NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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OF
NORTH CAROLINA

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1. Elected and sworn in 1 January 2011.
2. Retired 21 December 2010.
3. Appointed 1 January 2011.
4. Appointed 1 January 2011.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	Jerry R. Tillett	Manteo
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13A	Douglas B. Sasser	Whiteville
13B	Ola M. Lewis	Southport
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17B	A. Moses Massey	Mt. Airy
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John Congleton
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Margaret L. Weaver
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Larissa S. Williamson
Christopher H. Wilson
Donna B. Wojcik
Phillip K. Woods
Patrick Wooten
Harriet F. Worley
Claude N. Young, Jr.
Ward A. Zimmerman
Tamara S. Zmuda

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	Frank R. Parrish	Elizabeth City
2	Seth H. Edwards	Washington
3A	W. Clark Everett	Greenville
3B	Scott Thomas	New Bern
4	Ernie Lee	Clinton
5	Benjamin Russell David	Wilmington
6A	Melissa Pelfrey	Halifax
6B	Valerie Asbell	Ahoskie
7	Robert Evans	Tarboro
8	C. Branson Vickory III	Goldsboro
9	Samuel B. Currin	Oxford
9A	Wallace Bradsher	Roxboro
10	C. Colon Willoughby, Jr.	Raleigh
11A	Vernon Stewart	Lillington
11B	Susan Doyle	Smithfield
12	Billy West	Fayetteville
13	Jon David	Bolivia
14	Tracey Cline	Durham
15A	Pat Nadolski	Graham
15B	James R. Woodall, Jr.	Hillsborough
16A	Kristy McMillan Newton	Raeford
16B	L. Johnson Britt III	Lumberton
17A	Phil Berger, Jr.	Wentworth
17B	C. Ricky Bowman	Dobson
18	J. Douglas Henderson	Greensboro
19A	Roxann L. Vaneekhoven	Concord
19B	Garland N. Yates	Asheboro
19C	Brandy Cook	Salisbury
19D	Maureen Krueger	Carthage
20A	Reece Saunders	Wadesboro
20B	Trey Robinson	Monroe
21	Jim O'Neill	Winston-Salem
22	Sarah Kirkman	Lexington
22B	Gary Frank	Lexington
23	Thomas E. Horner	Wilkesboro
24	Gerald W. Wilson	Boone
25	James Gaither, Jr.	Newton
26	Andrew Murray	Charlotte
27A	R. Locke Bell	Gastonia
27B	Richard L. Shaffer	Shelby
28	Ronald L. Moore	Asheville
29A	Bradley K. Greenway	Marion
29B	Jeff Hunt	Hendersonville
30	Michael Bonfoey	Waynesville

PUBLIC DEFENDERS

DISTRICT	PUBLIC DEFENDER	ADDRESS
1	Andy Womble	Elizabeth City
3A	Robert C. Kemp III	Greenville
3B	James Q. Wallace III	Beaufort
5	Jennifer Harjo	Wilmington
10	George Bryan Collins, Jr.	Raleigh
12	Ron D. McSwain	Fayetteville
14	Lawrence M. Campbell	Durham
15B	James E. Williams, Jr.	Carrboro
16A	Jonathan L. McInnis	Laurinburg
16B	Angus B. Thompson, II	Lumberton
18	Wallace C. Harrelson	Greensboro
21	George R. Clary III	Winston-Salem
26	Kevin P. Tully	Charlotte
27A	Kellum Morris	Gastonia
28	M. LeAnn Melton	Asheville
29B	Paul B. Welch	Brevard

CASES REPORTED

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ORDERS

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

PETITIONS TO REHEAR

GENERAL STATUTES CITED

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

NORTH CAROLINA CONSTITUTION 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 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 examination by the Board of Law Examiners on the 19th day of December 2008, and said person has been issued a certificate of this Board:

Joshua Hilton Tetterron . . . . . .Raleigh

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 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:

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 admit-

ted 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 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 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 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

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 27th day of March 2009, and said person has been issued a certificate of this Board:

Antisha De'Vaye Peterkin . . . . . .Raleigh

Given over my hand and seal of the Board of Law Examiners on this the 26th day of June, 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 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

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

Katherine JoAnn Begor . . . . . .Charlotte
Andrew Francis Lopez . . . . . .District of Columbia

Given over my hand and seal of the Board of Law Examiners on this the 7th day of May, 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 3rd day of April 2009, and said person has been issued a certificate of this Board:

Nathan Clifton Chase, Jr. . . . . Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 7th day of May, 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 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
Jennifer Joyner Dacey . . . . . .New Bern
William Archie Dudley, Jr. . . . . .Durham
Kristen Elizabeth Finlon . . . . . .Charlotte
Jason Haworth Friedman . . . . . .Waynesville
Benjamin Paul Fryer . . . . . .Charlotte
Valerie Banet Gefert . . . . . .Charlotte
April Lawhon Gremillion . . . . . .Columbia, South Carolina
Thomas Moore Gremillion . . . . . .Chapel Hill
Abigail Maxwell Hammond . . . . . .Raleigh
Christian Watson Hancock . . . . . .Charlotte
Mary Anson Horowitz . . . . . .Durham
EJ Hurst II . . . . . .Chapel Hill
Hanan Ahmed Javaid . . . . . .Charlotte
Mark Anthony Jefferis . . . . . .Charlotte
Mark David Jenkins . . . . . .Raleigh
Mary Ann Kilany . . . . . .Dallas, Texas
Laurin Hamilton Fontaine Lucas . . . . . .District of Columbia
John David McCally . . . . . .Charlotte

Louis Franklin McDonald, Jr. . . . . Mooresville
Lani Rae Miller . . . . . Charlotte
Charlene Aletha Morring . . . . . Chesapeake, Virginia
David Brandt Oakley . . . . . Virginia Beach, Virginia
Jeffrey Laurence Osterwise . . . . . Philadelphia, Pennsylvania
Brione Berneche Pattison . . . . . Charlotte
Adrienne Claire Peacock . . . . . Raleigh
Robert Alan Pohl . . . . . Greensboro
Karen Sally Schuller . . . . . Apex
Travis Thomas Sheets . . . . . Apex
Taryn Elissa Smith . . . . . Charlotte
Jennifer Lynn Story . . . . . Charlotte
Michael Charles Taliercio . . . . . Greensoro
Jessica Lynn Tarsi . . . . . Emerald Isle
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 persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 1st day of May 2009, and said persons have been issued a certificate of this Board:

Dennis Lloyd Boothe . . . . . Durham
Elaine Richardson Jordan . . . . . Holden Beach
Edward Hallett Maginnis . . . . . District of Columbia

Given over my hand and seal of the Board of Law Examiners on this the 7th day of May, 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 1st day of May 2009, and said persons have been issued a certificate of this Board:

Mark Andrew Campanini . . . . . Applying from the State of Colorado
Kathryn Christian Bender . . . . . Applying from the District of Columbia

Renee F. Rendahl . . . . . .Applying from the State of Wisconsin
Samuel Joseph Nugent . . . . . .Applying from the State of Ohio
Lisa Marie Chikes Ostema . . . . . .Applying from the State of Colorado
Ronald Steven Melamed . . . . . .Applying from the State of Michigan
Audrey Ann Lambrecht . . . . . .Applying from the State of Michigan
Gabrielle Amber Pittman . . . . . .Applying from the State of Georgia
Susan Buchingham Reilly . . . . . .Applying from the District of Columbia
Terry T. Warren . . . . . .Applying from the State of Michigan

Given over my hand and seal of the Board of Law Examiners on this the 26th day of May, 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 22nd day of May 2009, and said persons have been issued a certificate of this Board:

Kathryn Christian Bender . . . . . .Applied from the District of Columbia
Debra Lynn Lloyd Blair . . . . . .Applied from the State of Iowa
Rodney D. Butler . . . . . .Applied from the State of New York
W. Randy Eaddy . . . . . .Applied from the State of Georgia
Glen Hunter Garrett . . . . . .Applied from the State of Ohio
Thomas Earl LeVere . . . . . .Applied from the State of Ohio
Sandra Kim Park . . . . . .Applied from the State of Georgia
Camden Ballard Scearce, Jr. . . . . .Applied from the State of Tennessee
Rhonda Diane Thompson . . . . . .Applied from the State of New York
Edward G. Vilano . . . . . .Applied from the State of Texas
Thomas Roy Zimmerman . . . . . .Applied from the State of West Virginia

Given over my hand and seal of the Board of Law Examiners on this the 26th day of June, 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 22nd day of May 2009, and said person has been issued a certificate of this Board:

Brady James Fulton . . . . . .Applying from the State of Illinois

Given over my hand and seal of the Board of Law Examiners on this the 26th day of June, 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 5th day of June 2009, and said person has been issued a certificate of this Board:

Joyce William Jones . . . . . .Applying from the State of Connecticut

Given over my hand and seal of the Board of Law Examiners on this the 26th day of June, 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 10th day of July 2009, and said person has been issued a certificate of this Board:

Joseph Anthony Schouten III . . . . . .Applying from the State of Illinois

Given over my hand and seal of the Board of Law Examiners on this the 6th day of August, 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 19th day of June 2009, and said persons have been issued a certificate of this Board:

John Joseph Nestico . . . . . .Charlotte
Debora Marie McNichol . . . . . .Raleigh

Given over my hand and seal of the Board of Law Examiners on this the 1st day of September, 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 comity by the Board of Law Examiners on the 7th day of August 2009, and said persons have been issued a certificate of this Board:

Tammy Alice Bouchelle . . . . . .Applying from the State of Georgia
Courtney E. Burbank . . . . . .Applying from the State of Pennsylvania
Marcy Conte Hingst . . . . . .Applying from the State of New York
William John Hudak . . . . . .Applying from the State of Massachusetts
Michael Kabakoff . . . . . .Applying from the State of New York
Steven R. Kaufman . . . . . .Applying from the District of Columbia
Robert Mark Klein . . . . . .Applying from the State of Kentucky
Audrey Ann Lambrecht . . . . . .Applying from the State of Michigan
Alston Christian McNairy . . . . . .Applying from the State of Georgia
Kim Anne Thompson . . . . . .Applying from the State of New York
Nwabundo Enuma Ume-Nwagbo . . . . . .Applying from the State of Georgia
John Richard Witcher III . . . . . .Applying from the State of New York

Given over my hand and seal of the Board of Law Examiners on this the 8th day of September, 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 28th day of August 2009, and said persons have been issued a certificate of this Board:

Andrew Harrison Ackley . . . . . .Raleigh
Derek Paul Adler . . . . . .Charlotte
Hannah Kennedy Albertson . . . . . .Winston-Salem
Stephanie Michelle Davis Albright . . . . . .Charlotte
Russell Clayton Alexander . . . . . .Morehead City
Britainy Faye Alford . . . . . .Greensboro
Bashir Musse Sheikh Ali . . . . . .Apex
Alonzo McAlpine Alston . . . . . .Charlotte
Sir-Christopher J. Anderson . . . . . .Henderson
Christopher Cole Anderson . . . . . .Jacksonville
Michele Nicole Andrejco . . . . . .Greensboro
Margaret Lewis Anthony . . . . . .Advance
Dorothy Pride Ariail . . . . . .Chapel Hill
Mark Arinci . . . . . .Winston-Salem
Maximillian Franklin Lafay Armfield . . . . . .Greensboro
Jamie Carroll Arnold . . . . . .Clyde
Brian C. Arthur . . . . . .Wilmington
Marc Stephen Asbill . . . . . .Charlotte
Lesley Rand Attkisson . . . . . .Buies Creek
Patrick McQuillan Aul . . . . . .Chapel Hill
Jonathan Kyle Aust . . . . . .High Point

Benjamin David Austrin-Willis . . . . . Charlotte
Jason Lee Aycoth . . . . . Greensboro
Ashlee Elaine Ayers . . . . . Nashville
Leslie Ann Baggatta . . . . . Hickory
Kahmil Annette Bailey . . . . . Raleigh
Heather Tonelli Baker . . . . . Raleigh
Kelly Lynn Ballard . . . . . Hope Mills
Matthew David Ballew . . . . . Durham
Danielle Monet Barbour . . . . . Durham
Shannan Maria Barclay . . . . . Cary
Benjamin Andrew Barco . . . . . Wilmington
LaTosha Rochelle Barnes . . . . . Fayetteville
Cristen Lee Bartus . . . . . Oregon, Ohio
Adrina Bass . . . . . Durham
Joseph Baird Bass III . . . . . Graham
Jennifer Ann Batson . . . . . Zebulon
Ashley Hume Baxter . . . . . New Bern
David Barrus Baxter, Jr. . . . . Durham
Amy Archer Beasley . . . . . Hendseronville
Daniel Roland Beaudry . . . . . Pooler, Georgia
Calvin Reid Beaver . . . . . Charlotte
Jonathan Aaron Bennett . . . . . Greensboro
Ashley Danielle Bennington . . . . . Monroe
Steven Allen Bimbo . . . . . Charlotte
Jason Michael Blackburn . . . . . Goldsboro
Arienne Elizabeth Blandina . . . . . Raleigh
Leland Scott Bloebaum . . . . . Cary
Katherine Elizabeth Bobb . . . . . Greensboro
Jennifer Elizabeth Bowden . . . . . Greensboro
Robert Porter Brackett, Jr. . . . . Hendersonville
Elliot Ian Brady . . . . . Efland
Edward Marvin Branscomb . . . . . Greensboro
Erin Theresa Bray . . . . . Charlotte
William Forrest Braziel III . . . . . Raleigh
Jennifer E. Brevorka . . . . . Greensboro, NC
Adam Mark Bridgers . . . . . Charlotte
Sarah Jane Brinson . . . . . Raleigh
Joanna Wallis Brooks . . . . . James Island, South Carolina
Marta Patrilous Brown . . . . . Raleigh
Robert Wilmot Brown III . . . . . Oxford
Jessica Lyn Brumley . . . . . Charlotte
Cherrelle Martina Bruton . . . . . Durham
Kristan Dale Bryant . . . . . Durham
Brock Logan Buck . . . . . Banner Elk
Michael Ryan Bucy . . . . . Greensboro
Jessica Leeanne Burge . . . . . Burlington
Scott Kenyon Burger . . . . . Okemos, Michigan
Monica Nicole Burnette . . . . . Durham
Elizabeht Arbogast Bushrod . . . . . Angier
Quinn Amber Byars . . . . . Durham
Sarah Abigail Byrd . . . . . Chapel Hill

Giles Cameron Byrd . . . . . Hallsboro
Lelan Clinton Byrd, Jr. . . . . Raleigh
Alexander J. Cabrejas . . . . . Durham
Matthew Michael Calabria . . . . . Cornelius
Gretchen Lee Caldwell . . . . . Charlotte
Elizabeth Danielle Caldwell . . . . . High Point
Dominique Lehnvon Camm . . . . . Durham
Amy Harris Caraway . . . . . Dallas
Matilde Jean Carbia . . . . . New Orleans, Louisiana
Justin Tyler Carpenter . . . . . Charlotte
Kimberly Jane Carter . . . . . Charlotte
Jennifer Gwynne Case . . . . . Williamsburg, Virginia
James Raymond Cass . . . . . Charlotte
Robert Lee Cayll . . . . . Conover
Darcel Chandler . . . . . Charlotte
Joy McMurry Chappell . . . . . Gastonia
Damon John Chetson . . . . . Apex
Connor Joseph Michael Childress . . . . . Charlottesville, Virginia
Laura Stephens Chipman . . . . . Durham
Nathan Alden Chrisawn . . . . . Burnsville
Donald Brandon Christian . . . . . Surf City
Elizabeth Labaredas Christiana . . . . . Spring Lake
Brian Lee Church . . . . . Montgomery, Alabama
Christopher Bradley Clare . . . . . Aiken, South Carolina
Keith Turner Clayton . . . . . Jamestown
Patrick James Cleary . . . . . Signal Mountain, Tennessee
Charles Tyrell Clemons . . . . . Staples
Carrie Beth Cline Hungate . . . . . Raleigh
Ashley Leder Clingman . . . . . Durham
Crandall Frances Close . . . . . Chapel Hill
Anna Warburton Coffin . . . . . Winston-Salem
Timothy James Coley . . . . . Durham
William Bradford Collins . . . . . Winston-Salem
Laura Anne Collins . . . . . Holly Springs
Jason Thomas Condrasky . . . . . Greensboro
Brian James Conley . . . . . Cordova, Tennessee
Laura Elizabeth Conner . . . . . Durham
Marcus Wayne Conner, Jr. . . . . Greenville
Hilary Roxanne Godette Cooper . . . . . Raleigh
Jeffrey Miles Cooper . . . . . Rutherfordton
Phillip Leon Cornett . . . . . Pittsboro
Jessica Lee Cornette . . . . . Cameron
Ann Kathryn Cosper . . . . . Wilmington
John David Costa . . . . . Charlotte
Kimberly Ann Costello . . . . . Greensboro
Sara Fitzhenry Coughlin . . . . . Chapel Hill
Alicia Marie Covert . . . . . Raleigh
Matthew Thomas Covington . . . . . Charlotte
Matthew Barron Covington . . . . . Charlotte
Gregory Preston Cowan . . . . . Clemmons
David Andrew Creech . . . . . Greenville

Melanie Yvonne Crenshaw . . . . . Greensboro
Amber Renee Cronk . . . . . Raleigh
Catherine Ann Cupo . . . . . Hickory
David Blake Currens . . . . . Cary
Lindsay Catherine Currie . . . . . Raleigh
Ashley Black Currin . . . . . Raleigh
Anthony James Cuticchia, Jr. . . . . Cary
Michele Hollowell Cybulski . . . . . Greensboro
Katherine Bruce Harris Dare . . . . . Fletcher
Angela Lynne Davis . . . . . Fayetteville
Andrew Jonathan Davis . . . . . Gainesville, Florida
Dene Marie Davis . . . . . Winston-Salem
Andrew Michael Davisson . . . . . Morrisville
James Aaron Dean . . . . . Winston-Salem
John Frederick Deans, Jr. . . . . Lillington
Matthew Stephen DeAntonio . . . . . Charleston, South Carolina
Anne Thurston Debnam . . . . . Zebulon
John Joseph Decker . . . . . North Charleston, South Carolina
Brandon Robert DeCurtins . . . . . Charlotte
Kelly Diane Dellerba . . . . . Clayton
Adrian William Dellinger . . . . . Raleigh
John Christopher Derrick . . . . . Wake Forest
James Shelton Derrick . . . . . Charlotte
Fred William DeVore IV . . . . . Chartlotte
Amrita Kaur Dhaliwal . . . . . Charlotte
Christopher James Dickson . . . . . Charlotte
Sean Thomas Dillenbeck . . . . . Waxhaw
Mark Philip Doby . . . . . Winston-Salem
Timothy Ryan Dodge . . . . . Durham
Eric Laurence Doggett . . . . . Cary
Alison J. Domnas . . . . . Chapel Hill
Elleveve Donahue . . . . . Lexington, South Carolina
Daniel Louis Donovan . . . . . Greensboro
Brittany Morgan Doolittle . . . . . Nashville, Tennessee
Dustin Randolph Dow . . . . . Southern Pines
James Edward Drawdy . . . . . Charlotte
Emily Marie Drosback . . . . . Greensboro
Jessica Morgan Drutchas . . . . . Bloomfield Hills, Michigan
Adam Taylor Duke . . . . . Glasgow, Virginia
Jennifer Dunlevy-Scholz Duncan . . . . . Chapel Hill
Damon Terry Duncan . . . . . Burlington
Melissa Ann Duncan . . . . . Burlington
Andria May Duncan . . . . . Murphy
Rustin Bryce Duncan . . . . . Greenville, South Carolina
Jeri Ashley Duncan . . . . . Monroe
Grant Steven Dunham . . . . . Morrisville, Pennsylvania
Corye Barbour Dunn . . . . . Durham
Joy Peele Easley . . . . . Oak Island
Deborah Grace Eberle . . . . . Cary
Lori Beth Edwards . . . . . Winston-Salem
Hunter Sutton Edwards . . . . . Charlotte

Courtney Nicole Ellis Guin . . . . . Charlotte
Brian David Elston . . . . . Arden
Phillip Charles Entzminger . . . . . Greenville
Ashley Lillian Erickson . . . . . Chapel Hill
Jay Wyatt Evans . . . . . Raleigh
Berit Louise Everhart . . . . . Durham
Erich Matthew Fabricius . . . . . Mebane
Caleb Jefferson Farmer . . . . . Rutherfordton
Stacey Erin Feinstein . . . . . Fayetteville
Mitchell Ross Feld . . . . . Charlotte
Thomas Russell Ferguson III . . . . . District of Columbia
Jessica Elizabeth Fields . . . . . Durham
Ann Elizabeth Fievet . . . . . Winston-Salem
Rip Stafford Fiser . . . . . Chapel HIll
Samuel David Fleder . . . . . Raleigh
Thomas James Floeter . . . . . Winston-Salem
John Thomas Floyd . . . . . Columbia, South Carolina
Kristen Marie Formanek . . . . . Wilmington
Lewis Chilton Foster III . . . . . Knoxville, Tennessee
Andrea Lauren Fowler . . . . . Chapel Hill
Elizabeth Clare Franks . . . . . Asheville
Ernest Lanier Freeman III . . . . . Durham
Meredith Christie French . . . . . Maineville, Ohio
Elizabeth Long Friary . . . . . Charlestown, Massachusetts
Michael Alexander Frickey . . . . . Raleigh
Preston Brooks Fuller . . . . . Charlotte
Michael Phillip Gaffney . . . . . Sewell, New Jersey
Cheryl Joan Gardner . . . . . Holly Springs
Charles Herman Gardner . . . . . Hope MIlls
Deedee Rouse Gasch . . . . . Jacksonville, Florida
Kevin Curry Gaskins . . . . . Chapel Hill
Rosalyn Claire Gell . . . . . Hillsborough
Lindsi Anne Gerdes . . . . . Fuquay-Varina
Andrew Daniel Gerschutz . . . . . Chapel Hill
Andrea Marie Gervais . . . . . Woodstock, Georgia
Alicia Charlene Gibson . . . . . Ridgeway, South Carolina
Robert Clayton Giddings . . . . . Durham
Melissa Scott Gilbert . . . . . Charlotte
Phillip Hunter Gilfus . . . . . Fayetteville
Zachary Christian Gill . . . . . Raleigh
Brittni Leticia Goldman . . . . . Charlotte
Kelley Louise Gondring . . . . . Charlottesville, Virginia
Thomas William Gooden . . . . . Mooresville
Kara Korea Goodman . . . . . Charlotte
Lakethia Ronnette Gore . . . . . Calabash
Ryan Heath Gore . . . . . Raleigh
Elizabeth Marie Graham . . . . . Raleigh
James Alexander Grant . . . . . Macon, Georgia
Norlan Waring Graves . . . . . Durham
Holly Jeanne Greeson . . . . . Cary
Valerie Lynn Griffith . . . . . Fort Myers, Florida

Holly Arlene Groh . . . . . Lillington
Jamie Lynne Grubb . . . . . Angier
Lambert Franklin Guinn . . . . . Charlotte
Vernon Hart Guthrie, Jr. . . . . Cary
Emily Michele Haas . . . . . Cary
Mary Carolyn Hackney . . . . . Raleigh
Allison Elizabeth Hager . . . . . Kings Mountain
Crystal Dawn Hairr . . . . . Dunn
Amelia Dudley Hairston-Porter . . . . . Durham
Emily Kelly Hales . . . . . Durham
Jennifer Mouchet Hall . . . . . Cary
Sarah Amelia Hall . . . . . Winston-Salem
James Bryan Hall, Jr. . . . . Charlotte
Cara-Ann Masako Hamaguchi . . . . . Charlottesville, Virginia
Erika Leigh Hamby . . . . . Greensboro
Elise Garland Hamilton . . . . . Greenville
Jennifer Davis Hammond . . . . . Salisbury
Erik Randall Hamner . . . . . Gibsonville
Mary Elizabeth Hanna-Weir . . . . . Ann Arbor, Michigan
Mark Joseph Hanson . . . . . Charlotte
Luke Barkley Hardison . . . . . Wilson
Jordan Laura Hardy . . . . . Raleigh
Jason Wayne Harmon . . . . . Boone
Scott Alexander Harper II . . . . . Charlotte
Andrea Leigh Dancy Harrell . . . . . Greensboro
LaTanya Alexcine Harris . . . . . Durham
Quentin Edward Harris . . . . . Greensboro
Jonathan Redford Harris . . . . . Cary
Phillip Absolom Harris, Jr. . . . . Durham
Ryan Benjamin Harrison . . . . . Spruce Pine
Melinda Ellen Harvey . . . . . Archdale
Shaun William Hassett . . . . . Colleyville, Texas
Nichole Monique Hatcher . . . . . Hanover, Maryland
Andrew Lee Hayes . . . . . Smithfield
James Bryant Haynes . . . . . Greensboro
Miriam Antoinette Heard . . . . . Greensboro
Douglas Bowen Heath . . . . . Raleigh
Timothy Evan Heinle . . . . . Greenville
Douglas William Hendrick . . . . . Chapel Hill
James Leighton Henson . . . . . Greensboro
John Alexander Heroy . . . . . Summerfield
Kristen Nicole Higbee . . . . . Gainesville, Florida
Daniel Ross Higginbotham . . . . . Durham
Kristopher Joel Hilscher . . . . . Fuquay-Varina
John Stephen Hindsman, Jr. . . . . Charlotte
Andrea Leigh Hinshaw . . . . . Raleigh
David Steven Hinson . . . . . Clemmons
James Chadwick Hinton . . . . . Greensboro
Adam Samuel Hocutt . . . . . Raleigh
Kimberly Ann Hoelzer . . . . . Charlotte
Amy Ruth Holbrook . . . . . Christiansburg, Virginia

Melissa Grace Holer . . . . . Charlotte
Pamela Ellinger Hollern . . . . . Jamestown
Matthew Baptiste Holloway . . . . . Asheville
Amy Norwood Holthouser . . . . . Davidson
Hannah Elizabeth Honour . . . . . Charlotte
Jackie Sue Houser . . . . . Mount Olive
James Lyle Howard . . . . . Morrisville
Kevin Vernon Howell . . . . . Raleigh
Matthew Blake Huffman . . . . . Salisbury
Meishia Hunter . . . . . Charlotte
Mary Albert Hutton . . . . . Charlotte
Samuel Paul Hyde . . . . . Bryson City
Joseph Lucas Hyde . . . . . Raleigh
Travis James Iams . . . . . Honolulu, Hawaii
Mojahed Omar Idlibi . . . . . Charlotte
James William Ineich . . . . . Southern Pines
Elizabeth Katherine Isbey . . . . . Asheville
Jeffrey Neale Jackson . . . . . Chapel Hill
Kristen Elaine Janicek . . . . . Raleigh
William Martin Jarrard . . . . . Raleigh
Thomas Brandon Jaynes . . . . . Shelby
Robert Paul Jenkins . . . . . Durham
Thomas Carroll Jeter III . . . . . Charlotte
Mark Steven Jetton, Jr. . . . . Matthews
Eric David Johnson . . . . . Durham
Matthew Omega Johnson . . . . . Durham
Brooke JeT'aime Johnson . . . . . Columbia, South Carolina
Adrienne Jones Johnson . . . . . Durham
Ted Lewis Johnson . . . . . Selma
Elyse Beaupre Johnson . . . . . Raleigh
Peter Wilson Johnston . . . . . Chapel Hill
Scott Travis Jones . . . . . Charlottesville, Virginia
Corinne Berry Jones . . . . . Greensboro
Carrie Latabia Jones . . . . . Raleigh
James Logan Joyce . . . . . Raleigh
Kathleen Marie Joyce . . . . . Wake Forest
Lauren Anne Joyner . . . . . Chapel Hill
Christopher Brooks Kamszik . . . . . Richmond, Virginia
Margaret Murphy Kane . . . . . Charlotte
Benjamin Cafritz Karb . . . . . Greensboro
Patrick Lee Kartes . . . . . Hillsborough
Amber Kishin Kauffman . . . . . Durham
Jeremy Shannon Keever . . . . . Conover
Adam Strickland Keith . . . . . Durham
Michael Robert Kelly . . . . . Winston-Salem
James Wyatt Kendall . . . . . Chapel Hill
Mark Nathan Kerkhoff . . . . . Charlotte
John David Kernodle . . . . . Durham
Kristi Ann Kerr . . . . . Cary
Aisha Khan . . . . . Charlotte
William Michael Kilgore . . . . . High Point

Nancy Hoyoung Kim . . . . . Hickory
William Lee Kimmey, Jr. . . . . Durham
Christopher Dayton King . . . . . Greenville, South Carolina
Margo McConnell King . . . . . Louisburg
Holly Margaret King . . . . . Raleigh
Harold Lloyd King, Jr. . . . . Raleigh
William Charles Kinney . . . . . Charlotte
Kristen Marie Kirby . . . . . Norfolk, Virginia
Christopher David Kishbaugh . . . . . Durham
Amanda Louise Klinger . . . . . Greenville
Joshua Townsend Knipp . . . . . Winston-Salem
Erica Rae Knott . . . . . Lexington, Virginia
Kelly Ann Koeninger . . . . . Cold Spring, Kentucky
Taji Kommineni . . . . . Asheville
Deborah Brooke Koslin . . . . . Birmingham, Alabama
Stanimir Nikolaev Kostov . . . . . District of Columbia
Todd Phillip Kostyshak . . . . . District of Columbia
Rishi Jayesh Kotiya . . . . . Cary
Stephen Scott Krake . . . . . Almond
Jennifer Moehring Kuhn . . . . . Greensboro
Barbara Joicey Lagemann . . . . . Chapel Hill
Steven Matthew Laird . . . . . Jacksonville
Jennifer Katherine LaMonte . . . . . Columbia, Maryland
Jason Brett Langberg . . . . . Raleigh
Kathryn Leighann Lannon . . . . . District of Columbia
April LaRegina . . . . . Durham
Angela Dawn Lassiter . . . . . Asheboro
Matthew Paul Latrick . . . . . Charlotte
Jamie Theodore Lau . . . . . Durham
Lydia Bree Laughrun . . . . . Charlotte
Katherine Young Lavoie . . . . . Raleigh
Matthew McLain Lawless . . . . . Durham
Erin Ruth Leach . . . . . Morehead City
Kathryn Mae LeBaube . . . . . Stokesdale
Jacqueline Michelle Adams Ledford . . . . . Greensboro
Joon Kil Lee . . . . . East Meadow, New York
Stanley Lewis Lee II . . . . . Garner
Gretchen Eleanor Leehr . . . . . Winston-Salem
Norman James Leonard . . . . . Burlington
Melissa Carrie LeVine . . . . . Raleigh
Dorothy Yvonne Lewis . . . . . Raleigh
Stephanie Dawn Lewis . . . . . Raleigh
Wendy Jean Lindberg . . . . . Durham
Mia Diane Lindquist . . . . . Pineville
Isaac Augustin Linnartz . . . . . Alexandria, Virginia
Adjoa Panyin Linzy . . . . . Durham
Tana Renee Liu-Beers . . . . . Durham
Melissa Catherine Starr Livesay . . . . . Lillington
Mollie McQueen Livingston . . . . . Raleigh
Patrick Ryan Lockamy . . . . . New Bern
Carrie Anderson Lofthus . . . . . Wrightsville Beach

Ronald Wilson Loftis III . . . . . Winston-Salem
Cherie Nannette Long . . . . . Chester, South Carolina
Yuliya Loshinsky . . . . . Wrightsville Beach
Nicolas Hendrik Lovelace . . . . . Matthews
Steven Andrew Lucente . . . . . Greensboro
David Andrew Lukach . . . . . Kingsport, Tennessee
Jennifer Barker Lyday . . . . . Mocksville
Chance Donwan Lynch . . . . . Durham
Jennifer Lynn Ma . . . . . Raleigh
Heather Michelle MacDonald . . . . . Raleigh
Kathryn Fairchild MacGregor . . . . . Williamston, Michigan
Amy Langston Mackin . . . . . Durham
Alison Lynette Maddux . . . . . Statesville
Joshua David Mahan . . . . . Durham
Michael Shawn Maier . . . . . Winston-Salem
Jessica Marie Major . . . . . Durham
Charles Hayes Mann . . . . . Wilmington
Kellie Dorise Mannette . . . . . Chapel Hill
Jennifer Nicole Manring . . . . . Winston-Salem
Jennifer Watson Marsh . . . . . Chapel Hill
Michael Leon Martinez . . . . . Charlotte
Anthony George Masino . . . . . Chapel Hill
Susan Eleanor Massey . . . . . Durham
Rebecca Marie Maxwell . . . . . Currituck
Ashley Renee Maxwell . . . . . Bridgeport, West Virginia
Robert Thomas May, Jr. . . . . Warrenton
Aaron Cole Mayer . . . . . Tampa, Florida
Stacy Julian Maynor . . . . . Durham
Ashley Elizabeth McAulay . . . . . Raleigh
Robert Jordan McCarter . . . . . Durham
Alicia Danielle McClendon . . . . . Durham
Dustin Carl McClimon . . . . . Bolivia
Rashonda Shari McClinton . . . . . Charlotte
Meghan French McClure . . . . . Charlotte
Scott Justin McCormick . . . . . Winston-Salem
Dustin Spencer McCrary . . . . . Statesville
Matthew Learned McCrystal . . . . . Chapel Hill
Elizabeth Susanne McCurry . . . . . Newton
Jerrell Davis McGee . . . . . Trinity
Jarrett Warren McGowan . . . . . Jacksonville
Emily Mairi McIntosh . . . . . Charlotte
Stephen Christopher McIntyre . . . . . Lumberton
Jeffrey Douglass McKinney . . . . . Apex
Adam Barrett McLamb . . . . . Lillington
Frankie Lafon McLean . . . . . Durham
Mary Elizabeth McLean . . . . . Raleigh
David Wilson McPhail . . . . . Charlotte
Robert Hall McWilliams, Jr. . . . . Charlotte
David Lee Meek . . . . . Macon, Georgia
Margaret Jeanne Megerian . . . . . Raleigh
Viral Vikram Mehta . . . . . Charlotte

Jeremy Daniel Melville . . . . . Rock Hill, South Carolina
Eric Steven Meredith . . . . . High Point
Angelo Mathew Metaxatos . . . . . Denver
Melissa Julia Michaud . . . . . New Bern
Andrew Thomas Miller . . . . . Myrtle Beach, South Carolina
William Thompson Miller . . . . . Winston-Sallem
Andrea Michelle Miller . . . . . Boone
Jason Andrew Miller . . . . . Fuquay-Varina
Megan Ashley Milliken . . . . . Jamestown
James Kevan Minick . . . . . Charlotte
Albert John Minn . . . . . Raleigh
Justin Lee Minshew . . . . . Princeton
Felicia Louise-Wright Mitchell . . . . . Charlotte
Matthew William Modell . . . . . Camden
Jeffrey Robert Monroe . . . . . Raleigh
Emily Catherine Moore . . . . . Greensboro
Clinton Funderburk Moore . . . . . Charlotte
Amanda Kay Moore . . . . . Woodleaf
Natalie Teague Morales . . . . . Gibsonville
Tiffany Dustina Morgan . . . . . Marion
Jeffery James Morris . . . . . Columbia, South Carolina
Jason Paul Murphy . . . . . Fuquay-Varina
Jordan Paul Nabb . . . . . Matthews
Steven Sibley Nelson . . . . . Charlotte
Helen Lavern Nelson . . . . . Fayetteville
Issac R. Nelson . . . . . Knightdale
Lisa Jan Nesbitt . . . . . Apex
Summer Marie Nettleman . . . . . Wilmington
Michael Gregory Newell . . . . . Raleigh
Lauren Oriana Newton . . . . . Gastonia
Bao Nguyen . . . . . Jacksonville
Peter Phelps Nicholson . . . . . Charlotte
Meghan Ione Nicholson . . . . . Charlotte
Heather Anne Nicolini Wade . . . . . High Point
Catherine Frances Noyes . . . . . Columbia, South Carolina
Neil Thompson Oakley . . . . . Burlington
David Keith Oaks . . . . . Punta Gorda, Florida
Kristen Elizabeth Oberg . . . . . Durham
Justine Samantha O'Connor-Petts . . . . . Hillsborough
Sarah Cook Oettinger . . . . . Raleigh
Justin Christopher Olsinski . . . . . Charlotte
Sean Michael Olson . . . . . Greensboro
Mary Margaret O'Rourke . . . . . Durham
Autumn Danielle Osbourne . . . . . Durham
Kyle Richard Szymczak Ostendorf . . . . . Chapel Hill
Lauren Mileo O'Sullivan . . . . . Charlotte
Travis Lloyd Packer . . . . . Raleigh
Travis Gene Page . . . . . Cherryville
Gavin Scott Painter . . . . . Greensboro
Patrick Adam Pait . . . . . Lumberton
Phavady Panyanouvong . . . . . Charlotte

Richard Isaac Parker . . . . . Benson
Bryan Philip Parker . . . . . Durham
Richard Sandford Parrotte . . . . . New Bern
John Phillip Paschal . . . . . Greensboro
Deven Nagar Patel . . . . . Chapel Hill
Yagnesh Dilip Patel . . . . . Trinity
Cory Bradley Patterson . . . . . Winston-Salem
Lee Austin Patterson III . . . . . Durham
Trena Marie Patton . . . . . Lenoir
Gregory Edward Pawlowski . . . . . Sandusky, Ohio
Heather Nicole Payne . . . . . Horse Shoe
Mary Fletcher Pena . . . . . Raleigh
Shannon Alaine Penland . . . . . Greenville
Michael Menno Vincent Pennink . . . . . Fayetteville
Abigail Elizabeth Peoples . . . . . Greenboro
Carver Clarke Peterson . . . . . Mercer Island, Washington
William Carl Petraglia . . . . . Pittsburgh, Pennsylvania
Julia Christina Petrasso . . . . . Greevnille
Sarah Elizabeth Pfau . . . . . Chapel Hill
Mark Jason Pickett . . . . . Durham
Benjamin Charles Pierce . . . . . Burlington
Jared Wallace Pierce . . . . . Durham
Winona Ann Pilkington . . . . . Matthews
Meredith Anne Pinson . . . . . Williamson, West Virginia
Derrick Ahmod Pitts . . . . . Fayetteville
Charlie Joseph Hunter Plemmons . . . . . Fuquay-Varina
Lindsey Ellis Powell . . . . . Raleigh
Melissa Pricilla Pressley . . . . . Rolesville
Amanda Grace Presson . . . . . Durham
Leslie Brooke Price . . . . . Clayton
Meghan Elizabeth Beeler Pridemore . . . . . Wake Forest
Sheena ReNae Pulley . . . . . Charlotte
Rachel Jean Purvis . . . . . Shallotte
Jonathan William Puryear . . . . . Concord
Cristina Segui Quantock . . . . . Hope Mills
Esther Felicia Queen . . . . . Durham
Nolana Ranell Quince . . . . . Raleigh
Matthew Dowdy Quinn . . . . . Lillington
Heather Erika Quinn . . . . . Manchester, New Hampshire
Christopher Harold Rahilly . . . . . Greensboro
Tram Ngoc Rattanavong . . . . . Burlington
Rebecca Ann Rausch . . . . . Murrells Inlet, South Carolina
Patrice Nicole Ray . . . . . Raleigh
Ray Wallace McCord Rayburn . . . . . Charlotte
Katherine Adkins Rech . . . . . Charlotte
Candice Lee Reese . . . . . Greensboro
Margaret Louise Reeves . . . . . Marshall
Aaron Michael Reeves . . . . . Hickory
Erin Jennings Regel . . . . . Raleigh
Christopher Lee Register . . . . . District of Columbia
Brian Joseph Register . . . . . Raleigh

Amalia Mercedes Restucha . . . . . Raleigh
Miranda Gail Reynolds . . . . . Greensboro
Andrew Charles Rheingrover . . . . . Charlotte
David Austin Ribelin . . . . . Greensboro
Matthew Hale Richardson . . . . . Fayetteville
Polly Cothran Richmond . . . . . Charlotte
Philipp Constantin Richter . . . . . Charlotte
Marlo Brooke Ricks . . . . . Conway
Lauren Alicia Rico . . . . . Fort Wayne, Indiana
Kristen Yarbrough Riggs . . . . . Raleigh
Allison Jean Riggs . . . . . Raleigh
Brenda Rivera-Sanchez . . . . . Raleigh
Sarah Katherine Robinson . . . . . Waxhaw
Kelly Brooks Robinson . . . . . Kernersville
Deviré M. Robinson . . . . . Elizabeth City
Stephanie Nicole Robinson . . . . . Cary
John William Rockers . . . . . Carrboro
Susan Courtwright Rodriguez . . . . . Arlington, Virginia
Kathryn Elizabeth Roebuck . . . . . Elizabeth City
Ashleigh Nicole Rose . . . . . Raleigh
Timothy Wayne Ross . . . . . Durham
Lisa Michele Rothman . . . . . Biltmore Lake
Jonathan Van Rountree . . . . . Apex
Guy Dawson Rouse III . . . . . Cary
James David Rowlee . . . . . Hollywood, Florida
Sterling Price Rozear . . . . . Durham
Adam Lee Rucker . . . . . Raleigh
Sara Elizabeth Russell . . . . . Apex
Patrick Lum Ryan . . . . . Atlanta, Georgia
Steven David Sadler . . . . . Charlotte
Mark Daniel Sanofsky . . . . . Charlotte
Diana Sachiko Santiago . . . . . Cary
Diana Santos . . . . . Durham
Albert Lochra Saslow . . . . . Greensboro
Frank Eugene Schall . . . . . Winston-Salem
William Clayton Scheffel . . . . . Winston-Salem
John Angelo Schena III . . . . . Greensboro
Danielle Rae Schmidt . . . . . Winston-Salem
Halsey Overton Schreier . . . . . Columbia, South Carolina
Leighton Bruce Scott . . . . . Winston-Salem
Roderick William Scott . . . . . Cary
Ronald Scott, Jr. . . . . Pinehurst
Heather Elaine Seals . . . . . Glen Alpine
Jennifer Iliana Segnere . . . . . Durham
Cerene Oceana Setliff . . . . . Winston-Salem
Christina Marie Shackelford . . . . . Smithfield
Michael Lee Shepherd . . . . . Clayton
Kindl Alia Shinn . . . . . Concord
James Adam Sholar . . . . . Raleigh
Ann Margaret Shy . . . . . Efland
Kellen Ruth Sibley . . . . . Charlotte

Kerri Lee Sigler . . . . . Greensboro
Megan Nicole Silver . . . . . Greensboro
Janelle Jill Silverman . . . . . Cary
Avery Ann Simmons . . . . . Charlotte
Holly Catherine Sims . . . . . Raleigh
Patricia Leigh Sindel . . . . . Durham
Jamison Howell Sites . . . . . Raleigh
Zebulon Loranzo Smathers . . . . . Canton
Caroline Campbell Smiley . . . . . Raleigh
Erin Elizabeth Smith . . . . . Winston-Salem
Janet Rebekah Smith . . . . . Winston-Salem
Corby Collins Smith . . . . . Charlotte
Jarrad Anthony Smith . . . . . Winston-Salem
Thomas Andrew Smith . . . . . Charlotte
William Judson Smith . . . . . Chapel Hill
Katrina Louise Smith . . . . . Durham
Travis Lee Smuckler . . . . . Knoxville, Tennessee
Zachary Richard Snyder . . . . . Salisbury
Robert Anthony Solano . . . . . Chapel Hill
James Martin Soliah . . . . . Carrboro
Christopher Lewis Sorey . . . . . Cary
Kellie Suzanne Southard . . . . . Yadkinville
Beverly Routh Spencer . . . . . Troy
Erica Caroline Spencer . . . . . District of Columbia
Steven Luther Spencer II . . . . . Greensboro
Christine Marie Sprow . . . . . Winston-Salem
William Curtis Keller Stackhouse . . . . . Goldsboro
Krista Ann Stallard . . . . . Charlotte
Allison Carole Standard . . . . . Fuquay-Varina
Christian Hart Staples . . . . . Charlotte
Josh Gregory Starin . . . . . Gainesville, Florida
David Bryan Starrett, Jr. . . . . Lynchburg, Virginia
Stephanie Kay Steiger . . . . . Greensboro
Ryan Hamilton Stewart . . . . . Mebane
William Stewart . . . . . Chapel Hill
Tracy Nicole Stewart . . . . . Wake Forest
Lisa Ann Stewart . . . . . High Point
Beth Ellen Stockwell . . . . . Shelby
Christine Fields Strader . . . . . Summerfield
Sally Catherine Strauss . . . . . Charlotte
Lauren Elizabeth Strobel . . . . . Elizabeth City
Alexis Nicole Strombotne . . . . . Raleigh
Tracy Humphrey Stroud . . . . . Winterville
John Davis Stroud . . . . . Charleston, South Carolina
Alexander Buchanan Stubbs . . . . . Winston-Salem
Nathan Edward Sweet . . . . . Jacksonville
Jesse Cowles Tally . . . . . Fayetteville
Meredith Brewer Taylor . . . . . Austin, Texas
Carrie Beth Temm . . . . . Raleigh
Sarah Kristin Thacker . . . . . Cary
John Allen Thomas . . . . . Raleigh

Dale Lionel Thomas, Jr. . . . . Raleigh
Barron Lloyd Thompson . . . . . Walkertown
Christopher David Thompson . . . . . Raleigh
Julia Forbes Thompson . . . . . Raleigh
Tad Edward Thompson . . . . . Danville, Virginia
Matthew Felton Tilley . . . . . Charlotte
Lindsay Bronwen Tingley . . . . . Rockville, Maryland
Allen Torres . . . . . Charlotte
Allen Nelson Trask III . . . . . Wilmington
Elizabeth Ellen Trivette . . . . . Chapel Hill
Elizabeth Lyn Troutman . . . . . Durham
Brian Patrick Troutman . . . . . Concord
Justin Gregory Truesdale . . . . . Raleigh
John Paul Tsahakis . . . . . Charlotte
Emily May-Lee Tseng . . . . . Charlotte
Sharon Lee Tucker . . . . . Coats
Christiana Glenn Tugman . . . . . Asheville
Kirby Andrade Turner . . . . . Durham
Ross David Ullman . . . . . Charlotte
Starling Bernard Underwood III . . . . . Fletcher
Ryan Armando Valente . . . . . Charlotte
Donald Robert van der Vaart . . . . . Raleigh
Peter Bartholomew Van Roten . . . . . Greensboro
Bobak Vazeen-Motlagh . . . . . Charlotte
Kimberly Jane Hoshino Velez . . . . . Chapel Hill
Stephanie Cari Vellios . . . . . Graham
Monica Eva Vernon . . . . . Durham
Carrie Freeman Vickery . . . . . Greensboro
Michael James Volpe . . . . . Clemmons
Christine Wilhoit Volponi . . . . . Charlotte
Leslie Marie Wagner . . . . . Richmond, Virginia
Jacob Alexander Wagoner . . . . . Boonville
John Lawrence Wait . . . . . Burlington
Matthew Todd Wakefield . . . . . Charlotte
Joan Marie Waldron . . . . . Charlotte
Chevonne René Wallace . . . . . Rockingham
Kris Andrew Wampler . . . . . Charlotte
Gregory Frederick Ward, Jr. . . . . Fort Mill, South Carolina
Jacob Edwin Warren . . . . . Raleigh
Thurston Holderness Webb . . . . . Winston-Salem
Caroline Frances Weeks . . . . . Creedmoor
Aaron Charles Weiner . . . . . Matthews
Julie Shore Weissman . . . . . Lillington
Marissa Amber West . . . . . Holly Springs
Dana Kroll West . . . . . Raleigh
Elizabeth Anne West . . . . . Raleigh
Teige Leeann West . . . . . Lenoir
Amanda Ruth Whiffing . . . . . Indianapolis, Indiana
Jeremy Ryan White . . . . . Greensboro
Ann Stuart Whitehurst . . . . . Boone
Lemuel Duncan Whitsett V . . . . . Raleigh

Kurt Robert Willems . . . . . Raleigh
Nisha Gloria Williams . . . . . Durham
Jonathan Lentine Williams . . . . . Jackson, Mississippi
Barry Lamont Williams . . . . . Raleigh
Abbie Ivey Williams . . . . . Greensboro
Andria Jacqueline Williams . . . . . Chapel Hill
Tracy Diane Williams . . . . . Oak Ridge
Saleisha Nadia Williams . . . . . Durham
Tashama Noni Williams . . . . . Chapel Hill
Kevin Grant Williamson . . . . . Chadbourn
Jillian Donison Willis . . . . . Greensboro
Erin Crowell Wills . . . . . Durham
Ada Katherine Wilson . . . . . Raleigh
Duncan Graham Wilson . . . . . Winston-Salem
Casey Michelle Winebarger . . . . . Lenoir
Kurt Spencer Wittenauer . . . . . Charlotte
Boyd Tyler Worley . . . . . Cerro Gordo
Paige Connor Worsham . . . . . Durham
Parker McAlister Worth . . . . . Raleigh
Virginia Elizabeth Worthy . . . . . Tega Cay, South Carolina
Jonathan Andrew Wright . . . . . Raleigh
Jennifer Rose Wyatt . . . . . Chapel Hill
Eleftherios Othon Xixis . . . . . Greensboro
Cary Nicholas Yacabucci . . . . . Charlotte
Christopher Sean Yacobi . . . . . Kill Devil Hills
Michal Ellen Yarborough . . . . . Raleigh
Jason Christopher Yoder . . . . . Indianapolis, Indiana
Andrew Tollison Yonchak . . . . . Davidson
Karen Marie Youmans . . . . . Charlotte
Crystal-Gaye Melissa Young . . . . . Raleigh
Virginia Evans Younger . . . . . Charlotte
Samantha Jo Younker . . . . . Raleigh
Jennifer Michele Zelvin . . . . . Port Saint Lucie, Florida
John Philip Zimmer . . . . . Fort Mill, South Carolina
Elizabeth Marion Zwickert Timmermans . . . . . Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 6th day of October, 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 were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 28th day of August 2009, and said persons have been issued a certificate of this Board:

Barrett McKinley Matthews . . . . . Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 7th day of December, 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 4th day of September 2009, and said persons have been issued a certificate of this Board:

Joseph Brandon Adams . . . . . Angier
Stephania Desir Alexis . . . . . Cary
Christopher James Autry . . . . . Charlotte
Megan Elizabeth Baumgardner . . . . . Concord
Douglas William Britt . . . . . Arlington, Virginia
Daniel J. Brown . . . . . Charlotte
Jonathan Rhett Burns . . . . . Charlotte
Paul Augustus Capua . . . . . Boone
Karen Krupka Carroll . . . . . Waxhaw
Margaret Cochrane . . . . . Charlotte
Alfred Braswell Cooper III . . . . . Atlantic Beach
Jessie Marie Corwin . . . . . Springville, Utah
Shaun Welborn Cranford . . . . . Columbia, South Carolina
Kelly Scott Donohue . . . . . Clayton
Benjamin Carlyle Downing . . . . . Charlotte
Vincent James Filliben . . . . . Winston-Salem
Jennifer Carol Finch . . . . . Willow Springs
Rudolph Clarence Gabriel . . . . . Waxhaw
Senitria Arnyce Goodman . . . . . Charlotte
Aaron Frederick Goss . . . . . Salisbury
Shanté Molika Green . . . . . Fayetteville
Shawn Joseph Handy . . . . . Carrboro
Botrus Adel Hanna . . . . . Morrisville
Jesse Abraham Haskins . . . . . Chapel Hill
Deron Kyle Henry . . . . . Winston-Salem
Richard Joseph Holmes . . . . . Charlotte
Theodore James Hovda III . . . . . Durham
Daniel Le Huynh . . . . . Doraville, Georgia
Benjamin Barrett Ingold . . . . . Durham
Brian Edward Isgett . . . . . Durham
Maria Rochelle Jones . . . . . Winton
Benita Nicole Jones . . . . . Raleigh
Stephanie Leigh Kelly . . . . . Marvin
Heather Lynn Kelly . . . . . Greenville
Drew Kyle Kifner . . . . . Durham
Hassan Terrance-Craig Kingsberry . . . . . Youngsville
Susan Pepper Lagana . . . . . Charlotte

Brian Kermit Law . . . . . Cary
James Whitfield Lee III . . . . . Saluda
Theodore Lotchin . . . . . Chapel Hill
Neil Christopher Magnuson . . . . . Chapel Hill
Justin Benjamin McCurry . . . . . Raleigh
Krystle Franchesca Melvin . . . . . Lumberton
Molly Jane Mitchell . . . . . Charlotte
Holly Anne Morgan . . . . . Boston, Massachusetts
Jennifer McArthur Nathan . . . . . Raleigh
Brook Livingston North . . . . . Durham
Anderson Proctor Page . . . . . Winston-Salem
Mark Anthony Pataky . . . . . Cary
Katie Elizabeth Ploghoft . . . . . Chapel Hill
Norman Donald Praet . . . . . Durham
Ronald Tyler Ridout . . . . . Chapel Hill
Kathryn Anne Sabbeth . . . . . Chapel Hill
Joshua Ryan Saliba . . . . . Durham
Mary Elise Scott . . . . . Columbia, South Carolina
Jennifer Elaine Sheets . . . . . Apex
Brian Scott Thomley . . . . . Orange, California
Kimberly Eleanor Truesdale . . . . . Raleigh
James Matthew Waters . . . . . Washington
Emily Collins White . . . . . Durham
Dominique Wilson Williams . . . . . Raleigh

Given over my hand and seal of the Board of Law Examiners on this the 6th day of October, 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 4th day of September 2009, and said persons have been issued a certificate of this Board:

David Michael Alban . . . . . Charlotte
Michael Mitchell Berger . . . . . Cary
James Barr Coleman . . . . . Bozeman, Montana
Sherod Hampton Eadon III . . . . . Columbia, South Carolina
Toni Haddix . . . . . Cary
Caralyn Joy Henderson . . . . . Warner Robins, Georgia
Jamie Tara Horowitz . . . . . Charlotte
Mikal Braun Shaikh . . . . . Durham
Charissa Anne Squicciarini Bass . . . . . Gastonia
Nathan Leroy Townsend . . . . . Temple Terrace, Florida
David James Martin . . . . . Las Vegas, Nevada

Given over my hand and seal of the Board of Law Examiners on this the 6th day of October, 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 25th day of September 2009, and said persons have been issued a certificate of this Board:

John Keogh Burke . . . . . .Franklinton
Samuel Wallace Carnwath III . . . . . .Charlotte
Zachary Taylor Champlin . . . . . .Smithfield, Utah
Hunter Wayne Frederick . . . . . .Fuquay-Varina
William Holmes Lilley III . . . . . .Greensboro
Jason Mark McKenna . . . . . .High Point
James Avery Miles . . . . . .Raleigh

Given over my hand and seal of the Board of Law Examiners on this the 6th day of October, 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 25th day of September 2009, and said persons have been issued a certificate of this Board:

Tyler Schilling Benson . . . . . .Raleigh
Sean Francis Cronin . . . . . .Fort Mill, South Carolina

Given over my hand and seal of the Board of Law Examiners on this the 9th day of November, 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 2nd day of October 2009, and said person has been issued a certificate of this Board:

James Nathan Galbreath . . . . . .Applying from the State of Texas

Given over my hand and seal of the Board of Law Examiners on this the 26th day of June, 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 9th day of October 2009, and said persons have been issued a certificate of this Board:

Richard Jeremy Sugg . . . . . .Rockingham
Andrew Lee Farris . . . . . .Saxapahaw
Gregory David Spink . . . . . .Charlotte
Michael Kyle McEnery . . . . . .Raleigh
Mital Mahendrakumar Patel . . . . . .Raleigh
Jonathan David Rhyne . . . . . .Raleigh
Julie Renee Richardson . . . . . .Liberty
Timothy Marc Shropshire . . . . . .Apex

Given over my hand and seal of the Board of Law Examiners on this the 26th day of October, 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 16th day of October 2009, and said persons have been issued a certificate of this Board:

Anne Elizabeth Bandle . . . . . .Applied from the State of Arkansas
Alan Richard Carlton . . . . . .Applied from the State of Connecticut
John Robert Ficarro . . . . . .Applied from the State of Michigan
Richard Koch Hughes . . . . . .Applied from the State of New York
Christopher Scott Kirk . . . . . .Applied from the State of Ohio
Shawn Patrick McKenna . . . . . .Applied from the District of Columbia

Given over my hand and seal of the Board of Law Examiners on this the 26th day of October, 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 16th day of October 2009, and said persons have been issued a certificate of this Board:

Randall Ross Howell . . . . . .Greensboro
Andrew Michael LaBreche . . . . . .Rutherfordton
Catherine Lee McLean . . . . . .Durham
Shanthi Elizabeth Senthe . . . . . .Leland

Given over my hand and seal of the Board of Law Examiners on this the 26th day of October, 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 October 2009, and said persons have been issued a certificate of this Board:

Raymond Joseph Coble . . . . . .Charleston, South Carolina
Peter Matthias Ellis . . . . . .Cary
Benjamin Steed Finholt . . . . . .Carrboro
Lisa Taylor Hudson . . . . . .Wake Forest
Eric Edward Rainey . . . . . .Asheville
Casey Christopher Varnell . . . . . .Macclesfield

Given over my hand and seal of the Board of Law Examiners on this the 20th day of November, 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 13th day of November 2009, and said persons have been issued a certificate of this Board:

Harry Greensfelder III . . . . . .Applied from the State of Missouri
Michael R. Hoernlein . . . . . .Applied from the State of New York
Scott S. Orenstein . . . . . .Applied from the State of Connecticut
Steven Todd Snyder . . . . . .Applied from the State of New York
Kimberly M. Ferrier . . . . . .Applied from the State of Minnesota
Tamara Nicole Jackson . . . . . .Applied from the State of Wisconsin
Stephanie A. Johnston Thomas . . . . . .Applied from the State of Georgia

Charlisa Moore Powell . . . . . .Applied from the District of Columbia
Anna Rose Stern . . . . . .Applied from the State of Michigan

Given over my hand and seal of the Board of Law Examiners on this the 7th day of December 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 13th day of November 2009, and said persons have been issued a certificate of this Board:

Benjamin Edwin Farish . . . . . .Raleigh
Peter Hull Gilbert . . . . . .Durham
Maximilian Longley . . . . . .Durham

Given over my hand and seal of the Board of Law Examiners on this the 7th day of December, 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 13th day of November 2009, and said person has been issued a certificate of this Board:

John Clifton Bumgarner . . . . . .Winston-Salem

Given over my hand and seal of the Board of Law Examiners on this the 25th day of January, 2010.

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

Charles Anderson . . . . . .Ft. Mill, South Carolina
Charlotte Ann Boone . . . . . .Cary
Josiah John Corrigan . . . . . .Trent Woods
Kristen Fisher . . . . . .Greensboro

Evelyn Rose Griggs . . . . . .Eakin
Julie Michele Gurman . . . . . .Asheville
Chun Hu . . . . . .Chapel Hill
Michael Daniel McGrath . . . . . .Jacksonville, Florida
Cameo Nicole Nichols . . . . . .Charlotte
Jill Sara Sherman . . . . . .Charlotte
Andrew Braxton Strickland . . . . . .Raleigh
Shera Kathleen Varnau . . . . . .Raleigh

Given over my hand and seal of the Board of Law Examiners on this the 8th day of January 2010.

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 December 2009, and said person has been issued a certificate of this Board:

Althea F. Richardson . . . . . .Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners on this the 25th day of January 2010.

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 December 2009, and said person has been issued a certificate of this Board:

Amy Lynn Williams . . . . . .Greensboro

Given over my hand and seal of the Board of Law Examiners on this the 25th day of January, 2010.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 11th day of December 2009, and said persons have been issued a certificate of this Board:

Patrick Goddard Barry . . . . . .Applied from the State of Pennsylvania
Lynn Wood Beck . . . . . .Applied from the State of Georgia

LICENSED ATTORNEYS

Julie Simone Brill . . . . . .Applied from the State of Vermont
James Ryan Fryling . . . . . .Applied from the State of Pennsylvania
Frederick N. Hadley . . . . . .Applied from the State of Indiana
Melissa Jackson . . . . . .Applied from the State of Wisconsin
Thomas E. McDonald . . . . . .Applied from the State of Michigan
Abbe W. McLane . . . . . .Applied from the State of Massachusetts
Leah Miriam Moore . . . . . .Applied from the State of Massachusetts
Kirsten E. Moore . . . . . .Applied from the State of New York
J. Lloyd Nault II . . . . . .Applied from the State of Georgia
Eleanor Hannigan Powers . . . . . .Applied from the State of Texas
Michele L. Sheridan . . . . . .Applied from the State of New York
David Gabriel Slezak . . . . . .Applied from the State of Ohio
Nathan Frederick Studeny . . . . . .Applied from the State of Ohio
Jeffrey John Svoboda . . . . . .Applied from the State of Michigan

Given over my hand and seal of the Board of Law Examiners on this the 8th day of January 2010.

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 8th day of January 2010, and said persons have been issued a certificate of this Board:

Jacques Gaston Balette . . . . . .Applied from the State of Texas
John Raymond Bandle . . . . . .Applied from the State of Arkansas
David A. Bauernfeind . . . . . .Applied from the State of Illinoiis
Shawn Christopher Cabot . . . . . .Applied from the State of Michigan
Danita L. Handlin . . . . . .Applied from the State of Texas
Robert Palmer . . . . . .Applied from the State of New York
Lauren J. Walter . . . . . .Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners on this the 29th day of January 2010.

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 were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 15th day of January 2010, and said persons have been issued a certificate of this Board:

J. David Garcia . . . . . .Applied from the State of Michigan

Given over my hand and seal of the Board of Law Examiners on this the 28th day of January 2010.

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 12th day of February 2010, and said persons have been issued a certificate of this Board:

Robert Wayne Johnson . . . . . .Applied from the State of New York
Carol Ann Hubbuch . . . . . .Applied from the State of Ohio
Frances Brooks Jones . . . . . .Applied from the State of Kentucky

Given over my hand and seal of the Board of Law Examiners on this the 19th day of March 2010.

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 12th day of February 2010, and said persons have been issued a certificate of this Board:

Joel David Hillygus . . . . . .Applied from the State of Massachusetts
Elissa Koch Moore . . . . . .Applied from the State of Illinois
Jeffrey Alan Catri . . . . . .Applied from the State of Ohio
Jessie C. Fontenot, Jr. . . . . .Applied from the State of Georgia
Gail Savetamal . . . . . .Applied from the State of New York
Justin Scott Gilfert . . . . . .Applied from the State of Kentucky
Kevin John Lamberson . . . . . .Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners on this the 10th day of March 2010.

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 12th day of February 2010, and said persons have been issued a certificate of this Board:

Robert Wayne Johnson . . . . . .Applied from the State of New York
Carol Ann Hubbuch . . . . . .Applied from the State of Ohio
Frances Brooks Jones . . . . . .Applied from the State of Kentucky

Given over my hand and seal of the Board of Law Examiners on this the 19th day of March 2010.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 26th day of February 2010, and said persons have been issued a certificate of this Board:

Scott Leon Ingersoll . . . . . .Applied from the State of Michigan
Regan Hungerford Rozier . . . . . .Applied from the State of Colorado
Michael J. Kinlin . . . . . .Applied from the State of Ohio
Angela Lynn Doyle . . . . . .Applied from the State of Iowa
Peter Jarrod Graff . . . . . .Applied from the State of New York
Lee Rosenbaum . . . . . .Applied from the State of Colorado
Joseph Parker DeCoursey . . . . . .Applied from the State of New York
Carmelo Mario Laquidara . . . . . .Applied from the State of New York
William Henry Harding . . . . . .Applied from the State of West Virginia
Lori Lovin Jessee . . . . . .Applied from the State of Tennessee
Jeffrey S. Nowak . . . . . .Applied from the State of Pennsylvania
Nathan Andrew Huff . . . . . .Applied from the State of Massachusetts
Brendan O'Donnell . . . . . .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 March 2010.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 12th day of March 2010, and said person has been issued a certificate of this Board:

Myra Linette McKenzie . . . . . .Applied from the State of Ohio

Given over my hand and seal of the Board of Law Examiners on this the 10th day of May 2010.

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 March 2010, and said person has been issued a certificate of this Board:

Tyler Lee Pierce . . . . . .Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 10th day of May, 2010.

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 March 2010, and said persons have been issued a certificate of this Board:

Shirley M. Diefenbach . . . . . .Applied from the State of New York
Michelle Ann Hickerson . . . . . .Applied from the State of Georgia
Roxanne Cecile Garner . . . . . .Applied from the State of Pennsylvania
Jason Huber . . . . . .Applied from the State of West Virginia
Robert J. Morgan . . . . . .Applied from the State of New York
Ann Vano . . . . . .Applied from the State of Pennsylvania

Given over my hand and seal of the Board of Law Examiners on this the 1st day of May 2010.

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 27th day of March 2010, and said persons have been issued a certificate of this Board:

Faheemah Mahasin Abdullah . . . . . Raleigh
John Knox Abernethy . . . . . Winston-Salem
Andrew Frederic Acker . . . . . Lincolnton
Tolulagbara Ola-Oluwa Adewale . . . . . Durham
Shea Airey . . . . . Tamassee, South Carolina
Vernetta Rinoa Alston . . . . . Raleigh
Adam Loren Baker . . . . . Nashville
Elizabeth Blackmore Barber . . . . . Chapel Hill
Stephanie Marie Barfield . . . . . Charlotte
Julie Beyer . . . . . Charlotte
Claudia Hoover Bingham . . . . . Garner
Elizabeth Blackwood . . . . . Charlotte
Kerin Louise Bligen . . . . . Charlotte
Andrea Bosquez-Porter . . . . . Fuquay-Varina
Edward Breitschwerdt . . . . . Fuquay-Varina
Edwin J. Buckley . . . . . Prescott, Arizona
Haley Burton . . . . . Charlotte
Matthew Cameron . . . . . Charlotte
Crystal Carlisle . . . . . Grand Haven, Michigan
Valerie Grey Chaffin . . . . . Columbia, Missouri
John Richard Champion . . . . . Chapel Hill
Thomas Chapman . . . . . Charlotte
Ronald Charlot-Aviles . . . . . Raleigh
Tara Nicole Cho . . . . . Durham
Brian Charles Cholewa . . . . . Raleigh
Thomas Benjamin Clark . . . . . Charlotte
Kenneth Connor . . . . . Leesburg, Virginia
Daniel Conrad . . . . . Durham
Thomas Corey . . . . . Charlotte
Jennifer Lee Cory . . . . . Charlotte
Matthew Coury . . . . . Chapel Hill
Daniel Covas . . . . . Winston-Salem
Jessica Crouse . . . . . Leeds, New York
David Matthew Curcio . . . . . Matthews
Leigh Dasher . . . . . Durham
Jonathan Blake Davis . . . . . Candler
Adriene Marie Davis . . . . . Durham
José Gladstone Dees . . . . . Brandywine, Maryland

David Demers . . . . . Charlotte
Sarah Dixon . . . . . Charlotte
Allison Williams Dobson . . . . . Durham
Christopher Robert Eakin . . . . . High Point
Ashley Austin Edwards . . . . . Charlotte
Lisa Diana Epperly . . . . . Charlotte
Cynthia Everson . . . . . Gastonia
Eric Farr . . . . . Eldred, Pennsylvania
Jennifer Felts . . . . . Charlotte
Ashley Donahue Fox . . . . . Cary
Michael Ganley . . . . . Raleigh
Cara Gardner . . . . . Greensboro
John Michael Genest . . . . . Durham
Lyndsey Jewell Gibson . . . . . Durham
Lauren Glazier . . . . . Charlotte
Camille Godwin . . . . . Lovettsville, Virginia
Jorge Gonzalez Torres . . . . . Huntersville
Kimberly Dawn Grande . . . . . Chapel Hil
Megan Rene Greene . . . . . Bluefield, West Virginia
Merissa Dyan Hannah . . . . . Ft. Mill, South Carolina
Amber Nicole Harrison . . . . . Charlotte
Nichelle Nicole Harrison . . . . . Greensboro
James Hart . . . . . Cary
Todd David Hastings . . . . . Wilmington
Jessica Healey . . . . . Durham
Christopher Hicks . . . . . Benson
Kimberly Hodge . . . . . Rock Hill, South Carolina
Tate Hodges . . . . . Wilmington
Jessica Nicole Holmes . . . . . Cary
Nycole Robinson Howard . . . . . Burnsville
Benjamin Huber . . . . . Charlotte
Thua Huynh, Jr. . . . . Due West, South Carolina
Helen Hynes . . . . . Hopkinton, Massachusetts
Samuel Richard Iden . . . . . Wake Forest
Robert Ingram III . . . . . Greenville, South Carolina
Rebecca Jaffe . . . . . Durham
Zachary Jett . . . . . Charlotte
Kimberly Jorgensen . . . . . Bethesda, Maryland
Eugene Joseph Joslyn, Jr. . . . . Cary
James Charles Keister . . . . . Goldsboro
Rhonda Baker Kelley . . . . . Durham
Stephanie Kennedy . . . . . Charlotte
Kimberley Kilgore-Kilpatrick . . . . . Wilson
Jean Kim . . . . . Asheville
Nathaniel Knust . . . . . Rockledge, Florida
Pedro Koe-Krompecher . . . . . Chicago, Illinois
Lucas Kurtz . . . . . Charlotte
Jeffrey Kuykendall . . . . . Tampa, Florida
Leah Landerman . . . . . Durham
John Landreth . . . . . Matthews
Matthew Terrence Lee . . . . . Asheville

Jeeyoun Lee . . . . . Raleigh
Jeffrey Phillip Lewis . . . . . Greensboro
Grayson Linyard . . . . . Laredo, Texas
Christopher Lynn Main . . . . . Statesville
Angela Manz . . . . . Virginia Beach, Virginia
Harry Clayton Marsh . . . . . Franklin, Ohio
Whitney Marshall . . . . . Wilmington
Jonathon Adam Martin . . . . . Charlotte
Alan Matavich . . . . . Youngstown, Ohio
Carrie Lynne McCann . . . . . Raleigh
Sarah McCracken . . . . . South Hill, Virginia
Maureen Rose McDonald . . . . . Charlotte
Timothy M. Melton . . . . . Wake Forest
David Edward Miller III . . . . . Durham
Samuel Earl Mills . . . . . Raleigh
Christi Misocky . . . . . Charlotte
Jamilah Malika Morris . . . . . Raleigh
Anthony Ryan Morrow . . . . . Chicago, Illinois
Colleen Mulcrone . . . . . Charlotte
Stephanie Nachtrieb . . . . . Cary
Joseph Nelson . . . . . Chicago, Illinois
Jessica Elaine Nelson . . . . . Charlotte
Andrew Thomas Nettleman . . . . . Wilmington
Caroline Nickel . . . . . Cary
William Lewis Nimick . . . . . Durham
Shannon Lee O'Donnell . . . . . Greensboro
Michele Nneka Okoh-Bernis . . . . . Raleigh
Neal Ashvin Patel . . . . . Huntersville
Jennifer Amy Phillips . . . . . Wendell
Norman Charles Post III . . . . . Charlotte
Tanya Powers . . . . . Charlotte
Elysia Prendergast . . . . . Hendersonville
Thomas Rardin . . . . . Chapel Hill
Sarah Raynes . . . . . Chapel Hill
Matthew Reeder . . . . . Asheville
Lauren Victoria Reeves . . . . . Raleigh
Kevin Remington . . . . . Charlotte
Keith Edward Richardson . . . . . Raleigh
Lori Richmond-Gershon . . . . . Chapel Hill
Leslie Robinson . . . . . Ypsilanti, Michigan
Dianna Schaeberle . . . . . Rockville, Maryland
Carey Jeanne Scheible . . . . . Winston-Salem
Melanie Scherer . . . . . Charlotte
Sheri Lee Schwab . . . . . Durham
George Scott . . . . . Lexington, South Carolina
Falls Seagrave . . . . . Charlotte
Mark Skanes . . . . . Ballston Spa, New York
Bryan Lee Skelton . . . . . Apex
John Slater . . . . . Chapel Hill
Stuart Sloan . . . . . Franklin
Chad Rollon Smith . . . . . Bryson City

Gonzalo Smith . . . . . Miami, Florida
Matthew Smith . . . . . Clayton
Rudolph Kevin Smith . . . . . Fayetteville
Ross Stuart Sohm . . . . . Charlotte
Christopher Leonard Spinelli . . . . . Chesapeake, Virginia
Erica Elizabeth Stauffer . . . . . Shaker Hieghts, Ohio
Anna Caylin Stites . . . . . Chapel Hill
Patrick Thomas Strubbe . . . . . West Lafayette, Indiana
Kindra Anne Taplin . . . . . Charlotte
Richard Paul Theokas . . . . . Shelby
Preston Nathaniel Thomas . . . . . Concord
Sonia Toney . . . . . Eden
Philip Benjamin Trotter . . . . . Charlotte
Anthony Richard Tuorto . . . . . Cary
Ryan Jacob Velderman . . . . . Winston-Salem
Wayne Weaver . . . . . Raleigh
Erin Whitcomb . . . . . Pompano Beach, Florida
Charles Tyler Wichmann . . . . . Charlotte
Memminger Edward Wiggins . . . . . Waxhaw
Eric Williams . . . . . Cary
Carolyn Anne Williams . . . . . Asheville
Caroline Ann Wingate . . . . . Waxhaw
Nicholas Wood . . . . . Durham
Nathan Workman . . . . . Indian Trail

Given over my hand and seal of the Board of Law Examiners on this the 26th day of April, 2010.

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 9th day of April 2010, and said persons have been issued a certificate of this Board:

Phillip Albergotti . . . . . Murrells Inlet, South Carolina
Richard Allen . . . . . Pittsboro
Leigh Altman . . . . . Charlotte
Benjamin Baroody . . . . . Murrells Inlet, South Carolina
Kate Ann Beardsley . . . . . Carolina Beach
William Bettmann . . . . . Mebane
J. Jerome Brady . . . . . Columbus, Ohio
Carl Carlson . . . . . Greensboro
Donna Cote . . . . . Wilmington
James Francis Cyrus IV . . . . . Durham
Joseph Delk IV . . . . . Mount Pleasant, South Carolina
Matthew Dellinger . . . . . Spartanburg, South Carolina
Michelle Dexter . . . . . Cary
Chad Diamond . . . . . Raleigh
Stephanie Fabricius . . . . . Mebane

Elizabeth Ferrell . . . . . Greensboro
Jennifer Mink Fleeman . . . . . Athens, Georgia
Elizabeth Foley . . . . . Winston-Salem
Paul Foley . . . . . Winston-Salem
Thomas Gallagher . . . . . Asheville
Jamie Susanne Getty . . . . . Lewisville
Jane Gordon . . . . . Beaufort
Casen Gregg . . . . . Charlotte
Craig Hensel . . . . . Greensboro
Eric Hepler . . . . . Ashburn, Virginia
Philip Holroyd . . . . . Raleigh
Ryan Hurley . . . . . Warwick, Rhode Island
Pamela Jermyn-Kaley . . . . . Cary
Steven Klotz . . . . . Chapel Hill
John Kotzker . . . . . Raleigh
Wendy McNeil . . . . . Charlotte
Justin Mettlach . . . . . Brooklyn, New York
Laura Meyer . . . . . Cary
R. Austin Oyler . . . . . Winston-Salem
Rachel Ralston . . . . . Gray, Tennessee
Ryan Reimers . . . . . Charlotte
Lara Say . . . . . Concord
Patrick Scarlett . . . . . Mt. Pleasant, South Carolina
Jacqueline Schaffer . . . . . Charlotte
Shaw Scott . . . . . Greensboro
Seema Prakash Shah . . . . . Jamestown
Erin Socha . . . . . Concord
Alan Stevens . . . . . Charlotte
Amy Michelle Townsend . . . . . Pleasant Garden
Katherine Trotter . . . . . Charlotte
Jeffrey Truitt . . . . . Garner
Shawn Voyles . . . . . Norfolk, Virginia
Amy Walker . . . . . Mebane
Tammy Wiggins . . . . . Pikeville
Raymond Williams III . . . . . Charlotte
Keayba McKenzie Worthington . . . . . Greensboro

Given over my hand and seal of the Board of Law Examiners on this the 26th day of April 2010.

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 9th day of April 2010, and said persons have been issued a certificate of this Board:

Elizabeth LaChelle Jacobs . . . . . Lumberton
Ryan Everett Thum . . . . . Shawsville, Virginia

Given over my hand and seal of the Board of Law Examiners on this the 10th day of May 2010.

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 were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 23rd day of April 2010, and said persons have been issued a certificate of this Board:

Michael A. Burger . . . . . .Applied from the State of Pennsylvania

Given over my hand and seal of the Board of Law Examiners on this the 22nd day of July 2010.

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 April 2010, and said persons have been issued a certificate of this Board:

Alicia Dawn Cassidy . . . . . .Winston-Salem
Duane Raymond Hall II . . . . . .Cocoa, Florida
John Wesley Moore . . . . . .Charlotte
Jenelle Lynn Neubecker . . . . . .Raleigh
John Bradford Pittman . . . . . .Durham
Timicia LaShae Robinson . . . . . .Charlotte
Bryan Nicolas Sanchez . . . . . .Charlotte
Courtney Erin Toledo . . . . . .Chapel Hill

Given over my hand and seal of the Board of Law Examiners on this the 18th day of May 2010.

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 7th day of May 2010, and said persons have been issued a certificate of this Board:

Lee J. Bell . . . . . .Applied from the State of Ohio
Kara Shayne Bowser . . . . . .Applied from the State of Pennsylvania

Pamela Susan Chestek . . . . . .Applied from the State of Massachusetts
Kimberly Kathryn Francis . . . . . .Applied from the State of Illinois
Philip A. Guzman . . . . . .Applied from the District of Columbia
Michael Hoard . . . . . .Applied from the State of Illinois
Michael David Layish . . . . . .Applied from the State of Ohio
Mary Hill Leahy . . . . . .Applied from the State of Wisconsin
David Theodore Marks . . . . . .Applied from the State of Texas
Joseph Bernard Nagel . . . . . .Applied from the State of Georgia
Suzan E. Roth . . . . . .Applied from the State of Georgia

Given over my hand and seal of the Board of Law Examiners on this the 28th day of June 2010.

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 7th day of May 2010, and said persons have been issued a certificate of this Board:

Helayne Barrie Levy . . . . . .Wilmington
Nicholas Daniel Mancine . . . . . .Charlotte
Benjamin Gregory Richter . . . . . .Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 28th day of June 2010.

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 June 2010, and said persons have been issued a certificate of this Board:

James Bateman III . . . . . .Richlands
Corwin DeLeon Eversley . . . . . .Durham
Benjamen Edward Klein . . . . . .Greensboro
Jeffrey Stewart Marvin . . . . . .Durham
Neal McHenry . . . . . .New Orleans, Louisiana
Alexander Nicely . . . . . .Chapel Hill

Given over my hand and seal of the Board of Law Examiners on this the 17th day of July 2010.

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

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 18th day of June 2010, and said person has been issued a certificate of this Board:

Leah Ann Kane . . . . . .Wilmington

Given over my hand and seal of the Board of Law Examiners on this the 10th day of August, 2010.

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 25th day of June 2010, and said person has been issued a certificate of this Board:

Michele Kernice Figueroa . . . . . .Applied from the State of Wisconsin

Given over my hand and seal of the Board of Law Examiners on this the 10th day of August 2010.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 25th day of June 2010, and said persons have been issued a certificate of this Board:

Derek Ross Fletcher . . . . . .Cornelius
Kerry Layne Lowery . . . . . .Grover
Rebecca Ann Moriello . . . . . .Durham
Jeffrey Barnes Stephenson, Jr. . . . . .Chapel Hill

Given over my hand and seal of the Board of Law Examiners on this the 10th day of August 2010.

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 2nd day of July 2010, and said persons have been issued a certificate of this Board:

Alexander Francis Vitale . . . . . .Charlotte
Breana Chea Smith . . . . . .Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 10th day of August 2010.

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 August 2010, and said persons have been issued a certificate of this Board:

Malinda Crutchfield Allen . . . . . .Applied from the State of Tennessee
Ryan Trevor Armour . . . . . .Applied from the State of Illinois
Dexter Benoit . . . . . .Applied from the State of Illinois
Carole L. Biggers . . . . . .Applied from the State of Michigan
Elmer Blakeney, Jr. . . . . .Applied from the State of Texas
Robert Carlton . . . . . .Applied from the State of West Virginia
Michael Coppin . . . . . .Applied from the State of Illinois
Kimberly D. Crockett . . . . . .Applied from the State of West Virginia
Irene Clark David . . . . . .Applied from the State of Illinois
Matthew Davison . . . . . .Applied from the State of Tennessee
Sandra Fried Fogleman . . . . . .Applied from the State of New York
Rahwa Gebre-Egziabher . . . . . .Applied from the District of Columbia
Robert A. Ginos . . . . . .Applied from the State of Illinois
Kristen H. Glover . . . . . .Applied from the State of Georgia
Christopher Manning Hanes . . . . . .Applied from the State of Georgia
Christie Michelle Hayes . . . . . .Applied from the State of Tennessee
Carol Hitselberger . . . . . .Applied from the State of Illinois
Patrick Horne . . . . . .Applied from the State of Tennessee
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Given over my hand and seal of the Board of Law Examiners on this the 4th day of October 2010.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
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Marian Outland Siemering . . . . . Raleigh
Candace Erin Siler . . . . . Trent Woods
Jerome Gerald Simmons . . . . . Rolesville
Joshua Alan Simmons . . . . . Pinnacle
Jerri Janise Simmons . . . . . Charlotte
Joshua Ryun Simpson . . . . . Hope Mills
Elizabeth Guild Simpson . . . . . Durham
Ross Joseph Simpson III . . . . . Chapel Hill
Lauren Kelly Sindelar . . . . . Morehead City
Tyler John Skitt . . . . . Waxhaw
Emily Anne Sloop . . . . . Raleigh
Daniel Francis Ermentrout Smith . . . . . Durham
Jonathan Morrison Smith . . . . . Goldsboro
Brandie Nicole Smith . . . . . Greensboro
Courtney Monieke Smith . . . . . Durham
Timothy Randall Snead . . . . . Laruel Hill
Michael Raymond Solis . . . . . Lynchburg, Virginia
Julie Cleverdon Solms . . . . . Durham
Meredith Daveluy Specht . . . . . Lillington
Margaret Hanna Speir . . . . . Winston-Salem
Daniel Lawrence Spiegel . . . . . Charlotte
Hilary Arthur St. Louis . . . . . Cramerton
William Joel Starling, Jr. . . . . Clinton

Kendra Lee Stead . . . . . Chicago, Illinois
Katherine Colleen Stille . . . . . Charlotte
Brooks Burgess Stone . . . . . Matthews
Brian William Strang . . . . . Durham
Tonja Ryan Strickland . . . . . Raleigh
John Carmichael Stuart, Jr. . . . . Raleigh
Christopher Lin Suggs . . . . . Suffolk, Virginia
Brian Timothy Sullivan . . . . . Raleigh
Christina Marie Sullivan . . . . . Huntersville
Jenny Elaine Sweet . . . . . Millers Creek
Bridget Davis Swing . . . . . Flat Rock
John Robert Szymankiewicz . . . . . Raleigh
Lorna Rouh-Lan Tai . . . . . Wrightsville Beach
Adam John Tan . . . . . Chapel Hill
Jeremy Moloney Tarr . . . . . Chapel Hill
Ryan Michael Tarrant . . . . . Raleigh
Justin Ryan Taylor . . . . . Wake Forest
Philip Andrew Taylor . . . . . Raleigh
DeAnna Nichole Taylor . . . . . Charlotte
Tiffani Dominique Taylor Otey . . . . . Whitesett
Clark Daniel Tew . . . . . Mooresville
Thomas Andrew Thekkekandam . . . . . Durham
Cassandra Lynn Thomas . . . . . Mitchellville, Maryland
Manda Linn Thomas . . . . . Elizabethtown
Ryan Paul Thompson . . . . . Charlotte
Elizabeth Dawn Thompson . . . . . Raleigh
Guinevere Ross Thompson . . . . . Greensboro
Kaelyn Noel Thompson . . . . . New Bern
Amy House Thurston . . . . . Raleigh
Jonathan William Trapp . . . . . Rocky Mount
Anthony Edward Traurig . . . . . Concord
Christopher Anthony Treadway . . . . . Scottsdale, Arizona
Eleanor Rhoades Trefzger . . . . . Hickory
Michael Jennings Trotter . . . . . Belmont
Kelsey Tucker . . . . . Raleigh
William Craig Turner, Jr. . . . . Burlington
Timothy James Tyson . . . . . Asheville
Taylor Caroline Tyson . . . . . Raleigh
Daniel John Umlauf . . . . . Winston-Salem
Robert Clarence Valdillez . . . . . Raleigh
Jessica Ann Vance . . . . . Arden
Daniel Malcolm Vandergriff . . . . . Winston-Salem
Elizabeth Chantale Varner . . . . . Spencer
Angela Lee Velez . . . . . Dayton, New Jersey
Dennis Omar Velez Lugo . . . . . Youngsville
Nicholas Michael Verna . . . . . Morrisville
Kevin Edwin Vidunas . . . . . Charlotte
Michael Tanakorn Vikitsreth . . . . . District of Columbia
Robert Blair Vocci . . . . . Greensboro
Derick Roberson Vollrath . . . . . Durham
Carolyn Elizabeth Waldrep . . . . . Alexandria, Virginia

Emily Marena Walker . . . . . Raleigh
Michelle Merck Walker . . . . . Carrboro
Aaron Hoover Wallace . . . . . Hickory
William Baldwin Warihay . . . . . Greensboro
John Calier Watson IV . . . . . Greensboro
Richard Monroe Webb . . . . . Mooresville
Marcus Aaron Weeks . . . . . Durham
Lauren Nicole Weinstein . . . . . Durham
James Lloyd West . . . . . Chapel Hill
Megan Gayle West . . . . . Raleigh
Sharita Marie Whitaker . . . . . Durham
Brett Kyle White . . . . . Greensboro
Robert Martin White . . . . . Durham
Kelly Christine White . . . . . Cary
Laura Beth White . . . . . Bremerton, Washington
Rebecca Elizabeth Wilhelm . . . . . Gastonia
Alex Ryan Williams . . . . . Lenoir
Alton Leroy Williams . . . . . Durham
Mallory Elizabeth Williams . . . . . Raleigh
Daniel Wright Willis . . . . . Durham
Amy M. Willis . . . . . Ararat, Virginia
Augustus Drewry Willis IV . . . . . Raleigh
Thomas Matthew Wilmoth . . . . . Kernersville
David Christopher Wilson . . . . . Charlotte
Monica Lee Wilson . . . . . Oviedo, Florida
Jonathan Wilson II . . . . . Durham
Claude Roberson Wilson III . . . . . Charlotte
Andrea Abigail Woelfle . . . . . Thomasville
Stephen Henry Wohlers . . . . . Huntersville
William Eugene Wooten . . . . . Chapel Hill
Anne Claire Wright . . . . . Boone
Ephriam Bruce Wright III . . . . . Raleigh
Timothy Robert Wyatt . . . . . Stoneville
Angela Dawn Zachary . . . . . Hampstead
Ryan Christopher Zellar . . . . . Cary

Given over my hand and seal of the Board of Law Examiners on this the 4th day of October 2010.

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 27th day of August 2010, and said persons have been issued a certificate of this Board:

Sara Rebekah Leuschke . . . . . Austin, Texas
Kyle Graham Melvin . . . . . Elizabethtown

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 27th day of August 2010, and said person has been issued a certificate of this Board:

Kristin Jo Uicker . . . . . .Raleigh

Given over my hand and seal of the Board of Law Examiners on this the 1st day of November 2010.

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 September 2010, and said persons have been issued a certificate of this Board:

Carol Wingler Hostler . . . . . .Durham
Elizabeth Ashley Sims . . . . . .Jacksonville

Given over my hand and seal of the Board of Law Examiners on this the 8th day of November 2010.

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 September 2010, and said persons have been issued a certificate of this Board:

Charles Leo Allen . . . . . .Morrisville
Brandon Sherard Atwater . . . . . .Durham
Cindy Johnette Bembry . . . . . .Raleigh
Sarah Snow Bencini . . . . . .High Point
Christine Camille Bischoff . . . . . .Arlington, Virginia
Ellen Bluestone . . . . . .Asheville

LICENSED ATTORNEYS

Sarah Elizabeth Bolling . . . . . Atlanta, Georgia
Celeste H. G. Boyd . . . . . Vass
Ira Braswell IV . . . . . Louisburg
Caitlin Anne Carson . . . . . Chapel Hill
John Pinckney Causey . . . . . Charlotte
Brian Lee Cox . . . . . Chapel Hill
Raymond Mark DiGuiseppe . . . . . Southport
Dannel Charles Duddy . . . . . Richmond, Virginia
John Patrick Fetner . . . . . Columbia, South Carolina
Mollie Maria Flanagan . . . . . Hillsborough
Erica Michelle Estes Genthner . . . . . Glendale, California
Seth Michael Goldstein . . . . . Redondo Beach, California
Charles Louis Gowland . . . . . Wake Forest
Pulvinder Kaur Grewal . . . . . West Bloomfield, Michigan
James Edwin Griffin III . . . . . Charlotte
Eric John Gurney . . . . . Raleigh
Kristi Dale Gillis Huff . . . . . Raleigh
Michael Hugh Kelly . . . . . College Park, Maryland
Karen Lee Kenney . . . . . Franklin
William Kirk Krueger, Jr. . . . . Raleigh
Adam Benjamin Levy . . . . . Raleigh
Guiselle Fatima Mahon . . . . . Matthews
Cynthia Kay Mason . . . . . Lexington, South Carolina
Matthew Joseph McGregor . . . . . Saint Pauls
Jennifer Marie Meksraitis . . . . . Raleigh
Daniel Charles Nash . . . . . Greensboro
Dustin Timothy Nichols . . . . . Winston-Salem
Patricia Tamara Niebauer . . . . . Whispering Pines
Leslie Anne Pedernales . . . . . Charlotte
Charles Aycock Poe III . . . . . Greensboro
Stephanie Stark Poling . . . . . Burnsville
Sarah Lynn Thompson Privette Bury . . . . . St. Edmonds, Suffolk
Sayera Jane Iqbal Qasim . . . . . Charlotte
Gary Evan Schuler . . . . . Charlotte
Zachary Blake Setzer . . . . . Matthews
Ryan Kirby Simmons . . . . . New Bern
Jessica Lynn Snowden . . . . . Wilmington
Collin Mariah Strickland . . . . . Chapel Hill
Ali Alexander Solhi . . . . . Cypress, California
Mandana Mobaraka Dashtaki Vidwan . . . . . Charlotte
Francis James Warmoth, Jr. . . . . Charlotte
Lewis Andrew Watson . . . . . Waxhaw
Michael Chase Wells . . . . . Waynesville
Daniel Wright Willis . . . . . Durham

Given over my hand and seal of the Board of Law Examiners on this the 4th day of October 2010.

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

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 24th day of September 2010, and said person has been issued a certificate of this Board:

Daniel Patrick Donahue . . . . . .Hertford

Given over my hand and seal of the Board of Law Examiners on this the 28th day of September 2010.

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 24th day of September 2010, and said persons have been issued a certificate of this Board:

Michael Easley, Jr. . . . . .Raleigh
Daniel Lehrer . . . . . .Chapel Hill
Charlene Brown Nelson . . . . . .Clayton
Daniel O'Malley . . . . . .Cary
Shannon Wharry . . . . . .Raleigh
Rikesia Williams . . . . . .Fayetteville

Given over my hand and seal of the Board of Law Examiners on this the 4th day of October 2010.

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 24th day of September 2010, and said person has been issued a certificate of this Board:

Natasha Marie Barone . . . . . .Fayetteville

Given over my hand and seal of the Board of Law Examiners on this the 1st day of November 2010.

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 1st day of October 2010, and said persons have been issued a certificate of this Board:

Venus Behrouzjou Liles . . . . . Raleigh
Andrew Jonathon Kisala . . . . . Durham
Cali Fay Schmitt . . . . . Durham
Benjamin Turner Many . . . . . Raleigh
Randall Stephen Hoose, Jr. . . . . Charlotte
Kirk Lee LeCureux . . . . . Charlotte
Alexander Thomas Maslow . . . . . Charlotte
Christa Engel Pletcher . . . . . Charlotte
John Wilder Harrington . . . . . Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 1st day of November 2010.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 15th day of October 2010, and said persons have been issued a certificate of this Board:

Sharif Abdoul Deveaux . . . . . Fayetteville
Bryan Anthony Dunkum . . . . . Jamestown
Michael Brett Few . . . . . Charlotte
Regenia Mae Hubbard . . . . . Hillsborough
Genevieve Alexander Mente . . . . . Boone
Eric Wade Rowell . . . . . Charlotte
Emile Christopher Thompson . . . . . Hyattsville, Maryland

Given over my hand and seal of the Board of Law Examiners on this the 1st day of November 2010.

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

HARLEYSVILLE MUTUAL INSURANCE COMPANY v. BUZZ OFF INSECT SHIELD, L.L.C., A NORTH CAROLINA LIMITED LIABILITY COMPANY; INTERNATIONAL GARMENT TECHNOLOGIES, L.L.C., A NORTH CAROLINA LIMITED LIABILITY COMPANY; ERIE INSURANCE EXCHANGE; AND ERIE INSURANCE COMPANY

No. 272A08

(Filed 15 April 2010)

Insurance— exclusion—false advertising claims—statements about own products

A commercial general liability insurance company (CGL) was not required to defend a policyholder (IGT) against an alleged false advertising claim brought by an insect repellant competitor (SCJ). The policy's Failure to Conform clause excludes injuries caused by false statements the insured makes about its own products, which were the only false statements alleged here.

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. 28, 664 S.E.2d 317 (2008), affirming an order on cross-motions for partial summary judgment entered on 24 May 2007 and an order denying motions to alter, amend, or vacate judgment entered on 25 June 2007, both by Judge John O. Craig, III in Superior Court, Guilford County. On 9 October 2008, the Supreme Court allowed plaintiff's petition for discretionary review of additional issues. Heard in the Supreme Court on 4 May 2009.

Pinto Coates Kyre & Brown, P.L.L.C., by David L. Brown, Martha P. Brown, and John I. Malone, Jr.; and Blank Rome LLP, by Jeremy A. Rist, pro hac vice; for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard L.L.P., by Mack Sperling; and Latham & Watkins LLP, by J. Scott Ballenger, pro hac vice; for defendant-appellee International Garment Technologies, L.L.C.

Nelson, Levine de Luca & Horst, LLC, by Michael A. Hamilton, pro hac vice; and Burton & Sue, L.L.P., by Gary K. Sue, for defendant-appellants Erie Insurance Exchange and Erie Insurance Company.

Nelson Mullins Riley & Scarborough LLP, by Joseph W. Eason and Stephen D. Martin, for Property Casualty Insurers Association of America, amicus curiae.

Maynard & Harris Attorneys at Law, PLLC, by C. Douglas Maynard, Jr., for United Policyholders, amicus curiae.

NEWBY, Justice.

This case arose out of a dispute between competing producers of insect repellents. Defendants Buzz Off Insect Shield, L.L.C. ("BOIS") and International Garment Technologies, L.L.C. ("IGT") allegedly falsely advertised the attributes of their insect-repellent clothing. S.C. Johnson & Son, Inc. ("SCJ"), defendants' competitor, believed that it was being injured by these advertisements. As a result, SCJ sued BOIS and IGT in federal court to compensate for this injury. The question currently before this Court is whether IGT's commercial general liability ("CGL") insurance carriers are required to defend it against SCJ's claims. To answer this question, we look to the language of the CGL policies to determine whether injury from a false advertisement is covered. The CGL policies appear to provide coverage for injury resulting from some false statements made in advertisements, but do not cover injury caused by false statements an insured makes about its own products. It is the CGL policies' "Quality Or Performance Of Goods—Failure to Conform to Statements" exclusion ("Failure to Conform exclusion") that eliminates any coverage for these types of false statements. Thus, the ultimate question we address is what kind of advertisement did SCJ allege as the cause of its injury. Did SCJ allege injury resulting solely from BOIS's and IGT's allegedly false statements about their own products, or did SCJ also include allega-

tions of injury from false statements about SCJ's products? Because SCJ only alleged it was injured by false statements defendants BOIS and IGT made about their own products, the CGL policies' Failure to Conform exclusion dictates that there is no insurance coverage for SCJ's injury, and therefore, the CGL insurance companies are not required to defend their insured IGT against SCJ's claims. As the Court of Appeals concluded the CGL insurance companies were required to defend against SCJ's claims, we reverse that decision and remand this matter to that court.

I. BACKGROUND

Defendants BOIS and IGT[1] process clothing manufactured and marketed by others to add an insect repellent to the apparel. During the 1990s, R.A. Lane Corporation, defendant BOIS's predecessor in interest, began developing a process ("the BOIS process") to treat fabric with the insect repellent permethrin such that the repellent binds to the fabric. Defendant BOIS eventually created the BOIS process and later received approval from the United States Environmental Protection Agency ("EPA") to apply the BOIS process to consumer apparel. Defendant IGT then marketed the BOIS process by entering into agreements with manufacturers of consumer apparel, such as L.L. Bean, Ex Officio, and Orvis, under which IGT would apply the BOIS process to apparel manufactured by these other entities. Defendants would then affix the BOIS mark, BUZZ OFF™, to the newly treated garments ("BOIS apparel") and return them to the manufacturer for sale.

It is undisputed that defendants promoted the treated apparel through various advertisements. Specifically, according to SCJ, defendants touted BOIS apparel by stating that it: (1) "reduce[s] or eliminate[s] the need to apply an insect-repellent product on the skin," (2) "protects uncovered skin from mosquito bites," (3) prevents wearers from "receiv[ing] any mosquito bites," (4) "is equivalent to or superior in performance to topical insect repellents, such as those containing DEET," (5) provides protection against mosquito bites without "the 'hassle' of applying 'messy' insect-repellent products directly to the skin," (6) "is highly effective through 25 washings," and (7) "contains a version of a natural insecticide that is derived from chrysanthemum flowers." These claims, it seems, ap-

1. BOIS and IGT are collectively referred to herein as "defendants." Any use of the term "defendants" refers only to BOIS and IGT. The term does not include Erie Insurance Exchange or Erie Insurance Company, which are also defendants in this action. We refer to these entities collectively as "Erie."

peared on and were disseminated by defendant BOIS's website and the BOIS apparel, the websites and print advertisements of other entities that manufactured clothing to be treated with the BOIS process ("BOIS Partners"), and the advertising materials of various retailers selling the BOIS apparel ("BOIS Partner Affiliates").

SCJ is a competitor of defendants. SCJ states that it "manufactures, under the trademark OFF and related marks, a variety of personal and area insect repellent products." Additionally, SCJ owns a prior BUZZOFF mark for use in connection with insect-repellent products. According to SCJ, its "OFF! brand insect repellents are, by far, the largest selling insect repellents in the United States." However, despite its stated industry-leading status, SCJ contended that it was being unlawfully injured by defendants' marketing and advertising of the BOIS apparel.

In response to its perceived injury, SCJ sued defendants in federal court ("the Underlying Action") seeking redress for numerous injuries allegedly caused by defendants. In its "First Amended Complaint for Injunctive and Other Relief" ("Amended Complaint"), SCJ included causes of action for: (1) trademark infringement in violation of the Lanham Act, 15 U.S.C. § 1114; (2) false advertising in violation of the Lanham Act, 15 U.S.C. § 1125(a); (3) violation of the Illinois Consumer Fraud and Deceptive Business Practices Act; (4) violation of the Illinois Uniform Deceptive Trade Practices Act; (5) violation of the North Carolina Unfair and Deceptive Trade Practices Act; (6) unfair competition in violation of the Lanham Act, 15 U.S.C. § 1125(a); and (7) unjust enrichment. SCJ requested, *inter alia*, a permanent injunction and monetary damages.

Though denominated under seven causes of action, the Amended Complaint essentially asserted that SCJ had suffered two distinct injuries. First, SCJ claimed defendants caused injury by creating confusion over the origin of BOIS apparel because defendants' BUZZ OFF mark is very similar to SCJ's long-standing OFF!-based and BUZZOFF marks. Second, SCJ alleged damage resulting from defendants' advertisements concerning the efficacy of BOIS apparel, and since those advertisements were purportedly false, SCJ's injury was wrongful and compensable.

For the time period during which the actions alleged by SCJ in its Amended Complaint occurred, defendant IGT was covered by several policies of insurance. In 2003 defendant IGT purchased insurance coverage from Erie Insurance Exchange and Erie Insurance Com-

pany (collectively "Erie") for the policy period from 25 April 2003 to 25 April 2004. The Erie policy was renewed following the initial policy period, but cancelled on 4 July 2004. In 2004 defendant IGT obtained insurance coverage from Harleysville Mutual Insurance Company ("Harleysville") for the policy period from 20 June 2004 to 20 June 2005.

After denying defendants' requests for assistance in defending the Underlying Action, Harleysville filed a declaratory judgment action against BOIS, IGT, and Erie in Superior Court, Guilford County. Harleysville contended that: (1) it owed no duty to BOIS because BOIS was not its insured; (2) it owed no duty to IGT because the language of its policy either did not provide coverage in the insuring agreement or excluded coverage otherwise granted; and (3) if there was coverage for the allegations in the Underlying Action, Erie alone was responsible for IGT's defense and indemnification. BOIS and IGT answered, counterclaimed against Harleysville, and cross-claimed against Erie, alleging that both policies provided coverage for SCJ's allegations and that the insurers had breached their insurance agreements in bad faith by failing to provide BOIS and IGT with a defense. Erie answered, counterclaimed, and cross-claimed, contending that: (1) BOIS was not an insured under the Erie policy; (2) the Erie policy does not cover the injuries SCJ alleged in its Amended Complaint; and (3) if SCJ's alleged injuries are covered by the insurance agreements, the injuries occurred during the Harleysville policy period and not the Erie policy period. Subsequently, after the case was designated exceptional, the trial court entered a Case Management Order that separated the duty to defend issue from the duty to indemnify and bad faith claims. The parties then filed cross-motions for summary judgment on the duty to defend issue.

By order entered 24 May 2007, the trial court granted partial summary judgment in favor of defendant IGT. After first determining that summary judgment was appropriate, the trial court concluded that the Harleysville and Erie policies provided coverage for the injuries SCJ had alleged and consequently, that Harleysville and Erie had a duty to defend IGT in the Underlying Action. The trial court also allowed in part Erie's and Harleysville's motions for summary judgment to the extent that BOIS is not insured under either insurance agreement. Following entry of summary judgment for IGT, Harleysville and Erie both filed motions to alter, amend, or vacate the judgment, which the trial court denied by order entered 25 June 2007.

Harleysville and Erie appealed the 24 May 2007 and 25 June 2007 orders to the North Carolina Court of Appeals.

The majority of a divided panel at that court affirmed the trial court's orders. *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 190 N.C. App. 28, 664 S.E.2d 317 (2008). Specifically, the majority held that the insuring agreement of each policy provided coverage for SCJ's claims and that neither the "Prior Publication" exclusion nor the "Quality or Performance of Goods" exclusion removed SCJ's claims from coverage under either the Harleysville or Erie policies. *Id.* at 34-36, 664 S.E.2d at 321-22. The dissenting judge expressed no opinion whether SCJ's alleged injuries were covered by the insuring agreement of the policies, but concluded that the "Quality Or Performance of Goods" exclusion precludes coverage in any event. *Id.* at 37, 41, 664 S.E.2d at 322, 324-25 (Geer, J., dissenting). Based on this dissent, Harleysville and Erie appealed as of right to this Court on the issue of whether the "Quality Or Performance of Goods" exclusion applies to deny insurance coverage for SCJ's allegations. On 9 October 2008, this Court allowed discretionary review of the question whether the "Material Published Prior To Policy Period" exclusion operates to bar coverage under the Harleysville policy.

II. ANALYSIS

When the language of the insurance policies and the contents of the complaint are undisputed, we review de novo the question whether an insurer has an obligation to defend its insured against those allegations. *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 690-91, 340 S.E.2d 374, 377 (1986). To answer this question, we apply the "comparison test," reading the policies and the complaint "side-by-side . . . to determine whether the events as alleged are covered or excluded." *Id.* at 693, 340 S.E.2d at 378.

This Court ascertains whether an insurer has a duty to defend in a different manner than we determine whether an insurer has a duty to indemnify. We explained this difference in *Waste Management of Carolinas, Inc. v. Peerless Insurance Co.*, in which we said that "[g]enerally speaking, the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy." *Id.* at 691, 340 S.E.2d at 377. To explain this difference in scope, we continued, "An insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings; its duty to pay is measured by the facts ultimately determined at trial." *Id.*; *see*

also Builders Mut. Ins. Co. v. N. Main Constr., Ltd., 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) ("An insurer's duty to defend a policy holder against a lawsuit is determined by the facts alleged in the pleadings." (citing *Waste Mgmt.*, 315 N.C. at 691, 340 S.E.2d at 377)). Thus, the duty to defend is broader than the duty to indemnify in the sense that an unsubstantiated allegation requires an insurer to defend against it so long as the allegation is of a covered injury; however, even a meritorious allegation cannot obligate an insurer to defend if the alleged injury is not within, or is excluded from, the coverage provided by the insurance policy. *Waste Mgmt.*, 315 N.C. at 692, 340 S.E.2d at 378 ("[T]hough the insurer is bound by the policy to defend 'groundless, false or fraudulent' lawsuits filed against the insured, if the facts are not even arguably covered by the policy, then the insurer has no duty to defend." (citations omitted)).

The difference in scope between the duty to defend and the duty to indemnify is based on the source of the factual narrative. *Id.* at 691, 340 S.E.2d at 377. In determining whether an insurer has a duty to defend, the facts as alleged in the complaint are to be taken as true and compared to the language of the insurance policy. If the insurance policy provides coverage for the facts as alleged, then the insurer has a duty to defend. Conversely, in determining whether an insurer has a duty to indemnify, the facts as determined at trial are compared to the language of the insurance policy. If the insurance policy provides coverage for the facts as found by the trier of fact, then the insurer has a duty to indemnify. In addressing the duty to defend, the question is not whether some interpretation of the facts as alleged could possibly bring the injury within the coverage provided by the insurance policy; the question is, assuming the facts as alleged to be true, whether the insurance policy covers that injury. The manner in which the duty to defend is "broader" than the duty to indemnify is that the statements of fact upon which the duty to defend is based may not, in reality, be true. As we observed in *Waste Management*, "[w]hen the pleadings state facts demonstrating that the alleged injury *is covered* by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable." *Id.* (emphasis added) (citations omitted).

To determine whether the allegations in the case *sub judice* are within the coverage afforded, we examine the language of the policies. The Harleysville and Erie policies both contain a Commercial General Liability Coverage Form, and the provisions of each policy at issue in this case are identical. The policies read in pertinent part:

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply.

. . . .

2. Exclusions

This insurance does not apply to:

. . . .

g. **Quality Or Performance Of Goods—Failure To Conform To Statements**

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

. . . .

i. **Infringement Of Copyright, Patent, Trademark or Trade Secret**

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights.

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

. . . .

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and

b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

. . . .

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

. . . .

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services[.]

Thus, by their express terms, the Harleysville and Erie policies exclude from coverage certain types of "personal and advertising injury." Before we ascertain the meaning of the policy language to determine whether it encompasses the facts as alleged in SCJ's Amended Complaint, we must consider the long-standing rules of construction we apply to insurance policies.

As with all contracts, the object of construing an insurance policy "is to arrive at the insurance coverage intended by the parties when the policy was issued." *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970) (citations omitted). If the parties have defined a term in the agreement, then we must ascribe to the term the meaning the parties intended. *Id.* (citation omitted). We supply undefined, "nontechnical words . . . a meaning consistent with the sense in which they are used in ordinary speech, unless the context clearly requires otherwise." *Id.* (citation omitted). We construe all clauses of an insurance policy together, "if possible, so as to bring them into harmony." 276 N.C. at 355, 172 S.E.2d at 522 (citation omitted). We deem all words "to have been put into the policy for a purpose," and we will give effect to each word if we can do so "by any reasonable construction." *Id.* (citation omitted).

This Court resolves any ambiguity in the words of an insurance policy against the insurance company. 276 N.C. at 354, 172 S.E.2d at 522 (citations omitted). We do so because the insurance company is the party that selected the words used. *Id.* Furthermore, this Court "construe[s] liberally" insurance policy provisions that extend cover-

age "so as to provide coverage, whenever possible by reasonable construction," *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986) (citations omitted), and we strictly construe against an insurance company those provisions excluding coverage under an insurance policy, *id.* (citing *Wachovia Bank & Tr.*, 276 N.C. at 355, 172 S.E.2d at 523).

However, we only apply the preceding rules of construction when a provision in an insurance agreement is ambiguous. *Wachovia Bank & Tr.*, 276 N.C. at 354, 172 S.E.2d at 522. To be ambiguous, the language of an insurance policy provision must, "in the opinion of the court, [be] fairly and reasonably susceptible to either of the constructions for which the parties contend." *Id.* (citation omitted). If the language is not "fairly and reasonably susceptible" to multiple constructions, then we "must enforce the contract as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay." *Id.* (citations omitted).

In accordance with the foregoing principles, we now turn to the language of the insurance policies at issue in the case *sub judice*. In doing so, we are mindful that the dissenting judge at the Court of Appeals expressed no opinion about the breadth of the Insuring Agreement clause of the policies. *Harleysville Mut.*, 190 N.C. App. at 37, 664 S.E.2d at 322 (Geer, J., dissenting). Therefore, this issue is not before us and we also express no opinion whether the allegations in SCJ's Amended Complaint are within the Insuring Agreement clause of the policies. We simply assume *arguendo* that SCJ sought to recover for " 'personal and advertising injury' to which [the Harleysville and Erie policies] appl[y]." We now turn our attention to the language of the Failure to Conform exclusion in the Harleysville and Erie policies.

The Failure to Conform exclusion incorporates the parties' definition of "personal and advertising injury." According to the policies, to be "personal and advertising injury," the injury suffered by a plaintiff must arise from an enumerated "offense[]." The "offenses" listed in the policies, such as "slander[]" and "libel[]," are causes of action in tort. *See Henderson v. U.S. Fid. & Guar. Co.*, 346 N.C. 741, 746, 488 S.E.2d 234, 237 (1997). One of the offenses listed is "[o]ral or written publication, in any manner, of material that . . . disparages a person's or organization's goods, products or serv-

ices." The policies do not further define this offense. Harleysville and Erie argue that this language restricts coverage to the tort of product disparagement. Defendant IGT contends, however, that the word "disparages" should be given its ordinary, dictionary definition, thereby allowing "personal and advertising injury" to result when an insured's advertisement " 'lower[s] in esteem or reputation' " a competitor's product.

Though the parties' readings of this phrase vary widely, we need not determine its precise contours to resolve the present controversy. Under any reading of this phrase, the definition of "personal and advertising injury" includes injury stemming from an "offense" involving the "publication . . . of material . . . [about] a person's or organization's goods, products or services." For the publication of material to constitute an offense, *i.e.*, tortious conduct, that material must be, *inter alia*, false. Because "personal and advertising injury" under the language of the policies can only result from an "offense," the published material must be, *inter alia*, false before injury in the ordinary sense of the word becomes "personal and advertising injury" as that term is used in the policies.

The Failure to Conform exclusion excludes actionable injury resulting from some false statements. The Failure to Conform exclusion removes from coverage that " '[p]ersonal and advertising injury' arising out of the failure of goods, products or services to conform with any statement of quality or performance made in" the insured's publications. "An injury 'arises out of' an excluded source of liability when it is proximately caused by that source." *Builders Mut.*, 361 N.C. at 88, 637 S.E.2d at 530 (citing *State Capital*, 318 N.C. at 547, 350 S.E.2d at 73-74). As such, the Failure to Conform exclusion envisions a scenario in which a plaintiff shows that an insured's product is, in reality, something different from what the insured has advertised. We have stated that "personal and advertising injury" includes injury resulting from tortious conduct involving, *inter alia*, a false statement. Thus, this exclusion removes from coverage "personal and advertising injury" proximately caused by a false statement an insured has made about its own product. *See R.C. Bigelow, Inc. v. Liberty Mut. Ins. Co.*, 287 F.3d 242, 246 (2d Cir. 2002) ("Although Celestial's complaint against Bigelow included claims of false advertising, these claims did not trigger a duty to defend under the advertising injury provision because they concerned allegedly false claims about *Bigelow's* products, and such false claims about the insured products are explicitly excluded by the policy.").

