimony must be allowed when it "may bear upon credibility in other ways, such as to cast doubt upon the capacity of a witness to observe, recollect, and recount." *Id.* at 719, 412 S.E.2d at 364 (citations and internal quotation marks omitted). The excluded testimony here, specifically the victim's prior indication that she had difficulty recalling whether certain events actually occurred, was exactly such evidence and should have been admitted. When testimony constitutes "the State's sole direct evidence on the ultimate issue, . . . credibility [takes] on enhanced importance." *Id.* at 723-24, 412 S.E.2d at 367 (citation omitted). This statement in *Williams* applies equally to the victim's testimony in the instant case. Moreover, "impeachment [is] particularly critical in light of the testimony of defendant's witnesses that contradicted [the State's evidence]." *Id.* at 724, 412 S.E.2d at 367. In the case at bar, defendant presented testimony of two eyewitnesses contradicting the victim's testimony. Excluding the cross-examination at issue here had "the effect of largely depriving defendant of [her] major defense." *Id.* at 721-22, 412 S.E.2d at 366. As a result, the trial court erred in excluding the disputed line of questioning, and therefore, defendant is entitled to a new trial.

As defendant is entitled to a new trial based on this Court's precedent and the rules of evidence, we need not reach the claim she raises as to her right to confront her accusers under the Confrontation Clauses of the Sixth Amendment to the Constitution of the United States and Article I, Section 23 of the North Carolina Constitution. *State v. Crabtree*, 286 N.C. 541, 543, 212 S.E.2d 103, 105 (1975) ("It is well established that appellate courts will not pass upon constitutional questions, even when properly presented, if there is some other ground upon which the case can be decided . . . ." (citations omitted)).

CONCLUSION

Both criminal defendants and prosecutors must be afforded wide latitude to cross-examine witnesses as to matters related to their credibility. Under the circumstances presented here, the victim's testimony was crucial to the State's case and attacking her credibility represented the primary theory of the defense. As a result, the trial court abused its discretion in excluding the challenged evidence relevant to the credibility of the victim. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court

with instructions to vacate the trial court's judgment and to further remand this case to that court for a new trial.

REVERSED AND REMANDED; NEW TRIAL.

STATE OF NORTH CAROLINA v. DAVID EDWARD WILSON

No. 257A07

(Filed 25 January 2008)

Agency— local jail—mental health clinician—employment by independent contractor—sexual acts—agent of sheriff

A mental health clinician employed by an independent contractor that provided services to prisoners housed in a local jail was also an agent of the sheriff, and was criminally liable under N.C.G.S. § 14-27.7(a) when he committed sexual acts with a prisoner.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 183 N.C. App. 100, 643 S.E.2d 620 (2007), finding no error in a judgment entered 1 November 2005 by Judge Richard D. Boner in Superior Court, Mecklenburg County. Heard in the Supreme Court 15 November 2007.

Roy Cooper, Attorney General, by Jane Ammons Gilchrist, Assistant Attorney General, for the State.

Nixon, Park, Gronquist, & Foster, by Mark P. Foster, Jr., for defendant-appellant.

EDMUNDS, Justice.

In this case, we consider whether defendant, a mental health clinician employed by an independent contractor that provided services to prisoners housed in a local jail, was also an agent of the sheriff. We conclude that defendant was an agent authorized to act for or in place of the sheriff, and, as a result, defendant was criminally liable when he committed sexual acts with a prisoner in violation of N.C.G.S. § 14-27.7(a). Accordingly, we modify and affirm the holding of the Court of Appeals.

A detailed recitation of the facts is not necessary. Defendant David Edward Wilson was employed by Prison Health Services, a company that contracted with the Mecklenburg County Sheriff's Office to provide mental health care for inmates. A female inmate at the Mecklenburg County jail who was experiencing nightmares requested treatment from defendant. During the course of treatment, defendant engaged in several sex acts with the inmate.

On 21 June 2004, the Mecklenburg County Grand Jury indicted defendant for sexual activity by a custodian and for attempted sexual activity by a custodian, all in violation of section 14-27.7(a).[1] The indictment alleged that the victim was "an inmate in the custody of the Mecklenburg County Jail" and that defendant was "a mental health clinician employed by Prison Health Services and contracted by the Mecklenburg County Sheriff's Office to work with mental health problems of inmates."

The single issue before us is whether defendant was an agent of the Mecklenburg County Sheriff's Office who may be prosecuted under N.C.G.S. § 14-27.7(a) for engaging in sex acts with a person in the custody of a government institution. This statute, entitled "Intercourse and sexual offenses with certain victims; consent no defense," provides in part:

> [I]f . . . a person who is an agent or employee of any person or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class E felony. Consent is not a defense to a charge under this section.

N.C.G.S. § 14-27.7(a) (2005).

At trial, defendant did not deny that he committed the alleged acts. Instead, defendant contended that he was not an "agent" of the Mecklenburg County Sheriff's Office for purposes of section 14-27.7(a). In support of this defense, defendant sought to introduce into evidence the employment contract between the Mecklenburg County Sheriff's Office and Prison Health Services. This contract provided that:

> 11.1 Independent Contractor Status. The parties acknowledge that PHS [Prison Health Services] is an independent contractor.

1. The Grand Jury also indicted defendant for crime against nature in violation of N.C.G.S. § 14-177, a charge which is not at issue in this appeal.

> Nothing in this Agreement is intended nor shall be construed to create an agency relationship, an employer/employee relationship, or a joint venture relationship among the parties.

Based upon this language, defendant argued that "the State, through the County, has already admitted in writing that [defendant] is actually an independent contractor and would not be construed as an agent or employee" of the Mecklenburg County Sheriff's Office.

The State filed a motion *in limine* seeking to have the trial court exclude the employment contract. In support of its motion, the State argued that defendant's purported status as an independent contractor was irrelevant because the State cannot delegate its duty to provide medical care to inmates, citing *Medley v. North Carolina Department of Correction*, 330 N.C. 837, 412 S.E.2d 654 (1992). In *Medley*, this Court considered whether an inmate could maintain a civil suit against the State under the Tort Claims Act for injury caused by the medical negligence of a prison physician who was an independent contractor. *Id.* at 838, 412 S.E.2d at 655. We determined that "the state has a nondelegable duty to provide adequate medical care for persons it incarcerates." *Id.* at 841, 412 S.E.2d at 657. Accordingly, we held that the State may not insulate itself from tort liability for injury resulting from the negligent provision of medical care by delegating that duty of care to an independent contractor. *Id.* at 845, 412 S.E.2d at 659.

After considering the arguments of both parties, the trial court allowed the State's motion and excluded the employment contract. However, in doing so, the trial court did not rely on *Medley*. Instead, the court stated:

> I don't think the contract between the company and the Sheriff is relevant. The issue that the jury is going to have to determine in this case is whether or not [defendant's] performance was authorized by the Sheriff of Mecklenburg County to perform something on the Sheriff's behalf, and in this case to provide mental health services, and whether or not he was acting as an agent at the time this act is alleged to have been committed.

In response to defense counsel's request for clarification, the court further explained that, for purposes of section 14-27.7(a), "the definition of agent is one who is authorized to perform acts on behalf of another." The case then proceeded to trial.

During the charge conference at the conclusion of the presentation of evidence, the trial court advised counsel that "I am going to give what amounts to a peremptory instruction that if somebody is providing mental health services, they are automatically an agent." The court noted that *Medley* "is some authority for the proposition that the defendant was an agent in this case," but stated that it was "reluctant to rely on [*Medley*], because it basically involves a civil liability, which I don't think that standard of care theory carries over to the criminal arena." Finally, the court stated:

> Let the record show that prior to the arguments of counsel at the bench the Court indicated to counsel that the Court would instruct that an agent is a person who is authorized to act for or in place of another; that that is the instruction that the Court will give defining an agent.
>
> Does anybody object to that definition?

Neither party objected, and the trial court so instructed the jury.

The jury found defendant guilty of all charges. Defendant appealed to the Court of Appeals, arguing that the trial court committed reversible error by excluding the employment contract between the Mecklenburg County Sheriff's Department and Prison Health Services. *State v. Wilson*, 183 N.C. App. 100, 102-03, 643 S.E.2d 620, 622 (2007). A divided panel of that court affirmed the trial court, citing *Medley*. *Id.* at ——, 643 S.E.2d at 622-23. The dissenting judge disagreed, arguing that "[i]f there is a basis for holding an independent contractor criminally liable as an agent of the State under the nondelegable duty theory, *Medley* does not provide it." *Id.* at ——, 643 S.E.2d at 624 (Wynn, J., dissenting). Defendant appealed to this Court as of right.

Defendant argues that the contract he sought to introduce shows that he was only an employee of independent contractor Prisoner Health Services and not an agent of the sheriff. In civil cases, courts make fine distinctions between agents and independent contractors. *See*, *e.g.*, *Holcomb v. Colonial Assocs., L.L.C.*, 358 N.C. 501, 509, 597 S.E.2d 710, 716 (2004) (stating that "an independent contractor can, in certain respects, be an agent" depending upon "the degree of control exercised by the principal"); *Cooper v. Asheville Citizen-Times Publ'g Co.*, 258 N.C. 578, 587, 590, 129 S.E.2d 107, 113, 115 (1963) (concluding that a contractual designation of a worker as an "independent contractor" was not controlling and that evidence of the

worker's status as an agent was sufficient to raise a jury question); *Harris v. Carter*, 227 N.C. 262 *passim*, 41 S.E.2d 764 *passim* (1947) (discussing whether the driver who injured the plaintiff was an agent or independent contractor of the defendant truck owner). However, a more straightforward analysis is appropriate in this criminal case.

As demonstrated by its title and text, one purpose of section 14-27.7 is to remove consent as a defense to a sex offense when a substantial imbalance of power exists between victim and perpetrator. *See* N.C.G.S. § 14-27.7 (stating that consent is not a defense to sexual contact between persons assuming the position of a parent and minors residing within the same home, between custodians and persons in their custody, between agents or employees of custodial institutions and persons in custody, and between school personnel and certain students at the same school). Whether a perpetrator's employer would be liable for its employee's sexual conduct in a civil suit is irrelevant to the harm identified by the General Assembly and addressed by section 14-27.7(a).

Defendant committed sex acts upon the victim while providing mental health services to inmates on behalf of the sheriff. We conclude that the general principle expressed by this Court in *Julian v. Lawton*, that "[a]n agent is one who acts for or in the place of another by authority from him," accurately describes the relationship intended to give rise to criminal liability under section 14-27.7(a). 240 N.C. 436, 440, 82 S.E.2d 210, 213 (1954) (citation and internal quotation marks omitted); *see also* Robert E. Lee, *North Carolina Law of Agency and Partnership* 1 (6th ed. 1977) ("Agency, in its broadest sense, indicates the relation which exists when one person is employed to act for another."). Such a relationship existed here.

Accordingly, we hold that the trial court correctly analyzed the issue and properly granted the State's motion *in limine* to exclude from evidence the employment contract between the Mecklenburg County Sheriff's Office and Prison Health Services. The decision of the North Carolina Court of Appeals finding no error in the judgment entered 1 November 2005 upon defendant's convictions for sexual activity by a custodian and attempted sexual activity by a custodian in violation of N.C.G.S. § 14-27.7(a) is hereby modified and affirmed.

MODIFIED AND AFFIRMED.

IN THE MATTER OF J.Z.M., R.O.M., R.D.M., AND D.T.F., MINOR CHILDREN

No. 366A07

(Filed 25 January 2008)

Termination of Parental Rights— failure to conduct hearing within 90 days—absence of prejudice

The decision of the Court of Appeals in this case reversing an order terminating respondent's parental rights because the termination hearing was not held within the 90-day period prescribed by N.C.G.S. § 7B-1109 is reversed for the reasons stated in the dissenting opinion that respondent failed to show that she was prejudiced by the delay where she merely asserted that she was deprived of the right to visit with the children, she made no assertion that had she been allowed visitation she would have been able to demonstrate that she had rectified her substance abuse and domestic violence issues which led to the removal of the children, and the delay gave the respondent additional time to rectify those issues but she failed to take advantage of this opportunity.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 184 N.C. App. 474, 646 S.E.2d 631 (2007), reversing an order signed on 18 April 2006 by Judge Louis A. Trosch, Jr. in District Court, Mecklenburg County. Heard in the Supreme Court 10 December 2007.

Mecklenburg County Attorney's Office, by J. Edward Yeager, Jr. and Tyrone C. Wade, for petitioner-appellant Mecklenburg County Department of Social Services.

Womble Carlyle Sandridge & Rice, PLLC, by Sarah A. Motley, for appellant Guardian ad Litem.

Charlotte Gail Blake for respondent-appellee mother.

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 consideration of respondent's remaining assignments of error.

REVERSED AND REMANDED.

IN RE J.E. & Q.D.

[362 N.C. 168 (2008)]

IN THE MATTER OF J.E. AND Q.D.

No. 297A07

(Filed 25 January 2008)

Termination of Parental Rights— guardian ad litem representation—termination hearing but not prior hearings

The decision of the Court of Appeals reversing an order terminating respondent's parental rights in her two children is reversed for the reason stated in the dissenting opinion that an order terminating parental rights should be affirmed when both children were represented by a guardian ad litem at the termination hearing but were unrepresented during some prior hearings not on direct appeal to the Court of Appeals.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 183 N.C. App. 217, 644 S.E.2d 28 (2007), reversing an order entered on 19 December 2005 by Judge Regan A. Miller in District Court, Mecklenburg County. Heard in the Supreme Court 11 December 2007.

North Carolina Guardian ad Litem Program, by Pamela Newell Williams, Appellate Coordinator, and Matt McKay, Attorney Advocate, for appellant Guardian ad Litem; and Mecklenburg County Attorney's Office, by Twyla H. George, for petitioner-appellant Mecklenburg County Department of Social Services.

Betsy J. Wolfenden for respondent-appellee mother.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed and that court is instructed to reinstate the order of the trial court terminating respondent's parental rights.

REVERSED.

STATE OF NORTH CAROLINA v. JOHNNY DWAYNE HILL

No. 416A07

(Filed 25 January 2008)

Sexual Offenses— amendment of indictment—change of statute in heading

The decision of the Court of Appeals in this case is reversed for the reason stated in the dissenting opinion that indictments for first-degree sexual offense were not substantially altered in violation of N.C.G.S. § 15A-923(e) when the trial court permitted the State at the close of the evidence to correct the heading of the indictments, which stated that the offenses were in violation of N.C.G.S. § 14-27.7A (the statutory rape statute), to state that the offenses were in violation of N.C.G.S. § 14-27.4.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 185 N.C. App. 216, 647 S.E.2d 475 (2007), vacating judgments entered 13 April 2006 by Judge W. Erwin Spainhour in Superior Court, Davidson County. Heard in the Supreme Court 12 December 2007.

Roy Cooper, Attorney General, by Anne M. Middleton, Assistant Attorney General, for the State-appellant.

James R. Glover for defendant-appellee.

PER CURIAM.

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

REVERSED.

IN RE H.L.A.D.

[362 N.C. 170 (2008)]

IN THE MATTER OF H.L.A.D.

No. 386A07

(Filed 25 January 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 184 N.C. App. 381, 646 S.E.2d 425 (2007), affirming an order entered on 14 September 2006 by Judge Thomas G. Taylor in District Court, Gaston County. Heard in the Supreme Court on 10 December 2007.

Sofie W. Hosford for petitioner-appellees James R. Helms and Crystal Helms.

Duncan B. McCormick for respondent-appellant father.

PER CURIAM.

AFFIRMED.

PHILLIPS v. PHILLIPS

[362 N.C. 171 (2008)]

BECKY D. PHILLIPS v. JAMES A. PHILLIPS, JR.

No. 409A07

(Filed 25 January 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 185 N.C. App. 238, 647 S.E.2d 481 (2007), vacating an order entered 16 June 2006 by Judge Beth S. Dixon in District Court, Rowan County, and remanding for additional findings. Heard in the Supreme Court 12 December 2007.

Robert L. Inge for plaintiff-appellee.

James A. Phillips, Jr., pro se, defendant-appellant.

PER CURIAM.

AFFIRMED.

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

IN RE J.J., J.J., J.J.

[362 N.C. 172 (2008)]

IN THE MATTER OF J.J., J.J., J.J., MINOR CHILDREN

No. 15A07

(Filed 25 January 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 180 N.C. App. 344, 637 S.E.2d 258 (2006), affirming an order entered on 24 March 2005 by Judge James A. Jackson in District Court, Gaston County. On 3 May 2007, the Supreme Court allowed respondent's petitions for writ of certiorari to review additional issues. Heard in the Supreme Court 11 December 2007.

Jill Y. Sanchez for petitioner-appellee Gaston County Department of Social Services.

Richard E. Jester for respondent-appellant mother.

PER CURIAM.

As to the constitutional issue addressed by the dissenting opinion in the Court of Appeals, the petition for writ of certiorari was improvidently allowed. As to all other issues, the majority decision of the Court of Appeals is affirmed.

AFFIRMED; CERTIORARI IMPROVIDENTLY ALLOWED IN PART.

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

ERIC THORNTON v. F.J. CHERRY HOSPITAL AND NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, SELF-INSURED, KEY RISK MANAGEMENT, SERVICING AGENT

No. 281A07

(Filed 25 January 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 183 N.C. App. 177, 644 S.E.2d 369 (2007), affirming a decision and order entered by the North Carolina Industrial Commission on 8 May 2006. Heard in the Supreme Court 10 December 2007.

Narron & Holdford, P.A., by Ben L. Eagles, for plaintiff-appellant.

Roy Cooper, Attorney General, by Amar Majmundar, Special Deputy Attorney General, for defendant-appellees.

PER CURIAM.

AFFIRMED.

STATE v. HUNT

[362 N.C. 174 (2008)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
LEE WAYNE HUNT	)	

No. 565P07

This matter having come before this Court on defendant's Motion to Review Pursuant to Rule 2, this Court notes that defendant was convicted and sentenced to life imprisonment at a time when such cases were directly appealable to the Supreme Court of North Carolina. Accordingly, this Court has jurisdiction to consider defendant's petition, which we treat as a Petition for Writ of Certiorari. As such, defendant's Petition for Writ of Certiorari is denied. The State's Motion to Dismiss Petition for Review Under Rule 2 is dismissed as moot. The State's Motion to Deny Defendant's Motion for Petition for Writ of Certiorari is dismissed as moot.

By order of the Court in Conference, this 24th day of January, 2008.

Hudson, J.
For the Court

Brady, J. Recused

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

Adams Creek Assocs. v. Davis Case below: 186 N.C. App. 512	No. 003P08	1. Defs' Motion for Temporary Stay (COA07-134)	1. Allowed 01/09/08
Barnes v. Dancy Case below: 186 N.C. App. 304	No. 537P07	Plt-Appellants' PDR Under N.C.G.S. § 7A-31 (COA07-79)	Denied 01/24/08
Beddard v. Albritton Case below: 184 N.C. App. 187	No. 357P07	1. Def-Appellant's NOA Pursuant to N.C.G..S. § 7A-30(1) (COA06-1241) 2. Def-Appellant's PDR Under N.C.G.S. § 7A-31(c)(2,3)	1. Dismissed *ex mero motu* 01/24/08 2. Denied 01/24/08
Billings v. General Parts, Inc. Case below: 187 N.C. App. 580	No. 029P08	Defs' Motion for Temporary Stay (COA07-318)	Allowed 01/23/08
Blyth v. McCrary Case below: 184 N.C. App. 654	No. 507P07	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA06-726) 2. Defs' (McCrary & Country Squire) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 01/24/08 2. Dismissed as Moot 01/24/08
Carter v. Marion Case below: 183 N.C. App. 449	No. 320P07	1. Plts' (Carter and Hyatt) NOA Based Upon a Constitutional Question (COA06-863) 2. Def's Motion to Dismiss Appeal 3. Plts' (Carter and Hyatt) PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 01/24/08 3. Denied 01/24/08
Cooke v. Cooke Case below: 185 N.C. App. 101	No. 418P07	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA06-1083) 2. Def's Motion to Dismiss Petition 3. Plt's Motion to Withdraw PDR 4. Plt's Substitute PDR Under N.C.G.S. § 7A-31	1. —— 2. Dismissed as Moot 01/24/08 3. Allowed 01/24/08 4. Denied 01/24/08

Davis v. Sgt. Peppers Rest. & Bar, Inc. Case below: 186 N.C. App. 132	No. 535P07	Plt-Appellants' PWC (COA06-1469)	Denied 01/24/08
Etter v. Pigg Case below: 187 N.C. App. 679	No. 570P07	Defs' PDR Under N.C.G.S. § 7A-31 (COA07-92)	Denied 01/24/08
Fairview Developers, Inc. v. Miller Case below: 187 N.C. App. 168	No. 585P07	Plts' PDR Under N.C.G.S. § 7A-31 (COA07-145)	Denied 01/24/08
Hodgson Constr., Inc. v. Howard Case below: 187 N.C. App. 408	No. 005P08	Defs' Motion for Temporary Stay (COA06-1414)	Allowed 01/08/08
Hollin v. Johnston Cty. Council On Aging Case below: 181 N.C. App. 77	No. 079P07	Defs' Motion for Temporary Stay (COA06-310)	Allowed 02/08/07 **Hudson, J., Recused**
In re J.G. Case below: 187 N.C. App. 496	No. 586P07	1. Petitioner's (Guilford County DSS) PDR Under N.C.G.S. 7A-31 (COA06-752) 2. Respondent's (Guardian Ad Litem) Conditional PDR Under N.C.G.S. 7A-31	1. Denied 01/24/08 2. Dismissed as Moot 01/24/08
Joker Club, LLC v. Hardin Case below: 183 N.C. App. 92	No. 304P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-123)	Denied 01/24/08 **Edmunds, J., Recused**
Kenyon v. Gehrig Case below: 183 N.C. App. 455	No. 379P07	Plt-Appellant's PDR Under N.C.G.S. § 7A-31 (COA06-724)	Denied 01/24/08

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

Kinesis Adver., Inc. v. Hill Case below: 187 N.C. App. 1	No. 595P07	1. Defs' (Hill and Robinette) NOA Based Upon a Constitutional Question (COA06-1224) 2. Plt's and Additional Counterclaim-Defs' Motion to Dismiss Appeal 3. Defs' (Hill and Robinette) PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 01/24/08 3. Denied 01/24/08
Legette v. Scotland Mem'l Hosp. Case below: 181 N.C. App. 437	No. 159P07	1. Defs' NOA Based Upon a Constitutional Question (COA06-148) 2. Plt's Motion to Dismiss Appeal 3. Defs' PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 01/24/08 3. Denied 01/24/08 **Hudson, J., Recused**
Midsouth Golf, LLC v. Fairfield Harbourside Condo Ass'n. Case below: 187 N.C. App. 22	No. 589P07	Plt's Motion for Temporary Stay (COA07-64)	Allowed 12/20/07
Penland v. Penland Case below: 186 N.C. App. 472	No. 559P07	Def's PDR Under N.C.G.S. 7A-31 (COA07-303)	Denied 01/24/08
Spaulding v. Honeywell Int'l, Inc. Case below: 184 N.C. App. 317	No. 390P07-2	1. Plt's Petition to Rehear PDR (COA06-1221) 2. Plt's Alternative PWC to Review Decision of COA	1. Dismissed 01/23/08 2. Denied 01/23/08
State v. Alvardo Case below: 187 N.C. App. 305	No. 612P07	1. Def's PDR Under N.C.G.S. § 7A-31(c)(3) (COA07-105) 2. Def's NOA Based Upon a Substantial Constitutional Question Under N.C.G.S. § 7A-30(1) 3. AG's Motion to Dismiss Appeal	1. Denied 01/24/08 2. —— 3. Allowed 01/24/08
State v. Byler Case below: 167 N.C. App. 109	No. 420P7	Def's PWC to Review a decision of the COA (COA03-453)	Dismissed 01/24/08 **Timmons-Goodson, J., Recused**

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

State v. Carpenter Case below: 185 N.C. App. 731	No. 551P07	Def's PWC to Review Decision of COA (COA06-1459)	Denied 01/24/08
State v. Christian Case below: 180 N.C. App. 621	No. 598P07	Def's PWC to review Decision of COA (COA05-1415)	Denied 01/24/08
State v. Cooper Case below: 186 N.C. App. 100	No. 490P07	AG's Motion for Temporary Stay (COA06-1356)	Allowed 10/08/07
State v. Dexter Case below: 186 N.C. App. 587	No. 577P07	1. Def's Motion for Temporary Stay (COA06-1611) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Denied 12/07/07 2. Denied 01/24/08 3. Denied 01/24/08
State v. Duke Case below: Gaston County Superior Court	No. 057A04-2	Def's Motion of Appeal for Denial of Writ of Mandamus	Denied 01/24/08
State v. Freeman Case below: 185 N.C. App. 408	No. 475A07	1. State's Motion to Dismiss Appeal (COA06-1502) 2. Def's Motion to Reconsider	1. Allowed 01/07/08 2. Denied 01/18/08
State v. Haislip Case below: 186 N.C. App. 275	No. 513P07	AG's Motion for Temporary Stay (COA06-1488)	Allowed 10/19/07
State v. Hall Case below: 187 N.C. App. 510	No. 013P08	Def's PDR Under N.C.G.S. 7A-31 (COA07-595)	Denied 01/24/08
State v. Handy Case below: 184 N.C. App. 758	No. 423P07	1. Def's NOA Based Upon a Constitutional Question (COA06-1337) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 01/24/08 2. Denied 01/24/08

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

State v. Hunt Case below: Cumberland County Superior Court	No. 565P07	1. Def's Motion for Request for Review Under Rule 2 (COAP07-567) 2. State's Motion for Extension of Time to File Response 3. State's Motion to Dismiss Def's Request for Review Under Rule 2 or, alternatively, State's Response to PWC and Motion to Deny	1. See Special Order Page 174 2. Allowed 11/29/07 3. See Special Order Page 174 **Brady, J., Recused**
State v. McIntosh Case below: 185 N.C. App. 732	No. 498P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1441)	Denied 01/24/08
State v. McLamb Case below: 186 N.C. App. 124	No. 489P07	AG's Motion for Temporary Stay (COA06-1319)	Allowed 10/08/07
State v. Person Case below: 187 N.C. App. 512	No. 002A08	1. State's NOA (Dissent) (COA06-1507) 2. State's Motion for Temporary Stay 3. State's Petition for Writ of Supersedeas	1. —— 2. Allowed 01/03/08 3. Allowed 01/24/08
State v. Pollard Case below: 181 N.C. App. 760	No. 147P07	1. Def's NOA Based Upon a Constitutional Question (COA06-721) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. 7A-31	1. —— 2. Allowed 01/24/08 3. Denied 01/24/08
State v. Raines Case below: Henderson County Superior Court	No. 211A06	1. Def-Appellant's Motion for Appropriate Relief to Stay Issuance of the Court's Mandate 2. Def-Appellant's Motion to Withdraw the Court's Slip Opinion	1. Denied 12/21/07 2. Denied 12/21/07
State v. Wells Case below: 185 N.C. App. 733	No. 514P07	1. Def's NOA Based Upon a Constitutional Question (COA06-1542) 2. Def's PDR Under N.C.G.S. 7A-31	1. Dismissed *ex mero motu* 01/24/08 2. Denied 01/24/08 **Hudson, J., Recused**

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

Sturgill v. Ashe Mem'l Hosp., Inc. Case below: 186 N.C. App. 624	No. 583P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-1476)	Denied 01/24/08
Subkhangulova (Dowdy) v. Dowdy Case below: 185 N.C. App. 733	No. 573P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1112)	Denied 01/24/08
Subkhangulova (Dowdy) v. Dowdy Case below: 185 N.C. App. 733	No. 574P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1101)	Denied 01/24/08
Venters v. Albritton Case below: 184 N.C. App. 230	No. 356P07	1. Def-Appellant's NOA Pursuant to N.C.G..S. § 7A-30(1) (COA06-1261) 2. Def-Appellant's PDR Under N.C.G.S. § 7A-31(c)(2,3)	1. Dismissed *ex mero motu* 01/24/08 2. Denied 01/24/08
Walsh v. Town of Wrightsville Beach Bd. of Alderman Case below: 186 N.C. App. 681	No. 467P06-2	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA05-1478-2)	Denied 01/24/08
Weaver v. Sheppa Case below: 186 N.C. App. 412	No. 558P07	Def's PDR Under N.C.G.S. § 7A-31 (COA07-52)	Allowed 01/24/08 **Newby, J., Recused**
WMS, Inc. v. Alltel Corp. Case below: 185 N.C. App. 86	No. 452P07	Defs' PDR Under N.C.G.S. § 7A-31 (COA06-793)	Denied 01/24/08

STATE OF NORTH CAROLINA v. ADAM EDWARD SPARKS, JR.

No. 160A07

(Filed 7 March 2008)

1. Appeal and Error— findings to which no error assigned— reviewed as a conclusion

Findings of fact which are essentially conclusions of law will be treated as such on appeal, and a finding which was actually a conclusion was reviewed even though error was not assigned to the finding.

2. Constitutional Law— double jeopardy—post-release revocation—sex offender's failure to register change of address

Prosecution of a defendant under N.C.G.S. § 14-208.11 (failure to register a change of address as a sex offender) and revocation of his post-release supervision for sexual offenses does not violate double jeopardy principles. A post-release revocation hearing is not a criminal prosecution; moreover, revocation and reinstatement of the original sentence results from the original felony convictions rather than the conduct which triggered the revocation (absconding from the post-release officer).

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 182 N.C. App. 45, 641 S.E.2d 339 (2007), reversing an order entered 24 October 2005 by Judge Timothy L. Patti in Superior Court, Catawba County. Heard in the Supreme Court 10 September 2007.

Roy Cooper, *Attorney General*, *by Ashby T. Ray*, *Assistant Attorney General*, *for the State.*

Richard E. Jester for defendant-appellant.

HUDSON, Justice.

Here we review a decision of the Court of Appeals reversing the trial court's order granting, on double jeopardy grounds, defendant's motion to dismiss the criminal charge of failing to register his change of address with the county sheriff as required by N.C.G.S. § 14-208.9. The majority in the Court of Appeals determined that the constitutional protections of double jeopardy do not apply to a post-release

supervision and parole revocation hearing[1] (hereinafter, "post-release revocation hearing") and that the revocation of post-release supervision (hereinafter, "post-release") and reinstatement of the time remaining on the original sentence do not constitute new or additional punishment. Hence, the Court of Appeals concluded that double jeopardy did not bar the State from pursuing a criminal charge against defendant for failing to register as a sex offender. We affirm.

I. BACKGROUND

On 29 November 1999, defendant Adam Edward Sparks, Jr. pleaded guilty to sexual activity by a substitute parent, indecent liberties with a child, and crime against nature, offenses classified respectively as Class E, Class F, and Class I felonies. N.C.G.S. §§ 14-27.7(a), -202.1, -177 (2005). Defendant was sentenced to an active term of twenty-five to thirty-nine months for sexual activity by a substitute parent, plus a consecutive sixteen to twenty month term for the other convictions. In addition, N.C.G.S. § 14-208.7 required defendant to register as a sex offender.

On 24 February 2003, after defendant had served thirty-nine months in prison, he was granted early release and placed on post-release. On the same date, defendant registered as a sex offender in Catawba County in accordance with section 14-208.7.

On 4 December 2003, defendant's post-release supervising officer completed a Post-Release Supervision and Parole Commission violation report, which alleged that defendant had violated conditions of his post-release by: (1) leaving his residence without notifying his post-release officer and failing to make his whereabouts known, rendering himself "an absconder"; (2) failing to pay the monthly supervision fee set by law; and (3) not complying with his mandatory sex offender treatment program (over five unexcused absences and an outstanding balance of $480.00 in costs for such treatment).

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1. We are aware that the statutory requirements dealing with revocation proceedings are located in separate sections depending upon whether a defendant is on post-release supervision or on parole. Nevertheless, the respective provisions which govern both forms of conditional release are virtually identical. *Compare* N.C.G.S. § 15A-1368.6 (2005) (post-release supervision) *with* N.C.G.S. § 15A-1376 (2005) (parole). In addition, in practice, the Post-Release Supervision and Parole Commission, the agency charged by our legislature to "adopt rules governing the hearing[s]" utilizes the same procedure regardless. *Id.* §§ 15A-1368.6, -1376; *see also* Stevens H. Clarke, *Law of Sentencing, Probation, and Parole in North Carolina* 189 (Inst. of Gov't, Chapel Hill, N.C., 2d ed. 1997) [hereinafter, Clarke, *Sentencing*]. As such, we refer to such proceedings in general terms as "post-release revocation proceedings."

On 1 July 2004, the North Carolina Department of Correction's Post-Release Supervision and Parole Commission ("Commission") revoked defendant's post-release status, which it called "parole," after "having found that this parolee [was] not adjusting satisfactorily or [had] violated conditions of parole," pursuant to "[N.C.G.S. §] 15A-1373."[2] The Commission activated the remainder of defendant's original sentence, which defendant served from 5 June 2004 through 20 December 2004, the date of his final, unconditional release.

On 2 August 2004, while defendant was serving out his time, a grand jury indicted him for failing to comply with sex offender registration as required by N.C.G.S. § 14-208.9 and in violation of N.C.G.S. § 14-208.11, which is a Class F felony. Specifically, the indictment alleged that on or about 13 December 2003, defendant

> fail[ed] to register with the Sheriff's office in the County where the defendant did in fact reside and fail[ed] to provide written notice of his change of address no later than the 10th day after his change in address to the Sheriff's office in the County of Catawba with whom the individual was last registered.

Defendant moved to dismiss the charge, alleging that the State could not both revoke his post-release for absconding and prosecute him for failing to notify the sheriff about his change of address without violating constitutional prohibitions against double jeopardy. On 19 September 2005, defendant testified that a hearing officer informed him at his June 2004 post-release revocation hearing that "he found me guilty of absconding, and that was the only thing he found me guilty of." On 24 October 2005, the trial court allowed defendant's motion and dismissed the charge, concluding that "to prosecute the Defendant for the offense alleged . . . would place the Defendant in jeopardy twice for the same behavior."

The State appealed. In the Court of Appeals, the State argued that double jeopardy protection did not apply here and the trial court

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2. We note that the documentation from the Commission which is included in the record states that defendant's "parole" was revoked. Defendant was on post-release supervision and not parole, and post-release supervision is not perfectly synonymous with parole under our statutory scheme. *Compare* N.C.G.S. ch. 15A, art. 84A (2005) *with* N.C.G.S. ch. 15A, art. 85 (2005). Further, the documentation incorrectly states that defendant's "parole" was revoked by the "authority of section 15A-1373 of the General Statutes of North Carolina." Under our statutory structure, the Commission's authority to revoke a defendant's parole based upon his violation of a parole condition is authorized by section 15A-1373, but its authority to revoke a defendant's post-release is derived from section 15A-1368.3. N.C.G.S. §§ 15A-1368.3, -1373 (2005).

erred by allowing defendant's motion to dismiss. The State asserted, *inter alia*, that as with probation revocation hearings, double jeopardy does not apply to these post-release proceedings. Specifically, the State contended that like a probation revocation hearing, a post-release revocation hearing is not a criminal prosecution and revoking post-release and activating the remaining sentence does not constitute new or additional punishment. The State maintained that such hearings merely involve an administrative determination of whether the supervisee violated one or more conditions of release, and if so, whether to revoke his post-release and impose consequences.

Defendant contended that a post-release revocation hearing is more like a criminal contempt proceeding and consequently is a criminal prosecution. He asserted that since the indictment contained the same "elements" as the conduct for which his post-release was revoked, allowing the State to prosecute him for the indictment would violate the *Blockburger* or "same elements" test for double jeopardy. *Blockburger v. United States*, 284 U.S. 299, 304, 76 L. Ed. 306, 309 (1932). The Court of Appeals majority agreed with the State and reversed the trial court's order. *State v. Sparks*, 182 N.C. App. 45, 49, 641 S.E.2d 339, 342 (2007).

The dissenter would have affirmed the trial court and concluded that defendant would be placed in double jeopardy if the State were permitted to indict and prosecute him for failing to register as a sex offender. *Id.* at 51-52, 641 S.E.2d at 343 (Tyson, J., dissenting). The dissenting judge reasoned that because the State failed to object to two of the trial court's findings of fact, these "unchallenged findings of fact [which] state [that] this indictment would place defendant in 'jeopardy twice' " were binding on appeal. *Id.* at 50-51, 641 S.E.2d at 343. These "findings of fact" are:

> 10. That the actions of the defendant, of allegedly leaving his residence at 780 3rd Ave. Place SE, Hickory, North Carolina, and not making his whereabouts known are the basis for the pending criminal charges in Catawba County file # 04-CRS-11042 and were also part of the basis for the violation report which was drafted by the Defendant's probation officer to terminate his post-release supervision.
>
> . . . .
>
> 13. That the parole document which terminated/revoked the Defendant's post-release supervision is non-specific as to

> the reason the Defendant's post-release supervision was terminated/revoked. The Court further finds that one of the allegations for the hearing was that the Defendant had moved from his residence, and that to prosecute the Defendant for moving from his residence without notifying the sheriff in 04-CRS-11042 would place the Defendant in jeopardy twice for the same behavior.

The dissent went on to note that the "trial court's order conclusively states [that] defendant's actions of (1) 'leaving his residence' and (2) 'not making his whereabouts known' [were] the basis for *both* defendant's revocation of his post-release supervision and re-incarceration and his subsequent criminal indictment." *Id.* at 50, 641 S.E.2d at 343. As a result, "[t]he trial court properly concluded that 'to prosecute the Defendant for the offense alleged in the [indictment] would place the Defendant in jeopardy twice for the same behavior.' " *Id.* at 51, 641 S.E.2d at 343 (brackets added by court).

II. ANALYSIS

[1] First, we address the argument, brought forth by defendant to this Court due to the dissenting opinion, that the State failed to assign error properly to the trial court's findings of fact, which rendered them binding on appeal and conclusively established a double jeopardy violation. It is well established that if a party fails to object to the findings of fact and bring them forward on appeal, they are binding on the appellate court. *See, e.g.*, *State v. Pendleton*, 339 N.C. 379, 389, 451 S.E.2d 274, 280 (1994), *cert. denied*, 515 U.S. 1121, 132 L. Ed. 2d 280 (1995). However, "findings of fact [which] are essentially conclusions of law . . . will be treated as such on appeal." *Harris v. Harris*, 51 N.C. App. 103, 107, 275 S.E.2d 273, 276 (citations omitted), *disc. rev. denied*, 303 N.C. 180, 280 S.E.2d 452 (1981); *see also City of Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946) ("The label of fact put upon a conclusion of law will not defeat appellate review."). In distinguishing between findings of fact and conclusions of law, "[a]s a general rule, . . . any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citing *Plott v. Plott*, 313 N.C. 63, 74, 326 S.E.2d 863, 870 (1985), and *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657-58 (1982)).

Here, the trial court's statement in finding of fact number 13 "[t]hat to prosecute the Defendant for moving from his residence without notifying the sheriff . . . would place the Defendant in jeop-

ardy twice for the same behavior" is actually a conclusion of law because a determination of double jeopardy requires the exercise of judgment and the application of legal principles. Conclusions of law are fully reviewable on appeal. *See, e.g.*, *State v. Smith*, 346 N.C. 794, 797, 488 S.E.2d 210, 212 (1997). The State did assign error to the trial court's conclusion of law that a double jeopardy violation occurred in the instant case. Hence, we review de novo whether the State's prosecution of defendant for failing to register his change of address violates double jeopardy.

Next, we address the Court of Appeals majority's conclusion that "the constitutional protections of double jeopardy are inapplicable" here. *Sparks*, 182 N.C. App. at 47, 641 S.E.2d at 340-41 (majority). The constitutional prohibition against double jeopardy protects a defendant from "additional punishment and successive prosecution" for the same criminal offense. *United States v. Dixon*, 509 U.S. 688, 696, 125 L. Ed. 2d 556, 568 (1993). "The [Double Jeopardy] [C]lause protects against three distinct abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense." *State v. Thompson*, 349 N.C. 483, 495, 508 S.E.2d 277, 284 (1998) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 664-65 (1969), *limited by Alabama v. Smith*, 490 U.S. 794, 104 L. Ed. 2d 865 (1989)). North Carolina's " 'law of the land' clause incorporates similar protections under the North Carolina Constitution." *State v. Ballenger*, 123 N.C. App. 179, 180, 472 S.E.2d 572, 573 (1996) (citing N.C. Const. art. I, § 19), *aff'd per curiam*, 345 N.C. 626, 481 S.E.2d 84 (1997), *cert. denied*, 522 U.S. 817, 139 L. Ed. 2d 29 (1997).

Based on the above law and the record indicating that the hearing officer found that defendant absconded from his post-release supervising officer in violation of his conditional release, we must determine: (1) whether this post-release revocation hearing was a criminal prosecution, and (2) whether the criminal prosecution of defendant pursuant to section 14-208.11 for failing to notify the sheriff of his change of address in accordance with section 14-208.9 and the revocation of his post-release constitute multiple punishments for the same offense. Our answer to both questions is no. We hold that double jeopardy does not bar the State from prosecuting defendant under section 14-208.11 for his alleged failure to register his change of address with the sheriff as required by section 14-208.9.

A. CRIMINAL PROSECUTION

[2] Although this Court has not specifically addressed whether a post-release revocation hearing is a criminal prosecution, it has long held that a "proceeding to revoke probation is not a criminal prosecution." *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 479 (1967); *see also State v. Braswell*, 283 N.C. 332, 337, 196 S.E.2d 185, 188 (1973). In support of this conclusion, our appellate courts have noted that unlike criminal prosecutions, probation revocation proceedings are informal, summary proceedings. *Hewett*, 270 N.C. at 353, 154 S.E.2d at 479-80; *see State v. Monk*, 132 N.C. App. 248, 252-53, 511 S.E.2d 332, 334-35, *appeal dismissed and disc. rev. denied*, 350 N.C. 845, 539 S.E.2d 1 (1999). This Court has also noted that:

> The inquiry of the court at such a hearing is not directed to the probationer's guilt or innocence [as in a criminal prosecution], but to the truth of the accusation of a violation of probation. The crucial question is: Has the probationer abused the privilege of grace extended to him by the court?

Hewett, 270 N.C. at 352, 154 S.E.2d at 479.

This Court reasoned further that a decision to revoke probation affects "conditional" and not absolute liberty and "[t]he rights of an offender in a proceeding to revoke his conditional liberty . . . are not coextensive with the . . . constitutional rights of one on trial in a criminal prosecution." *Id.* at 351, 154 S.E.2d at 478 (citations omitted). Hence, while an individual facing the possibility of probation revocation is entitled to certain procedural protections such as the right to appear before a judge, no formal trial is required and strict rules of evidence do not apply. *Id.* at 353, 154 S.E.2d at 479-80; *see also* N.C.G.S. § 15A-1345 (2005). Unlike in a criminal prosecution, "the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt." *Hewett*, 270 N.C. at 353, 154 S.E.2d at 480 (citations omitted).

Numerous similarities between a post-release revocation hearing and a probation revocation hearing support the State's contention and the conclusion that such a hearing is not a criminal prosecution, but rather an informal, summary proceeding. As with probation, "[t]he purpose of the revocation hearing is to determine whether the parolee or the [post-release] supervisee committed violations of conditions of [his conditional release] and, if so, whether parole or [post-release] should be revoked." Clarke, *Sentencing* 189. Next, regardless of whether the decision is to revoke a defendant's parole or his

post-release both entail the revocation of a defendant's "conditional" liberty. N.C.G.S. §§ 15A-1373(a) (parole), -1368.3(a) (post-release). Furthermore, as in the probation context, the defendant is not afforded the same procedural protections as when facing criminal prosecution. For example, formal rules of evidence do not apply and violations need not be proved beyond a reasonable doubt. N.C.G.S. §§ 15A-1376 (parole), -1368.6 (post-release).

In addition to these similarities, the fact that both parole and post-release supervision have always been functions of the executive and not the judicial branch supports the conclusion that these hearings are not criminal prosecutions. *Jernigan v. State*, 10 N.C. App. 562, 565-66, 179 S.E.2d 788, 791 ("[T]he power to grant and to revoke paroles developed originally as a function of the executive branch of government" and "has never been considered to be a judicial function."), *aff'd*, 279 N.C. 556, 184 S.E.2d 259 (1971); *see* Act of July 24, 1993, ch. 538, 1993 N.C. Sess. Laws 2298, 2329-70 (codified as amended at N.C.G.S. ch. 15A, arts. 84A and 85, and ch. 143B, art. 6, pt. 3 (2005)) (creating post-release supervision and entrusting administration of post release and parole programs to the Commission).

Further, we note that the majority of federal courts that have considered the issue, including the United States Supreme Court, have determined that probation, parole, and federal supervised release[3] revocation hearings are not criminal prosecutions. *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 36 L. Ed. 2d 656, 661-62 (1973) (probation); *Morrissey v. Brewer*, 408 U.S. 471, 480, 33 L. Ed. 2d 484, 494 (1972) ("[R]evocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations."); *see Johnson v. United States*, 529 U.S. 694, 700-01, 146 L. Ed. 2d 727, 736 (2000) (supervised release).

In addition to this federal jurisprudence, appellate courts of other states that have considered the issue have uniformly reached the same conclusion. *E.g.*, *Billings v. State*, 53 Ark. App. 219, 224, 921 S.W.2d 607, 610 (1996) ("Neither parole revocation nor sus-

3. Approximately ten years before our legislature enacted Structured Sentencing, Congress enacted the Sentencing Reform Act of 1984, which eliminated most forms of parole for federal crimes and created supervised release. Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3586 (2000)); *see Gozlon-Peretz v. United States*, 498 U.S. 395, 397, 112 L. Ed. 2d 919, 925 (1991). Like parole and post-release supervision, federal supervised release allows a defendant to serve part of his sentence outside prison walls subject to his compliance with certain prescribed conditions. 18 U.S.C. § 3583 (2000).

pended sentence revocation is a stage of a criminal prosecution.") (citations omitted); *People v. Gallegos*, 914 P.2d 449, 451 (Colo. Ct. App. 1995) ("[A] criminal contempt proceeding is distinguishable from a parole revocation proceeding, which is not a criminal prosecution."); *Smith v. State*, 171 Ga. App. 279, 282-83, 319 S.E.2d 113, 117 (1984) ("A probation hearing is not a part of the criminal prosecution and is not a second sentencing, or second imposition of punishment for the same offense."); *McQueen v. State*, 862 N.E.2d 1237, 1243 (Ind. Ct. App. 2007) ("[D]ouble jeopardy protection applies only to criminal proceedings and probation revocation proceedings are not criminal proceedings.").

Accordingly, we conclude that a post-release revocation hearing is not a criminal prosecution. In reaching this conclusion, we note that the extensive authority cited above, both from this state and from other jurisdictions, fails to support defendant's argument that such a hearing is analogous to a nonsummary criminal contempt proceeding. *See Dixon*, 509 U.S. at 696, 125 L. Ed. 2d at 567-68 (stating that "criminal contempt . . . enforced through nonsummary proceedings[] is 'a crime in the ordinary sense' " and the constitutional protections of double jeopardy apply (citations omitted)).

B. MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE

Our appellate courts have determined that probation revocation and its corresponding consequences, such as activation of a suspended sentence, result from a defendant's original conviction and not from the probation revocation hearing or the conduct which violates conditions of probation. *Hewett*, 270 N.C. at 352, 154 S.E.2d at 479 ("Although revocation of probation results in the deprivation of a probationer's liberty, the sentence he may be required to serve is the punishment for the crime of which he had previously been found guilty."); *Monk*, 132 N.C. App. at 253, 511 S.E.2d at 335 (same). As such, our courts have recognized that the possibility of probation revocation and its corresponding consequences were imposed on a defendant in the original conviction and sentence.

While we have not previously addressed this issue as we do here, the overwhelming majority of courts that have considered the issue have determined that the government may revoke a defendant's probation, parole, or supervised release and impose accompanying sanctions without violating double jeopardy. *See, e.g.*, *United States v. Woodrup*, 86 F.3d 359, 361-62 (4th Cir.) ("[A] sentence imposed upon the revocation of probation or parole is not punishment for the con-

duct prompting the revocation, but, rather, a modification of the original sentence for which the probation or parole was authorized . . . . We believe that the same must be true in the context of revocations of supervised release." (internal citations omitted)), *cert. denied*, 519 U.S. 944, 136 L. Ed. 2d 245 (1996); *United States v. Brown*, 59 F.3d 102, 104-05 (9th Cir. 1995) (per curiam) ("Revocation of parole or probation is regarded as reinstatement of the sentence for the underlying crime, not as punishment for the conduct leading to the revocation. Parole and probation are part of the original sentence." (internal citation omitted)). In addition, in *Johnson v. United States*, a case involving supervised release, the United States Supreme Court noted a potential pitfall in not attributing revocation and post-revocation penalties to the original offense. There, the Court stated:

> Where the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation . . . were also punishment for the same offense. Treating postrevocation sanctions as part of the penalty for the initial offense, however (as most courts have done), avoids these difficulties.

529 U.S. at 700-01, 146 L. Ed. 2d at 736 (citations omitted). The Court in *Johnson* concluded, "We therefore attribute postrevocation penalties to the original conviction." *Id.* at 701, 146 L. Ed. 2d at 736.

We also attribute revocation of a defendant's post-release and post-revocation penalties to the original conviction(s) and not to the revocation proceeding or to the condition(s) the defendant violated. Therefore, we conclude that revocation of defendant's post-release and reinstatement of the time remaining on his original sentence result from defendant's original felony convictions and not from his conduct which triggered the revocation, absconding from his post-release officer. As such, while the State's successful criminal prosecution of defendant for violating N.C.G.S. § 14-208.11 would result in punishment, it does not constitute new or additional punishment for the same offense in violation of double jeopardy principles.

In addition, we note that federal circuit courts have previously determined that "double jeopardy does not preclude criminal prosecution for conduct which also serves as the basis for a *parole* or *probation* revocation." *See United States v. Soto-Olivas*, 44 F.3d 788, 789 (9th Cir.) (citations omitted), *cert. denied*, 515 U.S. 1127, 132 L. Ed. 2d 290 (1995). In *United States v. Woodrup*, the Fourth Circuit

noted that considerable caselaw to this effect exists in the probation and parole contexts:

> In the analogous contexts of probation and parole, the [federal] courts of appeals, reasoning from the like fact that a sentence imposed upon the revocation of probation or parole is not punishment for the conduct prompting the revocation, but, rather, a modification of the original sentence for which the probation or parole was authorized, have consistently held that the subsequent criminal prosecution and punishment for conduct which previously served as the basis for a revocation of probation or parole does not offend the Double Jeopardy Clause of the Fifth Amendment.

86 F.3d at 361-62 (citations and footnote omitted). Federal circuit courts have reached the same conclusion in the context of supervised release. *Id.* at 363 ("[T]he Double Jeopardy Clause does not prohibit the government from criminally prosecuting and punishing an offense which has formed the basis for revocation of a term of supervised release." (citations omitted)).

III. Conclusion

Accordingly, in the instant case, we affirm the Court of Appeals and hold that the State may criminally prosecute defendant pursuant to N.C.G.S. § 14-208.11 for failing to notify the sheriff of his change of address as required by N.C.G.S. § 14-208.9.

AFFIRMED.

DOGWOOD DEVELOPMENT AND MANAGEMENT COMPANY, LLC v. WHITE OAK TRANSPORT COMPANY, INC.

No. 303A07

(Filed 7 March 2008)

1. Appeal and Error— appellate rules—default

The occurrence of default under the appellate rules arises primarily from the existence of a waiver occurring in the trial court, defects in appellate jurisdiction, and violation of nonjurisdictional requirements.

2. Appeal and Error— preservation of issues—raising in trial court

The requirement that litigants raise an issue in the trial court before presenting it on appeal plays an integral role in preserving the efficacy and integrity of the appellate process. However, the imperative to correct fundamental error may necessitate appellate review of the merits despite the occurrence of default.

3. Appeal and Error— jurisdictional default—Rule 2 not applicable

A jurisdictional default precludes the appellate court from acting in any manner other than to dismiss the appeal. In the absence of jurisdiction, the appellate courts lack authority to consider application of Rule 2.

4. Appeal and Error— appellate rules—nonjurisdictional violations—sanctions

The nonjurisdictional requirements prescribed by the appellate rules are designed to keep the appellate process orderly. Failure to comply with these requirements should not normally lead to dismissal. In the event of substantial or gross violations, the party responsible opens the door to appropriate remedial measures under Appellate Rules 25 and 34, but the court should impose a sanction other than dismissal in most instances. If the degree of noncompliance warrants dismissal, the court may consider invoking Rule 2 to reach the merits.

5. Appeal and Error— violations of appellate rules—dismissal inappropriate—other sanctions not considered

An appeal was remanded to the Court of Appeals to consider whether a sanction other than dismissal is appropriate for appellate rules violations.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 183 N.C. App. 389, 645 S.E.2d 212 (2007), dismissing defendant's appeal from a judgment and order entered 3 January 2006 and an order entered 2 March 2006, both by Judge Howard R. Greeson, Jr. in Superior Court, Forsyth County. Heard in the Supreme Court 13 November 2007.

Carruthers & Bailey, P.A., by J. Dennis Bailey, for plaintiff-appellee.

Parrish Smith & Ramsey, LLP, by Steven D. Smith; and Smith Moore, LLP, by J. Donald Cowan, Jr., for defendant-appellant.

MARTIN, Justice.

The Court of Appeals dismissed defendant White Oak Transport Company, Inc.'s appeal for violations of the North Carolina Rules of Appellate Procedure ("appellate rules" or "rules"). We reverse and remand with instructions, and clarify the manner in which the appellate courts should address violations of the appellate rules.

On 29 April 2004, plaintiff Dogwood Development and Management Company, LLC brought a breach of contract action against defendant in connection with defendant's waste hauling business. At trial, a jury found plaintiff and defendant entered into a contract, defendant breached the contract, and plaintiff was entitled to recover $155,365.00 in damages from defendant. The trial court entered judgment in favor of plaintiff on 3 January 2006. Ten days later, defendant moved for judgment notwithstanding the verdict and for a new trial, both of which the trial court denied on 2 March 2006. On 10 March 2006, defendant filed its notice of appeal from both the judgment and the order denying its post-trial motions. On 20 December 2006, plaintiff filed a motion to dismiss defendant's appeal for failure to comply with the appellate rules. Defendant did not respond.

On 5 June 2007, the Court of Appeals, in a divided opinion, dismissed defendant's appeal for violations of Rules 10(c)(1), 28(b)(4), and 28(b)(6). *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 183 N.C. App. ——, ——, 645 S.E.2d 212, 217 (2007). The dissenting judge would have imposed monetary sanctions under Rules 25(b) and 34(b) and addressed the merits of the appeal. *Id.* at ——, 645 S.E.2d at 219 (Hunter, J., dissenting). Defendant appealed to this Court on the basis of the dissenting opinion.

At the outset we observe that "rules of procedure are necessary . . . in order to enable the courts properly to discharge their dut[y]" of resolving disputes. *Pruitt v. Wood*, 199 N.C. 788, 790, 156 S.E. 126, 127 (1930). It necessarily follows that failure of the parties to comply with the rules, and failure of the appellate courts to demand compliance therewith, may impede the administration of justice. As this Court explained long ago:

> Procedure is essential . . . to the application of principle in courts of justice, and it cannot be dispensed with. It is dangerous to ignore or disregard it. . . . [To do so] is not only discreditable to the administration of public justice, but it leads eventually to

> confusion and wrong, and leaves the rights and estates of many people in a more or less perilous condition.

Spence v. Tapscott, 92 N.C. 576, 578 (1885). Compliance with the rules, therefore, is mandatory. *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007); *Reep v. Beck*, 360 N.C. 34, 38, 619 S.E.2d 497, 500 (2005); *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005) (per curiam); *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999); *Craver v. Craver*, 298 N.C. 231, 236, 258 S.E.2d 357, 361 (1979); *Pruitt*, 199 N.C. at 789, 156 S.E. at 127. As a natural corollary, parties who default under the rules ordinarily forfeit their right to review on the merits. *See Viar*, 359 N.C. at 401, 610 S.E.2d at 360 (" '[F]ailure to follow [the] rules will subject an appeal to dismissal.' " (quoting *Steingress*, 350 N.C. at 65, 511 S.E.2d at 299)).

But "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). We have therefore emphasized that noncompliance with the appellate rules does not, ipso facto, mandate dismissal of an appeal. *See Hart*, 361 N.C. at 311, 644 S.E.2d at 202 ("[E]very violation of the rules does not require dismissal of the appeal or the issue . . . ."). Whether and how a court may excuse noncompliance with the rules depends on the nature of the default.

[1] Our cases indicate that the occurrence of default under the appellate rules arises primarily from the existence of one or more of the following circumstances: (1) waiver occurring in the trial court; (2) defects in appellate jurisdiction; and (3) violation of nonjurisdictional requirements. In the instant case, defendant's noncompliance fell within the third category, violation of nonjurisdictional requirements of the appellate rules. Nevertheless, to provide further guidance, we briefly discuss all three principal categories of default.[1]

[2] The first major category of default, known as the waiver rule, arises out of a party's failure to properly preserve an issue for

1. The genesis of much of the present confusion surrounding the operation of our appellate rules originated in *Viar*, 359 N.C. 400, 610 S.E.2d 360, a decision susceptible to several reasonable interpretations. *Compare Caldwell v. Branch*, 181 N.C. App. 107, 110-11, 638 S.E.2d 552, 555 (citing *Viar* to support imposition of monetary sanctions, rather than dismissal, when appellant failed to brief standard of review as required by Rule 28(b)(6)), *disc. rev. denied*, 361 N.C. 690, 654 S.E.2d 248 (2007), *with State v. Summers*, 177 N.C. App. 691, 700, 629 S.E.2d 902, 908-09 (citing *Viar* to support dismissal of issue when appellant failed to brief standard of review as required by Rule 28(b)(6)), *appeal dismissed and disc. rev. denied*, 360 N.C. 653, 637 S.E.2d 192 (2006).

appellate review. Rule 10(b)(1) provides that "[i]n order 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). Rules 10(b)(2) and 10(b)(3) give specific instructions for preserving questions involving erroneous jury instructions and sufficiency of the evidence, respectively. N.C. R. App. P. 10(b)(2), (3).

The requirement expressed in Rule 10(b) that litigants raise an issue in the trial court before presenting it on appeal goes "to the heart of the common law tradition and [our] adversary system." *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453, 457 n.1 (3d Cir. 1982), *vacated and remanded on other grounds*, 462 U.S. 523 (1983). This Court has repeatedly emphasized that Rule 10(b) "prevent[s] unnecessary new trials caused by errors . . . that the [trial] court could have corrected if brought to its attention at the proper time." *Wall v. Stout*, 310 N.C. 184, 188-89, 311 S.E.2d 571, 574 (1984). *See also State v. Oliver*, 309 N.C. 326, 334, 307 S.E.2d 304, 311 (1983) (stating that "Rule 10 functions as an important vehicle to insure that errors are not 'built into' the record, thereby causing unnecessary appellate review"); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (stating that "[t]he purpose of Rule 10(b)(2) is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial"). Rule 10(b) thus plays an integral role in preserving the efficacy and integrity of the appellate process.

We have stressed that Rule 10(b)(1) "is not simply a technical rule of procedure" but shelters the trial judge from "an undue if not impossible burden." *State v. Black*, 308 N.C. 736, 740, 303 S.E.2d 804, 806 (1983); *see also* N.C. R. App. P. 10 drafting comm. comment., para. 2, *reprinted in* 287 N.C. 698, 700-01 (1975) [hereinafter Commentary] ("[N]o . . . error ought be the subject of appellate review unless it has been first suggested to the trial judge in time for [the judge] to avoid it or to correct it, or unless it is of such a fundamental nature that no such prior suggestion should be required of counsel."). *See generally* 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 19, at 76-87 (6th ed. 2004) [hereinafter Broun].

In light of the practical considerations promoted by the waiver rule, a party's failure to properly preserve an issue for appellate

review ordinarily justifies the appellate court's refusal to consider the issue on appeal. *See*, *e.g.*, *State v. Campbell*, 359 N.C. 644, 669, 617 S.E.2d 1, 17 (2005) (refusing to review admissibility of evidence on appeal when defendant did not object at trial as required by Rule 10(b)(1)), *cert. denied*, 547 U.S. 1073 (2006); *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) (same); *see also State v. Truesdale*, 340 N.C. 229, 232, 456 S.E.2d 299, 301 (1995) (refusing to review propriety of jury instructions when defendant did not object at trial to portion of instruction complained of on appeal as required by Rule 10(b)(2)); *Penley v. Penley*, 314 N.C. 1, 26-27, 332 S.E.2d 51, 66 (1985) (same).

The imperative to correct fundamental error, however, may necessitate appellate review of the merits despite the occurrence of default. For instance, plain error review is available in criminal appeals, *Odom*, 307 N.C. at 660, 300 S.E.2d at 378, for challenges to jury instructions and evidentiary issues, *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000), *cert. denied*, 532 U.S. 997 (2001). Our decisions have recognized plain error only "in truly exceptional cases" when "absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (observing that the heavy burden associated with plain error review is justified "because the defendant could have prevented any error by making a timely objection").

Aside from the possibility of plain error review in criminal appeals, Rule 2 permits the appellate courts to excuse a party's default in both civil and criminal appeals when necessary to "prevent manifest injustice to a party" or to "expedite decision in the public interest." N.C. R. App. P. 2. Rule 2, however, must be invoked "cautiously," and we reaffirm our prior cases as to the "exceptional circumstances" which allow the appellate courts to take this "extraordinary step."[2] *Hart*, 361 N.C. at 315-17, 644 S.E.2d at 205-06; *see also Steingress*, 350 N.C. at 66, 511 S.E.2d at 299-300 (observing that Rule 2 should only be invoked in "exceptional circumstances").

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2. North Carolina law recognizes other exceptions to the waiver rule codified in Rule 10(b), including when the "trial court acts contrary to a statutory mandate." *State v. Jaynes*, 353 N.C. 534, 544-45, 549 S.E.2d 179, 189 (2001) (quoting *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985)), *cert. denied*, 535 U.S. 934 (2002). For a more comprehensive discussion of possible exceptions to the waiver rule and a critique of the *Ashe* exception, see Broun § 19, at 78 n.278 ("[I]t is wholly unrealistic to expect trial judges to be familiar with all of the proliferating statutory provisions making evidence inadmissible.").

[3] In addition to the waiver rule, a default precluding appellate review on the merits necessarily arises when the appealing party fails to complete all of the steps necessary to vest jurisdiction in the appellate court. It is axiomatic that courts of law must have their power properly invoked by an interested party. *See generally* John Chipman Gray, *The Nature and Sources of the Law* 114-15 (2d ed. 1938) ("The essence of a judge's office is . . . not to interfere voluntarily in affairs, [and] not to act *sua sponte*, but is to determine cases which are presented to him."). Because "there must be a mode or method of calling the powers of a court into exercise, . . . rules of practice are prescribed by the laws of every state." Timothy Brown, *Commentaries on the Jurisdiction of Courts* § 3, at 8 (1891). The appellant's compliance with the jurisdictional rules governing the taking of an appeal is the linchpin that connects the appellate division with the trial division and confers upon the appellate court the authority to act in a particular case.[3] *Moore v. Vanderburg*, 90 N.C. 10, 10 (1884) ("The appeal is the essential means by which this court gets jurisdiction of an action . . . . It is the appeal that puts this court in relation with the case in the court below . . . ."); *see Williams v. Williams*, 188 N.C. 728, 730, 125 S.E. 482, 483 (1924) (explaining that jurisdiction confers upon the court "the power to hear, determine, and pronounce judgment on the issues before [it]").

A jurisdictional default, therefore, precludes the appellate court from acting in any manner other than to dismiss the appeal. *See, e.g.*, *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) ("In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 . . . . The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal." (citations omitted)); *Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 563-64, 402 S.E.2d 407, 408 (1991) (per curiam) (holding that because the record did not contain a notice of appeal in compliance with Rule 3, the Court of Appeals had no jurisdiction and the appeal must be dismissed); *In re Lynette H.*, 323 N.C. 598, 602, 374 S.E.2d 272, 274 (1988) (holding that the state's failure to give timely notice of appeal in compliance with Rule 3 resulted in a lack

3. We recognize that discretionary avenues of appellate jurisdiction exist in addition to those routes of mandatory review conferred by statute. *See* N.C. Const. art. IV, § 12, cl. 1; *In re Brownlee*, 301 N.C. 532, 547-48, 272 S.E.2d 861, 870 (1981); *see also* N.C. R. App. P. 21-24. Nonetheless, a discussion of the judiciary's inherent power to issue extraordinary and remedial writs, and this Court's general supervisory authority, is beyond the scope of this opinion.

of jurisdiction); *Booth v. Utica Mut. Ins. Co.*, 308 N.C. 187, 189, 301 S.E.2d 98, 99-100 (1983) (per curiam) ("Failure to give timely notice of appeal in compliance with . . . Rule 3 . . . is jurisdictional, and an untimely attempt to appeal must be dismissed." (citations omitted)); *see also State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (stating correctly that "compliance with the requirements of Rule 4(a)(2) is jurisdictional and cannot simply be ignored by [the] Court" (citation omitted)), *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005). Stated differently, a jurisdictional default brings a purported appeal to an end before it ever begins.

Moreover, in the absence of jurisdiction, the appellate courts lack authority to consider whether the circumstances of a purported appeal justify application of Rule 2. *See Bailey*, 353 N.C. at 157, 540 S.E.2d at 323 ("[S]uspension of the appellate rules under Rule 2 is not permitted for jurisdictional concerns."). As the Commentary to Rule 2 provides, our appellate courts have authority to suspend the rules in exceptional situations " 'except as otherwise expressly provided by these rules.' " Commentary to N.C. R. App. P. 2, 287 N.C. at 680. The Commentary explains that this "refers to the provision in Rule 27(c) that the time limits for taking appeal . . . may not be extended by any court." *Id.* Accordingly, Rule 2 may not be used to reach the merits of an appeal in the event of a jurisdictional default. *E.g.*, *Bailey*, 353 N.C. at 157, 540 S.E.2d at 323.

[4] The final principal category of default involves a party's failure to comply with one or more of the nonjurisdictional requisites prescribed by the appellate rules. This comprehensive set of nonjurisdictional requirements is designed primarily to keep the appellate process "flowing in an orderly manner." *Craver*, 298 N.C. at 236, 258 S.E.2d at 361. Two examples of such rules are those at issue in the present case: Rule 10(c)(1), which directs the form of assignments of error, and Rule 28(b), which governs the content of the appellant's brief. Noncompliance with rules of this nature, while perhaps indicative of inartful appellate advocacy, does not ordinarily give rise to the harms associated with review of unpreserved issues or lack of jurisdiction. And, notably, the appellate court faced with a default of this nature possesses discretion in fashioning a remedy to encourage better compliance with the rules.

We stress that a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal. *See*, *e.g.*, *Hicks v. Kenan*, 139 N.C. 337, 338, 51 S.E. 941, 941 (1905) (per curiam) (observing this Court's preference to hear merits

of the appeal rather than dismiss for noncompliance with the rules); 5 Am. Jur. 2d *Appellate Review* § 804, at 540 (2007) ("[I]t is preferred that an appellate court address the merits of an appeal whenever possible . . . . [A]n appellate court has a strong preference for deciding cases on their merits; and it is the task of an appellate court to resolve appeals on the merits if at all possible." (footnotes omitted)); Paul D. Carrington, Daniel J. Meador & Maurice Rosenberg, *Justice on Appeal* 2 (1976) ("[A]ppellate courts serve as the instrument of accountability for those who make the basic decisions in trial courts and administrative agencies.").

Rules 25 and 34, when viewed together, provide a framework for addressing violations of the nonjurisdictional requirements of the rules. Rule 25(b) states that "the appellate [court] may . . . impose a sanction . . . when the court determines that [a] party or attorney or both *substantially* failed to comply with these appellate rules. The court may impose sanctions of the type and in the manner prescribed by Rule 34 . . . ." N.C. R. App. P. 25(b) (emphasis added). Rule 34(a)(3) provides, among other things, that "the appellate [court] may . . . impose a sanction . . . when the court determines that . . . a petition, motion, brief, record, or other paper filed in the appeal . . . *grossly* violated appellate court rules." N.C. R. App. P. 34(a)(3) (emphasis added). Rule 34(b) enumerates as possible sanctions various types of monetary damages, dismissal, and "any other sanction deemed just and proper." N.C. R. App. P. 34(b).

Based on the language of Rules 25 and 34, the appellate court may not consider sanctions of any sort when a party's noncompliance with nonjurisdictional requirements of the rules does not rise to the level of a "substantial failure" or "gross violation." In such instances, the appellate court should simply perform its core function of reviewing the merits of the appeal to the extent possible.

In the event of substantial or gross violations of the nonjurisdictional provisions of the appellate rules, however, the party or lawyer responsible for such representational deficiencies opens the door to the appellate court's need to consider appropriate remedial measures. Rules 25 and 34 vest the appellate court with the authority to promote compliance with the appellate rules through the imposition of one or more enumerated sanctions.

The court's exercise of remedial discretion under Rules 25 and 34 entails a fact-specific inquiry into the particular circumstances of

each case, mindful of the principle that the appellate rules should be enforced as uniformly as possible. *See Hart*, 361 N.C. at 317, 644 S.E.2d at 206 ("[O]ur appellate courts must enforce the Rules of Appellate Procedure uniformly."); *Pruitt*, 199 N.C. at 790, 156 S.E. at 127 (observing that it is "necessary to . . . enforce [the appellate rules] uniformly"). Noncompliance with the rules falls along a continuum, and the sanction imposed should reflect the gravity of the violation. We clarify, however, that only in the most egregious instances of nonjurisdictional default will dismissal of the appeal be appropriate. *See Hart*, 361 N.C. at 311, 644 S.E.2d at 202 ("[E]very violation of the rules does not require dismissal of the appeal or the issue, although some other sanction may be appropriate, pursuant to Rule 25(b) or Rule 34 . . . ."). *Cf. Harris v. Maready*, 311 N.C. 536, 551, 319 S.E.2d 912, 922 (1984) (observing that dismissal for failure to comply with procedural rules is an "extreme sanction . . . to be applied only when . . . less drastic sanctions will not suffice"). In most situations when a party substantially or grossly violates nonjurisdictional requirements of the rules, the appellate court should impose a sanction other than dismissal and review the merits of the appeal. This systemic preference not only accords fundamental fairness to litigants but also serves to promote public confidence in the administration of justice in our appellate courts.

In determining whether a party's noncompliance with the appellate rules rises to the level of a substantial failure or gross violation, the court may consider, among other factors, whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would frustrate the adversarial process. *See Hart*, 361 N.C. at 312, 644 S.E.2d at 203 (noting that dismissal may not be appropriate when a party's noncompliance does not " 'impede comprehension of the issues on appeal or frustrate the appellate process' " (citation omitted)); *Viar*, 359 N.C. at 402, 610 S.E.2d at 361 (discouraging the appellate courts from reviewing the merits of an appeal when doing so would leave the appellee "without notice of the basis upon which [the] appellate court might rule" (citation omitted)). The court may also consider the number of rules violated, although in certain instances noncompliance with a discrete requirement of the rules may constitute a default precluding substantive review. *See*, *e.g.*, 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.").

If the court determines that the degree of a party's noncompliance with nonjurisdictional requirements warrants dismissal of the appeal under Rule 34(b), it may consider invoking Rule 2. In this situation, the appellate court may only review the merits on "rare occasions" and under "exceptional circumstances," *Hart*, 361 N.C. at 316, 644 S.E.2d at 205 (citations and internal quotation marks omitted), "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest," N.C. R. App. P. 2. *See Steingress*, 350 N.C. at 66, 511 S.E.2d at 299-300 (explaining that Rule 2 should only be invoked under "exceptional circumstances").

To summarize, when a party fails to comply with one or more nonjurisdictional appellate rules, the court should first determine whether the noncompliance is substantial or gross under Rules 25 and 34. If it so concludes, it should then determine which, if any, sanction under Rule 34(b) should be imposed. Finally, if the court concludes that dismissal is the appropriate sanction, it may then consider whether the circumstances of the case justify invoking Rule 2 to reach the merits of the appeal.

[5] Having reviewed the general principles for addressing defaults under the appellate rules, we now turn to the violations at issue in the present case. Here, defendant's appeal suffered from the following violations of the appellate rules: (1) failure to provide record or transcript references with the assignments of error in violation of Rule 10(c)(1); (2) failure to reference the assignments of error pertinent to each question presented in violation of Rule 28(b)(6); (3) failure to state the grounds for appellate review in violation of Rule 28(b)(4); and (4) failure to state the applicable standard of review for each question presented in violation of Rule 28(b)(6). With regard to each violation, the Court of Appeals set forth the applicable appellate rule, stated that defendant failed to comply with the rule, and concluded that "[d]efendant's failure to [comply with the given rule] warrants dismissal of its appeal." *Dogwood Dev. & Mgmt.*, 183 N.C. App. at ——, 645 S.E.2d at 214-16. The Court of Appeals did not, however, consider sanctions other than dismissal under Rules 25 and 34.

In failing to conduct any analysis under Rules 25 and 34 before dismissing the appeal, the Court of Appeals did not comply with our admonition in *Hart* to consider "whether other sanctions should be imposed pursuant to appellate Rule 25(b) or Rule 34." 361 N.C. at 317, 644 S.E.2d at 206. Accordingly, we remand to the Court of Appeals for consideration, consistent with this opinion, of whether the appellate

rules violations in this case implicate Rules 25 and 34, and if so, whether a sanction other than dismissal is appropriate.

REVERSED AND REMANDED.

IN RE: INQUIRY CONCERNING A JUDGE, NOS. 05-226, 06-005, 06-073, 06-086, 06-087, AND 06-105—MARK H. BADGETT, RESPONDENT

No. 173A07

(Filed 7 March 2008)

Judges— censure—suspension—willful misconduct—gross misconduct

A district court judge was censured and suspended from office as a judge for sixty days from entry of this order for conduct in violation of Canons 1, 2A, 2B, 3A(2), 3A(3), 3A(4), and 3D of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute, willful misconduct, and willful and persistent failure to perform his duties in violation of N.C.G.S. § 7A-376 based upon his participation in the preparation of a remittal of disqualification in cases involving an attorney with whom he had a business relationship, despite provisions of the Code of Judicial Conduct to the contrary; his untruthful statements under oath regarding his attempts to procure the remittal of disqualification; and his pressure on the district attorney to sign the remittal of disqualification by using threats and the power of his office.

This matter is before the Court pursuant to N.C.G.S. § 7A-376 upon a recommendation by the Judicial Standards Commission entered 19 March 2007 that respondent Mark H. Badgett, a Judge of the General Court of Justice, District Court Division, State of North Carolina Judicial District Seventeen-B, be censured for conduct in violation of Canons 1, 2A, 2B, 3A(2), 3A(3), 3A(4), and 3D of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice, willful misconduct, and willful and persistent failure to perform his duties in violation of N.C.G.S. § 7A-376. Calendered for argument in the Supreme Court on 17 October 2007, but determined on the record without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate

Procedure and Rule 2(c) of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission.

Robert C. Montgomery, Special Counsel, for the Judicial Standards Commission.

Randolph and Fischer, by J. Clark Fischer; and Melvin and Powell, by Edward L. Powell, for respondent.

ORDER OF SUSPENSION AND CENSURE

On 19 March 2007, the Judicial Standards Commission (Commission) recommended that this Court censure respondent, a Judge of the General Court of Justice, District Court Division, Judicial District Seventeen-B, for conduct inappropriate to his judicial office.

On 2 October 2006, the Commission filed a complaint alleging, *inter alia*, that respondent: (1) had a business relationship with attorney Ernest Clark Dummit; (2) neither disclosed this relationship to parties or counsel appearing before him nor disqualified himself from matters involving Dummit; (3) subsequently attempted to coerce District Attorney C. Ricky Bowman into signing a remittal of disqualification; (4) engaged in retaliatory conduct against the district attorney's office after the district attorney refused to sign the remittal; (5) made comments and ruled in a manner that created the impression that attorney Dummit was in a position to influence respondent, thereby calling into question his impartiality; (6) coerced a guilty plea from criminal defendant Dale William Walker; (7) attempted to coerce a guilty plea from criminal defendant Eric Wayne Potts; and (8) was habitually rude and condescending to those who appeared before him and demonstrated an arrogant and contemptuous demeanor while presiding over court.

Respondent filed his answer on 20 October 2006. The Commission conducted hearings on the matter on 30 November 2006, 1 December 2006, 18 and 19 January 2007, and 9 February 2007. It subsequently entered findings of fact as follows:

> 2. Prior to respondent's election as a district court judge, he was a practicing attorney in King, North Carolina and maintained his office in a building owned by him and located at 210 E. Dalton Street, King, North Carolina. After his election in November 2004, respondent entered into discussions with E. Clarke Dummit, an attorney with his primary office in Winston-Salem, North Carolina, concerning an arrangement by which Mr. Dummit

would lease respondent's building and purchase his files. On or about 1 December 2004, respondent entered into a lease of the premises to American Law Offices, PC doing business as "The Dummit Law Firm,' which lease was executed by respondent and Mr. Dummit as President of American Law Offices, PC. Thereafter, Mr. Dummit sent out letters soliciting respondent's former clients, and others, and representing that his offices would be located in respondent's former offices and that he would, as a courtesy to respondent, maintain respondent's legal files.

3. After respondent executed the lease to Mr. Dummit's law firm, Mr. Dummit appeared on behalf of clients on multiple occasions before respondent. At no time did respondent disclose to opposing counsel, including members of the staff of the district attorney for the 17-B Prosecutorial District, the business relationship existing between respondent and Mr. Dummit.

4. After members of the district attorney's staff complained concerning what they perceived to be favorable treatment accorded Mr. Dummit by respondent, respondent was advised by letter dated 10 January 2006 from Paul R. Ross, Executive Secretary of the Judicial Standards Commission, that his business relationship with Mr. Dummit was potentially grounds for disqualification in matters in which Mr. Dummit was involved. Respondent, as well as members of the district attorney's office, also received information from Mr. Ross with respect to the provisions of Canon 3D of the Code of Judicial Conduct regarding remittal of disqualification.

5. At respondent's direction, Mr. Dummit prepared a document entitled "In re Remittal of Disqualification" disclosing the landlord-tenant relationship existing between respondent and Mr. Dummit and deeming it "insubstantial and immaterial pursuant to the opinion rendered by the Judicial Standards Commission." No such opinion was ever rendered by the Commission or Mr. Ross. Mr. Dummit signed the document and sent it to respondent, who signed it, and to District Attorney C. Ricky Bowman, who declined to sign it. Notwithstanding the provisions of Canon 3D of the Code of Judicial Conduct requiring that a remittal of disqualification be reached independently of the judge's participation, respondent contacted Mr. Bowman on more than one occasion in efforts to obtain his signature on the document, including one occasion in open court in which he requested Mr. Bowman to come to the bench and told him that Mr. Ross had said Mr.

Bowman needed to sign the document and that the Judicial Standards investigation was over. Neither of those statements was true. Upon Mr. Bowman's refusal to sign the document, respondent became angry and threatened to "give everyone the maximum sentence" and "clog up superior court." *The Commission specifically finds that the respondent's testimony concerning his conversation at the bench with Mr. Bowman was not credible.* (emphasis added)

6. After receiving notice dated 27 December 2005 of the Commission's preliminary investigation . . . respondent inquired of Mr. Ross as to the identity of the complainants. Citing Commission Rules 4, 7, and 9, Mr. Ross advised respondent that the "identity of the complainant is confidential until the Commission concludes whether formal proceedings should be filed." Notwithstanding, respondent told Assistant District Attorney Angela Puckett that he knew who had complained, they were a "burr in his side" and that he was going to "unload on them." He created a hostile work environment to members of the district attorneys [sic] staff and told one of them, Mr. Langan, "you don't represent the State, the officer does" or words to that effect, and urged Mr. Bowman to fire Mr. Langan.

7. After respondent was served with the NOTICE OF COMPLAINT AND COMPLAINT in this matter, respondent threatened to sue Assistant District Attorney Tim Watson and "everyone in the district attorney's office." In response to a motion that respondent be recused from hearing matters in which the district attorney's office was involved, respondent agreed to recuse himself from hearing criminal matters, but ordered that the motion be sealed.

8. Respondent has been habitually rude and condescending to those who appear before him in court. On 14 March 2006, while hearing evidence in the case of *State v. Potts*, . . . respondent expressed displeasure at having to begin a contested trial late in the day, turned his back to the witness who was testifying, engaged in conversation with a courtroom clerk during the witness's testimony, and stated to defense counsel Karen Adams that he had "quit taking notes—I'm drawing arrows to who is related to who and what boyfriends and girlfriends go together." On 22 March 2006, respondent belittled courtroom clerk Hope Brim in open court by speaking to her in a sarcastic manner and suggesting that she had been late coming to court when, in fact, she

arrived before the usual time for the opening of court. In his testimony before the Commission, respondent acknowledged that he has, on occasion, been loud and arrogant while in court and that he needs to work on his judicial temperament.

9. On 28 March 2006, Patsy Royal was present in the courtroom where respondent was presiding. Virginia Smith was also present in the courtroom and observed Ms. Royal carve or scratch an obscenity into the wooden bench upon which she was seated. Ms. Smith reported the action to a deputy sheriff. As a result, Ms. Royal was taken into custody and taken before a magistrate and charged with injury to property, a Class 1 misdemeanor. She was then taken before respondent for the purpose of a first appearance and the setting of bond. Respondent asked the deputy if Ms. Royal was the one who had carved on a bench, which was indicative of his having received *ex parte* information concerning the underlying facts of the matter in addition to that contained in the warrant, since a description of the offense was not contained in the warrant. He became very angry and loud, telling Ms. Royal that her actions were akin to "burning a church" and that she was "going to pay" for her conduct and that "she would begin paying now", notwithstanding the fact that Ms. Royal had not been convicted of any crime at that time. When Ms. Royal attempted to speak, respondent would not allow her to do so and told her that she was going to listen. Respondent asked Assistant District Attorney Langan for a bond recommendation, telling him that whatever recommendation he made would not be enough. After Mr. Langen [sic] recommended a $5,000 bond, respondent set bond at $10,000 without making any inquiry into the circumstances required by N.C.G.S. [§] 15A-534(c).

From these findings, the Commission concluded as a matter of law that respondent should be censured and recommended that sanction to this Court on 19 March 2007.[1] This Court "may adopt the Commission's findings of fact if they are supported by clear and convincing evidence, or it may make its own findings." *In re Hayes*, 353 N.C. 511, 514, 546 S.E.2d 376, 378 (2001) (citing *In re Hardy*, 294 N.C. 90, 98, 240 S.E.2d 367, 373 (1978)) *cause dismissed*, 356 N.C. 389, 584 S.E.2d 260 (2002). Moreover, the Commission's recommendations are not binding on this Court. *In re Nowell*, 293 N.C. 235, 244, 237 S.E.2d 246, 252 (1977).

1. Five members voted to censure respondent; one favored removing him from office.

In reviewing the Commission's recommendations, "this Court acts as a court of original jurisdiction, rather than in its typical capacity as an appellate court." *In re Daisy*, 359 N.C. 622, 623, 614 S.E.2d 529, 530 (2005) (citing *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978) *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979)). Consequently, this Court exercises its independent judgment with respect to the disciplinary measures to be imposed on a judge. *In re Stephenson*, 354 N.C. 201, 205, 552 S.E.2d 137, 139 (2001) (citing *Nowell*, 293 N.C. at 244, 237 S.E.2d at 252). We have previously noted that rigid structure and rules in this area are not appropriate, since each case presents its own wrinkles and nuances and should therefore be decided on its own facts. *See In re Martin*, 302 N.C. 299, 316, 275 S.E.2d 412, 421 (1981).

Therefore, in reviewing the Commission's recommendations, this Court must first determine if the Commission's findings of fact are adequately supported by clear and convincing evidence, and in turn, whether those findings support its conclusions of law. Finally, we determine if the sanctions proposed by the Commission are appropriate in light of the circumstances of the case.

After carefully reviewing the record and transcript, we conclude that the Commission's findings are supported by clear and convincing evidence. We also agree with the Commission's conclusions that respondent's actions violated Canons 1, 2A, 2B, 3A(2), 3A(3), 3A(4), and 3D of the North Carolina Code of Judicial Conduct and constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute, willful misconduct, and willful and persistent failure to perform his duties in violation of N.C.G.S. § 7A-376. We must now decide whether to accept the Commission's recommendation of censure or impose a different penalty.

Since this Court's adjudication is unfettered by the Commission's recommendations, the Court may remove a judge even if the Commission has suggested a lesser sanction, such as censure. *Hardy*, 294 N.C. at 97-98, 240 S.E.2d at 373 (1978) (holding that "G.S. 7A-376 and -377 authorize and empower the Court . . . to make the final judgment whether to censure, remove, remand for further proceedings or dismiss the proceeding"). Thus, this Court's options in the instant case are not constrained by the Commission's recommendation.[2] Having reviewed and evaluated the record in this case in its

2. The recent amendments to N.C.G.S. § 7A-376 explicitly codify the option of "suspension" as a potential course of action in addition to the two other sanctions

entirety, we conclude that respondent's course of conduct is sufficiently egregious to warrant measures stronger than the censure proposed by the Commission.

Respondent's misconduct here is of a significantly greater magnitude than that present in other recent cases where we have held censure to be appropriate. *See*, *e.g.*, *In re Hill*, 357 N.C. 559, 591 S.E.2d 859 (2003) (censuring judge for verbally abusing an attorney and for sexual comments and horseplay); *In re Brown*, 356 N.C. 278, 570 S.E.2d 102 (2002) (censuring judge when on two occasions, the judge caused his signature to be stamped on orders for which he did not ascertain the contents and effect); *Stephenson*, 354 N.C. 201, 552 S.E.2d 137 (2001) (censure imposed when the judge solicited votes for his reelection from the bench); *In re Brown*, 351 N.C. 601, 527 S.E.2d 651 (2000) (censure appropriate when the judge consistently issued improper verdicts). Here, respondent's conduct has crossed the threshold from conduct prejudicial to the administration of justice, which would typically warrant a censure, to willful misconduct. Willful misconduct is more serious than conduct prejudicial to the administration of justice and thus merits greater sanctions. *In re Royster*, 361 N.C. 560, 563, 648 S.E.2d 837, 840 (2007) (citing *Peoples*, 296 N.C. at 157, 250 S.E.2d at 918 (1978)).

We have previously outlined what constitutes willful misconduct in office:

> Willful misconduct in office denotes "improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally, in bad faith. It is more than a mere error of judgment or an act of negligence. While the term would encompass conduct involving moral turpitude, dishonesty, or corruption, these elements need not necessarily be present."

In re Stuhl, 292 N.C. 379, 389, 233 S.E.2d 562, 568 (1977) (citing *In re Edens*, 290 N.C. 299, 226 S.E.2d 5 (1976)); *see also Nowell*, 293 N.C. at 248, 237 S.E.2d at 255. In the instant case, our attention is particularly drawn to respondent's testimony under oath regarding his attempts to procure a remittal of disqualification with respect to attorney Dummit. The Commission found that respondent directed Dummit to prepare a remittal of disqualification "disclosing the landlord-tenant relationship existing between respondent and Mr. Dummit and deeming it 'insubstantial and immaterial pursuant to the opinion rendered

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of "censure" or "removal". *See* Act of July 20, 2006, Ch. 187, Sec. 11, 2006 N.C. Sess. Laws 689, 692 (effective January 1, 2007).

by the Judicial Standards Commission.' " The Commission found that no such opinion had been rendered by the Commission or its Executive Secretary, Mr. Ross.

In addition, although respondent testified under oath that he did not direct Dummit to prepare the remittal, plenary evidence contradicted him. Respondent's own testimony indicated that he communicated with Paul Ross of the Commission regarding the remittal and yet it was Dummit who drafted the document. We also note that Tom Langan testified that he was present when respondent told an associate from Dummit's law firm to have Dummit draft the remittal.

Further, the Code of Judicial Conduct requires that agreements to a remittal of disqualification be reached independently of the judge's participation. Yet the Commission found that respondent contacted Mr. Bowman on multiple occasions in an effort to obtain his consent to the document. The Commission also found that respondent told Mr. Bowman that Paul Ross had said that Bowman needed to sign the document and the Commission's investigation was over. Neither of these statements was true. In addition, the Commission also determined that respondent became angry and threatened Mr. Bowman upon his refusal to sign the form. The Commission made an explicit determination that respondent's "testimony concerning his conversation at the bench with Mr. Bowman was not credible."

This course of events is especially troubling because respondent was under oath and sworn to tell the truth. We highlight, in this vein, at least three inappropriate actions by respondent: (1) his participation in the preparation of a remittal of disqualification, despite provisions of the Code of Judicial Conduct to the contrary; (2) his untruthful statements concerning the state of the investigation and the opinions purportedly tendered by the Commission and Paul Ross; and (3) his pressure on Mr. Bowman to sign the remittal, using threats and the power of his office.

The last issue is of particular concern, since at the time of the exchange, respondent was presiding over a courtroom. Ensconced on the bench and surrounded by the accouterments and trappings of his office, the tenor of his demands carried an air of menace which gave rise to the unavoidable inference that he sought to use the powers of his position to obtain a personal favor which was beyond the legitimate exercise of his authority. The use of the office to threaten and coerce Mr. Bowman was particularly inappropriate and is an issue of the gravest concern for this Court.

We hold that these actions constitute an improper or wrongful use of the power of his office acting intentionally or with gross disregard for his conduct and in bad faith. This being so, we further hold that respondent is guilty of gross misconduct. *See Stuhl*, 292 N.C. at 389, 233 S.E.2d at 568. At a time when the requirements of the Rule of Law subject the judiciary to intense and ever greater scrutiny by our citizens, the demands of respondent's judicial office required him to comport himself with dignity, reserve, and probity. The integrity of the office requires that its holder project nothing less than the high standards of character and rectitude citizens should expect from their judges. Respondent has singularly failed to live up to these standards.

Now, therefore, it is ordered by the Supreme Court of North Carolina in conference that respondent Mark H. Badgett be, and is hereby, CENSURED and SUSPENDED from office as a Judge of the General Court of Justice, District Court Division, Judicial District Seventeen-B, for SIXTY days from entry of this order for conduct in violation of Canons 1, 2A, 2B, 3A(2), 3A(3), 3A(4), and 3D of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute, willful misconduct, and willful and persistent failure to perform his duties in violation of N.C.G.S. § 7A-376.

By order of the Court in Conference, this 6th day of March, 2008.

Hudson, J.
For the Court

STATE OF NORTH CAROLINA v. QUANTE SEWARD

No. 174PA07

(Filed 7 March 2008)

Homicide— first-degree murder—Rule 24 hearing—judge's declaration of trial as noncapital—consideration of evidence of guilt

While trial courts have the authority following a Rule 24 conference to declare a defendant's trial noncapital based on the prosecution's failure to forecast the existence of evidence of an aggravating circumstance, the trial court in the instant case exceeded its authority by considering the sufficiency of the evi-

dence of defendant's guilt of first-degree murder. Accordingly, the trial court's order is reversed, and this case is remanded to the superior court to hold another Rule 24 conference and render a decision not inconsistent with this opinion. Rule 24, General Rules of Practice for the Superior and District Courts.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order dated 26 March 2007 by Judge Carl R. Fox in Superior Court, Warren County, denying the State's request to try defendant capitally. Heard in the Supreme Court 13 November 2007.

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, for defendant-appellee.

BRADY, Justice.

In this case we must determine the extent of the trial court's authority in conferences governed by Rule 24 of the General Rules of Practice for the Superior and District Courts to examine the existence of evidence of aggravating circumstances. We conclude that a trial court has the authority to declare a case noncapital following a Rule 24 conference based upon a finding that there exists no evidence of an aggravating circumstance. In its analysis, however, the trial court may not weigh the sufficiency of the evidence of the underlying charge of first-degree murder. Here, the trial court exceeded its authority by declaring a case noncapital based upon its view of the insufficiency of the evidence of defendant's guilt of the underlying charge of first-degree murder. Accordingly, we reverse and remand.

PROCEDURAL AND FACTUAL BACKGROUND

The Warren County Grand Jury returned true bills of indictment on 25 September 2006 charging defendant Quante Seward with the first-degree murder and attempted robbery with a dangerous weapon of Michael Leonforte.[1] On 4 October 2006, the prosecution filed a notice of hearing pursuant to Rule 24, which requires a pretrial conference in every case in which the defendant is charged with a crime punishable by death. On 26 March 2007, the Rule 24 conference was held in the Superior Court, Warren County.

1. On 27 November 2006, the Grand Jury returned a superseding first-degree murder indictment against defendant.

During the conference, the prosecutor proffered a brief forecast of the facts of the case:

> If Your Honor please, the facts as indicated by the many witnesses in this case, none of which said exactly the same thing, but essentially creating a picture wherein the facts show that in the early September evening—I can't remember the exact date. But anyway, the first week of September, the victim in this case, Mr. Michael Leonforte was traveling home from his Basic Law Enforcement Training program. He was an employee of the Sheriff's Department at that time, and completed the school, or would have completed it shortly after this occurred. He came, as he was going home, he was on a road right outside the town of Norlina, where there was a ditch on the side of the road, and a number of people in the road on the left side as he was traveling on the right side. In front of him was a vehicle blocking his vehicle. He had a—the people get in the ditch, but he eventually got them to move so he could go around the truck. As he went around the truck, two persons approached his vehicle, and the State would contend that the evidence would show that an attempt was made to rob him. This defendant, even by his own statement, was the first person that went to the vehicle. And that during the course of the robbery, one gunshot was fired into the vehicle and one was shot—of course, one shot struck Mr. Forte's [sic] body causing his death. The person shooting, doing the shooting, was Montellus Burchette, who is the co-defendant in this case. We also have him charged in this matter.

The trial court then inquired about the number of shots fired into Mr. Leonforte's vehicle, to which the prosecutor replied:

> There were two shots fired into the vehicle. Mr. Leonforte was in the vehicle and was shot in the vehicle. There was one shot that hit into the vehicle, and a shot into the body. And there's some evidence of a third shot, but there's no indication on the truck itself with regard to the pickup truck that was shot into.

The trial court then requested that the prosecutor forecast evidence of attempted robbery with a dangerous weapon. The prosecutor related statements given by witnesses to the alleged crimes:

> There were statements from witnesses, for example, Dexter Boyd, "It looked like Quant and Deshawn were trying to rob the white man in the green truck." This particular witness testified to

> what happened. There was another young lady that testified—well, didn't testify, made the statement that the co-defendant, Mr. Burchette, with whom we contend this defendant was acting, said that he was going to rob and kill somebody. She said that they were talking and she heard a gun, which is co-defendant's street [sic] say, "He needs to kill him a nigger, and he needs to rob somebody[.]"

The prosecutor further stated that one of the co-defendants yelled during the altercation "Give it up. Give it up." When asked to identify aggravating circumstances to support a death sentence, the prosecutor indicated the State would decide the exact theory at a later time, but that there was evidence of at least two aggravating circumstances—defendant committed the murder during the course of the attempted robbery and the murder was committed at great risk of death or bodily harm to others as a result of use of a weapon or device. *See* N.C.G.S. § 15A-2000(e)(5), (10) (2007). The trial court expressed doubt as to the admissibility of the State's forecasted evidence and entered an order ruling that the State may not proceed capitally against defendant. The State petitioned this Court for issuance of a writ of certiorari to the superior court, and this Court allowed the State's petition on 3 May 2007.

ANALYSIS

The State contends that trial courts lack the authority to declare cases noncapital at Rule 24 hearings. We disagree.

In 1994, pursuant to N.C.G.S. § 7A-34, this Court promulgated Rule 24 of the General Rules of Practice for the Superior and District Courts, which "provides a simple, bright-line rule, requiring prosecutors to petition for a special pretrial conference in *all* capital cases." *State v. Matthews*, 358 N.C. 102, 110, 591 S.E.2d 535, 541 (2004). Rule 24 provides:

> There shall be a pretrial conference in every case in which the defendant stands charged with a crime punishable by death. No later than ten days after the superior court obtains jurisdiction in such a case, the district attorney shall apply to the presiding superior court judge or other superior court judge holding court in the district, who shall enter an order requiring the prosecution and defense counsel to appear before the court within forty-five days thereafter for the pretrial conference. Upon request of either party at the pretrial conference the judge may

> for good cause shown continue the pretrial conference for a reasonable time.
>
> At the pretrial conference, the court and the parties shall consider:
>
> (1) simplification and formulation of the issues, including, but not limited to, the nature of the charges against the defendant, and the existence of evidence of aggravating circumstances;
>
> (2) timely appointment of assistant counsel for an indigent defendant when the State is seeking the death penalty; and
>
> (3) such other matters as may aid in the disposition of the action.
>
> The judge shall enter an order that recites that the pretrial conference took place, and any other actions taken at the pretrial conference.
>
> This rule does not affect the rights of the defense or the prosecution to request, or the court's authority to grant, any relief authorized by law, including but not limited to appointment of assistant counsel, in advance of the pretrial conference.

Gen. R. Pract. Super. & Dist. Cts. 24, 2008 Ann. R. N.C. 25.

This Court explained the purpose of Rule 24 in *State v. Chapman*:

> The pretrial conference is an administrative device intended to clarify the charges against the defendant and assist the prosecutor in determining whether any aggravating circumstances exist which justify seeking the death penalty. Capital defendants do not stand to lose or gain any rights at the conference. . . .
>
> . . . .
>
> While Rule 24 requires the trial court and the parties to consider the existence of evidence of aggravating circumstances, nothing in the rule intimates that the prosecution must enumerate with finality all aggravating circumstances it will pursue at trial. . . . In fact, a trial court cannot require the prosecution to declare which aggravating circumstances it will rely upon at the punishment phase.

342 N.C. 330, 338-39, 464 S.E.2d 661, 666 (1995) (citing *State v. Holden*, 321 N.C. 125, 153, 362 S.E.2d 513, 531 (1987), *cert. denied*,

486 U.S. 1061 (1988)), *cert. denied*, 518 U.S. 1023 (1996). While the trial court cannot require the district attorney to state with finality the aggravating circumstances that the prosecution will attempt to prove at a later penalty proceeding, the trial court's function in a Rule 24 conference is very similar to the "gatekeeping" function commended by this Court in *State v. Watson* a decade before adoption of Rule 24. 310 N.C. 384, 312 S.E.2d 448 (1984). In *Watson*, the defendant submitted a pretrial motion asking the trial court to determine whether the State's proposed evidence supporting the alleged aggravating circumstance was insufficient as a matter of law. *Id.* at 387-88, 312 S.E.2d at 451-52. The trial court determined that the forecasted evidence was insufficient as a matter of law to support the proposed aggravating circumstance and declared the case noncapital. *Id.* at 388, 312 S.E.2d at 452. This Court stated: "We do not here question or consider the correctness of this ruling. We do commend this procedure for its judicial economy and administrative efficiency." *Id.*

Thus, what became known as a *Watson* hearing was often utilized in capital cases. *See State v. Hunt*, 357 N.C. 257, 264-65, 582 S.E.2d 593, 598, *cert. denied*, 539 U.S. 985 (2003). "At the [*Watson*] hearing, the trial court must determine whether there is any evidence of the aggravating circumstances defined by N.C.G.S. § 15A-2000(e)." *Id.* at 265, 582 S.E.2d at 598 (citing *State v. Blake*, 317 N.C. 632, 634 n.1, 346 S.E.2d 399, 400 n.1 (1986)). While Rule 24 conferences permit trial courts to consider the prosecution's proffer of the factual basis for a sentence of death, *Watson* hearings provide an excellent opportunity for trial courts to evaluate the proposed evidence of aggravating circumstances and the testimony of subpoenaed witnesses, along with the memoranda of law and oral arguments of the parties. Nothing in Rule 24 supplants the judicial efficiency and efficacy of *Watson* hearings, although these hearings are somewhat similar to a Rule 24 conference. As indicated by *Hunt*, the duty of the trial court in Rule 24 conferences is similar to that of a *Watson* hearing, as "[t]he parties to a capital prosecution *must* consider the existence of aggravating circumstances at the Rule 24 hearing." *Id.* at 277, 582 S.E.2d at 606. Accordingly, if the prosecution's forecast of evidence at the Rule 24 conference does not show the existence of at least one aggravating circumstance, we hold the trial court may properly declare the case noncapital since a defendant may not receive a sentence of death in the absence of an aggravating circumstance. *See* N.C.G.S. § 15A-2000(c) (2007).

The trial court may not, however, declare a case noncapital on the basis of the sufficiency of the State's forecast of evidence on the underlying charge of first-degree murder. This limitation on the trial court's authority stems directly from the provisions of the Criminal Procedure Act and the procedural posture of a Rule 24 conference.

The text of Rule 24 provides for a pretrial conference only after a defendant has been indicted for first-degree murder. Gen. R. Pract. Super. & Dist. Cts. 24 (providing for "a pretrial conference in every case in which the defendant stands charged with a crime punishable by death"); *see* N.C.G.S. § 15-144 (2007) (indictment of capital defendants). Consequently, by the time a Rule 24 conference is held, a grand jury has already safeguarded defendant's due process rights with respect to this charge. *See Hunt*, 357 N.C. 257, 582 S.E.2d 593 (holding that the process of indictment by grand jury pursuant to N.C.G.S. § 15-144 adequately safeguards a defendant's rights under the federal and state constitutions). Thus, the purpose of Rule 24 is not to provide the trial court with an opportunity to second-guess the grand jury's determination as to the charge of first-degree murder. *See* N.C.G.S. § 15A-624(a) (2007) (providing that "[t]he grand jury is the exclusive judge of the facts with respect to any matter before it"). Indeed, the provisions of the Criminal Procedure Act dictate that once the grand jury has determined the sufficiency of evidence to support a charge, the trial court may not pass on the sufficiency of that evidence again until after the State has had an opportunity to present its case-in-chief. *Id.* §§ 15A-955 (limiting grounds on which an indictment may be dismissed and omitting sufficiency of the evidence to sustain a conviction as a possible basis), -1227 (2007) (providing that a motion for dismissal for insufficiency of the evidence to sustain a conviction may not be made earlier than "[u]pon close of the State's evidence").

As a result, it is critical for purposes of a Rule 24 conference to distinguish between the charge of first-degree murder and the aggravating factors supporting a sentence of death for a conviction on such a charge. Rule 24 directs the trial court to "consider . . . the existence of evidence of aggravating circumstances" that would permit a sentence of death under N.C.G.S. § 15A-2000(c). Gen. R. Pract. Super. & Dist. Cts. 24. The rule does not permit a trial court to declare a case noncapital based upon a weighing of the sufficiency of the State's forecast of evidence of guilt of the underlying first-degree murder charge.

Here, the record confirms that the trial court went beyond the scope of a Rule 24 conference by declaring defendant's case noncapital based on the sufficiency of the State's forecast of evidence on the underlying charge of first-degree murder. In support of its order declaring defendant's case noncapital, the trial court made two conclusions of law:

1. The State failed to produce sufficient evidence that the defendant was a co-conspirator, principal in fact, principal acting in concert, or aider and abettor in the commission of the felony of First-Degree Murder acting together with his co-defendant.

2. Because there is no admissible evidence that the defendant was a co-conspirator, principal in fact, principal acting in concert, or aider and abettor in the commission of the felony of First-Degree Murder acting together with his co-defendant, it is irrelevant that there may exist an Aggravating Circumstance against his co-defendant who is charged with crimes arising out of these events.

These conclusions do not track the (e)(6) or (e)(10) aggravators on which the State sought to proceed. *See State v. Jennings*, 333 N.C. 579, 621, 430 S.E.2d 188, 210 ("The gravamen of the [(e)(6)] aggravating circumstance is that the killing was for the purpose of getting money or something of value." (internal quotation marks and citation omitted)), *cert. denied*, 510 U.S. 1028 (1993), *quoted in State v. Parker*, 350 N.C. 411, 435, 516 S.E.2d 106, 122 (1999), *cert. denied*, 528 U.S. 1084 (2000); *see also State v. Davis*, 349 N.C. 1, 48-49, 506 S.E.2d 455, 481 (1998) (explaining that the (e)(10) circumstance concerns whether the murder weapon "in its normal use is hazardous to the lives of more than one person and whether a great risk of death was knowingly created" (citation omitted)), *cert. denied*, 526 U.S. 1161 (1999). Instead, the trial court's conclusions solely address the State's theory of accomplice liability "in the commission of the felony of First-Degree Murder," the charge underlying these aggravators. Accordingly, the trial court exceeded its authority under Rule 24 by declaring defendant's case noncapital based on the sufficiency of the State's forecast of evidence to support the underlying charge of first-degree murder.

Therefore, while trial courts have the authority to declare a defendant's trial noncapital because of the prosecution's failure to forecast the existence of evidence of an aggravating circumstance,

the trial court in the instant case exceeded its authority by considering the sufficiency of the evidence of defendant's guilt of first-degree murder. Accordingly, the trial court's order is reversed, and this case is remanded to the Superior Court, Warren County with instructions for that court to hold another Rule 24 conference and render a decision not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. JAMES ALLEN MEAD

No. 383A07

(Filed 7 March 2008)

Sentencing— consecutive—failure to specify—imposition after comment by clerk of court

The trial court did not err in a second-degree rape and second-degree sexual offense case by imposing consecutive sentences upon defendant after being advised by the assistant clerk of superior court following defendant's sentencing hearing that the trial court had not specified that these sentences were to run consecutively, because: (1) it was the stated intention of the trial judge that defendant's sentences would run consecutively, as reflected in the transcript of proceedings; (2) in light of the brutal nature of the crimes for which defendant was convicted, imposing consecutive terms was well within the trial court's discretion; (3) the statutory provision relied upon by defendant, N.C.G.S. § 15A-1334(b), is not applicable to this case when it cannot be inferred from the phrase "comment to the court on sentencing" any intent of the General Assembly to prohibit routine communication between trial judges and clerks of court during sentencing proceedings unless the clerk is first sworn as a witness; and (4) despite defendant's assertions to the contrary, there is no indication from the record that the discussion which took place between the trial judge and the clerk of court in this case fell outside of the usual administrative dialogue necessary for the fair and efficient conduct of court business.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 184 N.C. App. 306, 646 S.E.2d 597 (2007), finding no prejudicial error in part in judgments entered 8 March 2006 by Judge James L. Baker, Jr. in Superior Court, Avery County, and dismissing defendant's appeal in part. Heard in the Supreme Court 12 December 2007.

Roy Cooper, Attorney General, by Philip A. Lehman, Assistant Attorney General, for the State.

John Keating Wiles for defendant-appellant.

BRADY, Justice.

Defendant James Allen Mead was convicted by a jury of second-degree rape and second-degree sexual offense, and a divided panel of the Court of Appeals upheld these convictions. Defendant's appeal as of right on the basis of the dissenting opinion below presents a single issue for this Court to determine: Whether the trial court erred by imposing consecutive sentences upon defendant after being "advised" by the assistant clerk of superior court following defendant's sentencing hearing that the trial court had not specified that these sentences were to run consecutively. We hold that this was not error and thereby affirm the decision of the Court of Appeals.

BACKGROUND

I. State's Evidence

On 7 March 2005, the Avery County Grand Jury returned true bills of indictment charging defendant with second-degree rape and two counts of second-degree sexual offense. The State's evidence at trial tended to show the following: That late on the afternoon of 21 October 2004, the victim visited an unoccupied cabin in Avery County which was for sale and which she was interested in purchasing for her residence. At about 6 p.m., defendant and his two sons arrived at the cabin in a van and approached the victim. Defendant informed her that he had an ownership interest in the property, that there was a family dispute over it, and that it was not for sale. During this discussion, defendant, his sons, and the victim were seated on the front porch of the cabin drinking beer.

Approximately one hour later, defendant invited the victim to his residence on an adjacent property in order to view his horses and family pictures, and the victim accepted. When they arrived there,

defendant continued to consume alcohol while he showed the victim some family pictures and artifacts. He then instructed his sons to go outside and feed the horses.

Once alone with the victim, defendant suddenly grabbed her by the hair, punched her, and dragged her toward a nearby bedroom. The victim screamed, asked defendant to stop, and attempted to flee through the front door, which had been barricaded shut. Defendant dragged her back into the bedroom, where he punched her, tried to strangle and suffocate her, and began removing her clothes. The victim ran into the bathroom to escape once more, but defendant again pulled her into the bedroom. He then bit her nipples and threatened to bite one of them off unless she quit screaming. He also clawed at her anus and vagina with his hands, both internally and externally, and penetrated her vagina with his penis, threatening that he would kill her and dump her body in the woods if she was not quiet.

One of defendant's sons entered the bedroom during the struggle and told his father, "It is wrong what you are doing." Defendant then stopped and released the victim, who quickly got dressed and returned to her home, collapsing onto her bed in a state of shock. Later the next morning, the victim awoke in considerable pain and in fear that defendant might discover where she lived and murder her if she reported the crime, but she decided to report the incident. She drove to Spruce Pine Community Hospital, where the emergency room staff treated and evaluated her, completed a rape evidence kit, and photographed her injuries. A subsequent analysis conducted by the North Carolina State Bureau of Investigation comparing the semen and blood stains discovered on the victim and a blood sample later taken from defendant showed a DNA match which indicated it was 90.1 trillion times more likely that the semen on the victim came from defendant than from any other unrelated individual in the North Carolina Caucasian population.

II. Verdict, Sentence, and Appeal

On 8 March 2006, following defendant's trial, the jury returned its verdict finding defendant guilty of second-degree rape and one count of second-degree sexual offense but not guilty on the other count of second-degree sexual offense.

Also on 8 March 2006, the trial court held a brief sentencing hearing, during which the prosecutor and defense counsel both gave statements but no witnesses were called. Afterward, the court stated

its intention to sentence defendant within the presumptive range for the two convictions and stated further, "I am going to impose a significant sentence against you, which is what the law calls for." The court then pronounced a sentence of 100 to 129 months imprisonment for the second-degree rape conviction, with credit given for time already served, and a sentence of 100 to 129 months imprisonment for the second-degree sexual offense conviction, with no credit given for time already served, "all of the prior credit having been awarded in the first case." However, the court failed to specify whether these sentences were to run consecutively. *See* N.C.G.S. § 15A-1340.15(a) (2007) ("Unless otherwise specified by the court, all sentences of imprisonment run concurrently with any other sentences of imprisonment.").

After the trial court "complete[d] the matter" and defendant was taken out of the courtroom, some discussion took place between the trial judge and the assistant clerk of superior court which was not transcribed nor made a part of the record. Following this exchange, the trial judge then stated: "Madame Clerk, [defense counsel], that was a consecutive sentence. I want to make sure that was on the record with the defendant present. The clerk advised me that I did not say that was consecutive, and that was my intention." Defendant was escorted back into the courtroom, after which point the court stated that defendant's two sentences were to run consecutively, meaning defendant's sentence for second-degree sexual offense would not begin until the expiration of his sentence for second-degree rape. Judgment was entered accordingly.

Defendant subsequently gave notice of appeal, and on 3 July 2007, a divided panel of the Court of Appeals found no prejudicial error in his sentencing, although the dissenting judge would have vacated defendant's sentence and remanded the case for the trial court to enter judgment imposing concurrent sentences.[1] Defendant now appeals to this Court as of right on the basis of the dissent.

ANALYSIS

Defendant contends that the trial court erred by taking into consideration a "comment to the court on sentencing" which should have been barred by N.C.G.S. § 15A-1334(b). This statute, which governs the procedure for sentencing hearings, reads in part: "*No person* other than the defendant, his counsel, the prosecutor, and one mak-

1. The Court of Appeals unanimously dismissed a separate assignment of error that is not before this Court.

ing a presentence report may *comment to the court on sentencing* unless called as a witness by the defendant, the prosecutor, or the court." N.C.G.S. § 15A-1334(b) (2007) (emphasis added). Defendant argues that when the assistant clerk of superior court, who was not sworn as a witness at the hearing, "advised" the trial judge in regard to defendant's sentence, this amounted to a prohibited "comment to the court on sentencing" and should not have served as the basis for the trial court's imposition of consecutive sentences.

We note at the outset that it was the stated intention of the trial judge that defendant's sentences would run consecutively, as reflected in the transcript of proceedings. Defendant has not asserted otherwise. Thus, there can be no question that the sentences imposed against defendant comport with the intention of the trial court, which had the statutory authority and discretion to impose consecutive sentences against defendant. *See* N.C.G.S. § 15A-1354(a) (2007) ("When multiple sentences of imprisonment are imposed on a person at the same time . . . the sentences may run either concurrently or consecutively, as determined by the court."); *State v. LaPlanche*, 349 N.C. 279, 284, 507 S.E.2d 34, 37 (1998) ("It is undisputed that the trial court has express authority under N.C.G.S. § 15A-1354(a) to impose consecutive sentences." (citation omitted)). Moreover, in light of the brutal nature of the crimes for which defendant was convicted, imposing consecutive terms was well within the trial court's discretion. *See LaPlanche*, 349 N.C. at 284, 507 S.E.2d at 37.

Effectively then, defendant only challenges the *means* by which the trial court effectuated its intent that the sentences run consecutively. However, we find that the statutory provision relied upon by defendant, N.C.G.S. § 15A-1334(b), is simply not applicable to the circumstances presented in this case. By its plain meaning, the language of the statute encompasses all persons other than a defendant, defense counsel, prosecutors, and those making a presentence report. Nevertheless, we cannot infer from the phrase "comment to the court on sentencing" any intent of the General Assembly to prohibit routine communication between trial judges and clerks of court during sentencing proceedings unless the clerk is first sworn as a witness. To do so would erect an unnecessary barrier between trial judges and the clerks, deputy clerks, and assistant clerks of superior and district courts, who are entrusted with making entries on the records of these courts and required to ensure their accuracy and safekeeping. *See* N.C.G.S. § 7A-109(a) (2007); Gen. R. Pract. Super. & Dist. Cts. 17, 2008 Ann. R. N.C. 17.

Despite defendant's assertions to the contrary, there is no indication from the record that the discussion which took place between the trial judge and the clerk of court in this case fell outside of the usual administrative dialogue necessary for the fair and efficient conduct of court business. Defendant has failed to demonstrate that the trial court erred in sentencing him to two consecutive sentences of imprisonment based upon his convictions for second-degree rape and second-degree sexual offense. Accordingly, that portion of the opinion of the Court of Appeals finding no prejudicial error in defendant's sentencing is hereby affirmed.

AFFIRMED.

TINYA CHERNEY v. NORTH CAROLINA ZOOLOGICAL PARK

No. 606A04-3

(Filed 7 March 2008)

Tort Claims Act; Premises Liability— injury to zoo patron— premises liability standard

The decision of the Court of Appeals in this action under the Tort Claims Act for injuries received by a state zoo patron when a ficus tree fell in a zoo exhibit is reversed for the reasons stated in the dissenting opinion, and the case is remanded to the Court of Appeals for further remand to the Industrial Commission for entry of a new decision and order in accordance with the premises liability standard articulated in *Nelson v. Freeland*, 349 N.C. 615, and applied in *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 185 N.C. App. 203, 648 S.E.2d 242 (2007), affirming a decision and order entered by the North Carolina Industrial Commission on 28 April 2006. Heard in the Supreme Court 12 February 2008.

Knott & Berger, L.L.P., by Joe Thomas Knott, III, Bruce W. Berger, and Kenneth R. Murphy, III, for plaintiff-appellant.

Roy Cooper, Attorney General, by William H. Borden, Special Deputy Attorney General, for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals affirming the Industrial Commission's decision and order is reversed. This case is remanded to the Court of Appeals for further remand to the Industrial Commission for entry of a new decision and order in accordance with the premises liability standard articulated in *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998) and applied subsequently in *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 562 S.E.2d 887 (2002). The Commission shall enter its new decision and order on the record as it exists without taking additional evidence.

REVERSED AND REMANDED.

Justices NEWBY and TIMMONS-GOODSON did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. DWIGHT McDOUGALD

No. 64A07

(Filed 7 March 2008)

Search and Seizure— search of defendant's apartment— refusal of consent by defendant—consent by wife—harmlessness of error

The decision of the Court of Appeals in a prosecution for conspiracy to traffic in MDA is reversed and remanded for determination if any error under *Georgia v. Randolph*, —– U.S. —–, 164 L. Ed. 2d 208 (2006), in the search of defendant's apartment based upon his wife's consent after defendant refused consent was harmless beyond a reasonable doubt.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 181 N.C. App. 41, 638 S.E.2d 546 (2007), finding no error in judgments entered 12 April 2005 by Judge Jerry Cash Martin in Superior Court, Guilford County. On 11 October 2007, the Supreme Court allowed defendant's petition for discretionary review as to an additional issue. Heard in the Supreme Court 14 February 2008.

Roy Cooper, Attorney General, by John P. Scherer II, Assistant Attorney General, for the State.

Irving Joyner for defendant-appellant.

PER CURIAM.

Defendant appeals to this Court from the decision of the Court of Appeals on the basis of a dissent. In light of the State's concession of error, we reverse the decision of the Court of Appeals as to the appealable issue of right i.e. whether it was appropriate to dismiss defendant's appeal on procedural grounds. The case is remanded to the Court of Appeals to determine if any error under *Georgia v. Randolph*, —– U.S. —–, 164 L. Ed. 2d 208 (2006) was harmless beyond a reasonable doubt. The remaining issues addressed by the Court of Appeals are not before this Court and its decision as to these issues remains undisturbed.

REVERSED IN PART AND REMANDED.

WINDING RIDGE HOMEOWNERS ASSOCIATION, INC., A NORTH CAROLINA NOT-FOR-PROFIT CORPORATION, AND THEODORE J. HUMPHREY, III, A NATURAL PERSON v. ZALMAN JOFFE AND WIFE, DEVORA JOFFE; SUNTRUST MORTGAGE, INC.; JACKIE MILLER, TRUSTEE; ALSTON MASON; TYLER MURTAUGH; TRIP SHORT; BROOKS WELLER; AND TAYLOR HARRINGTON

No. 404A07

(Filed 7 March 2008)

Deeds— restrictive covenant—use of property—single family dwelling—lease to college students

A decision of the Court of Appeals that a restrictive covenant restricting the "use" of property to a single family residential dwelling prohibited a lease of the property to four unrelated college students is reversed for the reason stated in the dissenting opinion that the restrictive covenant is only a limitation on the type of structure that may be placed on the property and not a restriction on the type of occupancy permitted within the dwelling.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 184 N.C. App. ——, 646 S.E.2d 801 (2007), affirming an order entered on 18 August 2006 by Judge Carl R. Fox in Superior Court, Orange County. Heard in the Supreme Court 14 February 2008.

Brown & Bunch, PLLC, by Charles Gordon Brown, for plaintiff-appellees.

The Brough Law Firm, by G. Nicholas Herman, for defendant-appellants Zalman and Devora Joffe.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed and this matter is remanded to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

DARVELLA JONES v. HARRELSON AND SMITH CONTRACTORS, LLC, A NORTH CAROLINA CORPORATION, AND RODNEY S. TURNER D/B/A RODNEY S. TURNER HOUSEMOVERS

No. 36A07

(Filed 7 March 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 180 N.C. App. 478, 638 S.E.2d 222 (2006), dismissing plaintiff's appeal from a judgment entered on 10 May 2005 by Judge Jerry Braswell in Superior Court, Pamlico County. Heard in the Supreme Court 10 December 2007.

Smith Moore LLP, by J. Donald Cowan, Jr. and Elizabeth Brooks Scherer, for plaintiff-appellant.

Hopf & Higley, P.A., by Donald S. Higley, II, for defendant-appellee Harrelson and Smith Contractors, LLC.

Troutman Sanders, LLP, by Hannah G. Styron and D. Martin Warf, for North Carolina Association of Defense Attorneys; and Elliot Pishko Morgan, P.A., by David C. Pishko, for North Carolina Academy of Trial Lawyers, amici curiae.

PER CURIAM.

The decision of the Court of Appeals is reversed, and this case is remanded to that court for reconsideration in light of *Dogwood Development & Management Co. v. White Oak Transport Co.*, 362 N.C. 191, —— S.E.2d —— (2008), and *State v. Hart*, 361 N.C. 309, 644 S.E.2d 201 (2007).

REVERSED AND REMANDED.

JUANITA RICHARDSON AND ROBERT AND GLORIA GOWER, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED v. BANK OF AMERICA, N.A. AND NATIONSCREDIT FINANCIAL SERVICES CORPORATION

No. 240PA07

(Filed 7 March 2008)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 182 N.C. App. 531, 643 S.E.2d 410 (2007), affirming orders entered by Judge Catherine C. Eagles in Superior Court, Durham County, on 15 April 2003, 14 June 2004, 8 October 2004, 16 November 2004, 10 March 2005, 19 April 2005, 16 June 2005, 23 June 2005, 27 July 2005, and 12 October 2005. Heard in the Supreme Court 11 December 2007.

Jones Martin Parris & Tessener Law Offices, P.L.L.C., by John Alan Jones and G. Christopher Olson, for plaintiff-appellees.

Kennedy Covington Lobdell & Hickman, L.L.P., by John H. Culver III, and Amy Pritchard Williams; and O'Melveny & Myers, L.L.P. by Walter E. Dellinger III, for defendant-appellant NationsCredit Financial Services Corporation.

Roy Cooper, Attorney General, by Gary R. Govert, Special Deputy Attorney General, Philip A. Lehman, Assistant Attorney General, M. Lynne Weaver, Assistant Attorney General, and L. McNeil Chestnut, Special Deputy Attorney General and Counsel to the Commissioner of Banks, for Roy Cooper, Attorney General of North Carolina and Joseph A. Smith, Jr., North Carolina Commissioner of Banks.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., Jack L. Cozort, and Eileen R. Youens, for North Carolina Chamber, amicus curiae.

J. Reed Johnston, Jr. for Consumer Credit Industry Association, amicus curiae.

Hartell & Whiteman, L.L.P., by J. Jerome Hartzell, for North Carolina Academy of Trial Lawyers, amicus curiae.[1]

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

IN THE MATTER OF APPEAL OF IBM CREDIT CORPORATION FROM THE DECISION OF THE DURHAM COUNTY BOARD OF COUNTY COMMISSIONERS CONCERNING THE VALUATION AND TAXATION OF PERSONAL PROPERTY FOR TAX YEAR 2001

No. 520A07

(Filed 7 March 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 186 N.C. App. 223, 650 S.E.2d 828 (2007), remanding a final decision entered on 30 March 2006 by the North Carolina Property Tax Commission. Heard in the Supreme Court 13 February 2008.

Manning Fulton & Skinner P.A., by Michael T. Medford and Judson A. Welborn, for taxpayer-appellee.

S.C. Kitchen, Durham County Attorney, for respondent-appellant.

James B. Blackburn, III, General Counsel, North Carolina Association of County Commissioners; and Lucy Chavis, Assistant Wake County Attorney, for North Carolina Association of County Commissioners, amicus curiae.

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1. The following organizations were also named as amici in this brief, but pursuant to N.C. R. App. P. 33, their counsel are not listed in this opinion: North Carolina Justice Center; Legal Services of Southern Piedmont, Inc.; Pisgah Legal Services; and Financial Protection Law Center.

IN RE N.G.

[362 N.C. 229 (2008)]

PER CURIAM.

AFFIRMED.

IN THE MATTER OF N.G.

No. 510A07

(Filed 7 March 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 186 N.C. App. 1, 650 S.E.2d 45 (2007), affirming an order entered 30 January 2007 by Judge Albert A. Corbett, Jr. in District Court, Harnett County. Heard in the Supreme Court 13 February 2008.

E. Marshall Woodall and Duncan B. McCormick for petitioner-appellee Harnett County Department of Social Services.

Elizabeth Myrick Boone for appellee Guardian ad Litem.

Sofie W. Hosford for respondent-appellant mother.

Lisa Skinner Lefler for respondent-appellant father.

PER CURIAM.

AFFIRMED.

IN RE S.J.M.

[362 N.C. 230 (2008)]

IN THE MATTER OF S.J.M.

No. 363A07

(Filed 7 March 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 184 N.C. App. 42, 645 S.E.2d 798 (2007), affirming an order entered 10 January 2006 by Judge George R. Murphy in District Court, Lee County. Heard in the Supreme Court 12 February 2008.

Elizabeth Myrick Boone for appellee Guardian ad Litem and Beverly D. Basden for petitioner-appellee Lee County Department of Social Services.

Richard E. Jester for respondent-appellant mother.

PER CURIAM.

AFFIRMED.

LOWERY v. CAMPBELL

[362 N.C. 231 (2008)]

DEXTER LOWERY v. W. DAVID CAMPBELL D/B/A CAMPBELL INTERIOR SYSTEMS AND CISCO OF FLORENCE; AND AUTO-OWNERS INSURANCE COMPANY

No. 502A07

(Filed 7 March 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 185 N.C. App. 659, 649 S.E.2d 453 (2007), affirming orders entered in Superior Court, Robeson County, on 13 October 2003 by Judge Gary L. Locklear, on 15 November 2005 by Judge James F. Ammons, Jr., and on 7 June 2006 by Judge Jack A. Thompson. Heard in the Supreme Court 12 February 2008.

Musselwhite, Musselwhite, Branch & Grantham, by W. Edward Musselwhite, Jr., for plaintiff-appellee.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Lee B. Johnson, for defendant-appellant Auto-Owners Insurance Company.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. EDDIE CAPLE

No. 437A05-2

(Filed 7 March 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 185 N.C. App. 721, 650 S.E.2d 8 (2007), which, upon defendant's appeal from a judgment entered on 7 January 2004 by Judge B. Craig Ellis in Superior Court, Robeson County, remanded the case to the trial court for resentencing after being ordered by this Court to reconsider in light of *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, —— U.S. ——, 127 S. Ct. 2281, 167 L. Ed. 2d 1114 (2007), its previous decision to remand for resentencing. Heard in the Supreme Court 13 February 2008.

Roy Cooper, Attorney General, by Derrick C. Mertz, Assistant Attorney General, for the State-appellant.

Paul F. Herzog for defendant-appellee.

PER CURIAM.

Justice HUDSON 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, e.g., Barham v. Hawk*, 360 N.C. 358, 625 S.E.2d 778 (2006).

AFFIRMED.