Defendant IGT, however, urges this Court to hold that the Failure to Conform exclusion was intended to prevent dissatisfied consumers from bringing a products liability action veiled as a false advertising claim and consequently, that the Failure to Conform exclusion should not apply to false advertising claims between competitors.[2] In support of this contention, defendant IGT explains that there is a distinction between, on the one hand, being injured by a product's failure to perform as advertised and, on the other hand, being injured by that product's advertisement. *See*, *e.g.*, *Pennfield Oil Co. v. Am. Feed Indus. Ins. Co. Risk Retention Grp., Inc.*, No. 8:05CV315, 2007 WL 1290138, at *8 (D. Neb. Mar. 12, 2007) ("Alpharma's alleged injury is due to Pennfield's implicit disparagement of Alpharma's product and practices. Alpharma's injury—lost sales, profits and goodwill—would not be remedied if Pennfield's products were to conform to the allegedly false advertised quality. Accordingly, the court finds the failure to conform exclusion does not apply."). Defendant IGT then states that SCJ was allegedly injured by IGT's advertising, not by the failure of IGT's products to perform as advertised.

There is a distinction between being injured by an advertisement and being injured by a product's failure to perform as advertised. We agree that SCJ's alleged injury resulted from defendants' advertisements. In fact, SCJ explicitly stated in its Amended Complaint that defendants' "advertisements are likely to have caused and will likely . . . continue to cause SC Johnson to suffer substantial damages, including lost sales and lost profits." We also recognize that, as in *Pennfield Oil*, SCJ's alleged injuries would not be remedied if defendants' products performed as advertised. Generally speaking, SCJ would have suffered the same injury on account of defendants' advertisements whether or not those advertisements were true. Assuming *arguendo* that everything contained in defendants' advertisements was true, SCJ could have suffered the same injury, "lost sales and lost profits." Such is the nature of competition in the free market.

However, there is also a distinction between being injured by an advertisement and being wrongfully injured by an advertisement. A false advertisement leads to a similar injury, but it may give rise to a cause of action in which a plaintiff can recover for the damages suf-

2. We express no opinion on how any language in any part of the insurance policies may affect insurance coverage, if any, in a false advertising action brought by a consumer.

fered. Thus, even though SCJ suffers the same type of injury whether or not the advertisement is false, SCJ may only recover damages on account of its injury when the advertisement is false. The remedy for the injury inflicted by a truthful advertisement is found in the marketplace, not in the courthouse. As the policies in the case *sub judice* cover only that injury resulting from an "offense[]," the injury suffered must be actionable, meaning here, resulting from a false statement, to constitute "personal and advertising injury" as that term is used in the policies. As such, defendant IGT's construction of the language of the Failure to Conform exclusion is untenable and does not render the provision ambiguous. This Court, finding no ambiguity in the policies' provision at issue, must interpret the language of the Failure to Conform exclusion as the parties intended, as expressed by their chosen words. *Wachovia Bank & Tr.*, 276 N.C. at 354, 172 S.E.2d at 522. The Failure to Conform exclusion envisions an insured's false advertisement that causes injury, and the exclusion removes from coverage potential "personal and advertising injury" suffered from a false advertisement, when the falsity "aris[es] out of the failure of goods . . . to conform with . . . statement[s] of quality or performance made in [the insured's] 'advertisement.' "

Now, having determined the meaning of the Failure to Conform exclusion of the policies, we must review SCJ's allegations to determine whether the Harleysville and Erie policies provide coverage for the injury allegedly suffered by SCJ. To accomplish this, we will examine the portions of SCJ's Amended Complaint that contain allegations of false advertising because the parties agree that false advertising is the only claim made by SCJ that possibly enjoys insurance coverage.

SCJ devotes numerous pages of its Amended Complaint to detailing defendants' allegedly false statements in various media. The introductory section of the Amended Complaint provides an overview of SCJ's claims, contending that defendants, through their own advertisements and those of the BOIS Partners and BOIS Partner Affiliates, made "materially false and misleading advertising claims about the efficacy, use, and product attributes of BUZZ OFF Insect Repellent Apparel." Later in its Amended Complaint, SCJ utilizes an entire section for its allegations of defendants' false advertising.

This false advertising section, entitled "Allegations Relating to Defendants' False Advertising," contains eight subsections. The first four subsections focus on the alleged falsity of defendants' claims

that BOIS apparel protects both covered and exposed skin from insect bites. The fifth subsection addresses defendants' allegedly inaccurate statements that BOIS apparel remains effective through twenty-five laundry cycles. The sixth subsection emphasizes defendants' allegedly untrue contentions that BOIS apparel is treated with a natural insecticide. The seventh subsection illustrates an alleged contradiction between defendants' advertisements and the labels on the BOIS apparel. In the final subsection, SCJ condenses its various prior allegations of defendants' false advertising.

The first subsection of the false advertising section of SCJ's Amended Complaint is entitled "False Efficacy Claims on BOIS's Website." The allegations in that subsection state in part:

> 90. BOIS's website . . . makes several claims that falsely and unambiguously communicate that (a) by wearing BUZZ OFF Insect Repellent Apparel, consumers can reduce or eliminate the need to apply an insect-repellent product on the skin, (b) BUZZ OFF Insect Repellent Apparel protects uncovered skin from mosquito bites, (c) if you wear BUZZ OFF Insect Repellent Apparel, you will not receive any mosquito bites, and (d) BUZZ OFF Insect Repellent Apparel is equivalent to or superior in performance to topical insect repellents, such as those containing DEET.

SCJ then provides examples of statements from BOIS's website that support these allegations. SCJ listed the following examples:

> a) Under the BOIS website heading, BUZZ OFF *Facts*, the Defendants claim that BUZZ OFF Insect Repellent Apparel reduces the need to apply personal repellents to the skin, the application of which is described as "messy" and a "hassle": "Worry Free and Convenient—*Wearing BUZZ OFF apparel reduces the need to apply insect-repellent creams, lotions or sprays directly to the skin.* Although topical insect repellents may be effective, especially those containing DEET, many customers are wary of overuse. In addition, *applying repellents to the skin can be messy and frequent re-application is a hassle.*"
>
> b) The BOIS website includes a link to "BUZZ OFF In the News," which excerpts language from news articles and provides links to the articles in their entirety, the full text of which can be accessed for a fee. One article excerpt includes the claim: "*Imagine walking through the north woods with . . . no spray cans, no creams, no DEET . . . no way! Until Now. Orvis just introduced a new*

line of clothing called BUZZ OFF <u>*that erases the need for other insect repellents.*</u> . . . In spite of all the credentials, patents and hoopla, we don't hand out Editor's Choice Awards without extensive testing, so *we sent Bill Battles to Ontario in the stuff . . . . He swears that not a single one landed anywhere on him, and that's good enough for us*."

c) In a section titled "BUZZ OFF Facts," under a heading titled "Proven Effective," BOIS claims, "The developers of BUZZ OFF Insect Shield™ have conducted numerous studies to confirm its effectiveness. BUZZ OFF apparel has been shown to be highly effective through 25 washings. By contrast, insect repellents applied directly to the skin range in effectiveness and last from several minutes to several hours."

d) One claim suggests that the clothing provides a barrier around the wearer: "The BUZZ OFF process tightly binds the active ingredient to the garment, creating an invisible and odorless protection for the wearer."

d) [sic] "I would absolutely choose BUZZ OFF Apparel [over spray or lotion repellents], because it was actually more effective for me, and because I didn't have to completely slather myself with insect repellent. . . ."

e) "BUZZ OFF definitely allowed me to work in areas that would have been impossible to tolerate without applying some kind of insect repellent. One of the good things about these clothes is that you don't have to be constantly re-applying chemicals to your skin."

f) "This year we wore BUZZ OFF treated clothes, and even though the flies and mosquitoes were as bad as ever, *we got nearly perfect protection from them without having to use any insect repellent at all.* Instead of the dozens of mosquito and black fly bites I have gotten in previous years, with BUZZ OFF I got only one bite from a black fly which flew up in my sleeve and got trapped there. I took Deep Woods OFF! in my tackle box but never even got it out. In short, in 20 years of these fishing trips, no matter how much DEET I used, I don't think I ever came back with fewer than 25 black fly bites. *This year with BUZZ OFF clothes and no DEET at all, I got only one black fly bite—and not even one mosquito bite.*"

g) "I was wearing my BUZZ OFF shirt and hat and there was literally a force field of B52-sized skeeters around me, and not a one landed on me or touched me."

h) "I recently went down to the Amazon rain forest of Ecuador . . . . I hiked at all times of the day and night. . . . I never had any problems with any ants or other insects biting me [. . .] While I was down there I wore nothing but BUZZ OFF clothing and never had to put a single drop of insect repellant [sic] on the entire time. . . ."

(ellipses and italics as shown in complaint) (footnotes omitted). As SCJ contends, these examples "reinforce[] [the BOIS website's] claims by emphasizing the 'hassle' of applying 'messy' insect-repellent products directly to the skin."

In the second subsection, entitled "Similar False Claims on the BOIS Partners' Websites," SCJ reiterates the allegations made in the first subsection and here attributes them to the BOIS Partners' websites as well. To support its allegations, SCJ enumerates examples of text from the BOIS Partners' websites:

a) BUZZ OFF apparel ". . . creates an *invisible and odorless barrier that . . . provides protection from mosquitoes* . . . ."

b) BUZZ OFF apparel "provides the entire family with immediate protection from mosquitoes, ticks and other annoying and potentially life-threatening insects, simply by *wearing* the product. . . . *BUZZ OFF Insect Repellent Apparel works by creating an invisible and odorless protective barrier around the clothes and body.*"

c) "Ex Officio's innovative new BUZZ OFF apparel provides immediate protection from mosquitoes, ticks and other potentially life-threatening insects, *simply by wearing the product.*"

d) BUZZ OFF apparel "makes spray and lotion repellents obsolete."

e) ". . . enjoy the outdoors while reducing the nuisance of applying nasty insect-repellent lotions and sprays."

f) With BUZZ OFF apparel, referred to as "The Insect Repellent Alternative," "you no longer have to reapply repellent all day long, or get bitten when sprays or liquids start to wear off and lose their effectiveness."

g) "Wear shorts. Not bug spray."

h) "*Say good-bye to annoying bugs and messy sprays* . . . [BUZZ OFF apparel] provides reliable, proven protection from mosquitoes. . . . Odorless and invisible . . . *there's no need to keep applying messy sprays*. It's as easy as putting on a pair of pants or a shirt. . . . *As long as you are wearing BUZZ OFF apparel, you're protected. . . . Clothing that repels insects as effectively as sprays—without the mess*."

i) "BUZZ OFF is proven to be as effective as bug spray. But, because it's odorless you can relax at the outdoor table without the unappetizing odor or the greasy feel of other repellents."

j) "Effective: Works like bug spray in repelling mosquitoes . . . ."

k) "It provides the benefits of bug spray without the constant reapplication, so you'll dramatically reduce the number of insect bites without ever having to coat (and recoat) yourself with a spray or cream. . . . It is truly the insect repellent alternative."

l) BUZZ OFF apparel is "as effective as bug spray or cream," there is "[n]o need to constantly apply & re-apply repellent" and it reduces "the need for sprays or creams."

(ellipses and italics as shown in complaint) (footnotes omitted). SCJ uses these examples to illustrate that the BOIS Partners "reinforce" BOIS's alleged claims touting the efficacy of the BOIS apparel.

The third subsection, entitled "Similar False Claims in Catalog and Print Advertisements of the BOIS Partners," alleges that "the BOIS Partners . . . also make several claims that falsely and unambiguously communicate that, by wearing BUZZ OFF Insect Repellent Apparel, consumers can reduce or eliminate the need to apply an insect-repellent product on the skin and that BUZZ OFF apparel protects uncovered skin." SCJ provides quotations from the BOIS Partners' advertisements to support its allegation:

a) "For effective, odorless protection against biting insects . . . simply pop on this comfortable 3.4-oz. Marquesas™ cotton shirt. Ideal with BUZZ OFF™ pants for *full protection*."

b) "BUZZ OFF™ gives you the protection of insect repellent spray without having to keep reapplying oily chemicals to your skin."

> c) "It's as easy as putting on a pair of pants or a shirt, and it's durable—it continues to repel insects through 25 washings. *As long as you are wearing BUZZ OFF apparel, you're protected.*"

(ellipsis and italics as shown in complaint) (footnotes omitted). SCJ further alleges that one BOIS Partner went "so far as to claim that BUZZ OFF apparel provides a 'force field' around wearers of the clothing." In support of this allegation, SCJ provided the following examples: "a) 'Give yourself a bug and sun repellent force field' "; and "b) 'This holiday season . . . give a bug and sun repellent force field.' " (ellipsis as shown in complaint) (footnotes omitted).

In the fourth subsection, entitled "SC Johnson Studies Show that BUZZ OFF Apparel Has No Material Repellent Effect on Uncovered Skin and Does Not Prevent Mosquito Bites Even on Covered Skin," SCJ contends it tested BOIS apparel and found BOIS's claims that BOIS apparel protects unexposed and exposed skin from insect bites to be false.

In the Amended Complaint's fifth subsection, SCJ claims that defendants falsely advertise BOIS apparel as remaining effective through twenty-five laundry cycles. This subsection, "False Advertising Claiming that BUZZ OFF Insect Repellent Apparel is effective through 25 washings," states in part:

> 102. BOIS advertising includes several variations of the false and misleading claim that BUZZ OFF Insect Repellent Apparel is highly effective through 25 washings. Variations appear on the BOIS website, the BOIS Partners' websites and in print advertisements. Additionally, the claim appears on all stitched-on tags and hang tags of BUZZ OFF Insect Repellent Apparel, and thus all consumers who purchase the product see the claim.
>
> 103. The following are some examples of the claims on the BOIS website:
>
> > a) In a section titled "BUZZ OFF Facts," under a heading titled "Proven Effective," BOIS claims, "The developers of BUZZ OFF Insect Shield™ have conducted numerous studies to confirm its effectiveness. BUZZ OFF apparel has been sho*wn to be highly effective through 25 washings*. By contrast, insect repellents applied directly to the skin range in effectiveness and last from several minutes to several hours."

b) In that same section, under a heading titled, "Long Lasting," BOIS claims, "*The repellent quality is effective even after repeated washings. BUZZ OFF apparel will continue to repel insects through 25 washings*, the approximate effective life of the garment, according to the International Fabricare Institute. . . ."

104. The tags on all BUZZ OFF Insect Repellent Apparel state: "Repellency remains effective for 25 washings."

105. Some examples of the variations of the claim found on the BOIS Partners' websites and print advertisements, include:

a) "Odorless and invisible, BUZZ OFF repellent is bonded to the clothing so there's no need to keep applying messy sprays. It's as easy as putting on a pair of pants or a shirt, and it's durable—*BUZZ OFF protection continues to repel insects through 25 washings*. As long as you are wearing BUZZ OFF apparel, you're protected."

b) "BUZZ OFF™ apparel provides effective protection from insects through 25 washings."

c) The Orvis website includes the following claims, one of which is that BUZZ OFF Insect Repellent Apparel may be effective for more than 25 washings: "Through a patent-pending process, BUZZ OFF insect shield apparel by Orvis *provides protection from biting insects for 25 washings*, the average useful life of your clothes;" "Lasting: *Repels insects through 25 washings*;" and "Effective through *at least 25 washings*."

d) The Bass Pro Shops website also includes a claim that BUZZ OFF Insect Repellent Apparel may be effective for at least 25 washings: "Buzz Off insect repellent is *effective through 25+ launderings*;" "Lasting: Remains *effective through 25 washings*;" and "Reducing the need for sprays or creams, this protection is bonded into the fabric and is odorless, invisible and *proven effective through 25 washings*."

106. SC Johnson conducted additional tests to assess whether BUZZ OFF Insect Repellent Apparel in fact continues to prevent mosquito bites on covered skin for 25 washings. The tests demonstrated that, contrary to the Defendants' claims, test participants wearing BUZZ OFF Insect Repellent Apparel re-

> ceived multiple mosquito bites on covered skin after only a small period of time even when the shirts they wore had never been washed.
>
> 107. Moreover, when the shirts they wore had been washed as few as five and ten times, the test participants received large numbers of bites on covered skin during only a brief period of exposure to mosquitoes.

(ellipsis and italics as shown in complaint) (footnotes omitted). This subsection thus essentially claims defendants falsely portray their products as being effective longer than the products actually remain effective.

SCJ uses the sixth subsection, "False Advertising Claiming That BUZZ OFF Insect Repellent Apparel Contains A Version of a Natural Insecticide That is Derived From Chrysanthemum Flowers," to address defendants' claim that BOIS apparel's treating agent is naturally derived. SCJ contends that:

> 108. BOIS advertising materials contain several variations of a false and misleading claim that BUZZ OFF Insect Repellent Apparel contains a version of a natural insecticide that is derived from chrysanthemum flowers. With these false and misleading claims, the Defendants are deceiving consumers into believing that BUZZ OFF Insect Repellent Apparel, or its active ingredient, is a natural product rather than a synthetic chemical, when it in fact is the latter.
>
> 109. Defendants engage in this deception by confusing pyrethrum, which is a natural insecticide derived from chrysanthemum flowers, but is *not* an ingredient of Defendants' products, with permethrin, the active chemical in BUZZ OFF Insect Repellent Apparel, which is a molecularly-distinct, synthetic chemical that is no more a natural product than DEET, the active ingredient in many topical insect repellents, including SC Johnson's OFF! brand repellents.
>
> 110. The following are some examples of the false claims that appear in the advertising of Defendants and BOIS Partners:
>
> a) An article excerpt from the "BUZZ OFF In the News" link, claims that "[t]he BUZZ OFF secret lies in its ability to bind permethrin (a man-made insect repellent occurring naturally in chrysanthemums) to clothing," an ingredient that it describes as "odorless and invisible."

b) "BUZZ OFF Insect Shield builds a man-made version of a centuries-old insect repellent derived from the chrysanthemum plant directly into your clothes."

c) "How does it work? BUZZ OFF Insect Shield builds into your clothes a man-made version of a centuries-old insect repellent made from chrysanthemums."

d) "BUZZ OFF™ Insect Shield Insect Repellent Apparel is a revolutionary new product that combines Permethrin, a man-made form of a natural insect repellent found in the Chrysanthemum plant, with a new patent-pending process."

111. The claim that "a man-made version of a centuries-old insect repellent made from chrysanthemums" is built into BUZZ OFF Insect Repellent Apparel is deceptive in that it falsely communicates to consumers that BUZZ OFF Insect Repellent Apparel is a more natural option than traditional insect-repellent products, like those marketed under SC Johnson's OFF! brand, which contain chemical repellents, such as DEET. This claim also falsely communicates that BUZZ OFF Insect Repellent Apparel and/or the active ingredient in the apparel is made from chrysanthemums or is natural.

(footnotes omitted). Then, again returning to all claims allegedly made by defendants and the BOIS Partners, SCJ states that:

112. These messages are materially false and deceptive because permethrin is a chemical ingredient in the same way that DEET is a chemical ingredient, and permethrin is a synthetic chemical compound that is not derived from flowers.

113. The claim exploits the desire of consumers for natural products, including insect repellents. Consumers who rely on such misleading and deceptive statements are likely to use BUZZ OFF Insect Repellent Apparel to the exclusion of DEET-containing products such as OFF!, despite the fact that BUZZ OFF Insect Repellent Apparel provides protection from mosquitoes that is clearly inferior to the protection provided by topical repellents containing DEET, and thus potentially endangers the user's health.

114. Consumers could also be encouraged by these false and misleading claims to ignore the safe storage and disposal instructions required by law to be disclosed on BUZZ OFF apparel.

Ultimately, SCJ uses this subsection to allege that, despite defendants' advertising claims to the contrary, both OFF! and BUZZ OFF apparel use chemical repellents.

In the seventh subsection, entitled "Defendants' False Advertising Directly Conflicts with the Labels on the Apparel," SCJ alleges that defendants' advertisements convey a message contrary to the language found on the BOIS apparel tags. Specifically, SCJ states:

> 116. The EPA registration of BUZZ OFF Insect Repellent Apparel requires that the product label contain specific information about how to provide insect-repellent protection for skin that is not covered by the apparel, about the "life" of the product (*i.e.*, the amount of "washings" for which the product is effective), and care and disposal instructions.
>
> 117. The EPA requires that all labels include the statement: "For protection of exposed skin, *use in conjunction with an insect repellent registered for direct application to skin*."

(italics as shown in complaint) (footnote omitted). SCJ contends that EPA's mandate "reflects EPA's recognition that the efficacy of BUZZ OFF Insect Repellent Apparel is limited to the areas of the body actually covered by the apparel, and that the product does not adequately protect uncovered skin from mosquito and other insect bites." Finally, after stating that defendants' advertisements lack this EPA information, SCJ concludes by claiming that "the advertising is in direct conflict with EPA registration requirements" in that it "communicat[es] that by using BUZZ OFF Insect Repellent Apparel, consumers can reduce or eliminate the need to apply 'messy' insect repellent products on the skin."

In the eighth and final subsection, entitled "The Falsity of the Claims on Websites and in the Print Advertising," SCJ consolidates and recounts its prior allegations. SCJ states that:

> 121. The BOIS website, BOIS Partner websites, websites of companies that are upon information and belief, BOIS Partner Affiliates and the BOIS Partner catalogs and other print advertisements intentionally mislead, confuse and deceive consumers by communicating that (a) by wearing BUZZ OFF Insect Repellent Apparel, consumers can reduce or eliminate the need to apply an insect-repellent product on the skin, (b) BUZZ OFF Insect Repellent Apparel protects uncovered skin from mosquito bites, (c) if you wear BUZZ OFF Insect Repellent Apparel, you

will not receive any mosquito bites, and (d) BUZZ OFF Insect Repellent Apparel is equivalent to or superior in performance to topical insect repellents, such as those containing DEET.

122. These claims are materially false and deceptive, and pose a significant health and safety risk to consumers because wearing BUZZ OFF Insect Repellent Apparel does not reduce or eliminate the need to apply an insect-repellent product on the skin, BUZZ OFF Insect Repellent Apparel does not protect adjacent, uncovered and untreated skin from mosquito bites, BUZZ OFF Insect Repellent Apparel does not prevent consumers who wear it from receiving mosquito bites, and BUZZ OFF Insect Repellent Apparel is not equivalent to or superior in performance to topical insect repellents, such as those containing DEET.

123. The BOIS website, BOIS Partner websites, websites of companies that are upon information and belief, BOIS Partner Affiliates and the BOIS Partner catalogs and other print advertisements also intentionally mislead, confuse and deceive consumers by communicating that BUZZ OFF Insect Repellent Apparel is effective through 25 washings.

124. This claim is materially false and deceptive, and poses a significant health and safety risk to consumers because BUZZ OFF Insect Repellent Apparel does not prevent mosquito bites on covered skin through 25 washings.

125. The BOIS website, BOIS Partner websites, websites of companies that are upon information and belief, BOIS Partner Affiliates and the BOIS Partner catalogs and other print advertisements also intentionally mislead, confuse and deceive consumers by communicating that the active ingredient in BUZZ OFF Insect Repellent Apparel is made from chrysanthemum flowers and/or contains a version of a natural insect repellent that is derived from chrysanthemum flowers and/or is a more natural option than traditional repellents such as SC Johnson's OFF! Brand, which contain the chemical DEET.

126. These claims are materially false and deceptive because the active ingredient in BUZZ OFF Insect Repellent Apparel is a synthetic chemical that is not derived from chrysanthemum flowers nor does it contain a version of a natural insect repellent that is derived from chrysanthemum flowers, nor is it a more natural option than topical repellents containing DEET.

127. The aforesaid advertising constitutes commercial advertising or promotion within the meaning of the Lanham Act.

128. Further, the Defendants' false and misleading claims on the BOIS website, on the websites of the BOIS Partners, on the websites of the companies that are, upon information and belief BOIS Partner Affiliates and in the BOIS Partner catalogs and other print advertisements are likely to have caused and will likely to [sic] continue to cause SC Johnson to suffer substantial damages, including lost sales and lost profits.

129. Upon information and belief, the Defendants' false and misleading claims on the BOIS website, on the websites of the BOIS Partners, on the websites of the companies that are, upon information and belief BOIS Partner Affiliates and in the BOIS Partner catalogs and other print advertisements were and are intended to mislead and deceive purchasers into purchasing BUZZ OFF Insect Repellent Apparel instead of SC Johnson's OFF! brand personal insect repellents.

130. Upon information and belief, the foregoing actions of BOIS were undertaken willfully and wantonly, and with a conscious disregard for SC Johnson's rights.

131. The foregoing acts have occurred in, or in a manner affecting, interstate commerce.

This recitation appears to be SCJ's effort to set forth its claim under the Lanham Act.

Under the Lanham Act a plaintiff may sue a competitor when that competitor's advertisements misrepresent the qualities or characteristics of its own goods or products or of the plaintiff's goods or products. *See* 15 U.S.C. § 1125(a)(1)(B) (2006). The parties do not seem to dispute that SCJ alleged all the elements of a claim under the Lanham Act; they only appear to disagree whether SCJ claimed that defendants made false statements of fact regarding their own or SCJ's products. With the understanding that a plaintiff can recover damages under the Lanham Act when a defendant's advertising contains false statements regarding either defendant's own products or plaintiff's products, and having set forth in detail the allegations contained in SCJ's Amended Complaint, we now "strip[] to [its] essentials," *Waste Mgmt.*, 315 N.C. at 692, 340 S.E.2d at 378, the Amended Complaint to ascertain the gravamen of SCJ's claim.

SCJ's Amended Complaint alleges that the BOIS apparel was not of the quality and did not perform as well as defendants represented in their advertisements. In the portion of its Amended Complaint in which SCJ recounts its false advertising allegations, SCJ says:

> 121. The BOIS website, BOIS Partner websites, websites of companies that are upon information and belief, BOIS Partner Affiliates and the BOIS Partner catalogs and other print advertisements . . . [state] that (a) *by wearing BUZZ OFF Insect Repellent Apparel*, consumers can reduce or eliminate the need to apply an insect-repellent product on the skin, (b) *BUZZ OFF Insect Repellent Apparel protects* uncovered skin from mosquito bites, (c) if you *wear BUZZ OFF Insect Repellent Apparel*, you will not receive any mosquito bites, and (d) *BUZZ OFF Insect Repellent Apparel is equivalent* to or superior in performance to topical insect repellents, such as those containing DEET.
>
> 122. These claims are materially false and deceptive . . . ***because*** wearing BUZZ OFF Insect Repellent Apparel *does not reduce or eliminate the need to apply an insect-repellent product on the skin*, BUZZ OFF Insect Repellent Apparel *does not protect adjacent, uncovered and untreated skin from mosquito bites*, BUZZ OFF Insect Repellent Apparel *does not prevent consumers who wear it from receiving mosquito bites*, and BUZZ OFF Insect Repellent Apparel *is not equivalent to or superior in performance to topical insect repellents, such as those containing DEET*.

(emphases added). These two paragraphs of SCJ's Amended Complaint capture the essence of the claim: defendants' statements about their own products were literally not true. Further, SCJ states that defendants' claims that "BUZZ OFF Insect Repellent Apparel is effective through 25 washings" are "false . . . ***because*** BUZZ OFF Insect Repellent Apparel *does not prevent mosquito bites on covered skin through 25 washings*." (emphases added). This claim, too, is an allegation by SCJ that defendants made an untrue statement about their own products. Finally, SCJ alleges that defendants' statement that "the active ingredient in BUZZ OFF Insect Repellent Apparel is made from chrysanthemum flowers and/or contains a version of a natural insect repellent that is derived from chrysanthemum flowers and/or is a more natural option than traditional repellents such as SC Johnson's OFF! Brand" is "false . . . ***because*** the active ingredient in BUZZ OFF Insect Repellent Apparel is a synthetic chemical that is

not derived from chrysanthemum flowers nor does it contain a version of a natural insect repellent that is derived from chrysanthemum flowers, nor is it a more natural option than topical repellents." (emphasis added). As with SCJ's other allegations, this is a claim that defendants made a false statement about their own products. As SCJ's allegations are that defendants made statements about their own products that were not true, the gravamen of SCJ's false advertising claim is that defendants made false statements regarding the efficacy of their own products.

Defendant IGT contends that SCJ also alleged that defendants made false statements about SCJ's products. Specifically, IGT argues that the Amended Complaint recited three different categories of defendants' false statements about SCJ's products. First, SCJ stated that defendants made false representations that SCJ's products were less effective than the BOIS apparel, including one advertisement that mentions SCJ's "Deep Woods OFF!" by name and "suggests that topical repellents . . . are inferior to Buzz Off Apparel for repelling insects." Second, SCJ emphasized that defendants' advertisements repeatedly maintained that topical insect repellents are "messy," "nasty," and a "hassle" to apply. Third, SCJ alleged that defendants "made false and disparaging statements implying that topical repellents—such as S.C. Johnson's OFF!—are less safe than apparel due to their chemical constituents, specifically DEET." These allegations, defendant IGT contends, show that SCJ was also complaining of defendants' false statements about SCJ's products. We note that there may be support for defendant IGT's argument that these allegations involve false statements about SCJ's products. *See*, *e.g.*, *DecisionOne Corp. v. ITT Hartford Ins. Grp.*, 942 F. Supp. 1038, 1043 (E.D. Pa. 1996) (explaining that an entity's false comparisons between its and a competitor's products are untrue statements about the competitor's products).

We address in turn each of defendant IGT's three categories of allegedly false statements about SCJ's products. First, we agree that SCJ claims to be false defendants' contention that "BUZZ OFF Insect Repellent Apparel is equivalent to or superior in performance to topical insect repellents, such as those containing DEET." However, that comparison is alleged to be false not because defendants made representations that SCJ's products were ineffective, but because defendants made allegedly false claims that their products worked just as well as, if not better than, SCJ's products. As such, the alleged falsity of the advertisements arises from the failure of defendants'

products to actually perform as well as defendants claim they perform. Second, we agree that SCJ contends that defendants used adjectives such as "messy," "nasty," "unappetizing," and "greasy" to describe topical insect repellents and characterized the application of those repellents as a "hassle" and a "nuisance." At no point, however, does SCJ contend that these terms falsely describe SCJ's products. Moreover, given the subjective nature of these terms, we question whether such descriptive terms are actionable statements of fact. *See*, *e.g.*, *Groden v. Random House*, *Inc.*, 61 F.3d 1045, 1051 (2d Cir. 1995) ("[S]tatements of opinion are generally not the basis for Lanham Act liability." (citation omitted)). Third, we agree with defendant IGT that SCJ alleged that defendants made false statements indicating that their insect repellent was naturally derived. We disagree, however, with defendant IGT's contention that SCJ complained that defendants characterized the use of topical insect repellents as unsafe. In fact, SCJ explicitly stated that defendants' claims of a naturally derived insecticide were likely to cause SCJ injury because of a consumer desire "for natural products." Furthermore, SCJ made clear that defendants' claim was false because defendants' insect repellent "is a synthetic chemical compound that is not derived from flowers." We therefore conclude that while SCJ did allege that defendants' advertisements portrayed SCJ's products in a negative light, the alleged falsity of that portrayal lies solely in the alleged failure of defendants' products to be of the quality and as effective as defendants claimed.

In short, SCJ gave notice with its Amended Complaint that it intended to put defendants' products on trial, not its own. SCJ alleged that defendants advertised their products as having certain characteristics and as being of a certain nature. SCJ also said that it had tested defendants' products and found them not to have those claimed characteristics or that claimed nature. Finally, SCJ said it was going to prove (1) that defendants made certain statements about their own products and (2) that those statements were not true because defendants' products were not as defendants said. Conspicuously absent is any statement from SCJ that it intended to prove anything about defendants' statements characterizing SCJ's products.

After carefully reviewing the Amended Complaint, we conclude that SCJ averred that its alleged false advertising injury resulted from an apparent failure of defendants' products to be of the nature and quality advertised. While SCJ did allege that defendants made other

descriptive statements placing SCJ's products in an unappealing light, SCJ did not allege that these characterizations were false. The only falsity allegedly found in defendants' advertisements was that the BOIS apparel was not of advertised quality and did not work as well as defendants claimed.

Earlier we stated that the Failure to Conform exclusion encompasses allegations that an insured has made false statements about its own products. Under the language of the insurance policies, the Failure to Conform exclusion applies when the falsity resulting in the "personal and advertising injury" is caused by "the failure of goods . . . to conform with . . . statement[s] of quality or performance made in [the insured's] 'advertisement'." We express no opinion on what, if any, other circumstances fall within this particular exclusion from coverage under the insurance policies here.

As we stated in *Waste Management*, "[a]n insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings." 315 N.C. at 691, 340 S.E.2d at 377. Further, "when the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend." *Id.* Here, SCJ's Amended Complaint alleged facts indicating that the only falsity found in defendants' advertisements resulted from the failure of defendants' own products to be of their advertised quality and nature, placing the falsity of those advertisements squarely within the insurance policies' Failure to Conform exclusion. Therefore, we hold that the Failure to Conform exclusion relieved Harleysville and Erie of any duty to defend IGT against the allegations in SCJ's Amended Complaint.

III. DISPOSITION

As to the issue before this Court on appeal as of right, the Court of Appeals erred in holding that the Failure to Conform exclusion did not bar coverage for the injury alleged in SCJ's Amended Complaint. That portion of the Court of Appeals' decision is therefore reversed. In light of our holding here, we necessarily do not reach the question whether the Prior Publication exclusion is implicated with respect to the Harleysville policy and thus conclude that discretionary review of that issue was improvidently allowed. The remaining issues addressed by the Court of Appeals majority are not before us and its decision as to those issues therefore remains undisturbed. Accordingly, we remand this case to the Court of Appeals for further remand to the Superior Court, Guilford County, for entry of

summary judgment on the issue of the insurers' duty to defend in favor of Erie and Harleysville and for further proceedings not inconsistent with this opinion.

REVERSED IN PART AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. DANIEL EASLEY DEFOE

No. 161PA09

(Filed 15 April 2010)

Homicide— capital first-degree murder—two and one-half year delay holding Rule 24 pretrial conference—failure to show prejudicial error

The trial court did not err in a double first-degree murder case by permitting the case to proceed capitally despite the State's two and one-half year delay in holding a pretrial conference pursuant to Rule 24 of the General Rules of Practice for the Superior and District Courts because: (1) although after the 2001 amendments to N.C.G.S. §§ 15A-2001(a)(1) and 15A-2004(a), and (b) it is within the inherent authority of the trial court to enforce Rule 24 by declaring a case noncapital in appropriate circumstances, precluding a capital prosecution is an appropriate sanction only when the defendant makes a sufficient showing of prejudice resulting from the State's delay in holding the Rule 24 conference; and (2) defendant has not demonstrated that the State's noncompliance, while egregious, caused sufficient prejudice to warrant declaring the cases noncapital since defendant's lack of second counsel, investigators, and mitigation specialists at an earlier juncture did not cause sufficient prejudice to warrant declaring the cases noncapital. The requirements of Rule 24 are mandatory and lesser sanctions such as contempt or disciplinary action could be appropriate enforcement measures.

Justice NEWBY concurring in result only.

Justice BRADY joins in the concurring opinion.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review orders dated 8 January 2009 entered by Judge Christopher Collier in Superior Court, Richmond County, denying defendant's motions that his case be dismissed or declared noncapital. Heard in the Supreme Court 6 January 2010.

Roy Cooper, *Attorney General*, *by G. Patrick Murphy*, *Special Deputy Attorney General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Daniel Shatz*, *Assistant Appellate Defender*, *for defendant-appellant.*

TIMMONS-GOODSON, Justice.

The issue presented in these cases is whether the General Assembly's 2001 amendments[1] to the capital punishment statutes abrogated this Court's decision in *State v. Rorie*, 348 N.C. 266, 500 S.E.2d 77 (1998), so that the superior courts now have authority to declare a case noncapital as a sanction for the State's noncompliance with Rule 24 of the General Rules of Practice for the Superior and District Courts. We hold that the 2001 amendments eliminated the rationale on which *Rorie* was decided, and thus, legislatively abrogated our holding. However, there is an insufficient showing of prejudice to justify declaring the cases noncapital. Therefore, we affirm the trial court's ruling permitting the cases to proceed capitally.

I. Background

On or about 25 March 2006, defendant was arrested for the murders of Laxavier Jamiel Henry and Billy Glenn Medford, the first murder allegedly occurring on 10 March 2006 and the second on 23 March 2006. The grand jury returned true bills of indictment charging defendant with first-degree murder in both cases on 8 May 2006.[2]

On 21 June 2006, an assistant district attorney filed an "Application for Rule 24 Pre-Trial Conference [and] Notice of Intent to Seek Death Penalty" that listed the docket numbers of both murder cases against defendant. Rule 24 requires

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1. *See* Act of May 8, 2001, ch. 81, secs. 1, 3, 2001 N.C. Sess. Laws 163, 163-65 (amending N.C.G.S. § 15A-2000(a) & enacting N.C.G.S. § 15A-2004 (2009)) (collectively "2001 amendments").

2. The cases against defendant are 06CRS51011 and 06CRS51014. The grand jury also indicted codefendant Jason Matthew Patton for the same murders. The codefendant is not a party to this appeal.

> 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.

Gen. R. Pract. Super. & Dist. Cts. 24, 2009 Ann. R. N.C. 21.

In accord with Rule 24, the assistant district attorney's 21 June 2006 application requested the trial court "to schedule a Pretrial Conference in the above captioned matter within the next forty-five (45) days." The application also gave notice "to the above named Defendant and the Court, of the State's intent to seek the death penalty." However, the application was filed more than ten days after the grand jury returned the indictments, and the pretrial conference did not occur within forty-five days thereafter.

At some point, the Richmond County District Attorney's Office determined it had a conflict of interest and could not prosecute defendant for the murders. In a letter dated 28 November 2007, well over a year after the initial request for a Rule 24 conference, the Richmond County District Attorney's Office requested the Attorney General's Office to prosecute the murder charges against defendant. The Attorney General's Office agreed to prosecute both cases and requested the relevant files in a letter dated 3 December 2007. The Richmond County District Attorney's Office completed transfer of its relevant files by April or May 2008.

On 19 June 2008, defendant, through his counsel, filed a "Motion to Compel Compliance" complaining of the State's failure to provide discovery and to conduct a Rule 24 hearing. Specifically, the Motion to Compel asserted that a written discovery request filed on 12 June 2006 had gone unanswered despite numerous oral follow-up requests. The Motion to Compel also noted that the State had not yet conducted a Rule 24 hearing, notwithstanding its request two years earlier. Defendant requested various forms of relief, including dismissal, sanctions, and an order to compel discovery. Notably, however, the motion also stated that defense counsel "does not know but will be able to better determine whether or not the Defendant has been prejudiced by the delay of the State." No order ruling on the Motion to Compel is contained in the record, but defendant's later fil-

ings indicate that the State provided "a banker's box full of Discovery" in July 2008.

On 7 November 2008, the State filed a "Notice of Intent to Seek the Death Penalty" and an "Application for Pre-Trial Conference on Charge of First Degree Murder" pursuant to Rule 24.[3] Both were signed by two special deputy attorneys general. On 11 November 2008, defendant responded by filing a "Motion to Strike State's Notice of Intent to Seek Death Penalty As Well As Preclude State from Seeking the Death Penalty" ("Motion to Strike"). The Motion to Strike alleged that the two and one-half year delay from the date of indictment violated defendant's constitutional and statutory rights to a "correct Rule 24 Hearing," a speedy trial, and timely discovery. The Motion to Strike stated further that "the delay has impaired Defendant's ability to challenge not only his identification but the circumstances surrounding any involvement he may have had with regard to the crimes charged." The Motion to Strike complained that witnesses' recollections may have been compromised. Defendant made essentially the same assertions in two contemporaneous filings—a "Motion to Preclude State from Applying for a Pre-Trial Conference on Charge of First-Degree Murder" and a "Motion to Dismiss Case for the State's Flagrant Violation of Defendant's Rights."

The parties appeared before the trial court on 1 December 2008 for an anticipated hearing on the State's application for Rule 24 conference and defendant's motions in opposition. The Rule 24 conference did not occur as expected, and the trial court entered an order resetting the hearing for 8 January 2009. The parties agreed that the period between 1 December 2008 and 8 January 2009 would not be a basis for either side to claim prejudice.

The State's application for Rule 24 conference and defendant's motions in opposition were heard on 8 January 2009, more than thirty months after the initial filing by the State on 21 June 2006 of the application for Rule 24 conference. Defendant argued that the State was in continuous violation of Rule 24 and that he had suffered serious prejudice from the State's failure to hold a timely pretrial conference.

3. Only a "Notice of Intent to Seek the Death Penalty," referencing docket number 06CRS051011, and showing no "Filed" stamp, is appended to defendant's brief to this Court. Appended to the State's brief are an "Application for Pre-Trial Conference on Charge of First Degree Murder" and "Notice of Intent to Seek the Death Penalty," both referencing docket number 06CRS051014 and showing "Filed" stamps of 7 November 2008.

Specifically, defendant asserted that he had been unable to obtain funding for second counsel, private investigators, or mitigation specialists. Defendant argued that the 2001 amendments abrogated the *Rorie* decision, thus permitting the trial court to declare the cases noncapital as a sanction for the State's egregious noncompliance with Rule 24.

The trial court disagreed with defendant. Acknowledging that the 2001 amendments changed the law, the court nonetheless ruled that, based on *Rorie*, it lacked authority to declare the cases noncapital. Furthermore, the trial court was "not convinced that there is any prejudice." The court noted that defendant could have applied for second counsel, an investigator, and a mitigation specialist at any time, and also observed that the "case[s are] not scheduled for trial in the near future." Without authority to declare the cases noncapital for the State's failure to comply with Rule 24, and a lack of prejudice to justify that sanction in any event, the trial court overruled defendant's objections to the Rule 24 conference. Thereafter, the trial court heard the prosecutor's forecast of aggravating circumstances and ruled that the cases could proceed capitally. This Court allowed defendant's petition for writ of certiorari to review the trial court's rulings on defendant's objections to the violation of Rule 24.

II. Analysis

Defendant first argues that the 2001 amendments abrogated this Court's holding in *Rorie* by granting district attorneys discretion in first-degree murder cases when evidence of one or more aggravating circumstances exists. With that discretion, defendant argues, superior courts have authority to declare the case noncapital when the State fails to comply with the mandates of Rule 24. The State contends that defendant "misapprehends the effect" of the 2001 amendments. We agree with defendant.

Prior to 2001, the capital punishment statutes, as interpreted in judicial decisions, mandated district attorneys to seek the death penalty in first-degree murder cases if there was evidence of an aggravating circumstance. *See Rorie*, 348 N.C. at 270-71, 500 S.E.2d at 80 (citing N.C.G.S. § 15A-2000 (1997)); *State v. Britt*, 320 N.C. 705, 709-10, 360 S.E.2d 660, 662-63 (1987); *State v. Jones*, 299 N.C. 298, 308-09, 261 S.E.2d 860, 867 (1980). District attorneys had no discretion to prosecute a first-degree murder case noncapitally when evidence of an aggravating circumstance existed. *E.g.*, *Rorie*, 348 N.C. at 271, 500 S.E.2d at 80.

In *Rorie*, the Court was confronted with the question of whether the trial court exceeded its authority to enforce Rule 24 by precluding the State from prosecuting a first-degree murder case capitally. *Id.* at 267, 500 S.E.2d at 78. The trial court found and concluded as a matter of law

> that the most important purpose of Rule 24 is to assure that the Defendant has effective assistance of counsel and that on these facts, there has been a substantial violation of the defendant's rights to effective assistance of counsel by virtue of the state's failure to timely file its Rule 24 Petition and the Court will preclude the state from seeking the death penalty.

Id. at 268, 500 S.E.2d at 78-79. The State conceded, and this Court recognized in *Rorie*, that trial courts of this State have inherent authority to enforce procedural and administrative rules, including Rule 24. *Id.* at 269, 500 S.E.2d at 79. The courts' inherent authority to enforce Rule 24, however, stops short of actions that are "inconsistent with the Constitution or acts of the General Assembly." *Id.* at 270, 500 S.E.2d at 79-80. Because the trial court's order in *Rorie* precluded the district attorney from seeking the death penalty "notwithstanding what evidence of an aggravating circumstance or circumstances may exist," this Court held that the trial court exceeded its inherent authority to enforce Rule 24. *Id.* at 271, 500 S.E.2d at 80. The trial court's order was "potentially in conflict with the mandate of the General Assembly in the capital sentencing statute." *Id.* We admonished district attorneys, however, that the requirements of Rule 24 are mandatory and that lesser sanctions such as contempt or disciplinary action could be appropriate enforcement measures. 348 N.C. at 271-72, 500 S.E.2d at 80-81.

In 2001, the General Assembly added the following provisions to the capital sentencing statutes:

> (a) The State, in its discretion, may elect to try a defendant capitally or noncapitally for first degree murder, even if evidence of an aggravating circumstance exists. The State may agree to accept a sentence of life imprisonment for a defendant at any point in the prosecution of a capital felony, even if evidence of an aggravating circumstance exists.
>
> (b) A sentence of death may not be imposed upon a defendant convicted of a capital felony unless the State has given notice of its intent to seek the death penalty. Notice of intent to seek the

> death penalty shall be given to the defendant and filed with the court on or before the date of the pretrial conference in capital cases required by Rule 24 of the General Rules of Practice for the Superior and District Courts, or the arraignment, whichever is later.

N.C.G.S. § 15A-2004(a), (b) (2009). The General Assembly also amended section 15A-2000 to provide:

> *Except as provided in G.S. 15A-2004*, upon conviction or adjudication of guilt of a defendant of a capital felony in which the State has given notice of its intent to seek the death penalty, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment.

Id. § 15A-2000(a)(1) (2009) (emphasis added). The 2001 amendments revoked the statutory mandate that required prosecutors to seek the death penalty in first-degree murder cases with evidence of one or more aggravating circumstances. Thus, the 2001 amendments significantly undercut the rationale on which *Rorie* was decided.

Although the 2001 amendments gave prosecutors discretion in first-degree murder cases, the changes did not alter the mandates or the gatekeeper function of Rule 24 in capital cases. While defendants "do not stand to lose or gain any rights" at the Rule 24 conference, it remains an important "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." *State v. Chapman*, 342 N.C. 330, 339, 464 S.E.2d 661, 666 (1995), *cert. denied*, 518 U.S. 1023, 135 L. Ed. 2d 1077 (1996). Furthermore, the Rule 24 conference is the pivotal point in the pretrial proceedings when the court may declare the case capital, triggering appointment of second counsel and making public resources available to aid an indigent accused in preparing his defense. N.C.G.S. §§ 7A-450, -454 (2009); Indigent Def. Servs. R. 2A.2(d), 2D.1, 2009 Ann. R. N.C. 906, 915. With the Rule 24 hearing comes oversight of the capital litigation and acute supervision of further proceedings by the trial court. For these reasons, among others, "Rule 24's ten-day time limitation clearly contemplates that cases which may be tried capitally are to be identified as early as possible in the process." *Rorie*, 348 N.C. at 269, 500 S.E.2d at 79.

In addition to its gatekeeper function, the prompt Rule 24 conference preserves valuable public resources by avoiding allocation of

funds for second counsel and mitigation experts to defendants accused of capital offenses but who are tried noncapitally. In light of its important role in capital cases, the State must heed the " 'simple, bright-line rule, requiring prosecutors to petition for a [Rule 24] conference in *all* capital cases.' " *State v. Seward*, 362 N.C. 210, 213, 657 S.E.2d 356, 358 (2008) (quoting *State v. Matthews*, 358 N.C. 102, 110, 591 S.E.2d 535, 541 (2004)). As this Court has repeatedly stated, Rule 24 places the duty upon the State to apply to the court for the pretrial conference. *See id.*; *Matthews*, 358 N.C. at 109-10, 591 S.E.2d at 541; *Rorie*, 348 N.C. at 271-72, 500 S.E.2d at 80-81.

When the State fails to comply, this Court has repeatedly acknowledged the trial courts' inherent authority to enforce the mandates in Rule 24 through the contempt power or disciplinary action. *See Matthews*, 358 N.C. at 110, 591 S.E.2d at 541 ("If the prosecutor fails to petition the superior court for a pretrial conference, he risks disciplinary action."); *Rorie*, 348 N.C. at 271-72, 500 S.E.2d at 80-81 ("Repeated violations of the rule manifesting willful disregard for the fair and expeditious prosecution of capital cases may result in citation for contempt pursuant to N.C.G.S. § 5A-11(7) or other appropriate disciplinary action against the district attorney."). Before the 2001 amendments, a court's authority to enforce Rule 24 could not extend to declaring a case noncapital, because such an order was in potential conflict with a statutory mandate. As noted above, the 2001 amendments revoked that statutory mandate, and we have recently held that "the trial court may properly declare [a] case noncapital" if the State's "forecast of evidence at the Rule 24 conference does not show the existence of at least one aggravating circumstance." *Seward*, 362 N.C. at 215, 657 S.E.2d at 359 (citing N.C.G.S. § 15A-2000(c) (2007)). Because the 2001 amendments removed the statutory mandate on which *Rorie* was based, we now hold that the trial courts have inherent authority to declare a case noncapital as a sanction for the State's violation of Rule 24.

However, our holding does not end the inquiry. Thus, we next address whether the facts presented justify declaring these cases noncapital. Because "[c]apital defendants do not stand to lose or gain any rights at the conference," *Chapman*, 342 N.C. at 339, 464 S.E.2d at 666, the defendant must demonstrate that the State's noncompliance caused sufficient prejudice to warrant declaring the case noncapital. If the defendant cannot make a sufficient showing of prejudice to warrant declaring the case noncapital, trial courts may still consider whether lesser sanctions are appropriate. *See Rorie*, 348

N.C. at 271-72, 500 S.E.2d at 80-81. Such lesser sanctions may be fashioned "both [to] get the district attorney's attention and eliminate any possible prejudice to defendant resulting from the district attorney's failure to petition for the required hearing within the time prescribed." *Id.* at 271, 500 S.E.2d at 80-81.

Here, defendant contends that the State's two and one-half year delay is so egregious and prejudicial that declaring the cases noncapital is appropriate. Defendant specifically claims that the delay prejudiced his ability to obtain effective assistance of second counsel and to acquire resources to prepare his capital defense. We conclude that defendant has not demonstrated that the State's noncompliance, while egregious, caused sufficient prejudice to warrant declaring the cases noncapital.

Defendant acknowledges that the Office of Indigent Defense Services ("IDS") rules allow second counsel to be appointed before the Rule 24 conference occurs in capital cases. *See* Indigent Def. Servs. R. 2A.2(d). Moreover, Rule 24 expressly states that it "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. Nonetheless, defendant relies on IDS statistics to argue that appointment of second counsel before the Rule 24 conference is wasteful in the majority of cases that are charged capitally, but ultimately tried noncapitally. We agree that it was reasonable for defendant to wait until the cases were declared capital at the Rule 24 conference to request funding for second counsel, experts, and mitigation specialists to preserve resources. The lack of these resources, however, did not cause sufficient prejudice to declare the cases noncapital.

At the Rule 24 conference, the trial court expressly rejected defendant's prejudice arguments. Regarding the second counsel prong of his argument, the trial court stated: "Granted, it would have been helpful to have a second [counsel] at an earlier stage. But, as pointed out by State's counsel, the case[s are] not scheduled for trial in the near future. So I don't see any prejudice by not having a second chair appointed." Likewise, the trial court concluded that the lack of a mitigation specialist and investigator was not prejudicial because defendant also could have requested those resources before the Rule 24 conference. We agree with the trial court that there is insufficient prejudice to declare the cases noncapital because the date of trial is not imminent. Additionally, we note that trial courts may grant con-

tinuances when appropriate to give counsel time to become familiar with the case or to enable a defendant to acquire necessary witnesses. *See, e.g.*, *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998); *State v. Roper*, 328 N.C. 337, 349-51, 402 S.E.2d 600, 607-08, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991). Accordingly, defendant's lack of second counsel, investigators, and mitigation specialists at an earlier juncture did not cause sufficient prejudice to warrant declaring the cases noncapital.

III. Conclusion

The 2001 amendments to the capital sentencing statutes revoked the statutory mandate that provided the rationale for the *Rorie* decision. As a result, it is within the inherent authority of the trial court to enforce Rule 24 by declaring a case noncapital in appropriate circumstances. However, precluding a capital prosecution is an appropriate sanction only when the defendant makes a sufficient showing of prejudice resulting from the State's delay in holding the Rule 24 conference. Because defendant has not shown sufficient prejudice to warrant declaring the cases noncapital, we affirm the trial court's ruling on that basis.

MODIFIED AND AFFIRMED.

Justice NEWBY concurring in the result only.

I agree with the Court's holding that it would have been inappropriate in this case for the trial court to preclude the State from proceeding capitally as a sanction for noncompliance with Rule 24. However, I differ from the majority and would hold that declaring a case noncapital simply is not an appropriate means of enforcing Rule 24. By statute, the General Assembly has assigned to the Executive Branch the decision whether to seek the death penalty in first-degree murder cases with evidence of an aggravating circumstance.[4] In my view, a judicial decree that capital punishment is unavailable in such a case would deny the State its sole statutory discretion and thus violate the constitutional principle of separation of powers. I also be-

4. For practical reasons, district attorneys are placed within the "Judicial" article of the North Carolina Constitution. N.C. Const. art. IV, § 18(1). District attorneys' duties are set forth in conjunction with our constitution's provisions regarding prosecutorial districts, *id.*, which are pertinent to the Judicial Branch because they serve as the basis for our trial court districts. Notwithstanding this placement, district attorneys serve an executive function: they aid the Governor in "tak[ing] care that the laws be faithfully executed." N.C. Const. art. III, § 5(4).

lieve that preventing the prosecution of accused murderers to the full extent of the law would wrongly sanction the people of this state for the faults of a few officers of the Executive Branch.

The separation of governmental powers has been embedded in the foundational law of this state since our founders promulgated North Carolina's first constitution in 1776. N.C. Const. of 1776, Declaration of Rights IV ("That the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other."). The Court of Conference, this Court's predecessor, likewise recognized this essential precept from its earliest days. *Bayard v. Singleton*, 1 N.C. 15, 16, 1 N.C. 5, 6, 1 Mart. 48 (1787) (observing that our nation's founders formed a system of government "dividing the powers of government into separate and distinct branches, to wit: The legislative, the judicial, and executive, and assigning to each several and distinct powers, and prescribing their several limits and boundaries"). The explicit separation of powers has been preserved in this state despite numerous constitutional revisions, and Article I, Section 6 of the current North Carolina Constitution provides: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." Under this provision officers of one branch of government may not exercise the duties assigned to a coordinate branch or otherwise encroach upon those duties. *E.g.*, *State ex rel. Wallace v. Bone*, 304 N.C. 591, 591-92, 595, 286 S.E.2d 79, 79-80, 81 (1982) (holding that members of the General Assembly could not concurrently serve on an Executive Branch commission without violating Article I, Section 6).

Our state constitution sets forth in general terms the responsibilities of district attorneys:

> The District Attorney shall advise the officers of justice in his district, *be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district*, perform such duties related to appeals therefrom as the Attorney General may require, *and perform such other duties as the General Assembly may prescribe.*

N.C. Const. art. IV, § 18(1) (emphases added). One natural incident of a district attorney's constitutional duty to prosecute criminal actions is choosing what punishment to seek. Moreover, one of the "other duties" specifically assigned to prosecutors by the General Assembly

is to decide whether to pursue the death penalty when trying a defendant charged with first-degree murder. Section 15A-2004 of our General Statutes, entitled "Prosecutorial discretion," provides:

> (a) *The State, in its discretion, may elect to try a defendant capitally or noncapitally for first degree murder*, even if evidence of an aggravating circumstance exists. The State may agree to accept a sentence of life imprisonment for a defendant at any point in the prosecution of a capital felony, even if evidence of an aggravating circumstance exists.

N.C.G.S. § 15A-2004(a) (2009) (emphasis added). Particularly in capital cases, the legislature has firmly delegated to prosecutors the decision of what punishment to seek. Without a specific grant of authority from the General Assembly, the courts do not have any inherent power to participate in or interfere with that decision. *E.g.*, *In re Greene*, 297 N.C. 305, 308-10, 255 S.E.2d 142, 144-45 (1979) (explaining that "[t]he power to define a crime and prescribe its punishment originates with the Legislative Branch" and that any judicial power to alter criminal punishments is not inherent in the judiciary, but must derive from a legislative grant of authority); *see also State v. Perry*, 316 N.C. 87, 101, 340 S.E.2d 450, 459 (1986) ("It is well settled that the General Assembly and not the judiciary determines the minimum and maximum punishment which may be imposed on those convicted of crimes. The legislature alone can prescribe the punishment for those crimes." (citations omitted)).

Pursuant to its authority under Article IV, Section 13(2) of the North Carolina Constitution, the General Assembly has granted this Court the prerogative to make procedural rules to govern the trial courts. However, those rules must not conflict with our General Statutes: "The Supreme Court is hereby authorized to prescribe rules of practice and procedure for the superior and district courts *supplementary to, and not inconsistent with, acts of the General Assembly.*" N.C.G.S. § 7A-34 (2009) (emphasis added). Just as our procedural rules must be in accordance with the General Statutes, so too must the methods by which we enforce those rules comport with the acts of the legislature. *State v. Rorie*, 348 N.C. 266, 270, 500 S.E.2d 77, 79-80 (1998) ("[E]nforcement of the Rules of Practice promulgated by this Court cannot be effected in a manner inconsistent with the Constitution or acts of the General Assembly.").

This Court has held in the past that when our constitution and statutes delegate discretion to prosecutorial officers, the courts can-

not prevent the exercise of that discretion without exceeding their authority. In *State v. Camacho*, we considered a trial court order that sought " 'to avoid even the possibility or impression of any conflict of interest' " by directing a district attorney's office to immediately withdraw from a criminal action and request the Attorney General's Office to represent the State in the case. 329 N.C. 589, 593, 406 S.E.2d 868, 870 (1991) (emphasis omitted). The order also directed the Attorney General's Office to " 'immediately assume the prosecution of the case.' " *Id.* This Court held that the trial court's directions to both the district attorney and the Attorney General were in excess of judicial authority. 329 N.C. at 594, 595, 406 S.E.2d at 871. In so holding, we noted that our constitution and statutes give the State's district attorneys "exclusive discretion" in deciding whether to request that the Special Prosecution Division take over the prosecution of a case. *Id.* at 594, 406 S.E.2d at 871. We likewise observed that "even upon a proper request and authorization by a District Attorney, the Special Prosecution Division is to participate in criminal prosecutions *only if* the Attorney General, in his *sole* discretion as an independent constitutional officer, approves." *Id.* at 595, 406 S.E.2d at 871. As was the case in *Camacho*, the discretion at issue here is vested solely in the State's prosecutors. N.C.G.S. § 15A-2004(a); *see also* N.C. Const. art. IV, § 18(1). Thus, in keeping with our analysis in *Camacho*, judicial interference with the decision whether to seek the death penalty in a first-degree murder case with evidence of an aggravating factor must be held to exceed the power of the courts.

As noted by the majority, North Carolina's capital punishment scheme once required prosecutors to seek the death penalty in all first-degree murder cases in which there was evidence of an aggravating circumstance. *E.g.*, *Rorie*, 348 N.C. at 270-71, 500 S.E.2d at 80. In 2001 the General Assembly amended our capital punishment statutes to give prosecutors the discretion not to pursue the death penalty in such cases. Act of May 8, 2001, ch. 81, 2001 N.C. Sess. Laws 163 (codified at N.C.G.S. §§ 15A-2000(a), -2001, -2004 (2009)). The majority asserts these amendments abrogated *State v. Rorie*, in which this Court held that a trial court's order precluding the State from trying the defendant capitally for first-degree murder exceeded the trial court's authority to enforce Rule 24. 348 N.C. at 271, 500 S.E.2d at 80. Although *Rorie* was decided before the 2001 amendments, I do not believe this Court's reasoning in *Rorie* was wholly dependent on the pre-2001 requirement that prosecutors seek the death penalty.

In announcing its holding in *Rorie*, this Court stated:

> [T]he trial court's order is potentially in conflict with the mandate of the General Assembly in the capital sentencing statute and impermissibly impinges on the district attorney's obligation under the North Carolina Constitution to prosecute all criminal actions in the superior courts of his district. The order also impermissibly limits the right of the people to have defendant, if permitted by the evidence, prosecuted and punished to the full extent of the law for this most serious crime. *For these reasons* the sanction imposed for the district attorney's violation of a rule for the superior court promulgated by this Court pursuant to N.C.G.S. § 7A-34 exceeds the court's inherent authority to enforce the Rules of Practice, and the order cannot stand.

Id. (emphasis added). We thus gave three reasons for our holding. Because each of those reasons holds true in this case, I believe *Rorie* dictates the conclusion that declaring a case noncapital is not an appropriate means for a court to enforce Rule 24.

The first reason for our holding in *Rorie* was that "the trial court's order [was] potentially in conflict with the mandate of the General Assembly in the capital sentencing statute." *Id.* Although the General Assembly's mandate has changed since *Rorie* was decided, this concern is equally applicable in the instant case. The capital sentencing scheme now provides: "The State, in its discretion, may elect to try a defendant capitally or noncapitally for first degree murder, even if evidence of an aggravating circumstance exists." N.C.G.S. § 15A-2004(a). In other words, when there is evidence of an aggravating circumstance, the General Assembly has mandated that the prosecutor make a choice whether or not to pursue the death penalty. Under the majority opinion, even when there is evidence of an aggravating circumstance, the trial court has the power to preclude the prosecutor from making that choice. The majority's analysis is therefore "potentially in conflict with the mandate of the General Assembly in the capital sentencing statute." *Rorie*, 348 N.C. at 271, 500 S.E.2d at 80.

The second justification we gave for our holding in *Rorie* was that the trial court's order "impermissibly impinge[d] on the district attorney's obligation under the North Carolina Constitution to prosecute all criminal actions in the superior courts of his district." *Id.* As previously observed, the choice to pursue one of multiple potential punishments is concomitant with a district attorney's duty to

prosecute criminal actions under Article IV, Section 18(1) of our state constitution. Like the trial court's order in *Rorie*, a court order that effectively makes the choice of punishment for the prosecutor would "impermissibly impinge" on the district attorney's constitutional duty.

The third and final stated reason for our decision in *Rorie* was that the trial court's order "impermissibly limit[ed] the right of the people to have [the] defendant, if permitted by the evidence, prosecuted and punished to the full extent of the law for this most serious crime [of first-degree murder]." *Id.* The laws of our state include the death penalty as the most severe punishment for criminal offenses. In a first-degree murder case, when there is evidence of an aggravating circumstance (*i.e.*, "if permitted by the evidence"), N.C.G.S. § 15A-2004(a) requires the State to choose between proceeding capitally and proceeding noncapitally. Thus, in a first-degree murder case with evidence of an aggravating circumstance, there is at least a possibility that the State will seek imposition of capital punishment (*i.e.*, to prosecute and punish the defendant "to the full extent of the law"). However, a court order that deprives the State of the option of seeking the death penalty eliminates that possibility and thus limits the people's right to have the defendant prosecuted and punished as the law provides.

This right of the people is also relevant in another sense, one which this Court likewise recognized in *Rorie*. We observed in that case that "the people of the State, not the district attorney, are the party in a criminal prosecution." 348 N.C. at 270, 500 S.E.2d at 80 (citing N.C. Const. art. IV, § 13(1) ("Every action prosecuted by the people of the State as a party against a person charged with a public offense, for the punishment thereof, shall be termed a criminal action.") and *Simeon v. Hardin*, 339 N.C. 358, 368, 451 S.E.2d 858, 865 (1994)). Thus, the sanction of declaring a case noncapital is a sanction against the people of the state, not against the members of the district attorney's office who actually violated Rule 24. It is counterintuitive to punish the citizens of the State of North Carolina for the errors of a few individuals, both because this would be unfair to the people of the state and because it is unclear that a sanction against the people would effectively deter future misconduct by the district attorney's office. Presumably for these reasons, this Court stated in *Rorie*: "Repeated violations of [Rule 24] manifesting willful disregard for the fair and expeditious prosecution of capital cases may result in citation for contempt pursuant to N.C.G.S. § 5A-11(7) or

other appropriate disciplinary action *against the district attorney*." 348 N.C. at 271-72, 500 S.E.2d at 81 (emphasis added); *see also State v. Matthews*, 358 N.C. 102, 110, 591 S.E.2d 535, 541 (2004) (stating in a first-degree murder case that "[i]f the prosecutor fails to petition the superior court for a [Rule 24] pretrial conference, *he* risks disciplinary action" (emphasis added)). The people of the state are no less the complaining party in a criminal action today than they were when *Rorie* was decided. Therefore, it remains appropriate to sanction the person or persons who have violated Rule 24 rather than all the citizens of the state.

Of course, I recognize that there are other instances of courts imposing sanctions on the state as a whole in response to wrongdoing by a few executive officers. For example, the Exclusionary Rule in criminal cases requires that when officers of the State have obtained evidence in violation of constitutional search and seizure protections, the State may not present that evidence at the defendant's trial. *E.g.*, *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081, 1090 (1961).[5] However, the sanction of excluding evidence under such circumstances is utilized in part to protect specific rights of the defendant. *E.g.*, *State v. Carter*, 322 N.C. 709, 716, 370 S.E.2d 553, 557 (1988) (observing that the Exclusionary Rule is a " 'remedy to protect society from the excesses which led to the constitutional right' " to be free of unreasonable search and seizure (quoting *Eleuteri v. Richman*, 26 N.J. 506, 512, 141 A.2d 46, 49, *cert. denied*, 358 U.S. 843, 79 S. Ct. 52, 3 L. Ed. 2d 77 (1958))); *see also State v. Buchanan*, 353 N.C. 332, 336-37, 543 S.E.2d 823, 826 (2001) (explaining that the *Miranda* warnings and accompanying rule of exclusion were "conceived to protect an individual's Fifth Amendment right against self-incrimination in the inherently compelling context of custodial interrogations by police officers" (citation omitted)). With respect to the Rule 24 pretrial conference, this Court has stated that "[c]apital defendants do not stand to lose or gain any rights at the conference." *State v. Chapman*, 342 N.C. 330, 339, 464 S.E.2d 661, 666 (1995), *cert. denied*, 518 U.S. 1023, 116 S. Ct. 2560, 135 L. Ed. 2d 1077 (1996). Because a delay in holding the Rule 24 conference does not deprive the defendant of any personal rights, it is out of keeping with standard judicial practice to punish such a

5. The Exclusionary Rule was actually adopted in North Carolina before the Supreme Court of the United States held the rule applicable to state courts in *Mapp*. *State v. Carter*, 322 N.C. 709, 713-14, 370 S.E.2d 553, 556 (1988). It is particularly noteworthy that the North Carolina rule was not originally adopted by judicial decision, but by legislative act. *Id.*

delay in a manner that is detrimental to all the people of the state and directly beneficial to the defendant.

The sanction of declaring a case noncapital for Rule 24 violations also differs from judicial devices that protect defendants' rights in that the sanction at issue here bears little nexus with the conduct sought to be deterred. The Exclusionary Rule, for instance, excludes the very evidence that the State procured in an unlawful manner and thus prevents the State from reaping any direct reward from its officers' misconduct. *See*, *e.g.*, *Carter*, 322 N.C. at 716, 370 S.E.2d at 557 (observing that one of the reasons for the Exclusionary Rule " 'is that government should not stoop to the "dirty business" of a criminal in order to catch him' " (quoting *Eleuteri*, 26 N.J. at 512, 141 A.2d at 49)). In the Rule 24 context, however, the State's ability to seek the death penalty is not enhanced by a delay in holding the pretrial conference. Under N.C.G.S. § 15A-2004(a), the prosecutor has discretion to proceed capitally or noncapitally in a first-degree murder case as long as there is evidence of an aggravating factor. The timing of the Rule 24 conference has no effect on the existence of such evidence and, therefore, no effect on the prosecutor's discretion. Given the lack of a connection between the timing of the pretrial conference and the prosecutor's discretion in seeking the death penalty, it makes little sense to deprive the prosecutor of that discretion in response to a delay in complying with Rule 24.

The majority offers no explanation as to why the particular sanction of precluding the State from seeking the death penalty is an appropriate punishment for Rule 24 violations. Aside from observing the 2001 amendments to our capital sentencing scheme, the majority simply cites *State v. Seward*, in which we held that "if the prosecution's forecast of evidence at the Rule 24 conference does not show the existence of at least one aggravating circumstance, . . . the trial court may properly declare the case noncapital." 362 N.C. 210, 215, 657 S.E.2d 356, 359 (2008). However, a court's declaration that a first-degree murder case shall proceed noncapitally under *Seward* is not a sanction and has nothing to do with prosecutorial violations of Rule 24. A noncapital declaration under *Seward* is based on statutory provisions establishing that "a defendant may not receive a sentence of death in the absence of an aggravating circumstance." *Id.* (citing N.C.G.S. § 15A-2000(c) (2007)). In other words, we held in *Seward* that a prosecutor cannot choose between proceeding capitally and noncapitally as directed by N.C.G.S. § 15A-2004(a) unless the statutory condition precedent (namely, evidence of an aggravating cir-

cumstance) is satisfied. Nothing in *Seward* suggests that the noncapital declaration can be used as a sanction against the State.

I also note that the majority holds a noncapital declaration to be a proper sanction for violation of Rule 24 without clarifying the extent of the prosecutors' violation in this case. It is undisputed that the assistant district attorney's application for a Rule 24 pretrial conference was filed more than a month late. However, the quantum of the prosecution's further violation of Rule 24, if any, is unclear, not least because the rule itself seems to shift the burden of holding the pretrial conference to the superior court upon the district attorney's filing of an application. Gen. R. Pract. Super. & Dist. Cts. 24, 2009 Ann. R. N.C. 21 ("[T]he 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."). In *Rorie* we stated: "*Repeated violations* of [Rule 24] *manifesting willful disregard for the fair and expeditious prosecution of capital cases* may result in citation for contempt pursuant to N.C.G.S. § 5A-11(7) or other appropriate disciplinary action against the district attorney." 348 N.C. at 271-72, 500 S.E.2d at 81 (emphases added). The majority has not clearly established that the prosecutors crossed the threshold we set forth in *Rorie* for imposing sanctions against the district attorney, let alone the presumably higher threshold that would be needed to justify sanctioning the people of the state.

The General Assembly has delegated to the Executive Branch exclusive authority to decide whether to seek the death penalty in first-degree murder cases with evidence of an aggravating circumstance. I do not believe our judiciary can strip prosecutors of that discretion without violating the separation of governmental powers that has been a fixture of North Carolina constitutional law for well over two hundred years. Moreover, preventing the prosecution of criminal defendants to the full extent of the law wrongly punishes the people of this state for the errors of a few government officials. I would hold that the courts may not enforce Rule 24 by precluding the State from seeking the death penalty. I therefore concur only in the result of the majority's opinion.

Justice BRADY joins in this concurring opinion.

WHITE v. THOMPSON

[364 N.C. 47 (2010)]

CHARLES M. WHITE AND EARL ELLIS, INDIVIDUALLY AND NOW OR FORMERLY D/B/A ACE FABRICATION AND WELDING, A NORTH CAROLINA GENERAL PARTNERSHIP v. ANDREW THOMPSON, DOUGLAS THOMPSON, AND FRAN LURKEE, ALIAS

No. 226A09

(Filed 15 April 2010)

Unfair Trade Practices— allegations between partners—not in or affecting commerce—internal business operations

The Court of Appeals did not err in a case involving unfair and deceptive trade practice allegations between partners by concluding a partner's actions were not "in or affecting commerce" as that term is used under N.C.G.S. § 75-1.1, and thus not an unfair or deceptive trade practice, because: (1) the General Assembly sought to prohibit unfair or deceptive conduct in interactions between different market participants and did not intend for it to regulate purely internal business operations; and (2) in the instant case the breaching partner's unfair conduct was solely within a single partnership.

Justice HUDSON dissenting.

Justice TIMMONS-GOODSON joining 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, 196 N.C. App. ——, 676 S.E.2d 104 (2009), affirming in part and reversing in part a judgment entered 12 February 2008 by Judge Douglas B. Sasser in Superior Court, Columbus County. Heard in the Supreme Court 18 November 2009.

Lee & Lee, by Junius B. Lee, III, for plaintiff-appellants.

Ralph G. Jorgensen for defendant-appellees Andrew Thompson and Douglas Thompson.

NEWBY, Justice.

This case presents the question whether the General Assembly intended unfair or deceptive conduct among partners contained solely within a single business to be "in or affecting commerce" such that a partner's breach of his fiduciary duty owed to his fellow partners violates North Carolina's unfair and deceptive practices act ("the Act"), N.C.G.S. § 75-1.1. With the Act our General Assembly sought to prohibit unfair or deceptive conduct in interactions

between different market participants. The General Assembly did not intend for the Act to regulate purely internal business operations. In the present case the breaching partner's unfair conduct was solely within a single partnership. Accordingly, we hold that his action is not "in or affecting commerce" as that term is used in N.C.G.S. § 75-1.1 and that such conduct is therefore not a violation of the Act. As such, we affirm the decision of the Court of Appeals.

Plaintiffs Charles White and Earl Ellis, along with defendant Andrew Thompson, were partners in an entity known as Ace Fabrication and Welding ("ACE"). The partners formed ACE in October of 2000 primarily for the purpose of performing specialty construction and fabrication work at a plant in Bladen County operated by Smithfield Packing Company, Inc. The three men agreed that each would own one-third of ACE, and each would also receive an hourly wage from ACE for the work each partner actually performed. Shortly after forming ACE, the men acquired certain assets needed to operate their business, including the necessary insurance policies and billing and advertising materials. Also, the partners hired defendant Douglas Thompson, defendant Andrew Thompson's father, as ACE's accountant.

The Smithfield Packing plant at which ACE sought to work used a bidding system to award jobs to either ACE or one of the "five or six" other subcontractors performing specialty fabrication work in the plant. Defendant Andrew Thompson testified that Smithfield Packing would inform those interested in working in the plant of the available jobs. According to him, the three partners would evaluate the available job and then submit ACE's bid to the appropriate individual at Smithfield Packing. Barry White, an employee of Smithfield Packing, testified regarding the bidding process. Barry White stated that although four different individuals must approve purchase orders for jobs to be performed by outside subcontractors, all four individuals are "not necessarily [approving] who gets the job." Barry White "approve[d] the way [the purchase order had] been coded"; the "plant engineer and plant superintendent" approved the firm selected to complete the job; and the "plant manager . . . basically [ensured that the] money's being paid."

From the testimony presented at trial, it appears that ACE enjoyed initial success. Defendant Andrew Thompson testified that ACE won its first job roughly a week after it began submitting bids. Plaintiff White presented similar evidence, explaining that ACE successfully submitted bids and performed work at Smithfield Packing

from late October of 2000 until January of 2001. However, ACE's initial success eventually fell victim to disagreements and infighting among the partners.

The partners described to the jury their disagreements while involved with ACE. Plaintiff White testified that defendant Andrew Thompson misinformed him of some days on which ACE was scheduled to perform specific jobs. Plaintiff White further explained that defendant Andrew Thompson "had a little small crew that he liked to buddy with that he had hired" despite the partners' agreement that "any work was supposed to go between the three [partners] first because [the partners] made more money doing [their] own work." However, defendant Andrew Thompson claimed that the other two ACE partners were frequently unavailable for work. He stated that plaintiff White was frequently unavailable on weekends and was often "at the beach" with his wife. Defendant Andrew Thompson also relayed that plaintiff Ellis operated another business after ACE was formed and often "had places to go." More specifically, he recalled one instance when ACE was "working on wet cement one day and [plaintiff Ellis] said my 40 hours [are] up, let me get out of here." Plaintiff Ellis, however, testified that during every week of ACE's operation, he worked "40 to 50, sometimes 60" hours. Also, plaintiff White explained to the jury that he informed the other two partners before forming ACE that he held another job and asked if either had a problem with his other employment. According to plaintiff White, neither man had any reservation about forming ACE.

The ACE partners' disagreements led to defendant Andrew Thompson's decision to leave the partnership and start his own business, PAL. According to defendant Andrew Thompson, he decided to sever his ties with ACE and begin his own business in January of 2001. Further, he testified that he informed his partners of this decision sometime between 10 January and 15 January 2001. He also stated that after he had informed his partners of his decision to leave ACE, plaintiffs White and Ellis asked him to complete under the ACE name certain jobs which had been awarded to ACE. Defendant Andrew Thompson acceded to plaintiffs' request, explaining that he "finished those jobs in [the] A[CE] name and was also working in the P[AL] name." Plaintiff White, however, testified that he first heard in early February 2001 that defendant Andrew Thompson was starting another business. Moreover, plaintiff White stated that it was defendant Fran Lurkee, a Smithfield Packing employee, who conveyed that defendant Andrew Thompson

"wanted to go on his own" and had already been "doing . . . a great job" in the plant for defendant Lurkee.

The ACE partners experienced similar disharmony in attempting to distribute assets of the business. Apparently, plaintiffs were unable to communicate easily with defendants Douglas and Andrew Thompson after Andrew Thompson's departure from ACE. According to plaintiff White, "[s]ome of the money [disbursed by Smithfield Packing for work ACE had performed] wasn't being deposited [into ACE's account]." Plaintiffs White and Ellis changed the mailing address Smithfield Packing had on file for ACE, for the purpose of receiving payment for work ACE had completed. Plaintiff White also transferred the balance of the ACE bank account to his personal account, explaining that plaintiffs embarked on this course of action to preserve the status quo pending resolution of ACE's affairs. Furthermore, the partners hastily divided ACE's tools, leaving plaintiffs White and Ellis dissatisfied with the distribution. As explained by plaintiff White, defendant Andrew Thompson "threw [ACE's tools] on the floor and [plaintiffs White and Ellis] picked up what [they] had to have."

After defendant Andrew Thompson disassociated himself from ACE, the three former ACE partners continued to work in the Smithfield Packing plant. Plaintiff White testified he and plaintiff Ellis decided to form another business named Whelco. This business, despite being awarded several jobs, remained viable for only a few months. Defendant Andrew Thompson continued to perform work at Smithfield Packing under his new business name, PAL, until roughly October of 2001.

Plaintiffs filed the present lawsuit on 18 October 2002. In their complaint plaintiffs alleged that defendant Andrew Thompson: (1) "acted in derogation of the interests of his partners and the partnership" by, *inter alia*, forming PAL, to which he "funnel[ed] work originally intended for ACE"; (2) conspired with former Smithfield Packing employees, defendants Fran Lurkee and Carl Barnes, "to divert work originally contracted for by ACE . . . to his separate business entity and, on information and belief, paid illegal and improper emoluments for their assistance in this regard"; and (3) conspired with his father, defendant Douglas Thompson, "to improperly keep and maintain the books of ACE." Plaintiffs also contended that the preceding allegations constituted unfair and deceptive trade practices under the Act. Before the jury considered the case, defendant Carl Barnes apparently extinguished any potential liability on his part

in a bankruptcy proceeding, and the trial court directed a verdict in favor of defendant Fran Lurkee. The jury returned a special verdict finding that defendant Andrew Thompson breached his fiduciary duty to plaintiffs "by failing to act fairly, honestly, and openly," and it awarded $138,195.00 in damages against him. The jury also found that defendant Douglas Thompson breached his fiduciary relationship to plaintiffs "by failing to act fairly, honestly, and openly" and awarded $750.00 in damages against him. Pursuant to N.C.G.S. § 75-16, the trial court then, by judgment entered 12 February 2008, trebled these amounts to $414,585.00 and $2,250.00, respectively.

Defendants Andrew Thompson and Douglas Thompson appealed from the trial court's judgment to the Court of Appeals. The majority of a divided panel of that court reversed the portion of the trial court's judgment trebling the damage award with respect to defendant Andrew Thompson. *White v. Thompson*, 196 N.C. App. ——, ——, 676 S.E.2d 104, 108-09 (2009). The majority concluded that Andrew Thompson's usurpation of partnership opportunities was not "in or affecting commerce" as that phrase is used in the Act, stating that his conduct had no impact on the marketplace. *Id.* The dissenting judge, after examining precedent from both this Court and the Court of Appeals, would have held to the contrary. 196 —— N.C. App. at ——, 676 S.E.2d at 111-15 (Ervin, J., concurring in part and dissenting in part). The Court of Appeals otherwise affirmed the trial court's judgment. Plaintiffs appealed to this Court as of right based on the dissenting opinion filed in the Court of Appeals.

Before a plaintiff may avail itself of the Act's remedies, it must prove that a defendant's "conduct falls within the statutory framework allowing recovery." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 592, 403 S.E.2d 483, 492 (1991). The Act provides that "[u]nfair 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) (2009). Thus, a plaintiff must prove, *inter alia*, that a defendant's unfair or deceptive action was "in or affecting commerce" before the plaintiff may be awarded treble damages under N.C.G.S. § 75-16. *Sara Lee Corp. v. Carter*, 351 N.C. 27, 32, 519 S.E.2d 308, 311 (1999) (citation omitted); *HAJMM Co.*, 328 N.C. at 592, 403 S.E.2d at 492 (citation omitted).

In *HAJMM Co.* this Court determined that our General Assembly demonstrated with the text of the Act that it intended the Act to regulate a business's regular interactions with other market participants. 328 N.C. at 594, 403 S.E.2d at 493. There, we observed that

the Act defines " 'commerce' " as " 'business activities.' " *Id.* (quoting N.C.G.S. § 75-1.1(b) (1991)). We explained that the term " '[b]usiness activities' . . . connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *Id.* Ultimately, this Court determined that "extraordinary event[s]," such as raising capital, and internal operations of a single business, such as removing a "security from the capital structure," are not business activities within the General Assembly's intended meaning of the term. *Id.* We concluded in *HAJMM Co.* that securities transactions "are not 'business activities' as that term is used in the Act. They are not, *therefore*, 'in or affecting commerce,' even under a reasonably broad interpretation of the legislative intent underlying these terms." *Id.* (emphasis added). Thus, any unfair or deceptive practices occurring in the conduct of extraordinary events of, or solely related to the internal operations of, a business will not give rise to a claim under the Act. 328 N.C. at 594-95, 403 S.E.2d at 493.

Furthermore, in *Bhatti v. Buckland*, this Court observed that the history of the Act indicates that the General Assembly was targeting unfair and deceptive interactions between market participants. 328 N.C. 240, 245-46, 400 S.E.2d 440, 443-44 (1991). The General Assembly originally stated the Act's purpose as follows:

> The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.

N.C.G.S. § 75-1.1(b) (1975), *quoted in Bhatti*, 328 N.C. at 245, 400 S.E.2d at 443. Essentially, the General Assembly indicated through its original statement of purpose that the Act was designed to achieve fairness in dealings between individual market participants. To accomplish this goal, the General Assembly explained that the Act would regulate two types of interactions in the business setting: (1) interactions between businesses, and (2) interactions between businesses and consumers. The General Assembly sought for the Act to control any unfair or deceptive conduct occurring in one of these two types of interactions. In *Bhatti* we also observed that, despite a subsequent amendment to the Act, the General Assembly remained de-

voted to regulating unfair and deceptive conduct in interactions between market participants, both businesses and consumers. 328 N.C. at 245-46, 400 S.E.2d at 443-44.

We had occasion to apply these principles in *Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999), and *Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704 (2001). In *Sara Lee* an employee of the plaintiff corporation engaged in undisclosed self-dealing by purchasing on plaintiff's behalf computer parts and services supplied by firms in which the employee held a financial interest. 351 N.C. at 29, 519 S.E.2d at 309. We determined the defendant-employee's unfair or deceptive actions were within the Act's ambit because they did not occur solely within the employer-employee relationship, but rather occurred in interactions between the plaintiff and the defendant's outside businesses. *Id.* at 33-34, 519 S.E.2d at 312. In *Dalton*, on the other hand, we examined a situation in which the defendant, who was in the plaintiff's employ at the time of his conduct, formed a competing venture and successfully negotiated for the rights to publish a newspaper that had previously been published by the plaintiff. 353 N.C. at 649, 658, 548 S.E.2d at 706, 711-12. We determined that this conduct, the potential unfairness of which was confined to within a single business, was not within the Act's purview. *Id.* at 658, 548 S.E.2d at 712.

Our prior decisions have determined that the General Assembly did not intend for the Act's protections to extend to a business's internal operations. As we determined in *HAJMM Co.* and *Dalton*, the Act is not focused on the internal conduct of individuals within a single market participant, that is, within a single business. To the contrary, as we observed in *Bhatti* and *Sara Lee*, the General Assembly intended the Act's provisions to apply to interactions between market participants. As a result, any unfair or deceptive conduct contained solely within a single business is not covered by the Act. As the foregoing indicates, this Court has previously determined that the General Assembly did not intend for the Act to intrude into the internal operations of a single market participant.

In the case *sub judice* the unfairness of defendant Andrew Thompson's conduct occurred in interaction among the partners within ACE. Plaintiffs were partners with Andrew Thompson in a single market participant. Plaintiffs alleged and proved that defendant Andrew Thompson breached his fiduciary duty as a partner in this single market participant. Plaintiff White's testimony demonstrated that defendant Andrew Thompson preferred to work with several

men whom he had hired, rather than working with plaintiffs White and Ellis. Also, according to plaintiff White, defendant Andrew Thompson misinformed plaintiffs about the dates of certain projects ACE had contracted to perform and began working independently while still an ACE partner. Because defendant Andrew Thompson unfairly and deceptively interacted only with his partners, his conduct occurred completely within the ACE partnership and entirely outside the purview of the Act.

Plaintiffs contend, however, that defendant Andrew Thompson's conduct is within the Act's ambit because his actions led to the demise of ACE as a viable entity and its removal from the market, thereby reducing competition and potentially affecting prices in that market. Plaintiffs appear to argue that defendant Andrew Thompson's conduct potentially affected the price Smithfield Packing would have to pay for specialty fabrication work. However, this argument overlooks that the unfairness of defendant Andrew Thompson's conduct did not occur in his dealings with Smithfield Packing. Defendant Andrew Thompson was found to have breached his fiduciary duty to his partners through his conduct within the ACE partnership. The General Assembly simply did not intend for such conduct to fall within the Act's coverage.

While we appreciate the cogent, compelling analyses submitted in both the majority and dissenting opinions at the Court of Appeals, we believe the General Assembly did not intend to encompass within the Act defendant Andrew Thompson's conduct. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice HUDSON dissenting.

Because I would conclude defendant Andrew Thompson's conduct was "in or affecting commerce," as intended and articulated by our legislature in N.C.G.S. § 75-1.1, I respectfully dissent.

Here, as part of its unanimous verdict, the jury found and answered "yes" to the following pertinent special interrogatories:

> **ISSUE ONE:**
>
> Did Andrew Thompson have a fiduciary relationship, that is, a relationship of trust and confidence as the Court has explained it to you, with the Plaintiffs?
>
> . . . .

ISSUE ONE-B:

Did Andrew Thompson breach his fiduciary duty to the Plaintiffs in the handling of the business affairs of Ace Welding and Fabrication, by failing to act fairly, honestly, and openly?[1]

The jury then found that $138,195 in damages resulted from Andrew Thompson's conduct.[2] The trial court entered judgment thereupon, stating:

> And the plaintiff having at all times asserted that the actions of the defendants constituted unfair and deceptive trade practices, and the jury by special interrogatories having found that the defendants [Andrew Thompson and Douglas Thompson] and each of them had engaged in violations of their fiduciary duties to persons, to wit: the plaintiffs to whom they had developed such relationship of trust and confidence and this court finding by the greater weight of the evidence that the business conducted by the parties, to wit: ACE Welding and Fabrication was a business which was in or affecting commerce, this Court concludes as a matter of law that the damages assessed must be trebled.

As required by law, the trial court then trebled the damages resulting from defendant Andrew Thompson's and defendant Douglas Thompson's conduct and entered judgment in the amounts of $414,585 and $2250 against these defendants, respectively. N.C.G.S. § 75-16 (2009); *Bhatti v. Buckland*, 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991) ("If a violation of Chapter 75 is found, treble damages must be awarded." (citations omitted)).

Under North Carolina's unfair and deceptive practices act (the "Act"), "[u]nfair 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) (2009). "In order to establish a *prima facie* claim for unfair [or deceptive] trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff."

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1. The jury answered this same question "yes" regarding the conduct of defendant Douglas Thompson and "no" regarding the conduct of plaintiff Charles Michael White and plaintiff Earl Ellis.

2. The jury also found that $750 in damages resulted from Douglas Thompson's conduct. The conduct of these parties and the damages resulting therefrom are not before us on appeal.

Dalton v. Camp, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001) (citation omitted). We have noted that "[p]laintiff must first establish that defendants' conduct was 'in or affecting commerce' before the question of unfairness or deception arises." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 592, 403 S.E.2d 483, 492 (1991) (citation omitted).

Our legislature has instructed that "[f]or purposes of th[e Act], 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C.G.S. § 75-1.1(b) (2009). As noted by this Court, "this statutory definition of commerce is expansive"; nevertheless, "the Act is not intended to apply to all wrongs in a business setting." *HAJMM*, 328 N.C. at 593, 403 S.E.2d at 492. N.C.G.S. § 75-1.1(b) "defines the term 'commerce' to mean 'business activities,' " *id.* at 594, 403 S.E.2d at 493, and "[t]he term 'business' generally imports a broad definition," *Bhatti*, 328 N.C. at 245, 400 S.E.2d at 443 (citation omitted). As explained by this Court, " '[b]usiness activities' is a term which connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *HAJMM*, 328 N.C. at 594, 403 S.E.2d at 493.

The majority concludes here that: (1) the legislature intended the Act to regulate acts or conduct between businesses and consumers or between two or more businesses, but not between individuals within the same business; (2) prior decisions of this Court have determined that unfair or deceptive conduct contained within a single business is not covered under the Act; and (3) "[b]ecause defendant Andrew Thompson unfairly and deceptively interacted only with his partners, his conduct occurred completely within the ACE partnership and entirely outside the purview of the Act." I disagree with these conclusions.

First, our legislature has not indicated any intent to exclude unfair or deceptive conduct occurring between persons in the same business from coverage under the Act and in fact, has indicated the contrary. In support of its position, the majority primarily relies on a statement of purpose contained in a prior version of section 75-1.1(b), which states:

> (b) The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings

> *between persons engaged in business*, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.

N.C.G.S. § 75-1.1(b) (1975) (emphasis added). In my view, however, this language on its face actually *encompasses* unfair or deceptive conduct that occurs between persons "engaged in" the same business and *supports* the legislature's intent to *include* such conduct under the Act. My conclusion that the legislature intended to include such conduct under the ambit of the Act is further reinforced by the broad definition of " 'commerce' " contained in the current version of N.C.G.S. § 75-1.1(b)[3] and by section 75-16, which states:

> If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or 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, firm or corporation 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. As a result, I must conclude that instead of applying the Act as our legislature intended, the majority decision significantly undercuts it.

I conclude that Andrew Thompson's conduct here falls well "within the ambit of the inclusive phrase 'business activities, however denominated,' " as articulated in N.C.G.S. § 75-1.1 and as interpreted by this Court. *Bhatti*, 328 N.C. at 246, 400 S.E.2d at 444. " 'Business activities' *is a term which connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs*, such as the purchase and sale of goods, *or whatever other activities the business regularly engages in and for which it is organized.*" *HAJMM*, 328 N.C. at 594, 403 S.E.2d at 493 (emphases added). In *HAJMM* we held that conduct involving the issuance, transfer, and retirement of revolving fund certificates "is not a business activity which the issuing enterprise was organized to conduct" and does not equate to " 'business activities' as that term is used in the Act." *Id.* Here, unlike in *HAJMM*, the record contains ample evidence to support that ACE "was organized to conduct" certain specialty fabrica-

3. This definition has been in place since 27 June 1977. Act of June 27, 1977, ch. 747, secs. 2, 5, 1977 N.C. Sess. Laws 984, 984, 987.

tion jobs at Smithfield Packing and that bidding for, obtaining, and completing these jobs were "activities [that ACE] regularly engage[d] in and [reflected the purposes] for which it [was] organized." *Id.* The record also contains evidence suggesting that Andrew Thompson's conduct deprived plaintiffs of the ability to complete previously awarded speciality fabrication jobs and to obtain new jobs at Smithfield Packing, which ultimately affected the nature and extent of the market for specialty fabrication products by eliminating ACE as a viable competitor in that market. Consequently, I would conclude, as the trial court did, that Andrew Thompson's conduct falls "within the ambit of the inclusive phrase 'business activities' " and is, therefore, " 'in or affecting commerce' within the meaning and intent of that phrase as used in N.C.G.S. § 75-1.1(a)." *Bhatti*, 328 N.C. at 246, 400 S.E.2d at 444; *see also* N.C.G.S. § 75-16.

Second, even if the majority has correctly concluded that the legislature did not intend to include unfair and deceptive conduct between individuals in the same business under the Act, defendant Andrew Thompson's conduct is still covered under the Act, in that other entities were involved. Here, the majority frames the issue before us as "whether the General Assembly intended unfair or deceptive conduct among partners contained solely within a single business to be 'in or affecting commerce' such that a partner's breach of his fiduciary duty owed to his fellow partners violates . . . N.C.G.S. § 75-1.1." Though plaintiffs White and Ellis and defendant Andrew Thompson were partners in an entity known as Ace Fabrication and Welding ("ACE"), Andrew Thompson's conduct was not contained within a single business or market entity. Here, the record contains ample evidence to support that: (1) while Andrew Thompson was still a partner in ACE, he created his own separate, competing business, PAL, through which he obtained specialty fabrication work at Smithfield Packing and funneled jobs that had been originally awarded to ACE; and (2) Andrew Thompson began to engage in these activities before notifying plaintiffs White and Ellis that he had created PAL and planned to withdraw from ACE. The jury here found that, by usurping these business opportunities for himself and PAL to the exclusion of plaintiffs, Andrew Thompson breached his fiduciary duties to plaintiffs and made himself and PAL a market competitor of plaintiffs. This conduct affected commerce in much the same way as the conduct at issue in *Sara Lee Corp. v. Carter*, in which we held the conduct was covered under the Act. 351 N.C. 27, 31-34, 519 S.E.2d 308, 311-12 (1999) (concluding that the defendant

employee, who was responsible for purchasing computer hardware and services at the best possible price for his employer and had a fiduciary duty to his employer to act accordingly, was properly found liable under the Act when the defendant purchased computer parts and services at high prices from separate businesses he created and controlled while also employed with Sara Lee); *see also HAJMM*, 328 N.C. at 588, 403 S.E.2d at 489 (stating that "[b]usiness partners . . . are each other's fiduciaries as a matter of law" (citing *Casey v. Grantham*, 239 N.C. 121, 124-25, 79 S.E.2d 735, 738 (1954) ("It is elementary that the relationship of partners is fiduciary and imposes on them the obligation of the utmost good faith in their dealings with one another in respect to partnership affairs. Each is the confidential agent of the other, and each has a right to know all that the others know, and each is required to make full disclosure of all material facts within his knowledge in any way relating to the partnership affairs." (citation omitted)))).

Third, notwithstanding the majority's assertion to the contrary, this Court's decisions have not held that "any unfair or deceptive conduct contained within a single business" is excluded from the purview of the Act. None of the cases cited by the majority are predicated on whether said conduct was confined to a single business or market entity. Rather, this Court's analyses of whether the conduct was "in or affecting commerce" centered on the potential exclusion of the conduct from the Act, based on one of the following potential exceptions articulated in prior decisions of this Court or the Court of Appeals: (A) conduct involving an employer-employee relationship, *Dalton*, 353 N.C. at 657-58, 548 S.E.2d at 711-12 (citing *HAJMM*, 328 N.C. at 593, 403 S.E.2d at 492) stating that employer-employee relations are not covered under the Act)); *Sara Lee*, 351 N.C. at 31, 519 S.E.2d at 310 (citing *Buie v. Daniel Int'l Corp.*, 56 N.C. App. 445, 448, 289 S.E.2d 118, 119-20) (same), *disc. rev. denied*, 305 N.C. 759, 292 S.E.2d 574 (1982)); (B) conduct involving "securities transactions," *HAJMM*, 328 N.C. at 593, 403 S.E.2d at 492 (citing *Skinner v. E. F. Hutton & Co.*, 314 N.C. 267, 275, 333 S.E.2d 236, 241 (1985)); or (C) conduct involving a "private homeowner[] selling a residence," *Bhatti*, 328 N.C. at 244, 400 S.E.2d at 443. In *Dalton* we held that summary judgment in the defendants' favor on the employer's Chapter 75 claim was proper because, unlike the employee in *Sara Lee*, employee defendant Camp did not have a fiduciary duty to his employer, nor did he serve his employer in the capacity of a buyer or seller or "in any alternative capacity suggesting that his employ-

ment . . . otherwise qualified as 'in or affecting commerce.' " 353 N.C. at 658, 548 S.E.2d at 711-12.

Rather than supporting the majority's view, this Court's decision in *Sara Lee* strongly indicates that the type of self-dealing found by the jury here is exactly the type of conduct that is covered under the Act. *See* 351 N.C. at 34, 519 S.E.2d at 312 (holding that because the defendant employee breached his fiduciary duty to his employer to obtain computer parts and services at the lowest possible price and engaged in self-dealing and " 'business activities' " by purchasing these parts and services at inflated prices from companies in which he had a financial interest, "defendant's mere employee status . . . does not safeguard him from liability under the Act"). Indeed, in its discussion of the very definition of " 'commerce,' " this Court noted that the Act is subject to a "reasonably broad interpretation" and that " 'we have not limited [the Act's] applicability . . . to cases involving consumers only. After all, unfair trade practices involving only businesses affect the consumer as well.' " *Id.* at 32, 519 S.E.2d at 311 (quoting *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 665, 370 S.E.2d 375, 389 (1988) (citation omitted)). Further, this case is not analogous to *HAJMM*. 328 N.C. at 594-95, 403 S.E.2d at 493 (holding that "[r]evolving fund certificates are a cooperative's functional equivalent of traditional corporate securities" and "therefore, . . . like more conventional securities, [the] issuance or redemption of revolving fund certificates are not 'in or affecting commerce' "). Moreover, in *Bhatti* this Court held that the conduct of an individual selling real estate could potentially be covered under the Act. 328 N.C. at 246, 400 S.E.2d at 444 (holding that on the "sparse facts in th[e] record," the transaction "involved a buyer and seller in a commercial context to which the protections afforded by section 75-1.1" apply, and thus, "the sale fell within the ambit of the inclusive phrase 'business activities, however denominated,' and was therefore 'in or affecting commerce' within the meaning and intent of that phrase as used in N.C.G.S. § 75-1.1(a)" (internal citation omitted)). None of these cases can be read as compelling, or even pointing in the direction of, the conclusions reached by the majority.

Finally, I disagree with the majority's conclusion that "the unfairness of defendant Andrew Thompson's conduct did not occur in his dealings with Smithfield Packing" and as such, cannot be covered under the Act. As this Court has previously stated, "unfair [and deceptive] trade practices involving only businesses affect the consumer as well." *Kuykendall*, 322 N.C. at 665, 370 S.E.2d at 389. And, as the

record demonstrates, ACE's (and PAL's) business activities of bidding for, obtaining, and completing specialty fabrication work at Smithfield Packing necessarily involved Smithfield Packing as a potential or actual consumer.

Regardless of whether Andrew Thompson committed unfair or deceptive acts directly against Smithfield Packing itself, neither the Act nor this Court's case law mandates that unfair or deceptive conduct committed by a person engaged in business against another person or persons engaged in business must occur in dealings with a consumer in order for the conduct and the resulting injury to be covered under the Act. *See, e.g.*, N.C.G.S. § 75-16. By reversing the judgment against defendant Andrew Thompson, the majority, for the first time since Chapter 75 was enacted, has created out of whole cloth an exemption for a huge segment of business conduct. This decision has potentially widespread and damaging consequences for businesses and consumers alike, by essentially rewriting the statute to eliminate the accountability our legislature intended for unfair dealings within a business.

For these reasons, I would hold that defendant Andrew Thompson's conduct was "in or affecting commerce" and that the trial court correctly concluded that his conduct was actionable under the Act. I would reverse the Court of Appeals and reinstate the judgment based on the jury's verdict. Therefore, I respectfully dissent.

Justice TIMMONS-GOODSON joins in this dissenting opinion.

MARIA D. MEZA, PETITIONER v. DIVISION OF SOCIAL SERVICES AND DIVISION OF MEDICAL ASSISTANCE OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENTS

No. 518A08

(Filed 15 April 2010)

1. Administrative Law; Public Assistance— judicial review of agency decision—N.C.G.S. § 108A-79(k)—standard of review

The standard of review of an agency decision under N.C.G.S. § 108A-79(k) is *de novo* when the superior court exercises its statutory authority to take testimony and examine the facts of the case to determine whether the final decision is in error under

federal and State law. If, however, the superior court proceeds solely upon the administrative record, the hearing is governed by the provisions of the Administrative Procedure Act, in which questions of fact are reviewed under the whole record test and questions of law are reviewed *de novo*.

2. Administrative Law— judicial review of agency decision— emergency medical condition—findings of fact—whole record test

The Court of Appeals erred in affirming the superior court's judgment and order finding that petitioner non-qualified alien was suffering from an "emergency medical condition" as defined in 42 U.S.C. § 1396b(v)(3) for the duration of both of her stays at CMC-Randolph Behavioral Health Center and was thus entitled to Medicaid benefits for the entire length of her stays because: (1) the superior court erred in reviewing DHHS's factual findings *de novo*, as it proceeded solely based upon the administrative record; (2) the medical experts had conflicting opinions whether petitioner was suffering from an "emergency medical condition" under 42 U.S.C. § 1396b(v)(3), the record contains substantial competent evidence to support either the position of the hearing officer or that of the superior court, and thus the Court of Appeals erred in holding that the superior court properly considered the same evidence and concluded that the hearing officer's findings were not factually and legally justified; and (3) the whole record test does not allow the reviewing court to replace the factfinder's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.

Justice TIMMONS-GOODSON concurring in the result only.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 193 N.C. App. 350, 668 S.E.2d 571 (2008), affirming a judgment and order entered on 26 January 2007 by Judge Yvonne Mims Evans in Superior Court, Mecklenburg County. Heard in the Supreme Court 1 April 2009.

Ott Cone & Redpath, P.A., by Thomas E. Cone, for petitioner-appellee.

Roy Cooper, Attorney General, by Christopher G. Browning, Jr., Solicitor General, and Brenda Eaddy, Assistant Attorney General, for respondent-appellants.

PARKER, Chief Justice.

In this case we determine the appropriate standard of review to be applied by the superior court in an action commenced under N.C.G.S. § 108A-79(k), reviewing decisions by the North Carolina Department of Health and Human Services' Division of Social Services (DHHS) and Division of Medical Assistance (DMA) regarding claims for Medicaid benefits. For the reasons stated herein, we hold that when the superior court conducts a hearing based upon the administrative record, it must review questions of fact under the whole record test and questions of law de novo. In this case, the superior court having conducted a de novo review as to factual issues based solely on the administrative record, we reverse.

Petitioner Maria D. Meza was admitted to the CMC-Randolph Behavioral Health Center for psychiatric treatment on 15 October 2004 and was released on 29 October 2004. Petitioner applied for Medicaid benefits through the Mecklenburg County Department of Social Services (DSS) on 5 January 2005. On 26 January 2005, Mecklenburg County DSS issued a notice of benefits awarding Medicaid coverage for the date of admission (15 October 2004), but denying coverage for the remainder of the hospitalization. Petitioner was admitted to the same facility a second time, from 17 January 2005 through 11 February 2005, for inpatient mental health care. On 19 April 2005, petitioner again applied for Medicaid benefits through Mecklenburg County DSS. On 13 May 2005, Mecklenburg County DSS issued a notice of benefits for this hospitalization, again awarding Medicaid coverage only for the date of admission (17 January 2005).

Petitioner is a resident of Mecklenburg County, but is not a United States citizen. The parties do not dispute that for purposes of Medicaid coverage, petitioner is a "non-qualified alien." *See* 42 U.S.C. § 1396b(v)(1) (2000). As such, petitioner could not receive Medicaid coverage for her inpatient treatment unless her medical condition met the definition of an "emergency medical condition" under federal law. *Id.* § 1396b(v)(2)(A). Federal law defines the term "emergency medical condition" as:

> a medical condition . . . manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—
>
> (A) placing the patient's health in serious jeopardy,

(B) serious impairment to bodily functions, or

(C) serious dysfunction of any bodily organ or part.

Id. § 1396b(v)(3).

Petitioner appealed the decisions denying her claims for Medicaid coverage, and on 14 July 2005, a DHHS hearing officer conducted a hearing on both determinations. On 26 August 2005, the hearing officer issued a separate decision as to each period of hospitalization.

With respect to the first hospitalization, the hearing officer found that upon admission, petitioner was described as " 'acutely psychotic,' " with her husband reporting that she often wandered out of the house, forgot to change her clothes for several weeks at a time, threw food and clothing, and neglected her personal hygiene. The hearing officer further found that on 17 October 2004, petitioner's condition worsened to the extent that she was considered a danger to herself and forced medication was deemed necessary. According to the hearing officer, beginning on 22 October 2004 through discharge, petitioner was no longer considered to be a danger to herself.

Based on these findings, the hearing officer concluded that from 15 October 2004 through 21 October 2004, petitioner's condition required emergency medical services, and thus, she was entitled to Medicaid coverage for that period. With respect to the period from 22 October 2004 through 29 October 2004, the hearing officer concluded that petitioner's condition had stabilized to the extent that she was no longer a danger to herself, and therefore, "the remaining treatment was to cure the underlying illness." As a result, the hearing officer reversed the decision in part and awarded petitioner Medicaid coverage for her treatment from 15 October 2004 through 21 October 2004, but not from 22 October 2004 through 29 October 2004.

With respect to petitioner's second hospitalization, the hearing officer found that she had been previously diagnosed with schizophrenia and that she was withdrawn, isolated, and suspicious and had feelings of persecution. The hearing officer concluded that petitioner's condition did not qualify as "emergent" under the federal definition because her condition had stabilized following the initial day of admission. Based on this determination, the hearing officer affirmed the decision awarding Medicaid coverage only for the date of admission, 17 January 2005.

The hearing officer's decisions became DHHS's final decisions inasmuch as petitioner did not seek further review by the chief hearing officer. On 5 October 2005, petitioner filed a petition for judicial review pursuant to N.C.G.S. § 108A-79(k) in Superior Court, Mecklenburg County. The superior court heard the matter based on the administrative record developed before DHHS. Concluding that the case involved statutory interpretation and application of law to facts, the superior court reviewed the final agency decision de novo and made findings of fact.

The superior court found as fact that at the time of each hospital admission:

> Ms. Meza was in a severe psychotic state of sudden onset resulting from decompensation of her long-standing underlying illness. Throughout each [of her admissions], she demonstrated severe symptoms of psychosis, loss of touch with reality, paranoia and suspiciousness, internal distractions including delusions and hallucinations, gross disorganization, and inability to attend to basic needs such as eating, bathing, and grooming. Throughout most of both admissions, she was unable to talk or communicate in any meaningful manner with staff or her peers, and her judgment and insight were very limited. She refused medication during both admissions, and forced medication orders were required during each.

The court determined that petitioner's condition "placed her health in serious jeopardy and could reasonably have been expected to result in either placing [her] health in serious jeopardy or serious impairment to bodily functions or serious dysfunction of a bodily organ or part." The court further found that the treatment at issue was "required and given to stabilize her condition" and that "her condition was not stabilized until her discharge."

Based on its findings, the superior court concluded that (1) "[p]etitioner's medical condition at each admission was an emergency medical condition as defined in 42 U.S.C. § 1396b(v)(3)," and (2) "treatment throughout each admission constituted immediate, medically necessary, and appropriate treatment for [her] emergency medical condition." The superior court reversed DHHS's decisions and ordered DHHS to provide petitioner with Medicaid coverage for the entirety of both hospitalizations.

DHHS and DMA appealed to the Court of Appeals, which in a divided opinion affirmed the trial court's judgment and order. The

Court of Appeals' majority held that the superior court appropriately conducted a de novo review to determine whether DHHS's decisions were factually and legally correct. *Meza v. Div. of Soc. Servs.*, 193 N.C. App. 350, 355-56, 668 S.E.2d 571, 574-75 (2008). The dissenting judge would have reversed the trial court for failing to review DHHS's factual determinations under the whole record test and the conclusions of law de novo, as the trial court proceeded on the administrative record. *Id.* at 361-62, 668 S.E.2d at 578-79 (Steelman, J., dissenting). DHHS and DMA timely appealed to this Court based on the dissenting opinion.

DHHS and DMA contend that the trial court and the Court of Appeals did not apply the correct standards of review. We agree. Petitioner filed her appeal pursuant to N.C.G.S. § 108A-79(k), which both creates the right of action and defines the parameters within which the reviewing court must proceed.

As with the analysis of any statute, we look first to certain cardinal principles of statutory interpretation. "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). Moreover, where more than one statute is implicated, the Court must construe the statutes *in pari materia* and give effect, if possible, to all applicable provisions. *Bd. of Adjust. v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993) (citing *Jackson v. Guilford Cty. Bd. of Adjust.*, 275 N.C. 155, 167, 166 S.E.2d 78, 86 (1969)). With these principles in mind, we examine the proceeding contemplated under N.C.G.S. § 108A-79(k) to determine the appropriate standard of review.

[1] North Carolina General Statute section 108A-79(k) provides as follows:

> (k) Any applicant or recipient who is dissatisfied with the final decision of the Department may file . . . a petition for judicial review in superior court of the county from which the case arose. . . . The hearing shall be conducted according to the provisions of Article 4, Chapter 150B, of the North Carolina General Statutes. The court shall, on request, examine the evidence excluded at the hearing under G.S. 108A-79(e)(4) or G.S. 108A-79(i)(1) and if the evidence was improperly excluded, the

> court shall consider it. Notwithstanding the foregoing provisions, the court may take testimony and examine into the facts of the case, including excluded evidence, to determine whether the final decision is in error under federal and State law, and under the rules and regulations of the Social Services Commission or the Department of Health and Human Services. . . . Nothing in this subsection shall be construed to abrogate any rights that the county may have under Article 4 of Chapter 150B.

N.C.G.S. § 108A-79(k) (2005).

After stating the time and place for filing the petition, the first mandate of the statute is that the hearing before the superior court be conducted in accordance with Article 4, the judicial review section of Chapter 150B of the General Statutes, the Administrative Procedure Act (APA). A comparison of the provisions in N.C.G.S. § 108A-79(k) and those in Article 4 of the APA discloses that N.C.G.S. § 108A-79(k) is something of a hybrid and that the language in N.C.G.S. § 108A-79(k) is not consistent with provisions of Article 4 of the APA. However, an analysis of these differences does help to inform our decision as to the proper standard of review under N.C.G.S. § 108A-79. For example, N.C.G.S. § 150B-49 deals with new evidence before the superior court and specifically directs that if new evidence is to be taken, the superior court judge shall remand the case either to the administrative law judge or to the agency that conducted the hearing, whichever is applicable. *Id.* § 150B-49 (2005). Similarly, subsections (a) and (a1) of N.C.G.S. § 150B-51 track this same concept by requiring the superior court judge, in reviewing a State Personnel Commission or other agency decision, to determine first whether the Commission or the agency heard new evidence not considered by the administrative law judge and if so, to remand to the Commission or the agency for entry of a decision in accordance with the official record. *Id.* § 150B-51(a), (a1) (2005). Finally, in N.C.G.S. § 150B-51(c) the General Assembly provided that if the agency rejects the administrative law judge's recommendation, the superior court "shall review the official record, de novo, and shall," based on the official record, "make findings of fact and conclusions of law." *Id.* § 150B-51(c) (2005).

Under N.C.G.S. § 150B-51(b), the General Assembly provided the scope and standard of review in all agency decisions except those covered by N.C.G.S. § 150B-51(c). The APA gives a court reviewing the decision of an administrative agency a panoply of remedies, including authority to affirm or to remand the case to the agency

for further proceedings or to reverse or modify the agency's decision when a petitioner's "substantial rights" may have been violated because the agency's findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible . . . in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

Id. § 150B-51(b) (2005).

Unlike the above provisions of the APA, N.C.G.S. § 108A-79(k) authorizes the superior court when reviewing a DHHS decision to do two things. First, "[t]he court shall, on request, examine the evidence excluded at the hearing . . . and if the evidence was improperly excluded, the court shall consider it." *Id.* § 108A-79(k). Second, "[n]otwithstanding the foregoing provisions, the court may take testimony and examine into the facts of the case, including excluded evidence, to determine whether the final decision is in error under federal and State law." *Id.* This provision in the appeal from a DHHS agency decision, in which no administrative law judge determination is involved is akin to the provision of N.C.G.S. § 150B-51(c) in which the agency rejects the administrative law judge's recommendation, and the superior court is mandated to make findings of fact de novo, albeit on the official administrative record as opposed to taking new testimony.

Reading the language of N.C.G.S. § 108A-79(k) in conjunction with Article 4 of the APA, we conclude that under N.C.G.S. § 108A-79(k) two types of proceedings are authorized: one in which the superior court proceeds on the administrative record and the other in which the superior court hears testimony and develops its own factual record. This interpretation is consistent with this Court's decision in *Lackey v. North Carolina Department of Human Resources*, wherein this Court agreed with the Court of Appeals that the appropriate standard of review is provided by the review

provisions of the APA, which at that time were codified in N.C.G.S. § 150A-51. 306 N.C. 231, 234, 293 S.E.2d 171, 174 (1982). In *Lackey* the Court of Appeals reviewed the background of N.C.G.S. § 108-44, the precursor to N.C.G.S. § 108A-79, which, like the present statute, permitted the superior court to take testimony and examine into the facts. *Lackey v. N.C. Dep't of Human Res.*, 54 N.C. App. 57, 59-60, 283 S.E.2d 377, 378-79 (1981), *modified and aff'd*, 306 N.C. 231, 293 S.E.2d 171 (1982). The Court of Appeals stated:

> It is clear that the review provisions of Chapter 108, both the present and the former versions, give the Superior Court judge the option of proceeding on the record developed at the agency hearing or developing his own factual record. Judge Farmer chose to proceed on the agency record. Under such circumstances, and considering the similar thrust of the two statutes, we hold the review standards of the Administrative Procedures Act, G.S. 150A-51, should be applied in this case. Such a position is consistent with the present provisions of G.S. 108-44(j). [N.C.G.S. § 108-44(j) (1979) provided that hearings before the superior court should be conducted in accordance with the Administrative Procedure Act.]

Id. at 60, 283 S.E.2d at 379 (citation omitted); *see also*, *Diaz*, 360 N.C. at 386, 628 S.E.2d at 2-3; *Henderson v. N.C. Dep't of Human Res.*, 91 N.C. App. 527, 530-31, 372 S.E.2d 887, 889-90 (1988).

When the superior court proceeds on the administrative record, the review by that court "shall be conducted according to the provisions" of the APA. N.C.G.S. §§ 108A-79(k), 150B-51(b). The applicable standards of review under the APA are that " '[q]uestions of law receive *de novo* review,' whereas fact-intensive issues 'such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test.' " *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (alterations in original)).

When conducting de novo review, the reviewing court " ' "consider[s] the matter anew[] and freely substitutes its own judgment for the agency's." ' " *Id.* at 660, 599 S.E.2d at 895 (quoting *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13-14, 565 S.E.2d 9, 17 (2002) (alterations in original) (citation omitted)). However, when applying the whole record test, the reviewing court "may not substitute its judgment for the agency's as between two conflicting views,

even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004) (citing, *inter alia*, *Elliott v. N.C. Psychology Bd.*, 348 N.C. 230, 237, 498 S.E.2d 616, 620 (1998)). "Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision." *Id.* (citing *Elliott*, 348 N.C. at 237, 498 S.E.2d at 620). "Substantial evidence" is defined as "relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C.G.S. § 150B-2(8b) (2005).

In light of the foregoing, once the superior court determines, based on the whole record test, that the findings of fact are not supported by substantial evidence in the record and, therefore, cannot support the hearing officer's conclusions of law, the court can follow one of two procedures. The court can remand the case to the agency for further proceedings, or the court can take evidence, make findings of fact, and draw its own conclusions of law from the findings thus made. What the superior court is not permitted to do, however, is to make findings of fact de novo without taking testimony. Had the legislature intended that the superior court in reviewing a DHHS decision be able to make findings of fact without taking testimony, the legislature could have provided, as it did in N.C.G.S. § 150B-51(c), that the findings of fact be based on the official record.

Petitioner and the majority in the Court of Appeals rely upon *Chatmon v. North Carolina Department of Health & Human Services*, 175 N.C. App. 85, 622 S.E.2d 684 (2005), *disc. rev. denied*, 360 N.C. 479, 688 S.E.2d 689 (2006), for the proposition that even when, as in this case, the superior court does not hear testimony, that court is nevertheless permitted to conduct a de novo review as to factual issues to determine whether DHHS's decision is "factually and legally correct." *Id.* at 90, 622 S.E.2d at 688. This reliance on *Chatmon* is misplaced. The court in *Chatmon* did not reference this Court's decision in *Lackey* and proceeded as if in uncharted waters. The superior court in *Chatmon*, unlike the superior court in the present case, did not engage in de novo review, but based its decision on the administrative record and applied the whole record test. Moreover, the opinion in *Chatmon* did not articulate the standard of review the superior court is to apply in reviewing an agency decision pursuant to N.C.G.S. § 108A-79(k). As the dissenting opinion in the court below appropriately noted, "[n]either *Chatmon* nor N.C. Gen.

Stat. § 108A-79(k) explicitly grants the superior court the authority to engage in *de novo* review of the administrative agency's findings." *Meza*, 193 N.C. App. at 363, 668 S.E.2d at 579 (Steelman, J., dissenting). Moreover, *Chatmon* states that "section 108A-79(k) requires the trial court to sit as both a trial and appellate court" but that "the trial court should be limited to determining whether the reason offered for [the agency's] decision . . . was factually and legally correct." 175 N.C. App. at 90, 622 S.E.2d at 688. Section 108A-79(k) does not require the superior court as the reviewing court to sit as a trial court. Rather, the statute states that the superior court "may take testimony and examine into the facts of the case." N.C.G.S. § 108A-79(k). Under N.C.G.S. § 108A-79(k) the stated purpose for which the superior court may take evidence and examine into the facts, namely, to determine whether the agency's decision "is in error under federal and State law," is an iteration of the scope of review, not a statement of the appropriate standard of review.[1] For these reasons, in the present case the Court of Appeals erred in relying on *Chatmon* as controlling on the standard of review to be applied by the superior court. Thus, we specifically disavow the language in the decision below suggesting that *Chatmon* and N.C.G.S. § 108A-79(k), not the APA, are controlling. *Meza*, 193 N.C. App. at 354-57, 668 S.E.2d at 573-75.

We now turn to proceedings in which the superior court exercises its statutory authority to develop its own factual record. While the superior court's ultimate authority is to determine whether the agency's decision is in error under the applicable law, the statute contemplates a de novo review as to factual and legal issues. Only in conducting a full de novo review in which the superior court makes new findings of fact and conclusions of law could the superior court properly "examine into the facts of the case . . . to determine whether the final decision is in error under federal and State law." N.C.G.S. § 108A-79(k). We note that *Chatmon* states that N.C.G.S. § 108A-79(k) "should not be read to authorize the trial court to rehear the case,

1. The scope of judicial or appellate review covers whether the findings of fact are supported by the evidence, whether the findings support the conclusions of law, and whether the conclusions of law are a proper statement and application of the law. The standards of review are the tests by which these determinations are made, namely, the "any competent evidence" test, the "substantial evidence based on the whole record" test, and the "clear, cogent and convincing evidence" test with respect to findings of fact and the de novo standard of review with respect to questions or issues of law. *See generally Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 578-80, 281 S.E.2d 24, 27-29 (1981); *In re McCrary*, 112 N.C. App. 161, 164-66, 435 S.E.2d 359, 362-63 (1993).

make wholly new factual findings, and determine that alternative grounds not relied upon by [DHHS] would also justify the sanction." 175 N.C. App. at 90-91, 622 S.E.2d at 688. We do not read N.C.G.S. § 108A-79(k) to limit the superior court in this fashion. This portion of the holding in *Chatmon* does not find support in the language of the statute, and to the extent it is inconsistent with this opinion, it is overruled.

At this point we should note that our holding today that the superior court sitting as a reviewing court can engage in de novo fact finding is specifically limited to review pursuant to N.C.G.S. § 108A-79(k) and is in no way intended to implicate review of other administrative proceedings. *See Carroll*, 358 N.C. at 661-64, 599 S.E.2d at 895-97.

In the case at bar, the superior court heard the matter "based upon the administrative record." Accordingly, the superior court was bound by the standards of review articulated in the APA. N.C.G.S. § 108A-79(k). The superior court should have applied the whole record test to determine whether substantial evidence existed in the record to justify DHHS's decision. The superior court, however, erroneously conducted a de novo review as to factual issues and made new findings of fact without taking testimony.

Upon conducting its de novo factual review, the superior court found as fact that petitioner's "condition during each admission was an acute one . . . which placed her health in serious jeopardy and could reasonably have been expected to result in either placing the patient's health in serious jeopardy or serious impairment to bodily functions or serious dysfunction of a bodily organ or part." On the basis of these new findings, the superior court concluded that petitioner's condition "required immediate treatment to stabilize" her symptoms and that the absence of this treatment "would reasonably have been expected to result in either placing the patient's health in serious jeopardy or serious impairment to bodily functions or serious dysfunction of a bodily organ or part as described in 42 U.S.C. § 1396b(v)(3)." The Court of Appeals affirmed, holding that the superior court "properly conducted a de novo review to the extent it was functioning as an appellate court." *Meza*, 193 N.C. App. at 359, 668 S.E.2d at 577.

Having determined that the superior court's order was " 'entered under a misapprehension of the applicable law,' [this Court] may remand for application of the correct legal standards." *Carroll*, 358 N.C. at 664, 599 S.E.2d at 897 (internal quotation marks omitted)

(quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469, 597 S.E.2d 674, 693 (2004)). In *Carroll*, this Court recognized "that in cases appealed from administrative tribunals, the trial court's erroneous application of the appropriate standard of review does not automatically necessitate remand." *Id.* (citing, *inter alia*, *Mann Media*, 356 N.C. at 15-16, 565 S.E.2d at 18-19). The Court in *Carroll* further recognized that remand is not required when "the appellate court can reasonably determine from the record whether the petitioner's asserted grounds for challenging the agency's final decision warrant reversal or modification of that decision under the applicable provisions of N.C.G.S. § 150B-51(b)." 358 N.C. at 665, 599 S.E.2d at 898 (citing *Shackleford-Moten v. Lenoir Cty. Dep't of Soc. Servs.*, 155 N.C. App. 568, 572, 573 S.E.2d 767, 770 (2002), *disc. rev. denied*, 357 N.C. 252, 582 S.E.2d 609 (2003)).

The superior court's misapplication of the de novo standard of review to the factual issues in the administrative record does not interfere with this Court's ability to "assess how that standard *should have been applied* to the particular facts of this case." *Id.* We now proceed to the substantive issues in the interests of judicial economy and fairness to the parties.

[2] This Court must now determine whether the Court of Appeals erred in affirming the superior court's judgment and order finding that petitioner was suffering from an "emergency medical condition" as defined in 42 U.S.C. § 1396b(v)(3) for the duration of both of her stays at CMC-Randolph Behavioral Health Center.

The evidence in the record reveals that petitioner's condition was a recurring one, as she had been admitted to CMC-Randolph for approximately ten days in 2002 and she had also been hospitalized in 1999 or 2000. Upon her admission to CMC-Randolph on 15 October 2004, petitioner had not taken her medications for approximately one year.

The physicians reviewing petitioner's medical records reached differing conclusions as to her condition and whether she was suffering from an emergency medical condition. Mignon Benjamin, M.D., who examined petitioner's records for Medical Review of North Carolina, opined that petitioner was suffering from a chronic illness, not a sudden onset issue. Dr. Benjamin was also of the opinion that petitioner could have avoided her hospitalizations by remaining on her outpatient medications. Dr. Benjamin testified that on 15 October 2004, petitioner was admitted to get "psych medicine" and that upon

receiving the medicines, her condition began to slowly improve. Dr. Benjamin noted that the records of petitioner's October stay indicated no suicidal or homicidal ideation and that her violence checklist showed no aggression. As to the 17 January 2005 admission, Dr. Benjamin testified that petitioner again had no auditory hallucinations or suicidal or homicidal ideations, showed no aggression, and was not a danger to herself or others. As to both hospitalizations, Dr. Benjamin concluded that petitioner was not suffering from an emergency medical condition and that "perhaps we were mistaken to even give [coverage for] the first dates [of admission]."

Praful Mehta, M.D., petitioner's treating physician from 19 October through 29 October 2004, reviewed the records for petitioner's 15 October through 29 October 2004 hospitalization. Dr. Mehta noted that petitioner did not experience significant improvement in her mental status until 25 October 2004, ten days after admission. Dr. Mehta opined that due to the severity of petitioner's symptoms and her resistance to medication, "the absence of this acute level of medical attention would clearly have resulted in a very fast decompensation in her condition and would have placed her health in serious jeopardy." Dr. Mehta was of the opinion that the care petitioner received from 15 October through 29 October 2004 "all constituted a single course of treatment which was necessary for the treatment of an emergency medical condition."

Anthony J. DiNome, M.D., reviewed petitioner's records from her 17 January through 11 February 2005 hospitalization, when he was her treating physician. Dr. DiNome reported that petitioner showed no significant improvement in her mental status until 8 February 2005, after which she was transitioned to a lower level of care. Dr. DiNome was also of the opinion that petitioner's condition was such that "the absence of this acute level of medical attention would clearly have resulted in a very fast decompensation in her condition and would have placed her health in serious jeopardy." In Dr. DiNome's opinion, the care and services received by petitioner from 17 January through 11 February 2005 "all constituted a single course of treatment which was necessary for the treatment of an emergency medical condition."

The medical experts clearly had conflicting opinions whether petitioner was suffering from an "emergency medical condition" under 42 U.S.C. § 1396b(v)(3). As noted by the dissenting opinion in the Court of Appeals, the record, therefore, contains substantial competent evidence "to support either the position of the hearing officer

or that of [the superior court]." *Meza*, 193 N.C. App. at 361, 668 S.E.2d at 578 (Steelman, J., dissenting).

We reiterate that the whole record test "does not allow the reviewing court to replace the [fact finder's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citing *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 95 L. Ed. 456 (1951)). This principle applies to the superior court in this case, for when it "exercises judicial review over an agency's final decision, it acts in the capacity of an appellate court." *Carroll*, 358 N.C. at 662, 599 S.E.2d at 896. This principle has been adhered to by this Court, for " 'there is but one fact-finding hearing of record when witness demeanor may be directly observed.' " *Id.* (quoting Julian Mann III, *Administrative Justice: No Longer Just a Recommendation*, 79 N.C. L. Rev. 1639, 1653 (2001)).

In this case the DHHS hearing officer weighed the conflicting evidence and reached a middle ground regarding petitioner's first hospitalization, choosing to award Medicaid benefits from 15 October through 21 October 2004. The DHHS hearing officer chose to adopt Dr. Benjamin's opinion regarding the second hospitalization, finding that petitioner suffered from an emergency medical condition only on the day of admission, and awarded Medicaid benefits only for the day of 17 January 2005. The DHHS hearing officer's findings of fact are supported by substantial competent evidence in the form of Dr. Benjamin's expert opinion. Under this Court's decision in *Diaz*, 360 N.C. at 390, 628 S.E.2d at 5, recognizing the "stabilization" interpretation of the provisions in 42 U.S.C. § 1396b(v)(3), these findings of fact in turn support the hearing officer's conclusions of law that the care and services petitioner received were necessary to treat an emergency medical condition under 42 U.S.C. § 1396b(v)(3) as to those specific dates only and that Medicaid coverage should be awarded accordingly. The Court of Appeals, therefore, erred in holding that the superior court properly "considered the same evidence and concluded that the hearing officer's findings were not factually and legally justified." *Meza*, 193 N.C. App. at 356, 668 S.E.2d at 575.

In conclusion, we hold that the standard of review of an agency decision under N.C.G.S. § 108A-79(k) is de novo when the superior court exercises its statutory authority to "take testimony and examine into the facts of the case . . . to determine whether the final deci-

sion is in error under federal and State law." If, however, the superior court proceeds solely upon the administrative record, the hearing is governed by the provisions of the Administrative Procedure Act, in which questions of fact are reviewed under the whole record test and questions of law are reviewed de novo.

The superior court here erred in reviewing DHHS's factual findings de novo, as it proceeded solely based upon the administrative record. The Court of Appeals erred in affirming the superior court's de novo review of the factual issues. Because DHHS's factual findings are supported by substantial competent evidence in the record, the decision of the Court of Appeals is reversed, and the case is remanded to the superior court for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice TIMMONS-GOODSON concurring in the result only.

As the majority opinion observes, the superior court in this case conducted a *de novo* review of the administrative record and made its own factual findings without taking additional testimony. I agree with the majority that the superior court was not authorized to use this procedure and should have applied the whole record test. However, because I do not read section 108A-79(k) as expansively as the majority, I concur in the result only.

LENTON CREDELLE BROWN, ADMINISTRATOR OF THE ESTATE OF CLAMON BROWN v. KINDRED NURSING CENTERS EAST, L.L.C.; KINDRED HEALTH CARE OPERATING, INC.; KINDRED HEALTH CARE, INC.; PATRICIA EVELYN DIX, N.P.; STEVEN FERGUSON, M.D.; AND EASTERN CAROLINA FAMILY PRACTICE, P.A.

No. 227A09

(Filed 15 April 2010)

Medical Malpractice— Rule 9(j) certification—extension of time—only for filing complaint

The complaint of a plaintiff who did not follow the special pleading requirements of N.C.G.S. § 1A-1, Rule 9(j) was properly dismissed by the trial court, and the Court of Appeals was reversed, where plaintiff filed a complaint five days before the

statute of limitations expired and then moved for an extension to file the 9(j) statement. Even though the limitations period can be extended for 120 days under Rule 9(j), this extension is for the limited purpose of filing a complaint; there is no language indicating that the time period can also be used to locate a certifying expert, add new defendants, and amend a defective pleading, as plaintiff did here.

Justice HUDSON dissenting.

Chief Justice PARKER and Justice TIMMONS-GOODSON join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 196 N.C. App. ——, 675 S.E.2d 687 (2009), reversing an order entered on 10 March 2008 by Judge Cy A. Grant, Sr. in Superior Court, Hertford County dismissing plaintiff's complaint. On 27 August 2009, the Supreme Court allowed defendants' petition for discretionary review of additional issues. Heard in the Supreme Court 16 November 2009.

Gugenheim Law Offices, P.C., by Stephen J. Gugenheim, for plaintiff-appellee.

Harris, Creech, Ward and Blackerby, P.A., by Thomas E. Harris, W. Gregory Merritt, and Jay C. Salsman, for defendant-appellants Patricia Evelyn Dix, N.P., Steven Ferguson, M.D., and Eastern Carolina Family Practice, P.A.

BRADY, Justice.

This case presents the question whether a complaint alleging medical malpractice may be amended after the expiration of the two-year statute of limitations to include an expert certification as required by North Carolina Rule of Civil Procedure 9(j) (Rule 9(j)). We have previously held that "[a]llowing a plaintiff to file a medical malpractice complaint and to then wait until after the filing to have the allegations reviewed by an expert would pervert the purpose of Rule 9(j)." *Thigpen v. Ngo*, 355 N.C. 198, 204, 558 S.E.2d 162, 166-67 (2002). Because our decision in *Thigpen* controls this case, we reverse the decision of the Court of Appeals.

FACTUAL AND PROCEDURAL BACKGROUND

On 29 March 2006, nearly two years after his father passed away on 3 April 2004, plaintiff Lenton Brown commenced a *pro se* civil

action as administrator of his father's estate. In the complaint plaintiff alleged negligence, wrongful death, and medical malpractice against the following parties: Guardian Care of Ahoskie; Steve Jones, as Administrator of Guardian Care of Ahoskie; Kindred Hospitals East, L.L.C.; Kindred Nursing Centers East, L.L.C.; Ventas, Inc.; and Dr. Steven Ferguson.

Though plaintiff's complaint alleged medical malpractice, it failed to comply with the special pleading requirements of Rule 9(j). Under Rule 9(j), a pleading alleging medical malpractice "shall be dismissed" unless it "specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness . . . and who is willing to testify that the medical care did not comply with the applicable standard of care." N.C.G.S. § 1A-1, Rule 9(j) (2009). Two days after filing the complaint, plaintiff filed a "Motion for 9 J Extension," requesting a "120 day extension on filing a 9 J statement." Plaintiff based this motion on the provision in Rule 9(j) granting trial courts the discretion to extend the statute of limitations for a 120-day period to allow a plaintiff to file a medical malpractice complaint. On 2 June 2006, the trial court granted plaintiff's motion for a 120-day extension and made it retroactive to 29 March 2006.

Thereafter, on 11 July 2006, plaintiff filed an amended complaint, through counsel, naming the following parties as defendants: Kindred Nursing Centers East, L.L.C.; Kindred Healthcare Operating, Inc.; Kindred Healthcare, Inc.; Patricia Evelyn Dix, N.P.; Steven Ferguson, M.D.; and Eastern Carolina Family Practice, P.A. On 9 November 2006, the trial court dismissed with prejudice plaintiff's claims against defendants Kindred Nursing Centers East, L.L.C., Kindred Healthcare Operating, Inc., and Kindred Healthcare, Inc. The remaining defendants, Patricia Evelyn Dix, Steven Ferguson, and Eastern Carolina Family Practice, filed a motion on 18 September 2007 to dismiss the complaint for, among other things, failure to comply with the special pleading requirements of Rule 9(j). On 7 March 2008, the trial court allowed defendants' motion and dismissed plaintiff's complaint with prejudice. Plaintiff appealed to the Court of Appeals.

On 5 May 2009, a divided panel of the Court of Appeals reversed the trial court's order dismissing plaintiff's complaint. *Brown v. Kindred Nursing Ctrs. E., L.L.C.*, 196 N.C. App. ——, 675 S.E.2d 687 (2009). The Court of Appeals concluded that plaintiff corrected his defective complaint by filing an amended complaint with the requi-

site expert certification during the 120-day extension granted by the trial court. *Id.* at ——, 675 S.E.2d at 691. The dissenting judge argued that the trial court properly dismissed plaintiff's complaint since the medical care at issue had not been reviewed by an expert before plaintiff filed his original complaint. *Id.* at ——, 675 S.E.2d at 692-93 (Elmore, J., dissenting). Defendants now appeal to this Court as of right based on the dissenting opinion at the Court of Appeals. This Court also allowed defendants' petition for discretionary review as to additional issues on 27 August 2009.

ANALYSIS

The statute of limitations for "[a]ctions for damages on account of the death of a person caused by the wrongful act, neglect or fault of another" is two years from the date of death. N.C.G.S. § 1-53(4) (2009). Because plaintiff's father died on 3 April 2004, the statute of limitations, absent a valid extension, expired on 3 April 2006. In granting plaintiff's "Motion for 9 J Extension," the trial court attempted to extend the statute of limitations 120 days from 29 March 2006, the date on which plaintiff filed his original complaint. Thus, the question presented by this case is whether the trial court issued a valid extension of the statute of limitations under Rule 9(j).

The leading case addressing amended complaints and the statute of limitations under Rule 9(j) is *Thigpen v. Ngo*, 355 N.C. 198, 558 S.E.2d 162. In *Thigpen*, the plaintiff filed a complaint lacking an expert certification during a 120-day extension of the statute of limitations. *Id.* at 199-200, 558 S.E.2d at 164. After the 120-day extension expired, the plaintiff filed an amended complaint that included an expert certification. *Id.* at 200, 558 S.E.2d at 164. This Court held that the trial court properly dismissed the plaintiff's complaint for two reasons: (1) "[O]nce a party receives and exhausts the 120-day extension of time in order to comply with Rule 9(j)'s expert certification requirement, the party cannot amend a medical malpractice complaint to include expert certification"; and (2) "Rule 9(j) expert review must take place before the filing of the complaint." *Id.* at 205, 558 S.E.2d at 167.

Though similar in many respects, there are slight variations in the procedural posture underlying *Thigpen* and the present case. In *Thigpen* the plaintiff filed a motion for a 120-day extension of the statute of limitations before filing an initial complaint. Furthermore, the plaintiff in *Thigpen* did not file a certified complaint until after the 120-day extension had expired. Despite these procedural differ-

ences, both cases challenge the extent to which Rule 9(j) allows a party to amend a deficient medical malpractice complaint.

To resolve this question in the medical malpractice context, the specific policy objectives embodied in Rule 9(j) must be considered. As we explained in *Thigpen*, "[t]he legislature's intent was to provide a more specialized and stringent procedure for plaintiffs in medical malpractice claims through Rule 9(j)'s requirement of expert certification prior to the filing of a complaint." *Id.* at 203-04, 558 S.E.2d at 166. To lessen the additional burden of this special procedure, the legislature permitted trial courts to extend the statute of limitations "for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule." N.C.G.S. § 1A-1, Rule 9(j). This Court's holding in *Thigpen* maintained the balance struck by the legislature between ensuring access to the courts for resolution of medical malpractice claims and protecting health care providers from potentially frivolous suits.

With this legislative background in mind, we now turn to an analysis of the present case. Here, plaintiff filed a complaint five days before the statute of limitations expired and then moved for an extension to file a "9 J statement." However, Rule 9(j) only permits an extension of the statute of limitations "to file a complaint." Despite the wording of plaintiff's motion, Rule 9(j) makes no mention of a "9 J statement" or any other document outside of a complaint that can be submitted to demonstrate expert certification.

Furthermore, plaintiff's sole reason for requesting an extension of the statute of limitations is inconsistent with the General Assembly's purpose behind enacting Rule 9(j). Here, plaintiff did not move for a 120-day extension to locate a certifying expert before filing his complaint. Rather, plaintiff alleged malpractice first and then sought to secure a certifying expert. This is the exact course of conduct the legislature sought to avoid in enacting Rule 9(j). "[P]ermitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature." *Thigpen*, 355 N.C. at 204, 558 S.E.2d at 166.

In addition to using the 120-day extension of the statute of limitations to locate a certifying expert, plaintiff added new defendants to the lawsuit during this period. In fact, two of the three remaining defendants, Patricia Evelyn Dix and her employer Eastern Carolina Family Practice, P.A., were first included as defendants in the

amended complaint. Because Dix and her employer were not named in the initial complaint, plaintiff argues that proper certification attached to the only complaint filed against these two defendants. As such, plaintiff contends the trial court should not have dismissed the amended complaint with respect to Dix and Eastern Carolina Family Practice since Rule 9(j) certification attached to the "original complaint (or first pleading) that alleged medical malpractice by Defendant Dix." This argument is flawed for four reasons.

First, while it may be true that the amended complaint named Dix and her employer as defendants for the first time, the amended complaint challenged the same medical care as the original complaint. According to Rule 9(j)(1), the complaint "shall be dismissed" unless "[t]he pleading specifically asserts that the *medical care* has been reviewed by a person who is reasonably expected to qualify as an expert witness." (Emphasis added.) Rather than questioning whether certification occurred before plaintiff added individual defendants to the suit, the rule requires us to determine whether certification occurred before plaintiff challenged the overall medical care at issue. Litigants cannot circumvent the requirements of Rule 9(j) by adding new names to the same claims. Even though plaintiff included Dix and her employer as defendants for the first time in the amended complaint, the trial court properly dismissed the amended complaint with respect to all remaining defendants since the same medical care was at issue as that alleged in the original complaint.

Second, plaintiff did not file the amended complaint alleging malpractice against Dix and her employer until 11 July 2006, well after the two-year statute of limitations had expired on 3 April 2006. Although plaintiff requested a 120-day extension on 31 March 2006, this request was made two days after he filed the original complaint. As already discussed, the trial court had no authority to extend the statute of limitations in order for plaintiff to file a "9 J statement." Therefore, since Rule 9(j) provided no grounds for an extension of the statute of limitations, plaintiff did not file a timely complaint against Dix and her employer.

Third, assuming *arguendo* that plaintiff could amend his complaint to comply with Rule 9(j) after the two-year statute of limitations expired, the inclusion of Dix and her employer in the amended complaint would not relate back to the filing of the original complaint. Under Rule 15(c) of the North Carolina Rules of Civil Procedure, a claim against new parties does not relate back to the original complaint. *See Crossman v. Moore*, 341 N.C. 185, 187, 459

S.E.2d 715, 717 (1995). Thus, plaintiff's complaint against Dix and her employer is untimely under Rule 15(c), as well as under Rule 9(j).

Fourth, even if we were to conclude that the trial court had the statutory authority to grant plaintiff an extra 120 days to file a "9 J statement," this is not what plaintiff did. Rather than simply notifying the trial court that he had located an expert willing to testify in support of his medical malpractice allegations, plaintiff amended the complaint and added new defendants. The record does not demonstrate that plaintiff ever received specific permission from the trial court to file an amended complaint that named new parties. Thus, in addition to requesting an extension of the statute of limitations inconsistent with the procedure set out in Rule 9(j), plaintiff also lacked a basis for filing suit against Dix and her employer after expiration of the two-year statute of limitations.

Although plaintiff could not amend his complaint outside the limitations period, he nevertheless maintained an alternate path to the courtroom. In *Brisson v. Santoriello* this Court concluded that Rule 9(j) does not prevent parties from voluntarily dismissing a nonconforming complaint and filing a new complaint with proper certification. 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000). Unlike filing and later amending a defective complaint, dismissal has "the effect of leaving defendant exactly where he was prior to the filing of plaintiff's complaint—free from the taint of wrongful accusation or legal detriment." *Augur v. Augur*, 356 N.C. 582, 590, 573 S.E.2d 125, 131 (2002) (citations omitted). This procedural distinction is also consistent with the language of Rule 9(j), which specifically states that a nonconforming complaint "shall be dismissed"—not that it "shall be dismissed or amended." As stated in *Thigpen*, "we find the inclusion of 'shall be dismissed' in Rule 9(j) to be more than simply a choice of grammatical construction." 355 N.C. at 202, 558 S.E.2d at 165 (citation and internal quotation marks omitted). Under *Brisson*, by noticing a defect in the original complaint and voluntarily dismissing it, a plaintiff has acted consistently with the statute and can then refile the complaint in accordance with Rule 41 of the North Carolina Rules of Civil Procedure. Here, plaintiff attempted to amend his complaint under Rule 15 rather than voluntarily dismissing it and then refiling it with the proper Rule 9(j) certification and consistently with Rule 41.

Moreover, in *Brisson* the plaintiffs had complied with every portion of Rule 9(j) except for including the certification in the complaint. In fact, the plaintiffs in *Brisson* noted in a motion to amend

filed with the trial court before they took a voluntary dismissal that "a physician has reviewed the subject medical care, but it was inadvertently omitted from the pleading." 351 N.C. at 592, 528 S.E.2d at 569 (quotation marks omitted). In this case plaintiff specifically admitted in his "Motion for 9 J Extension" that he had been unable to find a physician willing to testify on his behalf before the filing of the complaint, stating that "doctors in this area while privately saying that there is clearly evidence of medical malpractice are reluctant to say so on the record." Rule 9(j) requires that the review be made not only by an expert, but by an expert who is "willing to testify." N.C.G.S. § 1A-1, Rule 9(j). In *Thigpen*, this Court noted that no evidence or statement demonstrated that the required 9(j) review occurred before the filing of the complaint, and "[a]llowing a plaintiff to file a medical malpractice complaint and to then wait until after the filing to have the allegations reviewed by an expert would pervert the purpose of Rule 9(j)." 355 N.C. at 204, 558 S.E.2d at 166-67. In the case *sub judice* plaintiff not only failed to allege that the case had been reviewed before the filing of the complaint by an expert willing to testify, but he specifically stated that such review had not taken place. Therefore, the reasoning in *Thigpen*, rather than *Brisson*, is controlling.

We find it instructive that the legislature has made no changes to Rule 9(j) in the eight years since this Court's ruling in *Thigpen*. "The legislature's inactivity in the face of the Court's repeated pronouncements" on an issue "can only be interpreted as acquiescence by, and implicit approval from, that body." *Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 9, 418 S.E.2d 648, 654 (1992) (citations omitted). Such legislative acquiescence is especially persuasive on issues of statutory interpretation. When the legislature chooses not to amend a statutory provision that has received a specific interpretation, we assume lawmakers are satisfied with that interpretation. *Wells v. Consol. Jud'l Ret. Sys. of N.C.*, 354 N.C. 313, 319, 553 S.E.2d 877, 881 (2001). Here, the legislature has made no indication that our holding in *Thigpen* should be altered. Therefore, Rule 9(j) should receive the same interpretation today that this Court gave it eight years ago. *See, e.g.*, *State v. Jones*, 358 N.C. 473, 484, 598 S.E.2d 125, 132 (2004) (concluding that because the General Assembly had not amended a criminal statute to convert possession of cocaine to a misdemeanor, "it is clear that the legislature has acquiesced in the practice of classifying the offense of possession of cocaine as a felony").

Although we recognize plaintiff initiated this medical malpractice action as a *pro se* litigant, it is well settled that "the rules [of civil procedure] must be applied equally to all parties to a lawsuit, without regard to whether they are represented by counsel." *Goins v. Puleo*, 350 N.C. 277, 281, 512 S.E.2d 748, 751 (1999) (stating that "the Rules of Civil Procedure promote the orderly and uniform administration of justice, and all litigants are entitled to rely on them"). This Court articulated many years ago its duty to enforce rules of procedure uniformly and explained: "When litigants resort to the judiciary for the settlement of their disputes, they are invoking a public agency, and they should not forget that rules of procedure are necessary, and must be observed . . . ." *Pruitt v. Wood*, 199 N.C. 788, 790, 156 S.E. 126, 127 (1930) (citation omitted); *see also McNabb v. United States*, 318 U.S. 332, 347 (1943) ("The history of liberty has largely been the history of observance of procedural safeguards."); *State v. Fennell*, 307 N.C. 258, 263, 297 S.E.2d 393, 396 (1982) (explaining that the rules of appellate procedure are "mandatory and not merely directory").

Plaintiff's procedural errors in the present case require us to reaffirm the holding of *Thigpen*. "Allowing a plaintiff to file a medical malpractice complaint and to then wait until after the filing to have the allegations reviewed by an expert would pervert the purpose of Rule 9(j)." *Thigpen*, 355 N.C. at 204, 558 S.E.2d at 166-67.

CONCLUSION

In sum, given the plain language of Rule 9(j) and our prior holding in *Thigpen*, plaintiff failed to file a valid medical malpractice complaint against defendants before the statute of limitations expired. Even though the limitations period can be extended for 120 days under Rule 9(j), this extension is for the limited purpose of filing a complaint. There is no language in Rule 9(j) that indicates this time period can also be used, as plaintiff did here, to locate a certifying expert, add new defendants, and amend a defective pleading. Because plaintiff failed to follow the special pleading requirements dictated by the General Assembly for medical malpractice actions, Rule 9(j) mandates that his complaint "shall be dismissed." Because of our holding, we need not address the other issues or arguments raised by the parties. Accordingly, we reverse the Court of Appeals and reinstate the trial court's order dismissing plaintiff's complaint.

REVERSED.

Justice HUDSON dissenting.

Because I do not agree that *Thigpen v. Ngo*, 355 N.C. 198, 558 S.E.2d 162 (2002), controls here and because the majority opinion demonstrates a fundamental misunderstanding of both the plain language of North Carolina Rule of Civil Procedure 9(j) (Rule 9(j)), which allows for an extension of the statute of limitations in a medical malpractice case, and the plain language of North Carolina Rule of Civil Procedure 15(a) (Rule 15(a)), which allows a plaintiff to amend his complaint as a matter of course and without leave of the trial court before the filing of a "responsive pleading" by a defendant, I respectfully dissent.

This is a medical malpractice case, initially filed by the plaintiff *pro se*, on 29 March 2006, alleging that negligence and medical malpractice caused the death of his father on 3 April 2004. The applicable statute of limitations provides that "[a]ctions for damages on account of the death of a person caused by the wrongful act, neglect or fault of another" must be brought within two years from the date of the person's death. N.C.G.S. § 1-53(4) (2009). Under section 1-53(4), the statute of limitations would not have run on plaintiff's claims on account of the death of his father until 3 April 2006. Until that time, plaintiff could have filed suit naming any and all persons and entities and alleging any and all claims he believed had merit.

Rule 9(j) contains the special provisions which are at issue here and which state, in pertinent part:

> Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court . . . may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.

Id. § 1A-1, Rule 9(j) (2009). Rule 9(j) also contains an expert certification requirement, which states that the complaint "shall be dismissed" unless it specifically alleges that "the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence . . . who is willing to testify that the medical care did not comply with the applicable standard of care" or "has been reviewed by a person that the

complainant will seek to have qualified as an expert witness . . . under Rule 702(e) . . . who is willing to testify that the medical care did not comply with the applicable standard of care." *Id.*, Rule 9(j)(1), (2). Significantly, Rule 9(j) contains no language addressing when the expert must conduct the review of the medical care. Further, Rule 9(j) does not require that the expert certification be contained in the original complaint, nor does it address in any way the existing Rules of Civil Procedure regarding amendments to pleadings, such as Rule 15(a).

Plaintiff filed his complaint *pro se* on 29 March 2006, and on 31 March 2006, before the expiration of the statute of limitations, he filed a "Motion for 9 J Extension." On 31 May 2006, a superior court judge allowed the motion for the 120-day extension, "retroactive to March 29, 2006." By entry of this order, the trial judge extended the statute of limitations for 120 days from 29 March 2006 until 27 July 2006.[1] Before the expiration of that period, plaintiff acquired counsel and filed: (1) a motion noting that, with the exception of defendant Kindred Nursing Centers East, L.L.C.,[2] none of the other original defendants had answered plaintiff's original 29 March 2006 *pro se* complaint, and consequently, "leave of Court is not required for purposes of filing" his amended complaint as to those defendants; and (2) an amended complaint adding two new parties defendant, Patricia Dix, N.P. and Eastern Carolina Family Practice, P.A. ("ECFP"). On 18 September 2007, defendants Patricia Dix, N.P., ECFP, and Steven Ferguson, M.D., who was named in plaintiff's original *pro se* complaint, moved to dismiss plaintiff's complaint. On 10 March 2008, the trial court entered an order allowing their motion to dismiss "pursuant to Rules 9(j), 12(b)(6), and 41 of the North Carolina Rules of Civil Procedure" and dismissed plaintiff's complaint with prejudice.

A majority of the Court of Appeals reversed the trial court, because plaintiff "sought and received a Rule 9(j) extension and filed his amended complaint complying with Rule 9(j) within the extended limitations period." *Brown v. Kindred Nursing Ctrs. E., L.L.C.*, 196 N.C. App. ——, ——, 675 S.E.2d 687, 689 (2009). The majority in the

1. In effect, the trial judge extended the statute of limitations for 116 days from 3 April 2006 until 27 July 2006. This action complies with the plain language of Rule 9(j) allowing a superior court judge "to extend the statute of limitations for a period not to exceed 120 days."

2. In November 2006 plaintiff voluntarily dismissed Kindred Nursing Centers, East, L.L.C., Kindred Healthcare Operating, Inc., and Kindred Healthcare, Inc., who therefore are not involved in this appeal.

Court of Appeals went on to explain that "[o]rdinarily, the issue with an amended [complaint]" filed *after* the statute of limitations has expired "is whether the amendment[s] 'relate[] back' " to a time *before* the statute of limitations expired. *Id.* at ——, 675 S.E.2d at 690-91. However, the court noted that because both the original and amended complaint were filed before the expiration of the extended statute of limitations, the "relation back" doctrine does not apply and that issue is not involved here. *Id.* at ——, 675 S.E.2d at 691. The dissenting opinion would have affirmed the dismissal based on *Thigpen*, which the dissenter maintained requires that the medical care be reviewed by an expert before the plaintiff files the original complaint in order to comply with Rule 9(j). *Id.* at ——, 675 S.E.2d at 692 (Elmore, J., dissenting).

Here the majority concludes that plaintiff did not receive a valid extension under Rule 9(j) because: (1) plaintiff titled his *pro se* request for an extension of the statute of limitations under Rule 9(j) as a "Motion for 9 J Extension" and the trial court's order extending the statute of limitations merely states that it "grants Plaintiff's motion for a 120 day extension for filing a 9 J statement"; and (2) plaintiff's sole reason for requesting the extension—to locate an expert who was willing to testify on the record as to the standard of care—"is inconsistent with the General Assembly's purpose behind enacting Rule 9(j)." I believe plaintiff did obtain a valid extension of the statute of limitations from 3 April 2006 until 27 July 2006 under Rule 9(j).

Rule 9(j) allows a superior court judge to extend the statute of limitations for a period of up to 120 days for a plaintiff "to file a complaint in a medical malpractice action in order to comply with this Rule." N.C.G.S. § 1A-1, Rule 9(j). In essence, when plaintiff filed his *pro se* motion requesting an extension of time to obtain and include a Rule 9(j) certification, typically included in the complaint, he was requesting time to file a complaint that complied with Rule 9(j). Despite the imprecise language, it appears that plaintiff's *pro se* motion could only mean that he was seeking additional time to file a complaint that complied with Rule 9(j). Thus, by extending the statute of limitations so that plaintiff could file a Rule 9(j) certification, the trial court was extending the time in which plaintiff could file a complaint. Nothing in Rule 9(j) indicates that, by enacting that rule, the legislature intended to prevent a plaintiff in a medical malpractice case from filing an original complaint before requesting a Rule 9(j) extension to locate a certifying expert who will testify on

the record. In fact, Rule 9(j)'s plain language speaks of "a" complaint, not an original or initial complaint. *Id.*

Rather than being based upon the plain language of Rule 9(j), the majority's interpretation here originates from dictum in this Court's opinion in *Thigpen*, to the effect that "[p]ermitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature." 355 N.C. at 204, 558 S.E.2d at 166. However, *Thigpen* is procedurally and factually distinguishable from this case in several material ways that lead me to conclude *Thigpen* does not control.

Here plaintiff filed the original, defective complaint before the statute of limitations ran, obtained a valid extension of the statute of limitations under Rule 9(j), and filed an amended complaint that complied with Rule 9(j) within the extended limitations period. In *Thigpen*, the plaintiff requested and obtained a valid extension of the statute of limitations under Rule 9(j) before filing any complaint. *Id.* at 199, 558 S.E.2d at 163-64. Then, she filed the original complaint lacking a Rule 9(j) certification after the original statute ran, but within the extended limitations period. *Id.* at 200, 558 S.E.2d at 164. She then sought to file an amended complaint containing a Rule 9(j) certification after the extended limitations period had passed. *Id.* Significantly, in *Thigpen* we held:

> In sum, based on this record, we hold that once a party receives *and exhausts* the 120-day extension of time in order to comply with Rule 9(j)'s expert certification requirement, the party cannot amend a medical malpractice complaint to include expert certification. Further, we hold that Rule 9(j) expert review must take place before the filing of the complaint.

355 N.C. at 205, 558 S.E.2d at 167 (emphasis added). In contrast to *Thigpen*, plaintiff here filed a complaint that complied with Rule 9(j)'s expert certification requirement before exhausting the extended limitations period. Furthermore, the expert review occurred before plaintiff filed the amended complaint, following a course of action that is not addressed by our holding in *Thigpen*.

The fact that the plaintiff in *Thigpen* filed the amended complaint after the expiration of the extended limitations period, not within it as plaintiff did here, is a critical distinction. This is because amendments to a complaint made after the statute of limitations has

expired, as occurred in *Thigpen*, necessarily invoke the "relation back" analysis, contained in N.C.G.S. § 1A-1, Rule 15(c), whereas the complaint here does not. In contrast, here plaintiff's ability to amend his complaint was subject to Rule 15(a), which states, in pertinent part:

> (a) *Amendments.*—A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party[.]

N.C.G.S. § 1A-1, Rule 15(a) (2009). Under Rule 15(a), with the exception of Kindred Nursing Centers East, L.L.C., plaintiff did not need leave of court to amend his complaint because none of the other defendants had filed an answer to plaintiff's original complaint. *See, e.g.*, *Pierce v. Johnson*, 154 N.C. App. 34, 37, 571 S.E.2d 661, 663 (2002) ("Rule 15(a) of the North Carolina Rules of Civil Procedure allows a party to 'amend his pleadings once as a matter of course at any time before a responsive pleading is served.' Rule 7 of the North Carolina Rules of Civil Procedure identifies all of the pleadings that are allowed in a civil case and makes it clear that motions and other papers are not considered pleadings. Therefore, threshold motions under Rule 12 and dispositive motions under other rules are not responsive pleadings that prevent an amendment without leave of court under Rule 15(a)." (citing N.C.G.S. § 1A-1, Rules 7, 15(a) (2001); *Johnson v. Bollinger*, 86 N.C. App. 1, 7, 356 S.E.2d 378, 382 (1987); 1 G. Gray Wilson, *North Carolina Civil Procedure*, § 15-2, at 292 (2d ed. 1995))). This Court has noted:

> The date of the filing of the motion, rather than the date the court rules on it, is the crucial date in measuring the period of limitations. The timely filing of the motion to amend, if later allowed, is sufficient to start the action within the period of limitations. Plaintiff's amendment was therefore not barred by the statute of limitations, and whether it would "relate back" to the filing of the original complaint was immaterial.

Mauney v. Morris, 316 N.C. 67, 71-72, 340 S.E.2d 397, 400 (1986). Plaintiff's amended complaint here has the effect of simply superseding his original complaint. *See Hughes v. Anchor Enters., Inc.*, 245 N.C. 131, 135, 95 S.E.2d 577, 581 (1956) (citation omitted).

Even if *Thigpen* does control, for this Court to require that the medical care be reviewed before the filing of the original complaint is not only a legislative act, but one that runs exactly contrary to the plain meaning of 9(j). Rule 9(j) permits the plaintiff to file a motion before the expiration of the statute of limitations which, if allowed, can extend the statute of limitations for up to 120 days "in order to comply with this Rule." To say that plaintiff has to have complied with the Rule before the extension period renders the extension meaningless. Such a conclusion would mean that, in order to get an extension of the statute of limitations "to comply with" the Rule, plaintiff would have to not need the extension.

Finally, the majority's approach would completely undercut the purpose of the 120-day extension permitted under Rule 9(j). The majority here even recognizes that the legislature created the 120-day extension in order to "lessen the additional burden" of the more "stringent procedure" now required in medical malpractice claims. The Court of Appeals recognized this as well. *Brown*, 196 N.C. App. at ——, 675 S.E.2d at 691 (majority). Requiring plaintiff to have had the review completed before the extension period would do the opposite. I do not believe that this is logical or consistent with the intent of the legislature. I would affirm the Court of Appeals, and thus, I respectfully dissent.

Chief Justice PARKER and Justice TIMMONS-GOODSON join in this dissenting opinion.

WILLIAM WOOD JOHNSON AND WIFE, SUZANNE WAYNE JOHNSON v. TIMOTHY P. SCHULTZ AND WIFE, SHELLEY D. SCHULTZ, DONALD A. PARKER, JERRY HALBROOK, TRUSTEE, AND STATE FARM BANK, F.S.B.

No. 75A09

(Filed 15 April 2010)

Real Estate— embezzlement by closing attorney—risk of loss—born by buyers

The trial court erred by granting summary judgment for the buyers in an action arising from the embezzlement of escrow funds by an attorney during a real estate closing, and the Court of Appeals correctly reversed that judgment. Considering the pro-

cedures customarily used for residential real estate closings and applying long-standing principles of equity, the buyers must bear the loss caused by the misconduct of their own attorney. However, in this case, there is evidence of a prior relationship with the attorney by the sellers, and the matter was remanded for a factual inquiry into whether the attorney also represented the sellers during the closing process.

Justice TIMMONS-GOODSON dissenting.

Justice HUDSON joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 195 N.C. App. ——, 671 S.E.2d 559 (2009), reversing and remanding a judgment entered on 16 October 2007 by Judge Jack A. Thompson in Superior Court, Johnston County. Heard in the Supreme Court on 8 September 2009.

Woodruff, Reece & Fortner, by Gordon C. Woodruff and Mary McCullers Reece, for plaintiff-appellees.

Pendergrass Law Firm, PLLC, by James K. Pendergrass, Jr., for defendant-appellants Timothy and Shelley Schultz, Jerry Halbrook, and State Farm Bank, F.S.B.

Katherine Jean, Counsel, and David R. Johnson, Deputy Counsel, for North Carolina State Bar, amicus curiae.

Horack Talley Pharr & Lowndes, P.A., by Robert B. McNeill and Phillip E. Lewis, for North Carolina Land Title Association, amicus curiae.

MARTIN, Justice.

This appeal presents the question of how North Carolina law allocates the risk of loss between a buyer and a seller when the closing attorney in a residential real estate transaction embezzles the sales proceeds. We conclude that in most residential closings buyers possess practical advantages over sellers in terms of protecting themselves from attorney misconduct. Therefore, under principles of equity recognized by this Court as early as 1875, buyers must bear the risk of such losses.

The facts of the instant appeal arise from a real estate transaction involving William and Suzanne Johnson (sellers or plaintiffs) and Timothy and Shelley Schultz (buyers). On 17 November 2005, buyers

contracted to purchase sellers' home in Benson, North Carolina for $277,500. Buyers hired attorney Donald Parker to represent them during the closing process. On behalf of buyers, Parker searched the title to the property, obtained title insurance, prepared and recorded a power of attorney, prepared the closing documents, and conducted the closing. Sellers were familiar with Parker from past dealings and paid him $125 to prepare a deed to the property. On 3 January 2006, the parties closed the transaction at Parker's law office.

To help pay for the property, buyers financed $200,320.24 from State Farm Bank (the Bank). On the day of closing, the Bank wired this money to Parker's trust account. Buyers paid the remaining balance from their personal funds. On 3 January 2006 at 4:46 p.m., Parker recorded the general warranty deed and the deed of trust. Thereafter, Parker tendered sellers a check drawn from his trust account for the net proceeds of the sale. When sellers attempted to cash Parker's check in May 2006, it was returned to them marked "NSF" for non-sufficient funds. The State Bar's subsequent investigation revealed that Parker had embezzled the closing proceeds on 4 January 2006.

On 13 July 2006, sellers filed a complaint against buyers, Parker, Jerry Halbrook as trustee under the deed of trust, and the Bank (defendants). Sellers filed an amended complaint against defendants on 20 July 2007 asking the trial court to set aside the conveyance of property and revert fee title back to sellers. In the alternative, sellers requested $277,500 in monetary damages. All defendants except for Parker—who admitted all allegations in the complaint—moved for summary judgment. The trial court ultimately concluded that sellers must bear the risk of loss since they were entitled to the sales proceeds at the time of the embezzlement. The trial court granted defendants' summary judgment motion, and sellers appealed.

The Court of Appeals, in a divided opinion, reversed the trial court's grant of summary judgment in favor of defendants. *Johnson v. Schultz*, 195 N.C. App. ——, 671 S.E.2d 559 (2009). The Court of Appeals concluded that placing the risk of loss on buyers is "not only more consistent with how residential real estate transactions are generally closed in this state, but also produces a more equitable result." *Id.* at ——, 671 S.E.2d at 566. Since the trial court did not consider whether Parker acted as sellers' attorney—a disputed issue of fact—the Court of Appeals remanded the case with instructions for the trial court to consider this issue to determine if sellers must share in the loss. *Id.* at ——, 671 S.E.2d at 570.

Before turning to the merits of this appeal, we briefly address two preliminary issues. First, we observe that the parties utilized the settlement method rather than the escrow method at closing. All three judges at the Court of Appeals agreed on this point, and the majority opinion describes both closing methods in detail. *Id.* at ——, 671 S.E.2d at 563-64. Second, because the parties did not engage in an escrow closing, the entitlement rule applied in *GE Capital Mortgage Services, Inc. v. Avent*, 114 N.C. App. 430, 442 S.E.2d 98 (1994), is not applicable to the present case. The entitlement rule provides an equitable framework for placing losses during escrow transactions on "the party who was entitled to the property at the time of the . . . embezzlement." *Id.* at 432, 442 S.E.2d at 100. *Avent* applied the entitlement rule to an escrow method closing, *id.*, and we decline to extend it to settlement method closings.

Having resolved these preliminary issues, we now turn to principles of equity that have been applied under North Carolina jurisprudence to allocate losses between innocent parties. The court in *Avent* stated that its application of the entitlement rule was "consistent with the equitable principle that where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence or by his negligent conduct made it possible for the loss to occur, must bear the loss." 114 N.C. App. at 435, 442 S.E.2d at 101 (internal quotation marks omitted) (quoting *Zimmerman v. Hogg & Allen, P.A.*, 286 N.C. 24, 30, 209 S.E.2d 795, 799 (1974) (alterations in original) (citations omitted)). Thus, while the entitlement rule is limited to escrow closings, there are no similar restrictions on the broader equitable principle underlying the *Avent* decision.

As early as 1875, this Court declared that "no principle of equity is better established than that where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must sustain it." *State ex rel. Barnes v. Lewis*, 73 N.C. 138, 144 (1875). This equitable maxim is not unique to this jurisdiction and is a foundational principle of American common law. *See, e.g.*, *Eliason v. Wilborn*, 281 U.S. 457, 462, 74 L. Ed. 962, 967 (1930) ("As between two innocent persons[,] one of whom must suffer the consequence of a breach of trust[,] the one who made it possible by his act of confidence must bear the loss."); 1 William Lawrence Clark & Henry H. Skyles, *A Treatise on the Law of Agency* § 493, at 1070 (1905) ("[W]here one or two innocent persons must suffer from the agent's wrongful act, it is just and reasonable that the

principal, who has put it in the agent's power to commit such wrong, should bear the loss, rather than the innocent third person." (citations omitted)); 2 John Norton Pomeroy, *Equity Jurisprudence* § 363, at 9 (Spencer W. Symons ed., 5th ed. 1941) (" 'He who trusts most must lose most.' " (citations omitted)).

A principal is typically only responsible "to third parties for injuries resulting from the fraud of his agent committed during the existence of the agency and within the scope of the agent's actual or apparent authority from the principal." *Norburn v. Mackie*, 262 N.C. 16, 23, 136 S.E.2d 279, 284 (1964) (citations omitted). In the present case there is no evidence that Parker acted within the scope of his actual or apparent authority when he embezzled the sales proceeds.

Even where the law of agency does not apply, however, equitable principles continue to operate. *See Goode v. Hawkins*, 17 N.C. 317, 319, 17 N.C. 393, 396-97 (1833) ("No one can [in equity] be permitted to set up a benefit derived through the fraud of another, although he may not have had a personal agency in the imposition." (citation omitted)). Thus, while agency law does not require the principal to absorb losses caused by actions outside the agent's authority, equity may nonetheless place these losses on the party "who first repose[d] the confidence, or by his negligent conduct made it possible for the loss to occur." *Wilmington & Weldon R.R., Co. v. Kitchin*, 91 N.C. 39, 44 (1884) (citing, *inter alia*, *Barnes*, 73 N.C. 138).

To determine which party reposed confidence in Parker, we must consider the customary procedures for closing real estate transactions in North Carolina. Although both parties in a residential real estate closing are free to hire their own attorney, "[t]he most common practice is for the closing attorney to represent the purchaser and lender while performing limited functions for the seller (such as the preparation of the deed)." Patrick K. Hetrick, Larry A. Outlaw & Patricia A. Moylan, N.C. Real Estate Comm'n, *North Carolina Real Estate Manual* 508 (2008-2009 ed.) (italics omitted) [hereinafter *North Carolina Real Estate Manual*]. In fact, the State Bar instructs that the closing attorney "may prepare the deed as an accommodation to the needs of her client, the buyer, without becoming the lawyer for Seller." N.C. St. B. Formal Ethics Op. 10 (July 14, 2005), *reprinted in North Carolina State Bar Lawyer's Handbook 2008*, at 317 (2008) [hereinafter Ethics Opinion]. Moreover, the buyer's attorney usually "handles or coordinates the closing, prepares the closing

statement(s), and disburses funds." *North Carolina Real Estate Manual* 509.

Because of these customary procedures for residential real estate closings, buyers have recourse to actionable legal claims not available to sellers. By embezzling the funds provided for the purchase of sellers' home, Parker breached fiduciary duties he undertook on behalf of buyers. Buyers also maintain the possibility of recovering a portion of their loss from the Client Security Fund of the North Carolina State Bar (CSF). The CSF reimburses "clients who have suffered financial loss as the result of dishonest conduct of lawyers engaged in the private practice of law in North Carolina." 27 NCAC 1D .1401(a) (Dec. 8, 1994). Accordingly, "it has been regarded as more appropriate for costs flowing from a lawyer's misconduct generally to be borne by the client rather than by an innocent third person." Restatement (Third) of the Law Governing Lawyers § 26 cmt. b (2000).

Furthermore, in a typical residential real estate transaction, closing protection letters place buyers in a better position than sellers to bear any losses that result from attorney misconduct. Closing protection letters, which are usually made available by title insurance companies, protect buyers from closing defects that affect the status of title. *See* 2 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 27-10, at 1195 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999). More particularly, "closing protection service . . . covers losses suffered due to the fraud or dishonesty of the . . . approved attorney in the handling of the protected party's funds or documents in connection with the closing." *Id.* at 1195. Notably, this coverage can only be obtained by "a purchaser, lessee, or lender." *Id.* at 1194. As a result, while insurance coverage is normally an irrelevant inquiry when allocating losses between parties, we find it significant that the market as a whole allows buyers to protect themselves through a means entirely unavailable to sellers. This fact provides further indication that, at least in a typical transaction, buyers are better positioned than sellers to recover losses caused by a dishonest closing attorney.

Although buyers observe that sellers chose not to accept cash or some other surer method of payment, we do not believe the loss here should fall on sellers simply because they adhered to the nearly universal practice of accepting a check drawn from the closing attorney's trust account. *See North Carolina Real Estate Manual* 524 ("The attorney will deposit all funds paid by the purchaser into his

trust account and then will make all required disbursements from the trust account."). As an initial proposition, we are unwilling to accept the consequences likely to result if the standard of practice would require lawyers to possess and disburse tens of thousands of dollars in cash at real estate closings. Moreover, as noted by the Court of Appeals, "shifting the risk of loss based merely on the form of payment the seller accepts would significantly disrupt the way residential real estate closings are handled under our current system." *Johnson v. Schultz*, 195 N.C. App. at ——, 671 S.E.2d at 568-69. Rather, equity dictates that the loss should lie with the party "who first repose[d] the confidence, or by his negligent conduct made it possible for the loss to occur." *Kitchin*, 91 N.C. at 44. Given that the parties here followed the customary procedures in this state for closing residential real estate transactions, we conclude that buyers reposed confidence in Parker as their closing attorney.

In summary, after considering the procedures customarily used for residential real estate closings and applying long-standing principles of equity, we hold that buyers must bear the loss caused by the misconduct of their own retained attorney. We stress that it is the buyer alone in most residential real estate transactions who is legally deemed to repose confidence in the closing attorney through the existence of the attorney-client relationship. In the present case, however, there is evidence that in addition to paying Parker $125 to prepare a deed to the property, sellers had a prior relationship with him. Thus, a factual inquiry must be conducted to determine whether Parker also represented sellers during the closing process. Therefore, we remand this case to the trial court to determine if an attorney-client relationship existed between sellers and Parker.

To determine whether an attorney-client relationship in fact existed between sellers and Parker, the trial court should consider the guidance offered in the Ethics Opinion as to how a closing attorney "may prepare the deed as an accommodation to the needs of her client, the buyer, without becoming the lawyer for Seller." To avoid establishment of an attorney-client relationship, the Ethics Opinion instructs lawyers to make certain clarifications and disclosures about their role in the transaction as well as to abstain from giving the seller legal advice. *Id.* On remand, we instruct the trial court to consider these factors and determine whether Parker, as closing attorney, exceeded the ethical safe harbor in the Ethics Opinion and established an attorney-client relationship with sellers.

To be sure, Parker's misconduct has adversely affected all parties to this proceeding. Although lawyers rarely embezzle closing proceeds, such misconduct has a devastating effect on the party who is ultimately left to incur the loss.[1] While the General Assembly enacted legislation holding settlement agents responsible for a loss liable for "actual damages plus reasonable attorneys' fees" and further requires payment to the injured party of "an amount equal to one thousand dollars ($1,000) or double the amount of interest payable on any loan for the first 60 days after the loan closing," N.C.G.S. § 45A-7 (2009), this statute provides little or no protection when the embezzler is judgment proof.[2]

For the reasons stated, we affirm the decision of the Court of Appeals. We remand this case to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

AFFIRMED.

Justice TIMMONS-GOODSON dissenting.

The majority holds for the first time that innocent buyers in a residential real estate transaction, by virtue of their mere employment of a closing attorney, are liable for the sellers' loss arising from the active malfeasance of the closing attorney. The majority explains that this result is equitable because the buyers are more likely to have insurance. Because the majority's decision inflicts incalculable damage upon the settled law of agency and violates the general rule that prohibits consideration of insurance coverage in determining liability, I respectfully dissent.

It is well established in North Carolina that an attorney-client relationship is based upon principles of agency. *E.g.*, *Dunkley v. Shoemate*, 350 N.C. 573, 577, 515 S.E.2d 442, 444 (1999). A universal rule of agency provides that a principal may not be held liable for the torts of his agent unless the agent's act is (1) expressly authorized by the principal, (2) committed within the scope of his employment and

1. The CSF provides no guarantee of complete relief as it is a discretionary fund that caps recovery sustained by an applicant due to the conduct of one attorney at $100,000. 27 NCAC 1D .1418 (e), (g) (Mar. 6, 1997).

2. The approach used in Virginia ensures that victimized parties are made whole, even if the embezzler is judgment proof. *See* Va. Code Ann. § 6.1-2.21(D) (1999) (requiring settlement agents to maintain malpractice insurance, blanket fidelity bonds or employee dishonesty insurance policies, and surety bonds).

in furtherance of the principal's business, or (3) ratified by the principal. *See*, *e.g.*, *Snow v. DeButts*, 212 N.C. 120, 122, 193 S.E. 224, 226 (1937). Mere employment of an agent is insufficient to impose liability upon the principal for the agent's wrongful acts committed outside the scope of employment. *See id.* at 122-24, 193 S.E. at 226-27; *Salmon v. Pearce*, 223 N.C. 587, 589, 27 S.E.2d 647, 649 (1943) (citations omitted).

Clearly, the acts of embezzlement by attorney Parker far exceeded the scope of his employment or any apparent or actual authority invested in him by either party, and the majority concedes as much. The majority nevertheless determines that the innocent buyers may be held liable for their employment of Parker under the principle that " '[w]here one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence, or by his negligent conduct made it possible for the loss to occur, must bear the loss.' " *Virginia-Carolina Joint Stock Land Bank v. Liles*, 197 N.C. 413, 418, 149 S.E. 377, 379 (1929) (quoting *Wilmington & Weldon R.R. Co. v. Kitchin*, 91 N.C. 39, 44 (1884)). This principle, taken out of context and presented without analysis by the majority, may perhaps appear at first blush to support the majority's proposition that an innocent, non-negligent party may be nonetheless held liable for the malfeasance of an agent. Careful examination of the legal precedent, however, including all the cases relied upon by the majority, quickly reveals that the principle is simply inapplicable to the facts of the present case.

The principle[3] that when one of two persons must suffer loss by the misconduct of a third party, the person who "first reposes the confidence, or by his negligent conduct made it possible for the loss to occur, must bear the loss," *id.*, is generally regarded as a principle of apparent authority under the law of agency. *See*, *e.g.*, *Investors Title Ins. Co. v. Herzig*, 320 N.C. 770, 774, 360 S.E.2d 786, 789 (1987) (stating that "this Court has held with respect to apparent authority that where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence or by his negligent conduct made it possible for the loss to occur, must bear the loss") (citing, *inter alia*, *Zimmerman v. Hogg & Allen, P.A.*, 286 N.C. 24, 30, 209 S.E.2d 795, 799 (1974) (discussing apparent authority)); *Kitchin*, 91 N.C. at 44-45 (holding the principals liable for the fraud of their agent who acted with apparent authority);

3. I refer hereafter to this principle as the "innocence principle" for ease of reading.

Robert E. Lee, *North Carolina Law of Agency and Partnership* § 57, at 73 (6th ed. 1977) (discussing the "innocence principle" as one of apparent authority).

Under apparent authority, a principal may be held liable for the misconduct of his agent if the agent acts within the scope of his apparent authority and the innocent third party has no notice of the limitation of the authority. *See*, *e.g.*, *Zimmerman*, 286 N.C. at 30-31, 209 S.E.2d at 799; 1 William Lawrence Clark & Henry H. Skyles, *Law of Agency* § 493, at 1070-71 (1905) (relating that a principal is bound by even the wrongful acts of his agent as long as the agent was "acting at the time for the principal, and within the scope of the business intrusted to him"). Here, there is no contention that Parker acted with any real or apparent authority when he embezzled the sales proceeds. Thus, the "innocence principle," as a principle of apparent authority, does not apply to the circumstances presented by the instant case.

The "innocence principle" is also sometimes invoked by courts in cases in which the direct loss to one of the parties has been caused by the misconduct of a third party who may not technically be the agent of one of the parties, but whose misconduct was nevertheless somehow enabled by one of the parties. In such cases, one of the parties will invariably be found to be "less innocent", that is, negligent in some manner:

> The maxim is often put in the form of "one of two *equally* innocent parties," etc.; but . . . it is clear that, in general, there is no reason for preferring one of two equally innocent parties, and the loss must in general lie where it has fallen. It seems perfectly clear that the incidence of the loss can only be shifted where the parties were *not* equally innocent, and that, before the loss can be thrown upon the principal, he must be shown to have been guilty of some misconduct,—that his conduct must have contributed in some way, which reasonable care would have avoided, to the perpetration of the wrong. Certainly the mere employment of an agent in the ordinary way is not such misconduct, unless we are prepared to say that one avails himself of this common, useful and supposedly lawful instrumentality at his risk, and this has not hitherto been deemed to be the law.

1 Floyd R. Mechem, *Law of Agency* § 749, at 532 (2d ed. 1914) [hereinafter "*Mechem*"].

The cases relied upon by the majority perfectly illustrate the truth of Professor Mechem's observations. For example, in *State ex rel. Barnes v. Lewis*, 73 N.C. 138 (1875), the State of North Carolina, acting on behalf of the estate of the plaintiff ward, brought a civil action against the defendant as surety to the bond given by the proposed guardian of the ward's estate. *Id.* at 138. The guardian wasted the ward's property and then died insolvent. *Id.* at 144. The Court determined that the defendant surety "fail[ed] to use ordinary caution either to protect himself or to protect the relator" which was "[c]learly . . . negligen[t]." *Id.* By his negligence, the defendant enabled the misconduct of the guardian. The Court declared that: "No fraud is imputed to the defendant: but no principle of equity is better established than that where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must sustain it." *Id.* Thus, although the Court in *Barnes* declared the defendant innocent of actual *fraud*, the defendant was clearly negligent and thereby liable. Hence, the defendant in *Barnes* was not truly "innocent," but instead enabled the misconduct of the third party through his negligence and was properly held accountable for such negligence.

Similarly, the plaintiffs in *Eliason v. Wilborn*, 281 U.S. 457, 74 L. Ed. 962 (1930), negligently entrusted a certificate of title to a third person, Napletone, who through forgery then fraudulently obtained a new certificate of title in himself, and subsequently sold the new certificate of title to innocent buyers. *See id.* at 458, 74 L. Ed. at 965. The plaintiffs sought cancellation of the deed and certificates issued to the innocent buyers. The United States Supreme Court stated that, "[a]s between two innocent persons one of whom must suffer the consequence of a breach of trust the one who made it possible by his act of confidence must bear the loss." *Id.* at 462, 74 L. Ed. at 967. Because the plaintiffs "saw fit to entrust [the certificate of title] to Napletone . . . they took the risk," *id.* at 461, 74 L. Ed. at 967, and the Court affirmed judgment for the buyers, *id.* at 452, 74 L. Ed. at 967. Thus, as was the case in *Barnes*, the Court was not faced with two truly "innocent" parties, but determined rather that the plaintiffs' "conduct . . . contributed in some way, which reasonable care would have avoided, to the perpetration of the wrong." 1 *Mechem* § 749, at 532.

The case of *Bank v. Liles* is also instructive. In *Liles* the plaintiff-bank brought suit to recover a $4500 loan to the defendant-borrowers. 197 N.C. at 414, 149 S.E. at 377. The note was secured by

a deed of trust on property that the defendants warranted was unencumbered. *Id.* The property was, however, encumbered by another lien. *Id.* The plaintiff-bank executed the loan by issuing a check payable to the defendants and their attorney. The defendants endorsed the check over to the attorney with directions for him to pay the balance on the prior lien, but instead the attorney absconded. 197 N.C. at 415-16, 149 S.E. at 378. In reviewing the case, this Court recited the "innocence principle" and determined that the defendants were required to bear the loss because they were "negligent, and there was a lack of due care on [their] part, in trusting [the attorney]" and because they "had the opportunity of protecting themselves, and failed to do so, by the check being made payable to the order of both." *Id.* at 418, 149 S.E. at 379. Thus, the Court in *Liles* made it clear that the defendants' liability arose through negligence, rather than their mere employment of the malfeasant attorney.

In the instant case, unlike the situation in *Barnes*, *Eliason*, and *Liles*, we are faced with the unfortunate reality of two completely innocent—that is, non-negligent parties. Buyers had no reason to mistrust Parker, had no opportunity to prevent Parker's misconduct, and did nothing to enable the embezzlement. In short, there was no lack of due care on the part of buyers. Buyers did nothing other than employ Parker to conduct the closing, and mere employment of an agent is insufficient to impose liability upon the principal for the agent's wrongful acts. *See Salmon*, 223 N.C. at 589, 27 S.E.2d at 649; *Snow*, 212 N.C. at 122-24, 193 S.E. at 226-27. Accordingly, the loss sustained by sellers cannot be shifted to buyers and must "lie where it has fallen." 1 *Mechem* § 749, at 532.

Although the majority expressly recognizes that "agency law does not require the principal to absorb losses caused by actions outside the agent's authority," the majority nevertheless determines that buyers may be held liable for Parker's malfeasance because they "reposed confidence in Parker." This is true with every principal-agent relationship, however. Under the majority's reasoning, innocent, non-negligent principals may now be held liable to third persons for the misconduct of their agents, even if the misconduct exceeds the scope of employment. This has never before been the law in North Carolina and should not be so now.

Unable to cite to any authority that supports its reasoning, the majority concludes that buyers should be held responsible for sellers' loss because "buyers are normally in a better position than sellers to bear the loss that results from embezzlement by the closing attor-

ney." Buyers are better positioned to sustain the loss, the majority asserts, because of the availability of insurance coverage to buyers. This Court has long held, however, that evidence of insurance coverage is irrelevant to the substantive inquiry of a case. *E.g.*, *Fincher v. Rhyne*, 266 N.C. 64, 68-69, 145 S.E.2d 316, 318-19 (1965); *Keller v. Caldwell Furn. Co.*, 199 N.C. 413, 415-16, 154 S.E. 674, 676 (1930). The majority's decision to base buyers' liability on the availability of insurance completely contradicts this nearly universal rule. I therefore disagree that equity requires buyers to absorb sellers' loss.

I strongly believe that buyers' liability must be premised on something more than general notions of equity that "seem[] to be resorted to only to cover loose reasoning or to span a gap without noticing it." 2 *Mechem* § 1986, at 1552. Because sellers fail to show that buyers in any manner contributed or enabled the theft of the sales proceeds by Parker, sellers cannot shift their loss to buyers, and the loss must "lie where it has fallen." 1 *Mechem* § 749, at 532. I recognize that this is a difficult case, but "we cannot break into well-settled principles of law in hard cases. If we did, we would have no orderly system, and law would be a 'rope of sand.' " *Liles*, 197 N.C. at 417, 149 S.E. at 379. Therefore, I respectfully dissent.

Justice HUDSON joins in this dissenting opinion.

NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION v. THE BOARD OF TRUSTEES OF GUILFORD TECHNICAL COMMUNITY COLLEGE

No. 470PA07

(Filed 15 April 2010)

Immunity— sovereign—waiver—workers' compensation insurance—insurance guaranty association

The doctrine of sovereign immunity did not bar the North Carolina Insurance Guaranty Association (NCIGA) from being reimbursed by Guilford Technical Community College (GTCC) pursuant to N.C.G.S. § 58-48-50(a1)(1) for payments NCIGA made on workers' compensation claims filed by GTCC employees after GTCC's workers' compensation insurance carrier became insolvent and was liquidated. The legislature has waived sovereign immunity through the Workers' Compensation Act for claims by

governmental employees, and this waiver applies to the provisions of the Insurance Guarantee Association Act involving workers' compensation insurance to effectuate the primary purpose of the Workers' Compensation Act, which is to provide workers secure, timely compensation. N.C.G.S. 97-7.

Justice EDMUNDS dissenting.

Chief Justice PARKER and Justice TIMMONS-GOODSON join in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 185 N.C. App. 518, 648 S.E.2d 859 (2007), reversing an order denying defendant's motion to dismiss entered on 27 January 2006 by Judge A. Leon Stanback, Jr. in Superior Court, Wake County. Heard in the Supreme Court 30 March 2009.

Nelson Mullins Riley & Scarborough LLP, by Christopher J. Blake and Leslie Lane Mize, for plaintiff-appellant.

Smith Moore Leatherwood LLP, by Sidney S. Eagles, Jr. and Matthew N. Leerberg, for defendant-appellee.

Roy Cooper, Attorney General, by Christopher G. Browning, Jr., Solicitor General; John F. Maddrey, Assistant solicitor General; and Gary R. Govert, Special Deputy Attorney General, for State of North Carolina, amicus curiae.

North Carolina League of Municipalities, by Andrew L. Romanet, Jr., General Counsel, and Gregory F. Schwitzgebel, III, Senior Assistant General Counsel; and North Carolina Association of County Commissioners, by James B. Blackburn, III, General Counsel, amici curiae.

HUDSON, Justice.

Here we address whether sovereign immunity bars the North Carolina Insurance Guaranty Association ("NCIGA") from being reimbursed by Guilford Technical Community College ("GTCC") through its Board of Trustees, pursuant to N.C.G.S. § 58-48-50(a1)(1) (2001)[1] of the Insurance Guaranty Association Act (the "Guaranty

1. Effective 10 June 2003, N.C.G.S. § 58-48-50(a1) was amended. Act of June 5, 2003, ch. 167, sec. 2, 2003 N.C. Sess. Laws 227, 229. The amendment "applies to claims associated with insurers that become insolvent on or after that date." *Id.*, sec.

Act"), N.C.G.S. chapter 58, article 48. Plaintiff NCIGA seeks reimbursement for payments NCIGA made on workers' compensation claims filed by GTCC's employees after GTCC's workers' compensation insurance carrier became insolvent and was liquidated. The Court of Appeals determined that there was no "clear proof that the State ha[d] waived [its] sovereign immunity pursuant to the reimbursement provision of the Guaranty Act" and held that GTCC's motion to dismiss should have been allowed based on sovereign immunity grounds. *N.C. Ins. Guar. Ass'n v. Bd. of Trs.*, 185 N.C. App. 518, 523, 648 S.E.2d 859, 862 (2007). Because we conclude that N.C.G.S. § 97-7 of the Workers' Compensation Act is a plain and unmistakable waiver of sovereign immunity for the underlying claims involved here, which renders an additional waiver of sovereign immunity in the Guaranty Act itself unnecessary, we reverse.

I. Background

NCIGA is a "nonprofit, unincorporated legal entity" created and governed by the Guaranty Act. N.C.G.S. § 58-48-25 (2007). "All insurers defined as member insurers in G.S. 58-48-20(6)" are required to be "members of the [NCIGA] as a condition of their authority to transact insurance in this State." *Id.* " 'Member insurer' means any person who (i) writes any kind of insurance to which th[e Guaranty Act] applies . . . and (ii) is licensed and authorized to transact insurance in this State." N.C.G.S. § 58-48-20(6) (2007). Under the Guaranty Act, when an insurer becomes insolvent and is liquidated by the insurance regulator of this or another state, NCIGA becomes "obligated" to pay for "covered claims" on behalf of the insolvent insurer in accordance section 58-48-35. "For purposes of administration and assessment," NCIGA is "divided into three separate accounts: (i) the automobile insurance account; (ii) the workers' compensation account; and (iii) the account for all other insurance to which the [Guaranty Act] applies." *Id.* § 58-48-25. Only the workers' compensation account is at issue here.

GTCC is a two-year accredited community college operating under N.C.G.S. chapter 115D. At some time before 31 December 2000, GTCC purchased a workers' compensation insurance policy from Reliance Insurance Company ("Reliance"). Reliance was domiciled in Pennsylvania and on 3 October 2001, was declared insolvent and placed into liquidation by the Pennsylvania insurance commissioner.

5, at 230. Because this case involves claims associated with an insurer insolvency that occurred before 10 June 2003, the pre-amended version of the statute is the version we review here.

Thereafter, under the Guaranty Act, NCIGA allegedly began to make payments on workers' compensation claims against GTCC. Before making these payments, NCIGA did not dispute that these were " '[c]overed claim[s]" as defined by N.C.G.S. § 58-48-20(4),[2] which provides:

> (4) "Covered claim" means an unpaid claim, including one of unearned premiums, which is in excess of fifty dollars ($50.00) and arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which [the Guaranty Act] applies as issued by an insurer, if such insurer becomes an insolvent insurer after the effective date of this Article and (i) the claimant or insured is a resident of this State at the time of the insured event; or (ii) the property from which the claim arises is permanently located in this State. "Covered claim" shall not include any amount awarded as punitive or exemplary damages; sought as a return of premium under any retrospective rating plan; or due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation or contribution recoveries or otherwise.

Id. § 58-48-20(4) (2001). NCIGA sought reimbursement from GTCC for these payments under N.C.G.S. § 58-48-50(a1)(1), which states in pertinent part:

> (a1) The [NCIGA] shall have the right to recover from the following persons the amount of any "covered claim" paid on behalf of such person pursuant to this Article:
>
> (1) Any insured whose net worth on December 31 of the year next preceding the date the insurer becomes insolvent exceeds fifty million dollars ($50,000,000) and whose liability obligations to other persons are satisfied in whole or in part by payments under this Article[.]

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2. Effective 10 June 2003, the definition of " '[c]overed claim' " was amended. Ch. 167, sec. 1, 2003 N.C. Sess. Laws at 228. For the reason stated in footnote one, the pre-amendment definition applies here. The amendment added the following to the end of subsection (4): " 'Covered claim' also shall not include . . . claims of any claimant whose net worth exceeds fifty million dollars . . . on December 31 of the year preceding the date the insurer becomes insolvent." *Id.* Prospectively, the situation here should no longer arise, as NCIGA would presumably no longer pay workers' compensation claims in lieu of an insolvent insurer of a high net worth employer, like GTCC, who would simply remain liable under the Workers' Compensation Act. *See* N.C.G.S. § 97-94 (2007). This decision thus applies only to a limited pool of employers and insurers.

Id. § 58-48-50(a1)(1) (2001). GTCC has not disputed that its net worth exceeded fifty million dollars as of 31 December 2000, but it has denied NCIGA is entitled to reimbursement, arguing that sovereign immunity bars NCIGA's claim.

On 20 September 2005, NCIGA filed a declaratory judgment complaint in the Superior Court in Wake County seeking "a judicial determination . . . whether GTCC is obligated to reimburse the NCIGA under the terms of the Guaranty Act in connection with the . . . payments expended by the NCIGA in connection with 'covered claims' arising from the insolvency of Reliance." NCIGA sought an adjudication that "under the express terms of the Guaranty Act," specifically N.C.G.S. § 58-48-50(a1)(1), GTCC is obligated to reimburse NCIGA for: (1) "the $324,013.00 expended [on workers' compensation claims] by the NCIGA through August 19, 2005 made in connection with the insolvency of Reliance" and (2) "NCIGA's continuing administration and handling of 'covered [workers' compensation] claims' against GTCC arising from the insolvency of Reliance."

GTCC moved to dismiss NCIGA's complaint under Civil Procedure Rules 12(b)(1), 12(b)(2), and 12(b)(6) on the sole ground that NCIGA's claims for reimbursement against GTCC are barred by sovereign immunity. N.C.G.S. § 1A-1, Rules 12(b)(1), 12(b)(2), and 12(b)(6) (2007). NCIGA asserted that the North Carolina General Assembly "has waived GTCC's sovereign immunity relative to worker[s'] compensation claims" under N.C.G.S. § 97-7 and "has expressly authorized the State and community college institutions to purchase workers' compensation insurance" under N.C.G.S. § 115D-23. In addition, NCIGA noted that N.C.G.S. § 58-48-50(a1)(1) gives NCIGA the right to recover "the full amount of any 'covered claim' from **any insured**" who meets the fifty million dollar net worth requirement. In sum, NCIGA contended that because of the explicit waiver of sovereign immunity in N.C.G.S. § 97-7 and because, pursuant to N.C.G.S. § 115D-23, GTCC has been statutorily authorized to become an "insured" to cover the liabilities imposed by the Workers' Compensation Act, GTCC could not "assert sovereign immunity to avoid its responsibility to reimburse the NCIGA" under N.C.G.S. § 58-48-50(a1)(1). In an order entered on 27 January 2006, the trial court denied GTCC's motion to dismiss.

In a unanimous opinion, the Court of Appeals reversed, holding that NCIGA could not "defeat GTCC's sovereign immunity defense." *Guar. Ass'n v. Bd. of Trs.*, 185 N.C. App. at 524, 648 S.E.2d at 862.

On 25 September 2007, NCIGA filed a petition for discretionary review with this Court, which we allowed on 11 December 2008.

II. Analysis

Under the Guaranty Act, NCIGA's obligation to pay an employer's "covered [workers' compensation] claims" arises when the employer procures workers' compensation insurance from a licensed and authorized insurer that then becomes insolvent. *See* N.C.G.S. §§ 58-48-20(5), -48-35 (2007), -48-20(4) (2001). The Guaranty Act also gives NCIGA the right to reimbursement if it has made payments on workers' compensation claims for a high net worth employer whose insurer is insolvent. *See Id.* § 58-48-50(a1)(1). Thus, both NCIGA's obligations to pay an employer's (here, GTCC's) workers' compensation claims and its right to obtain reimbursement from "[a]ny insured" high net worth employer arise from GTCC's having elected to insure its underlying workers' compensation liability with Reliance. *Id.* Yet, the Guaranty Act is essentially silent on the question of sovereign immunity, and the term "insured" is not defined therein.

This Court has long held:

> It is an established principle of jurisprudence, resting on grounds of sound public policy, that a state may not be sued in its own courts or elsewhere unless by statute it has consented to be sued or has otherwise waived its immunity from suit.
>
> By application of this principle, a subordinate division of the state, or agency exercising statutory governmental functions . . . may be sued only when and as authorized by statute.

Smith v. Hefner, 235 N.C. 1, 6, 68 S.E.2d 783, 787 (1952) (citations omitted). "Waiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983) (citations omitted). Consistent with these rules of construction, we have held that an express statutory waiver of sovereign immunity for a substantive claim made under one statute can continue and apply to a subsequent action seeking reimbursement from the State under a separate statute when the subsequent action "arises out of" the underlying substantive claim. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 332, 293 S.E.2d 182, 186-87 (1982) (holding that "[i]rrespective of whether G.S. Chapter 1B codifies the right to

indemnification[,] . . . . [t]he right to indemnification *arises out of a tort claim, the State's immunity to which was abrogated by the Tort Claims Act*," and consequently, "the State may be joined as a third-party defendant, whether in an action for contribution or in an action for indemnification, in the State courts" (emphasis added)). Similarly, the central issue before us here involves reimbursement that "arises out of" a substantive workers' compensation claim, "the State's immunity to which was abrogated by" section 97-7 of the Workers' Compensation Act. *Id.* at 332, 293 S.E.2d at 187.

The Workers' Compensation Act contains a clear and unmistakable waiver of the State's and its subdivisions' sovereign immunity with respect to workers' compensation claims by their employees. N.C.G.S. § 97-7 (2007). The Act provides, in pertinent part:

> Neither the State nor any municipal corporation within the State, nor any political subdivision thereof, nor any employee of the State or of any such corporation or subdivision, shall have the right to reject the provisions of this Article relative to payment and acceptance of compensation . . . [p]rovided, that all such corporations or subdivisions are hereby authorized to self-insure or purchase insurance to secure its liability under this Article and to include thereunder the liability of such subordinate governmental agencies as the county board of health, the school board, and other political and quasi-political subdivisions supported in whole or in part by the municipal corporation or political subdivision of the State.

Id.; *see Estes v. N.C. State Univ.*, 89 N.C. App. 55, 58, 365 S.E.2d 160, 161 (1988) ("G.S. [§] 97-7 extends the Workers' Compensation Act to the State. As an 'employer' under the Act, the State may not 'reject the provisions of [the] Article relative to payment and acceptance of compensation.' " (second alteration in original) (citations omitted)). Further, section 115D-23 specifically applies the Workers' Compensation Act to institutional employees of the state's community colleges. The statute requires the State Board of Community Colleges to "make the necessary arrangements to carry out those provisions of Chapter 97" for its employees and authorizes the board of trustees of each community college "to purchase insurance to cover workers' compensation liability." N.C.G.S. § 115D-23 (2007).

The General Assembly has mandated that every employer subject to the Workers' Compensation Act maintain the ability to pay compensation benefits, either by purchasing workers' compensation

insurance from an "authorized corporation, association, organization, or in any mutual insurance association formed by a group of employers so authorized" or by self-insuring. *Id.* § 97-93 (2007). "The term 'employer' " includes, *inter alia*, "the State and all political subdivisions thereof, [and] all public and quasi-public corporations therein." *Id.* § 97-2(3) (2007). In section 115D-23 the General Assembly has specifically "authorized" the "board of trustees" of each community college "to purchase insurance to cover workers' compensation liability" if the institution elects not to self-insure. *Id.* § 115D-23. If an employer, including the State and its entities, elects to purchase workers' compensation insurance, it still must comply with the provisions of the Workers' Compensation Act and the Guaranty Act by purchasing insurance only from an entity that is licensed and authorized to transact insurance business in this State.

However, even if an employer purchases insurance to secure its liability, the employer still remains primarily liable to its injured employees for any claims that fall under Chapter 97 in the event its insurer becomes insolvent. *See id.* § 97-94 (2007); *Roberts v. City Ice & Coal Co.*, 210 N.C. 17, 21, 185 S.E. 438, 440-41 (1936). As this Court stated in *Roberts*:

> Standing alone, the proposition that the employer under the Work[ers'] Compensation Act should be relieved of liability for the compensation to his injured employee by reason of the insolvency of his insurance carrier would present no serious difficulty. The liability of the employer under the award is primary. He, by contract, may secure liability insurance for his protection, but his obligation to the injured employee is unimpaired. Into the construction of every act must be read the purpose of the Legislature, and the underlying purpose in this instance (Work[ers'] Compensation Act) was to give relief to work[ers]. This relief in the nature of things had to be charged against the employer.
>
> The primary consideration is compensation for injured employees. The title and theory of the act import the idea of compensation for work[ers] and their dependents.
>
> The statute requires the employer to insure and keep insured his liability or furnish proof of his own ability to pay the compensation. It is further provided that insolvency of the employer shall not relieve the insurer, and manifestly the insolvency of the

> insurer should not relieve the insured, nothing else appearing. The obligation of the insurance company is to insure the employer against liability under the act, and while the statute gives to insurer the right of subrogation, that is for the benefit of the insurer and not intended to impair the right of the injured work[er] to compensation from the insured employer.

210 N.C. at 21, 185 S.E. at 440-41 (citations and internal quotation marks omitted). Thus, according to the Workers' Compensation Act and the principle enunciated in *Roberts*, GTCC remained at all times primarily liable on any workers' compensation claims at issue here.

" 'Legislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish.' " *Hyler v. GTE Prods., Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993) (citations omitted), *superseded in part by statute*, Workers' Compensation Reform Act of 1994, ch. 679, sec. 2.5, 1993 N.C. Sess. Laws 394, 399-400 (enacting N.C.G.S. § 97-25.1 (2007)). As noted by this Court, the Workers' Compensation Act is a remedial statutory scheme:

> Where radical and systematic changes have been made in setting up a system of such wide scope as we find in the Work[ers'] Compensation Act, *and one so markedly remedial in its nature*, the break with the past must necessarily be viewed with liberality in order to accomplish its purposes; and its provisions, liberally construed, given that effectiveness which alone will protect the act from erosion and regression.

Essick v. City of Lexington, 232 N.C. 200, 208, 60 S.E.2d 106, 112 (1950) (emphasis added). " '[T]he underlying purpose . . . [of the] (Work[ers'] Compensation Act) [is] to give relief to work[ers].' " *Roberts*, 210 N.C. at 21, 185 S.E. at 440 (citation omitted). Thus, the "primary consideration" in enacting the Workers' Compensation Act was to compensate injured employees. *Id.* Because, in general, the Workers' Compensation Act is the exclusive means for employees to recover compensation due to work-related injury or illness,[3] carrying out this remedial purpose is its core function. As such, the waiver of

3. *See* N.C.G.S. § 97-10.1 (2007) ("If the employee and the employer are subject to and have complied with the provisions of [the Workers' Compensation Act], then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.").

sovereign immunity in N.C.G.S. § 97-7 should be construed and applied to statutes, such as the Guaranty Act, in a manner that effectuates the primary purpose of the Workers' Compensation Act.

Enacted in 1971, the Guaranty Act "ha[s] one basic purpose: to better protect North Carolina claimants and policyholders." *State ex rel. Ingram v. Reserve Ins. Co.*, 303 N.C. 623, 627-28, 281 S.E.2d 16, 19 (1981). As our legislature has stated:

> The purpose of [the Guaranty Act] is to provide a mechanism for the payment of covered claims under certain insurance policies, to avoid excessive delay in payment, and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer, to assist in the detection and prevention of insurer insolvencies, and to provide an association to assess the cost of such protection among insurers.

N.C.G.S. § 58-48-5 (2007). With regard to workers' compensation claims, the Guaranty Act ensures that employees will be compensated in a timely manner even when the employer's insurer becomes insolvent. *See id.* § 58-48-35. As such, the provisions of the Guaranty Act pertaining to NCIGA's workers' compensation account are intended to promote the goals of the Workers' Compensation Act, and as our legislature has instructed, the Guaranty Act "shall be liberally construed to effect the purpose under G.S. 58-48-5 which shall constitute an aid and guide to [its] interpretation." *Id.* § 58-48-15 (2007).

Section 58-40-50(a1)(1) allows NCIGA's workers' compensation account to be reimbursed by high net worth employers, who are well situated to absorb the impact of their insurer's insolvency, thereby reflecting the legislature's intent that the funds be replenished for the benefit of other potential workers' compensation claimants. Reimbursement by high net worth employers also ensures that funds are available to pay the claims of smaller employers, who are less likely to be able to pay workers' compensation claims in the event their insurer becomes insolvent and who may be at greater risk of insolvency themselves. In addition, the Guaranty Act provides greater protection for workers' compensation claims than for claims arising from other forms of insurance that are subject to the Guaranty Act. *See id.* § 58-48-35(a)(1) (stating, *inter alia*, that: (1) although NCIGA's "obligation includes only the amount of each covered claim that is in excess of fifty dollars ($50.00) and is less than three hundred thousand dollars ($300,000)," NCIGA "*shall pay the*

full amount of a covered claim for benefits under [] workers' compensation insurance"; and (2) NCIGA is not obligated to "pay a claimant's covered claim, *except a claimant's workers' compensation claim* if . . . [t]he insured had primary coverage at the time of the loss with a solvent insurer" in a minimum amount specified by statute. (emphases added)).

III. Conclusion

The legislative intent behind the Workers' Compensation Act has always been to provide workers secure, timely compensation. The provisions of the Guaranty Act, both those involving the payment of workers' compensation claims due to insurer insolvency and those requiring repayment of said amounts by affected employers with a high net worth, are designed to further this purpose. The legislature has clearly waived sovereign immunity through the Workers' Compensation Act for claims by governmental employees, and this waiver applies to the provisions of the Guaranty Act involving workers' compensation insurance. This interpretation follows the longstanding requirement that a statutory waiver of immunity be strictly construed, in accordance with a clearly expressed legislative intent. *See Teachy*, 306 N.C. at 331, 293 S.E.2d at 186 (stating that "the abrogation of sovereign immunity" does not "impel[] such a strict construction as to thwart . . . obvious legislative intent" (citations omitted)). Thus, we conclude that the legislature has clearly and explicitly waived sovereign immunity for these underlying workers' compensation claims, that N.C.G.S. § 58-48-50(a1)(1) applies to GTCC, and that GTCC's motion to dismiss should not have been allowed. Accordingly, we reverse the decision of the Court of Appeals and instruct that court to reinstate the order of the trial court.

REVERSED.

Justice EDMUNDS dissenting.

Briefly stated, the issue in this case is whether the doctrine of sovereign immunity bars NCIGA from recovering from GTCC funds paid by NCIGA to cover workers' compensation claims filed against GTCC once Reliance Insurance Company, which had carried GTCC's workers' compensation policy, became insolvent.

The Insurance Guaranty Association Act creating NCIGA contains no waiver of sovereign immunity. N.C.G.S. ch. 58, art. 48 (2009). The majority nevertheless applies the waiver in N.C.G.S. § 97-7, in

which the General Assembly expressly waived sovereign immunity for workers' compensation claims brought against the State. That statute also permits governmental entities to purchase insurance to secure their liability under the Workers' Compensation Act. *Id.* § 97-7 (2009). However, no workers' compensation claims directly underlie this case. Every worker who had a valid covered claim apparently has been compensated or will be compensated by NCIGA. The question now is whether GTCC must reimburse NCIGA. Because no workers' compensation claims are at stake, the waiver of sovereign immunity in section 97-7 is inapplicable. In the absence of an applicable waiver, sovereign immunity applies and GTCC is not liable.

Although the majority cites *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982), as authority for its interpretation that waivers found in one statute can be portaged over to another statute, that case is distinguishable. In *Teachy*, the plaintiff sued the defendants for wrongful death arising out of a traffic collision. *Id.* at 325, 293 S.E.2d at 183. The defendants then filed a third-party complaint against the North Carolina Department of Transportation, alleging that a traffic light at the intersection where the accident occurred had been maintained negligently. *Id.* at 326, 293 S.E.2d at 183. When the State argued that sovereign immunity shielded it from suit, we found that the common-law "right to indemnification of a passively negligent tort-feasor from an actively negligent tort-feasor" arose out of the underlying tort claim and that the State had waived immunity from such indemnification claims in the Tort Claims Act. *Id.* at 332, 293 S.E.2d at 186-87. Thus, the tort theory of negligence directly underlay both the plaintiff's original claim and the defendants' subsequent claim against DOT, and the Tort Claims Act waived sovereign immunity in such suits.

In contrast, the majority here bootstraps a statutory waiver of sovereign immunity that is applicable only to workers' compensation claims into a suit over insurance liability brought by plaintiff NCIGA against defendant GTCC under the Insurance Guaranty Association Act, not the Workers' Compensation Act. The original claims between GTCC and the injured workers involved workers' compensation liability and were insured by third party Reliance. The majority's determination, that the workers' compensation waiver in section 97-7 reaches as far as claims by a fourth party (NCIGA) for indemnification of the insurance liability of insolvent third party Reliance, is an unwarranted extension of the holding in *Teachy*.

The majority correctly notes that this Court historically has been reluctant to find exceptions to the long-standing doctrine of sovereign immunity when the General Assembly has not explicitly set out a waiver. *See Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983) ("Waiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed.") (citation omitted). While I agree with the majority that the 2003 amendments to the applicable statutes may prevent a repetition of the immediate issue presented here, the majority's methodology is contrary to the letter and the spirit of *Guthrie* and invites creative attempts to circumvent sovereign immunity. Accordingly, I respectfully dissent.

Chief Justice PARKER and Justice TIMMONS-GOODSON join in this dissenting opinion.

IN RE: INQUIRY CONCERNING A JUDGE, NOS. 09-013, 09-018 AND 09-029
WILLIAM I. BELK, RESPONDENT

No. 464A09

(Filed 15 April 2010)

1. Judges— discipline—recusal of Chair of Judicial Standards Commission not required

The Chair of the Judicial Standards Commission was not required to recuse himself from a hearing conducted before the Commission even though respondent judge sent the Chair a letter requesting the opportunity to discuss respondent's service on a corporation's board of directors and the Chair sent a letter in response indicating that further meetings would not be of assistance in resolving the situation because: (1) the letter was transmitted after respondent had already been advised that his continuing service on a corporate board violated Canon 5C(2) of the North Carolina Code of Judicial Conduct; (2) the letter did not demonstrate bias, especially since the Supreme Court, and not the Commission, creates and interprets the Code; and (3) if bias could be contrived by the mere act of sending a letter to a member of the Commission and receiving a response, then it is fore-

seeable that a judge could send letters to each member of the hearing panel to create the appearance of bias.

2. Judges— discipline—findings of fact—clear, cogent, and convincing evidence

Although respondent contends the entire proceeding should be dismissed based on the Judicial Standards Commission's alleged failure to make findings of fact based on clear, cogent and convincing evidence, a review of the record and the transcript revealed that the Commission applied the proper standard.

3. Judges— service as corporate director—mandatory prohibition

The prohibition in N.C. Code of Judicial Conduct Canon 5C(2) against a judge serving as a corporate director is not merely a "suggestion or guide" but is mandatory.

4. Judges— discipline—jurisdiction—intentional misrepresentations—absence of formal charge—due process

The Judicial Standards Commission did not lack jurisdiction to discipline respondent for alleged misrepresentations he made during the Commission's investigation because the statement of charges did not allege intentional misrepresentation. While the better practice would have been for the Commission to file an amended statement of charges to conform to the evidence, the Commission's finding without a formal charge that respondent misrepresented himself did not violate respondent's due process rights since it offered him the opportunity to explain the misleading statements during the hearing.

5. Judges— discipline—confrontation with chief district court judge—sufficiency of basis

Respondent district court judge's inappropriate words and actions during a confrontation with the chief district court judge did not violate the Canons of the Code of Judicial Conduct and did not constitute a basis for discipline.

6. Judges— discipline—service on corporate board of directors—removal from office

A district court judge was removed from office for violations of Canons 1, 2A, and 5C(2) of the Code of Judicial Conduct and N.C.G.S. § 7A-376(b) based upon his failure to resign from a corporate board of directors even though he had been informed prior to the time he took the oath of office that his membership

on the board violated Canon 5C(2), his intentional misrepresentation of the reasons for his continued membership on the board during the Judicial Standards Commission's investigation, and his continued service on the board at the time of the hearing more than nine months after his installation to office.

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

This matter is before the Court pursuant to N.C.G.S. §§ 7A-376 and 7A-377 upon a recommendation by the Judicial Standards Commission entered 21 October 2009 that respondent William I. Belk, a Judge of the General Court of Justice, District Court Division, Judicial District Twenty-Six of the State of North Carolina, be removed for conduct in violation of Canons 1, 2A, 3A(3), and 5C(2) of the North Carolina Code of Judicial Conduct and for willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b). Heard in the Supreme Court 17 February 2010.

Nancy A. Vecchia, Counsel for the Judicial Standards Commission.

Kevin P. Byrnes for respondent-appellant.

PER CURIAM.

On 23 January 2009 and 11 February 2009, complaints were filed with the Judicial Standards Commission (Commission) alleging misconduct by Respondent. On 7 April 2009, the Commission filed a verified statement of charges alleging Respondent, William I. Belk, violated Canons 1, 2A, 3A(3), and 5C(2) of the North Carolina Code of Judicial Conduct (the Code) and N.C.G.S. § 7A-376(b). The Commission based the charges on Respondent's continued service as a director of Sonic Automotive, Inc. (Sonic) and director emeritus of Monroe Hardware Company (Monroe)[1] from 1 January 2009 through 7 April 2009 as well as Respondent's actions during a confrontation with Chief District Court Judge Lisa C. Bell on 6 February 2009. On 1 May 2009, Respondent filed a document entitled "Answers, Response and Defenses." The Commission conducted hearings on 10 September and 30 September 2009.

1. The Commission later abandoned Respondent's service on the Monroe Board as a basis for discipline because it found that his duties as director emeritus did not actually involve any responsibilities of a corporate director.

The Commission made the following findings of fact, conclusions of law, and recommendation:

FINDINGS OF FACT

1. William I. Belk was at all times referred to herein and is now a Judge of the General Court of Justice, District Court Division, Judicial District Twenty-six, 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. Respondent was elected a district court judge in the 4 November 2008 general election. On or about Friday, 5 December 2008, respondent attended a judicial education program for newly elected district court judges at the University of North Carolina School of Government in Chapel Hill, N.C. As a part of the educational program, Commission Executive Director Paul R. Ross and District Court Judge Rebecca Knight presented a two-hour session concerning ethical considerations for judges generally, and more specifically, the provisions of the North Carolina Code of Judicial Conduct, including the provisions of Canon 5 C.(2). During the program, respondent raised questions and concerns as to whether he could continue to serve as a member of various corporate boards of directors. Mr. Ross advised respondent that Canon 5 C.(2) prohibited a judge from serving as an officer, manager, or director of any business. Following the program, Mr. Ross and respondent had lunch together, at which time they continued their discussion with respect to respondent's ability to continue his service on corporate boards of directors. Respondent expressed his disagreement with the advice rendered by Mr. Ross.

3. Approximately one week later, Mr. Ross received a letter from respondent in which respondent continued to question the provisions of Canon 5 C.(2) and advance his argument that his service on the board of directors of a corporation which he identified as "Sonic Auto" would create no conflict with his responsibilities as a district court judge. Respondent sent a copy of the letter to Commission chairman Judge John C. Martin.

4. On or about 16 December 2008, Judge Martin responded to respondent reiterating the advice that Canon 5 C.(2) prohibited a

judge from service as an officer, director, or manager of any business, and informing respondent that the Commission had no authority to waive any provision of the Code of Judicial Conduct as it is promulgated by the North Carolina Supreme Court.

5. On or about19 [sic] December 2008, respondent wrote a letter to North Carolina Supreme Court Chief Justice Sarah E. Parker requesting that the Court amend the provisions of Canon 5 C.(2).

6. Respondent took the oath of office as a judge of the District Court Division of the General Court of Justice on 1 January 2009.

7. On or about 15 January 2009, respondent was notified by letter from Christie Speir Cameron, Clerk of the Supreme Court of North Carolina, that the Court had denied his request to amend Canon 5 C.(2) of the North Carolina Code of Judicial Conduct.

8. Sonic Automotive, Inc. is a publicly traded corporation incorporated under the laws of the State of Delaware. Sonic Automotive, Inc. owns automobile dealerships in approximately fifteen states, including North Carolina, and has its headquarters in Charlotte, North Carolina. Respondent has been a member of the Board of Directors of Sonic Automotive, Inc. since 1998, and has been "Lead Independent Director" since 2004, and serves on the audit committee and the compensation committee. According to the 8 April 2009 Annual Statement for the corporation, respondent's annual compensation for his services as a member of the Board of Directors of Sonic Automotive, Inc. for the year 2008 was approximately $143,500.

9. At all times from 1 January 2009 until the date of the hearing of the charges involved in this proceeding, respondent has continued to serve as a director of Sonic Automotive, Inc.

10. Prior to January 1, 2009, respondent was a member of the board of directors of Monroe Hardware Company. From 1 January 2009 until the present, respondent has continued to serve as "Director Emeritus" of Monroe Hardware Company and receives retirement compensation and medical insurance coverage from that corporation. The Commission does not find that there is clear and convincing evidence that respondent's position as "Director Emeritus" involves any responsibilities

as an officer, director, or manager or is anything more than an honorary position.

11. Upon being advised by Mr. Ross on 13 February 2009 of the initiation of the formal investigation of the complaints giving rise to these proceedings, respondent stated to Mr. Ross that he was continuing to serve as a director of Sonic Automotive, Inc. because he had a pre-existing medical condition and was provided with medical insurance by Sonic Automotive, Inc.

12. On 20 February 2009, respondent was interviewed by Commission Investigator Glenn Joyner. In the course of the interview, respondent told Mr. Joyner that Sonic Automotive, Inc. was the "source of [his] health insurance and [his] retirement."

13. Stephen K. Coss, General Counsel for Sonic Automotive, Inc., was interviewed by Mr. Joyner on 24 February 2009. Mr. Coss stated to Mr. Joyner that Sonic Automotive did not provide health insurance to respondent. After concluding the interview with Mr. Joyner, Mr. Coss called respondent and related to him the subjects about which Mr. Joyner had inquired.

14. On 25 February 2009, respondent called Mr. Joyner and told him that he received health insurance from Monroe Hardware Company, rather than Sonic Automotive, Inc., but that he had discussed with the Sonic directors the possibility of offering health insurance to its board members, who seemed receptive to the idea.

15. Sonic Automotive, Inc. did not in February 2009, and does not now, provide any medical insurance coverage for respondent.

16. The Commission finds that respondent's initial statements to Mr. Ross and Mr. Joyner with respect to Sonic Automotive, Inc.'s provision of health insurance were untrue and were intentionally made for the purpose of misleading the Commission in the investigation of this matter. The Commission further finds not credible respondent's explanation that he intended his statements to relate to his desire for Sonic Automotive, Inc. to provide him with health insurance at the conclusion of his judicial service.

17. Lisa C. Bell is the Chief Judge of the District Court Division, Judicial District Twenty-six, having been appointed as

Chief Judge by the Chief Justice of the North Carolina Supreme Court effective 1 January 2009.

18. On 4 February 2009, respondent submitted a request to Chief Judge Bell to be relieved of his court assignment on 11 February 2009 in order to attend a meeting of the Board of Directors of Sonic Automotive, Inc. On 6 February, Chief Judge Bell notified [respondent] that she had denied his request on the grounds that she had been told that the Commission had advised respondent that his "continued service on the Sonic board was not compliant with the Code of Judicial Conduct."

19. At approximately 4:10 p.m., respondent went to Chief Judge Bell's office to discuss her denial of his request. During the discussion, respondent became agitated and raised his voice, telling Chief Judge Bell that the issue of his service on the Sonic board was "none of her business," that the Commission had "leaked" the information to the press, and "this is all your fault." Chief Judge Bell asked respondent to leave her office and as he was doing so, he shouted at her that she was "a media hound" and a "political hack", that she had been "bought and paid for" by two named attorneys whom respondent said had orchestrated her appointment by the Chief Justice as chief district court judge so she could "screw him over," and that she should be ashamed. Respondent was standing very close to Chief Judge Bell in an intimidating manner, causing her to feel threatened and afraid, and shouted at her "you leave me the hell alone." Respondent's conduct occurred during business hours under such circumstances as to have been likely to have been heard by other court personnel and was, in fact, observed by Patricia Hines, a judicial assistant.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, each of which are made upon clear and convincing evidence, the Commission concludes:

1. Respondent's membership on the Board of Directors of Sonic Automotive, Inc. from and after 1 January 2009 to the date of the hearing in this matter was, and continues to be, in violation of the provisions of Canon 5 C.(2) of the North Carolina Code of Judicial Conduct.

2. Respondent's continuing membership on the Board of Directors of Sonic Automotive, Inc. after having been repeatedly advised that such conduct was not permitted by the Code of Judicial Conduct is in violation of Canon 1 and Canon 2 A. of the North Carolina Code of Judicial Conduct, is wilful misconduct while in office, and is conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

3. Respondent's intentional misrepresentations made to Mr. Ross and Mr. Joyner during the investigation of the allegations at issue in this proceeding, as found in Findings of Fact 11 through 16, are a violation of Canon 1 and Canon 2 A. of the North Carolina Code of Judicial Conduct and constitute wilful misconduct while in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

4. Respondent's conduct toward Chief Judge Bell, as found in Finding of Fact 19, constitutes a violation of Canon 1, Canon 2 A., and Canon 3 A.(3) of the North Carolina Code of Judicial Conduct and is wilful misconduct while in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, and after carefully considering the gravity of the violations as weighed against the evidence of good character produced by respondent, the Commission recommends to the Supreme Court of North Carolina that the respondent, William I. Belk, be removed from judicial office.

"The Commission serves 'as an arm of the Court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable.' " *In re Tucker*, 348 N.C. 677, 679, 501 S.E.2d 67, 69 (1998) (citation omitted). "[F]inal authority to discipline judges lies solely with the Supreme Court." *In re Hayes*, 356 N.C. 389, 398, 584 S.E.2d 260, 266 (2002) (citation omitted). When 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) (citation omitted). "Upon recommendation of the Commission, the Supreme Court may censure, suspend, or remove any judge for willful misconduct in office . . . or conduct prejudicial to the

administration of justice that brings the judicial office into disrepute." N.C.G.S. § 7A-376(b) (2009). "A judge who is removed for any of the foregoing reasons shall receive no retirement compensation and is disqualified from holding further judicial office." *Id.*

Therefore, in reviewing the Commission's recommendations, this Court must "determine if the Commission's findings of fact are adequately supported by clear and convincing evidence." *In re Badgett*, 362 N.C. 202, 207, 657 S.E.2d 346, 349 (2008). We next consider whether the findings of fact support the Commission's conclusions of law. *Id.* Finally, we decide whether the sanctions recommended by the Commission "are appropriate in light of the circumstances of the case." *Id.*

[1] As a preliminary matter, we consider Respondent's contention that the Chair of the Judicial Standards Commission, Court of Appeals Chief Judge John C. Martin, should have recused himself from the hearing conducted before the Commission. Before the hearing Respondent sent Chief Judge Martin a letter requesting the opportunity to discuss his service on Sonic's Board of Directors. Chief Judge Martin sent a letter in response indicating that further meetings would not "be of assistance in resolving the Sonic Auto situation." Chief Judge Martin's letter was transmitted after Respondent had already been advised that his continuing service on a corporate board violated Canon 5C(2) of the Code.

"Public confidence in the courts requires that cases be tried by unprejudiced and unbiased judges." *In re Martin*, 295 N.C. 291, 306, 245 S.E.2d 766, 775 (1978) (citation omitted). To satisfy the standard for recusal, the moving party must " 'demonstrate objectively that grounds for disqualification actually exist.' " *State v. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987) (citations omitted). Such a showing requires " 'substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially.' " *Id.*

At the hearing Respondent did not raise any objection to Chief Judge Martin's participation. Chief Judge Martin's letter does not demonstrate bias, especially since this Court, and not the Commission, creates and interprets the Code. If bias can be contrived by the mere act of sending a letter to a member of the Commission, and receiving a response, then it is foreseeable that a judge could send letters to each member of the hearing panel to create the appearance of bias. Respondent's preliminary argument fails.

[2] Turning to the merits, we first consider Respondent's argument that the entire proceeding should be dismissed because the Commission did not make findings of fact supported by "clear, cogent and convincing evidence." Respondent states that this Court has not rendered a decision defining "clear, cogent and convincing." Therefore, Respondent claims that the Commission had no basis upon which to make any recommendation to this Court.

Rule 18 of the Rules of the Judicial Standards Commission provides that "Commission Counsel shall have the burden of proving the existence of grounds for a recommendation of discipline by clear, cogent and convincing evidence, as that term is defined by the Supreme Court." Jud. Standards Comm'n R. 18, para. 3, 2010 N.C. R. Ct. (State) 443, 448. Under this rule Commission Counsel must demonstrate a fact by "clear, cogent and convincing evidence." *Id.* However, there is no distinction between "clear, cogent and convincing" and "clear and convincing" evidence. *See*, *e.g.*, *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984) ("It is well established that 'clear and convincing' and 'clear, cogent, and convincing' describe the same evidentiary standard." (citation omitted)).

After review of the record and the transcript, we conclude that the Commission properly applied the "clear, cogent and convincing" evidentiary standard. Respondent's argument is without merit.

[3] We next consider Respondent's argument that the Canon 5C(2) prohibition on corporate board membership is only a "suggestion or guide."

Canon 5C(2) states that a judge "should not serve as an officer, director or manager of any business." Code of Jud. Conduct Canon 5C(2), 2010 N.C. R. Ct. (State) 437, 440. Canon 5C(1) states:

> A judge *should* refrain from financial and business dealings that reflect adversely on the judge's impartiality, interfere with the proper performance of the judge's judicial duties, exploit the judge's judicial position or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.