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

Abdo v. M.B. Kahn Constr. Co. Case below: 187 N.C. App. 305	No. 034A08	1. Plt's NOA Based Upon a Constitutional Question (COA07-454) 2. Defs' Motion to Dismiss Appeal 3. Defs' Motion for Plt to to pay costs and reasonable expenses, including attorney's fees 4. Defs' Motion to Remand this Matter to Buncombe County for a Hearing to Determine Appropriate Sanctions 5. Defs' Motion for Plt to No Longer be Allowed to File in this Civil Action before the Court Unless Accompanied by a Certification, signed by a N.C. Licensed Attorney who is in Good Standing with the NC State Bar, Verifying Plt's Claims are of Merit	1. —— 2. Allowed 03/06/08 3. Denied 03/06/08 4. Denied 03/06/08 5. Denied 03/06/08
Adams Creek Assocs. v. Davis Case below: 186 N.C. App. 512	No. 003P08	Defs' Motion for Temporary Stay (COA07-134)	Allowed 01/09/08
Babb v. Bynum & Murphrey, PLLC Case below: 182 N.C. App. 750	No. 317P07	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA06-876) 2. Plts' Motion to Withdraw PDR 3. Plts' PWC to Review Decision of COA	1. —— 2. Allowed 03/06/08 3. Denied 03/06/08
Billings v. General Parts, Inc. Case below: 187 N.C. App. 580	No. 029P08	1. Defs' Motion for Temporary Stay (COA07-318) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed 01/23/08 Stay Dissolved 03/06/08 2. Denied 03/06/08 3. Denied 03/06/08
Bolick v. ABF Freight Sys., Inc. Case below: 188 N.C. App. 294	No. 076P08	1. Def's Motion for Temporary Stay (COA07-198) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed 02/21/08 Stay Dissolved 03/06/08 2. Denied 03/06/08 3. Denied 03/06/08

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Burrill v. Long Case below: 185 N.C. App. 158	No. 438P07	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA06-955) 2. Def's (Rate Bureau) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 03/06/08 2. Dismissed as Moot 03/06/08
Cameron v. Merisel Props., Inc. Case below: 187 N.C. App. 40	No. 594P07	1. Def's (Merisel) PDR Under N.C.G.S. § 7A-31 (COA07-54) 2. Def's Motion to Withdraw PDR	1. —— 2. Allowed 03/06/08
Citizens Addressing Reassignment & Educ., Inc. v. Wake Cty. Bd. of Educ. Case below: 182 N.C. App. 241	No. 254P07	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA06-105) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 03/06/08 2. Dismissed as Moot 03/06/08 **Martin, J., Recused**
Craig v. New Hanover Cty. Bd. of Educ. Case below: 185 N.C. App. 651	No. 484P07	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA07-80) 2. Plt's Motion to Convert "Petition for Discretionary Review" to a Notice of Appeal of Right 3. Plt's Alternative PWC to Review Decision of the COA	1. Denied 03/06/08 2. Denied 03/06/08 3. Allowed 03/06/08
Esposito v. Talbert & Bright, Inc. Case below: 181 N.C. App. 742	No. 154P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-572)	Denied 03/06/08
Fucito v. Francis Case below: 184 N.C. App. 377	No. 381P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1237)	Denied 03/06/08
Grant v. High Point Reg'l Health Sys. Case below: 184 N.C. App. 250	No. 474P05-2	Def-Appellant's PDR Under N.C.G.S. § 7A-31 (COA06-1079)	Allowed 03/06/08

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Hill v. Hill Case below: 187 N.C. App. 509	No. 638P05-2	1. Plt's Motion for Temporary Stay (COA07-266) 2. Plt's Petition for Writ of Supersedeas	1. Denied 01/30/08 2. Denied 01/30/08 **Martin, J., Recused** **Timmons-Goodson, J., Recused**
Hollin v. Johnston Cty. Council On Aging Case below: 181 N.C. App. 77	No. 079P07	1. Defs' Motion for Temporary Stay (COA06-310) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed 02/08/07 Stay Dissolved 03/06/08 2. Denied 03/06/08 3. Denied 03/06/08 **Hudson, J., Recused**
Hughes v. Rivera-Ortiz Case below: 187 N.C. App. 214	No. 611A07	1. Plt's NOA Based Upon a Dissent (COA06-1582) 2. Plt's PDR as to Additional Issue	1. —— 2. Allowed 03/06/08
In re A.R.H.B. & C.C.H.L. Case below: 186 N.C. App. 211	No. 538A07	1. Respondent Mother's (Shannon Leigh H.) NOA Based Upon a Constitutional Question (COA07-690) 2. GAL's Motion to Dismiss Appeal	1. —— 2. Allowed 03/06/08
In re D.W. Case below: 188 N.C. App. 164	No. 075P08	Respondent's (Father) PDR Under N.C.G.S. § 7A-31 (COA07-948)	Denied 03/06/08
In re R.B.B. Case below: 187 N.C. App. 639	No. 030P08	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA07-727)	Denied 03/06/08

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In re R.G.J. Case below: 187 N.C. App. 509	No. 601P07	1. Respondent's (Father) Petition for Writ of Mandamus (COA07-817) 2. Respondent's (Father) PWC to Review the Case *De Novo*	1. Denied 03/06/08 2. Denied 03/06/08
In re S.S., T.R., D.R. & M.R. Case below: 183 N.C. App. 300	No. 272P07	Respondent's (Father R.A.) PDR Under N.C.G.S. § 7A-31 (COA06-1538)	Denied 03/06/08
Kelly v. Wake Cty. Sheriff's Dept. Case below: 188 N.C. App. 165	No. 064P08	Def's (Sheriff's Dept.) Motion for Temporary Stay (COA06-1127)	Allowed 02/21/08
Lamar OCI South Corp. v. Stanly Cty. Zoning Bd. of Adjust. Case below: 186 N.C. App. 44	No. 485A07	1. Respondent's NOA (Dissent) (COA06-993) 2. Petitioner's PDR Under N.C.G.S. § 7A-31	1.—— 2. Allowed 03/06/08
Lancaster v. N.C. Dep't of Env't and Natural Res. Case below: 187 N.C. App. 105	No. 591P07	Respondents' PDR Under N.C.G.S. § 7A-31 (COA07-149)	Denied 03/06/08
Lane v. American Nat'l Can Co. Case below: 181 N.C. App. 527	No. 124P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-87)	Denied 03/06/08 **Martin, J., Recused**
Losing v. Food Lion, L.L.C. Case below: 185 N.C. App. 278	No. 454P07	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA06-1312) 2. Plt's PWC to Review Decision of COA	1. Denied 03/06/08 2. Denied 03/06/08
Meadows v. Iredell Cty. Case below: 187 N.C. App. 785	No. 019P08	Plts' PDR Under N.C.G.S. § 7A-31 (COA07-596)	Denied 03/06/08

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Midsouth Golf, LLC v. Fairfield Harbourside Condo Ass'n Case below: 187 N.C. App. 22	No. 589P07	Plt's Motion for Temporary Stay (COA07-64)	Allowed 12/20/07
Myers v. Bryant Case below: 187 N.C. App. 305	No. 607P07	Def's PDR Under N.C.G.S. § 7A-31 (COA07-491)	Denied 03/06/08
Neblett v. Hanover Inspection Serv., Inc. Case below: 186 N.C. App. 132	No. 515P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-1676)	Denied 03/06/08
Oakes v. Lincoln Cty. Bd. of Elections Case below: 186 N.C. App. 679	No. 061P07-2	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA06-1699) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied 03/06/08
Powe v. Centerpoint Human Servs. Case below: 183 N.C. App. 300	No. 286P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-958)	Denied 03/06/08
Rakestraw v. Town of Knightdale Case below: 188 N.C. App. 129	No. 070P08	Plts' PDR Under N.C.G.S. § 7A-31 (COA07-866)	Denied 03/06/08
Ramsey v. N.C. Div. of Motor Vehicles Case below: 184 N.C. App. 713	No. 412P07	Respondent's PDR Under N.C.G.S. § 7A-31 (COA06-931)	Denied 03/06/08
Robertson v. Robertson Case below: 186 N.C. App. 680	No. 001P08	1. Def's PDR Under N.C.G.S. § 7A-31 (COA06-1448) 2. Def's Motion to Withdraw PDR	1. 2. Allowed 02/01/08

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Row v. Row (Deese) Case below: 185 N.C. App. 450	No. 468P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-1692)	Denied 03/06/08
Smith v. Smith Case below: 179 N.C. App. 652	No. 526P06	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA05-1359) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Intervenor's (Robert Bzduch) Motion for Sanctions	1. Dismissed *Ex Mero Motu* 03/06/08 2. Denied 03/06/08 3. Denied 03/06/08
Stark v. Ratashara Case below: 188 N.C. App. 166	No. 353A04-4	1. Plt's NOA Based Upon a Constitutional Question (COA07-665) 2. Plt's Motion to Amend NOA	1. Dismissed *Ex Mero Motu* 03/06/08 2. Allowed 03/06/08
State v. Andrade Case below: 187 N.C. App. 510	No. 004P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-588)	Denied 03/06/08
State v. Askew Case below: 183 N.C. App. 156	No. 271P07	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA06-507) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 03/06/08 3. Denied 03/06/08
State v. Ayscue Case below: 187 N.C. App. 510	No. 006P08	1. Def-Appellant's Notice of Appeal Under N.C.G.S. § 7A-30(1) (COA07-345) 2. State's Motion to Dismiss Appeal 3. Def-Appellant's PDR Under N.C.G.S. § 7A-31 (c)	1. —— 2. Allowed 03/06/08 3. Denied 03/06/08
State v. Barefoot Case below: 184 N.C. App. 188	No. 343P07	1. Def's (Barefoot) PDR Under N.C.G.S. § 7A-31 (COA06-1056) 2. Def's (Jordan) NOA Based Upon a Constitutional Question 3. AG's Motion to Dismiss Appeal 4. Def's (Jordan) PDR Under N.C.G.S. § 7A-31	1. Denied 03/06/08 2. —— 3. Allowed 03/06/08 4. Denied 03/06/08

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State v. Barnes Case below: Rowan County Superior Court	No. 146A94-3	Def's PWC to Review Order of Rowan County Superior Court	Denied 03/06/08
State v. Bobbitt Case below: 187 N.C. App. 305	No. 606P07	Def's PDR Under N.C.G.S. § 7A-31 (COA07-270)	Denied 03/06/08
State v. Cleveland Case below: 184 N.C. App. 189	No. 059P08	Def's Motion for "Petition for Discretionary Review" (COA06-1026)	Denied 03/06/08
State v. Cobb Case below: 187 N.C. App. 295	No. 447P05-2	Def's PDR Under N.C.G.S. § 7A-31 (COA04-508-2)	Denied 03/06/08 **Timmons-Goodson, J., Recused** **Hudson, J., Recused**
State v. Coltrane Case below: 185 N.C. App. 160	No. 428P07	1. Def's NOA Based Upon a Constitutional Question (COA06-1286) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 03/06/08 2. Denied 03/06/08
State v. Cooper Case below: 186 N.C. App. 100	No. 490P07	AG's Motion for Temporary Stay (COA06-1356)	Allowed 10/08/07
State v. Crump Case below: 181 N.C. App. 150	No. 058P07	1. Def's Motion for "Petition for Discretionary Review (N.C. Gen. Stat. Sec. 7A-31)" (COA06-411) 2. Def's Motion to Appoint Counsel	1. Dismissed 03/06/08 2. Dismissed as Moot 03/06/08
State v. Daye Case below: 184 N.C. App. 758	No. 401P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1378)	Denied 03/06/08
State v. Duncan Case below: 188 N.C. App. 508	No. 091A08	State's Motion for Temporary Stay (COA07-85)	Allowed 02/21/08

State v. Ewell Case below: 186 N.C. App. 680	No. 108P05-2	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1494)	Denied 03/06/08
State v. Green Case below: 187 N.C. App. 510	No. 008P08	1. Def's NOA Based Upon a Constitutional Question (COA07-430) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 03/06/08 3. Denied 03/06/08
State v. Greene Case below: 184 N.C. App. 379	No. 388P07	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA06-1504) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 03/06/08 3. Denied 03/06/08
State v. Hester Case below: 185 N.C. App. 732	No. 497P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1463)	Denied 03/06/08
State v. Howell Case below: 184 N.C. App. 369	No. 369P07	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA06-1473) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 03/06/08 3. Denied 03/06/08
State v. Hunt Case below: 182 N.C. App. 348	No. 192P07	1. Def's NOA Based Upon a Constitutional Question (COA06-525) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 03/06/08 3. Denied 03/06/08
State v. Johnson Case below: 188 N.C. App. 633	No. 085P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-907)	Denied 03/06/08

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State v. Jordan Case below: 186 N.C. App. 576	No. 581P07	Def's PDR Under N.C.G.S. § 7A-31 (COA07-69)	Denied 03/06/08
State v. Kirby Case below: 187 N.C. App. 367	No. 014P08	1. Def's NOA Based Upon a Constitutional Question (COA06-1593) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 03/06/08 3. Denied 03/06/08
State v. Labinski Case below: 188 N.C. App. 120	No. 060P08	Def's Motion for Temporary Stay (COA06-1617)	Denied 02/15/08
State v. Lender Case below: 186 N.C. App. 306	No. 539P07	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA06-1632) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 03/06/08 3. Denied 03/06/08
State v. Loftis Case below: 185 N.C. App. 190	No. 440P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-728)	Denied 03/06/08
State v. Maready Case below: 188 N.C. App. 169	No. 032A08	1. State's NOA (Dissent) (COA07-171) 2. State's Motion Temporary Stay 3. State's Petition for Writ of Supersedeas	1. —— 2. Allowed 01/24/08 3. Allowed 03/06/08
State v. McFadden Case below: 181 N.C. App. 131	No. 060P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-519)	Denied 03/06/08
State v. McLamb Case below: 186 N.C. App. 124	No. 489P07	AG's Motion for Temporary Stay (COA06-1319)	Allowed 10/08/07
State v. Morgan Case below: 183 N.C. App. 160	No. 284P07	1. Def's (Morgan) NOA Based Upon a Constitutional Question (COA06-1234) 2. Def's (Morgan) PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 03/06/08 2. Denied 03/06/08

State v. Muhammad Case below: 186 N.C. App. 355	No. 547A07	1. Def's NOA Based Upon a Constitutional Question (COA06-1430) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed 03/06/08
State v. Murray Case below: 157 N.C. App. 143	No. 237P03-2	Def's Petition for Writ of Habeas Corpus (COA02-653)	Denied 02/07/08
State v. Myles Case below: 188 N.C. App. 42	No. 041A08	1. State's NOA (Dissent) (COA07-118) 2. State's Motion for Temporary Stay 3. State's Petition for Writ of Supersedeas	1. —— 2. Allowed 01/29/08 3. Allowed 03/06/08
State v. Patterson Case below: 185 N.C. App. 67	No. 434P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1347)	Denied 03/06/08
State v. Perez Case below: 182 N.C. App. 294	No. 199P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-440)	Denied 03/06/08
State v. Petrick Case below: 186 N.C. App. 597	No. 592P07	1. Def's NOA Based Upon a Constitutional Question (COA07-86) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 03/06/08 3. Denied 03/06/08
State v. Randolph Case below: 181 N.C. App. 150	No. 031P08	Def's PWC to Review Decision of COA (COA06-252)	Denied 03/06/08 **Hudson, J., Recused**
State v. Scriven Case below: 188 N.C. App. 167	No. 053P08	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA07-797) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 03/06/08 2. Denied 03/06/08
State v. Seek Case below: 187 N.C. App. 306	No. 616P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1650)	Denied 03/06/08

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State v. Stokely Case below: 184 N.C. App. 336	No. 380P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1222)	Denied 03/06/08
State v. Valdovinos Case below: 187 N.C. App. 307	No. 615P07	1. Def's NOA Based Upon a Constitutional Question (COA06-1485) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 03/06/08 3. Allowed 03/06/08 for limited purpose of remanding to the COA for reconsideration in light of *Brendlin v. California*, —— U.S. ——, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007)
State v. Walker Case below: 188 N.C. App. 331	No. 016P05-3	State's Motion for Temporary Stay (COA03-1426-2)	Allowed 02/01/08

STATE OF NORTH CAROLINA v. KENNETH BARNARD

No. 347A07

(Filed 11 April 2008)

Search and Seizure— traffic stop—thirty-second delay at green light—reasonable suspicion of driving while impaired

Defendant's thirty-second delay at a green traffic light under the circumstances gave rise to a reasonable, articulable suspicion that defendant may have been driving while impaired; the stop of his vehicle was constitutional, and the evidence (a crack pipe) obtained as a result of the stop was properly admitted. It is irrelevant that part of the officer's motivation for stopping defendant may have been a perceived, though apparently nonexistent, statutory violation of impeding traffic.

Justice BRADY dissenting.

Justice HUDSON dissenting.

Justice 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, 184 N.C. App. 25, 645 S.E.2d 780 (2007), finding no error in a judgment entered 6 April 2005 by Judge James U. Downs in Superior Court, Buncombe County. Heard in the Supreme Court 13 February 2008.

Roy Cooper, Attorney General, by Daniel S. Johnson, Special Deputy Attorney General, for the State.

Anne Bleyman for defendant-appellant.

The Avery, P.C., by Isaac T. Avery, III, for North Carolina Association of Police Attorneys, and Kimberly N. Overton for North Carolina Conference of District Attorneys, amici curiae.

NEWBY, Justice.

In this case we determine whether defendant's constitutional rights were violated by the traffic stop that led to his convictions. Based on the totality of the circumstances here, defendant's thirty-second delay before proceeding through a green traffic light gave rise

to a reasonable, articulable suspicion that he may have been driving while impaired. Because the stop of defendant's vehicle was constitutional, we affirm the majority decision of the Court of Appeals that affirmed the trial court's denial of defendant's motion to suppress all evidence obtained as a result of the stop.

Around 12:15 a.m. on 2 December 2004, Officer Brett Maltby was on patrol in a high crime area of downtown Asheville where a number of bars are located. Officer Maltby's marked patrol car was stopped behind defendant's vehicle at a red traffic light. When the light turned green, defendant remained stopped for approximately thirty seconds before making a legal left turn. Officer Maltby initiated a stop of the vehicle.

When he approached defendant to ask for his driver's license and registration, Officer Maltby noticed that defendant was shaking and that his breathing was rapid. Officer Maltby also detected a slight odor of alcohol on defendant's breath. Defendant said he did not have his license with him and gave Officer Maltby a name and birth date that did not match information on the officer's computer. Officer Maltby returned and asked defendant to step out of the vehicle. At that point, he observed an open container of alcohol in defendant's vehicle. After Officer Maltby placed defendant in investigatory detention, defendant provided his correct name, and Officer Maltby determined that defendant's driver's license was suspended. Officer Dwight Arrowood arrived at the scene and recovered a crack pipe (later determined to contain cocaine residue) and associated paraphernalia from defendant's vehicle.

Defendant offered to make a controlled buy of narcotics from a person known as "One-Arm Willy" if Officer Maltby would void defendant's citations for possession of an open container, driving while license suspended, and possession of drug paraphernalia. Officer Maltby agreed he would void the citations if defendant made a controlled buy. Later that night defendant successfully purchased a crack rock from One-Arm Willy. However, upon defendant's return to the police station, Officer Maltby searched defendant and found a second rock of cocaine, which defendant had obtained as a "front" from One-Arm Willy.

Defendant was subsequently charged with two counts of possession of cocaine and two counts of having achieved habitual felon status. Before trial, defendant moved to suppress evidence seized as a result of the searches of his vehicle and his person, as well as the

statements he made to the police. Defendant's motion to suppress was denied. A jury found defendant guilty of two counts of possession of cocaine, and defendant pled guilty to one count of having achieved habitual felon status. The remaining habitual felon status charge was dismissed.

A divided Court of Appeals panel found no error. The majority determined that the thirty-second delay after the traffic light turned green gave Officer Maltby a reasonable suspicion that defendant was driving while impaired. Therefore, the evidence obtained as a result of the stop was properly admitted. *State v. Barnard*, 184 N.C. App. 25, 30-31, 645 S.E.2d 780, 784 (2007).[1] The dissent argued that a thirty-second delay, standing alone, did not provide reasonable suspicion of driving while impaired. As a result, the dissent would have excluded the evidence obtained and statements made during the stop. *Id.* at ——, 645 S.E.2d at 789-90 (Calabria, J., dissenting). However, the dissent recommended a remand to determine whether defendant consented to the search that occurred following the controlled buy. *Id.* at ——, 645 S.E.2d at 790-91.

The question before this Court is whether the stop of defendant's vehicle was constitutional. The Fourth Amendment protects individuals "against unreasonable searches and seizures." U.S. Const. amend. IV. The North Carolina Constitution provides similar protection. N.C. Const. art. I, § 20. A traffic stop is a seizure "even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660, 667 (1979). Such stops have "been historically viewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)." *United States v. Delfin-Colina*, 464 F.3d 392, 396 (3rd Cir. 2006) (citation omitted). Despite some initial confusion following the United States Supreme Court's decision in *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), courts have continued to hold that a traffic stop is constitutional if the officer has a "reasonable, articulable suspicion that criminal activity is afoot." *Illinois v.*

1. The majority also affirmed the admission of defendant's statements to Officer Maltby. Although defendant made the statements before he was advised of his *Miranda* rights, the evidence showed the statements were volunteered and not the result of an interrogation. *Barnard*, 184 N.C. App. at 30-31, 645 S.E.2d at 784-85. The dissent did not address this *Miranda* issue. As such, defendant's arguments on this issue are not properly before this Court. *See, e.g.*, *Steingress v. Steingress*, 350 N.C. 64, 67, 511 S.E.2d 298, 300 (1999) (citing *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 463, 323 S.E.2d 23, 25 (1984)).

Wardlow, 528 U.S. 119, 123, 120 S. Ct. 673, 675, 145 L. Ed. 2d 570, 576 (2000) (citing *Terry*, 392 U.S. at 30, 88 S. Ct. at 1884, 20 L. Ed. 2d at 911); *see Delfin-Colina*, 464 F.3d at 396-97.

Reasonable suspicion is a "less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Wardlow*, 528 U.S. at 123, 120 S. Ct. at 675-76, 145 L. Ed. 2d at 576 (citation omitted). Only " 'some minimal level of objective justification' " is required. *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1, 10 (1989) (quoting *INS v. Delgado*, 466 U.S. 210, 217, 104 S. Ct. 1758, 1763, 80 L. Ed. 2d 247, 255 (1984)). This Court has determined that the reasonable suspicion standard requires that "[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citing *Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906). Moreover, "[a] court must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion" exists. *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621, 629 (1981)).

Here, the trial court concluded that based on the totality of the circumstances "a reasonable articulable suspicion of wrongdoing on the part of the [d]efendant existed." This conclusion of law is supported by the trial court's finding of fact that, after the traffic light turned green, defendant's vehicle "remained stopped for some 30 seconds without any reasonable appearance of explanation for doing so." The trial court's conclusion of law is also supported by Officer Maltby's testimony showing that, based on his training and experience, he made a rational inference from the thirty-second delay that defendant might be impaired:

> Q Based upon your training and experience, do you have an opinion as to whether or not that sort of delayed reaction could usually involve an impaired substance or driving while impaired?
>
> A [Officer Maltby] Absolutely. Yes, sir.
>
> Q Can you articulate that?
>
> A People's reaction is slowed down. A red light turning green and hesitating for 30 seconds definitely would be an indicator of impairment.

Because defendant's thirty-second delay at a green traffic light under these circumstances gave rise to a reasonable, articulable suspicion that defendant may have been driving while impaired, the stop of defendant's vehicle was constitutional and the evidence obtained as a result of the stop was properly admitted. It is irrelevant that part of Officer Maltby's motivation for stopping defendant may have been a perceived, though apparently non-existent, statutory violation of impeding traffic. The constitutionality of a traffic stop depends on the objective facts, not the officer's subjective motivation. *See Whren*, 517 U.S. at 811-13, 116 S. Ct. at 1773-74, 135 L. Ed. 2d at 96-98; *State v. McClendon*, 350 N.C. 630, 634-36, 517 S.E.2d 128, 131-32 (1999).

All other issues raised by defendant are not properly before this Court. The decision of the Court of Appeals is affirmed.

AFFIRMED.

BRADY, Justice, dissenting.

Defendant's thirty second delay at a traffic intersection after the light turned green did not violate any law and, standing alone, could not have raised a reasonable, articulable suspicion that defendant was engaged in criminal activity. Consequently, Officer Maltby's stop of defendant's vehicle for purportedly "impeding flow of traffic" was an unconstitutional seizure of defendant's person in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures. The trial court erred when it concluded otherwise.

By affirming the decision of a divided panel of the Court of Appeals below and holding that the stop of defendant's vehicle was constitutional, the majority has lowered the threshold of the Fourth Amendment's standard of reasonable, articulable suspicion to an unacceptable level, dangerously exposing the citizens of North Carolina to the potential for unreasonable and arbitrary police practices unchecked by our state's trial and appellate courts. Accordingly, I am compelled to respectfully dissent.

ANALYSIS

I. THE FOURTH AMENDMENT AND TRAFFIC STOPS

A. The Foundational Importance of the Fourth Amendment

The Fourth Amendment to the United States Constitution was created in direct response to the abuses of general writs of assist-

ance, which gave "customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws." *Stanford v. Texas*, 379 U.S. 476, 481 (1965). The uproar against and denunciation of these general writs, and the abuses by the petty officers to whom they had been issued, were instrumental in giving birth to the "child Independence." *Boyd v. United States*, 116 U.S. 616, 625 (1886) (citations and internal quotation marks omitted). Yet, the roots of the Fourth Amendment "go far deeper," *Stanford*, 379 U.S. at 482, to include all the abuses of the British Crown that the citizens of the Empire had endured for centuries, "from the time of the Tudors, through the Star Chamber, the Long Parliament, the Restoration, and beyond," *id.*; *see also Marcus v. Search Warrant of Prop.*, 367 U.S. 717, 724-29 (1961); *Boyd*, 116 U.S. at 624-29. It is against this backdrop that the Court must determine whether an officer may constitutionally seize an individual because of a single act or omission which is not itself a violation of any law or regulation.

B. *Terry v. Ohio*: the Reasonable, Articulable Suspicion Standard

In *State v. Watkins*, this Court said:

> The Fourth Amendment protects the "right of the people . . . against unreasonable searches and seizures." U.S. Const. amend. IV. It is applicable to the states through the Due Process Clause of the Fourteenth Amendment. It applies to seizures of the person, including brief investigatory detentions such as those involved in the stopping of a vehicle.

337 N.C. 437, 441, 446 S.E.2d 67, 69-70 (1994) (alteration in original) (citations omitted). The Supreme Court of the United States has held that a law enforcement officer may initiate a brief stop and frisk of an individual if there are "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). "And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* at 27 (citation omitted). Since *Terry*, the reasonable, articulable suspicion standard has been applied to brief investigatory traffic stops. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975); *Watkins*, 337 N.C. at 441, 443, 446 S.E.2d at 70-71.

The majority suggests there has been "confusion" following *Whren v. United States*, 517 U.S. 806 (1996), as to whether "a traffic stop" is constitutional if supported by reasonable, articulable suspicion. I cannot acknowledge such confusion, at least among the decisions of this Court issued after *Whren* was decided. However, the imprecise language employed by the majority opinion paints over the important and intuitive distinction between an *investigatory* traffic stop, to which the reasonable, articulable suspicion standard has been applied, and a traffic stop performed on the basis of a "*perceived* traffic violation," to which we recently applied the standard of probable cause in *State v. Ivey*. *See* 360 N.C. 562, 564, 633 S.E.2d 459, 461 (2006) (emphasis added).

C. *United States v. Cortez*: the Totality of the Circumstances

When determining whether a law enforcement officer had the reasonable, articulable suspicion necessary to seize a defendant, "[a] court must consider 'the totality of the circumstances—the whole picture.' " *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). Moreover, "an assessment of the whole picture . . . must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *Cortez*, 449 U.S. at 418. Consistent with the totality of the circumstances approach, a court must ascertain whether all of the circumstances *taken together* amount to reasonable suspicion. *United States v. Sokolow*, 490 U.S. 1, 9 (1989); *see also United States v. Arvizu*, 534 U.S. 266, 274 (2002) (stating that *Terry* precludes a "divide-and-conquer analysis" of reasonable suspicion).

D. The Degree of Suspicion Mandated by the Fourth Amendment

For investigatory traffic stops conducted pursuant to *Terry*, the totality of the circumstances approach creates the possibility that multiple factors "quite consistent with innocent travel" can, when viewed together, "amount to reasonable suspicion." *See Sokolow*, 490 U.S. at 9 (citations omitted). Indeed, *Terry* and its progeny "accept[] the risk that officers may stop innocent people." *See Illinois v. Wardlow*, 528 U.S. 119, 126 (2000). Ultimately, then, the key determination is not the innocence of an individual's conduct, "but the *degree of suspicion* that attaches to particular types of noncriminal acts." *Sokolow*, 490 U.S. at 10 (emphasis added) (citation and internal quotation marks omitted).

As a consequence of the inherent risk that *Terry* stops will be conducted against innocent persons, appellate courts should take great care not to set the standard of reasonable, articulable suspicion so low that the Fourth Amendment is rendered meaningless. It is true that the degree of suspicion required for *Terry* stops is "considerably less than proof of wrongdoing by a preponderance of the evidence" and "obviously less demanding than that for probable cause." *Id.* at 7 (citations omitted). On the other hand, the requisite degree of suspicion must be high enough "to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *See Brown v. Texas*, 443 U.S. 47, 51 (1979). Such would be the case if reasonable suspicion were to be founded upon an "inchoate and unparticularized suspicion or 'hunch' " and nothing more. *See Terry*, 392 U.S. at 27.

II. FOURTH AMENDMENT JURISPRUDENCE APPLIED TO THE INSTANT CASE

A. Due Deference to the Trial Court's Findings of Fact

As the majority notes, the trial court's relevant findings of fact in its order denying defendant's motion to suppress were limited to the following statement: "[Defendant] remained stopped [at the green light] for some 30 seconds without any reasonable appearance of explanation for doing so, and the officer observed that the victim [sic] was impeding traffic, if nothing else."[2] It is well established that the appellate courts of this State are bound by a trial court's findings of fact on appeal if supported by competent evidence, and our determination is limited to "whether the trial court's findings of fact support its conclusions of law." *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999) (citing *Watkins*, 337 N.C. at 438, 446 S.E.2d at 68), *cert. denied*, 530 U.S. 1245 (2000). Appellate courts are simply not in a position to make findings of fact on the basis of a cold reading of the transcript and trial record.

To the extent the majority reaches beyond the trial court's findings of fact and relies substantially upon the testimony of Officer Maltby to buttress the trial court's conclusion of law, this action constitutes a usurpation of the trial court's preeminence as finder of fact

2. It is apropos, perhaps, that even the trial court referred to defendant as "the victim" when describing the unconstitutional seizure of defendant in making its findings of fact.

and is contrary to this Court's settled precedent set forth in *Cheek*.[3] This overreach is especially troublesome considering that the testimony quoted in the majority opinion was provided by Officer Maltby in response to a *leading question* from the prosecutor. In fact, the only *unprompted* reasoning given by Officer Maltby for stopping defendant's vehicle was that defendant was "impeding flow of traffic," which Officer Maltby mistakenly believed to be a traffic violation, and that defendant's thirty second delay would typically mean "that the Defendant was paying particular attention to the rear view mirror and noticing me and not the actual traffic light," which is an *innocent* explanation for the officer's observations.[4]

B. A Perpetuated Mistake of Law: "Impeding Traffic"

The State has conceded on appeal that the North Carolina motor vehicle safety regulations, codified in Chapter 20 of the North Carolina General Statutes, do not prohibit "impeding traffic." To the contrary, the statutory provision regulating motor vehicle movement at traffic signals provides: "When the traffic signal is emitting a steady green light, vehicles *may* proceed with due care through the intersection subject to the rights of pedestrians and other vehicles as may otherwise be provided by law." N.C.G.S. § 20-158(b)(2a) (2007) (emphasis added).

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3. Apart from relying upon Officer Maltby's testimony that defendant's thirty second delay might have been consistent with impairment, the majority also asserts in its statement of the facts: "*Around 12:15 a.m.* on 2 December 2004, Officer Brett Maltby was on patrol in a *high crime area* of downtown Asheville where a number of bars are located." (Emphasis added.) However, neither the time at which the traffic stop occurred nor the characterization of the area in which it occurred as a "high crime area" comprised any part of the trial court's findings of fact. The majority has simply assumed the role of a trial court in order to "establish" these facts and cast defendant's thirty second delay in a more inculpatory light. Nevertheless, the majority is still left with only one factor to support its holding that the traffic stop was constitutional: defendant's thirty second delay.

4. The majority never contends, as indeed it cannot, that Officer Maltby *subjectively* believed defendant was driving while impaired at any time before he stopped defendant's vehicle. As reflected in his testimony under cross-examination, Officer Maltby never sounded his horn to alert defendant of the traffic signal turning green because he "wanted to further [his] investigation and watch [defendant] in his—in his driving demeanor at that point." However, under direct examination, Officer Maltby testified that he stopped defendant's vehicle "as he was turning." Thus, at no point does it appear that Officer Maltby actually attempted to observe defendant's driving demeanor for further signs of defendant's impairment, which clearly indicates that impairment played no part in Officer Maltby's on-the-spot decision to stop defendant's vehicle.

It is readily apparent that Officer Maltby's decision to stop defendant's vehicle was made under the misapprehension that "impeding traffic" constitutes a violation of North Carolina's motor vehicle safety regulations. This conclusion follows from the officer's response on cross-examination regarding whether defendant's left turn into the intersection of Coxe Avenue and Hilliard Avenue constituted a "legal turn": "The stop at a green light was impeding flow of traffic, yes, ma'am."

The characterization of "impeding traffic" as a punishable offense also occurred during the hearing on defendant's motion to suppress when the prosecutor, who evidently lacked a clear understanding of the law, argued:

> [PROSECUTOR:] *There's a crime of impeding traffic.* [Defendant] did impede traffic, the officer's vehicle, was impeding traffic. The officer had a right to stop him, *had probable cause* to believe he's—that he was impeding traffic. I would ask Your Honor to deny the Defendant's motion in that regard.

(Emphasis added.) Finally, the trial court perpetuated this mistake of law in its order denying defendant's motion to suppress the evidence resulting from the traffic stop. The court's finding of fact was that defendant "remained stopped [at the green light] for some 30 seconds without any reasonable appearance of explanation for doing so, *and the officer observed that the [defendant] was impeding traffic, if nothing else.*" (Emphasis added.) Based solely upon this finding of fact, the court made its conclusion of law "that from the totality of the circumstances that a reasonable articulable suspicion of wrongdoing on the part of the Defendant existed to warrant Officer Maltby's stop of the Defendant's vehicle in view of its prolonged existence at this intersection without any reason for doing so."

The majority would have us believe that this mistake of law is wholly "irrelevant," citing *Whren*, 517 U.S. at 811-13, and *State v. McClendon*, 350 N.C. 630, 634-35, 517 S.E.2d 128, 131-32 (1999), for the proposition that courts are generally more concerned with the "objective facts" of a case than with an officer's "subjective motivation." While it is true that "[i]n 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 the stop was constitutional, *see Ivey*, 360 N.C. at 564, 633 S.E.2d at 460-61 (citing *McClendon*, 350 N.C. at 635, 517 S.E.2d at 132), neither of the two decisions relied upon by the majority for this assertion involved a mistake of law.

Indeed, since *Whren* was decided, federal circuit courts have widely held that a law enforcement officer's mistake of law concerning whether a traffic violation has occurred—as opposed to a mistake of fact—will generally render a stop unconstitutional. *See, e.g.*, *United States v. Chanthasouxat*, 342 F.3d 1271, 1276-79 (11th Cir. 2003) (holding unconstitutional a traffic stop that was based upon the defendant's failure to have a rearview mirror affixed to the inside of his vehicle, which was not a requirement under city ordinance or Alabama law); *United States v. Lopez-Soto*, 205 F.3d 1101, 1105-06 (9th Cir. 2000) (holding unconstitutional a traffic stop that was based upon the defendant's failure to affix a registration sticker so that it was visible from the rear of his vehicle, which "simply was not a violation of Baja California law"); *United States v. Lopez-Valdez*, 178 F.3d 282, 289 (5th Cir. 1999) (holding a traffic stop unconstitutional because "no well-trained Texas police officer could reasonably believe that white light appearing with red light through a cracked red taillight lens constituted a violation of traffic law"); *United States v. Miller*, 146 F.3d 274, 276, 279 (5th Cir. 1998) (holding unconstitutional a traffic stop that was based upon the defendant's flashing his vehicle's turn signal without turning or changing lanes, which did not violate the Texas Transportation Code); *see also Ivey*, 360 N.C. at 566, 633 S.E.2d at 462 ("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 [the officer] had probable cause to believe any traffic violation occurred."). However, at least one federal circuit court has held that the constitutionality of the traffic stop might be based upon whether the defendant's actions gave rise to a reasonable, articulable suspicion that criminal activity was afoot, notwithstanding the officer's mistake of law. *See United States v. Delfin-Colina*, 464 F.3d 392, 400-01 (3d Cir. 2006) (citing generally *Whren*, 517 U.S. 806). *But see Lopez-Valdez*, 178 F.3d at 289 ("But if officers are allowed to stop vehicles based upon their subjective belief that traffic laws have been violated even where no such violation has, in fact, occurred, the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive.").

C. Defendant's Thirty Second Delay at the Traffic Signal

Even if this Court were to apply the reasonable, articulable suspicion standard despite the mistake of law committed by Officer Maltby and perpetuated by the prosecutor and the trial court, defendant's thirty second delay at the traffic signal after the light changed to

green, *standing alone*, is woefully inadequate to support a conclusion that the stop of defendant's vehicle was constitutional. The majority's application of the totality of the circumstances test underscores this stark reality: defendant's thirty second delay *is* "the totality of the circumstances—the whole picture" in the instant case. *See Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (quoting *Cortez*, 449 U.S. at 417 (internal quotation marks omitted)). The thirty second delay is the *sole factor* relied upon by the majority in its holding that defendant's conduct could have given rise to a reasonable, articulable suspicion that he was operating his vehicle under the influence of an impairing substance in violation of N.C.G.S. § 20-138.1(a).[5]

It is unprecedented for a court to hold, as the majority does, that a single act or omission that does not constitute a punishable offense and is therefore, by definition, subject to a myriad of innocent explanations, can nevertheless give rise to a reasonable, articulable suspicion that criminal activity is afoot. The Fourth Amendment demands something more. When *Terry* was decided in 1968, the Supreme Court of the United States established a basic pattern of analysis to be employed when courts apply the reasonable, articulable suspicion standard: Even though the factors presented in a case, when analyzed separately, might lend themselves to an innocent explanation, the determination which must be made is whether, *when taken together*, these otherwise innocent factors raise a reasonable, articulable suspicion of criminal activity. As stated in *Terry*:

> It was this legitimate investigative function Officer McFadden was discharging when he decided to approach petitioner and his companions. He had observed Terry, Chilton, and Katz go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation. There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the

5. Apart from the lack of precedent to support such a holding, there are two additional problems with the majority's reliance upon the *particular* suspicion that defendant was "driving while impaired," as have been noted above: First, there is no indication from the record that a suspicion of "driving while impaired" had anything to do with Officer Maltby's actual reasons for stopping defendant's vehicle. Second, the trial court made no finding of fact that defendant's conduct would have indicated he was impaired, but merely found that "defendant remained stopped for some 30 seconds without any reasonable appearance of explanation for doing so." Thus, the majority has usurped the trial court's role as finder of fact in order to establish the connection between a thirty second delay at an intersection and impaired driving.

> street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away.

392 U.S. at 22-23. The same basic pattern of analysis was repeated by our nation's highest court more recently. *See Arvizu*, 534 U.S. at 277-78 ("Undoubtedly, each of these factors alone is susceptible of innocent explanation, and some factors are more probative than others. Taken together, we believe they sufficed to form a particularized and objective basis for [the officer's] stopping the vehicle, making the stop reasonable within the meaning of the Fourth Amendment."); *Sokolow*, 490 U.S. at 9 ("Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion." (citations omitted)).

By departing from this basic, well-established pattern of analysis, the majority has drastically lowered the bar for the degree of suspicion required when applying the reasonable, articulable suspicion standard. The majority begins with a single innocent factor and concludes that it gives rise to a reasonable, articulable suspicion of criminal activity. However, at no point does the majority attempt to combine this factor with others to reach the requisite degree of suspicion. The reason is *there were no additional factors to consider*.

As a consequence of the majority's holding, one factor "susceptible of innocent explanation," *see Arvizu*, 534 U.S. at 277, can raise a sufficient level of suspicion for an investigatory traffic stop to pass constitutional muster, so long as that factor is also susceptible of a *less*-than-innocent explanation. Single instances of conduct which the people of the Old North State have always considered well within the boundaries set by our criminal statutes will now subject all North Carolinians, innocent and guilty alike, to limitless searches or seizures by law enforcement personnel without the protection of any meaningful judicial oversight.

Even more disturbing is the utter lack of evidence in the record, much less contained in the trial court's findings of fact, that defendant's thirty second delay is *even rationally related* to a suspicion that he was operating his vehicle under the influence of an impairing substance. The lone exception is Officer Maltby's testimony, provided at the prosecutor's prompting, that this conduct might be consistent with impairment. The majority must be operating under the assumption that this rational relationship is patently obvious, as the majority provides no rationale to support its conclusion that a thirty second delay could even indicate the *possibility* of a defendant's impairment, apart from quoting the testimony of Officer Maltby, who it seems certain had not considered this possibility at the time he stopped defendant's vehicle.

In its brief and at oral argument, the State sought to have this Court consider the National Highway Traffic Safety Administration guide to the visual detection of motorists who are driving while under the influence of an impairing substance. Although this source was included in the appendix to the State's brief before this Court, it was not made a part of the record at trial and ought not to play a role in this Court's appellate review. Nonetheless, that portion of the copied text which was underlined by the State in its appendix is entirely unpersuasive: "A driver whose vigilance has been impaired by alcohol also might respond *more slowly than normal* to a change in a traffic signal." (Emphasis added). Again, the State has established no rational relationship between impaired driving and such a *lengthy* delay of thirty seconds.[6]

The State also contends that the greater weight of authority from other states with regard to delayed reactions to traffic signals turning green tends to support the Court of Appeals' majority opinion in the instant case and to undermine that court's earlier decision in *State v. Roberson*. *See* 163 N.C. App. 129, 134-35, 592 S.E.2d 733, 736-37, *disc. rev. denied*, 358 N.C. 240, 594 S.E.2d 199 (2004) (holding that the defendant's eight-to-ten second delay did not give rise to reasonable, articulable suspicion). One case cited by the State, *State v. Liberda*, 2002 Minn. App. LEXIS 1216 (Minn. Ct. App. Oct. 22, 2002), is an *unpublished* decision of the Minnesota Court of Appeals and should

6. Likewise, the facts of the instant case are not probative of this connection between a thirty second delay and impaired driving, since upon stopping defendant's vehicle, Officer Maltby almost immediately ascertained that defendant was not, in fact, impaired. Thus, there was by necessity some other explanation for defendant's conduct *besides* impairment.

not be considered persuasive authority, as it serves no precedential value for Minnesota courts. *See* Minn. Stat. Ann. § 480A.08 subdiv. 3(c) (West 2002). Another case cited by the State, and also relied upon by the majority of the Court of Appeals, is inapplicable in this case because the holding was based upon the violation of a *perceived* motor vehicle safety regulation, meaning a probable cause standard should be applied. *See People v. Kelly*, 344 Ill. App. 3d 1058, 802 N.E.2d 850 (2003). In fact, the majority of cases from other states tend to undermine the State's contention that a delayed reaction to a traffic signal turning green, without more, can give rise to reasonable, articulable suspicion. *See, e.g.*, *State v. Emory*, 119 Idaho 661, 664, 809 P.2d 522, 523, 525 (Ct. App. 1991) (holding that a five-to-six second delay at a green traffic light, coupled with defendant's proceeding to drive straight but very close to a long line of parked cars on a narrow street, failed to give rise to reasonable suspicion and "could just as easily be explained as conduct falling within the broad range of what can be described as normal driving behavior"); *People v. Dionesotes*, 235 Ill. App. 3d 967, 968-70, 603 N.E.2d 118, 119-20 (1992) (holding that a ninety second stop in the middle of the road for no apparent reason did not give rise to reasonable suspicion); *Minnetonka v. Shepherd*, 420 N.W.2d 887, 891 n.2 (Minn. 1988) (commenting that being stopped in the middle of a residential street for no apparent reason was "arguably not enough by itself to justify the stop" of the subject vehicle); *State v. Hjelmstad*, 535 N.W.2d 663, 666 (Minn. Ct. App. 1995) (noting that a four second delay, "without more, does not demonstrate erratic driving"); *State v. Cryan*, 320 N.J. Super. 325, 331-32, 727 A.2d 93, 96 (App. Div. 1999) (holding that a five second delay at a green traffic light, followed by an unusually slow left turn, would not have supported a finding of reasonable suspicion). *But see, e.g.*, *State v. Puls*, 13 Neb. App. 230, 235, 690 N.W.2d 423, 428 (2004) (holding that a three-to-seven second delay at a green traffic light, by itself, "could promote a reasonable suspicion that [the defendant] was operating her [vehicle] under the influence of alcohol or drugs").

Defendant's thirty second delay was entirely consistent with any number of innocent explanations, such as changing a radio station, consulting a map for directions, indecision as to which direction one wishes to travel, placing or receiving a call on a cellular phone, or even, *as Officer Maltby himself testified*, a natural nervous reaction to observing an approaching law enforcement vehicle in the rearview mirror. In fact, a delay of thirty seconds is arguably *more* consistent with any of these innocent explanations than a delayed reaction of

only a few seconds, which itself could be indicative of the slowed reaction time one might expect to result from impairment.

Although "[a] determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct," *see Arvizu*, 534 U.S. at 277 (citation omitted), a determination that reasonable, articulable suspicion does *not* exist must be made by an appellate court when faced with a single, isolated factor that is susceptible to innocent explanation. To hold otherwise would be to permit law enforcement officers to act upon a mere "inchoate and unparticularized suspicion or 'hunch' " and would expose law-abiding citizens to searches or seizures at the slightest whiff of suspicion. *See Terry*, 392 U.S. at 27.

CONCLUSION

Justice Thurgood Marshall gave us a stark reminder in his dissenting opinion in *Sokolow*: "Because the strongest advocates of Fourth Amendment rights are frequently criminals, it is easy to forget that our interpretations of such rights apply to the innocent and the guilty alike." 490 U.S. at 11 (Marshall & Brennan, JJ., dissenting) (citation omitted); *see also Brignoni-Ponce*, 422 U.S. at 889 (Douglas, J., concurring) ("In criminal cases we see those for whom the initial intrusion led to the discovery of some wrongdoing. But the nature of the test permits the police to interfere as well with a multitude of law-abiding citizens, whose only transgression may be a nonconformist appearance or attitude.").

Lest the American people, and the people of North Carolina in particular, forget the foundational importance of the Fourth Amendment right to be secure against unreasonable searches and seizures, we should recall that the cherished liberties enjoyed in our brief historical moment have been inherited by this generation only because they have been nurtured and protected by earlier generations of Americans so driven in their pursuit of liberty that life itself was not too great a cost to purchase liberty for themselves and their posterity. If the Framers of the first ten amendments of the Federal Constitution thought it worthy to enshrine this liberty into the Bill of Rights, conscious as they were of the abuses they endured under British colonial rule, this Court should not be so quick to make a short sighted and imprudent decision to render it obsolete.

The Supreme Court of North Carolina now stands alone among the nation's courts of last resort in holding that a single factor susceptible of *innocent* explanation can give rise to a reasonable,

articulable suspicion that *criminal* activity is afoot. I would hold instead that the stop of defendant's vehicle was unconstitutional and would reverse the decision of the Court of Appeals and remand to that court for consideration of those issues not addressed in its initial opinion. For the multitude of reasons set forth above, I respectfully dissent.

HUDSON, Justice dissenting.

The officer here stopped defendant for "impeding traffic," because defendant delayed for thirty seconds after a traffic light had turned green before making a legal turn. These were the only reasons articulated for stopping defendant's vehicle, and I do not agree that these reasons, without more, provide a reasonable basis for the stop. Therefore, I respectfully dissent.

Before trial, defendant moved to suppress evidence seized from his vehicle and from his person when he was stopped in the early morning hours of 2 December 2004 and to suppress any in-custody statements in connection with the incident. Defendant contended that "he was illegally seized and detained by Officer Maltby . . . without reasonable and articulable suspicion of criminal wrongdoing or probable cause for his arrest." Therefore, he argued, the physical evidence and statements he made were all fruits of his illegal search and seizure. The trial court found as fact that defendant "remained stopped for some 30 seconds without any reasonable appearance of explanation for doing so, and the officer observed that the victim [sic] was impeding traffic, if nothing else." Based solely thereon, the court denied defendant's motion. Although Officer Maltby testified that in his opinion, based on his training and experience, the delay "definitely would be an indicator of impairment," the trial court did not find this to be a reason for the stop.

It is well established that an officer may make a brief, investigatory stop of a vehicle if there are "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 906 (1968); *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). "[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909

(citation omitted). On review, we must evaluate the totality of the circumstances to determine whether the officer possessed the reasonable, articulable suspicion needed to justify the stop. *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981); *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70.

The State argues that there are no controlling authorities and that defendant cites no cases dealing with a thirty second delayed reaction to a green light. After also noting that this Court is not bound by the decision in *State v. Roberson*, 163 N.C. App. 129, 592 S.E.2d 733, *disc. rev. denied*, 358 N.C. 240, 594 S.E.2d 199 (2004), in which an eight to ten second delay was held not to justify a stop, the State also distinguishes *Roberson* on the basis that a thirty second delay cannot be explained as reasonable. However, in conducting its reasonable suspicion analysis, this Court does not review the thirty second delay in isolation, but rather, views the delay as part of the totality of the circumstances.

Here, in addition to the basis noted by the trial court, the circumstances included that the officer had followed defendant and observed no problems with his driving and that after the delay at the stoplight, defendant made a legal turn. Further, defendant contends that the sheer presence of a police cruiser immediately behind a vehicle can distract even law abiding citizens and that the officer's own testimony supports this reasonable, innocent explanation for the delay at the stoplight. The officer testified that the delay could have been due to the fact that "Defendant was paying particular attention to the rear view mirror and noticing [the officer] and not the actual traffic light."

It appears that the officer and the trial court here mistakenly believed that impeding the flow of traffic was a violation of the law which justified the stop and that the trial court rested its denial of defendant's motion to suppress solely on this mistaken belief and the thirty second delay. Because impeding the flow of traffic is not a violation of law and because the thirty second delay is easily explained as innocent, I do not agree that under the totality of these circumstances, the officer here had reasonable suspicion to stop defendant's vehicle. Thus, I respectfully dissent.

Justice TIMMONS-GOODSON joins in this dissenting opinion.

CAROLINA BUILDING SERVICES' WINDOWS & DOORS, INC. v. BOARDWALK, LLC; MILLER BUILDING CORPORATION; DEBORAH C. LEE; SHANNON W. MYERS; JOHN C. CZERWINSKI AND WIFE, JEANETTE M. CZERWINSKI; MANISH G. PATEL; ALLEN H. VAN DYKE AND WIFE, PERRY G. VAN DYKE; GEORGE CORNELSON AND WIFE, KIMBERLYE F. CORNELSON; AFSHIN GHAZI; AND CHARLES H. HUNTLEY

No. 444PA06

(Filed 11 April 2008)

Liens— subcontractor's—not extinguished by default of general contractor

A default judgment in favor of an owner against a general contractor cannot be used as the basis for extinguishing a subcontractor's lien under N.C.G.S. § 44A-23. In this case, the subcontractor (Carolina Building) presented an affidavit that raised a genuine issue of material fact concerning the property owner's liability to the contractor, and summary judgment should not have been granted for the property owner (Boardwalk) on Carolina Building's lien.

Justice TIMMONS-GOODSON dissenting.

Justice BRADY joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of the unanimous, unpublished decision of the Court of Appeals, 178 N.C. App. 561, 631 S.E.2d 893 (2006), affirming orders entered on 28 March 2005 by Judge Larry Ford in Superior Court, Iredell County. Heard in the Supreme Court 13 September 2007.

Erwin and Eleazer, P.A., by L. Holmes Eleazer, Jr., Fenton T. Erwin, Jr., and Lex M. Erwin, for plaintiff-appellant.

Johnston, Allison & Hord, P.A., by Martin L. White and Greg C. Ahlum, for defendant-appellee Boardwalk, LLC; and Horack, Talley, Pharr & Lowndes, by D. Christopher Osborn, for defendant-appellees individual unit owners.

NEWBY, Justice.

This case presents the question of whether a default judgment in favor of an owner against a general contractor can form the basis for extinguishing a subcontractor's lien on property under N.C.G.S. § 44A-23. We hold a default judgment cannot be used for this purpose.

Before September 2001, Boardwalk, LLC ("Boardwalk") entered into a contract with Miller Building Corporation ("Miller") whereby Miller agreed to serve as the general contractor for Boardwalk's condominium project. In February 2002, well before completion of the project, Miller removed its personnel and equipment from the job site. Miller failed to fully pay its subcontractors, including Carolina Building Services' Windows and Doors, Inc. ("Carolina Building").

Carolina Building gave notice of a lien on funds to Boardwalk on 22 February 2002 and filed a subrogation lien on Boardwalk's property on 25 February 2002. On 24 April 2002, Carolina Building filed suit against Boardwalk and Miller asserting claims based on the liens, breach of contract against Miller, and quantum meruit. There is no dispute that Carolina Building furnished nearly $189,704.41 worth of materials to Miller, which were used on Boardwalk's property and for which Miller failed to pay. Miller never answered or appeared, and Carolina Building obtained an entry of default against Miller on 28 June 2002 and a default judgment on 10 December 2002.

Over two years later on 24 June 2004, Boardwalk filed a crossclaim against Miller alleging negligence and breach of contract. Again, Miller did not answer or appear. Boardwalk obtained an entry of default against Miller on 26 January 2005. Boardwalk then sought a default judgment in the amount of $185,420.38 against Miller. Carolina Building objected to the entry of that judgment. Boardwalk's motion for default judgment against Miller was consolidated with Boardwalk's and Carolina Building's cross-motions for summary judgment, and the matter was heard on 28 February and 1 March 2005.

Boardwalk presented affidavits asserting it incurred excess costs to complete the project thereby preventing Carolina Building from any monetary recovery against Boardwalk under the lien statutes. In opposition, Carolina Building presented an affidavit asserting Boardwalk completed the project for less than its contract price with Miller. The trial court concluded Carolina Building lacked standing to contest a default judgment in an action between Boardwalk and Miller and entered a default judgment against Miller on Boardwalk's crossclaim in the amount of $172,265.63, the difference asserted in Boardwalk's affidavits between the contract price and the cost to complete the project. Next, despite the competing affidavits presented by Boardwalk and Carolina Building, the trial court granted summary judgment for Boardwalk as to Carolina Building's claims, relying solely on the default judgment against Miller.

The Court of Appeals found the trial court did not err in holding Carolina Building lacked standing to object to Boardwalk's motion for default judgment against Miller. *Carolina Bldg. Servs.' Windows & Doors, Inc. v. Boardwalk, LLC*, 178 N.C. App. 561, 631 S.E.2d 893, 2006 WL 1984639, at *2-3 (July 18, 2006) (No. COA05-1030) (unpublished). As to Carolina Building's lien on funds, the Court of Appeals held summary judgment for Boardwalk was appropriate because both parties agreed that Boardwalk did not owe Miller any sum of money on 22 February 2002 (the date Boardwalk received notice of the lien on funds) and Boardwalk paid no funds to Miller after receiving Carolina Building's notice. *Id.*, at *6. Finally, the Court of Appeals held that the trial court did not err in granting summary judgment in favor of Boardwalk as to Carolina Building's lien on real property because the lien was subrogated to Miller's rights and that the default judgment in favor of Boardwalk against Miller meant that Miller had no right to a lien against Boardwalk's real property. *Id.*, at *7. On 25 January 2007, we allowed Carolina Building's petition for discretionary review as to the last issue addressed by the Court of Appeals: whether a default judgment for an owner against a general contractor who does not appear may be the basis for extinguishing a subcontractor's lien on the owner's real property. *Carolina Bldg. Servs.' Windows & Doors, Inc. v. Boardwalk, LLC*, 361 N.C. 218, 642 S.E.2d 245 (2007).

We decide this issue by examining the statutory scheme provided by the General Assembly in Chapter 44A. Recently, this Court dealt with a question concerning a lien on funds under N.C.G.S. §§ 44A-18 and 44A-20 and stated:

> 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. 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."

O & M Indus. v. Smith Eng'g Co., 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006) (citations omitted). Likewise, N.C.G.S. § 44A-23 is a remedial statute that must be construed broadly.

When certain notice and perfection requirements are met, a first tier subcontractor is subrogated to the claim of lien on real property of the contractor. N.C.G.S. § 44A-23(a) (1999). This is "a separate right of subrogation to the lien of the contractor who deals with the

owner, distinct from the rights contained in N.C.G.S. § 44A-18," *Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co.*, 328 N.C. 651, 660, 403 S.E.2d 291, 297 (1991), meaning "the subcontractor may assert whatever lien that the contractor who dealt with the owner has against the owner's real property relating to the project," *id.* at 661, 403 S.E.2d at 297 (citing *Powell & Powell v. King Lumber Co.*, 168 N.C. 723, 729, 168 N.C. 632, 638, 84 S.E. 1032, 1035 (1915)).

In pertinent part, N.C.G.S. § 44A-23 states: "Upon the filing of the notice and claim of lien and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent." N.C.G.S. § 44A-23(a). The parties agree that Carolina Building properly filed a notice and claim of lien and properly commenced the action. It is also uncontested that Miller defaulted after Carolina Building commenced its action and that Carolina Building did not provide written consent allowing Miller's actions to prejudice its rights. However, the parties disagree whether Miller's default constituted an "action."

Carolina Building presented an affidavit that raised a genuine issue of material fact concerning Boardwalk's liability to Miller based on a lien against Boardwalk's real property. Rather than consider this affidavit, the trial court focused on the default judgment for Boardwalk against Miller. By its plain meaning, an action is "[a] thing done." *Black's Law Dictionary* 31 (8th ed. 2004). Thus, Miller's choice not to defend Boardwalk's claims constituted an "action" which prejudiced the rights of Carolina Building contrary to the statutory mandate of N.C.G.S. § 44A-23. Carolina Building should have an opportunity to present its evidence concerning the merits of recovery under its lien on real property.

The decision of the Court of Appeals is reversed as to the issue before this Court on discretionary review. The remaining issues addressed by the Court of Appeals are not before this Court, and its decision as to those issues remains undisturbed. This case is remanded to the Court of Appeals for further remand to the trial court for proceedings not inconsistent with this opinion.

REVERSED IN PART AND REMANDED.

Justice TIMMONS-GOODSON, dissenting.

Notwithstanding the default judgment in favor of Boardwalk, the majority declares that the trial court erred in relying upon the

default judgment against Miller in granting summary judgment to Boardwalk, and that Carolina Building may pursue its claim to recovery on its lien on real property owned by Boardwalk. In so holding, the majority *sub silentio* overrules the settled law of default judgments in North Carolina. The majority moreover contravenes the lien law hierarchy created by N.C.G.S. §§ 44A-7 to -23. I therefore respectfully dissent.

I must first note that the majority's decision strays beyond the boundaries set by this Court when it agreed to entertain the case. The majority acknowledges that in allowing discretionary review, we limited the scope of our review to the second issue only, which is "whether a default judgment for an owner against a general contractor who does not appear may be the basis for extinguishing a subcontractor's lien on the owner's real property." We did not grant discretionary review to the first issue, which was that Carolina Building "lacked standing to object to Boardwalk's motion for default judgment against Miller." Thus, under the law of this case, Carolina Building has no standing to argue the merits of any defense Miller may have had to Boardwalk's claim against it. Yet the majority's resolution of the case contradicts itself and expressly allows Carolina Building to argue the merits of Miller's right to a lien against Boardwalk's real property. The majority thereby improperly reverses the opinion of the Court of Appeals not only as to the second issue, but as to the first issue as well.

Under our lien statutes, there are only two methods by which a subcontractor may assert lien rights against the owner's real property: (1) a direct liability lien pursuant to N.C.G.S. §44A-20(d); and (2) a subrogation lien pursuant to N.C.G.S. §44A-23, as we have here. Under N.C.G.S. § 44A-23, a subcontractor seeking a claim of lien on real property must first give notice of claim of lien upon funds pursuant to N.C.G.S. §§ 44A18-19. *See* N.C.G.S. § 44A-23(a). The notice of claim of lien upon funds 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.

O & M Indus. v. Smith Eng'r Co., 360 N.C. 263, 269, 624 S.E.2d 345, 349 (2006). Once notice of claim of lien upon funds is given, the subcontractor, "may, to the extent of this claim, enforce the claim of lien on real property of the contractor." N.C.G.S. § 44A-23(a). A subcontractor's claim of lien on real property is subrogated to the contractor's claim of lien on real property, and the lien is therefore necessarily limited to the amount of money the owner owes the contractor. N.C.G.S. § 44A-23(a); *Electric Supply Co. of Durham v. Swain Electrical Co.*, 328 N.C. 651, 661, 403 S.E.2d 291, 297 (1991). If the general contractor has no right to a lien, the first tier subcontractor likewise has no such right. *See* N.C.G.S. § 44A-23(a); *Watson Elec. Constr. Co. v. Summit Cos.*, 160 N.C. App. 647, 650-51, 587 S.E.2d 87, 91 (2003).

In the present case, it is undisputed that any claim by Carolina Building on Boardwalk's real property is subrogated to Miller's claim. Both parties also agree that after receiving Carolina Building's notice, Boardwalk paid no funds to Miller. Carolina Building's claim on Boardwalk's real property is therefore limited to the amount of money owed by Boardwalk to Miller. The entry of default and default judgment entered against Miller conclusively established that Boardwalk owed no money to Miller and Miller had no claim of lien upon Boardwalk's real property. " 'Once the default is established defendant has no further standing to contest the factual allegations of plaintiff's claim for relief. If he wishes an opportunity to challenge plaintiff's right to recover, his only recourse is to show good cause for setting aside the default . . . and, failing that, to contest the amount of recovery.' " *Bell v. Martin*, 299 N.C. 715, 721, 264 S.E.2d 101, 105 (1980) (citation omitted) (quoting Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2688 (alteration in original) (footnote omitted)). The default judgment entered here has not been set aside. As it is judicially established that Miller has no right to claim of lien on Boardwalk's property, it follows that, as the subcontractor, Carolina Building can have no claim of lien on Boardwalk's property. As such, Boardwalk was entitled to judgment as a matter of law, and the trial court did not err in granting summary judgment in favor of Boardwalk.

The majority does not expressly address the interplay between N.C.G.S. § 44A-23 and the law of default judgments, but determines that Carolina Building is entitled to "an opportunity to present its evi-

dence concerning the merits of recovery under its lien on real property." The majority thereby necessarily concludes that the default judgment entered here has no effect and may be regarded as a nullity in the face of N.C.G.S. § 44A-23(a)'s provision that "no action of the contractor shall be effective to prejudice the rights of the subcontractor." The majority offers no authority in support of its holding beyond a mere definition of the word "action." This holding fundamentally contradicts the settled law of default judgments in this State and ignores the lien law hierarchy created by N.C.G.S. §§ 44A-7 to -23. Notably, the majority makes no attempt to limit its holding to situations involving contractors and subcontractors, which throws into question the continued validity of default judgments in this State. If a validly-entered default judgment may no longer be relied upon by a property owner against a lien claim by a subcontractor, it begs the question to what other statutorily-based, judicially-created exceptions Rule 55 might be vulnerable. Ironically, the basis of Carolina Building's established claim to monies owed it by Miller—a default judgment entered against Miller in the same action—is the very same type of judgment Carolina Building and the majority deem ineffectual in the present case.

The factual scenario of the instant case is an all too common one, which is why the General Assembly established the lien protections of Chapter 44A. In a case between two innocent parties, as we have here, the risk must fall on the party better placed to protect its interest. *Compare O & M Indus. v. Smith Eng'r Co.*, 360 N.C. at 269, 624 S.E.2d at 349 (noting that, with a claim of lien on funds, "[p]rior to notice to the obligor, the subcontractor bears the risk of loss or nonpayment by the general contractor."). Carolina Building could have earlier filed for a lien and thus better protected itself from potential loss. *See, e.g.*, N.C.G.S. § 44A-18(5) (providing that a lien on funds will secure amounts earned by the claimant, even before amounts are due or performance is complete). I fear that the majority's broad holding may have many unanticipated consequences for our State's jurisprudence.

Justice BRADY joins in this dissenting opinion.

SCHENKEL & SHULTZ, INC. F/K/A SCHENKEL & SHULTZ, ARCHITECTS, P.A. v. HERMON F. FOX & ASSOCIATES, P.C.

No. 631A06

(Filed 11 April 2008)

1. Indemnity— express contractual indemnification—primary contract—flow-down provision of subcontract

Summary judgment should not have been granted for defendant engineering firm on plaintiff architectural firm's claim for express contractual indemnification arising from a subcontract for defendant to create the structural steel design for a school because genuine issues of material fact existed as to whether the parties intended in their subcontract to incorporate by reference the term of an express indemnification provision found in plaintiff's primary contract with the school board.

2. Trials— failure to designate an expert—language of scheduling order—summary judgment

The failure of plaintiff to designate an expert under a scheduling order was not dispositive in light of the language in the agreement and the evidence in the case and would not serve as a ground for granting summary judgment for defendant.

3. Appeal and Error— assignments of error—summary judgment

For purposes of an appeal from a trial court's entry of summary judgment for the prevailing party, the appealing party is not required under Rule 10(a) of the Rules of Appellate Procedure to make assignments of error.

Justice HUDSON 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, 180 N.C. App. 257, 636 S.E.2d 835 (2006), affirming an order dated 25 February 2005 entered by Judge Forrest Donald Bridges and reversing an order entered 9 August 2005 by Judge Timothy Kincaid, both in Superior Court, Mecklenburg County. Heard in the Supreme Court 11 April 2007.

Hamilton Martens Ballou & Sipe, LLC, by Herbert W. Hamilton, and Kennedy Covington Lobdell & Hickman, LLP, by Kiran H. Mehta, for plaintiff-appellee.

Hamilton Moon Stephens Steele & Martin, PLLC, by David G. Redding and Adrianne Huffman, for defendant-appellant.

TIMMONS-GOODSON, Justice.

We must determine in the present case whether the parties intended in their subcontract to incorporate by reference the terms of an express indemnification provision found in the primary contract. Because we conclude there exist genuine issues of material fact regarding the parties' intent to indemnify, summary judgment was inappropriate. We therefore affirm the decision of the Court of Appeals.

I. Background

On 24 November 1998, the Charlotte-Mecklenburg Board of Education (Board) contracted with the architectural firm of Schenkel & Shultz, Inc. (Schenkel) to design a vocational technical high school in Mecklenburg County. The "Standard Form of Agreement Between Owner and Designer" (Prime Agreement) signed by the Board and Schenkel provided that Schenkel would retain outside consultants or engineers to perform those aspects of the project for which it did not have in-house expertise. The Prime Agreement includes the following indemnification provision:

> 12.4 In the event a claim, suit, or cause of action is made against the Owner [the Board] and/or Owner's representatives for any personal injury, including death, or property damage (other than to the work itself), or other loss or damage resulting solely from any negligent act or omission of the Designer [Schenkel] or out of the Designer's breach of this Agreement, the Designer agrees to defend and hold the Owner, its agents, employees, servants, representatives, successors and assigns harmless and indemnified from and against any loss, costs, damages, expenses, attorneys fees and liability with respect to such claim, suit, or cause of action.

Schenkel in turn hired Hermon F. Fox & Associates, P.C. (Fox), an engineering firm, to create the project's structural steel design. The form contract between Schenkel and Fox was produced by The American Institute of Architects and titled "Standard Form of

Agreement Between Architect and Consultant" (AIA Document C141 6th ed. 1987) (Subprime Agreement). Article 1 of the Subprime Agreement, "Consultant's Responsibilities," Section 1 describes the services to be performed by Fox under the Subprime Agreement. Section 1.1.2 provides that:

> Consultant's [Fox's] services shall be performed according to this Agreement with the Architect [Schenkel] in the same manner and to the same extent that the Architect is bound by the attached Prime Agreement to perform such services for the Owner [the Board]. Except as set forth herein, the Consultant [Fox] shall not have any duties or responsibilities for any other part of the Project.

Construction began in the fall of 2000, but by the spring of 2001, project contractors, subcontractors, and consultants documented in correspondence with Schenkel their concerns regarding the integrity of the structural steel components of the project and requested that an independent assessment of the steel design be performed. The alleged steel design defects delayed the project, resulting in cost overruns. On 2 January 2002, the Board formally notified Schenkel of the design flaw allegations and cost overruns, as well as its potential claim against Schenkel for the cost of steel structure corrective work and associated delay costs. Schenkel then notified Fox of its intention to hold Fox responsible for any claim filed by the Board. Subsequent attempts by the parties to resolve the matter out of court were unsuccessful.

On 1 October 2004, Schenkel filed suit in Mecklenburg County against Fox, asserting claims for negligence, professional malpractice, breach of contract, breach of warranty, and indemnity for alleged errors in the project's structural steel design. Fox made a pretrial motion for judgment on the pleadings, which the trial court converted to a motion for partial summary judgment. The trial court granted the motion by Fox and dismissed with prejudice, on statute of limitations grounds, the claims for negligence, professional malpractice, breach of contract, and breach of warranty brought by Schenkel. The trial court also granted subsequent motions by Fox for summary judgment on Schenkel's indemnification claim and on a counterclaim by Fox against Schenkel for breach of contract. The trial court awarded Fox $37,787.50 on its counterclaim. Schenkel appealed from both the trial court's entry of partial summary judgment and the summary judgments dismissing the indemnification claim and granting Fox's counterclaim for breach of contract.

The North Carolina Court of Appeals heard the case on 22 August 2006. The Court of Appeals affirmed the trial court's entry of partial summary judgment for Fox on Schenkel's claims of negligence, professional malpractice, breach of contract, and breach of warranty. *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., P.C.*, 180 N.C. App. 257, 259, 636 S.E.2d 835, 838 (2006). The Court of Appeals reversed the trial court's order granting summary judgment in favor of Fox on its counterclaim for breach of contract. *Id.* In a divided opinion, a majority of the Court of Appeals also reversed the trial court's order granting summary judgment in favor of Fox on Schenkel's claim for indemnification, concluding that there existed genuine issues of material fact as to whether the contract expressly provided for a right to indemnification. *Id.* The dissenting judge concluded that Fox did not expressly agree to indemnify Schenkel. 180 N.C. App. at 274, 636 S.E.2d at 846 (Tyson, J., dissenting). Alternatively, the dissent concluded that summary judgment was appropriate because Schenkel failed to timely designate an expert pursuant to the trial scheduling order and was therefore precluded from offering expert testimony on the standard of care applicable to Fox's work as structural steel designers, which in turn would prevent Schenkel from establishing the underlying negligence or breach of contract the indemnity provision required. *Id.* at 272, 636 S.E.2d at 845. Fox appealed to this Court on the basis of the dissent.

II. Analysis

In reviewing an appeal based upon a dissent, we consider only those issues that were a point of dispute set out in the dissenting opinion of the Court of Appeals. *See* N.C. R. App. P. 16(b) ("Where the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those questions which are [] specifically set out in the dissenting opinion as the basis for that dissent . . . .").

[1] The central issue in dispute here is whether Fox agreed to indemnify Schenkel in the Subprime Agreement. The Prime Agreement between Schenkel and the Board expressly provides for indemnification against loss arising from negligence or breach of contract. The Subprime Agreement between Fox and Schenkel requires Fox to perform its services "in the same manner and to the same extent that [Schenkel) is bound by the attached Prime Agreement to perform such services for [the Board]." Fox contends this language merely requires it to perform its services in the same manner and to the same

extent as Schenkel must perform its services to the Board, and that the term "services" is defined in the contract as only engineering services. Schenkel responds that the language of the Subprime Agreement is a typical "flow-down" provision in which all the "same rights and obligations of the subcontractor . . . flow from the subcontract up through the general contractor to the owner, and conversely down the same contractual claim." T. Bart Gary, *Incorporation by Reference and Flow-Down Clauses*, 10 Construction Law., Aug. 1990, at 44, 46 [hereinafter Gary]. Schenkel argues that the flow-down provision of the Subprime Agreement incorporates by reference the entire Prime Agreement, including the indemnification provision. We agree that the parties' intent to indemnify is not easily discerned in the present case.

A. Indemnity Provision

An indemnity contract "obligates the indemnitor to reimburse his indemnitee for loss suffered or to save him harmless from liability." *New Amsterdam Cas. Co. v. Waller*, 233 N.C. 536, 538, 64 S.E.2d 826, 828 (1951). Our "primary purpose in construing a contract of indemnity is to ascertain and give effect to the intention of the parties, and the ordinary rules of construction apply." *Dixie Container Corp. of N.C. v. Dale*, 273 N.C. 624, 627, 160 S.E.2d 708, 711 (1968). The court must construe the contract "as a whole" and an indemnity provision "must be appraised in relation to all other provisions." *Id.* A contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law. *See Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 624 (1973). When an agreement is ambiguous and the intention of the parties is unclear, however, interpretation of the contract is for the jury. *Farmers Bank v. Michael T. Brown Distribs., Inc.*, 307 N.C. 342, 347-48, 298 S.E.2d 357, 360 (1983). "An ambiguity exists in a contract when either the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations." *Register v. White*, 358 N.C. 691, 695, 599 S.E.2d 549, 553 (2004). Thus, if there is uncertainty as to what the agreement is between the parties, a contract is ambiguous. *Id.*

The Subprime Agreement at issue here incorporates by reference terms of the Prime Agreement. "To incorporate a separate document by reference is to declare that the former document shall be taken as part of the document in which the declaration is made, as much as if it were set out at length therein." *Booker v. Everhart*, 294 N.C. 146, 152, 240 S.E.2d 360, 363 (1978). Construction industry contracts commonly incorporate terms of the general contract into the subcontract:

> The construction contracting process is characterized by the large volume of documents involved. Incorporating by reference a number of documents into a single document is a typical part of the modern construction contract. Aside from being a matter of convenience, the use of incorporation by reference clauses and flow-down clauses represents efforts to ensure consistency of obligations throughout the various tiers of the contracting process.

Gary at 44; *see generally* 2 Justin Sweet & Jonathan J. Sweet, *Sweet on Construction Industry Contracts: Major AIA Documents* § 17.05[A] at 567 (4th ed. 1999) [hereinafter Sweet]. "The relationship of the prime contract to the subcontract generates contractual attempts for consistency. Obligations can flow down to insure that subcontractors commit themselves to the performance and administrative requirement of the prime contract." Sweet at 567.

We agree with the Court of Appeals that the language of the "flow-down" clause of the Subprime Agreement is ambiguous and that the intention of the parties with regard to indemnification is therefore best left to the trier of fact. *Farmers Bank*, 307 N.C. at 347-48, 298 S.E.2d at 360. Fox asserts that a contractual indemnification provision against negligence must be "unequivocally clear," *see Candid Camera Video World, Inc. v. Mathews*, 76 N.C. App. 634, 636, 334 S.E.2d 94, 96 (1985), *disc. rev. denied*, 315 N.C. 390, 338 S.E.2d 879 (1986), and should also be "strictly construed" against Schenkel, *Hoisington v. ZT-Winston-Salem Assocs.*, 133 N.C. App. 485, 494, 516 S.E.2d 176, 183 (1999), *disc. rev. and cert. improvidently allowed*, 351 N.C. 342, 525 S.E.2d 173 (2000). Thus, contends Fox, if any ambiguity as to indemnity exists in the Subprime Agreement, the court must read such ambiguity in favor of Fox. However, this Court has never held that a standard indemnity provision must be "unequivocally clear." Rather, it is only exculpatory provisions, whereby a party seeks to protect itself from liability arising from its *own* negligence, *Gibbs v. CP&L Co.*, 265 N.C. 459, 467, 144 S.E.2d 393, 400 (1965), that this Court has strictly construed:

> Contracts which seek to exculpate one of the parties from liability for his own negligence are not favored by the law. Hence it is a universal rule that such exculpatory clause is strictly construed against the party asserting it. It will never be so construed as to exempt the indemnitee from liability for his own negligence or the negligence of his employees in the absence of explicit language clearly indicating that such was the intent of the parties.

Hill v. Carolina Freight Carriers Corp., 235 N.C. 705, 710, 71 S.E.2d 133, 137 (1952) (citations omitted). "There is a distinction between contracts whereby one seeks to wholly exempt himself from liability for the consequences of his negligent acts, and contracts of indemnity against liability imposed for the consequences of his negligent acts. The contract . . . of the latter class . . . is more favored in law." *Gibbs*, 265 N.C. at 467, 144 S.E.2d at 400. A standard contract of indemnity, in contrast to an exculpatory provision, "will be construed to cover all losses, damages, and liabilities which reasonably appear to have been within the contemplation of the parties." *Dixie Container Corp.*, 273 N.C. at 627, 160 S.E.2d at 711.

Fox concedes that the Prime Agreement expressly provides for indemnification. Thus, an express agreement to indemnify is present. The ambiguity here arises from the intended scope of the reference in the Subprime Agreement to the Prime Agreement. Whether or not the parties intended to incorporate the express indemnification provision of the Prime Agreement by use of the flow-down provision of the Subprime Agreement is the question here, and one which we conclude to be susceptible to differing yet reasonable interpretations. *See Farmers Bank*, 307 N.C. at 347-48, 298 S.E.2d at 360; *see also Gore v. George J. Ball, Inc.*, 279 N.C. 192, 201, 182 S.E.2d 389, 394 (1971) ("[I]t is for the jury to determine whether a particular agreement was or was not part of the contract actually made by the parties."). The party moving for summary judgment is entitled to such judgment only if he can show that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56 (2007); *e.g.*, *Hagler v. Hagler*, 319 N.C. 287, 289, 354 S.E.2d 228, 231 (1987). Based on the contract language, we cannot say as a matter of law that Fox had no duty to indemnify Schenkel for liability arising from Fox's steel structure design or breach of contract. Because we conclude that the language of the Subprime Agreement is susceptible to differing yet reasonable interpretations, the one broad, the other narrow, the contract is ambiguous and summary judgment was inappropriate. In order to resolve this ambiguity, the case must be remanded to the superior court for further proceedings. The Court of Appeals therefore did not err in reversing summary judgment on the indemnification claim.

B. Expert Testimony

[2] Fox argues that, even assuming a right to indemnification by incorporation exists, the indemnification provision gives rise to an

indemnity obligation only when damages result from a "negligent act or omission of [Fox] or out of [Fox's] breach of this Agreement." Fox argues that Schenkel cannot establish the standard of care needed to substantiate a negligent act or a breach of contract absent expert testimony, and thus Schenkel's failure to timely designate an expert to support its claim for indemnity is fatal as a matter of law.

The record indicates that the scheduling order set by the trial court required Schenkel to timely designate its experts, and that failure to comply with the deadlines would result in exclusion of such expert witnesses "absent a showing of excusable neglect for the noncompliance." Schenkel's complaint alleges it is entitled to indemnification by Fox "[t]o the extent that any defects and/or problems associated with the structural steel and/or its design cause[d] damage or economic loss to [Schenkel]." We agree that Schenkel will need to present evidence to establish such "defects and/or problems" (i.e., a breach of care) in the design, as well as a causal connection between Fox's design and the damages incurred. However, we do not agree that Schenkel's failure to timely designate an expert under the scheduling order is fatal to its claim at this juncture. The question of whether Schenkel must designate an expert apart from the fact witnesses in this case and when that designation is required is a matter for the trial court. The record contains numerous letters from project contractors, subcontractors, and consultants expressing their concerns over the inadequacies of Fox's original steel design, as well as evidence that Fox "re-designed" the steel structure in response to such concerns. Whether Schenkel is allowed to establish a breach and causation by using the letters and Fox's actions in response, or by other evidence it may possess, is a matter for consideration by the trial court. By failing to designate an expert witness in a timely fashion, Schenkel may have waived its right to call an expert witness, but in light of the language of the scheduling order permitting noncompliance where excusable neglect is shown and the evidence in the record, the failure to designate an expert is not dispositive of the motion for summary judgment in this case. The issue raised by Fox regarding designation of an expert witness under the scheduling order would therefore not serve as a ground for granting summary judgment to Fox. Accordingly, the Court of Appeals did not err in reversing the trial court's order granting Fox summary judgment.

[3] Finally, Fox argues that Schenkel's failure to assign error to or challenge the summary judgment order with regard to the issue of expert testimony required dismissal of the appeal. We disagree. This

Court has long held, and the law has not been changed, that for purposes of an appeal from a trial court's entry of summary judgment for the prevailing party, the appealing party is not required under Rule 10(a) of the Rules of Appellate Procedure to make assignments of error for the reason that on appeal, review is necessarily limited to whether the trial court's conclusions as to whether there is a genuine issue of material fact and whether the moving party is entitled to judgment, both questions of law, were correct. *Ellis v. Williams*, 319 N.C. 413, 415-17, 355 S.E.2d 479, 481-82 (1987).

III. Conclusion

We hold the Court of Appeals did not err in reversing the entry of summary judgment in favor of Fox on Schenkel's claim of express contractual indemnification. We therefore affirm the Court of Appeals as to that issue. The remaining issues addressed by the Court of Appeals are not before this Court, and its decision as to those matters remains undisturbed.

AFFIRMED.

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

STATE OF NORTH CAROLINA v. IZIAH BARDEN

No. 96A01-2

(Filed 11 April 2008)

1. Discovery— motions made in direct appeal—statutory basis in motion for appropriate relief

Motions for discovery and the production of documents concerning material about the State's jury selection were properly denied where the motions were filed pursuant to N.C.G.S. § 15A-1415(f). That statute by its plain language applied to proceedings surrounding a postconviction motion for appropriate relief, while these issues arose in the context of defendant's direct appeal.

2. Jury— selection—*Batson* hearing—new U.S. Supreme Court cases

In light of U.S. Supreme Court cases not available at the time of jury selection, a first-degree murder prosecution was remanded for another *Batson* hearing to consider the responses of two prospective jurors and give the State the opportunity to offer race-neutral reasons for striking one while seating the other.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from an order entered by Judge Steve A. Balog on 10 April 2003 in Superior Court, Sampson County, requiring that commitment issue in accordance with the judgment imposing a sentence of death entered by Judge Balog on 12 November 1999 in Superior Court, Sampson County, following a hearing on remand ordered by this Court pursuant to *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). Heard in the Supreme Court 14 February 2008.

Roy Cooper, Attorney General, by Robert C. Montgomery, Special Deputy Attorney General, for the State.

Ann B. Petersen for defendant-appellant.

HUDSON, Justice.

This matter is before the Court for the second time regarding alleged racial discrimination in jury selection. On 8 November 1999, a jury convicted defendant of first-degree murder in the Superior Court in Sampson County and on 12 November 1999, defendant was sentenced to death. Following defendant's first appeal under N.C.G.S. § 7A-27(a), this Court remanded the case to the trial court for the limited purpose of holding a hearing pursuant to *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), but found no error otherwise in defendant's trial or sentencing. *State v. Barden*, 356 N.C. 316, 572 S.E.2d 108 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003) [hereinafter *Barden I*].

In *Barden I*, defendant challenged the State's use of peremptory challenges to remove two prospective African-American jurors, Lemuel Baggett and Brenda Corbett. This Court noted that the first prong of the *Batson* test was at issue: Whether defendant made a prima facie showing that the challenges were based on race. We held that the trial court erred in concluding that defendant failed to present a prima facie showing under *Batson* and ordered that on remand, the trial court "give the State an opportunity for presenting

race-neutral reasons for striking prospective jurors Baggett and Corbett." *Id.* at 345, 572 S.E.2d at 128.

In anticipation of the *Batson* hearing, on 21 March 2003, defendant filed various motions aimed at obtaining information about materials used by the prosecution before and at trial to guide the State's jury selection process. These filings included motions for discovery and production of documents. The trial court denied the motions.

Defendant's *Batson* hearing was held during the 28 March 2003 special criminal session of the Superior Court in Sampson County. On 10 April 2003, Judge Balog entered an order denying defendant's *Batson* claims. Defendant again appealed to this Court, asserting error in the trial court's denial of his 21 March 2003 discovery motions and the trial court's denial of his *Batson* claims.

[1] Defendant assigns as error the denial of his "Motion for Discovery" and "Motion for Production of Documents," seeking to obtain notes, manuals, policies and other documents which could shed light on the State's preparation for and conduct of jury selection. Both motions were filed pursuant to N.C.G.S. § 15A-1415(f). Section 15A-1415 by its plain language applies to proceedings surrounding a "postconviction motion for appropriate relief." Because these discovery issues arise in the context of defendant's direct appeal rather than a post-conviction motion for appropriate relief, the trial court properly denied defendant's motions for discovery.

[2] However, we again remand this case to the Superior Court in Sampson County for the limited purpose of conducting an additional *Batson* hearing. On remand, a judge presiding over a criminal session shall consider the voir dire responses of prospective juror Baggett and those of Teresa Birch, a white woman seated on defendant's jury, in light of *Snyder v. Louisiana*, 552 U.S. ——, 128 S. Ct. 1203, —— L. Ed. 2d —— (2008), *Rice v. Collins*, 546 U.S. 333, 163 L. Ed. 2d 824 (2006), and *Miller-El v. Dretke*, 545 U.S. 231, 162 L. Ed. 2d 196 (2005), cases decided after defendant's prior *Batson* hearing. The State shall have an opportunity to offer race-neutral reasons for striking juror Baggett while seating juror Birch. The court should determine whether these explanations are race-neutral under the framework set forth in these United States Supreme Court decisions, which were not available to it at the time of the 2003 hearing. If the court upholds the strikes after this new hearing under *Batson* in light of *Snyder*, *Rice*, and *Miller-El*, the defendant's sen-

tence will stand. If not, he is entitled to a new trial. The trial court's order is subject to appellate review.

Accordingly, we remand to the Superior Court in Sampson County for another hearing on the *Batson* issue in light of *Snyder*, *Rice*, and *Miller-El*, with regard to prospective jurors Lemuel Baggett and Teresa Birch. The trial court is directed to hold this hearing, make findings of fact and conclusions of law, and certify its opinion to this Court within 120 days of the filing date of this opinion.

REMANDED.

DAVID J. WARD, EMPLOYEE v. FLOORS PERFECT, EMPLOYER, PENN NATIONAL INSURANCE, CARRIER

No. 339A07

(Filed 11 April 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 183 N.C. App. 541, 645 S.E.2d 109 (2007), affirming in part, reversing in part, and remanding an opinion and award filed on 28 October 2005 by the North Carolina Industrial Commission. Heard in the Supreme Court 17 March 2008.

Lennon & Camak, PLLC, by George W. Lennon, S. Neal Camak, and Michael W. Bertics, for plaintiff-appellant.

Young Moore and Henderson P.A., by Zachary C. Bolen, for defendant-appellees.

PER CURIAM.

Conclusions of Law 1 and 2 contained in the Industrial Commission's 28 October 2005 opinion and award are supported by competent evidence but are inconsistent, and the Court of Appeals inappropriately attempted to resolve the inconsistency in its decision. The Industrial Commission is best suited to resolve this discrepancy. *See Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 574-75, 336 S.E.2d 47, 52 (1985). Thus, we reverse the decision of the Court of Appeals and remand to that court with instructions to further remand this matter to the Industrial Commission for entry of a new opinion

and award determining whether plaintiff has undergone a change of condition affecting wage earning capacity pursuant to N.C.G.S. § 97-47.

REVERSED AND REMANDED.

MARVEN L. POINDEXTER, INC. v. BOARDWALK, LLC; MILLER BUILDING CORPORATION; DEBORAH C. LEE; SHANNON W. MYERS; JOHN C. CZERWINSKI AND WIFE, JEANETTE M. CZERWINSKI; MANISH G. PATEL; ALLEN H. VAN DYKE AND WIFE, PERRY G. VAN DYKE; GEORGE CORNELSON AND WIFE, KIMBERLYE F. CORNELSON; AFSHIN GHAZI; AND CHARLES H. HUNTLEY

No. 443PA06

(Filed 11 April 2008)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 178 N.C. App. 562, 631 S.E.2d 893 (2006), affirming an order entered on 14 April 2005 by Judge Larry Ford in Superior Court, Iredell County. Heard in the Supreme Court 13 September 2007.

Erwin and Eleazer, P.A., by L. Holmes Eleazer, Jr., Fenton T. Erwin, Jr., and Lex M. Erwin, for plaintiff-appellant.

Johnston, Allison & Hord, P.A., by Martin L. White and Greg C. Ahlum, for defendant-appellee Boardwalk, LLC, and Horack, Talley, Pharr & Lowndes, by D. Christopher Osborn, for defendant-appellees individual unit owners.

PER CURIAM.

For the reasons stated in *Carolina Building Services' Windows & Doors, Inc. v. Boardwalk, LLC*, 362 N.C. 262, —— S.E.2d —— (2008) (No. 444PA06), the decision of the Court of Appeals is reversed as to the issue before this Court on discretionary review. The remaining issues addressed by the Court of Appeals are not before this Court, and its decision as to those issues remains undisturbed. 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 IN PART AND REMANDED.

PEERLESS INS. CO. v. GENELECT SERVS., INC.

[362 N.C. 282 (2008)]

PEERLESS INSURANCE COMPANY, A/S/O ANTHONY AND DEBRA ADAMS v.
GENELECT SERVICES, INC.

No. 575A07

(Filed 11 April 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 187 N.C. App. 124, 651 S.E.2d 896 (2007), affirming an order granting summary judgment for defendant entered on 10 August 2006 by Judge Ronald K. Payne in Superior Court, Buncombe County. Heard in the Supreme Court 19 March 2008.

Cozen O'Connor, by Albert S. Nalibotsky and Peter F. Asmer, Jr., for plaintiff-appellant.

Van Winkle Law Firm, by Michelle Rippon, for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. BRYAN KEITH HESS

No. 465PA07

(Filed 11 April 2008)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 185 N.C. App. 530, 648 S.E.2d 913 (2007), affirming an order dated 14 July 2006 by Judge Michael E. Beale in Superior Court, Rowan County. Heard in the Supreme Court 19 March 2008.

Roy Cooper, Attorney General, by Christopher W. Brooks, Assistant Attorney General, for the State.

Haakon Thorsen for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

STATE OF NORTH CAROLINA v. ALFONZA DWANTA COLTRANE A/K/A ALFONZA DAWNTA COLTRANE

No. 348A07

(Filed 11 April 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 184 N.C. App. 140, 645 S.E.2d 793 (2007), finding no error in a judgment entered 1 February 2006 by Judge R. Stuart Albright in Superior Court, Randolph County. Heard in the Supreme Court 19 March 2008.

Roy Cooper, Attorney General, by Christopher W. Brooks, Assistant Attorney General, for the State.

Anne Bleyman for defendant-appellant.

PER CURIAM.

We affirm the decision of the Court of Appeals as to the appealable issue of right, that is, whether the evidence that defendant's driver's license was suspended or revoked was sufficient to submit the charge to the jury. The remaining issues addressed by the Court of Appeals are not properly before this Court and its decision as to these issues remains undisturbed.

AFFIRMED.

STATE OF NORTH CAROLINA v. RICHARD LIONEL COOK

No. 341A07

(Filed 12 June 2008)

1. Appeal and Error— appealability—motion to dismiss—scope of dissent

Defendant's motion to dismiss the State's appeal in a second-degree murder case is denied even though defendant contends the State's briefed arguments exceed the scope of the dissent, because: (1) although the case cited by the State is distinguishable from the instant case, it involved the issues of unfair surprise and the trial court's denial of defendant's motion to exclude evidence when the State unexpectedly advised on the day of trial that it would present an expert on retrograde extrapolation; and (2) the State's arguments fall within the scope of the dissent.

2. Criminal Law— denial of motion to continue—abuse of discretion—harmless error

Although the trial court abused its discretion in a second-degree murder case by failing to grant a continuance based on the State's failure to provide sufficient notice of an expert witness, failure to provide sufficient notice of the nature of the expert testimony, and failure to provide a copy of the expert's retrograde extrapolation report within a reasonable time before trial, the error was harmless beyond a reasonable doubt because: (1) defendant's continuance motion only sought more time to prepare a defense for the expert's testimony; (2) even if a continuance had provided defendant sufficient time to muster resources to rebut the expert's testimony, the State had abundant other admissible evidence of defendant's impairment including witnesses who observed defendant's consumption of alcohol at a poker game; witnesses who saw defendant's erratic driving just before the crash; a paramedic in the ambulance who smelled alcohol on defendant's breath; defendant's admission to the paramedic that he had consumed alcohol; a physician's note on defendant's medical records that defendant was intoxicated; the results of two blood samples showing alcohol, amphetamines, and marijuana in defendant's system shortly after the wreck; and the notation in defendant's medical records on the morning after the crash that he admitted to alcohol and marijuana consumption; and (3) the trial court's instructions to the jury on second-

degree murder did not require the State to prove that defendant was impaired since the State could prove either reckless driving or speeding as an alternative to impairment, and numerous witnesses testified to defendant's erratic driving and speeding before the wreck. The ruling of the Court of Appeals remanding to the trial court for a hearing concerning the trial court's denial of defendant's motion to continue is vacated, and this case is remanded to the Court of Appeals for consideration of defendant's remaining assignments of error.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 184 N.C. App. 401, 647 S.E.2d 433 (2007), finding no error in part and remanding in part judgments entered 22 February 2006 by Judge J.B. Allen, Jr. in Superior Court, Alamance County. Heard in the Supreme Court 18 March 2008.

Roy Cooper, Attorney General, by Isaac T. Avery, III, Special Counsel, for the State-appellant.

Constance E. Widenhouse, Assistant Appellate Defender, and Staples S. Hughes, Appellate Defender, for defendant-appellee.

EDMUNDS, Justice.

In this case, we consider whether the trial court should have allowed defendant's motion for continuance when the State failed to provide timely discovery to defendant. Although we conclude the trial court abused its discretion in failing to grant a continuance, we hold that the error was harmless beyond a reasonable doubt. We vacate the ruling of the Court of Appeals remanding this case to the trial court for a hearing concerning the trial court's denial of defendant's motion to continue and remand this case to the Court of Appeals for consideration of defendant's remaining assignments of error.

At trial, the State presented evidence that, on the evening of 28 October 2004, defendant was playing poker and drinking alcoholic beverages with friends and coworkers. Although he initially accepted an offer from one of the other players for a ride to the hotel in Burlington where he was staying, defendant drove away from the game in his own car. Two witnesses testified that they later observed defendant's automobile speeding and moving erratically moments before the crash, swerving around other vehicles and veering onto the shoulder. Shortly after midnight on 29 October 2004, defendant crashed his vehicle into a car parked on the shoulder of Interstate

40/85. Three men were sitting inside the parked car and as a result of the impact, Anibal Amaya Guevara was killed. The other two occupants, Adan Guerrero Rosales and Sergio Guerrero Rosales, suffered serious injuries.

Defendant complained of pain at the scene and was taken to a hospital. A paramedic in the ambulance smelled alcohol on defendant's breath and was advised by defendant that he had consumed a couple of beers. At the hospital, an emergency department physician wrote on defendant's medical records that defendant was "intoxicated." A blood sample drawn at 1:38 a.m. indicated that defendant had a blood alcohol concentration of 0.059 grams of alcohol per 100 milliliters of blood. The same toxicology screen also yielded a positive result for amphetamines and marijuana. A second blood sample, drawn at 3:00 a.m., showed defendant had a blood alcohol concentration of 0.03 grams of alcohol per 100 milliliters of blood. The hospital's medical records for defendant also included a 5:30 a.m. notation that defendant "[a]dmits to [alcohol] and cannabis."

On 14 February 2005, defendant was indicted for second-degree murder and two counts of assault with a deadly weapon inflicting serious injury, as well as for several other charges that were withdrawn before trial. On 23 March 2005, defendant filed a "Request for Voluntary Disclosure" pursuant to Article 48 of Chapter 15A of the North Carolina General Statutes, serving a copy on the Office of the District Attorney. In this request, defendant sought, among other things, the name and *curriculum vitae* of each expert witness the State intended to call, a concise and specific statement of each expert opinion the State intended to present, and the results of all reports of any scientific tests or studies made in connection with the case. Defendant filed a second similar discovery request on 19 January 2006.

The State retained Paul Glover as an expert witness in blood analysis and the effects of alcohol and drugs on human performance and behavior. Glover was a research scientist and training specialist employed by the Forensic Test for Alcohol Branch of the North Carolina Department of Health and Human Services. Before defendant's trial, Glover had testified approximately one hundred times in North Carolina courts regarding toxicology reports.

In a report dated 13 January 2006, Glover prepared a retrograde extrapolation of defendant's blood alcohol concentration at the time

of the crash. Retrograde extrapolation is a mathematical analysis in which a known blood alcohol test result is used to determine what an individual's blood alcohol level would have been at a specified earlier time. The analysis determines the prior blood alcohol level on the bases of (1) the time elapsed between the occurrence of the specified earlier event (*e.g.*, a vehicle crash) and the known blood test, and (2) the rate of elimination of alcohol from the subject's blood during the time between the event and the test. Glover's initial retrograde extrapolation report for defendant utilized defendant's 3:00 a.m. blood test along with an average blood alcohol elimination rate of 0.0172 grams of alcohol per 100 milliliters of blood per hour. This analysis indicated that defendant's blood alcohol concentration was 0.08 grams of alcohol per 100 milliliters of blood at the time of the crash.

Defendant's trial had been set for Monday, 20 February 2006. On Wednesday, 15 February 2006, the State notified defendant that Glover would testify as an expert witness, supplying Glover's *curriculum vitae* but no other information. Two days later, on the afternoon of Friday, 17 February 2006, the State provided defendant with Glover's 13 January 2006 retrograde extrapolation report. The hearing transcript indicates that the prosecutor received the written report on that Friday.

Upon receiving the report, defendant immediately filed a motion to continue the trial for at least sixty days. Citing N.C.G.S. § 15A-903(a)(2), which regulates discovery of expert testimony, defendant argued that the State had failed to notify him of Glover's expert opinion within a reasonable time before trial. Defendant's counsel averred in the motion that he was unfamiliar with blood alcohol concentration retrograde extrapolation and that, as a result of the late notice, he lacked sufficient time to find and consult an expert for defendant.

The trial court heard defendant's motion to continue the following Monday. Although defense counsel stated to the court that he sought a continuance because he needed time to retain an expert, the discussion among the court, defense counsel, and the prosecutor focused almost entirely on the admissibility of retrograde extrapolation testimony and whether Glover could be recognized as an expert. After the court instructed the prosecutor that he could not discuss Glover's proposed testimony in his opening statement, the court denied defendant's motion to continue and the trial began.

Glover testified that he was able to calculate the specific rate at which defendant metabolized alcohol because defendant's blood was tested at two different times after the crash. Over defendant's objections, Glover testified that, by utilizing defendant's actual blood alcohol elimination rate of 0.0147 in lieu of an average blood alcohol elimination rate of 0.0172, he calculated defendant had a blood alcohol concentration of 0.07 at the time of the crash. This concentration level was lower than the 0.08 concentration Glover calculated in his January 2006 report, which had been based on a single blood test and an average rate of elimination. Glover further testified that the toxicology screen showed both amphetamines and marijuana in defendant's blood system. In Glover's expert opinion, the combination of alcohol, amphetamines, and marijuana in defendant's system could have a synergistic effect, increasing defendant's impairment.

Defendant presented no evidence. The jury found defendant guilty of second-degree murder and both counts of assault with a deadly weapon inflicting serious injury. The trial court sentenced defendant to consecutive prison terms of 176 to 221 months for second-degree murder and 27 to 42 months for each count of assault. Defendant appealed his second-degree murder conviction to the Court of Appeals, arguing in part that the trial court abused its discretion by denying his motion to continue.

In a divided opinion, the Court of Appeals found no error in part and remanded in part. In its mandate remanding the case, the majority instructed the trial court to hold a hearing to make findings of fact and conclusions of law concerning, among other things, whether the State complied with N.C.G.S. § 15A-903 ("Disclosure of evidence by the State-Information subject to disclosure") and N.C.G.S. § 15A-907 ("Continuing duty to disclose") when it provided Glover's *curriculum vitae* and retrograde extrapolation report. *State v. Cook*, 184 N.C. App. 401, 410-11, 647 S.E.2d 433, 439 (2007). The dissenting judge believed this issue was controlled by a prior Court of Appeals opinion, *State v. Fuller*, 176 N.C. App. 104, 626 S.E.2d 655 (2006), and accordingly would have affirmed the trial court's denial of the motion to continue. *Cook*, 184 N.C. App. at 413, 647 S.E.2d at 439-40 (Wynn, J., dissenting). The majority preserved defendant's remaining assignments of error for consideration after the trial court's hearing and entry of order on remand. *Id.* at 411, 647 S.E.2d at 439.

[1] The State appeals to this Court as of right on the basis of the dissent, arguing that the Court of Appeals erred by remanding the case

for a hearing on the trial court's denial of defendant's motion to continue. In response, defendant initially contends that the State's appeal should be dismissed because the State's briefed arguments exceed the scope of the dissent, which focused on whether the Court of Appeals holding in *Fuller* controlled this case. In addition, defendant filed with this Court a separate "Motion To Dismiss State's Appeal Or, In The Alternative, To Strike The State's Brief," repeating the arguments made in its brief concerning the scope of the State's appeal. Although *Fuller* is distinguishable from the case at bar, *Fuller* involved issues of unfair surprise and the trial court's denial of the defendant's motion to exclude evidence when the State unexpectedly advised on the day of trial that it would present an expert on retrograde extrapolation. We conclude that the State's arguments fall within the scope of the dissent and deny defendant's motion to dismiss the State's appeal.

[2] Defendant contends the State, within a reasonable time before trial, failed to provide sufficient notice that Glover would be called as an expert witness, failed to provide sufficient notice of the nature of Glover's expert testimony, and failed to provide a copy of Glover's retrograde extrapolation report. Defendant maintains that he was prejudiced both by the State's late provision of discovery and by the court's denial of his motion to continue. As to each issue, defendant presents arguments based on state and federal constitutional grounds and on statutory grounds.

Turning first to defendant's contentions concerning the timeliness of the discovery, his rights to discovery are statutory. Constitutional rights are not implicated in determining whether the State complied with these discovery statutes. "There is no general constitutional or common law right to discovery in criminal cases." *State v. Haselden*, 357 N.C. 1, 12, 577 S.E.2d 594, 602 (citations omitted), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003); *see also Weatherford v. Bursey*, 429 U.S. 545, 559, 51 L. Ed. 2d 30, 42 (1977) ("There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one . . . ."). We will address defendant's constitutional arguments below when we consider whether he was prejudiced by the trial court's denial of his motion for a continuance.

The discovery process for criminal cases within the original jurisdiction of our superior courts is governed by Article 48 of Chapter 15A of the North Carolina General Statutes. N.C.G.S. § 15A-901

(2007). Before filing a motion for discovery "before a judge," a defendant must make a written request for voluntary discovery from the State. *Id.* § 15A-902(a) (2007). If the State voluntarily complies with the discovery request, "the discovery is deemed to have been made under an order of the court," *id.* § 15A-902(b) (2007), and the State then has a continuing duty to disclose additional evidence or witnesses:

> If a party, who is required to give or who voluntarily gives discovery pursuant to this Article, discovers prior to or during trial additional evidence or witnesses, or decides to use additional evidence or witnesses, and the evidence or witness is or may be subject to discovery or inspection under this Article, the party must promptly notify the attorney for the other party of the existence of the additional evidence or witnesses.

Id. § 15A-907 (2007).

Here, defendant filed two requests for voluntary discovery. Because the record indicates that the State thereafter voluntarily provided some timely discovery pursuant to N.C.G.S. § 15A-902(a), it was obligated to provide discovery as to its expert witness and the expert's report, pursuant to N.C.G.S. § 15A-903(a)(2) and (b). Section 15A-903(a)(2) governs the State's disclosure of expert witnesses and any reports made by such witnesses. Specifically, the State must:

> (2) Give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. *The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial*, as specified by the court.

Id. § 15A-903(a)(2) (2007) (emphasis added). In discussing a previous version of this statute, we stated that " '[t]he purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate.' " *State v. Murillo*, 349 N.C. 573, 585, 509 S.E.2d 752, 759 (1998) (quoting *State v. Patterson*, 335 N.C. 437, 455, 439 S.E.2d 578, 589 (1994)), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999).

We conclude the State violated N.C.G.S. § 15A-903(a)(2) when it failed to furnish defendant with sufficient notice within a reasonable time prior to trial. Once the voluntary discovery process began when defendant made his first request for voluntary discovery on 23 March 2005 and the State initiated its response, a continuing duty arose and lasted throughout the trial requiring the State to disclose additional evidence or witnesses. N.C.G.S. § 15A-907 (stating the continuing duty to "promptly notify" the opposing party of additional evidence or witnesses persists "prior to or during trial"). Although Glover's report was completed five weeks before trial was scheduled to begin, the State failed to provide notice that it planned to call Glover as a witness until five days before trial. Even then, the State provided only Glover's *curriculum vitae*, which was insufficient to put defendant on notice of the State's intent to use blood alcohol concentration retrograde extrapolation evidence at trial.

Not until the afternoon of 17 February 2006 did the State furnish Glover's report to defendant. Although the prosecutor apparently provided the report as soon as it was received in the District Attorney's office, N.C.G.S. § 15A-903(a)(2) requires that the State's expert witnesses "shall prepare, and the State shall furnish to the defendant, a report of the results of any examination or tests conducted by the expert." The record reveals that approximately five weeks elapsed between the preparation of the report and its disclosure to defendant the Friday before trial. Only upon receipt of the report did defendant learn he would be facing retrograde extrapolation testimony. Defendant then had just a weekend to find his own expert in this field and to decide whether to call such a witness to counter the State's evidence. Thus, under the facts of this case, the State's last-minute piecemeal disclosure of its expert's name, *curriculum vitae*, and written report was not "within a reasonable time prior to trial" as required by N.C.G.S. § 15A-903(a)(2).

The State nevertheless argues that this statute does not apply because it is "unclear" whether blood alcohol concentration retrograde extrapolation requires expert testimony since the extrapolation is performed by a "simple mathematic formula." If the process does not require an expert, the result is not an examination or test subject to discovery under N.C.G.S. § 15A-903(a)(2).

This argument is undermined by the State's pretrial conduct. The State provided Glover's name, *curriculum vitae*, and report to defendant and filed a corresponding "discovery certificate" with the trial court, just as it would with any other expert witness. In addition,

unlike its lay witnesses, the State qualified Glover on *voir dire* as an expert on "blood alcohol physiology, pharmacology, and the effects of drugs on human performance and behavior" and questioned Glover on direct examination regarding his "specialty" and "specialized degrees or training experience." Moreover, North Carolina courts have consistently regarded blood alcohol retrograde extrapolation as the domain of expert witnesses. *See, e.g.*, *State v. Davis*, 142 N.C. App. 81, 89-90, 542 S.E.2d 236, 241 (examining the "expert testimony" of a toxicologist under the standard of *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238 (1999), and noting "[w]e have accepted the reliability of extrapolation evidence since 1985"), *disc. rev. denied*, 353 N.C. 386, 547 S.E.2d 818 (2001); *State v. Catoe*, 78 N.C. App. 167, 168-69, 336 S.E.2d 691, 692-93 (1985) (holding blood alcohol concentration retrograde analysis admissible when a "qualified expert" gave "opinion testimony on scientific matters" and noting the "simple mathematical extrapolation" performed), *disc. rev. denied*, 316 N.C. 380, 344 S.E.2d 1 (1986).

Relying on the dissent in the Court of Appeals, the State also argues that *State v. Fuller*, 176 N.C. App. 104, 626 S.E.2d 655 (2006), should have controlled. In *Fuller*, the defendant pled guilty in district court to driving while impaired, then appealed to the superior court for trial de novo. *Id.* at 107, 626 S.E.2d at 657. On the morning of trial, the State gave notice to the defendant that it intended to call an expert witness on blood alcohol concentration retrograde extrapolation. *Id.* The trial court denied the defendant's motion to prevent the State from calling the expert witness and the Court of Appeals found no error. 176 N.C. App. at 107-08, 626 S.E.2d at 657-58.

Fuller is distinguishable from the case at bar. The statutory discovery requirements at issue here were inapplicable in *Fuller* because, as the *Fuller* court itself noted, these discovery statutes apply only to cases within the original jurisdiction of the superior court. *Id.* at 107-08, 626 S.E.2d at 657; N.C.G.S. § 15A-901. Moreover, the defendant in *Fuller* attempted to have the expert's testimony excluded outright. Here, in contrast, defendant instead sought only a continuance to prepare for Glover's testimony. Accordingly, the Court of Appeals panel was not bound by the holding in *Fuller*.

The State points out that the Court of Appeals noted in *Fuller* that the defendant "was on notice that [extrapolation] evidence might be offered" in the superior court trial because extrapolation evidence "has been accepted in this State since 1985." *Id.* at 108, 626 S.E.2d at

657. The State now adopts this approach and argues defendant "should have known" extrapolation evidence would be presented because the Court of Appeals in *Catoe* first approved admission of such evidence in 1985, and defendant "cannot close his eyes and hope the State will not offer certain testimony."

This argument echoes our statement in *Murillo* that "[t]he purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence *he cannot anticipate*." 349 N.C. at 585, 509 S.E.2d at 759 (emphasis added). Here, defendant had no effective ability to "anticipate" the evidence, as that term is used in *Murillo*. For example, while a defendant in a burglary or forgery case reasonably might anticipate the State will use fingerprint evidence, the defendant can do little to prepare to confront that evidence until he or she has seen the latent prints the State intends to use and copies of the report prepared by the State's expert. Similarly here, defendant's mere knowledge that the process of retrograde extrapolation existed did not require him to anticipate that the State would pursue this line of inquiry, retain an expert, and present such evidence. Even if defendant foresaw that the State would present such evidence, he had virtually no ability to prepare an effective response until he knew the result of the State's testing.

Defendant argues that no statute under Article 48 provides exceptions under which the State can fail to comply with the discovery statutes and rely on defendant's educated guess as to what evidence the State will present. This argument is persuasive. The language of N.C.G.S. § 15A-903(a)(2) is mandatory, providing that once voluntary discovery is initiated, the State "must" "[g]ive notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial." Each expert witness "shall prepare" and the State "shall furnish" a report of any examinations or tests conducted by the expert. The State "shall furnish" an expert's *curriculum vitae* and opinion "within a reasonable time prior to trial." The State's proposed exception to these statutory provisions, if accepted, would invite sandbagging.

Although we conclude that the State violated the pertinent discovery statutes, defendant moved for a continuance without seeking more severe sanctions for the violation. The trial court has discretionary power under N.C.G.S. § 15A-910(a)(2) to "[g]rant a continuance or recess" if a party fails to comply with the discovery statutes. *Id.* § 15A-910(a)(2) (2007). "Determining whether the State failed to comply with discovery is a decision left to the sound discretion of the

trial court." *State v. Jackson*, 340 N.C. 301, 317, 457 S.E.2d 862, 872 (1995) (citation omitted). "The trial court may be reversed for an abuse of discretion in this regard only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Carson*, 320 N.C. 328, 336, 357 S.E.2d 662, 667 (1987) (citation omitted).

After careful consideration, we conclude that the trial court's denial of defendant's motion to continue was an abuse of discretion. As noted above, defendant's motion was filed the Friday before trial and heard the day the trial was scheduled to begin. Defendant's written motion cited N.C.G.S. § 15A-903, and at the hearing defense counsel advised the trial court, "I don't believe I had sufficient time . . . to retain an expert on Mr. Cook's behalf." Nevertheless, the participants in the hearing focused almost entirely on whether Glover could be qualified as an expert and whether testimony based upon blood alcohol concentration retrograde extrapolation had been found admissible in previous cases. Distracted by these questions, the trial court made no mention during the hearing of the discovery statutes nor of the timeliness of the notice to defendant. Once the trial court determined that the evidence was admissible, it denied defendant's motion. We are satisfied that a continuance would have alleviated any "unfair surprise" to defendant, *Murillo*, 349 N.C. at 585, 509 S.E.2d at 759, and would have "afforded the defense opportunity to meet [the State's] evidence," *Jackson*, 340 N.C. at 317, 457 S.E.2d at 872. Accordingly, we hold that the trial court abused its discretion in denying defendant's motion to continue.

In so holding, we are not establishing a bright line rule automatically mandating a continuance whenever a party is untimely in providing discovery. The pertinent statute itself only requires disclosure "within a reasonable time prior to trial, as specified by the court." N.C.G.S. § 15A-903(a)(2). Often, as here, a party providing discovery only a short time before trial has just received it and is disclosing it immediately. We acknowledge that trial judges must have substantial latitude to deal with the myriad unforeseeable circumstances that arise during the course of litigation. The trial court here faced a familiar but difficult decision where the motion had to be considered while the jury pool waited. Nevertheless, the information was prepared by the State's expert weeks before trial but was only revealed to defendant at the eleventh hour. The hearing transcript indicates that, even before receiving Glover's written report, the prosecutor planned to use retrograde extrapolation analysis, though no notice had been pro-

vided to defendant. The furnishing to defendant of Glover's *curriculum vitae* the Wednesday before trial was, standing alone, insufficient to put defendant on notice of the type of expert testimony he faced. While we are sympathetic to the trial court's dilemma, we believe that, in the absence of a satisfactory explanation in the record for the delay between the State's expert's preparation of the report and its provision to defendant by the prosecutor, the trial court should have allowed a continuance. In so holding, we express no opinion as to an appropriate duration, a matter best left to the discretion of the trial court.

We next consider whether defendant was prejudiced by the error. Defendant raises the constitutional issues noted above, contending that the denial of his motion to continue violated his due process and confrontation rights under the United States and North Carolina Constitutions because "[i]mplicit in these constitutional provisions is the requirement that an accused have a reasonable time to investigate, prepare and present his defense." *State v. Tunstall*, 334 N.C. 320, 328, 432 S.E.2d 331, 336 (1993) (citations and internal quotation marks omitted). However, "[t]he denial of a motion to continue, even when the motion raises a constitutional issue, is grounds for a new trial only upon a showing by the defendant that the denial was erroneous and also that his case was prejudiced as a result of the error." *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982) (citation omitted). Therefore, even though we have concluded that the trial court erred in denying defendant's motion to continue, the error is subject to harmless error analysis. "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) (2007).

Here, even if we assume without deciding that defendant's constitutional rights were violated by the denial of a continuance, the record demonstrates that the error was harmless beyond a reasonable doubt. *See State v. Gardner*, 322 N.C. 591, 595, 369 S.E.2d 593, 596 (1988) ("Assuming without deciding that the error complained of is of constitutional dimension, we are satisfied that the error was harmless beyond a reasonable doubt."). Defendant's continuance motion only sought more time to prepare a defense for Glover's testimony. However, even if a continuance had provided defendant sufficient time to muster resources to rebut Glover's testimony utterly, the State had abundant other admissible evidence of defendant's impairment, including witnesses who observed defendant's consumption of

alcohol at the poker game; witnesses who saw defendant's erratic driving just before the crash; a paramedic in the ambulance who smelled alcohol on defendant's breath; defendant's admission to the paramedic that he had consumed alcohol; a physician's note on defendant's medical records that defendant was "intoxicated"; the results of two blood samples showing alcohol, amphetamines, and marijuana in defendant's system shortly after the wreck; and the notation in defendant's medical records on the morning after the crash that he admitted to alcohol and marijuana consumption. Glover's extrapolation testimony was but a thread in the web of evidence presented by the State.

In addition, the trial court's instructions to the jury on second-degree murder did not require the State to prove that defendant was impaired. The court followed the pattern instruction on second-degree murder by motor vehicle and listed impairment as one of several methods of satisfying the element of the offense that defendant violated a law governing the operation of a motor vehicle. The pertinent instructions were:

> Now, I charge you for you to find the defendant, Richard Cook, guilty of second degree murder, the State must prove six things beyond a reasonable doubt.
>
> . . . .
>
> Fourth, that the defendant violated the following law or laws of this State governing the operation of the motor vehicle.
>
> The law of this State makes it unlawful to drive while impaired, to drive recklessly and [to] exceed the posted speed limit. For you to find the defendant guilty of impaired driving, the State must prove these things beyond a reasonable doubt. That the defendant was driving a vehicle. That he was driving the vehicle on a highway within the State. And that at the time the defendant was driving that vehicle, he was either: (A) Was under the influence of an impairing [substance]. Alcohol is an impairing substance. Amphetamines is an impairing substance. Marijuana is an impairing substance.
>
> . . . .
>
> Or (B) The defendant had consumed sufficient alcohol at any relevant time after the driving the defendant had an alcohol concentration of .08 or more grams of alcohol in his blood. . . .

> Now, for you to find the defendant guilty of reckless driving, the State must prove two things. That the defendant drove a vehicle on a highway. I-40/I-85 in Alamance County is a highway.
>
> And second, that he drove that vehicle on I-85/I-40 by speeding, running another vehicle off the road, and hitting a parked vehicle in the emergency lane. And in so doing, he acted carelessly and heedlessly in willful or wanton disregard to the rights or safety of others.
>
> And for you to find the defendant guilty of exceeding the posted speed limit, the State must prove beyond a reasonable doubt that the defendant drove a vehicle on a highway in this State at a speed exceeding the posted speed limit.

Thus, to establish the fourth element, the State could prove either reckless driving or speeding as an alternative to impairment. As detailed above, numerous witnesses testified to defendant's erratic driving and speeding before the wreck. Accordingly, the State was not limited to proof that defendant was impaired to secure a conviction of second-degree murder by vehicle.

We find beyond a reasonable doubt that the trial court's denial of defendant's motion to continue was harmless error. Although the State violated N.C.G.S. § 15A-903(a)(2) when it failed to provide defendant with the required information "within a reasonable time prior to trial," and the trial court abused its discretion in failing to grant defendant's motion to continue the trial, defendant suffered no prejudice.

We reverse the decision of the Court of Appeals as to the appealable issue of right, that is, whether the Court of Appeals erred in remanding this case to the trial court for a hearing on the trial court's denial of defendant's motion to continue, and we vacate the Court of Appeals remand to the trial court. The remaining issues addressed by the Court of Appeals in its opinion 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 consideration of defendant's remaining assignments of error.

REVERSED IN PART AND REMANDED.

BARBARA KATRINA HASSELL, EMPLOYEE v. ONSLOW COUNTY BOARD OF EDUCATION, EMPLOYER, SELF-INSURED (KEY RISK MANAGEMENT SERVICES, INC.), THIRD-PARTY ADMINISTRATOR

No. 172A07

(Filed 12 June 2008)

1. Workers' Compensation— fault—inappropriateness

Fault has no place in the workers' compensation system, except as expressly provided by statute. In a workers' compensation action involving a teacher who claimed compensation for generalized anxiety disorder, any language in a finding implying that plaintiff's fault or responsibility for her condition plays a role in determining the compensability of the claim is irrelevant, inappropriate, and disavowed.

2. Workers' Compensation— testimony of psychologist—afforded little weight

The Industrial Commission in a workers' compensation case did not improperly ignore a psychologist's opinion. The Commission considered the expert's testimony but decided to afford it little weight, as it may do.

3. Workers' Compensation— finding about testimony—supported by evidence

The Industrial Commission's finding in a workers' compensation case concerning the testimony of plaintiff's psychologist was supported by competent evidence.

4. Workers' Compensation— teacher—generalized anxiety disorder—occupational disease—not proven

The Industrial Commission did not err in a workers' compensation case by concluding that a teacher did not prove that her mental illness was due to causes and conditions peculiar to her employment where the Commission had decided not to accept her psychologist's opinions. Without those opinions, plaintiff had no expert evidence to establish that her generalized anxiety disorder was an occupational disease.

Justice TIMMONS-GOODSON dissenting

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 182 N.C. App. 1, 641 S.E.2d 324

(2007), affirming an opinion and award filed on 5 October 2005 by the North Carolina Industrial Commission. Heard in the Supreme Court 17 October 2007.

Ralph T. Bryant, Jr., P.A., by Ralph T. Bryant, Jr., for plaintiff-appellant.[1]

Roy Cooper, Attorney General, by John F. Maddrey, Assistant Solicitor General, for defendant-appellee Onslow County Board of Education.

George W. Lennon for the North Carolina Academy of Trial Lawyers, amicus curiae.

HUDSON, Justice.

Plaintiff employee challenges the Industrial Commission's ("Commission's") determination that she is not entitled to workers' compensation benefits because her "generalized anxiety disorder" ("GAD") is not an occupational disease pursuant to N.C.G.S. § 97-53(13). Guided by the well-established standard of appellate review, we hold that the Commission properly concluded that plaintiff's condition is not an occupational disease because she failed to prove either that her work increased her risk of GAD or significantly contributed to it. Consequently, we affirm the denial of the claim.

From 1987 until February 2002, plaintiff was employed by the Onslow County Board of Education ("defendant") as a school teacher. Plaintiff worked at the elementary school level until approximately 1996, when she began teaching at Dixon Middle School ("Dixon Middle"). During her time at Dixon Middle, plaintiff consistently had problems managing the classroom and maintaining order, which other teachers of the same students did not have. Plaintiff dreaded going to work because of student disciplinary problems and student disrespect for her, which included verbal and physical harassment. Parents and students complained to the administration about plaintiff's performance as a teacher.

Over the course of her employment at Dixon Middle, plaintiff received numerous negative performance reviews and was required to enter into four "action plans," which are mandated by law when a teacher ranks below the standard in any of the major teaching

1. By order filed 7 May 2008, this Court allowed Mr. Bryant to withdraw as counsel for plaintiff.

functions. On 25 January 2002, plaintiff began her fourth action plan with defendant.

On 25 February 2002, a curriculum specialist observed plaintiff's classroom and determined that plaintiff had failed to show improvement in the quality of her classroom instruction. In addition, plaintiff failed to submit timely information to the administration and missed a meeting with Dixon Middle's principal to address these problems.

A few days later, the principal instructed plaintiff to continue working toward improving her classroom performance and told her that she was going to share the results of their meeting with the personnel department. The principal also asked plaintiff to sign a warning letter; plaintiff refused, left the school, and never returned to work. On 19 April 2002, plaintiff officially resigned her position with defendant, effective 3 June 2002.

In March 2002 psychologist Dennis Chestnut ("Dr. Chestnut") examined plaintiff. Dr. Chestnut found that plaintiff was experiencing a severe emotional crisis, and he considered hospitalizing her. He diagnosed her with GAD, medically excused her from work, and stated that she was unable to return to teaching. Dr. Chestnut continued to treat plaintiff on an ongoing basis. He stated that in his opinion, plaintiff's " 'job was driving her crazy' " and that her work experience was a major stressor in her life.

Before the Commission, plaintiff contended that her GAD was an occupational disease caused by a hostile and abusive classroom environment. The Commission disagreed, concluding that "plaintiff did not prove that her [GAD] is due to causes and conditions which are characteristic of and peculiar to her employment," and thus, her GAD was not compensable as an occupational disease. Plaintiff appealed.

In the Court of Appeals, plaintiff argued that her GAD was compensable as an occupational disease and that the evidence did not support certain of the Commission's findings of fact. She argued further that these findings did not support the Commission's conclusion of law that she failed to prove that her GAD was an occupational disease. Instead, plaintiff contended that the Commission should have found that her GAD was an occupational disease which arose from an abusive and dangerous work environment. In a divided opinion, the Court of Appeals affirmed the Commission's opinion and award. *Hassell v. Onslow Cty. Bd. of Educ.*, 182 N.C. App. 1, 12, 641 S.E.2d 324, 331 (2007). The majority upheld all of the Commission's factual

findings and conclusions of law and determined that plaintiff had failed to prove that her position as a teacher at Dixon Middle "placed her at an increased risk of developing an occupational disease" or that her work was a significant contributing factor in the development of her illness. *Id.* at 11-12, 641 S.E.2d at 331.

In his dissent, Judge Wynn agreed with plaintiff that the Commission "erred by finding that her employment at Dixon Middle School did not place her at an increased risk of developing an anxiety disorder" and by concluding that plaintiff's GAD was not compensable as an occupational disease. *Id.* at 12, 641 S.E.2d at 331-32 (Wynn, J., dissenting). The dissent expressed concern that the Commission improperly implied that the test of compensation involves "apportioning blame," and Judge Wynn further concluded that certain findings of fact made by the Commission were not supported by any competent evidence, to wit: (1) that plaintiff's "anxiety centered around her principal"; and (2) that the work/classroom environment was caused by plaintiff's "inadequate" job performance and thus resulted from her failings as a teacher. *Id.* at 13-14, 641 S.E.2d at 332. Although specific findings of fact are not discussed in the dissent, the matters addressed by the dissent are raised primarily in findings eleven, twelve, and thirteen, which are quoted below:

> 11. Dr. Chestnut explained that plaintiff's anxiety focused on her difficulty with the principal.
>
> > [Plaintiff] had gotten a new administrator, and she felt that the new administrator was not supportive of her . . . the new administrator did not feel that [plaintiff] was doing a good job, and that regardless of how hard she worked or regardless of what she did, that the administrator was going to find something wrong with it. . . . [S]he felt that the administrator was not supportive when she made decisions in reference to students. (Brackets in original.)
>
> Dr. Chestnut testified that the overall job quality of plaintiff's work experience exacerbated and/or caused her generalized anxiety. Yet, Dr. Chestnut also testified that in mental health, experts do not necessarily speak of correlation or causation. Dr. Chestnut stated that AXIS evaluations were designed to be able to make a deferential diagnosis rather than to get into causality or correlation. Dr. Chestnut did state that plaintiff's employment with defendant exposed her to an increased risk of developing an anxiety disorder as compared to members of the general public not so

employed. Dr. Chestnut stated that plaintiff's "job was driving her crazy" and that plaintiff's total job experience was a major stressor in her life. Dr. Chestnut did not indicate, however, that another person in the same work environment or experience would develop Generalized Anxiety Disorder. Dr. Chestnut conceded that Generalized Anxiety Disorder is the most prevalent psychiatric disorder reported in the United States.

12. The Commission gives little weight to the opinions of Dr. Chestnut concerning causation and increased risk of plaintiff's mental condition. Dr. Chestnut stated that the focus of his treatment was to be supportive of plaintiff, that he could not speak to the validity of plaintiff's complaints about the school work, and that he only dealt with plaintiff's perceptions. There is no testimony in Dr. Chestnut's deposition that he reviewed any of plaintiff's employment records or that he considered any concurrent personal stressors in plaintiff's life in formulating his opinions.

13. Although plaintiff developed an anxiety disorder, her psychological condition was not the result of anything caused by defendant or because she was required to do anything unusual as a teacher. Plaintiff was in a stressful classroom environment that was caused by her inadequate job performance and inability to perform her job duties as a teaching professional. Considering all the evidence presented, the Commission finds that there was nothing unusual about plaintiff's job with defendant or what was expected of her as compared to any person similarly situated. The work plaintiff was asked to perform by defendant was the same kind of work any teacher is required to do. Plaintiff was merely asked to perform her job in the manner it should have been performed. Plaintiff was responsible for the bad environment in her classroom.

Plaintiff gave notice of appeal to this Court on the basis of the dissenting opinion, arguing that the majority in the Court of Appeals erred by affirming the Commission's decision that her GAD did not entitle her to workers' compensation benefits for an occupational disease pursuant to N.C.G.S. § 97-53(13). Relying upon the dissent, she contends that the majority erred: (1) by upholding the Commission's finding of fact that she was "responsible" for causing the injurious environment and by thereby relying upon fault to deny her claim; (2) by ignoring Dr. Chestnut's testimony and upholding the Commission's findings that her GAD centered around and was caused by problems with her principal and her substandard job performance;

and (3) by concluding that she failed to prove that her employment placed her at an increased risk of developing GAD.

[1] Plaintiff first asserts that the Court of Appeals majority "erred when it upheld the Commission's finding of fact that plaintiff was at fault in causing the injurious environment and relied upon that finding of fault as a basis for denial of [plaintiff's] claim." In connection with this, she discusses only finding of fact thirteen, quoted above, which does not use the word "fault," but does appear to attribute the cause of her allegedly disabling condition to her inability to control her class. Plaintiff contends that the Commission erred when it based its denial of workers' compensation benefits upon its finding that plaintiff was "responsible" for, or essentially at fault, in creating the hostile classroom environment and that the Court of Appeals majority erred by upholding the Commission based upon the same reasoning.

This Court has stated unequivocally that the Workers' Compensation Act was "intended to eliminate the fault of the workman as a basis for denying recovery" and that "[t]he only ground set out in the statute upon which compensation may be denied on account of the fault of the employee is when the injury is occasioned by his intoxication or willful intention to injure himself or another." *Hartley v. N.C. Prison Dep't*, 258 N.C. 287, 290, 128 S.E.2d 598, 600 (1962) (citations and internal quotation marks omitted); *see also* N.C.G.S. § 97-12 (2007). Thus, except as expressly provided in the statute (as in section 97-12, which is not involved here), fault has no place in the workers' compensation system. Although finding thirteen does not use the word "fault," any language in that finding implying that fault plays a role in determining the compensability of this claim is irrelevant and inappropriate. We expressly disavow any language from the Commission's opinion and that of the Court of Appeals which can be read as indicating that plaintiff's fault or responsibility for her condition—including specifically the Court of Appeals' statement that "plaintiff herself created the stressful work environment"—was a valid reason to deny her claim. *Hassell*, 182 N.C. App. at 12, 641 S.E.2d at 331 (majority). The General Assembly has not specified such as a basis for denial of a workers' compensation claim, and we decline to do so here.

[2] Plaintiff next argues that the Commission did not give sufficient weight to Dr. Chestnut's testimony on causation, specifically contending that the "specious reasons given by the Commission majority

do not indicate that it seriously considered or weighed Dr. Chestnut's testimony before rejecting it." Plaintiff also asserts that the testimony of Dr. Chestnut, who was the only expert to testify, clearly showed that he believed her GAD was caused by the hostile classroom environment and that there is no competent evidence in the record to support the Commission's finding and conclusion that her anxiety resulted instead from her difficulty with the principal. This argument centers on findings eleven and twelve, quoted above. We disagree with plaintiff's contentions.

The applicable standard of appellate review in workers' compensation cases is well established. Appellate review of an opinion and award from the Industrial Commission is generally limited to determining: "(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." *Clark v. Wal-Mart*, 360 N.C. 41, 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)).

The Workers' Compensation Act and the decisions of this Court clearly state that the Commission is the sole judge of the credibility of the witnesses and the weight of the evidence. N.C.G.S. §§ 97-84 to -86 (2007); *Adams v. AVX Corp.*, 349 N.C. 676, 680-81, 509 S.E.2d 411, 413 (1998) (citing *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). Section 97-86 states that the award of the Commission "shall be conclusive and binding as to all questions of fact." N.C.G.S. § 97-86. This Court has explained that the Commission's findings of fact "are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *E.g.*, *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965) (per curiam). "Thus, on appeal, this Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (quoting *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274 (citation omitted)). "The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Id.* (citation omitted); *accord Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 553 (2000).

Here, plaintiff's claim for occupational GAD was filed under the catch-all disease provision of North Carolina's Workers' Compensa-

tion Act, which encompasses, "[a]ny 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) (2007). In 1983 this Court explained definitively that this provision does not require that the disease originate exclusively from or be unique to the particular occupation. *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 101-02, 301 S.E.2d 359, 369-70 (1983). Instead, a plaintiff worker satisfies the elements of this statute if she shows that her employment

> exposed [her] to a greater risk of contracting [the] disease than members of the public generally, and [that] the . . . exposure . . . significantly contributed to, or was a significant causal factor in, the disease's development. This is so even if other non-work-related factors also make significant contributions, or were significant causal factors.

Id. at 101, 301 S.E.2d at 369-70. Since *Rutledge*, this two-pronged proof requirement for an occupational disease, increased risk and significant contribution, has been approved and applied repeatedly by this Court and the Court of Appeals. *E.g.*, *Wilkins v. J.P. Stevens & Co.*, 333 N.C. 449, 453, 426 S.E.2d 675, 677 (1993); *James v. Perdue Farms, Inc.*, 160 N.C. App. 560, 562-63, 586 S.E.2d 557, 560-61 (2003), *disc. rev. denied*, 358 N.C. 234, 594 S.E.2d 191 (2004).

Plaintiff has the burden of proving that her claim is compensable under the Workers' Compensation Act and specifically here, that her claim qualifies as an occupational disease. *E.g.*, *Henry v. A.C. Lawrence Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950) (citations omitted). In cases involving "complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (citations omitted). The Commission "may not wholly disregard competent evidence"; however, as the sole judge of witness credibility and the weight to be given to witness testimony, the Commission "may believe all or a part or none of any witness's testimony." *Harrell v. J.P. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 (citation omitted), *disc. rev. denied*, 300 N.C. 196, 269 S.E.2d 623 (1980); *see also Anderson v. N.W. Motor Co.*, 233 N.C. 372, 376, 64 S.E.2d 265, 268 (1951) (citing *Henry*,

231 N.C. 477, 57 S.E.2d 760); *accord Deese*, 352 N.C. at 116, 530 S.E.2d at 553. The Commission is not required to accept the testimony of a witness, even if the testimony is uncontradicted. *Morgan v. Thomasville Furn. Indus.*, 2 N.C. App. 126, 127-28, 162 S.E.2d 619, 620 (1968) (citing *Anderson*, 233 N.C. at 376, 64 S.E.2d at 268). Nor is the Commission required to offer reasons for its credibility determinations. In *Deese*, this Court stated:

> This Court in *Adams* [*v. AVX Corp.*] made it clear that the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. Requiring the Commission to explain its credibility determinations and allowing the Court of Appeals to review the Commission's explanation of those credibility determinations would be inconsistent with our legal system's tradition of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another. The Commission's credibility determinations . . . cannot be the basis for reversing the Commission's order absent other error.

352 N.C. at 116-17, 530 S.E.2d at 553.

Here, while the Commission did include reasons for its credibility determinations in finding of fact twelve, it was not required to do so. After examining the record, we conclude that here, unlike in *Harrell*, 45 N.C. App. at 204-06, 262 S.E.2d at 835, the Commission considered the expert's testimony, but decided to afford it little weight, as it may do. Plaintiff's argument that the Commission improperly ignored Dr. Chestnut's opinion is without merit.

[3] Plaintiff's next argument, that the Commission's finding that "Dr. Chestnut explained that plaintiff's anxiety focused on her difficulty with the principal" is not supported by any competent evidence, also fails. Dr. Chestnut testified that plaintiff "was constantly in fear of not doing something, not pleasing somebody; you know, that fear was there, and . . . it's documented that . . . this is not satisfactory, this is not satisfactory." He further stated that plaintiff's "difficulties with her administrator . . . . increased her anxiety . . . . to push it to a clinical syndrome." While Dr. Chestnut did testify that what was going to happen with the children was where he "saw the greatest level of apprehension," this Court may not re-weigh the evidence, given that the Commission has already weighed the evidence, as is its role under statute. N.C.G.S. § 97-86; *Anderson v. Lincoln Constr. Co.*, 265 N.C.

at 434, 144 S.E.2d at 274; *Harrell*, 45 N.C. App. at 205, 262 S.E.2d at 835. This Court's duty is merely to determine whether the record contains any evidence tending to support the Commission's finding, and here, this portion of the Commission's finding is supported by competent evidence. *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274.

In sum, we conclude that the challenged portions of findings of fact eleven and twelve are supported by competent evidence and do not demonstrate that the Commission ignored Dr. Chestnut's testimony. Rather, the record shows that the Commission considered Dr. Chestnut's testimony and decided to give "little weight to [his] opinions . . . concerning causation and increased risk of plaintiff's mental condition."