Id. Canon 5C(1), 2010 N.C. R. Ct. (State) at 440 (emphasis added). Canon 5C(2) is "[s]ubject to the *requirements* of [Canon 5C(1)]." *Id.* Canon 5C(2) (emphasis added). Because the term "should" in Canon 5C(1) is referred to as a "requirement" in 5C(2), the use of the word "should" in Canon 5C(2) creates a mandatory prohibition. Accord-

ingly, the Canon 5C(2) prohibition against serving on corporate boards is mandatory, and Respondent is subject to discipline for his violation of that Canon.

Having concluded that the prohibitions in Canon 5C(2) are mandatory, we observe that the minimal standards embodied in the Code would be severely weakened if "should" were given a permissive meaning. Construing "should" as permissive would allow judges to "practice law" (Canon 5F), "solicit funds on behalf of a political party" (Canon 7C(1)), and join "organizations that practice[] unlawful discrimination" (Canon 2C) since all these prohibitions say "should not" instead of "shall not." Barring judges from serving on corporate boards not only eliminates one potential conflict of interest that may hinder judicial independence, but also avoids the perception of judicial bias.

We also agree with the Commission's conclusion that Respondent's continuing membership on the Sonic Board, after being told that he could not do so, violated Canons 1 and 2A, constituted willful misconduct while in office, and is conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

[4] We next consider Respondent's argument that the Commission lacked jurisdiction to discipline him for alleged misrepresentations he made during the Commission's investigation. Respondent bases his argument on the fact that the statement of charges does not allege intentional misrepresentation. Respondent contends the Commission's failure to amend the statement of charges stripped the Commission of jurisdiction to hear or rule on that allegation.

Before completion of a disciplinary hearing, the Commission's hearing panel "may allow or require amendments to the Statement of Charges . . . . to conform to the proof or to set forth additional facts." Jud. Standards Comm'n R. 16, 2010 N.C. R. Ct. (State) at 448. "In the event of an amendment setting forth additional facts, the respondent judge shall be given a reasonable time to answer the amendment and to prepare and present his or her defense to the matters charged thereby." *Id.*

While the better practice would have been for the Commission to file an amended statement of charges, we nevertheless find that Respondent's argument lacks merit. Although the Commission found, without making a formal charge, that Respondent intentionally misrepresented himself, the Commission in no way violated Respondent's due process rights since it offered him the opportunity to ex-

plain the misleading statements during the hearing. *See In re Greene*, 328 N.C. 639, 648, 403 S.E.2d 257, 262 (1991) ("Here respondent was accorded an adequate and fair hearing, was apprised of all material evidence received and relied on by the Commission and given opportunity to test, explain and rebut it."). Moreover, the veracity of witnesses who testify before the Commission and participate in the Commission's investigations may always be considered by this Court in its assessment of credibility and determination of appropriate discipline. *See*, *e.g.*, *In re Stephenson*, 354 N.C. 201, 205, 552 S.E.2d 137, 139 (2001) ("We consider the evidence and then exercise independent judgment as to whether to censure, to remove, or to decline to do either." (citation omitted)).

During the investigation Respondent informed both Mr. Ross and Mr. Joyner that he received his health insurance from Sonic when in fact Respondent knew that he did not receive insurance from this company. The investigation revealed that he actually received health insurance in his capacity as director emeritus of Monroe Hardware.

Therefore, the Commission's findings of fact related to Respondent's misrepresentations support its conclusion of law on this issue. Respondent's intentional misrepresentations to Mr. Ross and Mr. Joyner violated Canons 1 and 2A, constituted willful misconduct while in office, and demonstrated conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

[5] We now consider Respondent's argument that his confrontation with Chief Judge Bell did not constitute a valid basis for discipline.

Respondent argues that the Commission failed to show by clear and convincing evidence that his actions merited discipline. He concedes that during his confrontation with Chief Judge Bell, he probably raised his voice and used inappropriate language. However, he maintains that after this isolated incident, his relationship with Judge Bell returned to normal.

Canon 3A(3) states that "[a] judge should be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity, and should require similar conduct of lawyers, and of the judge's staff, court officials and others subject to the judge's direction and control." Code of Jud. Conduct Canon 3A(3), 2010 N.C. R. Ct. (State) at 438.

Standing alone, Respondent's words and actions during the confrontation with Judge Bell did not necessarily merit a recommenda-

tion of discipline by the Commission. While a district court judge must respect the Chief District Court Judge's duties and authority, the nature of the relationship between coworkers may at times produce episodes of contention, disagreement, and frustration. Despite the inappropriate nature of Respondent's actions during his confrontation with Chief Judge Bell, discipline is not normally imposed for a single incident of improper behavior exhibited towards a coworker. *See In re Bullock*, 324 N.C. 320, 322, 377 S.E.2d 743, 744 (1989) ("Not every intemperate outburst of a judge, especially when it is an isolated, single event, occurring in the privacy of the judge's office and brought on by what the judge might reasonably have perceived to be some provocation, amounts to conduct deserving of discipline."). Accordingly, the Commission's findings of fact do not support its conclusion that Respondent's behavior towards Chief Judge Bell violated Canons 1, 2A, and 3A(3) or N.C.G.S. § 7A-376.

[6] In summary, we conclude that Respondent's actions and misrepresentations as a whole, excluding his confrontation with Chief Judge Bell, demonstrated willful misconduct in office in violation of N.C.G.S. § 7A-376(b). Respondent violated Canons 1, 2A, and 5C(2) by failing to resign from the Sonic Board and by intentionally misrepresenting the reasons for his continued membership on the board during the Commission's investigation. Respondent continued to serve on the Sonic Board for over nine months after his installation to judicial office. Taken as a whole, Respondent's actions, misrepresentations, and willful violation of Canon 5C(2) are sufficiently egregious to warrant removal from office.

Although Respondent indicates that he has now resigned his office, "[t]he resignation of a judge and its acceptance by the Governor neither deprives this Court of jurisdiction over a proceeding for removal nor limits the sanctions available." *In re Renfer*, 347 N.C. 382, 384, 493 S.E.2d 434, 435 (1997) (citation omitted). Accordingly, we agree with the Commission's recommendation that Respondent be removed from judicial office.

It is hereby ordered by the Supreme Court of North Carolina in conference that Respondent, William I. Belk, be and is hereby, officially removed from office as a judge of the General Court of Justice, District Court Division, Judicial District Twenty-Six of the State of North Carolina, for conduct in violation of Canons 1, 2A, and 5C(2) of the North Carolina Code of Judicial Conduct and for willful misconduct in office and conduct prejudicial to the administration of justice

that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b). In consequence of his removal, Respondent is disqualified from holding further judicial office and is ineligible for retirement benefits. N.C.G.S. § 7A-376(b).

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

COUCOULAS/KNIGHT PROPERTIES, LLC v. TOWN OF HILLSBOROUGH, A NORTH CAROLINA MUNICIPALITY, AND ITS BOARD OF COMMISSIONERS

No. 404A09

(Filed 15 April 2010)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 199 N.C. App. ——, 683 S.E.2d 228 (2009), reversing orders and judgments entered on 1 April 2008 by Judge Donald W. Stephens in Superior Court, Orange County. Heard in the Supreme Court on 22 March 2010.

Brown & Bunch, PLLC, by LeAnn Nease Brown, for plaintiff/petitioner-appellant.

Brough Law Firm, by Robert E. Hornik, Jr., for defendant/respondent-appellees.

PER CURIAM.

AFFIRMED.

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

Berardi v. Craven Cty. School Dist. Case below: 196 N.C. App. —— (21 April 2009)	No. 213P09	Defs' PDR Under N.C.G.S. § 7A-31 (COA08-920)	Denied 4/14/10
Brown v. Meter Case below: 199 N.C. App. —— (18 August 2009)	No. 392P09	1. Defs' (Goodyear Luxembourg Tires, SA, Goodyear Lastikleri T.A.S. and Goodyear Dunlop Tires France, SA) NOA Based Upon a Constitutional Question (COA08-944) 2. Plts' Motion to Dismiss Appeal 3. Defs' (Goodyear Luxembourg Tires, SA, Goodyear Lastikleri T.A.S. and Goodyear Dunlop Tires France, SA) PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 4/14/10 3. Denied 4/14/10
Coventry Woods Neighborhood Ass'n v. City of Charlotte Case below: 202 N.C. App. —— (2 February 2010)	No. 099A10	1. Plts' NOA Based Upon a Constitutional Question (COA09-611) 2. Defs' Joint Motion to Dismiss Appeal	1. —— 2. Allowed 4/14/10
Duplin Cty. Bd. of Educ. v. Duplin Cty. Bd. of Cty. Comm'rs Case below: 201 N.C. App. —— (17 November 2009)	No. 522P09	1. Def's NOA Based Upon a Constitutional Question (COA09-397) 2. Plt's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 4/14/10 3. Denied
Griffith v. Keller Case below: 202 N.C. App. —— (3 March 2010)	No. 117P10	Plt's NOA Based Upon a Constitutional Question (COA09-1045)	Dismissed *Ex Mero Motu* 4/14/10
Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield Case below: 190 N.C. App. 28	No. 272A08	Def's (International Garment Tech.) Motion to Dismiss Appeal of Harleysville and Erie Ins. as to Question Two and to Strike Briefing in Support of Same (COA07-1002)	Denied 4/14/10
Hawkins v. SSC Hendersonville Operating Co., LLC Case below: 202 N.C. App. —— (3 March 2010)	No. 112P10	Plt-Appellant's Motion for Temporary Stay (COA09-23)	Allowed 03/17/10

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

Hewett v. Weisser Case below: 201 N.C. App. —— (8 December 2009)	No. 529P09	1. Defs' (Weisser) PDR Under N.C.G.S. § 7A-31 (COA08-1563) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 4/14/10 2. Dismissed as Moot 4/14/10
Holland v. Horne Case below: 202 N.C. App. —— (19 January 2010)	No. 083P10	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA09-399) 2. Plts' PWC to Review the Decision of the COA	1. Denied 4/14/10 2. Denied 4/14/10
In re D.Y., B.M.T., J.A.T. Case below: 202 N.C. App. —— (19 January 2010)	No. 079P10	Petitioners' (Cumberland Co. DSS & GAL) PDR Under N.C.G.S. § 7A-31 (COA09-1087)	Denied 4/14/10
In re J.A.G. Case below: 202 N.C. App. —— (2 February 2010)	No. 069P10	State's Motion for Temporary Stay (COA09-462)	Allowed 02/22/10
In re M.L.T.H. Case below: 200 N.C. App. —— (3 November 2009)	No. 497P09	Appellant's (State of NC) Motion for Temporary Stay (COA08-1569)	Allowed 12/08/09
State v. Belk Case below: 201 N.C. App. —— (8 December 2009)	No. 530P09	1. State's Motion for Temporary Stay (COA09-187) 2. State's Petition for Writ of Supersedeas 3. State's PDR	1. Allowed 12/28/09 363 N.C. 856 Stay Dissolved 04/14/10 2. Denied 4/14/10 3. Denied 4/14/10
State v. Coleman Case below: 200 N.C. App. —— (3 November 2009)	No. 484P09	Def's PDR Under N.C.G.S. § 7A-31 (COA09-307)	Denied 4/14/10
State v. Fowler Case below: 197 N.C. App. —— (19 May 2009)	No. 262P09	1. Def's NOA Based Upon a Constitutional Question (COA08-652) 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 4/14/10 3. Denied 4/14/10 4. Dismissed as Moot 4/14/10

State v. Freeman Case below: 202 N.C. App. —— (3 March 2010)	No. 113P10	State's Motion for Temporary Stay (COA09-774)	Allowed 03/18/10
State v. Jackson Case below: 202 N.C. App. —— (16 February 2010)	No. 120P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-692)	Denied 4/14/10
State v. Jenkins Case below: 202 N.C. App. —— (2 February 2010)	No. 068P10	State's Motion for Temporary Stay (COA09-546)	Allowed 02/19/10
State v. Lewis Case below: 202 N.C. App. —— (2 February 2010)	No. 106P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-662)	Denied 4/14/10
State v. Meadows Case below: 201 N.C. App. —— (5 January 2010)	No. 029P10	State's Motion for Temporary Stay (COA08-1576)	Allowed 01/19/10
State v. Mumford Case below: 201 N.C. App. —— (5 January 2010)	No. 032P10	State's Motion for Temporary Stay (COA09-300)	Allowed 01/22/10
State v. Neville Case below: 202 N.C. App. —— (19 January 2010)	No. 088P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-412)	Denied 4/14/10
State v. Paige Case below: 202 N.C. App. —— (16 February 2010)	No. 129P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-563)	Denied 4/14/10
State v. Patton Case below: Richmond County Superior Court	No. 312PA09	Def's PWC to Review Order of Richmond County Superior Court	Allowed, remanded for reconsideration in light of State v. Daniel Easley Defoe (161PA09) filed 15 April 2010

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

State v. Riley Case below: 202 N.C. App. —— (2 February 2010)	No. 147P10	Def's Motion for Temporary Stay (COA09-643)	Allowed 04/08/10
State v. Roughton Case below: 201 N.C. App. —— (22 December 2009)	No. 009P10	State's Motion for Temporary Stay (COA09-536)	Allowed 01/12/10
State v. Singleton Case below: 201 N.C. App. —— (5 January 2010)	No. 051P10	State's PDR Under N.C.G.S. § 7A-31 (COA09-263)	Allowed 4/14/10
State v. Smith Case below: 202 N.C. App. —— (19 January 2010)	No. 085P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-565)	Denied 4/14/10
State v. Smith Case below: 202 N.C. App. —— (19 January 2010)	No. 058P10	State's Motion for Temporary Stay (COA09-467)	Allowed 02/05/10
State v. Thomas Case below: 202 N.C. App. —— (2 February 2010)	No. 096P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-826)	Denied 4/14/10
State v. Via Case below: 197 N.C. App. —— (2 June 2009)	No. 274P09	1. Def's NOA Based Upon a Constitutional Question 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31 (COA08-1147)	1. —— 2. Allowed 4/14/10 3. Denied 4/14/10
State v. White Case below: Crave County Superior Court	No. 505P96-2	Def's Petition for Writ of Mandamus	Dismissed 4/14/10
State v. Williams Case below: 201 N.C. App. —— (5 January 2010)	No. 033P10	State's Motion for Temporary Stay (COA08-1334)	Allowed 01/22/10

Thompson v. N.C. Respiratory Care Bd. Case below: 202 N.C. App. —— (2 February 2010)	No. 104P10	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-599)	Denied 4/14/10

STATE OF NORTH CAROLINA v. JIMMY WAYLON WARD

No. 365PA09

(Filed 17 June 2010)

Drugs; Evidence— pills—sufficiency of visual inspection process—scientifically valid chemical analysis required

The trial court abused its discretion in a drug case by permitting the State's expert witness to identify certain pills as controlled substances when the expert's methodology consisted solely of a visual inspection and comparison with information provided by Micromedex literature and was not sufficiently reliable under N.C.G.S. § 8C-1, Rule 702, and the case is remanded to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this opinion, because: (1) the legislature imposed criminal liability for actions relating to counterfeit controlled substances to acknowledge that their very existence posed a threat to the health and well-being of citizens in our State, and a scientific, chemical analysis must be employed to properly differentiate between the real and the counterfeit; (2) the special agent's explanation for using Micromedex literature focused on concerns for expediency and maximizing limited laboratory resources in light of the relative seriousness of the criminal charges rather than demonstrating its proven reliability; (3) jurors may ascribe so much authority to a noteworthy expert in forensic chemistry that they treat his testimony as infallible and automatically accept his opinion on the chemical composition of a substance without properly appreciating, even with vigorous cross-examination and proper jury instructions, that the expert chemist never performed a scientific, chemical analysis; (4) the length of time a method has been employed does not necessarily heighten its reliability; (5) it cannot be concluded that the deficiencies of the special agent's visual identification process only affected the amount of weight the jury assigned to his testimony since the method of proof at issue was not sufficiently reliable for criminal prosecutions; and (6) the burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution, and some form of scientifically valid chemical analysis is required unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt.

Justice TIMMONS-GOODSON concurrs in the result only.

Justice NEWBY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 199 N.C. App. ——, 681 S.E.2d 354 (2009), finding error in part in a judgment entered 14 January 2008 by Judge Charles H. Henry in Superior Court, New Hanover County, and remanding for a new trial. Heard in the Supreme Court 15 February 2010.

Roy Cooper, Attorney General, by Amy Kunstling Irene, Assistant Attorney General, for the State-appellant.

Paul F. Herzog for defendant-appellee.

Anne Bleyman, and Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., Counsel for North Carolina Advocates for Justice, amicus curiae.

BRADY, Justice.

In the case *sub judice* the State presented expert witness testimony at trial to the effect that pills found on Defendant Jimmy Waylon Ward's person, in his vehicle, and at his residence were pharmaceuticals classified as controlled substances under the North Carolina Controlled Substances Act. N.C.G.S. ch. 90, art. 5 (2009). The issue for our review is whether the trial court abused its discretion by permitting the State's expert witness to identify certain pills when the expert's methodology consisted solely of a visual inspection process. Under the facts of this case, the testifying expert's visual identification of the purported controlled substances is not sufficiently reliable under N.C.G.S. § 8C-1, Rule 702. Accordingly, the trial court abused its discretion, and we affirm the Court of Appeals.

FACTUAL AND PROCEDURAL BACKGROUND

In relevant part, the State's evidence at trial tended to show that Mandy Pope visited the New Hanover County Sheriff's Office, Vice and Narcotics Division, on 22 August 2006 seeking to assist law enforcement in an investigation of the individual who allegedly supplied her mother with illicit pharmaceuticals on a regular basis. Pope telephoned defendant from the Sheriff's Office and arranged to meet him at the Carolina Beach Exxon station for the purpose of purchasing thirty Lorcet pills for six dollars per pill. Lorcet is an opium deriva-

tive, a Schedule III controlled substance. After law enforcement placed a transmitter device in her purse and gave her three hundred dollars in United States currency, Pope traveled with Detective Nancy Willaford in an undercover minivan to the designated Exxon station, arriving shortly after 8:00 p.m. Several other undercover law enforcement officers conducted surveillance and provided security and back-up support. Defendant arrived five to ten minutes later and parked his black Chevrolet Monte Carlo next to the minivan. Pope then exited the minivan and entered defendant's vehicle. Detective Willaford remained in the minivan. Pope and defendant conversed in his vehicle, and then both exited when defendant retrieved something from the trunk of his vehicle. Pope and defendant then returned to defendant's vehicle, and Pope purchased from defendant thirty blue, oval-shaped pills, which Pope believed to be Lorcets, for one hundred eighty dollars in United States currency. Pope then exited defendant's vehicle, entered the minivan, and traveled back to the Sheriff's Office with Detective Willaford. Defendant left the Exxon station in his vehicle, and several law enforcement officers continued their surveillance by following him to his residence. Pope returned the remaining money and delivered the pills she purchased from defendant to law enforcement.

Based on the officers' surveillance and the events at the Carolina Beach Exxon station, warrants were obtained the next day, 23 August 2006, to arrest defendant and search his residence. After observing a black Monte Carlo leave the mobile home park where defendant resided, law enforcement officers stopped the vehicle and confirmed that defendant was the operator. Defendant was arrested and his person and vehicle were searched incident to the arrest. Law enforcement recovered three pill bottles and six hundred twenty dollars in United States currency from defendant. One bottle contained blue tablets and had a label attached indicating thirty tablets of Hydrocodone in the name of Jimmy W. Ward. A second medicine bottle with an illegible affixed label contained white tablets. The third bottle contained three different kinds of pills and had a label attached indicating sixty tablets of generic Xanax in the name of defendant's cousin, Manuel Ward. Law enforcement officers also searched the trunk of defendant's vehicle and discovered several more bottles of pills and a bank envelope containing blue pills. A prescription bottle and an additional nine hundred five dollars were retrieved from under the trunk's carpeting. Law enforcement officers then searched defendant's residence and storage shed and another vehicle at the premises. From this search, officers seized a number of items, includ-

ing a digital scale, a silver metal pipe fashioned as a smoking device, a substance resembling off-white rocks, a bottle containing ninety-three tablets with an affixed label indicating Hydrocodone for Manuel Ward, and a plastic drinking cup containing full and half pill tablets.

On 25 September 2006, the New Hanover County Grand Jury returned six true bills of indictment charging defendant with numerous crimes related to his activities on 22 and 23 August 2006 and the resulting searches previously described. At trial Special Agent Irvin Lee Allcox, a chemist in the Drug Chemistry Section of the State Bureau of Investigation (SBI) crime laboratory, was qualified and testified as an expert in chemical analysis of drugs and forensic chemistry. He testified to working over thirty-four years for the SBI, including the most recent twenty-four years as a chemist in the SBI crime laboratory. He stated he had previously testified as an expert in forensic chemistry over five hundred times in state and federal courts. Among the items the SBI laboratory received for examination from the New Hanover County Sheriff's Office pertaining to this case, Special Agent Allcox identified the following controlled substances: Dihydrocodeinone, Hydrocodone, and Oxycodone, which are opium derivatives, and cocaine, Amphetamine, Alprazolam (Xanax), Diazepam (Valium), and Methylphenidate (Ritalin). He also identified Carisoprodol (Soma), which is not a controlled substance.

In response to questions concerning the identification process, Special Agent Allcox testified that of the sixteen collections of items submitted, he conducted a chemical analysis on "about half of them." The remaining tablets were identified solely by visual inspection and comparison with information provided by Micromedex[1] literature, which Special Agent Allcox described as a "medical publication that is used by the doctors in hospitals and pharmacies to identify prescription medicine." According to Special Agent Allcox, the SBI has used Micromedex in some capacity throughout the nearly thirty-five years he has been associated with the agency. He testified that through "a listing of all the pharmaceutical markings," Microme-

1. The transcript of Special Agent Allcox's testimony reflects the spelling, "Micromedics," and the Court of Appeals presumably adopted that spelling based on the transcript. *See State v. Ward*, —— N.C. App. ——, ——, 681 S.E.2d 354, 369, 372-73 (2009). However, both parties agree before this Court that "Micromedex" is the correct name. *See, e.g.*, *Wright v. Abbott Labs.*, 62 F. Supp. 2d 1186, 1195 (D. Kan. 1999) (referencing "the Micromedex drug information program"), *aff'd*, 259 F.3d 1226 (10th Cir. 2001); *Schroeder v. Nw. Cmty. Hosp.*, 371 Ill. App. 3d 584, 588, 862 N.E.2d 1011, 1015-16 (2006) (same), *appeal denied*, 224 Ill. 2d 593, 871 N.E.2d 61 (2007); http://www.micromedex.com. Accordingly, we will adopt the spelling "Micromedex" to refer to the literature utilized by Special Agent Allcox.

dex can help "identify the contents, the manufacturer and the type of substances in the tablets." He believed that counterfeit tablets were obvious to distinguish because they lacked the uniform color, shape, and markings associated with the high standards of the pharmaceutical industry. In his opinion, no tablets seized in this case were counterfeit.

When asked why he performed only a visual inspection with Micromedex literature on some of the tablets and a chemical analysis on others, Special Agent Allcox focused his response on concerns for maximizing time and resources: "[W]e have limited resources and we have to weed out—we have to analyze the most important items. . . . [W]e don't have the resources to analyze everything that's submitted." He also indicated that SBI standard operating procedures determined which substances received which type of analysis depending on the information provided to the laboratory by the law enforcement officer submitting the evidence. Physical evidence submitted to the SBI laboratory for analysis must be accompanied by Form SBI-5, "Request for Examination of Physical Evidence." Crime Lab Div., N.C. State Bureau of Investigation, *Evidence Guide* 11, 13-15, 20 (Jan. 1, 2010), *available at* http://www.ncdoj.gov/About-DOJ/State-Bureau-of-Investigation/Crim e-Lab/NCSBI-Evidence-Guide.aspx. In Part B of Form SBI-5, the requesting officer is asked to give a "[d]escription of the incident (Brief Summary of the events of the crime)" or to attach a copy of the investigative report. *Id.* at 15.

Special Agent Allcox described the significance of the requesting officer's description of the incident under investigation in terms of which type of analysis he performed. For instance, one collection of thirty pills in this case was not chemically analyzed because, based on the submission sheet given to the laboratory, the number of tablets submitted could potentially support only a misdemeanor charge of possession of a controlled substance. Under standard operating procedures, substances supporting only misdemeanor charges were routinely identified solely by visual inspection with comparison to the Micromedex literature. However, substances that were submitted to the laboratory under circumstances that would support felony charges received "a *complete* analysis" pursuant to laboratory procedures. (Emphasis added.) Defense counsel was quick to highlight on cross-examination that the collection of thirty pills at issue was ultimately used to bring a felony trafficking charge and not a misdemeanor possession charge. In response, Special Agent Allcox testified: "If the officer had indicated that it was an undercover buy case

when submitting these 30 tablets, then I would have done a *complete analysis*." (Emphasis added.)

The trial court admitted Special Agent Allcox's testimony regarding the substances on which he conducted a chemical analysis;[2] furthermore, over defendant's objections, the trial court also admitted Special Agent Allcox's testimony regarding substances which he identified merely by visual inspection and reference to the Micromedex literature.[3]

Defendant offered evidence and testified to the effect that most of the seized items were his legitimate prescription medications or they belonged either to his cousin Manuel Ward or to a girlfriend. He denied selling controlled substances to Mandy Pope on 22 August 2006, and he explained that he acquired the large sums of currency through buying and selling automobiles, a business he operated with his cousin Manuel Ward.

The jury returned guilty verdicts against defendant for six counts of trafficking in opium (three counts from his activities on 22 August

2. Special Agent Allcox conducted a chemical analysis of the following substances: (1) State's Exhibit 26-A-1, determined to be crack cocaine, a Schedule II controlled substance, with a weight of 3.0 grams; (2) State's Exhibit 26-A-3, consisting of 94 green tablets, determined to contain Dihydrocodeinone (Hydrocodone), a Schedule III preparation, with a weight of 76.8 grams; (3) State's Exhibit 26-B-1, consisting of 18½ blue tablets, determined to contain Dihydrocodeinone (Hydrocodone), a Schedule III preparation, with a weight of 15.7 grams; (4) State's Exhibit 26-B-4, consisting of 66 blue tablets, determined to contain Dihydrocodeinone (Hydrocodone), a Schedule III preparation, with a weight of 55.36 grams; (5) State's Exhibit 26-B-6, consisting in part of 13 orange tablets, determined to contain Amphetamine (Adderall), a Schedule II preparation, with a weight of 4.7 grams; (6) State's Exhibit 26-B-7, consisting of 19 white tablets, determined to contain Hydrocodone/Dihydrocodeinone, a Schedule III preparation, with a weight of 12.24 grams; and (7) State's Exhibit 26-B-12, consisting of 13 white tablets and determined to contain Dihydrocodeinone (Hydrocodone), a Schedule III preparation, with a weight of 9.5 grams.

3. Identification by visual inspection alone was made as to the following: (1) State's Exhibit 3-A, consisting of 30 blue tablets, determined to contain Dihydrocodeinone (Hydrocodone), a Schedule III controlled substance, with a total weight of 24 grams; (2) State's Exhibit 26-A-4, consisting of 3 blue tablets and fragments, identified as containing Amphetamine (Adderall), a Schedule II controlled substance; (3) State's Exhibit 26-B-3, consisting of (a) 83½ small, blue, oval tablets, identified as containing Alprazolam (Xanax), a Schedule IV controlled substance, (b) 14 round, blue tablets, identified as containing Diazepam (Valium), a Schedule IV controlled substance, and (c) 15½ orange tablets, identified as containing Methylphenidate (Ritalin), a Schedule II controlled substance; (4) State's Exhibit 26-B-5, containing 23 white tablets, identified as Oxycodone, a Schedule II controlled substance; (5) State's Exhibit 26-B-6, containing 5 white tablets, identified as Methylphenidate (Ritalin), a Schedule II controlled substance; and (6) State's Exhibit 26-B-9, containing 13 blue tablets, identified as Oxycodone, a Schedule II controlled substance.

2006 and three counts arising from his arrest and the searches conducted on 23 August 2006), and single counts of intentionally maintaining a dwelling for keeping or selling controlled substances, possession of cocaine, intentionally maintaining a vehicle for keeping or selling controlled substances, possession of Ritalin with the intent to sell or deliver, possession of Xanax with the intent to sell or deliver, possession of Valium with the intent to sell or deliver, possession of Oxycodone with the intent to sell or deliver, and possession of drug paraphernalia. The trial court arrested the jury's guilty verdict in connection with the conviction for possessing Oxycodone with the intent to sell or deliver. All charges were consolidated for judgment, and defendant was sentenced to an active term of 90 to 117 months of imprisonment and a $100,000 fine pursuant to the guidelines established in N.C.G.S. § 90-95(h)(4)(b). Defendant then gave notice of appeal.

On appeal defendant challenged the trial court's admission of prior bad acts evidence in connection with an arrest on 10 February 2005, as well as Special Agent Allcox's testimony identifying certain items as controlled substances based solely on a visual inspection process. The Court of Appeals issued a unanimous opinion on 18 August 2009 finding no error in part and ordering a new trial in part. *State v. Ward*, —— N.C. App. ——, ——, 681 S.E.2d 354, 373-74 (2009). Defendant's convictions for trafficking in opium on 23 August 2006 and for possession of cocaine were left undisturbed; however, the Court of Appeals vacated defendant's other convictions and ordered a new trial as to those offenses. *Id.* We allowed the State's motion for temporary stay on 4 September 2009. On 8 October 2009, this Court allowed the State's petitions for writ of supersedeas and for discretionary review to address whether the trial court abused its discretion by permitting Special Agent Allcox to give expert opinion testimony identifying certain pills based solely on a visual inspection methodology.

ANALYSIS

When reviewing the ruling of a trial court concerning the admissibility of expert opinion testimony, the standard of review for an appellate court is whether the trial court committed an abuse of discretion. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citations omitted). An " '[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Elliott*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (quoting

State v. Hennis, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)), *cert. denied*, 549 U.S. 1000 (2006).

Under the North Carolina Rules of Evidence, when "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C.G.S. § 8C-1, Rule 702(a) (2009). Under Rule of Evidence 702, this Court has established three steps "for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686 (citing *State v. Goode*, 341 N.C. 513, 527-29, 461 S.E.2d 631, 639-41 (1995)). The proponent of the expert witness, in this case the State, has "the burden of tendering the qualifications of the expert" and demonstrating the propriety of the testimony under this three-step approach. *See Crocker v. Roethling*, 363 N.C. 140, 144, 675 S.E.2d 625, 629 (2009). The parties view this case as implicating only the first step of the evaluation, so we will only address whether the method of proof was sufficiently reliable as an area for expert testimony.

Determining the reliability of a method of proof is "a preliminary, foundational inquiry into the basic methodological adequacy of an area of expert testimony." *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687. In order to

> determine whether an expert's area of testimony is considered sufficiently reliable, "a court may look to testimony by an expert specifically relating to the reliability, may take judicial notice, or may use a combination of the two." Initially, the trial court should look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable.

Id. at 459, 597 S.E.2d at 687 (quoting *Goode*, 341 N.C. at 530, 461 S.E.2d at 641). In the event that precedent does not guide the determination, or if a trial court is "faced with novel scientific theories, unestablished techniques, or compelling new perspectives on otherwise settled theories or techniques," then "nonexclusive 'indices of reliability' " may be used to answer the question of reliability. *Id.* at 460, 597 S.E.2d at 687 (citations omitted). Several recognized indices

of reliability are "the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked to sacrifice its independence by accepting [the] scientific hypotheses on faith, and independent research conducted by the expert." *Id.* (alteration in original) (citations and internal quotation marks omitted).

Recently, the field of forensic science has come under acute scrutiny on a nationwide basis. When articulating the right of a criminal defendant under the Sixth Amendment of the United States Constitution to confront forensic analysts as witnesses at trial, the Supreme Court of the United States in *Melendez-Diaz v. Massachusetts* was quick to recognize the significance of a landmark report issued in 2009 by the National Academy of Sciences. —— U.S. ——, ——, 129 S. Ct. 2527, 2536 (2009) (citing Comm. on Identifying the Needs of the Forensic Scis. Cmty., Nat'l Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009) [hereinafter National Academy Report], *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf *and* http://books.nap.edu/openbook.php?record_id=12589&page=R1). Relying on the National Academy Report in part, the Court commented that "[f]orensic evidence is not uniquely immune from the risk of manipulation," *id.* at ——, 129 S. Ct. at 2536, and "[s]erious deficiencies have been found in the forensic evidence used in criminal trials," *id.* at ——, 129 S. Ct. at 2537. The funding for the National Academy Report came from Congress in 2005 when it provided $1.5 million. H.R. Rep. No. 109-272, at 121 (2005) (Conf. Rep.). As a result, a diverse committee of forensic experts, scientists, and members of the legal community, conducted several years of research and concluded that the pervasive sentiment was that "[t]he forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country." National Academy Report Preface, at xx (Emphasis omitted). Among its many findings, the committee noted that forensic scientists "sometimes face pressure to sacrifice appropriate methodology for the sake of expediency." *Id.* Summary, at 24. The committee further found that "[t]here are many hard-working and conscientious people in the forensic science community, but [] under-resourcing inherently limits their ability to do their best work." *Id.* at 15.

In the case *sub judice* our determination is guided in part by precedent, enactments of the General Assembly, and Special Agent Allcox's own testimony. We conclude that the visual inspection methodology Special Agent Allcox proffered as an area for expert testimony is not sufficiently reliable to identify the substances at issue.

In *State v. Llamas-Hernandez* a jury found the defendant guilty of trafficking in cocaine after hearing lay witness testimony from two law enforcement detectives who seized "a white powdery substance weighing approximately 55 grams" at a residence where the defendant was a co-tenant. 189 N.C. App. 640, 643, 659 S.E.2d 79, 81 (2008), *rev'd per curiam*, 363 N.C. 8, 673 S.E.2d 658 (2009). The substance was chemically analyzed nine months before trial, but the laboratory report was not admitted into evidence as a sanction against the State for discovery violations. *Id.* at 651, 659 S.E.2d at 86 (Steelman, J., concurring in part and dissenting in part). The trial court allowed the detectives to testify as lay witnesses that the substance was powder cocaine based on their law enforcement experience and training in identifying controlled substances. *Id.* at 643, 647, 659 S.E.2d at 81, 83 (majority).

Subsequently, this Court reversed the Court of Appeals majority decision for "the reasons stated in the dissenting opinion." *Llamas-Hernandez*, 363 N.C. at 8, 673 S.E.2d at 658. The dissenting judge concluded that by providing "procedures for the admissibility of [] laboratory reports" and "enacting such a technical, scientific definition of cocaine, it is clear that the General Assembly intended that expert testimony be required to establish that a substance is in fact a controlled substance." *Llamas-Hernandez*, 189 N.C. App. at 652, 659 S.E.2d at 86-87 (Steelman, J., concurring in part and dissenting in part) (citing N.C.G.S. § 90-90(1)(d) (2007) (defining cocaine) and *id.* §§ 8-58.20, 90-95(g), (g1) (2007) (establishing procedures for admitting laboratory reports)). The dissent argued that "if it was intended by the General Assembly that an officer could make a visual identification of a controlled substance, then such provisions in the statutes would be unnecessary." *Id.* at 653, 659 S.E.2d at 87. The natural next step following our decision to adopt the reasoning of the dissenting judge in *Llamas- Hernandez* is to conclude here that the expert witness testimony required to establish that the substances introduced here are in fact controlled substances must be based on a scientifically valid chemical analysis and not mere visual inspection.[4]

4. Although not binding on this Court, we also note that courts in other jurisdictions have reached similar conclusions. In an analogous case from Illinois, an appellate

Next, as in *Llamas-Hernandez*, we find acts of the General Assembly relevant to our decision. First and foremost is the obvious point that throughout the lists of Schedule I through VI controlled substances found in sections 90-89 through 90-94, care is taken to provide very technical and "specific chemical designation[s]" for the materials referenced therein. *E.g.*, N.C.G.S. §§ 90-89(1) (opiates), -90(2) (opiates), -91(j) (stimulants), -92(a)(1) (depressants). These scientific definitions imply the necessity of performing a chemical analysis to accurately identify controlled substances before the criminal penalties in N.C.G.S. § 90-95 are imposed.

Furthermore, the legislature has made it unlawful not only to "manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance," *id.* § 90-95(a)(1), but it is also illegal to "create, sell or deliver, or possess with intent to sell or deliver, a *counterfeit* controlled substance," *id.* § 90-95(a)(2) (emphasis added). The statutory definition of "[c]ounterfeit controlled substance," *id.* § 90-87(6), designates three factors that collectively indicate evidence of an intent to misrepresent a controlled substance. One of the factors is that the "physical appearance of the tablets, capsules or other finished product containing the substance is substantially identical to a specified controlled substance." *Id.* § 90-87(6)(b)(3). Clearly, the General Assembly contemplated that anyone manufacturing a counterfeit substance would make it look as close to the genuine product as possible. By imposing criminal liability for actions related to counterfeit controlled substances, the legislature not only acknowledged that their very existence poses a threat to the health and well-being of citizens in our state, but that a scientific, chemical analysis must be employed to properly differentiate between the real and the counterfeit. Even a different felony class

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court held that expert witness testimony identifying tablets as containing controlled substances based on comparing them "to pictures in a book" amounted to "conjecture" and "speculat[ion]" and was not a "conclusive scientific analysis" on which the prosecution could rely to carry its burden of proof. *People v. Mocaby*, 378 Ill. App. 3d 1095, 1100, 882 N.E.2d 1162, 1167 (2008); *see also State v. Colquitt*, 133 Wash. App. 789, 794, 137 P.3d 892, 894 (2006) (overturning a conviction when the prosecutor offered as evidence that a law enforcement officer believed the substance at issue was cocaine and conducted a field test that was never verified by further laboratory testing).

The State cites decisions from other jurisdictions that appear to allow the type of visual inspection process at issue for identifying controlled substances. *See State v. Carter*, 07-1237, p. 14-16 (La. App. 3 Cir. 4/9/08); 981 So. 2d 734, 744-45; *State v. Clark*, 2008 MT 419, ¶¶ 40-43, 347 Mont. 354, ¶¶ 40-43, 198 P.3d 809, ¶¶ 40-43 (2008); *State v. Stank*, 2005 WI App. 236, ¶¶ 40-44, 288 Wis. 2d 664, ¶¶ 40-44, 708 N.W.2d 43, ¶¶ 40-44, *rev. dismissed*, 2006 WI 3, 286 Wis. 2d 664, 708 N.W.2d 695 (2005). To the extent these cases support the State's argument, we find them unpersuasive to our holding.

level is assigned for sentencing purposes based on whether a particular item is a genuine or fake controlled substance. *Compare id.* § 90-95(b) (assigning various felony levels to criminal activity relating to controlled substances, including Classes C, G, H, and I) *with id.* § 90-95(c) (stating that "[a]ny person who violates G.S. 90-95(a)(2) [the *counterfeit* controlled substance provision] shall be punished as a Class I felon"). As such, a scientifically valid chemical analysis of alleged controlled substances is critical to properly enforcing the North Carolina Controlled Substances Act.

In addition to the guidance we receive from precedent and enactments of the General Assembly, we may also " 'look to testimony by an expert specifically relating to the reliability' " of the method of proof. *Howerton*, 358 N.C. at 459, 597 S.E.2d at 687 (quoting *Goode*, 341 N.C. at 530, 461 S.E.2d at 641). Here, Special Agent Allcox's testimony is lacking in sufficient credible indicators to support the reliability of his visual inspection methodology. There is little evidence in the record either implying that identification of controlled substances by mere visual inspection is scientifically reliable or suggesting that Special Agent Allcox's particular methodology was uniquely reliable. His testimony is completely devoid of any scientific data or demonstration of the reliability of his methodology. Moreover, in stating, "I have not seen counterfeit pharmaceuticals that you cannot look at and see that they were counterfeit," and "I have seen very few pharmaceutical counterfeits over the years," Special Agent Allcox did not provide positive proof for the reliability of his methodology, especially when "the *rising occurrence* of potentially unsafe counterfeit drugs" is considered. U.S. Food & Drug Admin., *FDA Initiative to Combat Counterfeit Drugs*, http://www.fda.gov/Drugs/DrugSafety/ucm180899.htm (last visited June 4, 2010) (emphasis added); *see also Pharmaceutical Supply Chain Security: Hearing Before the H. Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the Comm. on Government Reform*, 109th Cong. 24 (2006) (" 'Counterfeit prescription drugs . . . pose a serious threat to the public health. *Many are visually indistinguishable from authentic drugs*.' " (emphasis added) (quoting U.S. Food & Drug Admin., *FDA Counterfeit Drug Task Force Report: 2006 Update*, at 1, *available at* http://www.fda.gov/Drugs/DrugSafety/ucm172773.htm)); Robert C. Bird, *Counterfeit Drugs: A Global Consumer Perspective*, 8 Wake Forest Intell. Prop. L.J. 387, 387, 389 (2008) ("The proliferation of counterfeit medicines is one of the most pressing issues facing the pharmaceutical industry. . . . The World

Health Organization estimates that . . . up to 20% [of drugs] sold in developed countries are counterfeit." (citations omitted)).

Rather than demonstrating its proven reliability, Special Agent Allcox's explanation for using Micromedex literature focused on concerns for expediency and maximizing limited laboratory resources in light of the relative seriousness of the criminal charges. The SBI's own website states that "chemists perform the chemical analysis of evidence from criminal investigations, such as drugs," and "chemists utilize state-of-the-art instrumentation systems to analyze evidence." N.C. Dep't of Justice, State Bureau of Investigation, Drug Chemistry & Toxicology, http://www.ncdoj.gov/About-DOJ/State-Bureau-of-Investigation/Crim e-Lab/Drug-Chemistry-and-Toxicology.aspx (last visited June 4, 2010). Apparently, however, this is not invariably the case. On cross-examination Special Agent Allcox explained: "And the procedure[] in the crime laboratory is that misdemeanor pharmaceutical cases, if it's misdemeanor amounts, less than a felony amount, then we do an identification using the Micromedics [sic] files and cases involving felony amounts, *then we do a complete analysis*." (Emphasis added.) It is difficult to view this testimony as reflecting anything other than a technique for "cutting corners." Thus, even Special Agent Allcox's own testimony casts an unsettling shadow of doubt on the reliability of mere visual inspection as a method of proof.

In arguing for the reliability of a visual inspection methodology, the State emphasizes Special Agent Allcox's professional experience and contends that "Micromedex is a well-established method that has been used by the crime lab for 35 years and is also used by doctors and pharmacists." The State submits that any shortcomings inherent to the visual identification process should be measured by the jury only when considering the weight of the evidence. We disagree.

Special Agent Allcox's credentials are not disputed; he appears to be eminently qualified as an expert witness in forensic chemistry. He has worked over thirty-four years with the SBI, including twenty-four years as a forensic chemist, and he handles pharmaceuticals on nearly a daily basis. The prosecutor at trial referred to him as "supremely qualified." However, the issue here concerns the reliability of his method of proof, which is a "preliminary, foundational inquiry." *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687. "Once the trial court has determined that the method of proof is sufficiently reliable as an area for expert testimony, *the next level of inquiry* is whether

the witness testifying at trial is qualified as an expert to apply this method to the specific facts of the case." *Goode*, 341 N.C. at 529, 461 S.E.2d at 640 (emphasis added) (citing N.C. R. Evid. 702).[5]

Special Agent Allcox's remarkable credentials as a forensic chemist presents a particularly compelling need to halt his testimony when it is based on an insufficient method of proof. In *State v. Grier* this Court held that polygraph evidence is inadmissible at trial because of the inherent unreliability of polygraph tests. 307 N.C. 628, 642-45, 300 S.E.2d 351, 359-61 (1983). As well, this Court was "disturbed by the possibility that the jury may be unduly persuaded" by the testimony of the polygraph examiner, which would likely " 'be shrouded with an aura of near infallibility.' " *Id.* at 643, 300 S.E.2d at 360 (quoting *United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1975)). This Court further noted that " '[t]o the extent that the polygraph results are accepted as unimpeachable or conclusive by jurors, despite cautionary instructions by the trial judge, the jurors' traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted.' " *Id.* at 644, 300 S.E.2d at 360 (quoting *Alexander*, 526 F.2d at 168). The concern in the present context is that jurors may ascribe so much authority to such a noteworthy expert in forensic chemistry that they treat his testimony as infallible and automatically accept his opinion on the chemical composition of a substance, without properly appreciating—even with vigorous cross-examination and proper jury instructions—that the expert chemist never even performed a scientific, chemical analysis.

Additionally, the length of time a method has been employed does not necessarily heighten its reliability or alleviate our concerns. The SBI's practice has been illuminated here due in part to the Supreme Court of the United States decision in *Melendez-Diaz v. Massachusetts*, in which the Court indicated that the Confrontation Clause of the Sixth Amendment to the United States Constitution

5. We note that although Special Agent Allcox's background is impressive in the field of analytical chemistry, he stated that he lacks a pharmaceutical degree or specialized training in pharmaceuticals. He testified that he holds a bachelor of science degree with a major in chemistry from North Carolina State University. While not the primary issue before us, we take this opportunity to note that "[c]aution should be exercised in assuring that the subject matter of the expert witness's testimony relates to the expertise the witness brings to the courtroom." Walker Jameson Blakey et al., *North Carolina Evidence: 2010 Courtroom Manual* 241 (2010). Beyond his routine use of Micromedex literature to visually identify substances, there is little indication in the record that Special Agent Allcox was better qualified to visually identify a tablet than the average juror with ordinary perceptive abilities who, if called upon, could compare a tablet to a photograph and other descriptive literature.

applies to forensic analysts generating laboratory reports in criminal investigations because the reports are testimonial in nature. —— U.S. at ——, 129 S. Ct. at 2531-32; *see also State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304-05 (2009) (applying *Melendez-Diaz* to a forensic analyst's autopsy report). Forensic chemists are being called upon to testify as expert witnesses so that defendants have an opportunity for cross-examination. The practical effect of the *Melendez-Diaz* ruling is that through cross-examination more light is being shed on the procedures expert witnesses use to support their testimony. In some instances, when practices are illuminated "in the crucible of cross-examination," their shortcomings become apparent. *See Crawford v. Washington*, 541 U.S. 36, 61 (2004). In this way, the Confrontation Clause gradually advances its "ultimate goal," which is to "ensure reliability of evidence." *Id.*

Furthermore, the State notes that doctors and pharmacists utilize Micromedex literature in the health care industry. However, if health care professionals make mistakes there are established legal avenues of recourse for damages. The consequences at stake in a criminal prosecution make the present situation somewhat different. The reliability of an expert witness's method of proof should be addressed before a defendant is found guilty, stripped of his liberty, and serves a sentence of incarceration.

Because the method of proof at issue is not sufficiently reliable for criminal prosecutions, we cannot conclude, as the State argues, that the deficiencies of Special Agent Allcox's visual identification process only affect the amount of weight the jury assigns to his testimony. Adopting that view would circumvent the fundamental issue at stake, that is, the reliability of the evidence, and would risk a greater number of false positive identifications.

We acknowledge that controlled substances come in many forms and that we are unable to foresee every possible scenario that may arise during a criminal prosecution. Nevertheless, the burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution. Unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required. This holding is limited to North Carolina Rule of Evidence 702. Our ruling does not affect visual identification techniques employed by law enforcement for other purposes, such as

conducting criminal investigations. Moreover, common sense limits this holding regarding the scope of the chemical analysis that must be performed. The State submitted sixteen batches of items consisting of over four hundred tablets to the SBI laboratory in this case. A chemical analysis of each individual tablet is not necessary. The SBI maintains standard operating procedures for chemically analyzing batches of evidence, and the propriety of those procedures is not at issue here. A chemical analysis is required in this context, but its scope may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration. As this Court stated in *Howerton*, expert testimony need not be "indisputably valid before it can be admitted into evidence." 358 N.C. at 460, 597 S.E.2d at 687.

The aim is that the analysis be objective. SBI chemists are in a unique position. The SBI is "a division of the Department of Justice," and Special Agent Allcox is a sworn law enforcement officer who "work[s] closely with local police and Sheriffs, [and] district attorneys." N.C. Dep't of Justice, State Bureau of Investigation, http://www.ncdoj.gov/about-DOJ/state-bureau-of-investigation.aspx (last visited June 4, 2010). Yet, subjectivity that may unwittingly lead to law enforcement bias is a peril that should be guarded against in the field of forensic science. In the end, our holding today will, we think, promote not merely convictions of those who have violated the Controlled Substances Act, but will help ensure true justice. Ultimately, the State is better served by identifying perpetrators with reliable evidence and reducing the likelihood that convictions rest on inaccurate data.

For the foregoing reasons we conclude that, as the proponent of Special Agent Allcox's expert witness testimony, the State has not carried its burden of demonstrating the sufficient reliability of his visual inspection methodology. Therefore, the trial court abused its discretion by permitting Special Agent Allcox to identify certain evidence as controlled substances based merely on visual inspection as a method of proof. We affirm the Court of Appeals as to the issue before us and remand to that court for further remand to the trial court for additional proceedings not inconsistent with this opinion.

AFFIRMED AND REMANDED.

Justice TIMMONS-GOODSON concurrs in the result only.

Justice NEWBY dissenting.

In this case the trial court properly exercised its discretion to admit an expert's testimony that, based on a visual examination and comparison with a medical publication, pills seized from defendant contained controlled substances. However, the majority concludes that the expert's method of visually identifying controlled substances is unreliable and that the trial court's decision to the contrary was an abuse of discretion. The majority's approach alters the law of this state as it pertains to the admission of expert opinion testimony. Accordingly, I respectfully dissent.

Special Agent Allcox of the State Bureau of Investigation ("SA Allcox") is an expert in forensic chemistry and drug analysis. He has two degrees in science, including a chemistry degree from North Carolina State University. The courses of study leading to these degrees included instruction in quantitative analysis of physical chemistry, general chemistry, organic chemistry, and qualitative analysis. In addition to his formal scientific education, SA Allcox has investigated and analyzed drugs in a professional capacity for over thirty-four years. Using this considerable education and experience, SA Allcox identified the pills seized in this case and determined that the majority of those pills contained controlled substances.

SA Allcox used a two step visual identification method to determine the composition of some of the pills seized from defendant. First, utilizing his education, training, and experience, SA Allcox examined the item and made notes of its pharmaceutical markings, its appearance, its color, its size, and its shape, and compared his findings to "a listing of all the pharmaceutical markings [used] to identify" a pill in the Micromedex publication. Second, after identifying the pill, SA Allcox determined its chemical composition from the Micromedex publication.

SA Allcox explained that the SBI laboratory normally uses this visual identification method to analyze pills in misdemeanor cases. It does so because the laboratory does not have the resources to conduct a chemical analysis of every item submitted. The SBI laboratory uses chemical analyses in its other cases to ensure that more of its resources are devoted to the more serious offenses, such as those involving cocaine and opium derivatives. SA Allcox explained that despite the lack of chemical analysis the method of visually identifying pills is reliable and proven.

SA Allcox testified that the medical industry believes that visual identification is a reliable method of determining a pill's chemical composition. He stated that "doctors in hospitals and pharmacies" rely on Micromedex "to identify prescription medicine." SA Allcox also explained that pharmacists dispense pills "based upon the markings that are on the drug" and that to identify those pills, pharmacists use the same Micromedex database that is used by the SBI laboratory. The clear implication from this testimony is that medical professionals believe this visual identification method is sufficiently reliable to stake their professional licenses, reputations, and patients' well-being on the accuracy and reliability of its results.

Furthermore, SA Allcox indicated that the SBI itself believes this method is reliable. SA Allcox stated that the SBI laboratory has used Micromedex "for the 35 years that [he has] been associated with the crime laboratory" and trusts the accuracy of the results achieved using it. His testimony further demonstrates this belief. After visually examining the pills in State's Exhibit 26-B-2, SA Allcox determined from Micromedex that the pills were Carisoprodol, which contains no controlled substances. Once he made this conclusion he conducted no further testing on these pills.

SA Allcox testified that the possibility of counterfeit pills does not render the visual identification method unsound or unreliable. SA Allcox explained that generally, he sees prescription tablets frequently and "test[s] them . . . on a daily basis in the crime laboratory." Further, SA Allcox indicated that he is aware of counterfeit pharmaceutical pills and stated that in his time with the SBI he has seen such pills. However, SA Allcox also explained that the "pharmaceutical industry is very closely regulated" and genuine "pharmaceutical tablets are very uniform in size and appearance and color." On the other hand, SA Allcox recalled that his experience had shown counterfeit tablets to be "very mismatched [and] not uniform in appearance." Regarding the tablets examined in this case, SA Allcox said they appear to be authentic. Generally, as noted by the majority, defendant conceded the authenticity of "most of the seized items."

Before an expert's opinion is admissible at trial, the trial court must conclude the expert's "method of proof" is sufficiently reliable. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citing *State v. Goode*, 341 N.C. 513, 527-29, 461 S.E.2d 631, 639-40 (1995)). That determination is a "preliminary, foundational inquiry," *id.* at 460, 597 S.E.2d at 687, consistent with our trial courts' responsibility under the Rules of Evidence to decide "preliminary

questions concerning . . . the admissibility of expert testimony," *id.* at 458, 597 S.E.2d at 686 (citing N.C.G.S. § 8C-1, Rule 104(a) (2003)). In performing this task "trial courts are afforded wide latitude of discretion" that will be upset on appeal only if the trial court abuses its discretion. *Id.* (citations and internal quotation marks omitted).

In *State v. Goode* this Court recognized that to be admissible an expert's method of proof must be sufficiently reliable. 341 N.C. 513, 527-29, 461 S.E.2d 631, 639-40. A trial court may consider expert testimony related to reliability, take judicial notice of the method's reliability, or rely on some combination of the two to make its decision. *Id.* at 530, 461 S.E.2d at 641 (citations omitted). In *Goode* the trial court heard testimony from the State's proffered expert regarding the reliability of bloodstain pattern interpretation. *Id.* We determined that the expert's testimony was sufficient to satisfy our reliability standard. *Id.* Additionally, we noted that our appellate courts had previously "implicitly accepted bloodstain pattern interpretation as a scientific method of proof." 341 N.C. at 530-31, 461 S.E.2d at 641. Accordingly, we determined that the trial court properly admitted expert testimony interpreting bloodstain patterns from a crime scene. *Id.* at 524, 530-31, 461 S.E.2d at 637-38, 641-42.

Several years later, in *Howerton v. Arai Helmet, Ltd.*, we examined the reliability standard of *Goode* and compared it with the reliability standard under the federal evidentiary rules to determine whether the standards are the same. Ultimately, we concluded that our trial courts are not required to thoroughly scrutinize an expert's scientific method like the Supreme Court of the United States required of federal trial courts in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). *Howerton*, 358 N.C. at 455-69, 597 S.E.2d at 684-93. While *Daubert* required federal trial courts to determine, *inter alia*, whether an expert's method of proof is " 'scientifically valid,' " *id.* at 456, 597 S.E.2d at 685 (quoting *Daubert*, 509 U.S. at 592-93, 113 S. Ct. at 2796, 125 L. Ed. 2d at 482), the *Goode* standard requires our trial courts to inquire only into the "basic methodological adequacy" of an expert's method of proof, *id.* at 460, 597 S.E.2d at 687.

Perhaps most importantly, we emphasized that the *Goode* standard does not require an expert's method "to be proven conclusively reliable or indisputably valid." *Id.* We explained there is a "fundamental distinction between the admissibility" and the credibility of evidence. *Id.* (citing *Queen City Coach Co. v. Lee*, 218 N.C. 320, 323, 11 S.E.2d 341, 343 (1940)). We recognized that even after satisfying

our admissibility standard, there may be "lingering questions or controversy concerning the quality of the expert's conclusions," but added that those matters affect the testimony's weight and credibility, not its admissibility. 358 N.C. at 461, 597 S.E.2d at 688 (citations omitted). We reminded the bench and the bar that " '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.' " *Id.* (quoting *Daubert*, 509 U.S. at 596, 113 S. Ct. at 2798, 125 L. Ed. 2d at 484) (alteration in original).

The standard of reliability for admitting expert testimony in our trial courts was illustrated just last year in *Crocker v. Roethling*, 363 N.C. 140, 675 S.E.2d 625 (2009).[6] In that case the plaintiffs sought to demonstrate that the defendant medical doctor breached the applicable "same or similar community" standard of care when he failed to perform a Zavanelli maneuver during delivery of their daughter. 363 N.C. at 141, 675 S.E.2d at 627 (Hudson & Timmons-Goodson, JJ.). The trial court excluded testimony from the plaintiffs' expert, John P. Elliott, M.D., as it appeared that he was "insufficiently familiar" with the applicable standard of care, *id.* at 143, 675 S.E.2d at 628, and that he failed to demonstrate a reliable method by which he formed his opinion on the content of the applicable standard of care, 363 N.C. at 158, 675 S.E.2d at 637-38 (Newby, J., Parker, C.J. & Brady, J., dissenting).

This Court reversed the exclusion of that testimony even though "Dr. Elliott had never practiced in Goldsboro and admitted in his deposition that he had never even practiced in a community similar to Goldsboro." *Id.* at 160, 675 S.E.2d at 639. Further, Dr. Elliott testified at his deposition that he "had never performed the Zavanelli maneuver, nor had he ever observed it performed during his twenty-four years of practice in Phoenix." *Id.* at 150-51, 675 S.E.2d at 633 (Martin & Edmunds, JJ., concurring). In fact, he formed his opinion "in part on a worldwide study that found only about one hundred reported cases in which the Zavanelli maneuver was used between 1985, when the maneuver was first mentioned in medical literature, and 1997, four years before [plaintiffs' daughter's] birth." *Id.* at 162, 675 S.E.2d at 640 (Newby, J., dissenting).

6. There is no majority opinion in this case. Justice Hudson filed an opinion in which Justice Timmons-Goodson joined. Justice Martin filed an opinion in which Justice Edmunds joined. Together, these opinions constituted "a majority of the Court in favor of reversing and remanding." *Crocker*, 363 N.C. at 154 n.1, 675 S.E.2d at 635 n.1 (Newby, J., dissenting).

In reversing the trial court's decision excluding the expert's opinion, the opinions composing the majority emphasized that the threshold reliability standard in this state is not exacting. Justice Hudson's opinion indicated that the threshold admissibility standard is met if the expert asserted familiarity with the applicable standard of care. *Id.* at 148, 675 S.E.2d at 631 (Hudson, J.). Justice Martin's opinion echoed that sentiment, stating that the foundational inquiry does not require conclusive reliability. *Id.* at 149, 675 S.E.2d at 632 (Martin, J., concurring). Justice Martin's opinion explained that "[e]vidence may be ' " 'shaky but admissible,' " ' and it is the role of the jury to make any final determination regarding the weight to be afforded to the evidence." *Id.* at 150, 675 S.E.2d at 632 (quoting *Howerton*, 358 N.C. at 460-61, 597 S.E.2d at 687-88).

Additionally, the Court made clear that there is no particular scientific method required to satisfy the reliability standard of *Goode*. Justice Hudson's opinion explained that "our statutes [and] case law . . . do [not] prescribe any particular method by which a medical doctor must become 'familiar' with a given community. Many methods are possible, and our jurisprudence indicates our desire to preserve flexibility in such proceedings." *Id.* at 147, 675 S.E.2d at 631 (Hudson, J.). The other two opinions agreed. *Id.* at 151, 675 S.E.2d at 633 (Martin, J., concurring); *id.* at 158, 675 S.E.2d at 637 (Newby, J., dissenting).

Finally, the opinions composing the majority reminded our trial courts that they should not exercise their discretion in a manner that excludes "shaky" expert testimony. Justice Hudson's opinion stated that this Court has "cautioned trial courts against 'asserting sweeping pre-trial "gatekeeping" authority . . . [which] may unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence.' " *Id.* at 147-48, 675 S.E.2d at 631 (Hudson, J.) (citations omitted). Similarly, Justice Martin's opinion emphasized the distinction this Court drew in *Howerton* between the stringent federal standard and our flexible standard that preserves the constitutional role of the jury. *Id.* at 150, 675 S.E.2d at 632-33 (Martin, J., concurring).

Crocker demonstrates the reliability of SA Allcox's method in the case *sub judice*. In *Crocker* the expert's testimony was markedly less reliable than SA Allcox's testimony. The expert in *Crocker* had never performed or seen a Zavanelli maneuver during roughly twenty-five years of practice. This patent lack of experience notwithstanding, this Court concluded that the trial court committed reversible error

by excluding his testimony opining that such a maneuver was part of the standard of care for a medical doctor practicing in Goldsboro because, in part, a study found that roughly ten Zavanelli maneuvers were performed worldwide each year between 1985 and 1997. *See* 363 N.C. at 162, 675 S.E.2d at 640 (Newby, J., dissenting). If the trial court in *Crocker* committed reversible error by excluding the expert's testimony, then SA Allcox's method of proof—utilizing over thirty-four years of experience in performing an analysis relied upon by both law enforcement and medical professionals—is sufficiently reliable under the *Goode* standard. If visual identification is sufficiently reliable in potentially life-and-death scenarios, it is difficult to fathom how the majority concludes the method is legally inadequate.

Furthermore, our recent decision in *State v. Llamas-Hernandez*, reversing the decision of the Court of Appeals "[f]or the reasons stated in the dissenting opinion," 363 N.C. 8, 673 S.E.2d 658 (2009), demonstrates that the trial court here did not abuse its discretion. In *Llamas-Hernandez* the dissenting opinion determined that the trial court abused its discretion when it allowed a police detective to provide lay opinion testimony that non-descript white powder was cocaine. 189 N.C. App. 640, 651, 654, 659 S.E.2d 79, 86, 88 (Steelman, J., concurring in part and dissenting in part).

The dissenting judge in *Llamas-Hernandez* offered several reasons for his conclusion. First, his opinion explains that, because our General Statutes contain technical definitions of controlled substances and procedures for admitting and allowing access to laboratory reports, expert testimony (rather than lay testimony) is needed to prove the existence of a controlled substance. *Id.* at 652-53, 659 S.E.2d at 86-87 (citations omitted). Second, the dissenting judge opined that the white powder had no characteristics that could be distinguished by sight. The dissenting opinion explained that while crack cocaine "pills" may be susceptible to visual identification because of their "distinctive color, texture, and appearance," *id.* at 654, 659 S.E.2d at 87, powdered cocaine is "a non-descript white powder" not conducive to a visual identification, *id.* The dissenting opinion's reasoning was consistent with long-standing precedent regarding the visual identification of controlled substances. *See State v. Fletcher*, 92 N.C. App. 50, 56-58, 373 S.E.2d 681, 685-86 (1988) (upholding the trial court's admission of expert testimony based on a visual examination that a substance was marijuana while stating that evidence of a chemical analysis would be entitled to greater weight).

In the case *sub judice*, an expert visually identified controlled substances with distinguishing characteristics. It is already established that SA Allcox is a qualified expert. Furthermore, SA Allcox explained that the manner in which he performed his analysis was to first "make notes of its pharmaceutical markings, its appearance, its color, its size, and its shape." These are all distinctive characteristics. SA Allcox would then locate the matching tablet in the Micromedex publication, from which he learned the "contents, the manufacturer and the type of substances in the tablets." In other words, SA Allcox described to the trial court the manner in which he used his experience and credentials to not only ascertain the distinctive characteristics of the pills he was examining and then determine their composition from Micromedex, but also to ensure that the pills were not counterfeit. As such, the trial court soundly exercised its discretion.

The majority's decision to the contrary significantly alters the law of this state as it pertains to the admission of expert testimony. At the outset, the majority's holding is essentially contrary to a point on which this Court unanimously agreed in *Crocker*: that because the *Goode* standard can be satisfied in any number of ways, trial courts should not lightly dismiss a particular method. *Crocker*, 363 N.C. at 147, 675 S.E.2d at 631 (Hudson, J.); *id.* at 151, 675 S.E.2d at 633 (Martin, J., concurring); *id.* at 158, 675 S.E.2d at 637 (Newby, J., dissenting). However, today the majority determines that "[u]nless the State establishes . . . another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required." This holding expressly limits the manner in which an expert may arrive at his or her opinion, in direct contradiction of this Court's statements in *Crocker*.

Further, the majority's decision appears to raise the threshold for the admission of expert testimony from the level established in *Crocker*. In *Crocker* we determined that the trial court erred by excluding expert testimony regarding the propriety of a rarely used procedure in a small community from an expert who utilized no relevant experience in his method of proof. Yet here the Court concludes that an expert's method of proof is unreliable despite his many years of experience performing the method and its use in the medical community. Such a conclusion most assuredly raises the admissibility standard from where it stood after *Crocker*.

Perhaps most significantly, the majority changes the foundational inquiry our trial judges must conduct prior to admitting an expert's

opinion. In *Howerton* we explained that the federal trial courts are required to thoroughly scrutinize and determine that an expert's method of proof is "scientifically valid" before admitting that opinion. 358 N.C. at 456, 597 S.E.2d at 685 (quoting *Daubert*, 509 U.S. at 592-93, 113 S. Ct. at 2796, 125 L. Ed. 2d at 482). We then distinguished our approach as "decidedly less mechanistic and rigorous than the exacting standards of reliability demanded by the federal approach." *Id.* at 464, 597 S.E.2d at 690 (citation and internal quotation marks omitted). Despite this illustration, the majority today emphasizes on several occasions that the trial court abused its discretion by admitting the expert's opinion in this case because the expert's method of proof is not "scientifically valid." Accordingly, it seems the majority's decision has altered the inquiry our trial courts must conduct.

The majority's attempt to use the present case's status as a criminal prosecution to justify its decision is unpersuasive. There is only one evidentiary standard for expert testimony. *See* N.C.G.S. § 8C-1, Rule 702 (2009). Further, we relied upon *Goode*, a criminal case, to provide our admissibility framework in *Howerton* and *Crocker*, both civil cases. The majority approves of such interchangeable use because its opinion relies upon *Goode*, *Howerton*, and *Crocker*. Nonetheless, the majority relies on Confrontation Clause cases to support its conclusion that SA Allcox's method of proof "is not sufficiently reliable *for criminal prosecutions*." (Emphasis added.) The majority advances as the purpose of the Confrontation Clause to " 'ensure reliability of evidence.' " (Quoting *Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 1370, 158 L. Ed. 2d 177, 199 (2004).) The majority opinion correctly recites the Clause's purpose, but misses its focus. The Confrontation Clause is a "procedural . . . guarantee." *Crawford*, 541 U.S. at 61, 124 S. Ct. at 1370, 158 L. Ed. 2d at 199. Those accused of criminal offenses are entitled to cross-examine the witnesses against them. This is the same procedural protection we afford in regard to all expert witnesses. As we said in *Howerton*, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 358 N.C. at 461, 597 S.E.2d at 688 (citations and internal quotation marks omitted) (alteration in original). Therefore, whether a case is criminal or civil in nature does not change the tenet that cross-examination is properly used to illustrate to the jury an opinion's shortcomings. However, the Confrontation Clause should not prevent the jury from considering the opinion altogether.

Moreover, the majority's attempt to justify its reasoning by noting the allegedly increasing incidents of counterfeit pharmaceutical drugs is similarly unavailing. Initially, there is some question regarding the propriety of reversing a discretionary decision of a trial court in reliance upon facts not presented to the trial court and that are not part of the record on appeal. In any event, the majority's creation of a prophylactic measure intended to prevent confusing a fake controlled substance with the genuine article is unwarranted. The General Assembly has provided a mechanism for a defendant to obtain evidence against him and have it tested. N.C.G.S. § 15A-903(a)(1) (2009). A defendant simply has to ask the trial court to order the State to produce the physical evidence, and the court must do so. *Id.* As the General Assembly has enacted this safeguard, the majority's attempt to use this case's classification as a criminal prosecution to justify its alteration of our evidence law is unfounded.

The majority concedes that the medical profession uses the Micromedex publication to identify medications when accurate identification could mean the difference between life and death. Yet the majority concludes that an expert opinion based on Micromedex is not sufficiently reliable to even be presented as *potentially* persuasive evidence to a criminal jury. Notwithstanding the majority's implications to the contrary, I believe that the medical profession's desire for appropriate diagnosis and treatment is as significant as that of our judicial system for accurate verdicts.

Whereas the majority concludes that the trial court's decision lacked a basis in reason, I believe the trial court exercised its discretion in a manner that comports with the law of this state regarding admission of expert testimony. Accordingly, I respectfully dissent.

STATE OF NORTH CAROLINA v. MICHAEL LEMARK WARD

No. 68A99-3

(Filed 17 June 2010)

Sentencing— capital—mental retardation—bifurcation—discretion of court

Trial court judges have the discretion to bifurcate the issues of mental retardation and capital sentencing; the plain language of N.C.G.S. § 15A-2005 contemplates a specific chronological

order of events within the sentencing proceeding, but does not explicitly require or prohibit bifurcation of the proceeding into distinct phases. There was no abuse of discretion in denying the motion to bifurcate in this case.

Justice BRADY concurring in the result only.

Justices MARTIN and NEWBY join in this concurring opinion.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order dated 26 March 2009 entered by Judge Cy A. Grant, Sr. in Superior Court, Halifax County, denying defendant's motions for a bifurcated sentencing hearing and to preclude the State from relitigating certain issues related to a previous trial in which a jury found defendant guilty of first-degree murder. Heard in the Supreme Court 6 January 2010.

Roy Cooper, *Attorney General*, *by Amy Kunstling Irene*, *Assistant Attorney General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Anne M. Gomez*, *Assistant Appellate Defender*, *for defendant-appellant.*

John Rittelmeyer for Disability Rights North Carolina and The Arc of North Carolina, *amici curiae.*

HUDSON, Justice.

Because N.C.G.S. § 15A-2005(e) does not explicitly prohibit a trial court from submitting the special issue of mental retardation to the jury in a bifurcated, rather than unitary, capital sentencing proceeding, we hold that the legislature has left that determination to the sound discretion of the capable trial judges of our State. Such a holding is consistent with the long-standing principle that when a statute is silent on whether to bifurcate, trial judges have the inherent authority and discretion to manage proceedings before them. Here, the record does not reflect an abuse of that discretion. Accordingly, we affirm the decision of the trial court to deny defendant's motion to bifurcate his sentencing proceeding.

Background

In 1998 defendant was convicted of the 1996 first-degree felony murder of Patricia Smith King, conspiracy to commit murder, robbery with a dangerous weapon, felonious breaking or entering, felonious

larceny, felonious possession of stolen goods, and felonious conspiracy to commit breaking or entering and larceny. A full statement of the facts of this case can be found in this Court's prior opinion. *See State v. Ward*, 354 N.C. 231, 238-43, 555 S.E.2d 251, 257-60 (2001). Following a capital sentencing proceeding, the jury returned a binding recommendation that defendant be sentenced to death.

Upon review, this Court found no prejudicial error in the guilt-innocence phase of defendant's trial, but did find error in the sentencing proceeding and remanded the case for a new capital sentencing proceeding. *Id.* at 237-38, 555 S.E.2d at 257. On remand, defendant moved that the trial court bifurcate his sentencing proceeding so that the jury would hear evidence concerning defendant's alleged mental retardation, be charged on that issue, and determine whether he is, in fact, mentally retarded prior to proceeding to the evidence of aggravating and mitigating circumstances. The trial court denied defendant's motion. On 27 August 2009, we allowed defendant's petition for writ of certiorari to the Court concerning the denial of his motion to bifurcate, as well as the denial of his motion to preclude the State from presenting evidence at the sentencing proceeding relating to the issues of premeditation, deliberation, and the identity of the shooter. As to the latter issue, we conclude that certiorari was improvidently allowed.

Analysis

In the context of the sentencing proceeding following the guilt-innocence phase of a capital trial, *see* N.C.G.S. § 15A-2000 (2009), the General Assembly has provided:

> (e) If the court does not find the defendant to be mentally retarded in the pretrial proceeding [as outlined in N.C.G.S. § 15A-2005(c)], upon the introduction of evidence of the defendant's mental retardation during the sentencing hearing, the court shall submit a special issue to the jury as to whether the defendant is mentally retarded as defined in this section. *This special issue shall be considered and answered by the jury prior to the consideration of aggravating or mitigating factors and the determination of sentence.* If the jury determines the defendant to be mentally retarded, the court shall declare the case noncapital and the defendant shall be sentenced to life imprisonment.

N.C.G.S. § 15A-2005(e) (2009) (emphasis added). A plain reading of these words shows that the statute suggests a single sentencing pro-

ceeding—"during *the* sentencing hearing"—while at the same time using language that indicates a required sequence of events within that proceeding: "*upon the introduction* of evidence . . . , the court shall submit a special issue" that "shall be considered *and answered . . . prior to* the consideration of . . . and the determination of sentence." *Id.* Unlike N.C.G.S. § 15A-2000, which explicitly provides that a capital trial must take place in two separate phases, first the determination of guilt or innocence, followed by the determination of sentence, N.C.G.S. § 15A-2005 is silent—and indeed inherently ambiguous—regarding whether these stages may or must take place in a unitary or bifurcated proceeding.

When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself:

> When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.

Diaz v. Div. of Soc. Servs., 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006). An ambiguous provision, such as at issue here, leads us in turn to the general rule that, " '[i]n discerning the intent of the General Assembly, statutes *in pari materia* should be construed together and harmonized whenever possible.' " *State v. Abshire*, 363 N.C. 322, 330, 677 S.E.2d 444, 450 (2009) (quoting *State v. Jones*, 359 N.C. 832, 836, 616 S.E.2d 496, 498 (2005) (alteration in original) (citation omitted)). For example, subsection (g) of N.C.G.S. § 15A-2005 also indicates that the question of mental retardation must be *both* considered *and* decided by the jury prior to the "consideration of aggravating and mitigating factors" pursuant to N.C.G.S. § 15A-2000(e) and (f):

> (g) *If the jury determines that the defendant is not mentally retarded* as defined by this section, *the jury may consider* any evidence of mental retardation presented during the sentencing hearing *when determining aggravating or mitigating factors* and the defendant's sentence.

N.C.G.S. § 15A-2005(g) (2009) (emphases added). If the jury determines that the defendant is in fact mentally retarded, then it need not consider evidence of aggravating and mitigating circumstances, because the trial judge must impose a life sentence.

Reading this statute to mandate a unitary sentencing proceeding discounts—or at the least underemphasizes—the critical phrase "and answered" in N.C.G.S. § 15A-2005(e). *Cf. N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) ("Because the actual words of the legislature are the clearest manifestation of its intent, *we give every word of the statute effect, presuming that the legislature carefully chose each word used.*" (emphasis added) (citation omitted)). Such a reading also disregards the additional words in subsection (g) indicating that, when retardation has been raised as a defense, the jury must "determine" the special issue of mental retardation—first as a separate issue, and then again as an aspect of "determining" the existence of aggravating and mitigating circumstances.

We read this language as envisioning a procedure in which evidence of aggravators is introduced—as well as considered—after the special issue of mental retardation has been answered. Indeed, the pattern jury instructions for capital sentencing proceedings in North Carolina recognize this ambiguity and provide trial judges the flexibility to modify jury instructions in capital cases accordingly. *See* 1 N.C.P.I.—Crim. 150.05 (2001) ("Death Penalty—Mental Retardation Jury Determination (with Special Verdict Form)")[1] (with an opening note stating that "[t]his instruction is written in a manner which contemplates that the jury will return to court with its answer to the mental retardation question before hearing arguments and being instructed [on aggravating and mitigating factors and determination of sentence]. *If the trial judge chooses to use a different procedure*, this instruction should be modified accordingly." (emphasis added)); *id.* ("The one issue for you to determine at this stage of the proceedings reads: 'Is the defendant, (*name*), mentally retarded?' "; "Your answer to this mental retardation issue, either 'yes' or 'no,' must be unanimous."); 1 N.C.P.I.—Crim. 150.10 ("Death Penalty—Instructions to Jury at Separate Sentencing Proceeding") (2004) ("Members of the jury, [having found the defendant guilty of] murder in the first degree [and the defendant having been determined by you not to be mentally retarded], it is now your duty to recommend to the Court whether the defendant should be sentenced to death or to life imprisonment.").

While these pattern jury instructions are not binding on this Court, they were drafted by a committee of the very same superior

1. An interim version of these instructions, dated November 2009, may be found at http://www.sog.unc.edu/programs/ncpji/documents/r150.05_11_2009.p df. The portions quoted here remain unchanged in the interim version.

court judges who oversee capital sentencing proceedings, and they demonstrate these judges' ability to exercise discretion sensibly. In the instructions crafted after N.C.G.S. § 15A-2005 was enacted in 2001, these trial judges have acknowledged the ambiguity in the statute and have addressed it in a careful manner. The instructions maintain consistent treatment of all capital defendants while also allowing for the type of "guided discretion" and "particularized consideration of the relevant aspects of the character and record of a convicted defendant" that we have held is critical to the constitutionality of our death penalty procedures. *State v. Barfield*, 298 N.C. 306, 35-52, 259 S.E.2d 510, 542-43 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986).

The plain language of N.C.G.S. § 15A-2005 indicates that the jury will make two separate determinations, at two distinct points during the sentencing proceeding: first, on the special issue of mental retardation, and next, only if the defendant is found not to be mentally retarded, the sentence to be imposed. Allowing trial courts the discretion to bifurcate such proceedings gives proper weight to the words "and answered," which also appear in the statute before the phrase "prior to the consideration of aggravating or mitigating factors and the determination of sentence." Surely the General Assembly chose to require that the special issue of mental retardation be *answered* to indicate that the sentencing proceeding follow a specific sequence of events. By mandating that the jury first consider *and answer* the special issue on mental retardation, N.C.G.S. § 15A-2005(c) does not preclude a bifurcated proceeding, but rather contemplates that only after completing and returning a "not mentally retarded" verdict on the first issue may the jury even begin to consider evidence of aggravating and mitigating factors.

The evidence presented to the jury on these questions may overlap somewhat, particularly concerning the defendant's adaptive functioning skills and whether the perpetration and details of the crime reflect those skills. *See* N.C.G.S. § 15A-2005(a)(1)a. (2009) (defining mentally retarded as "[s]ignificantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning"). However, the evidence is also likely to be appreciably different, as "[t]he defendant has the burden of proving significantly subaverage general intellectual functioning, significant limitations in adaptive functioning, and that mental retardation was manifested before the age of 18," which will typically be unrelated to

the details of the crime. *Id.* § 15A-2005(a)(2) (2009). It seems reasonable that the legislature intended to allow for a trial court, in overseeing the sequence of events envisioned in N.C.G.S. § 15A-2005(e), to wait until receiving a negative answer to the question of a defendant's mental retardation before expending time and resources on the presentation of evidence of aggravating and mitigating circumstances. *See* N.C.G.S. § 15A-2005(e) ("If the jury determines the defendant to be mentally retarded, the court shall declare the case noncapital and the defendant shall be sentenced to life imprisonment."). In light of this conditionality, that the jury only need consider aggravating and mitigating factors if it finds that the defendant is not mentally retarded, a trial judge might determine, in a case in which the evidence of mental retardation is particularly strong, that bifurcation would best promote judicial economy in that the need for the second phase could well be obviated.

In another instance, a trial court might determine that bifurcation would be the best means of avoiding undue prejudice. For example, when the evidence of aggravation is especially gruesome or heinous, the judge could conclude that viewing or hearing such evidence might unduly prejudice the jury in its determination of the issue of mental retardation. In connection with the issue of mental retardation, the jury will necessarily hear evidence about the defendant's intelligence quotient (IQ) and capabilities or limitations in "the following adaptive skills areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills." *Id.* § 15A-2005(a)(1)b. (2009). By contrast, the State's evidence of aggravating circumstances will focus on the worst aspects of the offense itself, much of which may be entirely irrelevant to the issue of mental retardation.[2] Because of this difference in subject matter, from the capacity of the defendant to the circumstances of the crime itself, a trial judge may sometimes deem it appropriate to conduct the sentencing proceeding in two phases to ensure the issues are considered and answered separately.

We have recognized the discretion of trial courts to conduct bifurcated proceedings, or the propriety of that approach, in a num-

2. Although N.C.G.S. § 15A-2000(a)(3) provides, in part, that "all such evidence [from the guilt determination phase] is competent for the jury's consideration in passing on punishment," it limits the evidence during the sentencing proceeding to "any matter that the court deems relevant to *sentence*." (Emphasis added.) The statute does not provide that such evidence is competent or relevant for the jury's consideration in passing on the special issue of mental retardation.

ber of other contexts. *See*, *e.g.*, *In re Will of Barnes*, 358 N.C. 143, 143, 592 S.E.2d 688, 689 (2004) (per curiam) (reversing the Court of Appeals based on the reasoning in the dissent, which would have affirmed the trial court's exercise of discretion in managing a trial by bifurcating the proceedings); *In re Will of Hester*, 320 N.C. 738, 742-43, 360 S.E.2d 801, 804-05 (1987) (noting that North Carolina Civil Procedure Rule 42(b) gives trial courts "extremely broad" discretion to sever or bifurcate civil proceedings when doing so "furthers convenience and avoids prejudice" (citation omitted)); *Barfield*, 298 N.C. at 350, 259 S.E.2d at 541-42 (recognizing the constitutionality of statute mandating bifurcated capital trial proceedings); *In re White*, 81 N.C. App. 82, 85, 344 S.E.2d 36, 38 (citing *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984), and noting that when the statutes do not specify how the proceedings are to be conducted, but only that both stages must occur, trial judges may conduct the adjudication and disposition stages of a termination of parental rights proceeding concurrently, or they may hold a bifurcated proceeding in which the stages take place separately), *disc. rev. denied*, 318 N.C. 283, 347 S.E.2d 470 (1986); *see also State v. Kilby*, —— N.C. App. ——, —— n.5, 679 S.E.2d 430, 433 n.5 (2009) (observing that "the wording of the statute" outlining the satellite-based monitoring program for sexual offenders, N.C.G.S. § 14-208.40B(c), allows for either a bifurcated or single proceeding, to take place in "two phases," with that determination left to the trial judge).

Like the statute at issue here, the statutes in each of these situations either explicitly provide for bifurcated proceedings or plainly contemplate that the proceeding take place in stages or phases. Thus, our case law demonstrates that, even bifurcated, a hearing is still treated as the same single proceeding or trial. *See*, *e.g.*, *In re Will of Hester*, 320 N.C. at 745, 360 S.E.2d at 806 ("Simple bifurcation of the sub-issues does not create two proceedings. In a bifurcated trial the entire action and all issues therein remain under the control of one court; bifurcation of issues normally results in only one judgment." (citation omitted)). The outcome here is consistent with our language in *Hester*: Whether or not the trial court bifurcates a sentencing proceeding, defendant will receive one, single sentencing judgment.[3]

We have stated that a "bifurcated trial is particularly appropriate where separate submission of issues avoids confusion and promotes

3. N.C.G.S. § 15A-2005(c) also allows for the possibility of a pretrial hearing on mental retardation to take place before the sentencing hearing, making such a pretrial hearing mandatory if the State consents. If the State does not agree, the trial court, in its discretion, may still order a pretrial hearing upon a motion by the defendant.

a logical presentation to the jury and where resolution of the separated issue will potentially dispose of the entire case." *Id.* at 743, 360 S.E.2d at 804 (citations omitted). Such an approach is also consistent with our recognition that trial judges have broad discretion to supervise and organize the proceedings before them:

> The paramount duty of the trial judge is to supervise and control the course of the trial so as to prevent injustice. In discharging this duty, the court possesses broad discretionary powers sufficient to meet the circumstances of each case. This supervisory power encompasses the authority to structure the trial logically and to set the order of proof. Absent an abuse of discretion, the trial judge's decisions in these matters will not be disturbed on appeal.

Id. at 741-42, 360 S.E.2d at 804 (citations omitted). This Court has long emphasized the inherent authority and discretion of trial judges:

> [A trial judge] is clothed with this power because of his learning and integrity, and of the superior knowledge which his presence at and participation in the trial gives him over any other forum. However great and responsible this power, the law intends that the Judge will exercise it to further the ends of justice, and though doubtless, it is occasionally abused, it would be difficult to fix upon a safer tribunal for the exercise of this discretionary power, which must be lodged somewhere.

Moore v. Edmiston, 70 N.C. 382, 390, 70 N.C. 470, 481 (1874); *see also State v. Davis*, 317 N.C. 315, 318, 345 S.E.2d 176, 178 (1986) ("The trial judge has inherent authority to supervise and control trial proceedings. The manner of the presentation of the evidence is largely within the sound discretion of the trial judge and his control of a case will not be disturbed absent a manifest abuse of discretion." (citations omitted)); *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985) ("In this connection it is well settled that it is the duty of the trial judge to supervise and control the course of a trial so as to insure justice to all parties.").

Equally important, we have recently noted in a capital case that "heightened attention to procedural safeguards is necessary in cases of alleged mental retardation in order to protect against the inadvertent and unconstitutional execution of mentally retarded defendants." *State v. Locklear*, 363 N.C. 438, 461, 681 S.E.2d 293, 310 (2009). Only if we recognize the silence on bifurcation in N.C.G.S. § 15A-2005, and afford trial judges the discretionary flexibility to

bifurcate the proceedings, do we conform with our recent jurisprudence in *Locklear*. Likewise, our seminal opinion in *State v. Barfield*, emphasizing the constitutional necessity of "particularized consideration of the relevant aspects of the character and record of a convicted defendant" in the application of the death penalty, 298 N.C. at 351, 259 S.E.2d at 542, requires us to resolve the ambiguity in N.C.G.S. § 15A-2000(e) by recognizing the "guided discretion" of trial judges to ensure a fair and impartial jury determination of a particular defendant's characteristics, including his possible mental retardation.

In *Locklear* this Court also recognized the cautionary advice given by the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304, 153 L. Ed. 2d 335 (2002), which struck down as unconstitutional the execution of mentally retarded defendants:

> Identifying mentally retarded offenders can be an inherently difficult task requiring particular attention to procedural safeguards. *See Atkins*, 536 U.S. at 317, 153 L. Ed. 2d at 348 (noting that "some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards"). The difficulty of this task increases the likelihood that mentally retarded offenders will be unconstitutionally sentenced to death. *See id.* at 321, 153 L. Ed. 2d at 350 ("Mentally retarded defendants in the aggregate face a special risk of wrongful execution.").

Locklear, 363 N.C. at 464, 681 S.E.2d at 312. Trial judges are best situated to evaluate the evidence presented of a defendant's mental retardation,[4] and to determine if bifurcating the sentencing proceeding into two distinct phases would promote both fairness and the interests of justice.

The record here reflects that, before denying defendant's motion for bifurcation, the trial judge heard extensive, well-reasoned argument on the issue from both the prosecution and the defense. Defendant's trial counsel explicitly outlined what such a bifurcated proceeding would look like, reasoning to the trial court:

> Let's go ahead and determine up front [defendant's mental retardation]. Put on the evidence that goes towards mental retardation: let's talk about that. And then if the jury finds that, that is

4. Indeed, N.C.G.S. § 15A-2000(a)(3) gives great deference to the trial court's ability to evaluate what evidence is relevant to the sentence under consideration, providing that "[a]ny evidence which the court deems to have probative value may be received."

> fine. If they don't find that, at least they had a chance to determine that issue without a lot of other baggage and those types of things coming in, and then we proceed. [The State] would not have to put the witness on a second time. The same juror has heard that [evidence of mental retardation]. We are not losing any time.
>
> I am just asking that that issue [of mental retardation] be determined up front without allowing the state [sic] to put everything in that they possibly would to try to inflame a jury and try to get them all jacked up ready to do anything. Let's focus on this issue.

Notwithstanding these arguments, the trial court denied defendant's motion. Nothing in the record or transcript indicates that the trial court's decision was arbitrary or "manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citing *Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980)). Nor is there any suggestion that the trial court erroneously believed it lacked the discretion to grant the motion. *State v. Johnson*, 346 N.C. 119, 124, 484 S.E.2d 372, 376 (1997) ("[T]here is error when the trial court refuses to exercise its discretion in the erroneous belief that it has no discretion as to the question presented." (citations and internal quotation marks omitted)). Accordingly, we see no abuse of discretion in the trial court's decision to deny defendant's motion to bifurcate the sentencing proceeding.

Conclusion

Because the plain language of N.C.G.S. § 15A-2005 contemplates a specific chronological order of events within the sentencing proceeding, but does not explicitly require or prohibit bifurcation of the proceeding into distinct phases, we hold that our State's trial judges have the discretion to determine whether to bifurcate the issues of mental retardation and sentence. Because we discern no abuse of discretion here, we affirm the trial court's order denying defendant's motion to bifurcate.

AFFIRMED IN PART; CERTIORARI IMPROVIDENTLY ALLOWED IN PART.

Justice BRADY concurring in the result only.

The imposition of a sentence of death is the most serious punishment that can be meted out by the State of North Carolina. Ac-

cordingly, every measure must be taken to ensure that all defendants are treated uniformly and consistently when at all possible. In the case *sub judice* the majority opens the door for vastly inconsistent procedures in capital sentencing proceedings across the State by allowing superior court judges the discretion to deviate from the bounds of the clearly defined statutory procedure set out by the General Assembly. Because this statutory framework does not allow the trial court the discretion to bifurcate a capital sentencing proceeding into a proceeding on mental retardation issues and then a separate proceeding on all other sentencing issues, I concur only in the result of the Court's opinion.

In 2001 the North Carolina General Assembly determined that those convicted of first-degree murder may not be sentenced to death if it is shown that the defendant is mentally retarded. N.C.G.S. § 15A-2005 (2009). The burden of proof in mental retardation issues rests upon the defendant. *Id.* § 15A-2005(a)(2). Upon a defendant's motion that is supported by appropriate affidavits, the trial court "may order a pretrial hearing to determine if the defendant is mentally retarded." *Id.* § 15A-2005(c). If the trial court finds the defendant to be mentally retarded in the pretrial hearing, the State may not proceed capitally. *Id.* However, if the trial court does not find the defendant to be mentally retarded in a pretrial hearing, the issue may be raised again and evidence presented during the sentencing hearing. N.C.G.S. § 15A-2005(e). The issue in the instant case is whether the trial court is required to, or has the discretion to, submit the special issue on mental retardation to the sentencing jury before the presentation of any evidence concerning aggravating and mitigating circumstances.

My analysis turns upon a correct interpretation of N.C.G.S. § 15A-2005(e), which states:

> If the court does not find the defendant to be mentally retarded in the pretrial proceeding, upon the introduction of evidence of the defendant's mental retardation during the sentencing hearing, the court shall submit a special issue to the jury as to whether the defendant is mentally retarded as defined in this section. This special issue shall be considered and answered by the jury prior to the consideration of aggravating or mitigating factors and the determination of sentence. If the jury determines the defendant to be mentally retarded, the court shall declare the case noncapital and the defendant shall be sentenced to life imprisonment.

N.C.G.S. § 15A-2005(e). This Court's method of statutory construction is well settled.

> When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.

Diaz v. Div. of Soc. Servs., 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) and *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) ("The best indicia of that intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.")). "Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) (citing *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188, 594 S.E.2d 1, 20 (2004)). I conclude that the language of N.C.G.S. § 15A-2005(e) is clear and unambiguous.

When, as here, defendant is not found to be mentally retarded during a pretrial proceeding, the trial court is required under section 15A-2005(e) to submit a separate issue on mental retardation "during the sentencing hearing" if a defendant introduces "evidence of the defendant's mental retardation." This plain language indicates that the General Assembly provided a means for giving the jury a special issue on mental retardation if the defendant presented evidence of mental retardation during the sentencing hearing, not in a hearing that occurs before the sentencing hearing. The statute requires that the trial court instruct the jury to determine the issue of mental retardation before considering the aggravating and mitigating evidence and determining the defendant's sentence. The statute, however, does not provide a procedure for the addition of a separate hearing before the sentencing hearing. Instead, the statute provides a mechanism for the evidence of mental retardation to be presented as part of the defendant's case during the sentencing proceeding. The legislature was well aware that in capital sentencing proceedings the State presents evidence of aggravating circumstances before a defendant's introduction of mitigating evidence. Thus, the General Assembly

intended that evidence of mental retardation would be introduced by a defendant after the State presented its evidence of aggravators.

Moreover, I am not convinced that the word "consideration" in the statute can be taken to mean that the jury may not *hear* evidence of aggravation or mitigation before its deliberation and determination of the mental retardation issue. The jury considers evidence of aggravation and mitigation after hearing all the evidence, being instructed "that it must *consider* any aggravating circumstance or circumstances or mitigating circumstance or circumstances" provided under N.C.G.S. § 15A-2000(e) and (f), N.C.G.S. § 15A-2000(b) (2009) (emphasis added), and after determining whether defendant is mentally retarded, *id.*; N.C.G.S. § 15A-2005(e). Simply viewing or hearing the evidence presented and introduced is not tantamount to a "consideration" of that evidence as envisioned by N.C.G.S. § 15A-2005(e). *See* The New Oxford American Dictionary 363 (2d ed. 2005) (defining consideration as "careful thought, typically over a period of time").

Defendant asserts that even if there is no statutory mechanism for bifurcating the hearing, this Court's decision in *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, 550 U.S. 948 (2007), would give the trial court the discretion to do so. I disagree. In *Blackwell* this Court established that a special verdict would be a proper way for a trial court to instruct a jury to consider aggravating factors in Structured Sentencing cases not subject to the "*Blakely* Act." *Id.* at 45-49, 638 S.E.2d at 455-58. *Blackwell* was governed by the decision in *Blakely v. Washington*, 542 U.S. 296 (2004), which required the jury to find aggravating factors used to enhance the defendant's sentence; however, *Blackwell* was not governed by the "*Blakely* Act," codified at N.C.G.S. §§ 15A-924(a), -1022.1, -1340.14, and -1340.16 (2005), which set out the procedure for doing so. Since, at the time, the statutes were silent on the issue, this Court reasoned that the trial court had the authority to use the common-law procedural mechanism of a special verdict to determine the existence of aggravators and thus comport with the mandate of the Supreme Court of the United States.

However, in this case the General Assembly has spoken, and there is a statutory mechanism. That statutory mechanism is that during defendant's presentation of evidence in the sentencing proceeding, if there is evidence introduced tending to show that defendant is mentally retarded, the trial court must submit a special issue to the jury to be considered and answered prior to any consideration of aggravating or mitigating circumstances and the determination of

sentence. Because the General Assembly has clearly spoken, trial courts are not allowed to deviate from that procedure. *See* N.C. Const. art. IV, § 13(2). Thus, the trial court had no discretion to bifurcate the sentencing hearing and properly denied defendant's motion.

Although the legislature could have elected to vest trial courts with discretion to trifurcate capital trials, it did not choose to do so. Instead, the legislature has established specific and comprehensive procedures for capital proceedings. *See* N.C.G.S. § 15A-2000 (2009). Under these statutory procedures, "upon conviction or adjudication of guilt of a defendant of a capital felony . . . the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment." *Id.* § 15A-2000(a)(1). The supplemental provisions for capital mental retardation determinations do not authorize, or even mention, adding a third, separate proceeding before the jury. *See id.* § 15A-2005. When, as here, the State metes out the most serious punishment recognized under our criminal law, capital defendants should be treated uniformly and provided "a separate sentencing proceeding." *Id.* § 15A-2000(a)(1); *see also Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("Because of the uniqueness of the death penalty, . . . it [cannot] be imposed under sentencing procedures that create[] a substantial risk that it would be inflicted in an arbitrary and capricious manner.").

CONCLUSION

Because trial courts do not have the discretion to bifurcate capital sentencing proceedings for the purpose of having the jury hear only evidence of mental retardation and then make a determination on that issue before the introduction of aggravating and mitigating circumstances, I concur only in the result reached by the majority's opinion.

Justices MARTIN and NEWBY join in this concurring opinion.

KIMBERLY S. SISK, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF SLADE AXEL SISK, A MINOR v. TRANSYLVANIA COMMUNITY HOSPITAL, INC.; ABBOTT LABORATORIES; AND ABBOTT LABORATORIES, INC.

No. 67PA09

(Filed 17 June 2010)

1. Attorneys— pro hac vice admission—revocation—court's discretion

N.C.G.S. § 84-4.1 gives the trial court discretionary authority to grant *pro hac vice* status to an appropriately qualified attorney, while N.C.G.S. § 84-4.2 gives the court the authority to summarily revoke that status on its own motion and in its discretion. Even before the statutes were enacted, *pro hac vice* admission was treated by the Supreme Court as a privilege that the trial court has the discretion to grant, deny, or revoke.

2. Attorneys— pro hac vice admission—revocation—ex parte contact with witness—findings supported by evidence

Where the trial court had revoked the *pro hac vice* admission of two attorneys for *ex parte* contact with an expert in actions in another state, the court's findings about contact with the witness and prejudice to defendant Abbott were supported by the evidence.

3. Attorneys— pro hac vice admission—revocation—discretionary authority of court

The trial court's conclusion that it had the discretionary authority to summarily revoke the *pro hac vice* admission of two attorneys was supported by statutes.

4. Attorneys— pro hac vice admission—revocation—ex parte contact with witness

Where the trial court revoked the *pro hac vice* admission of two attorneys, its conclusion that *ex parte* contact with a defense expert in actions in another state was inappropriate and constitutes the appearance of impropriety was a reasoned decision supported by the findings.

5. Attorneys— pro hac vice admission—revocation—inherent authority to discipline attorneys—not limited by State Bar

The trial court's inherent authority to discipline attorneys is not limited by the rules of the State Bar, but the trial court may

consider the Rules of Professional Conduct when deciding whether to revoke *pro hac vice* status. The trial court's invocation of Rule 4.3 of the Rules of Professional Conduct for guidance in this case does not indicate either a misapprehension of the rule or an inappropriate reliance on it, and the conclusion that the *ex parte* contact with the defense witness constituted an appearance of impropriety and was inconsistent with the fair dealings reflected in Rule 4.3 was supported by the findings.

6. Attorneys— pro hac vice admission revoked—plaintiff's right to select counsel—outweighed by conduct

Where the trial court revoked the *pro hac vice* admission of two attorneys, the conclusion that the attorneys' conduct outweighed the plaintiff's right to select counsel was fully supported by the findings.

7. Attorneys— pro hac vice admission—revoked for two attorneys for conduct of one

The trial court's discretionary decision to revoke the *pro hac vice* admission of two attorneys was justified, even though only one attorney had *ex parte* contact with a defense witness, where both attorneys had knowledge of and approved the contact, and both intended to keep the defense expert ignorant of the possible conflict of interest.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 194 N.C. App. 811, 670 S.E.2d 352 (2009), reversing an order entered 4 December 2007 by Judge Richard L. Doughton in Superior Court, Transylvania County. Heard in the Supreme Court 17 November 2009.

Law Office of Michael W. Patrick, by Michael W. Patrick, for plaintiff-appellee/appellant.

Roberts & Stevens, P.A., by James W. Williams and Ann-Patton Hornthal, for defendant-appellants/appellees Abbott Laboratories and Abbott Laboratories, Inc.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Roy W. Davis, Jr., for defendant-appellee Transylvania Community Hospital, Inc.

EDMUNDS, Justice.

In this case we consider whether the trial court abused its discretion when it revoked the *pro hac vice* status of two out-of-state attorneys pursuant to N.C.G.S. § 84-4.2. Recognizing the inherent power of the courts to control trials and discipline attorneys, as well as the important public interest in regulating out-of-state attorneys who practice law in this state, we hold that the North Carolina Rules of Professional Conduct do not limit the trial court's discretion to revoke *pro hac vice* status. Because we find that the trial court did not abuse its discretion, we reverse the Court of Appeals.

Shortly after his birth on 19 October 2004, Slade Axel Sisk (Slade) contracted a rare form of meningitis caused by the bacteria *Enterobacter sakazakii* (also known as *E. Sak*) and suffered permanent brain damage. On 15 February 2007, Slade's mother, plaintiff Kimberly S. Sisk, individually and in her capacity as guardian ad litem, filed a complaint in Superior Court, Transylvania County, against defendants Abbott Laboratories, Abbott Laboratories, Inc. (collectively, Abbott), and Transylvania Community Hospital, Inc. (the Hospital).

In her complaint plaintiff makes the following allegations. Slade's condition was caused by his ingestion of powdered Similac, an infant formula manufactured and sold by Abbott and provided to Slade by the Hospital. Powdered Similac is not sterile and should not have been given to Slade who, as a neonate, had an immature and compromised immune system. Although the Hospital knew or should have known the risks powdered infant formula poses to newborns, Abbott nevertheless failed to warn the Hospital that Similac could cause the type of meningitis contracted by Slade, and no defendant either informed plaintiff of the potential risks or advised plaintiff of the safe alternative of sterile liquid Similac. Plaintiff seeks compensatory and punitive damages against Abbott based on negligence, strict liability, and breach of warranty, and compensatory damages against the Hospital based on negligence.

On 9 May 2007, pursuant to N.C.G.S. § 84-4.1, out-of-state attorneys Stephen H. Meyer and Nicolas F. Stein were admitted *pro hac vice* to practice law in North Carolina for the limited purpose of representing plaintiff in her action against Abbott and the Hospital. On 17 October 2007, Abbott moved to disqualify plaintiff's out-of-state counsel because of their allegedly improper contact with one of Abbott's consulting experts.

Plaintiff responded with a copy of an 18 October 2007 opinion and order signed by the circuit court judge presiding over *Froman v. University Medical Center*, No. 04-CI-10681 (Jefferson Cir. Ct., Ky.), a factually similar Kentucky case involving allegations of *E. Sak* contamination. In the opinion and order, the Kentucky judge denied Abbott's motion to disqualify attorneys Meyer and Stein for communicating with Abbott's consulting expert in *Froman*. According to the Kentucky court's order, the two attorneys first became aware of the identity of Abbott's expert during the course of an *E. Sak* contamination case against Abbott Laboratories captioned *Hill v. University Medical Center, Inc.*, No. 04-CI-08866 (Jefferson Cir. Ct., Ky.). At that time, Abbott had entered into an agreement with its expert to provide consulting services in *E. Sak* cases. After the *Hill* case settled, but before the order of dismissal was entered, attorney Meyer contacted Abbott's expert in reference to the *Froman* case. At the time of the initial contact, Abbott was not yet a party in *Froman*, and Meyer was unaware of the agreement between Abbott and its expert. Nevertheless, the plaintiff was contemplating adding Abbott as a defendant and Meyer deliberately failed to advise the expert that Abbott was a potential defendant. After discussing the possibility of the expert providing services for the plaintiff in *Froman*, Meyer retained the expert. As a consequence, the expert found himself on both sides in *Froman*. Despite Abbott's claim that it had lost the services of its expert as a result of Meyer's action, in its opinion and order the Kentucky trial court denied Abbott's motion for sanctions, concluding that Abbott had failed to prove that the "plaintiffs' counsel committed any knowing violation of ethical rules," nor did Abbott "demonstrate prejudice as a result of counsel's actions."

On 4 December 2007, Judge Richard L. Doughton granted Abbott's motion in the case at bar and entered an order "revok[ing] the permission to practice of Nicholas F. Stein and Stephen H. Meyer previously granted." In accordance with plaintiff's request, the trial court made findings of fact and conclusions of law. The findings of fact included the following:

> 4. Mr. Stein and Mr. Meyer represented the Plaintiffs in a civil action in the State of Kentucky known as *Hill v. University Medical Center, Inc. and Abbott Laboratories, Inc.*, filed in the Jefferson Circuit Court (04-CI-08866) involving *E. Sak*. In a mediation proceeding in this action, Abbott Laboratories provided to Mr. Stein and Mr. Meyer a confidential document which disclosed the identity of Abbott's previously unidentified

retained expert. At the time of this disclosure, Abbott and the retained expert had a continuing contractual relationship, although Mr. Stein and Mr. Meyer had no actual knowledge of the continuing contractual relationship.

5. Prior to the dismissal of the *Hill* action, and while the action was pending, Mr. Meyer, with the knowledge of Mr. Stein, made *ex parte* contact with Abbott's retained expert in connection with another Kentucky civil action, *Froman v. University Medical Center, Inc.* (04-CI-10681)[,] involving *E. Sak* wherein Mr. Stein and Mr. Meyer were counsel for the Plaintiffs.

6. At the time of the *ex parte* contact by Mr. Meyer with Abbott's retained expert, Abbott Laboratories was not named as a defendant in *Froman*. However, Mr. Stein and Mr. Meyer had already contemplated adding Abbott as an[] additional defendant in the *Froman* suit. Notwithstanding this contemplation, Mr. Meyer contacted Abbott's retained expert, employed him as a retained expert, and intentionally did not advise Abbott's retained expert that he was contemplating a claim against Abbott Laboratories. This conduct by Mr. Meyer was condoned by Mr. Stein who admitted in argument to this Court that "we wanted to keep him (referring to Abbott's retained expert) in the black" with regard to their contemplation of making a claim against Abbott.

7. Abbott's retained expert was an unrepresented person, likely not experienced in dealing with legal matters.

8. On February 15, 2007, this action was filed in the Superior Court of Transylvania County by Bruce E. Elmore, Jr., an attorney in good standing licensed to practice law in the State of North Carolina. On May 7, 2007, Mr. Stein and Mr. Meyer were admitted to limited practice in the State of North Carolina for the sole purpose of appearing in this action. On June 4, 2007, Abbott's counsel first learned that Abbott's retained expert had been approached by Mr. Stein and Mr. Meyer.

9. As a result of the actions of Mr. Stein and Mr. Meyer, Abbott has been deprived of the services of its retained expert and has been injured in its defense of this action.

Based upon these findings of fact, the trial court concluded as a matter of law:

1. Pursuant to N.C.G.S. § 84-4.2, this Court has the discretionary authority to summarily revoke the permission granted to Mr. Stein and Mr. Meyer under N.C.G.S. § 84-4.1, on its own motion and in its discretion.

2. The conduct of Mr. Stein and Mr. Meyer in making *ex parte* contact with Abbott's retained expert, without Abbott's knowledge and permission, during the pendency of the *Hill* litigation was inappropriate and constitutes the appearance of an impropriety.

3. The conduct of Mr. Stein and Mr. Meyer in contacting Abbott's retained expert, an unrepresented person, without disclosing that their interests were in conflict with Abbott, constitutes the appearance of impropriety and is inconsistent with fair dealings as reflected in Rule 4.3 of the Rules of Professional Conduct.

4. This Court has balanced the limited, but substantial right of the plaintiff to select her attorneys against the conduct of Mr. Stein and Mr. Meyer and in doing so has taken judicial notice that there are many competent and capable North Carolina lawyers who are able to proceed to trial in complicated litigation in addition to Mr. Elmore. This Court concludes that the conduct set forth above outweighs the plaintiff's right to select counsel.

Plaintiff appealed, contending that (1) the trial court erred by concluding that the conduct of attorneys Meyer and Stein violated the North Carolina Rules of Professional Conduct, and (2) the trial court's findings of fact and conclusions of law were not supported by competent evidence in the record. *Sisk*, 194 N.C. App. at 812, 670 S.E.2d at 353. On 6 January 2009, the Court of Appeals reversed the trial court's disqualification order, finding that the trial court was acting under a "misapprehension of law" when it determined that the actions taken in Kentucky by plaintiff's out-of-state counsel violated the North Carolina Rules of Professional Conduct. *Id.* at 815, 670 S.E.2d at 355.

As the Court of Appeals correctly noted, an attorney is not subject to discipline under the North Carolina Rules of Professional Conduct if the attorney's conduct conforms to the rules of the jurisdiction in which the lawyer reasonably believes the predominant effect of that conduct will occur. N.C. St. B. Rev. R. Prof. Conduct 8.5(b)(2) ("Disciplinary authority; Choice of law"), 2010 Ann. R. N.C.

759, 880.[1] Apparently assuming that the predominant effect of the conduct would occur in Kentucky, the Court of Appeals held that because counsel's behavior did not violate the rules of that state, Rule 8.5 did not allow the conduct to be subject to discipline under the rules of North Carolina. *Sisk*, 194 N.C. App. at 815, 670 S.E.2d at 355. The Court of Appeals concluded that the trial court's misapprehension "was material and changed the outcome," and therefore, "the trial court's subsequent disqualification of counsel was manifestly unsupported by reason and constituted an abuse of discretion."*Id.*

On 30 April 2009, this Court allowed both Abbott's petition for discretionary review and plaintiff's conditional petition for discretionary review as to additional issues. Before this Court, Abbott contends that the trial court did not abuse its discretion by ordering that plaintiff's out-of-state counsel be disqualified from the instant case and that the Court of Appeals failed to accord sufficient deference to the trial court's exercise of its discretion. In her conditional petition, plaintiff challenges certain findings of fact made by the trial court and also argues that the trial court erred by concluding as a matter of law that the actions of the attorneys violated the North Carolina Rules of Professional Conduct. Plaintiff further contends that, in any event, the trial court erred in revoking Stein's *pro hac vice* status for action taken solely by Meyer. This Court later allowed the Hospital to file a brief and appear at the hearing of this appeal. Because certain issues raised in plaintiff's conditional petition involve the findings of fact and conclusions of law that underlie and support the trial court's discretionary decision to revoke *pro hac vice* status, we will first address these concerns before turning to the trial court's subsequent exercise of its discretion.

[1] We begin our analysis by considering a trial court's power to grant and revoke *pro hac vice* status. This status "is . . . not a right but

1. Specifically, Rule 8.5 provides in pertinent part:

> (b) *Choice of Law*. In any exercise of the disciplinary authority of North Carolina, the rules of professional conduct to be applied shall be as follows:
>
> (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
>
> (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer is not subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

a discretionary privilege which allows out-of-state attorneys to appear *pro hac vice* in a state's courts without meeting the state's bar admission requirements." *In re Smith*, 301 N.C. 621, 629, 272 S.E.2d 834, 840 (1981). North Carolina General Statute section 84-4.1 gives the trial court discretionary authority to grant such status to an appropriately qualified attorney, while section 84-4.2 gives the trial court corresponding authority summarily to revoke an order granting *pro hac vice* admission on the court's own motion and in its discretion. N.C.G.S. §§ 84-4.1, -4.2 (2009). Even before enactment of these statutes, this Court treated admission to practice *pro hac vice* as a privilege that the trial court has discretion to grant, deny, or revoke. *See Manning v. Roanoke & Tar River R.R. Co.*, 122 N.C. 513, 516, 122 N.C. 824, 828, 28 S.E. 963, 964 (1898) ("[T]he appearance of [out-of-state] counsel is a matter of courtesy in each and every case, and on motion in each case, and only for the occasion on which it is allowed."). "Decisions regarding whether to disqualify counsel are within the discretion of the trial judge and, absent an abuse of discretion, a trial judge's ruling on a motion to disqualify will not be disturbed on appeal." *Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 332 N.C. 288, 295, 420 S.E.2d 426, 430 (1992). Our review of a trial court's decision to revoke *pro hac vice* status is no less deferential.

[2] Plaintiff argues that the trial court's findings of fact are not supported by evidence in the record and therefore do not in turn support its conclusions of law. In addition, and more specifically, plaintiff contends that the trial court erred by concluding as a matter of law that the conduct of the attorneys violated the North Carolina Rules of Professional Conduct. The trial court conducted a hearing on defendants' motion, during which it considered submissions of the parties and arguments of counsel. In response to plaintiff's request, the trial court made nine findings of fact and four conclusions of law in its order allowing defendant Abbott's motion and revoking the *pro hac vice* status of attorneys Meyer and Stein, as quoted in part above.

" '[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.' " *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008) (quoting *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983) (second alteration in original)). The trial court's findings of fact included, in relevant part, that before the dismissal of the *Hill* litigation, plaintiff's counsel made *ex parte* contact

with Abbott's retained expert, an unrepresented person, but deliberately kept him ignorant as to potential claims against Abbott. The trial court also found that as a result of the conduct of plaintiff's counsel, "Abbott has been deprived of the services of its retained expert and has been injured in its defense of this action."

Most of the trial court's findings of fact are uncontested. However, plaintiff contends that there was no evidence to support the trial court's finding that counsel contacted Abbott's expert prior to the dismissal of the *Hill* action and insufficient evidence that counsel's conduct caused Abbott to lose the expert's help in the case at bar. As to the former claim, plaintiff argues that the parties had agreed to a dismissal in *Hill* and had swapped pertinent paperwork when the expert was contacted, but concedes in her brief that the dismissal had not been filed. Although plaintiff contends that the fact that the formality of filing occurred after the contact was immaterial, the trial court's finding of fact is supported by competent evidence.