[4] Once the Commission decided on the basis of lack of credibility and weight not to accept Dr. Chestnut's opinions, it determined that plaintiff had failed to carry her burden of establishing either increased risk or significant contribution as required by N.C.G.S. § 97-53(13), as explained by *Rutledge* and its progeny. Without Dr. Chestnut's opinions, plaintiff had no expert medical evidence to establish that her GAD was an occupational disease. *See*, *e.g.*, *Click*, 300 N.C. at 167, 265 S.E.2d at 391. Consequently, the Commission properly concluded that "plaintiff did not prove that her mental illness is due to causes and conditions which are characteristic of and peculiar to her employment," and that she is "not entitled to compensation under . . . [section] 97-53(13)."

For the reasons stated above, the opinion of the Court of Appeals affirming the Commission's opinion is affirmed as modified herein.

MODIFIED AND AFFIRMED.

Justice TIMMONS-GOODSON, dissenting.

Because I believe that the majority has erroneously upheld the denial of workers' compensation benefits on the basis of fault or contributory negligence, I respectfully dissent.

While the majority disavows any language from the Commission premising compensability on the absence of fault, it fails to address whether the Commission and Court of Appeals majority relied on this erroneous premise. In acknowledging an error in the proceedings below, yet upholding the result, it appears that the majority's treatment of plaintiff's argument omits a piece of the puzzle.

The majority acknowledges that any language in Finding Thirteen implying that fault plays a role in determining compensability is "irrelevant and inappropriate." However, the majority fails to evaluate the impact of the application of this erroneous standard. In the wider scheme of our Workers' Compensation Act as well as in the context of this case, the omitted piece is neither inconsequential nor tangential.

We have previously observed that one of the purposes of our Workers' Compensation Act was to abolish the "unholy trinity" of employer defenses which generally precluded any recovery by the injured worker at common law: contributory negligence; assumption of risk; and the fellow-servant rule. *Pleasant v. Johnson*, 312 N.C. 710, 711, 325 S.E.2d 244, 246 (1985) (citation omitted). " 'Contributory negligence involves the notion of some fault or breach of duty on the part of the employee.' " *Hamilton v. S. Ry. Co.*, 200 N.C. 543, 561, 158 S.E. 75, 85 (citation omitted), *cert. denied*, 284 U.S. 636 (1931).

In this case, the critical finding that plaintiff argues, but which the majority largely sidesteps in its analysis, is Finding of Fact 13:

> 13. Although plaintiff developed an anxiety disorder, her psychological condition was not the result of anything caused by defendant or because she was required to do anything unusual as a teacher. Plaintiff was in a stressful classroom environment that was *caused by her inadequate job performance* and inability to perform her job duties as a teaching professional. Considering all the evidence presented, the Commission finds that there was nothing unusual about plaintiff's job with defendant or what was expected of her as compared to any person similarly situated. The work plaintiff was asked to perform by defendant was the same kind of work any teacher is required to do. Plaintiff was merely asked to perform her job in the manner it should have been performed. *Plaintiff was responsible for the bad environment in her classroom.*

(emphasis added). The above language reflects almost a textbook definition of contributory negligence, a defense that the Commission may not consider under our Workers' Compensation Act. The Conclusions of Law similarly reflect language that imputes fault to plaintiff and denies recovery on that basis:

> 2. Mental illness which results from failing to perform one's job duties . . . is not compensable . . . .

3. In the present case, plaintiff's stress and anxiety disorder developed from her inability to perform her job in accordance with defendant's requirements.

Denying compensation on the basis of plaintiff's own fault is contrary to the provisions of the Workers' Compensation Act. *Hartley v. N.C. Prison Dep't*, 258 N.C. 287, 290, 128 S.E.2d 598, 600 (1962) ("[T]he various compensation acts were intended to eliminate the fault of the workman as a basis for denying recovery." (citations omitted)). The only exceptions to this rule concern intoxication or intentional injuries. *Id.*

Despite the explicit declarations of the majority, I fear that today's decision will open the door for future denials of workers' compensation benefits on the basis of the injured employee's own less than exemplary workmanship. Furthermore, such a spectacle will inevitably draw this Court into a morass of endless litigation seeking to separate innocent from blameworthy injuries.

This is exactly the situation the Workers' Compensation Act sought to avert by excluding common law defenses. *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003) ("[T]he North Carolina Workers' Compensation Act was created to ensure that injured employees receive sure and certain recovery for their work-related injuries without having to prove negligence on the part of the employer or defend against charges of contributory negligence." (citing *Pleasant*, 312 N.C. at 712, 325 S.E.2d at 246-47)) Since I fear that today's ruling departs from that, I respectfully dissent.

CHRISTINA M. BINNEY, PETITIONER v. BANNER THERAPY PRODUCTS, INC. AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS

No. 431A06

(Filed 12 June 2008)

Unemployment Compensation— misconduct related to job— copyright assertion—hard drive removal

The Court of Appeals erred by reversing the superior court affirmation of an Employment Security Commission decision denying unemployment compensation to the officer of a com-

pany who had been terminated because she claimed a personal copyright in the company's catalog and had taken home a hard drive from a company computer. In order to show that the employee was terminated for misconduct related to her job, the employer needed only to present evidence that she showed willful disregard of the employer's interest through deliberate violations or disregard of standards of behavior which the employer had the right to expect. The standard of review is whether any competent evidence supports the Commissions findings; the Court of Appeals misapplied the standard of review to the extent that it made its own assessment of the facts. N.C.G.S. § 96-14(2).

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 178 N.C. App. 417, 631 S.E.2d 848 (2006), affirming in part, reversing in part, and remanding a judgment entered 17 November 2004 by Judge James L. Baker, Jr. in the Superior Court in Buncombe County. On 8 March 2007, the Supreme Court allowed respondent Employment Security Commission's petition for discretionary review of an additional issue. Heard in the Supreme Court 11 September 2007.

Ferikes & Bleynat, PLLC, by Edward L. Bleynat, Jr. for petitioner-appellee.

Thomas S. Whitaker, Chief Counsel, by Sharon A. Johnston, for respondent-appellant Employment Security Commission of North Carolina.

HUDSON, Justice.

After being terminated by her employer, respondent Banner Therapy Products, Inc. ("Banner"), on 5 April 2003, petitioner Christina M. Binney ("Binney") sought unemployment insurance benefits under N.C.G.S. § 96-15(a) on 6 April 2003. Banner contested Binney's claim. Ultimately, the Employment Security Commission ("ESC") and then the superior court found her disqualified for benefits because of having been terminated for misconduct related to her job. The Court of Appeals reversed this determination. *Binney v. Banner Therapy Prods.*, 178 N.C. App. 417, 631 S.E.2d 848 (2006). We reverse.

The claim was first referred to an ESC adjudicator, who determined that Binney was disqualified, and Binney appealed. An appeals referee held a hearing where both Binney and Banner presented evi-

dence from various witnesses. On 5 November 2003, the appeals referee issued a decision finding Binney disqualified pursuant to N.C.G.S. § 96-14(2). Binney then appealed to the ESC, which relied on the evidence from the hearing before the appeals referee in making findings of fact and conclusions of law. The ESC disqualified Binney for unemployment insurance benefits after concluding that she had been fired for misconduct, consisting of asserting a personal copyright interest in Banner's catalogs and web site "in conjunction with" removing the hard drive from her work computer without authorization.

Binney petitioned for judicial review in the superior court in Buncombe County. On 17 November 2004, Judge James L. Baker, Jr. entered a judgment affirming the ESC decision, as well as all of its findings and conclusions. Binney then appealed to the Court of Appeals, challenging many of the ESC's findings of fact and conclusions of law and the superior court's judgment affirming them. On 18 July 2006, in a divided opinion, the Court of Appeals affirmed on the ESC's cross-assignment of error, reversed the superior court's decision on the merits, and remanded the matter for entry of an order reversing the Commission decision and for further remand to the Commission for additional proceedings.

The Court of Appeals considered two substantive issues: whether the ESC erred in finding and concluding that Binney's removal of the hard drive from her work computer without authorization constituted employment-related misconduct, and whether Binney's assertions of a personal copyright in her employer's catalogs and on its web site constituted work-related misconduct. The majority concluded that there was no evidence that Binney removed her hard drive for any improper purpose and that there was no formal policy against removing computer hard drives from the employer's premises. *Id.* at 425, 631 S.E.2d at 853. The majority also concluded that there was no evidence that Binney's assertions of a personal copyright on the employer's web site and in its catalogs were unreasonable or taken in bad faith and that the employer failed to carry its burden of proving Binney should be disqualified from receiving unemployment insurance benefits on that ground. *Id.* at 427-28, 631 S.E.2d at 854. However, Judge Hunter concluded that evidence of Binney's removal of the computer hard drive without authorization showed a deliberate disregard of the standards of behavior that the employer had a right to expect, and thus, Binney was properly disqualified for benefits. *Id.* at 431, 631 S.E.2d at 856 (Hunter, J., dis-

senting in part and concurring in part). The dissenting opinion did not address the matter of the personal copyright assertions. *Id.*

Respondent ESC filed its appeal of right based on the dissenting opinion's discussion about removal of the computer hard drive, along with a petition seeking this Court's discretionary review of the majority's ruling on the personal copyright issue. This Court allowed respondent's petition for discretionary review on 8 March 2007. Because the ESC and superior court based their conclusion of law that Binney was disqualified due to discharge for misconduct on the findings pertaining to both the copyright and hard drive issues, we address both.

Employer Banner sold rehabilitation and other health-care supplies via showroom, printed catalog, and web site listings. Binney had been an officer of the company since she, along with Thomas Maroney, Sandor Sharp and their wives, founded it in May 1997. At the time of these events, Maroney and his wife owned eighty percent of the company and Binney's share was ten percent. At the time of her termination Binney served as Banner's corporate treasurer and self-titled vice president of marketing. Banner produced its first catalog in 1997 and it indicated no copyright. In 1998, Binney added to the catalogs a notice of joint copyright for herself and Banner. From 1999 through 2003, all of Banner's catalogs carried an assertion of copyright for Binney personally, but no mention of Banner. At some point between 1998 and 2003, Sandor Sharp, part-owner and corporate secretary of Banner, noticed and asked Binney about her assertion of a personal copyright in the catalogs. Binney's explanation of her actions allayed his concerns, however, and the personal copyright apparently went otherwise unnoticed until March 2003. At that time, it quickly became a contentious issue, and after Binney removed the hard drive from her computer on 4 April 2003, Banner terminated her on 5 April 2003.

The ESC made the following pertinent findings regarding Binney's termination:

> 3. The claimant was discharged from this job for the following reasons: she produced catalogs and a web site for the employer that included a statement of that the claimant had a personal copyright interest in the catalogs and web site; she removed the hard drive from the computer supplied to her by the employer without being authorized to do so . . . .
>
> . . . .

5. The claimant was responsible for the production and distribution of the employer's product catalog. The first of these catalogs was produced in mid-1997.

6. In 2001, the claimant created an internet web site for the employer.

7. On or about March 15, 2003, Thomas Maroney, vice president, discovered that the employer's web site contained the following statement: "Copyright © 2001, Christine Marie Binney, All Rights Reserved." The employer had not authorized the claimant to include such a statement on the web site.

8. The employer then discovered that the 1997, 1998/1999, 2000, 2001, 2002, and 2003 catalogs, all of which were produced by the claimant in the performance of her job, contained similar statements that asserted that the claimant had a copyright interest in the catalogs. The employer had not authorized the claimant to include such a statement in the catalogs.[1]

9. The employer confronted the claimant concerning her copyright assertions. The claimant advised the employer that she had a copyright interest in the catalogs and web site; however, the claimant did not seek legal advice concerning her copyright interests prior to her discharge from employment.

10. On April 4, 2003, the employer learned that the claimant had removed the hard drive from the computer assigned to the claimant by the employer. The employer did not authorize the claimant to remove the hard drive.

The ESC then concluded:

> In the present case, the Commission concludes from the competent and credible evidence and the facts found therefrom that the claimant was discharged from employment. The Commission further concludes that the claimant's assertion of a personal copyright interest in the employer's catalogs and web site, in conjunction with her unauthorized removal of the hard drive of an employer computer, showed a deliberate disregard of the standards of behavior that the employer had a right to expect of the claimant. The Commission also concludes there-

1. Finding 8 contains one minor error, which does not affect the conclusion of law on the issues before us: the 1997 catalog did not contain a copyright assertion, and the 1998/1999 catalog contained the assertion of a joint copyright between Binney and Banner.

fore that the claimant was discharged for misconduct connected with the work.

Based upon these findings and conclusions, the ESC denied Binney's claim for unemployment insurance benefits.

In the superior court, Binney argued that the ESC's findings were premised on a misunderstanding of copyright law and the respective rights and duties of shareholders and officers in closely-held corporations, that the findings were not supported by competent evidence, and that the findings did not support the ESC's conclusion of law that she "willingly and knowingly showed a deliberate disregard of the standard of behavior that the employer had a right to expect." The superior court affirmed the ESC, finding that the ESC's findings were supported by competent evidence and thus binding on review, and that the findings in turn supported the ESC's conclusions. In the Court of Appeals, Binney challenged findings of fact 3, 5, 7, 8, 9 and 10, as well as the ESC's conclusion that these actions constituted work-related misconduct; all of these are quoted above.

The standard of review in appeals from the ESC, both to the superior court and to the appellate division, is established by statute. "In any judicial proceeding under this section, the findings of fact by the Commission, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." N.C.G.S. § 96-15(i) (2007). The General Assembly amended subsection (i) in 1989 to replace the phrase "if there is evidence to support them" with the present standard "if there is *any competent evidence* to support them." *See* Act of July 5, 1989, ch. 583, Sec. 12, 1989 N.C. Sess. Laws 1465, 1465 (emphasis added); *see also Williams v. Burlington Indus., Inc.*, 318 N.C. 441, 448-49, 349 S.E.2d 842, 846-47 (1986) (interpreting the standard of review under the previous provisions of § 96-15(i)).

This Court has held that "[o]rdinarily a claimant is presumed to be entitled to benefits under the Unemployment Compensation Act, but this is a rebuttable presumption with the burden on the employer to show circumstances which disqualify the claimant." *Intercraft Indus. Corp. v. Morrison*, 305 N.C. 373, 376, 289 S.E.2d 357, 359 (1982) (citations omitted). An employee is disqualified for unemployment benefits when she has been discharged for misconduct connected with her work. N.C.G.S. § 96-14(2) (2007). The statute further provides, in pertinent part:

> Misconduct connected with the work is defined as conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

Id. Violation of an employer's work rules is misconduct, unless "the evidence shows that the employee's actions were reasonable and were taken with good cause." *Intercraft Indus. Corp.*, 305 N.C. at 375, 289 S.E.2d at 359 (citations omitted). In the absence of a specific rule violation, " '[m]isconduct' may consist in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee." *Hagan v. Peden Steel Co.*, 57 N.C. App. 363, 365, 291 S.E.2d 308, 309 (1982) (citing *In re Collingsworth*, 17 N.C. App. 340, 194 S.E.2d 210 (1973)).

In its appeal to this Court based on the dissent, the ESC argues that the Court of Appeals disregarded the standard of review set out in N.C.G.S. § 96-15(i) and disregarded competent evidence in the record supporting the ESC's finding of fact regarding Binney's removal of the hard drive. Finding of fact 10, quoted above, concerns Binney's unauthorized removal of the hard drive from her company computer to take home with her for the weekend.

The Court of Appeals opinion cited the correct standard of review from the statute: whether "any competent evidence" supports the finding. *Binney*, 178 N.C. App. at 425, 631 S.E.2d at 853. The majority opinion then states that finding 10 lacks any support because "the employer admitted that the company had no policy [regarding removing hard drives] at all." *Id.* Maroney testified that Binney had never asked permission to remove her computer hard drive and that neither he nor any other officer would have approved such a request. That the employer had no policy on removing hard drives does not contradict the finding that the "employer did not authorize the claimant to remove the hard drive," and we conclude that competent evidence in the record supports this finding. To the extent that the majority made its own assessment of the facts (e.g., determining that Binney believed she had the authority to remove the hard drive), in lieu of analyzing whether any evidence supported the findings the ESC actu-

ally made, we agree that the Court of Appeals misapplied the statutory standard of review.

In its appeal to this Court based on our grant of discretionary review, the ESC again argues that the Court of Appeals disregarded the standard of review set out in N.C.G.S. § 96-15(i) and disregarded competent evidence in the record in support of the ESC's findings of fact regarding Binney's assertion of a personal copyright interest. The Court of Appeals cited the pertinent language from the statute, correctly noting that the standard of review was whether there was "any competent evidence" to support the ESC's findings. 178 N.C. App. at 422, 631 S.E.2d at 851. However, the majority opinion does not specify any particular finding that was not supported under this standard. Instead, the Court noted that the record did not contain any evidence that Binney acted unreasonably or in bad faith. *Id.* at 427, 631 S.E.2d at 854.

In the Court of Appeals, Binney purported to challenge findings of fact 3, 5, 7, 8 and 9, concerning Binney's assertion that she retained a personal copyright interest in the company web site and printed catalogs. Each of these findings is supported by competent evidence in the record. Maroney and Sharp both testified that Binney never told them she was claiming a personal copyright in the web site and that the placement of the copyright on the web site would not have been authorized by any of the company's officers. Maroney also testified that the copyright assertions in the 2000-2003 catalogs were not authorized by him or the other company officers or shareholders.

The Court of Appeals erred in disregarding this competent evidence which supported findings 3 through 9. The Court of Appeals noted that the record contained no evidence about whether Binney acted unreasonably or in bad faith. No evidence was required, since the ESC did not make a finding on that issue. Again, we agree that the Court of Appeals misapplied the standard of review of the findings the ESC actually made.

The majority opinion held that the findings did not support the ESC's conclusion that Binney must be disqualified from receiving benefits because they did not establish that Binney acted unreasonably or in bad faith. However, under N.C.G.S. § 96-14(2), Banner needed only to present evidence that Binney showed "willful . . . disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee." Here, the ESC only concluded that these

two issues combined to result in deliberate disregard of the standards Banner had a right to expect of Binney.

The transcript and other evidence indicate that in March 2003, Binney overheard Thomas Maroney, Banner's vice president, and (along with his wife) owner of eighty percent of Banner's stock, discussing the possible sale of Banner with a prospective buyer. This possibility appeared to create tension between Binney and Maroney and Banner's other corporate officers. In mid-March 2003, Maroney discovered the statements in Banner's catalogs and web site asserting that Binney retained a personal copyright interest in them. According to the transcript, this discovery led to a heated confrontation between Maroney and Binney at the Banner offices. Maroney testified that the company had not authorized Binney to include such statements in the catalogs or on the web site.

Binney testified that on Friday, 4 April 2003, as she was preparing to leave work for a weekend out of town, a customer requested a meeting with her the following Monday morning. To facilitate her preparations for the meeting, Binney decided to remove the hard drive from her work computer and take it home with her, a quicker method than transferring the needed data onto discs. On Saturday, 5 April 2003, Banner learned that Binney had removed the hard drive from her work computer when Maroney, his wife, and Sharp met with a computer consultant to review the company's computer system. Maroney and Sharp each testified that they had never authorized Binney to remove the hard drive and would not have authorized her to do if she had made such a request. They also testified that Binney's hard drive contained several pieces of critical business information that were not kept on Banner's servers.

Both Maroney and Binney testified to the tension and mistrust between Binney and the other shareholders and officers at Banner, created in part by the discovery of her personal copyright on the web site and in the catalogs in March 2003. The removal of the hard drive on 4 April 2003 took place only days after Binney and Maroney had a heated confrontation over the copyright issue and other matters. Whether Binney believed in good faith that she had a personal copyright interest in the materials is irrelevant; she never asked for nor received permission to assert a personal claim on the company's property by including the copyright statements. In fact, the transcript reveals that her only justification for doing so was a "personal decision." We conclude that the findings support the conclusion that Binney's assertion of a personal copyright on the company web site

and in its printed catalogs, without the employer's prior knowledge or authorization, satisfies the requirements of N.C.G.S. § 96-14(2).

In this context, both Binney's removal of the hard drive and her assertion of the copyright without seeking and receiving permission to do so support the conclusion that her conduct evidenced a deliberate disregard "of standards of behavior which the employer has the right to expect of his employee." *See* N.C.G.S. § 96-14(2). We hold that the ESC properly found and concluded that work-related misconduct was the basis of Binney's termination. Thus, the ESC's decision to deny unemployment benefits to Binney was correct, and the Court of Appeals erred in reversing the superior court's affirmance of the ESC's decision. We reverse the Court of Appeals as to this issue and instruct that court to reinstate the judgment of the trial court. The Court of Appeals' decision regarding the ESC's cross-assignment of error is not before this Court, and that court's decision as to that issue remains undisturbed.

REVERSED.

STATE OF NORTH CAROLINA v. WILLIAM JOSEPH MOORE

No. 460A06

(Filed 12 June 2008)

Constitutional Law— right to counsel—adequacy of determination of knowing, intelligent, and voluntary waiver

The trial court erred in a capital first-degree murder case by accepting defendant's waiver of the right to counsel on 14 November 2005, and defendant is entitled to a new trial because: (1) the trial court did not make an adequate determination pursuant to N.C.G.S. § 15A-1242 whether defendant's decision to proceed *pro se* was knowingly, intelligently, and voluntarily made; (2) defendant gave the judge no indication that he appreciated the consequences of proceeding without counsel; (3) the judge received no indication that defendant comprehended the nature of the charges and proceedings and the range of permissible punishments since at the time he was permitted to waive counsel, defendant did not articulate an awareness that the crime for which he was charged was punishable by death; (4) it was not

sufficient that defendant agreed with the judge that he had been afforded excellent legal counsel; (5) it was not enough that defendant claimed his decision was made without haste and was something that he had thought about for quite some time; (6) a defendant's demeanor and tone may be relevant in a trial court's inquiry under N.C.G.S. § 15A-1242, but these factors cannot serve as a substitute for the inquiry itself; (7) defendant's literacy or competency, including defendant's level of education, could not have been apparent to the judge from his brief colloquy with defendant before allowing him to waive his right to counsel; (8) a determination whether defendant was resolutely determined to control the outcome of his prosecution does not satisfy the constitutional standard that a defendant's waiver of the right to counsel must be knowingly, intelligently, and voluntarily made; and (9) a later colloquy that took place between defendant and another judge concerning defendant's decision to waive his right to counsel was not relevant since it did not take place until the first day of defendant's sentencing proceeding on 24 April 2006, more than five months after defendant was permitted to proceed without the assistance of counsel and approximately two months after defendant, proceeding *pro se*, pleaded guilty to first-degree 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 Clifton W. Everett, Jr. on 26 April 2006 in Superior Court, Chowan County, following defendant's plea of guilty to first-degree murder. Heard in the Supreme Court 17 March 2008.

Roy Cooper, Attorney General, by Joan M. Cunningham, Assistant Attorney General, for the State.

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

BRADY, Justice.

Defendant William Joseph Moore pleaded guilty to the first-degree murder of Pamela Spruill Virzi on 27 February 2006 and, following a sentencing proceeding, was sentenced to death on 26 April 2006. On appeal, defendant assigns error to the trial court's acceptance of his waiver of the right to counsel on 14 November 2005. We hold that the trial court did not make an adequate determination pur-

suant to N.C.G.S. § 15A-1242 whether defendant's decision to proceed *pro se* was knowingly, intelligently, and voluntarily made. Because this error was prejudicial, defendant is entitled to a new trial.

PROCEDURAL BACKGROUND

On 17 August 2004, defendant was arrested for the alleged murder of Pamela Spruill Virzi that same day. On 20 August 2004, James R. Vosburgh, a former superior court judge, was appointed by the North Carolina Office of Indigent Defense Services to represent defendant. On 7 September 2004, the Chowan County Grand Jury returned a true bill of indictment charging defendant with first-degree murder. The State subsequently elected to proceed capitally, and following the required Rule 24 conference on 27 September 2004, defendant was appointed a second trial attorney—Andrew Womble, the public defender in the First Prosecutorial District of North Carolina.

Between 22 October 2004 and 14 November 2005, defendant, through counsel, filed numerous pretrial motions pertaining to discovery, jury selection, and potential sentencing issues. At an arraignment hearing on 14 November 2005, however, defendant informed the presiding judge, the Honorable John E. Nobles, Jr., that he intended to waive his right to counsel. Following some discussion among defendant, his counsel, and Judge Nobles, defendant attested to his intention to waive his right to counsel by signing Administrative Office of the Courts form number AOC-CR-227. Judge Nobles certified defendant's waiver of his right to counsel on the same form and subsequently appointed attorney Vosburgh to serve as stand-by counsel.

On 27 February 2006, defendant, proceeding *pro se*, pleaded guilty to first-degree murder before the Honorable J. Richard Parker. Defendant's sentencing hearing was held from 24 to 26 April 2006, the Honorable Clifton W. Everett, Jr. presiding, at the conclusion of which the jury returned a binding recommendation that defendant be sentenced to death. Judge Everett sentenced defendant accordingly, and defendant now appeals his conviction and sentence of death to this Court as of right pursuant to N.C.G.S. § 7A-27(a).

ANALYSIS

This Court has long recognized the state constitutional right of a criminal defendant " 'to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes.' "

State v. Thomas, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992) (quoting *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972)); *see also* N.C. Const. art. I, § 23. However, "[b]efore allowing a defendant to waive in-court representation by counsel . . . the trial court must insure that constitutional and statutory standards are satisfied." *Thomas*, 331 N.C. at 673, 417 S.E.2d at 475.

"Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court . . . must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel." *Id.* at 674, 417 S.E.2d at 476 (citations omitted). A trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A-1242. *See id.* (citing *State v. Gerald*, 304 N.C. 511, 519, 284 S.E.2d 312, 317 (1981)). This statute provides:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel *only after* the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C.G.S. § 15A-1242 (2007) (emphasis added).

In the instant case, a review of the record and transcript from defendant's 14 November 2005 arraignment reveals that Judge Nobles erred in his omission of the appropriate inquiry mandated by N.C.G.S. § 15A-1242. Rather, it appears Judge Nobles deferred to defendant's assigned counsel to provide defendant with adequate constitutional safeguards. During defendant's arraignment, the following discussion took place among defendant, his counsel, and Judge Nobles:

> THE COURT: All right. Mr. Vosburgh, it is a great high honor to have you in my court, first of all. I appreciate that. I mean, obviously, I do know you having practiced in front of you a little bit, not enough, but I knew your reputation in Washington and Beaufort Counties.

You are lucky—sir, what is your last name?

[DEFENDANT]: Moore.

THE COURT: Mr. Moore to have such good attorneys. I know Mr. Womble also. I will tend to want you to follow their [advice]. But obviously, this is a very important case to you. I recognize that. The Court thinks that you are in good hands under the circumstances with Mr. Vosburgh and Mr. Womble. I would—you know, I would certainly highly recommend it whatever advice they give you, that you follow it.

In light of that if you still want to make a statement to me, I am not going to prohibit you from doing that. I wouldn't—I wouldn't give you that advice myself if I didn't truly believe that. Do you understand that?

[DEFENDANT]: Yes, sir.

THE COURT: All right. Well, you make your decision.

[DEFENDANT]: I have a long time ago.

THE COURT: All right, sir. Did you—I think the State wanted to arraign you in this matter, is that correct?

[PROSECUTOR]: Yes, sir.

THE COURT: Do you want to proceed with the arraignment, Mr. Vosburgh or do you want to go ahead and just let his statement be made?

MR. VOSBURGH: I don't believe—he wants to make his statement.

[DEFENDANT]: No, sir, I haven't. What I wanted to say is that with all that you have said about Mr. Vosburgh and Mr. Womble is true. The State has afforded me excellent legal counsel, but I still choose to represent myself.

THE COURT: All right, sir. All right, sir. In—that's fine. In light of that, I will certainly relieve Mr. Vosburgh and Mr. Womble as counsel of record if that's what [you] choose to do. I am going to appoint standby counsel. I am going to do that in the event that you need them. Do you understand that?

[DEFENDANT]: I would appreciate that.

THE COURT: Well, I will do that. I would—the Court will first, of course, ask Mr. Vosburgh if he would consider doing that.

If not, then I would ask Mr. Womble if he would consider doing that. It might be that you-all need to speak on that because whatever you ask me is what I am going to do.

MR. VOSBURGH: Your Honor, standby counsel doesn't have to do much and I think I am perfectly capable of doing that. But I think probably since I do work with the Capital Defender's Office and Mr. Womble is the chief counsel for the Public Defender's Office in this district, that depending on how long a trial of this matter will take, it would probably bring him to right much of a slow down. So if you would appoint me as standby counsel, I would be happy to accept it and do what I can without becoming reactivated in the case.

THE COURT: All right, sir. Well, I am going certainly to do that and I do appreciate it. The Court has a tremendous amount of confidence in you and particularly in a case like this where you are dealing with such a serious matter. It really does concern me, [Mr. Moore], that you—that you don't listen to the advice of your attorneys and then really don't listen to the Court. Because I don't think there is anyone in here that doesn't have your best interest at heart as to your opportunities to defend yourself or to take advantage of any legal rights that you may have.

So, again, I would encourage you to consider that situation and certainly if you continue with your thoughts of representing yourself, remember that one of the finest trial lawyers and one of the best trial lawyer[s] in the State is right there behind you.

[DEFENDANT]: I agree and this is not a decision that I have made in haste. This is something that I have thought about for quite some time.

THE COURT: All right, sir. In light of that, I am going to appoint [Mr. Vosburgh] as standby counsel.

MR. VOSBURGH: All right, sir.

THE COURT: Any other business for the Court?

[PROSECUTOR]: If we could address the arraignment, Your Honor, as to how he intends to [] plead to the charge.

[DEFENDANT]: I don't wish to enter a plea at this time.

THE COURT: Would you mind stepping down here and signing a waiver as to an attorney if you don't want one.

[DEFENDANT]: No, I don't want one.

THE COURT: All right.

The State contends that this Court's decision in *State v. Carter*, 338 N.C. 569, 451 S.E.2d 157 (1994), should control our holding in this case. In *Carter*, this Court concluded that the trial court's inquiry under N.C.G.S. § 15A-1242 "elicited the required information" from the defendant because "[the] defendant clearly indicated that he realized he was facing a possible death sentence" and "also indicated that he realized he was being retried on the same matters on which he had previously been tried during a three and one-half week long trial which ended in a mistrial." *Id.* at 583, 451 S.E.2d at 164. Thus, this Court held that the defendant was not entitled to a new trial because the trial court had sufficiently determined "that defendant's decision was both knowing and voluntary." *Id.*

In the instant case, unlike in *Carter*, defendant gave Judge Nobles no indication that he appreciated the consequences of proceeding without counsel. *See* N.C.G.S. § 15A-1242(2). Moreover, Judge Nobles received no indication that defendant comprehended "the nature of the charges and proceedings and the range of permissible punishments," since at the time he was permitted to waive counsel, defendant did not even articulate an awareness that the crime for which he was charged was punishable by death. *See id.* § 15A-1242(3).

It was not sufficient that defendant agreed with Judge Nobles that he had been afforded "excellent legal counsel." This assertion would have minimal bearing on whether defendant appreciated the consequences of proceeding without counsel and no bearing whatsoever on whether he comprehended "the nature of the charges and proceedings and the range of permissible punishments." *See id.* § 15A-1242(2), (3). Similarly, it is not enough that defendant claimed his decision was made without "haste" and was "something that [he had] thought about for quite some time." Although the extent of a defendant's deliberations when deciding to waive the right to counsel is indeed *relevant* to an inquiry under N.C.G.S. § 15A-1242, this factor is meaningless without any indication that the defendant's deliberations *have actually resulted in* an appreciation for the consequences of this decision and a comprehension of "the nature of the charges and proceedings and the range of permissible punishments." *See id.*

The State further argues that defendant's responses, "while brief, were clear, succinct and sufficient" to demonstrate that his decision

was "both knowing and voluntary," and that defendant's demeanor was "apparently calm" and revealed "no sign of confusion, reticence or hesitation." Again, a defendant's demeanor and tone may be relevant in a trial court's inquiry under N.C.G.S. § 15A-1242, but these factors cannot serve as a substitute for the inquiry itself.

Finally, the State contends there "is no question about defendant's literacy or competency," since defendant "is a college graduate who is intelligent, articulate, acted entirely appropriately throughout his hearings and who was resolutely determined to control the outcome of his prosecution." As reflected in the record and transcript of 14 November 2005, none of these factors, including defendant's level of education, could have been apparent to Judge Nobles from his brief colloquy with defendant before allowing him to waive his right to counsel. Moreover, a determination whether defendant was "resolutely determined to control the outcome of his prosecution" does not satisfy the constitutional standard set forth in *Thomas* that a defendant's waiver of the right to counsel must be "knowingly, intelligently, and voluntarily" made. *See* 331 N.C. at 674, 417 S.E.2d at 476 (citations omitted).

As the State notes in its brief, a later colloquy took place between defendant and Judge Everett concerning defendant's decision to waive his right to counsel. However, we do not consider this colloquy relevant to our holding because it did not take place until the first day of defendant's sentencing proceeding on 24 April 2006, more than five months after defendant was permitted to proceed without the assistance of counsel and approximately two months after defendant, proceeding *pro se*, pleaded guilty to first-degree murder before Judge Parker. Moreover, the colloquy took place between defendant and the last of three presiding superior court judges, who, due to the regular rotation within the superior court division, would not have known whether Judge Nobles had complied with N.C.G.S. § 15A-1242 at defendant's arraignment. Any error committed by Judge Nobles on 14 November 2005 could not have been cured on 24 April 2006, two months after defendant, without the assistance of counsel, pleaded guilty to first-degree murder.

Accordingly, we hold that Judge Nobles erred when he accepted defendant's waiver of the right to counsel on 14 November 2005 without first making the "thorough inquiry" mandated by N.C.G.S. § 15A-1242 to ensure that defendant's decision to represent himself was knowingly, intelligently, and voluntarily made. This error was prejudicial; therefore, defendant is entitled to a new trial.

Although not determinative in our decision, we take this opportunity to provide additional guidance to the trial courts of this State in their efforts to comply with the "thorough inquiry" mandated by N.C.G.S. § 15A-1242. The University of North Carolina at Chapel Hill School of Government has published a fourteen-question checklist "designed to satisfy requirements of" N.C.G.S. § 15A-1242:

1. Are you able to hear and understand me?
2. Are you now under the influence of any alcoholic beverages, drugs, narcotics, or other pills?
3. How old are you?
4. Have you completed high school? college? If not, what is the last grade you completed?
5. Do you know how to read? write?
6. Do you suffer from any mental handicap? physical handicap?
7. Do you understand that you have the right to be represented by a lawyer?
8. Do you understand that you may request that a lawyer be appointed for you if you are unable to hire a lawyer; and one will be appointed if you cannot afford to pay for one?
9. Do you understand that, if you decide to represent yourself, you must follow the same rules of evidence and procedure that a lawyer appearing in this court must follow?
10. Do you understand that, if you decide to represent yourself, the court will not give you legal advice concerning defenses, jury instructions or other legal issues that may be raised in the trial?
11. Do you understand that I must act as an impartial judge in this case, that I will not be able to offer you legal advice, and that I must treat you just as I would treat a lawyer?
12. Do you understand that you are charged with _____, and that if you are convicted of this (these) charge(s), you could be imprisoned for a maximum of _____ and that the minimum sentence is _____? (Add fine or restitution if necessary.)
13. With all these things in mind, do you now wish to ask me any questions about what I have just said to you?

14. Do you now waive your right to assistance of a lawyer, and voluntarily and intelligently decide to represent yourself in this case?

See 1 Super. Court Subcomm., Bench Book Comm. & N.C. Conf. of Super. Court Judges, *North Carolina Trial Judge's Bench Book* § II, ch. 6, at 12-13 (Inst. of Gov't, Chapel Hill, N.C., 3d ed. 1999) (italics omitted). While these specific questions are in no way required to satisfy the statute, they do illustrate the sort of "thorough inquiry" envisioned by the General Assembly when this statute was enacted and could provide useful guidance for trial courts when discharging their responsibilities under N.C.G.S. § 15A-1242.

Finally, "[b]ecause we dispose of this case on one assignment of error and because the other assigned errors [in defendant's brief and motion for appropriate relief] may not arise at retrial, we need not address them." *See State v. Pruitt*, 322 N.C. 600, 601, 369 S.E.2d 590, 591 (1988). Thus, we also dismiss defendant's motion for appropriate relief as moot.

NEW TRIAL; DEFENDANT'S MOTION FOR APPROPRIATE RELIEF DISMISSED AS MOOT.

DAVID STANDLEY v. TOWN OF WOODFIN, AN INCORPORATED MUNICIPALITY IN THE STATE OF NORTH CAROLINA; AND BRETT HOLLOMAN, CHIEF OF POLICE, IN HIS OFFICIAL CAPACITY

No. 531A07

(Filed 12 June 2008)

Constitutional Law— use of parks by registered sex offenders—ordinance prohibiting—rational relationship to legitimate government interest

A town ordinance prohibiting registered sex offenders from entering its parks was rationally related to the legitimate government interest of protecting park visitors from becoming victims of sexual crimes, and was constitutional. Furthermore, plaintiff's asserted liberty interest is not encapsulated by the right to intrastate travel, and the right to freely use the town's parks is not a fundamental right.

STANDLEY v. TOWN OF WOODFIN

[362 N.C. 328 (2008)]

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 186 N.C. App. ——, 650 S.E.2d 618 (2007), affirming an order granting summary judgment for defendants and denying summary judgment for plaintiff entered 7 August 2006 by Judge James L. Baker, Jr. in Superior Court, Buncombe County. Heard in the Supreme Court 5 May 2008.

American Civil Liberties Union of North Carolina Legal Foundation, by Katherine Lewis Parker, Legal Director; and Cloninger, Elmore, Hensley & Searson, P.L.L.C., by Bruce Elmore, Jr., Cooperating Attorney for American Civil Liberties Union of North Carolina Legal Foundation, for plaintiff-appellant.

Ferikes & Bleynat, PLLC, by Joseph A. Ferikes, for defendant-appellees.

BRADY, Justice.

On 19 April 2005, defendant Town of Woodfin (Woodfin) enacted Woodfin Town Ordinance Section 130.03 (the ordinance), which prohibited registered sex offenders, such as plaintiff, from knowingly entering any "public park owned, operated, or maintained" by Woodfin. Plaintiff asserts this ordinance is unconstitutional as violative of the due process right to intrastate travel. We disagree, and therefore affirm the decision of the Court of Appeals.

FACTUAL AND PROCEDURAL BACKGROUND

In 1987 plaintiff David Standley pleaded nolo contendere to attempted sexual battery and aggravated assault in Florida. After serving an active sentence, plaintiff was released and placed on supervised probation. Plaintiff violated the terms of his probation in 1995, when he was convicted of solicitation of an undercover policewoman posing as a prostitute. As a result of the probation violation, plaintiff was again incarcerated, but in 1999 he was unconditionally released from prison in Florida. In 2004 plaintiff moved to Buncombe County, North Carolina, where he presently resides in Woodfin with his mother. Because of his prior sex offenses, plaintiff is required to register with the North Carolina Sex Offender Registry and has done so. *See* N.C.G.S. § 14-208.7 (2007).

In 1998 plaintiff suffered a stroke, and as a result, he is disabled and never travels without being accompanied by his mother or

another adult who can assist him. Plaintiff would frequently visit Woodfin Riverside Park with his mother before enactment of the ordinance at issue.

Before 19 April 2005, two incidents involving sexual offenses occurred in or near two of the three public parks owned, operated, or maintained by Woodfin. Following these incidents, the Mayor and Board of Aldermen requested that the Town Administrator research and recommend action to best protect the children and other residents of Woodfin. Consistent with this research and recommendation, the Board enacted an ordinance on 19 April 2005, which stated in pertinent part:

> It shall constitute a general offense against the regulations of the Town of Woodfin for any person or persons registered as a sex offender with the state of North Carolina and or any other state or federal agency to knowingly enter into or on any public park owned, operated, or maintained by the Town of Woodfin.

Woodfin, N.C., Ordinance § 130.03(2)(A) (Apr. 19, 2005).

Plaintiff commenced suit against Woodfin by filing a summons and complaint,[1] alleging that the ordinance violated the due process right to travel under the Fourteenth Amendment of the United States Constitution and Article I, sections 19 and 35 of the North Carolina Constitution.[2] Both parties filed motions for summary judgment, and on 7 August 2006, the trial court granted summary judgment in favor of Woodfin and denied plaintiff's motion for summary judgment. Plaintiff appealed, and the Court of Appeals affirmed in a divided opinion. The majority of the Court of Appeals found the ordinance to be constitutional, but the dissenting judge would have held the ordinance was preempted under N.C.G.S. § 160A-174(b) and was unconstitutional.[3] Plaintiff now appeals to this Court as of right pursuant to N.C.G.S. § 7A-30(2).

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1. Plaintiff also named Brett Holloman, Chief of Police, as a defendant in his official capacity. References throughout this opinion to Woodfin implicitly include Holloman.

2. Plaintiff also alleged the ordinance was vague and overbroad, violated his procedural due process rights, and violated the prohibition against ex post facto laws. None of these issues is before the Court as they were not part of the basis of the dissenting opinion in the Court of Appeals.

3. Plaintiff has failed to present any argument in his brief to this Court concerning this ordinance's alleged preemption by N.C.G.S. § 160A-174(b)(5). Accordingly, we consider this argument abandoned. *See* N.C. R. App. P. 28(b)(6).

ANALYSIS

The Constitution of the United States preserves a right to *interstate* travel, which the Supreme Court of the United States has found to be a fundamental right. *See Saenz v. Roe*, 526 U.S. 489, 500 (1999) (discussing the three components of the right to travel); *United States v. Guest*, 383 U.S. 745, 757 (1966) ("The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union."). As a corollary, this Court has recognized a right to *intrastate* travel, stating that "the right to travel upon the public streets of a city is a part of every individual's liberty, protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by the Law of the Land Clause, Article I, § 17, of the Constitution of North Carolina." *State v. Dobbins*, 277 N.C. 484, 497, 178 S.E.2d 449, 456 (1971). "[T]he right to travel on the public streets is a fundamental segment of liberty," and as such its absolute prohibition "requires substantially more justification" than would otherwise be required for state action. *Id.* at 499, 178 S.E.2d at 457-58.

Plaintiff asserts that the ordinance is unconstitutional in that it violates the fundamental right to intrastate travel. We disagree. When reviewing an alleged violation of substantive due process rights, a court's first duty is to carefully describe the liberty interest the complainant seeks to have protected. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The right to intrastate travel is, as described by the United States Court of Appeals for the Sixth Circuit, "an everyday right, a right we depend on to carry out our daily life activities. It is, at its core, a right of function." *Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002), *cert. denied*, 539 U.S. 915 (2003). Plaintiff's alleged liberty interest to enter into Woodfin Riverside Park to have "barbecues and enjoy[] the leisure offered by nature along the riverbank" is not a right of function which one would "depend on to carry out [his] daily life activities." *Id.* As plaintiff's asserted liberty interest is not encapsulated by the right to intrastate travel, we next consider whether his asserted liberty interest to freely roam in parks owned, operated, or maintained by Woodfin is otherwise a fundamental right.

In determining whether plaintiff's asserted liberty interest is fundamental, we must assess whether it is "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [the liberty interest at issue] were sacrificed." *Glucksberg*, 521 U.S. at

720-21 (internal quotation marks and citations omitted). In undertaking such an analysis, we must tread carefully before recognizing a fundamental liberty interest, which would "to a great extent, place the matter outside the arena of public debate and legislative action" and run the very real risk of transforming the Due Process Clause into nothing more than the "policy preferences of the Members of this Court." *Id.* at 720 (citation omitted).

Precious few rights have been found by the Supreme Court of the United States to be fundamental in nature. Such rights include the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), the right to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), and the right to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965). *See Glucksberg*, 521 U.S. at 727 n.19 (listing others). Plaintiff's asserted liberty interest to enter and freely roam in the park is simply not comparable to those rights deemed fundamental by prior decisions of this Court and the Supreme Court of the United States. *Accord Doe v. City of Lafayette, Ind.*, 377 F.3d 757, 772-73 (7th Cir. 2004) (concluding that "assuming the record would support his contention that he is seeking a right to enter public parks simply to wander and loiter innocently, we cannot characterize that right as 'fundamental' "). Accordingly, we cannot conclude that plaintiff's asserted liberty interest is so "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." *Glucksberg*, 521 U.S. at 720-21 (internal quotation marks and citations omitted).

Because plaintiff's asserted liberty interest is not fundamental, we must determine whether the ordinance meets the rational basis test. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 181, 594 S.E.2d 1, 15 (2004) (quoting *Lowe v. Tarble*, 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985)). "When determining whether a rational basis exists for application of a law, we must determine whether the law in question is rationally related to a legitimate government purpose." *In re R.L.C.*, 361 N.C. 287, 295, 643 S.E.2d 920, 924 (2007) (plurality) (citing *Glucksberg*, 521 U.S. at 728; *Rhyne*, 358 N.C. at 180-81, 594 S.E.2d at 15), *cert. denied*, —— U.S. ——, 128 S. Ct. 615, 169 L. Ed. 2d 396 (2007). In assessing whether there is a legitimate government interest, "[i]t is not necessary for courts to determine the actual goal or purpose of the government action at issue; instead, any conceivable legitimate purpose is sufficient." *Id.* (citing *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

This Court has long recognized that the police power of the State may be exercised to enact laws, within constitutional limits, "to protect or promote the health, morals, order, safety, and general welfare of society." *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949) (citations omitted). By statute, the State of North Carolina has delegated to municipalities such as Woodfin the authority to, "by ordinance define, prohibit, regulate, or abate acts . . . detrimental to the health, safety, or welfare of its citizens." N.C.G.S. § 160A-174 (2007).

Protecting children and other visitors to parks owned and operated by Woodfin from sexual attacks is certainly a legitimate government interest. The issue is whether the means by which Woodfin sought to achieve this protection are rationally related to this legitimate interest. Plaintiff asserts that Woodfin's prohibition of all registered sex offenders from entering the parks is brought about by " 'vague, undifferentiated fears' regarding a particular group." We disagree. Our General Assembly has recognized "that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest." N.C.G.S. § 14-208.5 (2007); *see also Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (discussing the threat posed by sex offenders); *McKune v. Lile*, 536 U.S. 24, 32-33 (2002) (plurality) (same). In fact, released sex offenders are four times more likely to be rearrested for subsequent sex crimes than other released offenders. *See* Patrick A. Langan, et al., U.S. Dep't of Justice, *Recidivism of Sex Offenders Released from Prison in 1994*, at 1 (2003). Thus, Woodfin did not have "vague, undifferentiated fears" of sex offenders, but concerns that were founded on fact. Woodfin has a legitimate government interest in desiring to decrease and eliminate sexual crimes in its parks, and prohibiting those most likely to commit criminal sexual acts—persons previously convicted of such conduct—from entering the town's parks is a rational method of furthering that goal.

CONCLUSION

Because Woodfin's ordinance prohibiting registered sex offenders from entering its parks is rationally related to the legitimate government interest of protecting park visitors from becoming victims of sexual crimes, we affirm the decision of the Court of Appeals.

AFFIRMED.

STATE OF NORTH CAROLINA v. BRYANT LAMONT GWYNN

No. 158PA07

(Filed 12 June 2008)

1. Homicide— felony murder—second-degree murder instruction not required—underlying felony not in conflict

The Court of Appeals erred in a robbery with a dangerous weapon and first-degree murder under the felony murder rule case by granting defendant a new trial based on the erroneous conclusion that the trial court should have instructed the jury on second-degree murder as a lesser-included offense, because: (1) when the State proceeds on a theory of felony murder only, the trial court should not instruct on lesser-included offenses if the evidence as to the underlying felony supporting felony murder is not in conflict and all the evidence supports felony murder; (2) in the instant case, the State proceeded on a theory of felony murder only, relying on robbery with a dangerous weapon as the underlying felony; (3) evidence of the elements of robbery with a dangerous weapon was not in conflict when defendant initially received permission to access the victim's property in a limited or temporary manner but ultimately used a dangerous weapon to remove the stolen property from the victim's possession; and (4) although the victim permitted defendant to access the property in a limited and temporary manner prior to an anticipated sale, the victim in no way granted defendant permission to depart with the property.

2. Homicide— felony murder—manslaughter instruction not required—self-defense inapplicable

Although defendant raised two additional arguments which the Court of Appeals did not address including that the trial court erred by denying his request to instruct the jury on the lesser-included offense of manslaughter and that the trial court erred by denying his request to instruct the jury on self-defense, additional consideration of these issues on remand is unnecessary because: (1) the evidence of robbery with a dangerous weapon was not in conflict, and thus it follows that defendant was not entitled to an instruction on manslaughter given that, like second-degree murder, manslaughter is a lesser-included offense of felony murder; and (2) evidence at trial did not establish any of the exceptional circumstances under which self-defense may serve as a defense to felony murder.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 182 N.C. App. 343, 641 S.E.2d 719 (2007), vacating defendant's conviction and sentence imposed in a judgment entered on 16 November 2005 by Judge Ronald E. Spivey in Superior Court, Forsyth County, and ordering a new trial. Heard in the Supreme Court 17 March 2008.

Roy Cooper, Attorney General, by Robert C. Montgomery, Special Deputy Attorney General, for the state-appellant.

Kathryn L. VandenBerg for defendant-appellee.

MARTIN, Justice.

A jury found defendant Bryant Lamont Gwynn guilty of robbery with a dangerous weapon and first-degree murder under the felony murder rule. The Court of Appeals granted defendant a new trial because it concluded that the trial court should have instructed the jury on second-degree murder as a lesser-included offense. We reverse.

The evidence admitted at trial showed the following: On 22 September 2003, defendant arranged to buy two pounds of marijuana from the victim. Although the victim expected defendant to pay him a large sum of money for the marijuana, defendant did not bring payment with him because he intended only "[t]o go over there and rob [the victim]." To that end, defendant enlisted Calvin Carter and Ahmad Powell to accompany him. He also brought a loaded nine-millimeter handgun, which he planned to use to rob the victim.

Carter drove the men to the arranged meeting place. Defendant rode in the rear seat behind the driver and Powell rode in the front passenger seat. The victim initially greeted them and entered the backseat of the vehicle. At the victim's request, Carter drove the men to the victim's car. Defendant and the victim then exited the vehicle and approached the victim's car to retrieve the marijuana. The victim showed defendant the marijuana and the two walked back to Carter's vehicle.

Defendant entered Carter's vehicle first and sat in the rear seat behind the driver. Shortly thereafter, the victim walked up to Carter's vehicle on the passenger's side, at which time defendant saw the victim place a gun in his coat pocket. Just before entering the vehicle himself, the victim tossed the marijuana into the center of the backseat. The victim then sat down on the edge of the backseat with his

legs outside the vehicle and his back turned toward defendant. The victim asked defendant, "Are you going to get this weed?" Defendant responded immediately by shooting the victim six times in the back and once in the chest.

Defendant then told the victim to "get out of the car." The victim fell out of the vehicle, landing facedown on the road. Defendant instructed Carter to drive away, and they left with the victim's marijuana. A few minutes later, the victim's sister discovered him shortly before he died. Meanwhile, Carter, Powell, and defendant went to defendant's house and divided up the marijuana, with defendant keeping the largest share. After the crime, defendant bragged to Carter and Powell, saying multiple times, "I told you I was going to do it."

At the close of the evidence, defendant requested jury instructions on second-degree murder as a lesser-included offense of felony murder, as well as instructions on manslaughter and self-defense. The trial court denied the request on the basis that the evidence of the underlying felony of robbery with a dangerous weapon was not in conflict. The jury convicted defendant of robbery with a dangerous weapon and felony murder, and the trial court sentenced defendant to life imprisonment without parole.

Defendant appealed to the Court of Appeals, arguing that the trial court should have instructed the jury on second-degree murder because "[t]he element of use of force to obtain the marijuana was in doubt" as to the underlying felony of robbery with a dangerous weapon. The Court of Appeals agreed and granted defendant a new trial. *State v. Gwynn*, 182 N.C. App. 343, 346, 641 S.E.2d 719, 721 (2007). This Court allowed the state's petition for discretionary review.

[1] In *State v. Millsaps*, 356 N.C. 556, 572 S.E.2d 767 (2002), we comprehensively explained that when the state proceeds on a first-degree murder theory of felony murder only, the trial court must instruct on all lesser-included offenses "[i]f the evidence of the underlying felony supporting felony murder is in conflict and the evidence would support a lesser-included offense of first-degree murder." *Id.* at 565, 572 S.E.2d at 773 (citation omitted). Conversely, when the state proceeds on a theory of felony murder only, the trial court should not instruct on lesser-included offenses "[i]f the evidence as to the underlying felony supporting felony murder is not in conflict and all the evidence supports felony murder." *Id.* at 565, 572 S.E.2d at 774 (citation omit-

ted). In the instant case, the state proceeded on a theory of felony murder only, relying on robbery with a dangerous weapon as the underlying felony. Therefore, as the Court of Appeals correctly observed, defendant's argument turns on whether the evidence of robbery with a dangerous weapon was in conflict. *See Gwynn*, 182 N.C. App. at 345, 641 S.E.2d at 721.

Under N.C.G.S. § 14-87(a), "[t]he essential elements of robbery with a dangerous weapon are: (1) an unlawful taking or an attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened." *State v. Haselden*, 357 N.C. 1, 17, 577 S.E.2d 594, 605 (internal quotation marks omitted) (quoting *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998)), *cert. denied*, 540 U.S. 988 (2003); *see* N.C.G.S. § 14-87(a) (2007).

Evidence of these elements is not in conflict when, as here, the defendant initially receives permission to access the victim's property in a limited or temporary manner but ultimately uses a dangerous weapon to " '*remov[e]* the stolen property from the victim's possession.' " *State v. Barnes*, 345 N.C. 146, 150, 478 S.E.2d 188, 191 (1996) (emphasis added) (quoting *State v. Sumpter*, 318 N.C. 102, 111, 347 S.E.2d 396, 401 (1986)); *e.g.*, *State v. Hope*, 317 N.C. 302, 306, 345 S.E.2d 361, 364 (1986). In *State v. Hope*, the defendant entered a store, tried on one of the coats for sale, and eventually left the store wearing the coat while displaying a firearm to threaten store employees who attempted to stop him. 317 N.C. at 306, 345 S.E.2d at 364. On these facts, this Court held that the elements of robbery with a dangerous weapon were satisfied even though "nothing in evidence indicated that the victims cared if customers tried clothing on inside the store." *Id.* As this Court explained, because "neither [of the store employees] gave the defendant permission to take the coat from the store," the elements of robbery with a dangerous weapon were satisfied when defendant used the threat of deadly force to depart the store with the coat without paying for it. 317 N.C. at 306-07, 345 S.E.2d at 364; *see also Sumpter*, 318 N.C. at 111-12, 347 S.E.2d at 401-02 (observing that the taking for purposes of armed robbery in *Hope* occurred when "the defendant departed from the store with the coat").

In the present case, the evidence of robbery with a dangerous weapon was not in conflict. The evidence here showed that the victim gave defendant limited and temporary access to the marijuana by

tossing it into the backseat of the vehicle shortly before entering the vehicle himself. As defendant himself conceded, the victim only did so because he was "expecting payment" from defendant. The victim's own words confirmed this expectation, as he asked defendant, "Are you going to get this weed?"

Thus, as in *Hope*, the evidence showed that although the victim permitted defendant to access the property in a limited and temporary manner prior to an anticipated sale, the victim in no way granted defendant permission to depart with the property. *See Hope*, 317 N.C. at 306, 345 S.E.2d at 364; s*ee also State v. Buckom*, 328 N.C. 313, 318, 401 S.E.2d 362, 365 (1991) ("[I]f a jeweler places diamonds on a counter for inspection by a customer, under the jeweler's eye, the diamonds remain under the protection of the jeweler." (citation omitted)). Rather, the uncontroverted evidence established that defendant only acquired possession of the marijuana by shooting the victim seven times and fleeing the scene, thereby " 'removing the stolen property from the victim's possession.' " *Barnes*, 345 N.C. at 150, 478 S.E.2d at 191 (quoting *Sumpter*, 318 N.C. at 111, 347 S.E.2d at 401); *e.g.*, *Hope*, 317 N.C. at 306, 345 S.E.2d at 364. Accordingly, the evidence of robbery with a dangerous weapon was not in conflict, and the Court of Appeals erred in reversing the trial court's denial of defendant's request to instruct the jury on second-degree murder. *See Millsaps*, 356 N.C. at 565, 572 S.E.2d at 774.

[2] We observe in closing that defendant raised two additional arguments which the Court of Appeals did not address: (1) that the trial court erred by denying his request to instruct the jury on the lesser-included offense of manslaughter; and (2) that the trial court erred by denying his request to instruct the jury on self-defense. We conclude, however, that additional consideration of these issues on remand is unnecessary.

First, because the evidence of robbery with a dangerous weapon was not in conflict, it follows that defendant was not entitled to an instruction on manslaughter given that, like second-degree murder, manslaughter is a lesser-included offense of felony murder. *See Millsaps*, 356 N.C. at 565, 572 S.E.2d at 774; *see also State v. Thomas*, 325 N.C. 583, 591-92, 386 S.E.2d 555, 559-60 (1989) (observing that manslaughter is a lesser-included offense of felony murder). Second, as defendant himself concedes, our holding also renders his self-defense argument meritless, as the evidence at trial did not establish any of the exceptional circumstances under which self-defense may serve as a defense to felony murder: "(1) a reasonable basis upon

which the jury may have disbelieved the prosecution's evidence of the underlying felony; (2) a factual showing that defendant clearly articulated his intent to withdraw from the situation; or (3) a factual showing that at the time of the violence the dangerous situation no longer existed." *State v. Bell*, 338 N.C. 363, 387, 450 S.E.2d 710, 723 (1994) (citations omitted), *cert. denied*, 515 U.S. 1163 (1995); *accord State v. Moore*, 339 N.C. 456, 467-68, 451 S.E.2d 232, 238 (1994). Accordingly, defendant's remaining arguments necessarily fail.

For the foregoing reasons, the decision of the Court of Appeals is reversed. Defendant's conviction and sentence for felony murder remain undisturbed.

REVERSED.

IN THE MATTER OF APPEAL OF TYLETA W. MORGAN FROM THE DECISION OF THE HENDERSON COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE TAXATION OF CERTAIN REAL PROPERTY FOR TAX YEARS 1995 THROUGH 2003

No. 582A07

(Filed 12 June 2008)

Taxation— ad valorem—county's failure to assess house—immaterial irregularity—collection of back taxes

A decision by the Court of Appeals that a county's failure to assess a taxpayer's house for 1995 through 2003 after the owner listed the property was not an "immaterial irregularity" within the meaning of N.C.G.S. § 105-394 so that the county is barred from collecting the back taxes and interest is reversed for the reason stated in the dissenting opinion that the plain language of the statute provides that the county's failure to assess the house does constitute an "immaterial irregularity" which does not prohibit the collection of back taxes and interest.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 186 N.C. App. 567, 652 S.E.2d 655 (2007), affirming a final decision entered on 17 July 2006 by the North Carolina Property Tax Commission. Heard in the Supreme Court 7 May 2008.

DeVore, Acton & Stafford PA, by Fred W. DeVore, III, for taxpayer-appellee.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker and Benn A. Brewington, III, for appellant Henderson County.

Paul A. Meyer, Assistant General Counsel, North Carolina Association of County Commissioners, amicus curiae.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed and this matter is remanded to the Court of Appeals for further remand to the North Carolina Property Tax Commission for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. DEVOZEO DEMONTRA PERSON

No. 2A08

(Filed 12 June 2008)

Rape— erroneous instruction—not plain error

A Court of Appeals decision granting defendant a new trial on a charge of first-degree rape based on acting in concert with another person because of the trial court's erroneous instruction referring to guilt both as a principal and by acting in concert is reversed for the reason stated in the dissenting opinion that the instruction did not constitute plain error.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 187 N.C. App. ——, 653 S.E.2d 560 (2007), finding no prejudicial error in part in a trial which resulted in judgments entered 2 March 2006 by Judge Jesse B. Caldwell, III in Superior Court, Mecklenburg County, but remanding in part for entry of judgment and resentencing on one count each of second-degree rape and second-degree sexual offense and ordering a new trial for defendant on the charge of first-degree rape by acting in concert with someone else. Heard in the Supreme Court 7 May 2008.

Roy Cooper, Attorney General, by K.D. Sturgis, Assistant Attorney General, for the State-appellant.

Kevin P. Tully, Public Defender, by Julie Ramseur Lewis, Assistant Public Defender, for defendant-appellee.

PER CURIAM.

For the reasons given in the dissenting opinion, we reverse the decision of the Court of Appeals as to the appealable issue of right, that is whether defendant is entitled to a new trial on the charge of first-degree rape by acting in concert. As to that matter, the Court of Appeals is instructed to reinstate the judgment of the trial court. The remaining issues addressed by the Court of Appeals are not properly before this Court and its decision as to these issues remains undisturbed.

REVERSED IN PART.

KENNETH WAYNE WEAVER AND ANN WEAVER v. CHARLES MICHAEL SHEPPA, M.D., LESLIE PATRICIA MARSHALL, M.D., AND RALEIGH EMERGENCY MEDICINE ASSOCIATES, INC.

No. 558PA07

(Filed 12 June 2008)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 186 N.C. App. 412, 651 S.E.2d 395 (2007), reversing entry of judgment notwithstanding the verdict in defendants' favor on 24 July 2006 by Judge A. Leon Stanback, Jr. in Superior Court, Wake County. Heard in the Supreme Court 6 May 2008.

Knott & Berger, L.L.P., by Joe Thomas Knott, III and Bruce W. Berger, for plaintiff-appellees.

Young Moore and Henderson P.A., by William P. Daniell; and Ellis & Winters, LLP, by Leslie C. O'Toole, for defendant-appellants.

PER CURIAM.

Justice NEWBY 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).

AFFIRMED.

STATE OF NORTH CAROLINA v. AUDREY GOBAL

No. 545A07

(Filed 12 June 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 186 N.C. App. 308, 651 S.E.2d 279 (2007), affirming judgments entered 13 April 2005 by Judge John R. Jolly, Jr. in Superior Court, Wake County. Heard in the Supreme Court 7 May 2008.

Roy Cooper, Attorney General, by Anne M. Middleton, Assistant Attorney General, for the State.

Brian Michael Aus for defendant-appellant.

PER CURIAM.

AFFIRMED.

PEGG v. JONES

[362 N.C. 343 (2008)]

ELEANOR S. PEGG v. ERVIN JONES AND JOHN DOES 2-10 AND JANE DOE 1-10

No. 9A08

(Filed 12 June 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 187 N.C. App. ——, 653 S.E.2d 229 (2007), affirming a judgment entered on 6 October 2006 by Judge Dennis J. Winner in Superior Court, Orange County. Heard in the Supreme Court 6 May 2008.

Alexander & Miller, LLP, by Sydenham B. Alexander, Jr. and Meg K. Howes, for plaintiff-appellee.

Levine & Stewart, by John T. Stewart and James E. Tanner III, for defendant-appellant Ervin Jones.

PER CURIAM.

AFFIRMED.

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

STATE OF NORTH CAROLINA v. TOMMIE EARL MYLES

No. 41A08

(Filed 12 June 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 188 N.C. App. ——, 654 S.E.2d 752 (2008), reversing a judgment entered on 24 October 2006 by Judge J. Marlene Hyatt in Superior Court, Haywood County, and remanding with instructions to vacate defendant's guilty plea. Heard in the Supreme Court 7 May 2008.

Roy Cooper, *Attorney General*, *by John P. Scherer II*, *Assistant Attorney General*, *for the State-appellant.*

Constance E. Widenhouse, *Assistant Appellate Defender*, *and Staples S. Hughes*, *Appellate Defender*, *for defendant-appellee.*

PER CURIAM.

AFFIRMED.

IN RE D.B., C.B.

[362 N.C. 345 (2008)]

IN THE MATTER OF D.B., C.B.

No. 590A07

(Filed 12 June 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 187 N.C. App. 556, 652 S.E.2d 56 (2007), affirming an order entered 9 January 2006 by Judge Edward A. Pone in District Court, Cumberland County. Heard in the Supreme Court 7 May 2008.

Elizabeth Kennedy-Gurnee, Staff Attorney, for petitioner-appellee Cumberland County Department of Social Services, and Beth A. Hall, Attorney Advocate, for appellee Guardian ad Litem.

Janet K. Ledbetter for respondent-appellant father.

No brief for respondent-appellant mother.

PER CURIAM.

AFFIRMED.

ODOM v. CLARKE

[362 N.C. 346 (2008)]

MARTHA ODOM, GUARDIAN *AD LITEM* FOR SHERICKA WALLACE, MINOR CHILD	)	
v.	)	ORDER
DOUGLAS H. CLARKE, MD, PIEDMONT PRIMARY CARE, INC., F/K/A PIEDMONT PEDIATRIC CLINIC, P.A., AND CMC-NORTHEAST, INC.	)	

No. 63PA08

Defendant's (Cabarrus Memorial Hospital) Petition for Discretionary Review is allowed for the limited purpose of remanding this matter to the Court of Appeals for reconsideration in light of *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008).

By order of the Court in Conference, this 10th day of April, 2008.

Hudson, J.
For the Court

STATE v. THOMPSON

[362 N.C. 347 (2008)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
JESSE THOMPSON, JR.	)	
	)	

No. 79P08

Defendant's Petition for Discretionary Review is denied. Defendant's Motion for Appropriate Relief is dismissed without prejudice to defendant's right to file a Motion for Appropriate Relief in the trial division. The State's Motion to Dismiss Appeal is allowed.

By order of the Court in Conference, this 10th day of April, 2008.

Hudson, J.
For the Court

BEAUFORT COUNTY BOARD OF EDUCATION	)	
v.	)	ORDER
BEAUFORT COUNTY BOARD OF COMMISSIONERS	)	

No. 106PA08

Defendant's petition for discretionary review is allowed with respect to the following issues:

In light of Article IX, Section 2 of the North Carolina Constitution, is the statutory framework for resolving school funding disputes between the county board of education and the county board of commissioners constitutional?

If so, has the statutory framework been properly applied in this case?

By Order of the Court in Conference, this 10th day of April, 2008.

Hudson, J.
For the Court

KERRY WATTS	)	
v.	)	ORDER
NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES	)	

No. 191A07

Having reviewed the briefs and heard oral arguments on defendant's appeal on 17 March 2008, the Court *ex mero motu* withdraws its previous order, dated 11 October 2007, denying plaintiff's petition for discretionary review, and allows plaintiff's petition for discretionary review for the limited purpose of ordering briefing on the questions of (i) defendant's preservation for appellate review of the issue of the public duty doctrine and (ii) the implication, if any, of the Industrial Commission's finding of fact number nine on the application of the public duty doctrine.

Plaintiff shall have thirty (30) days from the date of this order to file and serve his brief, and defendant shall have thirty (30) days from the service of plaintiff's brief to file and serve its brief.

The Court will render its decision without further oral argument.

By Order of the Court in Conference this 27th day of March, 2008.

Newby, J.
For the Court

STATE v. SHERMAN

[362 N.C. 350 (2008)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
LEMUEL SHERMAN	)	

No. 313P07

Upon consideration of the petition for writ of certiorari filed by the State in this matter, the following order was entered and is hereby certified to the Superior Court, Durham County:

"Rule 24 authorizes the trial court to consider 'the existence of evidence of aggravating circumstances,' Gen. R. Pract. Super. & Dist. Cts. 24, 2008 Ann. R. N.C. 25, but 'does not permit a trial court to declare a case noncapital based on the State's forecast of evidence of guilt of the underlying first-degree murder charge.' *State v. Seward*, 362 N.C. 210, 216 (2008). The trial court therefore exceeded the scope of a Rule 24 conference when it declared defendant's case noncapital on the basis of its consideration of evidence relating to the underlying charge of first-degree murder. *Id.* Accordingly, the State's petition for writ of certiorari is allowed for the limited purpose of reversing the trial court's order and remanding for a new Rule 24 conference to be held consistent with Rule 24 and this Court's decision in *Seward*, 362 N.C. 210, —— S.E.2d ——."

By order of the Court in Conference, this the 10th day of April, 2008.

Edmunds, J.
For the Court

STATE v. ROYSTER

[362 N.C. 351 (2008)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
JEREMIAH ROYSTER	)	

No. 441PA04-4

Upon consideration of the petition for writ of certiorari filed by defendant in this matter, the following order was entered and is hereby certified to the Superior Court, Warren County:

"In addition to ordering a determination as to defendant's competency, this Court's 2 March 2006 special order required the trial court to hold an evidentiary hearing on defendant's pending MAR. Defendant's petition for writ of certiorari is therefore allowed for the limited purpose of reversing the trial court's 10 July 2007 order and remanding to the trial court with instructions to: (1) appoint a guardian ad litem for defendant; (2) appoint counsel for defendant; and (3) allow defendant, through counsel and his guardian ad litem, to proceed with the evidentiary hearing on his pending MAR under N.C.G.S. § 15A-1001(b)."

By order of the Court in Conference, this the 10th day of April, 2008.

Hudson, J.
For the Court

JACINDA BURTON, ADMINISTRATRIX OF THE ESTATE OF MICHAEL C. BURTON	)	
v.	)	
PHOENIX FABRICATORS AND ERECTORS, INC. AND DAVIS, MARTIN, POWELL & ASSOCIATES, INC.	)	
———————-	)	ORDER
DONNA DAVIS, ADMINISTRATRIX OF THE ESTATE OF CHARLES M. DAVIS	)	
v.	)	
PHOENIX FABRICATORS AND ERECTORS, INC. AND DAVIS, MARTIN, POWELL & ASSOCIATES, INC.	)	

No. 447P07

Finding that the order of the trial court denying defendant's motion to dismiss affects a substantial right and will work injury if not corrected before final judgment, we allow defendant's Petition for Discretionary Review for the sole purpose of remanding the matter to the Court of Appeals for consideration of the merits. Defendant's Alternative Petition for Writ of Certiorari is denied.

By Order of the Court in Conference, this 10th day of April, 2008.

Hudson, J.
For the Court

STATE v. GAINEY

[362 N.C. 353 (2008)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
DAVID GAINEY	)	

No. 531A00-2

This matter is before this Court on defendant's Petition for Writ of Certiorari, defendant's Petitions for Writ of Mandamus, and defendant's Motion for Leave to File Amendment to Petition for Writ of Certiorari and Withdrawal of Writs of Mandamus. Defendant's Motion to Withdraw Writs of Mandamus is allowed. Defendant's motion for Leave to File Amendment to Petition for Writ of Certiorari is allowed for the limited purpose of remanding the matter to the Superior Court for an evidentiary hearing on defendant's Motion for Appropriate Relief and defendant's Amended Motion for Appropriate Relief.

By order of the Court in Conference, this 10th day of April, 2008.

Hudson, J.
For the Court

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

Adams Creek Assocs. v. Davis Case below: 186 N.C. App. 512	No. 003P08	1. Defs' NOA Based Upon a Constitutional Question (COA07-134) 2. Defs' Motion for Temporary Stay 3. Defs' Petition for Writ of Supersedeas 4. Defs' PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 06/11/08 2. Allowed 01/09/08 362 N.C. 175 Stay Dissolved 06/11/08 3. Denied 06/11/08 4. Denied 06/11/08
Allied Envtl. Servs., PLLC v. N.C. Dep't Envtl. & Natural Res. Case below: 187 N.C. App. 227	No. 617P07	Respondent's PDR Under N.C.G.S. § 7A-31 (COA06-1148)	Denied 04/10/08
Andrews v. Haygood Case below: 188 N.C. App. 244	No. 057A07-2	1. Trustee/Appellant's (Charlie Brown) NOA Based Upon a Dissent (COA06-1670) 2. Trustee/Appellant's (Charlie Brown) PDR as to Additional Issues	1. —— 2. Allowed 04/10/08
Arnold v. City of Asheville Case below: 186 N.C. App. 542	No. 584P07	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA06-1167)	Denied 06/11/08
Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs Case below: 188 N.C. App. 399	No. 106PA08	1. Def-Appellant's NOA Under N.C.G.S. 7A-30 (Constitutional Question) (COA06-1712) 2. Plt's Motion to Dismiss Appeal 3. Def-Appellant's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 04/10/08 3. See Special Order Page 348

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Blinson v. State Case below: 186 N.C. App. 328	No. 546P06-2	1. Plts' NOA Based Upon a Constitutional Question (COA06-1258) 2. Def's (Dell, Inc.) Motion to Dismiss Appeal 3. Defs' (City of Winston-Salem, et al.) Motion to Dismiss Appeal 4. Defs' (State of NC and Fain) Motion to Dismiss Appeal 5. Plts' PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 04/10/08 3. Allowed 04/10/08 4. Allowed 04/10/08 5. Denied 04/10/08 **Martin, J., Recused**
Bolick v. ABF Freight Sys., Inc. Case below: 188 N.C. App. 294	No. 076P08	Plt's Conditional PDR Under N.C.G.S. § 7A-31 (COA07-198)	Dismissed as Moot 04/10/08
Burek v. Mancuso Case below: 189 N.C. App. 209	No. 153P08	Defs' PDR Under N.C.G.S. § 7A-31 (COA07-591)	Denied 06/11/08
Burton v. Phoenix Fabricators & Erectors, Inc. Davis v. Phoenix Fabricators & Erectors, Inc. Case below: 185 N.C. App. 303	No. 447P07	1. Def's (Phoenix) PDR Under N.C.G.S. § 7A-31 (COA06-1195) 2. Def's (Phoenix) Alternative PWC	1. See Special Order Page 352 2. See Special Order Page 352
Capps v. NW Sign Indus.of N.C., Inc. Case below: 185 N.C. App. 543	No. 383P05-2	1. Plt's Motion to Seal Response to Defs' PDR (COA06-1297) 2. Defs' PDR Under N.C.G.S. § 7A-31	1. Denied 11/08/07 2. Denied 04/10/08

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Capps v. NW Sign Indus.of N.C., Inc. Case below: 186 N.C. App. 616	No. 383P05-3	1. Defs' NOA (Dissent) (COA07-99) 2. Plt's Motion to Dismiss Appeal 3. Defs' PDR as to Additional Issues 4. Plt's Motion to Dismiss PDR	1. —— 2. Allowed 04/10/08 3. Dismissed as Moot 04/10/08 4. Allowed 04/10/08
Crawford v. Mintz Case below: 187 N.C. App. 378	No. 047A08	1. Plts' NOA (Dissent) (COA07-141) 2. Plts' PDR as to Additional Issues	1. —— 2. Allowed 06/11/08
Cunningham v. Cannon Mem'l Hosp., Inc. Case below: 187 N.C. App. 732	No. 028P08	Def's (David Cook, M.D.) PDR Under N.C.G.S. § 7A-31 (COA06-1532)	Denied 04/10/08
Durham Housing Auth. v. Partee Case below: 189 N.C. App. 388	No. 183P08	1. Def's Motion for Temporary Stay (COA07-581) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed 04/25/08 Stay Dissolved 06/11/08 2. Denied 06/11/08 3. Denied 06/11/08
84 Lumber Co., LP v. Habitech Enters. Inc. Case below: 187 N.C. App. 509	No. 011P08	Defs' PDR Under N.C.G.S. § 7A-31 (COA07-177)	Denied 06/11/08
Ellison v. Gambill Oil Case below: 186 N.C. App. 167	No. 541A07	1. Plt-Appellant's (Ellison) NOA (Dissent) (COA06-1016) 2. Plt-Appellant's (Ellison) PDR Under N.C.G.S. § 7A-31	1. —— 2. Denied 04/10/08
Freeman v. Rothrock Case below: 189 N.C. App. 31	No. 163A08	1. Plt's NOA (Dissent) (COA07-269) 2. Plt's PDR as to Additional Issues 3. Plt's Motion for Substitution of Party	1. —— 2. Allowed 06/11/08 3. Allowed 06/11/08

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Garrison v. Holt Case below: 185 N.C. App. 730	No. 491P07	Respondent's (Shelby Holt) PDR Under N.C.G.S. § 7A-31 (COA06-1085)	Denied 04/10/08
Hill v. Hill Case below: 187 N.C. App. 509	No. 138P07-2	1. Plt's NOA Based Upon a Constitutional Question (COA07-266) 2. Defs' Motion to Dismiss Appeal 3. Plt's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 04/10/08 3. Denied 04/10/08 **Martin, J., Recused** **Timmons-Goodson, J., Recused**
Hill v. Hill Case below: 361 N.C. 427 181 N.C. App. 69	No. 138P06-3	1. Plt's Motion for Reconsideration of Appeal of Right (COA06-331) 2. Plt's Petition for Rehearing of PDR	1. Denied 04/10/08 2. Dismissed 04/10/08 **Martin, J., Recused** **Timmons-Goodson, J., Recused**
Holt v. Albemarle Reg'l Health Servs. Bd. Case below: 188 N.C. App. 111	No. 078P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-262)	Denied 04/10/08
In re C.M.W. Case below: 190 N.C. App. 205	No. 239P08	State's Motion for Temporary Stay (COA07-1315)	Allowed 05/27/08
In re J.E.J., B.M.J., T.L.J. Case below: 188 N.C. App. 632	No. 083P08	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA07-589)	Denied 04/10/08
In re J.G. Case below: 188 N.C. App. 632	No. 115P08	Respondents' (Jason & Belinda Genwright) PWC to Review Decision of COA (COA07-1026)	Denied 04/10/08

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In re J.T. (I), J.T. (II), & A.J. Case below: 189 N.C. App. 206	No. 155P08	Petitioners' (Cumberland Co. DSS and GAL) Motion for Temporary Stay (COA07-1372)	Allowed 04/10/08
In re K.H. Case below: 189 N.C. App. 403	No. 186P08	Petitioners' (Cumberland Co. DSS & GAL) Motion for Temporary Stay (COA07-1277)	Denied 04/23/08
In re L.B. Case below: 187 N.C. App. 326	No. 007A08	1. Respondent's (Mother) NOA (Dissent) (COA07-549) 2. Respondent's (Mother) PDR as to Additional Issues 3. Respondent's (Father) NOA (Dissent) 4. Respondent's (Father) PDR as to Additional Issues 5. Respondent's (Mother) PWC to Review Decision of COA 6. Guardian ad Litem's Motion to Dismiss PWC	1. —— 2. Denied 04/10/08 3. —— 4. Denied 04/10/08 5. Denied 04/10/08 6. Denied 04/10/08
In re M.K.B. Case below: 188 N.C. App. 165	No. 090P08	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA07-1044)	Denied 04/10/08
In re Will of Beane Case below: 189 N.C. App. 209	No. 152P08	Propounder's (Joan Beane) PDR Under N.C.G.S. § 7A-31 (COA07-231)	Denied 06/11/08
In re Williamson Village Condos. Case below: 187 N.C. App. 553	No. 020A08	1. Motion by Appellee (Williamson Village Partners, LLC) for Suggestion of Affirmance of COA Decision (COA07-217) 2. Appellee's (Williamson Village Partners, LLC) Alternative PDR	1. Dismissed 06/11/08 2. Dismissed 06/11/08 **Martin, J., Recused**

Johnson v. City of Winston-Salem Case below: 188 N.C. App. 383	No. 111A08	1. Def-Appellant's NOA Based on a Dissent (COA07-536) 2. Def-Appellant's PDR Under N.C.G.S. § 7A-31	1. —— 2. Denied 06/11/08
Kyle v. Holston Grp. Case below: 188 N.C. App. 686	No. 170P08	Def-Appellants' PDR Under N.C.G.S. § 7A-31(c) (COA07-364)	Denied 06/11/08
Lakeview Condo. Ass'n v. Village of Pinehurst Case below: 185 N.C. App. 159	No. 456P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1001)	Denied 04/10/08
Lawson v. White Case below: 188 N.C. App. 165	No. 069P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-296)	Allowed and remanded for reconsideration in light of *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E. 2d 361 (2008) 06/11/08
Lineberger v. N.C. Dep't of Corr. Case below: 189 N.C. App. 1	No. 141A08	1. Defs' Motion for Temporary Stay (COA07-3) 2. Defs' Petition for Writ of Supersedeas 3. Defs' NOA Based Upon a Dissent 4. Defs' PDR as to Additional Issues	1. Allowed 04/04/08 2. Allowed 06/11/08 3. —— 4. Allowed 06/11/08
Mangum v. Raleigh Bd. of Adjust. Case below: 187 N.C. App. 253	No. 613P07	Plt-Appellants' PDR Under N.C.G.S. § 7A-31 (COA06-1587)	Allowed 06/11/08

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Massey v. Hoffman Case below: 184 N.C. App. 731	No. 413P07	1. Respondent's NOA Based Upon a Constitutional Question (COA06-1338) 2. Attorney General's Motion to Dismiss Appeal 3. Petitioner's Motion to Dismiss Appeal 4. Respondent's PDR Under N.C.G.S. § 7A-31 5. Petitioner's Conditional PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 06/11/08 3. Allowed 06/11/08 4. Denied 06/11/08 5. Dismissed as Moot 06/11/08
Matthews v. Wake Forest Univ. Case below: 187 N.C. App. 780	No. 035P08	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1549)	Denied 06/11/08
McDonald v. City of Concord Case below: 188 N.C. App. 278	No. 074P08	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA07-113)	Denied
Moore v. Charlotte-Mecklenburg Bd. of Educ. Case below: 185 N.C. App. 566	No. 503P07	Petitioner's PWC to Review Decision of COA (COA06-601)	Denied 04/10/08
Myers v. Bryant Case below: 188 N.C. App. 585	No. 107P08	Def-Appellant's PDR Under N.C.G.S. § 7A-31 (COA07-285)	Denied 06/11/08
Odom v. Clarke Case below: 188 N.C. App. 165	No. 063PA08	Def's (Cabarrus Memorial Hospital) PDR Under N.C.G.S. § 7A-31 (COA07-775)	See Special Order Page 346
Park East Sales, LLC v. Clark-Langley, Inc. Case below: 186 N.C. App. 198	No. 562P07	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA06-1496) 2. Defs' (Carmel, Lowe's & Western Surety) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 04/10/08 2. Dismissed as Moot 04/10/08

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Piles v. Allstate Ins. Co. Case below: 187 N.C. App. 399	No. 603P07	Def's (Allstate Insurance Co.) PDR Under N.C.G.S. § 7A-31 (COA06-1543)	Denied 06/11/08
Pitt Cty. v. Deja Vue, Inc. Case below: 185 N.C. App. 545	No. 496P07	1. Def's (Misty's and Rex Hudson) PDR Under N.C.G.S. § 7A-31 (COA06-838) 2. Def's (Silver Bullet Dolls and Faulkner) PDR Under N.C.G.S. § 7A-31	1. Denied 04/10/08 2. Denied 04/10/08
Pottle v. Link Case below: 187 N.C. App. 746	No. 027P08	Plts' PDR Under N.C.G.S. § 7A-31 (COA07-359)	Allowed 06/11/08 **Martin, J., Recused**
Pritchard v. Sladjoe Case below: 189 N.C. App. 404	No. 195P08	Plts' PDR Under N.C.G.S. § 7A-31 (COA07-194)	Denied 06/11/08
Rogers v. Black Case below: 188 N.C. App. 632	No. 113P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-462)	Denied 04/10/08
Roush v. Kennon Case below: 188 N.C. App. 570	No. 097P08	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA07-209) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 06/11/08 2. Dismissed as Moot 06/11/08 **Timmons-Goodson, J., Recused**
Royal v. N.C. Dep't of Crime Control & Pub. Safety Case below: 184 N.C. App. 378	No. 392P07	Respondents' PDR Under N.C.G.S. § 7A-31 (COA06-756)	Denied 04/10/08
Sandy Mush Props., Inc. v. Rutherford Cty. Case below: 187 N.C. App. 809	No. 067P07-2	Plt-Appellant's (Second) PDR Under N.C.G.S. § 7A-31 (COA06-68-2)	Allowed 06/11/08

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Selwyn Village Homeowners Ass'n v. Cline & Co. Case below: 186 N.C. App. 645	No. 597P07	Def's PDR Under N.C.G.S. § 7A-31 (COA07-116)	Allowed and remanded for reconsideration in light of *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E. 2d 361 (2008)
Silver v. GMRI, Inc. Case below: 186 N.C. App. 305	No. 568P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-1588)	Denied 04/10/08
Smithfield Housing Auth. v. Creech Case below: 188 N.C. App. 847	No. 114P07-2	1. Def's Motion for "Notice of Appeal" (COA07-669) 2. Def's Motion for Request for Stay of Judgment in 07CVD35 by the Writ of Supersedeas 3. Def's Motion for "Dual Petitions for Temporary Stays and Extraordinary Process Writ of Supersedeas" 4. Def's Dual Motions for Temporary Stays 5. Def's Motion to Vacate Writ of Possession	1. Dismissed *Ex Mero Motu* 03/25/08 2. Denied 03/19/08 3. Denied 03/04/08 4. Denied 03/25/08 5. Denied 03/25/08
Smithfield Housing Auth. v. Creech Case below: 188 N.C. App. 847	No. 114P07-3	1. Def's Motion for Temporary Stay (COA07-669) 2. Def's Petition for Writ of Supersedeas 3. Def's PWC to Review Order of Johnston County Superior Court 4. Def's PWC to Review Decision of COA	1. Denied 03/27/08 2. Denied 03/27/08 3. Denied 03/27/08 4. Denied 03/27/08

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Smithfield Housing Auth. v. Creech Case below: 188 N.C. App. 847	No. 114P07-4	1. Def's Motion to Reconsider, Rehear and Review NC Supreme Court Writ Request (COAP07-134) (COA07-669) 2. Def's Request to Await Petition Asking Court to Certify 114P07 for Discretionary Review out of 07CVD35, Johnston County and 07COAP669 3. Def's Request to Await "Supervisory" Petition from the Def to Oversee the Lower Courts' and Court of Appeals' Functions	1. Dismissed 06/11/08 2. Dismissed 06/11/08 3. Dismissed 06/11/08
State v. Arreola Case below: 188 N.C. App. 166	No. 089P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-538)	Denied 04/10/08
State v. Ballard Case below: 189 N.C. App. 210	No. 168P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-860)	Denied 06/11/08
State v. Barnes Case below: 183 N.C. App. 300	No. 215P08	Def's PWC to Review Decision of COA (COA06-1285)	Denied 06/11/08
State v. Berry Case below: 188 N.C. App. 166	No. 066P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-450)	Denied 04/10/08
State v. Bowman Case below: 188 N.C. App. 635	No. 105P08	State's Motion for Temporary Stay (COA06-1146)	Allowed 03/11/08
State v. Brooks Case below: 189 N.C. App. 210	No. 135P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-924)	Denied 04/10/08
State v. Brower Case below: 186 N.C. App. 397	No. 550P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1615)	Denied 04/10/08
State v. Buhl Case below: 180 N.C. App. 475	No. 082P08	Def's Motion for Appropriate Relief (COA06-386)	Dismissed 04/10/08

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State v. Campbell Case below: 188 N.C. App. 701	No. 109A08	1. Def-Appellant's NOA Based Upon a Constitutional Question (COA07-903) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed 06/11/08
State v. Cochrane Case below: 188 N.C. App. 166	No. 061P08	1. Def's NOA Based Upon a Constitutional Question (COA07-394) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 06/11/08 3. Denied 06/11/08
State v. Cook Case below: 184 N.C. App. 401	No. 341A07	Def's Motion to Dismiss State's Appeal or, in the Alternative, to Strike the State's Brief (COA06-1355)	See Opinion 362 N.C. 285
State v. Cooper Case below: 186 N.C. App. 100	No. 490P07	AG's Motion for Temporary Stay (COA06-1356)	Allowed 10/08/07
State v. Cosey Case below: 189 N.C. App. 531	No. 209P08	1. Def's NOA Based Upon a Constitutional Question (COA07-672) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 06/11/08 3. Denied 06/11/08
State v. Craig Case below: 188 N.C. App. 166	No. 046P08	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1061)	Denied 04/10/08
State v. Crowe Case below: 188 N.C. App. 765	No. 098P08	1. State's Motion for Temporary Stay (COA07-428) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 03/07/08 Stay Dissolved 06/11/08 2. Denied 06/11/08 3. Denied 06/11/08
State v. Cummings Case below: 188 N.C. App. 598	No. 093P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-374)	Denied 04/10/08
State v. Davis Case below: 188 N.C. App. 735	No. 125P08	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1707)	Denied 06/11/08

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State v. DeCastro Case below: Johnson Courty Superior Court	No. 221A93-3	Def's PWC to Review Order of Johnston County Superior Court	Denied 04/10/08
State v. Dickerson Case below: 188 N.C. App. 166	No. 072P08	1. Def's NOA Based Upon a Constitutional Question (COA07-14) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 06/11/08 3. Denied 06/11/08
State v. Duncan Case below: 188 N.C. App. 508	No. 091A08	1. State's Motion for Temporary Stay (COA07-85) 2. State's Petition for Writ of Supersedeas 3. State's NOA (Dissent) 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 02/21/08 2. Allowed 06/11/08 3. —— 4. Allowed 06/11/08
State v. Ellis Case below: 188 N.C. App. 820	No. 133P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-142)	Denied 06/11/08
State v. Estes Case below: 186 N.C. App. 364	No. 543P07	1. Def's NOA Based Upon a Constitutional Question (COA07-225) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. 7A-31	1. —— 2. Allowed 04/10/08 3. Denied 04/10/08
State v. Fields Case below: 186 N.C. App. 680	No. 587P07	Def's PDR Under N.C.G.S. § 7A-31 (COA07-317)	Denied 04/10/08
State v. Flores-Matamoros Case below: 182 N.C. App. 529	No. 158P08	Def's PWC to Review Decision of COA (COA06-878)	Denied 06/11/08
State v. Fuller Case below: 188 N.C. App. 633	No. 087P08	1. Def's NOA Based Upon a Constitutional Question (COA07-857) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 04/10/08 2. Denied 04/10/08

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State v. Gainey Case below: Harnett County Superior Court	No. 531A00-2	1. Def's PWC to Review the Order of Harnett County Superior Court 2. Def's Petition for Writ of Mandamus 3. Def's Petition for Writ of Mandamus 4. Def's Motion for Leave to File Amendment to PWC and Withdrawal of Writs of Mandamus	1. See Special Order Page 353 2. See Special Order Page 353 3. See Special Order Page 353 4. See Special Order Page 353
State v. Gibbs Case below: 176 N.C. App. 190	No. 504P07	Def's PWC to Review Decision of COA (COA05-814)	Denied 04/10/08 **Hudson, J. Recused**
State v. Gilmore Case below: 189 N.C. App. 404	No. 045P07-2	1. Def's PDR Under N.C.G.S. § 7A-31 (COA07-600) 2. Def's PWC to Review Decision of COA	1. Denied 06/11/08 2. Denied 06/11/08
State v. Gomez Case below: 188 N.C. App. 633	No. 103P08	1. Def's (Gomez) PDR Under N.C.G.S. § 7A-31 (COA07-636) 2. Def's (Hurtado) PWC to Review Decision of COA	1. Denied 06/11/08 2. Denied 06/11/08
State v. Haislip Case below: 186 N.C. App. 275	No. 513P07	1. AG's Motion for Temporary Stay (COA06-1488) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed 10/19/07 361 N.C. 699 2. Allowed 04/10/08 3. Allowed 04/10/08
State v. Hall Case below: 187 N.C. App. 308	No. 012P08	1. Def's NOA Based Upon a Constitutional Question (COA07-9) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 06/11/08 3. Denied 06/11/08
State v. Harris Case below: 189 N.C. App. 49	No. 150P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-383)	Denied 06/11/08

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State v. Hope Case below: 189 N.C. App. 309	No. 154P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-702)	Denied 06/11/08
State v. Icard Case below: 190 N.C. App. 76	No. 236A08	1. State's NOA (Dissent) (COA07-610) 2. State's Motion for Temporary Stay 3. State's Petition for Writ of Supersedeas	1. —— 2. Allowed 05/23/08 3. Allowed 05/23/08
State v. Jones Case below: 188 N.C. App. 848	No. 127P08	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1718)	Denied 04/10/08
State v. Jordan Case below: 188 N.C. App. 167	No. 081P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-484)	Denied 04/10/08
State v. Kelso Case below: 187 N.C. App. 718	No. 018P08	AG's PDR Under N.C.G.S. § 7A-31 (COA06-1489)	Denied 06/11/08
State v. Labinski Case below: 188 N.C. App. 120	No. 060P08	1. Def's Motion for Temporary Stay (COA06-1617) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Denied 02/15/08 362 N.C. 241 2. Denied 04/10/08 3. Denied 04/10/08
State v. Lane Wayne County Superior Court	No. 606A05	1. Def's Motion to Drop Appeals 2. Def's Motion to Fire Attorney, Ann B. Petersen	1. Denied 04/10/08 2. Denied 04/10/08
State v. Leach Case below: 189 N.C. App. 211	No. 171P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-411)	Denied 06/11/08
State v. Little Case below: 189 N.C. App. 404	No. 192P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-614)	Denied 06/11/08

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

State v. Marshall Case below: 188 N.C. App. 744	No. 126P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-838)	Denied 04/10/08
State v. Matthews Case below: 185 N.C. App. 732	No. 508P07	Def's PDR Under N.C.G.S. § 7A-31 (COA07-312)	Denied 04/10/08
State v. McHone Case below: 174 N.C. App. 289	No. 639P05	1. AG's Motion for Temporary Stay (COA04-1605) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed Pending determination of the State's PDR 11/23/05 360 N.C. 179 Stay Dissolved 01/26/06 2. Denied 01/26/06 3. Denied 01/26/06
State v. McLamb Case below: 186 N.C. App. 124	No. 489P07	1. AG's Motion for Temporary Stay (COA06-1319) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed 10/08/07 361 N.C. 700 Stay Dissolved 06/11/08 2. Denied 06/11/08 3. Denied 06/11/08
State v. Moore Case below: 185 N.C. App. 257	No. 451P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1405)	Dismissed 04/10/08
State v. Moore Case below: Chowan County Superior Court 362 N.C. 319	No. 460A06	1. Def's Motion for Appropriate Relief 2. State's Motion to Strike Def's Reply to State's Response to Motion for Appropriate Relief	1. Dismissed as Moot 06/11/08 2. Dismissed as Moot 06/11/08
State v. Morgan Case below: 189 N.C. App. 716	No. 203P08	State's Motion for Temporary Stay (COA07-745)	Allowed 04/30/08

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

State v. Payne Case below: 188 N.C. App. 633	No. 114P08	1. Def's NOA Based Upon a Constitutional Issue (COA07-821) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Motion for Appropriate Relief	1. —— 2. Allowed 04/10/08 3. Denied 04/10/08 4. Denied 04/10/08
State v. Pettis Case below: 186 N.C. App. 116	No. 522P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1380)	Denied 04/10/08
State v. Poindexter Case below: Randolph County Superior Court	No. 563A99-3	1. AG's PWC to Review Order of Randolph County Superior Court 2. Def's PWC to Review Order of Randolph County Superior Court 3. Def's PWC to Review Order of Randolph County Superior Court	1. Denied 06/11/08 2. Denied 06/11/08 3. Denied 06/11/08
State v. Prush Case below: 185 N.C. App. 472	No. 466P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1213)	Denied 06/11/08
State v. Rollins Case below: 189 N.C. App. 248	No. 138P08	State's Motion for Temporary Stay (COA07-380)	Allowed 04/01/08
State v. Rosales-Villa Case below: 189 N.C. App. 789	No. 214P08	1. Def's NOA Based Upon a Constitutional Question (COA07-1144) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 06/11/08 2. Denied 06/11/08
State v. Royster Case below: Warren County Superior Court	No. 441PA04-4	Def's PWC to Review the Order of the COA (COAP07-524)	See Special Order Page 351
State v. Rutledge Case below: 189 N.C. App. 405	No. 184P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-795)	Denied 06/11/08

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State v. Sherman Case below: Durham County Superior Court	No. 313PA07	1. AG's PWC to Review the Order of Durham County Superior Court 2. AG's Motion for Expedited Hearing	1. See Special Order Page 350 2. Dismissed as Moot
State v. Siler Case below: 188 N.C. App. 634	No. 117P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-328)	Denied 06/11/08
State v. Smith Case below: 188 N.C. App. 634	No. 092P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-905)	Denied 04/10/08
State v. Smith Case below: 190 N.C. App. —— (6 May 2008)	No. 234A08	1. State's NOA (Dissent) (COA07-172) 2. State's Motion for Temporary Stay 3. State's Petition for Writ of Supersedeas	1. —— 2. Allowed 05/23/08 3. Allowed 06/11/08
State v. Spargo Case below: 187 N.C. App. 115	No. 588P07	1. Def's NOA Based Upon a Constitutional Issue (COA06-1138) 2. State's Motion to Dismiss NOA 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 06/11/08 3. Denied 06/11/08
State v. Speller Case below: 178 N.C. App. 393	No. 188P08	Def's PWC to Review Decision of COA (COA05-1599)	Denied 06/11/08 **Hudson, J. Recused**
State v. Stallings Case below: 189 N.C. App. 376	185P08	1. Def's NOA Based Upon a Constitutional Question (COA07-729) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 06/11/08 3. Denied 06/11/08
State v. Stanley Case below: 187 N.C. App. 306	No. 599P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1669)	Denied 06/11/08
State v. Stephens Case below: 188 N.C. App. 286	No. 067P08	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1594)	Denied 04/10/08

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

State v. Sykes Case below: 189 N.C. App. 212	No. 461P07-2	Def's PWC to Review Decision of COA (COA07-537)	Denied 06/11/08
State v. Thomas Case below: 187 N.C. App. 814	No. 022P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-709)	Denied 04/10/08
State v. Thompson Case below: 188 N.C. App. 102	No. 068P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-363)	Denied 04/10/08
State v. Thompson Case below: 188 N.C. App. 167	No. 079PA08	1. Def's NOA Based Upon a Constitutional Question (COA06-1604) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. Def's Motion for Appropriate Relief	1. See Special Order Page 347 2. See Special Order Page 347 3. See Special Order Page 347 4. See Special Order Page 347
State v. Turnage Case below: 190 N.C. App. 123	No. 228A08	1. State's NOA (Dissent) (COA07-562) 2. State's Motion for Temporary Stay 3. State's Petition for Writ of Supersedeas	1. —— 2. Allowed 05/20/08 3. Allowed 05/20/08
State v. Upchurch Case below: 189 N.C. App. 212	No. 123P08	State's Motion for Temporary Stay (COA07-779)	Allowed 03/20/08
State v. Walker Case below: 188 N.C. App. 331	No. 016P05-3	1. State's Motion for Temporary Stay (COA03-1426-2) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 02/01/08 362 N.C. 243 Stay Dissolved **04/10/08** 2. Denied 04/10/08 3. Denied 04/10/08
State v. Walker Case below: 136 N.C. App. 443	No. 039P08	Def's PWC to Review Decision of COA (COA99-8)	Denied 04/10/08 **Edmunds, J., Recused**

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

State v. Wheeler Case below: 190 N.C. App. —— (20 May 2008)	No. 371P06-2	Def's PDR (COA07-1306)	Dismissed 06/11/08
State v. Williams Case below: 190 N.C. App. 207	No. 235P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1462)	Dismissed 06/11/08
State v. Williams Case below: 185 N.C. App. 318	No. 474P07	1. Def's NOA Based Upon a Constitutional Question (COA06-1420) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31 4. State's Conditional PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 06/11/08 3. Denied 4. Dismissed as Moot 06/11/08
State v. Williams 178 N.C. App. 394	No. 554P07	Def's Motion for "Petition for Discretionary Review" (COA05-1024)	Denied 04/10/08 **Hudson, J., Recused**
State v. Wood Case below: 189 N.C. App. 212	No. 147P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-912)	Denied 06/11/08
State v. Wright Case below: 189 N.C. App. 346	No. 145P08	State's Motion for Temporary Stay (COA07-611)	Allowed 04/07/08
State v. Wright Case below: 184 N.C. App. 464	No. 614P07	Def's PWC to Review the Decision of the COA (COA06-1435)	Denied 04/10/08
State v. Young Case below: 186 N.C. App. 343	No. 560A07	1. Def's NOA Based Upon a Constitutional Question (COA06-1247) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed 04/10/08
Stocum v. Oakley Case below: 185 N.C. App. 56	No. 444P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-957)	Denied 04/10/08

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

Teague v. N.C Dep't of Transp. Case below: 177 N.C. App. 215	No. 281P06-4	Plt's PWC to Review Decision of COA (COA05-522)	Denied 04/10/08
Teague. v. N.C. Dep't of Transp. Case below: 177 N.C. App. 215	No. 281P06-5	1. Plt's Motion to Reconsider PWC (COA05-522) 2. Plt's "Motion to Reconsider Writ of Certiorari from Wake Superior Court Prior to Determination there for Reasons of Judicial Misconduct" 3. Plt's Motion for Temporary Stay	1. Denied 06/11/08 2. Denied 06/11/08 3. Denied 06/09/08 **Edmunds, J., Recused**
Terry's Floor Fashions, Inc. v. Crown Gen. Contrs, Inc. Case below: 184 N.C. App. 1	No. 362A07	1. Def-Appellant's (Alvis) NOA (Dissent) (COA06-738) 2. Def-Appellant's (Alvis) PDR	1. —— 2. Denied 06/11/08
Tuck v. Turoci Case below: 188 N.C. App. 634	No. 077P08	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA06-1571) 2. Plt's Alternative PWC to Review the Decision of the COA	1. Denied 04/10/08 2. Denied 04/10/08
Wake Cares, Inc. v. Wake Cty. Bd. of Educ. Case below: 190 N.C. App. 1	No. 230P08	Plts' Motion for Temporary Stay (COA07-810)	Allowed 05/22/08 **Martin, J., Recused**
Watson v. Watson Case below: 187 N.C. App. 55	No. 593P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1640)	Denied 04/10/08
Watts v. N.C. Dep't of Env't & Natural Res. Case below: 182 N.C. App. 178	No. 191A07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-299)	Order denying Plt's PDR withdrawn ex mero motu. PDR allowed for limited purposes. See Special Order Page 349

Weber, Hodges & Godwin Commercial Real Estate Servs., LLC v. Cook Case below: 186 N.C. App. 288	No. 529P07	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA07-248) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 04/10/08 2. Dismissed as Moot 04/10/08
Williams v. HOMEQ Servicing Corp. Case below: 184 N.C. App. 413	No. 382A07	Def's Motion to Withdraw Appeal (COA06-674)	Allowed 04/10/08
Young v. Gum Case below: 185 N.C. App. 642	No. 494P07	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA06-1131) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31 (COA069-1131)	1. Denied 04/10/08 2. Dismissed as Moot 05/13/08 **Martin, J., Recused**

PETITIONS TO REHEAR

Carolina Bldg. Servs' Windows & Doors, Inc. v. Boardwalk, LLC Case below: 362 N.C. —— (11 April 2008)	No. 444PA06-2	Defs' Petition for Rehearing	Denied 06/11/08
Marven L. Poindexter, Inc. v. Boardwalk, LLC Case below: 362 N.C. —— (11 April 2008)	No. 443PA06-2	Defs' Petition for Rehearing	Denied 06/11/08

STATE OF NORTH CAROLINA v. JEREMY DUSHANE MURRELL

No. 484A06

(Filed 27 August 2008)

1. Confessions and Incriminating Statements— waiver of rights after appointment of counsel—knowing and voluntary—knowledge of indigent services rules not required

The trial court did not err in a first-degree murder prosecution by concluding that defendant's waiver of his rights was knowing and voluntary and that his statement to investigators was admissible. Counsel had been appointed but defendant waived his rights and elected not to have counsel present when making his statement to investigators after initiating contact. Whether defendant was advised of the provisions of IDS (indigent services) rules about the appointment of counsel in capital cases is immaterial to a determination under Miranda.

2. Jury— voir dire—prosecutor's remarks—definition of mitigating circumstance—shorthand summary

The prosecutor's remarks during voir dire in a first-degree murder prosecution that "A mitigating circumstance, if you choose to believe it, could make this crime more deserving of life imprisonment," were substantially correct shorthand summaries of the definition of mitigating circumstances and thus were not grossly improper.

3. Jury— selection—ability to impose death penalty

There was no plain error in a first-degree murder prosecution where the prosecutor was allowed to ask whether prospective jurors had the "intestinal fortitude" to vote for a death sentence. The question was not posed in a way that might affect the jurors' impartiality, and it is evident that the intent was to elicit answers which would have provided grounds for a challenge for cause.

4. Sentencing— capital—prosecutor's closing argument—mitigating circumstances

There was no plain error in a first-degree murder prosecution where defendant contended that the prosecutor misrepresented the law regarding mitigating circumstances by suggesting that mitigating evidence would have to lessen the severity of the crime. The remarks were at least substantially correct, and cannot then be said to be grossly improper.

5. Criminal Law— prosecutor's closing argument—witness not called

The court did not abuse its discretion in a first-degree murder prosecution by overruling defendant's objection to the prosecutor's closing argument regarding a witness whom the State did not call. Defendant did not demonstrate prejudice because the only aspect of the witness's testimony possibly suggested by the State's argument was the assessment that defendant was not schizophrenic, with which defendant's own expert agreed.

6. Sentencing— prosecutor's closing argument—ability to vote for death penalty

There was no gross impropriety in a first-degree murder prosecution in the trial court not intervening ex mero motu in the prosecutor's arguments about having the inner strength to carry out justice and having the intestinal fortitude to vote for the death penalty.

7. Sentencing— capital—prosecutor's argument—use of mitigating evidence

The trial court did not abuse its discretion in a first-degree murder prosecution by overruling defendant's objection to the prosecution's alleged argument that the jury should consider mitigation evidence in support of an aggravating circumstance. In context, the argument was that defendant's childhood temper tantrums should not be significant factors in the consideration of defendant's mitigating evidence.

8. Sentencing— capital—prosecution's closing argument—contention for State's position rather than personal opinion

There was no gross impropriety in a first-degree murder prosecution where the prosecutors argued that they wanted the jury to return a recommendation of death. They were advocating the State's position rather than expressing a personal opinion.

9. Sentencing— capital—mitigating circumstances—definition

There was no error, plain or otherwise, in the court's definition of mitigating circumstances in the sentencing phase of a first-degree murder prosecution.

10. Constitutional Law— effective assistance of counsel—questions to jurors about sympathy for defendant—no objection

There was no ineffective assistance of counsel in a first-degree murder prosecution where defendant contended that his trial counsel was ineffective in not objecting to questions concerning prospective jurors' sympathy for defendant because of his age. It would have been reasonable for trial counsel to interpret the questions as permissible inquiries into potential bias, and counsel sufficiently advocated the age of defendant as a mitigator.

11. Sentencing— capital—aggravating circumstances—pecuniary gain—causal connection—instructions

The trial court's instructions on the pecuniary gain aggravating circumstance in a capital sentencing proceeding sufficiently informed the jury regarding the circumstances which would support a finding of some causal connection between the murder and the pecuniary gain at the time the killing occurred when the court instructed that the pecuniary gain must have been "[obtained] as compensation for committing [the murder]" or "[intended or expected] as a result of the death of the victim."

12. Criminal Law— motion for appropriate relief—issues adequately raised

Under these particular circumstances, a defendant adequately raised on appeal each of the grounds underlying a motion for appropriate relief. Defendant filed his brief after filing his motion for appropriate relief and incorporated by reference into the brief each of the grounds for relief from the motion, and was evidently acting upon a good faith misunderstanding of the law.

13. Criminal Law— perjured testimony—prior convictions—not knowingly allowed

There was no error, and no prejudice even assuming error, where the defendant in a first-degree murder prosecution alleged that a witness was allowed to perjure himself concerning prior convictions, current charges, and discussions with a district attorney's office. The testimony about pending charges was true at that time, and defendant presented no evidence to support the assertion that the prosecution knowingly and intentionally allowed false testimony.

14. Constitutional Law— effective assistance of counsel—cross-examination of State's witness

A first-degree murder defendant was not denied the effective assistance of counsel in the cross-examination of a State's witness.

15. Constitutional Law— effective assistance of counsel—conflict of interest

A first-degree murder defendant received effective assistance of counsel where one of his attorneys had represented a State's witness previously, but the transcript revealed that the attorney did not remember the witness or her representation of him, nor did she discuss defendant's case with the witness. Defendant did not object at trial, or show that the potential conflict affected his lawyer's performance.

16. Criminal Law— inconsistent statements by State's witness—not the knowing presentation of false testimony

False testimony was not permitted from a witness for the prosecution where the witness made inconsistent statements. Issues of fact are of the jury to resolve.

17. Constitutional Law— effective assistance of counsel—cross-examination and request for instructions

A first-degree murder defendant was not denied the effective assistance of counsel in the cross examination of a State's witness and in the lack of a request for an instruction on accomplice testimony. Counsel's performance met the constitutionally required objective standard of reasonableness, and evidence of being an accessory after the fact does not subject the witness's testimony to rules regarding accomplice testimony.

18. Criminal Law— prosecutor's closing argument—not prejudicial

A first-degree murder defendant could not show that the failure to sustain his objection to the prosecutor's closing argument was prejudicial, even assuming the argument was improper. The argument concerned defendant ignoring the ringing of the victim's cell phone after the crime as the victim's family tried to find him; the challenged remarks were made to show the family's love of the victim.

19. Criminal Law— keeping facts from jury—corrected on cross-examination—not prejudicial

There was no prejudice in a first-degree murder prosecution where defendant argued that the prosecution had tried to keep from the jury the victim's attempt to buy marijuana. The jury heard the evidence through cross-examination of a detective.

20. Criminal Law— questions assuming facts not in evidence—objections sustained—not prejudicial

There was no prejudice in a first-degree murder prosecution where defendant asserted that the prosecution had asked questions assuming facts not in evidence, but defendant's objections had been sustained.

21. Sentencing— death penalty—not disproportionate

A death sentence was not disproportionate where the evidence supported the aggravating circumstances, there was no indication that the verdict was rendered under the influence of passion or any other arbitrary factor, and the sentence was proportionate in light of the defendant and the crime.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered on 17 February 2006 by Judge William Z. Wood, Jr. in Superior Court, Forsyth County, following a jury verdict finding defendant guilty of first-degree murder. On 26 March 2007, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments. On 21 September 2007, defendant filed a motion for appropriate relief with the Supreme Court. Heard in the Supreme Court 6 May 2008.

Roy Cooper, Attorney General, by Amy C. Kunstling, Assistant Attorney General, for the State.

Staples S. Hughes, Appellate Defender, by Benjamin Dowling-Sendor, Assistant Appellate Defender; and Paul M. Green for defendant-appellant.

BRADY, Justice.

Late in the evening on 21 August 2003, defendant approached Lawrence Matthew Harding, who was seated in his own vehicle in a parking lot adjacent to his place of employment. Defendant fatally shot Harding twice in the head and neck with a firearm and, after transporting him to Durham in the vehicle, placed his body inside the

trunk and took from him a watch and approximately $130.00. Three days later, defendant abandoned the vehicle—along with Harding's body—near a bus station in Richmond, Virginia. The victim was not discovered until 29 August 2003, more than one week after the murder. Defendant was apprehended and subsequently convicted of first-degree murder, first-degree kidnapping, and robbery with a dangerous weapon and was sentenced to death for the murder. We find no error in defendant's convictions or sentences and deny defendant's contemporaneously filed Motion for Appropriate Relief.

PROCEDURAL BACKGROUND

On 6 July 2004, the Grand Jury of Forsyth County returned true bills of indictment charging defendant with first-degree kidnapping, robbery with a dangerous weapon, and first-degree murder of Lawrence Matthew Harding. Defendant was tried capitally and, on 10 February 2006, was found guilty by a jury on all charges. With respect to the jury's verdict on the murder charge, the jury found defendant guilty of first-degree murder on the basis of both the theory of malice, premeditation, and deliberation and under the felony murder rule.

On 17 February 2006, following the statutorily required sentencing hearing, the jury returned a binding recommendation that defendant be sentenced to death for the first-degree murder conviction, and judgment was entered accordingly by the trial court. Defendant was also sentenced within the presumptive range for the robbery with a dangerous weapon and first-degree kidnapping convictions.

Defendant now appeals his first-degree murder conviction and sentence of death as of right pursuant to N.C.G.S. § 7A-27(a) and has asserted several assignments of error in a Motion for Appropriate Relief filed on 21 September 2007, during the pendency of his appeal. Defendant also moved to bypass the Court of Appeals in appealing his non-capital judgments, and this Court allowed the defendant's motion on 26 March 2007.

FACTUAL BACKGROUND

I. GUILT PHASE EVIDENCE

The State's evidence presented during the guilt phase of defendant's trial tended to show the following: That late in the evening on 21 August 2003, the victim, Matthew Harding, completed his regular food preparation shift at the restaurant where he was employed,

South by Southwest in Winston-Salem. He received a paycheck for $331.00, left the restaurant, and entered his red Mitsubishi Lancer automobile, which was parked in an adjacent lot. He was last observed by a fellow employee in the same parking lot at approximately 10:30 p.m., seated in his stationary vehicle with the interior light turned on and the stereo playing at a high volume.

A missing person report was filed with the Winston-Salem City Police Department on 22 August 2003 after the victim did not report for his scheduled shift at work and his father and stepmother were unable to contact him. Officer W.E. Kelsey, who took the report from the victim's parents, canvassed the restaurant's parking lot for evidence later the same day and retrieved a shell casing. On 29 August 2003, a red Mitsubishi Lancer with a North Carolina license plate number matching that of the victim's vehicle was discovered on Altamont Street in Richmond, Virginia, by the Richmond City Police Department.

The vehicle was seized and subsequently towed to the Virginia Medical Examiner's Office, where skeletal remains later identified as the victim's were discovered in the trunk. Investigators also recovered two projectile fragments from the floor of the rear passenger area of the vehicle and detected the presence of metal particles around a hole in the front passenger seat. An autopsy of the victim's remains conducted on 30 August 2003 revealed that he had suffered two gunshot wounds to the head and neck areas. The head wound would have been immediately incapacitating and fatal, whereas the wound traced from under the left side of his chin down through the soft tissue of his neck and into his spine might have been survivable but would have been painful and likely caused some paralysis; however, the autopsy did not reveal the order in which these wounds were inflicted.

One additional projectile was recovered during the autopsy. A ballistics expert tendered without objection from defendant testified that this projectile was consistent with a "caliber .380 auto full metal jacketed bullet" and that the shell casing retrieved by Officer Kelsey from the South by Southwest parking lot in Winston-Salem was a fired Winchester caliber .380 auto cartridge case.

The State also presented the testimonies of several acquaintances of defendant. Mangus Daniels, at whose apartment defendant resided during the summer of 2003, testified that before the night of 21 August 2003, defendant had occasionally mentioned the possibil-

ity of robbing someone to obtain money. Daniels further testified that on 21 August 2003 he received a telephone call from defendant, who indicated that he had robbed someone. After a few days, defendant returned to Daniels' apartment, at which point defendant described having forced someone into a trunk at gunpoint and taken the vehicle to Virginia. Defendant further described the victim as "a white guy" and stated that he left him in good health, although defendant had shot into the trunk of the vehicle to keep the victim from making too much noise. In October 2003, prompted by a Winston-Salem newspaper account of a body discovered in Virginia, Daniels first confronted defendant during a telephone conversation and then initiated contact with Crime Stoppers, the victim's family, and law enforcement concerning the murder.

Defendant also related to his girlfriend, Stacy Whitson, before 21 August 2003 that he wanted to rob someone for money. Defendant lived temporarily at Whitson's residence from 17 August 2003 until he was ultimately apprehended by law enforcement in October 2003. One day during October 2003, while at Whitson's residence, defendant returned a telephone call in response to a message he had received from Daniels. After speaking with Daniels, he said to Whitson, "I didn't want to get that phone call." Defendant then borrowed a vehicle belonging to Whitson's roommate in order to obtain a newspaper. Whitson later witnessed defendant balling up a newspaper and discarding it in the trash. Defendant also asked Whitson whether investigators could detect fingerprints on clothing.

Another of defendant's acquaintances, Bennie Cameron, testified that he was aware defendant possessed a firearm sometime before 21 August 2003 and that defendant had stated his intention to rob someone, put the individual in the trunk of his or her own vehicle, and take the vehicle to Durham. Defendant also indicated to Cameron that he knew of a "chop shop" in Durham.[1] In August 2003, defendant visited Cameron's apartment and indicated he had robbed someone and put the individual in the trunk. Defendant further indicated that he had obtained approximately $130.00 from the victim, whom he had transported to Virginia.

At about 11:00 p.m. on 21 August 2003, Alonzo Dingle, a friend of defendant who resided in Durham at the time, left work and returned to his apartment. Dingle heard a knock on the door as he was show-

1. "Chop shop" is defined as "a place where stolen automobiles are stripped of salable parts." *Merriam-Webster's Collegiate Dictionary* 202 (10th ed. 1993) [hereinafter *Merriam-Webster's*].

ering, and when he opened the door he observed defendant standing outside, smiling and wearing no shirt. According to testimony from Dingle, defendant requested his assistance in placing a dead body in the trunk of a vehicle. Defendant made several similar requests as he and Dingle spent some time inside the apartment, but Dingle did not believe defendant was serious.

Eventually, defendant convinced Dingle to follow him to the parking lot outside his apartment, where Dingle observed a white male inside a Mitsubishi Lancer with his head positioned on the floor of the front passenger area, one leg across the driver's seat and the other between the two front seats extending into the rear of the vehicle. Dingle testified that he observed no blood at this time and that he thought defendant and the other man were playing a joke on him.

Defendant subsequently drove the vehicle to a nearby neighborhood, with the victim's body situated in the same manner and Dingle seated in the rear. Defendant parked the vehicle on the street, moved around to the front passenger side, opened the door, and dragged the body out of the vehicle. At this point, Dingle observed the man's face was covered with blood and that he was not moving. Dingle then refused defendant's request for assistance and watched as defendant placed the body inside the trunk of the vehicle. When Dingle asked defendant what had happened, defendant explained that he needed to eat.

Additionally, the State introduced into evidence a recorded statement defendant made to law enforcement on 28 October 2003. Defendant's account of the events surrounding the victim's death on 21 August 2003 was as follows: He knew the victim, although not by name, from a previous encounter during which the victim had purchased marijuana from defendant. Sometime after 9:00 p.m. on 21 August 2003, while defendant was standing near an intersection in Winston-Salem, he was approached by the victim, who wished to again purchase marijuana, but defendant shook his head "no" to communicate that he did not have any marijuana at the time.

Defendant next saw the victim sometime later in the evening seated in his vehicle in a parking lot near a hotel and listening to music. By this time, defendant had obtained about an ounce of marijuana and was carrying in his right pants pocket a .380 caliber handgun, which he had borrowed from Dingle. Without speaking, defendant entered the vehicle through the front passenger side door to initiate the sale of marijuana to the victim in exchange for cash, in

similar fashion as the two had done previously. A struggle ensued, apparently initiated by the victim attempting to "snatch" the marijuana, during which defendant "panicked" and removed the handgun from his pocket with his right hand. The victim subsequently pulled at defendant's right hand, which caused the handgun to discharge once into the victim's face or head.[2]

Defendant repositioned the victim from the driver's seat to the front passenger seat of the vehicle, so that the victim was upside down with his head positioned near the floorboard. Defendant departed the scene operating the victim's vehicle, eventually merged onto Interstate 40, and drove east. He considered taking the victim to a hospital but, as he continued driving, the victim said to him, "Finish me off." As defendant described: "A few seconds later, he said, 'Please,' and he said, 'Please' again. And, he said, that's, that's when he got, got to me personally and that's when the . . . So, that's when it, cause he twitched and I shot him." After this second shot was fired, it appeared to defendant the victim was dead, and he noticed no further movement or other signs of life from the body.

According to defendant, he arrived at Dingle's apartment in Durham between 10:00 and 11:00 p.m. on 21 August 2003, with the victim's body situated in the same manner as before. When defendant explained to Dingle what had happened and requested his assistance, Dingle retrieved a pair of gloves and a hat. After some discussion, the two men decided to dispose of the body somewhere in Durham and traveled around town in the vehicle for thirty minutes to an hour with defendant operating the vehicle, the victim's body in the front passenger seat, and Dingle seated in the rear behind defendant. Ultimately, they decided to stop the vehicle and place the body inside the trunk, and Dingle assisted defendant in doing so.

After defendant and Dingle returned to the Durham apartment in the same vehicle, defendant showered and followed Dingle's advice to dispose of his own clothes and the victim's cellular phone, placing these items in trash bags and discarding them in the garbage dumpster outside of Dingle's apartment. Dingle also advised defendant to dispose of the vehicle, along with the victim's body, in some location outside of the state.

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2. Before making a recorded statement, defendant provided law enforcement an inconsistent account of events in which he stated that a third, unidentified individual shot the victim in the face while defendant and the victim were both seated in the vehicle engaged in the drug transaction.

Defendant departed Dingle's apartment and returned to the vehicle with the handgun, the victim's watch, and approximately $115.00 or $120.00 he had taken from the victim's wallet. He traveled north on an unspecified route until he reached Richmond, Virginia, in the early morning hours of 22 August 2003, at which point he decided he would dispose of the remaining evidence in that city. During the next three days, defendant drove the vehicle around the Richmond area and as far north as Washington, D.C., while the victim's body remained in the trunk. Defendant placed several calls from his cellular phone—to Whitson, Daniels, and his father—and at one point attended a screening of a horror film at an unspecified public movie theater. On 24 August 2003, defendant abandoned the vehicle, along with the body, in a secluded area near a bus station in Richmond. He discarded the keys to the vehicle, sold the .380 caliber handgun for $90.00, and used the proceeds to purchase a bus ticket to return to Winston-Salem. Once he arrived in Winston-Salem, defendant returned to Daniels' residence in a taxi.

Defendant did not introduce evidence during the guilt phase of his trial.

II. PENALTY PROCEEDING EVIDENCE

The State introduced as victim impact evidence the testimony of Judy Harding, the victim's stepmother, who described how much he was missed by his family.

Defendant introduced as mitigating evidence the testimonies of defendant's family members, including his father and sister, detailing how defendant was adversely affected during childhood by his mother's paranoid schizophrenia and the mental problems his father suffered as a result of a head injury.

Claudia Reeves Coleman, Ph.D., a licensed clinical psychologist with a practice in Raleigh, was tendered by defendant without objection as an expert in forensic psychology. Dr. Coleman testified that she diagnosed defendant as having suffered from a mood disorder since childhood; that defendant was thus prone to panic and anxiety attacks, depression, and poor impulse control; and that he was at a higher than normal risk for developing a schizophrenic disorder as a consequence of his family's mental health history. Dr. Coleman's opinion was that, at the time of the murder, defendant was suffering from a significant mood disorder which impaired his capacity to conform his conduct to the law.

The jury found as aggravating circumstances that the murder was committed for pecuniary gain, that the murder was especially heinous, atrocious, or cruel, that the murder was committed while defendant was engaged in the commission of robbery with a dangerous weapon, and that the murder was committed while defendant was engaged in the commission of first-degree kidnapping. One or more jurors found the statutory mitigating circumstances that defendant has no significant history of prior criminal activity and that the murder was committed while defendant was under a mental or emotional disturbance. Several nonstatutory mitigating circumstances were also found to exist by one or more jurors.

The jury unanimously found the mitigating circumstances insufficient to outweigh the aggravating circumstances, and further found that the aggravating circumstances were sufficiently substantial to call for imposition of the death penalty when considered with the mitigating circumstances. Accordingly, the jury entered its binding recommendation that defendant be sentenced to death for the murder conviction.

ANALYSIS

I. PRETRIAL ISSUES

[1] Defendant assigns error to the trial court's 30 January 2006 order denying his pretrial motion to suppress evidence. Defendant moved before trial to suppress an inculpatory statement he made to law enforcement on 28 October 2003, following his arrest on 24 October 2003, on the basis that he did not knowingly and voluntarily waive his right to counsel before making this statement.

At the conclusion of the hearing on defendant's motion to suppress, the trial court made, *inter alia*, the following findings of fact: On 24 October 2003, defendant was questioned by police investigators for approximately three hours at the Winston-Salem City Police Department. Immediately after this interview, during which defendant "did not make any admissions of any type . . . in any way," defendant was arrested for first-degree kidnapping and robbery with a dangerous weapon of Matthew Harding, but was not charged with murder. Detective D.L. Elmes subsequently transported defendant to the Forsyth County jail and gave defendant his business card in case defendant wished to speak with him or "wanted to get anything off his chest."

At approximately 8:00 a.m. on 28 October 2003, defendant initiated contact with investigators by placing a telephone call from the county jail to the number listed on Detective Elmes' business card and leaving a voice mail message requesting to meet with him. When the investigators arrived at the jail, they advised defendant of his *Miranda* rights. Defendant stated that he understood these rights and wanted to answer questions, indicated that he was aware he had already been appointed counsel, and responded that he did not wish to have an attorney present during questioning but instead chose to waive the appearance of his appointed counsel. Before making his statement, defendant told the investigators, "I want y'all to help me."

Based upon its findings of fact, the trial court concluded that defendant's statement to investigators "was made freely, voluntarily, and understandingly and . . . without promise of hope or reward . . . and without force or pressure." The court determined that the statement was admissible as a result.

Although defendant assigned error to the trial court's findings of fact, he has failed to make any argument on appeal that these findings were unsupported by competent evidence. Thus, we are bound by the trial court's findings of fact, and our review on appeal is limited to a determination of whether these findings support the lower court's conclusions of law. *See State v. Cheek*, 351 N.C. 48, 62-63, 520 S.E.2d 545, 554 (1999) (citing *State v. Watkins*, 337 N.C. 437, 438, 446 S.E.2d 67, 68 (1994)), *cert. denied*, 530 U.S. 1245 (2000).

Defendant asserts that his waiver of the right to have an attorney present during questioning was not knowing and voluntary because he "could not possibly waive a right that he did not know existed." However, defendant does not contend that investigators did not apprise him of his right to have an attorney present. Rather, he argues that certain steps should have been taken to notify the North Carolina Office of Indigent Defense Services (IDS) that defendant might potentially become a capital defendant. *See* N.C.G.S. §§ 7A-498.1 to -498.8 (2007) ("Indigent Defense Services Act"); Indigent Def. Servs. Rules, Subpart 2A ("Appointment and Compensation of Trial Counsel in Capital Cases"), *reprinted in* 2008 Ann. R. N.C. 974-79.[3] Yet the decision of the Supreme Court of the United States in *Miranda v. Arizona* expressly dispels any

3. We note that Part 2 of the IDS rules "*places with [IDS]* the responsibility for appointing and compensating counsel in capital cases." Indigent Def. Servs. Rules, Part 2, *reprinted in* 2008 Ann. R. N.C. 973 (emphasis added).

notion that the failure of investigators to *obtain* counsel for a defendant constitutes a violation of the Fifth Amendment right against self-incrimination:

> This does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person *they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation.*

384 U.S. 436, 474 (1966) (emphasis added). Whether defendant was advised of the provisions of the IDS rules pertaining to the appointment of counsel in capital cases is immaterial to a determination under *Miranda* of whether defendant was informed "that if he is indigent a lawyer will be appointed to represent him." *Id.* at 473; *see also Moran v. Burbine*, 475 U.S. 412, 422 (1986) ("Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right.").

In this regard, the instant case is easily distinguishable from *State v. Steptoe*, in which the defendant clearly communicated his desire to have a lawyer and to speak with an attorney, and only *after* the investigators "discouraged the appointment of counsel" did the defendant issue a statement. 296 N.C. 711, 716-17, 252 S.E.2d 707, 710-11 (1979). Here, in contrast, defendant had already been appointed counsel but waived his *Miranda* rights and elected not to have counsel present when making his statement to investigators after initiating contact with them. The trial court did not err in concluding that defendant's waiver was knowing and voluntary and that his statement to investigators on 28 October 2003 was thus admissible. Defendant's assignments of error related to this issue are overruled.

II. JURY SELECTION ISSUES

A. Prosecutor's Characterization of "Mitigating Circumstances"

[2] Defendant contends that the trial court erred during jury selection by permitting the prosecutor, over defendant's objection, to misrepresent the law with regard to mitigating circumstances. Our trial courts have traditionally been afforded broad discretion to rule upon the manner and extent of jury voir dire, and this Court will not disturb such a ruling on appeal absent an abuse of that

discretion. *State v. Polke*, 361 N.C. 65, 68-69, 638 S.E.2d 189, 191 (2006) (citations omitted), *cert. denied*, —— U.S. ——, 128 S. Ct. 70, 169 L. Ed. 2d 55 (2007).

Before trial, defendant filed a written motion "To Prohibit the DA from Improperly Defining a Mitigating Circumstance." At a pretrial hearing on defendant's motion on 12 January 2006, the trial court reserved its ruling on the motion, instructing both sides to "follow the statute" and to note an objection in the event opposing counsel made "any improper statement of the law."

During the State's jury voir dire questioning on 30 January 2006, the prosecutor stated without objection: "A mitigating circumstance, if you cho[o]se to believe it, could make this crime more deserving of life imprisonment." However, defense counsel did object to two similar remarks made by the prosecutor later in the proceeding, and these objections were sustained.

On the morning of 31 January 2006, defendant filed a written motion to prohibit the prosecutor from "incorrectly defining aggravating and mitigating circumstances." The trial court held a brief hearing on defendant's motion and again declined to enter a ruling, but noted defendant's continuing objection "to [the prosecutor's] questions."

As in *State v. Frye*, the prosecutor's remarks during voir dire "were shorthand summaries of the definition[] of . . . mitigating circumstances" and "were substantially correct, even if slightly slanted toward the State's perspective." *See* 341 N.C. 470, 491, 461 S.E.2d 664, 674 (1995), *cert. denied*, 517 U.S. 1123 (1996). Thus, the trial court's rulings upon defendant's motions and objections were not "manifestly unsupported by reason or so arbitrary that they could not have been the result of a reasoned decision." *Polke*, 361 N.C. at 69, 638 S.E.2d at 191 (citations and internal quotation marks omitted). Defendant's assignment of error is overruled.

B. The Prosecutor's Use of the Phrase "Intestinal Fortitude"

[3] Defendant also challenges on appeal a question asked individually of prospective jurors by the prosecutor at jury selection: Whether the individual possessed the "intestinal fortitude" to vote for a sentence of death. Defendant initially noted his objection to the prosecutor's use of this phrase and was overruled, but thereafter failed to preserve this assignment of error for appellate review

with further timely objection. Alternatively, defendant has asserted plain error.

Regardless of the applicable standard of review, we find no error related to this issue, plain or otherwise. Defendant attempts to distinguish this Court's previous decision in *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983). In *Oliver*, this Court found no error in the prosecutor's use of the words "backbone" and "intestinal fortitude," respectively, when questioning two prospective jurors "who equivocated on imposition of the death penalty" for the specific purpose of determining, "in light of their equivocation, whether they could comply with the law." *Id.* at 355, 307 S.E.2d at 323. The Court held that the defendants had failed to demonstrate prejudice since "these comments could be viewed as favorable, rather than unfavorable to defendants' position as they tended to encourage jurors who equivocated on imposition of the death penalty to serve." *Id.*

As stated in *Oliver*, we review prosecutorial remarks in light of both the context in which they were made and "the overall factual circumstances to which they referred." *Id.* (citation and internal quotation marks omitted). In this case, no less than in *Oliver*, the prosecutor's questions "were made not to badger or intimidate these [prospective jurors], but rather to determine . . . whether they could comply with the law." *Id.* It is evident from the transcript of jury selection proceedings that the prosecutor intended this question of "intestinal fortitude" to elicit from prospective jurors answers which would have provided grounds for a challenge for cause. *See* N.C.G.S. § 15A-1212(8), (9) (2007). In fact, the phrase "intestinal fortitude" was simply substituted when defendant's objection to the word "courage" was sustained.