As to plaintiff's latter claim, the exhibits before the trial court included the declaration of attorney June K. Ghezzi, who represents Abbott in *E. Sak* litigation. Attorney Ghezzi averred under oath that, after Abbott's expert realized he had been contacted by attorneys Stein and Meyer on behalf of the plaintiff in the *Froman* litigation, the expert would not return telephone calls, letters, or messages and had no contact with attorney Ghezzi or any other attorney with her firm. These statements support the trial court's finding of fact that counsel's conduct deprived Abbott of the services of its retained expert. Accordingly, after thoroughly reviewing the record, we conclude that the two findings of fact contested by plaintiff are supported by competent evidence and are binding on appeal.

[3] Turning next to the conclusions of law, we observe that, while generally "[c]onclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal," *id.* at 101, 655 S.E.2d at 369, when reviewing the conclusions of law in the instant order, reached in the context of the trial court's exercise of its discretion, we need determine only whether they are the result of a reasoned decision based upon the specific language of N.C.G.S. § 84-4.2. *Smith v. Beaufort Cty. Hosp. Ass'n*, 141 N.C. App. 203, 210-11, 540 S.E.2d 775, 780 (2000) (stating that section 84-4.2 expressly gives judges discretion summarily to revoke *pro hac vice* admissions previously allowed and that because the trial court's "conclusion of law is clearly the result of a reasoned decision," the trial court did not abuse

its discretion in ordering the revocation), *aff'd per curiam*, 354 N.C. 212, 552 S.E.2d 139 (2001).

First, the trial court concluded as a matter of law that "[p]ursuant to N.C.G.S. § 84-4.2, [it had] the discretionary authority to summarily revoke the permission granted to Mr. Stein and Mr. Meyer under N.C.G.S. § 84-4.1, on its own motion and in its discretion." As noted above, N.C.G.S. § 84-4.2 provides the trial court precisely this discretion to issue such a summary revocation and therefore expressly supports the trial court's first conclusion of law.

[4] The trial court next concluded that Stein and Meyer's "*ex parte* contact with Abbott's retained expert, without Abbott's knowledge and permission, during the pendency of the *Hill* litigation was inappropriate and constitutes the appearance of an impropriety." This conclusion of law is a reasoned decision supported by the trial court's findings of fact and is consistent with the trial court's exercise of its discretion under section 84-4.2.

[5] We now turn to the trial court's third conclusion of law, that the conduct of Meyer and Stein in contacting Abbott's unrepresented expert "without disclosing that their interests were in conflict with Abbott, constitutes the appearance of impropriety and is inconsistent with fair dealings as reflected in Rule 4.3 of the Rules of Professional Conduct." This conclusion of law is in two parts, the second of which cites for the first time the North Carolina Rules of Professional Conduct. The Court of Appeals held, and plaintiff argues before us, that the trial court erred in concluding that plaintiff's attorneys violated the North Carolina Rules of Professional Conduct:

> Because a Kentucky court had already determined that Mr. Meyer's and Mr. Stein's actions in a prior Kentucky case did not violate its ethical rules, Rule 8.5 prohibits their actions from now being determined to be subject to disciplinary action pursuant to the North Carolina Rules of Professional Conduct.

Sisk, 194 N.C. App. at 815, 670 S.E.2d at 355. The Court of Appeals determined that "[t]he trial court's conclusions were based upon a misapprehension of law and such misapprehension was material and changed the outcome." *Id.* Consequently, the Court of Appeals found that the trial court had abused its discretion and reversed the trial court. *Id.*

However, in focusing on the Rules of Professional Conduct, the Court of Appeals did not consider the trial court's independent inher-

ent authority to discipline attorneys. In North Carolina there are two methods for enforcing attorney discipline. *In re Delk*, 336 N.C. 543, 550, 444 S.E.2d 198, 201 (1994). Under the first method, discipline may be imposed when the Council of the State Bar proceeds against an attorney pursuant to statute. *Id.*; *see* N.C.G.S. § 84-28 (2009). Under the second, a court possesses inherent authority to discipline attorneys. *In re Delk*, 336 N.C. at 550, 444 S.E.2d. at 201. This authority is not limited by the rules of the State Bar. *Id.*; *see* N.C.G.S. § 84-36 (2009) ("Nothing contained in this Article shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys."). An attorney admitted *pro hac vice* is as much subject to this inherent authority of the court as is an attorney licensed in North Carolina, and the discretion summarily to revoke *pro hac vice* status pursuant to section 84-4.2 is entirely consistent with the inherent disciplinary powers of the court. Thus, while the choice of law provision of Rule 8.5 may control conduct that the Council of the State Bar can discipline,[2] that rule abridges neither a trial court's inherent authority to discipline attorney misconduct nor its discretion to revoke *pro hac vice* status under section 84-4.2.

Nevertheless, in exercising its discretion, a trial court may consider the Rules of Professional Conduct when deciding whether to revoke *pro hac vice* status. Rule 4.3 of the North Carolina Revised Rules of Professional Conduct provides in pertinent part:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:
>
> . . . .
>
> (b) state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

N.C. St. B. Rev. R. Prof. Conduct 4.3 ("Dealing with unrepresented person"), 2010 Ann. R. N.C. 759, 849. Moreover, the official comment to the rule states that "[t]o avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person." *Id.* cmt. para. 1.

2. As adumbrated above, because we base our holding on the inherent power of the trial court, we need not address the Court of Appeals tacit assumption that the predominant effect of the actions of attorneys Meyer and Stein would not be in North Carolina.

Here the trial court found as fact that "Abbott's retained expert was an unrepresented person, likely not experienced in dealing with legal matters." It further found that "Mr. Meyer contacted Abbott's retained expert, employed him as a retained expert, and intentionally did not advise [him] that he was contemplating a claim against Abbott Laboratories." These findings of fact adequately support both parts of the trial court's dual conclusion of law that the conduct of plaintiff's counsel (1) "constitut[ed] the appearance of impropriety" and (2) "[was] *inconsistent* with fair dealings as reflected in Rule 4.3 of the Rules of Professional Conduct." (Emphasis added.) As to the latter conclusion, this Court has not previously considered the extent to which Rule 4.3 applies to expert witnesses. However, we need not address whether the conduct of the attorneys violated this rule because the trial court's carefully worded conclusion of law states only that counsel's conduct was inconsistent with it.

The trial court's invocation of Rule 4.3 for guidance, therefore, does not indicate either a misapprehension of the rule or an inappropriate reliance on it. To the contrary, the trial court displayed a nuanced understanding of the discretion accorded it under section 84-4.2. Accordingly, we hold that the trial court was not acting under a "misapprehension of law" when it reached its decision here.

[6] In its fourth and final conclusion of law, the trial court balanced plaintiff's substantial right to select attorneys of her choice against the conduct of Meyer and Stein. In so doing, the court took judicial notice that many North Carolina lawyers are capable of handling plaintiff's case, indicating that the trial court gave adequate regard to the interests of both parties. In light of these findings, the trial court's conclusion that "the conduct set forth . . . outweighs the plaintiff's right to select counsel" is fully supported.

After reviewing the trial court's carefully considered findings of fact and conclusions of law, we hold that the trial court did not abuse its discretion in revoking the *pro hac vice* admission of attorneys Meyer and Stein.

[7] Finally, plaintiff asks us to consider whether the trial court erred in revoking the *pro hac vice* status of attorney Stein for the conduct of attorney Meyer. However, the trial court found as fact that Meyer acted with the knowledge and condonation of Stein and that Stein admitted in court that he and Meyer wanted to keep Abbott's expert "in the black," that is, ignorant of possible defendants, while contacting him. This finding of fact by the trial court concerning Stein's

involvement is supported by competent evidence and justifies the trial court's discretionary decision to revoke Stein's admission.

For the foregoing reasons we reverse the Court of Appeals and instruct that court to reinstate the trial court's order revoking the *pro hac vice* admissions of attorneys Meyer and Stein.

REVERSED.

IN THE MATTER OF D.S.

No. 273PA09

(Filed 17 June 2010)

Juveniles—delinquency—timeliness of filing petition—subject matter jurisdiction

The Court of Appeals erred by concluding that a juvenile court counselor (JCC) failed to timely file a juvenile delinquency petition alleging sexual battery in accordance with N.C.G.S. § 7B-1703, and the case is reversed and remanded to the Court of Appeals for consideration of the juvenile's remaining assignments of error related to the sexual battery adjudication because: (1) the JCC could not have filed a petition alleging sexual battery based upon the first complaint which did not allege that the juvenile had committed sexual battery, the second complaint contained new allegations of sexual battery, and the JCC complied with the timelines contained in N.C.G.S. § 7B-1703 by filing the juvenile petition alleging sexual battery one day after receiving that complaint; and (2) nothing in the pertinent provisions suggested that the JCC is permitted, let alone obligated, to investigate beyond the specific allegations contained in the complaint to determine every possible criminal offense that may arise or to include additional allegations in the petition that were not specifically articulated in the complaint. Furthermore, the legislature did not intend for the N.C.G.S. § 7B-1703 timelines to function as prerequisites for district court subject matter jurisdiction over allegedly delinquent juveniles.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 197 N.C. App.

—, 682 S.E.2d 709 (2009), affirming in part and vacating in part adjudication and disposition orders entered 16 April 2008 by Judge James G. Bell in District Court, Robeson County. Heard in the Supreme Court 6 January 2010.

Roy Cooper, Attorney General, by LaToya B. Powell, Assistant Attorney General, for the State-appellant.

Peter Wood for juvenile-appellee.

HUDSON, Justice.

Here we address whether a Robeson County juvenile court counselor ("JCC") complied with N.C.G.S. § 7B-1703 when the JCC filed a petition alleging D.S. to be delinquent, and if not, whether the failure to do so deprived the court of subject matter jurisdiction. The Court of Appeals determined that the JCC did not timely file the juvenile delinquency petition alleging sexual battery in accordance with N.C.G.S. § 7B-1703. *In re D.S.*, — N.C. App. —, —, 682 S.E.2d 709, 711 (2009). Relying on a prior opinion from that court, which holds that such failure divests the district court of subject matter jurisdiction, the Court of Appeals "vacate[d] the sexual battery adjudication." *Id.* at —, 682 S.E.2d at 710-11 (citing *In re J.B.*, 186 N.C. App. 301, 303, 650 S.E.2d 457, 458 (2007)). Because we conclude that the JCC here timely filed the juvenile delinquency petition in accordance with N.C.G.S. § 7B-1703, which in any event does not implicate subject matter jurisdiction, we reverse.

The record tends to show that in September 2007, D.S. and A.A. were fifth grade classmates. It was alleged that during class on 21 September 2007, D.S. touched A.A. multiple times on her buttocks and between her legs with a straw-like candy, known as Pixy Stix. Later A.A. told School Resource Officer Denise Ward ("SRO Ward") what had occurred.

SRO Ward filed a complaint with Robeson County JCC Chris Britt ("Mr. Britt") alleging D.S. to be delinquent for committing simple assault by "touching [A.A.] on her butt, [two] times with his hands" on 21 September 2007, in violation of N.C.G.S. § 14-33(a). Mr. Britt received the complaint on 25 September 2007, and on 10 October 2007, he approved the complaint for filing. Based thereon, Mr. Britt filed a juvenile delinquency petition alleging simple assault with the clerk of superior court. On 15 November 2007, Mr. Britt received a second complaint from SRO Ward regarding the same 21 September 2007 incident. This complaint alleged D.S. had violated

N.C.G.S. § 14-27.5 in that D.S. "for the purpose of sexual arousal or sexual gratification engage[d] in sexual contact, by placing his hand on the buttocks of . . . [A.A.], by force and against [her] will." On 16 November 2007, Mr. Britt approved this complaint for filing and filed a second juvenile delinquency petition with the clerk's office, this time alleging sexual battery.

In April 2008 the District Court in Robeson County entered an adjudication order finding D.S. delinquent for committing both offenses. The court then entered an order imposing a Level I disposition, which placed D.S. on probation for a period of up to twelve months. D.S. appealed the adjudication order to the Court of Appeals.

In the Court of Appeals D.S. argued that the trial court erred by adjudicating him delinquent of both simple assault and sexual battery. The Court of Appeals rejected D.S.'s arguments as to simple assault and affirmed the trial court's delinquency adjudication based on that charge. *Id.* at ——, 682 S.E.2d at 712. However, the court agreed with D.S. that "the trial court did not have subject matter jurisdiction over the second petition alleging sexual battery" because the JCC did not file it within the time period mandated by section 7B-1703. *Id.* at ——, 682 S.E.2d at 711. The court explained:

> In the case before us, the [JCC] received all of the information regarding the allegations against [D.S.] on 25 September 2007, but failed to act swiftly when he filed the second petition over 50 days later. Because it was untimely filed, the trial court did not have subject matter jurisdiction over the second petition alleging sexual battery. Therefore, the order adjudicating D.S. as a delinquent juvenile on the allegations of sexual battery must be vacated.

Id. at ——, 682 S.E.2d at 711. Having so concluded, the court "vacate[d] the adjudication and disposition orders for D.S. on the allegations of sexual battery." *Id.* at ——, 682 S.E.2d at 712.

On 6 July 2009, the State filed a petition for discretionary review with this Court seeking review of the following two issues:

> Did the Court of Appeals err by holding that the provisions of N.C.G.S. § 7B-1703 are jurisdictional prerequisites in juvenile delinquency cases?
>
> Even if N.C.G.S. § 7B-1703 is a jurisdictional statute, did the Court of Appeals err by holding the trial court had no jurisdiction

> where the complaint alleging sexual battery was received by the Department of Juvenile Justice and Delinquency Prevention one day prior to the filing of the juvenile petition?

We allowed the State's petition for discretionary review.

The State argues that the Court of Appeals erred by concluding that: (1) The N.C.G.S. § 7B-1703 timing requirements are prerequisites for the district court to obtain subject matter jurisdiction in a juvenile delinquency case; and (2) Mr. Britt did not comply with these requirements. We agree, although we address these issues in reverse order.

Our principal task here is to interpret the statute. In determining the meaning of a statute, this Court follows traditional rules of statutory construction.

> Legislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish. The statute's words should be given their natural and ordinary meaning unless the context requires them to be construed differently.

Shelton v. Morehead Mem'l Hosp., 318 N.C. 76, 81-82, 347 S.E.2d 824, 828 (1986) (citations omitted). Questions of statutory interpretation are questions of law and are reviewed de novo. *E.g.*, *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998) (citation omitted).

The statutory timeline for juvenile delinquency petitions is set forth in section 7B-1703, which provides in pertinent part:

> (a) The juvenile court counselor shall complete evaluation of a complaint within 15 days of receipt of the complaint, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor. The juvenile court counselor shall decide within this time period whether a complaint shall be filed as a juvenile petition.
>
> (b) Except as provided in G.S. 7B-1706, if the juvenile court counselor determines that a complaint should be filed as a petition, the counselor shall file the petition as soon as practicable, but in any event within 15 days after the complaint is received, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor. The juvenile court counselor shall assist the complainant when necessary with the preparation

> and filing of the petition, shall include on it the date and the words "Approved for Filing", shall sign it, and shall transmit it to the clerk of superior court.

N.C.G.S. § 7B-1703(a), (b) (2007).

Here we first hold that the JCC, Mr. Britt, complied with the statute. Section 7B-1703 states that a JCC has "15 days after the complaint is received, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor," to file a complaint as a juvenile petition. *Id.* § 7B-1703(b). Thus, we look for the meaning of the phrase "after the complaint is received." *Id.*

The State argues that the Court of Appeals interpreted the term "complaint" in a manner that completely contravenes the plain language of section 7B-1703. Specifically, the State contends that (1) a "complaint" is a written, sworn document that contains the allegation(s) against the juvenile; (2) as evidenced by Chapter 7B, Article 17, the JCC's role in screening and evaluating a complaint is largely ministerial and limited to considering the specific charge(s) alleged therein; (3) Mr. Britt could not have filed a petition alleging sexual battery based upon the first complaint, which did not allege that D.S. had committed sexual battery; (4) because the second complaint contained new allegations, that complaint was "received" by Mr. Britt on 15 November 2007; and (5) therefore, Mr. Britt complied with section 7B-1703 by filing the petition alleging sexual battery the next day, 16 November 2007.

The juvenile responds that 15 November 2007 could only qualify as the date Mr. Britt "received" the second complaint if the second complaint was based on new information or evidence, not merely new allegations. Further, he contends that Mr. Britt essentially "bur[ied] his head in the sand and ignore[d] the facts" behind the first complaint and that Mr. Britt should have conducted a "reasonable investigation based on the facts [that were] readily available" at the time. Had Mr. Britt done so, the juvenile maintains, Mr. Britt would or should have known to include the sexual battery allegation in the first petition.

The Court of Appeals explicitly acknowledged that two complaints were filed here. *In re D.S.*, ––– N.C. App. at ––, 682 S.E.2d at 711. Despite this finding, the court appeared to conclude that because both petitions apparently arose from the same incident, and because Mr. Britt learned of these facts when he received the first complaint, the date he "received" the complaint alleging sexual battery was 25

September 2007, not 15 November 2007. *Id.* at ——, 682 S.E.2d at 711. In reaching this conclusion the Court of Appeals treated the underlying allegations, rather than the document itself, as the "complaint" and emphasized the JCC's obligation "to act swiftly" in dealing with juvenile delinquency complaints. *Id.* at ——, 682 S.E.2d at 711.

While the term "complaint" is not defined in Chapter 7B, it is defined in the North Carolina Administrative Code[1] as: "A written allegation that a juvenile is delinquent or undisciplined with a signature verifying that the allegation is true. A complaint initiates the intake process."[2] 28 NCAC 4A.0101 (Apr. 2003); *see also* Lou A. Newman et al., *North Carolina Juvenile Defender Manual* 78 (John Rubin ed., School of Gov't, Chapel Hill, N.C. 2008) [hereinafter Newman, *Juvenile Defender*] (stating that a "[c]omplaint is the report from a law enforcement officer or from a member of the community made to the [JCC]'s office alleging delinquent acts committed by a juvenile"). The Administrative Code further provides:

> (a) Complaints——Complaints alleging that a juvenile is undisciplined or delinquent are accepted by a juvenile court counselor for evaluation. All complaints shall be in writing and must contain the following:
>
> (1) The juvenile's name;
>
> (2) The juvenile's age and date of birth;
>
> (3) The name of the juvenile's parents, guardians, or custodians;
>
> (4) The juvenile's home address;
>
> (5) The facts supporting any allegation that a juvenile is undisciplined or delinquent;
>
> (6) The date the complaint is received by the court counselor;
>
> (7) The complainant's name, address, and telephone number; and

1. The Administrative Code provisions regarding "Juvenile Justice and Delinquency Prevention" are implemented by the Department of Juvenile Justice and Delinquency Prevention under the rulemaking authority granted to it by our legislature. *See* N.C.G.S. §§ 143B-512(a), -516 (2007); *see also* 28 NCAC 1A .0101 (Apr. 2003).

2. " 'Intake' " is defined by statute as: "The process of screening and evaluating a complaint alleging that a juvenile is delinquent or undisciplined to determine whether the complaint should be filed as a petition." N.C.G.S. § 7B-1501(13) (2007).

(8) The complainant's signature, verified before an official authorized to administer oaths.

28 NCAC 4A .0102 (Apr. 2003). These provisions, which define "complaint" and specify its requisite contents, indicate, as the State suggests, that a "complaint" is a written and sworn document whose primary purpose is to articulate specific allegation(s) of delinquency to the JCC.

Chapter 7B, Article 17, entitled "Screening of Delinquency and Undisciplined Complaints," entrusts the JCC[3] the primary responsibility for "intake," defined as "[t]he with process of screening and evaluating a complaint alleging that a juvenile is delinquent . . . to determine whether the complaint should be filed as a petition," and articulates the JCC's responsibilities and the guidelines for fulfilling them. N.C.G.S. §§ 7B-1501(13), -1700 to -1707 (2007). As with the section 7B-1703 timelines, which begin to run "when the complaint is received," the JCC's initial intake responsibility regarding a juvenile delinquency matter begins "[w]hen a complaint is received." *Id.* §§ 7B-1701, -1703. "The pleading in a juvenile action is the petition," and a juvenile delinquency "action is commenced by the filing of a petition in the . . . office" of the clerk of superior court. N.C.G.S. §§ 7B-1801, -1804 (2007); *see also* Newman, *Juvenile Defender* 78 (stating that the petition "is the document filed in the office of the clerk of superior court initiating a juvenile court proceeding"). At oral argument the parties indicated that complainants, especially law enforcement officers, typically file a complaint by using one of the AOC's standard petition forms, and generally, the complaint and petition are the same document. The State further indicated that when this is done, the "complaint" becomes the "petition" when the JCC marks the "Approved for Filing" box on the AOC form, dates and signs the form, and files it with the clerk of superior court. *See* Newman, *Juvenile Defender* 78 ("The complaint is typically recorded on the Administrative Office of the Courts (AOC) juvenile petition form."). It appears that SRO Ward followed this course of action here, submitting the first complaint on the AOC petition form used for misdemeanor assaults (AOC-J-312, Rev. 7/06) and the second complaint on the AOC's general juvenile delinquency petition form (AOC-J-310, Rev. 7/06).

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3. JCC is defined as: "A person responsible for intake services and court supervision services to juveniles under the supervision of the chief court counselor." N.C.G.S. § 7B-1501(18a) (2007).

These authorities governing the JCC's intake obligations support the State's argument that the JCC's function is strictly limited, and consequently, that Mr. Britt need not have filed a petition alleging sexual battery based on the allegations contained in the first complaint. We conclude that the natural and ordinary meaning of the phrase, "when the complaint is received," is the date on which the JCC's office receives a document alleging that a juvenile is delinquent, and we further conclude that nothing about "the context requires [this phrase] to be construed differently." *Shelton*, 318 N.C. at 82, 347 S.E.2d at 828.

Under the juvenile code, once the JCC receives a complaint, the JCC must "make a preliminary determination" as to whether he is statutorily barred from filing or whether he is obligated to "file the complaint as a petition." N.C.G.S. § 7B-1701. The JCC must "without further inquiry . . . refuse authorization to file the complaint as a petition" if the complaint does not state a cause of action within the jurisdiction of the court, does not contain sufficient facts to legally support the charge alleged therein, or is frivolous. *Id.* If the JCC "finds reasonable grounds to believe that the juvenile has committed one of the . . . nondivertible offenses" specified in section 7B-1701, the JCC must, "without further inquiry, . . . authorize the complaint to be filed as a petition." *Id.* When, as here, the JCC's authority, or lack thereof, to file a complaint as a petition is not specifically mandated by section 7B-1701, the JCC must conduct an evaluation to "determine whether a complaint should be filed as a petition, the juvenile [should be] diverted [to a diversion plan] pursuant to G.S. 7B-1706, or the case [should be] resolved without further action." *Id.* § 7B-1702. Section 7B-1703 instructs the JCC to decide whether to file the complaint as a petition and if he decides to do so, to file the petition in accordance with the timelines contained therein. *Id.* § 7B-1703. Nothing in these provisions suggests, as D.S. argues, that the JCC is permitted, let alone obligated, to investigate beyond the specific allegations contained in the complaint to determine every possible criminal offense that may arise or to include additional allegations in the petition that were not specifically articulated in the complaint. However, the JCC is expressly prohibited from "engag[ing] in field investigations to substantiate complaints [and from] . . . produc[ing] supplementary evidence" during the entire "intake" process, although the JCC is permitted to "refer complainants to law enforcement agencies for those purposes." *Id.* § 7B-1700. Viewing these statutory provisions in conjunction with the Administrative Code

provisions that define the term "complaint" and articulate its requisite components, and given the strictly defined role our legislature intended for the JCC during intake, Mr. Britt need not have filed a petition alleging sexual battery based on the first complaint because, even though that complaint alleged that D.S. had touched A.A. on her buttocks and between her legs, it did not allege that D.S. had committed sexual battery or had touched A.A. for the purpose of sexual arousal or gratification.

Moreover, while we agree with the Court of Appeals and D.S. that some of the purposes and policies articulated in section 7B-1500 and the timelines contained in section 7B-1703 indicate that our legislature intended for juvenile delinquency cases to be resolved expeditiously, we do not believe we are thereby required to deviate from the plain and ordinary meaning of the phrase "after the complaint is received." In addition to the need for swift action that the Court of Appeals and D.S. emphasize, section 7B-1500 articulates the following purposes and policies underlying the statutes related to undisciplined and delinquent juveniles:

(1) To protect the public from acts of delinquency.

(2) To deter delinquency and crime, including patterns of repeat offending:

   a. By providing swift, effective dispositions that emphasize the juvenile offender's accountability for the juvenile's actions; and

   b. By providing appropriate rehabilitative services to juveniles and their families.

(3) To provide an effective system of intake services for the screening and evaluation of complaints and, in appropriate cases, where court intervention is not necessary to ensure public safety, to refer juveniles to community-based resources.

(4) To provide uniform procedures that assure fairness and equity; that protect the constitutional rights of juveniles, parents, and victims; and that encourage the court and others involved with juvenile offenders to proceed with all possible speed in making and implementing determinations required by this Subchapter.

Id. § 7B-1500 (2007); *see also id.* § 7B-2500 (2007) (stating that "[t]he purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction, including the protection of the public," and in "develop[ing] a disposition in each case," courts should "[e]mphasize[] accountability and responsibility" by the juvenile and the adult who is responsible for the juvenile and "[p]rovide[] the appropriate consequences, treatment, training, and rehabilitation to assist the juvenile toward becoming a nonoffending, responsible, and productive member of the community"). Nothing in these statutory provisions indicates our legislature's intent to elevate the expediency of the JCC's intake obligations over these other articulated purposes, as the Court of Appeals appeared to conclude and D.S. argues here. Further, the Court of Appeals' and D.S.'s proffered interpretation of section 7B-1703 undermines the other stated purposes articulated in sections 7B-1500 and 7B-2500.

We further conclude that our legislature did not intend the timing requirements of section 7B-1703 to be jurisdictional. Without mentioning section 7B-1601, "Jurisdiction over delinquent juveniles," D.S. argues that Mr. Britt's alleged failure to comply with the timeline at issue deprived the district court of subject matter jurisdiction. *Id.* § 7B-1601 (2007). In Chapter 7B, Article 16, entitled "Jurisdiction," the legislature gave district courts broad jurisdiction over delinquent juvenile cases. *Id.* §§ 7B-1600 to -1604 (2007). "The court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent. For purposes of determining jurisdiction, the age of the juvenile at the time of the alleged offense governs." *Id.* § 7B-1601(a). N.C.G.S. § 7B-1501(4) defines " 'Court' " as "[t]he district court division of the General Court of Justice," and N.C.G.S. § 7B-1501(7) defines "[d]elinquent juvenile" as "[a]ny juvenile who, while less than 16 years of age but at least 6 years of age, commits a crime or infraction under State law or under an ordinance of local government . . . or who commits indirect contempt by a juvenile as defined in G.S. 5A-31". *Id.* § 7B-1501(4), -(7) (2007).

On its face section 7B-1703 does not mention jurisdiction, nor does it indicate that a JCC's failure to meet the timing requirements contained therein divests the district court of subject matter jurisdiction. We believe that had the legislature intended section 7B-1703 to implicate subject matter jurisdiction, the legislature would have either included these requirements in Chapter 7B, Article 16 or expressly stated so in section 7B-1703 itself. *See id.* § 7B-1802 (2007)

("The petition shall allege the facts that invoke jurisdiction over the juvenile."). Because the legislature did neither, we conclude that it did not intend for the section 7B-1703 timelines to function as prerequisites for district court jurisdiction over allegedly delinquent juveniles. We note that this decision is consistent with the conclusions reached in prior North Carolina appellate decisions that have addressed Chapter 7B timeline requirements and jurisdiction, particularly in the contexts of abuse, neglect, and dependency and termination of parental rights. *See*, *e.g.*, *In re C.L.C.*, 171 N.C. App. 438, 443-445, 615 S.E.2d 704, 707-08 (2005) (holding that the statutory timelines governing the scheduling of the initial post-disposition custody review hearing under section 7B-906(a), the filing of permanency planning orders under section 7B-907(c), and the filing of a petition to terminate parental rights under section 7B-907(e) are " 'directory, rather than mandatory and thus, not jurisdictional' " (quoting *In re B.M.*, 168 N.C. App. 350, 354, 607 S.E.2d 698, 701 (2005))), *aff'd per curiam in part and disc. rev. improvidently allowed*, 360 N.C. 475, 628 S.E.2d 760 (2006).

We conclude that the JCC here (Mr. Britt) complied with the timelines contained in section 7B-1703 by filing the juvenile petition alleging sexual battery one day after receiving the juvenile complaint alleging sexual battery. Moreover, we conclude that our legislature did not intend for these timelines to implicate subject matter jurisdiction. Accordingly, we reverse the decision of the Court of Appeals as to the issues before this Court on appeal and remand this case to the Court of Appeals for consideration of D.S.'s remaining assignments of error related to the sexual battery adjudication.

REVERSED IN PART AND REMANDED.

TRAVIS T. BUMPERS AND TROY ELLIOTT, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED V. COMMUNITY BANK OF NORTHERN VIRGINIA

No. 269PA09

(Filed 17 June 2010)

Appeal and Error— appealability—unfair and deceptive trade practices—final judgment on substantive issues—attorney fees remaining—certification

A judgment ruling on all substantive issues of a claim under N.C.G.S. § 75-1.1 is final and appealable regardless of any unresolved request for attorney fees under N.C.G.S. § 75-16.1. In appropriate cases, as here, such a final judgment may be certified for immediate appeal under Rule 54(b).

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 196 N.C. App. ___, 675 S.E.2d 697 (2009), dismissing an appeal from orders granting partial summary judgment for plaintiffs and awarding damages entered on 28 April 2008 and 15 May 2008, by Judge John B. Lewis, Jr. in Superior Court, Wake County. Heard in the Supreme Court 15 February 2010.

Hartzell & Whiteman, L.L.P., by J. Jerome Hartzell, and Financial Protection Law Center, by Mallam J. Maynard, for plaintiff-appellant/appellee Travis T. Bumpers.

Ellis & Winters LLP, by Matthew W. Sawchak and Stephen C. Keadey, for defendant-appellee/appellant.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester and Adam K. Doerr, for NC Chamber, amicus curiae.

North Carolina Justice Center, by Carlene McNulty, and Center for Responsible Lending, by Daniel Mosteller, amici curiae.

TIMMONS-GOODSON, Justice.

The issue presented in this case is whether a judgment ruling on all substantive issues of a claim under section 75-1.1 is final and certifiable for appeal notwithstanding an unresolved claim for attorney fees under section 75-16.1. We hold that such a judgment is immediately appealable. Accordingly, we reverse and remand to the Court of Appeals for consideration of the merits of the issues raised on appeal.

I. Background

In 1999, plaintiff Travis T. Bumpers responded to a mailed advertisement for second mortgage loans from defendant Community Bank of Northern Virginia ("Community Bank").[1] After faxing documents and corresponding with Community Bank by phone, plaintiff was approved for a $28,450 loan and directed to a women's lingerie store for "closing" on the loan. A notary public working at the lingerie store gave plaintiff various closing documents to sign.

The closing documents listed an array of fees charged in connection with the loan, totaling more than $4,800. About $3,500 of the total fees were "Settlement Charges" by Community Bank, including a $2,062.63 "loan origination fee" and a $1,280.25 loan discount fee. Title America, LLC was listed as the "settlement agent." Fees charged by Title America included a $225.00 "settlement or closing fee," a $260.00 "processing fee," a $275.00 "document review" fee, and other title search and examination fees. Plaintiff executed the closing documents and later received the loan proceeds in the mail.

In 2001 plaintiff filed a lawsuit alleging, in relevant part, that Community Bank and Title America were liable under N.C.G.S. § 75-1.1 for charging duplicative closing fees for overlapping services, for charging a "loan discount fee" for a loan that was in fact not discounted, and for charging unreasonable, unnecessary, unfair, and deceptive fees in connection with the loan. Plaintiff's complaint also contained a claim for attorney fees and asserted usury claims under Chapter 24 of the General Statutes.

The case was removed to federal court shortly after the complaint was filed, and remanded to Superior Court, Wake County, in late 2002. The case was designated exceptional under Rule 2.1 of the General Rules of Practice for the Superior and District Courts in January 2003. On 1 May 2003, the superior court entered an order dismissing all of plaintiff's claims except those arising under Chapter 75 of the General Statutes.

Defendants removed the case to federal court again following the United States Supreme Court's decision in *Beneficial National Bank v. Anderson*, 539 U.S. 1, 156 L. Ed. 2d 1 (2003). Thereafter, the matter was transferred to the United States District Court for the Western District of Pennsylvania and consolidated with a national class action

1. The other named plaintiff, Troy Elliott, is not a party to this appeal. All references in this opinion to "plaintiff" refer only to Travis T. Bumpers.

involving similar claims against Community Bank and other defendants. Ultimately, in January 2008, the federal district court approved a proposed settlement for the national class action, but the court concluded that it lacked subject matter jurisdiction over plaintiff's remaining claims under Chapter 75 of our General Statutes. The federal district court characterized plaintiff's Chapter 75 claims as "sound[ing] purely in North Carolina statutory and common law." Thus, the federal district court again remanded the case to Superior Court, Wake County.

The superior court granted partial summary judgment for plaintiff in an order entered on 28 April 2008. Community Bank was found liable on two of plaintiff's section 75-1.1 claims. First, the superior court concluded that Community Bank charged a "loan discount fee" for providing a loan that was not discounted, which amounted to an unfair or deceptive trade practice under N.C.G.S. § 75-1.1. Second, the superior court found that Title America's "settlement charges" were redundant fees covering the same services and duplicative of the "origination fees" charged by Community Bank. The superior court labeled these practices as "systematic overcharging" also in violation of section 75-1.1. Furthermore, the superior court ruled that Title America acted as Community Bank's agent; thus, Community Bank was held liable for Title America's redundant and duplicative fees. The 28 April order deferred ruling on damages until a later hearing.

The superior court entered an order awarding damages to plaintiff on 15 May 2008. The court ruled that plaintiff's actual damages resulting from the loan discount fee were $1,864.78, which were trebled under section 75-16 to $5,594.34, plus prejudgment interest. Plaintiff's actual damages from the settlement charges by Title America were $1,136.13, which the court trebled to $3,408.38, plus prejudgment interest. The superior court specifically noted that it had "not considered an application for attorney fees under G.S. 75-16.1, but nonetheless determine[d] that there is no just cause for delay and that the judgment resulting from this order should be entered as a final judgment." The order concluded that the court would consider "separately whether attorney fees should be awarded" and if so, "the amount of any such fees."

Community Bank gave notice of appeal from the 15 May 2008 order and prior rulings. The Court of Appeals dismissed Community Bank's appeal, ruling that the 15 May 2008 order was interlocutory and not appealable because it expressly left the issue of attorney fees

to be decided in the future. *Bumpers v. Cmty. Bank of N. Va.*, ___ N.C. App. ___, ___, 675 S.E.2d 697, 700 (2009). Thus, the Court of Appeals held that the superior court improperly certified its 15 May 2008 order as final under Rule of Civil Procedure 54(b) before deciding the issue of attorney fees. *Id.* at ___, 675 S.E.2d at 700. Plaintiff petitioned this Court for discretionary review following the dismissal by the Court of Appeals. This Court allowed plaintiff's petition for discretionary review, in part, to address whether an unresolved request for attorney fees under section 75-16.1 prevents an order ruling on all substantive issues of a claim under section 75-1.1 from being final and appealable.

II. Discussion

In their briefs to this Court, both parties request clarification concerning when a judgment may be considered final and properly certified for appeal under Rule 54(b).[2] Realizing that the time for taking appeal has jurisdictional consequences that may result in inadvertent waiver of appellate rights, we attempt to provide the requested guidance.

The general rule has long been that appeal is allowed from a final judgment of the trial court. *See* N.C.G.S. § 1-277(a) (2009); *id.* § 7A-27(b), (c) (2009); *Tridyn Indus., Inc. v. Am. Mut. Ins. Co.*, 296 N.C. 486, 488-89, 251 S.E.2d 443, 445-46 (1979) (citing *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950)). " 'A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.' " *Tridyn Indus.*, 296 N.C. at 488, 251 S.E.2d at 445 (quoting *Veazey*, 231 N.C. at 361-62, 57 S.E.2d at 381). In appropriate cases, however, Rule 54(b) permits trial courts to certify for immediate appeal orders that are final as to a specific portion of the case, but which do not dispose of all claims as to all parties. Rule 54(b) states:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or

2. Because the trial court certified the 15 May 2008 order for immediate review, we decide the issue in the procedural posture in which it is presented without passing on whether certification was necessary.

> other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

N.C.G.S. § 1A-1, Rule 54(b) (2009).

In cases involving multiple claims or multiple parties, "Rule 54(b) modifies the traditional notion that a case could not be appealed until the trial court had finally and entirely disposed of it all." *Tridyn Industs.*, 296 N.C. at 490, 251 S.E.2d at 446 (citing *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 225 S.E.2d 797 (1976)). Thus, when the trial court enters a "judgment which is final and which fully terminates fewer than all the claims or [fully terminates all] claims as to fewer than all the parties," Rule 54(b) permits the trial court to make that judgment immediately appealable by indicating that " 'there is no just reason for delay.' " *Id.* at 490, 251 S.E.2d at 446-47 (citation omitted); *see also Oestreicher*, 290 N.C. at 124, 225 S.E.2d at 802 ("Our Court has consistently interpreted G.S. 1-277 so as to give any party to a lawsuit a right to an immediate appeal from every judicial determination . . . which constitutes a final adjudication, even when that determination disposes of only a part of the lawsuit." (emphasis omitted)).

On the other hand, trial courts may certify only those judgments that are final within the meaning of Rule 54(b). A trial court may not "by denominating [its] decree a 'final judgment' make it immediately appealable under Rule 54(b) if it is not such a judgment." *Tridyn Indus.*, 296 N.C. at 491, 251 S.E.2d at 447 (citing *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 47 L. Ed. 2d 435 (1976)). Accordingly, appellate courts may review whether the judgment certified for appeal under Rule 54(b) is indeed a final, appealable judgment. *Id.* at 491-92, 251 S.E.2d at 447.

The Court of Appeals relied on this premise from *Tridyn Industries* to hold that the trial court here improperly certified the case for appeal before ruling on the unresolved request for attorney

fees. *Bumpers*, ___ N.C. App. at ___, 675 S.E.2d at 700 (quoting *Tridyn Indus.*, 296 N.C. at 492, 251 S.E.2d at 448). We note, however, that *Tridyn Industries* involved an order of partial summary judgment to the plaintiff on the issue of liability under an insurance contract, leaving for future determination the issues of damages and attorney fees, among others. *See* 296 N.C. at 487-88, 251 S.E.2d at 445. In this case, by contrast, the trial court's 15 May 2008 order ruled on all substantive issues of plaintiff's claims under N.C.G.S. § 75-1.1, including damages, leaving only the issue of attorney fees for future determination. Thus, *Tridyn Industries* is distinguishable. Instead, the dispositive question here is whether an unresolved request for attorney fees under N.C.G.S. § 75-16.1 prevents a judgment ruling on all substantive issues of a claim under section 75-1.1 from being final and properly certified for appeal under Rule 54(b).

Among other jurisdictions, two prominent ideological approaches have emerged to address the issue presented in this case. In the federal system, the United States Supreme Court adopted a bright-line, "uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202, 100 L. Ed. 2d 178, 185 (1988). The Supreme Court deemed "it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain." *Id.* at 200, 100 L. Ed. 2d at 184. Thus, courts and litigants were thought to be best served by a "bright-line rule . . . that a decision on the merits is a 'final decision' for purposes of [28 U.S.C.] § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case." *Id.* at 202-03, 100 L. Ed. 2d at 185.

Other jurisdictions have followed suit, opting for a bright-line rule that an unresolved request for attorney fees does not prevent finality of a judgment disposing of all issues in the underlying substantive claim. *See, e.g.*, *State Bd. of Educ. v. Waldrop*, 840 So. 2d 893, 899 (Ala. 2002); *Harold Ives Trucking, Co. v. Pro Transp., Inc.*, 341 Ark. 735, 737, 19 S.W.3d 600, 602 (2000) (per curiam); *Paranteau v. DeVita*, 208 Conn. 515, 521-23, 544 A.2d 634, 637-39 (1988), *abrogated on other grounds as stated in Benvenuto v. Mahajan*, 245 Conn. 495, 504 n.4, 715 A.2d 743, 747 n.4 (1998); *McGurn v. Scott*, 596 So. 2d 1042, 1043-44 (Fla. 1992); *Snodgrass v. State Farm Mut. Auto. Ins. Co.*, 246 Kan. 371, 373-74, 789 P.2d 211, 213-15 (1990); *Blake v. Blake*, 341 Md. 326, 337-38, 670 A.2d 472, 477-78 (1996); *Midcom, Inc. v. Oehlerking*, 2006 SD 87, ¶¶ 19-20, 722 N.W.2d 722, 727-28; *Wlasiuk v.*

Whirlpool Corp., 76 Wash. App. 250, 253-55, 884 P.2d 13, 15-18 (1994). Some states follow the converse rule that a judgment on the merits is not final when an unresolved request for attorney fees remains. *See*, *e.g.*, *Billingsley v. BFM Liquor Mgmt., Inc.*, 259 Neb. 992, 997-99, 613 N.W.2d 478, 483-84 (2000) (dismissing appeal for lack of final judgment where the trial court had not ruled on a request for, *inter alia*, attorney fees); *Ft. Frye Teachers Ass'n v. Ft. Frye Local Sch. Dist. Bd. of Educ.*, 87 Ohio App. 3d 840, 843, 623 N.E.2d 232, 234-35 (1993) (holding that the trial court's failure to determine the amount of attorney fees to be awarded "left a portion of the case undecided," making the judgment "neither final nor appealable"); *Sittner v. Schriever*, 2000 UT 45, ¶ 19, 2 P.3d 442 (stating that " 'a trial court must determine the amount of attorney fees awardable . . . before the judgment becomes final for the purposes of an appeal' " (citation omitted)).

The second ideological approach is a case-by-case determination of whether the requested attorney fees are more appropriately characterized as an element of the substantive claim or merely an item of costs that is contingent upon the resolution of the substantive claim. *See*, *e.g.*, *Ferrell v. Glenwood Brokers, Ltd.*, 848 P.2d 936, 941-42 (Colo. 1993) (en banc) (recognizing a dichotomy in the classification of attorney fees as either costs or an element of damages and leaving it to the trial courts' discretion to make the appropriate characterization) (citing, *inter alia*, 1 Mary Francis Derfner & Arthur D. Wolf, *Court Awarded Attorney Fees* ¶ 1.02, at 1-9 (1992))); *Leske v. Leske*, 185 Wis. 2d 628, 633, 517 N.W.2d 538, 540 (Ct. App. 1994) (per curiam) (concluding that the nature of unresolved attorney fee claims is dispositive and a claim asserted under a fee-shifting statute does not render a judgment disposing of all substantive claims nonfinal). If the claim for attorney fees is deemed an item of damages or an element of the substantive claim, the judgment on the merits is not final and appealable until the attorney fee request is resolved. *See*, *e.g.*, *In re Marriage of Hill*, 166 P.3d 269, 271-72 (Colo. Ct. App. 2007) (concluding that final orders in a divorce proceeding that resolved property division and awarded spousal and child support but failed to resolve a statutory attorney fee claim were not appealable because the fee claim was "inextricably intertwined" with other issues in the case). If, on the other hand, the claim for attorney fees is asserted as an item of costs or pursuant to a fee-shifting provision that is contingent upon prevailing on the merits, a final judgment on the substantive claim is independently appealable notwithstanding the unresolved fee claim. *See Ferrell*, 848 P.2d at 941-42. *See generally*

Richard S. Crummins, *Judgment on the Merits Leaving Attorney's Fees Issues Undecided: A* Final *Judgment?*, 56 Fordham L. Rev. 487, 493-500 (1987) (discussing the distinction between the bright-line rule and case-by-case determination approach). Some courts deem the case-by-case approach most workable because characterization of the requested attorney fees as either an element of damages or an item of costs is left to the trial judge's discretion. *E.g.*, *Ferrell*, 848 P.2d at 941-42. We note that our Court of Appeals has engaged in a de facto case-by-case approach, sometimes dismissing appeals having unresolved fee issues and sometimes hearing such appeals. *Compare Webb v. Webb*, ___ N.C. App. ___, ___, 677 S.E.2d 462, 465 (2009) (dismissing appeal of interlocutory order awarding permanent alimony when a motion for attorney fees was pending before the trial court), *and Watts v. Slough*, 163 N.C. App. 69, 72-73, 592 S.E.2d 274, 276-77 (2004) (dismissing appeal from a grant of partial summary judgment because the trial court reserved ruling on the amount of costs and attorney fees for a later hearing), *with In re Will of Harts*, 191 N.C. App. 807, 808-10, 664 S.E.2d 411, 413-14 (2008) (holding that caveator's notice of appeal filed on 10 August 2007 was untimely as to a final judgment on merits entered on 21 May 2007, but timely as to an order awarding attorney fees entered on 24 July 2007); *Beau Rivage Plantation, Inc. v. Melex USA, Inc.*, 112 N.C. App. 446, 452-53, 436 S.E.2d 152, 155 (1993) (treating plaintiff's notice of appeal, timely filed after order granting summary judgment to defendant but before order awarding the specific amount of attorney fees to defendant, as sufficient to preserve appeal of both orders).

Plaintiff advocates a third approach espoused by the Supreme Court of New Mexico. In *Trujillo v. Hilton of Santa Fe*, the Court of Appeals of New Mexico dismissed as untimely an appeal taken beyond the prescribed time from an order ruling on all substantive issues of an underlying workers' compensation claim, but within the prescribed time from an order awarding attorney fees. 115 N.M. 398, 400, 851 P.2d 1065, 1067 (Ct. App.), *rev'd*, 115 N.M. 397, 851 P.2d 1064 (1993). In reversing the intermediate appellate court's dismissal of the appeal, the Supreme Court of New Mexico described the facts of the case as coming within a "twilight zone of finality" and retreated from its earlier adoption of the bright-line rule in *Budinich*. *Trujillo*, 115 N.M. at 398, 851 P.2d at 1065. Instead, the New Mexico Court

> recognize[d] that in the twilight zone a party should be allowed to choose the appropriate time for appeal, guided by considerations

> in the trial court that impact on meaningful and efficient appellate review. In the twilight of marginal cases, the zone of appeal should be one of practical choice and not one of procedural danger against which a bright-line rule would appear not to serve as a shield.

Id.; *see also Executive Sports Club, Inc. v. First Plaza Tr.*, 1998-NMSC-008, ¶¶ 12-13, 125 N.M. 78, 957 P.2d 63 (reaffirming the holding in *Trujillo*). Plaintiff asserts that the New Mexico approach "would give the greatest clarity and the lowest risk of surprise, and would substantially promote judicial efficiency."

We disagree with plaintiff regarding the benefits of the New Mexico approach and believe that a bright-line rule is the best means to promote judicial efficiency, foster meaningful appellate review, and avoid waiver of appellate rights. "The time of appealability, having jurisdictional consequences, should above all be clear." *Budinich*, 486 U.S. at 202, 100 L. Ed. 2d at 185. Accordingly, we briefly examine N.C.G.S. § 75-16.1 to determine how it interrelates with a judgment on the merits of a claim under N.C.G.S. § 75-1.1 for purposes of appeal.

Section 75-16.1 is a fee-shifting statute that provides:

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:
>
> (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or
>
> (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C.G.S. § 75-16.1 (2009). Thus, a party must show that it has prevailed on the substantive claim under section 75-1.1, and that one of the two factors enumerated above exists, before the trial court may award attorney fees to that party under section 75-16.1. *See United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049, 1061 (E.D.N.C. 1980), *aff'd*, 649 F.2d 985 (4th Cir.), *cert. denied*, 454 U.S.

1054, 70 L. Ed. 2d 590 (1981); *Evans v. Full Circle Prods., Inc.*, 114 N.C. App. 777, 780-81, 443 S.E.2d 108, 110 (1994) (citing *Mayton v. Hiatt's Used Cars, Inc.*, 45 N.C. App. 206, 212, 262 S.E.2d 860, 864, *disc. review denied*, 300 N.C. 198, 269 S.E.2d 624 (1980)). It follows, therefore, that a claim for attorney fees under section 75-16.1 is not a substantive issue, or in any way part of the merits of a claim under section 75-1.1.

Based on the foregoing analysis, we adopt the bright-line rule that an unresolved claim for attorney fees under section 75-16.1 does not preclude finality of a judgment resolving all substantive issues of a claim under section 75-1.1. Moreover, a final judgment under section 75-1.1 may be certified and appealed pursuant to Rule 54(b) in appropriate cases involving multiple claims or multiple parties. Thus, we hold that an order or judgment ruling on all substantive issues of a claim under section 75-1.1 is a final judgment that may be certified and appealed pursuant to Rule 54(b), notwithstanding any unresolved issue of attorney fees under section 75-16.1. The time for taking an appeal on the merits runs from entry of the final judgment on the claim under section 75-1.1, not entry of judgment on a claim for attorney fees under section 75-16.1.

In the instant case, there is no dispute that the superior court's 15 May 2008 order resolved all substantive issues of plaintiff's claims under section 75-1.1. Consequently, this order constituted a final judgment even though the superior court expressly reserved ruling on plaintiff's request for attorney fees. The superior court properly certified its 15 May 2008 order for immediate appeal under Rule 54(b) because that order was final as to plaintiff's claims under section 75-1.1.

III. Conclusion

A judgment ruling on all substantive issues of a claim under N.C.G.S. § 75-1.1 is final and appealable regardless of any unresolved request for attorney fees under N.C.G.S. § 75-16.1. In appropriate cases, such a final judgment may be certified for immediate appeal under Rule 54(b). Because the superior court's 15 May 2008 order ruled on all substantive issues of plaintiff's claims under N.C.G.S. § 75-1.1, the superior court properly certified that order for immediate appeal under Rule 54(b). Therefore, we reverse the dismissal by the Court of Appeals and remand this case to that court for consideration of the merits of the issues raised on appeal. Accordingly, we further conclude that discretionary review was improvidently

allowed as to whether the trial court properly granted summary judgment for plaintiff.

REVERSED AND REMANDED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

STATE EMPLOYEES ASSOCIATION OF NORTH CAROLINA, INC. v. NORTH CAROLINA DEPARTMENT OF STATE TREASURER AND RICHARD H. MOORE, IN HIS CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA

No. 487A09

(Filed 17 June 2010)

Public Records— denial of requested records—Rule 12(b)(6) dismissal

The trial court erred by dismissing a public records case under Rule 12(b)(6) where plaintiff's claim was supported by the Public Records Act, states facts sufficient to allege denied access to requested public records, and discloses no facts that necessarily defeat the claim.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 200 N.C. App. ——, 685 S.E.2d 516 (2009), affirming an order dismissing plaintiff's complaint entered on 21 July 2008 by Judge James E. Hardin, Jr. in Superior Court, Wake County. Heard in the Supreme Court 23 March 2010.

Blanchard, Miller, Lewis & Styers, P.A., by E. Hardy Lewis, for plaintiff-appellant.

Shanahan Law Group, PLLC, by Kieran J. Shanahan and Steven K. McCallister; and Joyce Rutledge, Legal Counsel, Retirement Systems Division, Department of State Treasurer, for defendant-appellees.

Bussian Law Firm, PLLC, by John A. Bussian, for North Carolina Press Association, and Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Mark J. Prak, for North Carolina Association of Broadcasters, amici curiae.

BRADY, Justice.

One of the earliest historians to comment on the "great experiment" that is America noted that our nation's political structure rests on the fundamental "principle of the sovereignty of the people." 1 Alexis de Tocqueville, *Democracy in America* 9, 40 (Henry Reeve trans., Arlington House 1966) (1835). In harmony with this principle, the North Carolina General Assembly recognized in the Public Records Act that "[t]he public records and public information compiled by the agencies of North Carolina government or its subdivisions are *the property of the people*." N.C.G.S. § 132-1(b) (2009) (emphasis added). The issue in this case is whether the complaint filed by plaintiff State Employees Association of North Carolina, Inc. under the North Carolina Public Records Act, *id.* §§ 132-1 to -10 (2009), is sufficient to overcome a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to North Carolina Rule of Civil Procedure 12(b)(6). We conclude that the complaint is sufficient and reverse the Court of Appeals.

FACTUAL BACKGROUND

Plaintiff's complaint and accompanying exhibits tend to show the following: Plaintiff is a nonprofit corporation incorporated under the laws of our state for the purpose of, *inter alia*, promoting the best interests of current, retired, and future employees of the State of North Carolina. Defendants are the North Carolina Department of State Treasurer (defendant department), and, in his official capacity, Richard H. Moore (defendant Moore), who is the former Treasurer of the State of North Carolina and as such was the custodian of the public records of defendant department when the complaint was filed (collectively defendants).

Plaintiff's complaint was the culmination of its efforts over the course of nearly a year to obtain copies of documents involving the investment decisions and performance of the Retirement Systems Division of the Department of State Treasurer. Plaintiff's corporate officers decided to investigate issues illuminated by an article published in February 2007 in *Forbes* magazine entitled, "Pensions, Pols, Payola." Neil Weinberg, *Pensions*, *Pols*, *Payola*, Forbes, Mar. 12, 2007, at 42, *available at* http://www.forbes.com/forbes/2007/0312/042.html. The article takes a critical approach to what it calls "a cesspool of pay-to-play" scenarios in "most of the U.S. State and local governments." *Id.* at 43. Particularly, the article reports on some of defendant Moore's activities and decisions:

> As state treasurer Moore, a Democrat, is the sole fiduciary for the North Carolina Retirement System, with $73 billion in assets. He holds sway over which money managers are entrusted to invest funds from the state pension plan. At stake: millions of dollars in fees. He has parlayed this clout into one of the biggest fundraising machines in the state by eagerly accepting contributions from dozens of financial firms that benefit (or could benefit) from his largesse.

Id. at 43.

As a result of the article, plaintiff's executive director wrote a letter to defendant Moore dated 1 March 2007 requesting copies of the following public records:

1. All documents from the Office of State Treasurer and the law firm retained regarding the dispute with *Forbes* over the magazine's request for information and the documents provided to Forbes.

2. A complete accounting of how the law firm was paid and the total cost to taxpayers.

3. All investment reports that your office has been required during your tenure to file with the legislature under GS 147-69.3(h)-(i), any other investment reports that have been required to be publicly filed under state law and identification of such reports that have not been filed.

4. A list of all current investment managers, their performance by year (or total time if shorter than a year) and the total fee amounts being paid by your office.

In response, defendant Moore provided plaintiff with copies of approximately seven hundred pages of public documents in March 2007. Plaintiff examined these documents over a number of months and concluded that they did not fully satisfy the request. As such, plaintiff's executive director sent a second letter to defendant Moore dated 16 October 2007. Plaintiff renewed its request as stated in the March 2007 letter and sought additional documents, as follows:

1. All private equity, hedge fund or real estate investments made or maintained by the Treasurer's Office on behalf of the state's pension funds since January 1, 2001. Please provide records that show the following information for each year that the investment was maintained by the Treasurer's Office:

a. Name of the fund or partnership

b. Name of the principals, fund managers and general partners

c. Date of the initial commitment, initial investment and any follow-[up] communications

d. Amount of capital committed and the actual amount of funds paid

e. Cash paid out

f. Remaining or estimated value

g. Internal rate of return

h. Investment multiple or return on capital

2. Records that show the fees paid to each external investment manager for the state's pension funds, including brokers, private equity managers, hedge fund managers and real estate investment managers since January 6, 2001. Please provide records that show the fees paid on an annual or monthly basis.

3. Records that show the fees paid to each broker, bank or other financial institution that manages or holds the investments, cash and/or deposits in the Cash Management Program from January 6, 2001, to the present. Please provide records that show the fees paid on an annual or monthly basis.

4. Records that show all stocks held each year by the state retirement system (including externally managed funds) administered by the State Treasurer from January 6, 2001, to the present.

5. Records that show the identity of each person who has served on the State Treasurer's investment committee since January 6, 2001. Please provide records that show the dates of service for each advisor, including any SEC investment advisor, registration forms or form ADV's provided to or retrieved by the State Treasurer's Office.

Having received no response to its October 2007 letter, plaintiff sent a third letter to defendant Moore on 6 December 2007, asking that the requested documents be made available by 31 December 2007; otherwise, plaintiff would "consider taking appropriate legal action." On 21 December 2007, the director of communications for

defendant department sent a letter to plaintiff stating that the "more than" seven hundred pages of documents "previously provided" was "believe[d]" to "fully answer[]" plaintiff's "original request," and if not, plaintiff was asked to provide "a list of the specific information that was not included with the original documents." On 7 January 2008, a second letter from defendant department's communications director reiterated that plaintiff should "indicate specifically" what was believed to be "missing."

Plaintiff then sent a fourth letter to defendant Moore dated 15 January 2008 and included a list of documents believed to be "omitted from those initially disclosed." Plaintiff referred to the requests made in its previous letters of 1 March and 16 October 2007 and described the items believed to still be missing. The letter indicated that plaintiff would file a lawsuit if defendants did not "produce the requested public records by 5:00 p.m. on Friday, January 18, 2008."

The director of communications for defendant department then sent two letters to plaintiff, both dated 18 January 2008. One letter addressed the items plaintiff believed to be missing from its initial request of 1 March 2007. One hundred sixty-two pages of copied documents were included with the letter which, according to defendants, "complete[d]" plaintiff's 1 March 2007 request. The second letter from defendant department dated 18 January 2008 addressed plaintiff's 16 October 2007 request. This letter stated that defendant department was working to provide the information, explained that plaintiff had received some of the requested documents already, and included copies of twenty-eight additional pages of copied material.

Plaintiff's executive director responded in a letter dated 24 January 2008 that he believed certain information was still missing, and he provided examples of specific documents that he believed existed but had not yet been disclosed. He asked for copies of the documents not yet provided and requested information explaining why defendants were taking so much time to fulfill the requests.

PROCEDURAL BACKGROUND

On 1 February 2008, plaintiff commenced this civil action by filing a verified complaint in Superior Court, Wake County. Through this suit plaintiff seeks an order declaring the requested documents to be public records and an order compelling defendants to provide copies of the documents for plaintiff to examine. On 13 March 2008,

defendants filed their answer and moved the trial court to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). The trial court entered an order granting defendants' motion on 21 July 2008 and dismissed the complaint with prejudice. Plaintiff then appealed to the Court of Appeals, which affirmed the trial court in a divided opinion issued on 3 November 2009. *State Employees Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, —— N.C. App. ——, ——, 685 S.E.2d 516, 519 (2009). The dissenting judge at the Court of Appeals opined that plaintiff had sufficiently alleged the substantive elements of a cause of action under the Public Records Act. *Id.* at ——, 685 S.E.2d at 520-21 (Elmore, J., dissenting). Plaintiff timely appealed as of right to this Court based on the dissent.

ANALYSIS

An appellate court conducts a de novo review when considering a trial court's dismissal of a complaint under North Carolina Rule of Civil Procedure 12(b)(6). "[W]e determine '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. In ruling upon such a motion, the complaint is to be liberally construed . . . .' " *Shepard v. Ocwen Fed. Bank, FSB*, 361 N.C. 137, 139, 638 S.E.2d 197, 199 (2006) (quoting *Meyer v. Walls*, 347 N.C. 97, 111-12, 489 S.E.2d 880, 888 (1997) (internal citation omitted)). Dismissal is warranted if an examination of the complaint reveals that no law supports the claim, or that sufficient facts to make a good claim are absent, or that facts are disclosed which necessarily defeat the claim. *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

Government agencies and officials exist for the benefit of the people, and "an informed citizenry [is] vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citations omitted). One of our nation's founding fathers, James Madison, once warned: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* The Complete Madison 337 (Saul K. Padover ed., Harper & Bros. 1953) (1865).

Our legislature has provided a means for fostering openness and transparency in government through the Public Records Act, codified at Chapter 132 of the North Carolina General Statutes. "[I]t is clear that the legislature intended to provide that, as a general rule, the public would have liberal access to public records." *News & Observer Publ'g Co. v. State ex rel. Starling*, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984) (citation omitted). The Public Records Act enables citizens to "obtain copies of their public records" unless the records are specifically exempted by law. N.C.G.S. § 132-1(b). Public records include "all documents . . . made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions." *Id.* § 132-1(a).

The Public Records Act supplies a cause of action when any government agency or subdivision denies rights provided by that statute:

> Any person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records, may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying, and the court shall have jurisdiction to issue such orders.

Id. § 132-9(a). Based on a plain reading of the statute, three elements are required to state a prima facie case: (1) a person requests access to or copies of public records from a government agency or subdivision, (2) for the purpose of inspection and examination, and (3) access to or copies of the requested public records are denied. *Id.*

In this case there is no disagreement that plaintiff made a public records request to inspect and examine certain documents. Defendants contend that the complaint was "correctly dismissed . . . because Plaintiff alleged absolutely no specific denial—not even upon information and belief." To the contrary, we find sufficient support for the allegation that plaintiff has been "denied access" to requested public records. Through five separate letters from plaintiff's executive director encompassing the period between 1 March 2007 and 24 January 2008, plaintiff made requests or clarifications regarding the public records it sought. A copy of each letter was fully incorporated into the complaint by reference and was attached thereto. Plaintiff's final letter to defendants before commencing suit included specific reasons why plaintiff believed that additional public records implicated by its initial requests existed, but had not been

provided. For example, in regards to its 1 March 2007 request, plaintiff stated, *inter alia*:

> [I]t is clear that not all documents containing correspondence from Forbes has been provided. The January 19, 2007, 3:43 p.m. e-mail from Kai Falkenberg to Ms. Lang refers to an attached letter "a copy of which —with enclosures-– has also been sent to you by fax." You have provided neither that letter nor the enclosures. Moreover, Neil Weinberg's message on the same date refers to a letter faxed to Ms. Lang from Forbes' attorney. If this is not the same letter referred to by Ms. Falkenberg, then you have not provided a copy of it.
>
> In addition, except for some responses that are attached to the Forbes e-mails, you have not provided all responses from Ms. Lang to Forbes. For example, attached to the February 14, 2007, e-mail message from Jason Storbakken is an e-mail from Ms. Lang stating: "Please see answers inserted in your original e-mail below." However, you have not produced the e-mail that contains Ms. Lang's answers. Moreover, attached to Jason Storbakken's message of February 14, 2007, 6:16 p.m., is a message stating: "On 2/14/07 PM, 'Sara Lang' . . . wrote:" but the text of Ms. Lang's message is omitted. It is difficult for me to draw any conclusion except that Ms. Lang's message has been intentionally deleted from the document.
>
> Finally, based on the size of the fee paid to the retained law firm and, thus, the number of hours that firm must have worked on this issue, it would appear that there must have been electronic or written correspondence between your office and that law firm regarding the Forbes public information request. However, no copies of any such correspondence have been produced.

Thus, plaintiff's allegations that additional public records exist that have not yet been disclosed are based on reasonable inferences. Notably, these allegations were included in a letter dated 24 January 2008, which was six days *after* the director of communications for defendant department expressed by letter the stance that defendants were "pleased to *complete*" plaintiff's "expanded March 1 request." (Emphasis added.) The contention that the 1 March 2007 request was complete, in light of plaintiff's ongoing allegations that available public records are still being improperly omitted from disclosure, brings this dispute to a crescendo, and for purposes of the complaint, suffi-

ciently alleges the substantive element that plaintiff has been "denied access to public records." *See* N.C.G.S. § 132-9(a).

A second letter from the director of communications for defendant department dated 18 January 2008 addressed plaintiff's 16 October 2007 public records request. This letter expressed that defendants were "working to fulfill this request in accordance with our public records policy of 'first come, first served.' " In his response letter dated 24 January 2008, plaintiff's executive director was unconvinced and commented: "[I]t is difficult for me to believe that there are other public record requests pending in your office that are more longstanding than my request made more than three months ago." Section 132-6 charges "[e]very custodian of public records" to "furnish copies" of requested public records "*as promptly as possible*." *Id.* § 132-6 (emphasis added). Whether the length of defendants' delay in producing copies of the requested public records constitutes a denial of access is not a question we need address at this time because we have found plaintiff's complaint sufficient on other grounds.

Furthermore, based on section 132-6(a), which limits a custodian's duty to "public records . . . in the custodian's custody," *id.*, defendants contend that "possession" is a necessary element of a cause of action under the Public Records Act. Moreover, citing *Gannett Pacific Corp. v. North Carolina State Bureau of Investigation*, 164 N.C. App. 154, 595 S.E.2d 162 (2004), the Court of Appeals majority in this case affirmed the dismissal of plaintiff's complaint, finding that defendant department "correctly reviewed their records, determined which public records were in their possession, and produced the responsive public records." *State Employees Ass'n of N.C., Inc.*, —— N.C. App. at ——, 685 S.E.2d at 519. However, section 132-9(a) provides plaintiff its cause of action, and that section makes no mention of a possession element. Of course, defendants may choose to rely on section 132-6(a) or other statutory provisions as potential defenses, but defendants will have opportunities through other proceedings to further advocate the position that it has complied with its burden. The Court of Appeals majority's reliance on *Gannett* is misplaced and does not comport with the actual holding of that case. The panel in *Gannett* remanded so that the trial court and not the state agency, which in *Gannett* was the North Carolina State Bureau of Investigation, would make the critical determination of whether the agency had possession of certain public records under the Public Records Act. 164 N.C. App. at 161, 595 S.E.2d at 166.

The final determination of possession or custody of the public records requested is not properly conducted by the state agency itself. The approach that the state agency has the burden of compliance, subject to judicial oversight, is entirely consistent with the policy rationale underpinning the Public Records Act, which strongly favors the release of public records to increase transparency in government. Judicial review of a state agency's compliance with a request, prior to the categorical dismissal of this type of complaint, is critical to ensuring that, as noted above, public records and information remain the property of the people of North Carolina. Otherwise, the state agency would be permitted to police its own compliance with the Public Records Act, a practice not likely to promote these important policy goals.

The only task at hand for purposes of Rule 12(b)(6) is to test the legal sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). Stated in terms of the three grounds for dismissal under Rule 12(b)(6), *Wood*, 355 N.C. at 166, 558 S.E.2d at 494, plaintiff's complaint reveals that its claim is supported by the Public Records Act, states facts sufficient to allege the substantive elements of a claim for denied access to requested public records, and discloses no facts that necessarily defeat the claim. Thus, we conclude that no deficiencies warrant dismissal of the complaint at this stage.

For the foregoing reasons, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the trial court for additional proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

IN THE MATTER OF D.L.H.

No. 350PA09

(Filed 17 June 2010)

Juveniles— delinquency—credit not allowed for time spent in secure custody before disposition

The Court of Appeals erred by holding that the term of a delinquent juvenile's confinement may be reduced by time spent in court-ordered custody before disposition because: (1) while

criminal sentences are designed to impose a punishment commensurate with the injury the offense has caused and to provide a general deterrent to criminal behavior, dispositions in juvenile actions have a greater focus on accountability and responsibility and aim to provide the appropriate consequences, treatment, training, and rehabilitation to assist the juvenile toward becoming a nonoffending, responsible, and productive member of the community; (2) the district court concluded that the juvenile was in need of the protective supervision of the court; (3) the time the juvenile spent in secure custody pending disposition was not the same as a term of juvenile confinement imposed under N.C.G.S. § 7B-2506(20), and her placement in a juvenile facility until disposition of her case was not a direct consequence of fighting at school or skipping classes, but instead was a reasonable exercise of the district court's discretion that was intended to serve the juvenile's best interests while the parties gathered information on how best to respond to her particular circumstances; (4) given the necessary delay in disposition, the district court believed this was the best temporary situation available for the juvenile; (5) the juvenile has advanced no argument that due process requires credit for time served before disposition in juvenile proceedings; (6) nothing in *In re Vinson*, 298 N.C. 640 (1979), can be construed as importing the entirety of North Carolina's criminal procedure law into the juvenile context; and (7) the absence of any statutory indication that N.C.G.S. § 15-196.1 applies to juvenile matters or that a juvenile is otherwise entitled to credit for time served under the circumstances of this case, together with the legislative policy of affording the courts a wide variety of options in juvenile matters, compels the conclusion that terms of juvenile confinement may not be reduced by time spent in court-ordered custody before disposition.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 198 N.C. App. ——, 679 S.E.2d 449 (2009), affirming in part and reversing in part orders entered on 13 December 2007 by Judge Sherry F. Alloway, on 14 January 2008 and 25 February 2008 by Judge Lawrence C. McSwain, and on 29 January 2008 by Judge Polly D. Sizemore, all in District Court, Guilford County. Heard in the Supreme Court on 15 February 2010.

Roy Cooper, Attorney General, by LaToya B. Powell, Assistant Attorney General, for the State-appellant.

Leslie C. Rawls for juvenile-appellee.

NEWBY, Justice.

The issue in this case is whether the delinquent juvenile D.L.H. is entitled to have her term of confinement reduced by time spent in secure custody pending her dispositional hearings. The General Statutes do not authorize credit for time served before disposition in the juvenile context, and our judiciary may not read into the law provisions that were not included by the legislature. Accordingly, terms of juvenile confinement may not be reduced by time spent in court-ordered custody before disposition. The Court of Appeals holding as to this issue is therefore reversed.

On 28 June 2007, a petition was filed alleging that D.L.H. was a delinquent juvenile based on her role in an affray at school. D.L.H. admitted to the affray in a transcript of admission filed 6 July 2007. By order entered 19 July 2007, the District Court, Guilford County, adjudicated D.L.H. a delinquent juvenile, continued disposition until 2 August 2007, and, in accordance with N.C.G.S. § 7B-1903(c), ordered that D.L.H. remain in the Guilford County Juvenile Detention Center pending disposition. D.L.H. remained in secure custody from her 6 July 2007 adjudicatory hearing until the dispositional hearing on 2 August 2007. Based on the latter hearing, the district court entered an order on 21 August 2007 placing D.L.H. on "Level 2 probation." The district court also imposed fourteen days of juvenile confinement, but provided "that those days are stayed on the condition that the juvenile cooperate and complete the terms of probation."

On 9 November 2007, a juvenile court counselor filed a motion for review, alleging that D.L.H. had violated the terms of her probation by unlawful absence from school. In an order entered 13 December 2007, the district court found that D.L.H. admitted to the counselor's allegations of truancy. As a result, the court ordered D.L.H. to serve the fourteen days of juvenile confinement that had been stayed by the 21 August 2007 order. D.L.H. served the fourteen days from 3 December 2007 through 17 December 2007. The court continued disposition until 3 January 2008. Following the 3 January 2008 hearing, the district court entered an order on 14 January 2008 in which the court again continued disposition, this time until 31 January 2008, and placed D.L.H. in the Guilford County Juvenile

Detention Center pending disposition. In addition to her fourteen day term of confinement, D.L.H. spent a total of fifty-five days in secure custody awaiting disposition.

On 10 January 2008, before the 31 January 2008 dispositional hearing, D.L.H. filed a motion seeking release from custody. In an order entered 29 January 2008, the motion was continued until the previously scheduled 31 January 2008 hearing. After that hearing took place, the district court entered an order on 25 February 2008 that extended D.L.H.'s probation until 31 January 2009. By notice filed 26 February 2008, D.L.H. appealed the district court's orders of 13 December 2007, 14 January 2008, 29 January 2008, and 25 February 2008.

In pertinent part, D.L.H. argued to the Court of Appeals that the district court erred by failing to reduce her fourteen days of juvenile confinement by the time she spent in secure custody pending disposition of her case. The Court of Appeals agreed, holding that N.C.G.S. § 15-196.1, the statute governing credit for time served in criminal cases, applies to juvenile confinement and that D.L.H. was entitled to credit for time served before disposition. *In re D.L.H.*, —– N.C. App. ——, ——, 679 S.E.2d 449, 452-54 (2009). This Court allowed discretionary review to determine whether section 15-196.1 applies in the juvenile context.

We begin our analysis by observing that the nature and purposes of juvenile proceedings remain distinct from those of criminal prosecutions. A finding of juvenile delinquency cannot be equated with a criminal conviction for all purposes, and "*protective* custody"[1] of juveniles differs from the imprisonment of criminals. *In re Burrus*, 275 N.C. 517, 529, 533-34, 169 S.E.2d 879, 886-87, 889-90 (1969) (emphasis added), *aff'd sub nom. McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971). While criminal sentences are designed "to impose a punishment commensurate with the injury the offense has caused . . . and to provide a general deterrent to criminal behavior," N.C.G.S. § 15A-1340.12 (2009), dispositions in juvenile actions have a greater focus on "accountability and responsibility" and aim to "[p]rovide[] the appropriate consequences, treatment, training, and rehabilitation to assist the juvenile toward becoming a nonoffending, responsible, and productive member of

1. For purposes of this opinion, "protective custody" refers to court-ordered custody of delinquent juveniles in general, including secure custody pending disposition, as well as confinement under N.C.G.S. § 7B-2506(20). "Secure custody," meanwhile, is a specific term of art used in Article 19 of the Juvenile Code.

the community," *id.* § 7B-2500 (2009). In confining delinquent juveniles, the State acts more as a caregiver than a jailer,

> exercis[ing] its power as *parens patriae* to protect and provide for the comfort and well-being of such of its citizens as by reason of infancy . . . are unable to take care of themselves. Thus, juveniles are in need of supervision and control due to their inability to protect themselves. In contrast, adults are regarded as self-sufficient.

In re Walker, 282 N.C. 28, 39, 191 S.E.2d 702, 709 (1972) (second alteration in original) (citation and internal quotation marks omitted). Indeed, when D.L.H. was adjudicated delinquent, the district court concluded that she was "in need of the *protective* supervision of the court." (Emphasis added.)

Further, we recognize that the time D.L.H. spent in secure custody pending disposition is not the same as a term of juvenile confinement imposed under N.C.G.S. § 7B-2506(20). D.L.H.'s placement in a juvenile facility until disposition of her case was not a direct consequence of fighting at school or skipping classes. Rather, the placement was a reasonable exercise of the district court's discretion that was intended to serve D.L.H.'s best interests while the parties gathered information on how best to respond to her particular circumstances. In its 25 February 2008 order, the district court made the following findings of fact:

> 5. The mother of the juvenile informs the court that the juvenile comes and goes as she pleases. Her mother also indicates the juvenile ignores curfews.
>
> 6. That on January 3, 2008 the mother informed the court that she was not willing to have the juvenile home and needed help from the court. The juvenile was placed in detention pending disposition on January 31, 2008.

These findings are unchallenged on appeal and are therefore binding on this Court. *E.g.*, *In re J.D.B.*, 363 N.C. 664, 668, 686 S.E.2d 135, 137 (2009) (citation omitted). D.L.H.'s mother was also concerned about the people with whom her daughter was associating, including a "much older" man who allegedly sold drugs. Discussing possible courses of action during the 3 January 2008 hearing, D.L.H.'s mother beseeched the district court to help her, stating, "I just need something where [D.L.H.] would learn to control her attitude, go to school, do as she's supposed to." D.L.H.'s mother proposed a number of

potential options, including night school, a structured day program, and an out-of-home placement. However, the parties had not yet fully investigated whether these programs would be appropriate in D.L.H.'s case, and thus, the district court was not able to make an informed decision at that time. The court continued disposition, instructed the parties to continue looking into the various alternatives, and placed D.L.H. in secure custody for the meantime. The court indicated that it was not ordering secure custody to punish D.L.H., but rather to ensure that her mother and the court would not "have to worry about" her while the parties conducted their investigations. In the court's own words, "I think I'm doing it for the good of this young lady in the long-run."

Given the necessary delay in disposition,[2] the district court placed D.L.H. in secure custody because it believed this was the best temporary situation available for the juvenile. The General Assembly has demonstrated through the Juvenile Code its desire to give the courts a broad range of alternatives in juvenile delinquency cases, with the manifest goal of creating optimal solutions tailored to the particular circumstances of each wayward child. *E.g.*, N.C.G.S. § 7B-2506(12) (enabling the court to impose intermittent confinement for a term of up to five days), (20) (confinement for a term of up to fourteen days), (24) (2009) (commitment to a youth development center for a term of at least six months). Especially in light of this legislative intent, we are reluctant to limit the district court's options in the name of treating delinquent juveniles like adult criminals.

D.L.H. nevertheless contends that the distinction between juvenile and criminal proceedings is not clear, citing this Court's decision in *In re Vinson*, 298 N.C. 640, 260 S.E.2d 591 (1979). Although this Court applied several criminal procedure protections in *In re Vinson*, a juvenile delinquency case, we reasoned in doing so that those pro-

2. The district court continued disposition in accordance with N.C.G.S. § 7B-2406. Nonetheless, particularly in a case involving secure custody pending disposition, we are compelled to reiterate the mandates of that statute, which encourage expeditious handling of juvenile matters:

> The court for good cause may continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.

N.C.G.S. § 7B-2406 (2009).

tections were mandated by constitutional guarantees of due process. *Id.* at 650-52, 260 S.E.2d at 598-99. D.L.H. has advanced no argument that due process requires credit for time served before disposition in juvenile proceedings. Furthermore, the criminal procedure devices employed in *In re Vinson* related only to the conduct of the juvenile's adjudicatory and dispositional hearings, not to the effect that time served before disposition might have on the juvenile's term of confinement. Nothing in *In re Vinson* can be construed as importing the entirety of North Carolina's criminal procedure law into the juvenile context. In fact, we explicitly acknowledged in *In re Vinson* the need "to carefully balance" juveniles' due process rights with "the State's police power interest in preserving order and its *parens patriae* interest in a delinquent child's welfare." *Id.* at 652, 260 S.E.2d at 599. We adhere to our desire to give due regard to the State's interest in ensuring juvenile well-being, and we find the criminal procedure safeguards applied in *In re Vinson* inapposite to the case *sub judice*. Mindful of the important differences between juvenile proceedings and criminal prosecutions, we now consider the statutory provisions at issue in this case.

Section 15-196.1 of the General Statutes provides:

> The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject.

N.C.G.S. § 15-196.1 (2009). By its plain language, this statute makes no reference to its applicability in juvenile matters. Section 15-196.1 is located in Chapter 15 of the General Statutes, entitled "Criminal Procedure." We have already demonstrated that D.L.H.'s delinquency proceedings do not constitute a criminal prosecution and are thus not subject to the full range of criminal procedure provisions. Moreover, as correctly noted by the Court of Appeals, there is no statute allowing credit for time served before disposition in the

Juvenile Code, which comprises Chapter 7B of the General Statutes and governs juvenile cases. *In re D.L.H.*, ––– N.C. App. at –––, 679 S.E.2d at 453.

"When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *State v. Jackson*, 353 N.C. 495, 501, 546 S.E.2d 570, 574 (2001) (citation and internal quotation marks omitted). The absence of any statutory indication that section 15-196.1 applies to juvenile matters or that a juvenile is otherwise entitled to credit for time served under the circumstances of this case, together with the legislative policy of affording the courts a wide variety of options in juvenile matters, compels us to conclude that terms of juvenile confinement may not be reduced by time spent in court-ordered custody before disposition.

A fuller consideration of the statutory schemes at work in this case only strengthens our conclusion. Section 15-196.1 demonstrates that the General Assembly knows how to provide credit for time served. Thus, the absence of a similar provision in the Juvenile Code seems to indicate a legislative intent not to allow such credit in juvenile cases. Also, the Juvenile Code itself specifically allows juvenile commitment terms to be reduced by the amount of "time the juvenile spends on *post-release supervision*." N.C.G.S. § 7B-2514(f) (2009) (emphasis added). This provision is further evidence that our legislature knows how to allow credit for time served and has consciously chosen not to do so with respect to time served before disposition of juvenile proceedings.

In addition, there are numerous instances in the Juvenile Code in which the General Assembly has explicitly made criminal procedure statutes and other criminal provisions applicable to juvenile proceedings. For example, the Juvenile Code expressly imports provisions from Chapter 15A, the Criminal Procedure Act, with respect to service of process. *Id.* § 7B-1806 (2009). Similarly, for cases in which the allegations of a juvenile petition are denied, the Juvenile Code specifically adopts "the rules of evidence applicable to criminal cases." *Id.* § 7B-2408 (2009). This practice of using clear legislative pronouncements to apply criminal provisions to juvenile cases renders all the more conspicuous the Juvenile Code's lack of any reference to section 15-196.1.

"It is our duty to interpret and apply the law as it is written, but it is the function and prerogative of the Legislature to make the law." *State v. Scoggin*, 236 N.C. 19, 23, 72 S.E.2d 54, 57 (1952) (citations omitted). As written, neither the criminal procedure provisions of our General Statutes nor the Juvenile Code calls for section 15-196.1 to be applied to juvenile proceedings. If juveniles are to receive credit for time spent in court-ordered custody before disposition, that result must be accomplished by legislative enactment rather than judicial fiat. Although we recognize that the distinction between juvenile proceedings and criminal prosecutions can be a fine one, our decision reflects the General Assembly's apparent and laudable desire to continue drawing that distinction. "Whatever may be the shortcomings of the [Juvenile Code], . . . we are not inclined to hamstring the State in its efforts to deal with errant children as wards of the State instead of criminals. The Constitution does not require such mischievous meddling." *In re Burrus*, 275 N.C. at 534, 169 S.E.2d at 889-90.

We hold that D.L.H. is not entitled to have her term of confinement reduced by time she spent in secure custody before her dispositional hearings, and we therefore reverse the Court of Appeals decision as to that issue. The remaining issues addressed by the Court of Appeals are not before this Court, and its decision as to those issues remains undisturbed.

REVERSED.

MILTON K. FUSSELL AND TERESA FUSSELL v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., PACESETTERS REALTY, INC. OF WAKE COUNTY, THE TOWN OF APEX, AND THOMAS COOPER

No. 369A09

(Filed 17 June 2010)

Negligence— sufficiency of allegations to state claim—turning on water at house—flooding—duty of care

Plaintiffs' complaint for damages was sufficient to survive a Rule 12(b)(6) motion for dismissal where they alleged that defendant town's employee turned on the water at a house they had purchased even though no one had answered the door, left without checking the meter to determine whether the flow

ceased in a short time, and an open bathtub spigot flooded the house. Under the liberal standards accorded notice pleading, the complaint adequately alleged that defendant owed plaintiffs a duty of care. By asserting that defendant's agent left the residence in the circumstances alleged and created a reasonably foreseeable risk of flooding, plaintiffs sufficiently stated a claim that defendant owed them a duty of care.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 198 N.C. App. ——, 680 S.E.2d 229 (2009), reversing an order dismissing plaintiffs' complaint entered on 6 December 2006 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Supreme Court 6 January 2010.

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

Little & Little, PLLC, by Cathryn M. Little, for defendant-appellant Town of Apex.

EDMUNDS, Justice.

In this case we consider whether plaintiffs' allegations of negligence against defendant Town of Apex ("defendant" or "Apex") adequately pleaded the element that defendant owed plaintiffs a duty of care. The complaint alleges that plaintiffs' property was damaged by flooding that resulted when, in response to a telephone call requesting that the water be turned on at the residence on the property, an agent or employee of Apex knocked on plaintiffs' doors and, receiving no answer, nevertheless turned on the water and left after confirming that the water meter was running. We conclude that plaintiffs' allegation of duty of care is sufficiently pleaded to avoid dismissal under the liberal standard applied when considering motions made pursuant to Rule 12(b)(6). Accordingly, we affirm the decision of the Court of Appeals.

Plaintiffs Milton K. Fussell and Teresa Fussell made the following allegations in their complaint. Plaintiffs purchased a house in Apex, North Carolina on 24 June 2004 from Seagroves Farm, LLC (Seagroves). Thomas Cooper, a real estate agent with Pacesetters Realty, Inc. (Pacesetters) represented Seagroves in the transaction. Plaintiffs had refused to close the sale before that date because Seagroves's tenant, Mary Lois Woodson, had not vacated the resi-

dence on the property. On 23 June 2004, as an inducement to complete the transaction, Cooper gave plaintiffs a written statement that Woodson would vacate the residence "as of midnight 6/23/04." Despite this assurance, Cooper nevertheless authorized, or at least allowed, Woodson to remain in the home as a tenant after 24 June 2004 without plaintiffs' knowledge or consent.

On 25 June 2004, Cooper telephoned Apex, and the call was answered by the Apex Police Department. Cooper requested that water service be restored at the property, representing that the tenant was preparing for a wedding and had no water. In response, Apex sent an employee or agent to the residence to reconnect the water. Despite having received no answer after knocking on the doors of the residence, Apex's employee or agent "reconnected the property's water service, confirmed that the meter was running, and left without taking precautions to ensure that no problems would arise as a result of the unauthorized and unexpected commencement of water service." A bathtub spigot was open at the time Apex recommenced water service. No one was present in the residence at that time, and water overflowed the tub and flooded the house for several days, causing substantial damage.

The complaint further alleged in Paragraph 36 that:

> Defendant Apex's agents, servants, or employees were negligent in that the agents, servants or employees:
>
> a. Failed to determine whether defendant Cooper had authority to direct that the water be turned on at the Property;
>
> b. Failed to determine the status or condition of the faucets and other plumbing before turning the water on;
>
> c. Failed to determine whether anyone was present in the house before turning the water on; and
>
> d. Failed to take precautions to ensure that no problems would arise when the water was turned on.

Plaintiffs filed suit in Superior Court, Wake County, against Apex, Pacesetters, Cooper, and North Carolina Farm Bureau Mutual Insurance Company, Inc. All four defendants filed motions to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The trial court denied the motions of Pacesetters and Cooper, but granted the motions of Apex and Farm

Bureau. Plaintiffs voluntarily dismissed their claims against Cooper and Pacesetters on 22 February 2008, then timely appealed the dismissal of their claim against Apex. Because Apex is the only defendant pertinent to this appeal, for clarity we will refer to it hereafter as "defendant."

In a divided opinion, the Court of Appeals reversed the dismissal, holding that the complaint's allegations sufficiently state a negligence claim on the grounds that defendant owed plaintiffs a duty of care when restoring water service to their property. —— N.C. App. at ——, 680 S.E.2d at 234. Because property damage is a reasonably foreseeable result of leaving water running in an unoccupied house, defendant violated that duty. *Id.* at ——, 680 S.E.2d at 230. The dissenting judge contended that no North Carolina case imposes upon a water supplier a duty of reasonable care to shut off the water supply in these circumstances, and because no such duty of care exists in North Carolina, plaintiffs' allegations failed. *Id.* at ——, 680 S.E.2d at 234-35 (Bryant, J., dissenting). Defendant appealed as of right on the basis of the dissent.

This Court treats factual allegations in a complaint as true when reviewing a dismissal under Rule 12(b)(6). *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006). A trial court considering a motion to dismiss on the basis of Rule 12(b)(6) should construe the complaint liberally and only grant the motion if it appears certain that plaintiffs could prove no set of facts which would entitle them to relief under some legal theory. *See, e.g.*, *McAllister v. Khie Sem Ha*, 347 N.C. 638, 641, 496 S.E.2d 577, 580 (1998); *Mullis v. Sechrest*, 347 N.C. 548, 555, 495 S.E.2d 721, 724 (1998); *Meyer v. Walls*, 347 N.C. 97, 111-12, 489 S.E.2d 880, 888 (1997). "A complaint may be dismissed pursuant to Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990).

Defendant argues that no law supports plaintiffs' negligence claim because defendant did not owe plaintiffs a duty of care. We have long held that a municipal corporation selling water for private consumption is acting in a proprietary capacity and can be held liable for negligence just like a privately owned water company. *Mosseller v. City of Asheville*, 267 N.C. 104, 107, 147 S.E.2d 558, 561 (1966). Specifically, such a provider is potentially liable for negligent acts of its agents or employees done in the scope of their agency or employ-

ment. *See Jones v. Gwynne*, 312 N.C. 393, 409, 323 S.E.2d 9, 18 (1984); *Munick v. City of Durham*, 181 N.C. 188, 195, 106 S.E. 665, 668 (1921). Accordingly, because a duty of care exists, the question before us is whether the allegations in plaintiffs' complaint are sufficient to establish the elements of negligence.

"To state a claim for common law negligence, a plaintiff must allege: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Stein*, 360 N.C. at 328, 626 S.E.2d at 267. "The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence." *Council v. Dickerson's, Inc.*, 233 N.C. 472, 474, 64 S.E.2d 551, 553 (1951). The duty of ordinary care is no more than a duty to act reasonably. The duty does not require perfect prescience, but instead extends only to causes of injury that were reasonably foreseeable and avoidable through the exercise of due care. *See Stein*, 360 N.C. at 328, 626 S.E.2d at 267; *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928) ("The risk reasonably to be perceived defines the duty to be obeyed . . . ."). Thus, "[i]t is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his conduct or that consequences of a generally injurious nature might have been expected. Usually the question of foreseeability is one for the jury." *Slaughter v. Slaughter*, 264 N.C. 732, 735, 142 S.E.2d 683, 686 (1965) (citations omitted).

Whether the harm was foreseeable depends on the particular facts. *Stein*, 360 N.C. at 328, 626 S.E.2d at 267-68. As the dissenting judge correctly noted, no North Carolina case has addressed the precise aquatic scenario now before us. In *Mosseller*, discussed in the Court of Appeals majority opinion below, the plaintiff brought suit against the defendant City of Asheville for injuries suffered when she slipped on ice. 267 N.C. at 105, 147 S.E.2d at 559. The ice had formed when water that leaked from the defendant's water main froze and thereafter had been covered with falling snow. *Id.* at 105-06, 147 S.E.2d at 560. The day before the plaintiff's accident, the superintendent of the defendant's Water Department had observed that the leak was causing a small flow down the gutter line of a street. *Id.* at 109-10, 147 S.E.2d at 562-63. There was no indication of bad weather at the time the superintendent observed the leak, and we found that so long as the water flow continued as observed by the superintendent, "it could not be reasonably foreseen that it would cause injury to a person using the street in the normal manner." *Id.* at 110, 147

S.E.2d at 563. Noting that the water did not "invade the property of another," *id.* at 108, 147 S.E.2d at 561, this Court held that the City of Asheville did not violate its duty of reasonable care by failing to call out its repair crew to fix the leak immediately and that the evidence of negligence was insufficient to be submitted to a jury, *id.* at 111, 147 S.E.2d at 563-64.

Although *Mosseller* involves municipality-supplied water, it is at heart a slip-and-fall case factually distinguishable from the case at bar. The leaking water in *Mosseller* was flowing innocuously along a curb when observed by the defendant's agent. The water subsequently froze and an unexpected snowfall covered the ice. We found that, while the city had a duty to exercise reasonable care over its streets and that a negligence action against a city or water authority was not foreclosed as a matter of law, under the facts presented in *Mosseller*, the connection between the leak seen one day and the hidden ice on which the plaintiff fell another day was too tenuous to support the plaintiff's negligence action. In contrast, the complaint indicates that here the water flowed into plaintiffs' house, the flow was not directly observed by defendant's agent to be apparently harmless, and the damage began almost immediately. While the analysis in *Mosseller* is sound, because of these and other distinctions, the result in *Mosseller* is not controlling in the case *sub judice*.

A trial court should not grant a motion to dismiss unless it is certain that the plaintiff could prove no set of facts that would entitle him or her to relief. *Meyer*, 347 N.C. at 111-12, 489 S.E.2d at 888. Defendant argues that plaintiffs failed adequately to allege that defendant owed a duty of care to plaintiffs. Because we have held that such a duty can exist, *see Mosseller*, 267 N.C. at 107, 147 S.E.2d at 561, our inquiry here boils down to a determination whether the complaint sufficiently sets out facts that, liberally construed under notice pleading, allege that damage to plaintiffs' property from flooding was reasonably foreseeable and preventable by defendant. We hold that this showing was made and accordingly, affirm the decision of the Court of Appeals majority.

We reach this determination based on the totality of facts alleged in this particular case, which includes the actions of defendant's agent or employee at the residence. We do not hold that, in the absence of suspicious circumstances, a water company has a duty to investigate the identity or motives of someone seeking to have water turned on at a property. Nor do we hold that, after receiving a re-

quest to turn on water service, such a water company must ascertain that someone is home or that there are no leaks, open faucets, or plugged drains before acting on the request. Accordingly, the allegations in Paragraph 36, parts (a), (b), and (c) of plaintiffs' complaint, quoted above, fail adequately to allege a duty owed by defendant to plaintiffs.

Nevertheless, any person engaged in an active course of conduct must exercise due care to prevent foreseeable harm. *See Stein*, 360 N.C. at 328, 626 S.E.2d at 267; *Dickerson's, Inc.*, 233 N.C. at 474, 64 S.E.2d at 553. The complaint alleges that defendant's agent or employee attempted to determine whether someone was at the residence before turning on the requested water service and that no one answered the knocks. The agent or employee, having reason to believe no one was home, then turned on the water and confirmed that the water meter was running, but did not wait at the residence the short time necessary to determine if the water flow would cease as any empty toilets and other such receptacles filled, and, if the flow did not cease, to cut off the water or otherwise prevent potential damage. By asserting that the agent left the residence under the circumstances alleged, thereby creating a reasonably foreseeable risk of flooding and resulting damage to the property, plaintiffs have sufficiently stated a claim that defendant owed them a duty of reasonable care. Since this issue was the basis for the dissent, we do not address the other elements of plaintiffs' negligence claim. N.C. R. App. P. 16(b).

We emphasize that our holding addresses the pleading stage only. We cannot predict whether a developed record will support plaintiffs' allegations of actionable negligence. Nevertheless, we hold that, under the liberal standards accorded to notice pleading, the complaint has adequately alleged that defendant owed plaintiffs a duty of care sufficient to withstand a motion to dismiss filed pursuant to Rule 12(b)(6). The decision of the Court of Appeals is affirmed. We remand this case to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this opinion.

AFFIRMED AND REMANDED.

STATE OF NORTH CAROLINA v. SAMUEL TRAVIS TANNER

No. 474PA08

(Filed 17 June 2010)

Possession of Stolen Property— felonious possession of stolen goods—acquittal of underlying breaking or entering and larceny charges

The Court of Appeals erred by concluding a defendant may not be convicted of felonious possession of stolen goods even though defendant was acquitted of the underlying breaking or entering and larceny charges because: (1) although our Court of Appeals cited *Perry*, 305 N.C. 225 (1982), to support its determination, that decision was made in the context of felonious larceny and not felonious possession of stolen goods; (2) while a defendant may be convicted of felonious larceny if he committed the larceny pursuant to a breaking or entering under N.C.G.S. § 14-72(b)(2), N.C.G.S. §§ 14-71.1, -72(c) does not require that a defendant be guilty of a breaking or entering in order to be convicted of felonious possession of stolen goods, but instead must establish simply that defendant knew or had reasonable grounds to believe the goods were stolen pursuant to a breaking or entering; and (3) the jury could have found beyond a reasonable doubt that defendant knew the goods had been stolen in violation of N.C.G.S. § 14-54 based upon defendant's own statements to a detective that the man who provided the stolen property to defendant had made a "score" from a barber shop.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 193 N.C. App. 150, 666 S.E.2d 845 (2008), vacating a judgment entered on 6 August 2007 by Judge W. Osmond Smith III in Superior Court, Wake County, and remanding for resentencing. Heard in the Supreme Court 22 March 2010.

Roy Cooper, *Attorney General*, *by Robert C. Montgomery*, *Special Deputy Attorney General*, *for the State-appellant.*

William D. Spence for defendant-appellee.

BRADY, Justice.

In this case we must determine whether a defendant who is acquitted of the underlying breaking or entering and larceny charges may be convicted of felonious possession of stolen goods on a theory

that the defendant knew or had reasonable grounds to believe that goods in his possession were stolen under circumstances that would make larceny of the goods a felony. We hold that a defendant may be convicted of felonious possession of stolen goods in such circumstances and therefore reverse the decision of the Court of Appeals.

FACTUAL AND PROCEDURAL BACKGROUND

On 27 August 2006, several businesses on South Person Street in Raleigh were broken into, including Hill's Barber Shop and Quality Hair Salon. Both businesses were ransacked and vandalized, and a variety of items were stolen, including razor blades, hair clippers, other items related to hair styling, a CD player, and a television. Based on descriptions of the goods, law enforcement located a set of the stolen hair clippers at a local pawnshop. From the pawnshop's records, law enforcement officers traced the item to Jeanette Brown, who told them she received the clippers from her roommates, Samuel Travis Tanner (defendant) and Antoinette Harrison. A detective and other uniformed officers later visited the residence of defendant, Brown, and Harrison. Upon arriving, the officers observed defendant exit the residence and throw a backpack into nearby bushes. Officers then stopped defendant and retrieved the backpack, and defendant consented to a search of its contents. The backpack contained various hair care products matching descriptions of the stolen items. Subsequently, law enforcement obtained a search warrant for defendant's residence and, upon execution of the warrant, discovered several of the stolen items in defendant's bedroom.

Defendant was arrested and knowingly and voluntarily waived his *Miranda* rights. Upon interrogation, defendant stated to Detective Sergeant R.A. McLeod of the Raleigh Police Department that he had received the items from an unidentified person who had a box of hair care items that he wanted to sell to defendant. Defendant thought the purchase was a "good deal," although he could not remember how much he paid for the items. Defendant stated that he did not know the items were "hot."

Defendant later told Detective McLeod that his first statement was not true and that he wanted to "come clean." Defendant then stated that one or two weeks earlier he saw a tall, slender, black male "sitting on the wall" drinking beer. The man told defendant that he had made a "score" from a barber shop and needed help carrying some bags from "his shop." Defendant stood at the door of the shop while the man hauled the stuff out. Defendant stated that he never

went into the shop, but just stood at the doorway and helped the man carry the goods away.

The Wake County Grand Jury returned true bills of indictment against defendant for (1) felonious breaking or entering, (2) felonious larceny, (3) felonious possession of stolen goods, and (4) attaining the status of habitual felon. At trial defendant's testimony differed from statements he had given to law enforcement. Although defendant corroborated some of the testimony of Detective McLeod regarding defendant's interrogation, defendant denied that other parts of the detective's testimony were true. Defendant testified that he purchased some of the goods from a man named "Slim" and that "Slim" gave him the backpack full of hair care products as a sort of refund for a prior drug transaction in which defendant had received counterfeit crack cocaine.

The jury returned verdicts finding defendant guilty of felonious possession of stolen goods but not guilty of felonious breaking or entering and felonious larceny. Defendant pleaded guilty to having attained habitual felon status. Defendant was sentenced in the presumptive range to 121-155 months imprisonment.

Defendant appealed his convictions to the Court of Appeals arguing, *inter alia*, that the trial court erred by accepting the jury's guilty verdict as to the felonious possession of stolen goods charge. The Court of Appeals unanimously held that because the jury acquitted defendant of the felonious breaking or entering charge, the trial court erred in accepting the jury's guilty verdict for felonious possession of stolen goods. *State v. Tanner*, 193 N.C. App. at 157, 666 S.E.2d at 850-51. The Court of Appeals thus vacated the judgment entered on defendant's stolen goods conviction and remanded the case to the trial court for entry of judgment and resentencing on the charge of misdemeanor possession of stolen goods. *Id.* at 157-58, 666 S.E.2d at 851. The Court of Appeals, because of its ruling on the felonious possession of stolen goods conviction, also vacated defendant's habitual felon judgment. *Id.* at 158, 666 S.E.2d at 851. This Court allowed the State's petition for discretionary review on 5 November 2009, and we now reverse the decision of the Court of Appeals.

ANALYSIS

In *State v. Perry*, 305 N.C. 225, 230, 287 S.E.2d 810, 813 (1982), this Court held that a defendant may not be convicted of felonious larceny if he was acquitted of the breaking or entering upon which the charge of felonious larceny was based. Indeed, it would be error,

> absent the jury's finding that the property stolen exceeded the diacritical amount set forth in the statute, for the trial judge to accept a verdict of guilty of felonious larceny where the jury has failed to find the defendant guilty of the felonious breaking or entering pursuant to which the larceny occurred.

Id. at 229, 287 S.E.2d at 813. A defendant is guilty of felonious larceny if the defendant committed the larceny "pursuant to a violation of [Section] 14-54," the breaking or entering statute. N.C.G.S. § 14-72(b)(2) (2009). Thus, in *Perry* this Court could not logically reconcile a verdict of not guilty of breaking or entering and a verdict of guilty of felonious larceny based upon the very breaking or entering of which the defendant had been acquitted. *Perry*, 305 N.C. at 230, 287 S.E.2d at 813.

In the case *sub judice* the Court of Appeals relied upon its decision in *State v. Marsh*, 187 N.C. App. 235, 240-42, 652 S.E.2d 744, 747-48 (2007), which rested upon the Court of Appeals decision in *State v. Goblet*, 173 N.C. App. 112, 121, 618 S.E.2d 257, 264 (2005). *Tanner*, 193 N.C. App. at 157, 666 S.E.2d at 850-51. In each of these cases, the Court of Appeals cited this Court's *Perry* decision as support for the proposition that a defendant cannot be convicted of felonious possession of stolen goods on a theory that the defendant knew or had reasonable grounds to believe them stolen pursuant to a breaking or entering when the defendant was acquitted of that same breaking or entering. However, this Court in *Perry* decided that issue in the context of felonious larceny, not felonious possession of stolen goods. The differences between the elements of felonious larceny and felonious possession of stolen goods require a different resolution in this case.

While a defendant may be convicted of felonious larceny if he committed the larceny pursuant to a breaking or entering, N.C.G.S. § 14-72(b)(2), the statute does not require that a defendant be guilty of a breaking or entering in order to be convicted of felonious possession of stolen goods, *id.* §§ 14-71.1, -72(c) (2009). The elements of possession of stolen goods are: "(1) possession of personal property; (2) which has been stolen; (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen; and (4) the possessor acting with a dishonest purpose." *Perry*, 305 N.C. at 233, 287 S.E.2d at 815 (citing, *inter alia*, N.C.G.S. § 14-71.1 (1982)). "The crime of possessing stolen goods knowing or having reasonable grounds to believe them to be stolen in the circumstances described in [N.C.G.S. § 14-72(b)] is a felony . . . ." N.C.G.S. § 14-72(c) (2009).

Thus, if a defendant is guilty of possession of stolen goods and also knows or has "reasonable grounds to believe" that the goods were stolen pursuant to a breaking or entering, the defendant is guilty of felonious possession of stolen goods.

While a conviction of felonious larceny under such a theory would require that the defendant guilty of the larceny also be the perpetrator of (or have aided and abetted) a breaking or entering, this is not the case for felonious possession of stolen goods. For the defendant to be guilty of felonious possession of stolen goods, the State need not prove that the defendant perpetrated the breaking or entering, but must establish simply that defendant knew or had reasonable grounds to believe the goods were stolen pursuant to a breaking or entering. A finding by the jury that a defendant did not take part in a breaking or entering but did possess stolen goods with the knowledge or reasonable grounds to believe that the goods were stolen pursuant to a breaking or entering by another is not fatally contradictory, but rather can be logically explained by the facts as recited above. As such, we overrule the decisions of the Court of Appeals in *Marsh*, *Goblet*, and other cases based upon those holdings insofar as they are inconsistent with this opinion. Here the jury could have found beyond a reasonable doubt that defendant knew the goods had been stolen in violation of N.C.G.S. § 14-54 based upon defendant's own statements to Detective McLeod that the man who provided the stolen property to defendant had made a "score" from a barber shop. Thus, because the verdicts rendered by the jury were not fatally contradictory, and the evidence was sufficient to support the jury's verdict of guilty of felonious possession of stolen goods, it was not error for the trial court to accept the jury's verdict. The Court of Appeals erred in holding otherwise.

CONCLUSION

A defendant does not have to be found guilty of committing an underlying breaking or entering in order to be convicted of felonious possession of stolen goods based upon knowledge or reasonable grounds to believe the goods were stolen during a breaking or entering. Accordingly, we reverse the decision of the Court of Appeals as to the matters before this Court for review and reinstate the trial court's judgment.

REVERSED.

DOUGLAS J. MARTINI v. COMPANION PROPERTY & CASUALTY INSURANCE COMPANY

No. 323A09

(Filed 17 June 2010)

Insurance–automobile— underinsured motorist coverage— substitute vehicle—issue of material fact

The decision of the Court of Appeals that the trial court properly granted summary judgment for plaintiff holding that plaintiff's insurance policy for a Toyota provided underinsured motorist (UIM) coverage for the Mitsubishi plaintiff was operating at the time of an accident because the Mitsubishi was a "temporary substitute" for the Toyota is reversed for the reasons stated in the dissenting Court of Appeals opinion. Sharply conflicting evidence presented by the parties at the summary judgment hearing presented a genuine issue of material fact as to whether the Toyota was "out of service" on the date of the accident and thus whether the Mitsubishi was a substitute vehicle within the meaning of the policy.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 679 S.E.2d 156 (2009), affirming in part and reversing and remanding in part an order of summary judgment entered on 12 May 2008 by Judge Leon J. Stanback, Jr. in Superior Court, Wake County. Heard in the Supreme Court 10 May 2010.

Brown, Crump, Vanore & Tierney, L.L.P., by R. Scott Brown and W. John Cathcart, Jr., for plaintiff-appellee.

Womble, Carlyle, Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr. and Michael T. Henry, for defendant-appellant.

PER CURIAM.

For the reasons stated in the dissenting opinion in the Court of Appeals, we reverse the decision of that court as to the appealable issue of right and hold that summary judgment was improperly entered on the issue of whether the insurance coverage provided in defendant's policy applied to plaintiff's vehicle at the time of the accident. The remaining issues addressed by the Court of Appeals are not properly before this Court, and the decision as to those issues

remains undisturbed. This case is remanded to the Court of Appeals for further remand to the Superior Court, Wake County for further proceedings not inconsistent with this opinion.

REVERSED IN PART AND REMANDED.

BROCK AND SCOTT HOLDINGS, INC. v. KIM D. WEST

No. 352PA09

(Filed 17 June 2010)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 198 N.C. App. ——, 679 S.E.2d 507 (2009), dismissing plaintiff's appeal from a judgment and order entered on 3 June 2008 by Judge James H. Faison, III in District Court, Pender County. Heard in the Supreme Court 11 May 2010.

Richard P. Cook, and Brock & Scott, PLLC, by Richard L. Jackson, for plaintiff-appellant.

No brief for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

IN RE J.A.G.

[364 N.C. 236 (2010)]

IN THE MATTER OF:	)	
	)	ORDER
J.A.G.	)	

No. 69P10

The Court allows the State's petition for discretionary review for the limited purpose of remanding to the Court of Appeals for reconsideration in light of our decision in *In re D.S.*, No. 273PA09 (June 17, 2010).

By Order of the Court in Conference, this 16th day of June, 2010.

For the Court
Hudson, J.

STATE v. SMITH

[364 N.C. 237 (2010)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
DAMIEN SMITH	)	

No. 58P10

The Court allows the State's petition for discretionary review for the limited purpose of remanding to the Court of Appeals for reconsideration in light of our decision in *In re D.S.*, No. 273PA09 (June 17, 2010).

By Order of the Court in Conference, this 16th day of June, 2010.

For the Court
Hudson, J.

WILLIAM L. UNDERWOOD	)	
	)	
v.	)	ORDER
	)	
TERESA W. UNDERWOOD	)	

* * * * * * * * * * * * * * * *

No. 447P09

We treat this petition as a Petition for Writ of Certiorari, and allow for the limited purpose of remanding to the Court of Appeals for reconsideration in light of *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983).

By order of this Court in Conference, this 16th day of June, 2010.

For the Court
Hudson, J.