Moreover, this Court has previously found no abuse of discretion or prejudicial error with respect to similar inquiries which have implicated a prospective juror's metaphorical physiological capacity to recommend a sentence of death when called upon to do so by law. *See*, *e.g.*, *State v. Flippen*, 349 N.C. 264, 275, 506 S.E.2d 702, 709 (1998) (questions concerning "courage" of prospective jurors), *cert. denied*, 526 U.S. 1135 (1999); *State v. Smith*, 328 N.C. 99, 130, 400 S.E.2d 712, 729 (1991) (questions concerning whether prospective jurors were "strong enough"); *State v. Hinson*, 310 N.C. 245, 252, 311 S.E.2d 256, 261 (question concerning "backbone" of an equivocating prospective juror), *cert. denied*, 469 U.S. 839 (1984). Similarly, the prosecutor's question in the instant case was not posed to prospective jurors in a way that might affect their impartiality, and the trial

court therefore committed no prejudicial error in overruling defendant's objection.

Defendant also argues, without citing any authority, that his trial counsel were ineffective to the extent they failed to note a timely objection to the prosecutor's questions. As we have applied an abuse of discretion standard of review to defendant's argument and have found this argument to be without merit, we need not reach any ineffective assistance of counsel claims related to this issue as they have been rendered moot.

Accordingly, defendant's related assignments of error are overruled.

III. PENALTY PROCEEDING ISSUES

A. Prosecution's Closing Argument

[4] Defendant raises several issues by assignment of error and argument in his brief concerning the prosecution's closing argument at the penalty proceeding on 16 February 2006.

Defendant first contends that the prosecution misrepresented the law with regard to mitigating circumstances. The prosecutor suggested more than once during closing argument that mitigating evidence would have to "lessen the severity of this crime." However, defense counsel failed to object to any of these remarks at trial. Thus, we review the remarks for whether they "were so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Barden*, 356 N.C. 316, 358, 572 S.E.2d 108, 135 (2002) (citing *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835 (1999)), *cert. denied*, 538 U.S. 1040 (2003).

As with defendant's similar assignment of error concerning prosecutorial remarks made during jury selection, we find that the prosecutor's remarks at closing argument "were shorthand summaries of the definition[] of . . . mitigating circumstances" and "were substantially correct, even if slightly slanted toward the State's perspective." *Frye*, 341 N.C. at 491, 461 S.E.2d at 674. Because these remarks were at least "substantially correct," it does not stand to reason that they were in any way "grossly improper." *Id.* These assignments of error are overruled.

[5] Defendant next contends that the trial court erred in overruling his objection to the following portion of the prosecution's closing argument:

> You also saw Dr. [Steve] Kramer sitting in the front row, somebody on the State's witness list. Defense may make—make a comment about why didn't the State call Dr. Kramer? Well, what is the net effect of zero? Zero. The cumulative effect of zero is zero. You want more testimony to tell you that this defendant is not schizophrenic?[4]

We apply an abuse of discretion standard in reviewing the trial court's decision to overrule defendant's timely objection. *State v. Peterson*, 361 N.C. 587, 606, 652 S.E.2d 216, 229 (2007) (citing *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002)), cert. denied, —– U.S. ——, 128 S. Ct. 1682, 170 L. Ed. 2d 377 (2008). Under this standard, we apply a two-part analysis: " '[T]his Court first determines if the remarks were improper . . . . Next, we 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.* at 606-07, 652 S.E.2d at 229 (quoting *Jones*, 355 N.C. at 131, 558 S.E.2d at 106 (alterations in original)).

Defendant asserts that the jury was erroneously permitted to infer from the prosecutor's line of argument that Dr. Kramer's testimony would have been favorable to the State had he been called as a witness and qualified as a mental health expert. However, the only aspect of Dr. Kramer's potential testimony that was even conceivably suggested by the State's closing argument was an assessment, *with which defendant's own mental health expert witness concurred*, that defendant was not schizophrenic. Even assuming, *arguendo*, the impropriety of the prosecutor's reference to Dr. Kramer, defendant has failed to demonstrate prejudice.

Thus, we hold that the trial court did not abuse its discretion by overruling defendant's objection to these remarks. Accordingly, this assignment of error is overruled.

[6] Defendant next assigns error to the trial court's failure to intervene *ex mero motu* during the prosecution's closing argument when the prosecutor implored jurors to "find the inner strength to carry out justice." Since defendant failed to object to the prosecutor's remarks,

4. In his brief, defendant describes other instances in which the prosecutor made reference to Dr. Kramer, both during jury selection and during the penalty proceeding, and discusses at length the facts surrounding the prosecutor's decision not to call Dr. Kramer as a witness. However, defendant has not preserved any of these matters for appellate review either through assignment of error or by "specifically and distinctly" contending plain error. Thus, our consideration is limited to the objected-to portion of the prosecution's closing argument quoted above. *See* N.C. R. App. P. 10(c).

we must determine whether these remarks were " 'so grossly improper that the trial court erred in failing to intervene *ex mero motu*.' " *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364 (quoting *Barden*, 356 N.C. at 358, 572 S.E.2d at 135), *cert. denied*, 540 U.S. 971 (2003).

Defendant provides no authority or legal analysis to demonstrate that the language "find the inner strength to carry out justice" was in any way grossly improper. Defendant argues instead that the cumulative effect of the prosecutor's questions during jury selection concerning jurors' "intestinal fortitude" to vote for the death penalty and the prosecutor's repeated remarks at closing argument imploring jurors to "find the inner strength to carry out justice" was sufficiently prejudicial to warrant a new sentencing hearing. Relatedly, defendant asserts that the prosecutor's question during jury selection concerning whether prospective jurors possessed the "intestinal fortitude" to vote for the death penalty was recalled in the minds of the jurors at closing argument when the prosecutor stated, "We asked you in jury selection if you were strong enough to do this."

As set forth above, we can discern no prejudicial error in the trial court's decision to allow the prosecutor's inquiry into the "intestinal fortitude" of prospective jurors to vote for a sentence of death. Absent any further analysis from defendant specifically addressing the prosecutor's remarks at closing argument, we are unable to hold that these remarks rose to the level of gross impropriety. Moreover, defendant has not carried his burden under the *Strickland* test with regard to the ineffective assistance of counsel claims he sets forth related to this issue. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (requiring a defendant to show both that trial counsel's performance was "deficient" *and* that the defendant was prejudiced as a result). Accordingly, defendant's assignments of error are overruled.

[7] Defendant contends that the following portion of the prosecution's closing argument prompted the jury to consider defendant's evidence in mitigation as evidence in support of an *aggravating* circumstance instead:

> Consider whether [defendant] has shown signs in his childhood of emotional disturbance as evidenced by prolonged crying spells or periods of staring at nothing or unwillingness to engage with other children or inability to tolerate being touched. He had temper tantrums when he was a toddler. He had a bad temper. He would throw fits when he didn't get what he wanted, I believe,

> was the testimony. Perhaps his personality for murder was already formed.

The trial court overruled defense counsel's objection to this argument. Thus, we determine whether the trial court abused its discretion and therefore, whether its ruling "could not have been the result of a reasoned decision." *Peterson*, 361 N.C. at 606, 652 S.E.2d at 229 (citation and internal quotation marks omitted) (quoting *Jones*, 355 N.C. at 131, 558 S.E.2d at 106).

Specifically, defendant characterizes the statement, "Perhaps his personality for murder was already formed," as an invitation to jurors to vote for a sentence of death *because of* the mitigating evidence he presented at the penalty proceeding. However, it is well established that " 'statements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal.' " *See State v. Thompson*, 359 N.C. 77, 110, 604 S.E.2d 850, 873 (2004) (quoting *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41, *cert. denied*, 513 U.S. 1046 (1994)), *cert. denied*, 546 U.S. 830 (2005). The prosecutor's line of argument from which the challenged remarks have been extracted can be traced back for seven pages of transcript and continues on for approximately eleven pages—for a total of eighteen transcript pages. This line of argument served the prosecutor's purpose of calling into question the weight jurors ought to assign to each individual item of defendant's mitigating evidence. At one point, the prosecutor stated to the jury that defendant would "hurl grapes around the courtroom" in the form of mitigating circumstances "[a]nd even though there are 41 of them, when you put 41 grapes on a scale with four watermelons, we know that it's not going to weigh more than four watermelons."

Viewed in this context, it is readily apparent that the prosecutor was not in any way suggesting defendant had formed a "personality for murder" as a toddler, but rather was using a skeptical tone to advocate the opposite conclusion: That, in the prosecutor's view, defendant's early temper tantrums should not be significant factors in jurors' consideration of defendant's mitigating evidence.

For this reason, we hold that the trial court did not abuse its discretion in overruling defendant's objection to this argument; therefore, this assignment of error is overruled.

[8] Finally, defendant contends that prosecutors expressed their personal desires, opinions, or beliefs during closing argument when ad-

vocating that the jury return a binding recommendation of death and that these remarks were grossly improper. Specifically, defendant assigns error to the following:

> [T]here are going to be four questions. I want you to answer yes, yes to every one of them, and then I want you to write—I want your foreperson to write on that last line death, because I want you to do justice, I want you to give a punishment that is appropriate for the crime.

Additionally, the prosecution encouraged the jury to "answer those questions yes, yes, yes, and yes. The recommendation in this case is death."

Because defendant did not object when these remarks were made, we review them for whether they were " 'so grossly improper that the trial court erred in failing to intervene *ex mero motu*.' " *Walters*, 357 N.C. at 101, 588 S.E.2d at 364 (quoting *Barden*, 356 N.C. at 358, 572 S.E.2d at 135). Defendant cites this Court's decision in *Jones* to support his assertion that the prosecutor's argument was grossly improper. *See* 355 N.C. at 135, 558 S.E.2d at 108 (stating that closing argument must be "devoid of counsel's personal opinion"); *see also* N.C.G.S. § 15A-1230(a) (2007) (stating that during closing argument to the jury "an attorney may not . . . express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant"); N.C. St. B. R. Prof. Conduct 3.4(e), 2008 Ann. R. N.C. 759, 848-49 (stating that "[a] lawyer shall not . . . in trial . . . state a personal opinion as to the justness of the cause").

In *Jones*, this Court vacated the defendant's death sentence and awarded a new sentencing hearing after holding that the trial court "abused its discretion by affording the prosecution undue latitude in its closing arguments at sentencing." 355 N.C. at 135, 558 S.E.2d at 109. Two distinct sets of remarks were found by the Court in *Jones* to exceed the bounds of permissible argument. First, the prosecutor had been permitted, over the defendant's objection, to state the following:

> [PROSECUTOR]: Thank you, judge. The United States of America, a great country, indeed around the world for its freedoms: freedom of speech, freedom of privacy in your own home. But with those freedoms comes individual responsibility that every citizen of this country must realize; that to have these freedoms, one is responsible for their own conduct; one is responsible for their own behavior.

> A year ago the Columbine shootings; five years ago Oklahoma City bombings. When this nation faces such tragedy—
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: —the laws of this country come in to bring order to that tragedy, to speak to that tragedy. Here we are addressing a tragedy of a man's life. The tragedy not of this defendant, the tragedy of [the victim] . . . .

Id. at 132 n.2, 558 S.E.2d at 107 n.2. Second, the trial court did not intervene *ex mero motu* to prevent the prosecutor from describing the defendant as a "quitter," a "loser," "worthless," "as mean as they come," and "lower than the dirt on a snake's belly." *Id.* at 133, 558 S.E.2d at 107.

In sharp contrast with *Jones*, the case at bar presents this Court with a closing argument well within the "wide latitude" of what is permissible, as the prosecutor merely sought to fulfill the well-recognized "duty to advocate zealously that the facts in evidence warrant imposition of the death penalty." *Williams*, 350 N.C. at 25, 510 S.E.2d at 642 (citing *State v. Conner*, 345 N.C. 319, 334, 480 S.E.2d 626, 633, *cert. denied*, 522 U.S. 876 (1997)). Thus, the prosecutor was advocating the State's position as to the Issues and Recommendation as to Punishment form rather than expressing a personal opinion or desire that defendant be sentenced to death. Defendant's argument is without merit, and consequently, his related assignments of error are overruled.

B. Trial Court's Instructions on Mitigating Circumstances

[9] Defendant contends that the trial court gave an incorrect definition of mitigating circumstances in its final charge to the jury at the close of the penalty proceeding. He challenges the following portion of the trial court's final charge to the jury at the conclusion of the penalty proceeding, although no timely objection was raised at the charge conference or made contemporaneously with the instructions:

> A mitigating circumstance is a fact or group of facts which do not—which do not constitute a justification or excuse for a killing or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or as making it less deserving of the extreme punishment than other first degree murders.

> Our law identifies several possible mitigating circumstances; however, in considering issue two, it is your duty—it would be your duty to consider as a mitigating circumstance any aspect of the defendant's character or record or any circumstances of this murder that the defendant contends is a basis for a sentence less than death and to consider any other circumstances arising from the evidence which you deem to have mitigating value.

Because defendant did not object to the trial court's jury instructions, this assignment of error was not preserved for appellate review. *See State v. Hardy*, 353 N.C. 122, 131, 540 S.E.2d 334, 342 (2000), *cert. denied*, 534 U.S. 840 (2001).

Alternatively, defendant asserts plain error; however, this Court has repeatedly upheld virtually identical instructions. *See*, *e.g.*, *State v. Williams*, 350 N.C. 1, 32-34, 510 S.E.2d 626, 647, *cert. denied*, 528 U.S. 880 (1999); *State v. Harden*, 344 N.C. 542, 564, 476 S.E.2d 658, 669-70 (1996), *cert. denied*, 520 U.S. 1147 (1997); *State v. Skipper*, 337 N.C. 1, 52-53, 446 S.E.2d 252, 280-81 (1994), *cert. denied*, 513 U.S. 1134 (1995), *superseded by statute on other grounds*, N.C.G.S. § 15A-2002, *as recognized in State v. Price*, 337 N.C. 756, 448 S.E.2d 827 (1994). Thus, there was no error in the trial court's instructions, plain or otherwise. Accordingly, defendant's assignment of error is overruled.

C. Ineffective Assistance of Counsel Claim Concerning (f)(7) Mitigator ("the age of the defendant at the time of the crime")

[10] Although the trial court properly submitted and instructed the jury on the (f)(7) mitigating circumstance, defendant claims ineffective assistance of counsel because his trial counsel did not object to a number of questions asked by the prosecution and the trial court during jury selection concerning prospective jurors' "sympathy" for defendant on account of his age. Further, defendant contends that these questions were prejudicial because they prevented the jury from considering the (f)(7) mitigating circumstance, defendant's age at the time of the murder, in its sentencing deliberations. *See* N.C.G.S. § 15A-2000(f)(7) (2007).

Among other questions cited by defendant, the prosecutor asked prospective jurors whether they would "be sympathetic to this defendant because of his age"; whether they agreed "that the law must apply the same to everyone regardless of their age, sex, and

race"; and whether they agreed that "a decision based upon somebody's age, race, or sex would be unlawful." At one point during the State's jury voir dire questioning, the trial court interjected and asked prospective jurors whether they understood that "deciding this case based on a person's age, race, religion, or sex" would be "morally wrong" in addition to being "unlawful." The prosecutor thereafter characterized "basing [a] decision on sex, age, or race" as both "unlawful" and "immoral" when questioning prospective jurors.

This Court has long recognized the two components of a defendant's ineffective assistance of counsel claims brought under the Sixth and Fourteenth Amendments to the United States Constitution, as set forth in *Strickland v. Washington*. *State v. Goss*, 361 N.C. 610, 623, 651 S.E.2d 867, 875 (2007) (citations omitted); *State v. Campbell*, 359 N.C. 644, 690, 617 S.E.2d 1, 30 (2005) (citations omitted), *cert. denied*, 547 U.S. 1073 (2006). First, defendant must demonstrate that his trial counsel's performance was "deficient," such that the errors committed were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Second, defendant is required to show prejudice resulting from trial counsel's "deficient performance," which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*

This Court has previously held that a prosecutor may " 'inquir[e] into the sympathies of prospective jurors in the exercise of [the State's] right to secure an unbiased jury.' " *See State v. Anderson*, 350 N.C. 152, 170-71, 513 S.E.2d 296, 308, (quoting *State v. McKoy*, 323 N.C. 1, 15, 372 S.E.2d 12, 19 (1988), *sentence vacated on other grounds*, 494 U.S. 433 (1990)), *cert. denied*, 528 U.S. 973 (1999). Defendant contends that the questions asked of prospective jurors by the State and the trial court in the present case were not permissible inquiries into the bias of prospective jurors. Instead, in effect defendant argues that these were "hypothetical questions involving the existence of a mitigating circumstance" and thus, impermissible because they were "designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts." *See id.* at 170, 513 S.E.2d at 307 (citations and internal quotation marks omitted).

It is far from clear that the questions asked by the prosecutor and the trial court were directed toward the (f)(7) mitigating circumstance of defendant's age rather than toward any bias which may have affected prospective jurors during the *guilt phase* of the trial because of defendant's age. Regardless, we are not persuaded that the performance of defendant's trial counsel "fell below an objective standard of reasonableness" as is required to show that counsel's performance was deficient. *See Strickland*, 466 U.S. at 687-88. Indeed, as defendant acknowledges, his trial counsel made repeated references to defendant's youth throughout the penalty proceeding and stated the following in closing argument:

> The defendant's age at the time of the crime was a mitigating factor. He was twenty-four. He had not finished college. The State wants you to believe he had apartments and lived with women, but what was he doing? He was living in somebody's dorm room. He had lived with various people that kicked him out. And I would contend that that's not evidence that he had established some home and was living through life as a mature person. And I think you can consider his age. That is a statutory mitigating factor. He was young.

Moreover, as the trial court submitted the (f)(7) mitigating circumstance and did not err in its instructions to the jury on this mitigator, there is nothing in the trial transcript and record to support a conclusion that defendant's trial counsel did not act reasonably to ensure the jury fully considered defendant's age as a mitigator in its sentencing deliberations.

Because it would have been reasonable for trial counsel to interpret the questions asked of prospective jurors concerning defendant's age as permissible inquiries into potential bias, and because counsel sufficiently advocated during the penalty proceeding that the jury find the (f)(7) mitigating circumstance, we conclude that defendant has not demonstrated the first component of his ineffective assistance of counsel claim—that counsel's performance was deficient. Consequently, defendant's claim is without merit, and his related assignments of error are overruled.

D. Trial Court's Instructions on (e)(6) Aggravator (that "[t]he capital felony was committed for pecuniary gain")

[11] Defendant asserts plain error and a violation of his rights to due process in the following instruction given by the trial court concern-

ing the (e)(6) aggravating circumstance—whether the murder "was committed for pecuniary gain":

> A murder is committed for pecuniary gain if the defendant, when he commits it, has obtained or intends or expects to obtain money or some other thing, in this case the victim's automobile, which can be valued in money, either as compensation for committing it or as a result of the death of the victim.
>
> *If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, the defendant took or intended to take the victim's automobile, then you would find this aggravating circumstance* and would so indicate by having your foreperson write yes in the space after this aggravating circumstance on the issues and recommendation form.

(Emphasis added.) *See* N.C.G.S. § 15A-2000(e)(6) (2007). The jury subsequently found the (e)(6) aggravator to exist.

Defendant contends that the italicized portion of the above instruction relieved the State of its burden of proving that the murder was committed *for the purpose* of pecuniary gain and of thereby showing that "the taking was [not] a mere act of opportunism committed after a murder was perpetrated for another reason." *See State v. Maske*, 358 N.C. 40, 54, 591 S.E.2d 521, 530 (2004). However, this Court has rejected several previous challenges to virtually identical instructions. *See Barden*, 356 N.C. at 383, 572 S.E.2d at 149-50 (citing, *inter alia*, *State v. Davis*, 353 N.C. 1, 35-37, 539 S.E.2d 243, 266-67 (2000), *cert. denied*, 534 U.S. 839 (2001)). In the instant case, as was true in the cases cited above, the trial court sufficiently informed the jury regarding the circumstances which would support a finding of "some causal connection between the murder and the pecuniary gain at the time the killing occur[red]," *Maske*, 358 N.C. at 54, 591 S.E.2d at 530 (citations omitted), with its instructions that the pecuniary gain must have been "[obtained] as compensation for committing [the murder]" or "[intended or expected] as a result of the death of the victim."

Thus, defendant has failed to demonstrate any error in these instructions, much less plain error. Defendant's assignment of error is overruled, as it is without merit.

Alternatively, defendant claims his trial counsel was ineffective, depriving defendant of his Sixth and Fourteenth Amendment rights to the effective assistance of counsel, by failing to note a timely objec-

tion to the trial court's instructions on the (e)(6) aggravating circumstance.[5] Since we have found no error in the challenged instructions, defendant has not demonstrated that his trial counsel's performance "fell below an objective standard of reasonableness," and his claim is without merit as a result. *See Strickland*, 466 U.S. at 687-88. Thus, defendant's assignment of error is overruled.

IV. DEFENDANT'S MOTION FOR APPROPRIATE RELIEF

[12] On 21 September 2007, defendant filed with this Court a Motion for Appropriate Relief from his sentence of death pursuant to Article 89 of the Criminal Procedure Act. *See* N.C.G.S. §§ 15A-1415, -1418 (2007). Through this motion, defendant assigns error to (1) the allegedly false testimony of State's witness Bennie Cameron; (2) the allegedly false testimony of State's witness Alonzo Dingle; and (3) the prosecutors' closing remarks, trial strategy, and direct examination pertaining to victim impact evidence. Moreover, defendant effectively contends that each assignment of error resulted in an invalid sentence as a matter of law and in his prayer for relief asks us to vacate his sentence of death or, in the alternative, remand the case to the trial court for an evidentiary hearing on these claims. *See id.* § 15A-1415(b)(8). This Court allowed oral argument on defendant's motion contemporaneously with argument concerning his direct appeal, and we have determined that the merits of this motion can be decided based upon the materials before us. *See id.* § 15A-1418(b).

We note at the outset that a capital defendant's Motion for Appropriate Relief filed pursuant to N.C.G.S. § 15A-1418 would ordinarily be subject to denial on statutory procedural grounds if "[u]pon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." *Id.* § 15A-1419(a)(3) (2007). The fact that each of defendant's three stated grounds for relief are based upon assignments of error contained in the record on appeal, and therefore, could have been presented by argument in defendant's brief, demonstrates that defendant "was in a position to adequately raise the ground[s] or issue[s] underlying the present motion" on direct appeal. *Id.* In *State v. Price*, this Court applied section 15A-1419(a)(3) to a defendant's Motion for Appropriate Relief filed during the pendency of his direct appeal, stating:

---

5. Defense counsel did object to the *submission* of the (e)(6) aggravating circumstance to the jury, but not to the precise wording of the trial court's jury instruction.

> Motions for appropriate relief generally allow defendants to raise arguments that could not have been raised in an original appeal, such as claims based on newly discovered evidence and claims based on rights arising by reason of later constitutional decisions announcing new principles or changes in the law. We agree with the State that statutes governing motions for appropriate relief were not intended to circumvent the orderly briefing of arguments on appeal. Motions for appropriate relief may not be used to add to an appeal new arguments which could have been raised in the briefs originally filed. Both of the arguments now raised by defendant in the motion for appropriate relief could have been raised in his original appeal. Therefore, defendant's motion for appropriate relief is subject to being dismissed.

331 N.C. 620, 630, 418 S.E.2d 169, 174 (1992) (internal citation omitted), *sentence vacated on other grounds*, 506 U.S. 1043 (1993).

In *Price*, this Court exercised its discretion to reach the merits of the defendant's claims notwithstanding the applicability of section 15A-1419(a)(3). *See* 331 N.C. at 630, 418 S.E.2d at 174-75. In fact, the version of N.C.G.S. § 15A-1419(b) which was applicable when *Price* was decided expressly provided for such an exercise of discretion "in the interest of justice and for good cause shown." *See* Act of June 21, 1996, ch. 719, sec. 2, 1995 N.C. Sess. Laws (Reg. Sess. 1996) 389, 391. However, the General Assembly has since amended section 15A-1419(b), which currently provides:

> (b) The court *shall* deny the motion under any of the circumstances specified in this section, *unless* the defendant can demonstrate:
>
> (1) Good cause for excusing the grounds for denial listed in subsection (a) of this section and can demonstrate actual prejudice resulting from the defendant's claim; or
>
> (2) That failure to consider the defendant's claim will result in a fundamental miscarriage of justice.

N.C.G.S. § 15A-1419 (2007) (emphasis added) (as amended by ch. 719, sec. 2, 1995 N.C. Sess. Laws (Reg. Sess. 1996) at 391-92). Thus, our state's appellate courts may excuse the grounds for denial set forth in section 15A-1419(a) *only if* a defendant can demonstrate (1) "good cause" resulting in "actual prejudice," as defined by N.C.G.S.

§ 15A-1419(c), (d), *or* (2) that a "fundamental miscarriage of justice," as defined by N.C.G.S. § 15A-1419(e), would otherwise result.

Because defendant filed his brief *after* filing his Motion for Appropriate Relief and incorporates by reference in his brief each of the three stated grounds for relief set forth in his motion, *and* because defendant was evidently acting upon a good faith misunderstanding of the law, we hold that defendant, under these particular circumstances, *did* adequately raise on appeal each of the grounds underlying the motion in his brief. *See* N.C.G.S. § 15A-1419(a)(3). After careful review of defendant's several arguments, we find they are all meritless. Accordingly, we overrule defendant's related assignments of error and deny his Motion for Appropriate Relief.

A. State's Witness Bennie Cameron

[13] Defendant first contends that the prosecution allowed State's witness Bennie Cameron to perjure himself concerning his prior convictions, current charges, and discussions with the Durham County District Attorney's office. Defendant also alleges that he received ineffective assistance of counsel with respect to the impeachment of Cameron on cross-examination, that defendant's right to effective assistance of conflict-free counsel was violated, and that defendant was sentenced to death upon materially false and unreliable information in violation of his state and federal constitutional rights. Defendant's arguments are without merit.

> [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 State 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) (internal quotation marks and citations omitted), *cert. denied*, 516 U.S. 1128 (1996).

Defendant asserts that Bennie Cameron testified falsely concerning "pending charges in Durham." At trial, defense counsel questioned Cameron concerning charges filed against "Kevin Jermaine McAdoo," which defendant contends has been identified by fingerprint comparison as an alias of Cameron. Defense counsel asked Cameron if he had any pending charges in Durham. He responded that he did not. This statement was in fact true, even assuming that Cameron and McAdoo are the same person, since the supporting documentation provided by defendant and the testimony at trial show that the charges against McAdoo were dismissed with leave for failure to appear. Although the charges were subject to reinstatement, they were not pending at the time of the challenged testimony.

Even assuming, *arguendo*, that this testimony was false, defendant has presented no supporting evidence for his assertion that the prosecution "knowingly and intentionally" allowed Cameron to testify falsely concerning these matters. Moreover, even had sufficient evidence been provided by affidavit or other supporting documentation to demonstrate such knowledge by the prosecutors, Cameron's testimony on this peripheral issue concerning charges dismissed in another district attorney's jurisdiction was simply not material. *See State v. Abraham*, 338 N.C. 315, 353, 451 S.E.2d 131, 151 (1994) (holding that counsel is not allowed to cross-examine witnesses on pending charges). Unlike *State v. Prevatte*, 346 N.C. 162, 163-64, 484 S.E.2d 377, 378 (1997), in which the State's witness faced pending charges within the *same* jurisdiction in which he testified, any charges pending against Cameron were being handled in a different jurisdiction, and defendant provides no supporting documentation of any discussion between the two district attorneys' offices to demonstrate that Cameron's testimony was biased in this respect. Moreover, this case is unlike *Davis v. Alaska*, 415 U.S. 308 (1974), in which the trial court had refused to allow defense counsel to question a witness as to his probationary status when the witness *was afraid he might be charged with the crime for which the defendant was on trial. Id.* at 312-14. In the instant case, there is no indication that Cameron feared being charged with the victim's murder. Thus, Cameron's allegedly false testimony was clearly not material to defendant's trial.

[14] Defendant also argues that he was denied effective assistance of counsel during the cross-examination of Cameron. We disagree. Defense counsel's performance at trial was far from deficient. Counsel not only confronted Cameron about his numerous prior convictions, but also questioned him concerning the charges under his

alleged alias and any conversations with the district attorney regarding the disposition of the alleged charges against him. Defense counsel's cross-examination of Cameron spanned twenty-nine pages of transcript and we cannot say that her performance in impeaching Cameron was deficient. Thus, defendant's ineffective assistance of counsel claim must fail. *See Strickland*, 466 U.S. at 687.

[15] Defendant argues that he was denied effective assistance of counsel because it was revealed during defense counsel Lisa Costner's cross-examination of Cameron that she had represented him on a previous charge that resulted in a conviction. However, the transcript also reveals that Costner did not recall Cameron or her representation of him, nor did she discuss defendant's case with Cameron. Defendant did not object at trial to this potential conflict of interest and has failed to show that this asserted conflict of interest " 'adversely affected his lawyer's performance.' " *State v. Walls*, 342 N.C. 1, 39-40, 463 S.E.2d 738, 757 (1995) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)), *cert. denied*, 517 U.S. 1197 (1996). As noted above, Costner sufficiently cross-examined Cameron and adequately raised issues concerning his credibility. Thus, defendant's arguments relating to Cameron's testimony lack merit, and his related assignments of error are overruled.

B. State's Witness Alonzo Dingle

[16] Defendant next contends that the prosecution was permitted to present false testimony from State's witness Alonzo Dingle concerning whether he observed blood on defendant's person when defendant first arrived at Dingle's apartment on the night of the murder. According to Detective Elmes' report of his unrecorded interview with Dingle, Dingle told investigators that he *had* observed blood on defendant's person at this point in time, whereas in Dingle's recorded interview he indicated that this was not the case and he had not observed any blood until defendant later removed the body from the passenger side of the vehicle. Although Dingle's statements are inconsistent, it cannot be said that the prosecution knowingly submitted false testimony for the jury's consideration based solely on the fact that the prosecutors submitted evidence which may have conflicted with Dingle's prior statements. As this Court has stated, "[T]here 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." *State v. Allen*, 360 N.C. 297, 305, 626 S.E.2d

271, 279 (citation omitted), *cert. denied*, —— U.S. ——, 127 S. Ct. 164, 166 L. Ed. 2d 116 (2006).

[17] Moreover, defendant's assertion that he was denied effective assistance of counsel because his counsel failed to properly cross-examine Dingle concerning his statement and failed to request a jury instruction on accomplice testimony must fail. At trial, defense counsel questioned Dingle concerning his recollection of the events in a manner designed to raise a suspicion in jurors' minds that Dingle's account was fictional. Counsel further impeached Dingle with his conflicting accounts of these events. Thus, counsel's performance met the constitutionally required "objective standard of reasonableness." *See Strickland*, 466 U.S. at 687-88. Additionally, even had counsel requested a jury instruction on accomplice testimony, it would not have been a proper instruction. There was no evidence that Dingle was an accessory before the fact, and "[e]vidence that a witness was an accessory after the fact does not subject [the witness's] testimony to rules relating to accomplice testimony." *State v. Cabey*, 307 N.C. 496, 501, 299 S.E.2d 194, 197 (1983). Moreover, as defendant was not entitled to such an instruction, the failure of the trial court to give the instruction could not constitute plain error. Accordingly, defendant's assignment of error related to Dingle's testimony is overruled.

C. Prosecutors' Closing Argument Remarks, Trial Strategy, and Direct Examination Pertaining to Victim Impact Evidence

[18] Finally, defendant has raised several assignments of error pertaining to victim impact evidence presented by the State during the penalty proceeding. Defendant first challenges the prosecutor's remarks during penalty proceeding closing argument that the victim's family placed numerous telephone calls to his cellular phone following his death. The prosecutor argued:

> MR. O'NEILL: And what did Alonzo Dingle tell you? . . . I heard the phone, some phone kept ringing, kept ringing, kept ringing, kept ringing. That was Matthew's family trying to find their kid—
>
> MS. COSTNER: Objection.
>
> THE COURT: Overruled.
>
> MR. O'NEILL: —trying to find their baby.

Defendant argues that this was patently false, as discovery records show that all of the calls placed to the victim's cellular phone were not made by concerned family members, but by friends. "This Court has articulated a two-part analysis for determining whether the trial court abused its discretion in such cases. '[T]his Court first determines if the remarks were improper . . . . Next, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court.' " *Peterson*, 361 N.C. at 606-07, 652 S.E.2d at 229 (quoting *Jones*, 355 N.C. at 131, 558 S.E.2d at 106 (alterations in original)). Even assuming, *arguendo*, that the prosecutor's remarks were improper, defendant cannot show that the trial court's failure to sustain his objection was prejudicial. The challenged remarks were obviously made for the purpose of showing the love the victim's family felt toward him. Moreover, considering (1) the evidence detailed above as to the impact of the victim's death on his family, (2) the fact someone was concerned of his whereabouts as indicated by the ringing of his cellular phone, and (3) the trial court's instruction to the jury that "if your recollection of the evidence differs from that of the Court or of the district attorneys, you are to rely solely upon your recollection of the evidence in your deliberations," defendant cannot demonstrate prejudice.

[19] Additionally, defendant asserts that the prosecution tried to "keep the victim's attempt to purchase marijuana from the jury by eliciting incomplete information from Detective Rowe" and by arguing to the jury that defense counsel's exploration of the issue was an attempt to "smear the victim." However, the jury was allowed to hear the relevant evidence through defense counsel's cross-examination of Detective Rowe, in which Detective Rowe stated affirmatively that he had information that "the victim was trying to purchase drugs at the time that he was shot." Thus, even had the prosecutor attempted to "conceal" this evidence, it came before the jury and defendant cannot show prejudice.

[20] Finally, defendant asserts that the prosecutor posed questions assuming facts not in evidence by asking witnesses about medication used by the victim's father. The prosecution asked both the victim's stepmother and his grandmother whether his father was taking medication and, if so, why. On both occasions, the trial court sustained defense counsel's objection to the question of why the victim's father was taking medication. "This Court has held that where the trial court sustains defendant's objection, he has no grounds to except,

and there is no prejudice." *State v. Robinson*, 355 N.C. 320, 341, 561 S.E.2d 245, 259 (citation omitted), *cert. denied*, 537 U.S. 1006 (2002). Thus, defendant's argument is without merit. Defendant's related assignments of error are overruled, and his Motion for Appropriate Relief is denied.

V. PRESERVATION ISSUES

Defendant assigns error to the trial court's instruction to the jury on the (f)(2) mitigating circumstance, contending it was plainly erroneous for the trial court to state that being "under the influence of mental or emotional disturbance," *see* N.C.G.S. § 15A-2000(f)(2) (2007), is similar to acting "in the heat of passion upon adequate provocation." This Court has previously upheld the language used by the trial court. *See State v. Wilkinson*, 344 N.C. 198, 218-20, 474 S.E.2d 375, 385-87 (1996). Although defendant bases his challenge of these instructions on apparently novel grounds, his bare contention that the trial court's characterization is unfounded does not compel us to overrule our previous holding that the trial court's instruction "clearly did not prevent the jury from considering any evidence tending to support this mitigating circumstance." *Id.* at 219-20, 474 S.E.2d at 386-87. Accordingly, we overrule defendant's assignment of error as without merit.

Defendant also contends that the trial court's instructions to the jury on the (f)(2) ("mental or emotional disturbance") and (f)(6) (impaired capacity) mitigating circumstances were plainly erroneous and violated his state and federal constitutional rights because these instructions limited the evidence the jury could consider in support of these circumstances. See N.C.G.S. § 15A-2000(f)(2), (f)(6) (2007). We have reviewed defendant's argument and decline to overrule this Court's previous holding that this argument is without merit. *See State v. Carroll*, 356 N.C. 526, 552, 573 S.E.2d 899, 915-16 (2002), *cert. denied*, 539 U.S. 949 (2003).

Additionally, defendant argues the following: (1) the especially heinous, atrocious, or cruel aggravating circumstance is unconstitutionally vague and overbroad; (2) the trial court erred in instructing the jury to answer "yes" for Issue Three of the Issues and Recommendation as to Punishment form even if the jury found that the mitigating and aggravating circumstances were of equal weight; (3) the trial court erred in instructing jurors that, in considering Issues Three and Four of the Issues and Recommendation as to Punishment form, they "may" consider the mitigating circumstances

found in response to Issue Two; (4) the trial court erred in instructing jurors that they could ignore nonstatutory mitigating circumstances if they deemed the evidence to have no mitigating value; and (5) the death penalty is inherently cruel and unusual, and North Carolina's capital sentencing procedure is unconstitutionally vague and overbroad. After reviewing defendant's several arguments, we decline to overrule this Court's numerous holdings that these contentions are all meritless. *State v. Duke*, 360 N.C. 110, 136-42, 623 S.E.2d 11, 28-32 (2005), *cert. denied*, —— U.S. ——, 127 S. Ct. 130, 166 L. Ed. 2d 96 (2006).

VI. PROPORTIONALITY REVIEW

[21] Having determined that defendant's trial and capital sentencing proceeding were free of prejudicial error, we must further 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 facts of the crime and the defendant." *State v. Raines*, 362 N.C. 1, 24, 653 S.E.2d 126, 141 (2007) (citing N.C.G.S. § 15A-2000(d)(2) (2005)).

The jury found four aggravating circumstances: (1) the murder was committed for pecuniary gain; (2) the murder was especially heinous, atrocious, or cruel; (3) the murder was committed while defendant was engaged in robbery with a dangerous weapon; and (4) the murder was committed while defendant was engaged in first-degree kidnapping. *See* N.C.G.S. § 15A-2000(e)(5), (e)(6), (e)(9) (2007). We find the record supports each of these aggravating circumstances.

First, the testimony of Bennie Cameron supported the jury's finding that defendant committed the murder for pecuniary gain—namely, the victim's vehicle—since defendant stated to Cameron before 21 August 2003 that he would rob someone, put the individual in the trunk of his or her own vehicle, and take the vehicle to Durham, where defendant knew of a "chop shop," referring to "a place where stolen automobiles are stripped of salable parts." *Merriam-Webster's* at 202.

Additionally, the State offered (1) considerable testimony from those who associated with defendant before the murder that defendant apparently intended to rob someone for money; (2) defendant's

statements to Mangus Daniels afterward that he had robbed someone at gunpoint; and (3) defendant's statement to investigators that he had taken money from the victim. Thus, the record supports the (e)(5) aggravating circumstance as to robbery with a dangerous weapon to obtain the victim's money. *See* N.C.G.S. § 14-87(a) (2007).

Defendant's statements to investigators, in conjunction with what he related to several acquaintances, tended to prove that the victim—while he remained alive—was unlawfully transported in his own vehicle without his consent and for the purpose of robbery or the infliction of serious bodily harm. This finding would support the (e)(5) aggravating circumstance as to first-degree kidnapping. *See id.* § 14-39 (2007) (providing that "the offense is kidnapping in the first degree" if the victim was "not released by the defendant in a safe place" or was "seriously injured").

Finally, defendant's statement to investigators tended to show that defendant, although he considered taking the victim to a hospital after the initial discharge of the handgun, fired a second, fatal shot at the helpless victim as he lay upside down on the front passenger side of the vehicle and after he begged defendant to put him out of his misery. This evidence, in turn, supports the jury's finding of the (e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel.

We find no indication in the record that the sentence of death recommended by the jury was imposed "under the influence of passion, prejudice, or any other arbitrary factor." *See id.* § 15A-2000(d)(2); *Raines*, 362 N.C. at 25, 653 S.E.2d at 141. "In such circumstances we will not disturb the jurors' weighing of aggravating and mitigating circumstances." *Raines*, 362 N.C. at 25, 653 S.E.2d at 141.

Lastly, we determine whether defendant's sentence is proportionate, considering both the individual defendant and the crime for which he was convicted. *See id.* "Ultimately, proportionality review rests upon the experienced judgments of the members of the Court." *Goss*, 361 N.C. at 629, 651 S.E.2d at 879 (citing *State v. Elliott*, 360 N.C. 400, 425, 628 S.E.2d 735, 752, *cert. denied*, —— U.S. ——, 127 S. Ct. 505, 166 L. Ed. 2d 378 (2006)). "In its determination, the Court must compare defendant's case with all similar cases in this jurisdiction, though we are not bound to cite each of these." *See id.* at 629, 651 S.E.2d at 879 (citing *State v. Cummings*, 361 N.C. 438, 477-78, 648 S.E.2d 788, 812 (2007), *cert. denied*, —— U.S. ——, 128 S. Ct. 1888, 170 L. Ed. 2d 760 (2008)).

This Court has previously found a sentence of death disproportionate in only 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 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).

Only in *Stokes* and *Bondurant* did the juries find the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. However,

> [i]n *Stokes*, the defendant was seventeen years old and the only one of four assailants to receive the death penalty. In *Bondurant*, the defendant showed immediate remorse for his actions and even directed the victim's transport to the hospital, hoping to see the victim live.

Cummings, 361 N.C. at 478, 648 S.E.2d at 812 (citations omitted). In contrast, in the case now before us, defendant was twenty-four years old at the time of the murder and was also the sole assailant. Moreover, although defendant stated to investigators that he killed the victim only because the victim repeatedly pleaded with him to do so, none of defendant's subsequent actions following the victim's death demonstrated any remorse. In fact, defendant took considerable steps to conceal his involvement in the murder—including abandoning the body in a remote location outside of the state.

Accordingly, after careful consideration, we find the sentence of death proportionate in light of this defendant and the crime for which he was convicted.

CONCLUSION

All remaining assignments of error presented by defendant but not set forth in his brief or argued on appeal are deemed abandoned. N.C. R. App. P. 28(b)(6); *see also Goss*, 361 N.C. at 630, 651 S.E.2d at 879 (citations omitted). We conclude that defendant received a fair trial and sentencing proceeding, that his convictions and sentence were free of error, and that the sentence of death is not dispropor-

tionate to the crime for which he was convicted. As detailed above, we also deny defendant's Motion for Appropriate Relief.

NO ERROR; MOTION FOR APPROPRIATE RELIEF DENIED.

STATE OF NORTH CAROLINA v. CHRISTOPHER DON STYLES

No. 442A07

(Filed 27 August 2008)

Search and Seizure— traffic stop—failure to signal—reasonable suspicion—motion to suppress evidence of drugs

The trial court did not err in a possession of Schedule II controlled substances, drug paraphernalia, and marijuana case by denying defendant's motion to suppress all evidence obtained as a result of a traffic stop of defendant's vehicle based on his failure to signal in violation of N.C.G.S. § 20-154(a), because: (1) reasonable suspicion is the necessary standard for traffic stops regardless of whether the traffic violation was readily observed or merely suspected; (2) defendant's vehicle was immediately in front of the officer's patrol vehicle when it changed lanes without a signal, and changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle; and (3) the officer's observation of defendant's traffic violation gave him the required reasonable suspicion to stop defendant's vehicle.

Justice HUDSON concurrs in the result only.

Justice BRADY dissenting.

Justice TIMMONS-GOODSON joins in the dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 185 N.C. App. 271, 648 S.E.2d 214 (2007), affirming a judgment entered on 3 November 2005 by Judge C. Preston Cornelius in Superior Court, Swain County. Heard in the Supreme Court 10 December 2007.

Roy Cooper, *Attorney General*, *by William B. Crumpler*, *Assistant Attorney General*, *for the State.*

Charlotte Gail Blake for defendant-appellant.

NEWBY, Justice.

In this case we must determine whether defendant's Fourth Amendment rights were violated by the traffic stop that led to his convictions. Because the stop of defendant's vehicle was constitutional, we affirm the decision of the Court of Appeals that affirmed the trial court's denial of defendant's motion to suppress all evidence obtained as a result of the stop.

Around 1:00 a.m. on 28 February 2004, Officer Greg Jones of the Bryson City Police Department was on duty and traveling on Main Street, a three lane road with two lanes in Officer Jones' direction of travel and one lane in the opposite direction. Defendant, who was operating a vehicle moving in the same direction and in front of Officer Jones' patrol vehicle, changed lanes without signaling. Officer Jones stopped defendant's vehicle. Upon approaching the driver's side of the vehicle, Officer Jones immediately detected an odor of marijuana. After defendant declined to consent to a search of his vehicle, Officer Jones deployed a drug-sniffing dog that was in his patrol vehicle. When the dog alerted to the presence of narcotics, Officer Jones initiated a search of the interior of defendant's vehicle, where he discovered marijuana and a pipe. Officer Jones placed defendant under arrest and found methamphetamine on defendant when he conducted a pat-down search.

Defendant was indicted for possession of Schedule II controlled substances, drug paraphernalia, and marijuana. On 25 October 2005, defendant filed a motion to suppress all evidence obtained as a result of Officer Jones' stop of defendant's vehicle. Defendant's motion was denied on 31 October 2005, and defendant pled guilty to all charges, expressly reserving the right to appeal the denial of his motion to suppress under N.C.G.S. § 15A-979(b). The trial court sentenced defendant to six to eight months imprisonment, suspended the sentence, and placed defendant on supervised probation for eighteen months.

On 7 August 2007, the Court of Appeals, in a divided opinion, affirmed the trial court's denial of defendant's motion to suppress. The majority held Officer Jones had probable cause to stop defendant's vehicle because Officer Jones observed a traffic violation by defendant: changing lanes without signaling. *State v. Styles*, 185 N.C. App. 271, 274-75, 648 S.E.2d 214, 217 (2007); *see* N.C.G.S. § 20-154(a) (2007). The dissent argued Officer Jones did not have probable cause to stop defendant's vehicle because there was no competent evidence that defendant's actions constituted a traffic violation. 185 N.C. App.

at ——, 648 S.E.2d at 217 (Stephens, J., dissenting). On 11 September 2007, defendant filed an appeal of right to this Court based on the dissenting opinion. *See* N.C.G.S. § 7A-30(2) (2007).

The Fourth Amendment protects individuals "against unreasonable searches and seizures," U.S. Const. amend. IV, and the North Carolina Constitution provides similar protection, N.C. Const. art. I, § 20. A traffic stop is a seizure "even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660, 667 (1979). Traffic stops have "been historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)." *United States v. Delfin-Colina*, 464 F.3d 392, 396 (3d Cir. 2006) (citation omitted). Under *Terry* and subsequent cases, a traffic stop is permitted if the officer has a "reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 675, 145 L. Ed. 2d 570, 576 (2000).

Reasonable suspicion is a "less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Id.* at 123, 120 S. Ct. at 675-76, 145 L. Ed. 2d at 576 (citation omitted). The standard is satisfied by " 'some minimal level of objective justification.' " *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1, 10 (1989) (quoting *INS v. Delgado*, 466 U.S. 210, 217, 104 S. Ct. 1758, 1763, 80 L. Ed. 2d 247, 255 (1984)). This Court requires that "[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citing *Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906). Moreover, "[a] court must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion" exists. *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621, 629 (1981)). *See generally State v. Barnard*, —— N.C. ——, ——, 658 S.E.2d 643, 645 (2008).

"The *Terry* standard was for many years accepted as the standard governing [routine] traffic stops. But, in 1996, dictum of the Supreme Court in *Whren v. United States* raised some doubt." *Delfin-Colina*, 464 F.3d at 396 (internal citations omitted). In *Whren*, the Court stated that "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, 116 S. Ct. 1769, 1772, 135 L. Ed. 2d 89, 95 (1996) (citations omitted).

In the years since *Whren*, this Court has occasionally discussed whether a traffic stop was constitutional in terms of probable cause. *See State v. Ivey*, 360 N.C. 562, 633 S.E.2d 459 (2006); *State v. McClendon*, 350 N.C. 630, 517 S.E.2d 128 (1999). At the same time, a distinction has developed in the Court of Appeals by which that court has required probable cause for traffic stops "made on the basis of a readily observed traffic violation," but reasonable suspicion for stops "based on an officer's mere *suspicion* that a traffic violation is being committed." *State v. Young*, 148 N.C. App. 462, 470-71, 559 S.E.2d 814, 820-21 (Greene, J., concurring), *appeal dismissed and disc. rev. denied*, 355 N.C. 500, 564 S.E.2d 233 (2002), *quoted in State v. Wilson*, 155 N.C. App. 89, 94, 574 S.E.2d 93, 97-98 (2002), *appeal dismissed and disc. rev. denied*, 356 N.C. 693, 579 S.E.2d 98, *and cert. denied*, 540 U.S. 843, 124 S. Ct. 113, 157 L. Ed. 2d 78 (2003). The State argues this distinction is incorrect because reasonable suspicion is the standard for both types of traffic stops. We agree.

Subsequent to *Whren*, federal courts have continued to hold that reasonable suspicion remains the necessary standard for stops based on traffic violations. Most recently, in *Delfin-Colina*, the Third Circuit addressed whether, after *Whren*, the required standard for a stop based on a readily observed traffic violation was reasonable suspicion or probable cause: "Was the Court, shifting gears, now requiring 'probable cause' as the predicate for a traffic stop? The consensus is to the contrary. . . . [T]he Second, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits have all 'construed *Whren* to require only that the police have "reasonable suspicion" to believe that a traffic law has been broken.' " 464 F.3d at 396 (quoting *United States v. Willis*, 431 F.3d 709, 723 (9th Cir. 2005) (W. Fletcher, J., dissenting)). In accord with every federal circuit to consider this issue, we hold that reasonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected.[1] *See id.* at 396-97 (determining that reasonable suspicion is

1. Our holding is consistent with *McClendon* and *Ivey*. Neither case concerned a factual situation in which the distinction between probable cause and reasonable suspicion was relevant. As in *Whren*, the issue in *McClendon* was not whether the officer had probable cause to stop the defendant's vehicle, but what weight to give the officer's subjective motivations. 350 N.C. at 635-36, 517 S.E.2d at 131-32. Although we used the term "probable cause" in *Ivey*, the facts of that case make it clear that the officer did not have probable cause or reasonable suspicion to stop the defendant's vehicle. 360 N.C. at 563, 565-66, 633 S.E.2d at 460-62. To the extent language in *Ivey* may be inter-

the appropriate standard for a traffic stop based on a readily observed traffic violation); *Willis*, 431 F.3d at 714-15 (applying reasonable suspicion standard to a traffic stop based on readily observed traffic violations); *Holeman v. City of New London*, 425 F.3d 184, 189 (2d Cir. 2005) (determining that either reasonable suspicion or probable cause is sufficient to support all types of traffic stops); *United States v. Chanthasouxat*, 342 F.3d 1271, 1275-76 (11th Cir. 2003) (concluding traffic stop based on a readily observed traffic violation would have been reasonable if police officer had either probable cause or reasonable suspicion); *United States v. Ramstad*, 308 F.3d 1139, 1144 (10th Cir. 2002) (requiring probable cause or reasonable suspicion for a traffic stop based on a readily observed traffic violation); *United States v. Callarman*, 273 F.3d 1284, 1286-87 (10th Cir. 2001) (same), *cert. denied*, 535 U.S. 1072, 122 S. Ct. 1950, 152 L. Ed. 2d 853 (2002); *United States v. Lopez-Soto*, 205 F.3d 1101, 1104-05 (9th Cir. 2000) (determining that reasonable suspicion is the appropriate standard for a traffic stop based on a readily observed traffic violation); *United States v. Ozbirn*, 189 F.3d 1194, 1198-99 (10th Cir. 1999) (requiring either probable cause or reasonable suspicion that a traffic violation had occurred).

Having determined that reasonable suspicion is the appropriate standard, we now turn to the facts of this case. Officer Jones stopped defendant's vehicle for failure to signal in violation of N.C.G.S. § 20-154(a), which states in pertinent part:

> (a) 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 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.

Defendant argues there is no evidence that the movement of his vehicle could have affected the operation of another vehicle. We disagree.

The trial court found that at the time defendant's vehicle changed lanes without a signal, it was "being operated by the defendant imme-

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preted as requiring probable cause, we specifically disavow that interpretation. In short, under this Court's post-*Whren* cases, probable cause is sufficient, but not necessary, for a traffic stop.

diately in front of" Officer Jones' patrol vehicle. As defendant has not specifically assigned error to this finding of fact, it is not reviewable on appeal. *See State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005), *cert. denied*, 547 U.S. 1073, 126 S. Ct. 1773, 164 L. Ed. 2d 523 (2006). This finding of fact indicates that defendant's failure to signal violated N.C.G.S. § 20-154(a), because it is clear that changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle. Officer Jones' observation of defendant's traffic violation gave him the required reasonable suspicion to stop defendant's vehicle. Thus, the trial court's findings of fact support its conclusion of law that defendant's constitutional rights were not violated by the stop.

AFFIRMED.

Justice HUDSON concurs in the result only.

Justice BRADY dissenting.

I cannot concur in the majority's holding that the law enforcement officer who stopped defendant's passenger vehicle had the constitutional authority to do so because the officer had reasonable, articulable suspicion that defendant violated N.C.G.S. § 20-154(a). In doing so, the majority relies upon the trial court's finding of fact that "on February 28th in the early morning hours Officer Jones . . . observed a vehicle being operated by the defendant *immediately* in front of him." (Emphasis added). This finding is based solely upon the following statement made by the officer at the probable cause hearing: "Upon getting behind the vehicle in question, the defendant had changed lanes and failed to signal. That's why I stopped the vehicle." Moreover, the clear, established, and indistinguishable precedent of this Court provides that probable cause is the proper standard in this case. Because there was no competent evidence presented at the suppression hearing or any other proceeding tending to show that the movement of defendant's vehicle affected or might have affected the travel of another vehicle and that, therefore, defendant's failure to use a turn signal violated N.C.G.S. § 20-154(a), I would reverse the decision of the Court of Appeals and the trial court's order and remand the case for further factual findings. Thus, I am compelled to respectfully dissent.

RELEVANT HISTORICAL BACKGROUND OF SEARCH AND SEIZURE JURISPRUDENCE

The history and development of search and seizure jurisprudence in Great Britain and the United States demonstrate that the issuance of general writs of assistance in the Colonies is widely presumed to be one of the leading causes of the American Revolution. *See* O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, *in The Era of the American Revolution: Studies Inscribed to Evarts Boutell Greene* 40 (Richard B. Morris ed., 1939) ("A[merican] histories without exception list writs of assistance as one of the active causes of the American Revolution."). General warrants—which the Founding Fathers considered evil—were usually "unparticularized warrant[s] (for example, ordering a search of 'suspected places')" or warrants which were issued without "a complaint under oath or an adequate showing of cause." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 558 (1999) [hereinafter *Original Fourth Amendment*]. In particular, the Founders' primary animadversion was the use of general writs of assistance, which "attested to the authority of the bearer to search places in which the bearer suspected uncustomed goods were hidden," and commanded "that all peace officers and any other persons who were present 'be assisting' in the performance of the search." *Id.* at 561 n.18; *see generally Marcus v. Search Warrant*, 367 U.S. 717 (1961) (brief history of the Fourth Amendment); Letter from Father of Candor to J. Almon, *reprinted in An Enquiry into the Doctrine*, *Lately Propagated*, *Concerning Libels*, *Warrants*, *and the Seizure of Papers* (Da Capo Press 1970) (1764) (discussing general writs of assistance); Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (Da Capo Press 1970) (1937) (detailed history of early Fourth Amendment development) [hereinafter *History and Development*]; William John Cuddihy, The Fourth Amendment: Origins and Original Meaning, 602-1791 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with N.C. Supreme Court Library, Raleigh, N.C.) (lengthy discussion of the origins of the Fourth Amendment). These writs of assistance, at least in England, were issued by the Court of Exchequer, which was authorized by statute to issue the writs to commissioned customs officials and naval officers. *See Original Fourth Amendment* at 561 n.18. General warrants and writs of assistance were controversial not only in the Colonies, but in England as well, where Chief Justice Pratt in *Huckle v. Money* compared the general warrant to the Spanish Inqui-

sition and found the general warrant to be "worse," calling it "a law under which no Englishman would wish to live an hour." 2 Wils. 206, 207, 95 Eng. Rep. 768, 769 (K.B. 1763); *see also Money v. Leach*, 3 Burr. 1742, 97 Eng. Rep. 1075 (K.B. 1765); *Entick v. Carrington*, 2 Wils. 275, 95 Eng. Rep. 807 (K.B. 1765); *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (C.P. 1763).

One of the primary reasons for founding-era hatred of general warrants and general writs of assistance was that both writs conferred upon petty officers broad and unfettered discretion to determine when it was legally proper to conduct a search. *See Original Fourth Amendment* at 578, 582. In fact, Sir Matthew Hale described such warrants as allowing the officer executing the general warrant to be the judge in his own case. Matthew Hale, 2 *The History of the Pleas of the Crown* 150 (George Wilson ed., Dublin 1778). In the Colonies, the disdain for general writs of assistance sparked James Otis's speech in the case of *Petition of Lechmere*: "I will to my dying day oppose, with all the powers and faculties God has given me, all such instruments of slavery on the one hand, and villainy on the other, as this writ of assistance is." John Adams, "Abstract of the Argument" *in* 2 *Legal Papers of John Adams* 139-40 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965); *see also* Quincy's Mass. Rep. 1761-1772, App. I 395-540 (1865) (detailing Massachusetts cases on writs of assistance). John Adams described Otis's speech as the thing that "breathed into this nation the breath of life." Letter from John Adams to H. Niles (Jan. 14, 1818), *in* X *The Works of John Adams* 276 (Boston, Little, Brown & Co. 1856).

After the Revolution, many states inserted clauses banning general warrants into the enumeration of rights in their constitutions. *See History and Development* at 79-82 (discussing state provisions). For instance, the North Carolina Constitution has provided a prohibition against general warrants since the first constitution in 1776: "General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted." N.C. Const. art. I, § 20. During the state legislatures' debates on ratification of the United States Constitution, the lack of a bill of rights, specifically the absence of a provision against general warrants, was discussed in detail. *See History and Development* at 92-97. Eventually, a search and seizure amendment was proposed by James Madison in the United

States Congress during the drafting of the Bill of Rights. *See id.* at 97-100. Finally, what we now know as the Fourth Amendment to the United States Constitution was submitted to the states and thereafter ratified:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Fourth Amendment jurisprudence initially developed slowly in the new nation. However, as urban crime became a concern of the federal and state governments, prompting the formation of full-time police forces, Fourth Amendment jurisprudence began to take shape with an increasing emphasis on warrantless searches and seizures. *See Original Fourth Amendment* at 724-34 (discussing modern Fourth Amendment doctrine); *see also History and Development* at 106-43 (detailing early Fourth Amendment precedent). Three Supreme Court of the United States opinions on Fourth Amendment doctrine are apposite to the present case: *Whren v. United States*, 517 U.S. 806 (1996); *Delaware v. Prouse*, 440 U.S. 648 (1979); and *Carroll v. United States*, 267 U.S. 132 (1925).

The issue in *Carroll* was the validity of warrantless automobile stops in the enforcement of the National Prohibition Act. 267 U.S. at 143. Mentioning the similarities between searches for contraband on ships and searches for contraband in automobiles,[2] the Court held a warrant was not required to search an automobile under the circumstances of the case. *Id.* at 149-53. In making this determination, the Court relied upon various customs statutes which allowed warrantless searches of ships, such as 1 Stat. 29, which was passed by the

2. The Court declined to apply the same analogy in a later Fourth Amendment case when a defendant sought exclusion of contraband found on a ship, claiming the same standard should apply to ships as to automobiles. In *United States v. Villamonte-Marquez*, the Court held it was constitutional for customs officers to board any vessel at any time and any place without any suspicion of wrongdoing in order to examine the vessel's manifest or other documents. 462 U.S. 579, 580-81 (1983). In doing so, the Court noted that "important factual differences between vessels located in waters offering ready access to the open sea and automobiles on principal thoroughfares in the border area" require a different result. *Id.* at 588; *see also* Martin J. Norris, 1 *The Law of Seamen* § 10:43, at 403-09 (4th ed. 1985).

same Congress that proposed the Fourth Amendment for ratification. *Id.* (citing Act of July 31, 1789, Sess. I, ch. 5, Sec. 24, 1 Stat. 29, 43). The Court in *Carroll* nonetheless limited warrantless automobile searches by clarifying: "[T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." 267 U.S. at 154.

Over fifty years later, the Court continued to develop the jurisprudence surrounding warrantless automobile seizures and searches in *Delaware v. Prouse*, in which the Court held an officer's stop of an automobile unconstitutional because the stop was performed without an articulable and reasonable suspicion that the driver was unlicensed. 440 U.S. at 663. The Court stated:

> [E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

Id.

The evolution of this concept was solidified in *Whren v. United States*, when the Supreme Court held that if an officer has probable cause to believe a traffic violation has occurred, the officer's stop of the driver does not run afoul of the Fourth Amendment. 517 U.S. at 811-19. This is true even if the asserted traffic violation was merely a pretext hiding the officer's subjective reason for the stop. *Id.* Certainly applicable to the issue *sub judice* is that the Supreme Court noted that probable cause is the "*traditional justification*" for police intrusion. 517 U.S. at 817.

Another issue that has frequently arisen in Fourth Amendment jurisprudence is equally applicable to traffic stop cases: When is it permissible to seize a person in the absence of probable cause that a crime has occurred? Beginning with *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court of the United States began developing the idea that in certain situations, a suspect may be stopped for further investigation based upon a reasonable, articulable suspicion that criminal activity is afoot. In *Terry*, a Cleveland, Ohio police detective observed two men, Chilton and Terry, standing at a street corner. *Id.* at

5. As he continued to observe the men, he noted that one would "leave the other one and walk . . . past some stores," turn around, and then walk back toward the street corner, "peering in the store window again" before conferring with his cohort at the street corner. *Id.* at 6. Once he returned, the other would pace down the street in the same manner. *Id.* The detective observed the two men doing this "ritual alternately between five and six times apiece—in all, roughly a dozen trips." *Id.* The two men then conferred with a third man. *Id.* The third man left, and the two men walked together and stopped in front of Zucker's store, where they once again conversed with the third man whom the officer observed conferring with them earlier. *Id.* The detective then approached the three men, "identified himself as a police officer and asked for their names." 392 U.S. at 6-7. The detective then proceeded to pat down the outside of Terry's clothing and felt a pistol "[i]n the left breast pocket of Terry's overcoat." *Id.* at 7. The detective then discovered a firearm "in the outer pocket of Chilton's overcoat." *Id.* The issue in *Terry* was whether the admission of the firearm found on Terry as evidence against him violated his rights under the Fourth Amendment to the United States Constitution. 392 U.S. at 8.

The Court, in determining that the admission of the firearm did not violate Terry's Fourth Amendment rights, first reaffirmed that " '[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.' " *Id.* at 9 (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). The Court noted that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.* at 16. After determining that the "stop and frisk" did not violate Terry's rights, the Court stated:

> Each case of this sort will, of course, have to be decided on its own facts. We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that *criminal activity may be afoot* and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others

> in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id. at 30 (emphasis added).

The Court continued to expound upon the doctrine articulated in *Terry* in subsequent cases. In *Sibron v. New York*, 392 U.S. 40 (1968), a companion case to *Terry*, the Court found that a police officer lacked reasonable suspicion that a suspect was involved in narcotics sales when the officer's conclusion was based merely on having observed the suspect speak at length with known narcotics addicts. *Id.* at 64. In so deciding, the Court noted: "The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so." *Id.*

In *United States v. Sokolow*, 490 U.S. 1 (1989), the defendant had been seized at an airport on suspicion of criminal activity involving controlled substances. The Court spelled out the facts which amounted to reasonable suspicion to seize the defendant for further investigation:

> Paying $2,100 in cash for two airplane tickets is out of the ordinary, and it is even more out of the ordinary to pay that sum from a roll of $20 bills containing nearly twice that amount of cash. Most business travelers, we feel confident, purchase airline tickets by credit card or check so as to have a record for tax or business purposes, and few vacationers carry with them thousands of dollars in $20 bills. We also think the agents had a reasonable ground to believe that respondent was traveling under an alias; the evidence was by no means conclusive, but it was sufficient to warrant consideration. While a trip from Honolulu to Miami, standing alone, is not a cause for any sort of suspicion, here there was more: surely few residents of Honolulu travel from that city for 20 hours to spend 48 hours in Miami during the month of July.

Id. at 8-9 (footnote omitted). In *Sokolow*, the Court noted the difference between seizures of persons based upon probable cause and reasonable suspicion:

> In *Terry v. Ohio*, we held that the police can stop and briefly detain a person for investigative purposes if the officer has a rea-

> sonable suspicion supported by articulable facts that criminal activity "may be afoot," even if the officer lacks probable cause.
>
> The officer, of course, must be able to articulate something more than an "inchoate and unparticularized suspicion or 'hunch.' " The Fourth Amendment requires "some minimal level of objective justification" for making the stop. That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means "a fair probability that contraband or evidence of a crime will be found," and the level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause.

Id. at 7 (citations omitted).

It is in light of this rich historical background and well-established judicial authority that I am compelled to dissent.

THE CONSTITUTIONAL STANDARD IN THE PRESENT CASE

In *State v. Ivey*, this Court clearly, unambiguously, and *unanimously* stated that "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." 360 N.C. 562, 564, 633 S.E.2d 459, 461 (2006) (citing *State v. McClendon*, 350 N.C. 630, 635-36, 517 S.E.2d 128, 132 (1999)). The majority relegates this clear standard in *Ivey* to "misinterpretations" and only discusses it in passing, stating merely that "this Court has occasionally discussed whether a traffic stop was constitutional in terms of probable cause." *Ivey's* discussion of the standard is indistinguishable from the present case, as the statute under which defendant was stopped is the *exact same statute* that was at issue in *Ivey*.

The principle of stare decisis "is a maxim to be held forever sacred." *Commonwealth v. Coxe*, 4 U.S. (4 Dall.) 170, 192 (Pa. 1800); *see also* Allyson K. Duncan & Frances P. Solari, *North Carolina Appellate Advocacy* § 1-9, at 8 (1989) ("[T]he principle of stare decisis proclaims, in effect, that where a principle of law has become settled by a series of decisions, it is binding on courts and should be followed in similar cases."). It has often been stated that "[t]his Court has never overruled its decisions lightly. No court has been more faithful to *stare decisis*." *Rabon v. Rowan Mem'l Hosp., Inc.*, 269 N.C. 1, 20, 152 S.E.2d 485, 498 (1967). Nevertheless, today the major-

ity has failed to adhere to this high principle, thereby casting doubt on the lasting precedential value of this Court's decisions.

Rather than rely upon the controlling authority of this Court's prior decisions, the majority has sought out non-authoritative opinions of federal circuit courts with which to justify its departure from our case law. This Court has stated:

> 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. 1165 (1986). We have no need to resort to decisions of lower federal courts when this Court's precedent speaks directly and clearly on the issue. When this Court has spoken on an issue, our lower courts should be able to consider the law settled by the opinions of this Court without the need to resort to time-consuming and tedious searches of the decisions of every other court in the nation in anticipation that the law of North Carolina might change on appeal.

Moreover, thorough research of the federal circuit court cases cited by the majority shows that reliance upon them is misplaced. Nearly every federal circuit case cited by the majority either relies directly on *Berkemer v. McCarty*, 468 U.S. 420 (1984), or cites as authority a circuit court decision that relies on *Berkemer* for the proposition that reasonable suspicion is the only requirement, regardless of the aim of the traffic stop.[3] One case cited by the majority, *United States v. Willis*, 431 F.3d 709, 714 (9th Cir. 2005), goes so far as to parenthetically state that *Berkemer* held "that a traffic

3. At times the path back to a misapplication of *Berkemer* twists and turns through several intermediary cases, a thorough presentation of which would only serve to obfuscate, rather than clarify. The only federal circuit court case cited by the majority that does not rely on a faulty interpretation of *Berkemer* is *Holeman v. City of New London*, 425 F.3d 184 (2d Cir. 2005). *Holeman* cites both *Whren* and *United States v. Arvizu*, 534 U.S. 266 (2002), for the proposition that "[t]he Fourth Amendment requires that an officer making such a stop have probable cause or reasonable suspicion that the person stopped has committed a traffic violation or is otherwise engaged in or about to be engaged in criminal activity." *Holeman*, 425 F.3d at 189-90. Neither *Whren* nor *Arvizu* supports the contention that reasonable suspicion of a traffic violation (as opposed to a crime) is a sufficient basis upon which to stop a vehicle.

stop requires reasonable suspicion." Even a cursory reading of *Berkemer* would disclose that *Berkemer* did not address the issue of the required level of suspicion to stop a vehicle. Instead, the relevant issue in *Berkemer* was whether an individual detained in a routine traffic stop was entitled to *Miranda* warnings. *See Berkemer*, 468 U.S. at 422-23. In analyzing this *Fifth* Amendment issue, the Court noted first that traffic stops are usually brief, and second that "circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police." *Id.* at 437-38. Therefore, the Court wrote, "In both of these respects, the usual traffic stop is more analogous to a so-called '*Terry* stop,' than to a formal arrest." *Id.* at 439 (internal citation omitted). Because the Court did not require *Miranda* warnings during *Terry* stops, the Court likewise held that *Miranda* warnings are not required for persons temporarily detained during routine traffic stops. *Id.* at 440. In making this analogy the Court stated:

> No more is implied by this analogy than that most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*. We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop.

Id. at 439 n.29. The circuit courts cited by the majority have certainly assumed much more from this analogy, even turning it into a "holding" that reasonable suspicion is the standard for all traffic stops. Thus, the majority's analysis stands upon cases that perpetuate a faulty reading of a Supreme Court of the United States opinion.[4] The better course of action would have been to simply follow this Court's precedent in *Ivey*.

Although the law of this State was, before today's decision, well settled that probable cause was required to stop defendant for a purported violation of N.C.G.S. § 20-154(a), the State made a lengthy and impassioned argument that probable cause was not required. The State argued, and the majority has agreed, that the standard for traffic stops in North Carolina is reasonable suspicion. In fact, the Assistant Attorney General representing the State at oral arguments said: "I am at war with those who say that probable cause is the standard rather than reasonable suspicion!"

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4. Moreover, the majority simply makes a blanket statement that reasonable suspicion is the proper standard, without conducting the required balancing test. *See United States v. Place*, 462 U.S. 696, 703 (1983).

The State is correct that in many situations all that would be required to seize a vehicle and its occupants would be a reasonable, articulable suspicion that criminal activity is afoot. For instance, law enforcement may observe certain facts that would, in the totality of the circumstances, lead a reasonable officer to believe a driver is impaired, such as weaving within the lane of travel or driving significantly slower than the speed limit. It would be difficult in such a situation, when no other traffic violation occurs, for an officer to formulate probable cause that the driver is impaired. In such circumstances, an officer would have reasonable suspicion to believe that criminal activity (i.e. driving while impaired) was afoot and could stop the vehicle to make reasonable inquiry. The instances in which this Court has applied a reasonable suspicion standard rather than requiring probable cause are those in which further investigation is warranted to confirm or contradict the officer's reasonable suspicion that criminal activity is afoot.

For instance, in *State v. Mitchell*, this Court found an officer had reasonable, articulable suspicion to believe that the defendant was engaged in criminal activity when he accelerated through a driver's license checkpoint even after being instructed to stop by the officer. 358 N.C. 63, 69-70, 592 S.E.2d 543, 546-47 (2004). In *State v. Foreman*, this Court held that an officer had reasonable suspicion to make further inquiries of the occupants of a vehicle that abruptly turned before reaching a roadblock and who were later found parked in a nearby driveway "bent or crouched down inside the car." 351 N.C. 627, 628-29, 527 S.E.2d 921, 922-23 (2000). Frequently, this Court has described those stops that can be made upon the basis of a reasonable, articulable suspicion as *investigatory* stops. *See State v. Campbell*, 359 N.C. 644, 664, 617 S.E.2d 1, 14 (2005), *cert. denied*, 547 U.S. 1073 (2006); *State v. Hughes*, 353 N.C. 200, 206-07, 539 S.E.2d 625, 630 (2000); *State v. Steen*, 352 N.C. 227, 238-39, 536 S.E.2d 1, 8-9 (2000), *cert. denied*, 531 U.S. 1167 (2001); *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994).

Thus, this Court's precedent makes it clear that in many situations *in which further investigation is warranted by the facts*, an officer may stop a vehicle on the basis of a reasonable, articulable suspicion that criminal activity is afoot. However, in the case *sub judice*, no further investigation would have been necessary. The officer indicated that he stopped defendant on the basis of his failure to use his turn signal. Either defendant's actions ran afoul of N.C.G.S. § 20-154(a) or they did not. There was nothing further for the officer

to investigate. Because the officer made this stop on the basis of a purported, clearly perceivable, readily observable traffic violation in which further investigation would have been of no value in determining whether a violation of N.C.G.S. § 20-154(a) occurred, the officer was required to have probable cause to believe that defendant violated a motor vehicle law before seizing defendant.

THE ABSENCE OF COMPETENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING OF FACT

This Court will only consider a trial court's findings of fact conclusive on appeal when they are supported by "competent evidence found in the record." *State v. Peterson*, 361 N.C. 587, 600, 652 S.E.2d 216, 226 (2007) (citing *State v. Cummings*, 361 N.C. 438, 471-72, 648 S.E.2d 788, 808 (2007), *cert. denied*, —— U.S. ——, 128 S. Ct. 1682, 170 L. Ed. 2d 377 (2008)), *cert. denied*, —— U.S. ——, 128 S. Ct. 1682, 170 L. Ed. 2d 377 (2008). Here, there is absolutely *no* evidence (much less competent evidence) to support the trial court's finding of fact "[t]hat on February 28th in the early morning hours Officer Jones . . . observed a vehicle being operated by the defendant *immediately* in front of him."[5] (Emphasis added). The only testimony given by Officer Jones with regard to his location in relation to defendant's vehicle is "[u]pon getting behind the vehicle in question, the defendant had changed lanes and failed to signal." The record is devoid of support for the trial court's finding. Yet solely on the basis of a sixteen-word, confusing, and confounding sentence contained in Officer Jones's testimony, the majority has constructed a favorable record for the State out of whole cloth.

The trial court's findings of fact were also insufficient to support its conclusion of law that Officer Jones had probable cause to stop defendant for a violation of N.C.G.S. § 20-154(a), which provides in pertinent part:

> 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

5. The majority asserts: "As defendant has not specifically assigned error to this finding of fact, it is not reviewable on appeal." Assuming *arguendo* that defendant's assignments of error are not specific enough as to this finding of fact, this Court should invoke Rule 2 of the North Carolina Rules of Appellate Procedure to "prevent manifest injustice to a party," N.C. R. App. P. 2, as this "[issue raises] important constitutional questions." *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120 (2002), *cert. denied*, 538 U.S. 1040 (2003).

> 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.

N.C.G.S. § 20-154(a) (2007) (emphasis added). The trial court made no finding of fact whether any vehicle, including Officer Jones's patrol vehicle, may have been affected by defendant's changing lanes. The mere finding by the trial court that Officer Jones's vehicle was immediately behind defendant is not identical to the required finding that Officer Jones's patrol vehicle *might have been affected* by the movement of defendant's vehicle.

The trial court concluded as a matter of law that "the stop by the officer was an investigatory stop in regards to a moving violation that he observed committed in his presence." As noted above, the idea that the officer would have needed to stop defendant in order to make reasonable inquiries whether defendant violated N.C.G.S. § 20-154(a) borders upon the farcical. Either defendant violated the statute in the presence of the officer or he did not. No amount of further investigation was necessary to allow the officer to revisit what he had just observed.

In *Ivey*, this Court noted that there was no indication in the record that another vehicle or any pedestrian might have been affected by the defendant's turn at a T-intersection that only permitted a right turn. 360 N.C. at 565, 633 S.E.2d at 461-62. The only distinction between the instant case and *Ivey* is one without a difference. The fact that the defendant in *Ivey* made a right turn without signaling when only a right turn was available was not dispositive of the case. Rather, the total lack of any evidence that the defendant's actions violated N.C.G.S. § 20-154(a) controlled the case's disposition. Similarly, in this case, there is no such competent evidence. *Ivey* controls the instant case, and at the very least this case should be remanded to the trial court with instructions to hold another hearing to make a proper determination whether Officer Jones's vehicle was or might have been affected by defendant's movement. If not, evidence seized by Officer Jones should have been suppressed by the trial court. *See Wong Sun v. United States*, 371 U.S. 471, 484 (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).

CONCLUSION

As eloquently stated by Supreme Court of the United States Associate Justice Robert Jackson, Fourth Amendment rights

> are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.
>
> But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court.

Brinegar v. United States, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting). I cannot agree that a brief, cryptic, and confusing statement by a law enforcement officer, which conveys insufficient information whether a purported traffic violation occurred, is a sufficient factual basis to support a finding of probable cause. The effect of the majority opinion is to retroactively issue a general warrant to Officer Jones, allowing him to be the judge in his own case, thereby "dangerously exposing the citizens of North Carolina to the potential for unreasonable and arbitrary police practices unchecked by our state's trial and appellate courts." *Barnard*, ––– N.C. at –––, 658 S.E.2d at 646 (Brady, J., dissenting). Today, the Court has fallen disappointingly short of enforcing the dictates of the Fourth Amendment and of Article I, Section 20 of the North Carolina Constitution and has disregarded our longstanding precedent. I therefore respectfully dissent.

Justice TIMMONS-GOODSON joins in this dissenting opinion.

STATE OF NORTH CAROLINA *EX REL.* ROY COOPER, ATTORNEY GENERAL OF NORTH CAROLINA v. RIDGEWAY BRANDS MANUFACTURING, LLC, A NORTH CAROLINA CORPORATION; RIDGEWAY BRANDS, INC.; JAMES C. HEFLIN; FRED A. EDWARDS; AND CARL B. WHITE

No. 408A07

(Filed 27 August 2008)

1. Corporations— civil penalties—piercing corporate veil—statute of limitations—relation-back doctrine—instrumentality test

The Court of Appeals erred by affirming the trial court's dismissal of the claim against the individual defendant seeking civil penalties arising out of the failure of the corporate defendant cigarette manufacturer to pay the 2004 escrow deposit required by N.C.G.S. § 66-291 based on the expiration of the applicable statute of limitations, and the matter is remanded because: (1) although existing authority from the Court of Appeals barred the use of the relation-back doctrine to add an additional party, this restriction was only applicable to new parties, and if plaintiff were to succeed on its claim to pierce the corporate veil, the individual defendant would not be considered a new party; (2) when the corporate defendant is the mere instrumentality, or alter ego, of the individual defendant, the individual is not considered a new party; (3) to the extent that other claims against the individual defendant remain part of the litigation, he could not conceivably be considered a new party when at the time of the filing of the amended complaint, which named him as a party to this action, the one-year statute of limitations had not expired as to any penalties arising from the failure to make the escrow deposit; (4) under the instrumentality test, if the plaintiff is able to pierce the corporate veil, the shareholder and the corporation are shown to be one and the same, and consequently, the addition of the shareholder would not be the addition of a new party; (5) North Carolina follows the same rule as most other jurisdictions that the initiating of a suit against a corporation tolls the statute of limitations with respect to its alter egos; (6) taking the allegations as true, it would be inequitable to permit the individual defendant to shelter behind the corporate identity of the very entity he and other defendants drained in the course of their actions; and (7) plaintiff has made the necessary showings at the pleading stage to establish that the corporate defendant was

operated as a mere instrumentality of the individual defendant, and as a consequence, plaintiff may add the individual defendant contingent on its subsequent ability to demonstrate that the individual and corporate defendants are alter egos.

2. Conspiracy— wrongful acts—agreement to violate statutory duties

The State stated a claim for civil conspiracy by the individual defendants to underprice cigarettes manufactured by the corporate defendant for the purpose of avoiding its statutory obligation to pay into the qualified escrow account where the complaint alleged that there was an agreement by defendants to violate their statutory duties and alleged specific actions by defendants in furtherance of the conspiracy.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 184 N.C. App. 613, 646 S.E.2d 790 (2007), affirming in part and reversing in part an order entered 9 December 2005 by Judge Donald L. Smith in Superior Court, Wake County, and remanding for further proceedings. Heard in the Supreme Court 18 March 2008.

Roy Cooper, Attorney General, by Christopher G. Browning, Jr., Solicitor General, and Richard L. Harrison and Melissa L. Trippe, Special Deputy Attorneys General, for plaintiff-appellee/appellant.

Poyner & Spruill LLP, by J. Nicholas Ellis, for defendant-appellant/appellee Ridgeway Brands Manufacturing, LLC and James C. Heflin.

TIMMONS-GOODSON, Justice.

In this opinion, we address two issues. First, in a claim by the State seeking to pierce the corporate veil of a corporate defendant, is defendant's purported alter ego considered a new party? We hold that when the corporate defendant is the mere instrumentality, or alter ego, of the individual defendant, the individual is not considered a new party. Second, in this case did the State's complaint allege sufficient facts to support a cause of action for civil conspiracy? Since the complaint contended that plaintiff had been injured by a wrongful act committed as part of an agreement between two or more persons pursuant to a common scheme, we hold that the complaint properly asserted a cause of action for conspiracy.

Background

The State of North Carolina ("plaintiff") entered into a Master Settlement Agreement ("MSA") with major domestic cigarette manufacturers in November 1998. Cigarette manufacturers doing business in the state were subject to N.C.G.S. § 66-291, which required them to choose between one of two options: (1) participation in the MSA; or (2) payment into a state escrow fund of specified sums, computed on the basis of the quantities of cigarettes sold by April 15 of each year.

Defendant James C. Heflin ("Heflin") formed the corporation that subsequently became Ridgeway Brands Manufacturing, LLC ("Ridgeway") in early 2001. Heflin was an owner and member-manager of Ridgeway, which was located in Stantonsburg, North Carolina, and sold tobacco products largely to a Kentucky corporation, Ridgeway Brands, Inc. ("Brands"). Brands handled products subject to the MSA for sale in North Carolina and other states. Since Ridgeway had opted not to sign the MSA, it was obligated to maintain a "qualified escrow account."

Fred A. Edwards ("Edwards") and Carl B. White ("White") were owners and active managers of Brands. Defendants Heflin, White, and Edwards allegedly agreed to underprice the cigarettes that Ridgeway sold exclusively to Brands. The underpriced cigarettes would allow Brands to increase its revenue and expand its market share at the expense of its competitors. However, these underpriced cigarettes would not generate sufficient revenue to enable Ridgeway to make the mandated escrow payments.

In late 2002 Heflin, Edwards, and White hired Lee Welchons ("Welchons") as the general manager of Ridgeway. Welchons had considerable experience in the tobacco industry. As a result, he was familiar with Ridgeway's obligations under N.C.G.S. § 66-291. Shortly after his arrival, Welchons discovered that Ridgeway's pricing structure did not enable it to meet those obligations. Defendants Heflin, Edwards and White failed to address Welchons' concerns and continued to market their products in a way that ensured that Ridgeway would incur huge escrow obligations. As their obligations mounted elsewhere, defendants diverted funds from Ridgeway to entities within the state of Kentucky, where they resided. At some point, some four million dollars wired by a customer to Ridgeway were moved to unknown accounts.

In early 2003 Heflin, Edwards, and White announced the merger of Ridgeway and Brands. Although the formalities were never con-

cluded, the merger became a de facto reality. In early 2003, Brands became the sole purchaser of cigarettes manufactured by Ridgeway. Ridgeway allegedly became "a corporation without a separate mind, will or existence of its own[,] . . . operated as a mere shell to perform for the benefit of . . . [Brands], Edwards, White and Heflin."

Plaintiff's interest in the matter stemmed from Ridgeway's obligations under N.C.G.S. § 66-291. Ridgeway was in compliance with its escrow obligations through 2002. However, problems began in 2003. Excise tax records indicated that Ridgeway sold approximately 70,691,920 cigarettes in the state that year. Under the applicable formula therefore, it was required to deposit $1,378,160.18 into its escrow account. It failed to do so. On 20 February 2004, plaintiff sent its first demand letter reminding Ridgeway of its statutory obligations and seeking payments.

Although Ridgeway did not pay the funds sought by plaintiff, it continued to sell cigarettes in North Carolina. Indeed, it sold at least seventeen million cigarettes between 1 January and 31 May 2004. In fall 2004, Ridgeway stopped manufacturing cigarettes. Plaintiff repeatedly sent letters to Ridgeway reminding the corporation of its statutory obligations after it missed its first payment. Nevertheless, Ridgeway failed to make the required deposit for a second year by the statutory deadline of 15 April 2005. It never paid its escrow fund obligations for cigarettes sold during 2003 or 2004.

On 4 May 2004, plaintiff instituted this action seeking to recover from Ridgeway the escrow deposit due in 2004 plus civil penalties. Plaintiff also sought an injunction prohibiting Ridgeway from selling tobacco products in North Carolina for two years. On 19 October 2005, plaintiff filed an amended complaint. This amended complaint added claims for the escrow deposit due in 2005, together with civil penalties arising from the failure to make the deposits. In addition to claims for civil conspiracy and separate claims under the North Carolina Unfair and Deceptive Trade Practices Act, plaintiff sought to impose liability upon defendants Brands, Edwards, White, and Heflin under a "piercing the corporate veil" theory. Plaintiff alleged that Heflin, Edwards, and White "overwhelmingly dominated and controlled [Ridgeway] to further [their] own objectives and those of [Brands]." Plaintiff contended, *inter alia*, that defendants Heflin, White, and Edwards agreed to underprice the cigarettes that Ridgeway sold exclusively to Brands knowing that the process would not enable Ridgeway to meet its obligations under N.C.G.S. § 66-291.

To support its effort to pierce the corporate veil, plaintiff alleged in the amended complaint that Heflin, Edwards, and White exhibited control over Ridgeway in the following ways: (1) establishing the pricing structure of cigarettes that Ridgeway sold to Brands; (2) ignoring Welchons' advice that the pricing structure was "grossly inadequate" to satisfy North Carolina's escrow statute requirements; (3) on one occasion, forbidding Welchons to shut down a cigarette line for repairs; (4) determining in which states cigarettes manufactured by Ridgeway would be sold; (5) making hiring decisions for Ridgeway; (6) directing monies intended for Ridgeway to Heflin, White, Edwards, or Brands; (7) excessively fragmenting Ridgeway; (8) directing the movement of funds to prevent the payment of statutory escrow obligations; (9) disposing of almost all assets of Ridgeway; (10) directing Welchons to send information regarding the value of the equipment, spare parts, and inventory owned by Ridgeway to an employee of Swift Transportation; (11) hiring attorneys Michelle Turpin and Victor Schwartz in 2004 to assist Ridgeway with its finances; (12) making payments to these attorneys in excess of one million dollars "[without] financial records of how that money was spent"; (13) directing, with Schwartz's aid, the destruction of Ridgeway's paper records, computer hard drives, and tape back-ups; (14) keeping "no corporate financial records or grossly inadequate corporate records"; and (15) informing Welchons that Ridgeway would not file bankruptcy because Heflin and others "did not want anybody looking back to see what was going on and track the money back to where it came from."

On 25 October 2005, Ridgeway and Heflin moved to dismiss plaintiff's amended complaint. In an order entered 9 December 2005, the trial court granted the motion in part, dismissing the claims for piercing the corporate veil, unfair and deceptive trade practices, and conspiracy as to both Ridgeway and Heflin. The order further dismissed the claim for civil penalties as to Heflin. Plaintiff appealed the dismissal with respect to defendant Heflin to the Court of Appeals.

The Court of Appeals affirmed in part, but reversed the portion of the trial court's order granting Heflin's motion to dismiss as to the claim for civil conspiracy under N.C.G.S. § 1A-1, Rule 12(b)(6). *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 184 N.C. App. 613, 646 S.E.2d 790 (2007). The Court of Appeals also reversed the trial court's order dismissing the claim for piercing the corporate veil. *Id.* The majority held that the allegations in the complaint were sufficient to state a claim for civil conspiracy. *Id.* at 624-26, 646 S.E.2d at 798-99.

However, it held that since the applicable statute of limitations had run, defendant Heflin could not be added as a new party via the "relation-back" doctrine for the purposes of assessing penalties arising out of the failure to pay the 2004 escrow deposit. *Id.* at 618-20, 646 S.E.2d at 795-96.

One judge dissented as to the dismissal of plaintiff's claims against Heflin for civil penalties with respect to the failure to pay the 2004 escrow deposit, and civil conspiracy. *Id.* at 626-27, 646 S.E.2d at 800 (Wynn, J., dissenting). The dissent noted that if plaintiff prevailed on its claim to pierce the corporate veil, then the addition of defendant Heflin would not be the addition of a *new* party. *Id.* at 627-28, 646 S.E.2d at 800. Therefore, the statute of limitations would not bar any proceedings against Heflin. *Id.* The dissent would further hold that the allegations in the complaint did not contain sufficient facts to support an allegation of civil conspiracy. *Id.* at 628, 646 S.E.2d at 800-01.

"Where the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those questions which are . . . specifically set out in the dissenting opinion as the basis for that dissent . . . ." N.C. R. App. P. 16(b); *accord State v. Hooper*, 318 N.C. 680, 681-82, 351 S.E.2d 286, 287 (1987). Therefore, we confine ourselves to the two issues that form the basis of the dissent. Each is addressed in turn.

Relation-back Against Defendant Heflin

[1] The trial court found, and the majority in the Court of Appeals agreed, that plaintiff's claims for civil penalties against defendant Heflin for the failure of defendant Ridgeway to fulfill its 2004 obligations under the escrow statute were barred by the relevant statute of limitations. *Ridgeway*, 184 N.C. App. at 618-20, 646 S.E.2d at 706-96. To reach this conclusion, the majority in the Court of Appeals looked to two statutes: N.C.G.S. §§ 1-54(2) and 66-291(c) (2005). *Id.*

Section 1-54(2) provides for a one-year statute of limitations when the right to collect a penalty authorized by statute "is given to the State alone." N.C.G.S. § 1-54(2) (2007). Section 66-291(c) vests such a right with the State for failure to comply with the escrow mandate. N.C.G.S. § 66-291(c) (2007) ("The Attorney General may bring a civil action on behalf of the State against any tobacco product manufacturer that fails to place into escrow the funds required under this section.") Since neither party contended that the claim against defendant Heflin for civil penalties for failure to make the 2004

deposit had been added within one year, the majority determined that the statute of limitations had run with respect to him.

The dissent did not dispute that one year had elapsed prior to the addition of defendant Heflin. However, noting that the order of the trial court allowing Heflin's 12(b)(6) motion was being reversed, thus permitting plaintiff to seek to pierce the corporate veil, the dissent would have permitted the addition of the 2004 civil penalties claim against Heflin. *Ridgeway*, 184 N.C. App. at 627-28, 646 S.E.2d at 800 (Wynn, J., dissenting). The pivotal distinction, in the dissent's view, was that existing authority from this Court barred the use of the relation-back doctrine to add an additional party, but this restriction was only applicable to *new* parties. *Id.* (citing *Crossman v. Moore*, 341 N.C. 185, 187, 459 S.E.2d 715, 717 (1995)). The dissent pointed out that if plaintiff were to succeed on its claim to pierce the corporate veil, defendant Heflin would not be considered a *new* party. *Id.* We agree.

In holding that plaintiff could not use the relation-back doctrine to add defendant Heflin on its civil penalty claim regarding nonpayment of the 2003 escrow, the Court of Appeals majority relied on our decision in *Crossman v. Moore*, 341 N.C. 185, 459 S.E.2d 715 (1995). In *Crossman*, the plaintiff filed to recover damages for personal injuries sustained in an automobile accident. The original complaint named as defendants Van Dolan Moore and the Dolan Moore Company. *Id.* at 186, 459 S.E.2d at 716. In fact, the actual driver of the automobile was Moore's son, Van Dolan Moore, II. *Id.* The trial court allowed plaintiff's motion to amend the complaint to add Van Dolan Moore, II, but denied plaintiff's motion that the amendment relate back to the time of the original filing. *Id.* We affirmed and explained the distinction thusly:

> As a matter of course, the original claim cannot give notice of the transactions or occurrences to be proved in the amended pleading to a defendant who is not aware of his status as such when the original claim is filed. We hold that this rule [N.C.R. Civ. P. 15(c)] does not apply to the naming of a new party-defendant to the action. It is not authority for the relation back of a claim against a new party.

314 N.C. at 187, 459 S.E.2d at 717. Therefore, the general principle relied on by the majority is correct. However, the majority ultimately held that "the statute of limitations expired as to any claims against Heflin for penalties under N.C. Gen. Stat. § 66-291(c) arising from the

failure to make the 2004 escrow deposit." *Ridgeway*, 184 N.C. App. at 620, 646 S.E.2d at 796 (majority).

Nothing in *Crossman* mandates this result. To the contrary, in *Crossman* we explicitly barred the use of the relation-back doctrine to add a *new* party. 341 N.C. at 187, 459 S.E.2d at 717. To the extent that other claims against Heflin remain part of the litigation, he could not conceivably be considered a new party. *See Ridgeway*, 184 N.C. App. at 621, 646 S.E.2d at 796. ("[A]t the time of the filing of the amended complaint, which named Heflin as a party to this action, the one-year statute of limitations had not expired as to any penalties arising from the failure to make the 2005 escrow deposit.")

Nevertheless, even under the terms of the Court of Appeals majority's own *Crossman* analysis, the pivotal determination here is whether, for the purpose of the 2004 N.C.G.S. § 66-291(c) claim, Heflin was a "new" party i.e. legally a distinct entity from Ridgeway. If he was, then the holding below must be upheld. However, if he was not, the addition of Heflin would not be the addition of a new party, and *Crossman* would be inapplicable. To determine whether Heflin and Ridgeway were distinct entities, we examine our corporation jurisprudence.

A. The Corporate Entity

The general rule is that in the ordinary course of business, a corporation is treated as distinct from its shareholders. *Troy Lumber Co. v. Hunt*, 251 N.C. 624, 627, 112 S.E.2d 132, 134 (1960). We have recently affirmed that the two entities—the corporation and the shareholder—are discrete and separate even if the shareholder, in turn, is another business entity rather than a natural person. *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 636, 652 S.E.2d 231, 235 (2007). However, since attributes of the corporate entity impact the rights of other parties, our inquiry does not stop there. As one treatise explains it, "[T]he critical point in countless cases has been whether corporateness has been *achieved* and, if so, whether it should be *recognized* for purposes of the matter at issue." Russell M. Robinson, II, *Robinson on North Carolina Corporate Law* § 2-21, at 2.08 (rev. 7th ed. 2006) [hereinafter Robinson] (citing *Sproles v. Greene*, 329 N.C. 603, 609, 407 S.E.2d 497, 500 (1991)).

B. Exceptions to the Corporate Entity

Therefore, while " '[a] corporation's separate and independent existence is not to be disregarded lightly,' " it may be theoretically

permissible to look behind the corporate form. *Dep't of Transp. v. Airlie Park, Inc.*, 156 N.C. App. 63, 68, 576 S.E.2d 341, 344 (2003) (citation omitted); Robinson § 2.10 at 2.10. Judge Easterbrook has noted that proceeding beyond the corporate form is a strong step: "Like lightning, it is rare [and] severe [.]" Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 89 (1985) [hereinafter Easterbrook].

Nevertheless, in a few instances, exceptions to the general rule of corporate insularity may be made when " 'applying the corporate fiction would accomplish some fraudulent purpose, operate as a constructive fraud, or defeat some strong equitable claim. Those who are responsible for the existence of the corporation are, in those situations, prevented from using its separate existence to accomplish an unconscionable result.' " *Bd. of Transp. v. Martin*, 296 N.C. 20, 26-27, 249 S.E.2d 390, 395 (1978) (quoting *Jonas v. State*, 19 Wis. 2d 638, 644, 121 N.W.2d 235, 238-39, 95 A.L.R.2d 880 (1963) (footnote omitted)).

To this end, courts will disregard the corporate form or "pierce the corporate veil" when "necessary to prevent fraud or to achieve equity." *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985) (citation omitted). In particular, we have previously held that a shareholder may not utilize the corporate form to shield criminal wrongdoing, defeat the public interest, and circumvent public policy. *State v. Louchheim*, 296 N.C. 314, 329, 250 S.E.2d 630, 639-40, *cert. denied*, 444 U.S. 836 (1979). *See generally*, Robinson § 2-10[1] at 2.25-26.

As the above cases show, we have allowed the inquiry to extend beyond the corporate identity in particular circumstances. Our next step, therefore, is to determine what test is utilized to determine if those particular circumstances exist.

C. The Instrumentality Rule

"There is a consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law." Easterbrook at 89. No less a personage than Justice Cardozo complained that the doctrine of veil piercing is "enveloped in the mists of metaphor." *Berkey v. Third Ave. Ry. Co.*, 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926). A learned treatise on the topic notes that analysis in the context of piercing the corporate veil does not readily lend itself to mechanical bright line rules.

> A ruling that a corporate entity should be disregarded is founded in equity and is therefore necessarily based on a balancing of the equities to determine whether the requested redress of injustice outweighs the need to respect validly established legal forms and relationships. . . . A rule of law summarizing applicable principles may appear to serve the desirable purpose of achieving the certainty and predictability that is so important in the corporate and commercial world but in fact may have just the opposite effect because no such mechanical test can accommodate the full range of circumstances that may invoke the equitable concept of piercing the corporate veil.

Robinson § 2.10[2] at 2.28.

We are therefore cognizant of the fact that a judgment in this area requires a peculiarly individualized and delicate balancing of competing equities. Nevertheless, for the purpose of achieving uniformity and predictability in this critical area of jurisprudence, this Court has previously adopted the "instrumentality rule." *Glenn*, 313 N.C. at 454, 329 S.E.2d at 330.

The issue in *Glenn* was whether B-Bom, Inc. could be held liable for the wrongful actions of D & S Enterprises, Inc. *Id.* at 451, 329 S.E.2d at 338. B-Bom owned Salem Manor and leased it to D & S. *Id.* at 451-52, 329 S.E.2d at 329-29. The primary function of D & S was to collect rent for B-Bom. *Id.* at 456, 439 S.E.2d at 331. The only asset of D & S was the lease on Salem Manor. *Id.* at 452, 329 S.E.2d at 329. B-Bom determined rent levels, and was paid from the rental moneys. *Id.*

D & S was sued by a tenant for wrongful eviction. *Id.* at 451-52, 329 S.E.2d at 329-29. At the time of the suit, D & S was insolvent. Noting that the bulk of rent and profits went to B-Bom, this Court held that D & S operated as a "mere shell" for B-Bom, whose owners exercised so much control over D & S as to make D & S a mere instrumentality of B-Bom. *Id.* at 456-7, 329 S.E.2d at 331-32. We further held that when a corporation operates as a "mere shell, created to perform a function for an affiliated corporation," liability can extend beyond the shell corporation. *Id.* at 457, 329 S.E.2d at 331.

Even though the rule was formally adopted in *Glenn*, the use of instrumentality analysis in our jurisprudence pre-dates *Glenn*. In an earlier case, this Court explained that the instrumentality rule allows for the corporate form to be disregarded if "the corporation is so operated that it is a mere instrumentality or *alter ego* of the sole or

dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State[.]" *Henderson v. Sec. Mortgage & Fin. Co.*, 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968). In that event, we held that "the corporate entity will be disregarded and the corporation and the shareholder *treated as one and the same person*." *Id.* (emphasis added).

D. Application to the Instant Case

Under the instrumentality test, if the plaintiff is able to pierce the corporate veil, the shareholder and the corporation are shown to be, to quote our holding in *Henderson*, "one and the same." *Id.* Consequently, the addition of the shareholder would not be the addition of a "new party." Therefore, the holding of *Crossman*, which the Court of Appeals majority found to be controlling, would not apply.

In order to prevail under the instrumentality rule, a party must prove three elements: (1) stockholders' control of the corporation amounting to "complete domination" with respect to the transaction at issue; (2) stockholders' use of this control to commit a wrong, or to violate a statutory or other duty in contravention of the other party's rights; and (3) this wrong or breach of duty must be the proximate cause of the injury to the other party. *Glenn*, 313 N.C. at 454-55, 329 S.E.2d at 330.

In this case, plaintiff's complaint has set forth allegations that Heflin and the other defendants dominated and controlled Ridgeway to the extent that it had no separate identity by, *inter alia*:

> c. directing in which states product was to be sold.
>
> . . . .
>
> e. directing moneys intended to Defendant Ridgeway Manufacturing to either Defendants Edwards, White, Ridgeway Kentucky[Brands] or Heflin;
>
> f. excessively fragmenting Defendant Ridgeway Manufacturing;
>
> g. destroying all corporate documents and records of Defendant Ridgeway Manufacturing;
>
> h. directing the movement of funds such to prevent the payment of statutory escrow obligations required by North Carolina; and
>
> i. by disposing of almost all assets of corporate Defendant Ridgeway Manufacturing while siphoning off funds to the De-

fendants and investors and therefore preventing the payment of salaries and other benefits owed to employees.

Plaintiff also alleged that as a result of defendants' alleged domination and control, Ridgeway Manufacturing became "a corporation without a separate mind, will or existence of its own and is operated as a mere shell to perform for the benefit of" Heflin and the other named defendants. Plaintiff was injured by these actions, since it was deprived of the escrow moneys to which it was entitled by statute.

Violation of statutory duties is not the type of conduct typically protected by the corporate form. It is axiomatic that when the corporation becomes a mere instrumentality of the shareholder and " 'a shield for his activities *in violation of the declared public policy or statute* of the State,' " the corporate fiction or form is disregarded and the corporation and the shareholder treated as the same entity. *Louchheim*, 296 N.C. at 329, 250 S.E.2d at 640 (quoting *Henderson*, 273 N.C. at 260, 160 S.E.2d at 44) (emphasis added); *see also State v. Salisbury Ice & Fuel Co.*, 166 N.C. 366, 369, 81 S.E. 737, 738 (1914) (noting that the misconduct of a corporation may be imputed to both the corporate entity and its officers). Indeed, in *Louchheim*, we allowed criminal charges to proceed against the shareholder, despite his argument that any conduct must be imputed solely to the corporation.

In examining the instant case, we note a number of factual allegations that support the contention that the corporate form was a mere instrumentality of its shareholders. "When reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true." *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006) (citing *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)). Plaintiff has alleged that the shareholders, including defendant Heflin, made a considered decision not to fulfill their statutory obligations in North Carolina.

Among the allegations against defendants are charges that they deliberately and purposefully chose to line their personal pockets by pricing cigarettes at a level that would increase their market share—to the detriment of their competitors who opted to function in a manner that would permit them to perform their statutory obligations. Defendant shareholders further chose to ignore the admonitions and warnings of their own experienced manager that their operational plan did not allow them to fulfill their statutory obligations. Defendant shareholders, including Heflin, also made a considered deci-

sion to pay their obligations in their home state of Kentucky while ignoring their obligations to North Carolina. Defendants further channeled corporate funds into unknown entities they controlled, leaving Ridgeway behind as a hollow shell from which plaintiff could not expect to recover anything.

Taking these allegations as true, it would be inequitable to permit defendants to shelter behind the corporate identity of the very entity they drained in the course of their actions. Given this, we hold that in light of our opinions in *Henderson* and *Glenn*, plaintiff has made the necessary showings at the pleading stage to establish that defendant Ridgeway was operated as a mere instrumentality of defendant Heflin. As a consequence, we hold that plaintiff may add defendant Heflin, contingent on its subsequent ability to demonstrate that defendants Heflin and Ridgeway are alter egos.

We note that this holding merely clarifies that North Carolina follows the same rule as most other jurisdictions that have considered the issue: the principle that initiating a suit against a corporation tolls the statute of limitations with respect to its alter egos. *See*, *e.g.*, *Ex parte Empire Gas Corp.*, 559 So. 2d 1072, 1073-74 (Ala. 1990); *Matthews Constr. Co. v. Rosen*, 796 S.W.2d 692, 693-94 (Tex. 1990); *Cf. Porter Cty. Sheriff Dep't v. Guzorek*, 862 N.E.2d 254, 255 (Ind. 2007) (a suit against an improper party tolled the statute of limitations against the correct party who was aware of the suit and participated in its defense); *Norwood Grp., Inc. v. Phillips*, 149 N.H. 722, 725, 828 A.2d 300, 303 (2003) (holding that subjecting an effort to pierce the corporate veil to the original shorter statute of limitations would allow the corporate form to be used as a " 'cloak for fraud' ") (citing *Matthews Constr.*, 796 S.W.2d at 694). Indeed, at least one federal court in North Carolina has already followed this approach. *Strawbridge v. Sugar Mountain Resort, Inc.*, 243 F. Supp. 2d 472, 478-79 (W.D.N.C. 2003) (applying North Carolina law and discussing the instrumentality rule and relation back doctrine). Therefore we reverse the Court of Appeals majority on this issue.

Claim of Conspiracy

[2] Next, we determine whether the majority below correctly held that the trial court improperly dismissed plaintiff's claim for civil conspiracy. The dissent in the Court of Appeals would hold that the complaint did not allege sufficient facts to constitute a civil conspiracy. *Ridgeway*, 184 N.C. App. at 628, 646 S.E.2d at 801 (Wynn, J., dissenting). In particular, the dissent would hold that plaintiff's com-

plaint "includes no factual allegations to support the notion of an agreement or conspiracy among Mr. Heflin, Mr. Edwards, and Mr. White to underprice the cigarettes for the express purpose of avoiding its statutory obligations to pay into the qualified escrow account." *Id.* After reviewing the complaint, we cannot agree.

"To create civil liability for conspiracy there must have been a wrongful act resulting in injury to another committed by one or more of the conspirators pursuant to the common scheme and in furtherance of the objective." *Henry v. Deen*, 310 N.C. 75, 87, 310 S.E.2d 326, 334 (1984) (citing *Muse v. Morrison*, 234 N.C. 195, 198, 66 S.E.2d 783, 785 (1951)). This Court has previously held that a complaint sufficiently stated a claim for civil conspiracy when it alleged (1) a conspiracy, (2) wrongful acts done by certain of the alleged conspirators in furtherance of that conspiracy, and (3) injury as a result of that conspiracy. *Muse*, 234 N.C. at 198, 66 S.E.2d at 785.

We note that in ruling upon such a motion, " 'the complaint is to be liberally construed, and the trial court should not dismiss the complaint unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief.' " *Meyer v. Walls*, 347 N.C. 97, 111-12, 489 S.E.2d 880, 888 (1997) (quoting *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987) (alteration in original)).

A review of the complaint reflects that plaintiff specifically alleged that there was an "Agreement of Defendants" to violate their statutory duties:

> Defendants shared an understanding, either expressed or implied, to enter into an agreement to underprice the cigarettes made by Defendant [Ridgeway] and distributed and sold by [Brands] so that [Ridgeway] would be unable to deposit sufficient escrow to cover sales in violation of N.C. Gen. Stat. § 66-291 and would deprive the State of North Carolina of a fund against which it could execute judgments against Defendant [Ridgeway].
>
> Defendants shared an understanding, either expressed or implied, to enter into an agreement to unfairly and deceptively underprice the cigarettes made by Defendant [Ridgeway] and distributed and sold by [Brands] so that [Ridgeway] would be unable to deposit sufficient escrow to cover sales in violation of N.C. Gen. Stat. § 66-291 and deprived the State of a fund against which it could execute judgments.

The majority in the court below referenced this section of the complaint and found it sufficient under the notice pleading standard. *Ridgeway*, 184 N.C. App. at 625-26, 646 S.E.2d at 799 (majority). In addition, the majority cited several specific instances of alleged actions by the defendants in furtherance of the alleged conspiracy:

> Plaintiff's complaint supports the theory that Heflin had an "independent personal stake in achieving the corporation's illegal objective," because plaintiff alleged that Heflin "directe[d] monies intended to [Ridgeway] to either . . . Edwards, White, [Brands] or [Heflin][.]" Plaintiff further alleged that, in 2004, Heflin told Welchons that "[Ridgeway] was not going to file for bankruptcy because [Heflin] and others did not want anybody looking back to see what was going on and track the money back to where it came from." After this comment, Welchons considered "the creation of financial records" and the hiring of "attorneys Schwartz and Turpin" to be "a cover-up to hide activities." Ridgeway made payments in excess of $1 million to Turpin and Schwartz, "of which none was ever accounted for or returned to [Ridgeway][.]" Welchons, the general manager of Ridgeway, was never told how the money was spent. Plaintiff alleged that Heflin and others "disposed of almost all assets of [Ridgeway]" and "siphon[ed] off funds to" themselves.

Id. at 626, 646 S.E.2d at 799. Under the criteria we have previously set out in *Muse*, plaintiff has alleged sufficient facts tending to show (1) the existence of the conspiracy, (2) acts in furtherance thereof, and (3) injury to plaintiff as a result of these acts. 234 N.C. at 198, 66 S.E.2d at 785. Taken together, these allegations are sufficient to withstand a motion to dismiss. "Whether plaintiff is able, in his proof, to make good the allegations of his complaint is of no concern now. But he is entitled to an opportunity to do so—a day in court." *Id.* The holding of the majority on this issue is affirmed.

Conclusion

In summary, we affirm the portion of the Court of Appeals opinion that reinstated the civil conspiracy claims. We reverse the portion of the opinion that affirmed the trial court's dismissal of the claim against defendant Heflin for civil penalties arising out of the failure to pay the 2004 escrow deposit. The remaining issues addressed by the Court of Appeals are not before this Court, and its decision as to these matters remains undisturbed.

Accordingly, the decision of the Court of Appeals is affirmed in part, reversed in part and this matter is remanded to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

IN THE MATTER OF T.H.T.

No. 469A07

(Filed 27 August 2008)

Child Abuse and Neglect; Mandamus— failure to timely enter order of adjudication and disposition—new hearing an improper remedy

The Court of Appeals did not err by concluding that respondent mother was not entitled to a new trial in a child custody and child abuse and neglect case even though the trial court failed to timely enter the order of adjudication and disposition in violation of the time lines set forth in N.C.G.S. §§ 7B-807(b) and 7B-905(a) and failed to hold a hearing pursuant to N.C.G.S. § 7B-807(b) to determine the cause of delay in entry of the order of adjudication and disposition, because: (1) in appeals from adjudicatory and dispositional orders in which the alleged error is the trial court's failure to adhere to statutory deadlines, such error arises subsequent to the hearing and therefore does not affect the integrity of the hearing itself; and (2) when the integrity of the trial court's decision is not in question, a new hearing serves no purpose but only compounds the delay in obtaining permanence for the child. When a trial court fails to enter an order of adjudication and disposition within thirty days after the hearing, a party should file a request with the clerk of court pursuant to N.C.G.S. § 7B-807(b) asking the trial court to enter its order or calendar a hearing to determine and explain the reason for the delay. If the trial court refuses or neglects to enter an order or to calendar a hearing, or fails to enter its order within ten days following the § 7B-807(b) hearing, a party may petition the Court of Appeals for a writ of mandamus.

Chief Justice PARKER concurs in the result only.

IN RE T.H.T.

[362 N.C. 446 (2008)]

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 185 N.C. App. 337, 648 S.E.2d 519 (2007), affirming an order entered 3 November 2006 by Judge J. Henry Banks in District Court, Vance County. Heard in the Supreme Court 18 March 2008.

Carolyn J. Yancey for petitioner-appellee Vance County Department of Social Services.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for respondent-appellant mother.

TIMMONS-GOODSON, Justice.

To ensure placement and permanence for children "within a reasonable amount of time," the Juvenile Code provides clear and unambiguous time limits for entry of orders of adjudication and disposition, permanency planning orders, and orders terminating parental rights. N.C.G.S. § 7B-100(5) (2007). Increasingly, appeals from orders of adjudication and disposition, permanency planning orders, and orders terminating parental rights cite as grounds for reversal the failure of district courts to timely enter the orders. These appeals have come from all districts and counties within our state, with delays ranging from several weeks to almost a year. This systemic failure by district courts to adhere to statutory time limits results in prolonged periods of instability for all parties involved. Such instability and uncertainty are particularly devastating to children, who experience time differently from adults. Today we determine that the appropriate remedy for such failures—the remedy best suited to enforce statutory time limits and thus best ensure that North Carolina children receive the resolution they need and deserve and that the statutes demand—is mandamus. Accordingly, to the extent the Court of Appeals determined that the failure by the trial court to adhere to the statutory time limit did not require a new hearing to remedy the error, we affirm the Court of Appeals.

BACKGROUND

Respondent is the mother of T.H.T. After respondent and her husband permanently separated on 26 July 2005, they shared custody of their daughter, T.H.T., through an informal custodial agreement. On approximately 16 October 2005, seven-month-old T.H.T. suffered a closed head injury while in respondent's care. The child's father thereafter filed a custody action in the district court in Vance County

seeking sole custody of T.H.T. The Department of Social Services in Vance County (DSS) also filed a juvenile petition on 2 February 2006, alleging that T.H.T. was abused and neglected. The trial court conducted a hearing on the juvenile petition on several days between 5 April 2006 and 26 July 2006. At the conclusion of the hearing, the trial court determined that T.H.T. was an abused and neglected juvenile and awarded legal and physical custody of T.H.T. to her father. The trial court awarded respondent unsupervised visitation privileges at specific times on most weekends. The trial court relieved DSS and the guardian ad litem of any further involvement in the case. The trial court, however, did not enter a written order reflecting its adjudication and disposition of T.H.T.'s case until 3 November 2006, nor did it hold a hearing pursuant to N.C.G.S. § 7B-807 to determine the cause of delay in entry of the order.

Respondent appealed from the adjudication and disposition order to the North Carolina Court of Appeals, which, in a divided opinion, affirmed the order of the trial court. *In re T.H.T.*, 185 N.C. App. 337, 648 S.E.2d 519 (2007). The dissenting judge concluded that the trial court's three-month delay in entering the order, coupled with the court's subsequent failure to hold a hearing to determine the cause of the delay, prejudiced respondent and warranted reversal of the order. *See id.* at 356, 648 S.E.2d at 531 (Tyson, J., dissenting). Respondent appeals to this Court on the basis of the dissent.

ANALYSIS

Respondent argues the trial court committed reversible error by failing to timely enter the order of adjudication and disposition in violation of the time lines set forth in N.C.G.S. §§ 7B-807(b) and 7B-905(a) and by failing to hold a hearing pursuant to N.C.G.S. § 7B-807(b) to determine the cause of delay in entry of the order of adjudication and disposition. Respondent correctly notes that there is no dispute that the trial court committed error in violating N.C.G.S. §§ 7B-807 and 7B-905. Thus, the dispositive issue before this Court is identification of the proper remedy. In order to determine whether the trial court's order should be reversed, as asserted by respondent, we first examine the relevant statutes at issue and their purposes as stated in the North Carolina Juvenile Code.

The North Carolina Juvenile Code

The North Carolina Juvenile Code "stresses the paramount importance of the child's best interest and the need to place children in safe, permanent homes within a reasonable time." *In re R.T.W.*, 359

N.C. 539, 549, 614 S.E.2d 489, 496 (2005), *superseded by statute on other grounds*, Act of Aug. 23, 2005, ch. 398, sec. 12, 2005 N.C. Sess. Laws 1455, 1460-61, *as recognized in In re T.R.P.*, 360 N.C. 588, 592, 636 S.E.2d 787, 791 (2006). The Juvenile Code sets out various time lines related to the hearing of juvenile cases, consistent with the Adoption and Safe Families Act of 1997,[1] to ensure 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(5). The two statutes specifically at issue here are N.C.G.S. §§ 7B-807 and 7B-905. Section 7B-807(b) states that an order of adjudication "shall be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing." *Id.* Section 7B-905(a) imposes an identical thirty-day deadline for the entry of an order of disposition. *Id.* In 2005 the General Assembly amended section 7B-807 to provide:

> If the [adjudicatory] order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection.

Id. The General Assembly's purpose, as indicated in the title of the act, was to "Amend the Juvenile Code to Expedite Outcomes for Children and Families Involved In Welfare Cases and Appeals." Act of Aug. 23, 2005, ch. 398, 2005 N.C. Sess. Laws 1455. Although not directly at issue here, we note that the General Assembly added identical language to N.C.G.S. § 7B-907(c), *see id.*, sec. 7, at 1458, per-

1. The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, provides that the best interests of the juvenile are of paramount consideration by the court and when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a safe, permanent home within a reasonable amount of time. *See* 42 U.S.C. §§ 670-675 (2000). The Act shortened the time frames for court hearings and permanent placement in order to minimize the amount of time that children spend in foster care. Its purpose is to free more children for adoption while simultaneously requiring that the process move quickly, so as to move toward permanency for these children. *See id*; *see also* the Strengthening Abuse and Neglect Courts Act of 2000, Pub. L. No. 106-314 (reinforcing the Adoption and Safe Families Act). Congress requires state agencies to follow the provisions and regulations of the Act in order to receive federal funds. *See* Michael T. Dolce, *A Better Day for Children: A Study of Florida's Dependency System with Legislative Recommendations*, 25 Nova L. Rev. 547, 555-60 (2001) [hereinafter Dolce, *A Better Day*] (discussing the requirements set by the Adoption and Safe Families Act to receive federal funding).

taining to permanency planning orders, and to N.C.G.S. §§ 7B-1109(e) and 7B-1110(a), pertaining to orders terminating parental rights, *see id.*, secs. 16, 17, at 1462-63. The statutory time limits recognize the critical function of timely entry of orders in cases affecting the welfare of children and are consistent with the Juvenile Code's overarching purpose of achieving safe, permanent homes for children within a reasonable amount of time. *See* N.C.G.S. § 7B-100(5).

The impact of delay

The importance of timely resolution of cases involving the welfare of children cannot be overstated. A child's perception of time differs from that of an adult. *See* Joseph Goldstein *et al.*, *The Best Interests of the Child: The Least Detrimental Alternative* 9 (1996) (explaining that a child's sense of time results in high sensitivity to the length of separation from a primary caregiver). As one commentator observed, "The legal system views [child welfare] cases as numbers on a docket. However, to a child, waiting for a resolution seems like forever—an eternity with no real family and no sense of belonging." Evelyn Lundberg Stratton, *Expediting the Adoption Process at the Appellate Level*, 28 Cap. U. L. Rev. 121, 121 (1999).

This Court has recognized that justice delayed in custody cases is too often justice denied. *See In re R.T.W.*, 359 N.C. at 545, 614 S.E.2d at 493 (commenting that "interminable custody battles do not serve the child's best interest"). Notably, our Rules of Appellate Procedure provide for expedited appeals in cases involving termination of parental rights and issues of juvenile abuse, neglect, and dependency. N.C. R. App. P. 3A. Thus, in almost all cases, delay is directly contrary to the best interests of children, which is the "polar star" of the North Carolina Juvenile Code. *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984) (emphasizing that "[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"); *see also* N.C.G.S. § 7B-100(5) (stating that "the best interests of the juvenile are of paramount consideration by the court"); *In re R.T.W.*, 359 N.C. at 552, 614 S.E.2d at 497 (noting that the denial of a stable home life for children is "completely repugnant to their best interests" and consequently to the Juvenile Code).

The statutory deadline dilemma

Despite the harm to children inflicted by delay and despite the clear and unambiguous statutory deadlines, an alarming number of

appeals over the past several years have involved significant violations by the trial courts of the statutory deadlines for entering orders of adjudication and disposition, as well as permanency planning orders and orders terminating parental rights.[2] In reviewing these appeals, the Court of Appeals generally weighed the time requirements of the statutes against the practical effects of the delay and examined the alleged harm resulting from the trial court's failure to enter an order within the proscribed period. The Court of Appeals tended to reverse or affirm the orders depending on the length of delay, with six months being the typical "tipping-point" for reversal. *See, e.g.*, *In re R.L.*, —— N.C. App. ——, ——, 652 S.E.2d 327, 336 (2007) (reversing order of adjudication entered seven months after the statutory deadline); *In re D.M.M.*, 179 N.C. App. 383, 389, 633 S.E.2d 715, 718-19 (2006) (reversing based in part on seven-month delay in entry of order of termination); *In re D.S.*, 177 N.C. App. 136, 140, 628 S.E.2d 31, 33-34 (2006) (reversing order of termination based solely on seven-month delay in entry of order); *In re O.S.W.*, 175 N.C. App. 414, 415-16, 623 S.E.2d 349, 350-51 (2006) (reversing order of termination due to six-month delay); *In re T.W.*, 173 N.C. App. 153, 161-62, 617 S.E.2d 702, 706-07 (2005) (reversing order of termination based, *inter alia*, on delay of nearly one year); *In re L.L.*, 172 N.C. App. 689, 697-700, 616 S.E.2d 392, 396-98 (2005) (concluding that a nine-month delay in entry of a custody review order prejudiced the parties). In such cases, the Court of Appeals reasoned that the parents were "prejudiced" because notice of appeal could not be taken until entry of the underlying order and all parties were denied a "sense of closure." *In re C.J.B.*, 171 N.C. App. 132, 135, 614 S.E.2d 368, 370 (2005). Although the errors cited by the appellants in these cases arose only after the hearings, the Court of Appeals nevertheless reversed and remanded for new hearings. *See, e.g.*, *In re R.L.*, —— N.C. App. at ——, 652 S.E.2d at 336 (remanding for additional proceedings while acknowledging that "the ultimate result of our holding today is less permanence for Respondents, and for [the children]"). At least one judge at the Court of Appeals has articulated his disagreement with this approach:

> I am troubled by our unexamined assumption that a permissible and appropriate remedy for delayed entry of the termination of parental rights order is to reverse the order and remand for a new hearing. In the usual case, reversal is an appropriate

2. We have found at least eighty appeals in the past five years in which the assigned error cited failure by the trial court to adhere to statutory deadlines.

> remedy precisely because the error at issue casts doubt on the outcome or verdict in the proceeding. A new trial or hearing is then required to ensure the fairness of the result in a case. In contrast, the delayed entry of an order for termination of parental rights does not cast doubt on the integrity of the decision.
>
> Additionally, reversal of the order with its associated further delay does nothing to remedy the late entry of the termination order. . . . Ironically, this Court's decision to require a new termination of parental rights hearing generally delays finality for at least another year. This compounds the delay in obtaining permanence for the child, and continues the status quo concerning parents' lack of access to their children. Simply put, the "remedy" of reversing bears no relationship whatsoever to the wrong that it seeks to redress.
>
> More significantly, I know of no statutory basis for our authority to reverse in this circumstance. Reversing orders on termination for the trial court's procedural failure to enter an order within the statutory duration is a draconian result that benefits no one.

In re J.N.S., 180 N.C. App. 573, 580-81, 637 S.E.2d 914, 918-19 (2006) (Levinson, J., concurring) (emphasis omitted). Other judges have echoed these concerns. *See*, *e.g.*, *C.L.K. v. Keeter*, 182 N.C. App. 600, 609, 643 S.E.2d 458, 463 (2007) (Geer, J., dissenting) ("With respect to respondent's delayed ability to appeal, the majority opinion has failed to explain in what manner that factor prejudiced respondent. If respondent desired to appeal more quickly, it was within his power to request that the court enter its order so that an appeal could be taken."); *In re J.Z.M.*, 184 N.C. App. 474, 480, 646 S.E.2d 631, 635 (2007) (Steelman, J., dissenting) ("The majority opinion confuses personal prejudice with legal prejudice and cannot show that the delay in any manner affected the outcome of [the] case."), *rev'd per curiam*, 362 N.C. 167, 655 S.E.2d 832 (2008).

In accordance with this line of Court of Appeals cases, respondent here argues that the delayed entry of the order of adjudication and disposition negatively affected (1) her ability to appeal, (2) her right to "ongoing review of her case," and (3) her efforts to "move forward" in her civil custody action. Respondent contends she was therefore "prejudiced" by the trial court's error, such that reversal of the adjudication order is required. Respondent does not assert, however—nor can she—that the delay in entry of the order of adjudica-

tion and disposition had any possible impact upon the actual hearing or the ensuing order by the trial court. Indeed, respondent does not argue that the trial court erred in its substantive decision, only that it erred by entering the order three months past the statutory deadline.[3] Under such facts, "the delayed entry of an order . . . does not cast doubt on the integrity of the decision." *In re J.N.S.*, 180 N.C. App. at 580, 637 S.E.2d at 918 (Levinson, J., concurring). When the integrity of the trial court's decision is not in question, a new hearing serves no purpose, but only "compounds the delay in obtaining permanence for the child." *Id.* Thus, when delayed entry of an otherwise proper order is the sole purported ground for appeal, a new hearing is not the proper remedy. Instead, a party's remedy lies in mandamus.

Mandamus

Mandamus translates literally as "We command." *Black's Law Dictionary* 980 (8th ed. 2004). A writ of mandamus is an extraordinary court order to "a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law." *Sutton v. Figgatt*, 280 N.C. 89, 93, 185 S.E.2d 97, 99 (1971). The appellate courts may issue writs of mandamus "to supervise and control the proceedings" of the lower courts. N.C.G.S. § 7A-32(b), (c) (2007). Appellate courts may only issue mandamus to enforce established rights, not to create new rights. *Moody v. Transylvania Cty.*, 271 N.C. 384, 390, 156 S.E.2d 716, 720 (1967). A court cannot refuse a petition for writ of mandamus when it is sought to enforce a clearly-established legal right. *Sutton*, 280 N.C. at 93, 185 S.E.2d at 99-100.

Mandamus lies when the following elements are present: First, the party seeking relief must demonstrate a clear legal right to the act requested. *Snow v. N.C. Bd. of Architecture*, 273 N.C. 559, 570, 160 S.E.2d 719, 727 (1968). Second, the defendant must have a legal duty to perform the act requested. *Moody*, 271 N.C. at 391, 156 S.E.2d at 721; *Steele v. Locke Cotton Mills Co.*, 231 N.C. 636, 640, 58 S.E.2d 620, 624 (1950) (noting that a defendant's duty to perform the act requested must exist both at the time of application for the writ and when the court issues the writ). Moreover, the duty must be clear and

3. The Court of Appeals majority concluded that the trial court did not err in adjudicating T.H.T. abused and neglected, *see In re T.H.T.*, 185 N.C. App. at ——, 648 S.E.2d at 525, and the dissent did not address the evidentiary issue. If respondent disputed the substantive merits of the order of adjudication and disposition (as she did before the Court of Appeals), she could have sought discretionary review from this Court in addition to giving her notice of appeal.

not reasonably debatable. *See Moody*, 271 N.C. at 390-91, 156 S.E.2d at 720-21. Third, performance of the duty-bound act must be ministerial in nature and not involve the exercise of discretion. *See id.* at 390, 156 S.E.2d at 720-21; *see also Gen. Elec. Co. v. Turner*, 275 N.C. 493, 497-98, 168 S.E.2d 385, 388 (1969) (observing that mandamus cannot be issued to control the manner of exercise of a discretionary duty (citations omitted)). Nevertheless, a court may issue a writ of mandamus to a public official compelling the official to make a discretionary decision, as long as the court does not require a particular result. *See Moody*, 271 N.C. at 390, 156 S.E.2d at 720; *see also Hamlet Hosp. & Training Sch. for Nurses, Inc. v. Joint Comm. on Standardization*, 234 N.C. 673, 680, 68 S.E.2d 862, 868 (1952) (noting that mandamus lies to "compel public officials to take action, but ordinarily [does] not require them, in matters involving the exercise of discretion, to act in any particular way" (citation omitted)). Fourth, the defendant must have "neglected or refused to perform" the act requested, and the time for performance of the act must have expired. *Sutton*, 280 N.C. at 93, 185 S.E.2d at 99. Mandamus may not be used to reprimand an official, to redress a past wrong, or to prevent a future legal injury. *Id.* at 93-94, 185 S.E.2d at 99-100. Finally, the court may only issue a writ of mandamus in the absence of an alternative, legally adequate remedy. *King v. Baldwin*, 276 N.C. 316, 321, 172 S.E.2d 12, 15 (1970); *Snow*, 273 N.C. at 570, 160 S.E.2d at 727. When appeal is the proper remedy, mandamus does not lie. *Snow*, 273 N.C. at 570, 160 S.E.2d at 727.

Mandamus is the proper remedy when the trial court fails to hold a hearing or enter an order as required by statute. For example, in *State v. Wilkinson*, the State, acting on behalf of a number of juveniles residing in a state mental health treatment facility, petitioned this Court for a writ of mandamus after the trial court refused to hold voluntary admission hearings that the State asserted were required by statute. 302 N.C. 393, 393-94, 275 S.E.2d 836, 837 (1981). Upon review, this Court agreed with the State that the hearings were mandated by statute and issued a writ of mandamus compelling the trial court to hold the hearings. *Id.* at 394, 275 S.E.2d at 837.

In *Stevens v. Guzman*, the Court of Appeals concluded that a writ of mandamus is the proper remedy for a trial court's failure to enter a written order. 140 N.C. App. 780, 783, 538 S.E.2d 590, 593 (2000), *disc. rev. improvidently allowed*, 354 N.C. 214, 552 S.E.2d 140 (2001). The plaintiff in *Stevens* moved for judgment notwithstanding the verdict and a new trial following a jury verdict in favor of the defendant.

Id. at 781, 538 S.E.2d at 591. The trial court denied these motions orally but did not enter a written order on the motions. *Id.* The plaintiff subsequently requested the trial court to reduce to writing its rulings on the plaintiff's motions, but the trial court refused. 140 N.C. App. at 781, 538 S.E.2d at 592. The plaintiff then appealed to the Court of Appeals, which acknowledged that the trial court was "obligat[ed] to enter orders disposing of a party's motions" but concluded that "[t]he failure of the trial court to enter an order, however, is not a matter to be addressed on an appeal from that inaction, but instead is to be addressed through a writ of mandamus filed with this Court." *Id.* at 783, 538 S.E.2d at 593 (citing N.C. R. App. P. 22(a)). The Court of Appeals therefore dismissed the appeal. *Id.*

In cases such as the present one in which the trial court fails to adhere to statutory time lines, mandamus is an appropriate and more timely alternative than an appeal. Meeting the statutory time line is not left to the trial court's discretion. When the trial court fails to enter its order or to call the subsequent hearing pursuant to N.C.G.S. § 7B-807(b), that failure is a ministerial action subject to mandamus. Once the clerk calendars the 7B-807(b) hearing, a trial court's failure to schedule the hearing promptly and enter its order may evince neglect and refusal to commit the order to writing. Finally, without an entry of judgment, appeal is not an alternative remedy. *See Logan v. Harris*, 90 N.C. 7, 7 (1884) (stating that to have a valid judgment, "it must be entered of record, and until this shall be done, there is nothing to appeal from"); *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737 ("This Court is without authority to entertain appeal of a case which lacks entry of judgment." (citation omitted)), *disc. rev. denied*, 347 N.C. 263, 493 S.E.2d 450 (1997); *see also* N.C. R. App. P. 3(c)(1) (stating that notice of appeal must be filed and served within thirty days after entry of judgment).

In child welfare cases in which a trial court fails to timely enter an order, mandamus is not only appropriate, but is the superior remedy. A writ of mandamus ensures that the trial courts adhere to statutory time frames without the ensuing delay of a lengthy appeal. Moreover, the availability of the remedy of mandamus ensures that the parties remain actively engaged in the district court process and do not "sit back" and rely upon an appeal to cure all wrongs. *See In re J.N.S.*, 180 N.C. App. at 581, 637 S.E.2d at 919 ("I do not agree that a party who waits passively for the trial court to perform the ministerial duty of entering an order—that which *mandamus* concerns—should be allowed to successfully argue on

appeal 'prejudice' resulting from the delayed entry of the order."); *In re L.L.*, 172 N.C. App. at 700, 616 S.E.2d at 398 (noting that "had [DSS] requested another review hearing earlier or petitioned for writ of mandamus, some of the delay may have been avoided"). Mandamus provides relatively swift enforcement of a party's already established legal rights, and we encourage parties to utilize mandamus in the appropriate circumstances.

Under the authorities we have discussed, a failure to proceed to judgment within a reasonable time deprives the parties of an adequate remedy at law, including the right to appeal a judgment entered. This Court does not have the authority to tell the trial court what judgment it should enter. We do, however, have the authority and the obligation to require the trial court to proceed to judgment when judgment has not been entered within the statutory time lines. Thus, when the trial court fails to enter an order of adjudication and disposition within thirty days after the adjudication and disposition hearing, a party should file a request with the clerk of court pursuant to N.C.G.S. § 7B-807(b) asking that the trial court enter its order or calendar a hearing "to determine and explain the reason for the delay." If the trial court refuses or neglects to enter the order or to calendar a hearing, or fails to enter its order within ten days following the 7B-807(b) hearing, a party may petition the Court of Appeals for a writ of mandamus. The party seeking relief should carefully adhere to the procedure for seeking mandamus as provided by "statute or rule of the Supreme Court or, in the absence of statute or rule, according to the practice and procedure of the common law." N.C.G.S. § 7A-32(b), (c); N.C. R. App. P. 22.

CONCLUSION

We hold that in appeals from adjudicatory and dispositional orders in which the alleged error is the trial court's failure to adhere to statutory deadlines, such error arises subsequent to the hearing and therefore does not affect the integrity of the hearing itself. Thus, a new hearing serves no legitimate purpose and does not remedy the error. Indeed, a new hearing only exacerbates the error and causes further delay. Instead, a party seeking recourse for such error should petition for writ of mandamus.

In arriving at our decision, this Court is not unmindful of the difficulties facing a conscientious district court judge trying to balance a busy trial docket with the many other daily details requiring his or her attention, particularly when the volume of abuse, neglect, and

dependency cases continues to increase.[4] Further, we are aware that delay may be beneficial in some circumstances. However, regularly allowing bureaucratic failure to be the sole cause of delay in the entry of orders affecting a child's welfare is anathema to the principles underlying the Juvenile Code.

Because the alleged error occurred after the hearing, and as the three-month delay in entry of the order of adjudication and disposition cannot be remedied by a new hearing, we agree with the Court of Appeals that the trial court committed no prejudicial error. We therefore affirm as modified herein the opinion of the Court of Appeals.

MODIFIED AND AFFIRMED.

Chief Justice PARKER concurs in the result only.

CURRY SHAW, EMPLOYEE v. U.S. AIRWAYS, INC., EMPLOYER, AMERICAN PROTECTION INSURANCE COMPANY, CARRIER

No. 580A07

(Filed 27 August 2008)

Workers' Compensation— average weekly wage—fringe benefits

An employer's contributions to an employee's retirement accounts are not included in the calculation of "average weekly wage" under the Workers' Compensation Act. Under the meaning of the Act, the inquiry is whether the employers' contributions constitute earnings: nothing in the Act specifically includes fringe benefits, and the legislature has not addressed fringe benefits in subsequent revisions since the terms "earnings" was first used in 1929. Weighing the public policy considerations of including fringe benefits as earnings for workers' compensation is the province of the General Assembly.

Justice HUDSON dissenting.

Justice TIMMONS-GOODSON joins in this dissenting opinion.

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4. According to the N.C. Administrative Office of the Courts, the number of abuse, neglect, and dependency petitions filed in district court has steadily increased over the last several years. *See* N.C. Admin. Office of the Courts, *North Carolina Courts FY 2005-06: Statistical and Operational Summary of the Judicial Branch of Government* 49 (2006).

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 186 N.C. App. 474, 652 S.E.2d 22 (2007), reversing and remanding an opinion and award filed on 13 September 2006 by the North Carolina Industrial Commission. Heard in the Supreme Court 19 March 2008.

The Sumwalt Law Firm, by Vernon Sumwalt, for plaintiff-appellee.

Littler Mendelson, P.C., by Kimberly A. Zabroski and Brian S. Clarke, for defendant-appellants.

NEWBY, Justice.

This case presents the issue of whether an employer's contributions to an employee's retirement accounts are included in the calculation of "average weekly wage" under our Workers' Compensation Act. While the Act is to be "liberally construed," such liberality is not to be extended "beyond [its] clearly expressed language." *See Deese v. Se. Lawn & Tree Expert Co.*, 306 N.C. 275, 277, 293 S.E.2d 140, 142-43 (1982). Because we do not believe inclusion of fringe benefits to be "clearly expressed," we reverse the Court of Appeals.

Plaintiff Curry Shaw worked as a fleet service worker for defendant-employer U.S. Airways. As an employee, plaintiff participated in two separate retirement programs. The first program was a 401(k) plan (the "Savings Plan") that allowed plaintiff to defer a certain percentage of his eligible income into a retirement savings account. Under the plan, defendant-employer would match fifty percent of plaintiff's contributions up to two percent of plaintiff's eligible compensation. The second retirement program (the "Pension Plan") was funded entirely by obligatory contributions made by defendant-employer on behalf of plaintiff, based on his income and age. The plans were maintained in separate accounts by plan administrator Fidelity Investment Services, which offered plaintiff investment options for the money contributed by plaintiff and defendant-employer. These investment options were the same for both plans and included a mix of pre-selected stocks, mutual funds, and bonds.

On 12 July 2000, plaintiff injured his back while attempting to lift luggage from a baggage belt at his workplace. In a Form 60 filed on 24 August 2000, defendant-employer and its workers' compensation carrier (collectively "defendants") admitted plaintiff's right to compensation under the North Carolina Workers' Compensation Act for

an injury by accident. Defendants reported plaintiff's "average weekly wage" as $825.55. This amount omitted defendant-employer's contributions in the 52 weeks preceding plaintiff's injury of $1,798.33 to plaintiff's Pension Plan and $899.17 to plaintiff's Savings Plan. Inclusion of these amounts in the average weekly wage calculation would have increased plaintiff's average weekly wage by $51.87 (the sum of defendant-employer's contributions to both plans divided by 52).

On 23 November 2004, plaintiff filed a Form 33 requesting a hearing because the parties were unable to agree whether defendant-employer's contributions to the Savings and Pension Plans were part of plaintiff's average weekly wage. Following a hearing on 25 May 2005, a Deputy Commissioner entered an opinion and award concluding that the contributions were not included. Plaintiff appealed to the Full Commission, which entered an opinion and award on 13 September 2006 affirming and modifying the Deputy Commissioner's decision. The Commission concluded the contributions "did not constitute earnings, but rather were a fringe benefit of [plaintiff's] employment with defendant-employer that should not be included in the calculation of his average weekly wage."

On appeal, the Court of Appeals majority reversed and remanded the case to the Commission after "conclud[ing] that not all fringe benefits are required to be excluded from an average weekly wage calculation and [that] the Commission did not apply the proper analysis in determining whether the contributions at issue in this case should be excluded." *Shaw v. U.S. Airways, Inc.*, 186 N.C. App. 474, 476-77, 652 S.E.2d 22, 23 (2007). The dissenting judge would have affirmed the Commission, disagreeing with the majority's interpretation of existing law and cautioning that "[a]ny more detailed mandates on what may and may not be included in these computations must come from our legislature, not from this Court." *Id.* at 489, 652 S.E.2d at 32 (Hunter, J., dissenting).

The sole question before us is whether defendant-employer's contributions to plaintiff's two retirement accounts should be included in plaintiff's "average weekly wage" as defined by N.C.G.S. § 97-2(5). We have observed that section 97-2(5) "sets forth in priority sequence five methods by which an injured employee's average weekly wages are to be computed." *McAninch v. Buncombe Cty. Sch.*, 347 N.C. 126, 129, 489 S.E.2d 375, 377 (1997). Plaintiff argues that defendant-employer's contributions to his retirement accounts should be included under the first method of calculating average

weekly wage, which in pertinent part provides: " 'Average weekly wages' shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . divided by 52 . . . ." N.C.G.S. § 97-2(5) (2007).

Thus, the inquiry becomes whether defendant-employer's contributions constitute "earnings." Plaintiff contends that the contributions are earnings because they represent economic gain to him and valuable consideration for his employment. Defendants argue that the contributions are not earnings because nothing in the plain language of section 97-2(5) specifically includes fringe benefits. We agree with defendants.

When interpreting a statute, we ascertain the intent of the legislature, first by applying the statute's language and, if necessary, considering its legislative history and the circumstances of its enactment. *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990) (citing *State ex rel. N.C. Milk Comm'n v. Nat'l Food Stores, Inc.*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967)). Our Workers' Compensation Act does not define "earnings." Thus, we review the historical context of the Act's adoption in 1929. At that time, fringe benefits were rare. *See Morrison-Knudsen Constr. Co. v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 461 U.S. 624, 632, 103 S. Ct. 2045, 2050, 76 L. Ed. 2d 194, 201 (1983) (noting that in 1927, when the federal workers' compensation statute at issue in that case was enacted, "employer-funded fringe benefits were virtually unknown"). Since its enactment, the original language used by the legislature in setting out the first method of calculating average weekly wages under section 97-2 has remained substantially unchanged. *See* The North Carolina Workmen's Compensation Act, ch. 120, sec. 2(e), 1929 N.C. Sess. Laws 117, 118. Moreover, the only substantive addition to this language was a 1947 amendment to include in average weekly wages subsistence allowances paid to war veteran trainees by the United States government. *See* Act of Apr. 2, 1947, ch. 627, sec. 1(1), 1947 N.C. Sess. Laws 929, 929. At no point has the General Assembly mentioned fringe benefits in their revisions of other parts of section 97-2. Given that fringe benefits were uncommon when the legislature used the term "earnings" in 1929 and the legislature's subsequent failure to address fringe benefits in the face of their proliferation, we conclude the General Assembly did not intend to include fringe benefits in the concept of earnings. Thus, we reach a different outcome from the Court of Appeals majority

because its analysis in the case below focused on whether the Act clearly *excludes* fringe benefits, rather than answering the controlling question: whether the Act specifically *includes* them.

Our statutory construction in this case is similar to that of the United States Supreme Court in *Morrison-Knudsen*, its leading case on the issue of fringe benefits in the federal workers' compensation system. In *Morrison-Knudsen*, the Court emphasized Congress's failure to include fringe benefits in numerous revisions of the Longshoremen's and Harbor Workers' Compensation Act, which was enacted in 1927, 461 U.S. at 632-37, 103 S. Ct. at 2050-53, 76 L. Ed. 2d at 201-04, and ultimately concluded that the employer's contributions to the employee's health and welfare pensions were not part of the employee's wages when calculating benefits under the Act, *id.* at 637, 103 S. Ct. at 2052-53, 76 L. Ed. 2d at 204. Relying on *Morrison-Knudsen*, the only North Carolina opinion to have addressed fringe benefits in workers' compensation cases held that it was not unfair under the fourth method of section 97-2(5) to exclude employer-paid health insurance premiums. *Kirk v. N.C. Dep't of Corr.*, 121 N.C. App. 129, 135-36, 465 S.E.2d 301, 305-06 (1995), *disc. rev. improvidently allowed*, 344 N.C. 624, 476 S.E.2d 105 (1996). While neither *Morrison-Knudsen* nor *Kirk* controls the outcome in this case, it is also true that neither gives us a compelling reason judicially to include fringe benefits as part of "earnings" under the statute.

A leading treatise on workers' compensation law provides additional guidance: "In computing actual earnings as the beginning point of wage-basis calculations, there should be included not only wages and salary but any thing of value received as consideration for the work, as, for example, tips, bonuses, commissions and room and board, constituting real economic gain to the employee." 5 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 93.01[2][a], at 93-19 (Nov. 2005) (footnotes omitted). While fringe benefits could be considered broadly as "[a] thing of value received as consideration for the work" or as "constituting real economic gain to the employee," the Larson text treats fringe benefits separately from its enumerated examples of earnings and cautions against including fringe benefits in calculations of the average weekly wage:

> Workers' compensation has been in force in the United States for over eighty years, and fringe benefits have been a common feature of American industrial life for most of that period. Millions of compensation benefits have been paid during this time.

> Whether paid voluntarily or in contested and adjudicated cases, they have always begun with a wage basis calculation that made "wage" mean the "wages" that the worker lives on and not miscellaneous "values" that may or may not someday have a value to him or her depending on a number of uncontrollable contingencies. Before a single court takes it on itself to say, "We now tell you that, although you didn't know it, you have all been wrongly calculating wage basis in these millions of cases, and so now, after eighty years, we are pleased to announce that we have discovered the true meaning of 'wage' that somehow eluded the rest of you for eight decades," that court would do well to undertake a much more penetrating analysis than is visible in the Circuit Court's opinion [which was reversed by the Supreme Court in *Morrison-Knudsen*] of why this revelation was denied to everyone else for so long.

Id. § 93.01[2][b], at 93-21 to -22.

Further support for our analysis is found in a basic understanding of "taxable income" under the Internal Revenue Code. Defendant-employer reported plaintiff's average weekly wage as $825.55, which includes plaintiff's contributions to the Savings Plan while excluding defendant-employer's matching contributions. This is consistent with the tax implications of each contribution. Plaintiff's contributions were simply the portion of his gross wages that he chose to place in the Savings Plan. While plaintiff's contributions were not subject to federal income tax at the time they were "earned" by plaintiff, they remained subject to federal Medicare and Social Security taxes. Internal Revenue Serv., U.S. Dep't of the Treasury, Publ'n No. 525, *Taxable and Nontaxable Income* 8 (2007). However, defendant-employer's contributions are subject to neither federal income tax nor Medicare and Social Security taxes. *See id.* Thus, the gross amount of plaintiff's earnings, including his retirement contributions, are treated as taxable income to some extent, whereas defendant-employer's contributions are not.

Noting the foregoing persuasive authorities, we acknowledge that fringe benefits are prevalent today, thus making their inclusion in the computation of benefits under the Workers' Compensation Act a significant issue. As we have stated before:

> This Court has interpreted the statutory provisions of North Carolina's workers' compensation law on many occasions. In every instance, we have been wisely guided by several sound

> rules of statutory construction which bear repeating at the outset here. First, the Workers' Compensation Act should be liberally construed, whenever appropriate, so that benefits will not be denied upon mere technicalities or strained and narrow interpretations of its provisions. Second, such liberality should not, however, extend beyond the clearly expressed language of those provisions, and our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of "judicial legislation." Third, it is not reasonable to assume that the legislature would leave an important matter regarding the administration of the Act open to inference or speculation; consequently, the judiciary should avoid "ingrafting upon a law something that has been omitted, which [it] believes ought to have been embraced."

Deese, 306 N.C. at 277-78, 293 S.E.2d at 142-43 (alteration in original) (citations omitted). Without further guidance from our legislature, we will not issue an opinion requiring the Industrial Commission to consider whether "earnings" includes fringe benefits. We do not know what practical effect such a holding would have on employee benefits. On the one hand, a more modern and fair notion of "earnings" might logically include the cash value of fringe benefits, which are strong incentives for many employees in choosing one employer over another. However, inclusion of fringe benefits as part of "earnings" in calculating workers' compensation benefits might deter employers from offering those benefits in the first place. Weighing these and other public policy considerations is the province of our General Assembly, not this Court.

Based on the plain language of section 97-2(5), we hold that employer contributions to an employee's retirement accounts are not included in the calculation of the employee's average weekly wage. Accordingly, we reverse the Court of Appeals.

REVERSED.

Justice HUDSON dissenting.

Plaintiff Shaw argued, and the Court of Appeals agreed, that in his narrow circumstances, when the employer's contributions to his pension and 401(k) plan are fully paid, vested, and quantifiable, they should have been included in the calculation of his average weekly wages under N.C.G.S. § 97-2(5). Since I believe that existing legal

authority from this Court supports the Court of Appeals majority and the plaintiff's position, I respectfully dissent.

Most fundamentally, prior language from this Court directly contradicts the majority's holding today. The issue here is whether the amounts contributed by the employer to plaintiff's pension and 401(k) plan should have been considered as earnings for purposes of determining the average weekly wage under this section. The Commission found as fact, and the parties do not dispute, that the total of the employer contributions in the year at issue is $1,798.33 (to pension) plus $899.17, which, if divided by 52, would increase plaintiff's average weekly wage by $51.87. The pivotal point is simply whether the employer's contributions to the pension plan constitute "earnings" within the context of N.C.G.S. § 97-2(5). In the government context, we have already held that: " ' "A pension paid . . . is a deferred portion of the compensation earned for services rendered." ' If a pension is but deferred compensation, already in effect earned, merely transubstantiated over time into a retirement allowance, then an employee has contractual rights to it. . . . Fundamental fairness also dictates this result." *Bailey v. State*, 348 N.C. 130, 141, 500 S.E.2d 54, 60 (1998) (quoting *Simpson v. N.C. Local Gov't Employees' Ret. Sys.*, 88 N.C. App. 218, 223-24, 363 S.E.2d 90, 94 (1987) (quoting *Great Am. Ins. Co. v. Johnson*, 257 N.C. 367, 370, 126 S.E.2d 92, 94 (1962)), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988)). With language so precisely on point, our inquiry should stop there. Having already held that retirement accounts for state employees are sufficiently sacrosanct to invoke the Contracts Clause of the state and federal constitutions, and even to pierce sovereign immunity, I cannot agree with a holding that consigns similar rights for an injured worker to some ephemeral realm not encompassed in the universe of "earnings."

Beyond *Bailey*, few rules are better established than that the Workers' Compensation Act must be liberally construed, to the end that benefits for injured workers not be limited or denied based on narrow or strained technical interpretations of the Act. *E.g. Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998); *Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968); *Johnson v. Asheville Hosiery Co.*, 199 N.C. 38, 40, 153 S.E. 591, 593 (1930). The section of the Act at issue here reads in pertinent part: " 'Average Weekly wages' shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . ." N.C.G.S. § 97-2(5) (2007). Defendants contend

that these amounts, while earned by plaintiff, are not "earnings" within the meaning of the statute because these types of payments are not specifically mentioned in the Act. For several reasons in addition to *Bailey*, I conclude that this interpretation is not consistent with the well-established requirement of liberal construction, but represents the opposite. The plain language of N.C.G.S. § 97-2(5) appears to contemplate that amounts beyond basic wages should be included in the statutory term "average weekly wages," by the use of the word "earnings." The General Assembly clearly knew how to use the word "wages" if that is what it intended; in this section, it used the broader term "earnings."

Defendants and the dissent in the Court of Appeals argue that because the kinds of benefits at issue here did not exist when the Act was first written in 1929 and the statute was not amended over the years specifically to include them, they must be excluded. I disagree, since I conclude that the language of the section is broad enough to include them, and other language in the Act supports that this was the legislature's intent. For example, although this language is not at issue here, this section provides elsewhere that "[w]herever allowances *of any character* made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings." *Id.* (emphasis added). This part of the section indicates clearly that the legislature intended that additional payments of any kind should be included in the computation of average weekly wage.

Defendants and the dissent refer to the amounts at issue here as "fringe benefits," not intended for inclusion. I conclude otherwise, in that such benefits are no longer considered "fringe" (if they ever were), but are actually a critical part of the package of recompense, and a central part of the employment contract. It is undisputed that plaintiff left a higher-paying job to join defendant precisely *because* of the employer contribution at stake here. Common sense dictates that being the impetus for switching jobs, the contributions represented something of value—the linchpin of determining whether a particular benefit should be included as the basis of wage-benefit calculations. *See* 5 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 93.01[2][a] (Nov. 2005). It is not realistic, in my view, to require the legislature to amend this section of the Act whenever a new form of benefit comes into existence, in light of the broad language of the existing statute.

Moreover, I do not believe that the cases relied upon by defendants, especially *Morrison-Knudsen* and *Kirk*, compel the conclusion argued. *Morrison-Knudsen Constr. Co. v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 461 U.S. 624, 76 L. Ed. 2d 194 (1983); *Kirk v. N.C. Dep't of Corr.*, 121 N.C. App. 129, 465 S.E.2d 301 (1995), *disc. rev. improvidently allowed*, 344 N.C. 624, 476 S.E.2d 105 (1996).

In *Morrison-Knudsen*, a case brought under the federal Longshoremen's and Harbor Workers' Compensation Act, the issue concerned whether employer contributions to the union trust fund should be considered as "wages." 461 U.S. at 626, 76 L. Ed. 2d at 197. In that case, not brought under our statute, the benefits in question were not quantifiable and it was unclear from the record whether they were vested as they are here. *Id.* at 627-28, 76 L. Ed. 2d at 198. Thus, the analysis is inapposite. Further, in *Kirk*, the Court was asked to include health insurance premiums in average weekly wages. 121 N.C. App. at 134, 465 S.E.2d at 305. Again, these benefits were not vested, quantifiable, or paid to the plaintiff in cash equivalent. *Id.* at 136, 465 S.E.2d at 306.

Here, the contributions to plaintiff were vested, quantifiable (and quantified above), and available to plaintiff, in that he could have withdrawn them at any time, albeit at risk of penalty and tax consequences. The majority's assertion that "defendant-employer's contributions are subject to neither federal income tax nor Medicare and Social Security taxes" is simply incorrect; they are taxed as income at the time they are withdrawn, with penalties if withdrawn early.

The majority also relies on selected excerpts from a federal income tax guide. The publication provides persuasive, not binding, authority in yet another context—federal income tax. However, a study of the Internal Revenue Code itself shows that the payments at issue here *are* treated as regular income upon withdrawal—a position that runs directly contrary to the majority's holding today. *See, e.g.*, I.R.C. § 402(h)(3) (2000) (providing that contributions to retirement accounts are subject to tax upon withdrawal: "Any amount paid or distributed out of an individual retirement plan pursuant to a simplified employee pension shall be included in gross income by the payee or distributee, as the case may be . . . ."). Therefore, the majority's reliance on an Internal Revenue Service guide is misplaced at best.

Plaintiff has argued persuasively that in his limited circumstances, when the employer's contributions are fully vested, quantifiable, and available to him personally as cash equivalent, such benefits should be included in the calculation of his average weekly wage pursuant to N.C.G.S. § 97-2(5). I conclude that the long-standing tradition and mandate of liberal construction of the Workers' Compensation Act require that we include, rather than exclude, these amounts from plaintiff's average weekly wage. While it is not for us to expand the benefits the legislature has prescribed under the Workers' Compensation Act, it is equally inappropriate for us to shrink them in the absence of a statutory mandate to do so. For these reasons, I would affirm the Court of Appeals.

Justice TIMMONS-GOODSON joins in this dissenting opinion.

O'MARA v. WAKE FOREST UNIV. HEALTH SCIENCES

[362 N.C. 468 (2008)]

JOSEPH O'MARA, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, LARRY REAVIS; AND JANELLA O'MARA	)	
v.	)	ORDER
WAKE FOREST UNIVERSITY HEALTH SCIENCES; NORTH CAROLINA BAPTIST HOSPITAL; FORSYTH MEMORIAL HOSPITAL, INC.; AND NOVANT HEALTH, INC.	)	

No. 414PA07

Having reviewed the briefs and heard oral arguments on plaintiffs' appeal on 6 May 2008, the Court *ex mero motu* modifies its previous order, dated 6 December 2007, by further allowing plaintiffs' petition for discretionary review for the limited purpose of ordering briefing on the questions of (i) whether the trial court erred by allowing defendants' motion to disqualify plaintiffs' expert witness based upon deposition testimony in response to defendants' questions alone without giving plaintiffs the opportunity to voir dire the witness or submit evidence in opposition to the motion and (ii) if the trial court did err, whether this error was prejudicial to plaintiffs.

Plaintiffs shall have thirty (30) days from the date of this order to file and serve their brief, and defendants shall have thirty (30) days from the service of plaintiffs' brief to file and serve their brief.

The Court will render its decision without further oral argument.

By order of the Court in conference, this the 9th day of May, 2008.

Hudson, J.
For the Court

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

Austin v. Bald II, L.L.C. Case below: 189 N.C. App. 338	No. 179P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1152)	Denied 08/26/08
Blaylock Grading Co., LLP v. Smith Case below: 189 N.C. App. 508	No. 208P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-615)	Denied 08/26/08
Burnette v. City of Goldsboro Case below: 188 N.C. App. 164	No. 073P08	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA06-1672)	Denied 08/26/08
Burrell v. Sparkkles Reconstruction Co. Case below: 189 N.C. App. 104	No. 159P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-494)	Denied 08/26/08
Cameron v. Bissette Case below: 190 N.C. App. —— (20 May 2008)	No. 301P08	Plts' PDR Under N.C.G.S. § 7A-31 (COA07-408)	Denied 08/26/08
Carolina First Bank v. Stark, Inc. Case below: 190 N.C. App. —— (20 May 2008)	No. 369P08	Defs' Motion for Temporary Stay (COA07-833)	Allowed 08/12/08
Christopher v. N.C. State Univ. Case below: 190 N.C. App. —— (20 May 2008)	No. 246P08	1. Plt's NOA Based Upon a Constitutional Question (COA07-1516) 2. Def's Motion to Dismiss Appeal 3. Plt's PDR Under N.C.G.S. § 7A-31 4. Plt's Petition for Writ of Supersedeas 5. Plt's Motion for Temporary Stay 6. Plt's Motion to Expedite Appeal	1. —— 2. Allowed 08/26/08 3. Denied 08/26/08 4. Denied 08/26/08 5. Denied 08/26/08 6. Denied 08/26/08

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

Crutchfield v. Carolina Football Enters., Inc. Case below: 189 N.C. App. 530	No. 223P08	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA07-748) 2. Def's (Traveler's) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 08/26/08 2. Dismissed as Moot 08/26/08 **Hudson, J., Recused**
Curl v. American Multimedia, Inc. Case below: 187 N.C. App. 649	No. 021P08	1. Plts' (Curl and Boger) PDR Under N.C.G.S. § 7A-31 (COA07-444) 2. Plts' Motion to Withdraw PDR	1. —— 2. Allowed 08/26/08
Davidson Cty. Broadcasting, Inc. v. Rowan Cty. Bd. of Comm'rs Case below: 186 N.C. App. 81	No. 517P07	Petitioners' (Broadcasting, et al.) PDR Under N.C.G.S. § 7A-31 (COA06-1444)	Denied 08/26/08
Edmunson v. Lawrence Case below: 187 N.C. App. 799	No. 026P08	1. Plts' NOA Based Upon a Constitutional Question Under N.C.G.S. § 7A-30(1) (COA07-694) 2. Defs' Motion to Dismiss Appeal 3. Plts' PDR Under N.C.G.S. § 7A-31 4. Plts' PDR (Prior to Determination) (COA08-83)	1. —— 2. Allowed 08/26/08 3. Denied 08/26/08 4. Denied 08/26/08
Fulmore v. Howell Case below: 189 N.C. App. 93	No. 526P07-2	Defs' (Howell & PFS Distribution) PDR Under N.C.G.S. § 7A-31 (COA07-984)	Denied 08/26/08
Good Hope Health Sys. v. Town of Lillington Case below: 188 N.C. App. 68	No. 248P07-2	1. Petitioner and Petitioner-Intervenors' (Good Hope & Town of Lillington) PDR Under N.C.G.S. § 7A-31 (COA07-551) 2. Petitioner & Petitioner-Intervenors' Motion to Consider Supplemental Response 3. Respondents' (NCDHHS, Harnett Health, et al.) Motion to Strike Response	1. Denied 08/26/08 2. —— 3. Allowed 08/26/08
Horry v. Woodbury Case below: 189 N.C. App. 669	No. 198A08	1. Def's PDR Under N.C.G.S. § 7A-31 (COA07-477) 2. Plt's NOA (Dissent)	1. Denied 08/26/08 2. ——

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

In re C.M.W. Case below: 190 N.C. App. 205	No. 239P08	1. State's Motion for Temporary Stay (COA07-1315) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 05/27/08 362 N.C. 357 Stay Dissolved 08/26/08 2. Denied 08/26/08 3. Denied 08/26/08
In re Estate of Dunn Case below: 187 N.C. App. 509	No. 010P08	Propounder's (Sandra Herring) PDR Under N.C.G.S. § 7A-31 (COA07-191)	Denied 08/26/08
In re Estate of Mills Case below: 187 N.C. App. 305	No. 572P07	1. Appellant's (Jerry S. Mills) NOA (COA07-334) 2. Appellees' (Green & Tomberlin) Motion to Dismiss Appeal 3. Appellant's (Jerry S. Mills) PDR Under N.C.G.S. § 7A-31 4. Appellees' (Green & Tomberlin) Motion to Impose Sanctions in the Form of Reasonable Attorney's Fees 5. Appellees' (Green & Tomberlin) Motion to Remand the Case to the Trial Division for Determination of Attorney's Fees	1. —— 2. Allowed 08/26/08 3. Denied 08/26/08 4. Denied 08/26/08 5. Denied 08/26/08
In re J.T. (I), J.T. (II), & A.J. Case below: 189 N.C. App. 206	No. 155P08	1. Petitioners' (Cumberland Co. DSS and GAL) Motion for Temporary Stay (COA07-1372) 2. Petitioners' (Cumberland Co. DSS and GAL) Petition for Writ of Supersedeas 3. Petitioners' (Cumberland Co. DSS and GAL) PDR Under N.C.G.S. § 7A-31 4. Respondent's (Father) Motion to Dismiss PDR	1. Allowed 04/10/08 362 N.C. 358 2. Allowed 08/26/08 3. Allowed 08/26/08 4. Dismissed as Moot 08/26/08
In re K.H. Case below: 189 N.C. App. 403	No. 186P08	1. Petitioners' (Cumberland Co. DSS & GAL) Motion for Temporary Stay (COA07-1277) 2. Petitioners' (Cumberland Co. DSS & GAL) Petition for Writ of Supersedeas 3. Petitioners' (Cumberland Co. DSS & GAL) PDR Under N.C.G.S. § 7A-31	1. Denied 04/23/08 362 N.C. 358 2. Denied 08/26/08 3. Denied 08/26/08

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

In re K.T.L. Case below: 177 N.C. App. 365	No. 293P06	Appellant's (Juvenile) PDR Under N.C.G.S. § 7A-31 (COA05-667)	Denied 01/25/07
In re M.G., M.B., K.R., J.R. Case below: 187 N.C. App. 536	No. 036P08	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA07-643) 2. Respondent's (Father) Motion to Dismiss Petition for Discretionary Review 3. Petitioner's Motion to Deem Petition Timely Filed 4. Petitioner's Alternative PWC to Review Decision of COA 5. Petitioner's PWC to Review Decision of COA	1. Allowed 08/26/08 2. Denied 08/26/08 3. Allowed 4. Dismissed as Moot 08/26/08 5. Dismissed as Moot 08/26/08
In re P.R., H.R. Case below: 189 N.C. App. 530	No. 178P08	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA07-1432)	Denied 08/26/08
Jones v. Robbins Case below: 190 N.C. App. —— (6 May 2008)	No. 267P08	Respondent's (Corbett Industries) PDR Under N.C.G.S. § 7A-31 (COA07-375 & 07-488)	Denied 08/26/08
Klinger v. SCI N.C. Funeral Servs., Inc. Case below: 189 N.C. App. 404	No. 187P08	Plt's PDR Under N.C.G.S. § 7A-30 (COA07-620)	Denied 08/26/08
Majors v. Majors Case below: 189 N.C. App. 210	No. 156P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-392)	Denied 08/26/08
Marriott v. Chatham Cty. Case below: 187 N.C. App. 491	No. 057P08	Plts' PDR Under N.C.G.S. § 7A-31 (COA07-326)	Denied 08/26/08

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

Midsouth Golf, LLC v. Fairfield Harbourside Condo. Ass'n Case below: 187 N.C. App. 22	No. 589P07	1. Plt's Motion for Temporary Stay (COA07-64) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Plt's Alternative PWC to Review Decision of COA 4. Plt's Petition for Writ of Supersedeas	1. Allowed 12/20/07 362 N.C. 177 Stay Dissolved 08/26/08 2. Denied 08/26/08 3. Dismissed as Moot 08/26/08 4. Denied 08/26/08
Miles v. Koon Case below: 190 N.C. App. 206	No. 287P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-1181)	Denied 08/26/08
Mosteller Mansion, LLC v. Mactec Eng'g & Consulting of Georgia, Inc. Case below: 190 N.C. App. —— (20 May 2008)	No. 297P08	Plt's (Mosteller Mansion) PDR Under N.C.G.S. § 7A-31 (COA07-664)	Denied 08/26/08
Norman v. N.C. Dep't of Transp. Case below: 190 N.C. App. 206	No. 052P04-3	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-894)	Denied 08/26/08
Pace v. Wake Forest Baptist Church Case below: 189 N.C. App. 531	No. 240P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-755)	Denied 08/26/08
Pickett v. Roberson Case below: 186 N.C. App. 132	No. 521P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1313)	Denied 08/26/08
Pulte Home Corp. v. American S. Ins. Co. Case below: 185 N.C. App. 162	No. 511P07	1. Def's (Ins. Co.) PDR Under N.C.G.S. § 7A-31 (COA06-747) 2. Def's (Ins. Co.) Motions for Admission of Counsel Pro Hac Vice	1. Denied 08/26/08 2. Allowed 08/26/08
PVC, Inc. v. McKim and Creed, PA Case below: 188 N.C. App. 632	No. 142P08	Third-Party Plt's (S&ME) PDR Under N.C.G.S. § 7A-31 (COA07-311)	Denied 08/26/08

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

Randell ex rel. Forest v. Beacham Case below: 188 N.C. App. 632	No. 108P08	1. Unnamed Def's PDR Under N.C.G.S. § 7A-31 (COA07-348) 2. Plts' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 08/26/08 2. Dismissed as Moot 08/26/08
Riverpointe Homeowners Ass'n v. Mallory Case below: 188 N.C. App. 837	No. 130A08	Def's NOA Based Upon a Constitutional Question (COA07-127)	Retained 08/26/08
Rowlette v. State Case below: 188 N.C. App. 712	No. 131P08	1. Plt's NOA Based Upon a Constitutional Question (COA06-1036) 2. State's Motion to Dismiss Appeal 3. Plt's Alternative PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/26/08 3. Denied 08/26/08
Saft America, Inc. v. Plainview Batteries, Inc. Case below: 189 N.C. App. 579	No. 204A08	1. Plt's NOA (Dissent) (COA07-823) 2. Def's (Energex Batteries) PDR as to Additional Issues	1. —— 2. Allowed 08/26/08 **Timmons-Goodson, J., Recused**
Sandoval v. Pillowtex Corp. Case below: 187 N.C. App. 305	No. 610P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-474)	Denied 08/26/08
Scott v. Ross Case below: 188 N.C. App. 847	No. 177P08	Defs' PDR Under N.C.G.S. § 7A-31 (COA07-104)	Denied 08/26/08
Seagle v. Herring Case below: 190 N.C. App. 206	No. 273P08	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA07-655) 2. Motion Filed by Linda H. Seagle to Substitute Party Plt	1. Denied 08/26/08 2. Allowed 08/26/08
Shuford v. Regal Mfg. Co./Worldtex, Inc. Case below: 188 N.C. App. 633	No. 100P08	Defs' (Regal Mfg./Worldtex and Crum & Foster) PDR Under N.C.G.S. § 7A-31 (COA07-772)	Denied 08/26/08

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

Skeen v. Warren & Sweat Mfg., Inc. Case below: 189 N.C. App. 210	No. 149P08	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA06-999) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 08/26/08 2. Dismissed as Moot 08/26/08
St. John Christian Holiness Church of God v. Hines Case below: 189 N.C. App. 404	No. 139P08	1. Defs' (Hines & Ellis-Smith) NOA Based Upon a Constitutional Question (COA07-820) 2. Defs'(Hines & Ellis-Smith) PDR Under N.C.G.S. § 7A-31 3. Defs' (Hines & Ellis-Smith) Petition for Mandatory Review Under N.C.G.S. § 7A-30	1. Dismissed *Ex Mero Motu* 08/26/08 2. Denied 08/26/08 3. Dismissed *Ex Mero Motu* 08/26/08
State v. Applewhite Case below: 190 N.C. App. 132	No. 226P08	Def's Motion for "Notice of Appeal" (COA07-1399)	Denied 08/26/08
State v. Baskin Case below: 190 N.C. App. 102	No. 249P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-832)	Denied 08/26/08
State v. Bernard Case below: 190 N.C. App. 206	No. 282P08	Def-Appellant's PDR (COA07-1289)	Denied 08/26/08
State v. Bowman Case below: 188 N.C. App. 635	No. 105P08	1. State's Motion for Temporary Stay (COA06-1146) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 03/11/08 362 N.C. 363 Stay Dissolved 08/26/08 2. Denied 08/26/08 3. Denied 08/26/08 4. Dismissed as Moot 08/26/08
State v. Bryson Case below: 190 N.C. App. 206	No. 248P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1230)	Denied 08/26/08

State v. Calhoun Case below: 189 N.C. App. 166	No. 151P08	1. Def's NOA Based Upon a Constitutional Question (COA07-580) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/26/08 3. Denied 08/26/08
State v. Caudill Case below: 188 N.C. App. 166	No. 071P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-96)	Denied 08/26/08
State v. Coltrane Case below: 188 N.C. App. 498	No. 099P08	1. Def's NOA Based Upon a Constitutional Question (COA07-486) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Continue or Hold Petition in Abeyance Pending Resolution of Issues by the Supreme Court of NC	1. Dismissed *Ex Mero Motu* 08/26/08 2. Denied 08/26/08 3. Denied 08/26/08
State v. Cook Case below: 190 N.C. App. —— (20 May 2008)	No. 254P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1096)	Denied 08/26/08
State v. Cooper Case below: 186 N.C. App. 100	No. 490P07	1. AG's Motion for Temporary Stay (COA06-1356) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed 10/08/07 361 N.C. 698 Stay Dissolved 08/26/08 2. Denied 08/26/08 3. Denied 08/26/08
State v. Cotton Case below: Moore County Superior Court	No. 344P08	1. Def's PWC 2. Def's Motion to Join for Consideration (with 221P08 & 343P08)	1. Denied 08/26/08 2. Allowed 08/26/08
State v. Cox Case below: 191 N.C. App. —— (3 June 2008)	No. 320P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1171)	Denied 08/26/08
State v. Cruz Case below: 181 N.C. App. 149	No. 047P07-2	Def-Appellant's PWC (COA06-259)	Denied 08/26/08 **Hudson, J., Recused**

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

State v. Drayton Case below: 189 N.C. App. 531	No. 207P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-943)	Denied 08/26/08
State v. Forte Case below: 190 N.C. App. 206	No. 263P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-739)	Denied 08/26/08
State v. Graham Case below: 186 N.C. App. 182	No. 536P07	1. Def's PDR Under N.C.G.S. § 7A-31 (COA06-837) 2. Def-Appellant's NOA Based Upon a Constitutional Question 3. State's Motion to Dismiss Appeal	1.Denied 08/26/08 2. —— 3. Allowed 08/26/08
State v. Hanton Case below: 188 N.C. App. 167	No. 054P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-313)	Denied 08/26/08
State v. Hughes Case below: 189 N.C. App. 531	No. 211P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1227)	Denied 08/26/08
State v. Hunter Case below: 184 N.C. App. 379	No. 518P07	Def's PWC to Review Decision of COA (COA06-1203)	Denied 08/26/08
State v. Ibarra Case below: 189 N.C. App. 788	No. 227P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1236)	Denied 08/26/08
State v. Larson Case below: 189 N.C. App. 211	No. 146P08	1. Def's NOA Based Upon a Constitutional Question (COA07-472) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/26/08 3. Denied 08/26/08
State v. Lee Case below: 189 N.C. App. 474	No. 206P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-539)	Denied 08/26/08
State v. McDuffie Case below: 190 N.C. App. 207	No. 262P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1177)	Denied 08/26/08

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

State v. Melvin Case below: 190 N.C. App. —— (20 May 2008)	No. 281P08	Def's "Petition for Writ of Discretionary Review" (COA07-1284)	Denied 08/26/08
State v. Miller Case below: 191 N.C. App. —— (17 June 2008)	No. 309A08	1. State's Motion for Temporary Stay (COA07-1037) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal (Dissent)	1. Allowed 07/03/08 2. Allowed 07/03/08 3. ——
State v. Mintz Case below: 188 N.C. App. 167	No. 080P08	1. Def's NOA Based Upon a Constitutional Question (COA07-167) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/26/08 3. Denied 08/26/08
State v. Newman Case below: 186 N.C. App. 382	No. 561P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1523)	Denied 08/26/08
State v. Oglesby Case below: 186 N.C. App. 681	No. 683P05-2	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1534-2)	Denied 08/26/08
State v. Page Case below: 189 N.C. App. 532	No. 210P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-699)	Denied 08/26/08
State v. Purser Case below: Stanly County Superior Court	No. 221P08	1. Def's PWC to Review Order of Stanly County Superior Court 2. Def's Motion to Join for Consideration (with 343P08 & 344P08)	1. Denied 08/26/08 2. Allowed 08/26/08
State v. Richardson Case below: Nash County Superior Court	No. 232A95-4	Def's PWC to Review Order of Nash County Superior Court	Denied 08/26/08
State v. Rollins Case below: 189 N.C. App. 248	No. 138P08	1. State's Motion for Temporary Stay (COA07-380) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 04/01/08 362 N.C. 369 2. Allowed 08/26/08 3. Allowed 08/26/08

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

State v. Ross Case below: 188 N.C. App. 167	No. 056P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-358)	Denied 08/26/08
State v. Rumph Case below: 174 N.C. App. 367	No. 304P08	Def's PWC to Review Decision of COA (COA05-281)	Dismissed 08/26/08
State v. Smith Case below: 188 N.C. App. 207	No. 065P08	1. Def's NOA Based Upon a Constitutional Question (COA06-1631) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/26/08 3. Denied 08/26/08
State v. Smith Case below: 187 N.C. App. 813	No. 024P08	Def-Appellant's PDR Under N.C.G.S. § 7A-31 (COA07-458)	Denied 08/26/08
State v. Stuart Case below: 185 N.C. App. 544	No. 472P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-908)	Denied 08/26/08
State v. Tante Case below: 189 N.C. App. 212	No. 148P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-457)	Denied 08/26/08
State v. Taylor Case below: 191 N.C. App. —— (5 August 2008)	388P08	State's Motion for Temporary Stay (COA07-391)	Allowed 08/25/08
State v. Toler Case below: 189 N.C. App. 212	No. 157P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-337)	Denied 08/26/08
State v. Upchurch Case below: 189 N.C. App. 212	No. 123P08	1. State's Motion for Temporary Stay (COA07-779) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 03/20/08 362 N.C. 371 Stay Dissolved 08/26/08 2. Denied 08/26/08 3. Denied 08/26/08

State v. Ventura Case below: Moore County Superior Court	No. 343P08	1. Def's PWC 2. Def's Motion to Join for Consideration (with 221P08 & 344P08)	1. Denied 08/26/08 2. Allowed 08/26/08
State v. Ware Case below: 188 N.C. App. 790	No. 129P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-260)	Denied 08/26/08
State v. Waters Case below: 189 N.C. App. 789	No. 232P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-557)	Denied 08/26/08
State v. Williams Case below: 190 N.C. App. —— (6 May 2008)	No. 276P08	1. Def's PDR Under N.C.G.S. § 7A-31 (COA07-1057) 2. State's Motion to Deem Response Timely Filed	1. Denied 08/26/08 2. Denied 08/26/08
State v. Williams Case below: 190 N.C. App. 173	No. 235P08-2	Def's "Motion for Petition for Discretionary Review" (COA07-1462)	Dismissed 08/26/08
State v. Wright Case below: 189 N.C. App. 346	No. 145P08	1. State's Motion for Temporary Stay (COA07-611) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 04/07/08 362 N.C. 372 Stay Dissolved 08/26/08 2. Denied 08/26/08 3. Denied 08/26/08
State v. Young Case below: 188 N.C. App. 848	No. 096P08	1. Def's NOA Based Upon a Constitutional Question (COA07-234) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31 4. State's Conditional PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/26/08 3. Denied 08/26/08 4. Dismissed as Moot 08/26/08

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

Sugar Creek Charter School, Inc., v. Charlotte-Mecklenburg Bd. of Educ. Case below: 188 N.C. App. 454	No. 116P08	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA07-207) 2. Motion by Defs' Counsel to Withdraw 3. Defs' Motion to Supplement PDR (Lack of Subject Matter Jurisdiction)	1. Denied 08/26/08 2. Allowed 08/26/08 3. Denied 08/26/08
Teague v. N.C. Dep't of Transp. Case below: 177 N.C. App. 215	No. 281P06-6	1. Plt-Appellant's Motion for Temporary Stay (COA05-522) 2. Plt-Appellant's PWC Based on Additional Issues	1. Denied 07/22/08 2. **Edmunds, J., Recused**
Wake Cares, Inc. v. Wake Cty. Bd. of Educ. Case below: 190 N.C. App. 1	No. 230P08	1. Plts' Motion for Temporary Stay (COA07-810) 2. Plts' Petition for Writ of Supersedeas 3. Plts' NOA Based Upon a Constitutional Question 4. Defs' Motion to Dismiss Appeal 5. Plts' Alternative PDR Under N.C.G.S. § 7A-31 6. Defs' Motion to Dissolve Temporary Stay 7. Defs' Motion to Deny Petition for Writ of Supersedeas	1. Allowed 05/22/08 362 N.C. 373 2. Allowed 08/26/08 3. —— 4. Allowed 08/26/08 5. Allowed 08/26/08 6. Dismissed as Moot 08/26/08 7. Dismissed as Moot 08/26/08 **Martin, J., Recused**
Ward v. Jett Properties, LLC Case below: 190 N.C. App. 208	No. 268P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-1448)	Denied 08/26/08
Yadkin Valley Bank & Tr. Co. v. AF Fin. Grp. Case below: 190 N.C. App. 208	No. 279P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-240 & 07-417)	Denied 08/26/08

IN RE: INQUIRY CONCERNING A JUDGE, NO. 06-216 MARK H. BADGETT, RESPONDENT

No. 144A08

(Filed 10 October 2008)

Judges— censure and removal—willful misconduct

A district court judge was censured and removed from office after: making statements in a civil domestic violence hearing about nationality or ethnicity which raised at least the appearance of bias; awarding spousal support when none had been requested and without evidence; ordering a deputy to search defendant's wallet and give the dollars found therein to plaintiff; and willfully attempting to hide his misdeeds by making untruthful, deceptive, and inconsistent statements to an SBI agent and attempting to influence the recollections of a deputy clerk and attorney. Moreover, he had a pattern of disregard for the integrity of the judicial office and had been censured and suspended previously; his willful misconduct amounted to a serious betrayal of the public trust.

This matter is before the Court pursuant to N.C.G.S. § 7A-376 upon a recommendation by the Judicial Standards Commission entered 6 March 2008 that respondent Mark H. Badgett, a Judge of the General Court of Justice, District Court Division, State of North Carolina Judicial District Seventeen-B, be censured for conduct in violation of Canons 1, 2A, 3A(1), and 3A(3) of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute and for willful misconduct in office in violation of N.C.G.S. § 7A-376. Heard in the Supreme Court 9 September 2008.

Robert C. Montgomery, Special Counsel, for the Judicial Standards Commission.

Randolph and Fischer, by J. Clark Fischer, for respondent.

BRADY, Justice.

ORDER OF CENSURE AND REMOVAL

This matter is before the Court upon the 6 March 2008 recommendation of the Judicial Standards Commission that respondent

Mark H. Badgett be censured as a result of his actions during and after a civil domestic violence hearing over which he presided as a district court judge in Surry County. Because of respondent's persistent acts of willful misconduct, we decline to accept the recommendation of the Judicial Standards Commission and instead order that respondent be censured and removed from office.

PROCEDURAL BACKGROUND

In a letter dated 8 November 2006, the Judicial Standards Commission (the Commission) notified respondent that it had ordered a preliminary investigation into allegations that respondent improperly ordered Floyd Mandez Carreon to be searched and "his money and vehicle keys seized and given to the plaintiff following a civil domestic violence hearing." In a filing dated 25 July 2007, the Commission notified respondent of the commencement of disciplinary proceedings against him for allegations of "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" and "willful misconduct." On 14 August 2007, respondent answered these allegations, and on 14 and 15 February 2008, the Commission heard evidence on this matter. On 6 March 2008, the Commission entered a formal recommendation to this Court that respondent be censured for his conduct arising from the Carreon case and his actions during the Commission's investigation.

FACTUAL BACKGROUND

The Commission made the following findings of fact in its recommendation:

> 1. Judge Mark H. Badgett was at all times referred to herein and is now a Judge of the General Court of Justice, District Court Division, Judicial District Seventeen-B, and as such is subject to the Canons of the North Carolina Code of Judicial Conduct, the laws of the State of North Carolina, and the provisions of the oath of office for a district court judge set forth in the North Carolina General Statutes, Chapter 11.
>
> 2. On 11 February 2005, a matter entitled *Kathy Mandez Carreon v. Floyd Mandez Carreon*, 05CvD164, was commenced in the District Court of Surry County in which the plaintiff sought a domestic violence protective order against the defendant. A copy of the complaint and summons, as well as an *ex parte* domestic violence order issued 17 February 2005, were served on the defendant, Florenzo Carreon, who is also know[n] as Floyd

Carreon, on or about 18 February 2005 and the matter was set for hearing on 24 February 2005.

3. On 24 February 2005, the respondent was presiding in the juvenile/DSS court in Surry County when the *Carreon* matter was brought before him for hearing. Deputy Clerk of Superior Court Melissa Marion and Deputy Clerk of Superior Court Ann Gillespie were also in the courtroom, as was the courtroom bailiff, Deputy Sheriff Larry Jones. Counsel for Mrs. Carreon, Stephanie Talbert (now Goldsborough) advised the respondent that defendant Floyd Carreon had offered to consent to the entry of a domestic violence order of protection but was unwilling to admit to the commission of the acts alleged in the complaint, and denied having engaged in violence toward Mrs. Carreon. Respondent declined to enter the consent order of protection. At that point, Mr. Carreon requested the respondent to allow him time to obtain counsel; respondent told him he had no right to a court-appointed counsel but permitted Mr. Carreon to leave the courtroom for approximately an hour to see if he could find counsel to represent him. Mr. Carreon consulted with attorney Hugh Mills, but was unable to arrange for Mr. Mills to represent him on that date. Mr. Mills advised Mr. Carreon to ask for a continuance.

4. Mr. Carreon returned to the courtroom within the time which had been permitted by respondent. Respondent saw Mr. Carreon return to the courtroom and observed that Mr. Mills had briefly come into the courtroom with Mr. Carreon and had then left the courtroom. Mr. Carreon again asked for a continuance in order to retain counsel; respondent denied the request even though Ms. Talbert did not oppose the motion. The usual practice in Surry County was to routinely allow continuances of such hearings. At the hearing before the Commission, respondent testified that he denied the request because he was of the understanding that the *ex parte* order would expire after 10 days and because the allegations made by Mrs. Carreon were serious. Respondent proceeded with the hearing, requiring Mr. Carreon to proceed *pro se*. After hearing testimony by Mrs. Carreon and by Mr. Carreon, respondent indicated that he would grant the order of protection.

5. After respondent indicated he would grant the order of protection, Mrs. Carreon made a statement to respondent to the effect that she had no money, was without electric power, and needed transportation. The complaint had not sought spousal

support, but respondent inquired of Ms. Talbert as to an amount of support she thought appropriate. Ms. Talbert hesitated, inasmuch as she had neither offered evidence on the issue of spousal support or prepared to litigate the issue, and then stated that she believed an amount of $500 to $600 per month would be appropriate. Respondent then ordered Mr. Carreon to pay $150 per week as spousal support to Mrs. Carreon, to begin "forthwith," and to deliver his truck and keys to the sheriff's department by 5:00 p.m. that same day. Other than the statements by Mrs. Carreon and Ms. Talbert, there was neither evidence offered of Mrs. Carreon's reasonable needs nor Mr. Carreon's ability to pay support, and respondent made no findings to support the award.

6. Mr. Carreon attempted to object to the award of spousal support. Respondent replied that Mr. Carreon could find some way to get the money saying ". . . you people always find a way," or words to that effect. Respondent also remarked to Mr. Carreon[,] "I don't know how you treat women in Mexico, but here you don't treat them that way." The Commission finds that respondent's words were directed to Mr. Carreon's ethnicity as an Hispanic person.

7. After Mr. Carreon objected to the award of spousal support, respondent inquired as to how much money Mr. Carreon had on his person. Mr. Carreon replied that he had $140. Respondent then ordered Deputy Jones[] to search Mr. Carreon's wallet. When Deputy Jones hesitated, respondent repeated his order to him to search Mr. Carreon's wallet. Deputy Jones took possession of Mr. Carreon's wallet, counted his money, and reported to respondent that the wallet contained $140, a driver's license, and a Social Security card. Respondent allowed Ms. Talbert to obtain Mr. Carreon's Social Security account number from the Social Security card and directed Deputy Jones to turn over Mr. Carreon's cash to Mrs. Carreon.

8. At no time during the hearing did Mr. Carreon do or say anything which gave Deputy Jones, Deputy Clerk Marion, or Deputy Clerk Gillespie any reason to believe that Mr. Carreon was violent or a danger to anyone in the courtroom. The Commission specifically finds that Deputy Jones approached Mr. Carreon only after being twice ordered to do so by respondent, and not because of any concerns about Mr. Carreon's behavior or the security of the courtroom.

9. After the hearing had been concluded, Deputy Clerk Marion was so concerned about respondent's actions that she reported the events to her supervisor, Clerk of Superior Court Pam Marion. Independently of Deputy Clerk Marion, Deputy Jones also reported the incident to his supervisor at the Sheriff's department because of the unusual circumstance of being ordered to take Mr. Carreon's wallet. Similarly, after reflecting on the events, Mrs. Carreon's attorney, Ms. Talbert, also discussed the occurrence with other attorneys in her office because she was concerned that Mr. Carreon had not been treated fairly, and had been "run over," by respondent at the hearing.

10. Subsequent to the hearing, Mr. Carreon retained counsel, Mr. Mills, who filed a motion pursuant to N.C.G.S. 1A-1, Rule 60 for relief from the 24 February 2005 [order] entered by respondent. The motion was heard by respondent on 23 March 2005, and was granted. In granting the motion, respondent instructed Mr. Mills to include in the order as reasons, among others, for granting the motion that due to a language barrier, respondent had not understood that Mr. Carreon wanted an attorney, and that the failure of Mrs. Carreon's complaint to request spousal support was due to a "clerical error." However, from the evidence adduced at the hearing before the Commission, including the testimony of respondent, it is clear that respondent was aware that Mr. Carreon wished to obtain an attorney.

11. Mrs. Carreon's complaint against Mr. Carreon was ultimately dismissed after a hearing on the merits, in which Judge Key found that Mrs. Carreon had not proven the allegations contained in her complaint.

12. After respondent had received notice that the Commission had ordered an investigation into the complaint which had been filed with it alleging respondent's misconduct in connection with the Carreon matter, he attempted to discuss the 24 February 2005 hearing with Deputy Clerk Marion by asking her if she remembered the case, suggesting that Mr. Carreon had appeared violent, and requesting that she prepare a written statement. Likewise, respondent initiated a conversation with Ms. Talbert concerning the hearing on 24 February 2005, telling Ms. Talbert that he did not recall instructing Deputy Jones to take Mr. Carreon's wallet and money. When Ms. Talbert replied that she did not recall the events to be as described by respondent, respondent told her that he had a "photographic memory."

13. On 15 March 2007, Assistant Special Agent in Charge Steve Wilson of the North Carolina State Bureau of Investigation interviewed respondent about the allegations contained in the complaint relating to the 24 February 2005 hearing in the Carreon matter. Respondent denied to Agent Wilson that he had instructed Deputy Jones to search Mr. Carreon's wallet or take his money. Respondent told Agent Wilson that Mr. Carreon was known to carry a gun, that respondent suspected Mr. Carreon was a gang member based on his appearance, and that Deputy Jones had gone over to stand near Mr. Carreon because the deputy was suspicious of him and was concerned for the security of those in the courtroom. The Commission finds that this statement by respondent to Agent Wilson was untrue and was made with the intent to deceive Agent Wilson.

14. During the same interview, respondent told Agent Wilson that Deputy Jones never had possession of Mr. Carreon's wallet. Later in the interview, he told Agent Wilson that he had instructed the deputy to obtain Mr. Carreon's wallet in order to determine Mr. Carreon's true identity. The Commission finds that these statements by respondent to Agent Wilson were inconsistent, false, and misleading.

ANALYSIS

In reviewing a recommendation from the Judicial Standards Commission, "this Court acts as a court of original jurisdiction." *In re Daisy*, 359 N.C. 622, 623, 614 S.E.2d 529, 530 (2005) (citing *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929 (1979)). Thus, we exercise independent judgment in reviewing recommendations of the Commission and may either accept a recommendation or impose a different sanction. *In re Nowell*, 293 N.C. 235, 244, 237 S.E.2d 246, 252 (1977). Additionally, acting as a court of original jurisdiction, this Court "may adopt the Commission's findings of fact if they are supported by clear and convincing evidence, or it may make its own findings." *In re Hayes*, 353 N.C. 511, 514, 546 S.E.2d 376, 378 (2001) (citing *In re Hardy*, 294 N.C. 90, 98, 240 S.E.2d 367, 373 (1978)), *cause dismissed*, 356 N.C. 389, 584 S.E.2d 260 (2002).

After a careful review of the transcripts and exhibits in the record, we conclude that the Commission's findings of fact are supported by clear and convincing evidence. Moreover, we adopt those findings of fact as our own.

Turning now to the recommendation of the Commission, while censure would be the proper disciplinary action for respondent's conduct prejudicial to the administration of justice, we disagree that censure is the proper sanction for respondent's willful misconduct. This Court has a duty to protect the public from judicial overreaching, including "willful misconduct in office, willful and persistent failure to perform the judge's duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." N.C.G.S. § 7A-376(b) (2007); *see also* N.C. Const. art. IV, § 17; Code Jud. Conduct Canons 1, 2A, 3A, 2008 Ann. R. N.C. 475, 475-80. "An independent and honorable judiciary is indispensable to justice in our society . . . ." Code Jud. Conduct pmbl., 2008 Ann. R. N.C. at 475. Judges in this State and throughout the nation are given the privilege and have the duty to adjudicate the gravest situations imaginable. As such, judges must not only respect the parties involved, but have a high regard for the law itself, whether it be constitutional, statutory, administrative, or common law.

The relevant portions of the Code of Judicial Conduct state: "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." *Id.* Canon 1. "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." *Id.* Canon 2A. "A judge should be faithful to the law and maintain professional competence in it," *id.* Canon 3A(1), and "[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," *id.* Canon 3A(3).

"Public confidence in the courts requires that cases be tried by unprejudiced and unbiased judges. A judge must avoid even the appearance of bias." *In re Martin*, 295 N.C. 291, 306, 245 S.E.2d 766, 775 (1978) (citations omitted). Respondent's statements to Mr. Carreon that "you people always find a way" and "I don't know how you treat women in Mexico, but here you don't treat them that way" raised at least the appearance of bias. A bias for or against the nationality or ethnicity of a party should play no role in the decision-making process, and respondent's statements betray this essential tenet of our law. *See* U.S. Const. amend. XIV, § 1; N.C. Const. art. I, § 19. Respondent's statements were indicative of a bias against Mr.

Carreon and thus violated Canons 1, 2A, and 3A(3) of the Code of Judicial Conduct and constituted conduct prejudicial to the administration of justice that brought the judicial office into disrepute.

Additionally, respondent misused his judicial power in two ways: (1) by awarding spousal support when none had been requested and no evidence had been taken on the issue, and (2) in ordering the bailiff, Surry County Deputy Sheriff Jones, to search Mr. Carreon's wallet and turn his money over to Mrs. Carreon. It is telling that Deputy Clerk Marion, Deputy Sheriff Jones, and Attorney Talbert recognized this abuse of power as violative of Mr. Carreon's rights. Yet respondent, the only individual in the courtroom who had sworn to justly adjudicate cases involving constitutional rights of our citizens, was the person who deprived Mr. Carreon of his rights without regard to notions of fairness and due process. While respondent argues that he should not be held to these lofty standards due to his inexperience on the bench at the time in question, this Court rejects such arguments: "A trial judge cannot rely on his inexperience or lack of training to excuse acts which tend to bring the judicial office into disrepute." *In re Martin*, 295 N.C. at 303, 245 S.E.2d at 773 (citing *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246). Respondent's actions violated Canons 2A, 3A(1) and 3A(3) of the Code of Judicial Conduct and constituted conduct prejudicial to the administration of justice that brought the judicial office into disrepute.

We agree that respondent should be censured for his conduct prejudicial to the administration of justice that brought the judicial office into disrepute. His actions, in this regard, are similar in magnitude to other cases in which we have approved recommendations of censure. *See*, *e.g.*, *In re Hill*, 357 N.C. 559, 591 S.E.2d 859 (2003) (verbal abuse of an attorney, sexual comments, and horseplay); *In re Stephenson*, 354 N.C. 201, 552 S.E.2d 137 (2001) (soliciting votes for reelection from the bench); *In re Brown*, 351 N.C. 601, 527 S.E.2d 651 (2000) (consistently issuing improper verdicts).

While this Court has often accepted recommendations for censure for conduct prejudicial to the administration of justice that brings the judicial office into disrepute, we have noted that willful misconduct is substantially more serious and may warrant a greater sanction in order to ensure the public trust of the judiciary. *See In re Royster*, 361 N.C. 560, 563, 648 S.E.2d 837, 840 (2007); *see also In re Peoples*, 296 N.C. at 158, 250 S.E.2d at 918 ("A judge should be removed from office and disqualified from holding

further judicial office only for the more serious offense of wilful misconduct in office.").

> Willful misconduct in office denotes "improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally, in bad faith. It is more than a mere error of judgment or an act of negligence. While the term would encompass conduct involving moral turpitude, *dishonesty*, or corruption, these elements need not necessarily be present."

In re Stuhl, 292 N.C. 379, 389, 233 S.E.2d 562, 568 (1977) (emphasis added) (quoting *In re Edens*, 290 N.C. 299, 305, 226 S.E.2d 5, 9 (1976)).

Respondent's untruthful, deceptive, and inconsistent statements to North Carolina State Bureau of Investigation Special Agent in Charge Wilson and his attempts to influence the recollections of Deputy Clerk Marion and Attorney Talbert constitute willful misconduct. Respondent was not under any compulsion to speak or make a formal statement to Special Agent Wilson. However, instead of merely relating the truth and letting the chips fall where they may, respondent willfully attempted to cover up his misdeeds from the Carreon hearing. This behavior is entirely unacceptable for a lawyer or a judge. Respondent's willful misconduct amounts to a serious betrayal of the trust the public invests in the judiciary and is similar in magnitude to other cases in which this Court has removed judges from office. *See, e.g.*, *In re Ballance*, 361 N.C. 338, 643 S.E.2d 584 (2007) (failing to file federal income tax returns); *In re Sherrill*, 328 N.C. 719, 403 S.E.2d 255 (1991) (conduct resulting in convictions for drug offenses); *In re Kivett*, 309 N.C. 635, 309 S.E.2d 442 (1983) (attempts to influence criminal prosecutions and multiple abuses of judicial power).

Moreover, respondent has demonstrated a pattern of disregard for the integrity of the judicial office. On 7 March 2008, this Court entered an order censuring and suspending respondent for sixty days because of conduct prejudicial to the administration of justice that brought the judicial office into disrepute, willful misconduct, and willful and persistent failure to perform his judicial duties. *In re Badgett*, 362 N.C. 202, 657 S.E.2d 346 (2008). As detailed in that order, upon his election to be a district court judge, respondent sold his private practice files and leased his building to Attorney E. Clarke Dummit, but, in cases over which respondent presided and in which Mr. Dummit represented a party, respondent repeatedly failed to dis-

close his business relationship with Mr. Dummit. *Id.* at 203-04, 657 S.E.2d at 347-48. Additionally, respondent made false statements from the bench to District Attorney C. Ricky Bowman in an effort to have Mr. Bowman sign a remittal of disqualification. *Id.* at 204-05, 657 S.E.2d at 348. Respondent also created a hostile work environment for members of the district attorney's staff, complaining that they were a "burr in his side." *Id.* at 205, 657 S.E.2d at 348. Moreover, respondent was habitually rude and condescending to those appearing before him in the courtroom. *Id.* Respondent's conduct throughout his tenure as a district court judge has been fraught with disrespect for the parties appearing before him, a persistent failure to be truthful, and a disregard for the laws and ethical rules that govern the judiciary. As such, we find it essential to the protection of the people of this State to remove respondent from office and disqualify him from holding any further judicial office in North Carolina.

Therefore, it is ordered by the Supreme Court of North Carolina that respondent Mark H. Badgett be, and is hereby, censured and removed from office as Judge of the General Court of Justice, District Court Division, Judicial District Seventeen-B, Surry and Stokes County, for conduct in violation of Canons 1, 2A, 3A(1), and 3A(3) of the Code of Judicial Conduct, for conduct prejudicial to the administration of justice that brought the judicial office into disrepute, and for willful misconduct in violation of N.C.G.S. § 7A-376 (2007). It is further ordered that respondent is disqualified from holding further judicial office in the State of North Carolina and is ineligible for retirement benefits.

STATE OF NORTH CAROLINA v. JAMES ALLEN TURNAGE, JR.

No. 228A08

(Filed 10 October 2008)

Appeal and Error; Burglary— sufficiency of evidence—majority and dissenting Court of Appeals opinions—inconsistencies

The Supreme Court remanded the Court of Appeals' reversal of a first-degree burglary conviction where there were inconsistencies in the Court of Appeals' majority and dissenting opinions. The Supreme Court could not ascertain whether the basis for the majority's reversal was limited to insufficient evidence of the

identity of the perpetrator or insufficient evidence of both the element of entry and the identity of the perpetrator. The writing of the dissenting opinion leaves the Supreme Court to speculate as to how the dissenting judge interpreted the majority opinion on the issue of entry.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 190 N.C. App. ——, 660 S.E.2d 129 (2008), reversing in part and finding no prejudicial error in part in judgments entered 10 March 2004 by Judge Robert H. Hobgood in Superior Court, Wake County. Heard in the Supreme Court 8 September 2008.

Roy Cooper, *Attorney General*, *by Catherine F. Jordan and David W. Boone*, *Assistant Attorneys General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Emily H. Davis*, *Assistant Appellate Defender*, *for defendant-appellee.*

PARKER, Chief Justice.

In this case we review the Court of Appeals' holding that the trial court erred in failing to dismiss the charge of first-degree burglary against defendant, James Allen Turnage, Jr.

In the early morning hours of 29 April 2003, Kristina Coleman was asleep in her home where she lived with her father at 508 Calloway Drive in Raleigh, North Carolina. Mr. Coleman had left to handle his paper route. The house was locked and secured. Shortly before 4:00 a.m. Ms. Coleman was awakened to the sound of breaking glass at the front entrance to her home; she called 911 to report that someone was attempting to break into the house.

When police responded they found defendant running up an embankment at the rear of the house toward a fence that ran along Highway 440. Raleigh Police Officer R.J. Armstrong apprehended defendant. A screwdriver-like object with an eyelet at one end, a seven inch metal rod, and a pen lighter were found in and taken from defendant's pockets. Officer Armstrong and Officer Jason Bloodworth also observed that defendant had cuts and blood on the inside of his hand. Defendant later testified that he had also had a crack pipe in his pocket that he had thrown away as he ran from the officers.

Defendant was subsequently indicted for first-degree burglary, possession of burglary tools, and habitual felon status. At his trial in March 2004, the evidence showed that the residence had a storm door and a wooden front door with three diagonal glass panes across the top of the wooden door. The State presented evidence that one of defendant's fingerprints was found on the exterior of the wooden front door to the Coleman house. Additionally, one of the panes of glass in the door was broken completely through, and glass was found both inside and outside the door. Although the edges of the broken window were "jagged," no blood was found. The exterior of the wooden door was damaged, but the interior of the door showed no damage, and none of the fingerprints on the inside of the door matched defendant's. Defendant testified that he had been at the Coleman house that night with an acquaintance, Artis Barber, but had not participated when Mr. Barber attempted to break into the house. Defendant further stated that he had slept very little in the days preceding the attempted break-in and had smoked crack cocaine and consumed at least a liter of Richard's Wild Irish Rose wine on the night in question.

At the conclusion of the trial, the jury found defendant guilty of first-degree burglary and possession of implements of housebreaking. The verdict sheet also listed the lesser-included offenses of attempted first-degree burglary, felonious breaking or entering, and non-felonious breaking or entering. Defendant pled guilty to habitual felon status.

On writ of certiorari to the Court of Appeals, the panel unanimously found no prejudicial error in defendant's conviction for possession of implements of housebreaking, but split with respect to the conviction for first-degree burglary with the majority voting to reverse and the dissenting judge voting no error. The State appealed to this Court based on the dissenting opinion.

In ruling on a defendant's motion to dismiss for insufficiency of the evidence, the trial court must determine "only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996) (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* (citing *Vause*, 328 N.C. at 236, 400 S.E.2d at 61). The trial court " 'must consider the evidence in the light most favorable to the State and the State is entitled to every rea-

sonable inference to be drawn from that evidence.' " *Id.* at 73, 472 S.E.2d at 926 (quoting *State v. Saunders*, 317 N.C. 308, 312, 345 S.E.2d 212, 215 (1986)).

Moreover, "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citing *State v. Stephens*, 244 N.C. 380, 384, 93 S.E.2d 431, 433 (1956). In order to be submitted to the jury for determination of defendant's guilt, the "evidence need only give rise to a reasonable inference of guilt." *Id.* (citations omitted). A motion to dismiss should be granted, however, "where the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant's guilt." *Id.* (citations omitted).

Burglary is a common-law offense defined in North Carolina as "the breaking and entering of a dwelling house of another in the nighttime with the intent to commit a felony therein." *State v. Williams*, 314 N.C. 337, 355, 333 S.E.2d 708, 720 (1985) (citation omitted); *see also* N.C.G.S. § 14-51 (2005). Regarding the element of entry, "the least entry with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, is sufficient to complete the offense." *Black's Law Dictionary* 478 (5th ed. 1979); *see also State v. Gibbs*, 297 N.C. 410, 418-19, 255 S.E.2d 168, 174 (1979) (approving language stating that entry in the law of burglary " 'is not confined to the intrusion of the whole body, but may consist of the insertion . . . . into the place broken the hand, the foot, or any instrument with which it is intended to commit a felony' " (quoting 13 Am. Jur. 2d *Burglary* § 10 (1964))).

The State's appeal is based on the dissenting opinion in the Court of Appeals, and that opinion addressed only the element of identity of defendant as the perpetrator of the offense. Thus, pursuant to Rule 16(b) of the Rules of Appellate Procedure, the only issue properly before this Court is whether the Court of Appeals erred in holding that the State presented insufficient evidence that defendant was the perpetrator of the first-degree burglary to withstand defendant's motion to dismiss. We hold that the majority of the Court of Appeals erred on this issue.

The evidence tended to show that defendant's fingerprint was found on the outside of the exterior wooden door just under a broken windowpane. Defendant was found by police in the backyard of the

residence, and at the time defendant was attempting to escape over a fence at the top of an embankment. Defendant's hand was bloody, and he had in his possession tools that would be useful in breaking and entering. Upon being apprehended, defendant said that he did not know the house was occupied. The Colemans had never seen defendant and had never invited him into their home. This evidence was sufficient to support a reasonable inference that defendant was the perpetrator of the crime and to withstand a motion to dismiss.

However, this Court cannot determine the proper disposition of the Court of Appeals' decision on account of inconsistencies in both the majority and dissenting opinions.

The Court of Appeals' majority first stated that "because we find that the State failed to present substantial evidence that Defendant James Allen Turnage, Jr. either entered the residence in question *or* was the perpetrator of an entry if it did occur, we reverse his conviction for first-degree burglary." *State v. Turnage*, 190 N.C. App. 123, 124-25, 660 S.E.2d 129, 131 (2008) (emphasis added). However, later in its discussion of the burglary charge, the majority stated:

> Although the fact of entry may be a reasonable inference from the broken glass, in that a body part or instrument may have crossed the plane of the door at the moment the glass broke, the State did not offer proof that it was Defendant who committed the entry, aside from a single thumbprint that was on the exterior of the door. Taken together, this evidence gives rise to mere speculation, "sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator[.]"

Id. at 128, 660 S.E.2d at 133 (citation omitted).

These two statements are conflicting; hence this Court cannot ascertain whether the basis for the majority's reversal of the burglary conviction was limited to insufficiency of the evidence as to identity of the perpetrator as suggested by the first sentence in the indented quotation or whether the basis was insufficiency of the evidence as to both the element of entry and identity of the perpetrator as suggested by the second sentence in the indented quotation.

Assuming without deciding, that, as a matter of law, the fact of entry for purposes of burglary may be established by an instrument crossing the plane of the door at the moment the glass broke, the conclusive second sentence does not comport with a correct application

of the test for a motion to dismiss based on insufficient proof of entry. Under the long-established test for a motion to dismiss as outlined above, if, as a matter of law, the evidence of broken glass permits a reasonable inference of the fact of entry "in that a body part or instrument may have crossed the plane of the door at the moment the glass broke," *id.*, then the evidence of entry was sufficient to submit to the jury and to withstand a motion to dismiss as to that element of burglary. Thus, the two statements in the above indented quotation cannot lie down together.

The dissenting opinion in the Court of Appeals addressed only the question of the sufficiency of the evidence as to the identity of defendant as the perpetrator of the offense, but the dissenting judge stated that in her opinion, "defendant received a fair trial free from error, prejudicial or otherwise," *Turnage*, 190 N.C. App. at 131, 660 S.E.2d at 134 (Bryant, J., concurring in part and dissenting in part), and that she would "hold no error in the denial of defendant's motion to dismiss the charge of first-degree burglary," *id.* at 131, 660 S.E.2d at 135. The dissenting judge does not indicate whether she concurs or dissents from the majority opinion on the issue of entry, stating only that "[t]he majority reasons this 'gives rise to mere speculation . . . "[as to] the identity of the defendant as the perpetrator[,]" ' and on this ground holds defendant's motion to dismiss should have been allowed." *Id.* at 127, 660 S.E.2d at 135 (brackets in original) (citation omitted). The dissenting opinion's use of an ellipsis for the words " 'as to either the commission of the offense or' " in the majority opinion leaves this Court to speculate as to how the dissenting judge interpreted the majority opinion on the issue of entry.

Accordingly, as to the only issue before this Court on the State's appeal of right, namely, the sufficiency of the evidence as to defendant's identity as the perpetrator of the offense if a burglary occurred, the decision of the Court of Appeals is reversed, and the case is remanded to that court for reconsideration of the sufficiency of the evidence on the element of entry for purposes of first-degree burglary and defendant's remaining assignments of error in light of this holding. Defendant's convictions for possession of implements of housebreaking and habitual felon status are not before this Court and remain undisturbed.

REVERSED IN PART AND REMANDED.

KERRY WATTS v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

No. 191A07

(Filed 10 October 2008)

Immunity; Public Officers and Employees— public duty doctrine—waiver

The Industrial Commission did not err in failing to apply the public duty doctrine where the Commission found that defendant state agency admitted it was negligent in issuing an improvement permit to plaintiff; defendant assigned no error to this finding and thereby rendered it conclusive on appeal; this admission of negligence by defendant necessarily encompasses a concession that defendant either owed plaintiff a "special duty" or that a "special relationship" existed between plaintiff and defendant; and defendant has thus effectively waived its argument that it owes no duty to plaintiff under the public duty doctrine.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 182 N.C. App. 178, 641 S.E.2d 811 (2007), affirming in part and reversing in part and remanding a decision and order entered by the North Carolina Industrial Commission on 3 October 2005. Heard in the Supreme Court 17 March 2008. Following oral argument, the Court on 27 March 2008 allowed plaintiff's petition for discretionary review of two additional issues. Determined on the supplemental briefs without further oral argument pursuant to N.C. R. App. P. 30(f)(1).

James, McElroy & Diehl, P.A., by John R. Buric and Preston O. Odom, III, for plaintiff-appellee/appellant.

Roy Cooper, Attorney General, by Dahr Joseph Tanoury, Assistant Attorney General, for defendant-appellant/appellee.

PER CURIAM.

When the North Carolina Industrial Commission found as fact that the defendant Department of Environment and Natural Resources "admitted" it was "negligent in issuing Permit No. 99291" and when defendant failed to assign error to this finding, such finding of negligence is binding on appeal and precludes defendant's assertion of the public duty doctrine as a defense in the instant case. We therefore affirm the opinion of the Court of Appeals to the extent

it holds that the Industrial Commission did not err in failing to apply the public duty doctrine.

The public duty doctrine is a rule grounded in common law negligence and provides that "when a governmental entity owes a duty to the general public, particularly a statutory duty, individual plaintiffs may not enforce the duty in tort." *Myers v. McGrady*, 360 N.C. 460, 465-66, 628 S.E.2d 761, 766 (2006). The doctrine operates to "limit tort liability, even when the State has waived sovereign immunity." *Id.* at 465, 628 S.E.2d at 766. Thus, when a plaintiff alleges negligence arising from the State's "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." *Id.* at 463, 628 S.E.2d at 764. When, however, a plaintiff establishes that the State owes the plaintiff a "special duty" or that a "special relationship" exists between the plaintiff and the State, the plaintiff's claims are not barred by the public duty doctrine. *Id.* at 468, 628 S.E.2d at 767. Thus, unless one of these two exceptions to the public duty doctrine applies, an individual plaintiff fails to state a claim in negligence against the State.

Here, the Industrial Commission found that defendant admitted it was "negligent" in issuing the permit to plaintiff. Defendant assigned no error to this finding, thereby rendering it conclusive on appeal. *See* N.C. R. App. P. 10(a). This admission of negligence by defendant necessarily encompasses a concession that defendant either owed plaintiff a "special duty" or that a "special relationship" existed between plaintiff and defendant, for otherwise no action in negligence could lie. *See Myers*, 360 N.C. at 463, 628 S.E.2d at 764. As defendant's admitted negligence in issuing the permit to plaintiff is conclusively established on appeal, defendant has effectively waived its argument that it owes no duty to plaintiff under the public duty doctrine. Because defendant has waived its right to argue the merits of whether the public duty doctrine would shield defendant from liability under the facts of the present case, we do not reach this issue, and we therefore express no opinion on the analysis of the public duty doctrine by the Court of Appeals. We therefore affirm the Court of Appeals to the extent it determined that the Industrial Commission did not err in failing to apply the public duty doctrine. The remaining issues addressed by the Court of Appeals are not properly before this Court and its decision as to these matters remains undisturbed.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA v. SHANNON DENISE HAISLIP

No. 513PA07

(Filed 10 October 2008)

Search and Seizure— motion to suppress—remand for findings and conclusions

A driving while impaired (DWI) case is remanded to the superior court for written findings and conclusions sufficient to resolve all issues raised by defendant's motion to suppress evidence used to convict her of DWI based upon her contention that the evidence was procured as the result of an unconstitutional motor vehicle checkpoint.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 186 N.C. App. 275, 651 S.E.2d 243 (2007), reversing a judgment entered on 23 May 2006, by Judge William C. Griffin, Jr. in the Superior Court in Pitt County, and remanding the case to the trial court. Heard in the Supreme Court 8 September 2008.

Roy Cooper, Attorney General, by Kathryne E. Hathcock, Assistant Attorney General, for the State-appellant.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant-appellee.

PER CURIAM.

The State of North Carolina seeks review of the unanimous Court of Appeals decision reversing the denial of defendant's motion to suppress the evidence used to convict her for driving while impaired and remanding for appropriate findings of fact and conclusions of law as to the constitutionality of a checkpoint. The State asserts that the Court of Appeals erred in holding that (1) defendant was "stopped" within the meaning of the Fourth Amendment; and (2) the constitutionality of the checkpoint is at issue, in that defendant evaded the checkpoint.

On review of a motion to suppress evidence, an appellate court determines whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law. *State v. Wynne*, 329 N.C. 507, 524, 406 S.E.2d 812, 821 (1991)

(citing *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983)). The trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citations and internal quotation marks omitted). The conclusions of law, however, are reviewed de novo. *State v. Hyatt*, 355 N.C. 642, 653, 566 S.E.2d 61, 69 (2002) (citation omitted), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003). The trial court's findings of fact are critical to our substantive review of an appellant's arguments.

Although the trial transcript indicates that the trial judge believed defendant "wasn't snared by the checkpoint," the transcript is devoid of any formal, specific findings of fact or conclusions of law as to what transpired on the evening of defendant's arrest. Thus, we disagree with the Court of Appeals' statement that the trial court made a "*finding* that Defendant was not stopped by the checkpoint." *State v. Haislip*, 186 N.C. App. 275, 280, 651 S.E.2d 243, 247 (2007). Indeed, although the trial judge stated at the very end of the proceedings that he had "written out in hand [his] findings and conclusions on the evidentiary hearing . . . with respect to the motion to suppress the evidence," the transcript reveals no ruling at all on the motion to suppress, and no such order was included in the record presented either to this Court or the Court of Appeals. *See id.* at 278, 651 S.E.2d at 246 ("No such [written] order appears in the record on appeal.").

Because we conclude that the record before us is inadequate to permit appellate review of the questions of law presented by the State's appeal, in that the record contains no order or ruling on defendant's motion to suppress, the decision of the Court of Appeals is vacated, and the case is remanded with direction to further remand to the Superior Court in Pitt County for written findings of fact and conclusions of law sufficient to resolve all issues raised by the motion to suppress.

VACATED AND REMANDED.

HUGHES v. RIVERA-ORTIZ

[362 N.C. 501 (2008)]

BLONDALE HUGHES v. EPIFANIO RIVERA-ORTIZ, M.D., AND CALLAWAY ASSOCIATES, LLP D/B/A PROMED OF NORTH CAROLINA, PLLC

No. 611A07

(Filed 10 October 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 187 N.C. App. 214, 653 S.E.2d 165 (2007), affirming an order entered 30 November 2005 denying plaintiff's motion for a new trial following a judgment entered 31 October 2005, both by Judge Richard D. Boner in Superior Court, Mecklenburg County. On 6 March 2008, the Supreme Court allowed plaintiff's petition for discretionary review of the unanimous portion of the same Court of Appeals opinion that reversed and remanded the trial court's denial of defendant Callaway's motion for directed verdict in its favor. Heard in the Supreme Court 11 September 2008.

Ferguson, Stein, Gresham & Sumter, P.A., by S. Luke Largess, for plaintiff-appellant.

Parker Poe Adams & Bernstein LLP, by Harvey L. Cosper, Jr., Lori R. Keeton, and Leigh K. Hickman, for defendant-appellee Epifanio Rivera-Ortiz, M.D.

Shumaker, Loop & Kendrick, LLP, by Scott M. Stevenson and Tasha L. Winebarger, for defendant-appellee Callaway Associates, LLP, d/b/a ProMed of North Carolina, PLLC.

PER CURIAM.

As to the issue on direct appeal based on the dissenting opinion, the decision of the Court of Appeals is affirmed. The petition for discretionary review as to an additional issue was improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

BETTY L. GRANT, EXECUTRIX OF THE ESTATE OF TOMMY J. GRANT v. HIGH POINT REGIONAL HEALTH SYSTEM

No. 474PA05-2

(Filed 10 October 2008)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 184 N.C. App. 250, 645 S.E.2d 851 (2007), affirming in part and reversing and remanding in part an order entered 10 February 2006 by Judge John O. Craig, III in Superior Court, Guilford County. Heard in the Supreme Court 11 September 2008.

Kennedy, Kennedy, Kennedy & Kennedy, L.L.P., by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellee.

Sharpless & Stavola, P.A., by Joseph P. Booth, III, for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

McINTYRE v. McINTYRE

[362 N.C. 503 (2008)]

STEVE McINTYRE v. VICKI McINTYRE

No. 58A08

(Filed 10 October 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 188 N.C. App. 26, 654 S.E.2d 798 (2008), affirming an order entered 31 July 2001 and a judgment and order entered 3 December 2004, both by Judge Chester C. Davis, and dismissing an appeal from an order entered 27 June 2000 by Judge Victoria L. Roemer, all in District Court, Forsyth County. Heard in the Supreme Court 9 September 2008.

Tash & Kurtz, PLLC, by Jon B. Kurtz; and Robinson & Lawing, LLP, by Michelle D. Reingold, for plaintiff-appellant.

Bell, Davis & Pitt, P.A., by Robin J. Stinson; and Gatto Law Offices, P.A., by Joseph J. Gatto, for defendant-appellee.

PER CURIAM.

AFFIRMED.

GOOD HOPE HEALTH SYSTEM, L.L.C., PETITIONER, AND THE TOWN OF LILLINGTON, PETITIONER-INTERVENOR v. N.C. 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. 57A06-2

(Filed 10 October 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 189 N.C. App. 534, 659 S.E.2d 456 (2008), affirming a final agency decision issued 10 September 2004 by the North Carolina Department of Health and Human Services. Heard in the Supreme Court 11 September 2008.

Smith Moore LLP, by Maureen Demarest Murray and Susan M. Fradenburg, for petitioner-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 Elizabeth B. Frock, 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.

AFFIRMED.

MACHER v. MACHER

[362 N.C. 505 (2008)]

OLLIE MAE MACHER N/K/A OLLIE MAE HARRIS v. ABE MORRIS MACHER

No. 55A08

(Filed 10 October 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 188 N.C. App. 537, 656 S.E.2d 282 (2008), affirming an order entered 21 November 2006 by Judge J. Henry Banks in District Court, Granville County, denying defendant's Rule 60(b) motion to vacate a divorce judgment entered 28 October 1998. Heard in the Supreme Court 10 September 2008.

Hopper, Hicks & Wrenn, PLLC, by N. Kyle Hicks, for plaintiff-appellee.

Burton & Ellis, PLLC, by Alyscia G. Ellis, for defendant-appellant.

PER CURIAM.

AFFIRMED.

ZORAIDA WILLIAMS, EMPLOYEE v. LAW COMPANIES GROUP, INC., EMPLOYER, ZURICH, CARRIER

No. 52A08

(Filed 10 October 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 188 N.C. App. 235, 654 S.E.2d 725 (2008), reversing and remanding an opinion and award entered by the North Carolina Industrial Commission on 19 July 2006. Heard in the Supreme Court 10 September 2008.

Scudder & Hedrick, PLLC, by Samuel A. Scudder, for plaintiff-appellant.

Lewis & Roberts, P.L.L.C., by Richard M. Lewis and Paul C. McCoy, for defendant-appellees.

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 Industrial Commission to make findings of fact regarding whether plaintiff's current disability was caused by the 21 September 2000 accident without consideration of the broken rod in plaintiff's femur.

REVERSED AND REMANDED.

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

IN RE L.B.

[362 N.C. 507 (2008)]

IN THE MATTER OF L.B.

No. 7A08

(Filed 10 October 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 187 N.C. App. 326, 653 S.E.2d 240 (2007), dismissing an appeal from a judgment entered on 2 February 2007 by Judge Marvin P. Pope, Jr. in District Court, Buncombe County. Heard in the Supreme Court 10 September 2008.

J. Suzanne Smith for petitioner-appellee Buncombe County Department of Social Services.

Jerry W. Miller and Michael Tousey, Attorney Advocates for appellee Guardian ad Litem for L.B.

Richard E. Jester for respondent-appellant mother.

Hartsell & Williams, P.A., by Christy E. Wilhelm, for respondent-appellant father.

PER CURIAM.

AFFIRMED.

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

Alltel Communications, Inc. v. Davidson Cty. Case below: 185 N.C. App. 158	No. 495P07	Petitioners' PDR Under N.C.G.S. 7A-31 (COA06-1137)	Denied 10/09/08
Blankenship v. Bartlett Case below: 184 N.C. App. 327	No. 455P06-2	1. Plts' NOA Based Upon a Constitutional Question (COA06-1012) 2. Defs' Motion to Dismiss Appeal 3. Plts' PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/09/08 3. Allowed 10/09/08
Bradley v. Maxim Healthcare Servs. Case below: 191 N.C. App. —— (5 August 2008)	No. 425P08	1. Defs' (Maxim and Ins. Co.) Motion for Temporary Stay (COA07-1052) 2. Defs' (Maxim and Ins. Co.) Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed 09/30/08 Stay Dissolved 10/09/08 2. Denied 10/09/08 3. Denied 10/09/08
Carl v. State Case below: 192 N.C. App. —— (2 September 2008)	No. 432P08	Defs' Motion for Temporary Stay (COA07-1288)	Allowed 09/17/08
Crawford v. Watlington Case below: 190 N.C. App. 205	No. 241P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1352)	Denied 10/09/08
Deason v. Owens-Illinois, Inc. Case below: 192 N.C. App. —— (19 September 2008)	No. 440P08	Defs' Motion for Temporary Stay (COA07-1159)	Allowed 09/22/08
Dotson v. Davis Case below: 189 N.C. App. 530	No. 205P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-789)	Denied 10/09/08
Gillis v. Montgomery Cty. Sheriff's Dep't Case below: 191 N.C. App. —— (15 July 2008)	No. 380P08	1. Plt's NOA Based Upon a Constitutional Question (COA07-1503) 2. Def's Motion to Dismiss Appeal 3. Plt's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/09/08 3. Denied 10/09/08

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

Gregory v. W.A. Brown & Sons Case below: 192 N.C. App. —— (19 August 2008)	No. 447A08	Def-Appellants' Motion for Temporary Stay (COA07-1265)	Allowed 09/24/08
Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, LLC Case below: 190 N.C. App. 28	No. 272A08	Plt's PDR as to Additional Issues (COA07-1002)	Allowed 10/09/08
Hodgson Constr., Inc. v. Howard Case below: 187 N.C. App. 408	No. 005P08	1. Defs' Motion for Temporary Stay (COA06-1414) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed 01/08/08 362 N.C. 176 Stay Dissolved 10/09/08 2. Denied 10/09/08 3. Denied 10/09/08
In re Estate of Lindley Case below: 185 N.C. App. 159	No. 436P07	Respondents' PDR Under N.C.G.S. § 7A-31 (COA06-1281)	Denied 10/09/08
Jones v. Dalton Case below: 189 N.C. App. 787	No. 229P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-553)	Denied 10/09/08 **Martin, J., Recused**
Majestic Cinema Holdings, LLC v. High Point Cinema, LLC Case below: 191 N.C. App. —— (17 June 2008)	No. 338P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-17)	Denied 10/09/08
N.C. Counties Liability & Prop. Joint Risk Mgmt. Agency v. Curry Case below: 191 N.C. App. —— (1 July 2008)	No. 362P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-1664)	Denied 10/09/08 **Martin, J., Recused**
Pottle v. Link Case below: 187 N.C. App. 746	No. 027PA08	Joint Motion to Dismiss Appeal (COA07-359)	Allowed 10/09/08 **Martin, J., Recused**

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

Powers v. Goodyear Tire & Rubber Co. Case below: 191 N.C. App. —— (17 June 2008)	No. 331P08	Plt-Appellant's PDR Under N.C.G.S. § 7A-31 (COA07-1218)	Denied 10/09/08
Progress Energy Carolinas, Inc. v. Sullivan Case below: 186 N.C. App. 305	No. 596P07	Def's PWC to Review the Decision of the COA (COA07-287)	Denied 10/09/08 **Martin, J., Recused** **Timmons-Goodson, J., Recused**
Reece v. Smith Case below: 188 N.C. App. 605	No. 110P08	Plt-Appellant's PDR Under N.C.G.S. 7A-31(c)(1) (COA07-368)	Denied 10/09/08
State v. Bailey Case below: 190 N.C. App. —— (3 June 2008)	No. 321P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-989)	Denied 10/09/08
State v. Bailey Case below: 190 N.C. App. —— (20 May 2008)	No. 294P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1150)	Denied 10/09/08
State v. Baldwin Case below: 190 N.C. App. 206	No. 270P08	1. Def's (Antonio Baldwin) PDR Under N.C.G.S. 7A-31 (COA07-1132) 2. Def's (Shawn Baldwin) PDR Under N.C.G.S. § 7A-31	1. Denied 10/09/08 2. Denied 10/09/08
State v. Bare Case below: 191 N.C. App. —— (5 August 2008)	No. 397P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1565)	Denied 10/09/08
State v. Brill Case below: 190 N.C. App. —— (20 May 2008)	No. 299P08	1. Def's NOA Based Upon a Constitutional Question (COA07-1143) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/09/08 3. Denied 10/09/08
State v. Brooks Case below: 190 N.C. App. —— (20 May 2008)	No. 286P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-940)	Denied 10/09/08

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State v. Buck Case below: 191 N.C. App. —— (15 July 2008)	No. 371P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-471)	Denied 10/09/08
State v. Chiaromonte Case below: 189 N.C. App. 788	No. 238P08	1. Def's NOA Based Upon a Constitutional Question (COA07-534) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/09/08 3. Denied 10/09/08
State v. Fowler Case below: Mecklenburg County Superior Court	No. 164A00-2	Def-Appellant's PWC	Denied 10/09/08
State v. Green Case below: 191 N.C. App. —— (15 July 2008)	No. 385P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1379)	Denied 10/09/08
State v. Hagans Case below: 188 N.C. App. 799	No. 124P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-743)	Denied 10/09/08
State v. Harrington Case below: 190 N.C. App. 207	No. 277P08	1. Def's NOA Based Upon a Constitutional Question (COA07-1442) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/09/08 3. Denied 10/09/08
State v. Harris Case below: 190 N.C. App. —— (3 June 2008)	No. 317P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1494)	Denied 10/09/08
State v. Holt Case below: 188 N.C. App. 167	No. 088P08	Def's PDR Under N.C.G.S. 7A-31 (COA07-435)	Denied 10/09/08
State v. Hunt Case below: 192 N.C. App. —— (19 August 2008)	No. 400P08	State's Motion for Temporary Stay (COA08-14)	Allowed 09/05/08

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State v. Jackson Case below: 189 N.C. App. 747	No. 219P08	1. Def's NOA Based Upon a Constitutional Question (COA07-695) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. 7A-31	1. —— 2. Allowed 10/09/08 3. Denied 10/09/08
State v. Jacobs Case below: 188 N.C. App. 167	No. 348P08	Def's PWC to Review the Decision of the COA (COA06-1652)	Denied 10/09/08
State v. Ligon Case below: 189 N.C. App. 404	No. 189P08	Def-Appellant's PDR Under N.C.G.S. § 7A-31 (COA07-799)	Denied 10/09/08
State v. Lopez Case below: 188 N.C. App. 553	No. 095P08	1. State's PDR Under N.C.G.S. § 7A-31 (COA07-422) 2. Def's NOA Based Upon a Constitutional Question 3. State's Motion to Dismiss Appeal 4. Def's PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Amend NOA and PDR	1. Allowed 10/09/08 2. —— 3. Allowed 10/09/08 4. Allowed 10/09/08 5. Allowed 10/09/08
State v. Ly Case below: 189 N.C. App. 422	No. 200P08	Defs' PDR Under N.C.G.S. 7A-31 (COA07-578)	Denied 10/09/08
State v. Parks Case below: 191 N.C. App. —— (17 June 2008)	No. 339P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1178)	Denied 10/09/08
State v. Pelham Case below: 191 N.C. App. —— (5 August 2008)	No. 279P04-2	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1024)	Denied 10/09/08
State v. Penny Case below: 174 N.C. App. 628	No. 360P08	Def's PWC to Review the Decision of the COA (COA04-1401)	Dismissed 10/09/08

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

State v. Salazar Case below: 191 N.C. App. —— (17 June 2008)	No. 335P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-893)	Denied 10/09/08
State v. Smith Case below: 191 N.C. App. —— (17 June 2008)	No. 332P08	Def-Appellant's PDR Under N.C.G.S. § 7A-31 (COA07-1243)	Allowed 10/09/08
State v. Turnage Case below: 190 N.C. App. 123	No. 228A08	Def's Motion to Dismiss State's Appeal (COA07-562)	Denied 10/09/08
State v. Williams Case below: 191 N.C. App. —— (1 July 2008)	No. 361P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1155)	Denied 10/09/08
State v. Wilson Case below: 192 N.C. App. —— (2 September 2008)	No. 436A08	1. State's Motion for Temporary Stay (COA07-1077) 2. State's Petition for Writ of Supersedeas 3. State's NOA (Dissent)	1. Allowed 09/18/08 2. Allowed 10/09/08 3. ——
State v. Zinkand Case below: 190 N.C. App. —— (3 June 2008)	No. 314P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-980)	Denied 10/09/08
Strezinski v. City of Greensboro Case below: 187 N.C. App. 703	No. 023P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-563)	Denied 10/09/08
Whisnant v. Teachers' & State Ret. Sys. of N.C. Case below: 191 N.C. App. —— (1 July 2008)	No. 355P08	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA07-1433)	Denied 10/09/08

STATE OF NORTH CAROLINA v. EDDIE LAMAR TAYLOR

No. 719A05

(Filed 12 December 2008)

1. Constitutional Law— forensics—not recorded or lost—due process

The State's failure to secure physical evidence in a first-degree murder prosecution was unintentional and defendant's due process rights were not violated. Although the investigator did not record the location of each piece of evidence within the store where the robbery and murder occurred and the crime scene photographs were lost, the evidence was of only speculative exculpatory value and the trial court did not err by denying defendant's motion to strike the death penalty or to suppress the ballistics evidence.

2. Jury— selection—race-based peremptory challenge—no prima facie showing

A first-degree murder defendant did not make a prima facie showing of a race-based peremptory challenge by the State where there was no pattern of discrimination and the prospective juror expressed tremendous hesitation in being able to vote for the death penalty.

3. Homicide— instructions—second-degree murder as lesser included offense

The trial court did not err by refusing defendant's request to instruct the jury on second-degree murder as a lesser included offense of first-degree premeditated and deliberate murder where defendant's conduct before, during, and after the murder provides sufficient positive evidence of premeditation and deliberation. Neither the absence of evidence of a plan to commit murder nor evidence that one was not the first to fire in a gunfight negates premeditation and deliberation.

4. Criminal Law— prosecutor's closing argument—defendant's credibility—prosecutor's personal belief

The trial court did not err by not intervening ex mero motu in the prosecutor's closing argument in a first-degree murder prosecution when the prosecutor argued that he did not believe defendant's statement. Given the overall context and the brevity

of the remark, it was not "so grossly improper" as to render the proceeding fundamentally unfair.

5. Criminal Law— outside contact with juror—mistrial denied

The trial court did not err by denying a first-degree murder defendant's motion for a mistrial based on contact between a juror and an outside party. The trial court questioned all of the parties, reprimanded and warned the person who allegedly followed the juror, specifically questioned the two jurors involved in the incident and received their individual assurances of impartiality, and inquired generally of all jurors and received their assurances of impartiality.

6. Robbery— attempted—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss a charge of attempted armed robbery of one victim arising from a robbery and shooting in a store. Defendant's attempted robbery was complete, despite the fact that defendant moved to an easier target without taking money from the first.

7. Evidence— flight—instruction appropriate and not prejudicial

The trial court did not err in a first-degree murder prosecution by instructing the jurors that they could consider flight in determining guilt. There was evidence that defendant left the scene hurriedly without aiding the victims and sought to avoid apprehension; moreover, even if the instruction was improper, there was overwhelming evidence of guilt, and the court correctly instructed the jury that proof of flight was not sufficient by itself to show guilt.

8. Constitutional Law; Homicide— felony murder—jury unanimity

The requirement of unanimity was satisfied in a felony murder conviction where there was an armed robbery of two store owners and of a patron, but the trial court did not specifically instruct the jurors as to which robbery they should consider as the underlying felony for the purpose of finding felony murder. Either of the alternative acts established an element of felony-murder.

9. Homicide— felony murder and premeditation—underlying robbery convictions not arrested

The trial court did not err by failing to arrest armed robbery judgments underlying a felony murder conviction where defendant was convicted on the basis of premeditation and deliberation and felony murder.

10. Sentencing— capital—aggravating circumstance—pecuniary gain—armed robbery

There was no plain error in the court's instruction on the pecuniary gain aggravating circumstance in a first-degree murder prosecution in a case which also involved an armed robbery. The court did not remove the requirement that the jury find that the murder was motivated by a hope or expectation of pecuniary gain.

11. Sentencing— capital—aggravating circumstance—pecuniary gain—prosecutor's argument

The trial court did not err by failing to intervene ex mero motu during the State's closing argument about the pecuniary gain aggravating circumstance in a first-degree murder prosecution. Although defendant contended that the jurors would have understood the prosecutor's statements to mean that the guilty verdicts on armed robbery and conspiracy to commit robbery automatically required the pecuniary gain aggravating circumstance, the prosecutor distinguished between the State's contention and what the jury must find, and told the jurors that they must look to the trial court for explanation and instruction on the aggravating circumstances.

12. Constitutional Law— effective assistance of counsel—concession of aggravating circumstance

A first-degree murder defendant was not denied the effective assistance of counsel where defense counsel briefly conceded the pecuniary gain aggravating circumstance before shifting the discussion to mitigating circumstances, which was consistent with an overall strategy of openness and truthfulness and the abundant evidence that the murder was committed for pecuniary gain.

13. Sentencing— capital—mitigating circumstance—no significant criminal activity

The trial court did not err in a capital sentencing proceeding by not submitting the mitigating circumstance of no significant history of prior criminal activity. Although defendant argues that his witnesses depicted a comprehensive life history without significant criminal activity, finding the circumstance on this evidence alone would be based upon speculation and conjecture. N.C.G.S. § 15A-2000(f)(1).

14. Sentencing— capital—multiple nonstatutory mitigating circumstances—shorthand instruction—single peremptory instruction

The trial court did not commit plain error in a capital sentencing proceeding by giving a shorthand instruction for thirty-two nonstatutory mitigating circumstances and by giving a single peremptory instruction for all of those nonstatutory mitigating circumstances.

15. Sentencing— capital—aggravating circumstance—pecuniary gain—evidence sufficient

There was sufficient evidence in a capital sentencing proceeding of the aggravating circumstance of pecuniary gain even where defendant did not personally take money from the victim and the trial court did not instruct on acting in concert in this context.

16. Sentencing— capital—prosecutor's argument—course of conduct—any misstatement cured by court

The trial court did not err in a capital sentencing proceeding by not intervening ex mero motu during the State's closing argument on the course of conduct aggravating circumstance. The prosecutor distinguished between what the State contended and what the jury must consider and find, and the court cured any misstatement by correctly instructing the jury.

17. Sentencing— capital—jurors' contact with victim's family—no mistrial

The trial court did not err during a capital sentencing proceeding by denying defendant's motion for a mistrial where the victim's adult children gestured to two jurors with a flat tire with a can of Fix-A-Flat, but both the jurors and the witnesses left without verbal communication. Any contact was at a distance and was nonverbal, fleeting, and unrelated to the trial.

18. Sentencing— capital—prosecutor's argument—weighing aggravating and mitigating circumstances

The trial court did not err during a capital sentencing proceeding by not intervening ex mero motu when the prosecutor's statement about weighing aggravating and mitigating circumstances was inconsistent with the law. The trial court properly instructed the jury, curing any misstatement.

19. Sentencing— capital—prosecutor's argument—absence of remorse

The trial court did not err in a capital sentencing proceeding by not intervening ex mero motu where the prosecutor commented on the absence of any evidence showing remorse.

20. Sentencing— capital—prosecutor's argument—characterization of defense witness

In a capital sentencing proceeding, the prosecutor's characterization of defendant's mental health expert as a professional witness was not so improper that the court erred by not intervening ex mero motu, and neither was an inaccurate statement about the witness's payment.

21. Criminal Law— recross-examination—records used by mental health expert

Any error by the court in sustaining the State's objection to defendant's recross-examination of his mental health expert concerning alteration of the records was not prejudicial. The prosecutor did not accuse the witness of falsifying records on cross-examination and did not open the door to defense counsel's question.

22. Sentencing— capital—prosecutor's argument—life in prison—beyond the record

The trial court did not err by not intervening ex mero motu in a capital sentencing proceeding where the prosecutor argued beyond the record about various prison amenities defendant would enjoy if sentenced to life in prison.

23. Sentencing— capital—peremptory instructions not requested—not given

The trial court did not err in a capital sentencing proceeding by not giving peremptory instructions on three statutory mitigating circumstances which were not requested.

24. Sentencing— capital—defense argument—types of murder and death penalty

The trial court did not abuse its discretion in a capital sentencing proceeding by sustaining the State's objections to a defense argument about the kinds of murders for which the death penalty is appropriate. The court did not sustain objections to all of the comparisons, and defendant was not prohibited from arguing that the circumstances of his case did not warrant the imposition of the death penalty.

25. Sentencing— capital—death sentence—supported by evidence—not arbitrary

The record fully supported the aggravating circumstances found by the jury in a capital sentencing proceeding, and there was no evidence that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary consideration.

26. Sentencing— capital—proportionate

A sentence of death was not disproportionate where defendant was convicted on the basis of both premeditation and deliberation and the felony murder rule, the jury found that the murder was part of a course of conduct that included other violent crimes and was committed for pecuniary gain, there was no evidence that defendant demonstrated remorse for the murder, and the case is more similar to cases in which the death sentence was held proportionate.

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 24 August 2005 in Superior Court, Harnett County, upon a jury verdict finding defendant guilty of first-degree murder. On 26 February 2007, 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 12 February 2008.

Roy Cooper, *Attorney General*, *by William B. Crumpler and Daniel P. O'Brien*, *Assistant Attorneys General*, *for the state.*

Staples Hughes, *Appellate Defender*, *by Anne M. Gomez and Daniel K. Shatz*, *Assistant Appellate Defenders*, *for defendant-appellant.*

MARTIN, Justice.

On 12 January 2004, Eddie Lamar Taylor (defendant) was indicted for the murder of Talmadge "Mitch" Joseph Faciane, Jr. (Mr. Faciane or the victim). Defendant was also indicted for two counts of robbery with a dangerous weapon, one count of conspiracy to commit robbery with a dangerous weapon, one count of attempted robbery with a dangerous weapon, and three counts of first-degree kidnapping. Defendant was tried capitally at the 25 July 2005 session of Superior Court, Harnett County.

On 17 August 2005, a unanimous jury found defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation, and under the felony murder rule. Following a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction, and the trial court entered judgment accordingly. Defendant gave notice of appeal pursuant to N.C.G.S. § 7A-27(a).

The evidence admitted during the guilt-innocence phase of defendant's trial tended to show the following: Mr. Faciane and his wife Dawn (Mrs. Faciane) owned and operated a community store known as Mitch's Grocery in Bunnlevel, North Carolina. The store contained food and various supplies, along with pinball machines, arcade games, and video poker machines. The video poker machines dispensed tickets, which customers could exchange for cash at the check-out counter. An envelope under the register held cash designated for video poker activities.

The check-out counter and cash register were located at the front of the store. At the back of the store were two steps, which led around a corner to the area containing the video poker machines. Surveillance cameras monitored both the front counter area and the video poker area. A door to the side of the check-out counter led to a garage where employees performed tire changes and other automotive repairs. This door also led to a side room that the Facianes used for storage and for sleeping on nights they did not want to drive home after closing.

At approximately 9:00 p.m. on 4 December 2003, the Facianes were working at their store when two customers, Barry and Sandra Butts (Mr. and Mrs. Butts or the Buttses), arrived and began playing the video poker machines. Shortly thereafter, Mr. Faciane went into the side room to take a shower while Mrs. Faciane remained at the front counter.

Minutes later, defendant and Tyrone Crawley (Crawley) entered the store wearing masks, gloves, and hooded sweatshirts and carrying guns. Defendant rounded the corner to the back where the Buttses were sitting, while Crawley moved towards Mrs. Faciane at the front. Crawley came around the front counter, pointed his gun at Mrs. Faciane, and said, "Give me the money." In response, Mrs. Faciane opened the cash register, and Crawley grabbed a handful of twenty dollar bills and receipts and put them in his pocket. Crawley began to reach for the ten dollar bills, but then stated, "No, I want 'the' money." Mrs. Faciane, assuming he was referring to the envelope containing cash for the games, retrieved the envelope from a shelf below the register and handed it to him.

In the meantime, defendant walked up behind the Buttses, pointed a gun at them, and ordered them to "stay still." The Buttses raised their arms in the air. Defendant then asked if they had anything in their pockets. Mr. Butts, who could not reach into his pockets, asked if he should stand, to which defendant responded, "No." Defendant then moved behind Mrs. Butts, leaned over her with his gun behind her neck, and removed her billfold from her jacket pocket. Defendant began looking through the billfold, which contained a check card, checkbook, and loose change.

Meanwhile, in the front of the store, Mr. Faciane appeared in the side doorway holding a twelve-gauge shotgun and said, "No." The next moment, Mrs. Faciane heard a loud noise. Mr. Faciane fell forward, no longer holding his gun. Mr. Faciane and Crawley then began struggling with each other on the floor, apparently wrestling over their guns. Mrs. Faciane grabbed her own revolver from a shelf behind the counter and fired twice at Crawley, attempting to hit his back or shoulder. In response to the gunfire in the front of the store, defendant stepped around the corner, saw Crawley and Mr. Faciane wrestling on the floor, and began firing at Mr. Faciane.

Mrs. Faciane testified that around this time, "it seemed like a war broke loose" and "gunshots seemed to be coming from everywhere." Bullets were flying past her from the back of the store. Mrs. Faciane saw Mr. Faciane, who had been attempting to stand up by bracing himself at the counter, fall to the ground. As Mrs. Faciane reached down to help Mr. Faciane, Crawley pumped the shotgun and fired at her, shooting her in the arm. He then ran towards the exit, but turned and paused, at which point Mrs. Faciane, afraid he was going to shoot her again, fired at him until she ran out of bullets. Mr. Faciane, who had since picked up Crawley's weapon, also fired at

Crawley from his position on the floor. Defendant ran back in the direction of the Buttses, circled around some shelves, and left the store.

After defendant and Crawley left, Mr. Faciane told Mrs. Faciane to call 911 because he had been shot. Mrs. Faciane attempted to place Mr. Faciane flat on the floor in order to determine where he had been shot and report his condition to the 911 operator. By the time emergency personnel arrived, however, Mr. Faciane was unconscious and breathing abnormally. Mr. Faciane bled to death on the floor of his store.

The Buttses left the store immediately after the robbery because Mrs. Butts was hyperventilating, and they went to the Harnett County Sheriff's Office, where they each gave a statement. Too afraid to sleep in their own home, they spent the night with their adult daughter.

An autopsy revealed that Mr. Faciane was shot two times and died as a result of blood loss from the wounds. One bullet entered Mr. Faciane's chest, causing bleeding in his chest cavity, and exited through his back shoulder blade. Another bullet entered his abdomen, causing bleeding there, and exited through his buttock. This second bullet lodged in Mr. Faciane's underwear and was discovered by the medical examiner who performed the autopsy. Lab testing and forensic investigation revealed that this bullet came from defendant's gun.

Emergency personnel and law enforcement officers arrived at the scene within minutes following the shootings. They described the store as a chaotic "war zone." Bullet casings, spent projectiles, debris, and shattered glass from doors and windows were everywhere. Later investigation showed that approximately thirty shots had been fired during the incident, with at least seven of those bullets coming from defendant's gun.

When defendant left Mitch's Grocery, he drove Crawley to Cape Fear Valley Hospital in Fayetteville. Defendant told the hospital security guard that Crawley had been shot in Fayetteville. The security guard escorted defendant to a deputy's office. Meanwhile, officers from the Harnett County Sheriff's Department who were at Mitch's Grocery were alerted to the presence of a possible suspect at Cape Fear Valley Hospital, and they requested that the deputy keep an eye on defendant until they arrived.

Crawley died as a result of a single gunshot wound to the chest. Hospital personnel discovered an identification card, one hundred three dollars, and receipts from Mitch's Grocery on Crawley's person.

When law enforcement officers arrived at the hospital, they took defendant to a hospital examination room and administered *Miranda* warnings. Defendant agreed to give a statement, in which he related that he had remained in the car while Crawley and a third person, whom he described as "B," robbed Mitch's Grocery. The officers then placed defendant under arrest for robbery with a dangerous weapon.

Defendant subsequently left the hospital with the officers and directed them to an abandoned house near Mitch's Grocery, where he claimed his accomplices and he had parked earlier that evening. The officers searched a path from the abandoned house to Mitch's Grocery and discovered Mrs. Butts's billfold on the ground. The officers then took defendant to the sheriff's department.

At the sheriff's department, defendant gave a second statement in which he again said he had stayed in the car during the robbery of Mitch's Grocery. This interview was cut short, however, by an officer who had been viewing the surveillance tape from the store. The tape showed defendant coming up behind the Buttses and the Buttses raising their hands. It next showed defendant stepping away from the Buttses, pointing a gun towards the front of the store, lowering the gun, and raising it up again while bringing his left hand to it.

Defendant agreed to give a third statement. He was shown a photograph from the video surveillance tape at some point before or during this third interview. During the interview, defendant related that before the robbery, he and Crawley rode around smoking marijuana. Crawley had a gun in the back seat, which looked like a machine gun. Around 8:45 p.m., the two picked up "B." "B" had a diagram of Mitch's Grocery that described in detail the store's layout. "B" told defendant and Crawley that a garage was attached to the store and that the store owners lived in a room next to the garage. "B" also said the store was a "gambling joint" where he had seen people win $1600 and $2500. "B" stated that the money was kept in a specific location behind the counter. The three proceeded to Mitch's Grocery and parked behind an abandoned house near the store. "B" pulled out a handgun, and defendant asked "B" for it.

In his statement, defendant admitted he entered the store, approached the Buttses, and took Mrs. Butts's billfold from her pocket. He also confessed to firing "B" 's gun, claiming that, upon

hearing gunshots in front, he shot three times in the direction of Crawley and the victim without aiming because he did not want to hit his friend.

Defendant offered no evidence in the guilt-innocence phase of trial. At the close of the state's evidence, the trial court allowed defendant's motion to dismiss the three kidnapping charges for insufficient evidence. In addition to finding defendant guilty of first-degree murder, the jury also found him guilty of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon of the Facianes, robbery with a dangerous weapon of Mrs. Butts, and attempted robbery with a dangerous weapon of Mr. Butts.

Additional facts and descriptions of events at trial, as necessary to an understanding of defendant's arguments, are set forth below.

PRETRIAL ISSUES

[1] Defendant argues the trial court erred by denying his motion to strike the death penalty as a possible sentence, or alternatively, to suppress all ballistics evidence collected at the crime scene because the state failed to preserve certain evidence.

Shortly after the murder, the Harnett County Sheriff's Department dispatched an investigator to Mitch's Grocery to process the crime scene. The investigator took approximately two hundred photographs to document the location of various pieces of evidence. He also collected shell casings, spent projectiles, and other evidence, but did not record in writing the specific location within the store where each item was discovered. The crime scene photographs were subsequently lost and unavailable for trial.

Before trial, defendant moved to strike the death penalty or to suppress all ballistics evidence recovered at the crime scene on the ground that the state failed to preserve evidence potentially exculpatory with respect to his defense. Following a hearing, the trial court denied both motions, noting in part that: (1) "There was no evidence presented that any procedures not followed by law enforcement in securing physical evidence was intentional on the part of law enforcement . . . ."; and (2) "There also is no showing by the Defendant that any errors committed by law enforcement in gathering evidence resulted in any prejudice to the defendant."

Defendant argues on appeal that he is entitled to a new sentencing proceeding because the state's failure to properly process the

crime scene deprived him of evidence allegedly favorable with respect to his defense. In support of this argument, defendant proposes the following logical sequence: (1) proper documentation of the evidence would have revealed that no shell casings or projectiles were discovered in the back of the store where the video poker machines were located; (2) this evidence would have refuted testimony by Mrs. Faciane suggesting that the first shot was fired from the back of the store; (3) this in turn would have proved defendant did not fire his weapon until after shots erupted in the front of the store; (4) this information ultimately would have resulted in more jurors finding the nonstatutory mitigating circumstance that defendant "fired only after others fired shots"; and (5) the jury would have returned a different verdict at sentencing. Defendant's argument lacks merit.

Whether a failure to make evidence available to a defendant violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution depends in part on the nature of the evidence at issue. *See Arizona v. Youngblood*, 488 U.S. 51, 57 (1988). When the evidence is exculpatory, that is, "either material to the guilt of the defendant or relevant to the punishment to be imposed," the state's failure to disclose the evidence violates the defendant's constitutional rights irrespective of the good or bad faith of the state. *California v. Trombetta*, 467 U.S. 479, 485 (1984) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). Nonetheless, when the evidence is only " 'potentially useful' " or when " 'no more can be said [of the evidence] than that it could have been subjected to tests, the results of which might have exonerated the defendant,' " the state's failure to preserve the evidence does not violate the defendant's constitutional rights unless the defendant shows bad faith on the part of the state. *State v. Mlo*, 335 N.C. 353, 373, 440 S.E.2d 98, 108 (quoting *Youngblood*, 488 U.S. at 57-58), *cert. denied*, 512 U.S. 1224 (1994); *accord State v. Hunt*, 345 N.C. 720, 725, 483 S.E.2d 417, 420-21 (1997); *State v. Drdak*, 330 N.C. 587, 593-94, 411 S.E.2d 604, 608 (1992). The United States Supreme Court has noted the difficulties involved in requiring a state "to take affirmative steps to preserve evidence on behalf of criminal defendants," *Trombetta*, 467 U.S. at 486, and has stated that "police do not have a constitutional duty to perform any particular tests" on crime scene evidence or to "use a particular investigatory tool," *Youngblood*, 488 U.S. at 58-59 (stating also that the Due Process Clause does not "impose[] on the police an

undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution").

In *Arizona v. Youngblood*, the United States Supreme Court concluded that the state's good faith failure to properly preserve semen samples from the body and clothing of a sexual assault victim did not violate the defendant's constitutional rights, even though the defendant argued the victim had erred in identifying him as the perpetrator and even though testing of the samples may have exonerated the defendant. 488 U.S. at 53-54, 56-58. The Court explained that "[t]he failure of the police to [preserve] the clothing and to perform tests on the semen samples can at worst be described as negligent" and "there was no suggestion of bad faith on the part of the police." *Id.* at 58.

Similarly, in *State v. Hunt*, this Court held the state's failure to preserve items seized at the defendant's home on the day of his arrest did not violate his due process rights, even though he argued the evidence would have shown he was intoxicated at the time of the murder. 345 N.C. at 724-25, 483 S.E.2d at 420-21. In so holding, we observed that "the exculpatory or impeachment value of the missing evidence [was] speculative" and "[n]othing in the record suggest[ed] that any law enforcement officer willfully destroyed the missing evidence." *Id.* at 725, 483 S.E.2d at 420.

In the present case, the state failed to preserve evidence with only speculative exculpatory value. Even had the evidence tended to show that defendant did not initiate the melee, this information was already before the jury from several sources. The testimony of both Mr. and Mrs. Butts, as well as defendant's own statement to law enforcement, indicated defendant did not fire from the video poker area of the store. In fact, one or more jurors found the nonstatutory mitigating circumstance that defendant "fired only after others fired shots."

Furthermore, the record supports the trial court's finding that any failure by law enforcement to follow procedures in securing physical evidence was unintentional. Because the state's failure to preserve potentially useful evidence from the crime scene "can at worst be described as negligent" and "there was no suggestion of bad faith," defendant's due process rights were not violated. *See Youngblood*, 488 U.S. at 58. Accordingly, the trial court properly denied defendant's motions to strike the death penalty and to suppress ballistics evidence.

JURY SELECTION

[2] Defendant next argues the trial court erred by holding that he failed to make a prima facie showing of racial discrimination when he objected to the state's peremptory challenge to an African-American prospective juror.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the North Carolina Constitution prohibit race-based peremptory challenges during jury selection. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *State v. Nicholson*, 355 N.C. 1, 21, 558 S.E.2d 109, 124, *cert. denied*, 537 U.S. 845 (2002). In *Batson v. Kentucky*, the United States Supreme Court set out a three-part test for determining whether the state impermissibly excluded a juror on the basis of race, 476 U.S. at 96-98, and this Court subsequently adopted that same test, *see State v. Augustine*, 359 N.C. 709, 715, 616 S.E.2d 515, 521 (2005) (citing *State v. Barden*, 356 N.C. 316, 342, 572 S.E.2d 108, 126 (2002), *cert. denied*, 538 U.S. 1040 (2003)), *cert. denied*, 548 U.S. 925 (2006). First, the defendant must make a prima facie showing that the state exercised a race-based peremptory challenge. *Augustine*, 359 N.C. at 715, 616 S.E.2d at 522 (citing *Batson*, 476 U.S. at 96-97). If the defendant makes the requisite showing, the burden shifts to the state to offer a facially valid, race-neutral explanation for the peremptory challenge. *Id.* (citing *Batson*, 476 U.S. at 97-98). Finally, the trial court must decide whether the defendant has proved purposeful discrimination. *Id.* (citing *Batson*, 476 U.S. at 98); *see also Snyder v. Louisiana*, ––– U.S. –––, –––, 128 S. Ct. 1203, 1211-12 (2008) (holding that prosecutor's proffered reason for peremptory challenge of African-American prospective juror was a pretext for purposeful discrimination when prosecutor accepted white jurors with "shared characteristic" of expressed concern regarding serving on jury due to conflicting obligations); *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step.").

In the present case, the trial court determined that defendant failed to make a prima facie showing. In reviewing this determination, we are mindful that trial courts, given their experience in supervising *voir dire* and their ability to observe the prosecutor's questions and demeanor firsthand, are "well qualified to 'decide if the circumstances concerning the prosecutor's use of peremptory chal-

lenges creates a prima facie case of discrimination.' " *State v. Chapman*, 359 N.C. 328, 339, 611 S.E.2d 794, 806 (2005) (alteration omitted) (quoting *Batson*, 476 U.S. at 97). The trial court's findings will be upheld on appeal unless they are clearly erroneous—that is, unless " 'on the entire evidence [we are] left with the definite and firm conviction that a mistake ha[s] been committed.' " *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 369 (1991)).

Several factors are relevant to whether a defendant has made a prima facie showing of racial discrimination: the races of the defendant, the victim, and key witnesses; the prosecutor's statements or questions to African-American prospective jurors that either appear racially motivated or alternatively, tend to refute an inference of discrimination; the prosecutor's repeated use of peremptory challenges against African-Americans in a manner that tends to establish a pattern of challenges against African-Americans in the venire; and the prosecutor's use of a disproportionate number of peremptory challenges against African-Americans in a single case. *See*, *e.g.*, *Augustine*, 359 N.C. at 715-16, 616 S.E.2d at 522; *Barden*, 356 N.C. at 343, 572 S.E.2d at 127; *State v. Quick*, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995) (citing *State v. Ross*, 338 N.C. 280, 285, 449 S.E.2d 556, 561 (1994)). Additionally, the state's acceptance rate of African-American jurors is a factor that may tend to refute a showing of discrimination. *See*, *e.g.*, *State v. Fletcher*, 348 N.C. 292, 318, 320, 500 S.E.2d 668, 683-84 (1998), *cert. denied*, 525 U.S. 1180 (1999); *Quick*, 341 N.C. at 145-46, 462 S.E.2d at 189.

With this legal framework in mind, we observe the following with regard to the present case: Defendant is African-American, while the victim was white. Mrs. Faciane and the Buttses were also white. Janet Monroe, an African-American, was the sixtieth prospective juror and was called for consideration as the tenth juror to be seated. Prior to Ms. Monroe's being called for consideration, the state had peremptorily challenged two African-American prospective jurors and had accepted two African-American prospective jurors. The state had peremptorily challenged seven white prospective jurors. After the state utilized its tenth peremptory challenge to excuse Ms. Monroe, defendant asserted a *Batson* violation.

In denying the motion, the trial court first noted that Ms. Monroe "expressed tremendous hesitation in being able to vote for the death penalty" and on that basis "the State was entirely justified in excusing her." The trial court also reviewed the other African-American prospective jurors whom the state peremptorily challenged and de-

termined there was no "pattern of discrimination in the exercised peremptory challenges." The trial court thus concluded defendant had failed to make a prima facie showing that the state peremptorily challenged Ms. Monroe on the basis of her race. Ultimately, two African-American and ten white jurors were chosen to serve, and two African-American jurors and one white juror were selected as alternates.

After careful review of the record, we conclude the trial court properly held that defendant failed to make a prima facie showing of racial discrimination. The state's peremptory challenges to three African-American prospective jurors do not establish a pattern of discrimination when viewed in conjunction with other relevant facts of this case. When defendant made his *Batson* objection, the state had accepted two out of five, or forty percent, of eligible African-American jurors. This Court has previously cited similar acceptance rates as tending to refute an allegation of discrimination. *See*, *e.g.*, *Fletcher*, 348 N.C. at 320, 500 S.E.2d at 684 (holding defendant failed to establish a prima facie case when the state peremptorily challenged three of five eligible minorities, for an acceptance rate of forty percent); *State v. Abbott*, 320 N.C. 475, 480-82, 358 S.E.2d 365, 369-70 (1987) (same); *see also State v. Gregory*, 340 N.C. 365, 397-99, 459 S.E.2d 638, 656-57 (1995) (concluding defendant failed to make a prima facie showing when minority acceptance rate was 37.5%), *cert. denied*, 517 U.S. 1108 (1996); *State v. Smith*, 328 N.C. 99, 121, 400 S.E.2d 712, 724-25 (1991) (stating that minority acceptance rate of 42.8% "is some evidence that there was no discriminatory intent").

Perhaps more importantly, the evidence of record supports the trial court's finding that Ms. Monroe "expressed tremendous hesitation in being able to vote for the death penalty." Early in the *voir dire* process, Ms. Monroe stated, "Well, you know, the death penalty—we don't have a life to give. I mean, God gave us our life, and we really don't have a life to take." Later she said, "The death penalty, I tell you, I really don't agree with." Ms. Monroe made other similar statements throughout the course of the examination. *See Nicholson*, 355 N.C. at 23, 558 S.E.2d at 126 ("The responses of . . . prospective jurors, even if insufficient to support a challenge for cause, are relevant to a determination of whether defendant has made a prima facie showing." (citations omitted)). Our review of the record reveals that the prosecutor's statements and questions during *voir dire* appear evenhanded and not racially motivated. *See Augustine*, 359 N.C. at 715-16, 616 S.E.2d at 522. That defendant is African-American and the murder

victim was white does not, standing alone, establish a prima facie case of discrimination. *See Quick*, 341 N.C. at 146, 462 S.E.2d at 189 (noting, in holding the defendant failed to make a prima facie showing, that "[t]he only circumstance arguably tending to establish discriminatory intent . . . is the fact that the victims were white and the defendant was black").

Accordingly, the trial court properly determined that defendant failed to establish a prima facie case during his *Batson* challenge.

GUILT-INNOCENCE PHASE

[3] Defendant asserts that the trial court erred by refusing his request to instruct the jury on second-degree murder as a lesser included offense of first-degree premeditated and deliberate murder.

When, as here, the state proceeds against a defendant on theories of both premeditated and deliberate murder and felony murder, the trial court "must instruct on all lesser-included offenses within premeditated and deliberate murder supported by the evidence," "irrespective of whether all the evidence would support felony murder." *State v. Millsaps*, 356 N.C. 556, 565-66, 572 S.E.2d 767, 773-74 (2002).

"An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *Id.* at 561, 572 S.E.2d at 771. The trial court should refrain from "indiscriminately or automatically" instructing on lesser included offenses. *State v. Strickland*, 307 N.C. 274, 286, 298 S.E.2d 645, 654 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). Such restraint ensures that " '[t]he jury's discretion is . . . channelled so that it may convict a defendant of [only those] crime[s] fairly supported by the evidence.' " *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (quoting *Hopper v. Evans*, 456 U.S. 605, 611 (1982)).

The standard for determining whether the trial court must instruct on second-degree murder as a lesser included offense of first-degree murder is as follows:

> If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should prop-

erly exclude from jury consideration the possibility of a conviction of second degree murder.

Millsaps, 356 N.C. at 560, 572 S.E.2d at 771 (quoting *Strickland*, 307 N.C. at 293, 298 S.E.2d at 658). Stated differently, the trial court must determine "whether the State's evidence is positive as to each element of [first-degree murder] and whether there is any conflicting evidence relating to any of these elements." *State v. Leroux*, 326 N.C. 368, 378, 390 S.E.2d 314, 322, *cert. denied*, 498 U.S. 871 (1990).

"Premeditation means that the act was thought over beforehand for some length of time, however short. Deliberation means an intent to kill, carried out in a cool state of blood, . . . and not under the influence of a violent passion or a sufficient legal provocation." *Leazer*, 353 N.C. at 238, 539 S.E.2d at 925 (citations and internal quotation marks omitted). Because premeditation and deliberation are ordinarily not susceptible to proof by direct evidence, they are most often proved by circumstantial evidence. *Id.*

This Court has identified certain conduct on the part of a defendant before, during, and after a murder that supports an inference of premeditation and deliberation. *See*, *e.g.*, *id.* Such conduct includes the following: (1) entering the site of the murder with a weapon, which indicates the defendant anticipated a confrontation and was prepared to use deadly force to resolve it, *Leazer*, 353 N.C. at 239, 539 S.E.2d at 925; *State v. Larry*, 345 N.C. 497, 513-14, 481 S.E.2d 907, 916-17, *cert. denied*, 522 U.S. 917 (1997); (2) firing multiple shots, because "some amount of time, however brief, for thought and deliberation must elapse between each pull of the trigger," *State v. Austin*, 320 N.C. 276, 295, 357 S.E.2d 641, 653, *cert. denied*, 484 U.S. 916 (1987); *accord State v. Chapman*, 359 N.C. 328, 376, 611 S.E.2d 794, 828 (2005); (3) pausing between shots, *State v. Ball*, 324 N.C. 233, 236, 377 S.E.2d 70, 72 (1989); and (4) attempting to cover up involvement in the crime, *Chapman*, 359 N.C. at 376, 611 S.E.2d at 828-29; *State v. Trull*, 349 N.C. 428, 448, 450, 509 S.E.2d 178, 191-92 (1998), *cert. denied*, 528 U.S. 835 (1999).