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

Berardi v. Craven Cty. School Dist. Case below: 202 N.C. App. —— (2 February 2010)	No. 213P09-2	Defs' PDR Under N.C.G.S. § 7A-31 COA09-702)	Denied 06/16/10
Boryla-Lett v. Psychiatric Solutions of N.C., Inc. Case below: 200 N.C. App. —— (3 November 2009)	No. 002P10	Plts' PDR Under N.C.G.S. § 7A-31 (COA08-1357)	Denied 06/16/10
Brown Bros. Harriman Trust Co. N.A. v. Benson Case below: 202 N.C. App. —— (2 February 2010)	No. 186P09-2	1. Defs' (John H. Benson and Linley C. Benson) NOA Based Upon a Constitutional Question (COA09-474) 2. Defs' PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 06/16/10 2. Denied 06/16/10
Dixon v. Sears Roebuck & Co. Case below: 203 N.C. App. —— (4 May 2010)	No. 241P10	1. Defs' Motion for Temporary Stay (COA09-716) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Denied 06/16/10 2. Denied 06/16/10 3. Denied 06/16/10
Edwards v. GE Lighting Sys., Inc. Case below: 200 N.C. App. —— (3 November 2009)	No. 500P09	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA09-247) 2. Def's (GE) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 06/16/10 2. Dismissed as Moot 06/16/10
Gray v. Bryant Case below: 203 N.C. App. —— (6 April 2010)	No. 183P10	1. Plt's NOA (COA09-749) 2. Plt's PDR	1. Dismissed *Ex Mero Motu* 06/16/10 2. Denied 06/16/10
Harbour Point Homeowners' Ass'n v. DJF Enters., Inc. Case below: 201 N.C. App. —— (5 January 2010)	No. 061P10	1. Def's (Georgia-Pacific Corp) PDR Under N.C.G.S. § 7A-31 (COA09-527) 2. Plts' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 06/16/10 2. Dismissed as Moot 06/16/10

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

Hodges v. Hodges Case below: 363 N.C. 802 200 N.C. App. —— (3 November 2009)	No. 501A09	1. Def's Motion to Vacate Order Dismissing NOA (COA09-128) 2. Def's Motion for Reconsideration Pursuant to Rule 37(b) 3. Def's Motion for New Trial Pursuant to Appellate Rule 2 4. Def's Motion for Temporary Stay 5. Def's Petition for Writ of Supersedeas	1. Dismissed 05/11/10 2. Dismissed 05/11/10 3. Dismissed 05/11/10 4. Denied 05/11/10 5. Denied 05/11/10
In re A.M Case below: 202 N.C. App. —— (16 February 2010)	No. 128P10	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA09-1169)	Denied 06/16/10
In re Appeal of Small (State v. Halley) Case below: 201 N.C. App. —— (8 December 2009)	No. 049P10	1. Respondent's (Benjamin Small) NOA Based Upon a Constitutional Question (COA09-485) 2. Respondent's (Benjamin Small) PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 06/16/10 3. Allowed 06/16/10
In re C.S., D.J., M.W., A.W., & M.J. Case below: 203 N.C. App.—— (4 May 2010)	No. 212P10	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA09-1560) 2. Respondent's (Father) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 06/16/10 2. Dismissed as Moot 06/16/10
In re H.R.S. Case below: 202 N.C. App. —— (2 February 2010)	No. 093P10	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA09-1201)	Denied 06/16/10
In re J.A.G. Case below: 202 N.C. App. —— (2 February 2010)	No. 069P10	1. State's Motion for Temporary Stay (COA09-462) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 02/22/10 363 N.C. 854 Stay Dissolved 06/16/10 2. Denied 06/16/10 3. See Special Order Page 236

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

In re M.L.T.H. Case below: 200 N.C. App. —— (3 November 2009)	No. 497P09	1. Appellant's (State of NC) Motion for Temporary Stay (COA08-1569) 2. Appellant's (State of NC) Petition for Writ of Supersedeas 3. Appellant's (State of NC) PDR Under N.C.G.S. § 7A-31	1. Allowed 12/08/09 363 N.C. 744 2. Allowed 06/16/10 3. Allowed 06/16/10
In re M.M. Case below: 200 N.C. App. —— (6 October 2009)	No. 460P09	Respondent's (Father) PDR Under N.C.G.S. § 7A-31 (COA09-610)	Denied 06/16/10
In re M.W. & J.W. Case below: 201 N.C. App. —— (22 December 2009)	No. 043P10	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA09-1009)	Denied 06/16/10
In re M.X. Case below: 200 N.C. App. —— (3 November 2009)	No. 527P09-3	1. Respondent Mother's PWC to Review Decision of COA (COA09-514) 2. Respondent Mother's Motion to Suspend the Rules of Appellate Procedure 3. Respondent Mother's Motion to Recuse Justice Robin E. Hudson	1. Dismissed 06/16/10 2. Denied 06/16/10 3. Dismissed 06/16/10
In re Webber Case below: 201 N.C. App. —— (8 December 2009)	No. 101P10	Respondent's PWC to Review Decision of COA (COA08-1488)	Denied 06/16/10
Land v. Land Case below: 201 N.C. App. —— (5 January 2010)	No. 062P10	Defs' PDR Under N.C.G.S. § 7A-31 (COA09-464)	Denied 06/16/10
McCracken and Amick, Inc. v. Perdue Case below: 201 N.C. App. —— (22 December 2009)	No. 037P10	Plts' PDR Under N.C.G.S. § 7A-31 (COA09-431)	Denied 06/16/10
McKyer v. McKyer Case below: 202 N.C. App. —— (2 March 2010)	No. 142P10	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-695)	Denied 06/16/10

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

Moss Creek Homeowners Ass'n. v. Bissette Case below: 202 N.C. App. —— (2 February 2010)	No. 107P10	1. Defs' and Third-Party Plts' (Ted and Mary Bissette) PDR Under N.C.G.S. § 7A-31 (COA08-1156-2) 2. Plts' and Third-Party Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 06/16/10 2. Dismissed as Moot 06/16/10
Puckett v. N.C. Dep't of Corr. Case below: 202 N.C. App. —— (16 February 2010)	No. 126P10	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-782)	Denied 06/16/10
Reese v. Mecklenburg Cty. Case below: 200 N.C. App. —— (3 November 2009)	No. 505P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-1417)	Denied 06/16/10
State v. Arrington Case below: 202 N.C. App. —— (2 March 2010)	No. 132P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-660)	Denied 06/16/10
State v. Arrington Case below: 198 N.C. App. —— (21 July 2009)	No. 138P10	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1355)	Denied 06/16/10
State v. Berrio Case below: 202 N.C. App. —— (19 January 2010)	No. 087P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-608)	Denied 06/16/10
State v. Blakeman Case below: 202 N.C. App. —— (2 February 2010)	No. 102P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-699)	Denied 06/16/10
State v. Breathette Case below: 202 N.C. App. —— (2 March 2010)	No. 154P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1007)	Denied 06/16/10
State v. Brennan Case below: 203 N.C. App. —— (4 May 2010)	No. 211P10	State's Motion for Temporary Stay (COA09-1362)	Allowed 05/21/10

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

State v. Brewington Case below: 204 N.C. App.— (18 May 2010)	No. 235P10	State's Motion for Temporary Stay (COA09-956)	Allowed 06/04/10
State v. Brown Case below: 202 N.C. App.— (16 February 2010)	No. 072P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-841)	Denied 06/16/10
State v. Bryant Case below: 201 N.C. App. — (5 January 2010)	No. 060P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-657)	Denied 06/16/10
State v. Carter Case below: 198 N.C. App. — (21 July 2009)	No. 180P10	Def's PWC to Review Decision of COA (COA08-960)	Denied 06/16/10
State v. Chambers Case below: 203 N.C. App. — (6 April 2010)	No. 194P10	1. Def's NOA Based Upon a Constitutional Question (COA09-733) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 06/16/10 2. Denied 06/16/10
State v. Conley Case below: 202 N.C. App. — (19 January 2010)	No. 136P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-456)	Denied 06/16/10
State v. Cooper Case below: 184 N.C. App. 378	No. 371P07-2	1. Def's PDR Under N.C.G.S. § 7A-31 (COA06-1076) 2. Def's Motion to Amend PDR Under N.C.G.S. § 7A-31(C); and N.C. R. App. P. Rule 9(B)(5)	1. Dismissed 06/16/10 2. Allowed 06/16/10
State v. Fraley Case below: 202 N.C. App. — (16 February 2010)	No. 121P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-785)	Denied 06/16/10
State v. Gainey Case below: 202 N.C. App. — (19 January 2010)	No. 080P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-686)	Denied 06/16/10
State v. Gatling Case below: 202 N.C. App. — (19 January 2010)	No. 076P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-735)	Denied 06/16/10

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

State v. Greene Case below: 202 N.C. App. —— (2 March 2010)	No. 144P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-829)	Denied 06/16/10
State v. Hawkins Case below: 202 N.C. App. —— (16 February 2010)	No. 124P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-821)	Denied 06/16/10
State v. Hensley Case below: 201 N.C. App. —— (5 January 2010)	No. 034P10	State's PDR Under N.C.G.S. § 7A-31 (COA08-1485)	Denied 06/16/10
State v. Hernandez Case below: 202 N.C. App. —— (2 March 2010)	No. 137P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-722)	Denied 06/16/10
State v. Hinson Case below: 203 N.C. App. —— (6 April 2010)	No. 176A10	1. State's Motion for Temporary Stay (COA09-748) 2. State's Petition for Writ of Supersedeas 3. State's NOA (Dissent)	1. Allowed 04/23/10 2. Allowed 04/23/10 3. ——
State v. Holmes Case below: 195 N.C. App. 598	No. 054P10	Def's PDR Under N.C.G.S. § 7A-31 (COA08-646)	Denied 06/16/10
State v. Hosch Case below: 202 N.C. App. —— (2 March 2010)	No. 146P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-866)	Denied 06/16/10
State v. Hurst Case below: Randolph County Superior Court	No. 363A04-2	Def's PWC to Review Order of Randolph County Superior Court	Denied 06/16/10
State v. James Case below: 202 N.C. App. —— (2 February 2010)	No. 208P10	Def's PWC to Review Decision of the COA (COA09-730)	Denied 06/16/10

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

State v. Jenkins Case below: 202 N.C. App. —— (2 February 2010)	No. 068P10	1. State's Motion for Temporary Stay (COA09-546) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 02/19/10 363 N.C. 857 Stay Dissolved 06/16/10 2. Denied 06/16/10 3. Denied 06/16/10
State v. Jones Case below: 202 N.C. App. —— (19 January 2010)	No. 052P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-673)	Denied 06/16/10
State v. King Case below: 202 N.C. App. —— (16 February 2010)	No. 118P10	Def's PWC to Review Decision of COA (COA09-524)	Denied 06/16/10
State v. Lee Case below: 202 N.C. App. —— (2 March 2010)	No. 158P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-834)	Denied 06/16/10
State v. Meadows Case below: 201 N.C. App. —— (5 January 2010)	No. 029P10	1. State's Motion for Temporary Stay (COA08-1576) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 01/19/10 363 N.C. 809 Stay Dissolved 06/16/10 2. Denied 06/16/10 3. Denied 06/16/10
State v. Miller Case below: 203 N.C. App. —— (4 May 2010)	No. 220P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1123)	Denied 06/16/10
State v. Mumford Case below: 201 N.C. App. —— (5 January 2010)	No. 032PA10	1. State's Motion for Temporary Stay (COA09-300) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 01/22/10 2. Allowed 06/16/10 3. Allowed 06/16/10

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

State v. Noel Case below: 202 N.C. App. —— (2 March 2010)	No. 151P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-784)	Denied 06/16/10
State v. Rahaman Case below: 202 N.C. App. —— (19 January 2010)	No. 067P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-586)	Denied 06/16/10
State v. Richardson Case below: 202 N.C. App. —— (16 February 2010)	No. 108P10	1. State's PDR Under N.C.G.S. § 7A-31 (CO09-621) 2. Def's Motion to Dismiss PDR	1. Denied 06/16/10 2. Dismissed as Moot 06/16/10
State v. Riley Case below: 202 N.C. App. —— (2 February 2010)	No. 147P10	1. Def's Motion for Temporary Stay (COA09-643) 2. Def's Petition for Writ of Supersedeas 3. Def's PWC to Review the Decision of the COA	1. Allowed 04/08/10 364 N.C. 131 Stay Dissolved 06/16/10 2. Denied 06/16/10 3. Denied 06/16/10
State v. Roughton Case below: 201 N.C. App. —— (22 December 2009)	No. 009P10	State's Motion for Temporary Stay (COA09-536)	Allowed 01/12/10
State v. Salvetti Case below: 202 N.C. App. —— (19 January 2010)	No. 066P10	1. Def's NOA Based Upon a Constitutional Question (COA09-504) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 06/16/10 2. Denied 06/16/10
State v. Smith Case below: 202 N.C. App. —— (19 January 2010)	No. 058P10	1. State's Motion for Temporary Stay (COA09-467) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 02/05/10 363 N.C. 858 Stay Dissolved 06/16/10 2. Denied 06/16/10 3. See Special Order Page 237
State v. Stitt Case below: 201 N.C. App. —— (8 December 2009)	No. 007P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-90)	Denied 06/16/10

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

State v. Sullivan Case below: 201 N.C. App. —— (22 December 2009)	No. 048P10	Def's Petition for Appeal of Right Under N.C.G.S. § 7A-31(C) (COA09-705)	Denied 06/16/10
State v. Turner Case below: 201 N.C. App. —— (5 January 2010)	No. 044A10	1. Def's NOA Based Upon a Constitutional Question (COA09-933) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed 06/16/10
State v. Walls Case below: 201 N.C. App. —— (8 December 2009)	No. 005P10	1. Def's NOA Based Upon a Constitutional Question (COA09-176) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 06/16/10 2. Denied 06/16/10
State v. Williams Case below: 201 N.C. App. —— (5 January 2010)	No. 033P10	1. State's Motion for Temporary Stay (COA08-1334) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 01/22/10 Stay Dissolved 06/16/10 2. Denied 06/16/10 3. Denied
State ex rel. Ross v. Overcash Case below: 202 N.C. App. —— (16 February 2010)	No. 122P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-318)	Denied 06/16/10
Steinkrause v. Tatum Case below: 363 N.C. 859 201 N.C. App. —— (8 December 2009)	No. 018A10	Petitioner's Motion to Reconsider Decision Denying Petition for Writ of Supersedeas (COA08-1080)	Allowed 06/16/10
Underwood v. Underwood Case below: —— N.C. App. —— (15 September 2009)	No. 447P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-1131)	See Special Order Page 238
Wilson v. Wilson Case below: 202 N.C. App. —— (16 March 2010)	No. 167A10	1. Defs' NOA (Dissent) (COA09-325) 2. Defs' PDR as to Additional Issues	1. —— 2. Denied 06/16/10

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

PETITION TO REHEAR

Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, LLC Case below: 364 N.C. 1	No. 272P08-3	Def's (International Garment Technologies, LLC) Petition for Rehearing (COA07-1002)	Denied 06/16/10

JONES v. KELLER

[364 N.C. 249 (2010)]

ALFORD JONES, PETITIONER v. ALVIN KELLER, SECRETARY OF THE DEPARTMENT OF CORRECTION, AND SUSAN R. WHITE, ADMINISTRATOR OF NEW HANOVER CORRECTIONAL CENTER, RESPONDENTS

No. 518PA09

(Filed 27 August 2010)

1. Prisons and Prisoners— sentence reduction credits— authority of Department of Correction

In a decision with a three-justice majority opinion and two justices concurring, it was held that the Department of Correction (DOC) acted within its statutory authority in limiting the application of good time, gain time, and merit time credits to the life sentence of an inmate convicted of first-degree murder between 8 April 1974 and 30 June 1978. Implicit in DOC's power to allow time for good behavior is the authority to determine the purposes for which that time is allowed; its application of its own regulations to accomplish the goal of releasing only those who are prepared and who can safely return to society is strictly administrative and outside the purview of the courts. An award of time by DOC need not be an all or nothing award for unlimited uses.

2. Constitutional Law— due process—calculation of inmate's sentence reduction credits

In a decision with a three-justice majority opinion and two justices concurring, there was no violation of the due process rights of an inmate (Jones) sentenced to life imprisonment for first-degree murder between 1974 and 1978 where the Department of Correction (DOC) withheld application of good time, gain time, and merit time from the calculation of the date for an unconditional release. When a liberty interest is created by a State, it follows that the State can control the contours of that interest within reasonable and constitutional limits. DOC's determination that Jones's immediate unconditional release would endanger public safety is a compelling State interest outweighing any limited due process liberty interest Jones may have.

3. Constitutional Law— ex post facto—calculation of inmate's sentence reduction credits—no violation

In a decision with a three-justice majority opinion and two justices concurring, the trial court correctly found that an inmate (Jones) had not suffered an *ex post facto* violation in the

Department of Correction's (DOC's) refusal to grant sentence reduction credits where Jones did not allege that any legislation or regulation altered the award of sentence reduction credits, nor did DOC change its interpretation of its applicable regulations.

4. Constitutional Law— equal protection—inmate's sentence reduction credits

In a decision with a three-justice majority opinion and two justices concurring, there was no equal protection violation in the Department of Correction's (DOC's) refusal to apply sentence reduction credits to a life sentence imposed for a first-degree murder between 1974 and 1978. The fact that the inmate (Jones) is serving a sentence for first-degree murder reasonably suggests that he presents a greater threat to society than prisoners convicted of other offenses, and DOC had a rational basis for denying good time, gain time, and merit time for the purposes of unconditional release, even though these same credits have been awarded for that purpose to other prisoners with determinate sentences.

Justice NEWBY concurring in the result.

Justice BRADY joins in this concurring opinion.

Justice TIMMONS-GOODSON dissenting.

Justice HUDSON joins in this dissenting opinion.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an opinion and order entered 14 December 2009 by Judge Ripley E. Rand in Superior Court, Wayne County, allowing petitioner's application for writ of habeas corpus and ordering his unconditional release from prison. Heard in the Supreme Court 16 February 2010.

Staples S. Hughes, Appellate Defender, and Katherine Jane Allen, Benjamin Dowling-Sendor, Daniel R. Pollitt, and Daniel K. Shatz, Assistant Appellate Defenders, for petitioner-appellee.

Roy Cooper, Attorney General, by Tiare B. Smiley and Robert C. Montgomery, Special Deputy Attorneys General, for respondent-appellants State of North Carolina and North Carolina Department of Correction.

Elliot Pishko Morgan, P.A., by David Pishko, and Abrams & Abrams, P.A., by Margaret Abrams, for North Carolina Advocates for Justice, amicus curiae.

EDMUNDS, Justice.

In this case we determine whether petitioner Alford Jones is entitled to habeas corpus relief from incarceration on the grounds that he has accumulated various credits against his sentence. Because we conclude that he is lawfully incarcerated, we reverse the decision of the superior court.

The record indicates that Jones was charged with the 6 January 1975 murder of William B. Turner, Sr. Jones was convicted on 19 March 1975 in Superior Court, Lenoir County, and sentenced to death. In an opinion dated 17 June 1976, this Court found no error in Jones's conviction and sentence. *State v. Jones*, 290 N.C. 292, 225 S.E.2d 549 (1976). On 1 September 1976, this Court entered an order vacating Jones's sentence of death, pursuant to the opinion of the Supreme Court of the United States in *Woodson v. North Carolina*, 428 U.S. 280, 49 L. Ed. 2d 944 (1976). Upon remand to the superior court, Jones was sentenced to a term of life imprisonment on 27 September 1976. As of 30 November 2009, Jones had accrued good time totaling 14,041 days, gain time totaling 2,146 days, and merit time totaling 1,745 days.

On 18 November 2009, Jones filed a petition for writ of habeas corpus in Superior Court, Wayne County. Jones's contention is that, when his good time, gain time, and merit time are credited to his life sentence, which is statutorily defined as a sentence of eighty years, he is entitled to unconditional release. After careful consideration, and relying on the opinion of the Court of Appeals in *State v. Bowden*, 193 N.C. App. 597, 668 S.E.2d 107 (2008), *disc. rev. improvidently allowed*, 363 N.C. 621, 683 S.E.2d 208 (2009), the superior court concluded that Jones was entitled to be awarded good time, gain time, and merit time by the Department of Correction (DOC) for all purposes, including calculation of Jones's date of unconditional release; that Jones had served the entirety of the sentence imposed in his case; and that Jones was entitled to relief. Accordingly, the trial court allowed Jones's petition for habeas corpus and ordered that Jones be released. This Court allowed DOC's motion for temporary stay and granted its petition for writ of certiorari.[1]

"Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the restraint, if

1. For convenience, we will refer to respondents collectively as "DOC" rather than name the individual officers against whom the action was brought.

unlawful . . . ." N.C. Const. art. I, § 21 (codified at N.C.G.S. § 17-1 (2009)). Before this court, Jones again contends that he is unlawfully imprisoned because the life sentence imposed on him for first-degree murder committed in 1975 was defined as a term of eighty years and he has earned sufficient credits to have completed the sentence. Accordingly, Jones argues that he is entitled to immediate unconditional release. However, the record discloses that DOC allowed credits to Jones's sentence only for limited purposes that did not include calculating an unconditional release date. We conclude that the limitations imposed by DOC on those credits are statutorily and constitutionally permissible. Therefore, his detention is lawful.

[1] Jones is one of a group of prisoners, each of whom committed first-degree murder between 8 April 1974 and 30 June 1978 and were sentenced to life imprisonment, and it is this limited group that we consider in this opinion. At the time of petitioner's offense, the controlling statute provided that "[a] sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison." N.C.G.S. § 14-2 (Cum. Supp. 1974). Although DOC interpreted a life sentence imposed under that statute to be an indeterminate sentence that would expire only upon an inmate's death, this statute unambiguously defined Jones's sentence as a determinate term of imprisonment for eighty years. *See Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) ("When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required.").

However, while section 14-2 sets the term of imprisonment, that statute is silent as to the administration of the sentence. Instead, the General Assembly delegated that responsibility to DOC. N.C.G.S. § 148-11 (Cum. Supp. 1974) ("The Secretary [of Correction] shall propose rules and regulations for the government of the State prison system, which shall become effective when approved by the Department of Correction."). The statutes further provide that "[t]he Secretary of Correction shall have control and custody of all prisoners serving sentence in the State prison system, and such prisoners shall be subject to all the rules and regulations legally adopted for the government thereof." *Id.* § 148-4 (Cum. Supp. 1974). Specifically, "[t]he rules and regulations for the government of the State prison system may contain provisions relating to grades of prisoners, rewards and privileges applicable to the several classifications of prisoners as an inducement to good conduct, allowances of time for good behavior,

the amount of cash, clothing, etc., to be awarded prisoners after their discharge or parole." *Id.* § 148-13 (1974).

Therefore, we must next consider the legality of the pertinent DOC regulations as they apply to petitioner. DOC is an arm of the executive branch of government. *Id.* § 143B-262(a) (2009). Under the doctrine of separation of powers, this Court has long held that when an agency of another branch of government is authorized to exercise regulatory power over the administration of prison sentences, we will defer to that authority to the extent the delegation is constitutional. *See Jernigan v. State*, 279 N.C. 556, 563, 184 S.E.2d 259, 265 (1971) ("This State is firmly committed to the doctrine that '[t]he legislative, executive, and supreme judicial powers of the State Government shall be forever separate and distinct from each other.' " (quoting N.C. Const. art. I, § 6 (1970) (alteration in original))).

> "The functions of the court in regard to the punishment of crimes are to determine the guilt or innocence of the accused, and, if that determination be one of guilt, then to pronounce the punishment or penalty prescribed by law. The execution of the sentence belongs to a different department of the government. The manner of executing the sentence and the mitigation of punishment are determined by the legislative department, and what the Legislature has determined in that regard must be put in force and effect by administrative officers."

Id. at 563-64, 184 S.E.2d at 265 (quoting *People v. Joyce*, 246 Ill. 124, 135, 92 N.E. 607, 612 (1910)); *see also Bacon v. Lee*, 353 N.C. 696, 716, 549 S.E.2d 840, 853-54, *cert. denied*, 533 U.S. 975, 150 L. Ed. 2d 804 (2001). "The punishment imposed in a particular case, if within statutory limits, is within the sound discretion of the presiding judge. The prison rules and regulations respecting rewards and privileges for good conduct ('good time') are strictly administrative and not judicial." *State v. Garris*, 265 N.C. 711, 712, 144 S.E.2d 901, 902 (1965) (per curiam) (citing N.C.G.S. § 148-13); *see also Goble v. Bounds*, 281 N.C. 307, 312, 188 S.E.2d 347, 350 (1972) (holding that a prisoner's complaint was appropriately dismissed by the superior court because questions whether the prisoner was entitled to parole, work release, or honor grade status "involve[] policy decisions which should be decided by the Department of Correction and the Board of Paroles," not the courts). Accordingly, as a general rule, the judiciary will not review the DOC's grant, forfeiture, or application of credits against a prisoner's sentence.

Nevertheless, DOC does not have carte blanche. "Of course, the responsibility for determining the limits of statutory grants of authority to an administrative agency is a judicial function for the courts to perform." *In re Appeal of Broad & Gales Creek Cmty. Ass'n*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980). Further, "[w]hen a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits." *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 253 (1997).

The regulations promulgated by DOC have changed several times since Jones's incarceration. Essentially, DOC's regulations provide for good time, gain time, and merit time to be credited against an inmate's sentence. *See*, *e.g.*, Div. of Prisons, N.C. Dep't of Corr., Policy and Procedure, ch. B, §§ .0109-.0116 (Oct. 5, 2007) (hereinafter DOC Manual); 5 NCAC 2B .0101-.0103 (Feb. 1976, Mar. 1980, Sept. 1983). Gain time and merit time are awarded to prisoners who perform work or otherwise take some action to qualify, while good time is automatically awarded to every prisoner. *See*, *e.g.*, 5 NCAC 2B .0102-.0104. (Sept. 1983). Pursuant to the regulations, good time is subject to forfeiture, but only for reasons specified therein, such as major infractions, while gain time and merit time are not subject to forfeiture for misconduct. *See*, *e.g.*, *id.* However, the distinctions between good time, gain time, and merit time, while of obvious importance to DOC and to inmates, are not material for our analysis as long as these credits are administered in a manner that satisfies statutory and constitutional requirements.

DOC argues, and the trial court found as fact, that "[t]he Department of Correction has never used good time, gain time, or merit time credits in the calculation of unconditional release dates for inmates who received sentences of life imprisonment." More specifically, DOC acknowledges that Jones earned gain and merit time, but states that these credits were not applied to reduce the time to be served on his sentence in any way. Accordingly, the inmate records maintained for Jones by DOC show his sentence as "99/99/99," a code that denotes a sentence of life imprisonment. These records also reflect a release date of "Life." DOC's position is that gain and merit time were only recorded in case Jones's sentence was commuted by a governor, at which time they would be applied to calculate a release date. DOC further contends that it awarded Jones good time solely for the purposes of allowing him to move to the least restrictive custody grade and to calculate his parole eligibility date, and not for the purpose of allowing Jones unconditional release. Thus, according to DOC, vari-

ous types of credits were awarded to Jones for different and limited purposes only, but no time was awarded for calculating a date of unconditional release. Because we defer to DOC's interpretation of its regulations, we need only consider whether DOC's interpretation that Jones's good time, gain time, and merit time credits were not awarded to him for purposes of unconditional release is statutorily and constitutionally permissible.

In making this determination, we first consider whether DOC's administration of good time, gain time, and merit time credits is within the statutory authority delegated it by the General Assembly. An "agency has those powers that are explicitly granted in the statute plus those powers that are ascertainable as inherent in the underlying policies of the statute, and that may be fairly implied from the statute." *In re Appeal of Cmty. Ass'n*, 300 N.C. at 280, 266 S.E.2d at 654-55 (citations omitted). At the time petitioner was sentenced, N.C.G.S. § 148-13 provided: "The rules and regulations for the government of the State prison system may contain provisions relating to grades of prisoners, rewards and privileges applicable to the several classifications of prisoners as an inducement to good conduct, allowances of time for good behavior . . . ." N.C.G.S. § 148-13 (1974).[2] In addition, at all relevant times N.C.G.S. § 143B-261 required DOC "to provide the necessary custody, supervision, and treatment to control and rehabilitate criminal offenders." *Id.* §§ 143B-261 (2009), 143B-261 (Cum. Supp. 1974).

Under the rationale of *In re Appeal of Cmty. Ass'n*, 300 N.C. at 280, 266 S.E.2d at 654-55, implicit in DOC's power to allow time for good behavior under section 148-13 is authority to determine the purposes for which that time is allowed. An award of time by DOC need not be an all-or-nothing award for unlimited uses. Discretion to determine the purposes for which time is awarded is consistent with such DOC goals as assuring that only those who can safely return to society are paroled or released and that they have been suitably prepared for outside life. *See* N.C.G.S. §§ 143B-261, 143B-262(a), 148-22 (2009). DOC's application of its own regulations to accomplish these ends is "strictly administrative" and outside the purview of the courts. *See*

2. Although section 148-13 has been amended numerous times since petitioner was sentenced, none of these amendments limited or mandated the purposes for which credits could be used. The section's current version requires the Secretary of Correction to adopt rules specifying the rates at which and circumstances under which time may be earned, with reference to other statutes that limit the total amount by which credits can reduce a sentence. N.C.G.S. § 148-13 (2009).

Garris, 265 N.C. at 712, 144 S.E.2d at 902. Accordingly, we conclude that DOC has acted within its statutory authority.

[2] We now turn to the question whether DOC's interpretation and implementation of its regulations are constitutional. Jones contends that DOC has violated his rights to due process and to equal protection. In addition, he argues that he has suffered an ex post facto violation. We address each of these claims.

The United States Supreme Court has held that "[l]iberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States." *Hewitt v. Helms*, 459 U.S. 460, 466, 74 L. Ed. 2d 675, 685 (1983), *abrogated in part on other grounds by Sandin v. Conner*, 515 U.S. 472, 132 L. Ed. 2d 418 (1995). However, "due process is flexible and calls for such procedural protections as the particular situation demands. . . . [N]ot all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer*, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 494 (1972). While a prisoner retains basic constitutional rights, *State v. Primes*, 314 N.C. 202, 208, 333 S.E.2d 278, 281 (1985), the Supreme Court has found that an inmate's liberty interests derived from the Fourteenth Amendment are limited, given the nature of incarceration, *Helms*, 459 U.S. at 467, 74 L. Ed. 2d at 685 ("[O]ur decisions have consistently refused to recognize more than the most basic liberty interests in prisoners."). Nevertheless, "a State may create a liberty interest protected by the Due Process Clause through its enactment of certain statutory or regulatory measures." *Id.* at 469, 74 L. Ed. 2d at 686; *see also Sandin v. Conner*, 515 U.S. at 483-84, 132 L. Ed. 2d at 429. Prisoner benefits in the form of good time, gain time, and merit time arise from such statutes or regulations. *See Wolff v. McDonnell*, 418 U.S. 539, 557, 41 L. Ed. 2d 935, 951 (1974) (stating that "the Constitution itself does not guarantee good time credit for satisfactory behavior while in prison . . . [b]ut the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances").

The liberty interest alleged to be at issue here thus is one created by the State through its regulations. When a liberty interest is created by a State, it follows that the State can, within reasonable and constitutional limits, control the contours of the liberty interest it creates. In other words, the liberty interest created by the State through

its regulations may be limited to those particular aspects of an inmate's incarceration that fall within the purview of those regulations. DOC has interpreted its regulations as permitting the award of different types of time credits for certain purposes and has, in fact, awarded those credits to Jones for those purposes. On the record before this Court, DOC has taken no action against Jones for punitive reasons. Because Jones has received the awards to which he is entitled for the purposes for which he is entitled, he has not been denied credits in which he has a constitutionally protected liberty interest.

Petitioner contends, however, that his credits should be applied toward calculation of the date of his unconditional release. We disagree. As indicated by *Wolff*, *Helms*, and *Sandin*, Jones's liberty interest in good time, gain time, and merit time is limited. Thus, his liberty interest, if any, in having these credits used for the purpose of calculating his date of unconditional release is de minimis, particularly when contrasted with the State's compelling interest in keeping inmates incarcerated until they can be released with safety to themselves and to the public. The record indicates that Jones is eligible for parole and has received annual parole reviews, but that the Parole Commission consistently has declined to parole him. Accordingly, Jones has received the process that is due him as an inmate eligible for parole, when the State's corresponding interest is assuring that inmates are safely released under supervision. Assuming without deciding that DOC's procedures for determining parole adequately protect an inmate's due process rights to consideration for parole, those procedures are also adequate to preserve Jones's constitutional rights while still permitting the State to withhold application of Jones's good time, gain time, and merit time to the calculation of a date for his unconditional release. He has no State-created right to have his time credits used to calculate his eligibility for unconditional release. Jones's due process rights have not been violated.

This State interest in ensuring public safety is particularly pronounced when dealing with those convicted of first-degree murder. *See State v. Rorie*, 348 N.C. 266, 271, 500 S.E.2d 77, 80 (1998) (describing first-degree murder as "this most serious crime"), *superseded by statute, Act of May 8, 2001, ch. 81, secs. 1, 3, 2001 N.C. Sess. Laws 163, 163-65, on other grounds as recognized in State v. Defoe*, 364 N.C. 29, 691 S.E.2d 1 (2010); *see also Graham v. Florida*, —— U.S. ——, ——, 176 L. Ed. 2d 825, 842 (2010) (stating that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punish-

ment than are murderers"); *State v. Davis*, 290 N.C. 511, 548, 227 S.E.2d 97, 119-20 (1976) ("Murder in the first degree is obviously the most serious of the felonious homicides."). The State has a duty to seek to ensure public safety through the orderly release of prisoners who are both under adequate supervision and prepared for resuming life outside of confinement. *See* N.C.G.S. § 15A-1371(d) (2009) (setting forth conditions under which the Post-Release Supervision and Parole Commission may refuse to release a prisoner on parole). DOC's determination that Jones's immediate unconditional release would endanger public safety in any respect is a compelling State interest outweighing any limited due process liberty interest Jones may have in application of his good time, gain time, and merit time credits to his unconditional release.

In addressing Jones's contentions, we are aware that DOC's regulations currently define good time, gain time, and merit time as "[t]ime credits applied to an inmate's sentence that reduce[] the amount of time to be served" and state that "[g]ood time is sentence reduction credit awarded, at the rate of one day deducted for each day served in custody for good behavior and/or without an infraction of inmate conduct rules." DOC Manual ch. B, § .0110(a), (f) (Oct. 5, 2007). These regulations were promulgated by DOC years after Jones was sentenced, *see* 5 NCAC 2B .0110(6) (Apr. 1995); *id.* 2B .0102 (Sept. 1983), when no challenge had been raised to the State's position that those sentenced to life pursuant to the version of section 14-2 in effect between 8 April 1974 and 30 June 1978 had been given an indeterminate sentence. Except for this limited time period, life sentences unquestionably were and still are indeterminate sentences. No regulation explicitly provides that credits are to be used to calculate an unconditional release date, and DOC asserts that it never considered that these regulations applied to Jones or other inmates similarly situated for the purpose of calculating an unconditional release date. Because the regulations were understood to be inapplicable for that purpose, the State did not fully prepare Jones for unconditional release. In light of the compelling State interest in maintaining public safety, we conclude that these regulations do not require that DOC apply time credits for purposes of unconditional release to those who committed first-degree murder during the 8 April 1974 through 30 June 1978 time frame and were sentenced to life imprisonment.

[3] We next consider Jones's ex post facto argument. He contends that DOC's interpretation of its regulations has retroactively increased the punishment for his offense after the offense was com-

mitted. The trial court concluded that failing to use good time, gain time, and merit time credits to calculate an unconditional release date for Jones was not an ex post facto violation.

The constitutions of both the United States and North Carolina prohibit the enactment of ex post facto laws. U.S. Const. art. I, § 10, cl. 1 ("No state shall . . . pass any . . . ex post facto law . . . ."); N.C. Const. art. I, § 16 ("Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted."). The federal and North Carolina constitutional ex post facto provisions are analyzed "under the same definition." *State v. Wiley*, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). Most pertinently here, the ex post facto prohibition applies to: " 'Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed.' " *Id.* (quoting *Collins v. Youngblood*, 497 U.S. 37, 42, 111 L. Ed. 2d 30, 38-39 (1990) (quoting *Calder v. Bull*, 3 U.S. 386, 390, 1 L. Ed. 648, 650 (1798))).

Legislation that retroactively alters sentence reduction credits in effect at the time a crime was committed can be an unconstitutional ex post facto law. *See Weaver v. Graham*, 450 U.S. 24, 25, 36, 67 L. Ed. 2d 17, 20-21, 28 (1981) (finding an ex post facto violation in Florida legislation that altered the availability of good time sentence reduction from a convicted prisoner's sentence). However, Jones does not allege that any legislation or regulation has altered the award of sentence reduction credits. Nor has DOC changed its interpretation of its applicable regulations. Accordingly, the superior court correctly found that Jones has suffered no ex post facto violation.

[4] Finally, Jones argues that DOC's denial of good time, gain time, and merit time for the purpose of calculating an unconditional release date violates his right to equal protection of the law. Jones contends that his equal protection right prohibits the State from treating inmates who committed first-degree murder between 8 April 1974 and 30 June 1978 and were sentenced to life imprisonment under N.C.G.S. § 14-2, who are thus serving determinate sentences, differently from other inmates serving determinate sentences. "When a governmental classification does not burden the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the lower tier of equal protection analy-

sis requiring that the classification be made upon a rational basis must be applied." *White v. Pate*, 308 N.C. 759, 766, 304 S.E.2d 199, 204 (1983); *see also Heller v. Doe ex rel. Doe*, 509 U.S. 312, 319, 125 L. Ed. 2d 257, 270 (1993). Thus, "equal protection of the laws is not denied by a statute prescribing the punishment to be inflicted on a person convicted of crime unless it prescribes different punishment for the same acts committed under the same circumstances by persons in like situation." *State v. Benton*, 276 N.C. 641, 660, 174 S.E.2d 793, 805 (1970), *quoted in State v. Dunlap*, 298 N.C. 725, 735-36, 259 S.E.2d 893, 899 (1979).

Jones was convicted of a different crime than others serving determinate sentences under statutes other than N.C.G.S. § 14-2, even if the sentences of some of those others are for eighty years or even longer (perhaps due to the imposition of consecutive sentences). The fact that Jones is serving a sentence for first-degree murder reasonably suggests that he presents a greater threat to society than prisoners convicted of other offenses. Thus, DOC has a rational basis for denying petitioner good time, gain time, and merit time for the purposes of unconditional release, even though these same credits have been awarded for that purpose to other prisoners with determinate sentences.

Accordingly, we hold that Jones is legally incarcerated. The holding of the trial court to the contrary is reversed.

REVERSED.

Justice NEWBY concurring in the result.

The question at the heart of this appeal is whether the General Assembly intended to eliminate life sentences by legislation enacted in 1974. A thorough analysis of that legislation reveals that the General Assembly never abolished life sentences. In fact, the legislature exhibited an affirmative intent to retain life imprisonment as a special sentence status. Because the administration of the relevant statutory mandates by the Department of Correction ("DOC") has been in consistent harmony with this legislative intent and with inmates' constitutional rights, it is not the place of the courts to overturn DOC's policy of treating life inmates differently from other prisoners.

I agree with the majority's ultimate holding that Jones is lawfully incarcerated. More specifically, I concur in the conclusion that DOC

has acted in accordance with its statutory grant of authority, and I agree further that Jones does not have any due process liberty interest in having his good time, gain time, or merit time credits applied to his sentence for purposes of calculating an unconditional release date. I write separately to express my belief that this latter conclusion is true for all inmates sentenced to life imprisonment for crimes committed between 8 April 1974 and 30 June 1978. I also write to provide a broader response to Jones's contention that his continued incarceration represents a violation of his right to equal protection of the laws.

As noted by the majority, the trial court found as fact that "[t]he Department of Correction has never used good time, gain time, or merit time credits in the calculation of unconditional release dates *for inmates who received sentences of life imprisonment.*" (Emphasis added.) This finding was based on competent testimony from respondent Alvin Keller, Secretary of DOC, and from Teresa O'Brien, an employee in DOC's Combined Records Section.[3] "[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary." *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (alterations in original) (citations and internal quotation marks omitted). Thus, this Court is bound by the finding that DOC has never applied good time, gain time, or merit time credits to calculate an unconditional release date for any inmate sentenced to life imprisonment.

Moreover, the majority correctly concludes that neither the General Statutes nor DOC's regulations give Jones any right to have his time credits applied for purposes of unconditional release. In general, we accord significant deference to the manner in which a statute is interpreted by the executive agency charged with enforcing it, *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citation omitted), and we give *controlling* weight to an agency's interpretation of its own regulations unless that interpretation is "plainly erroneous or inconsistent with the regulation[s],"

3. Respondent Keller testified that DOC's regulations have "never been understood to require awards of gain time towards unconditional release of inmates with life sentences" and that "good and gain time credits have never been applied to calculate an unconditional release date for any inmate with a life sentence imposed for a crime committed before 1 July 1981, which includes the *Bowden* group of inmates." Ms. O'Brien testified: "Good behavior credits, which include good, gain, and merit time, have never been applied to life sentences in order to calculate an expiration or unconditional release date."

Morrell v. Flaherty, 338 N.C. 230, 238, 449 S.E.2d 175, 180 (1994) (citations and internal quotation marks omitted), *cert. denied*, 515 U.S. 1122, 115 S. Ct. 2278, 132 L. Ed. 2d 282 (1995). DOC has never read the relevant statutes and regulations as requiring application of time credits to calculate unconditional release dates for life inmates. Given that those statutes and regulations make no attempt to set forth the specific purposes for which time credits are to be applied, DOC's interpretations are reasonable and worthy of deference so long as they are constitutionally sound.

Jones contends that he has a due process liberty interest in having his good time, gain time, and merit time credits applied for unconditional release purposes. However, as demonstrated above, the relevant statutes and regulations do not give inmates sentenced to life imprisonment any such right, nor has DOC vested life inmates with such a right through its manner of administering those statutes and regulations. Thus, life inmates like Jones can claim no liberty interest in having time credits applied to calculate their unconditional release dates.

Jones argues further: "The unequal treatment of Mr. Jones' sentence, *and that of other inmates in the* Bowden-*class*, amounts to a classic violation of equal protection laws." (Emphasis added.) The "*Bowden*-class" of inmates to which Jones refers is the group of inmates sentenced to life imprisonment for crimes committed between 8 April 1974 and 30 June 1978. Jones goes on to contend that "[his] *life sentence* is identical to a term of 80-years." (Emphasis added.) In other words, Jones argues that life sentences imposed under the 1974 version of section 14-2 are indistinguishable from ordinary term-of-years sentences and that DOC has, therefore, violated equal protection by treating his class of life inmates differently from term-of-years inmates. While I do not disagree with the majority's equal protection analysis, I believe there is a more direct way to respond to Jones's precise argument.

Jones's contention that his class of life inmates is no different from term-of-years inmates ignores the fact that section 14-2 does not abolish life sentences or render them indistinguishable from ordinary term-of-years sentences. Rather, in providing a definition for "[a] sentence of life imprisonment," section 14-2 explicitly retains life imprisonment as a special sentence status. N.C.G.S. § 14-2 (Cum. Supp. 1974). Moreover, the session law that gave rise to section 14-2 utilizes the sentence status of life imprisonment eight times, Act of Apr. 8, 1974, ch. 1201, 1973 N.C. Sess. Laws 323, and in six of those

instances the General Assembly set forth the life sentence as an available punishment for a specific crime, *id.*, secs. 1-4, 7, at 323-24. This continued use of the distinct sentence status of life imprisonment is hardly the manner in which one would expect the legislature to abolish life sentences or convert them to term-of-years sentences for all purposes.

Based on the General Assembly's intent to continue distinguishing life sentences (even those with an unconditional release date of eighty years) from term-of-years sentences, Jones is similarly situated to other life inmates, not to term-of-years inmates. As the trial court found, DOC has never used time credits to calculate unconditional release dates for inmates sentenced to life imprisonment. Thus, DOC has not subjected Jones to disparate treatment in comparison with other similarly situated inmates. Jones and other inmates sentenced to life imprisonment have been treated differently from ordinary term-of-years inmates, but the Supreme Court of the United States has said that if a law involving disparate treatment does not infringe upon a fundamental right or target a suspect class, the classification is permissible as long as it bears a rational relation to some legitimate end. *Heller v. Doe*, 509 U.S. 312, 319-20, 113 S. Ct. 2637, 2642, 125 L. Ed. 2d 257, 270 (1993) (citations omitted). Jones has not demonstrated any right, let alone a fundamental right, to have his time credits applied to his sentence for all possible purposes, nor has he shown that inmates sentenced to life imprisonment are a suspect class. Because DOC's disparate treatment of life inmates relative to term-of-years inmates is rationally related to the legitimate State ends of punishing heinous crimes with greater severity and ensuring public safety, Jones's equal protection claim fails.

Having stated the foregoing, I concur in the result of the majority's opinion.

Justice BRADY joins in this concurring opinion.

Justice TIMMONS-GOODSON dissenting.

The rule of law, consistency, and fundamental fairness are not advanced by today's decision allowing the Department of Correction (DOC) to withhold inmate Alford Jones's accumulated sentence reduction credits. This decision violates the DOC's own regulations and policies, Jones's constitutional rights, and the doctrine of separation of powers. And by doing so, I fear that a cornerstone of our legal system, the writ of habeas corpus, is devalued. The undisputed

record reflects that Jones has fully served his term of imprisonment and is thereby entitled to immediate unconditional release. The decision to the contrary offends all notions of fundamental fairness. I therefore respectfully dissent.

This case arises out of a mistake of law by the DOC that it now seeks to rectify through unwritten, retrospective policy pronouncements some thirty-five years after the fact. The DOC says the department believed that the "life" sentence imposed upon Jones was a sentence of natural life rather than the eighty-year sentence he was actually serving. The DOC awarded Jones sentence reduction credits but putatively believed that those credits would only shorten Jones's sentence in the event of a commutation by the governor. Expecting that the sentence reduction credits earned by Jones would never be utilized, the DOC continued to award Jones sentence reduction credits pursuant to DOC policies and regulations without placing any limitations upon the use of such credits.

This Court's 1978 decisions in *State v. Richardson* and *State v. Williams* cast doubt on the grounds upon which the DOC based its belief that N.C.G.S. § 14-2 meant natural life rather than a determinate eighty-year sentence. The nature and timing of the decisions put the DOC on notice that sentence reduction credits for Jones should diminish his eighty-year sentence. In *Richardson*, this court determined that "[a] sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years" and that pre-conviction incarceration credits should be applied to reduce the defendant's 100 year sentence, which included an eighty-year life sentence. *State v. Richardson*, 295 N.C. 309, 318-20, 245 S.E.2d 754, 760-61 (1978). Similarly, in *Williams*, this Court upheld the defendant's sentence of 300 years in prison, which was comprised in part by three consecutive eighty-year life sentences. *State v. Williams*, 295 N.C. 655, 679-80, 249 S.E.2d 709, 725 (1978). In neither case did the State, under which the DOC's interests are represented, argue that the proper interpretation of a life sentence under section 14-2 is natural life.

Despite our decisions in *Richardson* and *Williams*, it was only after inmate Bobby Bowden filed a writ of habeas corpus—contesting the lawfulness of his continued incarceration and requesting immediate release from his sentence—that the DOC altered the nature of the sentence reduction credits awarded to Jones, Bowden, and other similarly situated inmates. *See State v. Bowden*, 193 N.C. App. 597, 598, 668 S.E.2d 107, 108 (2008), *disc. rev. improvidently*

allowed, 363 N.C. 621, 683 S.E.2d 208 (2009). Specifically, the Court of Appeals observed that the DOC's records for Bowden initially "indicated that all of [his] good conduct time, merit time, and gain time credits had been applied to his sentence." *Id.* at 598, 668 S.E.2d at 108. Curiously, and "for reasons unclear to [the Court of Appeals], the Department of Correction later retroactively changed the status of [Bowden's] sentence reduction credits from 'applied' to 'pending.' " *Id.* Subsequent statements of policy by the DOC and other executive branch officials also cut against the letter of the DOC's regulations for awarding sentence reduction credits.

The question for this Court is therefore whether the DOC may now legally withhold the credits it has awarded Jones. In order to answer this question, I first examine the nature of Jones's interest in his sentence reduction credits.

The United States Supreme Court has explained that, although an inmate's "rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-56, 41 L. Ed. 2d 935, 950 (1974); *see also State v. Primes*, 314 N.C. 202, 208, 333 S.E.2d 278, 281 (1985) (stating that "basic constitutional rights adhere inside as well as outside the prison walls" (citations omitted)); *Goble v. Bounds*, 281 N.C. 307, 311, 188 S.E.2d 347, 349 (1972) (affirming that "a prisoner takes with him into the prison certain rights which may not be denied him") (citing *Lee v. Washington*, 390 U.S. 333, 19 L. Ed. 2d 1212 (1968) (per curiam)). Prisoners "may not be deprived of life, liberty, or property without due process of law." *Wolff*, 418 U.S. at 556, 41 L. Ed. 2d at 951 (citations omitted). The United States Supreme Court has specifically recognized that prisoners have a protected liberty interest in avoiding the withdrawal of sentence reduction credits awarded pursuant to state laws or policies. *See*, *e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 221, 162 L. Ed. 2d 174, 189 (2005) (noting that a prisoner's liberty interest "may arise from an expectation or interest created by state laws or policies" and that prisoners have a "liberty interest in avoiding withdrawal of [a] state-created system of good-time credits" (citing *Wolff*, 418 U.S. at 556-58, 41 L. Ed. 2d at 950-51)); *Weaver v. Graham*, 450 U.S. 24, 25, 35-36, 67 L. Ed. 2d 17, 20-21, 27-28 (1981) (determining that a statutory alteration reducing the availability of gain time for inmates' good conduct violated the prohibition against *ex post facto* laws and was

therefore unconstitutional). Thus, when the State creates "a right to a shortened prison sentence through the accumulation of credits for good behavior," the prisoner has a cognizable liberty interest in the credits that cannot be "arbitrarily abrogated." *Wolff*, 418 U.S. at 557, 41 L. Ed. 2d at 951.

In the instant case the General Assembly authorized prison rules and regulations granting "rewards and privileges" to inmates "as an inducement to good conduct." N.C.G.S. § 148-13 (1974). The General Assembly thereby delegated to the Secretary of Correction the authority to promulgate regulations granting sentence reduction credits. At all relevant times, the statutory authorization to issue regulations has been the only means by which the Secretary of Correction could exercise discretion regarding sentence reduction credits. Accordingly, the Secretary of Correction promulgated regulations awarding good, gain, and merit time to inmates, including Jones, provided the inmates behaved and participated in the requisite programs. In the years since then, Jones has continued to earn sentence reduction credits pursuant to DOC regulations, policies, and procedures. Jones therefore has a protected liberty interest in the sentence reduction credits which were created and awarded to him by the State, through the Secretary of Correction, pursuant to State-created policies, procedures and regulations, that cannot be "arbitrarily abrogated." *Wolff*, 418 U.S. at 557, 41 L. Ed. 2d at 951.

Indeed, at oral argument counsel for the DOC agreed that if sentence reduction credits were in fact "awarded" to Jones, he would have a corresponding liberty interest in those credits under *Wolff* that could not be denied absent procedural due process. However, counsel for the DOC denied that the sentence reduction credits had been awarded to Jones, asserting instead that the credits had only been "stored." This assertion flatly contradicts the trial court's finding that Jones "has been awarded good time, gain time, and merit time credits by the Department of Correction based on his conduct and his participation in the [work release and other related] programs." The DOC has not challenged any of the trial court's findings of fact and these findings are therefore binding.

Having determined that Jones has a protected liberty interest in the sentence reduction credits awarded him pursuant to State-created regulations and policies, I now consider whether the DOC may legally withhold the sentence reduction credits earned by Jones. The DOC essentially argues that because it has fundamentally misapprehended the nature of Jones's sentence for the past thirty years, it

should be allowed to perpetuate its mistake and retroactively eliminate the sentence reduction credits awarded to Jones. This argument flies in the face of bedrock principles securing fundamental fairness in the criminal justice system, including due process and the prohibition against *ex post facto* laws.

As the majority explains, the United States Supreme Court has recognized that a prisoner's liberty interest is constitutionally protected by procedural due process when that liberty interest is created by the State. *Wolff*, 418 U.S. at 555-58, 41 L. Ed. at 950-52. The Court held in *Wolff* that a prisoner's liberty interest "has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the State-created right is not arbitrarily abrogated." *Id.* at 557, 41 L. Ed. at 951. Accordingly, Jones's liberty interest in the sentence reduction credits cannot be diminished by the DOC without giving an adequate level of process. Yet the DOC provided no process whatsoever before attempting to change the applicability of Jones's good time, gain time, and merit time credits. The majority effectively concedes that some process is due by suggesting that the parole process is sufficient. However, the opinion leaves unexplained how the discretionary review of parole is relevant in a discussion of sentence reduction credits, a constitutionally protected interest. In the end, by providing no process prior to withholding Jones's sentence reduction credits, the DOC violated Jones's constitutional right to procedural due process.

Moreover, the DOC has no authority to impose a term of imprisonment other than the sentence handed down by the trial court. *See State v. Allen*, 346 N.C. 731, 737, 488 S.E.2d 188, 191 (1997) (stating that "[t]his Court has already settled that the General Assembly alone prescribes the maximum and minimum punishment which can be imposed on those convicted of crimes" (citation omitted)). The trial court sentenced Jones to a term of life imprisonment, which at the time was defined as a term of eighty years. The DOC is, and was at all times, therefore obligated to treat Jones's sentence as a determinate sentence of eighty years. To do otherwise violates the doctrine of separation of powers. *See Jernigan v. State*, 279 N.C. 556, 564, 184 S.E.2d 259, 265 (1971) (" 'The manner of executing the sentence and the mitigation of punishment are determined by the legislative department, and what the Legislature has determined in that regard must be put in force and effect by administrative officers.' " (quoting

People v. Joyce, 246 Ill. 124, 135, 92 N.E. 607, 612 (1910))). By defining a life sentence as eighty years, the General Assembly intended Jones to serve an eighty-year determinate sentence. As an inmate serving an eighty-year determinate sentence, like other inmates serving determinate sentences, Jones was entitled under DOC regulations and policies to earn sentence reduction credits for the purpose of shortening his sentence. The DOC's refusal to recognize the sentence reduction credits awarded to Jones ignores the will and intent of the General Assembly in defining a life sentence as eighty years and in enacting legislation authorizing sentence reduction credits. I would therefore hold that the DOC is without authority to withhold the sentence reduction credits it awarded to Jones.

The majority concludes, however, that Jones is not entitled to the benefit of the sentence reduction credits he has earned. I note that the majority accepts the following facts: (1) Jones was sentenced to a determinate term of imprisonment of eighty years. (2) While incarcerated, Jones earned good time, gain time, and merit time credits (sentence reduction credits) pursuant to DOC regulations and policies. (3) As of 30 November 2009, Jones's good time credit totaled 14,041 days; his gain time credits totaled 2146 days; and his merit time credit totaled 1745 days. (4) Under DOC regulations and policies, gain time credits and merit time credits are not subject to forfeiture. (5) Good time credits may be forfeited, but only for reasons specified in the DOC regulations, such as major infractions. (6) Under DOC regulations, good time, gain time, and merit time credits operate to reduce the length of an inmate's sentence. (7) The DOC regulations do not specify or limit the purposes for which sentence reduction credits are awarded.

Despite acknowledgment of these facts, the decision countenances the DOC's retrospective and unreasonable interpretation of its regulations, thereby abdicating the judiciary's solemn duty to check arbitrary acts by the other branches. *See Long v. Watts*, 183 N.C. 99, 113, 110 S.E. 765, 768 (1922) (stating that an independent judiciary must be secure against, *inter alia*, "the arbitrary authority of the administrative heads of government"). In addition, the majority fails to recognize that the DOC's position is not based upon any "interpretation" of its regulations. Rather, the DOC's position contravenes the regulations themselves. Nothing in any relevant provision of the North Carolina General Statutes, the North Carolina Administrative Code, the DOC's policies, procedures, or regulations, or North Carolina case law precedent specifically authorizes the

Secretary of Correction to apply the good time, gain time, merit time, or any other awarded credits only for certain purposes and not for others. Simply put, the DOC offers no textual support for its position and neither does the majority.

To the contrary, the DOC plainly sets forth the procedures by which Jones has earned sentence reduction credits. DOC policies and procedures establish "the rules and methods for computing sentence reduction credits in the form of Good Time for satisfactory behavior, Gain and Earned Time for participation in work or program assignments, and Meritorious Time for exemplary acts or for working under emergency conditions, and working overtime or for program achievement." Div. of Prisons, N.C. Dep't of Corr., Policy and Procedures ch. B, § .0109 (Oct. 5, 2007). The DOC defines "Sentence Reduction Credits" as "[t]ime credits applied to an inmate's sentence that reduces the amount of time to be served. These credits are called Good Time, Gain Time, Earned Time and Meritorious Time." *Id.*, § .0110(f). The provisions do not exclude Jones from earning sentence reduction credits. Notably, the DOC specifically excludes seven categories of inmates from earning good time and gain time, *id.*, §§ .0111(d), .0112(c), yet no exception applies to inmates that received life sentences for offenses committed between 8 April 1974 and 30 June 1978. Nevertheless, the majority now attempts to create and to apply an ad hoc exception to Jones. The DOC's position unjustifiably requires this Court to read into the applicable provisions limitations that are noticeably absent and that run counter to the plain and unambiguous language of the provisions. *See Britt v. N.C. Sheriffs' Educ. & Training Standards Comm'n*, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998) ("When the language of regulations is clear and unambiguous, there is no room for judicial construction, and courts must give the regulations their plain meaning."). Because there is no support for the DOC's position in the written regulations and policies—and with all support being to the contrary—the DOC presents no "interpretation of its regulations" to which this Court may defer.

Despite the lack of textual support for the DOC's position, the majority nonetheless reasons that the DOC has "implicit authority" to determine the purposes for which sentence reduction credits may be awarded and posits that "an award of time by [the] DOC need not be an all-or-nothing award for unlimited uses." I agree that the Secretary of Correction is fully authorized to "issue regulations" and "adopt rules" limiting the purposes for which sentence reduction credits

may be applied. N.C.G.S. § 148-13 (2009). However, the Secretary of Correction has not done so in this case. Instead, the Secretary has issued policies, procedures, and regulations regarding the award of sentence reduction credits, under which Jones accrued credits for good time, gain time, and merit time based on his participation in work, study, and other programs. The DOC concedes that the Secretary's discretion is exercised through the DOC regulations. These provisions and regulations do not permit the Secretary to withhold or withdraw the sentence reduction credits already awarded to Jones, nor do they limit the purposes for which the credits may be applied. And while the DOC need not issue a regulation or rule for every minor detail of prison administration and must be allowed a certain degree of flexibility in interpreting its rules, the DOC, should it desire to limit the purposes for which sentence reduction credits may be applied, must articulate these limitations in the form of written rules, regulations, or policies.

DOC regulations involving sentence reduction credits are not minor. Whether an inmate has fully served his sentence and is entitled to release from imprisonment is a question deeply implicating fundamental constitutional rights. *See Wolff*, 418 U.S. at 555-58, 41 L. Ed. 2d at 950-52. The majority asserts that Jones's liberty interest in his sentence reduction credits is "de minimis" and that the State may "control the contours of the liberty interest it creates." The majority cites no authority for this pronouncement, which conflicts with the United States Supreme Court's decisions in *Wolff* and *Weaver*. Accordingly, this Court should reject the DOC's unwritten, retrospective "interpretation," which is contrary to Jones's liberty interest and the unambiguous letter of the relevant regulations and statutes.

Jones does not challenge the DOC's authority to formulate rules and regulations. He asks only that the DOC abide by them. This Court has recognized that an inmate may "earn" a "right to honor grade status" and is " 'entitled' " to release after " 'full service of his sentence *less good time earned* during incarceration.' " *Goble*, 281 N.C. at 311, 188 S.E.2d at 349-50 (emphasis added) (quoting *Menechino v. Oswald*, 430 F.2d 403, 408 2d Cir. 1970 (1970), *cert. denied*, 400 U.S. 1023, 27 L. Ed. 2d 635 (1971)). Jones has earned his sentence reduction credits in accordance with DOC policies and regulations and is now entitled to release. I do not believe that a decision by this Court requiring the DOC to follow its own policies and procedures—which the Secretary of Correction is free to alter at any time—usurps or interferes with the power or authority of the DOC.

Today's decision offends common notions of fundamental fairness. For thirty years, Jones has behaved well, participated in prison work release and study programs, and otherwise performed the conditions necessary to earn sentence reduction credits. Now the State refuses to grant Jones the benefit of his efforts. And although the majority claims the DOC does not have "carte blanche" over the administration of prisoners' sentences, the rejection of Jones's fundamental liberty interests in favor of the DOC's "interpretation" of an unwritten and heretofore unarticulated practice is a departure from established principles. One wonders what other unwritten policies the DOC operates under and whether they, too, are supported by law. Today's decision condones spontaneous rule-making by the DOC that targets individuals retroactively, thereby abdicating this Court's role as a protector of Constitutional liberty rights.

This is a hard case. The lives of the victim and his family have been forever changed by Jones's criminal conduct. Public attention has been excited by the possibility of release of those previously committed to life sentences. The late United States Supreme Court Justice Oliver Wendell Holmes appropriately cautioned against allowing "immediate interests [to] exercise a kind of hydraulic pressure which makes what was previously clear seem doubtful, and before which even well settled principles of law will bend." *N. Securities Co. v. U.S.*, 193 U.S. 197, 400-01, 48 L. Ed. 679, 726 (1904) (Holmes, J., dissenting). Many would argue that the breaking point has been reached in this case.

Because withholding Jones's accumulated sentence reduction credits condones spontaneous rule-making by the DOC and violates the DOC's own regulations, Jones's constitutional rights, and the doctrine of separation of powers, I would affirm the order of the trial court allowing Jones's petition for writ of habeas corpus.

Justice HUDSON joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. MICHAEL RAY

No. 307PA09

(Filed 27 August 2010)

Appeal and Error— preservation of issues—failure to object at trial—failure to argue plain error on appeal

The Court of Appeals erred in a first-degree statutory sexual offense and indecent liberties with a child case by granting defendant a new trial based on the admission of his testimony regarding his prior assaultive behavior because: (1) defendant failed to preserve this issue for appellate review since he objected to the admission of this evidence only during a hearing out of the jury's presence, and he failed to argue plain error on appeal; and (2) even if defendant had preserved this issue for appellate review by timely objection, he would not be entitled to a new trial since he was not prejudiced by the evidence when the jury did not obtain any new information from defendant's testimony, and there was not a reasonable possibility of a different outcome at trial without the admission of this testimony in light of the substantial evidence of defendant's guilt. The additional issues considered by the Court of Appeals were undisturbed.

Justice HUDSON dissenting.

Chief Justice PARKER and Justice TIMMONS-GOODSON joining in the dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 678 S.E.2d 378 (2009), reversing judgments entered on 11 June 2008 by Judge Alma L. Hinton in Superior Court, Hoke County, and remanding the case for a new trial. Heard in the Supreme Court 11 May 2010.

Roy Cooper, *Attorney General*, *by Robert C. Montgomery*, *Special Deputy Attorney General*, *for the State-appellant.*

Geoffrey W. Hosford for defendant-appellee.

NEWBY, Justice.

This case presents the question whether defendant is entitled to a new trial based upon admission of evidence to which he did not offer a timely objection at trial and which he did not contend

amounted to plain error on appeal. We conclude that defendant has failed to preserve for appellate review the trial court's decision to admit into evidence a portion of his testimony regarding his history of alcohol consumption and assaultive behavior. Further, we determine that even if defendant had preserved this issue for appellate review by timely objection, he would not be entitled to a new trial because he was not prejudiced by the evidence about which he now complains. Accordingly, we reverse in part the decision of the Court of Appeals.

The State's evidence at defendant's trial on charges of first-degree statutory sexual offense and indecent liberties with a child tended to show the following. On 12 June 2005, seven year old L.G. and her mother attended a horseshoe tournament at defendant's house. Upon arrival, L.G. played games with other young children in attendance. After some time spent playing games, L.G. asked her mother if she could enter defendant's house to use the bathroom. Additionally, L.G. asked defendant whether he would allow her to enter his house to use the bathroom. Defendant acceded to L.G.'s request and, as L.G. had not previously visited defendant's house, informed her of the bathroom's location. L.G. then proceeded to the bathroom. While L.G. was in the bathroom attempting to pull up her clothes, and over her protests, defendant opened the bathroom door, entered, and walked toward L.G. Defendant then grabbed L.G., slammed her against a wall, lowered her clothes, covered her mouth, and digitally penetrated her vagina several times.

After the attack defendant left the bathroom and L.G. replaced her clothes. Immediately following, L.G. ran out of defendant's house and, while crying, informed her mother of defendant's conduct. L.G. and her mother then returned home and called the police. Later that evening, Deputy Jones and Sergeant Lewis of the Hoke County Sheriff's Office visited L.G.'s home. The officers prepared an incident report containing L.G.'s description of the evening's events.

Subsequently, Detective Sergeant Timothy Rugg ("Det. Rugg") of the Hoke County Sheriff's Office led the investigation into defendant's interaction with L.G. Det. Rugg first interviewed L.G. on 14 June 2005. L.G. recounted to Det. Rugg the details of defendant's conduct on the evening of 12 June 2005. L.G. explained that defendant had "hurt her" by digitally penetrating her vagina "about five times" while she was in the bathroom of his house. L.G.'s mother also spoke with Det. Rugg. Among other things, L.G.'s mother revealed that L.G. was experiencing pain when using the bathroom. Det. Rugg suggested

that L.G.'s mother take the child to a medical facility for immediate diagnosis and treatment, and he arranged a later appointment for L.G. to undergo a child medical exam at a specialty clinic in Fayetteville.

After speaking with Det. Rugg on 14 June 2005, L.G.'s mother took her to the pediatric emergency room of Cape Fear Valley Health System. There L.G. complained of experiencing pain while urinating. Following a urine culture, L.G. was diagnosed with and treated for a urinary tract infection ("UTI"). According to Howard Loughlin, M.D., an expert in pediatrics and child abuse pediatrics, digital manipulation of the vaginal area can cause a UTI and such a diagnosis on 14 June 2005 is consistent with vaginal area manipulation on 12 June 2005. L.G. also underwent a physical examination of her vaginal and anal areas during this emergency room visit. The physical examination revealed that while L.G.'s "[h]ymen appear[ed] open," there were "no signs of trauma" to her vaginal and anal areas.

Two months later, on 10 August 2005, Dr. Loughlin evaluated L.G. In addition to speaking with Det. Rugg and L.G.'s mother, Dr. Loughlin interviewed L.G. L.G. recalled to Dr. Loughlin that she and her mother were visiting defendant's house. During the visit, she needed to use the bathroom. While she was in the bathroom, defendant entered the room, "[s]lammed [her] against the wall," and "touched [her] private," which L.G. identified as her genital area. L.G. explained that defendant's digital penetration of her "felt bad when he was doing it and later." Dr. Loughlin found significant L.G.'s description of the digital penetration as painful, explaining that typically a child does not associate pain with such an act unless the child has experienced it.

Also as part of his evaluation, Dr. Loughlin reviewed L.G.'s medical records from her 14 June 2005 examination resulting in a UTI diagnosis, including the finding that L.G.'s vaginal and anal areas appeared normal and evinced no signs of trauma. Further, Dr. Loughlin physically examined L.G. and similarly found no signs of trauma. However, Dr. Loughlin explained that the absence of visible trauma to the vaginal or anal area of a digital penetration victim is "not uncommon." Ultimately, Dr. Loughlin opined that, based on several factors, including L.G.'s description of the event as painful and the resulting UTI, L.G.'s history "was consistent with her being sexually abused."

Following the State's presentation of evidence, defendant testified. Defendant denied that he had any contact with L.G. However, he

also recounted that he followed L.G. into his house on 12 June 2005, was in his house alone with L.G., and left the house before L.G. came back outside. Further, defendant admitted that he consumed roughly twelve beers on 12 June 2005. Moving beyond the events of 12 June 2005, defendant later informed the jury that he had convictions for, *inter alia*, driving while impaired and assault with a deadly weapon, and he acknowledged the "strong possibility" that he has a problem with alcohol.

During a portion of the State's cross-examination of defendant, the prosecutor focused on defendant's alcohol consumption and his alleged "slamm[ing]" of L.G. against a wall during the encounter. Outside the presence of the jury, the prosecutor informed the trial court that, for the purpose of proving motive and intent and pursuant to Rule of Evidence 404(b), he would like to question defendant regarding his assault of a woman after he consumed alcohol on several occasions during 1990. The prosecutor explained to the court that he had learned from the victim of these prior assaults that defendant did act in an assaultive manner after consuming alcohol. During the hearing defendant objected, but the trial court allowed the State to question defendant regarding this prior conduct for the purpose of proving motive and intent. The hearing concluded and the jury returned.

Once the State's examination of defendant resumed, the following exchange occurred:

> Q. Isn't it true that you have had problems with alcohol and assaultive behavior before?
>
> A. No, sir.
>
> Q. You have not had any problems where alcohol was involved and you assaulted other individuals?
>
> A. Yes, I have had that.
>
> Q. So, again, my question is, isn't it true that you have had prior occurrences where alcohol has affected your assaulting other individuals?
>
> A. No, sir.
>
> Q. So the alcohol played no part in your assaulting other individuals?
>
> A. No, sir.

Q. Did the alcohol play a part in your assaulting Ms. Brenda McPhaul back in December of 1990?

A. No, sir.

Q. Did alcohol play a part in your assaulting Ms. McPhaul with a deadly weapon in December of 1990?

A. No, sir.

Q. Did alcohol play a part in your assaulting Ms. McPhaul by pointing a gun in December of 1990?

A. No, sir.

Q. And did alcohol play a part in your assaulting Ms. McPhaul in February of 1990?

A. No, sir.

Q. The alcohol had no effect on your assaulting her during those times?

A. No, sir.

Q. But you had been drinking?

A. I can't really say "yes" that far back.

Q. You can't say "yes"?

A. Yeah. I can't say "yes" to that.

Q. You can't say "no"?

A. Can't say "no."

Though he objected out of the presence of the jury before this line of questioning began, defendant's attorney did not object during the actual exchange. After the presentation of all the evidence, the jury found defendant guilty of first-degree statutory sexual offense and indecent liberties with a child. The trial court then entered judgment accordingly.

In a unanimous opinion filed on 7 July 2009, the Court of Appeals granted defendant a new trial. *State v. Ray*, —— N.C. App. ——, 678 S.E.2d 378 (2009). That court determined, *inter alia*, that the trial court erred by admitting into evidence defendant's testimony regarding his assaultive behavior in 1990. *Id.* at ——, 678 S.E.2d at 381-82. Further, the Court of Appeals concluded that defendant had demon-

strated prejudice under N.C.G.S. § 15A-1443(a), entitling him to a new trial. *Id.* at ——, 678 S.E.2d at 384. We allowed the State's petition for discretionary review on the issue whether the Court of Appeals erred by granting defendant a new trial based on the admission of his testimony regarding his prior assaultive behavior.

Generally speaking, the appellate courts of this state will not review a trial court's decision to admit evidence unless there has been a timely objection. *State v. Thibodeaux*, 352 N.C. 570, 581-82, 532 S.E.2d 797, 806 (2000), *cert. denied*, 531 U.S. 1155, 121 S. Ct. 1106, 148 L. Ed. 2d 976 (2001).[1] To be timely, an objection to the admission of evidence must be made "at the time it is actually introduced at trial." *Id.* at 581, 532 S.E.2d at 806 (emphasis omitted). It is insufficient to object only to the presenting party's forecast of the evidence. *Id.* As such, in order to preserve for appellate review a trial court's decision to admit testimony, "objections to [that] testimony must be contemporaneous with the time such testimony is offered into evidence" and not made only during a hearing out of the jury's presence prior to the actual introduction of the testimony. *Thibodeaux*, 352 N.C. at 581-82, 532 S.E.2d at 806 (citations omitted).

In the case *sub judice* defendant objected to the admission of evidence regarding his 1990 assaultive behavior only during a hearing out of the jury's presence. In other words, defendant objected to the State's forecast of the evidence, but did not then subsequently object when the evidence was "actually introduced at trial." *Id.* at 581, 532 S.E.2d at 806 (emphasis omitted). Thus, defendant failed to preserve for appellate review the trial court's decision to admit evidence regarding his 1990 assaultive behavior. *See id.* Moreover, defendant lost his remaining opportunity for appellate review when he failed to argue in the Court of Appeals that the trial court's admission of this

1. Following this Court's opinion in *Thibodeaux*, "the General Assembly amended N.C. Rule of Evidence 103(a) to provide that once the trial court makes 'a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.' " *State v. Augustine*, 359 N.C. 709, 731, 616 S.E.2d 515, 531 (2005) (citing Act of May 21, 2003, ch. 101, 2003 N.C. Sess. Laws 127, 127), *cert. denied*, 548 U.S. 925, 126 S. Ct. 2980, 165 L. Ed. 2d 988 (2006). However, in *State v. Oglesby* this Court held that the 2003 amendment to Rule 103(a) is unconstitutional, "to the extent it conflicts with Rule of Appellate Procedure 10(b)(1)." 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007). In *Oglesby* we explained that this Court "has consistently interpreted" Appellate Rule 10(b)(1) "to provide that a trial court's evidentiary ruling on a pretrial motion is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial." *Id.* (citations omitted). Therefore, we consider the statements taken from *Thibodeaux* and referenced herein an accurate statement of the current law.

testimony amounted to plain error. 352 N.C. at 582, 532 S.E.2d at 806 (citing, *inter alia*, N.C. R. App. P. 10(c)(4)). Accordingly, the Court of Appeals erred by reaching the merits of defendant's arguments on this issue. *Id.*

However, even if defendant had by timely objection preserved for appellate review the decision to admit this portion of his testimony, he would not be entitled to a new trial. To receive a new trial based upon a violation of the Rules of Evidence, a defendant must show that the trial court erred and that there is a "reasonable possibility" that without the error "a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (2009); *see also State v. Mason*, 317 N.C. 283, 291, 345 S.E.2d 195, 200 (1986) ("[B]efore the defendant is entitled to any relief on appeal, he must show that he was prejudiced by the [trial court's] error." (citing N.C.G.S. § 15A-1443(a))). Essentially, defendant argues that the trial court erred by allowing the State to attempt to elicit his testimony regarding his 1990 assaultive behavior pursuant to Rule of Evidence 404(b). Initially we note that the trial court may not have erred in allowing the State to elicit evidence of defendant's prior conduct under Rule 404(b) as some proof of motive and intent. However, we need not resolve that question to dispose of the case *sub judice*. Accordingly, we simply assume *arguendo* that the trial court erred by admitting this evidence and proceed to determine the impact of this evidence on the jury's verdict.

The jury essentially failed to obtain any new information from defendant's testimony about which he now complains. During the portion of the State's examination at issue, the State questioned defendant about the connection between his consuming alcohol and his past assaultive behavior, specifically several assaults on Ms. Brenda McPhaul in 1990. Though defendant responded in the negative to most of the State's questions, it appears that the most the jury learned from this exchange was that defendant has in the past made poor decisions after consuming alcohol and that he has engaged in assaultive behavior. However, prior to the portion of defendant's testimony at issue, defendant told the jury about his past convictions for driving while impaired and assault with a deadly weapon, admissions that reflect both a prior exercise of poor judgment after using alcohol and past assaultive behavior. Thus, the jury essentially learned nothing more during the challenged exchange than it had already learned earlier in his testimony.

Defendant was not prejudiced by the admission of this portion of his testimony. As the jury learned nothing new during this exchange regarding defendant's prior conduct, there is not a "reasonable possibility" of a different outcome at trial without the admission of this testimony. This is especially true in light of the following substantial evidence of defendant's guilt: the victim's trial testimony, the consistency of her trial testimony and her description of the events to Det. Rugg and Dr. Loughlin, L.G.'s characterization of defendant's penetration of her as painful, Dr. Loughlin's testimony that L.G.'s history was "consistent with her being sexually abused," and the fact that L.G. contracted a UTI. As such, even assuming the challenged portion of defendant's testimony was admitted in error, it did not prejudice him, and defendant is not entitled to a new trial.

We reverse the decision of the Court of Appeals that defendant is entitled to a new trial. The additional issues considered by the Court of Appeals are not before us, and its decisions as to those matters therefore remain undisturbed. This case is remanded to the Court of Appeals for further remand to the Superior Court, Hoke County, for further proceedings not inconsistent with this opinion.

REVERSED IN PART AND REMANDED.

Justice HUDSON dissenting.

I would conclude that the State waived its preservation argument by neglecting to raise it below, specifically by failing to either cross-assign it as error in accordance with the then-applicable version of North Carolina Rule of Appellate Procedure 10(d) or to make the argument in its brief to the Court of Appeals. I would further conclude that admission of the cross-examination testimony regarding the 1990 assaults violated Rule 404(b) and resulted in reversible error warranting a new trial. Therefore, I respectfully dissent.

At the time of defendant's appeal, North Carolina Rule of Appellate Procedure 10(d) provided, in pertinent part:

> (d) *Cross-assignments of error by appellee.* Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.

N.C. R. App. P. 10(d).[2] Here, it is undisputed that defendant asserted in his assignments of error that the admission of his cross-examination testimony regarding the 1990 assaults violated Rule 404(b).[3] In his brief he set forth the standard of review as abuse of discretion and argued that its erroneous admission resulted in prejudicial error under N.C.G.S. § 15A-1443(a). Despite this, the State neglected to assert, either in a cross-assignment of error or in its brief to the Court of Appeals, that defendant had waived his Rule 404(b) argument by not assigning or arguing plain error in the record on appeal or his brief. This argument would have provided an alternative basis for the relief sought by the State—in fact, the basis for the relief it now seeks. Instead, the State simply responded to the defendant's argument by maintaining that there was no abuse of discretion—even though arguing that defendant waived the issue would have been simpler. As a result, the Court of Appeals did not address the issue of waiver or plain error, as the State now argues.

Based on earlier cases, I conclude it is not our role to allow the State another, different bite of the apple by permitting it to present, for the first time, an argument it did not make below. *See Pearce v. Am. Defender Life Ins. Co.*, 316 N.C. 461, 467, 343 S.E.2d 174, 178 (1986) ("Petitioners whose cases come before this Court on discretionary review are limited by Rule 16 of the North Carolina Rules of Appellate Procedure to those questions they have presented in their briefs to the Court of Appeals. Because these causes of action were not argued to that court, they are not properly before us."); *see also Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 21-22, 418 S.E.2d 648, 661 (1992) (same) (citing *Pearce*, 316 N.C. at 467, 343 S.E.2d at 178); *State v. Fuller*, 196 N.C. App. 412, 418, 674 S.E.2d 824, 829 (2009) (concluding that because the trial court had not denied the defendant's motion to suppress based on lack of standing and the State had not cross-assigned standing as an "alternative basis for upholding the trial court's order" under Appellate Rule 10(d), the State failed to preserve its argument for appellate review (citation

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2. Although the current version of North Carolina Rule of Appellate Procedure 10(c) eliminated cross-assignments of error and allows an appellee to "list proposed issues on appeal in the record on appeal," an appellee still must have "properly preserve[d]" these issues "for appellate review" by raising them below. N.C. R. App. P. 10(c).

3. The State had attempted unsuccessfully to offer these 1990 incidents under North Carolina Rule of Evidence 609; any convictions resulting therefrom were ruled too remote in time to be admissible. *State v. Ray*, —— N.C. App. ——, ——, 678 S.E.2d 378, 381 (2009).

omitted)). I would conclude that by not raising the issue until its petition for discretionary review to this Court,[4] the State has waived the argument it makes now. *Cf. State v. Horner*, 310 N.C. 274, 283, 311 S.E.2d 281, 287 (1984) (stating that "[a] party may waive statutory or constitutional provisions by . . . conduct inconsistent with a purpose to insist upon it" and declining to apply plain error review to alleged jury instruction error (citations omitted)). Similarly, I would decline to review this case for plain error, but would analyze it, if at all, to see if the Court of Appeals correctly saw error and prejudice.

Turning to the substance, I would conclude that the Court of Appeals correctly held that admission of the cross-examination testimony here clearly violated Rule 404(b). That court addressed the issue under the standard of review argued by both parties—whether there was an abuse of discretion. *Ray*, —— N.C. App. at ——, 678 S.E.2d at 384. Out of the presence of the jury, the State asked the court during the trial to permit it to cross-examine defendant regarding assaults he had committed against his former girlfriend, Brenda McPhaul (McPhaul), in 1990. The State argued that the 1990 incidents established defendant's motive and intent to commit the 2005 crimes, specifically asserting "he had too much to drink as he has in the past, and he assaulted a woman, which is a child, yes, but . . . she is still a woman, and he assaulted her in an aggressive way, the same way he assaulted other women in aggressive ways after drinking." The State indicated[5] that McPhaul stated that all the 1990 incidents occurred while she and defendant were dating and typically involved her confronting defendant with rumors of his infidelity upon his return home from drinking with friends. The confrontations led to fights, some initiated by McPhaul and some initiated by defendant. McPhaul further stated that: defendant never "seriously injured" her or sexually assaulted her; she had tried to hurt him during some of these altercations; her then minor children never indicated that defendant had "abuse[d them] in any way"; and she and defendant ended their relationship in or around December 1990 after he pulled a gun on her at a party "because she was seeing someone else." Ultimately, the trial

4. Although this Court accepted this case for discretionary review, this area of the law is well settled; it is difficult for me to see how this issue meets any of the statutory criteria for review.

5. The State informed the trial court that McPhaul was reluctant to communicate any details regarding the 1990 incidents and that it had to subpoena her in order to interview her and obtain a statement. McPhaul did not testify at trial, and the details that the State provided to the court regarding the incidents were purportedly derived from the pretrial interview.

court ruled that the State could cross-examine defendant regarding the as-described, 1990 assaults to establish his motive and intent to sexually assault a seven year old child and that the probative value outweighed any prejudicial effect.

Rule 404(b) reads in pertinent part

> (b) *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) (2009). We recently described the potential dangers of this kind of evidence in *State v. Carpenter*, 361 N.C. 382, 646 S.E.2d 105 (2007):

> When evidence of a prior [bad act] is introduced, the natural and inevitable tendency for a judge or jury is to give excessive weight to the vicious record . . . thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge. Indeed, [t]he dangerous tendency of [Rule 404(b)] evidence to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subjected to strict scrutiny by the courts.

Id. at 387-88, 646 S.E.2d at 109-10 (third and fourth alterations in original) (citations and internal quotation marks omitted).

Even though Rule 404(b) is often described as a "general rule of inclusion," several limitations have been placed on the admission of such evidence because "of the perils inherent in introducing prior [bad acts] under Rule 404(b)." *Id.* at 388, 646 S.E.2d at 110; *State v. Lynch*, 334 N.C. 402, 412-13, 432 S.E.2d 349, 354-55 (1993) (citations omitted). The prior bad act "must be relevant to the currently alleged crime." *Carpenter*, 361 N.C. at 388, 646 S.E.2d at 110 (citing N.C.G.S. § 8C-1, Rules 401 and 402 (2005)). Additionally, the prior bad acts' admission "is constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (citations omitted). Regarding the "similarity" requirement, "[e]vidence of a prior bad act generally is admissible under Rule 404(b) if it constitutes substantial evidence tending to support a reasonable finding by the jury that the defendant committed the

similar act." *Id.* at 155, 567 S.E.2d at 123 (citations and internal quotation marks omitted). "Finally, . . . the trial court must balance the danger of undue prejudice against the probative value of the evidence, pursuant to [North Carolina] Rule [of Evidence] 403." *Carpenter*, 361 N.C. at 388-89, 646 S.E.2d at 110 (citing N.C.G.S. § 8C-1, Rule 403 (2005)).

At most, the purported similarities between the 1990 incidents and the 2005 incident are merely generic. This Court has stated: "When the State's efforts to show similarities between crimes establish no more than 'characteristics inherent to most' crimes of that type, the State has 'failed to show . . . that sufficient similarities existed' for the purposes of Rule 404(b)." *Id.* at 390, 646 S.E.2d at 111 (quoting *Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123 (alteration in original)). At worst, they relate solely to defendant's purported bad character, to show that he "acted in conformity" with a propensity to commit bad acts, which is expressly forbidden by Rule 404(b). N.C.G.S. § 8C-1, Rule 404(b). Given that defendant denied that alcohol played a role, his testimony undercut the State's proffered theory that alcohol was the triggering factor (motive) in the 1990 incidents. Thus, admissibility of the evidence at issue even for that purpose falters. Further, as described by the State during the bench conference, the 1990 incidents are not similar at all to the 2005 incident for which defendant was on trial, except to show a propensity for assaultive behavior. The 1990 assaults involved violent incidents between two adults involved in a relationship, occurring fifteen years before the alleged 2005 crimes. They do not involve any assault, sexual or otherwise, on a seven year old child or share any additional factual similarities with the 2005 incident. As such, " 'substantial evidence of similarity among the prior bad acts and the crimes charged is . . . lacking.' " *Carpenter*, 361 N.C. at 391, 646 S.E.2d at 112 (quoting *Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123 (alteration in original)). Given the lack of similarity, the temporal distance between the incidents assumes even greater importance. *See, e.g.*, *State v. Artis*, 325 N.C. 278, 300, 384 S.E.2d 470, 482 (1989) ("Attenuated by time, the pertinence of evidence of prior offenses attaches to the defendant's character rather than to the offense for which he is on trial. In other words, remoteness in time tends to diminish the probative value of the evidence and enhance its tendency to prejudice."), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Further, any arguably "slight" probative value of this evidence is substantially outweighed by the danger of unfair prejudice, namely the "substantial likelihood that the jury w[ould] consider the evidence

only for the purpose of determining the defendant's propensity to commit the crimes with which he ha[d] been charged." *State v. White*, 331 N.C. 604, 615-16, 419 S.E.2d 557, 564 (1992) (citation omitted), *cert. denied*, 519 U.S. 936, 136 L. Ed. 2d 229 (1996).

Finally, defendant has shown "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (2009). The majority brushes off the prejudicial effect of this erroneously admitted character evidence, stating that "the most the jury learned from this exchange was that defendant has in the past made poor decisions after consuming alcohol and that he has engaged in assaultive behavior." Noting that the jury also learned that defendant had prior convictions for driving while impaired and assault with a deadly weapon, the majority concludes that "the jury essentially learned nothing more during the challenged exchange than it had already learned earlier in his testimony." In doing so, the majority overlooks the most damaging matter the jury learned from this evidence—that defendant had assaulted a female of an unspecified age multiple times, including with a gun—which was certain to damage him in the eyes of the jury. Close examination of the record reveals that defendant's credibility was critical to his defense, given the lack of physical evidence.[6] The State's only witnesses were a law enforcement officer, an investigator with the district attorney's office, the medical doctor who saw the alleged victim two months after the alleged incident, and the young girl. Defendant took the stand and denied any assault. In my view, the Court of Appeals correctly concluded that "[a]gainst th[e] backdrop of evidence" in this case, which was not overwhelming, "the jury's assessment of the relative credibility of L.G. and the Defendant assumed crucial significance." *Ray*, —— N.C. App. at ——, 678 S.E.2d at 384. In light of the well-recognized dangers and prejudice that easily flow from propensity evidence of the type admitted here, I would affirm the Court of Appeals' decision to award defendant a new trial.

For these reasons I respectfully dissent.

Chief Justice PARKER and Justice TIMMONS-GOODSON join in this dissenting opinion.

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6. In fact, during the bench conference on the admissibility of the 1990 assaults under Rule 404(b), the State explicitly acknowledged: "[T]he only two issues in this case are credibility of witnesses and motive; who to believe and why would [defendant] have done this."

NANCY HENSLEY, DIANE KENT, AND CLEAN WATER FOR NORTH CAROLINA, INC., PETITIONERS v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF LAND RESOURCES, RESPONDENT, AND MOUNTAIN AIR DEVELOPMENT CORPORATION, RESPONDENT-INTERVENOR

No. 525A09

(Filed 27 August 2010)

1. Environmental Law— Sedimentation Pollution Control Act—trout waters—golf course construction

The purpose of the Sedimentation Pollution Control Act is to minimize sedimentation resulting from land-disturbing activity and not simply to regulate the land-disturbing activity itself. The N.C.G.S. § 113A-57(1) requirement that any "land-disturbing activity" within a trout waters buffer zone must be "temporary" and "minimal" refers to the effects of sedimentation resulting from the activity and not to the entire scope of the activity. Rather than prohibiting development that encroaches on trout waters buffers, N.C.G.S. § 113A-57(1) aims to ensure that such development is undertaken only in a manner that minimizes sedimentation.

2. Environmental Law— Sedimentation Pollution Control Act—trout waters—construction of golf course—conditions

A variance under the Sedimentation Pollution Control Act for construction of a golf course in a trout waters buffer zone had particularly stringent conditions that minimized sedimentation during construction.

3. Environmental Law— Sedimentation Pollution Control Act—trout waters—construction of golf course—maintenance—variance

Mountain Air Development properly applied for the necessary variance to conduct construction activity in a trout waters buffer zone, and DLR complied with the statutory requirements in granting the variance. Periodic maintenance after the end of construction of a golf course in a trout buffer zone is not a violation of the "temporary" requirement of N.C.G.S. § 113A-57(1); this construction of the statute would essentially ban permanent development near trout waters, which contradicts the Sedimentation Pollution Control Act's stated purpose.

4. Environmental Law— Sedimentation Pollution Control Act—trout waters—construction of golf course—summary judgment

There was no genuine issue of material fact as to whether construction of a golf course in a trout waters buffer zone violated N.C.G.S. § 113A-57(1) where the testimony from the primary source of evidence on the project's factual compliance was too general and speculative to create an issue of fact about whether the sedimentation effects of the work were sufficiently temporary or minimal.

Justice HUDSON dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —– N.C. App. —–, 685 S.E.2d 570 (2009), reversing an order entered on 2 July 2008 by Judge W. Osmond Smith in Superior Court, Wake County, and remanding to the trial court for entry of summary judgment in petitioners' favor. Heard in the Supreme Court on 24 March 2010.

Southern Environmental Law Center, by J. Blanding Holman, IV, Julia F. Youngman, and Geoffrey R. Gisler, for petitioner-appellees.

Roy Cooper, Attorney General, by Rufus C. Allen, Assistant Attorney General; and Sueanna Sumpter and Kathryn Jones Cooper, Special Deputy Attorneys General, for respondent-appellant.

McGuireWoods, PLLC, by Benne C. Hutson; and Smith Moore Leatherwood LLP, by Ramona Cunningham O'Bryant, for respondent-intervenor-appellant.

William L. Richards for Blue Heron Whitewater LLC, Endless River Adventures, Inc., and FB Canoe Racing, Inc., amici curiae.

Duke University School of Law, by James Patrick Longest Jr. and Michelle Benedict Nowlin, for Catawba Riverkeeper Foundation, Inc., North Carolina Wildlife Federation, Pamlico-Tar River Foundation, White Oak-New Riverkeeper, Western NC Alliance, Yadkin Riverkeeper, American Whitewater and North Carolina Trout Unlimited, amici curiae.

NEWBY, Justice.

The question before the Court in this case is whether respondent North Carolina Division of Land Resources ("DLR") properly issued to respondent-intervenor Mountain Air Development Corporation ("Mountain Air") a variance from the trout waters buffer requirements of N.C.G.S. § 113A-57(1). Because we hold that the variance complied with the statutory restrictions, the decision of the Court of Appeals is reversed.

Mountain Air is the developer and owner of Mountain Air Country Club, a residential community in Burnsville, North Carolina. As part of this development, Mountain Air has constructed an eighteen-hole golf course, a lodge, condominiums, individual residences, and other amenities for the community. At some time before August 2002, Mountain Air decided to build an additional nine holes on the golf course ("the Project"), which involved construction of fairways and cart paths over and adjacent to streams on the property. Because a portion of the Project would involve encroachment into the buffer zone for Banks Creek, a stream classified as "trout waters" under 15A NCAC 2B .0304(a), Mountain Air was required to seek from DLR a variance from the buffer requirements for such waters. N.C.G.S. § 113A-57(1) (2009).

On 8 August 2002, Mountain Air submitted to DLR a request for a trout buffer variance. Mountain Air held its initial meetings with DLR in March and June of 2002 and, in response to DLR questions and comments, supplemented its request to DLR on the following dates: 15 August 2002, 3 February 2003, 27 March 2003, 8 April 2003, 3 June 2003, and 6 August 2003. On 14 October 2003, after well over a year of extensive negotiations with DLR, Mountain Air obtained the required variance ("the Variance"). The Variance allowed Mountain Air to remove the tree canopy along 2763 feet of the stream, clear 160 feet of buffer vegetation, and temporarily enclose and relocate stream segments within the buffer before permanently enclosing 1868 feet of the stream in pipes. Further, although neither Mountain Air's final proposal nor the Variance addresses future upkeep, we can naturally assume that Mountain Air will wish to conduct periodic golf course maintenance within the buffer zone.

In addition to the Variance, the Project required a Wetlands Permit from the United States Army Corps of Engineers pursuant to 33 U.S.C. § 1344 and a Water Quality Certification from the North Carolina Division of Water Quality ("DWQ") pursuant to 33 U.S.C.

§ 1341. Mountain Air acquired both of these before DLR granted the Variance. Mountain Air was able to obtain the Water Quality Certification because DWQ determined that the Project would comply with State water quality standards. Shortly after DLR granted the Variance, Mountain Air also obtained approval of an erosion control plan as required by N.C.G.S. § 113A-54.1.

Petitioner Clean Water for North Carolina, Inc. is a public interest organization headquartered in Asheville that provides support to local community efforts related to water quality. The organization's members, including the two individual petitioners, Nancy Hensley and Diane Kent, reside adjacent to or in close proximity to Mountain Air's proposed golf course development. Petitioners filed a petition for a contested case hearing in the Office of Administrative Hearings on 12 November 2003, alleging that the activities allowed by the Variance would have a "significant and adverse impact" on petitioners "and on their families, the use and enjoyment of their property, and their economic interests primarily from pollution in Banks Creek and loss of fish habitat." Mountain Air filed a motion to intervene, which was allowed on 8 January 2004.

Petitioners and respondents filed cross-motions for summary judgment and joint stipulated facts. An administrative law judge ("ALJ") granted partial summary judgment in favor of petitioners and partial summary judgment in favor of respondents.[1] Following the ALJ's order, the parties moved for reconsideration and for certification to the Sedimentation Control Commission ("the Commission"). On 19 January 2007, the Commission issued its final agency decision, reversing the ALJ's decision to grant partial summary judgment to petitioners and affirming the ALJ's decision to grant summary judgment to respondents. Petitioners sought judicial review of the final agency decision in Superior Court, Wake County, and Mountain Air agreed to limit activities within the trout waters buffer until a hearing on the merits of the petition. The superior court affirmed the Commission's decision and entered summary judgment for respondents. On appeal, a divided panel of the Court of Appeals reversed the order of the superior court and remanded for entry of summary judgment in favor of petitioners. *Hensley v. NCDENR*, —— N.C. App. ——, ——, 685 S.E.2d 570, 587 (2009). Respondents appealed to this Court on the basis of the dissenting opinion in the Court of Appeals.

1. The ALJ denied all summary judgment motions on other allegations in the petition "on the ground that genuine issues of material fact remain for hearing." These matters are still pending before the ALJ.

[1] Article 4 of Chapter 113A of the General Statutes, known as the Sedimentation Pollution Control Act of 1973 ("the Act"), addresses the State's problem of sedimentation pollution. The Act's preamble provides:

> The sedimentation of streams, lakes and other waters of this State constitutes a major pollution problem. Sedimentation occurs from the erosion or depositing of soil and other materials into the waters, principally from construction sites and road maintenance. The continued development of this State will result in an intensification of pollution through sedimentation unless timely and appropriate action is taken. Control of erosion and sedimentation is deemed vital to the public interest and necessary to the public health and welfare, and expenditures of funds for erosion and sedimentation control programs shall be deemed for a public purpose. *It is the purpose of this Article to provide for the creation, administration, and enforcement of a program and for the adoption of minimal mandatory standards which will permit development of this State to continue with the least detrimental effects from pollution by sedimentation.* In recognition of the desirability of early coordination of sedimentation control planning, it is the intention of the General Assembly that preconstruction conferences be held among the affected parties, subject to the availability of staff.

N.C.G.S. § 113A-51 (2009) (emphasis added).

The portion of the Act at issue is N.C.G.S. § 113A-57(1), which provides:

> No land-disturbing activity subject to this Article shall be undertaken except in accordance with the following mandatory requirements:
>
> (1) No land-disturbing activity during periods of construction or improvement to land shall be permitted in proximity to a lake or natural watercourse unless a buffer zone is provided along the margin of the watercourse of sufficient width to confine visible siltation within the twenty-five percent (25%) of the buffer zone nearest the land-disturbing activity. Waters that have been classified as trout waters by the Environmental Management Commission shall have an undisturbed buffer zone 25 feet wide or of sufficient width to confine visible siltation within the twenty-five percent (25%) of the buffer

> zone nearest the land-disturbing activity, whichever is greater. *Provided, however, that the Sedimentation Control Commission may approve plans which include land-disturbing activity along trout waters when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal.* This subdivision shall not apply to a land-disturbing activity in connection with the construction of facilities to be located on, over, or under a lake or natural watercourse.

Id. § 113A-57(1) (emphasis added). Specifically, the issue at hand is whether the "land-disturbing activity" that DLR approved in the Variance was "temporary" and "minimal" under section 113A-57(1).

As stated in the preamble, the purpose of the Act is to "permit development of this State to continue with the least detrimental effects from pollution by sedimentation." *Id.* § 113A-51. One method by which sedimentation is controlled is the regulation of "land-disturbing activity," which is defined in the Act as "any use of the land by any person in residential, industrial, educational, institutional or commercial development, highway and road construction and maintenance that results in a change in the natural cover or topography and that may cause or contribute to sedimentation." *Id.* § 113A-52(6) (2009).

The Court of Appeals equated the phrase "said disturbance" in section 113A-57(1) with the definition of "land-disturbing activity" in section 113A-52(6) and failed to distinguish the use of the land from the sedimentation pollution that it might cause. In other words, the Court of Appeals held that whether land-disturbing activity along a trout waters buffer zone is "temporary" and "minimal" depends on the scope of the entire project rather than just the sedimentation effects of the project. We disagree. According to the preamble, the purpose of the Act is to minimize sedimentation resulting from land-disturbing activity and not simply to regulate the land-disturbing activity itself. Each sentence of the preamble refers to sedimentation and the steps that the State must take in order to control the effects of erosion and sedimentation. Given the Act's overriding purpose of controlling sedimentation, we conclude that the "temporary" and "minimal" requirements of section 113A-57(1) refer to the sedimentation effects of the activity and not to the land use in general.

In reaching its holding the Court of Appeals stated that under the Act, "subject to certain limited exceptions, mandatory trout waters

buffer zones shall remain 'undisturbed' in perpetuity, or until such time as the General Assembly decides to enact legislation to the contrary." *Hensley*, —— N.C. App. at ——, 685 S.E.2d at 578. In light of the preamble, which demonstrates that the Act is an antisedimentation law and not an antidevelopment law, this viewpoint overstates the intent and effect of section 113A-57(1). Rather than prohibiting development that encroaches on trout waters buffers, section 113A-57(1) aims to ensure that such development is undertaken only in a manner that minimizes sedimentation. At the General Assembly's mandate, the Commission applies its expertise and grants variances only for projects that take due care to keep sedimentation to a minimum.

We also observe that the Court of Appeals' analysis focused heavily on the word "may" in the provision that defines land-disturbing activity as "any use of the land . . . that *may* cause or contribute to sedimentation." N.C.G.S. § 113A-52(6) (emphasis added). The majority held "as a matter of law" that the periodic maintenance work that Mountain Air will likely wish to perform in the buffer zone along Banks Creek " '*may* cause or contribute to sedimentation,' and thus constitutes ongoing 'land-disturbing activity.' " *Hensley*, —— N.C. App. at ——, 685 S.E.2d at 578. We find this reading of the definition of land-disturbing activity to be overly literal. Virtually any use of land *may* cause or contribute to sedimentation, so the Court of Appeals' interpretation effectively reads the variance provisions of section 113A-57(1) out of the Act. Because those variance provisions were enacted concurrently with the increased protections for trout waters, Act of July 25, 1989, ch. 676, sec. 3, 1989 N.C. Sess. Laws 1867, 1870, we do not believe the General Assembly intended such a result. Rather, we interpret section 113A-52(6) as a more general guide to DLR's discretionary decision whether to grant a variance under section 113A-57(1).

[2] A review of Mountain Air's variance proposal and the conditions of the Variance reveals that the sedimentation effects during the construction of the golf course were minimized. For example, in order to remove trees, Mountain Air had to comply with a myriad of requirements. Before removal, Mountain Air would flag the individual trees it wished to remove and give DLR's representatives an opportunity to inspect the flagged areas. If DLR expressed concern that specific tree removal would have adverse effects on stream coverage, Mountain Air would make appropriate "understory enhancements" before removal. Any trees that were felled were cut above the ground, "leaving stumps and root mass intact," and Mountain Air made efforts to

fell the trees away from the stream bank. Whenever possible, felled trees would be "tied off and lifted directly out of the buffer." Any subcanopy vegetation would only be removed by hand.

Mountain Air also set forth a thoroughly developed pipe installation strategy. Mountain Air proposed that its workers be divided into teams to reduce the chance of sediment leaving the work site and that those teams be supervised by "a manager who has been certified under the state-sanctioned Clean Water Contractor program." A Sediment Control Crew would maintain "stormwater and sediment pollution control logs." Mountain Air also carefully set forth the order and methods to be used for each specific segment of pipe installation. Likewise, Mountain Air developed detailed plans for equipment access, "energy dissipating plunge pools," rock excavation, seepage, compaction of the land after completion of the Project, and possible overflow of the pipes. To "reduce the already minimal risk of sedimentation," Mountain Air also proposed to monitor the weather forecast on a daily basis and delay or stop any activity if significant rain was forecast for the following twenty-four hour period.

Furthermore, DLR conditioned the Variance's approval on various additional sedimentation pollution controls, which Francis M. Nevils, Jr., Section Chief of DLR's Land Quality Section, described as "particularly stringent." Mountain Air had to monitor the weather forecast three days in advance of any land-disturbing activity, and that activity could not begin if there was a fifty percent chance of more than one-quarter inch of precipitation within twenty-four hours. The workers had to stabilize all disturbed areas in the buffer zone with temporary ground cover at the end of each workday. All materials excavated within the buffer zone had to be deposited outside the buffer and at least twenty-five feet from the top of the stream bank. "A person qualified in erosion and sedimentation control" was required to be present during all land-disturbing activities within the buffer zone. Tree removal could not begin until the site had been stabilized, and Mountain Air was required to use equipment that would minimize disturbance to the area. The approved erosion and sedimentation control plan included "the use of skimmer basins, skimmer traps or flocculant(s) and level spreaders or other means to create dispersed flow where appropriate to reduce sedimentation and turbidity." To protect rainbow trout and their habitat, Mountain Air was prohibited from working in the buffer zone during spawning season.

In short, both Mountain Air's proposal and DLR's "particularly stringent" Variance conditions ensured that erosion and sedi-

mentation were "minimal" during the period of construction along Banks Creek.

[3] In addition to the General Statutes, the Court of Appeals also relied on the administrative regulations of the Department of Environment and Natural Resources in concluding that the Project was not a "minimal" disturbance. Those regulations require written approval from the Director of DLR when a land-disturbing activity in a trout waters buffer zone exceeds ten percent of the total length of the buffer. 15A NCAC 4A .0105(26) (June 2010); *id.* 4B .0125(c) (June 2010). We will assume without deciding that the Project involved activity exceeding ten percent of the length of the buffer zone along Banks Creek and that Mountain Air was required to obtain this written approval. The Court of Appeals concluded that Mountain Air failed to do so and thus violated 15A NCAC 4B .0125(c). However, the letter granting the Variance contains the following language:

> In accordance with N.C. Gen. Stat. 113A-57(1) *and N.C. Admin. Code 15A 4B .0125(c)*, this letter will serve as written approval of the proposed encroachment into the trout water buffer zones, of tributaries to Banks Creek . . . . *This authority has been delegated to me, Francis M. Nevils, Jr., Section Chief, Land Quality Section by James D. Simons, Director, Division of Land Resources, in accordance with N.C. Gen. Stat. 143B-10.*

(Emphases added.) We hold that Mountain Air properly obtained written approval from DLR for its land-disturbing activity in the Banks Creek buffer zone.

The Court of Appeals also held that the Project was not "temporary" because of Mountain Air's presumed need to conduct periodic maintenance activity in the buffer zone after completion of all construction. Again, the court focused on the duration of the activity itself rather than its sedimentation effects. Further, the court's belief that occasional maintenance violates the "temporary" requirement of section 113A-57(1) regardless of whether additional variances are sought would essentially ban any type of permanent development near trout waters. This interpretation contradicts the Act's stated intention of encouraging continued development in this state.

[4] Having determined that the Court of Appeals' reading of the "temporary" and "minimal" requirements was more rigorous than the General Assembly intended, we now consider whether there was any genuine issue of material fact whether the Project violated section

113A-57(1). The primary source of evidence on the Project's factual compliance with section 113A-57(1) was Richard Preston Maas, who has a Ph.D. in Environmental Chemistry and extensive experience working to improve water quality. In his deposition testimony, Dr. Maas expressed his opinions that Mountain Air's activities along Banks Creek were "very likely to cause excessive siltation" and that the sedimentation impact of the Project would be "permanent and substantial." However, Dr. Maas also admitted that he based his opinions solely on previous experience with activities along other trout waters. He stated that the piping of Banks Creek would increase the stream's velocity and cause increased sedimentation, yet admitted that he had never prepared or reviewed any velocity calculations specific to the Project. When asked for his opinion about sedimentation pollution that might occur after completion of construction, Dr. Maas stated, "Well, I may develop an opinion about that, *if and when I visit the site*. But I don't have an opinion on that right now." (Emphasis added.) We conclude that Dr. Maas's testimony was too general and speculative to create a genuine issue of material fact as to whether the Project's sedimentation effects were sufficiently "temporary" or "minimal." We further conclude that when the Court of Appeals stated that the Project "*may* cause or contribute to sedimentation," the court engaged in fact-finding, which is not the role of the appellate courts. *Godfrey v. Zoning Bd. of Adjust.*, 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986). Particularly given our interpretation of section 113A-52(6) as a basic definition of land-disturbing activity rather than a highly literal rule that serves to ban all such activity in trout waters buffer zones, we find insufficient evidence in the record to justify further fact-finding in this case.

Lastly, we note that DLR's interpretation of the purpose and meaning of section 113A-57(1) is entitled to some judicial deference because the General Assembly made DLR responsible for administering the statute. *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citation omitted). This proposition is still legally sound despite N.C.G.S. § 150B-51(c), which provides that

> [i]n reviewing a final decision in a contested case in which an administrative law judge made a decision . . . and the agency does not adopt the administrative law judge's decision, the court shall review the official record, de novo, and . . . . shall not give deference to any prior decision made in the case.

N.C.G.S. § 150B-51(c) (2009). This Court has held that section 150B-51(c) "refers only to the agency's decision in the specific case

before the court" and that the trial court is not barred from "considering the agency's expertise and previous interpretations of the statutes it administers, as demonstrated in rules and regulations adopted by the agency or previous decisions outside of the pending case." *Rainey v. N.C. Dep't of Pub. Instruction*, 361 N.C. 679, 681, 652 S.E.2d 251, 252 (2007) (per curiam). The record here shows that DLR's interpretation that section 113A-57(1) gives DLR authority to grant variances when the impact from sedimentation will be "temporary" and "minimal" has been consistently applied.[2]

We hold that the requirements of N.C.G.S. § 113A-57(1) that any "land-disturbing activity" within a trout waters buffer zone must be "temporary" and "minimal" refer to the effects of sedimentation resulting from the activity and not to the entire scope of the activity. Mountain Air properly applied for the necessary Variance to conduct construction activity in a trout waters buffer zone, and DLR complied with the statutory requirements in granting the Variance. We also hold that there is no genuine issue of material fact whether the Project violated section 113A-57(1), and thus, respondents are entitled to summary judgment on the issues raised in the instant appeal. Accordingly, we reverse the decision of the Court of Appeals. This case is remanded to the Court of Appeals for further remand to the Superior Court, Wake County, with instructions to that court to remand this matter to the Office of Administrative Hearings for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice HUDSON dissenting.

Because I believe that the majority opinion here reaches a result that is contrary to both the letter and the spirit of the Sedimentation Pollution Control Act (Act) and its trout water buffer provisions, I must respectfully dissent.

The central question before this Court is whether, and to what extent, the changes in land along a trout stream are permitted in furtherance of the expansion of defendant Mountain Air's eighteen-hole graded golf course. Defendants argued, and the majority agrees, that land-disturbing activities including the removal of trees and

2. Francis M. Nevils, Jr. testified that in the two years before the date of his deposition, DLR issued "four or five" trout buffer variances. Mr. Nevils further testified that "[t]here was at least one that was comparable" to the Variance issued to Mountain Air.

canopy within the stream buffer and the permanent rerouting and enclosure of the stream within a pipe are not prohibited by N.C.G.S. § 113A-57(1). The majority relies on language in that section that allows the Sedimentation Control Commission to approve plans along trout waters "when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal." Referring to the preamble of the Act, the majority interprets this language as referring not to the use of the land along the stream in general, but only to sedimentation. Based thereon the majority reverses the Court of Appeals and affirms the trial court, holding that the Court of Appeals interpretation was "overly literal."

The majority asserts that the term "land-disturbing activity" applies only to sedimentation and not to the activity itself. However, the statutory language explicitly provides otherwise when it states:

> (6) "Land-disturbing activity" means *any use of the land* by any person in residential, industrial, educational, institutional or commercial development, highway and road constructions and maintenance that results in a change in the natural cover or topography and that may cause or contribute to sedimentation.

N.C.G.S. § 113A-52(6) (2009) (emphasis added). The majority simply rewrites this legislative definition, which is not the role of this Court.

I do not agree that the provisions of N.C.G.S. § 113A-57(1) apply only to the period of construction and am of the opinion that the majority in the Court of Appeals interpreted this statute exactly as the General Assembly intended. While the preamble to the statute does indicate that the overall purpose of the Act was to allow development to proceed around the state, it also notes that the General Assembly specifically intended to create a program to minimize the harmful effects of sedimentation pollution. As pointed out by plaintiffs and their amici curiae, the trout water protection provisions were advanced by legislators from the western part of the state, where such waters are located, in order to provide enhanced protection for such waters. The Administrative Law Judge who first issued an opinion in this case agreed, and noted that "prohibition of development in trout stream buffers is exactly the intent of the statute," with the narrow exception for activities that are temporary, with minimal disturbance.

The majority has turned those protections upside down by its decision today. While criticizing the Court of Appeals majority for

"effectively read[ing] the variance provisions . . . out of the Act," the majority here instead reads the *trout water protection provisions* out of the Act. My reading of the statutes and the arguments here leads me to conclude that the General Assembly did indeed intend to restrict development within the twenty-five-foot trout water buffer, while providing ample opportunity for construction of all manner of edifices nearby, even allowing for the buffer area to be disturbed during construction, as long as the disruption is temporary and minimal. Here the project will permanently destroy trees and canopy along the watercourse and will reroute and enclose in a pipe the watercourse itself. These alterations are neither temporary nor minimal. I would affirm the Court of Appeals on this issue.

STATE OF NORTH CAROLINA v. JAMES MICHAEL DAVIS

No. 320PA09

(Filed 27 August 2010)

1. Appeal and Error— preservation of issues—failure to raise constitutional issue at trial—right to appeal court's failure to follow statutory mandate

The Court of Appeals did not err by dismissing defendant's constitutional double jeopardy argument because it was not raised and passed on by the trial court and thus was not considered on appeal. However, our Supreme Court considered defendant's statutory argument, that N.C.G.S. § 20-141.4(b) did not authorize the trial court to impose punishment for felony death by vehicle and felony serious injury by vehicle because the second-degree murder and assault with a deadly weapon inflicting serious injury judgments provide greater punishment for the same conduct, notwithstanding defendant's failure to object at trial, since it is well established that when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved.

2. Motor Vehicles— driving while impaired—felony death by vehicle—felony serious injury by vehicle—second-degree murder and assault with deadly weapon inflicting serious injury provide greater punishment for same conduct

The trial court erred by sentencing defendant for felony death by vehicle and felony serious injury by vehicle when the second-degree murder and assault with a deadly weapon inflicting serious injury judgments provided greater punishment for the same conduct. In accord with the plain language of N.C.G.S. § 20-141.4(b), the General Assembly does not authorize punishment for the enumerated offenses when punishment is imposed for higher class offenses that apply to the same conduct. The felony death by vehicle and felony serious injury by vehicle judgments were vacated, and the conviction for driving while impaired was reinstated.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 678 S.E.2d 385 (2009), finding no error in part in judgments entered 11 June 2008 by Judge Richard D. Boner in Superior Court, Gaston County, and dismissing in part defendant's appeal. Heard in the Supreme Court 24 March 2010.

Roy Cooper, Attorney General, by Isaac T. Avery, III, Special Counsel, for the State.

James N. Freeman, Jr. for defendant-appellant.

TIMMONS-GOODSON, Justice.

The issue in this case is whether the trial court was authorized to sentence defendant for felony death by vehicle and felony serious injury by vehicle when second-degree murder and assault with a deadly weapon inflicting serious injury (ADWISI) judgments provided greater punishment for the same conduct. We hold that the General Assembly did not intend to punish for felony death by vehicle and felony serious injury by vehicle when a conviction for a greater offense is based on the same conduct. Accordingly, we vacate the felony death by vehicle and felony serious injury by vehicle judgments.

I. Background

During the evening of 16 June 2007, defendant drove his 1987 Ford F-350 truck northbound on Highway 321 in South Carolina

toward the North Carolina border. About three-quarters of a mile south of the state border, a South Carolina deputy sheriff was engaged in a traffic stop when he observed defendant's truck veer off the road, strike a road sign, and continue traveling northbound. A witness traveling southbound heard a loud "boom" and then saw a road sign flying through the air as defendant's truck wove from side to side.

Meanwhile, the Ray family, Warren, his wife Vicky, and their daughter Melissa, approached the intersection of Highway 321 and Robinson Clemmer Road slightly north of the border. The Ray family traveled in Melissa's 1999 Chevrolet S-10 extended cab pickup truck; Warren drove while Melissa rode in the front passenger seat and Vicky sat in the rear seat. Each member of the Ray family wore a seat belt.

While the family waited to turn left onto Highway 321 to travel southbound, Melissa saw defendant's truck veer off the road onto the grass, heading directly toward their vehicle. Defendant's F-350 truck forcefully collided with the Rays' smaller truck. The Rays' truck was "knocked [] straight up" and it flipped. Before losing consciousness, Melissa saw her mother ejected from their truck during the collision.

When Melissa regained consciousness, she found that her seat belt remained fastened, but her father, Warren, was unresponsive and lying on top of her. The truck was littered with blood and glass. Melissa was trapped in the wreckage until emergency responders cut the roof of the truck to free her.

Emergency medical personnel pronounced Warren and Vicky Ray dead at the scene of the accident. Autopsies later confirmed that they died from injuries sustained during the collision. Melissa received treatment for severe scratches and bruises at a nearby hospital. She experienced pain for about one year after the collision and required surgery to remove a hematoma that failed to heal.

At the scene of the accident, defendant denied that he had consumed any alcohol. At the hospital, however, a North Carolina state trooper administered an Alkasensor test that indicated defendant had alcohol in his system. Defendant also gave two blood samples that were subsequently tested for his blood alcohol concentration; the hospital retained one and the other was sent to the State Bureau of Investigation (SBI). The sample tested by the SBI yielded a blood alcohol concentration of 0.09 and the sample tested by the hospital registered 0.11. Based on these results, a testifying expert

opined that defendant's blood alcohol concentration was 0.13 at the time of the collision.

Accident investigators analyzed the scene. They found no skid marks or other indicia that defendant attempted to brake before the collision. One investigator estimated that defendant's F-350 was traveling between forty-six and forty-eight miles per hour at impact. After impact defendant's F-350 continued fourteen feet on the pavement and sixty-six feet on the grass before it stopped.

On 2 July 2007, defendant was indicted for two counts each of second-degree murder and felony death by vehicle for the deaths of Warren and Vicky Ray. Defendant was indicted for one count each of ADWISI and felony serious injury by vehicle for the injuries inflicted on Melissa Ray. Defendant was also indicted for one count each of reckless endangerment and driving while impaired. A jury convicted defendant on all charges in June 2008.

The trial court arrested judgment on driving while impaired, as a lesser included offense of felony death by vehicle and felony serious injury by vehicle, and entered judgment on all remaining convictions. The trial court sentenced defendant to consecutive terms of 189 to 236 months for both second-degree murder convictions, another consecutive term of 19 to 23 months for the felony serious injury by vehicle conviction, and, finally, a consecutive term of 29 to 44 months in prison for the conviction of ADWISI. Two terms of twenty-nine to forty-four months in prison were imposed for the felony death by vehicle convictions, which ran consecutively to each other but concurrently with the second-degree murder judgments. A forty-five day term was imposed for reckless driving to run concurrently with the first felony death by vehicle judgment. Defendant did not object at sentencing.