Here, before the murder, defendant entered Mitch's Grocery armed with a semiautomatic weapon and joined by an accomplice carrying what defendant described as a machine gun. That defendant was prepared to fire his weapon in the event of a confrontation, which the jury could reasonably infer from his bringing the gun into the store, is evidence of premeditation and deliberation. *See Leazer*, 353 N.C. at 239, 539 S.E.2d at 925; *Larry*, 345 N.C. at 514, 481 S.E.2d

at 916-17. Once inside the store, defendant pointed his gun at two customers in the back and instructed them to stay still and empty their pockets. When shots were fired in the front, defendant stepped around the corner from the back of the store into the front area. He then fired repeatedly towards the front of the store, hitting the victim and killing him. Defendant fired at least seven times with a semiautomatic weapon, a process that required a separate trigger pull for each shot. The store's surveillance camera recorded him pausing at one point, lowering his gun, and then raising it again. Defendant's actions of stepping around the corner to the front of the store, pulling the trigger of his gun seven times, and pausing at some point to lower his gun and raise it again provide ample evidence of premeditation and deliberation. *See Chapman*, 359 N.C. at 376, 611 S.E.2d at 828; *Ball*, 324 N.C. at 236, 377 S.E.2d at 72; *Austin*, 320 N.C. at 295, 357 S.E.2d at 653.

Following the murder, defendant misrepresented the nature of his involvement in the crimes. He misled hospital staff regarding where the shooting occurred and initially told investigators that he remained in the car during the shooting. These attempts to cover up his participation in the murder also support a finding of premeditation and deliberation. *See Chapman*, 359 N.C. at 376, 611 S.E.2d at 828-29; *Trull*, 349 N.C. at 448, 509 S.E.2d at 191-92.

In sum, defendant's conduct before, during, and after the murder provides sufficient positive evidence of premeditation and deliberation. Defendant argues that, although the state produced sufficient evidence of premeditation and deliberation, he was nevertheless entitled to an instruction on second-degree murder because he allegedly lacked a plan to kill the victim and only fired his weapon after gunfire erupted in the front of the store. Neither absence of evidence of a plan to commit murder nor existence of evidence that one was not the first to fire in a gunfight negates premeditation and deliberation. " '[N]o particular amount of time is necessary to illustrate that there was premeditation.' " *State v. Frye*, 341 N.C. 470, 500, 461 S.E.2d 664, 679 (1995) (quoting *State v. Sierra*, 335 N.C. 753, 758, 440 S.E.2d 791, 794 (1994)), *cert. denied*, 517 U.S. 1123 (1996). Moreover, a defendant who initiates a situation without the requisite intent to kill may form such intent in the midst of the situation. *See, e.g.*, *Larry*, 345 N.C. at 513, 481 S.E.2d at 916 (rejecting the contention that, in order to warrant an instruction on premeditation and deliberation, "the evidence must support a finding that [defendant] deliberated the specific intent to kill before the struggle with the victim began"); *State v.*

Harden, 344 N.C. 542, 555, 476 S.E.2d 658, 664 (1996) (stating that "[d]eliberation may occur during a scuffle or a quarrel between the defendant and the victim" (citing *State v. Hill*, 311 N.C. 465, 470, 319 S.E.2d 163, 167 (1984))), *cert. denied*, 520 U.S. 1147 (1997). This Court rejected a claim similar to that of defendant in *State v. Frye*, stating that "Defendant's assertion that he had the intent only to rob when he arrived at the victim's house does not negate or contradict the State's proof of premeditation and deliberation" and that "evidence of a struggle during the commission of a felony does not necessarily entitle a defendant to an instruction on a lesser charge." 341 N.C. at 501, 461 S.E.2d at 680.

Furthermore, with respect to evidence tending to show that defendant was not the first to fire, "[a] defendant is not entitled to an instruction on a lesser included offense merely because the jury could possibly believe some of the State's evidence but not all of it." *State v. Annadale*, 329 N.C. 557, 568, 406 S.E.2d 837, 844 (1991). For example, in *State v. Larry*, this Court held that although evidence regarding the number of shots fired by the defendant was conflicting (some witnesses testified the defendant fired one shot, while others testified he fired multiple shots), there was other sufficient positive evidence of premeditation and deliberation such that the trial court was not required to submit lesser included offenses of first-degree murder. 345 N.C. at 514, 518, 481 S.E.2d at 917, 919.

Similarly, in the present case, regardless of whether defendant was the first to fire his weapon, the state presented uncontroverted evidence from which the jury could rationally infer that defendant formed the requisite intent for first-degree murder at some point during the period in which he heard shots erupt in the front of the store, stepped around the corner to observe the action, and fired his weapon multiple times. *See Chapman*, 359 N.C. at 376, 611 S.E.2d at 828; *Leazer*, 353 N.C. at 239, 539 S.E.2d at 925-26.

Defendant also contends his statement, as recorded by law enforcement following the crime, that he "shot three times in the direction of Tyrone [Crawley] and the [victim] without aiming because he did not want to hit his friend" entitles him to an instruction on second-degree murder.

To the contrary, defendant's admission that he fired three times in the victim's direction supports a finding of premeditation and deliberation because "[p]remeditation and deliberation may be inferred from the multiple shots fired by defendant." *See Chapman*, 359 N.C.

at 376, 611 S.E.2d at 828; *see also Larry*, 345 N.C. at 514, 481 S.E.2d at 917 (holding evidence that the defendant fired two or more shots with a pause in between supported a finding of premeditation and deliberation); *State v. Watson*, 338 N.C. 168, 179, 449 S.E.2d 694, 701 (1994) (stating that " 'some amount of time, however brief, for thought and deliberation must elapse between each pull of the trigger' " (quoting *Austin*, 320 N.C. at 295, 357 S.E.2d at 653)), *cert. denied*, 514 U.S. 1071 (1995), *overruled in part on other grounds by State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995); *State v. Ruof*, 296 N.C. 623, 637, 252 S.E.2d 720, 729 (1979) (listing " 'the number of shots fired' " as being among "the circumstances to be considered in determining whether a killing is done with premeditation and deliberation" (quoting *State v. Smith*, 290 N.C. 148, 164, 226 S.E.2d 10, 20, *cert. denied*, 429 U.S. 932 (1976))).

Moreover, we will not invent from defendant's obscure assertion that he fired in a specific direction without aiming a scenario in which he shot the victim without the intent to kill. In the past, this Court has refused to consider similarly vague and isolated statements as evidence negating premeditation and deliberation. For example, in *State v. Chapman*, the defendant, while riding in a car, fired several shots into another car, killing one of the passengers. 359 N.C. at 337-38, 611 S.E.2d at 804-05. The defendant argued that his statement just before the murder that he was " 'about to shoot up this car,' " *id.* at 337, 611 S.E.2d at 805, suggested he did not intend to kill a human being and entitled him to an instruction on second-degree murder, *id.* at 377-78, 611 S.E.2d at 829. This Court disagreed and stated that when the defendant fired multiple shots into the victim's occupied vehicle, "Defendant's statement that he was going to shoot 'the car' and the fact that these shots were fired at night and between two moving vehicles in no way negate[d] the State's evidence of *mens rea*." *Id.* at 378, 611 S.E.2d at 829.

Similarly, in *State v. Smith*, 347 N.C. 453, 496 S.E.2d 357, *cert. denied*, 525 U.S. 845 (1998), the defendant was not entitled to an instruction on second-degree murder when the state produced evidence that he set fire to an apartment building to destroy evidence of his earlier mail theft from residents. *Id.* at 463-64, 496 S.E.2d at 363. This Court held that the defendant's "self-serving statement that he set the fire as a prank," made shortly after the crime, "was not sufficient to support an instruction on second-degree murder." *Id.* at 464, 496 S.E.2d at 363; *see also State v. Arnold*, 329 N.C. 128, 136, 139, 404 S.E.2d 822, 827, 829 (1991) (holding that the state presented

sufficient evidence of premeditation and deliberation and an instruction on second-degree murder was not warranted despite the alleged murder's purported statement to a friend following the killing "that he and [the victim] had gotten into a fight and he wished it had not happened," when no evidence suggested the murder occurred during a fight).

Defendant finally argues that Mr. Butts's testimony that defendant's "only objective was to get out of the store" tends to show defendant did not premeditate and deliberate the murder. But defendant has taken Mr. Butts's statement out of context. At trial, Mr. Butts described how defendant approached Mrs. Butts and him and took Mrs. Butts's billfold. Mr. Butts then continued:

> Then, there were shots that were fired in the front of the store, and whenever the shots were fired in the front of the store, the [defendant] went to the front of the store. More shots were fired. Then the [defendant] came towards the back of the store and then went around the counters and out towards the front door.
>
> . . . .
>
> Q. When the [defendant] came back, could you see what he was doing?
>
> A. There again, he was—he came back probably a lot faster than he went, I think because shots were being fired again, as I said. And it seemed to me that at that time his only objective was to get out of the store.

Thus, according to Mr. Butts, defendant decided to "get out of the store" after he moved to the front of the store and after much of the gunfight had already occurred. Furthermore, defendant himself told investigators that he first heard gunshots in the front of the store, then fired his weapon several times, and then ran out the door. Combined, these statements indicate it was only after defendant fired multiple shots in the front of the store that he ran back towards the Buttses and appeared to Mr. Butts to be focused on leaving the store. Neither Mr. Butts's testimony nor defendant's leaving the store after shooting the victim negates premeditation and deliberation.

[4] Defendant next contends the trial court erred by failing to intervene *ex mero motu* during the following portion of closing argu-

ments when the prosecutor expressed disbelief of a statement made by defendant:

> Anyway, [defendant] changes his statement and he says, "It's pretty much the way I told you except for I went in. I carried a gun into the store that I got off of 'B.' "
>
> But he's still not quite ready to take all the responsibility because he says—and I saw some of you when this statement was read and I know that you didn't believe it, just like I don't—"I fired three times without aiming because I didn't want to hit my friend." Fired three times without aiming, in a direction without aiming."

Defendant did not object to these remarks at trial. The prosecutor continued:

> Well, aren't you just as likely to hit him without aiming as you are to hit him with aiming? I mean, who fires three times meaning not to hit somebody without aiming? I aimed at the ceiling 'cause I didn't want to hit him. I aimed at the side rack 'cause I didn't want to hit him. I aimed somewhere else 'cause I didn't want to hit him. But I fired three times without aiming 'cause I didn't want to hit my friend.

"[W]e 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 fundamentally unfair." *State v. Allen*, 360 N.C. 297, 306-07, 626 S.E.2d 271, 280, *cert. denied*, 549 U.S. 867 (2006). In determining whether argument was grossly improper, this Court considers "the context in which the remarks were made," *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41, *cert. denied*, 513 U.S. 1046 (1994), as well as their brevity relative to the closing argument as a whole, *see State v. Fletcher*, 354 N.C. 455, 484-85, 555 S.E.2d 534, 552 (2001) (reasoning that when "[t]he offending comment was not only brief, but . . . was made in the context of a proper . . . argument," it was not grossly improper), *cert. denied*, 537 U.S. 846 (2002).

Here, the prosecutor's statement, "I know that you didn't believe it, just like I don't," was a small part of an otherwise proper argument that the jury should not believe defendant's statement that he fired without aiming because: (1) defendant's version of the events surrounding the murder was not credible, as evidenced by his changing his story when confronted with a videotape confirming his presence

inside the store; and (2) the statement was absurd on its face. Although the prosecutor should not have indicated his personal disbelief of defendant's statement, given the overall context and the brevity of the remark, it was not "so grossly improper" as to render the proceeding "fundamentally unfair." *See Allen*, 360 N.C. at 306-07, 626 S.E.2d at 280.

[5] Defendant next argues the trial court erred by denying his motion for mistrial based on an allegedly prejudicial incident involving contact between a juror and an outside party.

Near the end of the guilt-innocence phase of trial, the trial court dismissed the jury from the courtroom and called a person from the gallery forward. The trial court confronted the person with a report by a juror that when the juror left the courthouse on a prior afternoon, the person followed the juror's automobile for some distance. The person denied the allegation. The trial court nevertheless cautioned the person to stay away from jurors, and the person indicated his understanding. Later in the day, after the state rested its case, the trial court inquired of both the juror who reported the incident and a second juror who claimed to have witnessed it. The trial court asked each juror whether the incident affected that juror's ability to be fair and impartial in the trial of the case, and both jurors responded that it did not. When the two jurors related that they had discussed the incident with other jurors, the trial court brought out all of the jurors and inquired generally as to whether an alleged incident that occurred during the previous week affected their ability to be fair and impartial. All jurors responded negatively.

The following day, defendant moved for a mistrial. Defendant argued that because the person in question had been seated with defendant's family during part of the trial and was seen with them around the courthouse, the jury might associate the person's behavior with defendant, thereby prejudicing defendant. The trial court denied the motion, noting that the jurors had indicated their ability to be fair and impartial and that "the jurors do not know the identity of the person who allegedly followed them or what his connection is with any of the parties." On appeal, defendant contends the trial court's denial of his motion for mistrial was error and violated his right to a fair and impartial jury trial.

A trial court must declare a mistrial "if there occurs during the trial . . . conduct inside or outside the courtroom [that results] in substantial and irreparable prejudice to the defendant's case." N.C.G.S.

§ 15A-1061 (2007). " 'Mistrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict.' " *State v. Smith*, 320 N.C. 404, 418, 358 S.E.2d 329, 337 (1987) (quoting *State v. Stocks*, 319 N.C. 437, 441, 355 S.E.2d 492, 494 (1987)). The decision to grant or deny a mistrial lies within the sound discretion of the trial court and is "entitled to great deference since [the trial court] is in a far better position than an appellate court to determine the effect of any [misconduct] on the jury." *State v. Thomas*, 350 N.C. 315, 341, 514 S.E.2d 486, 502, *cert. denied*, 528 U.S. 1006 (1999). Absent an abuse of discretion, therefore, the trial court's ruling will not be disturbed on appeal. *Id.* An abuse of discretion occurs when a ruling is "manifestly unsupported by reason, which is to say it is so arbitrary that it could not have been the result of a reasoned decision." *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998).

Here, the trial court properly sought to determine the effect on the jury of any misconduct by thoroughly questioning all parties allegedly involved in or affected by the incident. The trial court reprimanded and warned the person who allegedly followed the juror, specifically questioned the two jurors involved in the incident and received their individual assurances of impartiality, and inquired generally of all jurors and received their assurances of impartiality. Additionally, there is no evidence tending to show the jurors were incapable of impartiality or were in fact partial in rendering their verdict. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for mistrial.

[6] Defendant next argues the trial court erred by denying his motion to dismiss the charge of attempted robbery with a dangerous weapon of Mr. Butts. When reviewing a sufficiency of the evidence claim, this Court considers whether the evidence, taken in the light most favorable to the state and allowing every reasonable inference to be drawn therefrom, constitutes "substantial evidence of each element of the crime charged." *State v. Davis*, 340 N.C. 1, 11-12, 455 S.E.2d 627, 632, *cert. denied*, 516 U.S. 846 (1995). "Substantial evidence means that the evidence must be existing and real, not just seeming or imaginary." *Id.* at 12, 455 S.E.2d at 632 (internal quotation marks omitted) (quoting *State v. Clark*, 325 N.C. 677, 682, 386 S.E.2d 191, 194 (1989)).

" '[A]n attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this

result.' " *Id.* (quoting *State v. Allison*, 319 N.C. 92, 96, 352 S.E.2d 420, 423 (1987)). The overt act must "go[] beyond mere preparation but fall[] short of the completed offense." *Id.* A defendant may attempt robbery with a dangerous weapon even when the defendant neither demands nor takes money from the victim. *See Davis*, 340 N.C. at 12-13, 455 S.E.2d at 632-33. For example, in *State v. Davis*, the following facts amounted to sufficient evidence of attempted robbery with a dangerous weapon: the defendants had been in a certain pawn shop two previous times on the day of the incident; the defendants entered the pawn shop for a third time just before closing and drew their pistols; one defendant said to the shop's proprietor, "Buddy, don't even try it"; and the defendants fled the shop without taking money or valuables when a gunfight erupted among the three. *Id.* at 12, 455 S.E.2d at 632. This Court determined the defendants' actions of drawing their pistols and their words, "Buddy, don't even try it," demonstrated their intent to rob and constituted an overt act in furtherance thereof. *Id.* at 12-13, 455 S.E.2d at 632-33; *see also State v. Smith*, 300 N.C. 71, 77-78, 80-81, 265 S.E.2d 164, 169-71 (1980) (holding evidence of attempted robbery with a dangerous weapon sufficient when the defendant pointed a gun at a convenience store proprietor and stated, "Don't move" and "Don't put your hands under that counter," but fled when a third party drove past the store and waved at the proprietor).

The instant case is analogous to *Davis*. Just as the defendants in *Davis* familiarized themselves with the pawn shop before the robbery, 340 N.C. at 12, 455 S.E.2d at 632, so too defendant and Crawley reviewed a diagram of Mitch's Grocery and were aware that large sums of money were kept on hand there for video poker games. These facts tend to support the state's contention that defendant intended to rob clientele of the store's video poker machines. Moreover, in the same way that the defendants in *Davis* drew their weapons and warned the victim not to "try it," *id.*, defendant in this case approached Mr. Butts from behind, pointed a gun at him, and indicated he should "stay still" and empty his pockets. These words and actions are evidence of both defendant's intent to rob Mr. Butts and an "overt act calculated to bring about" that result. *See id.* Having manifested an intent to rob Mr. Butts and performed an overt act in furtherance thereof, defendant's attempted robbery with a dangerous weapon was complete, despite the fact that defendant, without taking money from Mr. Butts, moved on to Mrs. Butts when she proved an easier target and ran from the store after the gunfight. *See Davis*, 340 N.C. at 12-13, 15, 455 S.E.2d at 632-34 (holding evidence of

robbery with a dangerous weapon sufficient when, following a gunfight, the defendants fled the store without taking money). Accordingly, the state presented substantial evidence of attempted robbery with a dangerous weapon, and the trial court properly denied defendant's motion to dismiss.

[7] Defendant also argues the trial court erred by instructing the jurors, over defendant's objection, that they could consider evidence of flight in determining whether defendant committed murder. "A trial court may properly instruct on flight where there is some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged." *State v. Lloyd*, 354 N.C. 76, 119, 552 S.E.2d 596, 625 (2001) (internal quotation marks omitted) (quoting *State v. Allen*, 346 N.C. 731, 741, 488 S.E.2d 188, 193 (1997)). Evidence that the defendant hurriedly left the crime scene without rendering assistance to the homicide victim may warrant an instruction on flight. *See*, *e.g.*, *State v. Anthony*, 354 N.C. 372, 425, 555 S.E.2d 557, 591 (2001) (holding evidence sufficient to warrant flight instruction when, after shooting the victim, "defendant immediately entered his car and quickly drove away from the crime scene without rendering any assistance to the victims or seeking to obtain medical aid for them"), *cert. denied*, 536 U.S. 930 (2002).

In the instant case, the evidence tended to show defendant left Mitch's Grocery hurriedly without aiding the Facianes or the Buttses and sought to avoid apprehension for the murder. Defendant himself told law enforcement officers that he "*ran* for the door after shooting," "*ran* out of the door and threw the wallet down on the way out," and "*ran* to the right when [he] left the store." (emphases added). At no point did defendant attempt to provide or obtain medical assistance for the victims. Instead, he drove to a hospital in a different county, where he misled hospital staff regarding the location of the incident and misled investigating officers regarding his role in the incident. Taken together, these actions constitute substantial "evidence . . . reasonably supporting the theory that the defendant fled after the commission of the crime charged." *Lloyd*, 354 N.C. at 119, 552 S.E.2d at 625 (internal quotation marks omitted) (quoting *Allen*, 346 N.C. at 741, 488 S.E.2d at 193).

Even assuming *arguendo* that the instruction on flight was improper, it cannot reasonably be said to have prejudiced defendant. Evidence that a bullet from defendant's gun went through the victim's abdomen and lodged in his underwear, combined with defendant's own confession to law enforcement, provided overwhelming evi-

dence that defendant committed the murder. In addition, the " 'trial court's instruction correctly informed the jury that proof of flight was not sufficient by itself to establish guilt and would not be considered as tending to show premeditation and deliberation.' " *Id.* at 120, 552 S.E.2d at 626 (quoting *State v. Grooms*, 353 N.C. 50, 81, 540 S.E.2d 713, 732 (2000), *cert. denied*, 534 U.S. 838 (2001)). Thus, defendant's argument is without merit.

[8] Defendant next contends he was deprived of his right to a unanimous jury verdict because the trial court did not specifically instruct the jurors as to which robbery with a dangerous weapon they should consider as the underlying felony for the purpose of finding felony murder. The trial court's felony murder instructions were implicitly disjunctive, as they generally referred to the robbery of "a person" without specifically referring to defendant's robbery of the Facianes or Mrs. Butts.

Article I, Section 24 of the North Carolina Constitution provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." *See also* N.C.G.S. § 15A-1237(b) (2007) ("The verdict must be unanimous . . . ."). It is well established, however, 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) (emphasis omitted); *see also State v. Hartness*, 326 N.C. 561, 563, 567, 391 S.E.2d 177, 178, 180-81 (1990) (holding that when a defendant is charged with "a single offense which may be proved by evidence of the commission of any one of a number of acts," an instruction that does not specify which of those acts the jury should consider is not fatally ambiguous such that it risks a nonunanimous verdict).

The trial court's instructions here allowed the jury to find defendant guilty of felony murder if it found he committed either robbery with a dangerous weapon of the Facianes or robbery with a dangerous weapon of Mrs. Butts. Because either of these alternative acts established an element of felony murder—namely, the commission of one of the several felonies enumerated in N.C.G.S. § 14-17—the requirement of jury unanimity was satisfied. *See Lyons*, 330 N.C. at 303, 412 S.E.2d at 312; *Hartness*, 326 N.C. at 567, 391 S.E.2d at 180-81; *cf. State v. Coleman*, 161 N.C. App. 224, 234-35, 587 S.E.2d 889, 896 (2003) (upholding jury finding of felony murder when the trial court instructed the jury in the disjunctive as to four separate felonies that could have served as the predicate felony, even though the trial

court's instructions were "ambiguous as to what underlying felony formed the basis of the felony murder charge"). Accordingly, defendant's argument fails.

[9] In his final guilt-innocence phase argument, defendant claims the trial court erred by failing to arrest judgment on the robbery with a dangerous weapon charges underlying his felony murder conviction. " '[W]here defendant is convicted of first-degree murder based upon both premeditation and deliberation and felony murder, the underlying felony does not merge with the murder conviction and the trial court is free to impose a sentence thereon.' " *State v. Robinson*, 342 N.C. 74, 82-83, 463 S.E.2d 218, 223 (1995) (quoting *State v. Bell*, 338 N.C. 363, 394, 450 S.E.2d 710, 727 (1994), *cert. denied*, 515 U.S. 1163 (1995)), *cert. denied*, 517 U.S. 1197 (1996). Here, defendant was convicted of first-degree murder both on the basis of premeditation and deliberation and under the felony murder rule. Consequently, neither the robbery with a dangerous weapon of the Facianes nor the robbery with a dangerous weapon of Mrs. Butts merged with the murder conviction, and the trial court did not err in failing to arrest judgment on those charges.

CAPITAL SENTENCING PROCEEDING

Defendant makes several arguments with respect to the pecuniary gain aggravating circumstance. *See* N.C.G.S. § 15A-2000(e)(6) (2007) ("The capital felony was committed for pecuniary gain.").

[10] We first consider defendant's argument that the trial court's instruction on the pecuniary gain aggravating circumstance constituted plain error because it allegedly failed to state the requirement that the murder must have been for the purpose of financial gain. The trial court instructed the jury as follows:

> [W]as the murder committed for pecuniary gain? A murder is committed for pecuniary gain if the defendant, when he commits it, has obtained or intends or expects to obtain money or some other thing which can be valued in money, either as compensation for committing it or as a result of the death of the victim.
>
> If you find from the evidence, beyond a reasonable doubt, that when the defendant killed the victim the defendant took money and other valuable property from the victim and that he intended or expected to obtain money or other things of value that can be valued in money as a result of the victim's death, if you find this aggravating circumstance you will so indicate . . . .

Because defendant did not object to the instruction at trial, we review for plain error. *See State v. Duke*, 360 N.C. 110, 138, 623 S.E.2d 11, 29 (2005), *cert. denied*, 549 U.S. 855, (2006); *see also* N.C. R. App. P. 10(c)(4) (allowing for plain error review of certain unpreserved issues in criminal cases). A reversal for plain error is only appropriate in the most exceptional circumstances and when the defendant establishes that "absent the error, the jury probably would have reached a different result." *State v. Cummings*, 352 N.C. 600, 616, 536 S.E.2d 36, 49 (2000) (internal quotation marks omitted) (quoting *State v. Sierra*, 335 N.C. 753, 761, 440 S.E.2d 791, 796 (1994)), *cert. denied*, 532 U.S. 997 (2001).

"The gravamen of the pecuniary gain aggravating circumstance is that the killing was for the purpose of getting money or something of value." *State v. Chandler*, 342 N.C. 742, 754, 467 S.E.2d 636, 643 (internal quotation marks omitted) (quoting *State v. Jennings*, 333 N.C. 579, 621, 430 S.E.2d 188, 210, *cert. denied*, 510 U.S. 1028 (1993)), *cert. denied*, 519 U.S. 875 (1996). The circumstance applies only when " 'the hope of pecuniary gain provided the impetus for the murder,' " *id.* (quoting *State v. Oliver*, 302 N.C. 28, 62, 274 S.E.2d 183, 204 (1981)), and not when, for example, "the taking was a mere act of opportunism committed after a murder was perpetrated for another reason," *State v. Maske*, 358 N.C. 40, 54, 591 S.E.2d 521, 530 (2004). Thus, an instruction that conveys to the jury that its "finding of robbery with a dangerous weapon . . . would automatically mandate the finding of the [pecuniary gain] aggravator" is erroneous. *State v. Jones*, 357 N.C. 409, 419-20, 584 S.E.2d 751, 758 (2003).

In considering jury instructions on the pecuniary gain aggravating circumstance, this Court has distinguished between instructions that explain, define, or describe pecuniary gain and those that "simply direct[] that if the jury [finds] robbery with a dangerous weapon, then the jury [would] find the pecuniary gain aggravating circumstance." *Id.* at 419-20, 584 S.E.2d at 758-59. For example, in *State v. Jones*, the trial court committed plain error by instructing the jury: "If you find from the evidence beyond a reasonable doubt . . . that when the defendant killed the victim, the defendant was in the commission of robbery with a dangerous weapon, you would find [the pecuniary gain] aggravating circumstance. . . ." *Id.* at 418-20, 584 S.E.2d at 757-58 (emphasis omitted). Similarly, in *State v. Maske*, the trial court erred by instructing the jury: "If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, the defendant took $200 from the victim's purse, you would

find [the pecuniary gain] aggravating circumstance . . . ." 358 N.C. at 56-57, 591 S.E.2d at 531-32. *Jones* and *Maske* both distinguish the pecuniary gain instruction upheld by this Court in *State v. Davis*, 353 N.C. 1, 36-37, 539 S.E.2d 243, 266-67 (2000), *cert. denied*, 534 U.S. 839 (2001), which read in part:

> If you find, from the evidence beyond a reasonable doubt, that when the defendant killed the victim, that the defendant took personal property or other items belonging to [the victim] and that he intended or expected to obtain money or property or any other thing that can be valued in money, you would find [the pecuniary gain] aggravating circumstance.

See Maske, 358 N.C. at 56, 591 S.E.2d at 532 (stating that the instruction in *Davis* "is distinguishable from the one given here"); *Jones*, 357 N.C. at 421, 584 S.E.2d at 759 (citing with approval the instruction in *Davis* and indicating it adequately described pecuniary gain).

The instruction in the present case was substantially similar to the instruction upheld by this Court in *Davis*. A side-by-side comparison of the two instructions reveals that both define and describe pecuniary gain in a similar manner. The trial court in *Davis* instructed the jurors to find the pecuniary gain circumstance if they determined "that when the defendant killed the victim . . . he intended or expected to obtain money or property or any other thing that can be valued in money." 353 N.C. at 36, 539 S.E.2d at 266. Likewise, the trial court in the instant case instructed the jurors to find the pecuniary gain circumstance if they determined "that when the defendant killed the victim . . . he intended or expected to obtain money or other things of value that can be valued in money as a result of the victim's death." The instruction did not "simply direct[] that if the jury found robbery with a dangerous weapon, then the jury would find the pecuniary gain aggravating circumstance," *see Jones*, 357 N.C. at 420, 584 S.E.2d at 758, and it did not remove from the jury the requirement that it find the murder was motivated by a hope or expectation of pecuniary gain. Accordingly, the instruction was not plain error.

In light of this holding and because defendant, in his brief to this Court, acknowledges that the trial court's instruction on pecuniary gain was "essentially consistent with the pattern instructions," we also reject defendant's argument that defense counsel's failure to object to the instruction or to request a special instruction constituted ineffective assistance of counsel.

[11] Defendant next argues the trial court erred by failing to intervene *ex mero motu* during the state's closing argument related to the pecuniary gain aggravating circumstance. Trial counsel are permitted wide latitude in arguing hotly contested cases, and the "scope of jury arguments is left largely to the control and discretion of the trial court." *State v. Peterson*, 361 N.C. 587, 606, 652 S.E.2d 216, 229 (2007) (internal quotation marks omitted) (quoting *Allen*, 360 N.C. 297, 306, 626 S.E.2d 271, 280, *cert. denied*, 549 U.S. 867 (2006)), *cert. denied*, —— U.S. ——, 128 S. Ct. 1682 (2008). "These principles apply not only to ordinary jury arguments, but also to arguments made in capital sentencing proceedings, and the boundaries for jury argument at the capital sentencing proceeding are more expansive than at the guilt phase." *State v. Thomas*, 350 N.C. 315, 360, 514 S.E.2d 486, 513-14 (citing *State v. Bishop*, 343 N.C. 518, 552, 472 S.E.2d 842, 860 (1996), *cert. denied*, 519 U.S. 1097 (1997)), *cert. denied*, 528 U.S. 1006 (1999).

" '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. McNeill*, 360 N.C. 231, 244, 624 S.E.2d 329, 338 (quoting *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002)), *cert. denied*, —— U.S. ——, 127 S. Ct. 396 (2006). "Under this standard, 'only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken.' " *State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001) (quoting *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890 (1996)), *cert. denied*, 536 U.S. 930 (2002). The defendant will not prevail on appeal unless "the sentencing hearing was so infected with unfairness by the prosecutor's comments as to violate defendant's due process rights." *State v. Braxton*, 352 N.C. 158, 219, 531 S.E.2d 428, 464 (2000), *cert. denied*, 531 U.S. 1130 (2001).

Here, the prosecutor argued to the jury:

> Now, when considering what the punishment shall be, you will be given instructions by His Honor as to how to proceed with that. He will tell you what they are, and he will instruct you. . . . You'll have two aggravating circumstances to consider. The first one is whether the murder was committed during a—whether the murder was committed for pecuniary gain; pecuniary, money.

> Was Mitch's death the result of the defendant getting money, and Jamel Crawley, from the store? They accomplished that, the money and receipts.
>
> Now, I contend that you have already found that aggravating circumstance because you have found the defendant guilty of conspiracy to commit robbery of the store and also robbery of the store. Now, you must find beyond a reasonable doubt, and all 12 jurors unanimously, whether that aggravating circumstance exists.

Defendant contends the jurors would have understood these statements to mean that the guilty verdicts on the charges of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon automatically required them to find the pecuniary gain aggravating circumstance as well. According to defendant, the statements were thus grossly improper.

"A trial court is not required to intervene *ex mero motu* where a prosecutor makes comments during closing argument which are substantially correct shorthand summaries of the law, even if slightly slanted toward the State's perspective." *State v. Barden*, 356 N.C. 316, 366, 572 S.E.2d 108, 140 (2002) (internal quotation marks omitted) (quoting *State v. Warren*, 347 N.C. 309, 322, 492 S.E.2d 609, 616 (1997), *cert. denied*, 523 U.S. 1109 (1998)), *cert. denied*, 538 U.S. 1040 (2003). Moreover, a prosecutor's misstatement of the law may be cured by the trial court's subsequent correct instructions. *Id.* In *State v. Barden*, we applied these principles to hold that, even when the defendant timely objected, "[t]he prosecutor's statement that armed robbery 'is' pecuniary gain was not so wide of the mark as to constitute reversible error." *Id.*

In the instant case, the prosecutor distinguished between what "I [the state] contend" about pecuniary gain on the one hand and what "you [the jury] must find" about pecuniary gain on the other hand. Additionally, the prosecutor told the jurors they should look to the trial court for explanation and instruction on the aggravating circumstances, and we have already concluded the trial court's instructions on pecuniary gain were proper. Therefore, the prosecutor's remarks were not so grossly improper that the trial court erred by failing to intervene *ex mero motu*.

[12] Defendant also claims he was afforded ineffective assistance of counsel when defense counsel conceded the existence of the pecu-

niary gain aggravating circumstance during closing argument. Defense counsel stated as follows: "[The aggravating circumstances] are, number one, 'Was this murder committed for pecuniary gain?' Was there a robbery? As [the prosecutor] said, you've already found that."

"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." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)), *cert. denied*, 549 U.S. 867 (2006). Performance is "deficient" when counsel's representation falls beneath an objective standard of reasonableness, *id.*, or when counsel's errors are "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *State v. Augustine*, 359 N.C. 709, 719, 616 S.E.2d 515, 524 (2005) (internal quotation marks omitted) (quoting *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985)), *cert. denied*, 548 U.S. 925 (2006). "[T]o 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." *Allen*, 360 N.C. at 316, 626 S.E.2d at 286 (internal quotation marks omitted) (quoting *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)).

Here, defense counsel briefly conceded the existence of the pecuniary gain aggravating circumstance before shifting focus to a lengthy discussion of the mitigating circumstances. This concession was consistent with defense counsel's overall strategy throughout the proceedings to exude openness and truthfulness with the jury and was reasonable in light of the abundant evidence tending to show the murder was committed for pecuniary gain. Defendant's own statement to law enforcement officers indicated that he and Crawley entered Mitch's Grocery armed and familiar with the specific location behind the counter where money was kept. Once inside the store, defendant took a billfold from a store customer, Mrs. Butts, while Crawley demanded money from the store's owner, Mrs. Faciane. When the victim resisted the robbery of his store, defendant shot and killed him. Defendant then fled the scene with Crawley, who had taken cash and receipts from the store's register. In the face of such strong evidence suggesting the murder was committed for pecuniary gain, we cannot say defense counsel's brief concession was objectively unreasonable or that, had counsel not so conceded, the jury

probably would have returned a sentence of life imprisonment. Thus, defendant's ineffective assistance of counsel claim fails.

[13] Defendant next argues the trial court erred by failing to submit to the jury the mitigating circumstance that defendant had no significant history of prior criminal activity. *See* N.C.G.S. § 15A-2000(f)(1) (2007). In support, defendant relies on the testimony of his two mental health experts, forensic psychiatrist Dr. Moira Artigues and forensic psychologist Dr. Brad Fisher, and three of his former schoolteachers. Dr. Artigues testified regarding defendant's background, particularly as it related to his emotional and mental health. She diagnosed defendant with the following disorders: Depressive Disorder Not Otherwise Specified, Personality Disorder Not Otherwise Specified with Borderline, Avoidant, and Dependent Traits, Cannabis Dependence, Major Depressive Disorder by history, Dysthymic Disorder by history, and Neglected Child by history. Dr. Fisher agreed in substance with the diagnoses and opinions of Dr. Artigues. The testimony of defendant's teachers centered primarily on his impoverished upbringing and learning disabilities. Defendant offered no evidence of his criminal record, and defense counsel twice indicated to the trial court that defendant was not seeking submission of the (f)(1) mitigating circumstance. Nevertheless, defendant now argues he was entitled to an (f)(1) instruction because the testimony of his sentencing witnesses allegedly depicted a comprehensive life history from which significant criminal activity was absent. Specifically, defendant asserts that testimony that he had not used drugs besides marijuana, had not been charged with any alcohol-related offenses, had not been in many fights at school, and had worked for a brick mason for many years amounted to substantial evidence that marijuana use and underage drinking constituted the extent of his criminal history.

The trial court must submit the (f)(1) mitigating circumstance "whenever [it] finds substantial evidence on which a reasonable jury could determine that a defendant has no significant history of prior criminal activity." *State v. Hurst*, 360 N.C. 181, 197, 624 S.E.2d 309, 322, *cert. denied*, 549 U.S. 875 (2006). "The statutory mitigating circumstance of no significant history of prior criminal activity is not supported by the mere absence of any substantial evidence concerning the defendant's prior criminal history." *State v. Gibbs*, 335 N.C. 1, 56, 436 S.E.2d 321, 352 (1993) (internal quotation marks omitted) (quoting *State v. Laws*, 325 N.C. 81, 111, 381 S.E.2d 609, 627 (1989), *sentence vacated on other grounds*, 494 U.S. 1022 (1990)), *cert.*

denied, 512 U.S. 1246 (1994). Thus, "when the record is silent as to a defendant's criminal history, no (f)(1) instruction is appropriate." *Hurst*, 360 N.C. at 198, 624 S.E.2d at 322.

Furthermore, mere references to illegal drug use are insufficient to constitute substantial evidence of a defendant's criminal history or lack thereof. *See, e.g.*, *State v. Powell*, 340 N.C. 674, 693, 459 S.E.2d 219, 228 (1995), *cert. denied*, 516 U.S. 1060 (1996); *Laws*, 325 N.C. at 110-11, 381 S.E.2d at 626-27. For example, in *State v. Powell*, the record did not contain sufficient evidence to warrant an instruction on the (f)(1) mitigating circumstance when "[t]he only such evidence consisted of testimony about defendant's cocaine use and a passing reference by a witness to the fact that defendant was temporarily released from jail to attend his father's funeral." 340 N.C. at 693, 459 S.E.2d at 228. Similarly, in *State v. Laws*, this Court rejected the defendant's argument that a witness's references to his marijuana use constituted substantial evidence of his lack of significant history of criminal activity. 325 N.C. at 110-11, 381 S.E.2d at 626-27. We concluded that "[a] jury finding of no significant history of criminal activity, solely upon [the witness's] remarks about marijuana use, would have been based purely upon speculation and conjecture, not upon substantial evidence, and unreasonable as a matter of law." *Id.* at 111, 381 S.E.2d at 627; *see also State v. Gainey*, 355 N.C. 73, 101, 558 S.E.2d 463, 481 (holding testimony by defense witnesses that defendant "had been in no real or 'bad trouble' and had not been involved with illegal drugs or weapons" was insufficient to support submission of the (f)(1) mitigating circumstance), *cert. denied*, 537 U.S. 896 (2002).

Likewise, in the instant case, testimony that defendant used marijuana but not other drugs, drank while underage but was never charged, and did not get in many fights at school is not substantial evidence that defendant lacked a significant history of prior criminal activity. Defendant's experts, who referenced defendant's drug and alcohol use in support of their medical diagnoses, did not expound upon the criminal aspect of defendant's substance abuse, nor did they testify regarding other crimes or the lack thereof that might have formed the basis of a determination regarding defendant's criminal history. In sum, the evidence cited by defendant begged further development in order to support submission of the (f)(1) mitigating circumstance, and the jury's finding of the circumstance on the strength of that evidence alone "would have been based purely upon speculation and conjecture . . . and unreasonable as a matter of law." *Laws*,

325 N.C. at 111, 381 S.E.2d at 627. Therefore, the trial court did not err in failing to submit the (f)(1) mitigating circumstance.

[14] Defendant next contends the trial court committed plain error by failing to give individualized instructions and explanations for each of the thirty-two nonstatutory mitigating circumstances submitted to the jury and by giving a single peremptory instruction for those mitigating circumstances. According to defendant, the trial court's manner of instructing the jury improperly suggested the nonstatutory mitigating circumstances were of less significance than the statutory mitigating circumstances. Because defendant did not object to the instruction at trial, we review for plain error. *See Duke*, 360 N.C. at 138, 623 S.E.2d at 29.

This Court rejected an argument similar to that of defendant in *State v. Trull*, 349 N.C. 428, 509 S.E.2d 178 (1998), *cert. denied*, 528 U.S. 835 (1999). There, the trial court did not separately instruct on each of the twenty-four nonstatutory mitigating circumstances and tendered a single peremptory instruction for all of them. *Id.* at 455, 509 S.E.2d at 195-96. Reasoning that "jury instructions should be as clear as practicable, without needless repetition" and that "jurors are presumed to pay close attention to the particular language of the judge's instructions," we held the defendant failed to show that "had the judge repeated the same instructions regarding nonstatutory mitigating circumstances twenty-four times, the jury probably would have reached a different verdict." *Id.* at 455-56, 509 S.E.2d at 196. Moreover, "this Court has repeatedly approved of trial judges issuing one peremptory instruction for multiple nonstatutory mitigating circumstances." *Id.* at 456, 509 S.E.2d at 196 (citing *State v. Bonnett*, 348 N.C. 417, 447-48, 502 S.E.2d 563, 583 (1998), *cert. denied*, 525 U.S. 1124 (1999)).

Here, the trial court clearly instructed the jury to consider each of the potential nonstatutory mitigating circumstances. Furthermore, one or more jurors found thirty of the thirty-two submitted nonstatutory mitigating circumstances. Like the defendant in *Trull*, defendant here has failed to show that had the trial court given individualized instruction and explanation for each of these circumstances, the jury probably would have reached a different verdict. *See id.* Therefore, the instruction did not constitute plain error.

[15] Defendant next argues the pecuniary gain aggravating circumstance was supported by insufficient evidence because defendant did not personally take money from Mr. Faciane and the trial court

did not instruct on acting in concert in the context of the pecuniary gain instruction.

"If there is substantial evidence defendant's motive in the killing was the gain of something of pecuniary value . . . the [pecuniary gain] circumstance is properly submitted." *Allen*, 360 N.C. at 312, 626 S.E.2d at 283. The pecuniary gain aggravating circumstance " 'requires the jury to consider not defendant's actions but his motive' for killing the victim[]." *State v. Tirado*, 358 N.C. 551, 599, 599 S.E.2d 515, 546 (2004) (quoting *State v. Green*, 321 N.C. 594, 610, 365 S.E.2d 587, 597, *cert. denied*, 488 U.S. 900 (1988)), *cert. denied*, 544 U.S. 909 (2005). Thus, for a murder to be committed "for pecuniary gain," N.C.G.S. § 15A-2000(e)(6), there is no requirement that the defendant actually take money from the victim, whether personally or acting in concert with another. *See State v. Chandler*, 342 N.C. 742, 754-56, 467 S.E.2d 636, 643-44 (upholding submission of the pecuniary gain aggravating circumstance when the defendant did not take money or property from the victim), *cert. denied*, 519 U.S. 875 (1996).

Here, substantial evidence tended to show defendant committed the murder for pecuniary gain. Defendant and Crawley possessed a diagram of Mitch's Grocery and were aware that store customers sometimes won large sums of money from the video poker machines. The two entered the store armed and demanded money from people inside, including Mrs. Faciane. When Mr. Faciane resisted, defendant shot and killed him. These facts are sufficient evidence that defendant's "motive in the killing was the gain of something of pecuniary value." *See Allen*, 360 N.C. at 312, 626 S.E.2d at 283.

[16] Defendant also contends the trial court erred by failing to intervene *ex mero motu* during the state's closing argument related to the course of conduct aggravating circumstance. The prosecutor argued as follows:

> The second [aggravating circumstance] is called course of conduct, whether the murder was committed while the defendant was in a course of conduct of robbery of Sandra Butts and attempted robbery of Barry Butts. In fact, he was back at the back of the store robbing the two of them and then came forward and shot Mitch and shot at Dawn. And I contend, the State contends that you have found that aggravating circumstance already because you have already found the defendant guilty of robbery with a dangerous weapon of Sandra Butts and attempted robbery with a dangerous weapon of Barry Butts.

> But, again, you must consider that, and all 12 of you find beyond a reasonable doubt whether that aggravating circumstance exists.

A jury should find the course of conduct aggravating circumstance when the murder "was part of a course of conduct in which the defendant engaged and which included the commission . . . of other crimes of violence against another person or persons." N.C.G.S. § 15A-2000(e)(11) (2007). Defendant complains that the prosecutor's remarks erroneously informed the jurors that the guilty verdicts on the charges of robbery with a dangerous weapon and attempted robbery with a dangerous weapon automatically required them to find the course of conduct aggravating circumstance as well.

The prosecutor's closing argument with respect to the course of conduct aggravating circumstance was similar to his argument with respect to the pecuniary gain aggravating circumstance. Here as well, the prosecutor distinguished between what "I [the state] contend" about defendant's course of conduct on the one hand and what "you [the jury] must consider . . . and . . . find" about defendant's course of conduct on the other hand. Further, the trial court correctly instructed the jury on the course of conduct aggravating circumstance, thus curing any misstatement of law by the prosecutor. *See Barden*, 356 N.C. at 366, 572 S.E.2d at 140 (explaining a prosecutor's misstatement of law may be cured by the trial court's subsequent correct instructions). For the same reasons the prosecutor's remarks regarding the pecuniary gain aggravating circumstance were not grossly improper, the prosecutor's remarks regarding the course of conduct aggravating circumstance were not grossly improper. *See McNeill*, 360 N.C. at 244, 624 S.E.2d at 338 (stating that the standard of review for assessing allegedly improper closing arguments to which opposing counsel failed to object is whether the remarks were so grossly improper that the trial court erred by not intervening *ex mero motu*).

[17] Defendant next argues the trial court erred by denying his motion for mistrial based on an allegedly prejudicial incident involving contact between two jurors and two state's witnesses during the capital sentencing proceeding.

Before the beginning of jury deliberations on the morning of 24 August 2005, the state reported the following to the trial court: The previous evening after the close of court, two jurors were outside, and one of their cars had a flat tire. The victim's two adult children,

who gave victim impact testimony during the sentencing proceeding, noticed the flat tire and held up a can of Fix-A-Flat. The jurors saw this gesture, but walked away. The victim's children then put down the can of Fix-A-Flat, got into their car, and drove away. No verbal communication occurred during the incident. After hearing the state's report, defense counsel declined the trial court's invitation to inquire of the involved jurors and instead moved for a mistrial.

The trial court must declare a mistrial only if conduct inside or outside the courtroom results in "substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061. The decision whether to grant or deny a mistrial is within the sound discretion of the trial court and is entitled to great deference on appeal. *State v. Thomas*, 350 N.C. 315, 341, 514 S.E.2d 486, 502, *cert. denied*, 528 U.S. 1006 (1999).

In support of his contention that the contact between the jurors and the victim's children substantially prejudiced his position at sentencing, defendant cites this Court's decision in *State v. Bailey*, 307 N.C. 110, 296 S.E.2d 287 (1982), in which we held that prejudicial error resulted from improper contact between a state's witness and members of the jury. *Id.* at 115, 296 S.E.2d at 290. In *Bailey*, a sheriff who testified on behalf of the state drove three jurors to a restaurant for an evening meal during a break in the jury's deliberations. *Id.* at 111, 296 S.E.2d at 288. In granting a new trial, this Court noted the importance of the sheriff's testimony at trial and also stated that our holding was "limited to the particular and peculiar circumstances of this case." *Id.* at 114-15, 296 S.E.2d at 289-90.

The facts of the present case are distinguishable from those of *Bailey*. Furthermore, here, any contact between the jurors and the two state's witnesses appears to have occurred at a distance and was nonverbal, fleeting, and unrelated to defendant's trial. Therefore, we cannot say the trial court abused its discretion in denying defendant's motion for mistrial.

[18] Defendant next asserts the trial court erred by failing to intervene *ex mero motu* at several points during the state's sentencing proceeding closing argument. Defendant did not object to any of these arguments at trial.

Defendant first claims the prosecutor misstated the law with regard to the jury's duty when weighing aggravating and mitigating circumstances, necessitating the trial court's *ex mero motu* in-

tervention. After discussing the aggravating and mitigating circumstances that would be submitted to the jury, the prosecutor stated the following: "You then weigh them to determine whether the mitigating circumstances are insufficient to outweigh the aggravating circumstances. That means the State has to prove that they're either equal or that the aggravating circumstances outweigh the mitigating circumstances."

"Issue Three" on the capital sentencing recommendation form requires the jury to weigh the mitigating and aggravating circumstances. This Court has consistently rejected arguments that a jury is permitted "to recommend death if it finds that the mitigating circumstances are of equal weight and value to the aggravating circumstances found." *State v. Keel*, 337 N.C. 469, 493, 447 S.E.2d 748, 761 (1994), *cert. denied*, 513 U.S. 1198 (1995); *see also*, *e.g.*, *Hurst*, 360 N.C. at 206, 624 S.E.2d at 327; *State v. King*, 353 N.C. 457, 491-92, 546 S.E.2d 575, 599-600 (2001), *cert. denied*, 534 U.S. 1147 (2002); *State v. Golphin*, 352 N.C. 364, 468-69, 533 S.E.2d 168, 235-36 (2000), *cert. denied*, 532 U.S. 931 (2001); *State v. Hunt*, 323 N.C. 407, 433, 373 S.E.2d 400, 416-17 (1988), *judgment vacated on other grounds*, 494 U.S. 1022 (1990), *and 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). Thus, the prosecutor's statement was inconsistent with the law as articulated by this Court. Nevertheless, a prosecutor's misstatement of law with regard to the manner in which the jury should consider mitigating and aggravating circumstances may be cured by the trial court's subsequent correct instruction. *See*, *e.g.*, *Barden*, 356 N.C. at 365-66, 572 S.E.2d at 139-40; *State v. Braxton*, 352 N.C. 158, 218-19, 531 S.E.2d 428, 463-64 (2000), *cert. denied*, 531 U.S. 1130 (2001); *State v. Geddie*, 345 N.C. 73, 99, 478 S.E.2d 146, 159-60 (1996), *cert. denied*, 522 U.S. 825 (1997); *State v. Buckner*, 342 N.C. 198, 238, 464 S.E.2d 414, 437 (1995), *cert. denied*, 519 U.S. 828 (1996). Here, the trial court properly instructed the jury in accordance with our case law regarding its duty at Issue Three, thereby curing any misstatement.

[19] Defendant also claims the trial court should have intervened *ex mero motu* when the prosecutor commented on the absence of any evidence showing defendant expressed remorse for the murder. After discussing various submitted mitigating circumstances, the prosecutor stated: "Nowhere in any of the testimony during the sentencing phase has remorse been mentioned about the defendant's remorse for Mitch's death." Defendant alleges this statement

improperly encouraged the jury to consider lack of remorse as an aggravating circumstance.

Although lack of remorse may not be submitted as an aggravating circumstance, a prosecutor may properly draw attention to a defendant's failure throughout the capital proceeding to demonstrate a sense of remorse. *State v. Brown*, 320 N.C. 179, 199, 358 S.E.2d 1, 15, *cert. denied*, 484 U.S. 970 (1987). Here, lack of remorse was not "placed before the jury for consideration as an aggravating [circumstance], either verbally or on the verdict sheet." *See id.* Accordingly, the prosecutor's remark was not grossly improper, and the trial court did not err in failing to intervene *ex mero motu*.

[20] Defendant next asserts the trial court should have intervened *ex mero motu* when the prosecutor referred to Dr. Moira Artigues, defendant's mental health expert, as a "professional witness" and incorrectly stated she was paid by the Center for Death Penalty Litigation.

" '[I]t is not improper for the prosecutor to impeach the credibility of an expert during his closing argument.' " *State v. Roache*, 358 N.C. 243, 300, 595 S.E.2d 381, 417 (2004) (quoting *State v. Norwood*, 344 N.C. 511, 536, 476 S.E.2d 349, 361 (1996), *cert. denied*, 520 U.S. 1158 (1997)). Furthermore, while a prosecutor should not " 'insinuate that [a] witness would perjure himself or herself for pay,' " it is entirely proper for the prosecutor to " 'point[] out that the witness' compensation may be a source of bias.' " *Id.* at 300, 595 S.E.2d at 418 (quoting *State v. Rogers*, 355 N.C. 420, 463, 562 S.E.2d 859, 885 (2002)). This Court has specifically addressed a situation in which a prosecutor characterized a defense witness as " 'a professional witness for the defendant' " and determined that such a characterization, "while inflammatory, was not improper to the point of being unduly prejudicial to defendant." *State v. Brewer*, 325 N.C. 550, 578-79, 386 S.E.2d 569, 585 (1989), *cert. denied*, 495 U.S. 951 (1990).

Likewise, in the instant case, the prosecutor's characterization of Dr. Artigues as a "professional witness" was not so grossly improper that the trial court erred by failing to intervene *ex mero motu*. Furthermore, although the prosecutor improperly stated that Dr. Artigues was paid by the Center for Death Penalty Litigation, "[t]his inaccuracy in the prosecutor's portrayal of the expert's [source of compensation] . . . did not so infect the trial with unfairness" as to deprive defendant of a fair sentencing proceeding. *See State v.*

Cummings, 352 N.C. 600, 627, 536 S.E.2d 36, 55 (2000), *cert. denied*, 532 U.S. 997 (2001).

[21] Defendant further contends the trial court erred by sustaining the state's objection to one of defendant's questions during redirect examination of Dr. Artigues. On cross-examination, the prosecutor elicited extensive testimony from Dr. Artigues concerning information about defendant's background contained in her reports. The prosecutor then elicited testimony that Dr. Artigues had testified as an expert in forensic psychiatry about forty times, but never for the state, that she had made three presentations to the North Carolina Trial Lawyers Association Capital College regarding the circumstances under which defense attorneys should retain mental health experts, and that she was being paid $275 per hour for her work on defendant's case.

On redirect examination by defense counsel, the following exchange occurred:

> [DEFENSE COUNSEL]: And the fact that you're being paid and compensated for your time, has that influenced your opinions at all?
>
> [DR. ARTIGUES]: No, it has not.
>
> [DEFENSE COUNSEL]: The fact that you're being paid for your time, did that change any of the records that you received which corresponded to your opinions in this case?
>
> [DR. ARTIGUES]: No, it did not.
>
> [DEFENSE COUNSEL]: You didn't doctor any of these records at all because you're being paid—
>
> [PROSECUTOR]: Objection.
>
> [DEFENSE COUNSEL]: —did you?
>
> THE COURT: Well, sustained as to that question.

According to defendant, the state's cross-examination of Dr. Artigues impugned both her character and her diagnoses by suggesting she was a "hired gun" for capital defendants, thereby opening the door to defendant's rebuttal question about whether Dr. Artigues "doctored" any records.

"[The] North Carolina Rules of Evidence permit broad cross-examination of expert witnesses." *State v. Bacon*, 337 N.C. 66, 88, 446

S.E.2d 542, 553 (1994) (citing N.C. R. Evid. 611(b)), *cert. denied*, 513 U.S. 1159 (1995). "[A] prosecutor's questions as to the amount of time [a defense expert] spent working with criminal cases and the number of cases in which [she has] testified for the State and for a defendant [are] entirely appropriate." *Rogers*, 355 N.C. at 455, 562 S.E.2d at 881. Thus, it was proper for the prosecutor to question Dr. Artigues regarding her forensic practice, the contents of the records to which she referred on direct examination, her status as a paid witness, and her potential bias.

Additionally, "[q]uestions asked on redirect should not go beyond matters discussed during cross-examination." *State v. Skipper*, 337 N.C. 1, 39, 446 S.E.2d 252, 273 (1994), *cert. denied*, 513 U.S. 1134 (1995), *superseded on other grounds by statute*, N.C.G.S. § 15A-2002, *as recognized in State v. Price*, 337 N.C. 756, 448 S.E.2d 827 (1994), *cert. denied*, 514 U.S. 1021 (1995). Our review of the record reveals the prosecutor's questions relating to Dr. Artigues's records were straightforward without any intimation of wrongdoing. Certainly the prosecutor did not accuse Dr. Artigues of falsifying records. Therefore, defendant's contention that the prosecutor's cross-examination of Dr. Artigues "opened the door" to defense counsel's question, "You didn't doctor any of these records at all because you're being paid, did you?" is without merit.

We also observe that just before this question, defense counsel asked Dr. Artigues whether her being paid for her time "change[d] any of the records that [she] received which corresponded to [her] opinions in this case," and Dr. Artigues responded that it did not. She also testified that the payment she received for her time had not influenced her opinion. In light of this testimony, the question about doctoring the records was redundant, and an answer by Dr. Artigues would have added little to the information already before the jury. We therefore conclude that any error on the part of the trial court in sustaining the state's objection did not prejudice defendant.

[22] Defendant also challenges the prosecutor's closing argument references to various prison amenities defendant would enjoy if sentenced to life imprisonment. The prosecutor remarked that defendant would potentially be able to do the following while in prison: visit with his mother and sisters, eat his meals and drink his coffee, watch the sun rise, exercise, watch television, read, draw, receive an education, and enjoy the fresh air. Defendant contends these remarks were grossly improper because they were irrelevant and stated facts outside the record.

"[I]t 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. Forte*, 360 N.C. 427, 443, 629 S.E.2d 137, 148 (quoting *State v. Alston*, 341 N.C. 198, 252, 461 S.E.2d 687, 717 (1995), *cert. denied*, 516 U.S. 1148 (1996)), *cert. denied*, —— U.S. ——, 127 S. Ct. 557 (2006). This Court has previously determined that remarks similar to those made by the prosecutor here did not rise to the level of gross impropriety, even when the remarks referenced facts outside the record. *See*, *e.g.*, *State v. May*, 354 N.C. 172, 179, 552 S.E.2d 151, 156 (2001) (holding trial court did not err by failing to intervene *ex mero motu* when state referenced the defendant playing cards, punching a punching bag, having a snack, watching television, and listening to the radio while in prison, even though these facts were not in the record), *cert. denied*, 535 U.S. 1060 (2002); *State v. Smith*, 347 N.C. 453, 467, 496 S.E.2d 357, 365 (holding trial court did not err by failing to intervene *ex mero motu* when state argued the defendant would spend his time in prison "comfortably doing things such as playing basketball, lifting weights, and watching television"), *cert. denied*, 525 U.S. 845 (1998); *State v. Reeves*, 337 N.C. 700, 732, 448 S.E.2d 802, 817 (1994) (holding that state's remarks that the defendant would have a " 'cozy little prison cell . . . with [a] television set, air conditioning and three meals a day' " were not so egregious as to require the trial court to intervene *ex mero motu*, even if these facts were not in the record), *cert. denied*, 514 U.S. 1114 (1995). Similarly, in the present case, "[w]hile the prosecutor improperly argued facts not in the record, the trial court still did not abuse its discretion by failing to intervene *ex mero motu*." *See May*, 354 N.C. at 179, 552 S.E.2d at 156.

[23] Defendant next argues the trial court committed plain error by failing to give peremptory instructions on three statutory mitigating circumstances: (1) the murder "was committed while the defendant was under the influence of mental or emotional disturbance," N.C.G.S. § 15A-2000(f)(2) (2007); (2) defendant's capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired," N.C.G.S. § 15A-2000(f)(6) (2007); and, (3) defendant's age at the time of the crime, N.C.G.S. § 15A-2000(f)(7) (2007). The trial court instructed on each of these mitigating circumstances without a peremptory instruction and submitted all three to the jury. One or more jurors found the (f)(2) and (f)(6) mitigating circumstances, but no juror found the (f)(7) mitigating circumstance.

" '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.' " *Forte*, 360 N.C. at 440, 629 S.E.2d at 146 (quoting *State v. Bishop*, 343 N.C. 518, 557, 472 S.E.2d 842, 863 (1996), *cert. denied*, 519 U.S. 1097 (1997)). To be entitled to a peremptory instruction, however, the defendant must timely request it. *State v. Gregory*, 340 N.C. 365, 415, 459 S.E.2d 638, 667 (1995) (citing *State v. Johnson*, 298 N.C. 47, 77, 257 S.E.2d 597, 618-19 (1979), *overruled in part on other grounds by State v. Williams*, 339 N.C. 1, 452 S.E.2d 245 (1994), *cert. denied*, 516 U.S. 833 (1995), *and overruled on other grounds by State v. Warren*, 347 N.C. 309, 492 S.E.2d 609 (1997), *cert. denied*, 523 U.S. 1109 (1998)), *cert. denied*, 517 U.S. 1108 (1996). "The trial court is not required to determine on its own which mitigating circumstances are deserving of a peremptory instruction." *Id.* at 415-16, 459 S.E.2d at 667 (citing *Johnson*, 298 N.C. at 77, 257 S.E.2d at 618-19); *see also Skipper*, 337 N.C. at 41, 446 S.E.2d at 274 ("As defendant did not request that peremptory instructions be given for any other circumstances, the trial court did not err in not giving such instructions.").

The record reveals and defendant concedes that defendant did not request a peremptory instruction on any of the three submitted statutory mitigating circumstances. Consequently, the trial court did not err in failing to give the peremptory instructions.

[24] Defendant next contends the trial court erred by sustaining the state's objections to defense counsel's closing argument regarding the types of murders for which the death penalty is most appropriate. According to defendant, the trial court improperly restricted him from arguing that the facts of his case did not warrant a death sentence and that his crime was not "the worst of the worst." *See Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting).

During closing argument, defense counsel urged the jurors to consider the types of things that come to mind when they think about a death penalty case. Counsel first gave as examples, "Dennis Rader, who is a serial killer," "Eric Rudolph, the bomber," and "Scott Peterson[,] who killed his wife and unborn daughter." Counsel next referred to murders involving children, at which point the state objected and the trial court sustained the objection. Defense counsel then added, "Murder of the elderly, murder of the handicapped, torture." The state again objected, but defense counsel continued, "Rape or sexual offense, trophy killings, serial killings, using

bombs or weapons of mass destruction, someone who gets an enjoyment or thrill out of killing, someone who kills someone in their own family." At this point the state objected for a third time, and the trial court sustained the objection and allowed the state's motion to strike.

"Control of the jury argument [is] within the sound discretion of the trial court." *Braxton*, 352 N.C. at 221, 531 S.E.2d at 465. Furthermore, " '[u]pon objection, the trial court has the duty to censor remarks not warranted by the evidence or law.' " *State v. Wilson*, 335 N.C. 220, 225, 436 S.E.2d 831, 834 (1993) (quoting *State v. Anderson*, 322 N.C. 22, 37, 366 S.E.2d 459, 468, *cert. denied*, 488 U.S. 975 (1988)). A defendant may not "make comparisons between cases and the facts of each case" in which a determination favorable to a defendant was made, *State v. McNeill*, 360 N.C. 231, 248, 624 S.E.2d 329, 340, *cert. denied*, —— U.S. ——, 127 S. Ct. 396 (2006), because: (1) "[t]he facts of the other cases are not pertinent" to a jury's consideration of evidence presented in a particular case, *Braxton*, 352 N.C. at 222, 531 S.E.2d at 465; and (2) "the circumstances of other murders, either actual or imagined," are often "not present in the record at the time of closing arguments," *McNeill*, 360 N.C. at 248, 624 S.E.2d at 341. *See also* N.C.G.S. § 15A-1230(a) (2007) ("During a closing argument to the jury an attorney may not . . . make arguments on the basis of matters outside the record . . . ."). In *State v. McNeill*, this Court held the trial court did not err in sustaining the state's objections to these remarks by defense counsel during closing argument: "[W]hat would be some examples of murders that would be worse [than the murder committed by defendant]?" and, "[W]hat [defendant] did is not the worst first degree murder. And it has not been committed by the worst defendant." 360 N.C. at 247-48, 624 S.E.2d at 340-41.

Here, defense counsel engaged in far more specific comparisons than did the defense counsel in *McNeill*. Defense counsel listed several specific murderers and several general types of murder with which he urged the jury to compare the instant murder. The trial court sustained objections to only some of these comparisons. Moreover, defendant was not prohibited from arguing that the circumstances of his case—regardless of the circumstances of other cases—did not warrant imposition of the death penalty. For these reasons, we cannot say the trial court abused its discretion in sustaining the state's objections.

PRESERVATION ISSUES

Defendant raises additional issues that have previously been decided by this Court contrary to his position: (1) whether the trial court properly denied defendant's motion for a bill of particulars; (2) whether the trial court properly overruled defendant's objection to the state's closing argument that the jury is the community's voice; (3) whether the short-form indictment was sufficient to charge first-degree murder; (4) whether the trial court properly denied defendant's motion to strike the death penalty from consideration as violative of defendant's federal and state constitutional rights; (5) whether the trial court properly denied defendant's motion objecting to the use of the pecuniary gain aggravating circumstance on the ground that the wording of the pecuniary gain statute is unconstitutionally vague; (6) whether the trial court properly denied defendant's motion to prohibit death qualification of the jury; (7) whether the trial court properly denied defendant's motion for separate juries for the two phases of his trial; (8) whether the trial court's instructions on Issue Three were vague or confusing; (9) whether the trial court's instruction that at Issues Three and Four each juror may consider the mitigating circumstances found by that juror, rather than any mitigating circumstance found by any juror, was proper; (10) whether the trial court's instruction that at Issue Three each juror may, rather than must, consider the mitigating circumstances found by that juror was proper; and (11) whether the trial court's instruction that the jury must be unanimous to answer "No" to Issues One, Three, and Four was proper. We have considered defendant's contentions on these issues and find no compelling reason to depart from our prior holdings. Therefore, we reject defendant's arguments.

PROPORTIONALITY REVIEW

[25] Finally, we undertake our statutory duty to determine: (1) whether the record supports the aggravating circumstances found by the jury; (2) whether the death sentence was imposed "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) (2007).

Defendant was convicted of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. The jury found both aggravating circumstances submitted to exist: (1) the murder was "committed for pecuniary gain," § 15A-2000(e)(6);

and (2) the murder was "part of a course of conduct in which the defendant engaged" and which included defendant's commission of "other crimes of violence against another person or persons," § 15A-2000(e)(11).

The jury found two statutory mitigating circumstances to exist: (1) the murder was committed "while the defendant was under the influence of mental or emotional disturbance," § 15A-2000(f)(2); and (2) defendant's capacity to "appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired," § 15A-2000(f)(6). The jury also found the statutory catch-all mitigating circumstance to exist and have mitigating value, § 15A-2000(f)(9). Additionally, the jury found thirty of thirty-two submitted nonstatutory mitigating circumstances to exist and have mitigating value. These related generally to the circumstances of the crime and defendant's cooperation with law enforcement, defendant's impoverished upbringing and neglectful parents, and defendant's mental health problems.

Having thoroughly reviewed the record, transcript, briefs, and oral arguments in this case, we conclude that the record fully supports the aggravating circumstances found by the jury. Further, there is no evidence that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We therefore turn to our duty of proportionality review.

[26] At the outset, we reiterate that this Court accords great deference to a jury's sentencing recommendation and will declare a death sentence disproportionate " '[o]nly in the most clear and extraordinary situations.' " *State v. Raines*, 362 N.C. 1, 25, 653 S.E.2d 126, 142 (2007) (quoting *State v. Chandler*, 342 N.C. 742, 764, 467 S.E.2d 636, 648, *cert. denied*, 519 U.S. 875 (1996)). We will not "substitute our own notions as to the appropriateness of the penalty of death in a given case for those of the jury." *Chandler*, 342 N.C. at 764, 467 S.E.2d at 648.

Instead of replicating the function of the jury in a given case, our purpose is " 'to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury.' " *State v. Badgett*, 361 N.C. 234, 263, 644 S.E.2d 206, 223 (quoting *State v. Hyatt*, 355 N.C. 642, 670, 566 S.E.2d 61, 79 (2002), *cert. denied*, 537 U.S. 1133 (2003)), *cert. denied*, —— U.S. ——, 128 S. Ct. 502 (2007). Thus, in conducting our proportionality review, we consider whether, under the " 'totality of the circumstances,' " *State v. Kemmerlin*, 356 N.C. 446, 489, 573

S.E.2d 870, 898 (2002) (quoting *State v. Bondurant*, 309 N.C. 674, 694 n.1, 309 S.E.2d 170, 183 n.1 (1983)), the death sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," § 15A-2000(d)(2). Similarity, however, "merely serves as an initial point of inquiry" and "is not the last word on the subject of proportionality." *State v. Watts*, 357 N.C. 366, 381, 584 S.E.2d 740, 751 (2003) (citations and internal quotation marks omitted), *cert. denied*, 541 U.S. 944 (2004). Rather, a determination of whether the death penalty is disproportionate in a given case " 'ultimately rest[s] upon the experienced judgments of the members of this Court.' " *McNeill*, 360 N.C. at 253, 624 S.E.2d at 344 (quoting *State v. Garcia*, 358 N.C. 382, 426, 597 S.E.2d 724, 754 (2004) (alteration in original) (internal quotation marks omitted), *cert. denied*, 543 U.S. 1156 (2005)); *accord Raines*, 362 N.C. at 25, 653 S.E.2d at 142; *State v. Cummings*, 361 N.C. 438, 478, 648 S.E.2d 788, 812 (2007), *cert. denied*, —— U.S. ——, 128 S. Ct. 1888 (2008).

We begin by observing that several characteristics of both defendant's crime and defendant's conduct have been cited routinely by this Court as supporting a determination that a death sentence is not disproportionate. First, defendant was convicted of first-degree murder both on the basis of premeditation and deliberation and under the felony murder rule. Although a death sentence may properly be imposed for convictions based solely on felony murder, *see, e.g.*, *Chandler*, 342 N.C. at 747, 754, 764, 467 S.E.2d at 639, 643, 648-49; *State v. Williams*, 305 N.C. 656, 660, 682, 691, 292 S.E.2d 243, 247, 259, 263-64, *cert. denied*, 459 U.S. 1056 (1982), "a finding of premeditation and deliberation indicates a more calculated and cold-blooded crime" for which the death penalty is more often appropriate, *see, e.g.*, *Badgett*, 361 N.C. at 263, 644 S.E.2d at 223 (internal quotation marks omitted) (quoting *Hyatt*, 355 N.C. at 670, 566 S.E.2d at 79).

Additionally, the jury in this case found that the murder was part of a course of conduct that included other violent crimes, specifically, defendant's robbery with a dangerous weapon of Mrs. Butts and attempted robbery with a dangerous weapon of Mr. Butts, and that the murder was committed for pecuniary gain. " 'The course of conduct circumstance is often present in cases where the jury imposes death instead of life imprisonment.' " *State v. Guevara*, 349 N.C. 243, 263, 506 S.E.2d 711, 724 (1998) (quoting *State v. Miller*, 339 N.C. 663, 694, 455 S.E.2d 137, 154, *cert. denied*, 516 U.S. 893 (1995)), *cert. denied*, 526 U.S. 1133 (1999). Furthermore, this Court has held the course of conduct circumstance, standing alone, *see State v.*

Hoffman, 349 N.C. 167, 194, 505 S.E.2d 80, 96 (1998), *cert. denied*, 526 U.S. 1053 (1999), and the pecuniary gain circumstance, standing alone, *Chandler*, 342 N.C. at 760, 764, 467 S.E.2d at 646, 649; *State v. Ward*, 338 N.C. 64, 124, 129, 449 S.E.2d 709, 743, 746 (1994), *cert. denied*, 514 U.S. 1134 (1995), sufficient to sustain a sentence of death.

Finally, there is no evidence that defendant demonstrated remorse for the murder. This Court has frequently highlighted a defendant's display of remorse or lack thereof as a relevant consideration in proportionality review. *See, e.g.*, *State v. Goss*, 361 N.C. 610, 630, 651 S.E.2d 867, 879 (2007) (noting defendant "failed to show any immediate remorse for the murder"), *cert. denied*, —— U.S. ——, 129 S. Ct. 59 (2008); *State v. Elliot*, 360 N.C. 400, 426, 628 S.E.2d 735, 752 (noting "defendant certainly has not shown any remorse for his actions"), *cert. denied*, —— U.S. ——, 127 S. Ct. 505 (2006); *State v. Robinson*, 355 N.C. 320, 345, 561 S.E.2d 245, 261 (noting "[d]efendant showed no remorse when telling his accomplice and others what happened after having shot and killed the victim"), *cert. denied*, 537 U.S. 1006 (2002); *see also Bondurant*, 309 N.C. at 694, 309 S.E.2d at 182 (emphasizing, in determining death sentence to be disproportionate, that defendant, immediately after shooting the victim, "exhibited a concern for [the victim's] life and remorse for his action" by accompanying the victim to the hospital).

In the instant case, defendant drove his injured accomplice to the hospital, but did not offer aid to or seek medical assistance for the victim. Instead, upon arrival at the hospital, defendant attempted to conceal the location of the shooting, and he twice told law enforcement officers that he stayed in the car during the robbery. Only after officers viewed a recording of the robbery captured by the surveillance camera at Mitch's Grocery did defendant confess to entering the store and firing his weapon. *See State v. Harris*, 338 N.C. 129, 153-54, 449 S.E.2d 371, 382-83 (1994) (noting that "no member of the jury found mitigating value in the defendant's purported remorse," perhaps because "[w]hile the defendant surrendered himself to the authorities and cooperated fully, he did so . . . only after being informed that the victim, prior to his death, had identified the defendant by name and that police were looking for him"), *cert. denied*, 514 U.S. 1100 (1995). Shortly after the murder, while defendant was incarcerated, he placed a call that was recorded and played for the jury at trial. During this ten-minute call, defendant expressed no remorse for his actions, even when the person with whom he was speaking informed him that the store owner had died at the hospital.

Finally, there is no evidence that defendant demonstrated a sense of remorse at trial.

We next compare the present case with other cases in which this Court has ruled on the proportionality issue. *See Badgett*, 361 N.C. at 263, 644 S.E.2d at 223.

We first consider whether the present case is substantially similar to any of the eight cases in which this Court held that the death penalty was disproportionate. *See Kemmerlin*, 356 N.C. at 489, 573 S.E.2d at 898; *State v. Benson*, 323 N.C. 318, 328, 372 S.E.2d 517, 522 (1988); *State v. Stokes*, 319 N.C. 1, 27, 352 S.E.2d 653, 668 (1987); *State v. Rogers*, 316 N.C. 203, 237, 341 S.E.2d 713, 733 (1986), *overruled in part on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988), *and by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900 (1997); *State v. Young*, 312 N.C. 669, 691, 325 S.E.2d 181, 194 (1985); *State v. Hill*, 311 N.C. 465, 479, 319 S.E.2d 163, 172 (1984); *Bondurant*, 309 N.C. at 694, 309 S.E.2d at 183; *State v. Jackson*, 309 N.C. 26, 46, 305 S.E.2d 703, 717 (1983). Defendant contends the instant case is particularly similar to *State v. Benson* and *State v. Stokes*.

In *Benson*, the defendant planned to rob the victim, a restaurant manager, while the victim was depositing the day's receipts at the bank. 323 N.C. at 320-21, 372 S.E.2d at 518. As the victim approached the night deposit box with his moneybag, the defendant, who had been hiding in the bushes, demanded the money and shot the victim in the legs. *Id.* at 321, 372 S.E.2d at 518. He then grabbed the moneybag and fled the scene, leaving the victim to die from blood loss. *Id.* *Benson* is distinguishable from the present case in the following significant respects: the defendant in *Benson* pled guilty to first-degree murder under the felony murder rule only, 323 N.C. at 320, 372 S.E.2d at 518, while defendant in the present case was convicted of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule; the jury in *Benson* found only one aggravating circumstance, that the murder was committed for pecuniary gain, *id.* at 328, 372 S.E.2d at 522, while the jury in the present case found the course of conduct aggravating circumstance in addition to the pecuniary gain aggravating circumstance; and the defendant in *Benson* "pleaded guilty during the trial and acknowledged his wrongdoing before the jury," *id.* at 328, 372 S.E.2d at 523, while defendant in the present case failed to show remorse for his crime or otherwise acknowledge his wrongdoing before the jury.

In *Stokes*, the defendant and several accomplices beat the victim to death while robbing his warehouse. 319 N.C. at 3, 352 S.E.2d at 654. *Stokes* is distinguishable from the present case in the following significant respects: the defendant in *Stokes* was convicted of first-degree murder under the felony murder rule only, *id.* at 4, 352 S.E.2d at 654, while defendant in the present case was convicted of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule; and the defendant in *Stokes* was seventeen years old at the time of the crime, *id.* at 21, 352 S.E.2d at 664, while defendant in the present case was twenty-one years old. Furthermore, in determining the death sentence was disproportionate in *Stokes*, this Court emphasized that the defendant was "not . . . more deserving of death" than his accomplice, who received a sentence of life imprisonment for committing "the same crime in the same manner" as the defendant. *Id.* at 20-21, 352 S.E.2d at 664. No such situation is present here.

We have also compared the instant case with the other six cases in which this Court determined the death penalty was disproportionate and conclude that it is not substantially similar to any of those cases. Instead, each of those cases may be distinguished not only by its general facts, but also by one or more notable characteristics not present in the instant case. In *State v. Kemmerlin*, the defendant had been subjected to physical and emotional abuse by the victim; the defendant's accomplice, who performed the act of killing the victim, received a sentence of life imprisonment; and the jury found only one aggravating circumstance, the pecuniary gain circumstance, which was supported by weak evidence. 356 N.C. at 451-55, 488-89, 573 S.E.2d at 877-79, 898. In *State v. Rogers*, the defendant mistakenly shot the victim while attempting to shoot someone else, and the defendant's accomplice was sentenced to life imprisonment. 316 N.C. at 211-12, 341 S.E.2d at 718-19. In *State v. Young*, the defendant was nineteen years old at the time of the murder, and the jury did not find the course of conduct aggravating circumstance. 312 N.C. at 686, 688, 325 S.E.2d at 192-93. In *State v. Hill*, the evidence surrounding the murder was "somewhat speculative," there was no evidence of any motive for the murder, and the murder was not part of a violent course of conduct by the defendant. 311 N.C. at 478-79, 319 S.E.2d at 171-72. In *State v. Bondurant*, the defendant demonstrated a sense of remorse immediately after fatally shooting the victim and accompanied the victim to the hospital to seek medical assistance. 309 N.C. at 694, 309 S.E.2d at 182. Finally, in *State v. Jackson*, the defendant was convicted only under the felony murder rule, and there was a general

lack of evidence concerning the details of the murder. 309 N.C. at 43, 46, 305 S.E.2d at 715, 717.

Although we could selectively extrapolate discrete similarities between the instant case and some of those cases in which this Court has held the death sentence disproportionate, our review reveals that, "considering both the crime and the defendant," § 15A-2000(d)(2), the instant case is more factually similar to cases in which this Court has held the death sentence not disproportionate. In particular, we have reviewed several cases that share the following features with the present case: the defendant fatally shot an attendant during the perpetration of an armed robbery of a small business; there was no evidence indicating the defendant, at the time he entered the store, planned to kill the attendant; and the defendant was convicted of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule.

For example, in *State v. Robinson*, the defendant and an accomplice planned to rob a Pizza Inn and gathered clothes and weapons to use during the robbery. 355 N.C. at 325, 561 S.E.2d at 249. Later in the evening, with weapons drawn and faces covered, the two entered the store and approached the cash register. *Id.* The defendant pointed his weapon at the store manager and demanded money. *Id.* When the manager replied, "What are you going to do if I don't?" the defendant fired his weapon at the floor. *Id.* Then, when the manager moved forward, the defendant shot him in the head and fled with his accomplice. 355 N.C. at 325-26, 561 S.E.2d at 249. The defendant was convicted of first-degree murder and sentenced to death, and this Court determined that the death sentence was not disproportionate. *Id.* at 325, 345, 561 S.E.2d at 249, 261.

In *State v. Hoffman*, the defendant entered a jewelry store wearing a ski mask and carrying a gun. 349 N.C. at 173, 505 S.E.2d at 84. The defendant shot the victim, who was standing behind the store's display counter, broke three glass display cases, and took various items of jewelry. *Id.* Again, this Court upheld the first-degree murder conviction and the death sentence. 349 N.C. at 195, 505 S.E.2d at 97.

In another similar case, *State v. Cummings*, 346 N.C. 291, 488 S.E.2d 550 (1997), *cert. denied*, 522 U.S. 1092 (1998), the defendant decided to rob a certain convenience store after observing that the store " 'looked easy to rob' " because an "old man" was running it by himself. *Id.* at 302, 488 S.E.2d at 557. Evidence suggested that when the defendant entered the store and demanded money, the attendant

attempted in some manner to protect himself and his property with a gun he kept behind the cash register. *Id.* at 300, 302, 488 S.E.2d at 556-57. The defendant shot the attendant two times, killing him. *Id.* at 303, 488 S.E.2d at 557. The defendant then took money from the cash register and left the store. *Id.* at 302, 488 S.E.2d at 557. As he was leaving, he fired an additional shot in an attempt to scare the victim's wife, who, upon hearing gunshots, had run outside her house, located fifty feet from the store. *Id.* at 299-300, 488 S.E.2d at 555. At trial, the defendant was convicted of first-degree murder and sentenced to death. *Id.* at 300, 488 S.E.2d at 555. This Court concluded that the death sentence was not disproportionate. *Id.* at 335, 488 S.E.2d at 576.

Cummings is also similar to the present case with respect to several specific characteristics of the crime and the defendant's conduct. With regard to the crime itself, the jury in *Cummings* found that the murder was committed for pecuniary gain and that the murder was part of a course of conduct including other violent crimes. *Id.* at 333, 488 S.E.2d at 575. The jury in the present case found the same two aggravating circumstances. With regard to the defendant's conduct, the defendant in *Cummings* initially told law enforcement officers that he remained outside while the robbery and shooting occurred, and only later confessed to the version of the story outlined above. *Id.* at 302, 488 S.E.2d at 556-57. Likewise, in the present case, defendant twice told law enforcement officers that he remained in the car during the robbery of Mitch's Grocery, and only in his third statement confessed to being inside the store and firing his weapon. Furthermore, in both *Cummings* and the present case, the jury recommended a sentence of death despite finding a significant number of mitigating circumstances—twenty-eight of the thirty-two submitted in *Cummings*, *id.* at 334, 488 S.E.2d at 576, and thirty-three of the thirty-six submitted in the present case. *See also State v. Thompson*, 359 N.C. 77, 82-85, 130-31, 604 S.E.2d 850, 857-59, 885-86 (2004) (holding death sentence not disproportionate when the defendant, in the course of robbing a Domino's Pizza, fatally shot the store manager two times and set fire to the building to cover up his crime), *cert. denied*, 546 U.S. 830 (2005); *State v. Larry*, 345 N.C. 497, 507, 534, 481 S.E.2d 907, 913, 929 (holding death sentence not disproportionate when the defendant, after pointing a gun at a Food Lion employee and taking money from the safe, fatally shot a store customer who was also an off-duty police officer when the officer chased him outside and struggled with him on the ground), *cert. denied*, 522 U.S. 917 (1997).

For all of the foregoing reasons, we conclude that the death sentence is not excessive or disproportionate in this case.

In sum, we hold that defendant received a fair trial and capital sentencing proceeding free from prejudicial error. Consequently, the trial court's judgment and sentence of death remain undisturbed.

NO ERROR.

IN THE MATTER OF THE WILL OF JOHN A. JONES, JR.

No. 37A08

(Filed 12 December 2008)

Wills— undue influence by spouse—issue of fact

There was a genuine issue of undue influence in a case involving two wills and an allegation of undue influence over the mortally ill decedent by his wife of 47 years, given the evidence of the relevant factors and the entire combination of facts, circumstances, and inferences.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 188 N.C. App. 1, 655 S.E.2d 407 (2008), affirming entry of summary judgment for caveator on 20 October 2006 by Judge Knox V. Jenkins, Jr. in Superior Court, Johnston County. Heard in the Supreme Court 5 May 2008.

Brady, Nordgren, Morton & Malone, PLLC, by Travis K. Morton and Jason L. Hendren, for propounder-appellant Joseph B. McLeod.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by John W. Narron, Bettie Kelley Sousa, and Alicia Jurney Whitlock, for caveator-appellee Jean L. Jones.

HUDSON, Justice.

This case involves a dispute over a will executed on 1 September 2005 by testator John "Buck" Jones, Jr. and whether that will was the product of undue influence exerted upon Mr. Jones by his wife of forty-seven years, Jean L. Jones. Because we believe genuine issues

of material fact remain as to the question of undue influence, we reverse the Court of Appeals, which, in a divided opinion, affirmed the trial court's grant of summary judgment to Mrs. Jones and its order for the will to be accepted for probate. We also instruct the Court of Appeals to remand to the trial court for further proceedings not inconsistent with this opinion on the issues of undue influence and *devasivit vel non*.

On 11 October 2005, Mr. Jones, a Johnston County resident, died at the age of seventy-six, survived by his wife and no linear descendants. Prior to the will he executed on 1 September 2005 ("September Will"), Mr. Jones executed a will and trust agreement on 3 March 2005 ("March Will"); none of the beneficiaries was present at the signing. In the March Will, executed after a February 2005 meeting with attorney Michael S. Batts and his law partner, Mr. Jones directed that all household items, his farming operation, his domesticated animals, his gun collection, and any remaining personal effects be distributed outright to Mrs. Jones upon the event of his death. He also specifically devised certain cattle to Robert Fowler, with whom he had a longstanding friendship and partnership for cattle breeding and sales.

The March Will further provided that the residue of the estate, including Mr. Jones's shares in Carolina Packers, Inc., a closely held meatpacking company in Smithfield, North Carolina, started by Mr. Jones's father and of which Mr. Jones was president and majority shareholder, go into a trust for Mrs. Jones's benefit during her life. Joseph B. McLeod, who had provided tax and accounting services for both Carolina Packers and Mr. Jones since 1988, was named trustee. Upon Mrs. Jones's death, the stock was to be delivered to three longtime Carolina Packers employees, Kent Denning, Johnny Hayes, and Lynette Thompson. Mr. Jones also named Mr. McLeod the executor of the March Will. According to evidence in the record, Mr. Jones was in decent health, ambulatory, and still working at Carolina Packers at the time he signed the March Will. According to Mr. Batts, Mr. Jones specifically stated that he wanted his wife taken care of but did not want her to have control of Carolina Packers, and he described the terms of the March Will as being "exactly what I want."

In the September Will Mr. Jones expressly "revoke[d] all earlier wills and codicils" and left close to the entirety of his estate to Mrs. Jones outright, including the cattle previously devised to Mr. Fowler. The September Will also directed that the residue of the estate be placed in a trust; although the trust documents do not appear in the record, the parties' briefs to this Court suggest that the September

Will gave Mrs. Jones control of Carolina Packers. She was also named executrix of the September Will.

Between the signing of the March Will and the September Will, Mr. Jones began "a steady downhill course" in April 2005, apparently related to the cancer with which he had been diagnosed in 2004. In late July 2005, Mr. Jones visited Rex Hospital's emergency room due to "pain [and] confusion," and CT scans at that time showed multiple metastatic deposits or tumors in his brain. According to Dr. Leroy G. Hoffman, Mr. Jones's treating oncologist during August and September 2005, such tumors can cause confusion, and a doctor's notes from that emergency room visit reflect that Mr. Jones was indeed "profoundly weak and confused," with Mrs. Jones "serving as his surrogate decision-maker." Mr. Jones's diagnosis at that time, of which Mrs. Jones was "very aware," was terminal.

Deposition testimony and affidavits from longtime friends and acquaintances of Mr. Jones further indicate that he was suffering from intense pain, exhaustion, and confusion during the summer of 2005. Kent Denning, who had worked at Carolina Packers for approximately twenty years, recalled Mr. Jones exhibiting signs of confusion in the office at that time, resulting in having to take Mr. Jones home. Also in July, Mr. Fowler observed Mr. Jones take more than the prescribed amount of narcotic pain medication while the two men were fishing together. Mrs. Jones stated that Mr. Jones had experienced difficulties regulating his pain prescription beginning in late June and through part of the summer of 2005.

On or about 1 August 2005, Mr. Jones underwent "a thoracic lumbar laminectomy" to relieve pain and pressure from a tumor pressing against his spine. Dr. Hoffman testified that when "someone's admitted to the hospital for an episode like this . . . with the medications they're taking, the postoperative setting, there can be confusion. . . . There may [also] be some emotional stress going on. You'd most likely think there was." Following his release from the hospital in early August, Mr. Jones became a "total care" patient, relying heavily on others, especially Mrs. Jones, to assist him with his medication, getting out of bed, shaving, bathing, eating, and leaving home. He remained this way until his death in October.

During the months of August and September 2005, Mr. Jones was especially physically and mentally weak. According to good friend John Antunes, Mr. Jones looked and sounded increasingly weak and vulnerable, physically and mentally, during the summer of 2005 until

the time of his death. Attorney Michael Batts likewise described Mr. Jones as being worn down, exhausted, and completely dependent on Mrs. Jones when he met with them at their residence on 5 August 2005 to discuss potential changes to the March Will, which he had drafted. Mr. Fowler stated that during his August and September visits with Mr. Jones, he "appeared very weak, less alert, and he did not speak much." In a mid-August meeting with the Joneses regarding Mr. Jones's and Mr. Fowler's cattle dealing, Mr. Fowler recalled that Mrs. Jones controlled the conversation, even though Mr. Fowler had never known Mr. Jones to involve his wife in these matters. He also believed that Mr. Jones appeared "weak, sick, and defeated."

Wayne Sinclair, a close friend of Mr. Jones for over ten years and a witness to the March Will, stated that he saw Mr. Jones nearly every day during 2005. Between August and September 2005, he observed Mr. Jones's health, strength, and mental ability, including his sharpness and alertness, rapidly decline, and he often helped Mr. Jones shave and bathe. According to Mr. Sinclair, Mr. Jones stopped speaking much during his September visits, and he also saw Mr. Jones crying, which he had never before seen. Mr. Sinclair stated that "[b]y the end of August 2005, [Mr. Jones's] attitude and personality were greatly changed in that it appeared to [him] that he was not the same man. His spirit was gone and all of the fight was out of him by that point."

Finally, Dr. Hoffman saw Mr. Jones several hours after the September Will was executed. Dr. Hoffman stated that "it would be hard to not see some signs of depression in anyone who is in this state of cancer," and Mr. Jones "seemed to be somewhat depressed, which is understandable considering he has been an extremely active gentleman all his life." Dr. Hoffman further maintained, "I don't think he was the normal outgoing person or type of person he was six months ago. I didn't ever see him then, but I would imagine that there was some depression."

Following Mr. Jones's death, propounder Joseph McLeod submitted the March Will for probate on 14 October 2005. Shortly thereafter, Mrs. Jones filed a caveat to the March Will alleging that the September Will had expressly revoked the prior will and was therefore the valid last will and testament of Mr. Jones. Mr. McLeod was a propounder of the March Will and the caveator of the September Will; Mrs. Jones was the caveator of the March Will and the propounder of the September Will. On 20 October 2006, in response to Mrs. Jones's July motion for summary judgment, the trial court concluded that

there was no genuine issue of fact as to whether Mr. Jones was unduly influenced by Mrs. Jones in executing the September Will. Accordingly, the trial court granted summary judgment to Mrs. Jones and ordered the Clerk of the Superior Court in Johnston County to accept the September Will for probate.

Mr. McLeod appealed, arguing that the trial court committed reversible error in concluding that (1) the September Will was not executed under undue influence exerted by Mrs. Jones; (2) Mr. Jones had the testamentary capacity to execute the September Will; and (3) summary judgment on the issue of *devisavit vel non* was appropriate despite evidence of undue influence and lack of capacity. In a divided opinion, the Court of Appeals affirmed the trial court's grant of summary judgment as to each issue. *In re Will of Jones*, —— N.C. App. ——, ——, 655 S.E.2d 407, 419 (2008). The Court of Appeals majority concluded that Mr. McLeod had "failed to present specific facts showing that Mr. Jones's will was executed solely as a result of fraudulent and overpowering influence by Mrs. Jones that controlled Mr. Jones at the time he executed the documents." *Id.* at ——, 655 S.E.2d at 417. Moreover, Mr. McLeod had not "carried his burden of proving undue influence" and had "failed to show that Mr. Jones was susceptible to undue influence at the time he executed the September Will." *Id.* at ——, 655 S.E.2d at 416. Although the dissenting judge concurred on the issue of testamentary capacity, she disagreed as to undue influence and *devisavit vel non*, finding that Mr. McLeod had forecast sufficient evidence on those issues. *Id.* at ——, 655 S.E.2d at 422 (Stroud, J., concurring in part and dissenting in part). Based on the dissent, Mr. McLeod appeals to this Court.

Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that "there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (citations and quotation omitted). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted). If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial. *E.g.*, *Lowe v. Bradford*, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982) (citing N.C.G.S. § 1A-1, Rule 56(e)). Nevertheless, "[i]f there is any question as to the weight of evi-

dence summary judgment should be denied." *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999) (citing *Kessing v. Nat'l Mortgage Corp.*, 278 N.C. 523, 535, 180 S.E.2d 823, 830 (1971)).

In applying these well-established principles here, we must determine whether Mr. McLeod, as propounder of the March Will, forecast evidence of a prima facie case of undue influence sufficient to overcome Mrs. Jones's motion for summary judgment. This Court has previously defined "undue influence" as

> something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an expression of the wishes of the maker, but rather the expression of the will of another. "It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made."
>
> In short, undue influence, which justifies the setting aside of a will, is a fraudulent influence, or such an overpowering influence as amounts to a legal wrong. It is close akin to coercion produced by importunity, or by a silent, resistless power, exercised by the strong over the weak, which could not be resisted, so that the end reached is tantamount to the effect produced by the use of fear or force.

In re Will of Turnage, 208 N.C. 130, 131-32, 179 S.E. 332, 333 (1935). Thus, while undue influence requires "more than *mere* influence or persuasion because a person can be influenced to perform an act that is nevertheless his voluntary action," *In re Will of Andrews*, 299 N.C. 52, 53, 261 S.E.2d 198, 199 (1980) (internal citation omitted), it does not require moral turpitude or a bad or improper motive, *In re Will of Craven*, 169 N.C. 641, 649, 169 N.C. 561, 568, 86 S.E. 587, 591 (1915). Indeed, undue influence may even be exerted by a person with the best of motives. *Id.*; *see also In re Will of Turnage*, 208 N.C. at 132, 179 S.E. at 333. Nevertheless, influence is not necessarily "undue," even if gained through persuasion or kindness and resulting in an "unequal or unjust disposition . . . in favor of those who have contributed to [the testator's] comfort and ministered to his wants, [so long as] such disposition is voluntarily made." *In re Will of Craven*, 169 N.C. at 650, 169 N.C. at 569-70, 86 S.E. at 592 (citation omitted).

Undue influence is an inherently subjective term, and finding its existence thus requires engaging in a heavily fact-specific inquiry. Indeed, we have noted the difficulty of making such a determination in past cases:

> It is impossible to set forth all the various combinations of facts and circumstances that are sufficient to make out a case of undue influence because the possibilities are as limitless as the imagination of the adroit and the cunning. The very nature of undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty.

In re Will of Andrews, 299 N.C. at 54-55, 261 S.E.2d at 200 (citation omitted); *see also Hardee v. Hardee*, 309 N.C. 753, 756, 309 S.E.2d 243, 245 (1983) ("This Court has recognized the difficulty a party faces in proving undue influence in the execution of a document." (citation omitted)). Nevertheless, we have identified several factors that often support a finding of undue influence ("*Andrews* factors"):

"1. Old age and physical and mental weakness;

2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision;

3. That others have little or no opportunity to see him;

4. That the will is different from and revokes a prior will;

5. That it is made in favor of one with whom there are no ties of blood;

6. That it disinherits the natural objects of his bounty;

7. That the beneficiary has procured its execution."

In re Will of Andrews, 299 N.C. at 55, 261 S.E.2d at 200 (quoting *In re Will of Mueller*, 170 N.C. 69, 71, 170 N.C. 28, 30, 86 S.E. 719, 720 (1915)).

The diverse circumstances of *Mueller* and *Andrews* illustrate the need to apply and weigh each factor in light of the differing factual setting of each case. In *Mueller*, the testator's children contested a will executed a week before the testator's death, which left his estate to his caregivers of two weeks, his sister-in-law and her husband. In *Andrews*, the testator's son challenged a will which more favorably treated the testator's second wife and her son by a previous marriage.

In each instance, the facts were sufficient to present the question of undue influence to the jury and to support the jury's verdict setting aside the will.

A caveator need not demonstrate every factor named in *Andrews* to prove undue influence, *In re Estate of Forrest*, 66 N.C. App. 222, 225, 311 S.E.2d 341, 343, *aff'd per curiam*, 311 N.C. 298, 316 S.E.2d 55 (1984), as "[u]ndue influence is generally proved by a number of facts, each one of which standing alone may be of little weight, but taken collectively may satisfy a rational mind of its existence," *Hardee*, 309 N.C. at 757, 309 S.E.2d at 246 (citation and quotation marks omitted).

Accordingly, any evidence showing "an opportunity and disposition to exert undue influence, the degree of susceptibility of [the] testator to undue influence, and a result which indicates that undue influence has been exerted" is generally relevant and important. *In re Will of Thompson*, 248 N.C. 588, 593, 104 S.E.2d 280, 285 (1958) (citation and internal quotation marks omitted). If a reasonable mind could infer from such evidence that the purported last will and testament is not the product of the testator's "free and unconstrained act," but is rather the result of "overpowering influence . . . sufficient to overcome [the] testator's free will and agency," then "the case must be submitted to the jury for its decision." *In re Will of Andrews*, 299 N.C. at 56, 261 S.E.2d at 200.

Here, the record contains a substantial amount of evidence presented by both parties, much of which ultimately conflicts on the question of undue influence as considered through application of the *Andrews* factors. Indeed, the factual situation presented here is more difficult in no small part because the party accused of exerting undue influence over Mr. Jones is his wife of forty-seven years, the natural object of his bounty and an individual who undoubtedly influenced Mr. Jones and his decisions.

We have recognized the particular closeness of the marital relationship on a number of occasions in the context of will cases. *See, e.g.*, *In re Peterson*, 136 N.C. 10, 20, 136 N.C. 13, 27, 48 S.E. 561, 566 (1904) ("In the light of the experience and observation of men of the best judgment and soundest minds, we can see nothing in the fact that this man gave his estate, the produce of their joint industry and economy, to his wife, tending to show mental incapacity or undue influence."); *see also In re Will of Ball*, 225 N.C. 91, 93, 33 S.E.2d 619, 621 (1945) ("Nor is the fact testator gave his property to the childless

wife of his bosom to the exclusion of his sister and his nephews and nieces evidence of undue influence."); *In re Will of Broach*, 172 N.C. 520, 524, 90 S.E. 681, 683 (1916) ("But the fact that a wife has influence with her husband, and even if there is evidence that she is the dominant partner, this does not of itself prove that she exerted that influence to dictate the terms of the will[.]"); *In re Will of Cooper*, 166 N.C. 210, 211, 81 S.E. 161, 162 (1914) (rejecting as "untenable" the caveator's position that the propounder wife had to rebut a presumption of undue influence).

These cases demonstrate a strong respect for marriage and suggest that spouses are often accorded special consideration in undue influence cases in light of their close relationship with the testator. Nevertheless, the question remains as to whether such influence was "undue" in the context of Mr. Jones's decision to revoke the March Will and execute the September Will. Again, much of the deposition testimony and affidavits is open to competing interpretations. Given our standard of review, however, we view this evidence in the light most favorable to Mr. McLeod and find that he has forecast sufficient facts from which a jury could reasonably infer that Mr. Jones executed the September Will as a result of Mrs. Jones's undue influence.

We reach no conclusion as to the validity of Mr. McLeod's allegations, but find it nonetheless necessary to demonstrate which evidence presented by Mr. McLeod might allow a jury to reasonably infer undue influence, under both the *Andrews* factors and our prior case law defining the term. First, as to Mr. Jones's age, physical, and mental weakness when he signed the September Will: as outlined above, Mr. Jones was seventy-six years old, ill with cancer, and by many accounts confused, in pain, significantly debilitated, and nearly entirely dependent on his wife. In contrast, he was in decent health, ambulatory, and still working at the time the March Will was executed. According to the testimony and affidavits of several individuals who saw Mr. Jones and interacted with him in the months immediately before his death, he appeared vulnerable to undue influence because of his weakened state and in their opinions, Mrs. Jones was engaged in such undue influence.

Mrs. Jones maintains that we should disregard the contents of some of the affidavits submitted by Mr. McLeod, such as that of Mr. Sinclair, as those statements are contradicted by a later affidavit from Mr. Sinclair that she offers. However, these discrepancies, as well as those in the evidence from Dr. Hoffman, go to the weight and credibility of the evidence, which are questions for a jury and not for this

Court. *See, e.g.*, *In re Will of Jarvis*, 334 N.C. 140, 143, 430 S.E.2d 922, 923 (1993) (stating that determining the credibility of testimony is "for the jury, not the court").

We find similarly unpersuasive Mrs. Jones's contention that the trial court's finding that Mr. Jones did not lack testamentary capacity at the time he executed the September Will, undisturbed by the Court of Appeals and not before this Court, should compel the conclusion that Mr. Jones's physical and mental weakness were not so acute as to support the inference that he was more vulnerable to undue influence. We have previously stated that even if a jury resolves the issue of mental capacity against a party seeking to set aside a document, a jury can still find "consistent[] with its answer to the mental capacity issue, that when [the person at issue] executed the [document] he was physically and mentally weak." *Hardee*, 309 N.C. at 758, 309 S.E.2d at 246; *see also Caudill v. Smith*, 117 N.C. App. 64, 69, 450 S.E.2d 8, 12 (1994) ("[A] finding against the [party challenging a document] on the issue of mental capacity does not necessarily preclude a finding of mental weakness on the issue of undue influence." (citing *Hardee*, 309 N.C. at 758, 309 S.E.2d at 246)), *disc. rev. denied*, 339 N.C. 610, 454 S.E.2d 247 (1995).

Turning to the second *Andrews* factor, that the testator is "in the home of the beneficiary and subject to his constant association and supervision," we note again the particular difficulty of weighing such a finding when the testator and the beneficiary are husband and wife residing in the same home, and we caution that this factor should not be allowed to be effectively considered per se prejudicial against a spouse.

The third *Andrews* factor, that "others have little or no opportunity to see" the testator, is likewise self-evident in a situation such as here, in which a wife is looking after a very ill husband. By all accounts, Mrs. Jones was Mr. Jones's primary caregiver in the last months of his life, and evidence of her attention to her husband's needs undoubtedly mitigates the suggestion that she provided such care solely to unduly influence his estate planning decisions. Moreover, the mere fact that the record contains deposition testimony and affidavits from numerous friends and acquaintances who visited Mr. Jones during August and September 2005 undermines the argument that Mrs. Jones was deliberately isolating Mr. Jones.

Nevertheless, Mr. McLeod has forecast evidence that could allow a reasonable jury to infer exactly that conclusion. For example, Mr.

Jones signed the September Will at the residence where both he and Mrs. Jones lived, while she was present in the house. Although Mr. Jones did occasionally leave the house for brief periods in the late summer months, by the time he executed the September Will, he was completely dependent on others for his physical mobility and care. Mrs. Jones confirmed that Mr. Jones would sometimes spend time at home without his wife, but that she never left him for more than a couple of hours at a time.

More significantly, however, Mr. McLeod presented evidence that an intercom, or baby monitor, was located in Mr. Jones's bedroom, suggesting that Mrs. Jones may have monitored Mr. Jones's personal visits, telephone conversations, or both. In addition, despite his weakened physical condition, the telephone in Mr. Jones's room was located under his bed during the summer of 2005, and Mrs. Jones removed it entirely in September. Mr. Batts recounted twice trying to telephone Mr. Jones on 23 August 2005 to discuss the proposed changes to the March Will; both times, Mrs. Jones answered the calls and barred Mr. Batts from speaking to Mr. Jones.

Although Mr. Batts insisted the call was about a private matter, Mrs. Jones repeatedly inquired as to the purpose of the call and whether Mr. Batts was going to draft a new will. According to Mr. Batts, Mrs. Jones implied that Mr. Batts wanted to challenge the will, and she stated that she had not coerced Mr. Jones into changing his will and had only talked with him about it once. After not hearing back from Mr. Jones, Mr. Batts called him back on 25 August 2005; Mrs. Jones again screened the call and refused to allow Mr. Batts to speak with her husband. James V. Narron, the attorney who drafted the September Will, also recalled that Mrs. Jones told him in a telephone conversation that she wanted Mr. Jones to leave her everything outright and did not want anyone from Carolina Packers to know that Mr. Narron was coming to their home.

Again, while a jury might ultimately find Mrs. Jones's restrictions to be consistent with the actions of a dutiful wife concerned about her sick husband's well-being, Mr. McLeod has forecast evidence that could likewise lead a reasonable jury to weigh this evidence in favor of the conclusion that Mrs. Jones used her control over access to insert herself between Mr. Jones and his attorney, particularly concerning the terms of his will. Regardless of which interpretation hews most closely to the truth, the evidence reflects that a genuine issue of material fact remains.

The fourth *Andrews* factor, that "the will is different from and revokes a prior will," is unquestionably present here as to the March Will and the September Will. Moreover, Mr. McLeod offered considerable evidence that the September Will differed significantly from Mr. Jones's longtime estate plans, while the March Will was largely consistent with prior testamentary instruments executed by Mr. Jones in 1992, 2001, 2003, and 2004. In each of those documents, Mr. Jones devised the bulk of his estate to a trust that would pay income to Mrs. Jones for life but did not pass Carolina Packers shares to her outright. Rather, the 1992 will ultimately directed his shares to a nonprofit foundation bearing his name; the subsequent documents directed the shares to certain named employees, as did the March Will. Although Mr. Jones periodically changed the employees designated to receive the shares, he always included the three employees named in the March Will among the beneficiaries. Mr. Jones also always either named himself or Carolina Packers' certified public accountant (CPA) as trustee and his acting CPA as executor. By contrast, the September Will left everything to Mrs. Jones, including all stock in Carolina Packers, and named her executrix.

Although the fifth and sixth *Andrews* factors—that "the will is in favor of one with whom there are no ties of blood" and that "it disinherits natural objects of [the testator's] bounty"—obviously weigh in Mrs. Jones's favor as the testator's wife and only natural heir, the unique factual situation presented here lessens the importance of these factors. For example, under either the March Will or the September Will, Mrs. Jones received the bulk of Mr. Jones's estate; the principal differences were the degree of control accorded to her as executrix of the September Will, and its provisions as to ownership of the cattle and Carolina Packers. In the latter case, the change ran contrary to Mr. Jones's long-expressed desires, as evidenced in his conversation with Mr. Batts when he executed the March Will and in the earlier testamentary instruments.

Finally, as to the seventh *Andrews* factor, that "the beneficiary has procured [the will's] execution," Mr. McLeod's forecast of evidence is replete with specific facts that could allow a reasonable jury to infer such a conclusion. For example, after learning of the existence and terms of the March Will at some point in July 2005, Mrs. Jones told Mr. McLeod that, "she was very upset about the provisions of the March Will, that she had put up with [Mr. Jones] for almost fifty years and that there was no way that she was going to let that Will remain as it was." The record contains no evidence that Mr. Jones

desired or attempted to change the March Will before that conversation. However, on 1 August 2005, while Mr. Jones was still in the hospital, Mrs. Jones called Mr. Batts and told him that "*she* wanted to see him about Mr. Jones' Will and power of attorney."

In his affidavit, notes, and a file memorandum regarding his subsequent meeting with the Joneses on 5 August 2005, Mr. Batts recollected the following observations: (1) Mrs. Jones led the group's conversation and repeatedly stated that the will needed to be changed so that "she got everything"; (2) "Due to [Mr. Batts's] years of experience, [he] had red flags and warning bells going off in [his] head," and as a result, asked to speak with Mr. Jones alone, to which Mrs. Jones responded, " '[W]hy, he'll just tell you the same thing' "; (3) After Mrs. Jones left the room, Mr. Jones began the conversation by stating that Mr. Batts "should just do the Will the way that [Mrs. Jones] wanted it"; (4) After Mr. Batts informed Mr. Jones that his job as an attorney was to draft a testamentary plan that reflected Mr. Jones's desires, Mr. Jones replied that "he didn't really care anymore, that it wouldn't be his problem who got what because he would be gone"; (5) Mr. Jones further stated that "he would hate to see the company sold because it had been in either his or his father's name for about fifty years," but he "guess[ed]" it "would be okay to leave [it] up to [Mrs. Jones] and the board of directors"; (6) Mr. Jones emphasized that all he wanted to focus on was getting back on his feet "and that he didn't want to keep talking about his Will all the time."

According to Mr. Batts, when he and Mr. Jones rejoined Mrs. Jones, she repeatedly inquired as to what they had discussed. When Mr. Batts responded that it was better if the information remained private due to a potential will contest, Mrs. Jones continued to press the matter. At this point, Mr. Jones became irritated and stated, " '[I]t's the same thing as we talked about before, I didn't tell him anything different.' " Mr. Batts recalled that Mrs. Jones followed him outside after the meeting and without Mr. Jones present, spent several minutes emphasizing again that all Mr. Jones needed was a simple will leaving everything to her and naming her executrix. When Mr. Batts informed her that Mr. Jones had told the named employees about the March Will, she responded that "if they did contest the Will she would just fire them." She further stated that she had been " 'stepped on for too long and was now going to fight for what was hers' " and "her lawyers had told her that [Mr. Jones'] Will wouldn't have worked anyway, because she would have been able to contest it and get one-half of the company."

In addition, Mrs. Jones told Mr. Fowler, Mr. Sinclair, and Mr. Narron of her desire to get the March Will changed. In mid-August Mrs. Jones told Mr. Fowler she knew the March Will left Carolina Packers to three employees and that she was concerned that, if the terms of the Will were effected, she would be voted off the company's board of directors. Mrs. Jones also informed Mr. Fowler for the first time that Mr. Jones had left him certain cattle in the March Will and said that "they wanted [Mr. Fowler] to sign a contract providing [Mrs.] Jones would own half of the calf crop and rights thereto." Mr. Fowler recalled that during the meeting, Mr. Jones "appeared weak, sick, and defeated" and stated, while "[l]ooking down at the floor," "Just sign the contract like she wants."

Around the end of August, Mrs. Jones told Mr. Sinclair the March Will was " 'totally wrong,' " that it did not provide enough support for her, and that she was going to have someone "look into" a new will. In a telephone conversation with Mr. Narron on 29 August 2005, Mrs. Jones stated that she wanted Mr. Jones to leave her everything outright.

All of these incidents and conversations, when viewed in the light most favorable to Mr. McLeod, could support a reasonable jury's inference of undue influence.

In light of our standard of review, we do not recite all of Mrs. Jones's evidence supporting her contention that Mr. Jones's wishes were reflected in the September Will. Suffice it to say, however, that the full evidence under each of the *Andrews* factors, as well as the entire "combination of facts, circumstances and inferences," *In re Will of Andrews*, 299 N.C. at 56, 261 S.E.2d at 200, leaves an issue of undue influence in the execution of the September Will. Perhaps, as asserted by Mrs. Jones, Mr. Jones had a change of heart as to the distribution of his business assets based on his love for her and the care she provided for him at the end of his life. Nevertheless, those questions and ambiguities are precisely the reason why summary judgment was inappropriate here, as the evidence, when taken in the light most favorable to Mr. McLeod, shows that a genuine issue of material fact remains as to whether Mrs. Jones's influence was "undue."

We conclude that Mr. McLeod has sufficiently forecast a prima facie case of undue influence and likewise presents genuine issues of material fact related to the questions of undue influence and *devisavit vel non* in relation to the September Will. Therefore, we reverse and remand to the Court of Appeals for further remand to

the trial court for proceedings not inconsistent with this opinion on the issues of undue influence and *devisavit vel non*.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. JOSHUA DAVID SMITH

No. 234A08

(Filed 12 December 2008)

1. Confessions and Incriminating Statements—extrajudicial confession—corpus delicti rule—first-degree sexual offense

The Court of Appeals did not err by reversing defendant's conviction for first-degree sexual offense based on insufficient evidence under the *corpus delicti* rule to corroborate defendant's extrajudicial confession when the victim twice denied that a first-degree sexual offense ever occurred, because none of the State's evidence was trustworthy to establish the sexual act element of a first-degree sexual offense (that the victim's lips, tongue, or mouth ever touched defendant's penis) when: (1) although the State argued defendant's trial testimony strongly corroborated the essential facts and circumstances surrounding the first-degree sexual offense, the pertinent statements were vague; (2) even if the victim's brother reported defendant's statements honestly and accurately, it cannot be said that the evidence was independent from defendant's extrajudicial confession, and defendant's statements were more of a report of a meeting with an officer rather than an actual confession; (3) it could not be rationalized that defendant's demeanor and alleged confession to the victim's brother, minutes after defendant's extrajudicial confession, was of the caliber to qualify as the strong, substantial, independent corroboration evidence required by *Parker*, 315 N.C. 222; and (4) the opportunity evidence submitted by the State was not strong enough when no independent proof, such as physical evidence or witness testimony, of any crime could be shown.

2. Indecent Liberties— instruction—plain error analysis

The Court of Appeals erred by concluding the trial court's indecent liberties instructions constituted plain error, because:

(1) the jury received the verbatim instructions on indecent liberties taken from the North Carolina Pattern Jury Instructions; (2) there was strong corroborating evidence to establish the trustworthiness of defendant's extrajudicial confession as to the indecent liberties charge; and (3) it was immaterial that the trial court did not give specific instructions as to which of those acts were at issue when the jury could have found that defendant's acts during the first or second visit constituted an indecent liberty with a child.

3. Appeal and Error— remand—consideration of remaining assignments of error

Our Supreme Court remanded this first-degree sexual offense and indecent liberties case to the Court of Appeals for consideration of defendant's remaining assignments of error as they relate to the indecent liberties conviction. If, after reviewing defendant's remaining assignments of error the Court of Appeals finds no error, the case should be further remanded to the Superior Court for resentencing as to the indecent liberties conviction.

Justice TIMMONS-GOODSON concurring in result only.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 190 N.C. App. 44, 660 S.E.2d 82 (2008), reversing a judgment entered 27 July 2006 by Judge Linwood O. Foust in Superior Court, Cleveland County and remanding for a new trial on the charges of indecent liberties with a child. Heard in the Supreme Court 11 September 2008.

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

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Kirby H. Smith, III, for defendant-appellee.

BRADY, Justice.

Defendant Joshua David Smith was tried for first-degree rape, first-degree sexual offense, and one count of indecent liberties with a child. The jury acquitted defendant of first-degree rape, but convicted him of first-degree sexual offense, a Class B1 felony, and indecent liberties with a child, a Class F felony. The trial court consolidated the offenses for purposes of sentencing, and sentenced defendant to an active term of imprisonment for 196 months to 245 months in the

North Carolina Department of Correction. Defendant appealed his convictions to the Court of Appeals, which, in a divided opinion, reversed his first-degree sexual offense conviction and granted a new trial on the indecent liberties charge. The State has appealed two issues as of right on the basis of the dissent in the Court of Appeals.

First, we must consider whether there was substantial corroborating evidence independent of defendant's extrajudicial confession sufficient to sustain his conviction for first-degree sexual offense. We hold that under the *corpus delicti* rule, there was not substantial independent evidence to corroborate the extrajudicial confession sufficient to sustain the conviction for first-degree sexual offense. Second, we must determine whether the trial court's jury instructions regarding the indecent liberties charge created confusion constituting plain error. We hold that the trial court did not err in its indecent liberties instructions. Accordingly, we affirm in part, reverse in part, and remand the case to the Court of Appeals to consider defendant's remaining assignments of error.

PROCEDURAL AND FACTUAL BACKGROUND

On 14 April 2003, the Cleveland County Grand Jury returned indictments charging defendant with first-degree rape, first-degree sexual offense, and one count of indecent liberties with a child. Following a four-day jury trial in July 2006, defendant was found not guilty of first-degree rape, but guilty of first-degree sexual offense and indecent liberties with a child. Defendant appealed to the Court of Appeals, where a majority of the court reversed his conviction for first-degree sexual offense and remanded the charge of indecent liberties with a child to the trial court for a new trial. The case is before us on the basis of the dissent at the Court of Appeals.

The evidence presented at trial tended to show that in December 2002, K.L.C., the victim, was twelve years old and lived in Lawndale, North Carolina with her mother, grandmother, and nineteen-year-old brother, Jonathan. Defendant, who was then twenty-one years old, also resided in Lawndale with his girlfriend Cassie and their three-month-old daughter. The couple and Jonathan were friends. Through this friendship, K.L.C. became acquainted with Cassie. Before Christmas 2002, K.L.C. had only briefly met defendant on a single occasion.

Around the Christmas holiday, defendant and Cassie visited Jonathan and K.L.C.'s residence on two consecutive evenings (the

first visit and the second visit).[1] During the first visit, defendant, Jonathan, Cassie, and Jonathan's fifteen-year-old neighbor consumed alcohol defendant had purchased for the party. Jonathan and his neighbor also smoked marijuana. K.L.C. was present during this party, but was not drinking or smoking. At some point late in the evening, Cassie and Jonathan left the residence, leaving K.L.C. to watch the extremely intoxicated defendant.

K.L.C. testified that while Jonathan and Cassie were away, she and defendant were alone in Jonathan's bedroom. She asserted that although defendant made inappropriate comments to her, no sexual contact occurred. Defendant testified that after Jonathan and Cassie left, he passed out in a drunken stupor on Jonathan's bed, and later awakened to find K.L.C. between his legs, attempting to fellate him. Defendant testified he immediately pushed her away. From this testimony it is unclear if K.L.C.'s mouth ever made contact with defendant's penis.

The next evening, another party was held at Jonathan and K.L.C.'s residence. During this second visit, Cassie and defendant brought their three-month-old daughter. The alcohol and marijuana use continued; however, it is disputed in the record as to whether the defendant was drinking. As the evening progressed, defendant and Cassie decided to spend the night at Jonathan and K.L.C.'s residence but realized they would need more diapers and formula for their infant. The group decided defendant would leave with the infant to get the diapers and formula and that K.L.C. would accompany him.[2]

Defendant and K.L.C. traveled approximately two miles to defendant's residence. K.L.C. testified that once there, she followed defendant inside, carrying the infant in a car seat. She placed the car seat on the floor and then asked where the restroom was located. After defendant pointed to his bedroom, she proceeded to the restroom and defendant followed her. K.L.C. testified that once they were in the bedroom defendant grabbed her shoulders from behind, threw her on the bed, removed her clothing, undressed himself, and then inserted his penis into her vagina. K.L.C. testified that despite

1. The dates of the visits are in dispute. K.L.C. testified that defendant visited her residence on 25 and 26 December 2002; defendant testified that the visits occurred on 26 and 27 December 2002.

2. K.L.C. testified that Jonathan made her go with defendant on this trip because Jonathan wished to be alone with Cassie. Jonathan and K.L.C. both testified during trial that Jonathan and Cassie were having an affair. Jonathan testified that K.L.C. decided to go with defendant to help take care of the baby.

her efforts to halt defendant, she was unable to stop the rape until her brother Jonathan telephoned the residence and left a message on defendant's answering machine.[3] After this telephone call, defendant took K.L.C. and the infant back to K.L.C. and Jonathan's residence. At trial, Jonathan testified that he thought K.L.C. and defendant were gone for at least forty-five minutes.

Conversely, defendant testified that no sexual encounter of any kind occurred while K.L.C. and he were on their errand. Defendant stated that once they arrived at his residence, he told K.L.C. to stay in the truck with the infant. When he went inside to get the formula and diapers, K.L.C. came in with the infant and sat on the couch in the living room. Next, defendant went to the restroom, with the door closed, and during this time Jonathan telephoned and left a message on his answering machine. After using the restroom, defendant telephoned Jonathan's residence and told Cassie that K.L.C., the infant, and he were about to leave to return to Jonathan and K.L.C.'s residence. Defendant said he then prepared a bottle for the infant and all three left his residence. Defendant estimated that he and K.L.C. were in his residence together for five minutes.

K.L.C. told her sister Amanda about the alleged rape a week later. Amanda informed K.L.C.'s mother, who then notified law enforcement. Detective Debbie Arrowood of the Cleveland County Sheriff's Department investigated the report. On the morning of 28 January 2003, Detective Arrowood questioned defendant after he voluntarily arranged a meeting with her. Defendant told Detective Arrowood that he never had any sexual contact with K.L.C. Defendant then left her office, but he voluntarily returned in the afternoon to speak with her again. Detective Arrowood testified that during the second interrogation defendant made an extrajudicial confession. She testified that

> Joshua stated . . . he was at [K.L.C.]'s house a couple of days before [the second visit] and he had been drinking. Joshua stated he was in Jonathan's bedroom, who is [K.L.C.]'s brother, and he was lying on the bed. Joshua stated [K.L.C.] came in the room and was coming on to him. Joshua told me that [K.L.C.] took her pants off, [and] laid down beside him on the bed. Joshua stated [K.L.C.] wanted him to do oral sex on her, but he wouldn't do it. Joshua stated [K.L.C.] unzipped his pants, took out his penis, and tried to give him a blow job. Joshua stated that he couldn't get it up because he had been drinking, so [K.L.C.] stopped.

3. Jonathan testified that he telephoned because he thought defendant and K.L.C. had been gone too long, and he was worried about his sister.

Detective Arrowood also testified that defendant admitted, " 'Yes, it was a stupid mistake and it has ruined my life.' "

The State also presented evidence that defendant made a statement to Jonathan that he received fellatio from K.L.C. Jonathan testified that he traveled with defendant to Detective Arrowood's office and waited while defendant spoke with the detective. Jonathan stated that immediately after defendant came out of the office he appeared upset and admitted to accepting fellatio from K.L.C. Jonathan testified that defendant was apologetic.

At trial, defendant testified that during his interview with Detective Arrowood he was untruthful when he told her about K.L.C. lying on the bed with him and asking for cunnilingus. He also denied making any statement to Jonathan that he let K.L.C. attempt to give him fellatio or that he wanted her to do so.

Detective Arrowood also testified to interviewing K.L.C. about the alleged rape. K.L.C. described the alleged rape, but during her interview and at trial, K.L.C. stated that prior to the alleged rape no sexual or indecent acts occurred between her and defendant. She also stated that no sexual contact between her and defendant occurred after the alleged rape.

ANALYSIS

Two issues have been presented to this Court on appeal. First, we must decide if, under the *corpus delicti* rule, there was substantial evidence independent of defendant's extrajudicial confession sufficient to sustain his conviction for first-degree sexual offense. Next, we must determine if the jury instructions on the charge of indecent liberties with a child constituted plain error.

I. Sufficiency of the Evidence Under the *Corpus Delicti* Rule

[1] Defendant argues there was not sufficient evidence under the *corpus delicti* rule to sustain his conviction for first-degree sexual offense. Under the *corpus delicti* rule, the State may not rely solely on the extrajudicial confession of a defendant, but must produce substantial independent corroborative evidence that supports the facts underlying the confession. *State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985). Before applying this complex rule to the instant case it is necessary to recite a brief history of how the *corpus delicti* rule developed and understand its current application in North Carolina law.

A. Historical Background of the *Corpus Delicti* Rule

Throughout history, law-based societies have placed a high premium on ensuring that substantial proof of a crime exists before imposing punishment on a defendant. For instance, *Hammurabi's Code of Laws*, which is thought to date back to circa 2250 B.C., required one accusing another of a capital offense to prove his case or else be put to death. *See* Robert Francis Harper, *The Code of Hammurabi King of Babylon about 2250 B.C.* § 1 (2d ed. 1904). Elsewhere in the *Code*, witnesses are required to attest to contracts and report the contents truthfully if a dispute arises, or else face harsh legal punishment. *Id.* at §§ 11-15. Similarly, the *Torah*, an ancient bases for Judeo-Christian law, instructed on the testimony of witnesses. As Moses approached death, he reminded the Israelites of their unique history and relayed rules that comprised Israel's duties under the Mosaic covenant. *See Deuteronomy* 4:44-32:47. In doing so, Moses instructed Israel to seek justice to protect against false witnesses. Therefore, he instructed that "[a] matter must be established by the testimony of two or three witnesses." *Deuteronomy* 19:15 (NIV). The *Koran* contains similar instructions. Generally, at least four witnesses are required to testify before a woman can be punished for adultery under Islamic law. *Koran* 24:2-12. These basic concepts can also be traced to the Middle Ages. For instance, in the late twelfth century, accusatory proceedings required an accuser to present *plena probatio*, or "full proof" of his charges. James A. Brundage, *Medieval Canon Law* 142-43 (1995). *Plena probatio* was established if two credible eyewitnesses could attest to the defendant's commission of the crime charged. *Id.*

Modern societies have also developed legal rules to help ensure that defendants are only punished for crimes they have actually committed. To establish guilt in any criminal case, it is the duty of the State to show that "(a) the injury or harm constituting the crime occurred; (b) this injury or harm was done in a criminal manner; and (c) the defendant was the person who inflicted the injury or harm." 1 Kenneth S. Broun et al., *McCormick on Evidence §* 147 at 600 (6th ed. 2006)[hereinafter 1 *McCormick on Evidence*]. It is generally acknowledged that the *corpus delicti* rule was developed to address the first two duties of the prosecuting authority. *Id.*

The term *corpus delicti* literally means "body of the crime." Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* at 140 (3d ed. 1982)[hereinafter *Criminal Law*]. Legally, the *corpus delicti* of an offense refers to the "fact of the specific loss or injury sustained": in

homicide, the dead body; in larceny, the missing property; and in arson, the burnt residence. 7 John Henry Wigmore, *Evidence in Trials at Common Law* § 2072, at 524 (James J. Chadbourn rev., Little, Brown & Co. 1978)[hereinafter 7 *Wigmore on Evidence*](emphasis omitted). The *corpus delicti* rule establishes that "no criminal conviction can be based upon defendant's extrajudicial confession or admission, although otherwise admissible, unless there is other evidence tending to establish the corpus delicti." *Criminal Law* at 142 (emphasis omitted).

The *Corpus Delicti* Rule in England

Legal scholars trace the modern concept of *corpus delicti* to several seventeenth century English cases; the most notable among them is *Perry's Case*. *Id*. at 142-43. *Perry's Case* involved a defendant who confessed to the murder of a missing English man. 14 T.B. Howell, *A Complete Collection of State Trials* 1313-24 (London, T.C. Hansard 1816). In his confession, the defendant implicated both his mother and brother in the homicide. *Id*. at 1313-19. All three were executed before the alleged victim was discovered *alive* years later. *Id*. at 1319-22. The public shock and horror resulting from this case and others with similar circumstances spurred the beginnings of the *corpus delicti* rule. *Criminal Law* at 142. Subsequent English courts failed to specifically define the rule or its scope, but versions of the law can be seen in English statutes dating back to the second half of the eighteenth century. One such statute, documented in William Blackstone's *Commentaries on the Laws of England*, requires that a defendant's confession to any treason against the Crown be made in *open court* in order to convict. 4 William Blackstone, *Commentaries* 350 (Oxford, Clarendon Press 1769). Absent such public confession, at least two witnesses were required to testify against the defendant. *Id*. Several similar statutes emerged in the English courts, but no clear doctrine developed, which left the law in "an unfortunate state of obscurity, subject to much difference of opinion." *7 Wigmore on Evidence* § 2070, at 509.

The *Corpus Delicti* Rule in America

Since no definitive rule emanated from the English courts, American courts were free to adopt versions of the *corpus delicti* rule that were most fitting to the needs of the time. *Id.* § 2071, at 511. American jurisprudence has consistently valued witness testimony, as evidenced by the United States Constitution. Article III establishes that a conviction for treason must be supported by "the testimony of

two witnesses to the same overt act, or on confession in open court." U.S. Const. art. III, § 3. Additionally, the Confrontation Clause provides the accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. It is believed that these provisions were written at least partly in response to the infamous seventeenth century trial of Sir Walter Raleigh, in which Raleigh was convicted based on the out of court confession of Lord Cobham, who named Raleigh as his accomplice in a conspiracy to overthrow the King of England. Stanley A. Goldman, *Guilt by Intuition: The Insufficiency of Prior Inconsistent Statements to Convict*, 65 N.C. L. Rev. 1, 30 (1986). Some suggest that Cobham's confession was elicited by torture. *Id.* In any event, Raleigh was denied the right to confront Cobham in open court. *Id.* In addition to Article III, Section 3 and the Confrontation Clause, the *corpus delicti* rule was seen by the American courts as further protection for defendants from dubious extrajudicial confessions. 1 *McCormick on Evidence* § 145, at 595-96.

Instances of false confessions also spurred the legal development of the rule. The most famous of these involved two brothers from Massachusetts, Stephen and Jesse Bourne. Edwin M. Borchard, *Convicting the Innocent* 15-22 (1932). Years after the disappearance of their brother-in-law, the two were accused of his murder. *Id.* at 18. Jesse blamed his brother Stephen for the murder, and eventually Stephen confessed to killing his brother-in-law. *Id.* at 16-18. Stephen later retracted the confession and professed his innocence, but he was still convicted and sentenced to death. *Id.* at 18. However, before Stephen was executed, the allegedly murdered brother-in-law appeared, alive and well, and Stephen was released. *Id.* at 19-20. This case, as well as others like it, cast a shadow of doubt on the reliability of extrajudicial confessions. *Criminal Law* at 143. As a result, different versions of the *corpus delicti* rule were adopted throughout the country. Now, all American jurisdictions follow some version of the *corpus delicti* rule. 1 *McCormick on Evidence* § 145, at 592.

Historically, the legal justifications supporting the *corpus delicti* rule have been threefold: First, the rule protects against those shocking situations in which alleged murder victims turn up alive after their accused killer has been convicted and perhaps executed. *Parker*, 315 N.C. at 233, 337 S.E.2d at 493 (citing Julian S. Millstein, Note, *Confession Corroboration in New York: A Replacement for the* Corpus Delicti *Rule*, 46 Fordham L. Rev. 1205, 1205 (1978) [hereinafter Note, *Confession Corroboration*](citation omitted)). Second,

the rule ensures that confessions that are " 'erroneously reported or construed . . . , involuntarily made . . . , mistaken as to law or fact, or falsely volunteered by an insane or mentally disturbed individual' " cannot be used to falsely convict a defendant. *Id.* (quoting Note, *Confession Corroboration* at 1205). Finally, the rule is thought to promote good law enforcement practices because it requires thorough investigations of alleged crimes to ensure that justice is achieved and the innocent are vindicated. *Id.* (citing Note, *Confession Corroboration* at 1205).

B. North Carolina's *Corpus Delicti* Corroboration Evidence Standard

It has long been established in North Carolina that the State may not rely solely on the extrajudicial confession of a defendant to prove his or her guilt; other corroborating evidence is needed to convict for a criminal offense. *See State v. Long*, 2 N.C. 360, 360, 2 N.C. 455, 456, 1 Hayw. 455 (1797) (per curiam). "[A] naked confession, unattended with circumstances, is not sufficient. A confession, from the very nature of the thing is a very doubtful species of evidence, and to be received with great caution. . . . [If] there are no confirmatory circumstances . . . it is better to acquit the prisoner." *Id.* While it has been universally understood that other corroboration evidence must accompany the extrajudicial confession, the quantum and quality of this corroboration evidence have been debated through the years. As a result, corroboration evidence standards vary from state to state. In *Parker*, North Carolina joined the national trend expanding the *corpus delicti* rule to allow a defendant's extrajudicial confession to sustain a conviction when the trustworthiness of the confession is substantiated by *evidence aliunde*. 315 N.C. 222, 337 S.E.2d 487. *Parker* held that in noncapital cases, a conviction can stand if "the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime." *Id.* at 236, 337 S.E.2d at 495. Furthermore, *Parker* emphasizes "that when independent proof of loss or injury is lacking, there must be *strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession." *Id.*

C. Application of the *Corpus Delicti* Rule to the First-degree Sexual Offense Conviction

A defendant is guilty of first-degree sexual offense if the State proves, beyond a reasonable doubt, that (1) the defendant engaged in

a sexual act with a victim who is under the age of thirteen, and (2) the defendant is at least twelve years old and at least four years older than the victim. *See* N.C.G.S. § 14-27.4 (2007). A sexual act, as defined by statute, means "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body . . . ." *Id.* § 14-27.1(4) (2007). Fellatio is defined as "any touching of the male sexual organ by the lips, tongue, or mouth of another person." *See, e.g.*, *State v. Johnson*, 105 N.C. App. 390, 393, 413 S.E.2d 562, 564, *appeal dismissed and disc. rev. denied*, 332 N.C. 348, 421 S.E.2d 158 (1992); *see also* 1 N.C.P.I.—Crim. 207.45.1 (2008).

In the instant case, a critical fact exists that necessarily bears upon our analysis: the victim twice denied that a first-degree sexual offense ever occurred. When interviewed by Detective Arrowood six weeks after the alleged events transpired, K.L.C. stated that there was no sexual contact between defendant and her on the night of the first visit. Additionally, K.L.C. testified at trial that during the first visit, she was alone with defendant in Jonathan's bedroom, and while defendant made inappropriate comments to her, no sexual contact occurred on the night of the first visit. A victim of sexual violence, especially a minor victim, is not required to testify to the sexual offense in order for a conviction to stand. *See State v. Cooke*, 318 N.C. 674, 679, 351 S.E.2d 290, 292 (1987) (stating that "there is no requirement that the victim testify before the accused may be convicted"). However, in this unique situation, in which the victim explicitly denies that the offense ever occurred, we believe it is imperative to adhere to *Parker's* emphasis that "strong" corroboration evidence supporting defendant's extrajudicial confession must be shown when proof of injury or loss is otherwise lacking. 315 N.C. at 236, 337 S.E.2d at 495.

The State argues that under the *corpus delicti* rule, defendant's extrajudicial confession, along with several pieces of corroborative evidence, is sufficient to sustain a conviction for first-degree sexual offense. However, none of the State's evidence is trustworthy to establish the sexual act element of a first-degree sexual offense, that K.L.C.'s lips, tongue, or mouth ever touched defendant's penis. In the extrajudicial confession, defendant stated to Detective Arrowood that K.L.C. unzipped his pants, removed his penis, and *attempted* fellatio, but that he could not achieve an erection because of his alcohol consumption. From this confession alone a jury could not determine

beyond a reasonable doubt that K.L.C.'s mouth ever made contact with defendant's penis, which is a required element in a sexual offense prosecution.

The State relies on three types of corroborative evidence to sustain the extrajudicial confession. First, the State argues defendant's trial testimony strongly corroborates the essential facts and circumstances surrounding the first-degree sexual offense. At trial, defendant stated that on the evening of the first visit, K.L.C. was between his legs and he felt *something* touch his penis. Like the extrajudicial confession, this statement is also vague; it is not clear from the record what this "something" was. This testimony is insufficient to strongly corroborate the essential facts and circumstances of a "sexual act" necessary to convict defendant of a first-degree sexual offense.

Next, the State argues that evidence of defendant's statements to Jonathan made immediately following the extrajudicial confession to Detective Arrowood, along with Jonathan's testimony about defendant's demeanor at the time, strongly corroborates the extrajudicial confession. Jonathan testified that defendant allegedly confessed that "he had let [K.L.C.] give him oral sex." This testimony is not sufficient to corroborate defendant's extrajudicial confession under the *corpus delicti* rule because defendant's alleged statements are not *independent* from the extrajudicial confession. Jonathan testified that on 28 January 2003, he accompanied defendant to the police station and waited for him while he met with Detective Arrowood. During the meeting, defendant made his extrajudicial confession. Jonathan testified that immediately after the meeting, defendant "was upset when he came out of Ms. Arrowood's office." Jonathan further testified that after asking defendant what happened in the office, defendant "admitted to having oral sex with [K.L.C.]." At trial, defendant denied ever making these statements to Jonathan.

Parker requires that the corroborating evidence supporting defendant's extrajudicial confession be substantial and *independent*. 315 N.C. at 236, 337 S.E.2d at 495. Even if Jonathan reported defendant's statements honestly and accurately, we cannot say the evidence is independent from defendant's extrajudicial confession. Jonathan testified that the statements were made *immediately* following defendant's meeting with Detective Arrowood. Furthermore, the statements were elicited after Jonathan asked defendant about what happened in the meeting. In this respect, defendant's statements are more of a report of the meeting than an actual "confession." Therefore, because these statements were

derived from the extrajudicial confession given to Detective Arrowood just minutes before, they have no more probative value than the extrajudicial confession itself.

Jonathan's testimony describing defendant's demeanor also fails to meet *Parker's* strong corroboration standard. While Jonathan did testify that defendant told him that "he was sorry, that it wasn't right, but it still don't change the fact" after the interview, these statements are neither substantial, independent, nor strong because defendant allegedly made them in the same mental condition and under the same stress of the interrogation with Detective Arrowood. If the extrajudicial confession is suspect under the *corpus delicti* rule and cannot stand alone to convict defendant, then we cannot rationalize that defendant's demeanor and alleged confession to Jonathan, minutes after his extrajudicial confession, is of the caliber to qualify as the strong, substantial, independent corroboration evidence *Parker* requires.

The State last contends that under *Parker*, several pieces of "opportunity evidence" are sufficient to sustain defendant's conviction for first-degree sexual offense. The State offers testimony from both defendant and K.L.C. that they were alone together in Jonathan's bedroom during the first visit, as well as Jonathan's testimony that he left K.L.C. with defendant during the first visit.

In *Parker*, this Court held that facts tending to show the defendant had the opportunity to commit the crime can be considered as independent evidence to establish the trustworthiness of the defendant's confession. 315 N.C. at 236-39, 337 S.E.2d at 495-97. However, the opportunity evidence in *Parker* differs from the case at bar. In *Parker*, the defendant was charged with armed robbery and first-degree murder of two victims. *Id.* at 224, 337 S.E.2d at 488. The State was able to produce significant independent evidence of both murders and of armed robbery, including the bodies of both victims and the recovered property stolen from the first victim. *Id.* at 224-25, 337 S.E.2d at 488-89. However, no evidence of the second armed robbery could be shown, other than the defendant's extrajudicial confession. *Id.* at 227, 337 S.E.2d at 490. This Court ruled that evidence showing the defendant had the opportunity to commit the crime was sufficient under the *corpus delicti* rule to sustain the second armed robbery conviction in light of the "overwhelming amount and convincing nature of the corroborative evidence . . . of more serious crimes committed against [both] victim[s] . . . at the time of the robbery." *Id.* at 237-38, 337 S.E.2d at 496. The present case differs from *Parker*

because no independent proof, such as physical evidence or witness testimony, of any crime can be shown. Furthermore, in the case at bar, K.L.C., an alleged *living* victim, gave two statements averring that the sexual offense did not occur. In light of these facts, the opportunity evidence submitted by the State is not strong enough to establish the *corpus delicti* of first-degree sexual offense under *Parker*, namely, that a "sexual act" occurred between defendant and K.L.C.[4]

Because the State has not met its burden to provide strong corroboration evidence relevant to the essential facts and circumstances of defendant's extrajudicial confession, the *corpus delicti* of the first-degree sexual offense charge has not been established, and the conviction cannot be sustained.

II. Jury Instructions on Indecent Liberties with a Child

[2] Defendant asserts that the jury instructions regarding indecent liberties with a child were confusing and misleading in that the trial court failed to specify the acts underlying the indecent liberties charge. Because defendant failed to object to the instructions at trial, we consider only whether the trial court committed plain error. *See* N.C. R. App. P. 10(c)(4).

"A reversal for plain error is only appropriate in the most exceptional cases." *State v. Duke*, 360 N.C. 110, 138, 623 S.E.2d 11, 29 (2005), *cert. denied*, —— U.S. ——, 127 S. Ct. 130, 166 L. Ed. 2d 96 (2006). Plain error analysis should be applied cautiously and only when "after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (citation omitted), *cert. denied*, 459 U.S. 1018 (1982)). An appellate court "must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (citing *Odom*, 397 N.C. at 661, 300 S.E.2d at 378-79).

The jury received the verbatim instructions on indecent liberties taken from the North Carolina Pattern Jury Instructions. *See* 2 N.C.P.I.—Crim. 226.85 (2008). When instructing on indecent liberties, the judge is under no requirement to specifically identify the acts that

4. Nothing in K.L.C.'s testimony regarding the alleged rape established the elements of a sexual-offense.

constitute the charge. *See State v. Hartness*, 326 N.C. 561, 563-67, 391 S.E.2d 177, 178-81 (1990). In *State v. Lawrence*, this Court stated, "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." 360 N.C. 368, 375 627 S.E.2d 609, 613 (2006) (citing *Hartness* and *State v. Lyons*, 330 N.C. 298, 412 S.E.2d 308 (1991)).

Defendant contends that *Hartness* and *Lawrence* should not control this issue because, in those cases, all of the evidence offered at trial was ruled competent to support the charges alleged. He argues that this case differs because the jury could have based its indecent liberties conviction solely on the same acts that resulted in the sexual offense conviction, which we have now found invalid under the *corpus delicti* rule. We disagree. While the evidence presented at trial was insufficient to sustain the sexual offense conviction, it withstands the *corpus delicti* rule as to the conviction for indecent liberties with a child. Therefore, even if the jury based its conviction on the same facts as those underlying the sexual offense charge, it was appropriate for them to do so.

"[T]he crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts." *Hartness*, 326 N.C. at 567, 391 S.E.2d at 180. A defendant is guilty of indecent liberties with a child if,

> being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C.G.S. § 14-202.1 (2007). Defendant's extrajudicial confession alone establishes all of the elements of indecent liberties with a child; thus, under the *corpus delicti* rule, the question becomes whether independent corroborating evidence is strong enough to prove the trustworthiness of the confession. As discussed above, Jonathan's testi-

mony regarding defendant's statements made immediately after the extrajudicial confession is not evidence independent of the confession and is not sufficient corroboration evidence. However, after reviewing the entirety of the record, we find there is strong corroborating evidence to establish the trustworthiness of defendant's extrajudicial confession as to the indecent liberties charge.

First, defendant's trial testimony mirrors his extrajudicial confession in that he admits that during the first visit, he was drunk and alone with K.L.C. on Jonathan's bed *with his penis exposed*. This evidence strongly corroborates defendant's extrajudicial confession admitting to an indecent liberty against K.L.C. and satisfies the requirements of the *corpus delicti* rule. The jury also heard K.L.C. testify that defendant grabbed her by the shoulders, undressed her, and exposed himself during the second visit. Therefore, it was proper for the jury to consider the confession, along with the other evidence presented at trial, to determine if defendant committed the crime of indecent liberties with a child. Because the jury could have found that defendant's acts during the first or second visit constituted an indecent liberty with a child, it is immaterial that the trial court did not give specific instructions as to which of those acts were at issue. *See Lawrence*, 360 N.C. at 375, 627 at 613. After receiving correct instructions on the law, the jury was unanimous in deciding that defendant committed the offense of indecent liberties with a child. As such, we find no plain error and affirm defendant's conviction for indecent liberties with a child.

CONCLUSION

Because we hold that there was insufficient evidence under the *corpus delicti* rule to satisfy the "sexual act" element of first-degree sexual offense, we affirm the Court of Appeals' reversal of defendant's conviction on that charge.

We further hold that the jury instructions regarding the indecent liberties charge were not confusing and did not constitute plain error. We thus reverse the portion of the Court of Appeals' opinion that concluded otherwise and granted defendant a new trial on this issue.

[3] The Court of Appeals found it unnecessary to address defendant's remaining assignments of error based on its finding that these matters were unlikely to occur at a new trial. Because we reverse the Court of Appeals' decision granting defendant a new trial, we remand this case to that court for consideration of defendant's remaining

assignments of error as they relate to the indecent liberties conviction. If, after reviewing defendant's remaining assignments of error the Court of Appeals finds no error, we instruct that the case be further remanded to the Superior Court for resentencing as to the indecent liberties conviction.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Justice TIMMONS-GOODSON concur in the result only.

KATELYN ANDREWS, A MINOR, THROUGH HER GUARDIAN AD LITEM, DAVID ANDREWS; AND DAVID ANDREWS AND ANDREA ANDREWS, INDIVIDUALLY v. VANESSA P. HAYGOOD, M.D., INDIVIDUALLY; CENTRAL CAROLINA OBSTETRICS AND GYNECOLOGY, P.A., A NORTH CAROLINA CORPORATION; THE WOMEN'S HOSPITAL OF GREENSBORO, A NORTH CAROLINA NOT-FOR-PROFIT CORPORATION; KIM RICHEY, R.N., INDIVIDUALLY; AND JENNIFER DALEY, R.N., INDIVIDUALLY v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE, INTERVENOR

No. 57A07-2

(Filed 12 December 2008)

Subrogation— Medicaid—medical malpractice settlement—reimbursement for prior medical expenditures

The trial court did not err in a medical malpractice case by subrogating plaintiff's settlement proceeds to the North Carolina Division of Medical Assistance, subject to the one-third statutory limitation, because: (1) *Ahlborn*, 547 U.S. 268 (2006), does not mandate a judicial determination of the portion of a settlement from which the State may be reimbursed for prior medical expenditures, but instead the United States Supreme Court left to the States the decision on the measures to employ in the operation of their Medicaid programs; (2) North Carolina employs an alternative statutory procedure under N.C.G.S. § 108A-57(a) which allows total reimbursement to the State only when the amount of assistance previously paid for medical expenses is one-third of plaintiff's settlement or less; if the amount of the State's claim exceeds one-third of the recovery, our statute limits reimbursement to one-third of the settlement; and plaintiffs are free to negotiate a settlement with the State for a lien amount less than that required by our statutes; and (3) N.C.G.S. § 108A-59(a) pro-

vides a reasonable framework that comports with the requirements of federal Medicaid law as interpreted by *Ahlborn*.

Justice HUDSON dissenting.

Justices BRADY and TIMMONS-GOODSON join in dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 188 N.C. App. 244, 655 S.E.2d 440 (2008), affirming an order entered on 27 July 2006 by Judge Steve A. Balog in Superior Court, Alamance County. On 10 April 2008, the Supreme Court allowed appellant's petition for discretionary review of additional issues. Heard in the Supreme Court 13 October 2008.

Wishart, Norris, Henninger & Pittman, P.A., by Pamela S. Duffy and Molly A. Orndorff, for trustee-appellant Charlie D. Brown.

Roy Cooper, Attorney General, by Susannah P. Holloway, Assistant Attorney General, for intervenor-appellee North Carolina Department of Health and Human Services, Division of Medical Assistance.

Glenn, Mills, Fisher & Mahoney, P.A., by Carlos E. Mahoney, Counsel for North Carolina Academy of Trial Lawyers, amicus curiae.

NEWBY, Justice.

This case presents the question of whether the statutory framework governing the State's subrogation claim for medical expenses on a Medicaid recipient's tort claim settlement complies with federal Medicaid law as interpreted by the Supreme Court of the United States in *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006). Because *Ahlborn* does not mandate a specific method for determining the medical expense portion of a plaintiff's settlement, we uphold North Carolina's reasonable statutory scheme and accordingly affirm the Court of Appeals.

Plaintiff Katelyn Andrews brought suit against defendants, alleging medical malpractice and seeking recovery for injuries she sustained at birth. The parties entered into confidential settlement agreements and established a settlement account for the proceeds.

Because Katelyn is a North Carolina Medicaid recipient, the North Carolina Division of Medical Assistance ("DMA") sought to recover from the account the amount it paid for her medical expenses, $1,046,681.94. The trial court determined the DMA has subrogation rights to the entire amount of the settlement, limited by the statutory provision that only one-third of a recovery is subject to subrogation. N.C.G.S. § 108A-57(a) (2005). Because the amount expended by the DMA was less than one-third of the settlement, the trial court ordered full reimbursement. The trustee of the settlement account appealed.

The Court of Appeals affirmed the trial court's order based on our prior decision in *Ezell v. Grace Hospital, Inc.*, 360 N.C. 529, 631 S.E.2d 131 (2006), *rev'g per curiam for reasons stated in the dissenting opinion*, 175 N.C. App. 56, 623 S.E.2d 79 (2005), *reh'g denied*, 361 N.C. 180, 641 S.E.2d 4 (2006). A*ndrews v. Haygood*, 188 N.C. App. 244, 247, 655 S.E.2d 440, 444 (2008). However, a dissent questioned the majority's reliance on *Ezell* because in reversing the Court of Appeals, we did not specifically address the applicability of the holding in *Ahlborn* to the issues in *Ezell*. *Id.* at ——, 655 S.E.2d at 444-45 (Wynn, J., dissenting).

Based on the dissent, the trustee appealed to this Court, and we granted review of additional issues arising from the trial court's denial of requests for an evidentiary allocation hearing and for a delay in resolution of the case until a third party could be joined. The trustee contends that absent an agreement between the parties, federal law requires a judicial determination of the portion of a tort claim settlement that represents the recovery of medical expenses. In response, the DMA contends the statutory one-third limiting provision complies with *Ahlborn's* interpretation of federal Medicaid law. The DMA thus argues that judicial apportionment of medical expenses from the settlement is not required. We agree.

Medicaid is a cooperative program that provides federal and state medical care funding for certain individuals who are unable to afford their own medical costs. *See Ahlborn*, 547 U.S. at 275, 126 S. Ct. at 1758, 164 L. Ed. 2d at 468. Participating states are required by federal law to "take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under the plan" and to "seek reimbursement for [medical] assistance [made available on behalf of a recipient] to the extent of such legal liability." 42 U.S.C. § 1396a(a)(25)(A)-(B) (2000). State laws control the administration of the program, including the method by which a state may seek reimbursement for prior Medicaid assistance. *See Ahlborn*, 547 U.S. at

275-77, 126 S. Ct. at 1758-59, 164 L. Ed. 2d at 468-70. State laws, however, must comply with federal Medicaid law. *Id.*

The Supreme Court of the United States addressed the operation of a state's Medicaid reimbursement statute in *Ahlborn*, in which the Court was asked to determine whether the Arkansas Department of Health and Human Services ("ADHS") could claim a statutory lien on a settlement for more than the portion that by stipulation represented the recovery of medical expenses. *Ahlborn*, 547 U.S. at 279-80, 126 S. Ct. at 1760-61, 164 L. Ed. 2d at 470-71. The Arkansas statutes in question[1] allowed total reimbursement to ADHS for all previous medical payments made on the plaintiff's behalf. *Id.* at 278-79, 126 S. Ct. at 1759-60, 164 L. Ed. 2d at 470-71. Ahlborn, a Medicaid recipient, challenged the statute because it permitted reimbursement from settlement proceeds recovered for damages other than medical expenses. *Id.* at 274, 126 S. Ct. at 1757-58, 164 L. Ed. 2d at 468. In her suit against the alleged tortfeasors, she sought compensation for medical expenses, pain and suffering, lost wages, and permanent impairment of her future wage-earning ability. *Id.* at 273, 126 S. Ct. at 1757, 164 L. Ed. 2d at 467. After the parties settled for $550,000, ADHS asserted a lien against the settlement for $215,645.30—the total amount of prior payments made by ADHS for Ahlborn's medical care. *Id.* at 274, 126 S. Ct. at 1757, 164 L. Ed. 2d at 468. Ahlborn challenged the lien, alleging it violated federal Medicaid law "insofar as its satisfaction would require depletion of compensation for injuries other than past medical expenses." *Id.*

Before trial, Ahlborn and ADHS stipulated to several facts. *Id.* at 274, 126 S. Ct. at 1757-58, 164 L. Ed. 2d at 468. The reasonable value of Ahlborn's claim, absent any consideration of liability, was specified to be approximately $3,040,708.18. *Id.* The parties agreed the settlement amount of $550,000 represented approximately one-sixth of the estimated total damages. *Id.* ADHS further stipulated that if Ahlborn's construction of the Arkansas statute were correct, ADHS

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1. The pertinent sections of the Arkansas Code read:

> As a condition of eligibility, every Medicaid applicant shall automatically assign his or her right to any settlement, judgment, or award which may be obtained against any third party to the Department of Human Services *to the full extent* of any amount which may be paid by Medicaid for the benefit of the applicant.

Ark. Code. Ann. § 20-77-307(a) (2001) (emphasis added). Accordingly, "when medical assistance benefits are provided . . . to a . . . recipient because of injury, disease, or disability for which another person is liable . . . the Department of Human Services shall have a right to recover from the person *the cost of benefits so provided.*" *Id.* § 20-77-301(a) (2001) (emphasis added).

would only be entitled to reimbursement for one-sixth of the total past medical payments, or $35,581.47. *Id.*

The Supreme Court of the United States determined that ADHS was entitled to recover $35,581.47, the portion of the settlement stipulated to represent Ahlborn's recovery of medical expenses. *Id.* at 292, 126 S. Ct. at 1767, 164 L. Ed. 2d at 479. The Court held: "Federal Medicaid law does not authorize ADHS to assert a lien on Ahlborn's settlement in an amount exceeding $35,581.47 . . . . Arkansas' third-party liability provisions are unenforceable insofar as they compel a different conclusion." *Id. Ahlborn* thus controls when there has been a prior determination or stipulation as to the medical expense portion of a plaintiff's settlement. In those cases, the State may not receive reimbursement in excess of the portion so designated.

The *Ahlborn* holding, limited by the parties' stipulations, did not require a specific method for determining the portion of a settlement that represents the recovery of medical expenses. *See id.* at 288, 126 S. Ct. at 1765, 164 L. Ed. 2d at 476. The Court recognized that "some States have adopted special rules and procedures for allocating tort settlements" under certain circumstances, but ultimately "express[ed] no view on the matter" and "le[ft] open the possibility that such rules and procedures might be employed to meet concerns about settlement manipulation." *Id.* at 288 n.18, 126 S. Ct. at 1765 n.18, 164 L. Ed. 2d at 476 n.18. *Ahlborn* thus does not mandate a judicial determination of the portion of a settlement from which the State may be reimbursed for prior medical expenditures. Instead, the Supreme Court left to the States the decision on the measures to employ in the operation of their Medicaid programs. *Id.*

Our General Assembly created a statutory method to determine the amount of the State's reimbursements for prior medical payments. North Carolina law provides that Medicaid recipients are "deemed to have made an assignment to the State of the right to third party benefits, contractual or otherwise to which [the recipient] may be entitled." N.C.G.S. § 108A-59(a) (2005). Implementation of the recipient's statutory assignment is governed by section 108A-57(a) of our General Statutes:

> Notwithstanding any other provisions of the law, to the extent of payments under this Part, the State . . . shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of this assistance . . . against any person. . . . Any attorney retained by the beneficiary of the assistance shall, out of

> the proceeds obtained on behalf of the beneficiary by settlement with . . . a third party . . . distribute to the Department the amount of assistance paid by the Department . . . *but the amount paid to the Department shall not exceed one-third of the gross amount obtained or recovered.*

Id. § 108A-57(a) (2005) (emphasis added). While encouraging complete recovery for past medical payments, the North Carolina statute allows total reimbursement to the State only when "the amount of assistance" previously paid for medical expenses is one-third of the plaintiff's settlement or less. *Id.* If the amount of the State's claim exceeds one-third of the recovery, our statute limits reimbursement to one-third of the settlement. *Id.* Section 108A-57(a) thus prevents excessive depletion of a plaintiff's recovery to satisfy the State's reimbursement lien. Nonetheless, plaintiffs are free to negotiate a settlement with the State for a lien amount less than that required by our statutes.

Rather than requiring a specific determination of the medical expense portion of a settlement, North Carolina employs an alternative statutory procedure that we believe is permitted by *Ahlborn*. *See Ahlborn*, 547 U.S. at 288 n.18, 126 S. Ct. at 1765 n.18, 164 L. Ed. 2d at 476 n.18. Our state law defines "the portion of the settlement that represents payment for medical expenses" as the lesser of the State's past medical expenditures or one-third of the plaintiff's total recovery, limiting the State's reimbursement to the portion so designated. *See* N.C.G.S. § 108A-57(a); *see also Ahlborn*, 547 U.S. at 282, 126 S. Ct. at 1762, 164 L. Ed. 2d at 472-73. The one-third limitation of section 108A-57(a) thus comports with *Ahlborn* by providing a reasonable method for determining the State's medical reimbursements, which it is required to seek in accordance with federal Medicaid law. *See* 42 U.S.C. § 1396a(25)(A)-(B) (2000).

This statutory scheme protects plaintiffs' interests while promoting efficiency in Medicaid reimbursement cases throughout North Carolina. In enacting our statute, the General Assembly may have considered factors such as the strain on resources to send State employees across North Carolina to participate in evidentiary allocation hearings each time a Medicaid recipient recovers from a third party. Likewise, the legislature may have found it important that a case-by-case determination of the medical expense portion of settlements could lead to variable results and increased litigation due to inconsistency in outcomes. Certainly, "[w]eighing these and other public policy considerations is the province of our General Assembly,

not this Court." *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 463, 665 S.E.2d 449, 453 (2008).

We accord a presumption of validity to the General Statutes of this State. *See, e.g., Wayne Cty. Citizens Ass'n for Better Tax Control v. Wayne Cty. Bd. of Comm'rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991); *Ramsey v. N.C. Veterans Comm'n*, 261 N.C. 645, 647, 135 S.E.2d 659, 661 (1964). When the General Assembly enacts a statute after examining its legal and public policy implications, it is not the province of this Court to substitute its judgment for that of our legislature. *See, e.g., Shaw*, 362 N.C. at 463, 665 S.E.2d at 453; *Newlin v. Gill*, 293 N.C. 348, 350-52, 237 S.E.2d 819, 821-22 (1977); *see also Bockweg v. Anderson*, 328 N.C. 436, 451-52, 402 S.E.2d 627, 636-37 (1991) (Martin, J., dissenting). As we previously did in *Ezell*, we have again reviewed section 108A-57(a) and find it to be a reasonable framework that comports with the requirements of federal Medicaid law as interpreted by *Ahlborn*. If the General Assembly desires a different result in these cases it may amend the statutes accordingly.

We therefore affirm the Court of Appeals' holding that the trial court did not err in subrogating the plaintiff's settlement proceeds to the DMA, subject to the one-third statutory limitation. Because our resolution of this issue is dispositive, we need not address the requested joinder of United Healthcare and the Court of Appeals decision as to that issue remains undisturbed.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Justice HUDSON dissenting.

Although I agree with the majority that "[*Arkansas Department of Health & Human Services v.*] *Ahlborn* does not mandate a specific method for determining the medical expense portion of a plaintiff's settlement," the United States Supreme Court nevertheless did explicitly hold in *Ahlborn* that a State may not violate the anti-lien provisions of 42 U.S.C. §§ 1396a(a)(18) and 1396p by requiring a Medicaid recipient to reimburse it out of settlement funds designated for purposes other than medical care. 547 U.S. 268, 284-85, 164 L. Ed. 2d 459, 474 (2006). The terms of the settlement at issue here provide insufficient detail to allow us to determine whether the application of N.C.G.S. § 108A-57(a) would violate the anti-lien provisions of the federal Medicaid statutes, pursuant to the holding in *Ahlborn*.

Because I conclude that we are bound to follow *Ahlborn*, I must respectfully dissent.

As observed by the United States Supreme Court, the federally funded and administered Medicaid program is "a cooperative one," with participating states "compl[ying] with certain statutory requirements for making eligibility determinations, collecting and maintaining information, and administering the program" in exchange for the federal funding. *Id.* at 275, 164 L. Ed. 2d at 468-69. Among these requirements is "that the state agency in charge of Medicaid . . . 'take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under the plan.' " *Id.* at 275, 164 L. Ed. 2d at 469 (quoting 42 U.S.C. § 1396a(a)(25)(A) (2000) (alteration in original)). Further,

> The [state] agency's obligation extends beyond mere identification, however; "in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability."

Id. at 276, 164 L. Ed. 2d at 469 (quoting 42 U.S.C. § 1396a(a)(25)(B)). The federal Medicaid statutes obligate participating states to enact so-called "assignment laws" to provide for such reimbursement. *Id.* at 276-77, 164 L. Ed. 2d at 469-70 (citing 42 U.S.C. §§ 1396a(a)(25)(H), 1396k(a)).

In enacting section 108A-57(a), our General Assembly fulfilled this requirement while also explicitly limiting the percentage of a settlement that the State could recover through assignment:

> Notwithstanding any other provisions of the law, to the extent of payments under this Part, the State, or the county providing medical assistance benefits, *shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of this assistance*, or of the beneficiary's personal representative, heirs, or the administrator or executor of the estate, against any person. The county attorney, or an attorney retained by the county or the State or both, or an attorney retained by the beneficiary of the assistance if this attorney has actual notice of payments made under this Part shall enforce this section. Any attorney retained by the beneficiary of the assistance shall, out of the proceeds obtained on behalf of the beneficiary by settlement

> with, judgment against, or otherwise from a third party by reason of injury or death, distribute to the Department the amount of assistance paid by the Department on behalf of or to the beneficiary, as prorated with the claims of all others having medical subrogation rights or medical liens against the amount received or recovered, *but the amount paid to the Department shall not exceed one-third of the gross amount obtained or recovered.*

N.C.G.S. § 108A-57(a) (2005) (emphases added). Moreover, the General Assembly specifically provided that "the provisions of this Part shall be liberally construed in relation to [the federal Social Security Act providing grants to the states for medical assistance] so that the intent to comply with it shall be made effectual." *Id.* § 108A-56 (2005). In my view, the majority's interpretation runs contrary to this directive by risking violations of the federal anti-lien provisions, which would render our State out of compliance with Medicaid requirements and thereby jeopardize the funding our State receives.

The General Assembly's explicit direction that we defer to the federal provisions as necessary guides our consideration of the interaction of these federal and state statutes. In addition, because this case involves questions of federal statutory law, we are bound by the United States Supreme Court's interpretation of the federal Medicaid statutes. As this Court has stated:

> It is elementary that an act of Congress, in pursuance of the Constitution of the United States, is the supreme law of the land. Constitution of the United States, Article VI, Clause 2. Thus, in case of a conflict between such an act and the law of North Carolina, the act of Congress controls and, so long as it remains in effect, modifies the law of this State and the authority of its courts to render judgment in accordance therewith. It is equally well settled that a decision of the Supreme Court of the United States, construing an act of Congress, is conclusive and binding upon this Court.

R.H. Bouligny, Inc. v. United Steelworkers, 270 N.C. 160, 173-74, 154 S.E.2d 344, 356 (1967). The United States Supreme Court decision in *Ahlborn* directly addresses and determines the question presented by this case, as our state statute is similar to the one at issue in *Ahlborn* and the factual situations are analogous. Therefore, I conclude that *Ahlborn* is binding upon this Court, and its reasoning and holding compel the conclusion that the application of N.C.G.S. § 108A-57(a)

here, without any further determination of how the settlement proceeds were allocated among the different types of damages alleged by plaintiff, would be contrary to federal law.

In delivering the opinion of a unanimous Court in *Ahlborn*, Justice John Paul Stevens framed the issue as follows:

> When a Medicaid recipient in Arkansas obtains a tort settlement following payment of medical costs on her behalf by Medicaid, Arkansas law automatically imposes a lien on the settlement in an amount equal to Medicaid's costs. When that amount exceeds the portion of the settlement that represents medical costs, satisfaction of the State's lien requires payment out of proceeds meant to compensate the recipient for damages distinct from medical costs—like pain and suffering, lost wages, and loss of future earnings. The Court of Appeals for the Eight Circuit held that this statutory lien contravened federal law and was therefore unenforceable. Other courts have upheld similar lien provisions. We granted certiorari to resolve the conflict and now affirm.

547 U.S. at 272, 164 L. Ed. 2d at 467 (internal citations omitted). Thus, contrary to the majority's assertion that the *Ahlborn* holding controls only in situations in which there has been "a prior determination or stipulation as to the medical expense portion of a plaintiff's settlement," the Supreme Court in no way rested its analysis on whether a settlement had been so allocated.

Rather, the Supreme Court in *Ahlborn* "express[ed] no view on" how such allocation should be determined "[e]ven in the absence of such a postsettlement agreement," *id.* at 547 at 288 & n.18, 164 L. Ed. 2d at 476 & n.18, emphasizing instead simply that, regardless of how an allocation is made, "the exception carved out by [the anti-lien provisions laid out in 42 U.S.C. §§ 1396a(a)(18) and 1396p] is limited to payments [by the third party to the plaintiff-beneficiary] for medical care. Beyond that, the anti-lien provision applies," *id.* at 284-85, 164 L. Ed. 2d at 474. Indeed, the Court repeatedly emphasized this point as to "whether [a state agency] can lay claim to more than the portion of [the plaintiff-beneficiary's] settlement that represents medical expenses":

> The text of the federal third-party liability provisions suggests not; it focuses on recovery of payments for medical care. Medicaid recipients must, as a condition of eligibility, "assign the

> State any rights . . . *to payment for medical care* from any third party," 42 U.S.C. § 1396k(a)(1)(A) (emphasis added), not rights to payment for, for example, lost wages.

Id. at 280, 164 L. Ed. 2d at 471 (alteration in original). More explicitly, "under the federal statute the State's assigned rights extend only to recovery of payments for medical care." *Id.* at 282, 164 L. Ed. 2d at 472. Likewise, "assignment of the right to compensation for lost wages and other nonmedical damages is nowhere authorized by the federal third-party liability provisions." *Id.* at 286 n.16, 164 L. Ed. 2d at 475 n.16.

These statements broadly prohibit a state's claim to reimbursement from any funds not earmarked solely for medical expenses under any circumstances. Accordingly, to the extent that the terms of a settlement are unclear as to the portion designated for medical expenses, the *Ahlborn* analysis requires states to fashion a method to make those determinations and protect their right to reimbursement, for example, "by obtaining the State's advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision." *Id.* at 288, 164 L. Ed. 2d at 476. Simply put, an indispensable step in calculating the amount of a State's right to reimbursement for medical expenses is establishing how much of a third-party settlement has been allocated to the medical expenses of the plaintiff-beneficiary.

The majority would hold that in N.C.G.S. § 108A-57(a), the General Assembly attempted to do just that and that the statute "comports with *Ahlborn* by providing a reasonable method for determining the State's medical reimbursements," namely, capping the reimbursement at no more than one-third of a beneficiary's settlement with a third party. However, application of the bright-line rule articulated by the majority in a case like this one, in which there has been no allocation, could allow precisely the result that is explicitly barred by *Ahlborn*. In fact, this would be the outcome with any settlement in which the amount actually paid by the Division of Medical Assistance (DMA) is greater than the amount of the settlement designated for medical expenses, but less than the one-third cap specified in N.C.G.S. § 108A-57(a).

A hypothetical example illustrates this point.[2] Suppose a plaintiff—a past beneficiary of Medicaid assistance—settles with a tort

2. Because the settlement agreements here are confidential and held under seal, I use only hypothetical figures.

feasor for $2 million following an automobile accident. She initially alleged damages totaling $5 million, including $500,000 in past medical expenses, $1 million in future medical expenses, $1.5 million in pain and suffering, and $2 million in lost future earnings income. Medicaid, through DMA, paid the full $500,000 in actual past medical costs for the beneficiary's treatment following the accident. Under the majority's holding and application of N.C.G.S. § 108A-57(a), DMA would be entitled to $500,000 of the settlement. However, without knowing more about how the parties allocated the settlement among the different types of damages sought, the amounts might suggest that the parties, as in *Ahlborn*, reached a settlement that prorated the beneficiary's damages, awarding her forty percent of what she sought in each category of damages. In that scenario, of the $2 million settlement, $200,000 would be designated for past medical expenses, $400,000 for future medical expenses, $600,000 for pain and suffering, and $800,000 for lost future earnings income. Awarding the full $500,000 to DMA would thus exceed the $200,000 designated for past medical expenses and clearly violate the explicit holding of *Ahlborn*.

Likewise, N.C.G.S. § 108A-57(a) and the majority opinion make no distinction between past medical expenses paid by DMA that relate directly to the injury that is the basis of the settlement and expenses that were paid for treatment of a preexisting, ongoing condition. For example, in the scenario outlined above, suppose DMA had paid $500,000 in medical costs for the beneficiary, but only $300,000 of that amount related to the automobile accident, with the balance of $200,000 spent on treatment for the beneficiary's leukemia. Under the majority's holding, DMA could still claim the full $500,000 from the beneficiary, as that amount does not exceed the one-third statutory limitation in N.C.G.S. § 108A-57(a)—even though that recovery would include reimbursement for medical expenses totally unrelated to the accident or the settlement. This result, permitted by this Court's earlier holding in *Ezell v. Grace Hospital, Inc.*, 360 N.C. 529, 631 S.E.2d 131, *rev'g per curiam for reasons stated in the dissent* 175 N.C. App. 56, 623 S.E.2d 79 (2005), *reh'g denied*, 361 N.C. 180, 641 S.E.2d 4 (2006), would clearly violate the anti-lien provisions of the federal Medicaid statutes, contrary to the holding of *Ahlborn*. As such, I also believe we should overrule that decision.

Here, as in *Ahlborn*, plaintiff's civil suit sought damages including, but not limited to, past medical expenses paid by Medicaid and others; the complaint also alleged damages for mental and physical pain and anguish, severe and permanent injury, future medical ex-

penses, loss of future earnings, disfigurement and loss of normal use of her body, her parents' expenses for education and life care, and her parents' emotional distress and derivative claims. These claims were settled among all parties, with proceeds held in a single account and no allocations made as to which specific amounts represented damages for which particular type of claim. Nevertheless, the parties clearly intended the settlement to account for all of the different types of damages alleged not just by plaintiff, but also by her parents. The parties concede that the amount of the settlement here allows DMA to be fully reimbursed for the entire $1,046,681.94 it had paid through October 2005 for plaintiff's medical care, without violating the one-third cap of N.C.G.S. § 108A-57(a). However, the lack of stipulation or other determination as to the allocation of the settlement funds among the damages leaves us unable to conclude whether a DMA lien for full reimbursement would impermissibly entitle DMA to an amount greater than the medical expenses portion of the settlement, as is prohibited by *Ahlborn*.

In addition, the majority misinterprets N.C.G.S. § 108A-57(a) as being the General Assembly's blanket determination that the full one-third of any settlement amount between a plaintiff and a third party is for medical expenses.[3] In my view, that is neither what the statute says nor what it does. According to the plain language of the statute, the legislature envisioned both that a beneficiary could have a private attorney representing her in an action against a third party, *see* N.C.G.S. § 108A-57(a) (referring to "[a]ny attorney retained by the

3. Although neither party has raised the issue of unconstitutional impairment of contract before this Court, I also believe the majority's interpretation could lead to the conclusion that N.C.G.S. § 108A-57(a) violates the Contract Clause of the United States Constitution by overriding the intentions of parties to private contract. *See* U.S. Const. art. I, § 10, cl. 1 ("No state shall . . . pass any . . . law impairing the obligation of contracts . . . ."); *Adair v. Orrell's Mut. Burial Ass'n*, 284 N.C. 534, 538, 201 S.E.2d 905, 908 ("Any law which enlarges, abridges or changes the intention of the parties as indicated by the provisions of a contract necessarily impairs the contract . . . .") (citations omitted), *appeal dismissed*, 417 U.S. 927 L. Ed. 2d 231 (1974).

I recognize that such impairment is sometimes permissible "to protect the general welfare of its citizens, so long as such impairment is reasonable and necessary to serve an important public purpose." *Bailey v. State*, 348 N.C. 130, 151, 500 S.E.2d 54, 66 (1998) (citing *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25-26, 52 L. Ed. 2d 92, 111-12 (1977)). However, " 'a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well.' " *Id.* at 152, 500 S.E.2d at 67 (quoting *U.S. Trust*, 431 U.S. at 31, 52 L. Ed. 2d at 115). Moreover, " '[i]n applying this standard, . . . complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake.' " *Id.* at 151, 500 S.E.2d at 66 (quoting *U.S. Trust*, 431 U.S. at 25-26, 52 L. Ed. 2d at 112 (alteration in original)).

beneficiary of the assistance"), and that for most settlements, damages for medical expenses would be prorated among the various providers, *see id.* (requiring the recipient's attorney to "distribute to the Department the amount of assistance paid by the Department on behalf of or to the beneficiary, as prorated with the claims of all others having medical subrogation rights or medical liens against the amount received or recovered"). Thus, the General Assembly itself recognized that either stipulations by the parties or evidentiary hearings would be necessary to determine the amount of recovery by DMA and others seeking reimbursement for payment of medical expenses. Moreover, as with other lien statutes, *see, e.g.*, N.C.G.S. § 97-10.2(f) (2005) (Workers' Compensation Act), the General Assembly acknowledged that the beneficiary's attorney would likely be entitled to a large percentage of the settlement as a contingent fee; as such, the one-third cap represents a reasonable ceiling on the amount paid to DMA while also ensuring that the beneficiary would still recover a meaningful proportion of the settlement.

This reading of the statute is supported by the public policy rationale that underpins the federal requirements for "assignment laws" adopted by the states to seek reimbursement for the Medicaid payments they make. Such assignments prevent "double recovery" by a beneficiary: because the beneficiary is required to repay Medicaid from the medical expenses portion of his settlement with a third-party tortfeasor, he does not keep both the State's money and damages recovered from the tortfeasor. However, both the federal and state statutory schemes rely on the beneficiary—not the State or county—to bring a civil action against the third-party tortfeasor. Indeed, without the beneficiary's action to bring the suit, the State may enjoy no recovery at all for the Medicaid payments it made to the beneficiary as a result of the injury or accident. Thus, the State seeks to encourage beneficiaries to bring such suits. Accordingly, the statute is designed to protect the State's interest in having the suit brought by providing an incentive for the beneficiary to bring the suit—namely, by safeguarding some portion of the settlement for the beneficiary rather than allowing all of the proceeds to be paid to the attorneys and to DMA and other medical lienholders. Without this guarantee of some return, beneficiaries would be unlikely to go through the time and inconvenience associated with pursuing a civil action, and the State or DMA would be left with no recovery at all.

Application of N.C.G.S. § 108A-57(a) in a manner consistent with this rationale likewise comports with the reasoning relied upon by

the United States Supreme Court in *Ahlborn* to ensure that a state Medicaid agency does not "force an assignment of, or place a lien on, any other portion of [the beneficiary's] property" or settlement proceeds designated to compensate a beneficiary for other types of damages. 547 U.S. at 284, 164 L. Ed. 2d at 474. Specifically, *Ahlborn* compels our State to apply N.C.G.S. § 108A-57(a) in compliance with the following language:

> Federal Medicaid law does not authorize [the state agency] to assert a lien on [a beneficiary's] settlement in an amount exceeding [the pro rata portion designated as reimbursement for medical payments made], and the federal anti-lien provision affirmatively prohibits it from doing so. [The State's] third-party liability provisions are unenforceable insofar as they compel a different conclusion.

Id. at 292, 164 L. Ed. 2d at 479. Thus, I would not find that N.C.G.S. § 108A-57(a) violates the federal anti-lien provisions on its face, as it could be applied to factual situations in which the parties have stipulated, or an evidentiary hearing has determined, how to allocate the settlement proceeds among medical expenses and other damages. Nevertheless, I conclude that here, when the settlement proceeds have not been so allocated, the only way to ensure that the application of the statute complies with *Ahlborn* is to provide for such an allocation.[4]

I would therefore reverse the Court of Appeals with instructions to remand to the trial court to hold an evidentiary hearing to ensure that the DMA lien is not applied to settlement proceeds aside from those designated to reimburse medical expenses.

Justices BRADY and TIMMONS-GOODSON join in this dissenting opinion.

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4. As noted by the Supreme Court in *Ahlborn*, the risk of settlement manipulation, also discussed by Judge Steelman in his dissent in *Ezell*, 175 N.C. App. at 65-66, 623 S.E.2d at 85, "can be avoided either by obtaining the State's advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision." *Ahlborn*, 547 U.S. at 288, 164 L. Ed. 2d at 476. In addition, the United States Supreme Court disavowed this rationale—that was the basis of Judge Steelman's dissent, which we adopted, 360 N.C. 529, 631 S.E.2d 131—and observed that "there [is] a countervailing concern that a rule of absolute priority might preclude settlement in a large number of cases, and be unfair to the recipient in others." *Ahlborn*, 547 U.S. at 288, 164 L. Ed. 2d at 476. For this reason too I would disagree with the majority opinion's conclusion that *Ezell* is still good law.

STATE OF NORTH CAROLINA v. KENNETH WAYNE MAREADY

No. 32A08

(Filed 12 December 2008)

1. Search and Seizure— traffic stop—reasonable suspicion

The Court of Appeals erred in a prosecution for second-degree murder arising from a traffic accident and other offenses by concluding officers lacked reasonable suspicion to conduct a traffic stop of defendant because: (1) the overarching inquiry when assessing reasonable suspicion is always based on the totality of circumstances; (2) the potential indicia of reliability included all the facts known to the officers from personal observation including those that did not necessarily corroborate or refute the informant's statements; (3) an informant's ability to provide a firsthand eyewitness report is one indicator of reliability; and (4) the officers had sufficient grounds to subject defendant to the minimal intrusion of a simple investigatory stop based on facts including that they observed an intoxicated man stumbling across the roadway to enter a silver Honda automobile; saw a minivan with its emergency flashers activated driving unusually slowly, and eventually coming to a halt immediately in front of the Honda; responded after being flagged down by the minivan driver who seemed to be distressed; and obtained information in a face-to-face encounter that the driver of the Honda, whom the minivan driver had apparently been in a position to observe, had been running stop signs and stop lights.

2. Evidence— prior crimes or bad acts—six driving while impaired convictions—malice—intent—plain error analysis

The trial court did not commit plain error in a second-degree murder case based on vehicular homicide by its instructions to the jury regarding the purposes for which they could consider defendant's prior driving while impaired convictions because: (1) evidence of a defendant's prior traffic-related convictions is admissible to prove the malice element in a second-degree murder prosecution based on vehicular homicide; (2) irrespective of defendant's prior convictions, the State presented such significant evidence of intent with regard to all the charges against defendant that it cannot be said that the challenged instruction probably affected the jury's verdicts; (3) defendant's own statements to officers on the day of the accident showed his knowl-

edge and understanding that he was driving illegally and was not going to stop; (4) regarding the charges of driving while impaired, driving while license revoked, and careless and reckless driving, the defense conceded the State had presented sufficient evidence for the jury to find defendant guilty; (5) regarding the larceny and possession of stolen goods charges, the defense conceded all elements of the State's case except the value of the stolen vehicle; and (6) these concessions, in conjunction with the abundance of direct and circumstantial evidence of defendant's intent when committing the crimes for which he was convicted, lead to the conclusion that any purported error in the jury instructions did not have a probable impact on the jury's finding of guilt.

3. Evidence— prior crimes or bad acts—stale convictions—more than sixteen years old—plain error analysis

The trial court did not commit plain error in a second-degree murder case based on vehicular homicide by admitting into evidence prior traffic-related convictions against defendant that were more than sixteen years old because: (1) given that the jury in this case was aware of defendant's four DWI convictions in the sixteen years preceding the offenses at issue, it cannot be said that the jury probably would have reached different verdicts if it had not been informed of his other two DWI convictions and nine convictions for other traffic-related offenses; (2) our Supreme Court rejected the notion that its per curiam opinion in *State v. Goodman*, 357 N.C. 43 (2003), established a bright-line rule that admission of any traffic-related conviction that occurred more than sixteen years before the events at issue in a second-degree murder case amounted to plain error per se; (3) the relevance of a temporally remote traffic-related conviction to the question of malice does not depend solely upon the amount of time that has passed since the conviction took place, and instead the extent of its probative value depends largely on intervening circumstances; (4) the older convictions did not serve only to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged, but instead constituted part of a clear and consistent pattern of criminality that was highly probative of his mental state at the time of his actions in regard to this case; and (5) remoteness in time generally affects only the weight to be given N.C.G.S. § 8C-1, Rule 404(b) evidence, not its admissibility, and this is especially true when, as here, the prior conduct tended to show a defendant's state of mind as opposed

to establishing that the present conduct and prior actions are part of a common scheme or plan.

Justice TIMMONS-GOODSON 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, 188 N.C. App. 169, 654 S.E.2d 769 (2008), reversing judgments entered 24 April 2006 by Judge Abraham P. Jones in Superior Court, Durham County, and remanding for a new trial on all charges. Heard in the Supreme Court on 8 September 2008.

Roy Cooper, *Attorney General*, *by Isaac T. Avery, III*, *Special Counsel*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Daniel R. Pollitt*, *Assistant Appellate Defender*, *for defendant-appellee.*

NEWBY, Justice.

This case, which involves an investigatory traffic stop and the subsequent criminal trial, presents three issues. First, we determine whether the law enforcement officers who conducted the traffic stop had reasonable suspicion to justify their detention of defendant. Next, we resolve whether the trial court committed plain error in its instructions to the jury regarding the purposes for which they could consider defendant's prior convictions. Finally, we decide whether it was error for the trial court to admit into evidence prior convictions against defendant that were more than sixteen years old. Because we hold the traffic stop was lawful and defendant received a trial free of plain error, we reverse the decision of the Court of Appeals.

I. BACKGROUND

As a result of a traffic accident in which a person was killed, a Durham County grand jury indicted defendant for second-degree murder; felonious larceny and felonious possession of stolen goods (based on the theft of an automobile); assault with a deadly weapon inflicting serious injury; two counts of assault with a deadly weapon; driving while impaired; driving while license revoked; careless and reckless driving; felony speeding to elude arrest; and habitual felon status. At his trial, defendant moved to suppress all testimony related to the traffic stop that gave rise to these charges, arguing the

officers who detained him lacked reasonable suspicion of criminal activity. In its order denying the motion to suppress, the trial court made findings of fact based on the voir dire testimony, stating in essence the following.

On 12 February 2005, two deputies from the Durham County Sheriff's Office were on patrol and saw an apparently intoxicated man walking along Sherron Road in Durham County. The man was staggering near the roadway, so the deputies began driving toward him. As they did so, the deputies saw in the opposite lane a minivan being driven at a slow pace with its hazard lights activated. Behind the minivan was a silver Honda Civic. The officers watched as the intoxicated man ran across the roadway, crossing two traffic lanes, and got into the Honda. After passing the minivan, which had come to a stop, the Honda continued down Sherron Road. The deputies turned around, and as they pulled alongside the minivan, its driver signaled to them to get their attention. The minivan driver appeared distraught and told the deputies they needed to check on the driver of the silver Honda because he had been driving erratically, running stop signs and stop lights. The deputies continued along Sherron Road and found the Honda stopped at a stop light. They activated their blue lights and conducted an investigatory stop of the Honda, which defendant was found to be driving.

After the trial court denied defendant's motion to suppress, one of the deputies repeated his voir dire testimony in the presence of the jury and then continued recounting the facts. He stated that when he approached the Honda after it pulled over to the side of the road, he detected a strong odor of alcohol and noticed defendant's motor skills appeared to be impaired. When asked if he had been drinking, defendant admitted that he had. The deputies ordered defendant out of the vehicle in order to perform sobriety tests, but defendant refused. When the deputies tried to remove defendant from the vehicle by force, he "said that he was not going back to the penitentiary, and he put the vehicle into gear and sped off." The deputies got back in their patrol car and pursued defendant, and despite traveling at approximately sixty-five to seventy miles per hour (in a forty-five-mile-per-hour zone), they were unable to gain on the Honda. They soon rounded a curve and saw the Honda "flipping continuously," as well as a red pickup truck flipping at the same time. The deputies found the driver of the truck thrown from her vehicle, resulting in fatal injuries. An SBI agent testified that defendant's blood, drawn approximately six hours after the wreck occurred, showed an alcohol

concentration of 0.14, well in excess of the legal limit. *See* N.C.G.S. § 20-138.1(a)(2) (2005).

The jury convicted defendant of second-degree murder; misdemeanor larceny and misdemeanor possession of stolen goods; assault with a deadly weapon inflicting serious injury; two counts of assault with a deadly weapon; driving while impaired; driving while license revoked; careless and reckless driving; and felony eluding arrest. The jury also found the presence of an aggravating factor and that defendant had attained habitual felon status. A majority of the Court of Appeals reversed, holding the officers did not have reasonable suspicion to stop defendant; the trial court committed plain error in its jury instructions; and it was plain error to admit evidence of prior convictions against defendant that were more than sixteen years old. *State v. Maready*, —— N.C. App. ——, 654 S.E.2d 769 (2008). The State now appeals based on the dissent.

II. REASONABLE SUSPICION

[1] We first address defendant's contention that the initial traffic stop was unconstitutional because it was not founded on reasonable suspicion of criminal activity. This Court has recently confirmed that "reasonable suspicion is the necessary standard for traffic stops." *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008) (citations omitted).

> Reasonable suspicion is a "less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." Only " 'some minimal level of objective justification' " is required. This Court has determined that the reasonable suspicion standard requires that "[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." Moreover, "[a] court must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion" exists.

State v. Barnard, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (citations omitted), *cert. denied*, —— U.S. ——, 129 S. Ct. 264, —— L. Ed. 2d —— (2008).

The trial court concluded as a matter of law that based on the totality of the circumstances, the deputies had reasonable sus-

picion of criminal activity and were thus justified in stopping the silver Honda. We agree, as this conclusion is fully supported by the trial court's findings of fact. As noted by the Court of Appeals majority, finding of fact number eight is not supported by competent evidence insofar as it states the driver of the minivan told the deputies that defendant "may be drunk." The trial court's findings are otherwise supported by the evidence, however, and they in turn support the conclusion that the deputies had reasonable suspicion to stop defendant.

We reiterate that the overarching inquiry when assessing reasonable suspicion is always based on the *totality* of the circumstances. *Id.* When police act on the basis of an informant's tip, the indicia of the tip's reliability are certainly among the circumstances that must be considered in determining whether reasonable suspicion exists. *E.g.*, *Alabama v. White*, 496 U.S. 325, 330, 110 S. Ct. 2412, 2416, 110 L. Ed. 2d 301, 309 (1990). The potential indicia of reliability include all "the facts known to the officers from personal observation," *id.*, including those that do not necessarily corroborate or refute the informant's statements.

One such fact in the instant case was that the minivan was traveling immediately in front of the silver Honda as the officers approached, and thus the driver apparently would have been in a position to view the alleged traffic violations she reported. An informant's ability to provide a firsthand eyewitness report is one indicator of reliability. We also note that the minivan driver's especially cautious driving and her apparent distress were consistent with what one would expect of a driver who had witnessed a nearby motorist driving erratically.

Similarly, we give significant weight to the fact that the minivan driver approached the deputies in person and gave them information at a time and place near to the scene of the alleged traffic violations. She would have had little time to fabricate her allegations against defendant. Moreover, in providing the tip through a face-to-face encounter with the sheriff's deputies, the minivan driver was not a completely anonymous informant. It is inconsequential to our analysis that the officers did not actually pause to record her license plate number or other identifying information. Not knowing whether the officers had already noted her tag number or if they would detain her for further questioning, and aware they could quickly assess the truth of her statements by stopping the silver Honda, the minivan driver

willingly placed her anonymity at risk. This circumstance weighs in favor of deeming her tip reliable.[1]

These indicia of reliability, together with the rest of the attendant circumstances, satisfy the reasonable suspicion standard. The deputies in this case observed an intoxicated man stumbling across the roadway to enter the silver Honda; saw the minivan, with its emergency flashers activated, driving unusually slowly and eventually coming to a halt immediately in front of the Honda; responded after being flagged down by the minivan driver, who seemed to be distressed; and obtained information in a face-to-face encounter that the driver of the Honda, whom the minivan driver had apparently been in a position to observe, had been running stop signs and stop lights. Under these circumstances, the officers had sufficient grounds to subject defendant to the "minimal intrusion" of a simple investigatory stop. *See Illinois v. Wardlow*, 528 U.S. at 126, 120 S. Ct. at 677, 145 L. Ed. at 577. We therefore hold the traffic stop was constitutional and that the trial court properly denied defendant's motion to suppress.

III. JURY INSTRUCTIONS

[2] We next consider the trial court's instructions to the jury with regard to defendant's prior convictions. At trial, the State introduced defendant's certified driving record from the Division of Motor Vehicles, which listed, *inter alia*, six prior convictions for driving while impaired. During jury instructions, the trial court told the jury they could consider this evidence "for the limited purpose for which it has been received," which the court defined as "solely for . . . showing that the defendant had the requisite malice or intent which is a necessary element of crimes charged in this case."

This Court has held evidence of a defendant's prior traffic-related convictions admissible to prove the malice element in a second-degree murder prosecution based on vehicular homicide. *State v.*

1. If an informant places his anonymity at risk, a court can consider this factor in weighing the reliability of the tip. An instance where a tip might be considered anonymous but nevertheless sufficiently reliable to justify a proportionate police response may be when an unnamed person driving a car the police officer later describes stops for a moment and, face to face, informs the police that criminal activity is occurring.

Florida v. J.L., 529 U.S. 266, 276, 120 S. Ct. 1375, 1381, 146 L. Ed. 2d 254, 263 (2000) (Kennedy, J. & Rehnquist, C.J., concurring) (citing *United States v. Sierra-Hernandez*, 581 F.2d 760 (9th Cir.), *cert. denied*, 439 U.S. 936, 99 S. Ct. 333, 58 L. Ed. 2d 333 (1978)).

Rich, 351 N.C. 386, 400, 527 S.E.2d 299, 307 (2000). Defendant argues, and the Court of Appeals agreed, that the trial court exceeded the bounds of this holding by instructing the jury that defendant's prior convictions could be used to prove the intent element of each crime for which he was tried.

Because defendant failed to object to the jury instruction at trial, his challenge is subject to plain error review. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (citing *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000), *cert. denied*, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001); *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378 (1983)). Plain error has been defined as " '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (citation omitted), *cert. denied*, 459 U.S. 1018, 103 S. Ct. 381, 74 L. Ed. 2d 513 (1982)). "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 378-79.

Assuming without deciding that there was error in the trial court's instruction, our review of the record in this case reveals any such error did not amount to plain error. Irrespective of defendant's prior convictions, the State presented such significant evidence of intent with regard to all the charges against defendant that we cannot say the challenged instruction probably affected the jury's verdicts. We call particular attention to the testimony regarding defendant's own statements on the day of the incident. During an earlier encounter with another deputy several hours before the wreck, defendant stated he had recently been released from jail, that his driver's license was suspended, and that "he didn't drive." Later, during the investigatory traffic stop, defendant admitted he had been drinking. Then, as he fled the scene of the stop, defendant "said that he was not going back to the penitentiary." These statements strongly demonstrate defendant's knowledge and understanding that he was driving illegally and was not going to stop.

Also, although not dispositive of the State's burden of proving all elements of the charges beyond a reasonable doubt, *see State v. Patterson*, 297 N.C. 247, 256, 254 S.E.2d 604, 610 (1979), a number of concessions made by the defense during closing arguments are rele-

vant in assessing the effect of the alleged error on the jury's verdicts. Regarding the charges of driving while impaired, driving while license revoked, and careless and reckless driving, the defense conceded the State had presented sufficient evidence for the jury to find defendant guilty. Regarding the larceny and possession of stolen goods charges, the defense conceded all elements of the State's case except the value of the stolen vehicle. These concessions, in conjunction with the abundance of direct and circumstantial evidence of defendant's intent when committing the crimes for which he was convicted, lead us to conclude any purported error in the jury instructions did not have "a probable impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 379 (citing *United States v. Jackson*, 569 F.2d 1003 (7th Cir.), *cert. denied*, 437 U.S. 907, 98 S. Ct. 3096, 57 L. Ed. 2d 1137 (1978)). We therefore hold the challenged instruction did not constitute plain error.

IV. PRIOR CONVICTIONS

[3] We lastly consider the trial court's admission into evidence of prior traffic-related convictions against defendant that were more than sixteen years old. Because defendant failed to object to the admission of his driving record, we review that admission for plain error. *Dogwood Dev. & Mgmt.*, 362 N.C. at 196, 657 S.E.2d at 364 (citing *Cummings*, 352 N.C. at 613, 536 S.E.2d at 47; *Odom*, 307 N.C. at 660, 300 S.E.2d at 378).

Rule 404(b) of the North Carolina Rules of Evidence provides:

> *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. . . .

N.C.G.S. § 8C-1, Rule 404(b) (2005). This Court's decisions have interpreted Rule 404(b) as

> a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

Defendant's driving record contained a number of convictions that occurred more than sixteen years before the date of the crimes at issue here. The question before us is whether there is a fixed point in time when a prior conviction becomes too temporally remote to be probative. The Court of Appeals' holding that it was plain error to admit the convictions that were more than sixteen years old was based on our per curiam opinion in *State v. Goodman*, 357 N.C. 43, 577 S.E.2d 619 (2003) (*rev'g* 149 N.C. App. 57, 560 S.E.2d 196 (2002)), in which this Court reversed a Court of Appeals majority for the reasons stated in the dissenting opinion. In *Goodman*, another second-degree murder case based on vehicular homicide, the trial court had likewise admitted the defendant's full driving record. That record reflected a total of six previous driving while impaired ("DWI") convictions. The Court of Appeals majority held it was not plain error to admit the entire driving record. 149 N.C. App. at 70, 560 S.E.2d at 204-05. The dissent emphasized the defendant had few convictions in the years immediately preceding the incident at issue and argued that many of the convictions reflected in the defendant's record were too temporally remote to be admitted under Rule 404(b) of the North Carolina Rules of Evidence. *Id.* at 73, 560 S.E.2d at 206 (Greene, J., dissenting). On appeal, this Court reversed on the basis of the dissent in a per curiam opinion.

Defendant's driving record in the instant case stands in stark contrast to the record at issue in *Goodman*. Like the *Goodman* defendant, defendant here had six previous DWI convictions. However, whereas only one of the *Goodman* defendant's previous DWI convictions occurred within the sixteen years preceding the crime at issue in that case, *id.*, defendant in the case *sub judice* was convicted of DWI four times in the sixteen years leading up to the incident at issue. Moreover, while the most recent prior DWI conviction in *Goodman* occurred more than eight years before the crime at issue there, *id.*, defendant in this case was convicted of DWI less than six months before the incident giving rise to the current charges against him. The driving record in this case demonstrates a much more consistent, and therefore more probative, pattern of criminal behavior than the record in *Goodman*. Given that the jury in this case was aware of defendant's four DWI convictions in the sixteen years preceding the offenses at issue, we do not agree with defendant's contention that the jury probably would have reached different verdicts if it had not been informed of his other two DWI convictions and nine convictions for other traffic-related offenses. *See State v. Hammett*, 361 N.C. 92, 98, 637 S.E.2d 518, 522 (2006) (appellate court reviewing

evidentiary admissions for plain error must ask "whether the jury would probably have reached a different verdict if [the challenged evidence] had not been admitted" (citing *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 108 S. Ct. 1598, 99 L. Ed. 2d 912 (1988)). We therefore find no plain error in the admission of defendant's whole driving record.

In so doing, we necessarily reject the notion that this Court's per curiam opinion in *Goodman* established a bright-line rule that admission of any traffic-related conviction that occurred more than sixteen years before the events at issue in a second-degree murder case amounts to plain error per se. The relevance of a temporally remote traffic-related conviction to the question of malice does not depend solely upon the amount of time that has passed since the conviction took place. Rather, the extent of its probative value depends largely on intervening circumstances. In the instant case, in which defendant was convicted of DWI four times in the sixteen years preceding the events now at issue, his older convictions do not serve only "to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *Coffey*, 326 N.C. at 279, 389 S.E.2d at 54. Those convictions instead constitute part of a clear and consistent pattern of criminality that is highly probative of his mental state at the time of his actions at issue here.

It remains true that assessments of the probative value of evidence under Rule 404(b) must be guided by considerations of "similarity and temporal proximity." *State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993) (citation omitted). However, " 'remoteness in time *generally* affects only the weight to be given [404(b)] evidence, not its admissibility.' " *State v. Parker*, 354 N.C. 268, 287, 553 S.E.2d 885, 899 (2001) (internal quotation marks omitted) (quoting *State v. White*, 349 N.C. 535, 553, 508 S.E.2d 253, 265 (1998) (emphasis added), *cert. denied*, 527 U.S. 1026, 119 S. Ct. 2376, 144 L. Ed. 2d 779 (1999)), *cert. denied*, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002). This is especially true when, as here, the prior conduct tends to show a defendant's state of mind, as opposed to establishing that the present conduct and prior actions are part of a common scheme or plan. *See State v. Stager*, 329 N.C. 278, 306-07, 406 S.E.2d 876, 892-93 (1991).

Unlike the instant case, *State v. Goodman* was an exception to the general rule: a case in which the intervening circumstances between temporally distant convictions and the actions at issue militated strongly against admission of the remote convictions. Our hold-

ing in *Goodman* was based on the temporal remoteness of the defendant's prior convictions *combined with* the defendant's relatively clean driving record in the years leading up to the crime at issue in that case. It does not follow that admission of any conviction greater than sixteen years old automatically constitutes error, and hence we disavow any such reading of *Goodman*.[2]

The probative value (and thus the admissibility) of 404(b) evidence must be determined on a case-by-case basis rather than through application of a fixed temporal maximum. Temporal proximity is simply one factor for courts to consider in deciding whether a piece of evidence has probative value beyond "show[ing] that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *Coffey*, 326 N.C. at 279, 389 S.E.2d at 54.

V. DISPOSITION

The decision of the Court of Appeals is reversed and this case is remanded to that court for consideration of defendant's remaining assignments of error.

REVERSED AND REMANDED.

Justice TIMMONS-GOODSON, concurring in part and dissenting in part.

I agree with the majority that the trial court properly denied defendant's motion to suppress, and I therefore concur fully with Section II of the majority opinion. I do not agree, however, that the trial court's erroneous instruction and the admission of defendant's entire driving record had no probable effect upon the jury verdict. Thus I respectfully dissent as to Sections III and IV.

As to the trial court's instruction, the Court of Appeals unanimously agreed that it was erroneous. *See State v. Maready*, —— N.C.

2. In adopting "the reasons stated in the dissenting opinion" in *Goodman*, *see* 357 N.C. 43, 577 S.E.2d 619, this Court agreed with the dissent that *in the circumstances of that case* it was plain error to admit the defendant's traffic-related convictions dating more than sixteen years from the actions at issue there. We did not, however, adopt any purported statements of law that were unnecessary to the dissent's reasoning. As evidenced by its relegation to a footnote, the statement that "any conviction dating beyond sixteen years, however slight, runs afoul of the temporal proximity requirement of Rule 404(b)," *Goodman*, 149 N.C. App. at 73 n.1, 560 S.E.2d at 206 n.1 (Greene, J., dissenting), was unnecessary to the dissent's reasoning. That statement is hereby expressly rejected.

App. ——, ——, ——, 654 S.E.2d 769, 779, 783 (2008). However, the dissenting judge in the Court of Appeals disagreed with the majority's conclusion that the instructional error amounted to plain error. —— N.C. App. at ——, 654 S.E.2d at 783 (Tyson, J., dissenting). Thus the only question regarding this issue properly before this Court is whether the instruction amounted to plain error. The majority concludes that the erroneous instruction had no probable effect upon the jury verdict. I disagree.

The State's case against defendant was not overwhelming. Defendant did not confess, and he conducted a vigorous defense. Defendant particularly contested the intent element of the charges of second-degree murder, assault with a deadly weapon inflicting serious injury, assault with a deadly weapon, and fleeing to elude arrest. Defendant argued that he fled from the officers because he feared for his personal safety. In support of this argument, defendant presented a neutral witness, Rhonda Arnold, who worked at a hardware store across the street from where the deputies stopped defendant. Ms. Arnold witnessed the deputies' interaction with defendant and testified, in contrast to the deputies' testimony, that both officers had their weapons drawn and pointed at defendant, and that they were yelling at him to get back in his car. Defense counsel contended that, as a result of the deputies' actions, defendant panicked and fled, which was "clearly a bad decision" but was nevertheless motivated by his desire for "safety and fear of what might happen to him." Thus, the intent element of the second-degree murder, assault with a deadly weapon inflicting serious injury, assault with a deadly weapon, and fleeing to elude arrest charges was closely contested.

Moreover, the majority omits from its analysis certain facts that I believe are relevant to the plain error analysis here. First, the jury wrote a note inquiring about the intent element in the assault charges and sought clarification of the jurors' interpretation of intent. The jury asked the trial court whether the word "intent" could "be interpreted strictly only as [defendant] absolutely intended to hit the other cars" or whether "intent" could be "interpreted as the sum total of the actions caused the collision [and] this implies intent." The trial court informed the jury that intent "can be interpreted as the sum total of the actions caused the collision and this implies intent." The jury also specifically requested reinstruction on the intent element of the fleeing to elude arrest charge. Further, the prosecutor emphasized defendant's lengthy DMV record during the trial and argued that such records proved defendant was "acting intentionally."

The jury's concern with the intent element of the crimes, combined with the State's emphasis on defendant's DMV records to show intent, demonstrates that the erroneous instruction probably influenced the jury verdict. *See State v. Goodman*, 357 N.C. 43, 577 S.E.2d 619 (2003) (per curiam) (reversing the Court of Appeals decision reported at 149 N.C. App. 57, 560 S.E.2d 196 (2002), for reasons stated in the dissenting opinion, which found plain error when the jury (1) requested to have the definition of malice read twice, and (2) later requested a written definition of malice, along with the defendant's driving record, to consider during its deliberations, *id.* at 72-73, 560 S.E.2d at 206 (Greene, J., dissenting)). In addition, the trial court's erroneous instruction—that the jury could use defendant's past convictions to find intent on *all* the charges—was particularly prejudicial because of the similarity between his past convictions and the charges in the present case. *See State v. Badgett*, 361 N.C. 234, 247, 644 S.E.2d 206, 214 (stating that "it is error to admit evidence of the defendant's prior conviction when the defendant does not testify"), *cert. denied*, —— U.S. ——, 169 L. Ed. 2d 351 (2007); *State v. Wilkerson*, 356 N.C. 418, 571 S.E.2d 583 (2002) (per curiam) (reversing the Court of Appeals decision reported at 148 N.C. App. 310, 559 S.E.2d 5 (2002), which opined, *inter alia*, that "any similarities between the *offense* of which defendant was previously convicted and the current charged *offense* (as opposed to similarities in the facts and circumstances underlying such offenses) manifestly *increases* the danger of unfair prejudice", *id.* at 327, 559 S.E.2d at 16 (Wynn, J., dissenting)).

I do not agree that defendant's own statements constitute such significant evidence of intent on all of the charges as to render the erroneous instruction harmless. Nor do I find defendant's concessions during closing argument relevant to whether the State presented substantial evidence of the intent element of the charges of assault with a deadly weapon inflicting serious injury, felony fleeing/eluding arrest with a motor vehicle, two counts of assault with a deadly weapon, and misdemeanor larceny. I moreover conclude that the admission of defendant's entire driving record also had a probable effect upon the jury verdict. I would therefore hold that defendant has demonstrated plain error, and I would affirm the Court of Appeals.

STATE OF NORTH CAROLINA v. THEODORE JERRY WILLIAMS

No. 256A08

(Filed 12 December 2008)

Constitutional Law— right to fair trial—flagrant constitutional violation of rights—irreparable harm—State's destruction of evidence

The Court of Appeals did not err by dismissing the charge of felony assault on a government officer or employee under N.C.G.S. § 15A-954(a)(4) based on the State's destruction of evidence of a poster that contained two photographs of defendant placed on a wall in the offices of the District Attorney for the Twentieth Prosecutorial District depicting defendant without any injuries as he appeared when processed into the Stanly County Detention Center on 17 November 2003 with a caption stating "Before he sued the D.A.'s office," and a second photograph depicting the injured defendant as he appeared when processed back into the Stanly County Detention Center on 20 April 2004 with a caption stating "After he sued the D.A.'s office," because: (1) although the mere making of a poster was not a violation of defendant's constitutional rights for purposes of his motion under *Brady v. Maryland*, 373 U.S. 83 (1963), the flagrant violation of defendant's constitutional rights was found in that on numerous occasions defendant requested specific items of evidence that were favorable to him and material to his defense, but the State failed to provide that evidence, destroyed it, and then stated it could not be produced; (2) the pertinent poster and photographs were relevant to defendant's theory of a conspiracy between Stanly and Union County Law Enforcement and Prosecutors to retaliate against him for the filing of a civil rights complaint, and the evidence also would have tended to prove the partial or complete defense of self-defense against the assault charge since proof of the injuries sustained at the Union County Jail would have tended to show that defendant was not the aggressor; (3) the evidence was material and in its absence it could not be said that defendant would receive a fair trial resulting in a verdict worthy of confidence; and (4) defendant met his burden of showing irreparable prejudice to the preparation of his case by showing defendant could not recreate the evidence, and defendant demonstrated the futility of relying on witness testimony to prove the contents of the poster.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 190 N.C. App. 301, 660 S.E.2d 189 (2008), affirming an order entered 18 January 2007 by Judge James E. Hardin in Superior Court, Union County. Heard in the Supreme Court 13 October 2008.

Roy Cooper, Attorney General, by Derrick C. Mertz, Assistant Attorney General, for the State-appellant.

Richard E. Jester for defendant-appellee.

BRADY, Justice.

This case requires us to decide whether dismissal of a criminal charge against defendant was appropriate under N.C.G.S. § 15A-954(a)(4). In a pretrial hearing, the State admitted to the existence, possession, and destruction of material evidence favorable to defendant and acknowledged that it was impossible to produce the evidence at that time or, by implication, at any future trial. Based on these circumstances, we conclude that the State flagrantly violated defendant's constitutional rights and irreparably prejudiced the preparation of his defense. Accordingly, we find the requirements of N.C.G.S. § 15A-954(a)(4) satisfied and affirm the Court of Appeals.

BACKGROUND

Theodore Jerry Williams (defendant) was arrested and placed in the Stanly County Detention Center on 17 November 2003 on charges unrelated to the present matter. During February and March 2004 and while in custody in Stanly County, defendant initiated actions in various courts naming an assistant district attorney for Stanly County, the Stanly County Sheriff, and the Stanly County Commissioners for alleged civil rights violations.

After filing these actions, defendant was transferred to the Union County Jail on 19 April 2004. Even though defendant made numerous requests, he received neither the paperwork authorizing nor an explanation for his transfer. Less than twenty-four hours after his arrival at the Union County Jail, defendant was charged with misdemeanor assault on a government official at that facility. The State alleged that defendant punched Union County Sheriff's Deputy Brad Moseley when Deputy Moseley attempted to remove defendant from a holding cell. Defendant denied the allegation and testified that in the early morning hours of 20 April 2004, he was maced and beaten by multiple officers at the Union County Jail, where he sustained severe injuries,

including a broken arm. Defendant testified he was then transferred back to the Stanly County Detention Center midday on 20 April 2004, and photographs were taken of him at that time for reprocessing purposes. The photographs showed the bruises and wounds defendant sustained at the Union County Jail.

Defendant further testified that after the events of 20 April 2004 and while he was being held in Stanly County, two individuals, one of whom was defendant's attorney, informed defendant of a poster they had seen on a wall in the offices of the District Attorney for the Twentieth Prosecutorial District, which included Stanly and Union Counties at the time. The poster contained two photographs of defendant. The first depicted defendant without any injuries as he appeared when processed into the Stanly County Detention Center on 17 November 2003, with a caption stating: "Before he sued the D.A.'s office." The second photograph depicted the injured defendant as he appeared when processed back into the Stanly County Detention Center on 20 April 2004, with a caption stating: "After he sued the D.A.'s office." Defendant testified that after viewing the poster, his attorney began making requests and serving subpoenas to obtain the poster and the photographs used to create the poster. However, defendant never received any of the requested items. At a pretrial hearing in Stanly County on 11 July 2005 concerning charges in that jurisdiction, Assistant District Attorney Stephen Higdon (ADA Higdon) admitted to the existence of the poster, its removal and destruction, and the impossibility of producing it or the original photographs that appeared on the poster.

After defendant was indicted for having attained habitual felon status, the Union County Grand Jury returned a superseding true bill of indictment on 30 October 2006, charging defendant with felony assault on a government officer or employee. Proceeding *pro se*, on 28 November 2006, defendant filed a Motion to Dismiss for Prosecutorial Misconduct and *Brady*[1] Violation, in accordance with N.C.G.S. § 15A-954. A hearing was held on the motion on 18 January 2007. Defendant testified that he helped fill out and serve the subpoenas and that the poster existed at the time the initial subpoenas were served. The State declined to cross-examine or otherwise rebut defendant's evidence and presented no evidence of its own. Instead, the State opposed defendant's motion solely on legal grounds.

1. Referring to *Brady v. Maryland*, in which the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. 83, 87 (1963).

The salient portions of the trial judge's findings of fact from the hearing include the following:

> 4) That on April the 19th of 2004 the Defendant was transported to Union County . . . .
>
> . . . .
>
> 6) The Defendant alleges that he was assaulted by various officers and members of the Union County Jail. . . . That on April the 20th, 2004, the Defendant was photographed by the staff of the Stanly County Jail . . . .
>
> 7) That the photograph of the Defendant made on April 20th, 2004, showed the Defendant's condition during a time relevant to the subject prosecution.
>
> 8) That in May of 2004, Detention Officer Becky Green of the Stanly County Sheriff's Office went on an unrelated matter to the Stanly County office of the District Attorney for the 20th Prosecutorial District, that while in the office Ms. Green saw a poster which contained two photographs of the Defendant. One photograph . . . was made when the Defendant was processed into the jail on November 17th of 2003, with a caption saying, in quotation, "Before suing the District Attorney's office," closed quotation, and a second photograph . . . that was made when the Defendant was processed back into the Stanly County Jail between April 19th and 20th of 2004, which showed the Defendant's injuries and was captioned, quotation, "After he sued the District Attorney's office" . . . .
>
> 9) That during proceedings regarding this case and upon the request of the Defendant for discovery and disclosure that [ADA] Higdon stated in open court that the poster had been destroyed and was not available, and that the subject photographs originally taken at the Stanly County Jail were not available as well.

Based on these findings of fact, the trial judge concluded the following as a matter of law:

> 1) That the photographs of the Defendant made during his processing into the Stanly County Jail on November 17th of 2003 and again between April the 19th and 20th of 2004 are relevant and material to the defense of the subject prosecution.

2) That the poster of the photographs described herein was willfully destroyed and not made available to the Defendant although the Defendant made a valid and timely request for same.

3) That the original photographs described herein have not been made available and as represented by the State of North Carolina are unavailable to the Defendant, even though implicitly requested by the Defendant.

4) That due to the destruction or failure of the State to provide this evidence, which is material and may be exculpatory in nature, the Defendant's rights pursuant to the Constitution of the United States and the North Carolina Constitution have been flagrantly violated and there is such irreparable prejudice to the Defendant's preparation of his case that there is no remedy but to dismiss the prosecution.

The State timely appealed to the Court of Appeals, where a majority affirmed the trial court's ruling. *State v. Williams*, 190 N.C. App. 301, ——, 660 S.E.2d 189, 190 (2008). The dissenting judge at the Court of Appeals argued that finding of fact number nine was not supported by competent evidence and that the trial judge's conclusions of law were erroneous. *Id.* at ——, 660 S.E.2d at 196-97 (Tyson, J., dissenting). The State timely appealed to this Court based on the dissent.

ANALYSIS

In reviewing a trial judge's findings of fact, we are "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). Even if "evidence is conflicting," the trial judge is in the best position to "resolve the conflict." *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601, *cert. denied*, 403 U.S. 934 (1971). The decision that defendant has met the statutory requirements of N.C.G.S. § 15A-954(a)(4) and is entitled to a dismissal of the charge against him is a conclusion of law. "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) (citing *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment" for that of

the lower tribunal. *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)).

I. FINDING OF FACT NUMBER NINE IS SUPPORTED BY COMPETENT EVIDENCE

The trial judge's order does not falter on finding of fact number nine. That finding of fact states:

> That during proceedings regarding this case and upon the request of the Defendant for discovery and disclosure that [ADA] Higdon stated in open court that the poster had been destroyed and was not available, and that the subject photographs originally taken at the Stanly County Jail were not available as well.

The trial judge found defendant's testimony to be credible. Moreover, defendant's evidence was uncontroverted in that the State offered no evidence and no witnesses at the hearing on 18 January 2007; the State made only a legal argument against the motion to dismiss. Although much of the evidence was ambiguous and the sequence of events was never entirely clarified, the trial court's consideration is limited to the evidence actually presented and matters as to which the court takes judicial notice. Here, an examination of the record shows that the trial judge had several pieces of competent evidence before him to support finding of fact number nine. Defendant testified that his attorney began requesting copies of the poster and pictures after first viewing the poster. Without objection by the State, defendant stated that the poster existed when subpoenas were initially served. One subpoena included in the record was issued to Assistant District Attorneys Nicholas Vlahos and Stephen Higdon dated 31 May 2005. The subpoena ordered ADAs Vlahos and Higdon to appear and testify on 6 June 2005 and to produce the poster or the computer hard drive used to create the poster. After this subpoena was served, a pretrial hearing was conducted on 11 July 2005 in Stanly County concerning several cases against defendant in that jurisdiction. The transcript from that hearing was admitted into evidence before the trial judge in the instant matter. During the 11 July 2005 hearing, ADA Higdon confirmed that the poster did exist, but that it had been "removed" and "destroyed." ADA Higdon made this admission in response to defendant's request for the evidence. The State offered no evidence that the poster was already destroyed before defendant requested it.

As to the unavailability of the subject photographs, defendant clearly testified that he did not have the photographs used in the poster and that he never personally saw the poster. Conversely, the State contended for the first time on appeal that defendant and his former counsel admitted to possessing copies of the photographs used in the poster.

On this point, the transcripts reflect that defendant's former counsel stated he had a Stanly County Sheriff's Office booking report with defendant's picture on it. This booking report, however, was never offered as evidence by either side, and furthermore, a former officer of the Stanly County Sheriff's Office, Becky Green, saw the poster and testified that it was "like a mug shot from the jail" but "larger than what the mug shots are." Ms. Green testified that each photograph on the poster was about four by six inches in size. Additionally, the State highlights that defendant appears to have possessed a *side view* photograph of himself when questioning a witness on 18 January 2007. However, the poster in question contained a front view of defendant's face and not a side view. The Court of Appeals majority pointed out that ADA Higdon represented on 11 July 2005 that the actual "photographs" used for the poster "had been 'given to [Assistant District Attorney Nicholas] Vlahos' and had been 'destroyed.' " *State v. Williams*, 190 N.C. App. at ——, 660 S.E.2d at 193 (brackets in original). Regardless, defendant's unrebutted testimony to the trial judge was that he never possessed copies of the photographs.

Based on this evidence, the trial court's finding of fact number nine was supported by competent evidence and is binding on appeal. *See Cooke*, 306 N.C. at 134, 291 S.E.2d at 619.

II. THERE IS NO REMEDY BUT TO DISMISS THE PROSECUTION

N.C.G.S. § 15A-954(a)(4) requires that upon a defendant's motion, the trial court "must dismiss the charges stated in a criminal pleading if it determines that . . . [a] defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." As the movant, defendant bears the burden of showing the flagrant constitutional violation and of showing irreparable prejudice to the preparation of his case. This statutory provision "contemplates drastic relief," such that "a motion to dismiss under its terms should be granted sparingly." *State v. Joyner*, 295 N.C. 55, 59, 243 S.E.2d 367, 370 (1978).

Section 15A-954(a)(4) was "intended to embody the holding of this Court in *State v. Hill*." *Id.* (citing Official Commentary to N.C.G.S. § 15A-954). In *Hill*, this Court concluded that the defendant's pretrial motion to dismiss should have been allowed because the defendant was denied his constitutional rights to counsel and to obtain witnesses on his behalf. 277 N.C. 547, 552-54, 178 S.E.2d 462, 465-66 (1971). The denial of the defendant's rights to counsel and to obtain witnesses was particularly egregious because it deprived the defendant in *Hill* of the "only opportunity to obtain evidence which might prove his innocence." *Id.* at 555, 178 S.E.2d at 467. We share a similar concern in the instant case regarding defendant's ability to secure material and favorable evidence.

A. Flagrant Violation of Constitutional Rights

The trial judge concluded that the State violated defendant's rights under the United States and North Carolina Constitutions. The making and public display of this poster was unprofessional behavior.[2] "[T]he citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law . . . and who approaches his task with humility." Robert H. Jackson, *The Federal Prosecutor*, *in* 31 J. Am. Inst. of Crim. L. & Criminology 3, 6 (1940-41) [hereinafter *The Federal Prosecutor*] (address delivered by the then Attorney General of the United States at the Second Annual Conference of U.S. Attorneys on 1 April 1940 in Washington, D.C.).[3] The mere making of the poster, however, is not a

2. After hearing the evidence, the trial judge, the Honorable James E. Hardin, commented:

> I've been in the system now in one form or another since 1979. I spent more than twenty years in the D.A.'s office; I filled five different positions, eleven and a half years as the [elected] D.A. Frankly, if I had two assistants that put together a photographic array like this and made a poster and posted it on the wall making fun of a defendant, even if they can't stand him, they would have had a real problem with me. I got a real problem with this poster . . . . There's no excuse for that. We're going to treat people with dignity and respect even if they're charged with crimes. That's the right thing to do and I think frankly, as prosecutors, we're held to that responsibility ethically, morally and legally.

During oral argument, counsel for the State firmly acknowledged how "inappropriate" it was that this poster had been made and displayed.

3. The making and public display of this poster bring to mind the comments of former United States Attorney General and former United States Supreme Court Justice Robert H. Jackson: "While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst." *The Federal Prosecutor* at 3. A prosecutor "can have no better asset than to have his profession recognize that his attitude toward those who feel his power has been dispassionate, reasonable and just." *Id.* at 4.

violation of defendant's constitutional rights for purposes of his motion under *Brady v. Maryland*, 373 U.S. 83 (1963). The flagrant violation of defendant's constitutional rights is found in that on numerous occasions defendant requested specific items of evidence that were favorable to him and material to his defense, but the State failed to provide that evidence, destroyed it, and then stated it could not be produced.

In *Brady*, the Supreme Court of the United States determined that the Due Process Clause of the Fourteenth Amendment to the United States Constitution required in state criminal cases "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87 (citing U.S. Const. amend. XIV, § 1). Evidence favorable to an accused can be either impeachment evidence or exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). "Evidence is considered 'material' if there is a 'reasonable probability' of a different result had the evidence been disclosed." *State v. Berry*, 356 N.C. 490, 517, 573 S.E.2d 132, 149 (2002) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). Materiality does not require a "demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 434 (citation omitted). Rather, defendant must show that the government's suppression of evidence would " 'undermine[] confidence in the outcome of the trial.' " *Id.* (quoting *Bagley*, 473 U.S. at 678).

Although *Brady* does not require that a defendant make a specific request for favorable and material evidence, *see id.* at 433 (citing *Bagley* and *United States v. Agurs*, 427 U.S. 97 (1976)), the record indicates that on numerous occasions preceding the 11 July 2005 hearing, defendant requested specific items of material evidence favorable to his defense. Moreover, public records show subpoenas seeking this evidence dated 20 September 2004, 31 May 2005, 27 January 2006, and 20 February 2006.[4] The subpoenas order that the poster or the computer hard drive used to create the poster be pro-

4. While the September 2004, January 2006, and February 2006 subpoenas do not appear to be included as part of the record in the case *sub judice*, they are part of the record in another action arising out of Stanly County. *State v. Williams*, 186 N.C. App. 233, 650 S.E.2d 607 (2007). We take judicial notice of these subpoenas in accordance with our practice of taking "judicial notice of the public records of other courts within the state judicial system." *State v. Thompson*, 349 N.C. 483, 497, 508 S.E.2d 277, 286 (1998) (citing *Alpine Motors Corp. v. Hagwood*, 233 N.C. 57, 62 S.E.2d 518 (1950)).

duced. Yet, defendant never received the requested evidence because the State destroyed it.

Additionally, the evidence was favorable to defendant. As to the assault charge, the evidence would have been admissible at trial for impeachment purposes during defendant's cross-examination of the State's witnesses. Moreover, defendant alleged in his motion that since 19 April 2004, he had been "the victim of a vicious conspiracy between Stanly and Union County Law Enforcement and Prosecutors . . . to retaliate against [him] for the filing of a civil rights complaint in Stanly County Superior Court . . . and a civil rights complaint in the United States District Court." The poster and photographs were certainly relevant to defendant's theory of this conspiracy against him. The evidence also would have tended to prove the partial or complete defense of self-defense against the assault charge, because proof of the injuries sustained at the Union County Jail would have tended to show that defendant was not the aggressor. Therefore, defendant established that the "constitutional duty" of producing this evidence was "triggered." *See Kyles*, 514 U.S. at 434.

Moreover, the evidence was material. In its absence, we cannot say that defendant would receive a fair trial "resulting in a verdict worthy of confidence." *Id.* By demonstrating the value of the evidence for impeachment purposes and to show self-defense, defendant has raised the reasonable probability that confidence in the outcome of a guilty verdict at trial would be undermined because "the favorable evidence could reasonably be taken to put the whole case in such a different light." *Kyles*, 514 U.S. at 435; *see Bagley*, 473 U.S. at 678; *Berry*, 356 N.C. at 517, 573 S.E.2d at 149. Thus, "the constitutional duty" to produce the evidence in the instant matter was "triggered by the potential impact of favorable but undisclosed evidence." *Kyles*, 514 U.S. at 434. "[T]he prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Id.* at 438.

Relying on *State v. Hunt*, 339 N.C. 622, 657, 457 S.E.2d 276, 296 (1994), *State v. Alston*, 307 N.C. 321, 337, 298 S.E.2d 631, 642 (1983), and *State v. Hardy*, 293 N.C. 105, 127, 235 S.E.2d 828, 841 (1977), the State argues that *Brady* is inapposite to the instant matter because *Brady* only requires the State to turn over evidence at trial. We disagree for purposes of the instant matter. At its most fundamental level, the due process principle *Brady* and its progeny protect is concerned with the "avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials

are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87; *see Bagley*, 473 U.S. at 675 (The prosecutor's duty is "to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial."). The question is whether in the absence of the suppressed evidence a defendant receives a fair trial, "understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434.

> Every person charged with a crime has an absolute right to a fair trial. By this it is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in keeping with substantive and procedural due process requirements of the Fourteenth Amendment. It is the duty of both the court and the prosecuting attorney to see that this right is sustained.

State v. Britt, 288 N.C. 699, 710, 220 S.E.2d 283, 290 (1975) (citations omitted).

Here, ADA Higdon stated that the evidence had been "destroyed" and that he "cannot produce something that does not exist." Accordingly, we conclude that when the State makes a *pretrial* admission to the existence and destruction of evidence requested by the accused which is favorable to him and material to his guilt or punishment, and when the State further discloses that it is impossible to produce the evidence at that time or, by implication, at trial, then in the interest of judicial economy, the trial judge does not need to await a trial and verdict before deciding that a due process violation exists. The violation is already apparent, and any subsequent trial would be fundamentally unfair to defendant. As the Court in *Brady* recognized,

> [a] prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . .

373 U.S. at 87-88. If the architecture of injustice is apparent, then the trial judge does not need to allow the prosecution to design the trial any further.[5]

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5. Ensuring that justice is done is not only the goal of this Court, but it is ultimately an interest of the State itself. *See Berger v. United States*, 295 U.S. 78, 88 (1935). The State of North Carolina " 'wins its point whenever justice is done its citizens in the courts.' " *See Brady*, 373 U.S. at 87 (quoting an inscription on the walls of the United States Department of Justice building).

Indeed, the statute under which we are granting relief contemplates injuries occurring pretrial, during defendant's "*preparation of his case*." N.C.G.S. § 15A-954(a)(4) (2007) (emphasis added). The statute is the procedural mechanism that allows us to give effect to the *Brady* violation before a trial begins. Finally, we note again that section 15A-954(a)(4) was intended to embody the holding in *State v. Hill*, in which this Court held that the trial judge should have allowed the defendant's *pretrial* motion to dismiss based on the deprivation of the defendant's constitutional rights. *See* 277 N.C. at 550, 556, 178 S.E.2d at 464, 467.

In sum, the State's destruction of material, favorable evidence to defendant, and its admission that the evidence could not be produced, warrant the conclusion that any trial commenced against defendant would not comport with our notions of due process. Defendant's constitutional rights were flagrantly violated.

B. Irreparable Prejudice

Besides a flagrant constitutional violation, to grant defendant relief we must also find "such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C.G.S. § 15A-954(a)(4). This requirement also derives from *State v. Hill*, in which the defendant was charged with drunken driving, but was not allowed to immediately meet with counsel or witnesses who could have observed him "with reference to his alleged intoxication." 277 N.C. at 553, 178 S.E.2d at 466. This Court's concern in *Hill* regarding the irreparable prejudice to the defendant's ability to "obtain evidence which might prove his innocence," *id.* at 555, 178 S.E.2d at 467, is analogous to our concern for defendant regarding the effect of his being denied material evidence favorable to his defense.

As the party moving for dismissal, defendant has the burden of showing irreparable prejudice to the preparation of his case. Defendant has met his burden in two ways. First, competent evidence supports the trial judge's conclusion that defendant never possessed the original photographs from which the poster was made. Consequently, we cannot remedy this situation by ordering or permitting defendant to re-create an item of evidence he did not originally create and for which he does not possess the raw materials. The State ardently contends that defendant can reproduce the poster, but has offered no evidence to support this claim. Based on defendant's testimony, the evidence before the trial judge was that defendant could not re-create the evidence. Therefore, as this Court said in *Hill*, we

cannot "[u]nder these circumstances . . . assume that which is incapable of proof." *Id.* at 554, 178 S.E.2d at 466.

Second, defendant has demonstrated the futility of relying on witness testimony to prove the contents of the poster. Several of defendant's subpoenas called for ADA Nicholas Vlahos, an alleged creator of the poster, to appear with the poster *and testify*, but Mr. Vlahos never did either. Additionally, defendant presented the transcript of a trial in Stanly County on unrelated charges, during which defendant attempted to question a witness regarding the existence and contents of the poster. At every turn, the State objected to the questions, and the trial judge sustained the objections. Thus, the record reflects that any attempt to introduce witness testimony about the poster at a trial in the instant case would likely be similarly unfruitful. Based on defendant's uncontroverted evidence, the unavoidable conclusion is that he was irreparably prejudiced in the preparation of his case because of the State's destruction of material, favorable evidence.

CONCLUSION

Beyond the unprofessional nature of this poster, we are satisfied that defendant has met the elements of N.C.G.S. § 15A-954(a)(4). We conclude that no other remedy exists but for the assault charge against defendant to be dismissed. Accordingly, we affirm the Court of Appeals.

AFFIRMED.

BARBARA GLOVER MANGUM, TERRY OVERTON, DEBORAH OVERTON, AND VAN EURE, PETITIONERS v. RALEIGH BOARD OF ADJUSTMENT, PRS PARTNERS, LLC, AND RPS HOLDINGS, LLC, RESPONDENTS

No. 613PA07

(Filed 12 December 2008)

Zoning— special use permit—challenge by adjacent property owners

Property owners adjacent to or in close proximity to a proposed adult establishment had standing to challenge the special use permit for that establishment where they demonstrated special damages separate and apart from damages the community

might suffer. While proximity alone does not provide standing, it bears on the question, and the petitioners here testified to adverse effects including parking problems, security, stormwater runoff, littering, and noise.

Justice TIMMONS-GOODSON dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 187 N.C. App. 253, 652 S.E.2d 731 (2007), vacating and remanding an order entered on 12 September 2006 by Judge Narley L. Cashwell in Superior Court, Wake County. Heard in the Supreme Court 14 October 2008.

Smith Moore LLP, by James L. Gale, David L. York, and Elizabeth Brooks Scherer, for petitioner-appellants.

Poyner & Spruill LLP, by Robin Tatum Currin, for respondent-appellee RPS Holdings, LLC.

BRADY, Justice.

In this case we determine the circumstances under which an adjacent property owner or property owner in close proximity has standing to challenge a Board of Adjustment's grant of a Special Use Permit. We hold that petitioners have standing to challenge the Raleigh Board of Adjustment's issuance of a Special Use Permit to PRS Partners, LLC and RPS Holdings, LLC. Thus, we reverse the decision of the Court of Appeals holding otherwise and remand this case to that court for determination of issues not reached by that court.

FACTUAL AND PROCEDURAL BACKGROUND

On 15 November 2005, PRS Partners, LLC and RPS Holdings, LLC (respondents) filed an application for a Special Use Permit for an adult establishment with the Raleigh Board of Adjustment (the Board). Respondents sought the Special Use Permit in order to operate a proposed business at 6713 Mt. Herman Road, Raleigh (the subject property). Petitioner Barbara Glover Mangum is the owner of a parcel of land directly adjacent to the subject property, and at this location she operates Triangle Equipment Company, Inc., a retail business selling compact construction, yard, and garden equipment. Petitioners Terry and Deborah Overton own three properties directly adjacent to the subject property, upon which they operate Triangle Coatings, Inc. Petitioner Ms. Van Eure is the owner of the Angus Barn, a prominent Raleigh restaurant, which is not located immedi-

ately adjacent to the subject property, but access to the subject property is along a narrow roadway that passes by the restaurant. A hearing was held by the Board on 9 January 2006, during which petitioners presented evidence concerning the probability of increased traffic, increased water runoff, parking and safety concerns, and adverse secondary effects on their businesses if the Board granted the Special Use Permit.

On 24 February 2006, the Board served notice of its approval of the Special Use Permit application, and petitioners appealed the Board's decision to Superior Court, Wake County, by Petition for Writ of Certiorari on 24 March 2006. On 13 April 2006, respondents filed a motion to dismiss the petition, asserting that petitioners lacked standing to challenge the Board's decision pursuant to N.C.G.S. § 160A-388(e2). On 12 September 2006, the trial court denied respondents' motion to dismiss and reversed the Board's decision approving the Special Use Permit. Respondents appealed to the Court of Appeals, which, on 20 November 2007, held that petitioners lacked standing to challenge the Board's decision and vacated and remanded the decision of the trial court. Petitioners timely petitioned for discretionary review by this Court, and we allowed the petition on 11 June 2008. We now reverse the decision of the Court of Appeals.

ANALYSIS

The sole issue before us is whether petitioners have standing to challenge the issuance of the Special Use Permit. As a general matter, the North Carolina Constitution confers standing on those who suffer harm: "All courts shall be open; [and] every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law . . . ." N.C. Const. art. I, § 18.

> The rationale of [the standing rule] is that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue. "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation[s] of issues upon which the court so largely depends for illumination of difficult constitutional questions.' "

Stanley v. Dep't of Conservation & Dev., 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973) (quoting *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (alteration in original) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). It is not necessary that a party demonstrate that injury has already

occurred, but a showing of "immediate or threatened injury" will suffice for purposes of standing. *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342 (1977)); *see also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 472 (1982).

Specifically, in contests concerning zoning decisions, this Court has stated:

> The mere fact that one's proposed lawful use of his own land will diminish the value of adjoining or nearby lands of another does not give to such other person a standing to maintain an action, or other legal proceeding, to prevent such use. If, however, the proposed use is unlawful, as where it is prohibited by a valid zoning ordinance, the owner of adjoining or nearby lands, who will sustain special damage from the proposed use through a reduction in the value of his own property, does have a standing to maintain such proceeding.

Jackson v. Guilford Cty. Bd. of Adjust., 275 N.C. 155, 161, 166 S.E.2d 78, 82 (1969) (citations omitted). Additionally,

> [i]f . . . that which purports to be an amendment permitting a use of property forbidden by the original ordinance is, itself, invalid, the prohibition upon the use remains in effect. In that event, the owner of other land, who will be specially damaged by such proposed use, has standing to maintain a proceeding in the courts to prevent it.

Id. at 161, 166 S.E.2d at 83 (citations omitted).[1] It is undisputed that defendants' proposed use of the land is unlawful unless they are issued a Special Use Permit. Moreover, the General Assembly has provided that "*[e]very* decision of the board [of adjustment] shall be subject to review by the superior court by proceedings in the nature of certiorari." N.C.G.S. § 160A-388(e2) (2007) (emphasis added).

In the instant case, the trial court found petitioners had standing based upon the terms of the Raleigh City Code[2] and alternatively that

1. The validity of the Board's decision is not presented to us in this appeal.

2. The trial court wrote: "[T]he Raleigh City Code protects 'adjacent properties' by requiring the Board to make findings regarding the secondary effects of the proposed Adult Establishment on such adjacent properties. The Code also specifically recognizes that Adult Establishments 'because of their very nature' have 'serious objectionable operational characteristics' that extend into surrounding neighborhoods."

petitioners had made sufficient allegations to establish "special damages" for purposes of standing through their testimony regarding "increased traffic, increased water runoff, parking, and safety concerns." The Court of Appeals reversed the trial court, finding the allegations and evidence presented inadequate to show the special damages required to challenge the issuance of the permit. *Mangum v. Raleigh Bd. of Adjust.*, 187 N.C. App. 253, ——, 652 S.E.2d 731, 736 (2007). We disagree with the conclusion of the Court of Appeals and hold that the allegations and evidence presented by petitioners in regards to the "increased traffic, increased water runoff, parking, and safety concerns," as well as the secondary adverse effects on petitioners' businesses, were sufficient special damages to give standing to petitioners to challenge the issuance of the permit.

In our de novo review of a motion to dismiss for lack of standing, we view the allegations as true and the supporting record in the light most favorable to the non-moving party. *See Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 477, 495 S.E.2d 711, 713, *cert denied*, 525 U.S. 1016 (1998). We also note that North Carolina is a notice pleading jurisdiction, and as a general rule, there is no particular formulation that must be included in a complaint or filing in order to invoke jurisdiction or provide notice of the subject of the suit to the opposing party. *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." (citation omitted)). To deny a party his day in court because of his "imprecision with the pen" would "elevate form over substance" and run contrary to notions of fundamental fairness. *See Pyco Supply Co., Inc. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 443, 364 S.E.2d 380, 385 (1988).

In their petition for writ of certiorari filed in the superior court, petitioners alleged that they either owned property immediately adjacent to or in close proximity to the subject property. While this assertion, in and of itself, is insufficient to grant standing, it does bear some weight on the issue of whether the complaining party has suffered or will suffer special damages distinct from those damages to the public at large. Moreover, petitioners testified during the Board hearing that granting the Special Use Permit would have adverse effects on their property, including problems related to parking, safety, security, stormwater runoff, littering, and noise.

Because we hold that petitioners have standing under our prior case law regardless of the terms of the Raleigh City Code, we express no opinion whether the terms of the Code would be sufficient to grant petitioners standing.

For instance, LaMarr Bunn, a licensed landscape architect and licensed real estate broker, testified at the Board hearing on behalf of petitioners in opposition to the permit. He testified about the value of surrounding properties, the large number of 911 calls made concerning similar businesses in Raleigh, his concerns about a proposed sign for the business, and the lack of stormwater retention areas. Petitioner Mangum testified at the Board hearing concerning parking at the subject property. According to her calculations, if the proposed business had full occupancy, each vehicle in the parking lot would need to have transported at least four persons on average.[3] She testified that this lack of adequate parking at respondents' property could result in patrons of the proposed business parking their vehicles at her adjacent site. Moreover, Mangum testified that if even one vehicle parked on Mt. Herman Road, tractor trailers would be unable to bring equipment to her business at night. Mangum expressed concerns over stormwater runoff, as her property was "sitting much lower than the property in question." She further testified regarding her concerns about safety, litter, vandalism, and other damage to her property. These concerns were based in part on problems Mangum had at a property in South Carolina that is immediately adjacent to an adult establishment.

Petitioner Terry Overton expressed his concerns about security on his adjacent property, stormwater runoff onto his lower-situated property, garbage, and parking overflow. Petitioner Eure testified regarding her safety concerns for her customers and employees stemming from traffic and regarding anticipated secondary adverse effects upon her business. Petitioners' allegations were reiterated in the petition filed in the superior court.

These allegations and testimony were sufficient to demonstrate special damages to these property owners separate and apart from the damage the community as a whole might suffer. We cannot agree with respondent's arguments and the dissent's contention that allegations of vandalism, safety concerns, littering, trespass, and parking overflow from the proposed business to adjacent or nearby lots fail to establish that the value of petitioners' properties would be adversely affected or that petitioners would be unable to enjoy the

3. According to LaMarr Bunn's testimony, the public space of the proposed building is 6,800 square feet, which requires 140 parking spots and equates to 560 seats in the facility. Thus, the proposed plans would provide one parking spot for every four seats in the establishment. While it was Mangum's opinion that this was inadequate, the plan is within the standards specified by § 10-2081 of the Raleigh City Code.

use of their properties. Accordingly, the decision of the Court of Appeals that petitioners lack standing must be reversed.

CONCLUSION

Because petitioners' allegations and testimony demonstrated the existence of special damages if the Special Use Permit were granted, petitioners have standing to challenge the issuance of the permit, and the Court of Appeals erred in holding otherwise. Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded to that court for determination of the remaining issues raised by respondents but not addressed by the Court of Appeals.

REVERSED AND REMANDED.

Justice TIMMONS-GOODSON dissenting.

Because the majority misapplies the longstanding precedent of this Court and unnecessarily relaxes the requirements for standing, I respectfully dissent.

After correctly quoting the rule on standing announced by this Court in *Jackson v. Guilford County Board of Adjustment*, the majority then disregards North Carolina's stringent requirements for standing in favor of the less consistent rule of some other jurisdictions. In North Carolina, adjacent and nearby property owners have standing to appeal from quasi-judicial zoning decisions if the owners will sustain special damages, distinct from the rest of the community, amounting to a reduction in property values. *Jackson*, 275 N.C. 155, 161, 166 S.E.2d 78, 82 (1969) (citations omitted). While some states have held that evidence of increases in traffic, population, and noise may alone suffice to show special damages and grant standing, *see*, *e.g.*, *Lynch v. Gates*, 433 Pa. 531, 534-35, 252 A.2d 633, 634-35 (1969) (increases in noise, population density, traffic, and loss of light and air), in North Carolina, a reduction in property value has been an essential element of standing for nearly forty years, *see*, *e.g.*, *Cty. of Lancaster v. Mecklenburg Cty.*, 334 N.C. 496, 503 n.4, 434 S.E.2d 604, 610 n.4 (1993) (citing Court of Appeals decisions which rely on *Jackson* for the rule that adjoining property owners must present evidence of a reduction in property values).

Under the well-established rule of *Jackson*, a petitioner must allege, and the trial court must find, that the adjacent or nearby property owner will suffer special damages amounting to a reduction in property value. *See*, *e.g.*, *Smith v. Forsyth Cty. Bd. of Adjust.*, 186

N.C. App. 651, 654, 652 S.E.2d 355, 358 (2007) (holding that petitioner lacked standing when she failed to allege that the zoning decisions at issue had decreased the value of her property or would do so in the future). Additionally, the record must contain evidence sufficient to sustain a finding that the petitioner will in fact suffer a diminution in property value. *See, e.g.*, *Lloyd v. Town of Chapel Hill*, 127 N.C. App. 347, 351, 489 S.E.2d 898, 901 (1997) (no standing when the record did not contain sufficient evidence to sustain a finding that the petitioner would suffer a diminution in property value); *Heery v. Town of Highlands Zoning Bd. of Adjust.*, 61 N.C. App. 612, 614, 300 S.E.2d 869, 870 (1983).

North Carolina's more stringent rule on standing is appropriate in light of the fundamental right of an owner to lawfully use and enjoy his property without undue restrictions. *See Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 401, 584 S.E.2d 731, 736 (2003) (" 'Every person owning property has the right to make any lawful use of it he sees fit, and restrictions sought to be imposed on that right must be carefully examined . . . .' " (quoting *Vance S. Harrington & Co. v. Renner*, 236 N.C. 321, 324, 72 S.E.2d 838, 840 (1952) (alteration in original))); *cf. Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 274 N.C. 362, 372, 163 S.E.2d 363, 370 (1968) (stating in an action for damages for the taking of private property for public use without paying just compensation that "the right of private property is a fundamental, material, inherent and inalienable right"). The rule is also consistent with N.C.G.S. § 160A-388(e2), which restricts standing in appeals from quasi-judicial decisions in zoning cases to "aggrieved part[ies]." N.C.G.S. § 160A-388(e2) (2007). Finally, the rule lends itself to objective, consistent, and fair application, gives property owners predictability, and discourages frivolous litigation.

Turning to the facts of this case, respondents seek a Special Use Permit to open an adult establishment in compliance with the Raleigh City Code. The proposed establishment would be located near the end of Mount Herman Road, a small, dead-end street in an industrial zoning district. The adjacent uses on Mount Herman Road include a heavy equipment rental company, a commercial steel company, a lumber company, an electrical transformer plant, and a fifteen acre vacant parcel. Petitioners are the owners of adjacent properties, plus an owner of property that is located at least one-half mile from the site of the proposed establishment and on a major highway that does not connect to Mount Herman Road.

In their petition for writ of certiorari filed in the superior court, petitioners alleged that they testified at the hearing before the Board of Adjustment regarding the adverse effects of the proposed adult establishment on their respective adjacent and nearby properties. However, petitioners did not allege that they would suffer special damages amounting to a reduction in property values. Thus, the petition for writ of certiorari failed to allege standing under North Carolina law. *See Jackson*, 275 N.C. at 161, 166 S.E.2d at 82.

In its order denying respondents' motion to dismiss for lack of subject matter jurisdiction, the trial court erroneously concluded that petitioners have standing based on the applicable provisions of the Raleigh City Code. The trial court incorrectly concluded that the line of cases which require proof of special damages was inapposite and that petitioners did not need to show special damages amounting to a proven diminution in property values. The trial court added that, in the alternative, petitioners' allegations regarding increased traffic, increased water runoff, parking, and safety concerns alone were sufficient to establish special damages for standing purposes. Notably, the trial court's order lacks a finding that petitioners would experience a diminution in property values.

The majority refrains from addressing the errors in the trial court's order by stating in a footnote that its holding is based on our prior case law and not the Raleigh City Code. However, the majority has failed to cite any cases which hold that allegations regarding increased traffic, increased water runoff, parking, and safety concerns alone are sufficient to establish special damages for standing. Our prior case law indicates that adjacent and nearby property owners have standing to appeal in quasi-judicial zoning cases only if they would suffer special damages amounting to a diminution in property values.

The record of the hearing before the Board of Adjustment clearly shows that petitioners have failed to present evidence that they would suffer a diminution in property values. Mr. Bunn testified at the hearing that inadequate parking, increased traffic, water runoff, and safety issues would adversely affect the adjacent properties. However, Mr. Bunn gave no opinion regarding whether these concerns would diminish the values of the properties belonging to petitioners. Petitioners Mrs. Mangum, Mr. Overton, and Ms. Eure testified regarding their concerns, which were largely based on the assumptions that the provisions of the Raleigh City Code pertaining to parking were inadequate or that respondents would fail to comply with

the conditions in the Special Use Permit. However, no witness testified that the proposed establishment would diminish the values of petitioners' properties. The only valuation evidence presented by petitioners concerned a fifteen acre vacant parcel, owned by a nonparty to this action.

The evidence presented before the Board of Adjustment demonstrates that, contrary to the majority's suggestion, petitioners' lack of standing in this case goes beyond a mere "imprecision with the pen." Testimony regarding the effects of increased traffic, increased water runoff, parking, and safety concerns, without evidence that these factors would in fact diminish petitioners' property values, is simply too general to support standing under North Carolina law. Thus, because petitioners have failed to satisfy the requirements for standing, I would affirm the decision of the Court of Appeals.

CHAPEL HILL TITLE AND ABSTRACT COMPANY, INC., AND JONATHAN STARR AND WIFE, LINDSAY STARR, PETITIONERS v. TOWN OF CHAPEL HILL AND THE TOWN OF CHAPEL HILL BOARD OF ADJUSTMENT, RESPONDENTS v. ROBERT B. FERRIER, HANSON R. MALPASS, AND WIFE, BETSY J. MALPASS, RESPONDENT-INTERVENORS

No. 275A08

(Filed 12 December 2008)

Zoning— variance—conservation district plus restrictive covenants—no legally reasonable use

A board of adjustment erred by denying a request for a variance where a Resource Conservation District ordinance prohibited construction on 78.5% of the property and restrictive covenants prevented construction on the remainder. The language of the ordinance requires a variance if the owner is left with no legally reasonable use, and instructs the board of adjustment to consider the actual state in which the property is found when determining that question. A prior building permit that can never be used does not rebut the presumption of no legally reasonable use.

Justice BRADY concurring.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 190 N.C. App. ——, 660 S.E.2d

667 (2008), reversing and remanding an order entered on 25 July 2007 by Judge Kenneth C. Titus in Superior Court, Orange County. Heard in the Supreme Court 14 October 2008.

The Brough Law Firm, by Michael B. Brough, for petitioner-appellants.

Northen Blue, LLP, by David M. Rooks and Samantha H. Cabe, for respondent-appellees.

Poyner & Spruill LLP, by Robin Tatum Currin and Andrew J. Petesch, for respondent-intervenor-appellees.

HUDSON, Justice.

In 2004 petitioners Chapel Hill Title and Abstract Company and Jonathan and Lindsay Starr sought a variance from respondents Town of Chapel Hill and its Board of Adjustment to construct a home in Chapel Hill on a vacant lot zoned for residential use. Because 78.5% of the property in question falls within a "Resource Conservation District" (RCD), unless petitioners receive a variance, the lot is subject to an ordinance that generally prohibits construction in such RCD areas. Moreover, restrictive covenants that also apply to the lot likewise prevented petitioners from building on the portion of the lot not subject to the RCD ordinance. After a protracted legal battle among the parties, including a first appeal to and remand by the Court of Appeals, the Board of Adjustment denied the variance on 30 January 2007.

The Superior Court of Orange County granted petitioners' writ of certiorari to review the Board's decision and allowed respondent-intervenors, who own homes in the immediate vicinity of the subject property, to intervene in the action. On 25 July 2007, the trial court entered an order reversing the Board's decision and remanding the matter with instructions "to issue the requested variance." Respondents and respondent-intervenors appealed to the Court of Appeals, which reversed the trial court in a 20 May 2008 divided opinion and remanded with instructions to reinstate the Board's resolution denying the variance. *Chapel Hill Title & Abstract Co., Inc. v. Town of Chapel Hill*, 190 N.C. App. ——, ——, 660 S.E.2d 667, 673 (2008). Based on the dissent in the Court of Appeals, petitioners appealed to this Court.

Petitioners challenge two conclusions of law made in the Board's denial of their request for a variance and subsequently upheld by the

Court of Appeals: (1) Because petitioner Chapel Hill Title obtained a building permit in December 2002 to construct a residence on the lot in a location wholly outside the RCD, the operation of the RCD ordinance is not responsible for petitioners having no legally reasonable use of the property; and (2) because petitioners were aware of the RCD ordinance and other limitations when they purchased the property, any hardship is self-created and does not arise out of application of the ordinance. The Town of Chapel Hill conceded in oral arguments before this Court that if petitioners could not build at all without the variance, denial of the variance would result in "extreme hardship" to petitioners. As such, we need not consider the arguments offered as to the rule applicable to a self-created hardship. Instead, we address only the issue of whether petitioners are left with "no legally reasonable use" of their property.

At the outset, we look to the pertinent language of the RCD ordinance itself to determine when a variance must be granted:

> 3.6.3 Resource Conservation District
>
> *(j) Variances in the Resource Conservation District*
>
> (1) Application
>
> An owner of property who alleges that the provisions of the Resource Conservation District leave no legally reasonable use of the property may apply to the Board of Adjustment for a variance. . . .
>
> (2) Required Findings
>
> A. The review of the Board of Adjustment shall extend to the entire zoning lot that includes area within the Resource Conservation District. The Board of Adjustment shall grant a variance, subject to the protections of this Article, if it finds:
>
> (1.) That the provisions of this Article leave an owner no legally reasonable use of the portion of the zoning lot outside of the regulatory floodplain; and
>
> (2.) That a failure to grant the variance would result in extreme hardship.
>
> B. In making such findings, the Board of Adjustment shall consider the uses available to the owner of the

> entire zoning lot that includes area within the Resource Conservation District.
>
> . . . .
>
> (7) Presumption
>
> > . . . [A] showing that the portion of the Resource Conservation District outside of a regulatory floodplain overlays more than seventy-five percent (75%) of the area of a zoning lot, shall establish a rebuttable presumption that the Resource Conservation District leaves the owner no legally reasonable use of the zoning lot outside of the regulatory floodplain. Such presumption may be rebutted by substantial evidence before the Board of Adjustment.

Chapel Hill, N.C., Land Use Management Ordinance art. 3.6.3 (2004) (titled "Resource Conservation District").

According to the Board and the Court of Appeals majority below, although petitioners were entitled to the rebuttable presumption of "no legally reasonable use" because 78.5% of the property in question falls within an RCD, that presumption was rebutted by the building permit granted to petitioner Chapel Hill Title in 2002. Thus, "the provisions of *this Article*," namely, the operation of the RCD ordinance alone, did not leave petitioners with "no legally reasonable use" of the property. *Id.* (emphasis added). Nevertheless, due to restrictive covenants to which the property is also subject, petitioner Chapel Hill Title was enjoined in April 2003 from using that building permit to construct a residence outside the RCD area of the lot in question.

The central question we address is whether the Board should consider the operation of the RCD ordinance independently, or in conjunction with, the effect of the private restrictive covenants, when determining if petitioners are entitled to a variance. We find the plain language of the ordinance itself to provide the answer, to wit: "In making such findings [as to legally reasonable use and extreme hardship], the Board of Adjustment *shall consider the uses available* to the owner of the entire zoning lot that includes area within the Resource Conservation District." *Id.* (emphasis added). Thus, the variance language of the ordinance instructs the Board to consider the actual state in which the property is found—including both its physical and legal conditions—and how those conditions interact

with the RCD ordinance, when determining if a variance is necessary to leave an owner with a "legally reasonable use" of the property.

Here, petitioners are clearly prevented by restrictive covenants from constructing a home on the 21.5% of the property that falls outside of the RCD ordinance; as such, they have no reasonable "uses available" to them of that portion of the lot. Likewise, because more than seventy-five percent of the property is subject to the ordinance, petitioners have shown they are entitled to rely on the rebuttable presumption of "no legally reasonable use" of the property. This presumption is not rebutted by a building permit that was issued but can never be used.

We find that the Board of Adjustment failed to properly consider "the uses available" to petitioners of the entire lot when determining that the 2002 building permit issued to petitioner Chapel Hill Title rebutted the presumption that petitioners were left with "no legally reasonable use" under the operation of the RCD variance. We therefore conclude that the Board erred by denying petitioners' request for a variance. Accordingly, we reverse the Court of Appeals and remand to that court with instructions to remand to the trial court to reinstate its original order to remand to the Board of Adjustment with instructions to issue the requested variance to petitioners.

REVERSED AND REMANDED.

Justice BRADY concurring.

While I concur in the Court's opinion, I write separately to emphasize the importance of property rights and the duty the government has to compensate individuals when it chooses to take land for public use. I believe that respondents' denial of petitioners' request for a variance not only violates the provisions of the Chapel Hill Resource Conservation District Ordinance (RCD Ordinance) because of respondents' failure to consider the effect of the restrictive covenants on the subject property, but I also believe that the denial results in a de facto taking, which requires respondents to provide just compensation for petitioners' land. As Justice Harlan aptly stated over a century ago: "Due protection of the rights of property has been regarded as a vital principle of republican institutions." *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 235-36 (1897). This historic right can be traced to the very earliest of our laws, and the courts have an important responsibility to steadfastly protect against its erosion.

The legal protection of private property rights dates back to the Magna Carta, which declares: "No free-man shall be seized, or imprisoned, *or dispossessed*, . . . excepting by the legal judgment of his peers, or by the laws of the land." Boyd C. Barrington, *The Magna Charta and Other Great Charters of England* sec. 39, at 239 (1900) (emphasis added). In his *Commentaries on the Laws of England*, William Blackstone wrote that "[an] absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." William Blackstone, 1 *Commentaries* sec. III, at *138.

The Founders drew on these principles when drafting the Bill of Rights. The Fifth Amendment to the Constitution of the United States, applied to the States through the Fourteenth Amendment, provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. In North Carolina, the requirement that government provide just compensation for a taking of private property is implicit in our state constitution. This Court has recognized

> the fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of this State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is considered in North Carolina as an integral part of "the law of the land" within the meaning of Article I, Section 19 of our State Constitution.

Long v. City of Charlotte, 306 N.C. 187, 196, 293 S.E.2d 101, 107-08 (1982) (citations omitted).

Not all government use or regulation of private land requires a payment of just compensation; a valid exercise of the government's police power to promote public welfare does not offend constitutional property rights and is not a taking. Determining what qualifies as a valid government regulation, as opposed to an unconstitutional taking, is a complicated task, and the Supreme Court of the United States has admitted that such a determination cannot be reduced to one formula or bright line test. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986). Rather, courts must rely on "ad hoc,

factual inquiries into the circumstances of each particular case" to ascertain if Fifth Amendment principles are violated. *Id.* (citations omitted). However, the Supreme Court has provided guidance on critical factors to consider in any takings analysis. There are three factors that have " 'particular significance' " in these inquiries: "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.' " 475 U.S. at 225 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

In the instant case, the economic impact of the RCD Ordinance is determinative in deciding whether its application to the property amounts to a taking. If the effect of a government regulation "denies all economically beneficial or productive use of land," then a taking has occurred and compensation must be given to the owner, regardless of the intent of the regulation or how favorably it affects public welfare. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (citations omitted).

There is no question that regulating the use and quality of the town's water resources is within the scope of respondents' police power. Protection of the public water supply is necessary and essential to the health and welfare of the citizens of Chapel Hill. However, the noble purpose of the RCD Ordinance does not grant respondents immunity from the Fifth Amendment to the United States Constitution or the Constitution of North Carolina. This Court has indicated on numerous occasions that a "*zoning ordinance* would be deemed 'unreasonable and confiscatory,' as applied to a particular piece of property, if the owner of the affected property was deprived of all 'practical' use of the property and the property was rendered of no 'reasonable value.' " *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 264, 302 S.E.2d 204, 210 (1983) (quoting *Helms v. City of Charlotte*, 255 N.C. 647, 653, 657, 122 S.E.2d 817, 822, 825 (1961)); *see also Finch v. City of Durham*, 325 N.C. 352, 364, 384 S.E.2d 8, 15 (1989) ("[T]he test for determining whether a taking has occurred in the context of a rezoning is whether the property as rezoned has a practical use and a reasonable value." (citations omitted)).

The RCD Ordinance depletes petitioners' property of all reasonable use and economic value. It is undisputed that petitioners cannot develop their property in any residential capacity without violating either the restrictive covenants imposed on the land in 1959 or the RCD Ordinance adopted by the Town of Chapel Hill in the

mid-1980s. The restrictive covenants at issue "run with the land," and this Court has ruled that such restrictions are interests in property. *See City of Raleigh v. Edwards*, 235 N.C. 671, 678-79, 71 S.E.2d 396, 402 (1952).[1] Petitioners have previously been enjoined from building a residence in violation of these covenants. The RCD Ordinance as enacted renders 78.5% of petitioners' property undevelopable. Respondents argue that petitioners' remaining property outside the scope of the RCD Ordinance is still developable, yet they fail to consider the effect of the restrictive covenants that run with the land. The restrictive covenants cannot be separated from the parcel, and thus, respondents must evaluate the land as they find it in their consideration of petitioners' variance request. When the restrictive covenants are properly evaluated, it is clear that application of the RCD Ordinance has deprived petitioners of all "economically beneficial or productive use" of the property. *See Lucas*, 505 U.S. at 1015. As a result of the RCD Ordinance, petitioners are left with no developable property. Thus, the wooded residential lot, which measures slightly over a half acre, has been depleted of all practical use and reasonable value. If respondents' denial of petitioners' variance request stands, then the RCD Ordinance, as applied to the property, amounts to a taking and just compensation must be paid.

To comply with the laws of this State and the Constitution of the United States, respondents must either grant petitioners a variance or justly compensate petitioners for the taking of the property. Otherwise, respondents' actions amount to an unconstitutional taking of private property in violation of the United States Constitution and Article I, Section 19 of the North Carolina Constitution.

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1. In *Edwards*, the City sought to erect a water tower on a lot in violation of the private restrictive covenants previously imposed on the property. 235 N.C. at 674, 71 S.E.2d at 398-99. This Court ruled that if restrictive covenants were violated by the government for public use, persons with interests in those covenants were entitled to just compensation for the taking of those property rights. *Id.* at 677-79, 71 S.E.2d at 400-02.

PENNY M. RUMPLE RICHARDSON, EMPLOYEE v. MAXIM HEALTHCARE/ALLEGIS GROUP, EMPLOYER, KEMPER INSURANCE COMPANY/AMERICAN PROTECTION INSURANCE C/O SPECIALTY RISK SERVICES, CARRIER

No. 102A08

(Filed 12 December 2008)

1. Workers' Compensation— notice—actual knowledge negates written notice requirement

The Court of Appeals erred in a workers' compensation case by remanding to the Full Commission for additional findings of fact and conclusions of law concerning whether plaintiff satisfied the notice requirements of N.C.G.S. § 97-22 even though plaintiff did not give written notice of the accident to her employer until she filed Form 18 on 24 June 2002, well outside the thirty-day period specified in section 97-22, because: (1) as the Commission noted in findings four, twenty-seven and twenty-eight, plaintiff did notify her employer by telephone within thirty minutes after the collision, providing the employer actual knowledge of the accident, and the employer was also aware of plaintiff's injuries and medical treatments based on her regular communications between May 2001 and May 2002; (2) the plain language of N.C.G.S. § 97-22 requires an injured employee to give written notice of an accident "unless it can be shown that the employer, his agent or representative, had knowledge of the accident," thus negating the Commission's need to make any findings about prejudice, and an employee may be excused from even that requirement by providing a reasonable excuse for failing to give notice and by showing that the employer has not been prejudiced; (3) had it so desired, the employer could have acted to minimize the seriousness of plaintiff's injury by providing early medical care and to conduct the earliest possible investigation into the surrounding circumstances; and (4) the Commission's findings regarding sufficiency of notice were supported by competent evidence in the record that in turn supported its conclusions.

2. Workers' Compensation— replacement of breast implant—sufficiency of evidence

The Court of Appeals did not err in a workers' compensation case by concluding there was insufficient evidence of the need to replace plaintiff's left breast implant, and the case is remanded to the Full Commission to determine the appropriate amount of

compensation for replacement of the right implant alone, because: (1) there was no competent evidence to support the Commission's finding ten regarding accident-related damage to the left implant or about the need to replace both implants when only one was damaged simply based on the assertion that the replacements would have to be symmetrical and evenly matched; (2) a testifying doctor was unable to testify to a reasonable degree of medical probability that any damage to the left implant was related to the accident, he specifically stated that he could not do so, and he expressed no opinion about the need to replace both implants when one is replaced and did not discuss any need or expectation that implants be evenly matched or symmetrical; and (3) plaintiff cited no testimony to support the Commission's finding.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 188 N.C. App. 337, 657 S.E.2d 34 (2008), affirming in part, reversing in part, and remanding an opinion and award entered by the North Carolina Industrial Commission on 15 March 2006. Heard in the Supreme Court 10 September 2008.

Anne R. Harris; and Lennon & Camak, PLLC, by George W. Lennon, for plaintiff-appellant.

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

HUDSON, Justice.

This workers' compensation case concerns two issues: 1) sufficiency of notice to the employer of an injury by accident, and 2) whether competent evidence supported the Industrial Commission's findings about the need to replace plaintiff's left breast implant. We conclude that in enacting N.C.G.S. § 97-22, the General Assembly did not intend to require an injured worker to give written notice when the employer has actual notice of her on-the-job injury, as the employer had here. Further, we find the evidence of the need to replace the left implant to be insufficient. As discussed below, we affirm in part, reverse in part, and remand.

On 16 May 2001, plaintiff Penny Rumple Richardson was injured in a motor vehicle collision while on her job as a certified nursing assistant. Plaintiff's evidence showed that she suffered numerous injuries, including to her chest. Within thirty minutes after the crash,

while on the way to the emergency room, she called her supervisor by telephone to report the incident and request that he send someone to care for her patient in her absence. She did not give written notice until she filed a Form 18 (Notice of Accident to Employer and Claim of Employee for Workers' Compensation Benefits) with the Industrial Commission in June 2002.

Plaintiff saw her family physician for facial injuries and body soreness the day after the wreck. She also saw a plastic surgeon, David Bowers, M.D., beginning on 31 May 2001 and "complained of ruptured breast implants." On 7 June 2001, Dr. Bowers replaced both implants. He testified that the right implant did appear to be ruptured, but that "the left implant did not appear to me to be—to have been ruptured." Plaintiff also sought treatment for her knee from an orthopedic surgeon. Collectively, these physicians took her out of work until 6 August 2001. Plaintiff then worked until 6 October 2001, when she had surgery on her right knee. She performed sporadic light-duty jobs for her employer until shortly before another knee surgery on 25 June 2002. Since that date, she has been under restrictions and has not worked.

Following the accident, plaintiff filed a claim with Nationwide Insurance, her own motor vehicle carrier, because the at-fault driver of the other car did not stop and was never located. After receiving her final check from Nationwide in payment for her personal injuries, plaintiff filed her claim for workers' compensation benefits with the Industrial Commission in June 2002.

Defendants denied liability for the claim. The matter was heard before a deputy commissioner, who awarded plaintiff temporary total disability compensation and ordered defendants to pay all related medical expenses.

Defendants appealed to the Full Commission, which filed a divided decision on 15 March 2006 affirming the deputy with modifications. Defendants appealed to the Court of Appeals. On 5 February 2008, a divided panel of that court affirmed in part, reversed in part, and remanded the matter to the Commission for further proceedings. The majority agreed with defendants that the Full Commission erred in failing to address properly whether plaintiff reported her claim as required by N.C.G.S. § 97-22 and concluded that she failed to show a causal connection between the accident and any damage to her left breast implant. We reverse on the issue of notice, but affirm on the question of whether there was competent evidence to support the award of benefits for replacement of the left implant.

The standard of review in workers' compensation cases has been firmly established by the General Assembly and by numerous decisions of this Court. N.C.G.S. § 97-86 (2007); *e.g. Deese v. Champion Int'l Corp.*, 352 N.C. 109, 530 S.E.2d 549 (2000). Under the Workers' Compensation Act, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965). Therefore, on appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. *Adams v. AVX Corp.*, 349 N.C. 676, 681-82, 509 S.E.2d 411, 414 (1998). This "court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274.

The Commission made the following findings of fact and mixed findings of fact and conclusions of law[1] relevant to the two issues before this Court:

> 4. The plaintiff called her supervisor, David Popp, to report the accident within thirty minutes of the incident. She requested that he send a staff member to care for her patient. The defendants acknowledge the plaintiff's same-day notification of the accident as indicated on the Form 19 dated August 9, 2002. The defendants did not send another staff member to care for the plaintiff's patient.
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> . . . .
>
> 8. The plaintiff began to experience a decrease in the size of her breast implants almost immediately after the accident. She reported her concerns to the physicians at the emergency room, where a visual inspection was performed, and no asymmetry noted.
>
> 9. The plaintiff followed up with Dr. David Bowers, a plastic surgeon, on May 31, 2001, regarding her breast implants. She reported a decrease in the size of her implants since the accident. On June 7, 2001, Dr. Bowers performed bilateral breast re-augmentation, removing Plaintiff's original breast implants and replacing them with new implants. Dr. Bowers testified that the

1. Denominated findings of fact 27 and 28 are actually mixed findings of fact and conclusions of law.

right breast implant had a leak at the time it was removed, but the left one did not appear to have ruptured. He replaced both implants with fully filled 475 cc implants. Dr. Bowers billed and was paid by Nationwide Insurance for his work, pursuant to plaintiff's claim with Nationwide. Dr. Bowers restricted the plaintiff from work from June 7, 2001, the date of her surgery, until July 26, 2001.