Before the Court of Appeals, however, defendant claimed that N.C.G.S. § 20-141.4(b) did not authorize his sentences for felony death by vehicle and felony serious injury by vehicle because the second-degree murder and ADWISI judgments provide greater punishment for the same conduct. Further, defendant claimed that felony death by vehicle is a lesser included offense of second-degree murder and that felony serious injury by vehicle is a lesser included offense of ADWISI. Thus, defendant also argued the trial court violated double jeopardy by failing to arrest the felony death by vehicle and felony serious injury by vehicle judgments. *See State v. Davis*, ––– N.C. App. –––, –––, 678 S.E.2d 385, 390 (2009). The Court of Appeals did not

address the merits of defendant's arguments, holding instead that defendant did not preserve his objection "to a purported double jeopardy violation" because he did not object at trial. *Id.* at ——, 678 S.E.2d at 390 (citing, *inter alia*, *State v. Madric*, 328 N.C. 223, 231, 400 S.E.2d 31, 36 (1991)).

Following the decision by the Court of Appeals, defendant filed with this Court a notice of appeal based upon a constitutional question and a petition for discretionary review. This Court dismissed defendant's notice of appeal, but allowed his petition for discretionary review to consider whether section 20-141.4 authorizes defendant's sentences for felony death by vehicle and felony serious injury by vehicle.

II. Analysis

[1] The threshold issue we must decide is whether defendant preserved his arguments for appellate review. The Court of Appeals held, and the State now argues, that defendant was required to object at sentencing to preserve his arguments for appeal. To the extent defendant relies on constitutional double jeopardy principles, we agree that his argument is not preserved because "[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004) (citation omitted), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005); *see also Madric*, 328 N.C. at 231, 400 S.E.2d at 36 (holding that the defendant waived a constitutional double jeopardy argument he failed to raise at trial). Therefore, we affirm the dismissal by the Court of Appeals as it relates to defendant's constitutional double jeopardy argument.

However, defendant also makes the distinct argument that section 20-141.4(b) did not authorize the trial court to impose punishment for felony death by vehicle and felony serious injury because the second-degree murder and ADWISI judgments provide greater punishment for the same conduct. It is well established that "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (citing *State v. Bryant*, 189 N.C. 112, 126 S.E. 107 (1925)); *see also Tirado*, 358 N.C. at 571, 599 S.E.2d at 529 (finding waiver of the constitutional argument that the defendant was denied a fair and impartial jury, but addressing the interrelated contention that the trial court violated its

statutory duty to ensure a randomly selected jury). Accordingly, the Court of Appeals erred by failing to review defendant's argument that the trial court lacked statutory authority to sentence him for felony death by vehicle and felony serious injury by vehicle. We review that argument now.

[2] Defendant's argument presents a question of statutory interpretation. "The intent of the Legislature controls the interpretation of a statute." *State v. Joyner*, 329 N.C. 211, 217, 404 S.E.2d 653, 657 (1991) (citation and quotation marks omitted). When a statute is unambiguous, this Court "will give effect to the plain meaning of the words without resorting to judicial construction." *State v. Byrd*, 363 N.C. 214, 219, 675 S.E.2d 323, 325 (2009) (citations omitted). " '[C]ourts must give [an unambiguous] statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.' " *State v. Green*, 348 N.C. 588, 596, 502 S.E.2d 819, 824 (1998) (citations omitted), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999).

Chapter 20 of our General Statutes regulates motor vehicles and includes criminal statutes that target impaired driving. In 2006, the General Assembly expanded the scope of section 20-141.4, adding, among other offenses, felony serious injury by vehicle. Motor Vehicle Driver Protection Act of 2006, ch. 253, sec. 14, 2006 N.C. Sess. Laws 1178, 1187-88. In the 2006 amendment, the General Assembly also added a prefatory clause to subsection (b), which we find dispositive here. Thus, the current version of section 20-141.4 clearly and unambiguously provides, "*Unless the conduct is covered under some other provision of law providing greater punishment*, the following classifications apply to the offenses set forth in this section: . . . (2) Felony death by vehicle is a Class E felony. . . . (4) Felony serious injury by vehicle is a Class F felony." N.C.G.S. § 20-141.4(b) (2009) (emphasis added).

Defendant argues the prefatory clause in subsection (b) limits a trial court's authority to impose punishment for the enumerated offenses when punishment is imposed for higher class offenses that apply to the same conduct. The State counters that the prefatory clause merely forecloses the argument that punishment for a higher class offense—such as second-degree murder in this case—is limited to the "Class E" designation given felony death by vehicle. *See* N.C.G.S. § 14-17 (2009) (classifying second-degree murder as a class B2 felony). Defendant's interpretation comports with the plain language of the statute.

Section 20-141.4(b), entitled "Punishments," classifies the enumerated offenses "[u]nless the conduct is covered by some other provision of law providing greater punishment." Thus, according to the plain language of the statute, the classifications and corresponding ranges of punishment authorized in subsection (b) apply only when the conduct is not punished by a higher class offense. In turn, when a trial court imposes punishment for a greater offense covering the same conduct, it is not authorized to impose punishment for the offenses enumerated in subsection (b). The General Assembly enacted an alternative in subsection (b), whereby a defendant may be sentenced for the enumerated offenses in the absence of applicable greater offenses, but not for both.

Generally, the offenses in section 20-141.4 criminalize two types of conduct: 1) causing a death by driving while impaired or violating other road rules; or 2) causing serious injury by driving while impaired. *See id.* § 20-141.4(a1)-(a6) (2009). Thus, the offenses in that statute are aimed at preventing homicides and injurious assaults caused by impaired or otherwise unlawful operation of motor vehicles. As the State emphasizes in its brief, it has long been the law in North Carolina that common law homicide and assault offenses apply to deaths and injuries caused by impaired driving. *See*, *e.g.*, *State v. Jones*, 353 N.C. 159, 164-65, 538 S.E.2d 917, 922-23 (2000) (affirming convictions of ADWISI in impaired driving case); *State v. Rich*, 351 N.C. 386, 393-94, 527 S.E.2d 299, 303 (2000) (affirming second-degree murder convictions for impaired driving incident); *State v. Snyder*, 311 N.C. 391, 394, 317 S.E.2d 394, 396 (1984) (holding that reckless conduct during the course of drunk driving can fulfill the malice element necessary to sustain a conviction of second-degree murder); *State v. Trott*, 190 N.C. 674, 679-80, 130 S.E. 627, 629-30 (1925) (finding no error in conviction of second-degree murder in connection with impaired driving incident); *see also State v. Sudderth*, 184 N.C. 753, 755, 114 S.E. 828, 829 (1922) (citing cases for the proposition that violating a statute designed for the safety of persons on the road may subject the driver to prosecution "for murder or manslaughter if death ensues, and for assault in cases of personal injury"). Because common law homicide and assault offenses have long applied to deaths and injuries caused by impaired driving, the State contends that the General Assembly manifested an intent to allow cumulative punishment by also creating the offenses in section 20-141.4.

To the contrary, the General Assembly expressly provided in subsection (b) that the enumerated offenses apply "[u]nless the conduct is covered under some other provision of law providing greater punishment." This language indicates the General Assembly was aware when it enacted the current version of section 20-141.4 that other, higher class offenses might apply to the same conduct. In such situations, as in this case, the General Assembly intended an alternative: that punishment is *either* imposed for the more heavily punishable offense *or* for the section 20-141.4 offense, but not both.

The State further argues that if the General Assembly intended section 20-141.4(b) to preclude multiple punishments, it would have drafted that restriction into subsection (c). Subsection (c) provides:

> No person who has been placed in jeopardy upon a charge of death by vehicle may be prosecuted for the offense of manslaughter arising out of the same death; and no person who has been placed in jeopardy upon a charge of manslaughter may be prosecuted for death by vehicle arising out of the same death.

N.C.G.S. § 20-141.4(c) (2009). The State's reliance on subsection (c) is misplaced. Subsection (c) has no application here because defendant was not charged with or convicted of manslaughter. Moreover, we have recently rejected the notion that the legislature intends the opposite of language it refuses to incorporate into a statute. *See N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 202, 675 S.E.2d 641, 650 (2009) ("That a legislature declined to enact a statute with specific language does not indicate the legislature intended the exact opposite."); *see also Styers v. Phillips*, 277 N.C. 460, 472-73, 178 S.E.2d 583, 590-91 (1971). Rather, the General Assembly made its intent clear in subsection (b).

Although this Court has not previously interpreted the language in the prefatory clause of section 20-141.4(b), we note that the Court of Appeals has made the same interpretation of identical language in various criminal statutes. In *State v. Ezell*, for example, the defendant was tried and convicted of ADWISI and assault inflicting serious bodily injury based on the same conduct. 159 N.C. App. 103, 105, 582 S.E.2d 679, 681 (2003). The trial court imposed consecutive sentences for the convictions, and the defendant advanced a double jeopardy argument on appeal. *Id.* at 105, 582 S.E.2d at 681-82. Ultimately, however, the Court of Appeals' analysis turned on the statutory provision that assault inflicting serious bodily injury applied " '[*u*]*nless* the conduct is covered under some other provision of law providing greater

punishment.' " *Id.* at 109, 582 S.E.2d at 684 (quoting N.C.G.S. § 14-32.4 (brackets and emphasis added by court)). ADWISI was a Class E felony, thereby providing greater punishment for the same conduct than assault inflicting serious bodily injury, a Class F felony. *Id.* at 111, 582 S.E.2d at 685. Thus, the trial court could not sentence the defendant for both offenses. *Id.* The Court of Appeals interpreted "unless the conduct is covered under some other provision of law providing greater punishment" the same way in at least two cases after *Ezell*. *State v. McCoy*, 174 N.C. App. 105, 116, 620 S.E.2d 863, 871-72 (2005) (holding that the defendant could not be sentenced for misdemeanor assault inflicting serious injury and ADWISI, a Class E felony, for the same conduct), *disc. rev. denied*, 628 S.E.2d 8 (2006); *cf. State v. Hines*, 166 N.C. App. 202, 208-09, 600 S.E.2d 891, 896-97 (2004) (holding that separate sentences for aggravated assault on a handicapped person and the greater felony of robbery with a dangerous weapon were permissible as punishing distinct conduct—an assault and a robbery).

In this case, defendant points out that second-degree murder is a Class B2 felony, *see* N.C.G.S. § 14-17, and ADWISI is a Class E felony, *id.* § 14-32(b) (2009). Section 20-141.4(b) specifies that felony death by vehicle is a Class E felony and felony serious injury by vehicle is a Class F felony "[u]nless the conduct is covered under some other provision of law providing greater punishment." The judgments for second-degree murder and felony death by vehicle punish the same conduct, as do the felony serious injury by vehicle and ADWISI judgments. Because second-degree murder and ADWISI provide greater punishment for the same conduct, section 20-141.4(b) does not authorize the trial court to impose sentences for felony death by vehicle and felony serious injury by vehicle.

In accord with the plain language of section 20-141.4(b), we hold that the General Assembly did not authorize punishment for the enumerated offenses when punishment is imposed for higher class offenses that apply to the same conduct. Thus, the trial court in this case was not authorized to sentence defendant for felony death by vehicle and felony serious injury by vehicle.

III. Conclusion

Defendant's sentences for second-degree murder and ADWISI punish the same conduct as his sentences for felony death by vehicle and felony serious injury by vehicle. According to the plain language of section 20-141.4(b), the trial court was not authorized to impose

punishment for felony death by vehicle and felony serious injury by vehicle because second-degree murder and ADWISI impose greater punishment for the same conduct. Therefore, the felony death by vehicle and felony serious injury by vehicle judgments are vacated and the conviction for driving while impaired is reinstated. This case is remanded to the Court of Appeals for further remand to Superior Court, Gaston County, for resentencing consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

CHARLES A. STANFORD; DONALD M. STANFORD, JR.; JAMES C. STANFORD; RANDOLPH L. STANFORD; CANDACE STANFORD ROBERTS; LESLEY STANFORD; AND ROBIN STANFORD MULKEY, PLAINTIFFS v. OLIVER JOHNSON PARIS, PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES WHITSON STANFORD, JR. (90-E-255, ORANGE COUNTY); OLIVER JOHNSON PARIS, INDIVIDUALLY; AND JEAN S. MANN, AND SPOUSE, EDWARD N. MANN, JR., LEVEL I DEFENDANTS, AND STANFORD PLACE LIMITED PARTNERSHIP, A NORTH CAROLINA LIMITED PARTNERSHIP (OLIVER JOHNSON PARIS, GENERAL PARTNER); OLIVER JOHNSON PARIS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JANE S. PARIS (00-E-1010, MECKLENBURG COUNTY); JANE S. PARIS FAMILY TRUST (OLIVER JOHNSON PARIS, TRUSTEE); EDWARD N. MANN, III, AND SPOUSE, LINDSAY W. MANN; ORANGE WATER AND SEWER AUTHORITY; MARGARET M. PLESS; JENNIFER MANN HAWLEY, AND SPOUSE, LEON L. HAWLEY, JR.; AND CHARLES S. MANN, AND SPOUSE, LORI A. MANN, LEVEL II DEFENDANTS

No. 208PA09

(Filed 27 August 2010)

Appeal and Error— interlocutory order—title to land—construction of will—failure to appeal—appeal not waived

Plaintiffs did not forfeit their right to appeal by not taking an immediate appeal from an interlocutory order in an action involving the construction of a will and real estate. Although it was argued that an interlocutory order affecting title to land must be immediately appealed, the precedents involved condemnation cases or can be distinguished on procedural grounds.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review orders entered by the Court of Appeals on 12 March 2009 dismissing plaintiffs' appeal from an order allowing motions to dismiss entered on 16 February 2007 by Judge Carl R. Fox in Superior Court, Orange County. Heard in the Supreme Court 18 November 2009.

Donald M. Stanford, Jr., pro se, and for plaintiff-appellants.

Horack Talley Pharr & Lowndes, PA, by Zipporah Basile Edwards and Robert B. McNeill, for defendant-appellees Oliver Johnson Paris, Personal Representative of the Estate of Charles Whitson Stanford, Jr.; Oliver Johnson Paris, Individually; Stanford Place Limited Partnership, a North Carolina limited partnership (Oliver Johnson Paris, General Partner); Oliver Johnson Paris, Personal Representative of the Estate of Jane S. Paris; and Jane S. Paris Family Trust (Oliver Johnson Paris, Trustee).

Epting & Hackney, by Robert Epting and Ellen B. Scouten, for defendant-appellee Orange Water and Sewer Authority.

Boxley, Bolton, Garber & Haywood, LLP, by Kenneth C. Haywood; and Horack Talley Pharr & Lowndes, P.A., by Robert B. McNeill and Zipporah Basile Edwards, for defendant-appellee Margaret M. Pless.

Hartzell & Whiteman, L.L.P., by J. Jerome Hartzell, for North Carolina Advocates for Justice, amicus curiae.

PARKER, Chief Justice.

Plaintiffs instituted this action on 13 October 2006 seeking a declaratory judgment as to the construction of Charles Whitson Stanford, Jr.'s (decedent) holographic will that, after certain specific bequests, left "[a]ll stocks, bonds, and real estate, saving account and E Bonds wheresoever situate [including] . . . all stock in Redfields, Inc. left to me by my father, Charles W. Stanford, Sr." to his sisters Jean Stanford Mann and Jane Stanford Paris. The will did not contain a residuary clause. Decedent died 19 May 1990, having never married and leaving no children. Plaintiffs are some of decedent's nieces and nephews who claim that certain of decedent's property adeemed by extinction and should have passed by intestate succession. In addition to Oliver Johnson Paris, individually and as personal representative of decedent's estate, Jean S. Mann and her spouse, Edward N. Mann, Jr., are Level I defendants. The Level II defendants are individuals or entities that purchased or received property which is the subject of this dispute.

The issue before this Court on writ of certiorari is a procedural one. Therefore, this opinion will not discuss the factual basis of the underlying claims. At various times after the complaint and amend-

ment thereto were filed, all defendants filed a motion or motions to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. On 16 February 2007, the trial court entered an order dismissing all defendants except Oliver Johnson Paris, individually and as personal representative of decedent's estate; however, the order did dismiss claims against Oliver Johnson Paris, individually and as personal representative of decedent's estate, related to title to real property owned by Paris. The claims against Paris that were unrelated to his ownership of real property were not dismissed.

By order entered 20 February 2007, the trial court also allowed a separate motion by defendant Orange Water and Sewer Authority (OWASA) to dismiss it from the action. On 20 August 2007, plaintiffs filed a motion for summary judgment. By order entered 15 November 2007, the trial court granted summary judgment in part in favor of defendant Paris and in part in favor of plaintiffs. The trial court determined that the real estate and stock in Redfields, Inc. devised under decedent's will did not adeem, but that certain personal property was not included in decedent's will and should have been distributed under the intestate succession laws. The trial court further ruled that it could not determine whether defendant incurred liability for distribution of the items of personal property until it considered and ruled upon plaintiffs' claims for breach of fiduciary duty and defendant's defenses, including the defense of the statute of limitations.

On 3 March 2008, plaintiffs filed a motion for relief from judgment or order pursuant to Rule 60 of the Rules of Civil Procedure seeking relief from the 15 November 2007 summary judgment order on the grounds that the order omitted an NCNB checking account belonging to decedent and that the intestate estate had been improperly depleted in satisfaction of decedent's specific bequests. By order entered 19 March 2008, the trial court denied plaintiffs' Rule 60 motion.

Thereafter, in a partial judgment by consent entered by the trial court on 18 July 2008, plaintiffs and defendant Paris, individually and in his capacity as personal representative of decedent's estate, agreed that the only remaining issues before the court were Paris's liability, if any, for distribution of decedent's 1984 Buick LeSabre and $2,457.19 the estate received from the State of North Carolina Unclaimed Property Program and that plaintiffs agreed to settle these claims only in exchange for payment of a sum certain from Paris. This consent judgment further provided: "Pursuant to Rule 54 of the Rules of Civil Procedure, entry of this judgment resolves all remaining is-

sues before the Court with respect to this action and thus constitutes the final judgment in this matter."

On 15 August 2008, plaintiffs filed their notice of appeal to the Court of Appeals from the final judgment entered on 18 July 2008 and from all the previously entered interlocutory orders. The record on appeal was filed with the Court of Appeals on 5 January 2009.

After plaintiffs gave notice of appeal and served the proposed record on appeal, defendant OWASA filed a motion to dismiss plaintiffs' appeal on the grounds that the appeal was not filed within thirty days from the trial court's 20 February 2007 order allowing OWASA's motion to dismiss under Rule 12(b)(6) as required by Rule 3 of the Rules of Appellate Procedure. The trial court heard OWASA's motion to dismiss the appeal on 15 December 2008, and, in an order entered 17 December 2008, concluded that "[s]ince this Court's order allowing Defendant OWASA's Motion to Dismiss under Rule 12(b)(6) adversely determined issues vital to Plaintiffs' claims of title to real property, and therefore affected their substantial rights, Plaintiffs were required to appeal within thirty days." The trial court further concluded that plaintiffs failed to file notice of appeal within thirty days of the [20] February 2007 order as required by Rule 3 of the Rules of Appellate Procedure and that their appeal should be dismissed. The trial court thus allowed OWASA's motion to dismiss plaintiffs' appeal as to that defendant.

At the 15 December 2008 hearing on OWASA's motion, counsel for defendant Margaret Pless and counsel for the Level I and Level II Paris defendants made oral motions to dismiss plaintiffs' appeal of the trial court's 16 February 2007 order granting defendant Pless's and the Paris defendants' Rule 12(b)(6) motions on the grounds that these defendants are similarly situated to OWASA and are entitled to the same relief. By order entered 5 January 2009, the trial court concluded that these motions had merit and ordered that "Pless and the Paris Defendants' Motions to Dismiss Appeal of the 12(b)(6) Order entered on February 15, 2007[1] is ALLOWED, and Plaintiffs' appeal herein is dismissed for failure to comply with Rule 3 of the Rules of Appellate Procedure."

This order of the trial court was filed on 5 January 2009 at 11:32 a.m., the Orange County trial court coordinator having earlier that morning notified all counsel that the trial court had signed the order dismissing plaintiffs' appeal on 2 January 2009. Plaintiffs filed the

1. The order entered on 16 February 2007 was signed on 15 February 2007.

record on appeal with the Court of Appeals on 5 January 2009 at 2:39 p.m. and at the same time filed a petition for writ of certiorari to the Court of Appeals to review the trial court's 17 December 2008 order dismissing plaintiffs' appeal of the 20 February 2007 order allowing OWASA's motion to dismiss pursuant to Rule 12(b)(6). This petition for writ of certiorari was referred by the Court of Appeals to the panel assigned the case.

On 17 February 2009, plaintiffs filed their brief in the Court of Appeals arguing the issues related to the 16 February 2007, 20 February 2007, 15 November 2007, 19 March 2008, and 18 July 2008 orders without any mention of the 5 January 2009 order dismissing plaintiffs' appeal. Plaintiffs did not file a petition for writ of certiorari as to the trial court's 5 January 2009 order dismissing plaintiffs' appeal from the 16 February 2007 order. On 24 February 2009, defendant Margaret Pless filed a motion for appropriate relief seeking "dismissal of the appeal as to any claims against [her]" and relief from the requirement to file any brief or other papers before the Court of Appeals in response to the brief filed by plaintiffs. On 12 March 2009, the Court of Appeals entered an order treating defendant Pless's motion for appropriate relief as a motion to dismiss appeal and allowing the motion. On 25 February 2009, the Paris defendants also filed a motion for appropriate relief seeking relief "from any requirement to respond to . . . those portions of [plaintiffs'] brief seeking review of the trial court's February 16, 2007 Order Allowing Motions to Dismiss Complaint." By order also entered 12 March 2009, the Court of Appeals treated this motion for appropriate relief as a motion to dismiss appeal and allowed the motion only as to defendants Oliver Johnson Paris, individually and as personal representative of the estate of Charles Whitson Stanford, Jr.; Stanford Place Limited Partnership; Oliver Johnson Paris as personal representative of the estate of Jane S. Paris; and Oliver Johnson Paris, trustee of the Jane S. Paris Family Trust.

Plaintiffs filed a motion for extension of time to file a petition for writ of certiorari in the Court of Appeals as to defendant Margaret Pless and the Paris defendants. This third motion was also denied on 12 March 2009. Plaintiffs' 6 April 2009 motion to reconsider the three 12 March 2009 orders was denied on 21 April 2009.

On 19 May 2009, plaintiffs filed a petition for writ of certiorari in this Court seeking review of the orders of the Court of Appeals dated 12 March 2009 and 21 April 2009. On 27 August 2009, this Court

allowed the petition for writ of certiorari as to the following issue: "Did plaintiffs waive their right to appeal the trial court's 16 February 2007 order allowing [defendants'] motion to dismiss by waiting to appeal until after entry of the trial court's final judgment?"

As plaintiffs note, the trial court did not certify that the 16 February 2007 order was a final judgment and that there was no just reason for delay under Rule 54(b) of the Rules of Civil Procedure, which would have made the order subject to immediate appellate review. The order did not resolve all claims or all rights and liabilities of all parties and was, thus, not a final order. *See* N.C.G.S. § 1A-1, Rule 54(b) (2009). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citing *Johnson v. Roberson*, 171 N.C. 194, 88 S.E. 231 (1916)). Two avenues are available to a party to obtain review of an interlocutory order. One is certification under Rule 54(b). The other is pursuant to N.C.G.S. § 1-277 if the interlocutory order "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment." *Id.* (citations omitted).

The appeals process "is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment." *City of Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951). Accordingly, interlocutory appeals are discouraged except in limited circumstances. *See* N.C.G.S. § 1-277 (2009), *id.* § 7A-27 (2009). N.C.G.S. § 1-277 provides:

> (a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, . . . which affects a substantial right claimed in any action or proceeding; or which in effect determines the action and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

As this Court said in *Department of Transportation v. Rowe*, "[t]he language of N.C.G.S. § 1-277 is permissive not mandatory. Thus, where a party is entitled to an interlocutory appeal based on a substantial right, that party may appeal but is not required to do so." 351 N.C. 172, 176, 521 S.E.2d 707, 710 (1999).

Defendants, relying on *Watson v. Millers Creek Lumber Co.*, 178 N.C. App. 552, 631 S.E.2d 839 (2006), which quoted *North Carolina Department of Transportation v. Stagecoach Village*, 360 N.C. 46, 619 S.E.2d 495 (2005), argue that an interlocutory order such as the 16 February 2007 order in this case affecting title to land must be immediately appealed even though it is not a final order. This reliance is misplaced. First, the procedural posture of *Watson* is distinguishable from the present case. In *Watson* the Court of Appeals allowed the interlocutory appeal, determining that since the order affected title to land, a substantial right was adversely affected. 178 N.C. App. at 554-55, 631 S.E.2d at 840-41. By contrast, in this case plaintiffs' appeal has been dismissed. Second, *Stagecoach Village* was a condemnation case. This Court has said that in condemnation cases, after a hearing pursuant to N.C.G.S. § 136-108, appeal of an issue affecting title to land or area taken by the State is mandatory and the interlocutory appeal must be taken immediately. *See Stagecoach Vill.*, 360 N.C. at 48, 619 S.E.2d at 496; *Rowe*, 351 N.C. at 176, 521 S.E.2d at 710; *N.C. State Highway Comm'n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967), *modified*, *Rowe*, 351 N.C. at 176-77, 521 S.E.2d at 710. The holding that appeal of an interlocutory order affecting title to land and area taken is mandatory is in the context of condemnation cases. Disregarding the words "in condemnation cases" misconstrues the holdings in *Stagecoach Village*, *Rowe*, and *Nuckles* that such interlocutory appeals are mandatory.

In this case plaintiffs gave timely notice of appeal after entry of the final consent judgment on 18 July 2008. Based on the foregoing, we hold that plaintiffs did not forfeit their right to appeal by not taking an immediate appeal of the interlocutory 16 February 2007 order. The orders of the Court of Appeals entered 12 March 2009 and the orders of the trial court entered 17 December 2008 and 5 January 2009 dismissing plaintiffs' appeal are vacated and this case is remanded to the Court of Appeals for consideration of plaintiffs' appeal on the merits.

VACATED AND REMANDED.

STATE OF NORTH CAROLINA v. ANDREW CHANDLER, JR. A/K/A JUNIOR CHANDLER

No. 298PA09

(Filed 27 August 2010)

Evidence— expert testimony—child sexual abuse

The trial court erred by granting defendant's motion for appropriate relief under N.C.G.S. § 15A-1415(b)(7) based on an alleged significant change in the law pertaining to the admissibility of expert opinion evidence in child sexual abuse cases since the time of defendant's trial and appeal because: (1) there has been no significant change in the law regarding admissibility of expert testimony in child sexual abuse cases, and the rule has remained constant that before expert testimony may be admitted, an adequate foundation must be laid; (2) for expert testimony presenting a definitive diagnosis of sexual abuse, an adequate foundation requires supporting physical evidence of the abuse; and (3) our Supreme Court did not need to consider retroactive application of such a change since it concluded there has been no significant change in the law.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review a judgment on motion for appropriate relief entered on 31 March 2008 by Judge C. Philip Ginn in Superior Court, Buncombe County, or, in the alternative, to remand the matter to the Court of Appeals for review of the issues presented. Heard in the Supreme Court 23 March 2010.

Roy Cooper, Attorney General, by Anne M. Middleton, Assistant Attorney General, for the State-appellant.

Mark Montgomery for defendant-appellee.

TIMMONS-GOODSON, Justice.

In this appeal we determine there has been no "significant change" in the law regarding admissibility of expert testimony in child sexual abuse cases since the time of defendant's trial and appeal. Thus, we hold that defendant is not entitled to the relief he sought pursuant to the retroactivity rule set forth in N.C.G.S. § 15A-1415(b)(7). We therefore reverse the judgment of the trial court.

Background

Defendant was convicted in 1987 of five counts of first-degree sexual offense, six counts of taking indecent liberties with a child, and one count of crime against nature in a sexual abuse case involving seven preschool children. *State v. Chandler*, 324 N.C. 172, 174-75, 178, 376 S.E.2d 728, 730-31, 732 (1989). This Court found no error in defendant's convictions. *Id.* at 190, 376 S.E.2d at 739. On 30 March 2007, defendant filed a motion for appropriate relief under N.C.G.S. § 15A-1415(b)(7) in Superior Court, Madison County,[1] contending there had been a significant change in the law pertaining to the admissibility of expert opinion evidence in child sexual abuse cases since the time of his trial and appeal. Defendant argued the law previously allowed an expert to testify that a child was in fact sexually abused absent physical evidence of abuse, but that, since the time of his trial and appeal, such evidence had become inadmissible. Defendant further contended this change in the law was required to be retroactively applied to his case and that the admission of erroneously admitted expert opinion evidence had prejudiced his case.

The trial court agreed with defendant in part. The trial court found that "[a]t the time of the defendant's trial and appeal, testimony by a qualified medical expert that a child has been abused was admissible without physical evidence of abuse being determined" but that "[s]ubsequent to the defendant's trial and appeal, the appellate courts have reconsidered this issue." The trial court believed the cases of *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002) (per curiam), *State v. Ewell*, 168 N.C. App. 98, 606 S.E.2d 914, *disc. rev. denied*, 359 N.C. 412, 612 S.E.2d 326 (2005), and *State v. Couser*, 163 N.C. App. 727, 594 S.E.2d 420 (2004), significantly changed the law such that "expert testimony that a child has been abused is [now] inadmissible at least where there is no physical evidence of abuse."

The trial court then examined the expert testimony presented at defendant's trial and the physical evidence supporting the expert testimony. Because there was significant physical evidence of sexual abuse as to most of the victims, the trial court determined the expert testimony regarding those children had been properly admitted. However, with regard to one of the victims, "Brandon,"[2] the trial

1. Although properly initiated in Madison County, where defendant was originally indicted, the motion for appropriate relief was transferred to Buncombe County, where judgment was originally entered in defendant's case.

2. We use this pseudonym to protect the identity of the child victim.

court found there was "no physical evidence of abuse which could have been used to assist in the formulation of the opinions of the state's expert witnesses" and there was "a reasonable likelihood that, without the testimony of the state's expert witnesses in regard to the victim, [Brandon], that he had been sexually abused, the jury would have had a reasonable doubt as to the truthfulness of the trial testimony of this victim."

The trial court concluded that "[s]ince the trial and conviction of the defendant there has been a significant change in the law favorable to the defendant in that the appellate courts of North Carolina have held that opinion evidence from an expert as to the existence of abuse is not now admissible without significant physical evidence of abuse." The trial court determined defendant was therefore entitled to a new trial with regard to the convictions involving the victim Brandon, and it set aside those convictions accordingly.[3] The trial court denied defendant's motion for appropriate relief as to the convictions related to the other victims, but it determined that, because two of those first-degree sexual offense convictions were consolidated with defendant's conviction for sentencing purposes, defendant was entitled to a new sentencing hearing "to correct the record and to determine, in the Court's discretion, the relationship of the sentence originally imposed in the matters of [the two first-degree sexual offense convictions involving other victims] to the other original sentences imposed by the trial court." On 30 June 2008, the State filed a petition for writ of certiorari at the Court of Appeals seeking review of the trial court's order. The Court of Appeals first allowed, then later dismissed the State's petition. This Court allowed the State's petition for writ of certiorari on 10 December 2009.

Analysis

The State asserts the trial court erred in granting defendant's motion for appropriate relief pursuant to N.C.G.S. § 15A-1415(b)(7). Section 15A-1415(b)(7) permits the trial court to grant a motion for appropriate relief when "[t]here has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required." N.C.G.S. § 15A-1415(b)(7)

3. Two convictions and judgments involve Brandon. Defendant's first conviction involving Brandon, first-degree sexual offense, was consolidated with two identical convictions related to other children for purposes of sentencing defendant to one of his life terms. The other conviction was for indecent liberties with Brandon, for which defendant received a consecutive three-year term.

(2009). Thus, the issue this Court must decide is whether there has been a significant change in the law in favor of defendant requiring retroactive application.

To determine whether there has been a "significant change" in the law pertaining to admissibility of expert opinion testimony in child sexual abuse cases, we must first examine the law in effect at the time of defendant's trial and appeal in 1987 and 1988. Rule 702 of the North Carolina Rules of Evidence governs the admissibility of expert testimony and provides, in pertinent part, that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C.G.S. § 8C-1, Rule 702 (2009). "Thus, in order for one qualified as an expert to present an opinion based upon his specialized knowledge, his opinion must assist the trier of fact." *State v. Trent*, 320 N.C. 610, 614, 359 S.E.2d 463, 465 (1987) (citing *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978)).

In *Trent* the defendant was convicted of first-degree rape and taking indecent liberties with a minor. *Id.* at 611-12, 359 S.E.2d at 464. The victim told the examining pediatrician that defendant had sexual intercourse with her. *Id.* at 613, 359 S.E.2d at 465. At trial the pediatrician testified over the defendant's objections that the victim had been sexually abused. *Id.* The pediatrician stated he based his diagnosis upon the history given to him by the victim, as well as a pelvic examination, which revealed that the victim's hymen was not intact. *Id.* However, the pelvic examination, which was conducted four years after the alleged abuse occurred, found "no lesions, tears, abrasions, bleeding or otherwise abnormal conditions." *Id.* The pediatrician acknowledged that the condition of the hymen would justify a conclusion that the victim had been sexually active but would not by itself support a diagnosis of abuse. *Id.* at 614, 359 S.E.2d at 465-66.

Upon review, the Court in *Trent* held the trial court erred in admitting the pediatrician's testimony. *Id.* at 614-15, 359 S.E.2d at 465-66. We explained that when

> determining whether expert medical opinion is to be admitted into evidence the inquiry should be . . . whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in

> a better position to have an opinion on the subject than is the trier of fact.

Id. at 614, 359 S.E.2d at 465 (quoting *Wilkerson*, 295 N.C. at 568-69, 247 S.E.2d at 911 (alteration in original)). Because the pediatrician's diagnosis was based on inconclusive physical evidence, there was "nothing in the record to support a conclusion that he was in a better position than the jury to determine whether the victim was sexually abused." *Id.* at 614, 359 S.E.2d at 466. The State therefore failed to establish "a sufficient foundation to show that the opinion expressed by [the pediatrician] was really based upon his special expertise, or stated differently, that he was in a better position than the jury to have an opinion on the subject." *Id.* Because admission of the expert testimony had prejudiced the defendant, we granted him a new trial. 320 N.C. at 615, 359 S.E.2d at 466.

Thus, under the law established in *Wilkerson*, later set forth by Rule 702 of the North Carolina Rules of Evidence, and subsequently interpreted by this Court in *Trent*, expert opinion evidence must be based upon the expert's specialized knowledge in order to assist the trier of fact. *Trent* specifically addressed the requirement that physical evidence support a definitive diagnosis of sexual abuse. Rule 702 and *Trent* were established law at the time of defendant's direct appeal to this Court. *Cf. State v. Aguallo*, 318 N.C. 590, 597-600, 350 S.E.2d 76, 81-82 (1986) (holding that an expert's testimony that the child victim in a sexual abuse case was "believable" was inadmissible credibility evidence under Rules 608 and 405 and was prejudicial error); *State v. Keen*, 309 N.C. 158, 162-64, 305 S.E.2d 535, 537-38 (1983) (decided before effective date of Rule 702 and citing, *inter alia*, *Wilkerson*, in holding that the trial court erred in allowing an expert to improperly opine that the victim had in fact been sexually attacked, as opposed to properly testifying that the victim exhibited symptoms consistent with a sexual attack). Indeed, in his direct appeal to this Court, defendant assigned as error the lack of proper foundation for the expert testimony in question here, which demonstrates his awareness of the potential merit of the issue. Defendant chose not to pursue that argument in his brief to this Court, however, and we therefore did not address whether the State laid a proper foundation for admission of the expert testimony.[4]

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4. We note that defendant amended his motion for appropriate relief to include a claim for ineffective assistance of counsel based on his original appellate counsel's failure to pursue this argument on direct appeal. The trial court did not rule on this claim, however, and it is therefore not presently before us on appeal.

Defendant nevertheless argues, and the trial court agreed, that the law began to "change dramatically" in 2000 with decisions such as *State v. Bates*, 140 N.C. App. 743, 538 S.E.2d 597 (2000), *disc. rev. denied*, 353 N.C. 383, 547 S.E.2d 20 (2001), and *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002) (per curiam). In *Bates* the Court of Appeals determined that the expert's diagnosis of sexual abuse and resulting testimony lacked a proper foundation when a physical examination of the victim showed no signs of abuse. 140 N.C. App. at 747-48, 538 S.E.2d at 600-01. And in *Stancil* this Court said:

> In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility. *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987); *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179, *aff'd per curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001). However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.

355 N.C. at 266-67, 559 S.E.2d at 789 (citations omitted).

While defendant contends that *Stancil* reflects a substantial shift in legal analysis, that opinion did not modify or overrule any previous decisions. *Cf. State v. Hinnant*, 351 N.C. 277, 287, 523 S.E.2d 663, 669 (2000) (expressly overruling previous inconsistent decisions but limiting retroactive application of the holding to "trials commencing on or after the certification date of [the] opinion or to cases on direct appeal"). *Stancil* instead relied directly on *Trent*, as did *Bates*. *See Stancil*, 355 N.C. at 266-67, 559 S.E.2d at 789; *Bates*, 140 N.C. App. at 748, 538 S.E.2d at 601. Similarly, the decisions in *Ewell* and *Couser*, which the trial court found contributed to this purported "significant change" in the law, also cited *Trent* in support of the proposition that physical evidence must support a definitive diagnosis of sexual abuse. *See Ewell*, 168 N.C. App. at 103, 606 S.E.2d at 918; *Couser*, 163 N.C. App. at 730, 594 S.E.2d at 422-23. Thus, rather than effecting a "significant change" in the law, *Stancil*, *Bates*, *Couser* and *Ewell* simply applied the existing law on expert opinion evidence as stated in *Trent*.

Whether sufficient evidence supports expert testimony pertaining to sexual abuse is a highly fact-specific inquiry. *See State v.*

Hammett, 361 N.C. 92, 95-97, 637 S.E.2d 518, 521-22 (2006). Different fact patterns may yield different results. We agree with the State that "reasonable jurists continue to disagree over how or whether the rule discussed in *Trent* applies to different situations." However, the rule has remained constant. Before expert testimony may be admitted, an adequate foundation must be laid. *Trent*, 320 N.C. at 614, 359 S.E.2d at 465-66. And for expert testimony presenting a definitive diagnosis of sexual abuse, an adequate foundation requires supporting physical evidence of the abuse. *Id.*; *Stancil*, 355 N.C. at 266-67, 559 S.E.2d at 789. We therefore conclude there has been no significant change in the law as enumerated in and required by N.C.G.S. § 15A-1415(b)(7). Because we conclude there has been no significant change in the law, we need not consider whether retroactive application of such a change, if it existed, would be required.

Conclusion

We hold there has been no "significant change" in the law pertaining to the admissibility of expert opinions in child sexual abuse cases so as to entitle defendant to relief under N.C.G.S. § 15A-1415(b)(7). Contrary to the trial court's findings and conclusions, the decision in *Stancil* was not a significant change in the law, but merely an application of this Court's existing case law on expert opinion evidence. Accordingly, the trial court erred in allowing defendant's motion for appropriate relief. Therefore, the judgment of the trial court is reversed and defendant's convictions and sentences at issue are reinstated.

REVERSED.

FAYE B. BROWN, PETITIONER v. THE NORTH CAROLINA DEPARTMENT OF CORRECTION; ALVIN KELLER, IN HIS CAPACITY AS SECRETARY OF THE DEPARTMENT OF CORRECTION; AND KENNETH ROYSTER, IN HIS CAPACITY AS SUPERINTENDENT OF RALEIGH CORRECTIONAL CENTER FOR WOMEN, RESPONDENTS

No. 517PA09

(Filed 27 August 2010)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an opinion and order entered 14 December 2009 by Judge Ripley E. Rand in Superior Court, Wake County, allowing petitioner's application for

writ of habeas corpus and ordering her unconditional release from prison. Heard in the Supreme Court 16 February 2010.

Staples S. Hughes, Appellate Defender, and Katherine Jane Allen, Benjamin Dowling-Sendor, Daniel R. Pollitt, and Daniel K. Shatz, Assistant Appellate Defenders, for petitioner-appellee.

Roy Cooper, Attorney General, by Tiare B. Smiley and Robert C. Montgomery, Special Deputy Attorneys General, for respondent-appellants State of North Carolina and North Carolina Department of Correction.

Elliot Pishko Morgan, P.A., by David Pishko, and Abrams & Abrams, P.A., by Margaret Abrams, for North Carolina Advocates for Justice, amicus curiae.

PER CURIAM.

For the reasons stated in *Jones v. Keller*, —— N.C. ——, ——, S.E.2d —— (2010) (518PA09), we reverse the trial court's 14 December 2009 order allowing petitioner's petition for writ of habeas corpus.

REVERSED.

Justices BRADY and NEWBY concur in the result for the reasons stated in the concurring opinion in *Jones v. Keller*, —— N.C. ——, ——, S.E.2d (2010) (518PA09).

Justices TIMMONS-GOODSON and HUDSON dissent for the reasons stated in the dissenting opinion in *Jones v. Keller*, —— N.C. ——, ——, S.E.2d —— (2010) (518PA09).

MORRIS COMMUNICATIONS CORP. D/B/A FAIRWAY OUTDOOR ADVERTISING	)	
v.	)	ORDER
CITY OF BESSEMER CITY ZONING BOARD OF ADJUSTMENT	)	

* * * * * * * * * * * * * * * *

No. 150A10

The Court allows petitioner's petition for discretionary review of issue Number 1:

> (1) Did the Court of Appeals err in concluding that the Respondent Zoning Board's interpretation of the City of Bessemer City's Zoning Ordinance is entitled to some deference when the matter of the interpretation of an ordinance and/or statute is reviewed de novo on appeal and the reviewing court is entitled to freely substitute its judgment for that of the local zoning board?

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

By order of the Court in Conference, this 26th day of August, 2010.

Hudson, J.
For the Court

STATE v. FOLSTON

[364 N.C. 322 (2010)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
WILBUR WILLIAM FOLSTON, JR.	)	

* * * * * * * * * * * * * * * *

No. 317PA09

The state's petition for writ of certiorari is allowed for the limited purpose of entering the following order:

For the reasons stated in *Jones v. Keller*, 364 N.C. ——, —— S.E.2d —— (2010) (518PA09), we reverse the trial court's 27 April 2009 order granting defendant's motion for appropriate relief and remand to the trial court for further proceedings consistent with the Jones opinion.

By order of the Court in Conference, this 26th day of August, 2010.

Hudson, J.
For the Court

STATE v. FOREMAN

[364 N.C. 323 (2010)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
DERRICK ROCHELL FOREMAN	)	

* * * * * * * * * * * * * * * *

No. 270PA10

The state's petition for writ of certiorari is allowed for the limited purpose of entering the following order:

Rule of Appellate Procedure 21(c) mandates that petitions for writ of certiorari "shall be filed without unreasonable delay." *See, e.g.*, *State v. Rush*, 158 N.C. App. 738, 741 (2003) (finding that "four-year delay in challenging a judgment constitutes 'unreasonable delay'" under Rule 21(c)); *Huebner v. Triangle Research Collaborative*, 193 N.C. App. 420, 426 (2008) (holding that defendant's three-year delay in requesting certiorari review constituted "unreasonable delay" under Rule 21(c)). Defendant's thirteen-year delay in filing his petition for writ of certiorari in the Court of Appeals constituted unreasonable delay. Accordingly, the Court of Appeals' order allowing defendant's petition for writ of certiorari is reversed and defendant's appeal is dismissed.

By order of the Court in Conference, this 26th day of August, 2010.

Hudson, J.
For the Court

Bennett v. Equity Residential Case below: 203 N.C. App. —— (6 April 2010)	No. 228P10	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-878)	Denied 08/26/10
Bowles Auto., Inc. v. N.C. Div. of Motor Vehicles Case below: 203 N.C. App. —— (16 March 2010)	No. 164P10	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1411)	Denied 08/26/10
Bumgarner v. Burlington Ins. Co. Case below: 202 N.C. App. —— (16 February 2010)	No. 110P10	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-850)	Denied 08/26/10
Cloninger v. N.C. Dep't of Health & Human Servs. Case below: 203 N.C. App. —— (6 April 2010)	No. 204P10	1. Petitioners' NOA Based Upon a Constitutional Question (COA09-970) 2. Petitioners' PDR Under N.C.G.S. § 7A-31 3. Respondent's Motion to Dismiss	1. Dismissed *Ex Mero Motu* 08/26/10 2. Denied 08/26/10 3. Dismissed as Moot 08/26/10
Credigy Receivables, Inc. v. Whittington Case below: 202 N.C. App. —— (2 March 2010)	No. 159P10	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-465)	Denied 08/26/10
Crowley v. Crowley Case below: 203 N.C. App. —— (6 April 2010)	No. 197P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-898)	Denied 08/26/10
Fish House, Inc. v. Clarke Case below: 204 N.C. App. —— (18 May 2010)	No. 263P10	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-1047)	Denied 08/26/10
Gaines v. Cumberland Cty. Hosp. Sys., Inc. Case below: 203 N.C. App. —— (6 April 2010)	No. 206P10	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1419-2)	Denied 08/26/10

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

Goetz v. N.C. Dep't of Health & Human Servs. Case below: 203 N.C. App. —— (20 April 2010)	No. 215P10	Plt-Appellants' PDR Under N.C.G.S. § 7A-31 (COA09-985)	Denied 08/26/10
Grantham v. Crawford Case below: 204 N.C. App. —— (18 May 2010)	No. 257P10	1. Defs' (Crawford and Carolina Womancare) PDR Under N.C.G.S. § 7A-31 (COA09-528) 2. Def's (High Point Regional) PDR Under N.C.G.S. § 7A-31	1. Denied 08/26/10 2. Denied 08/26/10 **Martin, J., Recused**
High Rock Lake Partners, LLC v. N.C. Dep't of Transp. Case below: 204 N.C. App. —— (18 May 2010)	No. 262P10	1. Respondent's PDR Under N.C.G.S. § 7A-31 (COA09-95) 2. Intervenor's (John M. Dolven, M.D.) PDR Under N.C.G.S. § 7A-31; or in the Alternative, a Petition for Writ of Certiorari Pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure or Petition for Relief under Rule 2 of the North Carolina Rules of Appellate Procedure	1. Denied 08/26/10 2. Denied 08/26/10
In re A.D.E. & M.R.E. Case below: 202 N.C. App. —— (2 March 2010)	No. 152P10	Respondent's (Father) PDR Under N.C.G.S. § 7A-31 (COA09-1184)	Denied 08/26/10
In re Appeal of Amusements of Rochester, Inc. Case below: 201 N.C. App. —— (8 December 2009)	No. 019P10	1. Petitioners' (Amusements of Rochester, Powers Great Am. Midways Co. & Leslie & Debbie Powers) NOA Based Upon a Constitutional Question (COA09-234) 2. Respondent's (Pender County) Motion to Dismiss Appeal 3. Petitioners' (Amusements of Rochester, Powers Great Am. Midways Co. & Leslie & Debbie Powers) PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/26/10 3. Denied 08/26/10
In re E.M. Case below: 202 N.C. App. —— (2 March 2010)	No. 178P10	1. Petitioner's (Mecklenburg Co. DSS) PWC to Review the Decision of COA (COA09-1370) 2. Respondent's Motion to Dismiss PWC	1. Denied 08/26/10 2. Dismissed as Moot 08/26/10

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

In re J.N. Case below: 202 N.C. App. —— (2 March 2010)	No. 153P10	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA09-1239)	Denied 08/26/10
In re T.E.S. Case below: 203 N.C. App. —— (20 April 2010)	No. 209P10	Respondent's PDR Under N.C.G.S. § 7A-31 (COA09-1556)	Denied 08/26/10
Midkiff v. Compton Case below: 204 N.C. App. —— (18 May 2010)	No. 289P10	Plt's PWC to Review the Decision of the COA (COA09-254)	Denied 08/26/10
Morris Communications Corp. v. City of Bessemer City Zoning Bd. of Adjust. Case below: 202 N.C. App. —— (2 March 2010)	No. 150A10	1. Petitioner's NOA (Dissent) (COA09-440) 2. Petitioner's PDR as to Additional Issues 3. Respondent's Motion to Dismiss Petition	1. —— 2. See Special Order Page 321 3. Denied 08/26/10
N.C. Dep't of Health & Human Servs. v. Thompkins Case below: 205 N.C. App. —— (6 July 2010)	No. 380P09-2	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1137)	Denied 08/26/10
Owens-Bey v. County of Forsyth Case below: 203 N.C. App. —— (4 May 2010)	No. 314P10	Plt's PWC to Review Decision of COA (COA09-1307)	Denied 08/26/10
Raymond v. N.C. Police Benevolent Ass'n Case below: 203 N.C. App. —— (6 April 2010)	No. 230P10	Defs' PDR Under N.C.G.S. § 7A-31 (COA09-797)	Allowed 08/26/10
Reese v. Mecklenburg Cty. Case below: 204 N.C. App. —— (15 June 2010)	No. 309P10	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-499)	Denied 08/26/10

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Soder v. Corvel Corp. Case below: 202 N.C. App. —— (2 March 2010)	No. 189P10	Plt's PWC to Review the Decision of the COA (COA09-542)	Denied 08/26/10
Sperry v. Koury Corp. Case below: 202 N.C. App. —— (19 January 2010)	No. 078P10	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-391)	Denied 08/26/10
State v. Barron Case below: 202 N.C. App. —— (2 March 2010)	No. 145P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-770)	Denied 08/26/10
State v. Battle Case below: 202 N.C. App. —— (16 February 2010)	No. 123P10	State's PDR Under N.C.G.S. § 7A-31 (COA09-201)	Denied 08/26/10
State v. Braddy Case below: 195 N.C. 460	No. 070P10	Def's PDR Under N.C.G.S. § 7A-31 (COA08-333)	Denied 08/26/10
State v. Brooks Case below: 202 N.C. App. —— (2 March 2010)	No. 156P10	Def's PDR (COA09-560)	Denied 08/26/10
State v. Carter Case below: 203 N.C. App. —— (4 May 2010)	No. 231P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1073)	Denied 08/26/10
State v. Craven Case below: 205 N.C. App. —— (20 July 2010)	No. 322P10	State's Motion for Temporary Stay (COA09-1138)	Allowed 08/05/10
State v. Dark Case below: 204 N.C. App. —— (15 June 2010)	No. 297P10	Defendant's PDR Under N.C.G.S. § 7A-31 (COA09-1287)	Denied 08/26/10
State v. Ellis Case below: 188 N.C. App. 820	No. 133P08-2	Def's Motion for Certificate of Appealability (COA07-142)	Dismissed 08/26/10

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

State v. Espinoza-Valenzuela Case below: 203 N.C. App. —— (20 April 2010)	No. 225P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-661)	Denied 08/26/10
State v. Folston Case below: Cleveland County Superior Court	No. 317PA09	1. State's Motion for Temporary Stay (COAP09-532) 2. State's Petition for Writ of Supersedeas 3. State's PWC to Review Order of Cleveland County Superior Court	1. Allowed 08/07/09 2. Allowed 01/28/10 3. See Special Order Page ——
State v. Foreman Case below: Pitt County Superior Court	No. 270P10	1. State's Petition for Writ of Supersedeas (COAP10-351) 2. State's Motion for Temporary Stay 3. State's PWC	1. Denied 08/26/10 2. Allowed 06/29/10 Stay Dissolved 08/26/10 3. See Special Order Page ——
State v. Freeman Case below: 202 N.C. App. —— (2 March 2010)	No. 113PA10	1. State's Motion for Temporary Stay (COA09-774) 2. State's Petition for Writ of Supersedeas 3. State's PDR 4. Def's Cross-Petition for Discretionary Review 5. Def's Conditional PDR	1. Allowed 03/18/10 364 N.C. 130 2. Allowed 08/26/10 3. Allowed 08/26/10 4. Denied 08/26/10 5. Denied 08/26/10
State v. Hall Case below: 203 N.C. App. —— (4 May 2010)	No. 238P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1097)	Denied 08/26/10
State v. Jacobs Case below: 202 N.C. App. —— (2 February 2010)	No. 100P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-762)	Denied 08/26/10

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

State v. Johnson Case below: Alamance County Superior Court	No. 119P00-28	1. Def's PWC to Review Order of Alamance Superior Court 2. Def's PWC to Review Order of Alamance County Superior Court 3. Def's Motion to Appoint Counsel 4. Def's Motion to Proceed *In Forma Pauperis*	1. Dismissed 08/26/10 2. Dismissed 08/26/10 3. Denied 08/26/10 4. Allowed 08/26/10
State v. Lane Case below: Wayne County Superior Court	No. 606A05-2	Def's Motion for Remand	Denied 08/26/10
State v. Little Case below: 203 N.C. App. —— (4 May 2010)	No. 240A10	1. Def's NOA based Upon a Constitutional Question (COA09-1223) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed 08/26/10
State v. Maready Case below: 205 N.C. App. —— (6 July 2010)	No. 32A08-2	1. State's Motion for Temporary Stay (COA07-171-2) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Defendant's PDR Under N.C.G.S. § 7A-31 5. Defendant's Notice of Appeal Based upon a Constitutional Question 6. Defendant's PDR as to Additional Issues	1. Allowed 7/23/10 Stay Dissolved 08/26/10 2. Denied 08/26/10 3. Denied 08/26/10 4. Denied 08/26/10 5. Dismissed *Ex Mero Motu* 08/26/10 6. Dismissed as Moot 08/26/10
State v. May Case below: 202 N.C. App. —— (2 February 2010)	No. 308P10	1. Def's Motion for Appropriate Relief (COA09-175) 2. Def's PWC to Review Decision of COA	1. Dismissed 08/26/10 2. Dismissed 08/26/10
State v. McCoy Case below: 204 N.C. App. —— (1 June 2010)	No. 274P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-827)	Denied 08/26/10

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

State v. McNeill Case below: 205 N.C. App. —— (20 July 2010)	No. 324P10	State's Motion for Temporary Stay (COA09-1585)	Allowed 08/06/10
State v. Medina Case below: 205 N.C. App. —— (20 July 2010)	No. 332P10	Def's PDR Under N.C.G.S. § 7A-31 (COA10-71)	Denied 08/26/10
State v. Owens Case below: 197 N.C. App. —— (19 May 2009)	No. 203P10	1. Def's PDR Under N.C.G.S. § 7A-31 (COA08-1279) 2. Def's Writ of Certiorari to Review Decision of COA	1. Dismissed *Ex Mero Motu* 08/26/10 2. Denied 08/26/10
State v. Paddock Case below: 204 N.C. App. —— (1 June 2010)	No. 281P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-538)	Denied 08/26/10
State v. Parnell Case below: 203 N.C. App. —— (16 March 2010)	No. 169P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-909)	Denied 08/26/10
State v. Pastuer Case below: 205 N.C. App. —— (20 July 2010)	No. 327P10	State's Motion for Temporary Stay (COA09-1432)	Allowed 08/06/10
State v. Phillips Case below: Moore County Superior Court	No. 48A08	1. Defendant's Motion to Dismiss Appellant's Motion Filed in this Court Under the North Carolina Racial Justice Act Without Prejudice to File a Motion Under the Racial Justice Act in Post-Conviction Proceedings if Appellant is not Granted Relief on Direct Appeal (COAP00-56) 2. Defendant's Motion in the Alternative to Remand to the Superior Court of Moore County for an Evidentiary Hearing and other proceedings 3. Defendant's Motion for Appropriate Relief Under the Racial Justice Act	1. Allowed 08/26/10 2. Dismissed as Moot 08/26/10 3. Dismissed Without Prejudice 08/26/10

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

State v. Pinkerton Case below: 205 N.C. App. —— (20 July 2010)	No. 321A10	State's Motion for Temporary Stay (COA09-654)	Allowed 08/06/10
State v. Rice Case below: 203 N.C. App. —— (20 April 2010)	No. 216P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1099)	Denied 08/26/10
State v. Richardson Case below: 203 N.C. App. —— (4 May 2010)	No. 234P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1394)	Denied 08/26/10
State v. Santiano Case below: 205 N.C. App. —— (6 July 2010)	No. 305P10	Def's Motion for Temporary Stay (COA09-506)	Allowed 07/26/10
State v. Sargeant Case below: 206 N.C. App. —— (3 August 2010)	No. 355A10	1. State's NOA (Dissent) (COA09-262) 2. State's Motion for Temporary Stay 3. State's Petition for Writ of Supersedeas	1. —— 2. Allowed 08/20/10 3. Allowed 08/20/10
State v. Simmons Case below: 204 N.C. App. —— (18 May 2010)	No. 261P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1093)	Denied 08/26/10
State v. Simmons Case below: 204 N.C. App. —— (1 June 2010)	No. 284P10	1. Def's NOA Based Upon a Constitutional Question (COA09-1170) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/26/10 3. Denied 08/26/10
State v. Stanley Case below: 205 N.C. App. —— (20 July 2010)	No. 316P10	Def's Motion for Temporary Stay (COA09-1263)	Allowed 07/30/10
State v. Sullivan Case below: 202 N.C. App. —— (16 February 2010)	No. 115P10	1. Def's NOA Based Upon a Constitutional Question (COA09-526) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/26/10 3. Denied 08/26/10

State v. Tellez Case below: 203 N.C. App. —— (6 April 2010)	No. 198P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1010)	Denied 08/26/10
State v. Toledo Case below: 204 N.C. App. —— (18 May 2010)	No. 250P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1063)	Denied 08/26/10
State v. Torres-Garcia Case below: 201 N.C. App. —— (22 December 2009)	No. 036P10	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA09-409) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/26/10 3. Denied 08/26/10
State v. Tucker Case below: 204 N.C. App. —— (18 May 2010)	No. 265P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1112)	Denied 08/26/10
State v. Turnage Case below: 203 N.C. App. —— (20 April 2010)	No. 228P08-2	1. State's Motion for Temporary Stay (COA07-562-2) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 05/10/10 Stay Dissolved 08/26/10 2. Denied 08/26/10 3. Denied 08/26/10
State v. Walker Case below: 197 N.C. App. —— (19 May 2009)	No. 223P10	Def's PWC and/or Any Other Available Relief Pursuant to the All Writs Act (COA08-1319)	Denied 08/26/10

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

State v. Waring Case below: Wake County Superior Court	No. 525A07	1. Defendant's Motion to Dismiss Appellant's Motion Filed in this Court under the North Carolina Racial Justice Act Without Prejudice to File a Motion under the Racial Justice Act in Post-conviction Proceedings If Appellant Is Not Granted Relief on Direct Appeal 2. Defendant's Motion in the Alternative to Remand to the Superior Court of Wake County for an Evidentiary Hearing and Other Proceedings 3. Defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act 4. State's Motion in the Alternative to Remand to the Superior Court of Wake County for an Evidentiary Hearing and Other Proceedings	1. Allowed 08/26/10 2. Dismissed as Moot 08/26/10 3. Dismissed Without Prejudice 08/26/10 4. Dismissed as Moot 08/26/10
State v. Wheeler Case below: 202 N.C. App. ––– (19 January 2010)	No. 081P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-768)	Denied 08/26/10
State v. Wilkins Case below: 203 N.C. App. ––– (4 May 2010)	No. 233P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1006)	Denied 08/26/10
State v. Wilson Case below: 203 N.C. App. ––– (4 May 2010)	No. 239P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-903)	Denied 08/26/10
State v. Witherspoon Case below: 204 N.C. App. ––– (18 May 2010)	No. 249P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1303)	Denied 08/26/10
Steinkrause v. Tatum Case below: 201 N.C. App. ––– (8 December 2009)	No. 018A10	Petitioner's (Steinkrause) Petition for Writ of Supersedeas (COA08-1080)	Allowed 07/06/10

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

Wallace Farm, Inc. v. City of Charlotte Case below: 203 N.C. App. —— (16 March 2010)	No. 170P10	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-939)	Denied 08/26/10
Watkins v. Trogdon Masonry, Inc. Case below: 203 N.C. App. —— (6 April 2010)	No. 174P10	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-758)	Denied 08/26/10
Wright v. Town of Zebulon Case below: 202 N.C. App. —— (16 March 2010)	No. 190P10	1. Plt's PWC to Review Decision of COA (COA09-960) 2. Defs' Conditional PWC to Review Decision of COA	1. Denied 08/26/10 2. Dismissed as Moot 08/26/10

STATE OF NORTH CAROLINA v. KENNEY BOWDITCH,
KENNETH EDWARD PLEMMONS, AND MARK ALLEN WATERS

No. 448PA09

(Filed 8 October 2010)

Constitutional Law— ex post facto—satellite monitoring—sexual offenders—offense committed before program effective

Subjecting sexual offenders to the satellite-based monitoring program (SBM) does not violate the *ex post facto* clauses of the state or federal constitution where the offenses occurred before the SBM statutes took effect. SBM has the nonpunitive objective of being a regulatory tool against an unacceptable threat to public safety. Examining the relevant factors from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, neither the purpose nor the effect of the program negates the legislature's civil intent. The trial court was reversed.

Justice HUDSON dissenting.

Chief Justice PARKER and Justice TIMMONS-GOODSON join in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of a memorandum and order entered 12 June 2009 by Judge Dennis J. Winner in Superior Court, Buncombe County, allowing defendants' motions to dismiss petitions filed by the State to enforce satellite monitoring provisions on defendants. Heard in the Supreme Court 10 May 2010.

Roy Cooper, *Attorney General*, *by Joseph Finarelli*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Barbara S. Blackman*, *Assistant Appellate Defender*, *for defendant-appellee Kenneth Plemmons; Paul F. Herzog for defendant-appellee Kenney Bowditch; and Rhonda K. Moorefield for defendant-appellee Mark Waters.*

BRADY, Justice.

In 2006 the North Carolina General Assembly ratified "An Act To Protect North Carolina's Children/Sex Offender Law Changes" direct-

ing the Department of Correction (DOC) to establish a continuous satellite-based monitoring ("SBM") program for certain classes of sex offenders. An Act To Protect North Carolina's Children/Sex Offender Law Changes, ch. 247, sec. 15, 2006 N.C. Sess. Laws 1065, 1074-79 (codified as amended at N.C.G.S. §§ 14-208.40 to -208.45 (2009)). Defendants Kenney Bowditch, Kenneth Edward Plemmons, and Mark Allen Waters have each pleaded guilty to multiple counts of taking indecent liberties with a child. All of these offenses occurred before the SBM statutes took effect on 16 August 2006. Defendants dispute their eligibility for SBM, arguing that their participation would violate guarantees against ex post facto laws contained in the federal and state constitutions. We hold that the SBM program at issue was not intended to be criminal punishment and is not punitive in purpose or effect. Thus, subjecting defendants to the SBM program does not violate constitutional prohibitions against ex post facto laws.

PROCEDURAL BACKGROUND

Defendant Plemmons pleaded guilty on 1 November 2006 to five counts of taking indecent liberties with a child. He stipulated to the aggravating factors that the victim was very young and that he abused a position of trust with the victim. Beginning in February and ending in May 2006, defendant Plemmons committed the multiple offenses when he was at least fifty years of age and his victim was a young girl of five to six years of age. Two of the offenses were consolidated for sentencing, and defendant Plemmons received an active term of imprisonment of twenty-four to twenty-nine months. The trial court suspended the remaining sentences and imposed a period of supervised probation.

Defendant Waters pleaded guilty on 12 April 2007 to five counts of taking indecent liberties with a child. At the time of his offenses, which were committed between August and December 2004, defendant Waters was approximately forty years old and his victim was a ten year old girl. The trial court suspended the sentences and imposed a period of supervised probation on defendant Waters.

Defendant Bowditch pleaded guilty on 3 December 2007 to eight counts of taking indecent liberties with a child. From June through August 2006, Bowditch, who was then sixteen years old, committed his offenses against an eight year old victim. After consolidating some of the cases and suspending sentences, the trial court imposed a period of supervised probation on defendant Bowditch.

Upon receiving notice of the State's intention to seek their enrollment in the SBM program, defendants filed separate motions on constitutional grounds to dismiss the State's petitions for satellite-based monitoring. After conducting hearings on 1 May and 28 May 2009, the trial court issued a memorandum and order on 12 June 2009 making numerous findings of fact and concluding as a matter of law that (1) determining whether an offense is aggravated for purposes of imposing lifetime satellite-based monitoring is a fact-based, rather than an element-based, inquiry;[1] (2) the legislature "intended Satellite monitoring to be criminal punishment"; and (3) even if not intended to be punitive, SBM's purpose and effect, when analyzed according to the factors enunciated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), "are so punitive that civil intent is negated." The trial court then ruled that applying SBM to defendants "would be unconstitutional under the *ex post facto* provisions of both the United States and North Carolina Constitutions." As such, the trial court allowed defendants' motions and dismissed the State's petitions. The State gave notice of appeal to the Court of Appeals on 23 June 2009. Defendants then filed a petition with this Court on 27 October 2009 to certify the case for discretionary review prior to determination by the Court of Appeals. This Court allowed defendants' petition on 18 February 2010 to address the significant constitutional question at issue.

FACTUAL BACKGROUND

After its enactment effective 16 August 2006, the SBM legislation was codified at Part 5 of Article 27A, Chapter 14, of the North Carolina General Statutes. Chapter 14 contains the Criminal Law portion of our statutes, and Article 27A is entitled "Sex Offender and Public Protection Registration Programs." As authorized by the legislation, DOC established and began administering the SBM program on 1 January 2007.

At the hearings conducted on 1 May and 28 May 2009, the trial court heard testimony from three individuals who were employed by DOC in the Division of Community Corrections (DCC). Todd Carter testified about his role as a probation officer assigned to assist with monitoring SBM participants on a local level; Lori Anderson testified as a manager for the Twenty-Eighth Judicial District; and Hannah

1. The State assigned error to this conclusion of law, but did not address the issue in its brief. Thus, under the rules of appellate procedure applicable to this case, we consider the assignment of error to be abandoned, and we will not address it. *See* N.C. R. App. P. 28(b)(6).

Roland, who was based in Raleigh, testified as the special operations administrator in charge of the SBM program for sex offenders.

In relevant part, their testimony tended to reflect the following: SBM's enrollment population consists of (1) offenders on parole or probation who are subject to State supervision, (2) unsupervised offenders who remain under SBM by court order for a designated number of months or years, and (3) unsupervised offenders subject to SBM for life, who are also known as "lifetime trackers." *Cf.* N.C.G.S. §§ 14-208.40, -208.40A, -208.40B (describing when SBM is required at all, when it is mandatory "for life," and when it should be imposed "for a period of time to be specified by the court").

All SBM participants receive three items of equipment. First, at all times they wear a transmitter, which is a bracelet held in place by a strap worn around one ankle. Tampering with the bracelet or removing it triggers an alert. The ankle bracelet in use at the time of the hearings was approximately three inches by one and three-quarters inches by one inch. Second, participants wear a miniature tracking device (MTD) around the shoulder or at the waistline on a belt. The MTD may not be hidden under clothing. The device contains the Global Positioning System (GPS) receiver and is tethered to the ankle bracelet by a radio-frequency (RF) signal. The size of the MTD in use at the time of the hearings was four and one-quarter inches by two inches by three inches. The MTD includes an electronic screen that displays text messages communicating possible violations or information to the participant. Third, a base unit is required for charging the MTD's battery, and although it is typically kept at a participant's residence, the base unit may be used to recharge the MTD wherever electricity is available. The MTD requires at least six hours of charging per twenty-four hour period.

Personnel from DCC perform maintenance on the equipment every ninety days and replace the transmitter once a year. This maintenance requires a visit to the location of the base. The maintenance is conducted under an agreement signed by SBM participants when monitoring begins. Criminal liability is imposed for, *inter alia*, refusing to allow the required maintenance, destroying the equipment, or interfering with its proper functioning. N.C.G.S. § 14-208.44(b), (c).

The monitoring aspects of SBM are conducted by DOC/DCC. Personnel in Raleigh monitor unsupervised participants and assist field staff with tracking supervised offenders. Outside of normal

work hours for the personnel in Raleigh, local law enforcement officers are on call to receive and address alerts as necessary.

The equipment facilitates a "near real time" log of a participant's movements. However, only periodic checks are conducted on the movements of unsupervised participants, going back a day or two at a time. If DCC personnel observe certain patterns of movement or locations that a participant appears to frequent, they may contact local officers to identify the area and look for vulnerable sites, such as schools or day-care centers. If reviewing the tracking information reveals a participant's presence at a location that may constitute a violation of North Carolina law, DCC contacts local law enforcement, which may investigate further. Supervised offenders may be subject to "inclusion zones," areas in which they must remain for a period of time, or "exclusion zones," which they must refrain from visiting. No such zones are utilized for unsupervised participants. The tracking information is stored at DOC for one year, and then the program vendor archives the information for the length of the State's contract plus seven years.

The SBM equipment transmits various alerts regarding potential violations to DCC personnel. Alerts that are uploaded "immediately" consist for the most part of alerts indicating "bracelet gone," violations of "inclusion" or "exclusion" zones, or "no GPS" signal. The alert for "bracelet gone" is sent when transmission is lost between the ankle bracelet and the MTD. The loss in transmission may be due to a variety of causes, such as removing the MTD and venturing too far away from it. Equipment in use at the time of the hearings allowed for a range of approximately fifty feet between the MTD and the ankle bracelet, while newer equipment allows for a range of up to thirty feet. The alerts for "inclusion" or "exclusion" zones are triggered when a supervised SBM participant violates the boundaries of an established zone. The "no GPS" alert is triggered when transmission is lost between participants and the satellite that is tracking their movements. SBM participants must acknowledge the alerts and respond to attempts to resolve them.

SBM may affect a participant's daily activities. Entrance into some buildings disrupts the GPS signal, requiring the participant to go outside to reestablish satellite connection. Submerging the ankle bracelet in three feet or more of water generates a "bracelet gone" alert. In terms of travel, the SBM program places no restrictions on unsupervised participants who may leave the state temporarily or permanently after returning the SBM equipment to

DOC. It is possible, though, that the GPS signal may be lost in remote areas, and commercial airplane flight is likely limited due to security regulations.

Nonetheless, testimony indicated that the equipment and DCC can make accommodations according to the needs of SBM participants. At a place of employment, the MTD can be set at a stationary location while the participant moves around, as long as the range of the equipment's signal is not exceeded. If circumstances necessitate going in and out of range, officers know of a participant's employment situation and can confirm via telephone that the participant is at work. Moreover, for certain medical procedures the ankle bracelet can be relocated or removed. If a physician orders a magnetic resonance imaging (MRI) procedure, for example, DCC staff can remove the equipment for the MRI.

ANALYSIS

An appellate court reviews conclusions of law pertaining to a constitutional matter de novo. *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citing *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004)). The trial court's findings of fact are binding on appeal if they are " 'supported by competent evidence,' " and they must ultimately support the trial court's conclusions of law. *Id.* (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)).

This Court has considered a number of cases involving various statutory provisions directed at convicted sex offenders. *See, e.g.*, *State v. Abshire*, 363 N.C. 322, 677 S.E.2d 444 (2009) (clarifying the definition of "address" in the registration statutes); *Standley v. Town of Woodfin*, 362 N.C. 328, 661 S.E.2d 728 (2008) (upholding a city ordinance criminalizing knowing entry into public parks by registered sex offenders); *State v. Bryant*, 359 N.C. 554, 614 S.E.2d 479 (2005) (upholding registration statutes as constitutional when applied to a convicted sex offender who moved to North Carolina from another jurisdiction). The case before us is this Court's first opportunity to rule on an aspect of the SBM program.[2]

2. The North Carolina Court of Appeals has already addressed the present issue, stating that the SBM program does not violate ex post facto prohibitions in at least eleven unanimous opinions. *State v. Stewart*, COA09-928, slip op. at 1 (N.C. App. Mar. 2, 2010) (unpublished); *State v. Murdock*, COA09-615, slip op. at 1 (N.C. App. Jan. 19, 2010) (unpublished); *State v. Boothe*, COA09-264, slip op. at 1 (N.C. App. Jan. 5, 2010) (unpublished); *State v. Lederer-Hughes*, COA09-280, slip op. at 1 (N.C. App. Nov. 17, 2009) (unpublished); *State v. Hughes*, COA09-288, slip op. at 1 (N.C. App. Nov. 3, 2009)

The United States and North Carolina Constitutions prohibit ex post facto laws. U.S. Const. art. I, § 10, cl. 1; N.C. Const. art. I, § 16. "An *ex post facto* law may be defined, as relevant here, as a law that 'allows imposition of a different or greater punishment than was permitted when the crime was committed.' " *State v. Barnes*, 345 N.C. 184, 233-34, 481 S.E.2d 44, 71 (1997) (quoting *State v. Vance*, 328 N.C. 613, 620, 403 S.E.2d 495, 500 (1991)), *cert. denied*, 522 U.S. 876 (1998). Under this Court's jurisprudence, "the federal and state constitutional *ex post facto* provisions are evaluated under the same definition." *State v. Wiley*, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002) (citing *State v. Robinson*, 335 N.C. 146, 147-48, 436 S.E.2d 125, 126-27 (1993)), *cert. denied*, 537 U.S. 1117 (2003).

In 1997, the Supreme Court of the United States reviewed legislation enacted by Kansas that established "procedures for the civil commitment of persons who, due to a 'mental abnormality' or a 'personality disorder,' are likely to engage in 'predatory acts of sexual violence.' " *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997) (quoting Kan. Stat. Ann. § 59-29a02 (1994)). In 2003, the Court decided *Smith v. Doe*, in which it considered the registration requirements and notification system of Alaska's Sex Offender Registration Act. 538 U.S. 84, 89-90 (2003). The Court held in both *Smith* and *Hendricks* that the statutory measures under review did not violate the Ex Post Facto Clause of the federal constitution. *Smith*, 538 U.S. at 105-06; *Hendricks*, 521 U.S. at 370-71. *Smith* and *Hendricks* are significant because of their explanation of controlling ex post facto law and because of their similar subject matter to the case *sub judice*. As further explained below, many parallels exist between the SBM program at issue and the regulatory schemes analyzed in *Smith* and *Hendricks*. The instant case falls within the framework established by those precedents for civil, regulatory schemes that address the recidivist tendencies of convicted sex offenders.

An ex post facto analysis begins with determining whether the express or implicit "intention of the legislature was to impose pun-

(unpublished); *State v. Miller*, COA09-623, slip op. at 1 (N.C. App. Nov. 3, 2009) (unpublished); *State v. Downey*, —— N.C. App. ——, 683 S.E.2d 791 (2009) (unpublished); *State v. Stines*, —— N.C. App. ——, 683 S.E.2d 411 (2009); *State v. Chandler*, COA08-885, slip op. at 1 (N.C. App. July 21, 2009) (unpublished); *State v. Anderson*, —— N.C. App. —— 679 S.E.2d 165 (2009), and *State v. Bare*, —— N.C. App. ——, 677 S.E.2d 518 (2009). Three other panels at the Court of Appeals have concluded the same, but in divided opinions. *State v. Vogt*, —— N.C. App. ——, 685 S.E.2d 23 (2009) (Elmore, J., dissenting); *State v. Morrow*, —— N.C. App. ——, 683 S.E.2d 754 (2009) (Elmore, J., concurring in part and dissenting in part); *State v. Wagoner*, —— N.C. App. ——, 683 S.E.2d 391 (2009) (Elmore, J., dissenting).

ishment," and if so, "that ends the inquiry." *Smith*, 538 U.S. at 92 (citing *Hendricks*, 521 U.S. at 361). If the intention was to enact a civil, regulatory scheme, then by referring to the factors enunciated in *Kennedy v. Mendoza-Martinez* for guidance, we must further examine whether the statutory scheme is "so punitive either in purpose or effect as to negate" the legislature's civil intent. *Smith*, 538 U.S. at 92 (quoting *Hendricks*, 521 U.S. at 361) (internal quotation marks omitted).

The Legislative Objective in Enacting SBM Was Nonpunitive

Our analysis begins with discerning through statutory construction "the legislative objective," *id.* (citing *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)), whether announced " 'expressly' " or indicated " 'impliedly,' " regarding SBM's status as civil regulation or criminal punishment, *id.* at 92-93 (quoting *Hudson v. United States*, 522 U.S. 93, 99 (1997)). The text, structure, manner of codification, and enforcement procedures of the statutory scheme are a few of the probative indicators of legislative intent. *Id.* at 92-94 (citations omitted). At the outset, we note that the legislature did not expressly attach the label of civil or criminal to the SBM program. Unlike the sex offender registration programs, which are prefaced by an extensive expression of purpose in N.C.G.S. § 14-208.5, the legislature did not enact a separate purpose section specific to SBM. Nonetheless, several indicators demonstrate that the legislative objective in enacting SBM was to establish a nonpunitive, regulatory program.

The legislature's intent in establishing SBM may be inferred from the declaration in the authorizing legislation that it "shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.' " Ch. 247, sec. 1(a), 2006 N.C. Sess. Laws at 1066. Desiring to protect our State's children from the recidivist tendencies of convicted sex offenders demonstrates an intent to create a nonpunitive, regulatory scheme. *Cf. Smith*, 538 U.S. at 93 (noting that nonpunitive sex offender registration statutes were designed to protect the public from harm); *Hendricks*, 521 U.S. at 361-63 (noting that involuntary civil commitment of dangerous sex offenders was intended to protect the public).

Furthermore, the placement of the SBM program within Article 27A of Chapter 14 of our General Statutes is significant. The SBM program follows immediately after the Article 27A sections composing the Sex Offender Registration Programs. N.C.G.S. §§ 14-208.5 to

-208.32 (2009). Before enactment of the SBM program, the Supreme Court of the United States had determined sex offender registration statutes to be civil regulations, *Smith*, 538 U.S. at 105-06, and North Carolina appellate courts had reached the same conclusion, *see State v. Sakobie*, 165 N.C. App. 447, 451-52, 598 S.E.2d 615, 617-18 (2004). Moreover, the legislature's statement of purpose for Article 27A, found at section 14-208.5, explains that "the purpose of this Article [is] to assist law enforcement agencies' efforts to protect communities." Understandably, section 14-208.5 explicitly refers to registration, but the SBM program is consistent with that section's express goals of compiling and fostering the "exchange of relevant information" concerning sex offenders. The decision to codify the SBM statutory scheme in the same Article and immediately following the registration programs implies a legislative objective to make the SBM program one part of a broader regulatory means of confronting the unique "threat to public safety posed by the recidivist tendencies of convicted sex offenders." *Abshire*, 363 N.C. at 323, 677 S.E.2d at 446.

Defendants suggest that the SBM program's location in Chapter 14, the "Criminal Law" portion of our General Statutes, is relevant. However, placement in a criminal code is not dispositive. *See*, *e.g.*, *Smith*, 538 U.S. at 94-95 (stating that codifying a sex offender registration provision in a criminal procedure code was not dispositive of the statute's punitive nature); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984) (holding that a forfeiture provision for firearms was a civil sanction despite codification of its authorizing statute in a criminal code). We are more persuaded to recognize the legislature's civil intent behind SBM by noting that the program was codified into the previously recognized nonpunitive, regulatory scheme located in Article 27A of Chapter 14.

Another attribute of the SBM program that may be probative of legislative intent is that its administration is overseen by the Division of Community Corrections, which is under the Department of Correction. Even though Hannah Roland testified that in her opinion there were no other DOC programs that were not criminal punishment of some sort, any initial reaction that DOC/DCC's involvement inherently relegates SBM to the domain of criminal punishment is premature.

Among DOC's varied responsibilities and activities are programs "designed to give persons committed to the Department op-

portunities for physical, mental and moral improvement," N.C.G.S. § 148-22(b) (2009), programs for "academic and vocational and technical education," *id.* § 148-22.1(a) (2009), and programs providing "incarcerated offenders a work and training environment that emulates private industry," *id.* § 148-129(1) (2009). Without definitively deciding the nature of these programs, we note that their existence makes the effect of DOC/DCC's involvement in administrating the SBM program at the least, "open to debate." *Cf. Smith*, 538 U.S. at 94-96 (making a similar conclusion as to the enforcement procedures established by Alaska's sex offender registry program). DOC is responsible for the administration of criminal punishment, but not everything DOC handles is therefore punitive. DOC's programs retain the common element of involving accused or convicted criminal offenders, but that all of DOC's activities involve criminal punishment should not be presumed. SBM participants are offenders who, at some point in time and for some duration of time, come under DOC's authority by virtue of their criminal convictions. As a result, utilizing DOC's administrative and personnel resources for the SBM program appears to make sound organizational and fiscal sense. We cannot agree, as defendants argue, that "[h]ad the General Assembly intended SBM to be civil, it would have entrusted its creation and supervision to a governmental entity other than DOC."

In sum, the General Assembly described the SBM program as a means "To Protect North Carolina's Children" and codified the SBM provisions in Article 27A of Chapter 14 of our General Statutes. These decisions in particular evince the nonpunitive objective of making SBM another regulatory tool in an effort to defend against an unacceptable threat to public safety.

Civil Intent Is Not Negated by SBM's Purpose or Effect

Although the legislature sufficiently implied its civil intent in enacting the SBM program, ex post facto jurisprudence compels an analysis of whether SBM is so punitive in purpose or effect that the legislature's civil intent is negated. *See Smith*, 538 U.S. at 92. The " 'useful guideposts,' " *id.* at 97 (quoting *Hudson*, 522 U.S. at 99), for this analysis are factors compiled in *Kennedy v. Mendoza-Martinez*. They are helpful but not necessarily " 'exhaustive' " or " 'dispositive.' " *Id.* at 97 (quoting *United States v. Ward*, 448 U.S. 242, 249 (1980)). As the Court in *Smith* similarly recognized, two of the factors carry "little weight" in this context because SBM applies only to certain offenders based on their past conduct, not to their current

behavior.[3] *See id.* at 105; *Doe v. Bredesen*, 507 F.3d 998, 1004, 1007 (6th Cir. 2007) (relying on *Smith* and noting that the two *Mendoza-Martinez* factors referenced above "were not particularly germane" when testing sex offender registration and SBM statutes for ex post facto concerns), *cert. denied*, —— U.S. ——, 129 S. Ct. 287 (2008). Thus, the following five

> factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.

Smith, 538 U.S. at 97; *see Mendoza-Martinez*, 372 U.S. at 168-69 (footnotes omitted). The trial court stated that it considered the *Mendoza-Martinez* factors and in its order listed seven points in support of its determination that the factors weigh in favor of negating the legislature's civil intent. While it is not entirely clear which of the trial court's observations correspond to which factors, we will assess some of the trial court's observations and defendants' arguments as we undertake a de novo review of the issue.

As outlined in *Smith*, addressing the first relevant factor entails a discussion of historical or traditional methods of punishment. The technology behind SBM is relatively new, and in that sense, it has no history or tradition of being used for punishment. As such, a meaningful discussion requires an attempt at drawing analogies. The trial court concluded that traditional criminal punishments and SBM share the aspects of "supervision by the State" and "[s]hame and humiliation by wearing a readily identifiable mechanism in public." Defendants also argue that relevant here are the trial court's references to SBM as being similar to electronic house arrest and to a defendant's ability to free himself of SBM by leaving the state permanently.

An offender's period of parole or probation, and its attendant State supervision, historically have been considered a form of crimi-

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3. The two factors of only "little weight," *Smith*, 538 U.S. at 105, are "whether [the scheme] comes into play only on a finding of *scienter*" and "whether the behavior to which it applies is already a crime." *Mendoza-Martinez*, 372 U.S. at 168 (footnotes omitted). These factors are inconsequential in this setting because, similar to the sex offender registration law at issue in *Smith*, the SBM program applies only to individuals who have committed crimes *in the past*. SBM applies to individuals based on prior behavior, and its concern is with recidivist tendencies. *See Smith*, 538 U.S. at 105.

nal punishment. *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987). There is a level of monitoring that takes place in the SBM program; however, the difference here is that SBM's "surveillance components are not of a type that we have traditionally considered as a punishment." *See Bredesen*, 507 F.3d at 1005. DCC considers some SBM participants to be supervised but that terminology is used because those offenders are concurrently serving a period of parole or probation. DCC considers other SBM participants who are no longer on parole or probation to be unsupervised. The movements of unsupervised SBM participants are only periodically checked for observable patterns or proximity to sensitive locations. Consistent with the terms of their probation, supervised offenders may be subject to "inclusion zones" or "exclusion zones," but no such zones are utilized for unsupervised participants.

The monitoring taking place in the SBM program is far more passive and is distinguishable from the type of State supervision imposed on probationers, who must live under a regime of " 'conditional liberty properly dependent on observance of special [probation] restrictions.' " *Griffin*, 483 U.S. at 874 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (alteration in original)); *see also Smith*, 538 U.S. at 101 ("Probation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release . . . ." (citations omitted)). Through the SBM program the State is logging and reviewing information about offenders' whereabouts. Hannah Roland explained DCC's approach to the "lifetime trackers," stating "[A]ll we're doing is tracking them. We're not technically supervising them. As the law stipulates, they are unsupervised." Even the requirement that DCC personnel be allowed to enter a participant's residence every ninety days is dissimilar from a parole or probation setting. DCC's reason for the visit is not supervisory or investigatory; the only purpose is to perform regularly scheduled maintenance on the SBM equipment that is still property of the State.

Furthermore, likening the SBM program more to house arrest than to sex offender registration is unavailing. Defendants argue that "DOC has the power" to establish and limit an inclusion zone "to the offender's residence, thereby turning the home into a prison cell." However, there is no evidence that exclusion or inclusion zones have been utilized for unsupervised SBM participants. Hannah Roland was asked by defense counsel at one point about the zones: "But they could be utilized; is that correct?" and her answer was "No." Her tes-

timony reflects that inclusion or exclusion zones are used for participants on supervised probation as an aid to compliance with their *probation* restrictions. For instance, an individual on probation may be ordered to attend a treatment center. Through an inclusion zone around the treatment center at the appropriate times, SBM may facilitate the probation officer's knowledge of whether the individual attended the treatment session. Utilizing SBM as a tool in this capacity does not make it a punishment.

As additional support for the house arrest argument, defendants note that the MTD's battery requires recharging for six hours during every twenty-four hour period. This ties the SBM participant for the charging period to the location of the base unit, which is most likely the participant's residence. However, this feature of the SBM equipment can be distinguished from a house arrest situation because the MTD's battery can be charged wherever electricity is available. In this day and age, finding a source of available electricity, whether at a home, hotel, place of employment, or even in a moving vehicle, should be little or no challenge.

Next, defendants argue that SBM is similar in form to historical punishments involving shaming and humiliation because the ankle bracelet and MTD must be worn in a conspicuous manner that is thus visible in public. The Court in *Smith* noted how historically there have been certain punishments intended to "inflict public disgrace," such as ordering convicted offenders " 'to stand in public with signs cataloguing their offenses.' " 538 U.S. at 97 (quoting Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 Mich. L. Rev. 1179, 1226 (1982)). There is a dispositive difference between these historical types of shaming punishments and SBM. An integral dynamic of a shaming punishment is the State's purposeful arrangement of a "face-to-face" display of the offender in front of fellow citizens for public disgrace and ridicule. *Id.* at 98. With SBM the State's objective is not to publicize crimes and bring a "resulting stigma" on the offender. *See id.* at 99. Any humiliation from enrollment in SBM is unintended by the State.

There is no evidence in the record that any sex offender has faced personal embarrassment or social ostracism because of wearing the SBM equipment in public, nor is there any evidence that a casual public observer has even recognized the SBM equipment and identified its wearer as a convicted sex offender. We are persuaded by the observation of the court in *Doe v. Bredesen*, which concluded that Tennessee's SBM equipment was "relatively unobtrusive" and

"[i]n its size, shape, and placement . . . appears very similar to . . . other nondescript electronic device[s]." 507 F.3d at 1005. The MTD used for Tennessee's SBM program under evaluation in *Bredesen* was larger than the MTD in the present case: "6 inches by 3.25 inches by 1.75 inches," *id.*, compared here to 4.25 inches by 2 inches by 3 inches. A casual observer could perceive the MTD to be any number of personal electronic devices, such as a cellular phone, personal digital assistant (PDA), or MP3 player. We cannot conclude that simply mandating the wearing of the SBM equipment in public amounts to a form of criminal punishment.

The final historical means of punishment that defendants attempt to analogize to SBM is that of banishment. There is no dispute that "banishment and exile have throughout history been used as punishment." *Mendoza-Martinez*, 372 U.S. at 168 n.23. Banishment is "[e]xpulsion from" a community. *Black's Law Dictionary* 655 (9th ed. 2009) (defining "exile" and showing "banishment" as a synonym thereof). Here, the argument is unconvincing because SBM expels no one from anywhere. An unsupervised offender subject to SBM is free to leave North Carolina and remove himself from any regulatory scheme imposed by our State, including SBM, if he so chooses. SBM does not banish anyone, and neither is leaving the state the only means of removal from the SBM program. *See* N.C.G.S. § 14-208.43 (enabling sex offender on lifetime SBM to petition for removal upon meeting certain conditions).

The second relevant *Mendoza-Martinez* factor is whether SBM imposes an affirmative disability or restraint on its participants and if so, to what extent. This requires a consideration of "how the effects of [SBM] are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Smith*, 538 U.S. at 99-100.

There is no denying that being subjected to SBM has an impact on the lives of its participants. Yet, when viewed in light of other civil, regulatory schemes, we cannot conclude that the effects of SBM transform it into criminal punishment. While considering an ex post facto challenge to a sex offender registration scheme in *Smith*, the Court commented that registration "obligations are *less harsh* than the sanctions of occupational debarment, which [] have [been] held to be nonpunitive." *Id.* at 100 (emphasis added) (citing *Hudson*, 522 U.S. at 104 (forbidding work in the banking industry); *De Veau v. Braisted*, 363 U.S. 144 (1960) (forbidding work as a union official); *Hawker v. New York*, 170 U.S. 189 (1898) (revoking medical license));

see also Bredesen, 507 F.3d at 1005 (relying on *Smith* to conclude that the effects of Tennessee's SBM program were less harsh than occupational debarment). Occupational debarment is far more harsh than an SBM program that allows offenders to choose where they work and what type of occupation they pursue. Hannah Roland testified that DCC makes efforts to accommodate the employment requirements of SBM participants, when necessary. She further stated regarding employment situations that DCC attempts "to work with [offenders] and get their cooperation to make it as easy and frustrating-free as possible." There is no indication in the record that any SBM participant has been unable to pursue a desired occupation due to SBM. *Cf. Smith*, 538 U.S. at 100 (noting the absence of record evidence showing any "substantial occupational or housing disadvantages" due to sex offender registration).

The effects of the present SBM program are also less harsh than the post-incarceration, involuntarily confinement of sex offenders that was found to be nonpunitive in *Kansas v. Hendricks*, 521 U.S. 346 (1997). In *Hendricks* the Court acknowledged that the civil commitment scheme involved "an affirmative restraint," but noted that even detainment " 'does not inexorably lead to the conclusion that the government has imposed punishment.' " *Id.* at 363 (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)). The SBM program does not detain an offender in any significant way. Defendants point out that the SBM program requires participants to acknowledge messages sent via the MTD and cooperate with DCC in resolving alerts. Additionally, every ninety days a participant must allow DCC personnel to perform maintenance on the SBM equipment where it is located, typically in the participant's residence. While these requirements of the SBM program, and others, constrain a participant's experience of absolute freedom, no aspect of the SBM program remotely approaches the same level of restraint as the detainment inherent in the civil commitment scheme upheld in *Hendricks*. Similar to registration schemes, the requirements necessary to operate SBM "make a valid regulatory program effective and do not impose punitive restraints." *Smith*, 538 U.S. at 102.

Noting the maintenance that must be performed by DCC personnel every ninety days, typically within an offender's residence, the dissenting opinion argues that the SBM program unnecessarily burdens the Fourth Amendment rights of those convicted felons subject to SBM. However, it is beyond dispute that convicted felons do not enjoy the same measure of constitutional protections, including the

expectation of privacy under the Fourth Amendment, as do citizens who have not been convicted of a felony. *See*, *e.g.*, *Velasquez v. Woods*, 329 F.3d 420 (5th Cir. 2003) (per curiam) (holding that collecting blood samples from felons for registration in a DNA databank does not violate the Fourth Amendment); *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997) (holding that convicted sex offenders have no right of privacy preventing a state from requiring them to register as such and be subject to community notification of their residences), *cert. denied*, 523 U.S. 1007 (1998); *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992) ("Even probationers lose the protection of the Fourth Amendment with respect to their right to privacy against searches of their homes pursuant to an established program to ensure rehabilitation and security." (citing *Griffin*, 483 U.S. at 868)), *cert. denied*, 506 U.S. 977 (1992); *Standley*, 362 N.C. at 329-33, 661 S.E.2d at 730-32 (holding that a convicted sex offender's constitutional rights were not violated by a municipal ordinance that prohibited him from access to public parks); *Bryant*, 359 N.C. at 557-70, 614 S.E.2d at 481-89 (holding that no due process violation occurred when a convicted sex offender who was required to register in South Carolina failed to register in North Carolina, even though he received no actual notice of registration requirement). Here felons convicted of multiple counts of indecent liberties with children are not visited by DCC personnel for random searches, but simply to ensure the SBM system is working properly.

Finally, in regards to the second factor, defendants list an array of activities that SBM may prohibit or render more difficult. Examples include bathing, swimming, scuba diving, camping in rural areas, and travel by airplane. Moreover, any activity conducted inside a building potentially could be interrupted if the building's structure blocked the satellite signal and required a participant to exit and reestablish satellite connection. These are not trivial interferences, yet they are certainly no more onerous than the harsh effects of the regulations found to be nonpunitive in occupational debarment cases or in *Hendricks*.

Doe v. Bredesen is likewise persuasive on this point. The court in that case considered record testimony from an offender enrolled in Tennessee's SBM program. He described his experiences of not being allowed to swim or bathe, of needing to go outside a building "at least once every hour so that monitoring can take place," and of one time "stand[ing] in the rain, for over thirty minutes, for all his neighbors to see" while a problem with the equipment was corrected. *Bredesen*,

507 F.3d at 1002. Still, the court in *Bredesen* could not conclude that these circumstances rendered Tennessee's SBM program punitive.

The next relevant factor is whether the SBM program promotes the traditional aims of punishment. Retribution and deterrence are "the two primary objectives of criminal punishment." *Hendricks*, 521 U.S. at 361-62. Defendants argue that SBM is retributive because it applies only to individuals who have been convicted of prior criminal behavior. In *Hendricks* the Court noted that under Kansas law, even "persons absolved of criminal responsibility may nonetheless be subject to confinement." *Id.* at 362 (citation omitted). The Court commented that the "absence of the necessary criminal responsibility suggests that the State [was] not seeking retribution for a past misdeed." *Id.* We do not find this language dispositive, though, in light of *Smith*, which did not conclude that Alaska's sex offender registration scheme was retributive even though registration "applie[d] only to past conduct, which was, and is, a crime." 538 U.S. at 102, 105. The SBM program is concerned with protecting the public against recidivist tendencies of convicted sex offenders. Thus, the fact that it applies only to individuals convicted of prior criminal conduct is consistent with its regulatory purpose and not indicative of a retributive nature.

Both the State and defendants acknowledge that SBM may have a deterrent purpose or effect in some measure. "But the mere presence of this purpose is insufficient to render a sanction criminal . . . ." *Hudson*, 522 U.S. at 105 (citations omitted). As the Court recognized in *Smith*, "[a]ny number of governmental programs might deter crime without imposing punishment," 538 U.S. at 102, and that is the case here. The SBM program's foremost purpose is not to deter crime, and the possibility of having that secondary effect does not transform SBM into a form of punishment.

The fourth relevant factor is whether SBM has a rational connection to a nonpunitive purpose. The Court in *Smith* identified this indicator as "a '*[m]ost significant*' factor in [its] determination." *Id.* at 102 (emphasis added) (quoting *United States v. Ursery*, 518 U.S. 267, 290 (1996) (alteration in original)). Both the State and defendants recognize a rational connection between SBM and the nonpunitive purpose of protecting the public.

The fifth and final relevant *Mendoza-Martinez* factor is whether SBM is excessive with respect to its nonpunitive purpose of public safety. This inquiry "is not an exercise in determining whether the

legislature has made the best choice possible to address the problem" but "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Id.* at 105. The risk of recidivism posed by sex offenders has been widely documented and is well established. *See Standley*, 362 N.C. at 333, 661 S.E.2d at 731 (discussing the high recidivism rates among sex offenders); *see also McKune v. Lile*, 536 U.S. 24, 32-34 (2002) (plurality) (describing sex offender recidivism rates as "frightening and high"). The SBM program at issue is reasonable when compared to the unacceptable risk against which it seeks to protect.

Moreover, SBM's reasonableness is supported by its limited application and its potentially limited duration. Only three classifications of offenders qualify for SBM according to N.C.G.S. § 14-208.40(a). The legislature viewed these categories of offenders as posing a particular risk to society. It is not excessive to legislate with respect to these types of sex offenders "as a class, rather than require individual determination of their dangerousness." *Smith*, 538 U.S. at 104. Individual determinations can be made though under N.C.G.S. § 14-208.43 if an offender on lifetime SBM petitions the North Carolina Post-Release Supervision and Parole Commission for removal from the SBM program, subject to meeting certain conditions.[4] The possibility of removal from the SBM program following a determination that the "person is not likely to pose a threat to the safety of others" adds to the reasonableness of the SBM program. N.C.G.S. § 14-208.43(c).

CONCLUSION

The SBM program at issue was enacted with the intent to create a civil, regulatory scheme to protect citizens of our state from the threat posed by the recidivist tendencies of convicted sex offenders. Having examined the relevant *Mendoza-Martinez* factors in detail, we conclude that neither the purpose nor effect of the SBM program negates the legislature's civil intent. Accordingly, subjecting defendants to the SBM program does not violate the Ex Post Facto Clauses of the state or federal constitution. The trial court is reversed, and this case is remanded to that court for further proceedings consistent with this opinion.

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4. Section 14-208.43(e) does not permit consideration of a request to terminate participation of an offender subjected to SBM under section 14-208.40(a)(2). This provision does not detract from our conclusion, however, because section 14-208.40(a)(2) itself requires an individualized assessment before applying SBM to an offender whose risk level "requires the highest possible level of supervision and monitoring."

REVERSED AND REMANDED.

Justice HUDSON dissenting.

Sexual offenses are among the most disturbing and damaging of all crimes, and certainly the public supports the General Assembly's efforts to ensure that victims, both past and potential, are protected from such harm. We all agree that innovative approaches are especially necessary to minimize, if not remove, any contact between vulnerable children and those who would prey on them. My review of the record here, however, reveals that the satellite-based monitoring (SBM) program as implemented through the Department of Correction has marginal, if any, efficacy in accomplishing that important purpose. As such, I conclude that its substantial interferences into the daily lives of those monitored are too punitive in effect to be imposed retroactively on these petitioners. I would therefore reverse the Court of Appeals and affirm the trial court's order.

I agree with the majority opinion that nothing on the face of the statutes in question, N.C.G.S. §§ 14-208.40 to -208.45 (2009), indicates that the General Assembly intended the SBM program as a criminal punishment rather than as a civil regulatory scheme for monitoring sex offenders. Likewise, I recognize that the General Assembly enacted the SBM program "to protect our State's children from the recidivist tendencies of convicted sex offenders," specifically those found guilty of aggravated offenses or determined to be sexually violent predators. However, my analysis of the factors laid out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 9 L. Ed. 2d 644, 660-61 (1963), compels the conclusion that the DOC's implementation has transformed this SBM program from regulatory to punitive in its effects on the liberty interests of these defendants.

When we properly apply *Mendoza-Martinez*, by giving heavy weight to the two key factors, namely, whether the regulatory scheme "has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose," *Smith v. Doe*, 538 U.S. 84, 97, 155 L. Ed. 2d 164, 180 (2003), I must conclude this program is punitive in effect. Indeed, the United States Supreme Court has emphasized that "[t]he Act's rational connection to a nonpunitive purpose is a most significant factor in our determination that the statute's effects are not punitive," while noting that even "imprecision" or a "lack[] [of] a close or perfect fit" between a statute and its nonpunitive aims does not mean the stated purpose is a "sham or mere pretext." *Id.* at 102-03, 155 L. Ed. 2d at 183 (citations, internal quotation

marks, and alteration omitted). Certainly, a program that affirmatively restrains an enrollee's liberty—indeed, even one authorizing the involuntary commitment of an individual to an institution—may be found to be nonpunitive if the action at issue advances the program's regulatory purpose. *See Kansas v. Hendricks*, 521 U.S. 346, 370-71, 138 L. Ed. 2d 501, 516 (1997) (upholding a statute that provides for the involuntary civil commitment of sexually violent predators who are determined to suffer from a "mental abnormality" or "personality disorder"). A review of the transcripts and exhibits here shows that this program does not protect the public in any effective way. In light of its lack of effectiveness, the SBM program at issue here is so excessively restraining and intrusive that it becomes punitive.

As to this "most significant factor" from *Mendoza-Martinez*, the majority merely recites the State's assertion of a "rational connection between SBM and the nonpunitive purpose of protecting the public." Nowhere does the majority opinion—or even the State, in its brief and arguments to this Court or in the hearing before the trial court—articulate how the SBM program, as currently implemented by the DOC through the Division of Community Corrections (DCC), even begins to further its stated purpose of protecting our State's children. Likewise, the majority opinion refers to the risk of recidivism by these offenders and concludes, without any evidence or additional analysis, that "[t]he SBM program at issue is reasonable when compared to the unacceptable risk against which it seeks to protect."[5]

Indeed, the trial court returned to this question repeatedly at the hearing, particularly the statements by DCC personnel that inclusion and exclusion zones are not used as part of the program:

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5. The State did not submit any evidence or data to support the assertion that sex offenders are more recidivist than other criminals. In fact, several reputable sources, including North Carolina's own Sexual Offender Accountability and Responsibility (SOAR) program, identify this notion as one of the top "myths" concerning sex offenders, although the data are somewhat murky. *See* SOAR Program Presentation, Conference of North Carolina Superior Court Judges (June 14, 2006), http://www.sog.unc.edu/faculty/smithjess/200606conference/200606CarboStat.doc (listing a series of "Myths," including: "Sex offenders have the highest recidivism rates of all criminals."); Melissa D. Grady, *Sex Offender Myths: Fact or Fiction: What do we know about sex offenders and how to prevent sex crimes?* [hereinafter *Sex Offender Myths*], http://www.preventchildabusenc.org/wp-content/uploads/2009/06/ October-Sex-Offender-Myths_Final1.pdf ("Myth #8: Most sex offenders reoffend," but in reality, "the rate varies depending on the types of crimes or the types of victims an offender targets"; "Myth #5: Current laws . . . have been effective in reducing the number of sex crimes committed," but actually, "nearly 96% of all sex crimes are committed by first-time offenders." (emphases omitted)).

COURT: Why monitor somebody if you can't exclude them from going to places you don't want them to go?

[Todd Carter]: I think part of the problem is like an urban—like Asheville, North Carolina, we have a lot of schools. If somebody's going up Merrimon Avenue—

COURT: I understand the difficulties of it. The question is what benefit is the state getting from this knowing where the defendants are if there are no places that are excluded that they can't go? There must be some purpose to doing this, I assume.

[Todd Carter]: Yes, your Honor. I think why they don't do that is they would get so many false readings.

COURT: I understand that, but why do they? Why do they monitor people at all? Or do you know?

[Todd Carter]: I guess part of it is because it's the law and policy handed down.

Again, when Lori Anderson was testifying:

COURT: But there's nothing by regulation or statute that would stop somebody who's done with all this but still under satellite monitoring from going into a school or park other than Woodfin and other things like that?

A: Not that I'm aware of.

Similarly, Hannah Roland affirmed that, with respect to "unsupervised" offenders, who are no longer on any type of post-release parole or probation, "They are not under any type of supervision, so we don't want to appear to be supervising them. It's a periodic check." Ms. Roland attributed this effort not "to appear to be supervising them" to advice that DOC and DCC had received from their legal counsel.

This testimony calls into serious question the efficacy of the SBM program as currently implemented without the use of inclusion and exclusion zones. Although, as the Supreme Court stated in *Smith*, a regulatory scheme need not be "the best choice possible to address the problem," 538 U.S. at 105, 155 L. Ed. 2d at 185, courts have repeatedly emphasized the need for some showing that the program does, in fact, advance the stated nonpunitive purpose. *See*, *e.g.*, *id.* at 102-03, 155 L. Ed. 2d at 183 (observing that the sex offender registry statute in question "has a legitimate nonpunitive purpose of 'public

safety, *which is advanced by alerting the public to the risk of sex offenders in their communit[y]*' "); *Hendricks*, 521 U.S. at 363, 138 L. Ed. 2d at 516 ("Far from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, *to hold the person until his mental abnormality no longer causes him to be a threat to others*." (citation omitted) (emphasis added)); *Wallace v. State*, 905 N.E.2d 371, 383 (Ind. 2009) (considering whether the registration statute in question, initially enacted as a measure "to give the community notification necessary to protect its children from sex offenders," "*advances* a legitimate purpose of public safety" or establishes a framework that is a "legitimate way to protect the public from repeat offenders" (emphasis added)); *State v. Letalien*, 2009 ME 130, ¶ 54, 985 A.2d 4, 24 (2009) (emphasizing the "positive benefit" of the "over-inclusive aspect of the registration requirement" because "the public has ready access to information for a longer period regarding a group of individuals who, at least as a class of persons, pose a public safety risk"); *see also* Erin Murphy, *Paradigms of Restraint*, 57 Duke L.J. 1321, 1407 ("[R]ather than rely upon speculative assessments that a particular technology achieves a particular goal, courts should demand evidence of its capacity to achieve its stated purpose.").

Here the majority opinion itself repeatedly downplays the intrusive nature of the SBM program and emphasizes that it is "passive,"[6] that unsupervised enrollees "are only periodically checked," that no enrollees are currently subject to inclusion or exclusion zones (and unsupervised enrollees never will be), and that the State is merely "logging and reviewing information about offenders' whereabouts" after the fact. Most telling, the equipment provides only a "near real-time" log of enrollees' movements, and DCC personnel testified that they do not always immediately respond to all alerts because the equipment so frequently loses signal.

Moreover, Ms. Roland testified that she had a staff of only two probation officers to oversee the seventy people subject to lifetime monitoring as of May 2009. She agreed that "there's a lot of randomness to the monitoring" of the lifetime enrollees. The exhibits submitted by the DOC and DCC, including the "agreements" signed by enrollees, and the testimony at the hearings indicate that the SBM

6. In fact, while the majority uses the word "passive" to characterize the monitoring, the SBM program actually falls under the "active" category of monitoring as defined by the manufacturer of the devices and by the DCC's own Sex Offender Management Interim Policy, because the device provides an immediate notification, or "near real-time reporting," of an alert or violation.

program does not provide any information to the public beyond what is already readily available through the sex offender registry.[7]

Thus, although DOC and DCC may "observe certain patterns of movement or locations that a participant appears to frequent," prompting follow-up investigation to see if the area has any "vulnerable sites, such as schools or daycare centers," no evidence or testimony suggests that the SBM program—with its ongoing interference in and with enrollees' daily lives, even those who have completed all criminal sentences and other post-release supervision—operates to prevent actual harm to our state's children. Of course, the records maintained by the DCC about enrollees' movements and whereabouts may be useful in apprehending a suspect after a crime has already taken place, but the SBM program does nothing to bar enrollees—those at high risk of recidivism—from abusing a child anywhere, at any time.[8] Rather, the record before us, particularly the testimony of DCC officials, demonstrates that no one knows when one of these offenders is actually in a school, or near a child care center, or talking to a neighborhood child, or even has a child in his home, before any harm might befall that child.[9] The General As-

7. The sex offender registry allows members of the public to take steps to protect themselves, for example, by researching the publicly available list if they have doubts about a caregiver, coach, or neighbor. The SBM program does not involve any such release of information or provide additional means for the public to avoid these offenders found to be at high risk of recidivism, aside from their possible identification through the ankle bracelet and MTD—yet the majority opinion notes that these devices "could [be] perceive[d] to be any number of personal electronic devices" and thus essentially do nothing to alert the public that a dangerous sex offender is in their midst.

8. Even worse, the SBM program may provide a false sense of security in this regard, as another common myth about sex offenders is that they are strangers to the victims. *See Sex Offender Myths*. According to this report,

> [N]early 97% of all sexual crimes against children under the age of 5 are committed by either a relative (48.6%) or someone the victim knows (48.3%) and for children ages 6 to 11 who were sexually assaulted, 42% of their perpetrators were relatives and 52.9% were acquaintances. Those percentages only begin to change slightly with age, with studies showing that as individuals get older, they are more likely to be assaulted by a stranger.

Id. (internal citations omitted). For that reason, Grady concludes that "[c]urrent laws . . . do nothing to protect the nearly half of child sexual crime victims who are living in the same home as their perpetrator." *Id.* The SBM program does nothing to mitigate these real risks.

9. Todd Carter testified that "they can go wherever they want to," and Lori Anderson stated she was not aware of anything preventing someone under SBM from going into a school or park. Hannah Roland also confirmed that there is no immediate alert if a lifetime tracker goes within three hundred feet of a school. *But see* Act of July

sembly may have intended the SBM program to further the nonpunitive purpose of protecting our children, but the evidence presented here simply does not show that the program's current implementation, without the use of inclusion or exclusion zones, bears any rational connection to that purpose, beyond conclusory statements claiming a link.

Given that the program as implemented essentially fails in its nonpunitive purpose, the numerous affirmative restraints and intrusions it imposes on its enrollees become, in my view, punitive in effect. These intrusions include the following, found as fact by the trial court and unchallenged by the State, which are binding on this Court on appeal:

> 7. Generally persons who have completed probation are not subject to supervision by the State. Persons who were not on probation who are subject to satellite based monitoring are subject to supervision by the State in the following ways:
>
> A. If they are in a building and there is a break in contact with the satellite they are ordered to remove themselves from the building until the satellite contact is reconnected.
>
> B. Every 90 days the satellite monitoring equipment in the possession of the Defendant must be checked by a probation officer.
>
> C. Employees of the State are at all times capable of determining the geographical location of the Defendant.
>
> . . . .
>
> E. Defendants are unable to go swimming or in a hot tub. If it were to become necessary for purposes of physical therapy that the Defendant receive whirlpool therapy or ther-

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18, 2008, ch. 117, sec. 12, 2008 N.C. Sess. Laws 426, 432 (the "Jessica Lunsford Act," providing in part that registered sex offenders are prohibited from knowingly being "[o]n the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds" with limited exceptions).

Tragically, law enforcement authorities in at least one other state have been forced to confront this very problem. *See* Eliott C. McLaughlin & Patrick Oppmann, *Sex offender kills teen while under GPS monitoring, police say*, CNN.com (Mar. 12, 2009), http://articles.cnn.com/2009-03-12/justice/sex.offender.gps_1_gps-monitoring-offender-death-penalty-arguments?_s=PM:CRIME (recounting the story of a thirteen-year-old Washington State girl killed in a field by a sex offender wearing a GPS monitoring device).

apy within a swimming pool it would be necessary on each occasion for the Defendant to have the probation officer remove the bracelet and reattach it after the therapy was complete. The same would be true with MRI's or other medical devices.

F. Because the equipment cannot pass security, the Defendants could not fly on a commercial airline. Because the equipment is on constantly and would interfere with important radio transmissions Defendants would not be able to fly on private airplanes.

G. At least once a day for a 4 to 6 hour period the MTD must be recharged in a device which is attached to an electrical outlet and the Defendant must remain in the vicinity of that device for the whole period of recharging.

H. While the Defendant is within the purview of the public the MTD must be worn by the Defendant on a place that is open and in plain view of everyone. The MTD is approximately 4¼ inches x 2 inches x 3 inches for the current MTD. The new MTD to be put in use by the State is of slightly different dimensions. Therefore, anyone of the public who knew what the equipment was would know that the Defendant had been convicted or pled guilty to a sex offense. The MTD may not be covered with clothing or anything else.