10. The damage to plaintiff's breast implants were [sic] caused or aggravated by the accident. Dr. Bowers testified that the accident caused the leak he found in the plaintiff's right breast implant. He was not certain whether the accident caused the rippling in her left breast implant or whether the rippling was from normal wear and tear. However, Dr. Bowers noted that, even if there was deterioration of the implants pre-accident, the trauma to the plaintiff's chest would "most definitely" have accelerated or aggravated the process. Dr. Bowers replaced both implants, even though only one had ruptured, because the replacements would have to be symmetrical and evenly matched. Replacement of one implant required replacement of both.

. . . .

27. Defendants had no reasonable basis upon which to deny the plaintiff's claim. The defendants also failed to admit or deny the plaintiff's claim for injuries that she sustained in the May 16, 2001 accident in that they had actual notice of her injury by accident within 30 minutes of the time of the accident and have known about the medical treatment plaintiff has received as it was performed.

28. The plaintiff notified the defendant-employer about her accident on May 16, 2001, within thirty minutes. Her notice was timely. She gave written notice, by filing a Form 18 in June 2002. In light of the defendants' actual notice of the plaintiff's accident in May 2001, the defendants were not prejudiced by her failure to immediately file a written notice.

29. The defendants have not denied this claim within the prescribed time period as set forth in N.C. Gen. Stat. § 97-18, despite their actual notice. Thus, the Full Commission finds the amount of $250.00 to be a reasonable sanction for the defendants' failure to comply with the filing requirements of N.C. Gen. Stat. § 97-18.

[1] We begin by considering whether the majority in the Court of Appeals erred in remanding to the Full Commission for additional findings of fact and conclusions of law concerning whether plaintiff satisfied the notice requirements of N.C.G.S. § 97-22. As discussed below, we conclude that the Commission's findings and conclusions were adequate and the Court of Appeals' decision to remand was in error.

N.C.G.S. § 97-22 provides:

> Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, . . . *unless it can be shown that the employer, his agent or representative, had knowledge of the accident*, . . . ; but no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, *unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.*

N.C.G.S. § 97-22 (2007) (emphasis added). Here, plaintiff did not give written notice of the accident to her employer until she filed Form 18 on 24 June 2002, well outside the thirty day period specified in section 97-22. However, as the Commission noted in findings four, twenty-seven and twenty-eight, plaintiff did notify her employer by telephone within thirty minutes after the collision, providing the employer actual "knowledge of the accident." The employer was also aware of plaintiff's injuries and medical treatments based on her regular communications between May 2001 and May 2002.

These findings in turn support the Commission's conclusion (actually stated in denominated finding twenty-eight) that in light of their immediate actual knowledge of plaintiff's injury by accident, "defendants were not prejudiced by her failure to immediately file a written notice." Thus, the Commission concluded, plaintiff complied with the requirements of section 97-22 by providing immediate actual notice to her employer, which was a reasonable excuse for not giving timely written notice, and by satisfying the Commission "that the employer has not been prejudiced thereby."

We note that the majority in the Court of Appeals cited *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979), for the proposition that "the mere existence of actual notice, without

more, cannot satisfy the statutorily required finding with respect to 'prejudice,' as the issue of 'prejudice' pursuant to section 97-22 must be evaluated in relation to the purpose of the notice requirement." *Richardson v. Maxim Healthcare/Allegis Grp.*, 188 N.C. App. 337, 346-47, 657 S.E.2d 34, 40 (2008). In *Booker*, this Court's actual holding was that the employer had waived the notice issue by failing to raise it before the Commission. 297 N.C. at 482, 256 S.E.2d at 204. In dicta, this Court did discuss two purposes for the statutory notice requirement: "It allows the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury, and it facilitates the earliest possible investigation of the circumstances surrounding the injury." *Id.* at 481, 256 S.E.2d at 204 (citation omitted). More recently, in *Legette v. Scotland Mem'l Hosp.*, 181 N.C. App. 437, 640 S.E.2d 744 (2007), *appeal dismissed and disc. rev. denied*, 362 N.C. 177, 658 S.E.2d 273 (2008), the Court of Appeals held that the hospital's actual notice of the plaintiff's injury "obviated the need for Plaintiff to provide written notice." *Id.* at 447, 640 S.E.2d at 751.

Although we denied review in *Legette*, leaving that holding intact, we have not explicitly stated the holding as above. Today we do. The plain language of section 97-22 requires an injured employee to give written notice of an accident "*unless it can be shown that the employer, his agent or representative, had knowledge of the accident.*" When an employer has actual notice of the accident, the employee need not give written notice, and therefore, the Commission need not make any findings about prejudice. The second clause of N.C.G.S. § 97-22, following the semicolon, applies to those cases in which written notice is required because the employer has no actual notice of the accident. It explains that an employee may be excused from even that requirement by providing a reasonable excuse for failing to give notice and by showing that the employer has not been prejudiced. Here, the employer's immediate actual notice of plaintiff's injury by accident satisfied the purposes of section 97-22, identified by this Court in *Booker*. Had it so desired, the employer could have acted to minimize the seriousness of plaintiff's injury by providing early medical care and to conduct the earliest possible investigation into the surrounding circumstances. Significantly, the employer's "actual notice" or "knowledge" of the accident also triggered the employer's duties set forth elsewhere in the Act to notify the Commission within five days, to notify the plaintiff within fourteen days of its decision to admit or deny the injury, and to quickly investigate. *See* N.C.G.S. §§ 97-18, 97-92; Indus. Comm'n R. 104. Moreover,

although we now hold it was not required to do so, the Commission specifically concluded that the employer here suffered no prejudice, having failed to act on its *actual* notice in any way, and further having failed to carry out these related statutory duties.

Finding four, and the factual portions of findings twenty-seven and twenty-eight are supported by competent evidence in the record, specifically by testimony from plaintiff and by the Form 19 eventually filed by the employer, dated 9 August 2002. In addition, as noted in finding twenty-nine, despite its actual knowledge of plaintiff's injury by accident on the day the accident occurred, 16 May 2001, the employer failed to investigate the circumstances or file the required forms and reports until it filed Form 19 in August 2002. As a result of these statutory violations, the Commission imposed a sanction upon defendants in the amount of $250.00. Because they are supported by competent evidence and not challenged here, these findings are conclusive. Here, the Commission's findings and conclusions regarding notice of plaintiff's injury go beyond what is required by N.C.G.S. § 97-22, although consistent with the dicta in *Booker*. We conclude that the Commission's findings regarding sufficiency of notice were supported by competent evidence in the record and that those findings in turn support its conclusions.

[2] We next consider whether competent evidence supported the Commission's finding that replacement of plaintiff's left breast implant was necessary as a result of the compensable accident. The majority in the Court of Appeals held that although "the Full Commission correctly ruled with respect to the replacement of plaintiff's right breast implant," it "erred in concluding that 'plaintiff sustained compensable injuries to her . . . *bilateral* breast implants.' " *Richardson*, 188 N.C. App. at 350, 657 S.E.2d at 42 (emphasis added by court). We agree.

Having carefully reviewed the record, we find no competent evidence to support the Commission's finding ten regarding accident-related damage to the left implant or about the need to replace both implants when only one was damaged because "the replacements would have to be symmetrical and evenly matched." Dr. Bowers consistently distinguished between the left and right breast implants, noting that the right implant had ruptured and was leaking while the left was not ruptured. He opined that the rippling he saw in the left implant was more likely due to an original underfilling. Dr. Bowers was unable to testify to a reasonable degree of medical probability that any damage to the left implant was related to the accident, and

he specifically stated that he could not do so. He expressed no opinion about the need to replace both implants when one is replaced and did not discuss any need or expectation that implants be evenly matched or symmetrical. Plaintiff cites no testimony to support the Commission's finding, referring only to Dr. Bowers' testimony that plaintiff told him that she thought there had been bilateral loss in the size of the implants. Although it seems logical that symmetry is desirable, our review is limited to the evidence in the record, and on this point, we find none.

Because there is no competent evidence to support finding ten, the Commission's award of benefits related to replacement of plaintiff's left implant cannot be upheld. Therefore, we affirm the Court of Appeals' remand to the Full Commission to determine the appropriate amount of compensation for replacement of the right implant alone.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

STATE OF NORTH CAROLINA v. THOMAS HOWARD DUNCAN

No. 91A08

(Filed 12 December 2008)

Constitutional Law— effective assistance of counsel—failure to request diminished capacity instruction—motion for appropriate relief

The decision of the Court of Appeals that defense counsel's failure to request an instruction on diminished capacity in a first-degree murder trial constituted ineffective assistance of counsel was reversed for the reason stated in the dissenting opinion that the ineffective assistance of counsel claim should be dismissed without prejudice so as to allow defendant to reassert that claim in a subsequent motion for appropriate relief proceeding in which defense counsel's trial strategy may be considered.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 188 N.C. App. 508, 656 S.E.2d 597 (2008), vacating a judgment entered on 28 June 2006 by Judge Gary E. Trawick in Superior Court, Brunswick County, and remand-

ing for a new trial. On 11 June 2008, the Supreme Court allowed the State's petition for discretionary review of an additional issue. Heard in the Supreme Court 17 November 2008.

Roy Cooper, Attorney General, by John G. Barnwell, Assistant Attorney General, and Jonathan P. Babb, Special Deputy Attorney General, for the State-appellant.

Center for Death Penalty Litigation, by Lisa Miles, for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion of the Court of Appeals, the decision of the Court of Appeals is reversed and that court is instructed to reinstate the judgment of the trial court. Discretionary review of the additional issue was improvidently allowed. Defendant's claim of ineffective assistance of counsel is dismissed without prejudice to his right to raise that issue by filing a motion for appropriate relief in the superior court.

REVERSED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

C. WAYNE CRAWFORD AND LYNN P. CRAWFORD v. COLON S. MINTZ, JR., WILLIAM R. OWENS, AND BFD PROPERTIES, INC. D/B/A RE/MAX PROPERTY ASSOCIATES

No. 47A08

(Filed 12 December 2008)

Fraud— negligent misrepresentation—misinformation in MLS listing—justifiable reliance

The decision of the Court of Appeals that the trial court erred by denying defendant real estate brokers' motion for a directed verdict on plaintiff buyers' claim for negligent misrepresentation arising from defendants' incorrect statement on the sellers' MLS listing that the house was served by a city sewer system when it in fact had a septic system is reversed for the reason stated in the dissenting opinion that, although the buyers saw this misinfor-

mation on a printout that omitted the language "Information deemed reliable but not guaranteed," the trial court properly submitted the issue of justifiable reliance to the jury.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 187 N.C. App. 378, 653 S.E.2d 222 (2007), reversing an order and judgment entered on 11 May 2006 by Judge James R. Fullwood in District Court, Wake County. On 11 June 2008, the Supreme Court allowed plaintiffs' petition for discretionary review of additional issues. Heard in the Supreme Court 19 November 2008.

Everett, Gaskins, Hancock & Stevens, LLP, by E.D. Gaskins, Jr. and Michael J. Tadych, for plaintiff-appellants.

McDaniel & Anderson, L.L.P., by John M. Kirby, for defendant-appellees.

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 consideration of the remaining assignments of error. Plaintiffs' petition for discretionary review as to additional issues was improvidently allowed.

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. ERIC GLENN LANE

No. 606A05

(Filed 12 December 2008)

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Gary E. Trawick on 11 July 2005 in Superior Court, Wayne County, upon a jury verdict finding defendant guilty of first-degree murder. On 20 March 2008, 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 on 17 November 2008.

Roy Cooper, Attorney General, by Robert C. Montgomery, Special Deputy Attorney General, and Derrick C. Mertz, Assistant Attorney General, for the State.

Ann B. Petersen for defendant-appellant.

PER CURIAM.

The trial court entered judgment imposing the jury's capital sentence in this case on 11 July 2005. The Supreme Court of the United States decided *Indiana v. Edwards* on 19 June 2008. —— U.S. ——, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008). Based on *Edwards*, defendant argues on appeal that he is entitled to a new trial because the trial court was unaware of its discretion to deny defendant's request for self-representation, and that if it had been aware of its discretion, the trial court would have required counsel for defendant. In light of *Edwards*, this case is remanded to the Superior Court, Wayne County, for further hearing by the presiding trial judge to determine the following issues:

(1) At the time defendant sought to represent himself in this matter, did he come within the category of "borderline-competent" (or "gray-area") defendants, *id.* at ——, 128 S. Ct. at 2384-85, 171 L. Ed. 2d at 353-55, defined by the Supreme Court of the United States as parties "competent enough to stand trial under *Dusky* [*v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960) (per curiam)] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves"? *Edwards*, —— U.S. at ——, 128 S. Ct. at 2388, 171 L. Ed. 2d at 357.

Only if the first inquiry is answered in the affirmative should the trial court proceed to this second issue:

(2) Given that the United States Constitution permits judges to preclude self-representation for defendants adjudged to be "borderline-competent" based on a "realistic account of the particular defendant's mental capacities," *id.* at ——, 128 S. Ct. at 2387-88, 171 L. Ed. 2d at 357, the court shall consider whether the court in its discretion would have precluded self-representation for defendant and appointed counsel for him pursuant to *Indiana v. Edwards*, and if so, whether in this case defendant was prejudiced by his period of self-representation.

The trial court is directed to hold this hearing, make findings of fact and conclusions of law, and certify its opinion to this Court within 120 days of the filing date of this opinion.

REMANDED.

TERRY'S FLOOR FASHIONS, INC. v. CROWN GENERAL CONTRACTORS, INC. AND JERRY SHUMATE ALVIS

No. 362A07

(Filed 12 December 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 184 N.C. App. 1, 645 S.E.2d 810 (2007), affirming a judgment entered on 28 September 2005 by Judge Jane P. Gray in District Court, Wake County. Heard in the Supreme Court 13 October 2008.

Ragsdale Liggett PLLC, by Walter L. Tippett, Jr. and Caroline V. Barbee, for plaintiff-appellee.

Young Moore and Henderson, P.A., by David M. Duke and Shannon S. Frankel, for defendant-appellant Jerry Shumate Alvis.

PER CURIAM.

AFFIRMED.

LAMAR OCI SOUTH CORPORATION D/B/A LAMAR ADVERTISING OF ASHEVILLE, PETITIONER v. STANLY COUNTY ZONING BOARD OF ADJUSTMENT AND STANLY COUNTY, RESPONDENTS

No. 485A07

(Filed 12 December 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 186 N.C. App. 44, 650 S.E.2d 37 (2007), reversing an order entered on 19 April 2006 and affirming an order entered on 28 April 2006, both by Judge Mark E. Klass in Superior Court, Stanly County. On 6 March 2008, the Supreme Court allowed petitioner's petition for discretionary review of additional issues. Heard in the Supreme Court 14 October 2008.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Craig D. Justus, for petitioner-appellee/appellant.

Hamilton Moon Stephens Steele & Martin, PLLC, by Robert C. Stephens and Mark R. Kutny, for respondent-appellants/appellees.

PER CURIAM.

As to the issue on direct appeal 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 IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

IN RE WILLIAMSON VILLAGE CONDOMINIUMS

No. 20A08

(Filed 12 December 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 187 N.C. App. 553, 653 S.E.2d 900 (2007), reversing an order granting summary judgment for defendants entered 20 November 2006 by Judge Preston Cornelius in Superior Court, Iredell County, and remanding for entry of summary judgment in plaintiff's favor. Heard in the Supreme Court 13 October 2008.

McIntosh Law Firm, by James C. Fuller and Prosser D. Carnegie, for plaintiff-appellee.

Eisele, Ashburn, Greene & Chapman, PA, by Douglas G. Eisele, for defendant-appellants.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. RICKY KYLE CORBETT

No. 337A08

(Filed 12 December 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 191 N.C. App. ——, 661 S.E.2d 759 (2008), dismissing defendant's appeal from a judgment entered 2 April 2007 by Judge James C. Spencer, Jr. in Superior Court, Alamance County. Heard in the Supreme Court 19 November 2008.

Roy Cooper, Attorney General, by Kathryne E. Hathcock, Assistant Attorney General, for the State.

C. Scott Holmes for defendant-appellant.

PER CURIAM.

AFFIRMED.

JULIUS CAESER MOORE v. NATIONWIDE MUTUAL INSURANCE COMPANY AND NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

No. 330A08

(Filed 12 December 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 191 N.C. App. —, 664 S.E.2d 326 (2008), affirming an order dismissing plaintiff's complaint entered 22 August 2007 by Judge Phyllis M. Gorham in Superior Court, Duplin County. Heard in the Supreme Court 17 November 2008.

Crawford & Crawford, LLP, by Robert O. Crawford, III; and Hemmings & Stevens, P.L.L.C., by Aaron C. Hemmings, for plaintiff-appellant.

George L. Simpson III for defendant-appellees.

Twiggs, Beskind, Strickland & Rabenau, P.A., by Jerome P. Trehy, Jr., for the North Carolina Academy of Trial Lawyers, amicus curiae.

Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for the North Carolina Association of Defense Attorneys, amicus curiae.

PER CURIAM.

AFFIRMED.

IN RE B.L.H. & Z.L.H.

[362 N.C. 674 (2008)]

IN THE MATTER OF B.L.H. AND Z.L.H., MINOR CHILDREN

No. 259A08

(Filed 12 December 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 190 N.C. App. 142, 660 S.E.2d 255 (2008), reversing judgments entered 25 July 2007 by Judge Marvin P. Pope, Jr. in District Court, Buncombe County. Heard in the Supreme Court 14 October 2008.

Charlotte W. Nallan for petitioner-appellant Buncombe County Department of Social Services.

Michael N. Tousey, Attorney Advocate, for appellant Guardian ad Litem.

Annick Lenoir-Peek, Assistant Appellate Defender, for respondent-appellee mother.

PER CURIAM.

AFFIRMED.

JEFFREY BERNARD LINEBERGER v. NORTH CAROLINA DEPARTMENT OF CORRECTION, A NORTH CAROLINA STATE AGENCY, AND THE NORTH CAROLINA POST-RELEASE SUPERVISION AND PAROLE COMMISSION, A NORTH CAROLINA STATE AGENCY

No. 141A08

(Filed 12 December 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 189 N.C. App. 1, 657 S.E.2d 673 (2008), affirming an order and judgment entered on 7 June 2006 by Judge Donald W. Stephens in Superior Court, Wake County. On 11 June 2008, the Supreme Court allowed defendants' petition for discretionary review of additional issues. Heard in the Supreme Court 18 November 2008.

Glover & Petersen, P.A., by Ann B. Petersen and James R. Glover, for plaintiff-appellee.

Roy Cooper, Attorney General, by Elizabeth F. Parsons, Assistant Attorney General, for defendant-appellants.

PER CURIAM.

As to the issue on direct appeal 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 IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

STEVIE JOHNSON, EMPLOYEE v. CITY OF WINSTON-SALEM, EMPLOYER, SELF-INSURED

No. 111A08

(Filed 12 December 2008)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 188 N.C. App. 383, 656 S.E.2d 608 (2008), affirming an opinion and award entered by the North Carolina Industrial Commission on 5 February 2007. Heard in the Supreme Court on 13 October 2008.

Roderick T. McIver for plaintiff-appellee.

Wilson & Coffey, LLP, by Kevin B. Cartledge and Lorin J. Lapidus, for defendant-appellant.

PER CURIAM.

AFFIRMED.

ELLISON v. GAMBILL OIL CO.

[362 N.C. 677 (2008)]

JERRY ELLISON, EXECUTOR OF THE ESTATE OF KATE H. ELLISON, PLAINTIFF	)	
v.	)	
GAMBILL OIL COMPANY, INC., J. GWYN GAMBILL, INCORPORATED, AND JIM GAMBILL; GUNVANTPURI B. GOSAI AND B&B MINI MART, INC.; AND ARLIS TESTER D/B/A TESTERS GARAGE AND MUFFLER SHOP AND/OR TESTERS SHELL & MUFFLER SHOP, DEFENDANTS	)	ORDER
J. GWYN GAMBILL, INCORPORATED, THIRD PARTY PLAINTIFF	)	
v.	)	
JEFF BARRETT D/B/A BARRETT PETROLEUM EQUIPMENT, THIRD PARTY DEFENDANT	)	
RUDRAM ENTERPRISES, INC., CROSS-PLAINTIFF-INTERVENOR	)	
v.	)	
J. GWYN GAMBILL, INCORPORATED, JIM GAMBILL, AND JEFF BARRETT D/B/A BARRETT PETROLEUM EQUIPMENT	)	

No. 541A07

Having reviewed the briefs and heard oral arguments on plaintiff's appeal on 17 November 2008, the Court *ex mero motu* withdraws its previous order, dated 10 April 2008, denying plaintiff's petition for discretionary review, and allows plaintiff's petition for discretionary review.

Plaintiff shall have forty-five (45) days from the date of this order to file and serve her brief and defendants shall have forty-five (45) days from the service of plaintiff's brief to file and serve their briefs. After all briefs have been filed pursuant to this order, if necessary, the Court will recalendar the case for additional oral argument.

By order of the Court in Conference, this 11th day of December, 2008.

Hudson, J.
For the Court

NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION	)	
v.	)	ORDER
THE BOARD OF TRUSTEES OF GUILFORD TECHNICAL COMMUNITY COLLEGE	)	

No. 470P07

The Court allows plaintiff's Petition for Discretionary Review and orders briefing on the following issues:

(1) Whether granting the right to a State agency to participate in a program, including the right to sue for benefits arising from the program, waives the defense of sovereign immunity?

(2) Whether a legislative amendment which made State agencies and subdivisions "persons" eligible for the benefits of the North Carolina Insurance Guaranty Association Act (N.C.G.S. § 58-48-1 *et seq*.) also waived the defense of sovereign immunity as to the NCIGA's expressly granted cause-of-action against high net-worth employers?

By Order of the Court in Conference, this 11th day of December, 2008.

Hudson, J.
For the Court

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

Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co. Case below: 192 N.C. App. —— (19 August 2008)	No. 451P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-329)	Denied 12/11/08
Blue Ridge Co. v. Town of Pineville, N.C. Case below: 188 N.C. App. 466	No. 101P08	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA07-206) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 12/11/08 2. Dismissed as Moot 12/11/08
Bluebird Corp. v. Aubin Case below: 188 N.C. App. 671	No. 128P08	Plt's (Susi) PDR Under N.C.G.S. § 7A-31 (COA07-282)	Denied 12/11/08
Brown v. Ellis Case below: 184 N.C. App. 547	No. 389P07	1. Plt-Appellant's NOA Pursuant to N.C.G.S. § 7A-30(1) (COA06-710) 2. Def's Motion to Dismiss Appeal 3. Plt-Appellant's Conditional PDR 4. Plt-Appellant's PWC for Review of Order of COA 5. Def's Conditional PDR Under N.C.G.S. § 7A-31 6. Plt's Motion for Leave to Supplement PWC, NOA, and PDR	1. —— 2. Allowed 12/11/08 3. Allowed 12/11/08 4. Denied 12/11/08 5. Denied 12/11/08 6. Allowed 04/10/08
Bryant v. Taylor King Furn. Case below: 189 N.C. App. 530	No. 167P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-120)	Allowed 12/11/08
CIM Ins. Corp. v. Cascade Auto Glass, Inc. Case below: 190 N.C. App. —— (3 June 2008)	No. 311P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1079)	Denied 12/11/08 **Martin, J., Recused**

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

Cockerham-Ellerbee v. Town of Jonesville Case below: 190 N.C. App. 150	No. 266P08	Defs' PDR Under N.C.G.S. § 7A-31 (COA07-1161)	Denied 12/11/08
Countrywide Home Loans, Inc. v. Bank One, N.A. Case below: 190 N.C. App. ––– (20 May 2008)	No. 293P08	Defs' PDR Under N.C.G.S. § 7A-31 (COA07-1137)	Denied 12/11/08
Dalenko v. Collier Case below: 191 N.C. App. ––– (5 August 2008)	No. 274A08-2	Plt's NOA Based Upon a Constitutional Question (COA07-1404)	Dismissed *Ex Mero Motu* 12/11/08
Davis v. City of New Bern Case below: 189 N.C. App. 723	No. 201P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-785)	Denied 12/11/08 **Martin, J., Recused**
Davis v. Sugarman Case below: 192 N.C. App. ––– (19 August 2008)	No. 471P08	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA07-505) 2. Defs' (Sugarman & Sanger Clinic) Conditional PDR Under N.C.G.S. § 7A-31 3. Defs' (Scherczinger & Charlotte Cardiology) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 12/11/08 2. Dismissed as Moot 12/11/08 3. Dismissed as Moot 12/11/08
Elm St. Gallery, Inc. v. Williams Case below: 191 N.C. App. ––– (5 August 2008)	No. 414P08	Plts' PDR Under N.C.G.S. § 7A-31 (COA08-10)	Denied 12/11/08 **Edmunds, J., Recused**
Felts v. Felts Case below: 192 N.C. App. ––– (2 September 2008)	No. 454P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-967)	Denied 12/11/08
Goodwin v. Smith Case below: 171 N.C. App. 707	No. 398P08	1. Plt's PWC to Review Order of Guilford County Superior Court (COA04-1266) 2. Plt's PWC to Review Decision of COA	1. Denied 12/11/08 2. Denied 12/11/08

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

Gregory v. W.A. Brown & Sons Case below: 192 N.C. App. —— (5 August 2008)	No. 447A08	1. Def-Appellants' NOA (Dissent) (COA07-1265) 2. Def-Appellants' Motion for Temporary Stay 3. Def-Appellants' Petition for Writ of Supersedeas 4. Def-Appellants' PDR as to Additional Issues	1. —— 2. Allowed 09/24/08 3. Allowed 12/11/08 4. Denied 12/11/08
Hamilton v. Thomasville Med. Assocs. Case below: 187 N.C. App. 789	No. 025P08	Defs' PDR Under N.C.G.S. § 7A-31 (COA07-583)	Denied 12/11/08
Heatzig v. MacLean Case below: 191 N.C. App. —— (5 August 2008)	No. 418P08	1. Def's (Elizabeth MacLean) NOA Based Upon a Constitutional Question (COA07-875) 2. Plt's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 12/11/08 3. Denied 12/11/08
Helms v. Helms Case below: 191 N.C. App. —— (17 June 2008)	No. 340A08	1. Def-Appellant's NOA (Dissent) (COA07-1090) 2. Def-Appellant's PDR	1. —— 2. Denied 12/11/08
In re A.S. Case below: 190 N.C. App. —— (3 June 2008)	No. 310A08	1. Respondent's (Mother) NOA (Dissent) (COA07-1242) 2. Respondent's (Mother) PDR as to Additional Issues	1. —— 2. Denied 12/11/08
In re C.T.J. Case below: 191 N.C. App. —— (1 July 2008)	No. 352P08	Respondent's PDR Under N.C.G.S. § 7A-31 (COA08-75)	Denied 12/11/08
In re E.S. Case below: 191 N.C. App. —— (5 August 2008)	No. 396P08	Juvenile's PDR Under N.C.G.S. § 7A-31 (COA07-1054)	Denied 12/11/08
In re K.L.C. & K.R.N. Case below: 191 N.C. App. —— (15 July 2008)	No. 470P08	Respondent-Appellant's Petion for "Writ of Certari (sic)"	Dismissed 12/11/08

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

In re Z.A.K. Case below: 189 N.C. App. 354	No. 191P08	1. Petitioner's (Juvenile) PDR Under N.C.G.S. § 7A-31 (COA07-641) 2. Respondent's (State) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 12/11/08 2. Dismissed as Moot 12/11/08
Johnson v. Walker Case below: 190 N.C. App. 205	No. 302P08	Defs' PDR Under N.C.G.S. § 7A-31 (COA07-523)	Denied 12/11/08
Kerr v. Long Case below: 189 N.C. App. 331	No. 216P08	Plt's PWC to Review Decision of COA (COA07-916)	Denied 12/11/08
Meares v. Dana Corp. Case below: 193 N.C. App. —— (7 October 2008)	No. 502P08	Defs' Motion for Temporary Stay (COA07-1401)	Allowed 11/12/08
Muchmore v. Trask Case below: 192 N.C. App. —— (16 September 2008)	No. 479P08	Plt's Motion for Temporary Stay (COA07-995)	Allowed 10/24/08
N.C. Ins.Guar. Ass'n v. Board of Trs. of Guilford Technical Cmty. Coll. Case below: 185 N.C. App. 518	No. 470P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-401)	See Special Order Page 678
N.C. State Bar v. Gilbert Case below: 189 N.C. App. 320	No. 194P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-74)	Denied 12/11/08
Sawyer v. Market Am., Inc. Case below: 190 N.C. App. —— (3 June 2008)	No. 312P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-1257)	Denied 12/11/08
Snyder v. Duncan Case below: 191 N.C. App. —— (15 July 2008)	No. 382P08	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA07-106) 2. Def's (Buchanan) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 12/11/08 2. Dismissed as Moot 12/11/08

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

Snyder v. Learning Servs. Corp. Case below: 187 N.C. App. 480	No. 016P08	1. Def's PDR Under N.C.G.S. § 7A-31 (COA07-98) 2. Def's Motion to Withdraw PDR	1. —— 2. Allowed 12/11/08 **Martin, J., Recused**
State v. Abshire Case below: 192 N.C. App. —— (16 September 2008)	No. 459A08	1. State's Motion for Temporary Stay (COA07-1185) 2. State's Petition for Writ of Supersedeas 3. State's NOA (Dissent) 4. State's PDR as to Additional Issues	1. Allowed 10/06/08 2. Allowed 12/11/08 3. —— 4. Allowed 12/11/08
State v. Banks Case below: 191 N.C. App. —— (5 August 2008)	No. 426P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1226)	Denied 12/11/08
State v. Bass Case below: 190 N.C. App. 339	No. 373P08	1. Def's NOA Under N.C.G.S. § 7A-30(1) (COA07-604) 2. Def's PWC Under N.C.G.S. § 7A-32(c), 15A-1442 et seq. and Rule 21 of the N.C. R. App. P.	1. Dismissed *Ex Mero Motu* 12/11/08 2. Denied 12/11/08
State v. Boston Case below: 191 N.C. App. —— (5 August 2008)	No. 421P08	1. Def-Appellant's NOA (Constitutional Question) 2. State's Motion to Dismiss Appeal 3. Def-Appellant's PDR Under N.C.G.S. § 7A-31(c)(2)	1. —— 2. Allowed 12/11/08 3. Denied 12/11/08
State v. Bowden Case below: 193 N.C. App. —— (4 November 2008)	No. 514P08	State's Motion for Temporary Stay (COA08-372)	Allowed 11/21/08
State v. Bryant Case below: 191 N.C. App. —— (15 July 2008)	No. 376P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1337)	Denied 12/11/08

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

State v. Chappelle Case below: 193 N.C. App. —— (21 October 2008)	No. 494P08	1. Def's NOA Based Upon a Constitutional Question (COA07-1312) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Allowed 12/11/08 3. Denied
State v. Cousar Case below: 190 N.C. App. —— (3 June 2008)	No. 313P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-850)	Denied 12/11/08
State v. Delrosario Case below: 190 N.C. App. —— (3 June 2008)	No. 323P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-953)	Denied 12/11/08
State v. Dewalt Case below: 190 N.C. App. 158	No. 261P08	1. Def's PDR Under N.C.G.S. § 7A-31 (COA07-196) 2. Def's Motion to Suspend the Rules to Permit the Belated Filing of a NOA Based Upon a Constitutional Question, or, in the Alternative, Def's PWC 3. State's Motion to Dismiss Appeal	1. Denied 12/11/08 2. Denied 12/11/08 3. Dismissed as Moot 12/11/08
State v. Duncan Case below: 191 N.C. App. —— (15 July 2008)	No. 386A08	1. Def's NOA Based Upon a Constitutional Question (COA07-1559) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed 12/11/08
State v. Garris Case below: 191 N.C. App. —— (15 July 2008)	No. 381P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1388)	Denied 12/11/08
State v. Godwin Case below: 193 N.C. App. —— (7 October 2008)	No. 489P08	1. Def's NOA Based Upon a Constitutional Question (COA07-1280) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 12/11/08 3. Denied 12/11/08
State v. Grimes Case below: 193 N.C. App. —— (21 October 2008)	No. 509P08	1. Def's NOA Based Upon a Constitutional Question (COA08-425) 2. Def's PDR Under N.C.G.S. § 7A-31	1.Dismissed *Ex Mero Motu* 12/11/08 2. Dismissed 12/11/08

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

State v. Hallyburton Case below: 190 N.C. App. 206	No. 446P08	Def's PWC to Review Decision of COA (COA07-1114)	Denied 12/11/08
State v. Hyman Cases below: 1. 172 N.C. App. 173 2. 182 N.C. App. 529 3. Bertie County Superior Court	No. 245P08	1. Def's PWC to Review Decision of COA (COA04-1058) 2. Def's PWC to Review Decision of COA (COA06-939) 3. Def's PWC to Review Order of Bertie County Superior Court	1. Denied 12/11/08 2. Denied 12/11/08 3. Denied 12/11/08
State v. Ibarra Case below: 189 N.C. App. 788	No. 227P08-2	Def's Petition for Writ of Habeas Corpus Under N.C. Gen. Stat. Sec. 17-3 et al. (COA07-1236)	Denied 12/03/08
State v. Jacobs Case below: 193 N.C. App. —— (4 November 2008)	No. 617P05-2	State's Motion for Temporary Stay (COA04-541-2)	Allowed 11/24/08
State v. Little 191 N.C. App. —— (5 August 2008)	No. 407P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-82)	Denied 12/11/08
State v. Lopez Case below: 188 N.C. App. 553	No. 095PA08	1. State's PDR Under N.C.G.S. § 7A-31 (COA07-422) 2. Def's NOA Based Upon a Constitutional Question 3. State's Motion to Dismiss Appeal 4. Def's PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Amend NOA and PDR	1. Allowed 12/11/08 2. —— 3. Allowed 12/11/08 4. Allowed 12/11/08 5. Allowed 12/11/08
State v. Lugo Case below: 191 N.C. App. —— (5 August 2008)	No. 409P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-906)	Denied 12/11/08
State v. McArthur Case below: 191 N.C. App. —— (1 July 2008)	No. 363P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1348)	Allowed 12/11/08

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

State v. McDonald Case below: 191 N.C. App. —— (5 August 2008)	No. 410P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-710)	Denied 12/11/08
State v. McDougald Case below: 190 N.C. App. —— (20 May 2008)	No. 253P08	Def's PWC to Review Decision of COA (COA07-993)	Dismissed 12/11/08
State v. Moore Case below: 187 N.C. App. 510	No. 445P08	Def's PWC to Review Decision of COA (COA06-1618)	Denied 12/11/08
State v. Morgan Case below: 189 N.C. App. 716	No. 203P08	1. State's Motion for Temporary Stay (COA07-745) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR under N.C.G.S. § 7A-31	1. Allowed 04/30/08 Stay Dissolved 12/11/08 2. Denied 12/11/08 3. Denied 12/11/08 4. Dismissed as Moot 12/11/08
State v. Oakman Case below: 191 N.C. App. —— (5 August 2008)	No. 411P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-929)	Denied 12/11/08
State v. Philip Morris USA, Inc. Case below: 193 N.C. App. —— (7 October 2008)	No. 002P05-3	State's Motion for Temporary Stay (COA07-409)	Allowed 11/10/08
State v. Poteat Case below: 187 N.C. App. 813	No. 350P08	Def's PWC to Review Decision of COA (COA07-511)	Denied 12/11/08
State v. Ramos Case below: 193 N.C. App. —— (18 November 2008)	No. 535A08	1. State's Motion for Temporary Stay (COA07-994) 2. State's Petition for Writ of Supersedeas 3. State's NOA (Dissent)	1. Allowed 12/05/08 2. Allowed 12/11/08 3. ——

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

State v. Robinson Case below: 191 N.C. App. —— (5 August 2008)	No. 412P08	1. Def's NOA Based Upon a Constitutional Question (COA07-1274) 2. State's Motion to Strike NOA 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 12/11/08 3. Denied 12/11/08
State v. Robinson Case below: 140 N.C. App. 388	No. 200P07-3	Def's Motion for "Notice of Belated Appeal (NOBA) Under Rule 14 Appeal of Right for Court of Appeals to Supreme Court Under G.S. 7A-30 and G.S. 15A-1444(a)" (COAP05-858) (COA00-78)	Dismissed 12/11/08
State v. Sayavong Case below: 191 N.C. App. —— (1 July 2008)	No. 461P08	Def's PWC to Review the Decision of the COA (COA08-64)	Denied 12/11/08
State v. Sexton Case below: 193 N.C. App. —— (7 October 2008)	No. 483P08	State's Motion for Temporary Stay (COA07-1438)	Allowed 10/27/08
State v. Sink Case below: 191 N.C. App. —— (1 July 2008)	No. 353P08	1. Def's PDR Under N.C.G.S. § 7A-31 (COA07-1407) 2. Def's PWC to Review the Decision of the COA	1. Denied 12/11/08 2. Dismissed as Moot 12/11/08
State v. Smith Case below: 193 N.C. App. —— (18 November 2008)	No. 534P08	State's Motion for Temporary Stay (COA08-533)	Allowed 12/05/08
State v. Tanner Case below: 193 N.C. App. —— (7 October 2008)	No. 474P08	State's Motion for Temporary Stay (COA08-251)	Allowed 10/20/08
State v. Thomas Case below: 191 N.C. App. —— (1 July 2008)	No. 365P08	1. Def's NOA Based Upon a Constitutional Question (COA08-209) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 12/11/08 2. Denied 12/11/08
State v. Walker Case below: 192 N.C. App. —— (19 August 2008)	No. 455P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-36)	Denied 12/11/08

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

State v. Worrell Case below: 190 N.C. App. 387	No. 247P08	1. Def's NOA Based Upon a Constitutional Question (COA07-1120) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 12/11/08 3. Denied 12/11/08
Villepigue v. City of Danville, VA Case below: 190 N.C. App. 359	No. 278P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-876)	Denied 12/11/08

APPENDIXES

PRESENTATION OF
ASSOCIATE JUSTICE
JAMES WILLIAM PLESS, JR.
PORTRAIT

RULES OF APPELLATE PROCEDURE

AMENDMENT TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING THE
ADMINISTRATIVE COMMITTEE

AMENDMENT TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING THE PARALEGAL
CERTIFICATION PROGRAM

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING TRANSFER TO
INACTIVE STATUS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE MODEL DISTRICT BAR BYLAWS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PRACTICAL TRAINING OF LAW STUDENTS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE JUDICIAL DISTRICT BARS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE IOLTA PROGRAM

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA BOARD OF LAW EXAMINERS

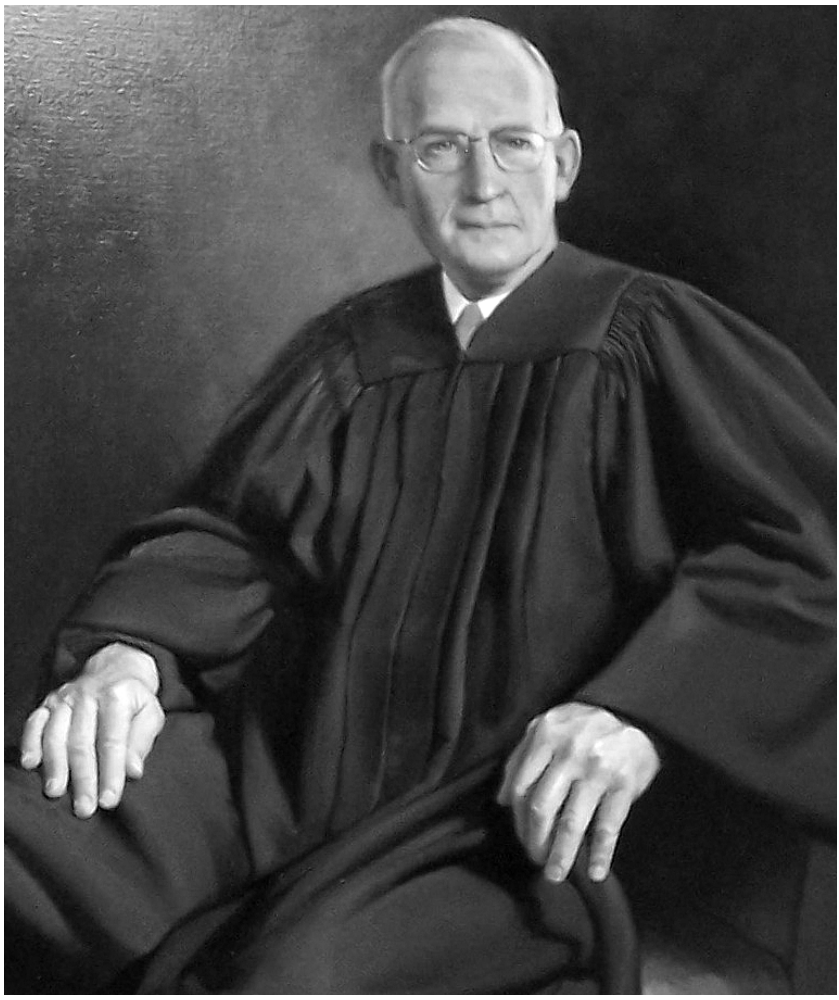
AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

ORDER ADOPTING RULES IMPLEMENTING MEDIATION IN MATTERS BEFORE THE CLERK OF SUPERIOR COURT

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE LEGAL SPECIALIZATION PROGRAM



Presentation of the Portrait of

JAMES WILLIAM PLESS, JR.

Associate Justice

Supreme Court of North Carolina

1966-1968

December 4, 2008

OPENING REMARKS
and
RECOGNITION OF
RICHARD T. LUNGER III
by
CHIEF JUSTICE SARAH PARKER

The Chief Justice welcomed the guests with the following remarks:

Good afternoon Ladies and Gentlemen. I am pleased to welcome each of you to your Supreme Court on this very special occasion in which we honor the service on this Court of Associate Justice J. William Pless, Jr.

Today marks an important milestone in the history of the Court as we continue a tradition that was begun 120 years ago. The first session of the Court to receive a portrait of a former member was held on March 5, 1888, when the portrait of Chief Justice Thomas Ruffin was presented. The Court takes great pride in continuing this tradition into the 21st century.

In 1966 when Governor Dan Moore appointed Justice Pless to the Supreme Court, the appointment received high editorial praise from newspapers across the state. The Raleigh *News and Observer* commented:

> Governor Dan Moore did a good deed for the state and himself when he appointed J. Will Pless to the North Carolina Supreme Court.

The presentation of Justice Pless' portrait today will make a significant contribution to our portrait collection. This contribution allows us to appropriately remember not only an important part of our history but also to honor the memory of a valued member of our Court family.

At this time, it is my distinct pleasure to recognize Richard T. Lunger III, Justice Pless' great-grandson, a member of the Virginia Bar, who will present the portrait to the Court.

Presentation of Portrait

by

Richard T. Lunger III

May it please the Court:

Good afternoon Chief Justice Parker and distinguished members of the Court, I am honored to be here today on behalf of the Pless family who has asked me to prepare this statement and present this honorable Court with this portrait of Justice Pless prepared by Bradley Stevens.

I am Justice Pless' great-grandson and knew Justice Pless only as a child. As the Court will recall, the single most important thing in his life were the people of his beloved Blue Ridge Mountains. Although in countenance he appeared a tall, stern and domineering man, he was in fact a very patient and compassionate man whose modest, warm and polite demeanor endowed him with many close and lasting friendships over a broad socio-economic spectrum. His kind, nimble and energetic wit was always at the forefront, whether at home or on the bench. He was also a driven man with a strong work ethic. He was productive in pursuit of his career and in service of his community, and in particular of Southwestern North Carolina, which he really never wanted to leave.

Justice James William Pless, Jr., "Will" to his friends, or simply "Judge" to his family, was born in the mountain city of Brevard, North Carolina on July 1, 1898 to James William Pless, Sr. and Annie Miller Pless. He and his brother Edwin J. Pless grew up in Marion, McDowell County, North Carolina. His father was a distinguished lawyer and mayor of both Brevard and Marion. Much of his childhood was spent traveling from law office to law office with his father. Judge later explained he became a lawyer because that was what his father did and he never really considered anything else. By the time he graduated from Marion High School in 1913 he had already spent several years reading the law with his father. After high school he attended Davidson College, named after one of his ancestors, Gen. William Davidson of the Revolutionary War, and graduated from Chapel Hill in 1917. After serving in the United States Army as a corporal during World War I, he attended and graduated from law school at Chapel Hill in 1919. That same year he received his law license and joined the firm of Pless, Winborne and Pless where his father continued teaching him the practice of law. He was in private practice for only five years when he was appointed the 18th District Solicitor by Gov-

ernor Morrison in 1924. At the age of 25 he was the youngest solicitor ever appointed in the State. When Governor Ehringhaus appointed him Superior Court Judge in 1934, he also became the youngest judge ever to hold that office in this State. He was elected to that judgeship for four consecutive 8-year terms with no opposition from either the Republican or Democratic Party—another North Carolina record. By 1965 he had held court in over 70 of the State's 100 Counties.

After 32 years as a Superior Court Judge, having served as a regular Superior Court Judge longer than any other judge in the State's history, he reflected and was quoted as saying "A Superior Court Judge is the only person I know of who has to bat a thousand; 999 isn't good enough. I've just finished a case that lasted all week and I guess there were several hundred objections during the testimony. Now, if I handled them all correctly except for one, that one mistake could cause a new trial." As a judge, he was a fervent advocate of the simplification and modernization of court procedure and was known for his interest in the rehabilitation of young criminals and instigated a plan that was subsequently adopted to segregate youngsters from hardened offenders. When finally appointed to the Supreme Court by Governor Moore in 1966, Judge was ready, as he put it, for a transition to more time for study and reflection of the law.

Judge was seriously committed to community service. He served in a number of community, civic and professional organizations during his career. He held many positions at his local Methodist Church, including teaching Sunday school classes, was president of the local Kiwanis Club, created the Marion Lake and Golf Club, was master of his Masonic Lodge, commander of his American Legion post, served on the Legion's State Executive Committee, a member of the Sons of the American Revolution, the Society of the Cincinnati, Sons of Confederate Veterans, and was national president and President Emeritus of Phi Delta Phi, the largest legal fraternity in the world. He also served as president of the Conference of Superior Court Judges for seven years under appointments of three Chief Justices—Chief Justices Barnhill, Winborne and Denny. He also served a term as vice president of the North Carolina Bar Association. In 1963, after heading the campaign for a Constitutional amendment on court reform, he won the bar association's John J. Parker Award, which is irregularly given only when bar members feel an outstanding service has been rendered to the public.

Judge lead a bustling family life surrounded by his wife Marjorie and his four children, James William Pless III, Allan Davidson Pless,

Ann Neal Pless and Marjorie Kirby Pless, and the dozens of grandchildren and great-grandchildren. Judge was also an avid reader, with history and biographies as his favorite subjects. More than anything else, however, he was an avid lover of music, which he had learned from his mother. He played the guitar and sang often for family, the church choir, and whenever goaded into doing it on special public occasions. When asked about having had to sing at an Asheville bar convention, Judge was quoted as saying "Nobody can accuse me of having dignity." According to his daughter Ann, he was also the "best dancer in North Carolina."

Judge loved the outdoors and the people and culture of western North Carolina. After his retirement, it was a common occurrence for many of the distinguished attorneys of this State to just drop by and sit on the front porch of the family home in Marion to discuss current cases. All knew they were welcome. His "Kibbin" weekends at the family Cabin in the Pisgah Wilderness on Mackey's Creek were a much sought-after invitation. His lake house on Lake Tahoma was where all his children, grandchildren and great-grandchildren were indoctrinated into hunting, fishing, boating and other outdoor activities. This love of western North Carolina lead to his repeated rejections of other offered opportunities outside of the region. He was one of those rare people who was totally fulfilled by what he did and where he lived.

Upon his death, per his request, his coffin was draped in the North Carolina flag instead of the American flag.

Chief Justice Parker, and distinguished members of this Court, it is a privilege to appear before you behalf of the Pless family to present this portrait of Justice J. Will Pless, Jr. Thank you.

ACCEPTANCE OF JUSTICE PLESS' PORTRAIT

by

CHIEF JUSTICE SARAH PARKER

Thank you, Mr. Lunger for that fitting tribute to your great-grandfather and our former colleague. At this time, I am privileged to call upon a granddaughter Martha Noblitt and a grandson W. Pless Lunger to unveil the portrait of Justice Pless.

Thank you Martha and Pless. Your participation today makes this ceremony special, and we are honored that you could be with us. On behalf of the Supreme Court, I am indeed honored to accept this portrait of Justice Pless as a part of our collection. We are delighted to have this fine work of art, and we sincerely appreciate the efforts of the family and all who helped to make this presentation a reality.

Justice Pless' portrait will be hung in an appropriate place in this building as quickly as possible and will be a source of strength to us and to our successors throughout the years. Additionally, these proceedings will be printed in the North Carolina Reports.

On behalf of the Pless family, I invite all of you to a reception in the Historical Society room on the first floor of this building. I thank all of you for being with us today. I look forward to having a chance to meet with you and to talk with you at our reception.

Order Adopting Amendments to the North Carolina Rules of Appellate Procedure

Rule 3A of the North Carolina Rules of Appellate Procedure is hereby amended as described below:

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)(l) 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.~~

Where there is an order establishing the indigency of the appellant, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the appellant and provide copies to the office of the Clerk of the Court of Appeals and to the respective parties to the appeal at the addresses provided within thirty-five days from the date of assignment.

Where there is no order establishing the indigency of the appellant, the appellant shall have 10 days from the date that the transcriptionist is assigned to make written arrangements with the assigned transcriptionist for the production and delivery of the transcript of the designated proceedings. If such written arrangement is made, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the appellant and provide copies to the office of the Clerk of the Court of Appeals and to the respective parties to the appeal at the addresses provided within forty-five days from the date of assignment. The non-indigent appellant shall bear the cost of the appellant's copy of the transcript.

Where there is no order establishing the indigency of the appellee, the appellee shall bear the cost of receiving a copy of the requested transcript.

Motions for extensions of time to prepare and deliver transcripts are disfavored and will not be allowed by the Court of Appeals absent extraordinary circumstances.

(2) *Record on Appeal.* Within ten days after receipt of the transcript, the appellant shall prepare and serve upon all other parties a proposed record on appeal constituted in accordance with Rule 9. Trial counsel for the appealing party shall have a duty to assist appellate counsel, if separate counsel is appointed or retained for the appeal, in preparing and serving a proposed record on appeal. Within ten days after service of the proposed

record on appeal upon an appellee, the appellee may serve upon all other parties: (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 twenty days after receipt of the transcript, the appellant shall file three legible copies of the settled record on appeal in the office of the Clerk of the Court of Appeals within five business days from the date the record was settled. If all appellees fail within the times allowed them either to serve notices of approval or to serve objections, amendments, or proposed alternative records on appeal, the appellant's proposed record on appeal shall constitute the settled record on appeal, and the appellant shall file three legible copies thereof in the office of the Clerk of the Court of Appeals within five business days from the last date upon which any appellee could have served such objections, amendments, or proposed alternative record on appeal. If an appellee timely serves amendments, objections, or a proposed alternative record on appeal and the parties cannot agree to the settled record within thirty days after receipt of the transcript, each party shall file three legible copies of the following documents in the office of the Clerk of the Court of Appeals within five business days after the last day upon which the record can be settled by agreement: (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 December, 2008.

Adopted by the Court in Conference this 11th day of June, 2008. 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 practicable on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Hudson, 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 October 19, 2007.

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 Administrative Committee

Rule .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~~ Failure to Fulfill Obligations of Membership

(a) Procedure for Enforcement of Obligations of Membership

Whenever a member of the North Carolina State Bar fails to fulfill an obligation of membership in the State Bar, whether established by the administrative rules of the State Bar or by statute, the member shall be subject to administrative suspension from membership pursuant to the procedure set forth in this rule; provided, however, that the procedures for the investigation of and action upon alleged violations of the Rules of Professional Conduct by a member are set forth in subchapter 1B of these rules and that no aspect of any procedure set forth in this rule shall be applicable to the State Bar's investigation of or action upon alleged violations of the Rules of Professional Conduct by a member.

(1) The following are examples of obligations of membership that will be enforced by administrative suspension. This list is illustrative and not exclusive:

(A) Payment of the annual membership fee, including any associated late fee and the surcharge as set forth in G.S. 84-34;

(B) Payment of the annual Client Security Fund assessment;

(C) Payment of the costs of a disciplinary, disability, reinstatement, show cause, or other proceeding of the State Bar as ordered by the chair of the Grievance Committee, the Disciplinary Hearing Commission, the secretary, or the council;

(D) Filing of the certificate of insurance coverage as required in Rule .0204 of subchapter 1A of these rules;

(E) Filing of a pro hac vice registration statement as required in Rule .0101 of subchapter 1H of these rules; and

(F) Filing of an annual report form and attending continuing legal education activities as required by Sections .1500 and .1600 of subchapter 1D of these rules.

~~(a)~~ (b) Notice ~~of Overdue Fees, Costs, Certificates 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~~ an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute, 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)~~ (c) Service of the Notice

The notice 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.

~~(c)~~ (d) 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~~ an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute, the council may enter an order suspending the member from the practice of law. The order shall be effective 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)~~ (e) 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~~ to fulfill an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute.

(2) Recommendation of Administrative Committee

The Administrative Committee shall determine whether the member has shown cause why the member should not be suspended. If the committee determines that the member has failed to show cause, the committee shall recommend to the council that the member be suspended.

(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 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)~~ (f) Late ~~Tender of Membership Fees, Assessed Costs, or Certificate of Insurance Coverage~~ Compliance

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~~ fulfills the obligation of membership before a suspension order is entered by the council, no order of suspension will be entered.

(g) Administrative Suspension Pursuant to Statute.

The provisions of this rule notwithstanding, if any section of the North Carolina General Statutes requires suspension of an occupa-

tional license, the procedure for suspension pursuant to such statute shall be as established by the statute. If no procedure is established by said statute, then the procedures specified in this rule shall be followed.

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 19, 2007.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2008.

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 6th day of March, 2008.

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 6th day of March, 2008.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PARALEGAL CERTIFICATION 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 19, 2007.

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 paralegal certification program, 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

Rule .0121 Lapse, Suspension, or Revocation of Certification

(a) The board may suspend or revoke its certification of a paralegal, after hearing before the board on appropriate notice, upon a finding that

(1) the certification was made contrary to the rules and regulations of the board;

(2) the individual certified as a paralegal made a false representation, omission, or misstatement of material fact to the board;

(3) the individual certified as a paralegal failed to abide by all rules and regulations promulgated by the board;

(4) the individual certified as a paralegal failed to pay the fees required;

(5) the individual certified as a paralegal no longer meets the standards established by the board for the certification of paralegals; ~~or~~

(6) the individual is not eligible for certification on account of one or more of the grounds set forth in Rule .0019(c); or

(7) the individual violated the confidentiality agreement relative to the questions on the certification examination.

(b) . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 19, 2007.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2008.

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 6th day of March, 2008.

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 6th day of March, 2008.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING TRANSFER TO INACTIVE STATUS

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 19, 2007.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning transfer to inactive status, 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 Administrative Committee

Rule .0901 Transfer to Inactive Status

(a) Petition for Transfer to Inactive Status

. . .

(b) Conditions Upon Transfer

No member may be voluntarily transferred to disability-inactive status, ~~or~~ retired/nonpracticing status, or emeritus pro bono status until:

(1) the member has paid all membership fees, surcharges, Client Security Fund assessments, late fees, and costs assessed by the North Carolina State Bar or the Disciplinary Hearing Commission, as well as all past due fees, fines and penalties owed to the Board of Continuing Legal Education; ~~and~~

(2) ~~all grievances and disciplinary matters pending against the member have been finally resolved~~ the member acknowledges that the member continues to be subject to the Rules of Professional Conduct and to the disciplinary jurisdiction of the State Bar including jurisdiction in any pending matter before the Grievance Committee or the Disciplinary Hearing Commission; and,

(3) in the case of a member seeking emeritus pro bono status, it is determined by the Administrative Committee that the member is in good standing, is not the subject of any mat-

ter pending before the Grievance Committee or the Disciplinary Hearing Commission, and will be supervised by an active member employed by a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1.

(c) Order Transferring Member to Inactive Status

Upon receipt of a petition which satisfies the provisions of Rule .0901(a) above, the council may, in its discretion, enter an order transferring the member to inactive status and, where appropriate, granting emeritus pro bono status. The order shall become effective immediately upon entry by the council. A copy of the order shall be mailed to the member.

. . .

Rule .0905 Pro Bono Practice by Out of State Lawyers

(a) A lawyer licensed to practice in another state but not North Carolina who desires to provide legal services free of charge to indigent persons may file a petition with the secretary addressed to the council setting forth:

(1) the petitioner's name and address;

(2) the state(s) in which the petitioner is or has been licensed and the date(s) when the petitioner was licensed;

(3) the name of a member who is employed by a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1 and has agreed to supervise the petitioner; and

(4) any other matters pertinent to the petition as determined by the council.

(b) Along with the petition, the petitioner shall provide in writing:

(1) a certificate of good standing from each jurisdiction in which the petitioner has been licensed;

(2) a record of any professional discipline ever imposed against the petitioner;

(3) a statement from the petitioner that the petitioner is submitting to the disciplinary jurisdiction of the North Carolina State Bar, and will be governed by the North Carolina Rules of Professional Conduct in regard to any law practice authorized by the council in consequence of the petition; and

(4) a statement from the member identified in the petition agreeing to supervise the petitioner in the provision of pro bono legal services exclusively for indigent persons.

(c) The petition shall be referred to the Administrative Committee for review. After reviewing the petition and other pertinent information, the committee shall make a recommendation to the council regarding whether the petition should be granted.

(d) Upon receipt of a petition and other information satisfying the provisions this rule, the council may, in its discretion, enter an order permitting the petitioner to provide legal services to indigent persons on a pro bono basis under the supervision of a member employed by a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1. The order shall become effective immediately upon entry by the council. A copy or the order shall be mailed to the petitioner and to the supervising member. No person permitted to practice pursuant to such an order shall pay any membership fee to the North Carolina State Bar or any district bar or any other charge ordinarily imposed upon active members, nor shall any such person be required to attend continuing legal education courses.

(e) Permission to practice under this rule may be withdrawn by the council for good cause shown pursuant to the procedure set forth in Rule .0903 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 October 19, 2007.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2008.

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 Statues.

This the 6th day of March, 2008.

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 6th day of March, 2008.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE MODEL DISTRICT BAR BYLAWS

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 19, 2007.

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 Model District Bar Bylaws, as particularly set forth in 27 N.C.A.C. 1A, Section .1000, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Organization of the North Carolina State Bar

Section .1000, Model Bylaws for Use by Judicial District Bars

Rule .1010 Committees

(a) Standing committee(s): The standing committees shall be the Nominating Committee, Pro Bono Committee, Fee Dispute Resolution Committee, ~~and~~ Grievance Committee, and Professionalism Committee provided that, with respect to the Fee Dispute Resolution Committee and the Grievance Committee, the district meets the State Bar guidelines relating thereto.

(b) Fee Dispute Resolution Committee:

. . .

(g) Professionalism Committee:

(1) The Professionalism Committee shall consist of the three immediate past presidents of the district bar or such other members of the district bar as shall be appointed by the president.

(2) The purpose of the Professionalism Committee shall be the promotion of professionalism and thereby the bolstering of public confidence in the legal profession. The committee may further enhance professionalism through CLE programs and, when appropriate, through confidential peer intervention in association with the Professionalism Support Initiative (PSI) which is sponsored and supported by the Chief Justice's Commission on Professionalism. The PSI effort is to investigate and informally assist with client-lawyer, lawyer-lawyer, and lawyer-judge relationships to ame-

liorate disputes, improve communications, and repair relationships. The Professionalism Committee shall have no authority to discipline any lawyer or judge, or to force any lawyer or judge to take any action. The committee shall not investigate or attempt to resolve complaints of professional misconduct cognizable under the Rules of Professional Conduct and shall act in accordance with Rules 1.6(c) and 8.3 of the Rules of Professional Conduct. The committee shall consult and work with the Chief Justice's Commission on Professionalism when 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 October 19, 2007.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2008.

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 6th day of March, 2008.

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 6th day of March, 2008.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PRACTICAL TRAINING OF LAW STUDENTS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 19, 2007.

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 Practical Training of Law Students, as particularly set forth in 27 N.C.A.C. 1C, Section .0200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1C, Rules Governing the Board of Law Examiners and the Training of Law Students

Section .0200 Rules Governing Practical Training of Law Students

Rule .0201 Purpose

The following rules are adopted to encourage law schools to provide their students with supervised practical training of varying kinds during the period of their formal legal education and to enable law students to obtain supervised practical training while serving as legal interns for government agencies.

Rule .0202 Definitions

The following definitions shall apply to the terms used in this section:

~~(1) Legal aid clinic—A department, division, program or course in a law school, approved by the Council of the North Carolina State Bar, which operates under the supervision of an active member of the State Bar and renders legal services to eligible persons.~~

(1) ~~(2)~~ Eligible persons—Persons who are unable financially to pay for the legal services of an attorney, as determined by a standard established by a judge of the General Court of Justice, a legal services corporation, or a law school legal aid clinic providing representation. "Eligible persons" includes non-profit organizations serving low-income communities.

(2) Government agencies—The federal or state government, any local government, or any agency, department, unit, or other entity of federal, state, or local government, specifically including a public defender's office or a district attorney's office.

(3) Law school—An ABA accredited law school or a law school actively seeking accreditation from the ABA and licensed by the Board of Governors of the University of North Carolina. If ABA accreditation is not obtained by a law school so licensed within three years of the commencement of classes, legal interns may not practice, pursuant to these rules, with any legal aid clinic of the law school.

(4) Legal aid clinic—A department, division, program, or course in a law school that operates under the supervision of an active member of the State Bar and renders legal services to eligible persons.

(5)~~(3)~~ Legal intern—A law student who is certified to provide supervised representation to clients or to appear on behalf of government agencies under the provisions of the rules of this Subchapter.

(6) ~~(4)~~ Legal services corporation—A nonprofit North Carolina corporation organized exclusively to provide representation to eligible persons.

(7) ~~(5)~~ Supervising attorney—An active member of the North Carolina State Bar who satisfies the requirements of Rule .0205 of this Subchapter and who supervises one or more legal interns.

Rule .0203 Eligibility

To engage in activities permitted by these rules, a law student must satisfy the following requirements:

(1) . . .

(5) neither ask for nor receive any compensation or remuneration of any kind from any client for whom he or she renders services, but this shall not prevent an attorney, legal services corporation, law school, ~~public defender agency,~~ or ~~the state~~ government agency from paying compensation to the law student or charging or collecting a fee for legal services performed by such law student;

. . .

Rule .0205 Supervision

(a) A supervising attorney shall

(1) be an active member of the North Carolina State Bar who has practiced law as a full-time occupation for at least two years;

. . .

(6) prior to commencing the supervision, assume responsibility for supervising a legal intern by filing with the North Carolina State Bar a signed notice setting forth the period during which the supervising attorney expects to supervise the activities of an identified legal intern, and that the supervising attorney will adequately supervise the legal intern in accordance with these rules; and

(7) notify the North Carolina State Bar in writing promptly whenever the supervision of a legal intern ceases.

Rule .0206 Activities

(a) A properly certified legal intern may engage in the activities provided in this rule under the supervision of an attorney qualified and acting in accordance with the provisions of Rule .0205 of this subchapter.

(b) Without the presence of the supervising attorney, a legal intern may give advice to a client, including a government agency, on legal matters provided that the legal intern gives a clear prior explanation ~~to the client~~ that the legal intern is not an attorney and the supervising attorney has given the legal intern permission to render legal advice in the subject area involved.

(c) A legal intern may represent an eligible person, ~~or~~ the state in criminal prosecutions, a criminal defendant who is represented by the public defender, or a government agency in any proceeding before a federal, state, or local tribunal, including an administrative agency, if prior consent is obtained from the tribunal or agency upon application of the supervising attorney. Each appearance before the tribunal or agency shall be subject to any limitations imposed by the tribunal or agency including, but not limited to, the requirement that the supervising attorney physically accompany the legal intern.

(d) In all cases under this rule in which a legal intern makes an appearance before a tribunal or agency on behalf of a client who is an individual, the legal intern shall have the written consent in advance of the client. The client shall be given a clear explanation, prior to the giving of his or her consent, that the legal intern is not an attorney. This consent shall be filed with the tribunal and made a part of the record in the case. In all cases in which a legal intern makes an appearance before a tribunal or agency on behalf a government agency, the consent of the government agency shall be presumed if the legal intern is participating in an internship program of the government agency. A statement advising the court of the legal intern's participation in an internship program of the government

agency shall be filed with the tribunal and made a part of the record in the case.

(e) . . .

Rule .0207 Use of Student's Name

(a) A legal intern's name may properly

(1) . . .;

(2) be signed to letters written on the letterhead of the supervising attorney, legal aid clinic, or ~~district attorney's office~~ government agency, provided there appears below the legal intern's signature a clear identification that the legal intern is certified under these rules~~,~~. An appropriate designation is "Certified Legal Intern under the Supervision of [supervising attorney]."

(b) A student's name may not appear

(1) on the letterhead of a supervising attorney, legal aid clinic, or ~~district attorney's office~~ government agency;

(2) on a business card bearing the name of a supervising attorney, legal aid clinic, or ~~district attorney's office~~ government agency; or

(3) on a business card identifying the legal intern as certified under these rules.

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 19, 2007.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2008.

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 6th day of March, 2008.

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 6th day of March, 2008.

Hudson, 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 19, 2007.

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, Rules of the Standing Committees of the North Carolina State Bar

Section .1600, Regulations Governing the Administration of the Continuing Legal Education Program

Rule .1601 General Requirements for Course Approval

(a) Approval. CLE activities may be approved upon the written application of a sponsor, other than an accredited sponsor, or of an active member on an individual program basis. An application for such CLE course approval shall meet the following requirements:

(1) If advance approval is requested by a sponsor, the application and supporting documentation, including ~~two~~ one substantially complete set~~s~~ of the written materials to be distributed at the course or program, shall be submitted at least 45 days prior to the date on which the course or program is scheduled. If advance approval is requested by an active member, the application need not include a complete set of written materials.

(2) In all other cases, the application and supporting documentation shall be submitted by the sponsor not later than 45 days after the date the course or program was presented or prior to the end of the calendar year in which the course or program was presented, whichever is earlier. Active members requesting credit must submit the application and supporting documentation within 45 days after the date the course or program was presented or, if the 45 days have elapsed, as soon as practicable after receiving notice from

the board that the course accreditation request was not submitted by the sponsor.

(3) . . .

(b) Course Quality and Materials.

. . .

(e) Records. Sponsors, including accredited sponsors, shall within 30 days after the course is concluded

(1) . . .;

(2) remit to the board the appropriate sponsor fee and, if payment is not received by the board within 30 days after the course is concluded, interest at the legal rate shall be incurred; and

(3) . . .

(f) Announcement.

. . .

(g) Notice. Sponsors not having advanced approval shall make no representation concerning the approval of the course for CLE credit by the board. The board will mail a notice of its decision on CLE activity approval requests within ~~30~~ (45) days of their receipt when the request for approval is submitted before the program and within ~~30~~ (45) days when the request is submitted after the program. Approval thereof will be deemed if the notice is not timely mailed. This automatic approval will not operate if the sponsor contributes to the delay by failing to provide the complete information requested by the board or if the board timely notifies the sponsor that the matter has been tabled and the reason therefor.

Rule .1604 Accreditation of Prerecorded Simultaneous Broadcast, and Computer-Based Programs

(a) Presentation Including Prerecorded Material. An active member may receive credit for attendance at, or participation in, a presentation where prerecorded material is used. Prerecorded material may be either in a video or an audio format.

(b) Simultaneous Broadcast. An active member may receive credit for participation in a live presentation which is simultaneously broadcast by telephone, satellite, or video conferencing equipment. The member may participate in the presentation by listening to or viewing the broadcast from a location that is remote from the origin of the broadcast. The broadcast may include prerecorded ma-

terial provided it also includes a live question and answer session with the presenter.

(c) Accreditation Requirements.

. . .

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 19, 2007.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2008.

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 6th day of March, 2008.

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 6th day of March, 2008.

Hudson, 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 April 25, 2008.

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, Sections .1500 and .1600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

.1501 Scope, Purpose, and Definitions

(a) Scope . . .

(c) Definitions . . .

(13) "Professional responsibility" shall mean those courses or segments of courses devoted to a) the substance, ~~the~~ underlying rationale, and ~~the~~ practical application of the ~~Revised~~ Rules of Professional Conduct; b) the professional obligations of the ~~attorney~~ lawyer to the client, the court, the public, and other lawyers; and c) the effects of stress, substance abuse and chemical dependency, or debilitating mental conditions on a lawyer's professional responsibilities and the prevention, detection, treatment, and etiology of stress, substance abuse, chemical dependency, and debilitating mental conditions. This definition shall be interpreted consistent with the provisions of Rule .1501(c)(4) or (6) above.

(14) "Professionalism" courses are courses or segments of courses devoted to the identification and examination of, and the encouragement of adherence to, non-mandatory aspirational standards of professional conduct which transcend the requirements of the ~~Revised~~ Rules of Professional Conduct. Such courses address principles of competence and dedication to the service of clients, civility, improvement of the justice system, diversity of the legal profession and clients, advancement of the rule of law, ~~and~~ service to the community, and service to the disadvantaged and those unable to pay for legal services.

(15) "Rules" shall mean . . .

Section .1600, Regulations Governing the Administration of the Continuing Legal Education Program

.1602 Course Content Requirements

(a) Professional Responsibility Courses on Stress, Substance Abuse, Chemical Dependency, and Debilitating Mental Conditions—Accredited professional responsibility courses on stress, substance abuse, chemical dependency, and debilitating mental conditions shall concentrate on the relationship between stress, substance abuse, chemical dependency, debilitating mental conditions, and a lawyer's professional responsibilities. Such courses may also include (1) education on the prevention, detection, treatment and etiology of stress, substance abuse, chemical dependency, and debilitating mental conditions, and (2) information about assistance for chemically dependent or mentally impaired lawyers available through lawyers' professional organizations. No more than three hours of continuing legal education credit will be granted to any one such course or segment of a course.

(b) . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 25, 2008.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of September, 2008.

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 9th day of October, 2008.

Sarah Parker
Sara 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 9th day of October, 2008.

Hudson, 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 18, 2008.

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

. . .

(d) Late Filing Penalty

Any attorney who, for whatever reasons, files the report showing compliance or declaring an exemption after the due date of the last day of February shall pay a $75.00 late filing penalty. This penalty shall be submitted with the report. A report that is either received by the board or postmarked on or before the due date shall be considered timely filed. An attorney who is issued a notice to show cause pursuant to Rule .1523(b) ~~complies with the requirements of the rules during the probationary period under Rule .1523(e) of this subchapter~~ shall pay a late compliance fee of $125.00 pursuant to Rule .1523(e) of this subchapter. The board may waive the late filing penalty or the late compliance fee upon a showing of hardship or serious extenuating circumstances or other good cause.

.1523 Noncompliance

(a) Failure to Comply with Rules May Result in Suspension

. . .

(b) Notice of Failure to Comply

The board shall notify a member who appears to have failed to meet the requirements of these rules that the member will be suspended

from the practice of law in this state, unless the member shows good cause in writing why the suspension should not be made or the member shows in writing that he or she has complied with the requirements within the 30-day period after ~~receiving~~ service of the notice. Notice shall be served on the member ~~pursuant to Rule 4 of the North Carolina Rules of Civil Procedure~~ by mailing a copy thereof by registered or certified mail return receipt requested to the last-known address of the member according to the records of the North Carolina State Bar or such later address as may be known to the person effecting the service. Notice may also be served by personal service ~~and may be served~~ by a State Bar investigator or any other person authorized ~~thereunder~~ pursuant to Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(c) Entry of Order of Suspension Upon Failure to Respond to Notice to Show Cause

If a written response attempting to show good cause is not postmarked or received by the board by the last day of the 30-day period after the member ~~received~~ was served with the notice to show cause, upon the recommendation of the board and the Administrative Committee, the council may enter an order suspending the member from the practice of law. The order shall be entered and served as set forth in Rule .0903(c) of this subchapter.

(d) Procedure Upon Submission of a Timely Response to a Notice to Show Cause

(1) Consideration by the Board

If the member files a timely written response to the notice, the board shall consider the matter at its next regularly scheduled meeting or may delegate consideration of the matter to a duly appointed committee of the board. If the matter is delegated to a committee of the board and the committee determines that good cause has not been shown, the member may file an appeal to the board. The appeal must be filed within 30 calendar days of the date of the letter notifying the member of the decision of the committee. The board shall review all evidence presented by the member to determine whether good cause has been shown or to determine whether the member has complied with the requirements of these rules within the 30-day period after ~~receiving~~ service of the notice to show cause.

(2) Recommendation of the Board

The board shall determine whether the member has shown good cause why the member should not be suspended. If the board deter-

mines that good cause has not been shown ~~and~~ or that the member has not shown compliance with these rules within the 30-day period after ~~receipt~~ service of the notice to show cause, then the board shall refer the matter to the Administrative Committee for hearing together with a written recommendation to the Administrative Committee that the member be suspended.

(3) Consideration by and Recommendation of the Administrative Committee

. . .

(e) Late Compliance Fee

Any member ~~who complies with the requirements of the rules during the 30-day period after receiving the~~ to whom a notice to show cause is issued pursuant to paragraph (b) above shall pay a late compliance fee as set forth in Rule .1522(d) of this subchapter; provided, however, upon a showing of good cause as determined by the board as described in paragraph (d)(2) above, the fee may be waived.

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 18, 2008.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of September, 2008.

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 9th day of October, 2008.

Sarah Parker
Sara 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 9th day of October, 2008.

Hudson, J.
For the Court

AMENDMENTS TO 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 July 18, 2008.

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 3.6, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) . . .

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is reasonably necessary to mitigate the recent adverse publicity.

(d) . . .

Comment

[1] . . .

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the com-

mentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates. A lawyer who is subject to the rule must take reasonable measures to insure the compliance of nonlawyer assistants and may not employ agents to make statements the lawyer is prohibited from making. Rule 5.3 and Rule 8.4(a); see, e.g., Rule 3.8(f)(prosecutor's duty to exercise reasonable care to prevent persons assisting prosecutor or associated with prosecutor from making improper extrajudicial statements).

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a). Although paragraph (b)(2) allows extrajudicial statements about information in a public record, a lawyer may not use this safe harbor to justify, by means of filing pleadings or other public records, statements prohibited by paragraph (a). *See also* Rule 3.1.

[5] . . .

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others. Moreover, when there is sufficient prior notice, a lawyer is encouraged to seek judicial intervention to prevent improper extrajudicial statements that may be prejudicial to the client and thereby avoid the necessity of a public response.

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 July 18, 2008.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of September, 2008.

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 9th day of October, 2008.

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 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 9th day of October, 2008.

Hudson, J.
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR 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 19, 2007.

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 1.15, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 1.15-1 Definitions

For purposes of this Rule 1.15, the following definitions apply:

(a) "Bank" . . .

(i) ~~"Instrument" denotes an instrument under the Uniform Commercial Code, a payment item or advice accepted for credit by a bank, or a requisition or order for the electronic transfer of funds.~~ "Item" denotes any means or method by which funds are credited to or debited from an account; for example: a check, substitute check, remotely created check, draft, withdrawal order, automated clearinghouse (ACH) or electronic transfer, electronic or wire funds transfer, electronic image of an item and/or information in electronic form describing an item, or instructions given in person or by telephone, mail, or computer.

(j) "Legal services" . . .

Rule 1.15-2 General Rules

(a) Entrusted Property.

. . .

(h) ~~Instruments~~ Items Payable to Lawyer. ~~An instrument~~ Any item drawn on a trust account or fiduciary account for the payment of the lawyer's fees or expenses shall be made payable to the lawyer and shall indicate on the item the client balance on which the ~~instrument~~ item is drawn. Any item that does not capture this information may not be used to withdraw funds from a trust account or a fiduciary account for payment of the lawyer's fees or expenses.

(i) No Bearer ~~Instruments~~ Items. No ~~instrument~~ item shall be drawn on a trust account or fiduciary account made payable to cash

or bearer and no cash shall be withdrawn from a trust account or fiduciary account by means of a debit card.

(j) No Personal Benefit.

. . .

Rule 1.15-3 Records and Accountings

(a) Check Format. All general trust accounts, dedicated trust accounts, and fiduciary accounts must use business-size checks that contain an Auxiliary On-Us field in the MICR line of the check.

~~(a)~~ (b) Minimum Records for Accounts at Banks. The minimum records required for general trust accounts, dedicated trust accounts, and fiduciary accounts maintained at a bank shall consist of the following:

(1) all records listing the source and date of receipt of any funds deposited in the account including, but not limited to, bank receipts, ~~or~~ deposit slips and wire and electronic transfer confirmations, ~~listing the source and date of receipt of all funds deposited in the account~~ and, in the case of a general trust account, all records also listing the name of the client or other person to whom the funds belong;

(2) all canceled checks or other ~~instruments~~ items drawn on the account, or printed digital images thereof furnished by the bank, showing the amount, date, and recipient of the disbursement, and, in the case of a general trust account, the client balance against which each ~~instrument~~ item is drawn, provided, that:

(A) digital images must be legible reproductions of the front and back of the original ~~instruments~~ items with no more than six ~~instruments~~ images per page and no images smaller than 1-3/16 x 3 inches; and

(B) the bank must maintain, for at least six years, the capacity to reproduce electronically additional or enlarged images of the original ~~instruments~~ items or records related thereto upon request within a reasonable time;

(3) all instructions or authorizations to transfer, disburse, or withdraw funds from the trust account (including electronic transfers or debits), or a written or electronic record of any such transfer, disbursement, or withdrawal showing the amount, date, and recipient of the transfer or disburse-

ment, and, in the case of a general trust account, also showing the name of the client or other person to whom the funds belong;

(4) all bank statements and other documents received from the bank with respect to the trust account, including, but not limited to notices of return or dishonor of any ~~instrument~~ item drawn on the account against insufficient funds;

(5) in the case of a general trust account, a ledger containing a record of receipts and disbursements for each person or entity from whom and for whom funds are received and showing the current balance of funds held in the trust account for each such person or entity; and

(6) any other records required by law to be maintained for the trust account.

~~(b)~~(c) Minimum Records for Accounts at Other Financial Institutions. The minimum records required for dedicated trust accounts and fiduciary accounts at financial institutions other than a bank shall consist of the following:

(1) all records listing the source and date of receipt of all funds deposited in the account including, but not limited to, depository receipts, ~~or~~ deposit slips, and wire and electronic transfer confirmations ~~listing the source and date of receipt of all property deposited in the account~~;

(2) a copy of all checks or other ~~instruments~~ items drawn on the account, or printed digital images thereof furnished by the depository, showing the amount, date, and recipient of the disbursement, provided, that the images satisfy the requirements set forth in Rule 1.15-3(b)(2);

(3) all instructions or authorizations to transfer, disburse, or withdraw funds from the account (including electronic transfers or debits) or a written or electronic record of any such transfer, disbursement, or withdrawal showing the amount, date, and recipient of the transfer or disbursement;

(4) all statements and other documents received from the depository with respect to the account, including, but not limited to notices of return or dishonor of any item drawn on the account for insufficient funds; and

(5) any other records required by law to be maintained for the account.

~~(c)~~(d) ~~Quarterly~~ Reconciliations of General Trust Accounts.

(1) Quarterly Reconciliations. At least quarterly, the individual client balances shown on the ledger of a general trust account must be totaled and reconciled with the current bank statement balance for the trust account as a whole.

(2) Monthly Reconciliations. Each month, the balance of the trust account as shown on the lawyer's records shall be reconciled with the current bank statement balance for the trust account.

(3) The lawyer shall retain ~~all~~ a record ~~pertaining to~~ of the ~~quarterly~~ reconciliations of the general trust account for a period of six years in accordance with Rule 1.15-3(g).

~~(d)~~(e) Accountings for Trust Funds. The lawyer shall render to the client a written accounting of the receipts and disbursements of all trust funds (i) upon the complete disbursement of the trust funds, (ii) at such other times as may be reasonably requested by the client, and (iii) at least annually if the funds are retained for a period of more than one year.

~~(g)~~(f) Accountings for Fiduciary Property. Inventories and accountings of fiduciary funds and other entrusted property received in connection with professional fiduciary services shall be rendered to judicial officials or other persons as required by law. If an annual or more frequent accounting is not required by law, a written accounting of all transactions concerning the fiduciary funds and other entrusted property shall be rendered to the beneficial owners, or their representatives, at least annually and upon the termination of the lawyer's professional fiduciary services.

~~(f)~~(g) Minimum Record Keeping Period. A lawyer shall maintain, in accordance with this Rule 1.15, complete and accurate records of all entrusted property received by the lawyer, which records shall be maintained for ~~a period of~~ at least the six (6) year ~~years~~ period immediately preceding the lawyer's most recent fiscal year end ~~from the last transaction to which the record pertain~~.

~~(g)~~(h) Audit by State Bar. The financial records required by this Rule 1.15 shall be subject to audit for cause and to random audit by the North Carolina State Bar; and such records shall be produced for inspection and copying in North Carolina upon request by the State Bar.

Comment

[1] The purpose of a lawyer's trust account or fiduciary account is to segregate the funds belonging to others from those belonging to

the lawyer. Money received by a lawyer while providing legal services or otherwise serving as a fiduciary should never be used for personal purposes. Failure to place the funds of others in a trust or fiduciary account can subject the funds to claims of the lawyer's creditors or place the funds in the lawyer's estate in the event of the lawyer's death or disability.

. . .

Responsibility for Form of Checks, Records and Accountings

[15] It is the lawyer's responsibility to assure that complete and accurate records of the receipt and disbursement of entrusted property are maintained in accordance with this rule. The required record retention period of six years set forth in this rule does not preclude the State Bar from seeking records for a period prior to the retention period and, if obtained, from pursuing a disciplinary action based thereon if such action is not prohibited by law or other rules of the State Bar.

[16] Many businesses are now converting paper checks to automated clearinghouse (ACH) debits to decrease costs and increase operating efficiencies. When a check is converted, the check is taken either at the point-of-sale or through the mail for payment, the account information is captured from the check, and an electronic transaction is created for payment through the ACH system. The original physical check is typically destroyed by the converting entity (although an image of the check may be stored for a certain period of time). If a check drawn on a trust account is converted to ACH, the lawyer will not receive either the physical check or a check image. The transaction will appear on the lawyer's trust account statement as an ACH debit with limited information about the payment (e.g., dollar amount, date processed, originator of the ACH debit).

[17] To prevent conversion of a check to ACH without authorization, a lawyer is required to use checks with an "Auxiliary On-Us field." A check will not be eligible for conversion to ACH if it contains an Auxiliary On-Us field, which is an additional field that appears in the left-most position of the MICR (magnetic ink character recognition) line on a business size check. The lawyer should confirm with the lawyer's financial institution that the Auxiliary On-Us field is included on the lawyer's trust account checks. Including an Auxiliary On-Us field on the check will require using checks that are longer than six inches. As with the other information in the MICR line of a check, the routing, account and payment numbers, the financial institution issuing the check determines the content of the Auxiliary On-Us field.

[18] Authorized ACH debits that are electronic transfers of funds (in which no checks are involved) are allowed provided the lawyer maintains a record of the transaction as required by Rule 1.15-3(b)(3) and (c)(3). The record, whether consisting of the instructions or authorization to debit the account, a record or receipt from the register of deeds or a financial institution, or the lawyer's independent record of the transaction, must show the amount, date, and recipient of the transfer or disbursement, and, in the case of a general trust account, also show the name of the client or other person to whom the funds belong.

~~[16]~~ [19] The lawyer is responsible for keeping a client, or any other person to whom the lawyer is accountable, advised of the status of entrusted property held by the lawyer. In addition, the lawyer must take steps to discover any unauthorized transactions involving trust funds as soon as possible. Therefore, it is essential that the lawyer regularly reconcile a general trust account. This means that, at least once a ~~quarter~~ month, the lawyer must reconcile the current bank statement balance with the balance shown for the entire account in the lawyer's records ~~with the current bank balance~~, such as a check register or its equivalent, as of the date of the bank statement. At least once a quarter, the lawyer must reconcile the individual client balances shown on the lawyer's ledger with the current bank statement balance. Monthly reconciliation will help to uncover unauthorized ACH transactions promptly. The current bank balance is the balance obtained when subtracting outstanding checks and other withdrawals from the bank statement balance and adding outstanding deposits to the bank statement balance. With regard to trust funds held in any trust account, there is also an affirmative duty to produce a written accounting for the client and to deliver it to the client, either at the conclusion of the transaction or periodically if funds are held for an appreciable period. Such accountings must be made at least annually or at more frequent intervals if reasonably requested by the client.

Bank Notice of Overdrafts

~~[17]~~ [20] A properly maintained trust account should not have any ~~instruments~~ items presented against insufficient funds. However, even the best-maintained accounts are subject to inadvertent errors by the bank or the lawyer, which may be easily explained. The reporting requirement should not be burdensome and may help avoid a more serious problem.

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 19, 2007.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2008.

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 6th day of March, 2008.

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 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 6th day of March, 2008.

Hudson, J.
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR 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 January 25, 2008.

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 1.15, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 1.15-2 General Rules

(a) ...

(b) Deposit of Trust Funds. All trust funds received by or placed under the control of a lawyer shall be promptly deposited in either a general trust account or a dedicated trust account of the lawyer. Trust funds placed in a general account are those which, in the lawyer's good faith judgment, are nominal or short-term. General trust accounts are to be administered in accordance with the Rules of Professional Conduct and the provisions of 27 NCAC Chapter 1, Subchapter D, Section .1300.

Rule 1.15-3 Records and Accountings

Comment

Client Property

[3] Every lawyer who receives funds belonging to a client must maintain a trust account. The general rule is that every receipt of money from a client or for a client, which will be used or delivered on the client's behalf, is held in trust and should be placed in the trust account. All client money received by a lawyer, except that to which the lawyer is immediately entitled, must be deposited in a trust account, including funds for payment of future fees and expenses. Client funds must be promptly deposited into the trust account. Client funds must be deposited in a general trust account if there is no duty to invest on behalf of the client. Generally speaking, if a reasonably prudent person would conclude that the funds in question, either because they are nominal in amount or are to be held for a short time, could probably not earn sufficient interest to justify the cost of investing, the funds should be deposited in the general trust account. In determining whether there is a duty to invest, a lawyer shall exercise his or her professional judgment in good faith and shall consider the following:

a) The amount of the funds to be deposited;

b) The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

c) The rates of interest or yield at financial institutions where the funds are to be deposited;

d) The cost of establishing and administering dedicated accounts for the client's benefit, including the service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the client's benefit;

e) The capability of financial institutions, lawyers, or law firms to calculate and pay income to individual clients;

f) Any other circumstances that affect the ability of the client's funds to earn a net return for the client.

When regularly reviewing the trust accounts, the lawyer shall determine whether changed circumstances require further action with respect to the funds of any client. The determination of whether a client's funds are nominal or short-term shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with an ethical impropriety or breach of professional conduct based on the good faith exercise of such judgment . . .

Rule 1.15-4, ~~Interest on Lawyers' Trust Accounts~~ [Reserved]

(Deleted in its entirety.)

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 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 25, 2008.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2008.

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 6th day of March, 2008.

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 6th day of March, 2008.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE JUDICIAL DISTRICT BARS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 19, 2007.

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 judicial district bars, as particularly set forth in 27 N.C.A.C. 1A, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Organization of the North Carolina State Bar

Section .0900 Organization of the Judicial District Bars

Rule .0902 Annual Membership Fee

If a judicial district bar elects to assess an annual membership fee from its active members pursuant to N.C.G.S. A784-18.1(b), the following procedures shall apply:

(a) Notice to State Bar.

. . .

(d) Late Fee. Each judicial district bar may impose but shall not be required to impose a late fee of any amount not to exceed ~~thirty~~ fifteen dollars ~~($30.00)~~ ($15.00) for non-payment of the annual membership fee on or before the stated delinquency date.

(e) Members Subject to Assessment.

. . .

(f) Hardship Waivers. A judicial district bar may not grant any waiver from the obligation to pay the judicial district bar's annual membership fee. ~~unless the lawyer requesting the waiver is granted a waiver of the lawyer's annual membership fee to the North Carolina State Bar for the comparable period.~~ A judicial district bar may waive the late fee upon a showing of good cause.

(g) Reporting Delinquent Members to 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 19, 2007.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2008.

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 6th day of March, 2008.

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 6th day of March, 2008.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE IOLTA 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 January 25, 2008.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the IOLTA program, as particularly set forth in 27 N.C.A.C. 1D, Section .1300, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar

Section .1300, Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts (IOLTA)

Rule .1301 Purpose

The IOLTA Board of Trustees (board) shall carry out the provisions of the Plan for ~~Disposition of Funds Received by the North Carolina State Bar from~~ Interest on Lawyers' Trust Accounts and administer the IOLTA program (NC IOLTA). ~~The plan is:~~ Any funds remitted to the North Carolina State Bar from ~~depository institutions~~ banks by reason of interest earned on general trust accounts established by lawyers pursuant to Rule 1.15-2(b) of the Rules of Professional Conduct shall be deposited by the North Carolina State Bar through the board in a special account or accounts which shall be segregated from other funds of whatever nature received by the State Bar.

The funds received, and any interest, dividends, or other proceeds ~~received thereafter~~ earned on or with respect to these funds, net of banking charges described in section .1316(e)(1), shall be used for programs concerned with the improvement of the administration of justice, under the supervision and direction of the NC IOLTA Board ~~established under this plan to administer the funds~~. The board will award grants or non-interest bearing loans under the ~~four~~ categories approved by the North Carolina Supreme Court being mindful of its tax exempt status and the IRS rulings that private interests of the legal profession are not to be funded with IOLTA funds.

The programs for which the funds may be ~~utilized shall consist of~~ awarded are:

(1) providing civil legal services for indigents;

(2) enhancement and improvement of grievance and disciplinary procedures to protect the public more fully from incompetent or unethical attorneys;

(3) development and maintenance of a fund for student loans to enable meritorious persons to obtain a legal education ~~when otherwise they would not~~ who would not otherwise have adequate funds for this purpose;

(4) such other programs designed to improve the administration of justice as may from time to time be proposed by the board and approved by the Supreme Court of North Carolina.

Rule .1316 ~~Severability~~ IOLTA Accounts

~~If any provision of this plan or the application thereof is held invalid, the invalidity does not affect other provisions or application of the plan which can be given effect without the invalid provision or application, and to this end the provisions of the plan are severable.~~

(a) Pursuant to order of the North Carolina Supreme Court, every general trust account as defined in the Rules of Professional Conduct maintained by a lawyer or law firm must be an interest-bearing account. Funds deposited in a general, interest-bearing trust account must be available for withdrawal upon request and without delay. For the purposes of these rules, these general, interest-bearing trust accounts shall be known as "IOLTA accounts."

(b) Every lawyer must insure that all general trust accounts maintained by the lawyer or law firm are interest bearing.

(c) Every lawyer must comply with all the administrative requirements of this rule, including the certification required in Rule .1318 below.

(d) Every lawyer or law firm maintaining IOLTA accounts shall advise NC IOLTA of the establishment or closing of each IOLTA account. Such notice shall include the name of the bank where the account is established; the name of the account; the bank account number; and the name and bar number of the lawyer(s) in the firm. The North Carolina State Bar shall furnish to each lawyer or law firm maintaining IOLTA accounts a suitable plaque or scroll explaining the program, which plaque or scroll shall be exhibited in the office of the lawyer or law firm.

(e) Every lawyer or law firm maintaining IOLTA accounts shall direct the bank in which an IOLTA account is maintained to:

(1) remit interest or dividends, less any deduction for bank service charges, fees, and taxes collected with respect to the deposited funds, at least quarterly to NC IOLTA at the North Carolina State Bar. If the bank does not waive service charges or fees on IOLTA accounts, reasonable customary account maintenance fees may be assessed, but only against accrued interest and funds belonging to the law firm or lawyer maintaining the account. Fees for wire transfer, insufficient funds, bad checks, stop payment orders, account reconciliation, negative collected balances, and check printing are business costs or costs billable to others and may not be charged against the interest earned by an IOLTA account.

(2) transmit with each remittance to NC IOLTA at the North Carolina State Bar a statement showing the name of the law firm or lawyer maintaining the account with respect to which the remittance is sent, the earnings period, and the rate of interest applied in computing the remittance; and

(3) transmit to the law firm or lawyer maintaining the account at the same time a report showing the amount remitted to NC IOLTA at the North Carolina State Bar, the earnings period, and the rate of interest applied in computing the remittance.

Rule .1317 Confidentiality

(a) As used in this rule, "confidential information" means all information regarding IOLTA account(s) other than (1) a lawyer's or law firm's status as a participant, former participant, or non-participant in NC IOLTA, and (2) information regarding the policies and practices of any bank in respect of IOLTA trust accounts, including rates of interest paid, service charge policies, the number of IOLTA accounts at such bank, the total amount on deposit in all IOLTA accounts at such bank, the total amounts of interest paid to NC IOLTA, and the total amount of service charges imposed by such bank upon such accounts.

(b) Confidential information shall not be disclosed by the staff or trustees of NC IOLTA to any person or entity, except that confidential information may be disclosed (1) to any chairperson of the grievance committee, staff attorney, or investigator of the North Carolina State Bar upon his or her written request specifying the information requested and stating that the request is made in connection with a grievance complaint or investigation regarding one or more trust accounts of a lawyer or law firm; or (2) in response to a lawful order or other process issued by a court of competent jurisdiction, or a sub-

poena, investigative demand, or similar notice issued by a federal, state, or local law enforcement agency.

Rule .1318 Certification

Every lawyer admitted to practice in North Carolina shall certify annually on or before June 30 to the North Carolina State Bar that all general trust accounts maintained by the lawyer or his or her law firm in North Carolina are established and maintained as IOLTA accounts or that the lawyer is exempt from this provision because he or she does not maintain any general trust account(s) in North Carolina.

Rule .1319 Noncompliance

A lawyer's failure to comply with the mandatory provisions of this subchapter shall be reported to the Administrative Committee which may initiate proceedings to suspend administratively the lawyer's active membership status and eligibility to practice law pursuant to Rule .0903 of this subchapter.

Rule .1320 Severability

If any provision of this plan or the application thereof is held invalid, the invalidity does not affect other provisions or application of the plan which can be given effect without the invalid provision or application, and to this end the provisions of the plan are severable.

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 25, 2008.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2008.

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 6th day of March, 2008.

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 6th day of March, 2008.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

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 19, 2007.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning classes of membership, as particularly set forth in 27 N.C.A.C. 1A Section .0200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Organization of the North Carolina State Bar

Section .0200, Membership—Annual Membership Fees

Rule .0201 Classes of Membership

(a) Two Classes of Membership

Members of the North Carolina State Bar shall be divided into two classes: active members and inactive members.

(b) Active Members

. . .

(c) Inactive Members

(1) The inactive members shall include:

(A) all persons who have been admitted to the practice of law in North Carolina but who the council has found are not engaged in the practice of law or holding themselves out as practicing attorneys and who do not occupy any public or private position in which they may be called upon to give legal advice or counsel or to examine the law or to pass upon the legal effect of any act, document, or law, and

(B) those persons granted emeritus pro bono status by the council and allowed to represent indigent clients on a pro bono basis under the supervision of active members working for nonprofit corporations organized pursuant to Chapter 55A of the General Statutes of North Carolina for the sole purpose of rendering legal services to indigents.

(2) Inactive members of the North Carolina State Bar may not practice law, except as provided in this rule for persons granted emeritus pro bono status, and are exempt from payment of membership dues during the period in which they are inactive members. For purposes of the State Bar's membership records, the category of inactive members shall be further divided into the following subcategories:

(A)~~(1)~~ Retired/nonpracticing

This subcategory includes those members who are not engaged in the practice of law or holding themselves out as practicing attorneys and who are retired, hold positions unrelated to the practice of law, or practice law in other jurisdictions.

(B)~~(2)~~ Disability inactive status

This subcategory includes members who suffer from a mental or physical condition which significantly impairs the professional judgment, performance, or competence of an attorney, as determined by the courts, the council, or the Disciplinary Hearing Commission.

(C)~~(3)~~ Disciplinary suspensions/disbarments

This subcategory includes those members who have been suspended from the practice of law or who have been disbarred by the courts, the council, or the Disciplinary Hearing Commission for one or more violations of the Rules of Professional Conduct.

(D)~~(4)~~ Administrative suspensions

This subcategory includes those members who have been suspended from the practice of law, pursuant to the procedure set forth in Rule .0903 of subchapter 1D, for failure to fulfill the obligations of membership ~~comply with the regulations regarding mandatory continuing legal education, payment of membership fees, or payment of late fees pursuant to these rules~~.

(E) Emeritus pro bono status

This subcategory includes those members who are permitted by the council to represent indigent persons under the supervision of active members who are employed by nonprofit corporations duly authorized to provide legal services to such persons. This status may be withdrawn

by the council for good cause shown pursuant to the procedure set forth in Rule .0903 of subchapter 1D.

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 19, 2007.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2008.

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 6th day of March, 2008.

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 6th day of March, 2008.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA BOARD OF LAW EXAMINERS

The following amendments to the Rules and Regulations of the North Carolina Board of Law Examiners were duly adopted by the North Carolina Board of law Examiners on June 12, 2008, and approved by the Council of the North Carolina State Bar at its quarterly meeting on July 18, 2008.

BE IT RESOLVED by the North Carolina Board of Law Examiners that the Rules and Regulations of the North Carolina Board of Law Examiners, particularly Rule .0501 (6) of the Rules Governing Admission to the Practice of Law in the State of North Carolina, be amended as follows (additions are underlined, deletions are interlined):

.0501 Requirements for General Applicants

(6) have stood and passed the Multistate Professional Responsibility Examination approved by the Board within the twenty-four (24) month period next preceding the beginning day of the written bar examination prescribed by Section .0900 of this Chapter which the applicant applies to take, or shall take and pass the Multistate Professional Responsibility Examination within the twelve (12) month period thereafter. ~~; or, if later, shall take and pass the first Multistate Professional Responsibility Examination offered after the Board releases the results of the applicant's written examination;~~ The time limits are tolled for a period not exceeding four (4) years for any applicant who is a servicemember as defined in the Servicemembers Civil Relief Act, 50 U.S.C. Appx. § 511, while engaged in active service as defined in 10 U.S.C. § 101, and who provides a letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents attendance for the examination, stating that military leave is not authorized for the servicemember at the time of the letter, and stating when the servicemember would be authorized military leave to take the examination.

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 Board of Law

Examiners were duly approved by the Council of the North Carolina State Bar at a regularly called meeting on July 18, 2008.

Given over my hand and the Seal of the North Carolina State Bar, this the 5th day of August, 2008.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina Board of Law Examiners as approved by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 26th day of August, 2008.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations to the North Carolina Board of Law Examiners 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 26th day of August, 2008.

s/ Hudson, J.
Hudson, 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 July 18, 2008.

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

.0129 Confidentiality

(a) Except as otherwise provided in this rule and G.S. 84-28(f), all proceedings involving allegations of misconduct by or alleged disability of a member will remain confidential until

(1) a complaint against a member has been filed with the secretary after a finding by the Grievance Committee that there is probable cause to believe that the member is guilty of misconduct justifying disciplinary action or is disabled;

(2) the member requests that the matter be made public prior to the filing of a complaint;

(3) the investigation is predicated upon conviction of the member of or sentencing for a crime;

(4) a petition or action is filed in the general courts of justice;

(5) the member files an affidavit of surrender of license; or

(6) a member is transferred to disability inactive status pursuant to Rule .0118(g). In such an instance, the order transferring the member shall be public. Any other materials, including the medical evidence supporting the order, shall be kept confidential unless and until the member petitions for reinstatement pursuant to Rule .0118(c), unless provided otherwise in the order.

(b) The previous issuance of a letter of warning, formerly known as a letter of admonition, or an admonition to a member may be revealed in any subsequent disciplinary proceeding.

(c) This provision will not be construed to prohibit the North Carolina State Bar from providing a copy of an attorney's response to a grievance to the complaining party where such attorney has not objected thereto in writing. ~~or to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates, to other jurisdictions investigating qualifications for admission to practice, or to law enforcement agencies investigating qualifications for government employment or allegations of criminal conduct by attorneys. Further, this provision will not be construed to prohibit the North Carolina State Bar, with the consent of the chairperson of the Grievance Committee, from providing relevant information concerning a letter of caution, letter of warning or admonition, to authorized agencies investigating complaints against North Carolina attorneys, so long as the inquiring jurisdiction maintains the same level of confidentiality respecting the information as the North Carolina State Bar. In addition, the secretary will transmit notice of all public discipline imposed and transfers to disability inactive status to the National Discipline Data Bank maintained by the American Bar Association. The secretary may also transmit any relevant information to the Client Security Fund Board of Trustees to assist the Client Security Fund Board in determining losses caused by dishonest conduct of members of the North Carolina State Bar.~~

(d) This provision will not be construed to prohibit the North Carolina State Bar from providing information or evidence to any law enforcement or regulatory agency.

(e) This provision will not be construed to prevent the North Carolina State Bar, with the approval of the chairperson of the Grievance Committee, from notifying the Chief Justice's Commission on Professionalism of any allegation of unprofessional conduct by any member.

(f) This provision will not be construed to prevent the North Carolina State Bar from notifying the Lawyer Assistance Program of any circumstances that indicate a member may have a substance abuse or mental health issue.

(g) This provision will not be construed to prohibit the North Carolina State Bar, with the approval of the chairperson of the Grievance Committee, from providing information concerning the existence of a letter of caution, letter of warning, or admonition to any agency that regulates the legal profession in any other jurisdiction so long as the inquiring jurisdiction maintains the same level of confidentiality respecting the information as does the North Carolina State Bar.

(h) The secretary will transmit notice of all public discipline imposed and transfers to disability inactive status to the National Discipline Data Bank maintained by the American Bar Association.

(i) The secretary may also transmit any relevant information to the Client Security Fund Board of Trustees to assist the Client Security Fund Board in determining losses caused by dishonest conduct of members of 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 July 18, 2008.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of September, 2008.

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 9th day of October, 2008.

Sarah Parker
Sara 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 9th day of October, 2008.

Hudson, J.
For the Court

Order Adopting Amendments to the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases

WHEREAS, section 7A-38.4A of the North Carolina General Statutes codifies a statewide system of court-ordered mediated settlement conferences to be implemented in district court judicial districts in order to facilitate the resolution of equitable distribution and other family financial matters within the jurisdiction of those districts, and

WHEREAS, N.C.G.S. §§ 7A-38.4A(o) provides for 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), Rules 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 day of October, 2008.

Adopted by the Court in conference the 11th day of June, 2008. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases amended through this action in the advance sheets of the Supreme Court.

Hudson, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

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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 fam-

ily 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 all equitable distribution actions in all judicial districts, 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). The Court shall dispense with the requirement to attend a mediated settlement conference or other settlement procedure only for good cause shown.

(2) Scope of Settlement Proceedings. 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 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.~~ selecting a mediator, the Dispute Resolution Commission shall assemble, maintain and post on its web site at a list of certified family financial mediators. The list shall supply contact information for mediators and identify Court districts that they are available to serve. Where a mediator has supplied it to the Commission, the list shall also provide biographical information including information about an individual mediator's education, professional experience and mediation training and experience.

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 participate 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, the 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.*~~

(1) If an agreement is reached at the conference, the parties shall reduce to writing the essential terms of the agreement.

a. If the parties conclude the conference with a written document containing all the terms of their agreement, signed by all parties and formally acknowledged as required by NCGS 50-20(d) for property distribution, the mediator shall report to the Court that the matter has been settled and include in the report the name and

signature of the person responsible for filing closing documents with the Court.

b. If the parties are able to reach an agreement at the conference, but are unable to have it written or have it signed and acknowledged as required by NCGS 50-20(d) for property distribution agreements, then the parties shall summarize their understanding in written form and shall use it as a memorandum and guide to writing such agreements and orders as may be required to give legal effect to its terms. In that event, the mediator shall facilitate the writing of the summary memorandum and shall either:

(i) report to the Court that the matter has been settled and include in the report the name and signature of the person responsible for filing closing documents with the Court; or, in the mediator's discretion,

(ii) declare a recess of the conference. If a recess is declared, the mediator may schedule another session of the conference if the mediator determines that it would assist the parties in finalizing a settlement.

(2) If the agreement is reached at the conference, the person(s) responsible for filing closing documents with the Court shall sign the mediator's report to the Court. The parties 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 prior to the conference or finalized while the conference is in recess, the parties shall notify the mediator 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. The mediator shall report to the Court that the matter has been settled and who reported the settlement.

(4) No settlement agreement resolving issues reached at the proceeding conducted under this section or

during its recesses shall be enforceable unless it has been reduced to writing, signed by the parties, and acknowledged as required by NCGS 50-20(d).

C. 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.~~ include the names of those persons attending the mediated settlement conference. 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 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.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 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, 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. CHANGE OF APPOINTED MEDIATOR. Pursuant to Rule 2.A., the parties may select a certified mediator or nominate a non-certified mediator to conduct their mediated settlement conference. Parties who fail to select a mediator and then desire a substitution after the Court has appointed a mediator, shall obtain Court approval for the substitution. The Court may approve the substitution only upon proof of pay-

ment to the Court's original appointee the $125 one time, per case administrative fee, and any other amount due and owing for mediation services pursuant to Rule 7.B. and any postponement fee due and owing pursuant to Rule 7.E.

~~C.~~ D. **PAYMENT OF COMPENSATION BY PARTIES.** Unless otherwise agreed to by the parties or ordered by the Court, the mediator's fees shall be paid in equal shares by the named parties. Payment shall be due and payable upon completion of the conference.

~~D.~~ E. **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.~~ F **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. Good cause shall mean that the reason for the postponement involves a situation over which the party seeking the postponement has no control, including but not limited to, a party or

attorney's illness, a death in a party or attorney's family, a sudden and unexpected demand by a judge that a party or attorney for a party appear in Court for a purpose not inconsistent with the Guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts, or inclement weather such that travel is prohibitive. Where good cause is found, a mediator shall not assess a postponement fee.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause provided that the mediator was notified of the settlement immediately after it was reached and the mediator received notice of the settlement at least fourteen (14) calendar days prior to the date scheduled for mediation.

~~(3)~~(4) 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, except that ~~or if the request is within five (5) business days of the scheduled date the fee shall be $250.~~ if the request for postponement is made within seven (7) calendar days of the scheduled date for mediation, 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)~~(5) 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~~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 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.~~ D.

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.~~F.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. 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.~~ G.

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.~~G. is intended to give the Court express authority to enforce payment of fees owned 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.~~F (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. Each applicant for certification under this provision shall have completed the North Carolina

Bar Association's two-day basic family law CLE course or equivalent course work in North Carolina law relating to separation and divorce, alimony and post separation support, equitable distribution, child custody and support and domestic violence and in addition, shall:

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~~ and ~~possess~~ have earned ~~a four year college~~ an undergraduate degree from an accredited ~~institution~~ four-year college or university, ~~except that the four year degree requirement shall not be applicable to mediators certified prior to January 1, 2005.~~; or

~~**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(e)(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.~~

2. Have completed a 40 hour family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9, or, if already a certified Superior Court mediator, have completed the 16 hour family mediation supplemental course pursuant to Rule 9, and have additional experience as follows:

(a) as a Licensed Attorney and/or Judge of the General Court of Justice of the State of North Carolina or other state for at least five years; or

(b) as a Licensed Physician certified in psychiatry pursuant to NCGS 90-9 et seq., for at least five years; or

(c) as a person licensed to practice psychology in North Carolina pursuant to NCGS 90-270.1 et seq., for at least five years; or

(d) as a Licensed Marriage and Family Therapist pursuant to NCGS 90-270.45 et seq., for at least five years; or

(e) as a Licensed Clinical Social Worker pursuant to NCGS 90B-7 et seq., for at least five years; or

(f) as a Licensed Professional Counselor pursuant to NCGS 90-329 et seq., for at least five years; or

(g) as a Certified Public Accountant certified in North Carolina for at least five years.

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.~~ Attorneys licensed to practice law in states other than North Carolina shall complete this requirement through a course of self-study as directed by the Commission's Executive Secretary.

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~~.~~ as required by Rule 8.A.

D. Have observed as a neutral observer with the permission of the parties two ~~mediated settlement conferences~~ mediations ~~as a neutral observer which~~ involve ing custody or family financial issues ~~and which are~~ conducted by a mediator who is certified pursuant to these rules, or 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~~.~~, and, if the applicant is not an attorney licensed to practice law in one of the United States, have observed three additional Court ordered mediations in cases that are pending in State or Federal Courts in North Carolina having rules for mandatory mediation similar to these.

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.~~ An applicant for certification shall disclose on his/her application(s) any of the following: any criminal convictions; any disbarments or other revocations or suspensions of any professional license or certification, including suspension or revocation of any license, certification, registration or qualification to serve as a mediator in another state or country for any reason other than to pay a renewal fee. In addition, an applicant for certification shall disclose on his/her application(s) any of the following which occurred within ten years of the date the application(s) is filed with the Commission: any pending disciplinary complaint(s) filed with, or any private or public sanction(s) imposed by a professional licensing or regulatory body, including any body regulating mediator conduct; any judicial sanction(s); any civil judgment(s); any tax lien(s); or any bankruptcy filing(s). Once certified, a mediator shall report to the Commission within thirty (30) days of

receiving notice any subsequent criminal conviction(s); any disbarment(s) or revocation(s) of a professional license, other disciplinary complaints filed with, or actions taken by, a professional licensing or regulatory body; any judicial sanction(s); any tax lien(s); any civil judgment(s) or any filing(s) for bankruptcy.

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.

J. 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. No application for recertification shall be denied on the grounds that the mediator's training and experience does not meet the training and experience required under Rules which were promulgated after the date of his/her original certification.

~~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) In proceedings for sanctions under this section;

(b) 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 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, 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 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 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 settle-

ment 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 admissibility of conduct and statements as provided by G.S. 7A-38.1 (1) 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 agree-

ment(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 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 resolution 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), the Rules Implementing Mediation In Matters Before The Clerk Of Superior Court are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st of October, 2008.

Adopted by the Court in conference the 11th day of June, 2008. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules Implementing Mediation In Matters Before The Clerk Of Superior Court amended through this action in the advance sheets of the Supreme Court.

Hudson, 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 Commis-

sion 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 certified 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 significant 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 con-

ference 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 settle-

ment 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 certified mediator within the time set out in the Clerk's order and then desire a substitution after the Clerk has appointed a certified 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.~~ The Clerk may approve the substitution only upon proof of payment to the Clerk's original appointee the $125 one time, per case administrative fee, any other amount due and owing for mediation services pursuant to Rule 7.B., and any postponement fee due and owing pursuant to Rule 7.F., unless the Clerk determines that payment of the fees would be unnecessary or inequitable.

E. INDIGENT CASES. No person ordered to attend a mediation found to be indigent by the Clerk for 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 Amendments To The Rules Implementing Statewide Mediated Settlement Conferences And Other Settlement Procedures In Superior Court Civil Actions

WHEREAS, section 7A-38.1 of the North Carolina General Statutes codifies a statewide system of court-ordered mediated settlement conferences to be implemented in superior court judicial districts in order to facilitate the resolution of civil actions within the jurisdiction of those districts, 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 and Other Settlement Procedures in Superior Court Civil Actions are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of October, 2008.

Adopted by the Court in conference the 11th day of June, 2008. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions amended through this action in the advance sheets of the Supreme Court.

Hudson, 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 agree-

ment 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 shall, by written order, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in all civil actions except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his/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 Judges of said districts shall, by local rule, require all persons and entities iden-

tified in Rule 4 to attend a pre-trial mediated settlement conference in all civil actions except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his/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. 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 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 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 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.~~ selecting a mediator, the Dispute Resolution Commission shall assemble, maintain and post on its web site at a list of certified Superior Court mediators. The list shall supply contact information for mediators and identify Court districts that they are available to serve. Where a mediator has supplied it to the Commission, the list shall also provide biographical information including information about an individual mediator's education, professional experience and mediation training and experience.

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; or who has been authorized

to negotiate on behalf of such party and can promptly communicate during the conference with persons who have decision-making authority to settle the action; provided, however, if a specific procedure is required by law (*e.g.*, a statutory pre-audit certificate) or the party's governing documents (*e.g.*, articles of incorporation, bylaws, partnership agreement, articles of organization, or operating agreement) to approve the terms of the settlement, then the representative shall have the authority to negotiate and make recommendations to the applicable approval authority in accordance with that procedure;

(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 electronically 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 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 thirty (30) days or within ninety (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.

(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.~~ include the names of those persons attending the mediated settlement conference. 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 pur-

poses 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 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~~ may select a certified mediator to conduct their mediated settlement conference. Parties who fail to select a certified 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.~~ The Court may approve the substitution only upon proof of payment to the Court's original appointee the $125 one time, per case administrative fee, any other amount due and owing for mediation services pursuant to Rule 7.B. and any postponement fee due and owing pursuant to Rule 7.E.

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. Good cause shall mean that the reason for the postponement involves a situation over which the party seeking the postponement has no control, including but not limited to, a party or attorney's illness, a death in a party or attorney's family, a sudden and unexpected demand by a judge that a party or attorney for a party appear in Court for a purpose not inconsistent with the Guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts, or inclement weather such that travel is prohibitive. Where good cause is found, a mediator shall not assess a postponement fee.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause provided that the mediator was notified of the settlement immediately after it was reached and the mediator received notice of the settlement at least fourteen (14) calendar days prior to the date scheduled for mediation.

~~**(3)**~~**(4)** 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, except that ~~or if the request is within five (5) business days of the scheduled date the fee shall be $250.~~ if the request for postponement is made within seven (7) calendar days of the scheduled date for mediation, 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)~~**(5)** If all parties select ~~or nominate~~ the certified 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 named 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, medi-

ators 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 <u>after date of licensure</u> 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 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 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 statutes, 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;~~ An applicant for certification shall disclose on his/her application(s) any of the following: any criminal convictions; any disbarments or other revocations or suspensions of any professional license or certification, including suspension or revocation of any license, certification, registration or qualification to serve as a mediator in another state or country for any reason other than to pay a renewal fee. In addition, an applicant for certification shall disclose on his/her application(s) any of the following which occurred within ten years of the date the application(s) is filed with the Commission: any pending disciplinary complaint(s) filed with, or any private or public sanctions(s) imposed by a professional licensing or regulatory body, including any body regulating mediator conduct; any judicial sanction(s); any civil judgment(s); any tax lien(s); or any bankruptcy filing(s). Once certified, a mediator shall report to the Commission within thirty (30) days of receiving notice any subsequent criminal conviction(s); any disbarment(s) or revocation(s) of a professional license(s), other disciplinary complaint(s) filed with, or actions taken by, a professional licensing or regulatory body; any judicial sanction(s); any tax lien(s); any civil judgment(s) or any filing(s) for bankruptcy.

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). Non-binding 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:

(a) In proceedings for sanctions under this section;

(b) 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 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 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 non-binding 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. No-

tice 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, respond-

ing 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 procured 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 nonbinding and limited to the summary trial.

E. JURY SELECTION. In the case of a summary jury trial, potential jurors shall be selected in accordance with the procedure set out in the pre-summary trial order. These jurors

shall complete a questionnaire previously stipulated to by the parties. Eighteen jurors or 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.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE LEGAL SPECIALIZATION PROGRAM

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 25, 2008.

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, Section .1700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1700, The Plan for Legal Specialization

.1709 Succession

Each member of the board shall be entitled to serve for one full three-year term and to succeed himself or herself for one additional three-year term. Thereafter, no person may be reappointed without having been off of the board for at least three years~~.~~ : provided, however, that any member who is designated chairperson may serve one additional three-year term in that capacity.

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 25, 2008.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of September, 2008.

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 9th day of October, 2008.

Sarah Parker
Sara 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 9th day of October, 2008.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE LEGAL SPECIALIZATION 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 18, 2008.

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 .2100,.2300, and .2400 be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .2100 Certification Standards for the Real Property Law Specialty

.2105 Standards for Certification as a Specialist in Real Property Law

Each applicant for certification as a specialist in real property 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 real property law:

(a) Licensure and Practice . . .

(b) Substantial Involvement . . .

(c) Continuing Legal Education—An applicant must have earned no less than 36 hours of accredited continuing legal education (CLE) credits in real property law during the three years preceding application with not less than six credits in any one year. Of the 36 hours of CLE, at least 30 hours shall be in real property law and the balance may be in the related areas of environmental law, taxation, business organizations, estate planning and probate law, and elder law.

(d) Peer review . . .

(e) Examinations . . .

.2106 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 .2106(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement . . .

(b) Continuing Legal Education—The specialist must have earned no less than 60 hours of accredited continuing legal education credits in real property law as accredited by the board with not less than six credits earned in any one year. Of the 60 hours of CLE, at least 50 hours shall be in real property law and the balance may be in the related areas of environmental law, taxation, business organizations, estate planning and probate law, and elder law.

(c) Peer Review . . .

27 N.C.A.C. 1D, Section .2300 Certification Standards for the Estate Planning and Probate Law Specialty

.2305 Standards for Certification as a Specialist in Estate Planning and Probate Law

Each applicant for certification as a specialist in estate planning and probate 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 estate planning and probate law:

(a) Licensure and Practice . . .

(b) Substantial Involvement . . .

(c) Continuing Legal Education—An applicant must have earned no less than 72 hours of accredited continuing legal education (CLE) credits in estate planning and probate law during the three years preceding application. Of the 72 hours of CLE, at least 45 hours shall be in estate planning and probate law (provided, however, that eight of the 45 hours may be in the related areas of elder law, Medicaid planning, and guardianship), and the balance may be in the related areas of taxation, business organizations, real property, ~~and~~ family law, elder law, Medicaid planning, and guardianship.

(d) Peer Review . . .

.2306 Standards for Continued Certification as a Specialist

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued cer-

tification must apply for continued certification within the time limit described in Rule .2306(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement . . .

(b) Continuing Legal Education—Since last certified, a specialist must have earned no less than 120 hours of accredited continuing legal education credits in estate planning and probate law. Of the 120 hours of CLE at least 75 hours shall be in estate planning and probate law (provided, however, that 15 of the 75 hours may be in the related areas of elder law, Medicaid planning, and guardianship), and the balance may be in the related areas of taxation, business organizations, real property, ~~and~~ family law, elder law, Medicaid planning, and guardianship.

(c) Peer Review . . .

(d) Time for Application . . .

27 N.C.A.C. 1D, Section .2400 Certification Standards for the Family Law Specialty

.2405 Standards for Certification as a Specialist in Family Law

Each applicant for certification as a specialist in family 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 family law:

(a) Licensure and Practice . . .

(b) Substantial Involvement . . .

(c) Continuing Legal Education—During the three calendar years prior to the year of application and the portion of the calendar year immediately prior to application, an applicant must have earned no less than 45 hours of accredited continuing legal education (CLE) credits in family law, nine of which may be in related fields. Related fields shall include taxation, trial advocacy, evidence, negotiation (including training in mediation, arbitration, and collaborative law), ~~and~~ juvenile law, real property, estate planning and probate law, business organizations, employee benefits, bankruptcy, elder law, and immigration law. Only nine hours of CLE credit will be recognized for attendance at an extended negotiation or mediation training course ~~although designated as a family law course~~. Parenting coordinator

training will not qualify for family law or related field hours. At least 9 hours of CLE in family law or related fields must be taken during each of the three calendar years preceding application.

(d) Peer Review . . .

.2406 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 .2406(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement— . . .

(b) Continuing Legal Education—Since last certified, a specialist must have earned no less than 60 hours of accredited continuing legal education credits in family law or related fields. Not less than nine credits may be earned in any one year, and no more than twelve credits may be in related fields. Related fields shall include taxation, trial advocacy, evidence, negotiations (including training in mediation, arbitration, and collaborative law), ~~and~~ juvenile law, real property, estate planning and probate law, business organizations, employee benefits, bankruptcy, elder law, and immigration law. Only nine hours of CLE credit will be recognized for attendance at an extended negotiation or mediation training course ~~although designated as a family law course~~. Parenting coordinator training will not qualify for family law or related field hours.

(c) Peer Review . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 18, 2008.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of September, 2008.

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 9th day of October, 2008.

Sarah Parker
Sara 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 9th day of October, 2008.

Hudson, J.
For the Court

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CRIMINAL LAW—Continued

himself concerning prior convictions, current charges, and discussions with a district attorney's office. The testimony about pending charges was true at that time, and defendant presented no evidence to support the assertion that the prosecution knowingly and intentionally allowed false testimony. **State v. Murrell, 375.**

Prosecutor's closing argument—defendant's credibility—prosecutor's personal belief—The trial court did not err by not intervening ex mero motu in the prosecutor's closing argument in a first-degree murder prosecution when the prosecutor argued that he did not believe defendant's statement. Given the overall context and the brevity of the remark, it was no "so grossly improper" as to render the proceeding fundamentally unfair. **State v. Taylor, 514.**

Prosecutor's closing argument—impropriety—not prejudicial—The trial court did not abuse its discretion by allowing a portion of the State's closing argument which defendant asserted was a personal attack. The prosecutor's comment was neither laudable nor appropriate, but it was not extreme, the evidence of guilt was overwhelming, and the argument was confounding as to its true meaning. **State v. Raines, 1.**

Prosecutor's closing argument—not prejudicial—A first-degree murder defendant could not show that the failure to sustain his objection to the prosecutor's closing argument was prejudicial, even evening assuming the argument was improper. The argument concerned defendant ignoring the ringing of the victim's cell phone after the crime as the victim's family tried to find him; the challenged remarks were made to show the family's love of the victim. **State v. Murrell, 375.**

Prosecutor's closing argument—whether murder was provoked—not an argument for jury nullification—A prosecutor's argument about whether a murder defendant was provoked (to which defendant did not object) was not so prejudicial as to require intervention ex mero motu. The prosecutor was not arguing for jury nullification as defendant contended, but that the jury should find defendant guilty of first-degree rather than second-degree murder. Moreover, the court instructed the jury that it was necessary to understand and apply the law as given. **State v. Raines, 1.**

Prosecutor's closing argument—witness not called—The court did not abuse its discretion in a first-degree murder prosecution by overruling defendant's objection to the prosecutor's closing argument regarding a witness whom the State did not call. There was no prejudice; defendant's own expert agreed with the assessment that defendant was not schizophrenic. **State v. Murrell, 375.**

Questions assuming facts not in evidence—objections sustained—not prejudicial—There was no prejudice in a first-degree murder prosecution where defendant asserted that the prosecution had asked questions assuming facts not in evidence, but defendant's objections had been sustained. **State v. Murrell, 375.**

Recross-examination—records used by mental health expert—Any error by the court in sustaining the State's objection to defendant's recross-examination of his mental health expert concerning alteration of the records was not prej-

EVIDENCE

Cross-examination—exclusion of testimony and evidence—credibility of victim—The trial court erred in a simple assault case when it excluded certain testimony and evidence during cross-examination of the victim regarding her written responses to inquiries contained in a questionnaire completed by the victim during a visit to a place called Wellspring in preparation for civil litigation arising from the same alleged assault, including her response that she had difficulty recalling whether certain events actually occurred, and defendant is entitled to a new trial, because the excluded testimony went to the credibility of the victim and should have been admitted under N.C.G.S. § 8C-1, Rule 611(b), and the trial court abused its discretion by excluding such testimony under N.C.G.S. § 8C-1, Rule 403. **State v. Whaley, 156.**

Discovery of body—reaction of parent—not prejudicial—There was no prejudice from the admission of testimony about how a witness discovered her sister's death and about her mother's reaction to the news where the evidence of guilt was overwhelming. **State v. Raines, 1.**

Flight—instruction appropriate and not prejudicial—The trial court did not err in a first-degree murder prosecution by instructing the jurors that they could consider flight in determining guilt. There was evidence that defendant left the scene hurriedly without aiding the victims and sought to avoid apprehension; moreover, even if the instruction was improper, there was overwhelming evidence of guilt, and the court correctly instructed the jury that proof of flight was not sufficient by itself to show guilt. **State v. Taylor, 514.**

Prior crimes or bad acts—six driving while impaired convictions—malice—intent—plain error analysis—The trial court did not commit plain error in a second-degree murder case based on vehicular homicide by its instructions to the jury regarding the purposes for which they could consider defendant's prior driving while impaired convictions because evidence of a defendant's prior traffic-related convictions is admissible to prove the malice element in a second-degree murder prosecution based on vehicular homicide. **State v. Maready, 614.**

Prior crimes or bad acts—stale convictions—more than sixteen years old—plain error analysis—The trial court did not commit plain error in a second-degree murder case based on vehicular homicide by admitting into evidence prior traffic-related convictions against defendant that were more than sixteen years old. **State v. Maready, 614.**

Reaction of victims' son to death of parents—invited and not prejudicial—There was no prejudice from the admission of testimony about the reaction of the victims' son to the death of his parents where the exclusion of the testimony would not have changed the result. Moreover, the testimony came during a line of questioning by defendant, and any error was invited. **State v. Raines, 1.**

Victim impact testimony—unfinished statement—not prejudicial—There was no prejudicial error in victim impact testimony in a first-degree murder sentencing hearing where the sister of one of the victims, who also knew defendant, began a sentence which was not finished after an objection. The jury did not hear the complete thought, and the appellate court will not speculate that the witness was asking the jury to minimize mitigating evidence. **State v. Raines, 1.**

SENTENCING—Continued

SENTENCING—Continued

not intervening ex mero motu during the State's closing argument on the course of conduct aggravating circumstance. The prosecutor distinguished between what the State contended and what the jury must consider and find, and the court cured any misstatement by correctly instructing the jury. **State v. Taylor, 514.**

Capital—prosecutor's argument—final moments of victims' lives—defendant shifting blame—not grossly improper—A prosecutor's closing arguments in the penalty phase of a first-degree murder prosecution concerning the final moments of murdered victims' lives was not so grossly improper as to require intervention ex mero motu. A remark that defendant was probably blaming the prosecutor for trying to give him the death penalty was part of an argument that no one but defendant was to blame for his predicament and comes nowhere close to the level of gross impropriety. **State v. Raines, 1.**

Capital—prosecutor's argument—life in prison—beyond the record—The trial court did not err by not intervening ex mero motu in a capital sentencing proceeding where the prosecutor argued beyond the record about various prison amenities defendant would enjoy if sentenced to life in prison. **State v. Taylor, 514.**

Capital—prosecutor's argument—mitigating circumstances—There was no plain error in a first-degree murder prosecution where defendant contended that the prosecutor misrepresented the law regarding mitigating circumstances by suggesting that mitigating evidence would have to lessen the severity of the crime. The remarks were at least substantially correct, and cannot then be said to be grossly improper. **State v. Murrell, 375.**

Capital—prosecutor's argument—mitigating value—A prosecutor at a first-degree murder sentencing hearing did not argue that mitigating evidence must be connected to the crime, but that the evidence did not have mitigating value. **State v. Raines, 1.**

Capital—prosecutor's argument—use of mitigating evidence—The trial court did not abuse its discretion in a first-degree murder prosecution by overruling defendant's objection to the prosecution's alleged argument that the jury should consider mitigation evidence in support of an aggravating circumstance. In context, the argument was that defendant's childhood temper tantrums should not be significant factors in the consideration of defendant's mitigating evidence. **State v. Murrell, 375.**

Capital—prosecutor's argument—weighing aggravating and mitigating circumstances—The trial court did not err during a capital sentencing proceeding by not intervening ex mero motu when the prosecutor's statement about weighing aggravating and mitigating circumstances was inconsistent with the law. The trial court properly instructed the jury, curing any misstatement. **State v. Taylor, 514.**

Consecutive—failure to specify—imposition after comment by clerk of court—The trial court did not err in a second-degree rape and second-degree sexual offense case by imposing consecutive sentences upon defendant after being advised by the assistant clerk of superior court following defendant's sentencing hearing that the trial court had not specified that these sentences were to run consecutively. **State v. Mead, 218.**

WORKERS' COMPENSATION

Average weekly wage—fringe benefits—An employer's contributions to an employee's retirement accounts are not included in the calculation of "average weekly wage" under the Workers' Compensation Act. **Shaw v. U.S. Airways, Inc., 457.**

Expiration of time limitations—equitable estoppel—A party may be equitably estopped, even in the absence of bad faith, from raising the two-year filing requirement of N.C.G.S. § 97-24 as an affirmative defense to a workers' compensation claim. **Gore v. Myrtle/Mueller, 27.**

Fault—inappropriateness—Fault has no place in the workers' compensation system, except as expressly provided by statute. In a workers' compensation action involving a teacher who claimed compensation for generalized anxiety disorder, any language in a finding implying that plaintiff's fault or responsibility for her condition plays a role in determining the compensability of the claim is irrelevant, inappropriate, and disavowed. **Hassell v. Onslow Cty. Bd. of Educ., 299.**

Finding about testimony—supported by evidence—The Industrial Commission's finding in a workers' compensation case concerning the testimony of plaintiff's psychologist was supported by competent evidence. **Hassell v. Onslow Cty. Bd. of Educ., 299.**

Findings of fact—sufficiency of evidence—The Industrial Commission did not err in a workers' compensation case by its findings of fact supporting the conclusion that plaintiff's ongoing disability and medical treatment were the result of a compensable injury, and that plaintiff's fall at home in November 2001 did not amount to an intervening event that broke the chain of causation from the original injury. **Davis v. Harrah's Cherokee Casino, 133.**

Injury by accident—causation—medical records—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff suffered a compensable back injury by accident because plaintiff employee's medical records were stipulated into evidence by the parties and represent competent evidence to support the Commission's findings of fact determining that there was a causal connection between plaintiff's injuries and her work. **Gore v. Myrtle/Mueller, 27.**

Notice—actual knowledge negates written notice requirement—The Court of Appeals erred in a workers' compensation case by remanding to the Full Commission for additional findings of fact and conclusions of law concerning whether plaintiff satisfied the notice requirements of N.C.G.S. § 97-22 even though plaintiff did not give written notice of the accident to her employer until she filed Form 18 well outside the thirty-day period specified in section 97-22 where plaintiff did notify her employer by telephone within thirty minutes after the collision, providing the employer actual knowledge of the accident, and the employer was also aware of plaintiff's injuries and medical treatments based on her regular communications. The plain language of N.C.G.S. § 97-22 requires an injured employee to give written notice of an accident "unless it can be shown that the employer, his agent or representative, had knowledge of the accident," thus negating the Commission's need to make any findings about prejudice, and an employee may be excused from even that requirement by providing a reason-

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