In a finding of fact challenged by the State, the trial court further found that:

D. Each Defendant must wear on their ankle a plainly visible bracelet and must be within two or three feet of a miniature tracking device (hereinafter called MTD) (the one exception to this is that if the MTD is placed in a stable position such as on a table the State would only be notified if the Defendant was more than 30 feet from the MTD which the State is going to use within the next 60 days [within 50 feet with the MTD currently used]) (the 30 feet or 50 feet above stated might be a smaller distance depending upon the configuration of the walls of a building in which the Defendant may be present). As a practical matter the Court finds that the limitations thus stated severely limits [sic] the Defendant's ability to be present in certain types

> of buildings; as an example: If a Defendant attended a movie in a modern, multiplex theater it would be necessary for the Defendant to place the MTD on a stable surface in order to avoid the State notifying him that he must constantly leave the building. However, if the Defendant found it necessary to go more than 30 feet away from the MTD to purchase a refreshment, go to the restroom or for some other purpose the connection would be broken and it would be necessary for him to leave the theater until the connection was reconnected and therefore in all probability to purchase a new ticket to complete viewing the movie or to explain the circumstances to the movie personnel. The net result of this would be that the Defendant would not be able to go to a movie in a multiplex theater. Likewise, it would be impractical for Defendants to maintain employment that required them to be within a building and to move more than 30 feet from a fixed position.

This finding is based in large part on testimony offered by DCC personnel tasked by the DOC with implementation of the SBM program, much of which is recited by the majority opinion. As the testimony easily meets our standard of "competent evidence," *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted), it should likewise be binding on this Court.

The majority concedes that the SBM program "may render more difficult or prohibit" activities including "bathing, swimming, scuba diving, camping in rural areas, and travel by airplane," yet concludes that these "interferences" are nonpunitive when compared to the restrictions at issue "in occupational debarment cases or in [*Kansas v.*] *Hendricks*."[10] However, this analogy is false, as it misapplies the analytical framework outlined by the Supreme Court in *Mendoza-Martinez* and *Smith*. In those cases, as *Hendricks*, the Supreme Court evaluated each factor individually—noting, for example, that the civil commitment scheme in *Hendricks* "*does involve an affirmative restraint*," 521 U.S. at 363, 138 L. Ed. 2d at 516 (emphasis

10. The Supreme Court did not explicitly apply the *Mendoza-Martinez* factors in *Hendricks* and in fact found that the statute there had no retroactive application. In *Hendricks* eligibility for involuntary confinement was predicated on an additional finding, separate and apart from the underlying conviction, that the individual currently suffers from a "mental abnormality" or "personality disorder" and is likely to pose a future danger to the public. 521 U.S. at 371, 138 L. Ed. 2d at 520. Here, enrollment is based solely on the prior conviction and the details of that offense.

added)—but nevertheless concluded that the factors taken *together* did not transform a regulatory scheme into a punitive one.[11]

The *balance* of the *Mendoza-Martinez* factors should guide courts in determining if a statute's effects are punitive in spite of its stated regulatory intent. Three factors determine the nature of these effects: "whether, in its necessary operation, [it]: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; [or] promotes the traditional aims of punishment." *Smith*, 538 U.S. at 97, 155 L. Ed. 2d at 180. Again, from the DCC testimony offered at the hearings and the findings of fact binding on this Court on appeal, the trial court's conclusion is well supported that the SBM program "is much more similar to electronic house arrest than it is to registration particularly in that sex registration does not require monitoring by anyone nor does it require a waiver of 4th Amendment rights where electronic house arrest implicitly or impliedly includes both."

Taken together, the findings of fact and the DCC testimony clearly demonstrate that both supervised and unsupervised enrollees in the SBM program are subject to regular, intrusive disruptions in their lives by the State. Moreover, they are exposed to a distinct likelihood of public shame, humiliation, and ostracism because of the visibility of the equipment.[12] When asked the difference between the

11. If one were to engage in such analogies, it would be equally easy to find examples of recent federal court cases that have addressed more technologically advanced attempts to monitor sex offenders and their activities that also do not involve occupational debarment or confinement and have concluded that such regulatory schemes are punitive and may not be retroactively applied. *See, e.g.*, *Doe v. Nebraska*, No. 8:09CV456, 2009 WL 5184328, at *8 (D. Neb. Dec. 30, 2009) (barring the State of Nebraska from the retroactive application of "probation-like" statutes requiring consent to search and allow installation of monitoring hardware and software and making it a crime to use Internet social networking sites accessible by minors for persons who have been convicted of sex offenses but who have completed their criminal sentences and who are not on probation, parole, or court-ordered supervision); *Doe v. Prosecutor, Marion Cty., Ind.*, 566 F. Supp. 2d 862, 865, 882-83 (S.D. Ind. 2008) (finding punitive in effect a new requirement that sex offenders no longer subject to State supervision "must also consent to the search of their personal computers or devices with internet capability at any time, and they must consent to installation on the same devices . . . of hardware or software to monitor their internet use," as this "unconstitutional chilling of and intrusion upon plaintiffs' privacy and security at home, and in their papers and effects" is even greater than the requirement to register public information or prohibitions against working in a particular profession).

12. In a dissent from the Sixth Circuit's denial of the defendant's petition for rehearing en banc regarding the retroactive application of satellite-based monitoring in *Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007), *cert. denied*, —— U.S. —— 172 L. Ed. 2d 210 (2008), six judges on that court characterized the GPS device used there as "a cat-

restrictions for home confinement (house arrest) and those for the SBM program, Todd Carter answered that the two are "pretty much fairly similar."[13] While it is strictly true that the SBM program "allows offenders to choose where they work and what type of occupation they pursue," this assertion by the majority opinion ignores the practical reality presented by the technological limitations of the ankle bracelet and the MTD device.

Enrollees are constrained in the type of jobs they may hold; even if the DCC maintains that its staff "attempts 'to work with [offenders] and get their cooperation to make it as easy and frustrating-free as possible,' " such assistance is entirely at the discretion of DCC personnel. In fact, Hannah Roland testified that there are "no written guidelines" on "whether or not an offender can be worked with [regarding] a particular job they have" and such decisions are in the

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alyst for public ridicule . . . a form of shaming, humiliation, and banishment, which are well-recognized historical forms of punishment." 521 F.3d 680, 681 (6th Cir. 2008) (citations omitted). They further concluded that the program is "excessive in forcing [the defendant] to broadcast his sex offender status not only to those who choose to inquire, but also to the general public" and decried that "[t]he majority, in upholding the Surveillance Act, deliberately turned a blind eye to the obvious effects of forcing [the defendant] to wear such a large box on his person." *Id.*

13. Electronic monitoring, or electronic house arrest, in North Carolina has been described as "involv[ing] the use of electronic equipment to ensure that a person remains in his or her residence or some other place during specific periods. . . . As a condition of adult criminal probation, electronic monitoring now qualifies as an intermediate punishment . . . ." Stevens H. Clarke, *Law of Sentencing, Probation, and Parole in North Carolina* 13 (Inst. of Gov't, Chapel Hill, N.C., 2d ed. 1997). More specifically,

> In the system usually used in North Carolina, the monitoring device is a transmitter attached to the probationer's ankle. The transmitter has a battery life of approximately ninety days. It transmits a continuous signal to a receiver that is installed in the probationer's home, plugged into the electric power and telephone lines. As long as the probationer is within range of the receiver, the system is passive. If the probationer steps beyond the transmitter's range, the receiver initiates a call from the probationer's home over existing telephone lines to a host computer located in the Department of Correction's monitoring center in Raleigh. The computer then records the date and the exact time that the signal was absent from the offender's transmitter. When the receiver obtains a signal from the transmitter indicating that the offender is again within range, another call is made to the host computer indicating the time that the signal resumed. In addition to active calls, the system makes routine calls approximately every four hours to see that the system is operating correctly and that the offender has not tampered with the equipment. The system operates at all hours throughout the period of electronic house arrest.

Id. (citing N.C.G.S. § 15A-1340.11(4), (6)(d) (1996); N.C. Dep't of Corr., Div. of Adult Prob. & Parole, *Policies and Procedures* (1996)). Thus, in effect, the current SBM program is electronic house arrest without the use of inclusion and exclusion zones.

discretion of the officer and his or her chief. The written policies make no such allowances, and employers are surely not required to accommodate the need of enrollees to stay within thirty feet of the MTD, take a break to go outside every time an alarm sounds, or have their supervisor confirm to DCC that the enrollee remains at work.

The DCC employees acknowledged both the limitations of the tracking equipment and their susceptibility to disruptive "lost signal" alarms, often triggered when an enrollee is in a building such as one with "a lot of steel." Lori Anderson testified that the "majority types of problems" relate to "the larger the building, the larger the facility, whichever it may be, the farther, deeper that the offender gets into the facility" and conceded that enrollees employed as janitors or parking deck attendants would be likely to encounter issues with the equipment losing its GPS signal. The DCC policy is written such that the MTD cannot be "covered" or "hidden," prohibiting offenders even from "put[ting] [a coat] over" the MTD when "it's cold and winter" or "raining," yet enrollees are required to go outside immediately upon losing a signal and wait until the signal is restored. Todd Carter admitted that he has had "clients" who had to "stand outside in the elements" while waiting to regain a signal, including on holidays and during family gatherings.

Given that the SBM program does not effectively protect our children from prospective harm, its restrictions and infringements on enrollees' liberty interests appear only to be retributive and deterrent in purpose and effect, two traditional aims of punishment.[14] In particular, as found by the trial court, the requirement that enrollees, both supervised and unsupervised, allow DOC employees into their

14. The majority maintains that the SBM program's deterrent effect is "secondary" and "does not transform SBM into a form of punishment," yet Steve Chapin, the Chief Executive Officer of Pro Tech Monitoring, the company that provides the equipment for North Carolina's SBM program, has observed that, "*GPS will not prevent a crime. It's a crime deterrent.* It has proven to be a good tool, but you can't oversell it—there's no physical barrier that it creates that can prevent a crime." Randy Dotinga, *Attack of the Perv Trackers*, Wired Magazine (Nov. 9, 2006), *available at* http://www.wired.com/science/discoveries/news/2006/11/72094 (emphasis added). Similarly, a special report by the Pennsylvania Auditor General, whose office surveyed all fifty states regarding their GPS monitoring practices, concluded that "*GPS technology cannot prevent a crime from occurring or show exactly what the offender is doing*, but it can provide critical, verifiable information either to place a sex offender at the scene of a committed crime or to rule the offender out. Moreover, it can serve as a deterrent." Jack Wagner, *Using GPS technology to track sex offenders: Should Pennsylvania do more?*, Special Report, Pa. Dep't of the Auditor Gen. (July 2008), *available at* www.auditorgen.state.pa.us/Reports/Performance/Special/speGPS072108.pdf (emphasis added) (bold type omitted).

homes for equipment maintenance every ninety days is a clear infringement on their Fourth Amendment rights:

> I. It is required of each Defendant (or the Defendant would be guilty of a Class 1 misdemeanor) that he allow a probation officer or officers access to his residence for purpose of checking and maintaining the equipment and that he therefore waive his 4th Amendment rights.

The SBM program "requirements" form that supervised enrollees must sign, and the "maintenance agreement" that unsupervised enrollees must sign, both provide for this regular maintenance. Both also state that even if an enrollee refuses to sign the agreement, "these requirements are still in effect."

Unlike the majority, I would not characterize these forms as "an agreement signed by SBM participants when monitoring begins." Nor should their acquiescence to this required entry be considered a voluntary waiver of their Fourth Amendment rights, because apparently consent will be implied even if they do not agree, and they are subject to criminal penalties if they refuse. The majority opinion brushes aside these constitutional concerns, maintaining that this requirement is "dissimilar from a parole or probation setting" and acceptable because the purpose is for maintenance on property owned by the State, rather than to supervise or investigate an enrollee. This explanation does not adequately justify such constant intrusion on and monitoring of someone who is not on probation or parole.[15]

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15. Indeed, the majority opinion's lengthy and numerous citations to cases involving the "lessened" Fourth Amendment rights of convicted sex offenders are both inapposite and unavailing in the context at hand. All the cases cited by the majority opinion involve the *prospective* loss of Fourth Amendment rights by convicted felons; I take no issue with that contention and recognize that it is well supported in the law. Rather, I emphasize again that here, we are concerned with the *retroactive* stripping of the fundamental right to privacy in one's own home. *Cf. Standley v. Town of Woodfin*, 362 N.C. 328, 332, 661 S.E.2d 728, 731 (2008) (observing that the right to travel is not "fundamental" and thus, an ordinance infringing that right need only meet the rational basis test of review).

The sex offender registry cases cited by the majority do not allow the State to enter the convicted offender's home on a regular, warrantless basis, but instead addressed only the right to privacy with respect to dissemination of the offender's name, address, and other identifying information. *Russell v. Gregoire*, 124 F.3d 1079, 1093 (9th Cir. 1997), *cert. denied*, 523 U.S. 1007, 140 L. Ed. 2d 321 (1998); *see also State v. Bryant*, 359 N.C. 554, 568, 614 S.E.2d 479, 488 (2005) (finding that the "defendant had actual notice of his *lifelong duty* to register with the State of South Carolina as a convicted sex offender" and thus, suffered no due process violation).

Furthermore, the majority also relies on cases in which the defendant in question remains in prison. *Velasquez v. Woods*, 329 F.3d 420, 421 (5th Cir. 2003) (per curiam));

Such a casual dismissal of Fourth Amendment rights runs contrary to one of this nation's most cherished ideals: the notion of the right to privacy in our own homes and protection against intrusion by the State into our personal effects and property. *See*, *e.g.*, *Ker v. California*, 374 U.S. 23, 32, 10 L. Ed. 2d 726, 737 (1963) ("Implicit in the Fourth Amendment's protection from unreasonable searches and seizures is its recognition of individual freedom. That safeguard has been declared to be as of the very essence of constitutional liberty the guaranty of which is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen . . . ." (citations and internal quotation marks omitted)); *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34 ("The sanctity of the home is a revered tenet of Anglo-American jurisprudence." (citations omitted)), *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987); *State v. Sparrow*, 276 N.C. 499, 512, 173 S.E.2d 897, 906 (1970) (emphasizing "the constitutional principle that a person's home is his castle," "in accordance with the ancient rules of the common law" (citations omitted)). Even sex offenders continue to have some constitutional rights.[16] We may not be fond of this particular class of defendants,

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Jones v. Murray, 962 F.2d 302, 306 (4th Cir.), *cert. denied*, 506 U.S. 977, 121 L. Ed. 2d 378 (1992). By contrast, the SBM program at issue here subjects certain convicted offenders to lifetime tracking and can be applied even after those individuals have paid their debt to society by serving their criminal sentences and completing their terms of parole, probation, or any other court-ordered supervision.

16. As one federal district judge recently wrote in the context of warrantless searches and monitoring of sex offenders' Internet and computer use, which is less intrusive than governmental entry into a home:

> As heinous as sex and violent crimes are, many other crimes are also threats to our Nation. The social contract reflected in our Constitution imposes limits on law enforcement to protect liberty and privacy. Americans invest a significant portion of public resources to promote social peace and safety. But our founders drew a clear line, based on observed and experienced abuses, on the government's ability to invade fundamentally personal areas. To enter the homes of or to search the personal effects, papers, and bodies of persons in the general population, public officials must have cause to believe that they will find evidence of a crime. It is almost always possible to characterize the Fourth Amendment as an inconvenience to law enforcement officials as they carry out their vital duties. That inconvenience, however, is one of the fundamental protections that separates the United States of America from totalitarian regimes. The right to feel safe and secure in one's own home, person, and belongings is central to our way of life.

Prosecutor, Marion Cty., Ind., 566 F. Supp. 2d at 887 (citations omitted). Likewise, in his dissent from the Sixth Circuit's denial of the defendant's petition for rehearing en banc in *Doe v. Bredesen*, Judge Damon Keith observed, "We must be careful, in our rush to condemn one of the most despicable crimes in our society, not to undermine the freedom and constitutional rights that make our nation great." 521 F.3d at 681.

but that does not lessen their Fourth Amendment rights nor their expectation of privacy in their own homes.

When weighed against its almost complete lack of efficacy in furthering the purpose of protecting our children, the intrusions of the SBM program become punitive in effect. The physical and practical realities of the SBM program—the size and weight of the ankle bracelet and MTD, the requirement to remain in one place for six hours for daily recharging, the degree to which SBM interferes with everyday work and recreation activities, the degree to which the program impedes enrollees' freedom of travel, and its invasive requirement for consent to enter an enrollee's home—transform the effect of the scheme from regulatory to punitive. This is particularly true for those enrollees who are "unsupervised," meaning that they have completed their prison sentences and any post-release supervision ordered by the court.[17] Whereas "supervised" enrollees remain on probation and, as such, are already subject to many of the provisions mandated under the SBM program,[18] "unsupervised" enrollees have fully paid their debt to society yet continue to be monitored by the State, twenty-four hours a day, seven days a week.

Thus, I conclude that, applying the *Mendoza-Martinez* factors, the SBM program is excessively intrusive in light of its minimal efficacy in advancing its nonpunitive purpose. As such, this SBM program is punitive in effect and should not be applied retroactively. I observe, too, that a number of other state supreme courts have reached a similar conclusion, both regarding GPS monitoring as well as more stringent registration requirements for sex offenders that do not implicate the type of Fourth Amendment issues present here. *See*, *e.g.*, *Wallace*, 905 N.E.2d at 384 (concluding that the sex offender registration scheme "imposes burdens that have the effect of adding punishment beyond that which could have been imposed when [a] crime was committed" and that the program cannot be retroactively applied); *Letalien*, 2009 ME 130, at ¶ 62, 985 A.2d at 26 (finding a life-

17. Of course, as convicted sex offenders found to be recidivists, to have committed aggravated offenses, or to be sexually violent predators, even "unsupervised" offenders are still required to maintain lifetime registration on the sex offender registry. As such, unless the offender successfully petitions a court for termination, the public will forever have access to information including the offender's name and identifying features, offense history, home address, a current photograph, and fingerprints. N.C.G.S. §§ 14-208.6A, -208.7, -208.22.

18. For example, probationers are generally subject to curfews and travel restrictions; others may be prohibited from visiting certain locations or spending time anywhere other than home or work.

time registration requirement, including quarterly in-person verification, "without . . . affording those offenders any opportunity to ever be relieved of the duty" to register to be punitive and barring its retroactive application); *Commonwealth v. Cory*, 454 Mass. 559, 572, 911 N.E.2d 187, 197 (2009) (holding that "as a result of the substantial burden on liberty [GPS monitoring] imposes as part of the sentence for certain crimes, the statute is punitive in effect" and therefore may not be applied retroactively to a defendant placed on probation for qualifying sex offenses committed before the statute's effective date); *see also Doe v. Schwarzenegger*, 476 F. Supp. 2d 1178, 1181 (E.D. Cal. 2007) ("[R]eading the [Sexual Predator Punishment and Control Act (SPPCA), which requires, *inter alia*, GPS monitoring of registered sex offenders] retroactively would raise serious ex post facto concerns, and the court is obligated to avoid doing so if it can reasonably construe the statute prospectively."). In other states the legislature has explicitly provided that such statutes have only prospective application. *See*, *e.g.*, *Burrell v. State*, 993 So.2d 998, 999 (Fla. 2007) (discussing Florida's version of the Jessica Lunsford Act and noting that "[t]he statute specifically states that it applies to sex offenders whose offenses occurred on or after" the statute's effective date).[19]

I conclude only that the retroactive application of these statutes violates the ex post facto clauses of our state and federal constitutions and would therefore prohibit their application solely to those sex offenders who committed their offenses before the effective date of the statute. I respectfully dissent.

Chief Justice PARKER and Justice TIMMONS-GOODSON join in this dissenting opinion.

19. Likewise, following the federal district court's ruling in *Doe v. Schwarzenegger*, the State of California declined to appeal, instead stating its agreement that the SPPCA should be applied prospectively only.

VIKTORIA KING, A MINOR, BY AND THROUGH HER PARENT, REVONDIA HARVEY-BARROW v. BEAUFORT COUNTY BOARD OF EDUCATION AND JEFFREY MOSS, SUPERINTENDENT, BEAUFORT COUNTY SCHOOLS, IN HIS OFFICIAL CAPACITY

No. 480A09

(Filed 8 October 2010)

1. Long-term suspension— alternative education—reasons for exclusion

While the denial of alternative education to a high school student during her long-term suspension for a willful violation of a lawful school rule is not a violation of the state constitution, a long-term suspended student has a statutory right to receive alternative education when feasible and appropriate, and a suspended student excluded from alternative education has a state constitutional right to be informed by school administrators of the reason for the exclusion because the exclusion from alternative education potentially infringes on the student's right to equal educational access under N.C. Const. art. I, § 2(1).

2. Schools and Education— long-term suspension—alternative education—reasons for exclusion—standard of scrutiny

Alternative education decisions for students who receive long-term suspensions are reviewed under the state constitutional standard of intermediate scrutiny because: (1) strict scrutiny fails to accord sufficient respect for school officials' informed judgments regarding the provision of alternative education and imposes untenable administrative burdens, and applying strict scrutiny to long-term suspensions jeopardizes the safety of the greater school community and impedes the educational progress of the suspended students' peers; (2) rational basis review does not adequately protect student access to educational opportunities or guard against arbitrary decisions or inadvertent errors by school officials; (3) under the state intermediate scrutiny standard, school administrators must articulate an important or significant reason for denying students access to alternative education, although the reasons supporting their decisions do not need to be compelling; (4) in the school disciplinary context, intermediate scrutiny strikes a practical balance between protecting student access to educational opportunities and empowering school officials to maintain safe and orderly

schools; and (5) the requirement that school administrators articulate an important or significant reason for denying educational services is not unduly burdensome since the people of North Carolina "have a right to the privilege of education." N.C. Const. art. I, § 15.

Justice TIMMONS-GOODSON concurring in part and dissenting in part.

Justice HUDSON joining in opinion concurring in part and dissenting in part.

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 200 N.C. App. ——, 683 S.E.2d 767 (2009), affirming an order entered 16 May 2008 by Judge William C. Griffin, Jr. in Superior Court, Beaufort County. Heard in the Supreme Court on 22 March 2010.

Children's Law Clinic, Duke Law School, by Jane Wettach; and Advocates for Children's Services, Legal Aid of North Carolina, Inc., by Erwin Byrd and Lewis Pitts, for plaintiff-appellant.

Tharrington Smith, L.L.P., by Curtis H. Allen III, for defendant-appellee Beaufort County Board of Education.

Edelstein and Payne, by M. Travis Payne, for North Carolina Advocates for Justice, amicus curiae.

University of North Carolina School of Law Center for Civil Rights, by Mark Dorosin and Benita N. Jones, for Advancement Project, Advocates for Basic Legal Equality, Inc., Legal Aid of Western Ohio, Inc., Advocates for Children of New York, Alabama Disabilities Advocacy Program, American Civil Liberties Union, Barton Child Law & Policy Clinic, Center for Civil Rights at UNC School of Law, Charles Hamilton Houston Institute for Race and Justice at Harvard Law School, Children and Family Justice Center; Children's Law Center of Massachusetts, Connecticut Legal Services, Inc., Council of Parent Attorneys and Advocates, Education Law Center, Juvenile Justice Project of Louisiana, Legal Aid Society of Birmingham, Legal Assistance Foundation of Metropolitan Chicago; NAACP Legal Defense & Educational Fund, Inc.,

National Association of Counsel for Children, National Association of Social Workers, National Children's Law Network, National Economic and Social Rights Initiative, New York Law School Racial Justice Project, Public Counsel, Southern Poverty Law Center, TeamChild, University of Tennessee College of Law Education Law Practicum, Sharon A. Bourne-Clarke, Melissa Kenney Ngaruri, Heather E. Price, Russell Skiba, Anita Wadhwa, and Julie Waterstone, amici curiae.

Laurie Gallagher for Council for Children's Rights, amicus curiae.

Jack Holtzman for North Carolina Justice Center, Concerned Citizens for the Betterment of Beaufort County Schools, Parents Supporting Parents, Tamar Birckhead, American Civil Liberties Union of North Carolina Legal Foundation, Southern Coalition for Social Justice, Center for Death Penalty Litigation, Inc., Office of the Juvenile Defender, North Carolina Black Leadership Caucus, and NC Conference of NAACP Branches, amici curiae.

Robert F. Orr and Charles L. Becton, amici curiae.

Campbell Shatley, PLLC, by Christopher Z. Campbell; and Allison B. Schafer, General Counsel, for North Carolina School Boards Association, amicus curiae.

Ann McColl, General Counsel; and William A. Tobin, Social Science Research Institute, Duke University, for North Carolina Association of School Administrators, amicus curiae.

MARTIN, Justice.

This case presents the question of whether the Beaufort County School Board and its superintendent (defendants) violated state law by denying Viktoria King (plaintiff) access to alternative education during her long-term suspension from school. After considering long-standing precedent affording school officials discretion in administering student disciplinary codes and recent cases recognizing a state constitutional right to a sound basic education, we hold that defendants must articulate a reason for denying plaintiff access to alternative education during her long-term suspension.

On 18 January 2008, plaintiff, a sophomore at Southside High School in Beaufort County, participated in a fight involving numerous students. She received a ten-day suspension for her involvement in the fight. The principal at Southside High School also recommended that plaintiff receive a long-term suspension. On 1 February 2008, the Beaufort County Superintendent, Jeffrey Moss, adopted the principal's recommendation and suspended plaintiff for the remainder of the 2007-2008 school year without offering her alternative education. Plaintiff timely appealed the suspension to a panel of central office administrators. On 13 February 2008, the panel conducted a due process hearing and subsequently upheld the decision.

On 20 February 2008, plaintiff filed a complaint in Superior Court seeking injunctive and declaratory relief. Plaintiff alleged that defendants violated her state constitutional right to a sound basic education by failing to provide her access to alternative education. Plaintiff also filed a Motion for Temporary Restraining Order and Preliminary Injunction, requesting that the trial court order defendants to provide educational services to plaintiff during her suspension. The trial court denied this motion and dismissed plaintiff's complaint pursuant to Rules 12(b)(6) and 12(b)(7) of the North Carolina Rules of Civil Procedure. The Court of Appeals, in a divided opinion, affirmed the trial court's ruling in favor of defendants. *King ex rel. Harvey-Barrow v. Beaufort Cty. Bd. of Educ.*, —— N.C. App. ——, 683 S.E.2d 767 (2009).

[1] Plaintiff alleges that defendants' denial of alternative education during her long-term suspension is a violation of the state constitution. Before this Court plaintiff repeatedly emphasized the importance of requiring defendants to articulate a reason for denying her access to alternative education. While the state constitution requires defendants to provide a reason for refusing alternative education to plaintiff, we decline plaintiff's invitation to create a constitutional right to alternative education for students who violate lawful school rules.

The General Assembly has enacted a comprehensive statutory scheme specifying the powers and duties of local school boards and school officials in connection with school discipline and alternative education. The statute vests school officials with the authority to issue long-term suspensions to students "who willfully violate[] the policies of conduct established by the local board of education." N.C.G.S. § 115C-391(c) (2009). Section 115C-47(32a) requires local boards of education to "establish at least one alternative learning

program and . . . adopt guidelines for assigning students to alternative learning programs." *Id.* § 115C-47(32a) (2009). In addition to mandating alternative learning programs, the General Assembly requires local boards of education to create "strategies for providing alternative learning programs, when feasible and appropriate, for students who are subject to long term suspension or expulsion." *Id.* The statute encourages school boards to incorporate these strategies into their "safe school plans," which are "designed to provide that every school . . . is safe, secure, and orderly . . . ." *Id.*; N.C.G.S. § 115C-105.47 (2009). This comprehensive scheme grants long-term suspended students a statutory right to receive alternative education when feasible and appropriate.

In acknowledging a statutory right to alternative education, we stress that a fundamental right to alternative education does not exist under the state constitution. Nevertheless, insofar as the General Assembly has provided a statutory right to alternative education, a suspended student excluded from alternative education has a state constitutional right to know the reason for her exclusion. This right arises from the equal access provisions of Article IX, Section 2(1) of the North Carolina Constitution. *See Leandro v. State*, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) ("Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state *an opportunity* to receive a sound basic education in our public schools." (emphasis added)); *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 618, 264 S.E.2d 106, 113 (1980) ("[E]qual access to participation in our public school system is a fundamental right, guaranteed by our state constitution and protected by considerations of procedural due process." (citations omitted)). Because exclusion from alternative education potentially infringes on a student's state constitutional right to equal educational access, school administrators must articulate a reason when they exclude a long-term suspended student from alternative education.

[2] Having observed that our holding does not recognize a state constitutional right to alternative education, we consider the standard of review to be applied when a suspended student is denied access to alternative education. The present case requires us to harmonize the rational basis test employed in school discipline cases with the strict scrutiny analysis that formed a part of this Court's constitutional holding in school funding cases. *Compare Hutchins v.* [*Sch. Comm. of*] *Durham*, 137 N.C. 68, 70-71, 49 S.E. 46, 47 (1904) ("[T]he constitutional guarantee that tuition shall be free and the schools equally

open to all is necessarily subject to reasonable regulations to enforce discipline by expulsion of the disorderly and protection of the morals and health of the pupils." (citations omitted)), *with Leandro*, 346 N.C. at 345, 488 S.E.2d at 254 ("[T]he right to education provided in the state constitution is a right to a sound basic education."). The tension between these differing standards of review must be resolved in a manner that (1) protects student access to educational opportunities, while (2) preserving the discretion of school officials to maintain safe and orderly schools.

North Carolina courts have historically accorded school administrators great deference in the exercise of their disciplinary authority. For instance, in *Coggins ex rel. Coggins v. Board of Education*, this Court upheld the school board's decision to bar students from participating in certain organizations. 223 N.C. 763, 770, 28 S.E.2d 527, 532 (1944). In so doing, we noted that "the local board is the final authority so long as it acts in good faith and refrains from adopting regulations which are clearly arbitrary or unreasonable." *Id.* at 769, 28 S.E.2d at 531. In *Craig ex rel. Craig v. Buncombe County Board of Education*, the Court of Appeals upheld the decision of school officials to suspend students for smoking on campus since the school's "legitimate concerns" were "reasonably related to the educational process and thus provide[d] a rational basis for the regulation." 80 N.C. App. 683, 686, 343 S.E.2d 222, 224 (1986) (citation omitted), *disc. rev. denied and appeal dismissed*, 318 N.C. 281, 348 S.E.2d 138 (1986). Indeed, the Court of Appeals observed that "a student may be constitutionally suspended or expelled for misconduct whenever the conduct is of a type the school may legitimately prohibit." *In re Jackson*, 84 N.C. App. 167, 176, 352 S.E.2d 449, 455 (1987).

Despite this well-established precedent, plaintiff urges this Court to adopt strict scrutiny for school disciplinary determinations. Most courts, however, review school disciplinary decisions using a more deferential standard. *See, e.g.*, *Tucson Pub. Sch., Dist. No. 1 v. Green ex rel. Askew*, 17 Ariz. App. 91, 94, 495 P.2d 861, 864 (1972); *Satan Fraternity v. Bd. of Pub. Instruction*, 156 Fla. 222, 225, 22 So. 2d 892, 893 (1945); *Wilson v. Hinsdale Elementary Sch. Dist. 181*, 349 Ill. App. 3d 243, 248, 810 N.E.2d 637, 642 (2004); *S. Gibson Sch. Bd. v. Sollman*, 768 N.E.2d 437, 442 (Ind. 2002); *Davis v. Hillsdale Cmty. Sch. Dist.*, 226 Mich. App. 375, 379-81, 573 N.W.2d 77, 79 (1997) (per curiam); *Busch v. Omaha Pub. Sch. Dist.*, 261 Neb. 484, 488, 623 N.W.2d 672, 677 (2001); *Hamilton v. Unionville-Chadds Ford Sch.*

Dist., 552 Pa. 245, 247, 714 A.2d 1012, 1014 (1998). Even the Supreme Court of Wyoming, one of the few state courts to apply strict scrutiny in this context, acknowledges that "school districts are in the best position to judge the student's actions in light of all the surrounding circumstances and tailor the appropriate punishment to fit the unique circumstances of each student's situation." *In Re RM*, 2004 WY 162, ¶ 25, 102 P.3d 868, 876 (Wyo. 2004). Put simply, "the special context of public schools requires a more lenient approach to reviewing the decisions of school officials, and the professional judgments of school officials on school safety and student discipline issues are entitled to appropriate judicial deference." John Dayton & Anne Proffitt Dupre, *Searching for Guidance in Public School Search and Seizure Law: From* T.L.O. *to* Redding, 248 Educ. L. Rep. 19, 27-28 (2009) (citations omitted).

At the same time, we have held strict scrutiny applicable to some educational issues. In *Leandro v. State*, this Court applied strict scrutiny to the question of whether the state had failed to provide students in low-income districts "a sufficient education to meet the minimal standard for a constitutionally adequate education." 346 N.C. at 342, 488 S.E.2d at 252. Within the context of school funding, the Court concluded that "Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools." *Id.* at 347, 488 S.E.2d at 255. In contrast to our school discipline cases, *Leandro* placed the burden on the state "to establish that [its] actions denying this fundamental right [were] 'necessary to promote a compelling governmental interest.' " *Id.* at 357, 488 S.E.2d at 261 (citation omitted); *see Stephenson v. Bartlett*, 355 N.C. 354, 377-78, 562 S.E.2d 377, 393 (2002) ("Under strict scrutiny, a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest." (citation omitted)).

But *Leandro* does not immunize students from the consequences of their own misconduct. A critical distinction exists between the state uniformly denying students in low-income districts access to a sound basic education and the state offering all students a sound basic education but temporarily removing students who engage in misconduct that disrupts the sound basic education of their peers. As we have said, "The right to attend school and claim the benefits afforded by the public school system is the right to attend subject to all lawful rules and regulations prescribed for the government

thereof." *Coggins*, 223 N.C. at 767, 28 S.E.2d at 530. School administrators undeniably possess both freedom and flexibility to punish students who disrupt the educational process or endanger other students. *See Goss v. Lopez*, 419 U.S. 565, 580, 42 L. Ed. 2d 725, 738 (1975) ("[O]ur schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed."); *Doe v. Superintendent of Sch. of Worcester*, 421 Mass. 117, 131, 653 N.E.2d 1088, 1096 (1995) ("[A] student's interest in a public education can be forfeited by violating school rules." (citations omitted)).

Notwithstanding the long history of judicial deference to the disciplinary determinations of school administrators, plaintiff argues that her *Leandro* right to a sound basic education requires us to apply strict scrutiny to defendants' decision to deny her alternative education. We reject plaintiff's attempt to sever the alternative education determination from her own misbehavior. These matters are legally inseparable in that administrative procedures for the provision of alternative education are inextricably linked with administrative planning for school safety. *See* N.C.G.S. § 115C-47(32a) (encouraging local school boards to incorporate their strategies for providing alternative education to long-term suspended students into their safe school plans); *id.* § 115C-105.47(b)(3) (indicating that safe school plans must include mechanisms to provide alternative education placements for "seriously disruptive" students).

In any event, adoption of strict scrutiny to review disciplinary determinations would necessarily require judges to routinely substitute their own views for those of school administrators. Amicus North Carolina School Boards Association observes: "[Plaintiff] invites this Court to do something that the General Assembly has been unwilling to do: force schools to provide alternative educational services to students who are temporarily removed from school due to their own dangerous or disruptive behavior." We agree with amicus that adoption of strict scrutiny for disciplinary and alternative education decisions by school officials would render "long-term suspension practically unusable as a form of student discipline and flood[] the courts with litigation regarding a myriad of discretionary administrative decisions." Defendant school board adds: "Under Plaintiff's radical interpretation of *Leandro*, . . . courts would be called upon to micro-manage student discipline matters in protracted litigation challenging good faith efforts by the legislature and local boards to maintain safe and orderly schools." We are unwilling to go so far.

Strict scrutiny fails to accord sufficient respect for school officials' informed judgments regarding the provision of alternative education and imposes untenable administrative burdens. In each case in which a school administrator determines that an alternative education placement is inappropriate, the school must prove its disciplinary decision is narrowly tailored to effectuate a compelling interest. *See, e.g.*, *Stephenson*, 355 N.C. at 377-78, 562 S.E.2d at 393 (citations omitted); *Treants Enters., Inc. v. Onslow Cty.*, 83 N.C. App. 345, 351, 350 S.E.2d 365, 369 (1986) (indicating that to survive strict scrutiny, a law "must be narrowly drawn to express only the legitimate interests at stake" (citations omitted)), *aff'd*, 320 N.C. 776, 360 S.E.2d 783 (1987); *see also Dunn v. Blumstein*, 405 U.S. 330, 343, 31 L. Ed. 2d 274, 284 (1972) (noting that strict scrutiny places "a heavy burden of justification . . . on the State"); *Blumstein*, 405 U.S. at 343, 31 L. Ed. 2d at 285 ("And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' " (quoting *Shelton v. Tucker*, 364 U.S. 479, 488, 5 L. Ed. 2d 231, 237 (1960))).

Because of the unworkable burdens it imposes on school administrators, applying strict scrutiny to long-term suspensions jeopardizes the safety of the greater school community and impedes the educational progress of the suspended student's peers. *See New Jersey v. T.L.O.*, 469 U.S. 325, 350, 83 L. Ed. 2d 720, 740 (1985) (Powell, J., concurring) ("The primary duty of school officials and teachers, as the Court states, is the education and training of young people. . . . Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers . . . ."). In contrast to regulatory statutes and criminal codes enacted by legislative bodies, school disciplinary rules are not drafted to withstand strict scrutiny in courts of law. *See Vieth v. Jubelirer*, 541 U.S. 267, 294, 158 L. Ed. 2d 546, 568 (2004) (plurality) (noting that in the context of constitutional review of statutes, "strict scrutiny readily, and almost always, results in invalidation"); Ann L. Majestic, Jean M. Cary & Janine M. Murphy, *Chapter 18: Student Conduct Issues*, *in* Education Law in North Carolina § 1802.A.1, at 18-5 (2001) ("[S]chool officials have the difficult task of drafting rules that anticipate and define most misbehavior with specificity and also contain some *broad, general phrases* that will cover unanticipated misconduct."

(emphasis added)). Indeed, the United States Constitution does not require school rules to withstand such scrutiny. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686, 92 L. Ed. 2d 549, 560 (1986) ("We have recognized that 'maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures . . . .' " (quoting *T.L.O.*, 469 U.S. at 340, 83 L. Ed. 2d at 733)); *id.* at 686, 92 L. Ed. 2d at 560 ("Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, *the school disciplinary rules need not be as detailed as a criminal code* which imposes criminal sanctions." (emphasis added)). Consequently, application of strict scrutiny to the student disciplinary process operates to the detriment of our public school communities.

Rational basis review, on the other hand, does not adequately protect student access to educational opportunities or guard against arbitrary decisions or inadvertent errors by school officials. Under this standard, "[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." *In re R.L.C.*, 361 N.C. 287, 295, 643 S.E.2d 920, 924 (emphasis added) (citation omitted), *cert. denied*, 552 U.S. 1024, 169 L. Ed. 2d 396 (2007). As applied to alternative education determinations, rational basis review undoubtedly upholds administrative decisions even in the absence of a proffered reason, as plaintiff experienced in the present case. But this Court's previous recognition of state constitutional rights to equal educational access and a sound basic education compels more exacting review. *See Leandro*, 346 N.C. at 357, 488 S.E.2d at 261; *Sneed*, 299 N.C. at 618, 264 S.E.2d at 113.

Accordingly, we hold that alternative education decisions for students who receive long-term suspensions are reviewed under the state constitutional standard of intermediate scrutiny. *See*, *e.g.*, *Blankenship v. Bartlett*, 363 N.C. 518, 524, 681 S.E.2d 759, 764 (2009) (applying intermediate scrutiny to state constitutional challenge). Under the state intermediate scrutiny standard, school administrators must articulate an important or significant reason for denying students access to alternative education; however, the reasons supporting their decisions do not need to be compelling. *See*, *e.g.*, *id.* at 526-27, 681 S.E.2d at 765-66 ("Judicial districts will be sustained if the legislature's formulations advance important governmental interests . . . ."). In the school disciplinary context, intermediate scrutiny strikes a practical balance between protecting student access to edu-

cational opportunities and empowering school officials to maintain safe and orderly schools.

State law requires local boards of education to establish at least one alternative learning program and create strategies for assigning long-term suspended students to it when feasible and appropriate. N.C.G.S. § 115C-47(32a). Since the General Assembly has chosen to grant this statutory right to long-term suspended students, school administrators cannot arbitrarily deny access without violating the state constitution. *See* N.C. Const. art. IX, § 2; *Leandro*, 346 N.C. at 347, 488 S.E.2d at 255; *Sneed*, 299 N.C. at 618, 264 S.E.2d at 113.

School administrators are not required to provide alternative education to every suspended student, especially those students who forfeit this statutory right through their own misbehavior. Because the safety and educational interests of all students receiving alternative education must be protected, students who exhibit violent behavior, threaten staff or other students, substantially disrupt the learning process, or otherwise engage in serious misconduct may be denied access. For these students, school officials will have little or no difficulty articulating an important or significant reason for denying access to alternative education under the state standard of intermediate review.

We believe considerations of fairness, institutional transparency, and public trust are generally best effectuated when government provides a reason for its denial of services. In the present case, defendants did not articulate any reason for denying plaintiff access to alternative education during her semester-long suspension. The record indicates only that plaintiff participated in "a fight involving numerous students" at Southside High School. Because the people of North Carolina "have a right to the privilege of education," N.C. Const. art. I, § 15, the requirement that school administrators articulate an important or significant reason for denying educational services is not unduly burdensome.

Even though defendants may have concluded plaintiff's violent behavior made her a threat to students and staff if she were placed in an alternative learning facility, it is not the role of this Court to speculate why plaintiff was denied alternative education. Nevertheless, when defendants suspended plaintiff for misbehavior they did not have the benefit of this Court's harmonization of our decision in *Leandro* with the standards of review applicable to school discipline cases. *Cf. State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310

(1984) (ordering remand where the trial court could not have been aware of the correct legal standard), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 732 (1986), *overruled on other grounds by McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988), *cert. denied*, 489 U.S. 1033, 103 L. Ed. 2d 230 (1989). Accordingly, on remand, defendants should be afforded the opportunity to explain why they denied plaintiff access to alternative education.

We therefore reverse the decision of the Court of Appeals and remand this case to that court for further remand to the trial court for additional proceedings consistent with this opinion.

REVERSED AND REMANDED.

Justice TIMMONS-GOODSON concurring in part and dissenting in part.

No school system in the State of North Carolina can deprive students of all state-funded educational opportunities, unless it is absolutely necessary. I believe the Constitution of North Carolina and precedent from this Court made this guarantee to the children of our state. Today's decision retreats from that promise. Because I would hold the right to education to be a fundamental right that is indivisible and not subject to parceling, I disagree with today's decision.

Viktoria King was a sophomore at Southside High School in Beaufort County during the 2007-2008 school year. On 18 January 2008, multiple fights broke out among students after dismissal of school, including one allegedly between Viktoria and another student. For her involvement in the fight, Viktoria was suspended for five months, the remainder of the school year. The Beaufort Superintendent subsequently denied her, without explanation, access to all public educational options.

The question presented to this Court is whether Viktoria King's complaint was sufficient to withstand a motion to dismiss. Viktoria claims that her constitutional right to a sound basic education was violated by depriving her of all state-funded educational opportunities during her long-term suspension. Because her alleged facts, if proved, would establish the violation of a fundamental right, I agree with the decision to reverse the opinion of the Court of Appeals upholding dismissal of Viktoria's claim.

I disagree, however, with the majority's application of intermediate scrutiny. The North Carolina Constitution and precedent

from this Court firmly establish for every child of this state a constitutionally-rooted fundamental right to the opportunity for a sound basic education. Accordingly, a purported violation of this right, including the cessation of all state-funded educational services, should be strictly scrutinized.

When presented with a Rule 12(b)(6) motion to dismiss, the question is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some [recognized] legal theory." *Isenhour v. Hutto*, 350 N.C. 601, 604, 517 S.E.2d 121, 124 (1999) (alteration in original) (citation and internal quotation marks omitted); N.C.G.S. § 1A-1, Rule 12(b)(6) (2009). Dismissal under Rule 12(b)(6) is proper when either "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted). "In ruling upon such a motion, the complaint is to be liberally construed . . . ." *Shepard v. Ocwen Fed. Bank*, 361 N.C. 137, 139, 638 S.E.2d 197, 199 (2006) (quoting *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997)).

In her complaint, plaintiff invokes the fundamental right to an opportunity for a sound basic education. Our North Carolina Constitution guarantees that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. In addition, Article IX is exclusively dedicated to education, whose importance is described in the very first section: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged." *Id.* art. IX, § 1. Not coincidentally, this right to education appears beside other indisputably fundamental rights, such as religious liberty, freedom of speech and press, and freedom from *ex post facto* laws. *Id.* art. I, §§ 13, 14, 16.

In light of the emphasis that the framers of the North Carolina Constitution placed on education, this Court has recognized our constitution to establish the right to an opportunity for a sound basic education. And until today, the Court has never parsed this right to give it varying levels of protection depending on the context. Thirty years ago, in *Sneed v. Greensboro City Board of Education*, this Court concluded that "equal access to participation in our public

school system is a *fundamental right*, guaranteed by our state constitution and protected by considerations of procedural due process." 299 N.C. 609, 618, 264 S.E.2d 106, 113 (1980) (emphasis added) (holding the right to attend school could not be made contingent on the ability to pay). We reaffirmed this right in *Leandro v. State*, declaring that the North Carolina Constitution confers upon "every child . . . *a fundamental right to a sound basic education* which would prepare the child to participate fully in society as it existed in his or her lifetime." 346 N.C. 336, 348, 488 S.E.2d 249, 255 (1997) (emphasis added).

Again in *Hoke County Board of Education v. State*, this Court understood our constitution and *Leandro* to confer on each child an "individual right of an opportunity to a sound basic education." 358 N.C. 605, 617, 599 S.E.2d 365, 378 (2004) (according this right "to all children . . ., regardless of their respective ages or needs," *id.* at 172, 675 S.E.2d at 350). And as recently as last year, we considered the right to education fundamental yet again, stating, "The general and uniform system of public schools indicates a fundamental right to a sound basic education." *Wake Cares, Inc. v. Wake Cty. Bd. of Educ.*, 363 N.C. 165, 172-73, 675 S.E.2d 345, 350-51 (2009) (citation omitted) (internal quotation marks omitted) (allowing the assignment of students to year-round schools without parental consent). The majority and I agree that our case law recognizes a fundamental right to the opportunity for a sound basic education, but we part ways when it comes to splintering that right.

Put simply, the right to education is indivisible and cannot cease to be fundamental. *See District of Columbia v. Heller*, 554 U.S. 570, ___, 171 L. Ed. 2d 637, 683 (2008). "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* None of the preceding cases contains any suggestion that the fundamental right to the opportunity for a sound basic education is limited to any particular context. As a result, I would hold this right to protect students from a complete termination of state-funded educational services during long-term suspensions. To hold otherwise would allow schools to grant every child an equal opportunity to enter school and then deprive them of all public education when it is less than necessary to do so.

The framers of our constitution and justices of this Court have held the right to the "privilege of education" to be of fundamental interest to the well-being of this state, as education prepares "stu-

dents to participate and compete in the society in which they live and work." *Leandro*, 346 N.C. at 345, 488 S.E.2d at 254. Indeed, the right to public education is a cornerstone of our democracy. For these reasons, I decline to segment the constitutionally mandated "privilege of education" in this state. Education is an indivisible fundamental right, and it remains so in the context of long-term suspensions.

Because we are dealing with a fundamental right, strict scrutiny is the appropriate standard of review to determine whether that right has been unconstitutionally infringed by a government action. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004); *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 336 N.C. 657, 681, 446 S.E.2d 332, 346 (1994); *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980). In fact in *Leandro*, which involved a challenge to disparate funding of local school systems that resulted in discrepancies in academic and extracurricular opportunities, this Court applied strict scrutiny. Under that analysis, when a fundamental right to a sound basic education is interfered with, the State must show that the interference is "necessary to promote a compelling governmental interest." *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261 (citation and quotation marks omitted). Further, a State action infringing upon "the exercise of a fundamental right" must be "narrowly tailored." *Stephenson v. Bartlett*, 355 N.C. 354, 377, 562 S.E.2d 377, 393 (2002) (citations and quotation marks omitted). The application of strict scrutiny also shifts the burden of proof, requiring the governmental entity to prove that infringement of the right was necessary to further a compelling state interest. *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261 (citation omitted).

No participant in this appeal suggests that local boards of education lack a compelling interest in ensuring safe and orderly schools. No one disputes that this compelling governmental interest operates in every long-term suspension or expulsion for fighting, other violent behavior, or any conduct that threatens the orderly administration of the schools. *Cf. Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507, 21 L. Ed. 2d 731, 738 (1969) (recognizing the "comprehensive authority" of school officials to control conduct in the schools within "fundamental constitutional safeguards"). Accordingly, strict scrutiny only requires school administrators to consider whether a long-term suspension or expulsion *without some alternative educational option* is necessary to achieve safety and order. If denial of an alternative education program is not necessary to fur-

ther a compelling state interest, then such action is not narrowly tailored and must be reversed.

In other words, if it is possible to provide a student who has infringed a school rule with some form of education without jeopardizing the safety of others, then that opportunity should be provided. If a safe and orderly school environment can be maintained without barring a student from every single state-funded educational service, then such a barrier should not be erected.

The analysis now turns to whether plaintiff has alleged facts that, "treated as true, state a claim upon which relief can be granted." *Wood*, 355 N.C. at 166, 558 S.E.2d at 494 (citing *Isenhour*, 350 N.C. at 604, 517 S.E.2d at 124). First, plaintiff sufficiently alleges interference with her fundamental right to an opportunity for education. Complete termination of educational services from January 18 until the end of the school year interferes with this fundamental right.

Plaintiff further alleges that this complete deprivation of all educational services was unnecessary and therefore not narrowly tailored. Both parties agree that defendants did not provide a reason for denying plaintiff access to any alternative education program during her suspension. It is also undisputed that plaintiff was denied access to an alternative education program during her long-term suspension because of her participation in a fight.

What is still unclear, however, is the exact reasoning upon which defendants denied plaintiff access to an alternative school. Nevertheless, if it is true that plaintiff was suspended for fighting, and no other factors contributed to defendants' decision, then it was not necessary to deny plaintiff access to all educational services. It is unnecessary to the maintenance of a fruitful learning environment that *every* participant of *every* fight be both suspended *and* denied access to an alternative education program. Accordingly, plaintiff's factual allegations are sufficient to survive a motion to dismiss.

Since this appeal seeks review of a motion to dismiss, principles of judicial restraint do not allow this Court to determine whether defendants' decision to bar plaintiff from all alternative educational programs will actually withstand a strict scrutiny analysis. That analysis depends upon the strength of defendants' rationale for the decision as determined by the finder of fact. Indeed, defendants may prove it was necessary to deny plaintiff access to all educational services, *see* Adam Winkler, *Fatal in Theory and Strict in Fact: An*

Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 Vand. L. Rev. 793, 862-71 (2006) (concluding that strict scrutiny, especially when fundamental rights are involved, is not always "fatal in fact" in federal cases), but this Court's role is not to prospectively define the contours of narrow tailoring. Our state constitution does not require a student to receive public educational services regardless of how dangerous that student is to the school population, but it does prohibit state interference with this right unless absolutely necessary to do so. Accordingly, while this Court has previously recognized the authority of school officials to punish and discipline students in order to maintain a safe and secure educational environment, such authority does not empower school officials to implement punishments that violate a student's constitutional rights. *See Tinker*, 393 U.S. at 513, 21 L. Ed. 2d at 741. At this stage, it will be for the trial court to decide whether the defendants' reasons for this denial are narrowly tailored and necessary to advance a compelling state interest.

Having explained why I agree with the majority that dismissal of plaintiff's claim was inappropriate, I now address my disagreement with the legal analysis put forth by the majority to support the application of intermediate scrutiny.

First, the majority opinion "does not recognize a state constitutional right to alternative education," but nonetheless goes on to consider the appropriate constitutional standard of review when a suspended student alleges an infringement of her "statutory right to alternative education." I find it novel to apply a *constitutional* standard of review to determine whether a *statute* has been violated. The majority seeks to "harmonize" the application of the rational basis test with the strict scrutiny test, citing various cases in which these tests were applied for the purpose of determining whether constitutional rights were violated by state action. However, the rational basis, intermediate scrutiny, and strict scrutiny standards of review traditionally have been applied to determine whether a government action violates individual rights having constitutional roots, not those created by statute. Classic examples of this application at the federal level include *Zablocki v. Redhail*, 434 U.S. 374, 54 L. Ed. 2d 618, (1978) (right to marry); *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147 (1973) (right to abortion); *Bullock v. Carter*, 405 U.S. 134, 31 L. Ed. 2d 92 (1972) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618, 22 L. Ed. 2d 600 (1969) (right to interstate travel), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651, 39

L. Ed. 2d 662 (1974); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 86 L. Ed. 1655 (1942) (right to procreate). In North Carolina, this Court has also used these standards of review to evaluate constitutional claims. *Rhyne*, 358 N.C. at 180, 594 S.E.2d at 15 (due process and equal protection); *Leandro*, 346 N.C. at 348, 488 S.E.2d at 255 (quality of education); *Carolina Util. Customers Ass'n, Inc.*, 336 N.C. at 681, 446 S.E.2d at 346 (equal protection); *Sneed*, 299 N.C. at 618, 264 S.E.2d at 113 (access to education).

While the majority tries to resolve this problem by naming the constitutional hook of "equal educational access," this solution is based on a flawed syllogism. The majority acknowledges (1) that *Sneed* recognized the state constitutional right to equal educational access as a fundamental right, *Sneed*, 299 N.C. at 618, 264 S.E.2d at 113 ("[Equal access to participation in our public school system is a fundamental right . . . ."), and (2) that "exclusion from alternative education potentially infringes on a student's state constitutional right to equal educational access." Yet the majority somehow concludes merely that "school administrators must articulate a reason when they exclude a long-term suspended student from alternative education." In my view, this conclusion does not follow. The logically sound conclusion is that the exclusion from alternative education programs and all other educational services potentially infringes upon a fundamental right. As the majority agrees that interference with a fundamental right requires a strict scrutiny analysis, strict scrutiny should be applied in this case.

Second, even in the context of an alleged constitutional violation, intermediate scrutiny is the incorrect standard for determining whether the right to an opportunity to a sound basic education has been violated. Until today, this Court has uniformly applied strict scrutiny in cases involving the right to education. While the majority opinion relies on *Coggins ex rel. Coggins v. Board of Education* for the proposition that school disciplinary decisions are subject only to rational basis review, the student in *Coggins* only challenged limitations on his participation in "secret societies known as Greek letter fraternities," not a denial of all educational services. 223 N.C. 763, 768-69, 28 S.E.2d 527, 531 (1944). In fact, the challenged rule made "no attempt to deny plaintiff any instruction afforded by class work or by the required curriculum of the school." *Id.* at 769, 28 S.E.2d at 531. Thus, the reliance by the majority on *Coggins* is misplaced.

Partitioning the right to education into subcategories, each with a different standard of review, also has uncertain and unexplained

implications for what has long been considered a vested fundamental right of every North Carolina student. At best, the right to a sound basic education is transformed into a quasi-fundamental right in the student discipline context, *cf. Blankenship*, 363 N.C. at 526-27, 681 S.E.2d at 765-66 (holding that "the right to vote in superior court elections on substantially equal terms is a quasi-fundamental right" that is "reviewed under intermediate scrutiny"), and it remains fundamental in all other contexts. At worst, this decision has rewritten our constitution and overruled thirty years of precedent from this Court collectively establishing that the right to the opportunity for a sound basic education is fundamental. Whatever the precise parameters of today's holding, the intermediate scrutiny standard is incompatible with Article I, Section 15; Article IX; and three decades of precedent.

Equally troubling is that intermediate review, in practice, will be no more exacting than the exceedingly deferential rational basis standard, which requires only that the regulation be reasonably related to some conceivable legitimate end. *Standley v. Town of Woodfin*, 362 N.C. 328, 332, 661 S.E.2d 728, 731 (2008) (citations omitted). As noted above, school districts always have an important, indeed compelling, interest in maintaining safe and orderly schools. A denial of alternative educational opportunities will ordinarily be substantially related to maintaining safety and order simply because the offender is dissociated from the school environment. The majority essentially concedes this point, stating that "school officials will have little or no difficulty articulating an important or significant reason for denying access to alternative education." Thus, the intermediate standard of review will be toothless in the student discipline context and grossly inadequate to protect a fundamental right. I agree with the Supreme Court of the United States, which proclaimed, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Healy v. James*, 408 U.S. 169, 180, 33 L. Ed. 2d 266, 279 (1972) (citations and internal quotation marks omitted).

There also is no reason to believe that applying strict scrutiny would bring about the exaggerated consequences imagined by the majority. Strict scrutiny will not "immunize individuals from the consequences of their own misconduct," because at times, it may be necessary to remove a student from all state-funded public education to ensure the safety and order of all schools, traditional and alternative. *Cf. Tinker*, 393 U.S. at 513, 21 L. Ed. 2d at 741 (stating that a student's conduct that "materially disrupts classwork or involves substantial

disorder" is not "immunized by the constitutional guarantee of freedom of speech"). For the same reason, strict scrutiny review would not prohibit long-term suspensions. Strict scrutiny is satisfied on a showing that it is necessary to remove a long-term suspended or expelled student without an alternative educational option in order to maintain safety and discipline in the schools. To that end, plaintiff and her amici point out that alternative education need not take any particular form. Alternative learning options might include computer- and Internet-based learning programs. "[I]n all but the most extreme cases the State will be able to provide reasonable state-funded educational opportunities and services . . . . Under such circumstances, providing educational opportunities and services to [long-term suspended or expelled] children is constitutionally mandated." *Cathe A. v. Doddridge Cty. Bd. of Educ.*, 200 W. Va. 521, 532, 490 S.E.2d 340, 351 (1997) (footnote omitted).

Further, this case marks only the second time our Court has applied intermediate scrutiny, and it is the first application in a statutory context. *See Blankenship v. Bartlett*, 363 N.C. 518, 526, 681 S.E.2d 759, 765 (2009) (applying intermediate scrutiny when considering equal protection challenges to judicial districts allegedly drawn in violation of the N.C. Constitution and analogizing that controversy to federal cases considering challenges based on rights guaranteed under the First Amendment). I must note, however, that *Blankenship* adopted the intermediate standard of review from federal jurisprudence and *Plyler v. Doe*. *Id.* at 524-27, 681 S.E.2d at 764-66. In *Plyler*, the Court refused to apply strict scrutiny to Texas's withholding of free public education from the children of undocumented aliens, concluding that the right to education is only "quasi-fundamental" under the Federal Constitution, since that right is not expressly or impliedly guaranteed therein and the children were not a suspect class. *Plyler v. Doe*, 457 U.S. 202, 221-23, 72 L. Ed. 2d 786, 801-03 (1982). By contrast, this Court has already determined the right to the opportunity for a sound basic education to be fundamental. *Leandro*, 346 N.C. at 348, 488 S.E.2d at 255-56. For the above reasons the intermediate standard of review is inappropriate for student discipline decisions that infringe upon the fundamental right to the opportunity for a sound basic education.

In my view, if it is possible to provide a student with some form of educational services during her long-term suspension without jeopardizing the safety and security of others, then that opportunity must be provided. This Court should simply apply the North Carolina

Constitution as it is written and according to precedent from this Court. The complaint sufficiently alleges that defendants infringed plaintiff's fundamental right to the opportunity for a sound basic education by unnecessarily removing her from all public school educational options without an alternative educational option.

Because plaintiff sufficiently alleged deprivation of a fundamental right, I would reverse the decision by the Court of Appeals affirming the dismissal of plaintiff's complaint. Therefore, I concur with the majority decision to reverse the Court of Appeals and remand this matter to the trial court. I conclude, however, that strict scrutiny, not intermediate scrutiny, is the proper standard of review. Accordingly, I respectfully dissent from the analysis and holding of the majority as to the correct standard of review on remand.

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

Justice NEWBY dissenting.

For over one hundred years, our courts have refrained from interfering with a disciplinary decision of our professional educators and elected officials unless that decision is shown to be irrational. Today's majority decision unnecessarily departs from that practice. While I agree with the general proposition that school officials ought not remove a student from the public school system unless they have a proper reason for doing so, I disagree with the majority's conclusion that our courts should second-guess our school officials' reasonable disciplinary decisions. Accordingly, I respectfully dissent.

Plaintiff was disciplined for her involvement in a fight at Southside High School on 18 January 2008. According to her complaint, such behavior is a violation of the Student Code of Conduct Policy for the Beaufort County Schools ("the Policy") and exposes her to a penalty of removal for up to ten days and a possible long-term suspension. Pursuant to the Policy, plaintiff was suspended for ten days and ultimately received a long-term suspension. Plaintiff filed a statutory administrative appeal, but her suspension was upheld.

Now plaintiff asserts a claim that the North Carolina Constitution mandates that she have access to an alternative education program while she is under long-term suspension.[1] In her complaint plaintiff

1. Plaintiff also alleged in the trial court that the statute under which she was excluded from school is unconstitutional, but she has since abandoned that claim.

precisely contended that she has a fundamental right to "the opportunity to obtain a sound, basic education." She alleged that defendants denied her that fundamental right by suspending her "through the end of the school year and den[ying] her any access to educational services during her suspension." She argued that the denial was unconstitutional unless defendants "demonstrate that the denial is necessary to promote a compelling governmental interest." Plaintiff sought injunctive and declaratory relief specifically tailored to this claim.

The trial court dismissed plaintiff's claim. The trial court determined, *inter alia*, that plaintiff's claim should be dismissed under Rule 12(b)(6) because her allegations "fail to state a claim upon which relief may be granted." The court provided three alternative grounds for its dismissal under Rule 12(b)(6). First, the court explained that the statutory administrative appeal afforded by our legislature to students under long-term suspension is an adequate state law remedy precluding plaintiff's direct action under the North Carolina Constitution. Second, the court reasoned that defendants' decision to deny plaintiff access to an alternative education program is not subject to strict scrutiny, and, relying on precedent from the Court of Appeals, concluded that there is "no affirmative duty to provide" access to such programs "absent a legislative mandate." Third, the court stated that even if strict scrutiny were the appropriate standard, school officials may lawfully temporarily halt the provision of educational services, as occurred here.

The Court of Appeals affirmed the trial court's decision to dismiss plaintiff's claim under Rule 12(b)(6). *King ex rel. Harvey-Barrow v. Beaufort Cty. Bd. of Educ.*, ——N.C. App. ——, ——, 683 S.E.2d 767, 771 (2009). The Court of Appeals majority concluded that school disciplinary decisions are not subject to strict scrutiny. *See id.* at ——, 683 S.E.2d at 770-71. Rather, that court relied upon its prior decision in *In re Jackson*, 84 N.C. App. 167, 352 S.E.2d 449 (1987), which held that school disciplinary decisions are subject to rational basis review. *King*, —— N.C. App. at ——, 683 S.E.2d at 770-71. The dissenting judge reasoned that our opinion in *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997), required that the decision denying plaintiff access to an alternative education program be subjected to strict scrutiny and concluded that plaintiff had adequately stated a claim. —— N.C. App. at ——, 683 S.E.2d at 772-73 (Geer, J., dissenting).

In my view, the Court of Appeals properly affirmed the trial court's dismissal of plaintiff's claim. As the majority observes, there

is no fundamental, constitutional right to an alternative education program. Our precedent indicates that our courts review school disciplinary decisions for a rational basis. Because plaintiff has not alleged that defendants arbitrarily denied her access to an alternative education program, I would affirm the decision of the Court of Appeals.

We have historically refrained from intruding upon the reasonable disciplinary decisions of our local school officials. *See Hutchins v. [Sch. Comm. of] Durham*, 137 N.C. 78, 80, 137 N.C. 68, 70-71, 49 S.E. 46, 47 (1904) (citations omitted). For example, in *Coggins ex rel. Coggins v. Board of Education*, 223 N.C. 763, 769, 28 S.E.2d 527, 531 (1944), we explained that courts review school board disciplinary rules for "unreasonableness" and will intervene when faced with a "clearly arbitrary or unreasonable" regulation. *Id.* Aside from "the unreasonableness of such a rule," we stated that complaints about disciplinary decisions of our local school officials "raise questions essentially political in nature, and the remedy, if any, is at the ballot box." *Id.* As the majority notes, our historical deference accords with the practice in almost all our sister states.

Our recent decisions in *Hoke County Board of Education v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004), and *Leandro* left intact the deference afforded the disciplinary decisions of school officials. In *Hoke County* and *Leandro* we elucidated our children's fundamental right under the state constitution to a qualitatively sound basic education. *Hoke Cty.*, 358 N.C. at 609, 599 S.E.2d at 373; *Leandro*, 346 N.C. at 346, 488 S.E.2d at 254 (citation omitted). We applied strict scrutiny to the alleged violations of that right in those cases. *Hoke Cty.*, 358 N.C. at 609, 599 S.E.2d at 373; *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261 (citation omitted). However, as the majority illustrates, there is a fundamental distinction between our schools failing to afford a qualitatively sound education and disciplining students following their misbehavior. Accordingly, *Hoke County* and *Leandro* did not raise the level of scrutiny to which we subject the disciplinary decisions of our local school officials.

The courts' limited role in disciplinary matters safeguards the constitutional province of our coordinate branches of government. The people of this state have vested control and management of our public schools in the legislative and executive branches of our government. N.C. Const. art. IX, §§ 2(1), 5; *see also Leandro*, 346 N.C. at 357, 488 S.E.2d at 261 ("[T]he administration of the pub-

lic schools of the state is best left to the legislative and executive branches of government.").

Those branches have constructed a detailed scheme by which to operate our public schools so as to protect the schools' paramount mission: education. To promote academic achievement by all students, our General Assembly has determined that "all schools should be safe, secure, and orderly." N.C.G.S. § 115C-105.45 (2009). Accordingly, the legislature has required local school boards to adopt plans designed to maintain safety, *id.* § 115C-105.47(a) (2009), and "policies . . . governing the conduct of students," *id.* § 115C-391(a) (2009). A student may be removed from our schools for a willful violation of the local school board's policies governing conduct, subject to numerous procedural safeguards. *Id.* § 115C-391(c) (2009).

Students receive a myriad of procedural protections to guard against an erroneous determination of a school policy violation and the arbitrary imposition of discipline. The General Assembly has provided for several levels of review of a long-term suspension decision. *See id.* (requiring that a school principal and superintendent act together in issuing a long-term suspension); *id.* § 115C-391(e) (2009) (allowing a decision to issue a long-term suspension to be appealed to the local school board and making that decision subject to judicial review under Article 4 of Chapter 150B of the General Statutes). Like the board in Beaufort County, many local school boards have provided another level of procedural protection by allowing for an initial review hearing before a panel of central office administrators. The parent of a student recommended for expulsion or long-term suspension must also be given written notice of the proposed action. *Id.* § 115C-391(d5) (2009) (requiring the notice to contain information on the student's conduct, the school's conduct policy, the hearing process, the right to have an attorney represent the student, whether an advocate other than an attorney may assist the student, and the parent's right to review the student's school records). These procedural protections ensure that a student will not be subjected to the possibility of being excluded from all educational opportunities unless that student has actually committed a willful violation of school policy.

For those students found to have violated local school board policies, the General Assembly has provided for potential additional educational opportunities, despite no constitutional obligation to do so. Each local school board must create one alternative education program and adopt "guidelines for assigning students to" it. *Id.*

§ 115C-47(32a) (2009). As the majority notes, the General Assembly has allowed local school boards to determine when it is "feasible and appropriate" to assign students subject to long-term suspension to the local school board's alternative education program. *Id.*

The statutory structure enacted by the General Assembly affords local school officials flexibility in managing our public schools. That flexibility demonstrates a recognition that denial of admission to an alternative education program may act as an additional deterrent against disruptive behavior in our public schools. Further, it may serve to maintain a safe and orderly environment in an alternative school, especially in a case like the one presently before the Court in which numerous students were involved in a violent disturbance. Also, the legislature appears to understand that mandating alternative education, whether that means admission to an alternative school or participation in some other learning program, tailored to every student who has willfully violated school board policy could devour the already scarce resources available to our schools to provide all our children the opportunity to obtain a sound basic education. *See Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 501-02, 681 S.E.2d 278, 280 (2009) (illustrating the funding challenges facing our local boards of education).

Using its immense "history and expertise" in education, *Hoke Cty.*, 358 N.C. at 645, 599 S.E.2d at 395, our General Assembly has, along with the various local school boards, accomplished a considerable task. As required when administering discipline in our schools, the political branches of our government have balanced divergent interests—including the misbehaving student's interest in obtaining an education, other students' interests in having an unimpeded opportunity to obtain an education, and the interests of all students, teachers, and administrators to interact in a safe environment—with, *inter alia*, scarce financial, human, and capital resources. *See Hoke Cty.*, 358 N.C. at 620, 599 S.E.2d at 379 (clarifying that the constitutional right we articulated in *Leandro*, the right to the opportunity to receive a sound basic education, is vested in all this state's children).

To maintain this balance this Court should, as it has historically done, give reasonable deference to our coordinate branches of government and the professional educators and administrators retained to manage our public schools. Rational basis review gives appropriate deference while simultaneously ensuring that there is a legitimate

reason for a student's exclusion, allowing our school officials to administer our schools free of judicial micromanagement. On the other hand, under intermediate and strict scrutiny school officials must establish both the reason for their decision and that their reason is appropriately weighty. Such requirements unduly burden our school officials and place our trial courts in the position of second-guessing their decisions. Accordingly, the judicial branch should not determine whether school officials' reason for denying a student access to alternative education as a disciplinary matter is "important" or "significant," as opposed to "reasonable." Such an intrusion will weigh heavily on both our courts and our schools. *Coggins*, 223 N.C. at 769, 28 S.E.2d at 531.

To be sure, there is much in the majority's decision with which I agree. Initially, the majority correctly determines "that a fundamental right to alternative education does not exist under the state constitution." Additionally, the majority properly recognizes that our constitution affords a right to equal educational access. However, I disagree that the equal educational access provision of our constitution mandates that plaintiff be told the reason for her exclusion from an alternative education program, a remedy she failed to request. Perhaps if plaintiff had alleged defendants treated her differently than those similarly situated because of some immutable characteristic, then our constitution would afford heightened scrutiny of defendants' decision. But that is not the case before us.

In my view, today's decision has altered the administrative framework established for our public schools by our constitution and our General Statutes. Plaintiff here concedes that defendants complied with all statutory obligations in the handling of her long-term suspension. Nonetheless, after today's decision our local school boards and administrators have less control and flexibility in making disciplinary decisions than that granted to them by our legislature. Because I see no justification to depart from our well-settled precedent subjecting school disciplinary decisions to rational basis review, and because plaintiff did not allege defendants arbitrarily denied her access to an alternative education program, I would affirm the decision of the Court of Appeals concluding that the trial court properly dismissed plaintiff's claim. Accordingly, I respectfully dissent.

STATE OF NORTH CAROLINA v. AUBREY ALBERTO MUMFORD

No. 32PA10

(Filed 8 October 2010)

1. Criminal Law— verdicts—inconsistent—not contradictory

Verdicts of guilty of the greater offense of felony serious injury by vehicle but not guilty on the lesser offense of driving while impaired were inconsistent but not mutually exclusive. N.C.G.S. § 20-141.1(a3), felony serious injury by vehicle, does not require a conviction of driving while impaired, but only a finding that defendant was engaged in the conduct described.

2. Sentencing— restitution—amount—sufficiency of evidence—no prejudice

The trial court erred in ordering restitution in a prosecution for felony serious injury by vehicle and driving while impaired because there was not a definite and certain stipulation and the mere presentation of a worksheet by the prosecution was not sufficient to support the award. However, there was no prejudice because defendant cannot be made to pay more than is actually owed, so that defendant will pay the lesser of the amount owed or the amount ordered by the court.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 201 N.C. App. ——, 688 S.E.2d 458 (2010), vacating judgments entered on 10 September 2008 by Judge Paul L. Jones in Superior Court, Greene County. Heard in the Supreme Court 9 September 2010.

Roy Cooper, *Attorney General*, *by Robert C. Montgomery*, *Special Deputy Attorney General*, *for the State-appellant.*

Rudolph A. Ashton, *III for defendant-appellee.*

BRADY, Justice.

On 10 September 2008 a Greene County jury found defendant Aubrey Alberto Mumford guilty of five counts of felony serious injury by vehicle and one count of misdemeanor hit and run, but found defendant not guilty of driving while impaired. After sentencing defendant to a term of imprisonment, the trial court also ordered defendant to pay restitution. To be convicted under N.C.G.S.

§ 20-141.4(a3), felony serious injury by vehicle, a person must be "engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2." N.C.G.S. § 20-141.4(a3) (2009). In this case we first consider whether a not guilty verdict under N.C.G.S. § 20-138.1 and a guilty verdict under N.C.G.S. § 20-141.4(a3) are merely inconsistent or legally contradictory. We hold that the jury's verdicts are merely inconsistent. Next, we consider whether the trial court erred by ordering defendant to pay restitution when defendant did not explicitly stipulate or otherwise unequivocally agree to the amount of restitution ordered. We hold that the trial court did err in its award of restitution but that the error was not prejudicial. Accordingly, we reverse the opinion of the Court of Appeals on these issues and remand the case to the Court of Appeals for consideration of assignments of error not addressed in that court's initial opinion.

PROCEDURAL AND FACTUAL BACKGROUND

On 8 June 2007, a high school graduation party was held at a private residence on Fred Harrison Road, a two lane road in Greene County. Party guests parked their vehicles along both sides of the road near the residence. The party continued into the early morning hours until uninvited guests arrived and fighting and gunfire erupted. The party hosts told their guests to leave. As guests were returning to their vehicles a large, dark-colored Cadillac traveling on Fred Harrison Road struck several pedestrians. Gunshots were then fired at the Cadillac. Following the gunfire, the Cadillac accelerated and left the scene. In total, the Cadillac struck five pedestrians. Law enforcement arrived at the scene approximately five minutes later. After officers assisted victims and requested emergency medical assistance, they conducted a criminal investigation and found casings from a nine millimeter handgun, a Cadillac hood ornament, and pieces of a vehicle grill on the road near where the vehicle struck the victims.

Deputy Sheriff Jason Spencer located the Cadillac at the residence of defendant's grandmother. The Cadillac's hood ornament and pieces of the grill were missing, and two bullet holes were found in the back of the vehicle. Defendant was taken into custody at approximately 2:30 a.m. on 9 June 2007. Defendant was advised of his rights and took an intoxilyzer test at 3:47 a.m. Defendant's blood alcohol level was measured to be .09. Based upon this test, an expert for the State testified at trial that defendant's blood alcohol level would have been .15 at the time of the collision. Defendant gave a statement to law enforcement relating that on 8 June 2007, he began drinking at

6:00 p.m. and over the course of the evening had one thirty-two ounce beer, a shot of liquor, and two more swallows of beer before the collision on Fred Harrison Road. Defendant stated he had "two or three" more "big swallows" of beer after the collision but before he was apprehended by law enforcement.

On 3 March 2008, the Greene County Grand Jury returned a true bill of indictment charging defendant with one count of felony hit and run, five counts of felony serious injury by vehicle while engaged in the offense of impaired driving, one count of driving while impaired, and one count of driving while license revoked. Before trial, defendant pleaded guilty to driving while license revoked. Defendant was tried for the remaining offenses at the 8 September 2008 criminal term of Superior Court, Greene County.

The trial court instructed the jury on all charges by using the North Carolina Criminal Pattern Jury Instructions. The charge for felony serious injury by vehicle stated, in pertinent part:

> The Defendant has been charged with five counts of felonious serious injury by vehicle. For you to find the Defendant guilty of this offense, the State must prove [*inter alia*, the following] things beyond a reasonable doubt. First, that the Defendant was driving a vehicle. Second, that he was driving the vehicle upon a highway or street within the state. Third, that at the time the Defendant was driving that vehicle he was under the influence of an impairing substance.
>
> Alcohol is an impairing substance. The Defendant is under the influence of an impairing substance when the Defendant has taken or consumed a sufficient quantity of that impairing substance that caused the Defendant to lose a normal control of Defendant's bodily or mental faculties or both to such an extent that there is an appreciable impairment of either or both of these faculties; or had consumed sufficient alcohol that at any relevant time after the driving the Defendant has an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath per 100 milliliters of blood, at a relevant time after driving, that Defendant still had in his body . . . alcohol consumed before or during the driving. The results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration.

The jury was given the following instruction with regard to the driving while impaired charge:

> For you to find the Defendant guilty of [driving while impaired] the State must prove three things beyond a reasonable doubt. First, the Defendant was driving a vehicle. Second, that the Defendant was driving that vehicle upon a highway or street within the state. Third, at the time the Defendant was driving the vehicle the Defendant was under the influence of an impairing substance.
>
> As I previously said, alcohol is an impairing substance. The Defendant is under the influence of an impairing substance when the Defendant has taken or consumed a sufficient quantity of that impairing substance to cause the Defendant to lose the normal control of the Defendant's bodily or mental faculties or both to such an extent that there is an appreciable impairment of either or both of these faculties or had consumed sufficient alcohol that at any relevant time after the driving the Defendant had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath.
>
> A relevant time is any time after the driving that the driver still has in the body alcohol consumed before or during the driving. The results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration.

The trial court did not specifically instruct the jury that in order to find defendant guilty of felony serious injury by vehicle, it must also find him guilty of driving while impaired. The jury found defendant guilty of all five counts of felony serious injury by vehicle and of misdemeanor hit and run but returned a not guilty verdict on the charge of driving while impaired. After the verdicts were returned, the State submitted restitution worksheets to the court, which calculated that defendant owed $228,043.84 in restitution. Defense counsel at one point agreed with the prosecutor's statement that the amount submitted on the worksheets included insurance payments, but made no further statements or objections concerning the restitution worksheets. The State submitted no further evidence supporting the amounts submitted on the restitution worksheets.

Defendant was sentenced to (1) concurrent forty-five day sentences for misdemeanor hit and run and driving while license revoked, and (2) two consecutive, consolidated eighteen to twenty-two month terms of imprisonment for felony serious injury by vehicle. Defendant was also ordered to pay restitution in the amount of $228,043.84.

Defendant appealed the judgments. The Court of Appeals held that the felony serious injury by vehicle and driving while impaired verdicts were legally inconsistent and contradictory, and it vacated defendant's five convictions for felony serious injury by vehicle. The Court of Appeals further held that the trial court erred in its order requiring defendant to pay restitution and accordingly, vacated that portion of the trial court's order.

Felony Serious Injury by Vehicle Convictions

[1] Defendant argues that the Court of Appeals correctly concluded that the jury's conflicting verdicts regarding the felony serious injury by vehicle and driving while impaired charges are legally inconsistent *and* contradictory, which requires the convictions for the compound offenses of felony serious injury by vehicle to be vacated. The State argues that the verdicts are merely inconsistent and as such cannot be disturbed pursuant to long-standing precedent. The standard of review for this issue is whether there was any error of law in the decision of the Court of Appeals. *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994) (citations omitted).

In North Carolina jurisprudence, a distinction is drawn between verdicts that are merely inconsistent and those which are legally inconsistent *and* contradictory. *See State v. Meshaw*, 246 N.C. 205, 207-08, 98 S.E.2d 13, 15 (1957), *overruled in part on other grounds by State v. Speckman*, 326 N.C. 576, 580, 391 S.E.2d 165, 168 (1990). It is firmly established that when there is sufficient evidence to support a verdict, "mere inconsistency will not invalidate the verdict." *State v. Davis*, 214 N.C. 787, 794, 1 S.E.2d 104, 108 (1939) (citing *State v. Sigmon*, 190 N.C. 684, 130 S.E. 854 (1925)). However, when a verdict is inconsistent and contradictory, a defendant is entitled to relief. *Meshaw*, 246 N.C. at 207-08, 98 S.E.2d at 15. The distinction between verdicts that are merely inconsistent and those that are inconsistent and contradictory has not been clearly established by this Court, but several cases offer guidance on the issue.

In *State v. Sigmon* the defendant was found guilty of transporting intoxicating liquors but not guilty of unlawful possession of intoxicating liquors. 190 N.C. at 690-91, 130 S.E. at 857. The defendant argued that "a party could not be guilty of transporting unless likewise guilty of possession"; therefore, the not guilty verdict obligated the court to vacate the transporting conviction. *Id.* at 691, 130 S.E. at 857. This Court disagreed, stating, "[W]hile the jury would have been fully justified in finding the defendant guilty on both counts, under

the evidence in this case, their failure to do so, does not, as a matter of law, vitiate the verdict on the count for transporting." *Id.*

Seven years later in *Dunn v. United States*, 284 U.S. 390 (1932), the Supreme Court of the United States held that "[c]onsistency in [a] verdict is not necessary." *Id.* at 393. The defendant in Dunn was charged in a three count indictment for "maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor", unlawful possession of intoxicating liquor, and unlawful sale of intoxicating liquor. *Id.* at 391. The defendant argued that his acquittal of unlawful possession and unlawful sale of intoxicating liquor entitled him to a discharge of his conviction for "maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor." *Id.* at 391-92. The Court reasoned that the guilty verdict should stand because if the nuisance charge had been tried individually under a separate indictment, the evidence presented was sufficient to support a conviction. *Id.* at 393. The Court declined to venture into the reasons behind the jury's verdict, simply stating, "That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters." *Id.* at 394.

In *United States v. Powell*, 469 U.S. 57 (1984), the Supreme Court of the United States specifically addressed whether an acquittal of a predicate offense required a reversal of a guilty verdict on the compound felony. In *Powell*, the defendant was indicted on several charges related to the selling and distribution of cocaine. *Id.* at 59-60. The defendant was convicted of charges relating to using the telephone to sell and distribute cocaine, but acquitted of conspiracy to possess cocaine and possession of cocaine with the intent to sell or distribute, underlying offenses of the telephone facilitation charges. *Id.* The Court reaffirmed its ruling in *Dunn*, explaining that

> [t]he rule that the defendant may not upset [an inconsistent] verdict embodies a prudent acknowledgment of a number of factors. First . . . inconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. But in such situations the Government has no recourse

> if it wishes to correct the jury's error; the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause.
>
> Inconsistent verdicts therefore present a situation where "error," in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course.

Id. at 65 (internal citations omitted). In *State v. Reid*, 335 N.C. 647, 658-61, 440 S.E.2d 776, 782-83 (1994), this Court adopted the above reasoning in *Powell* when upholding a conviction of an aider and abettor even though the principal had been acquitted.

In the above cases each defendant was charged on multiple count indictments, and each jury returned guilty verdicts for a greater offense while acquitting the defendant of the lesser offense. These verdicts were inconsistent because they represented an apparent flaw in the jury's logic—presumably, a finding of guilt in the greater offense would establish guilt in the lesser offense. However, because each count of an indictment is, "in fact and theory, a separate indictment," *State v. Toole*, 106 N.C. 564, 566, 106 N.C. 736, 740, 11 S.E. 168, 169 (1890), the inconsistencies were permissible, and not found to be legally contradictory, as long as there was sufficient evidence to support the guilty verdict.

The outcome is different when a jury returns a "mutually exclusive" verdict. Verdicts are mutually exclusive when a verdict "purports to establish that the [defendant] is guilty of two separate and distinct criminal offenses, the nature of which is such that guilt of one necessarily excludes guilt of the other." *Meshaw*, 246 N.C. at 207, 98 S.E.2d at 15 (holding that the defendant receive a new trial due to the "mutually exclusive nature of the two separate and distinct criminal offenses" of larceny and receiving stolen items).

In *State v. Speckman*, the jury found the defendant guilty of both embezzlement and obtaining property by false pretenses. 326 N.C. at 577, 391 S.E.2d at 166. This Court found the two crimes to be mutually exclusive, stating:

> [T]o constitute embezzlement, the property in question initially must be acquired lawfully, pursuant to a trust relationship,

> and then wrongfully converted. On the other hand, to constitute false pretenses the property must be acquired unlawfully at the outset, pursuant to a false representation. This Court has previously held that, since property cannot be obtained simultaneously pursuant to both lawful and unlawful means, guilt of either embezzlement or false pretenses necessarily excludes guilt of the other. . . . [U]nder our law, a defendant may not be convicted of both embezzlement and false pretenses arising from the same act or transaction, due to the mutually exclusive nature of those offenses.

Id. at 578, 391 S.E.2d at 166-67 (citations omitted). The defendant was entitled to a new trial on both charges. *Id.* at 580, 391 S.E.2d at 168.

In the present case defendant was found guilty of the greater offense of felony serious injury by vehicle but acquitted of the lesser offense of driving while impaired. While these verdicts are certainly inconsistent, they are not mutually exclusive. Since this case presents nothing "more than mere inconsistency," defendant is not entitled to relief. *Meshaw*, 246 N.C. at 207, 98 S.E.2d at 15. This result does not unjustly expose criminal defendants to nescient or rogue juries because "a criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." *Powell*, 469 U.S. at 67. In the instant case, defendant was convicted of five counts of felony serious injury by vehicle under N.C.G.S. § 20-141.4(a3). Subsection 20-141.4(a3) does not require a *conviction* of driving while impaired under N.C.G.S. § 20-138.1 or N.C.G.S. § 20-138.2, but only requires a finding that the defendant was engaged in the conduct described under either of these offenses. Both the trial court and the Court of Appeals concluded that there was sufficient evidence presented at trial to support defendant's convictions for felony serious injury by vehicle under N.C.G.S. § 20-141.4(a3). *State v. Mumford*, ––– N.C. App. –––, –––, 688 S.E.2d 458, 462-63 (2010).

For over seventy years, the prudence of the inconsistent verdict rule has guided this Court in analyzing conflicting and unexplained verdicts. We decline to depart from the wisdom of this well-established precedent today. As such, defendant's convictions for felony serious injury by vehicle should not be disturbed. Accordingly, the decision of the Court of Appeals vacating these convictions is reversed.

We note that two cases appear to be contradictory to the above inconsistent verdict analysis and this Court's previous holdings in *Meshaw* and *Speckman*. *See State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982) (affirming the decision of the Court of Appeals to vacate defendant's sentence for felonious larceny when the trial court returned a guilty verdict for felonious larceny but acquitted defendant of breaking or entering); *State v. Holloway*, 265 N.C. 581, 144 S.E.2d 634 (1965) (per curiam) (ordering a new trial when defendant was found guilty of felonious larceny, but acquitted of breaking or entering and no evidence was presented at trial to prove the value of the stolen goods). To the extent that these two cases are contrary to today's holding and long-standing inconsistent verdict precedent, they are overruled.

Restitution

[2] The State asserts that the Court of Appeals erred in vacating the portion of the judgment ordering defendant to pay restitution. We agree.

The State argues that defense counsel stipulated to the amount of the restitution. The following colloquy occurred during the sentencing hearing:

> The Court: . . . The Court orders that judgment be rendered against the Defendant in the amount of $228—$228,043.84. Is this the amount that does not include insurance payments?
>
> Mr. Rogerson [defense counsel]: It does not, Your Honor.
>
> Mr. Muskus [prosecutor]: It does, Judge, that's actually Ms. Tyndall—
>
> Mr. Rogerson: We verified that?
>
> Mr. Muskus: It does.
>
> Mr. Rogerson: Okay. All right, that's fine.
>
> The Court: Okay. Judgment in the amount of $228,043.84.

As an initial matter, we must consider whether the portion of the judgment ordering restitution may be reviewed on appeal without an objection to the trial court's ruling by defendant. The State urges us to find that N.C.G.S. § 15A-1446(d)(18) is unconstitutional because the statute conflicts with this Court's supreme authority to make rules for the Appellate Division under Article IV, Section 13(2) of

the North Carolina Constitution. The State cites several instances in which we have found various other subdivisions of subsection 15A-1446(d) to be unconstitutional. *See*, *e.g.*, *State v. Spaugh*, 321 N.C. 550, 552-53, 364 S.E.2d 368, 370 (1988) (noting this Court's previous holding that subdivision (d)(5) is unconstitutional because of conflict with then Rule 10(b)(3) (citing *State v. Stocks*, 319 N.C. 437, 439, 355 S.E.2d 492, 493 (1987); *State v. Bennett*, 308 N.C. 530, 535, 302 S.E.2d 786, 790 (1983) (holding subdivision (d)(13) unconstitutional because of conflict with then Rule 10(b)(2); *State v. Elam*, 302 N.C. 157, 160, 273 S.E.2d 661, 664 (1981) (holding subdivision (d)(6) unconstitutional because of conflict with Rules 10 and 14(b)(2)). However, in each of these cases the provisions of subsection 15A-1446(d) conflicted with specific provisions of our appellate rules rather than the general rule stated in Rule of Appellate Procedure 10(a). Rule 10(a) provides generally that an issue may not be reviewed on appeal if it was not properly preserved at the trial level or unless the alleged error has been "deemed preserved" "by rule or law." N.C. R. App. P. 10(a)(1). Here subdivision (d)(18) states that an argument that "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law" may be reviewed on appeal even without a specific objection before the trial court. This provision does not conflict with any specific provision in our appellate rules and operates as a "rule or law" under Rule 10(a)(1), which permits review of this issue.

A trial court's judgment ordering restitution "must be supported by evidence adduced at trial or at sentencing." *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995) (citations omitted). Issues at a sentencing hearing may be established by stipulation of counsel if that stipulation is " ' "definite and certain." ' " *State v. Alexander*, 359 N.C. 824, 828, 616 S.E.2d 914, 917 (2005) (quoting *State v. Powell*, 254 N.C. 231, 234, 118 S.E.2d 617, 619 (1961)(citations omitted), *superseded by statute*, Safe Roads Act of 1983, ch. 435, sec. 29, 1983 N.C. Sess. Laws 332, 354-60 (codified as amended at N.C.G.S. § 20-179(a) (2003)(as recognized in *State v. Denning*, 316 N.C. 523, 342 S.E.2d 855 (1986)).

Here we cannot agree with the State that defense counsel's statements quoted above amount to a definite and certain stipulation. There appeared to be some confusion over whether insurance payments had or had not been included in the restitution worksheets. We cannot be certain that defense counsel's statement was a stipulation

to the amount of the restitution or an affirmation that he was now clear on whether the insurance payments had been included on the worksheets. Moreover, we agree with defendant that the mere presentation of the worksheet by the prosecutor was not sufficient to support the award of restitution. *See, e.g.*, *id.* at 827, 616 S.E.2d at 917 (stating that "a mere worksheet, standing alone, is insufficient to adequately establish a defendant's prior record level"). However, any error in the determination of restitution cannot be prejudicial to defendant because at the time the judgment is collected, defendant cannot be made to pay more than what is actually owed, that is, the amount actually due to the various entities that provided medical treatment to defendant's victims. Because defendant will pay the lesser of the actual amount owed or the amount ordered by the trial court, there is no prejudice to defendant. Accordingly, we reverse the decision of the Court of Appeals vacating the portion of the trial court's judgment ordering payment of restitution.

Conclusion

For the foregoing reasons we reverse the decision of the Court of Appeals vacating defendant's convictions for felony serious injury by vehicle. Further, we hold that the trial court erred in ordering restitution, but find that the error was not prejudicial. Therefore, we reverse the Court of Appeal's decision vacating that portion of the judgment. We remand this case to the Court of Appeals for consideration of those issues not addressed in its initial opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. DOUGLAS DWAYNE WHITAKER

No. 21A10

(Filed 8 October 2010)

Firearms and Other Weapons— 2004 amendment to N.C.G.S. § 14-415.1—prohibition on convicted felons from possessing firearm—not ex post facto law or bill of attainder

The 2004 amendment to N.C.G.S. § 14-415.1, which prohibits convicted felons from possessing any firearm in any location, does not violate state and federal constitutional protections

against *ex post facto* laws, nor is it an unconstitutional bill of attainder, because: (1) it is not an unconstitutional *ex post facto* law since the General Assembly's purpose in enacting the 2004 amendment to N.C.G.S. § 14-415.1 was to establish a civil regulatory measure and its effect does not render it punitive in nature; and (2) it is not a bill of attainder since it does not impose punishment on a select group of persons without a judicial trial, and even if the N.C.G.S. § 14-415.1 prohibition on possession of firearms by felons did operate as a punishment, it is unlikely that felons would be considered a group protected under the Bill of Attainder Clause since laws regulating the conduct of convicted felons have long been upheld as valid exercises of the legislative function.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 201 N.C. App. ——, 689 S.E.2d 395 (2009), reversing in part and finding no error in part in judgments entered 10 June 2008 by Judge Lindsay R. Davis, Jr. in Superior Court, Moore County. Heard in the Supreme Court 7 September 2010.

Roy Cooper, Attorney General, by E. Michael Heavner, Assistant Attorney General, for the State.

Law Office of Bruce T. Cunningham, Jr., by Bruce T. Cunningham, Jr. and Amanda S. Zimmer, for defendant-appellant.

BRADY, Justice.

This case requires us to determine whether the 2004 amendment to N.C.G.S. § 14-415.1, which prohibits convicted felons from possessing any firearm in any location, violates state and federal constitutional protections against ex post facto laws or is an unconstitutional bill of attainder. We hold that the amended statute is not an impermissible ex post facto law or bill of attainder. Accordingly, we affirm the decision of the Court of Appeals.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant Douglas Dwayne Whitaker, a convicted felon with an extensive criminal record, was informed by Detective Sergeant George K. Dennis of the Moore County Sheriff's Office in June of 2005 that he could no longer possess the firearms currently in his residence because of a recent change in the law that bans felons from

possessing any firearm. Defendant was also advised on 11 April 2006 by his probation and parole officer, Connie Burns, that according to the rules and regulations of his probation, he could not possess firearms. Despite these warnings, defendant failed to divest himself of his firearms, and on 27 April 2006, a search of defendant's bedroom revealed four rifles and seven shotguns, a total of eleven firearms. Defendant was not arrested and charged at that time, but voluntarily surrendered to authorities on 8 May 2006, when he was charged with eleven counts of possession of a firearm by a felon in violation of N.C.G.S. § 14-415.1.

Following the presentation of evidence and instruction by the trial court, the jury returned verdicts of guilty on all eleven charges. The trial court entered judgment on one count, sentencing defendant, who had a prior record level of V, to 18 to 22 months of imprisonment. The trial court arrested judgment on the other ten counts. Defendant appealed to the Court of Appeals, which in a divided decision reversed the ten convictions on which judgment had been arrested, but found no error in defendant's conviction upon which he was sentenced. *State v. Whitaker*, —— N.C. App. ——, ——, 689 S.E.2d 395, 406 (2009). The Court of Appeals held, *inter alia*, that the amended N.C.G.S. § 14-415.1 is not an ex post facto law or bill of attainder. *Id.* at ——, 689 S.E.2d at 405. An opinion concurring in part and dissenting in part would have held that the amended statute is an unconstitutional ex post facto law and an impermissible bill of attainder. *Id.* at ——, 689 S.E.2d at 407-08 (Elmore, J., concurring in part and dissenting in part). Defendant appealed as of right to this Court based on the dissenting opinion below.

ANALYSIS

A. Ex Post Facto

The United States and North Carolina Constitutions preserve the right of the people to be free from ex post facto laws. The United States Constitution provides that "[n]o State shall . . . pass any . . . ex post facto Law." U.S. Const. art. I, § 10, cl. 1. Moreover, the North Carolina Constitution states: "Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted." N.C. Const. art. I § 16. This Court has articulated that "both the federal and state constitutional *ex post facto* provisions are evaluated under the same definition." *State v. Wiley*, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002) (citation omitted), *cert. denied*, 537 U.S. 1117 (2003).

> [A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

Beazell v. Ohio, 269 U.S. 167, 169-70 (1925).

Defendant asserts that the 2004 amendment to N.C.G.S. § 14-415.1 is an unconstitutional ex post facto law. In 1975 our General Statutes prohibited

> the possession of "any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches" by persons convicted of certain felonies, mostly of a violent or rebellious nature, "within five years from the date of such conviction, or unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such conviction, whichever is later." Act of June 26, 1975, ch. 870, sec. 1, 1975 N.C. Sess. Laws 1273.
>
> Subsequently, in 1995 the General Assembly amended N.C.G.S. § 14-415.1 to prohibit the possession of such firearms by all persons convicted of any felony, without regard to the date of conviction or the completion of the defendant's sentence. Act of July 26, 1995, ch. 487, sec. 3, 1995 N.C. Sess. Laws 1414, 1417. The 1995 amendment did not change the previous provision in N.C.G.S. § 14-415.1 stating that "nothing [therein] would prohibit the right of any person to have possession of a firearm within his own house or on his lawful place of business." However, in 2004 the General Assembly amended N.C.G.S. § 14-415.1 to extend the prohibition on possession to *all* firearms by any person convicted of any felony, even within the convicted felon's own home and place of business. Act of July 15, 2004, ch. 186, sec. 14.1, 2004 N.C. Sess. Laws 716, 737.

Britt v. State, 363 N.C. 546, 547-48, 681 S.E.2d 320, 321 (2009).[1] It should be noted that the trial court's judgment against defendant was

1. N.C.G.S. § 14-415.1 was amended in 2006 to exempt "antique firearm[s]," as defined in N.C.G.S. § 14-409.11, from its provisions. N.C.G.S. § 14-409.11 provides:

> (a) The term "antique firearm" means any of the following:
>
> (1) Any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured on or before 1898.

not for any prior act but was consistent with defendant's possession of a firearm in 2006, over two years after N.C.G.S. § 14-415.1 was amended to prohibit such action. In the strictest sense, defendant's conviction is for an offense that he committed after his actions were deemed criminal, namely the possession of any firearm by a felon. The question then becomes whether the 2004 amendment to N.C.G.S. § 14-415.1 is an ex post facto law, not because it imposes punishment for future acts, but because it prohibits the possession of firearms by a convicted felon, which defendant asserts operates as a form of enhanced punishment for his prior felonies.[2]

Defendant does not assert, and we do not hold, that the General Assembly's express or implied intent was to impose further punishment upon convicted felons by prohibiting them from possessing firearms. *See Smith v. Doe*, 538 U.S. 84, 92 (2003) (stating that an ex post facto analysis begins by considering whether "the intention of the legislature was to impose punishment" (citing *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997))). Thus, we move to the second phase of ex post facto analysis, which requires us to determine whether the 2004 amendment to N.C.G.S. § 14-415.1 is "so punitive either in purpose or effect as to negate" the legislature's civil intent.

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(2) Any replica of any firearm described in subdivision (1) of this subsection if the replica is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition.

(3) Any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder substitute, and which cannot use fixed ammunition.

(b) For purposes of this section, the term "antique firearm" shall not include any weapon which:

(1) Incorporates a firearm frame or receiver.

(2) Is converted into a muzzle loading weapon.

(3) Is a muzzle loading weapon that can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

Additionally, the General Assembly passed a new statute in 2010 to allow certain convicted felons to have their right to bear arms restored. Act of July 6, 2010, ch. 108, sec. 1, 2010 N.C. Sess. Laws ——, —— (codified at N.C.G.S. § 15-415.4).

2. The indictments charging defendant with a violation of N.C.G.S. § 14-415.1 list his 1988 conviction for felony possession of cocaine as the underlying felony prohibiting his possession of firearms. The indictment did not allege that defendant's 2005 conviction of felony possession of cocaine was an underlying felony supporting the charge. The date of defendant's 2005 felony offense was 27 June 2005, which was *after* the 1 December 2004 effective date of amended N.C.G.S. § 14-415.1.

Id. at 92 (quoting *Hendricks*, 521 U.S. at 361) (internal quotation marks omitted). The Supreme Court of the United States has laid out several factors that are instructive but not exhaustive.

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment[,] whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry . . . .

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (footnotes omitted). Of these factors, defendant argues that the statute is not rationally related to the legislature's nonpunitive intent and that the scope of the 2004 amendment is excessive when compared with the purpose of protecting public safety. We disagree.

It is clear that the General Assembly's nonpunitive intent is to protect the public from future violent actions of those it has deemed by its classification of offenses to be either most dangerous or to have demonstrated a heightened disregard for the law. Thus, the question is whether prohibiting convicted felons from possessing firearms that do not fall under the definition of antique firearms is rationally connected to the purpose of public safety. The Supreme Court of the United States asserted that a legislature's "judgment that a convicted felon . . . is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness is rational." *Lewis v. United States*, 445 U.S. 55, 67 (1980) (discussing the federal ban on possession of firearms by convicted felons in the context of the equal protection clause). Moreover, the Court emphasized that questioning the legislature's judgment on this issue "seems plainly inconsistent with the deference that a reviewing court should give to a legislative determination that, in essence, predicts a potential for future criminal behavior." *Id.* at n.9. Moreover, the Supreme Court of the United States has described bans on possession of firearms by felons as regulatory action. *See District of Columbia v. Heller*, 554 U.S. ——, ——, 128 S. Ct. 2783, 2817 n.26, 171 L. Ed. 2d 637, 678 n.26 (characterizing long-standing prohibitions such as the ban on possession of firearms by felons as "presumptively lawful regulatory measures").

Defendant asserts that the statute is not rationally connected to the nonpunitive purpose of the General Assembly because certain crimes that, in defendant's opinion, are more indicative of dangerousness are classified as misdemeanors rather than felonies. However, it is not the duty of, or within the province of, this Court to make criminal offense classifications. Our sole determination is whether there is a rational connection, not whether there is a "perfect fit," between the legislative goal and the means used to accomplish it. *Smith v. Doe*, 538 U.S. at 103 (stating that "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance"). Here the General Assembly determined that the best way to protect the public is to prohibit possession of firearms by those who have shown a heightened disregard for our laws and who often have a propensity for violence. "The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Id.* at 103-04.

Although defendant cites this Court's recent holding in *Britt v. State* as support for the alleged irrationality of N.C.G.S. § 14-415.1, the analysis in *Britt* focused on the plaintiff's right to keep and bear arms as preserved by the North Carolina Constitution. *See Britt*, 363 N.C. at 549, 681 S.E.2d at 322. In *Britt*, the plaintiff had pleaded guilty to a single nonviolent felony decades earlier. *Id.* In the case *sub judice* the Court of Appeals unanimously determined that defendant, who has multiple convictions over a lengthy period of time, is not entitled to relief under the North Carolina Constitution's right to keep and bear arms. —— N.C. App. at ——, 689 S.E.2d at 398-405 (majority); *Id.* at ——, 689 S.E.2d at 406-07 (Elmore, J., concurring in part and dissenting in part). This Court's decision in *Britt* is inapplicable to this case.

Defendant argues that the 2006 amendment exempting antique firearms as defined by N.C.G.S. § 14-409.11 from the provisions of N.C.G.S. § 14-415.1 demonstrates the General Assembly's irrationality in crafting the statute at issue. However, the General Assembly's decision to exempt antique firearms does not make an otherwise rational connection irrational. The exemption of antique firearms from the ban demonstrates that the General Assembly has determined that antique firearms would be less likely to be used in a crime. For example, the General Assembly could have rationally determined that the length of time it takes to load and reload a muzzle loader type of firearm lessens the danger that such a firearm would be used in the

commission of a crime and thus, it provided an exception for those weapons in N.C.G.S. § 14-409.11(a)(3). Section 14-415.1 is rationally connected to the nonpunitive purpose of public safety.

Defendant also argues that N.C.G.S. § 14-415.1 is excessive in light of its purpose to protect public safety. We disagree.

Defendant first argues that N.C.G.S. § 14-415.1 is excessive because it does not provide an exemption for the possession of a firearm in the home or business. To the contrary, the General Assembly could have rationally concluded that protection of the public should extend to individuals in a convicted felon's home or business. Domestic violence often occurs in the home, as do controlled substance transactions. It is not excessive for the General Assembly to attempt to accomplish its purpose of protecting the public by also attempting to protect those who reside, work, or do business with convicted felons.

Defendant also asserts that when applied to his case in particular, the law is excessive because the arms in his possession were not easily concealable and were located in his home, and defendant's prior convictions are for nonviolent crimes. Nonetheless, the record indicates that defendant has a lengthy and diverse criminal record. From 1984 to 2008, defendant has two convictions for possession of drug paraphernalia, two convictions of driving while impaired, two convictions for possession of cocaine, a conviction for selling or delivering cocaine, a conviction for taking indecent liberties with a child, a conviction for maintaining a place to keep controlled substances, and a misdemeanor conviction for possession of oxycodone, a controlled substance. It is certainly not excessive for defendant to be denied the further use of firearms following his repeated disregard for our criminal laws.

Because the General Assembly's purpose in enacting the 2004 amendment to N.C.G.S. § 14-415.1 was to establish a civil regulatory measure, and because the amended statute's effect does not render it punitive in nature, the amended N.C.G.S. § 14-415.1 is not an unconstitutional ex post facto law.

B. Bill of Attainder

Defendant asserts that the 2004 amendment to N.C.G.S. § 14-415.1 also operates as an impermissible bill of attainder. Bills of attainder are prohibited by the United States Constitution: "No State shall . . . pass any bill of attainder." U.S. Const. art. I § 10, cl. 1.

A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977) (citations omitted). "In forbidding bills of attainder, the draftsmen of the Constitution sought to prohibit the ancient practice of the Parliament in England of punishing without trial 'specifically designated persons or groups.' " *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 847 (1984) (quoting *United States v. Brown*, 381 U.S. 437, 447 (1965)).

As we have already determined that the statute's prohibition of possession of firearms by felons does not operate as punishment, N.C.G.S. § 14-415.1 cannot be a bill of attainder. Any punishment defendant received pursuant to N.C.G.S. § 14-415.1 followed a judicial trial in which a jury determined defendant was a convicted felon and possessed a firearm in violation of the law. Moreover, the statute does not inflict punishment on those who have committed prior acts, but on those who commit the future act of possessing a firearm after having been convicted of a felony. Even if the N.C.G.S. § 14-415.1 prohibition on possession of firearms by felons did operate as a punishment, it is unlikely that felons would be considered a group protected under the Bill of Attainder Clause, as "[l]aws regulating the conduct of convicted felons have long been upheld as valid exercises of the legislative function." *United States v. Donofrio*, 450 F.2d 1054, 1055-56 (5th Cir. 1971), *reversed and remanded on other grounds*, 450 F.2d 1054, 1056 (5th Cir. 1972) (per curiam). Because N.C.G.S. § 14-415.1 does not impose punishment on a selected group of persons without a judicial trial, it is not a bill of attainder.

CONCLUSION

Because the 2004 amendment to N.C.G.S. § 14-415.1 neither operates as an ex post facto law nor is a bill of attainder, we affirm the decision of the Court of Appeals. The remaining issues addressed by the Court of Appeals are not before this Court and its decision as to these matters remains undisturbed.

AFFIRMED.

HUBER ENGINEERED WOODS, LLC v. CANAL INSURANCE COMPANY

No. 168A10

(Filed 8 October 2010)

Insurance— commercial automobile liability policy—trucking company—no duty to defend manufacturer

A decision by the Court of Appeals that a trucking company's commercial automobile liability insurer was required under the terms of its policy to defend and indemnify plaintiff manufacturer in a wrongful death action by the estate of a deceased truck driver who was fatally injured in a fall from his truck while attempting to secure a tarp over a load of plywood at plaintiff manufacturer's plant was reversed for the reasons stated in the dissenting Court of Appeals opinion that plaintiff is not an "insured" under the trucking company's policy and that an employee exclusion clause in the policy applied to bar coverage to plaintiff.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 203 N.C. App. ——, 690 S.E.2d 739 (2010), affirming in part and vacating in part an order of summary judgment entered on 15 December 2008 by Judge Jesse B. Caldwell, III in Superior Court, Mecklenburg County. Heard in the Supreme Court 8 September 2010.

Robinson Bradshaw & Hinson, P.A., by R. Steven DeGeorge, for plaintiff-appellee.

Smith Moore Leatherwood LLP, by Robert D. Moseley, Jr., pro hac vice, C. Fredric Marcinak III, Sidney S. Eagles, Jr., and Elizabeth Brooks Scherer, for defendant-appellant.

Nexsen Pruet, PLLC, by James W. Bryan and E. Taylor Stukes, for Trucking Industry Defense Association, amicus curiae.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals holding that defendant has a duty to defend plaintiff in the underlying action at issue. We affirm the decision of the Court of Appeals vacating the portion of the trial court's order of summary judgment that found defendant has a duty to indemnify plaintiff in the underlying action. This case is re-

manded to the Court of Appeals for further remand to the Superior Court, Mecklenburg County, for proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

STATE OF NORTH CAROLINA v. CHARLES RALPH HINSON

No. 176A10

(Filed 8 October 2010)

Drugs— manufacturing methamphetamine—instruction or methods—no variance with indictment

A decision of the Court of Appeals that a variance between the indictment charging that defendant manufactured methamphetamine by "chemically combining and synthesizing precursor chemicals" and a jury instruction on the possible methods of manufacturing methamphetamine constituted plain error was reversed for the reason stated in the dissenting opinion that, while the trial court's instruction utilized slightly different words than those in the indictment, the import of the language in the indictment and that in the instruction was the same.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 203 N.C. App. ——, 691 S.E.2d 63 (2010), finding error in a judgment entered 17 October 2008 by Judge James W. Morgan in Superior Court, Cleveland County, and ordering a new trial in part and remanding for resentencing. Heard in the Supreme Court 8 September 2010.

Roy Cooper, Attorney General, by John P. Scherer II and Katherine A. Murphy, Assistant Attorneys General, for the State-appellant.

Teddy & Meekins, by Anne Bleyman, for defendant-appellee.

PER CURIAM.

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

REVERSED.

JESSICA HARDY, A MINOR, BY AND THROUGH HER PARENT, GAIL HARDY v. BEAUFORT COUNTY BOARD OF EDUCATION; JEFFREY MOSS, SUPERINTENDENT, BEAUFORT COUNTY SCHOOLS, IN HIS OFFICIAL CAPACITY

No. 481A09

(Filed 8 October 2010)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 201 N.C. App. ——, 685 S.E.2d 550 (2009), affirming an order entered 16 May 2008 by Judge William C. Griffin, Jr. in Superior Court, Beaufort County. Heard in the Supreme Court 22 March 2010.

Children's Law Clinic, Duke Law School, by Jane Wettach; and Advocates for Children's Services, Legal Aid of North Carolina, Inc., by Erwin Byrd and Lewis Pitts, for plaintiff-appellant.

Tharrington Smith, L.L.P., by Curtis H. ("Trey") Allen III, for defendant-appellee Beaufort County Board of Education.

Jack Holtzman for North Carolina Justice Center; Concerned Citizens for the Betterment of Beaufort County Schools; Parents Supporting Parents; Tamar Birckhead; Southern Coalition for Social Justice; Center for Death Penalty Litigation, Inc.; Office of the Juvenile Defender; North Carolina Black Leadership Caucus; and NC Conference of NAACP Branches, amici curiae.

Campbell Shatley, PLLC, by Christopher Z. Campbell; and Allison B. Schafer, General Counsel, for North Carolina School Boards Association, amicus curiae.

PER CURIAM.

For the reasons stated in *King v. Beaufort Cty. Bd. of Educ.*, —— N.C. ——, —— S.E.2d —— (Oct. 8, 2010) (No. 480A09), the decision of the Court of Appeals is reversed, and this case is remanded to that court for further remand to the trial court for further proceedings consistent with *King*.

REVERSED AND REMANDED.

Justices TIMMONS-GOODSON and HUDSON concur in part and dissent in part for the reasons stated in Justice TIMMONS-GOODSON'S concurring and dissenting opinion in *King v. Beaufort*

Cty. Bd. of Educ., ––– N.C. ––––, ––– S.E.2d ––– (Oct. 8, 2010) (No. 480A09). Justice NEWBY dissents for the reasons stated in his dissenting opinion in *King*.

W.D. GOLDSTON, JR., JAMES E. HARRINGTON, AND CITIZENS, TAXPAYERS, AND BONDHOLDERS SIMILARLY SITUATED v. STATE OF NORTH CAROLINA AND MICHAEL F. EASLEY, GOVERNOR, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY

No. 443A09

(Filed 8 October 2010)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ––– N.C. App. ––––, 683 S.E.2d 237 (2009), affirming in part and reversing in part a judgment and order entered 27 March 2008 by Judge Joseph R. John, Sr., in Superior Court, Wake County. Heard in the Supreme Court 7 September 2010.

Boyce & Isley, PLLC, by G. Eugene Boyce and R. Daniel Boyce; and North Carolina Institute for Constitutional Law, by Robert F. Orr and Jeanette K. Doran, for plaintiff-appellees.

Roy Cooper, Attorney General, by Norma S. Harrell, Special Deputy Attorney General, John F. Maddrey, Assistant Solicitor General, and Christopher G. Browning, Jr., Solicitor General, for defendant- appellants.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr. for James E. Holshouser, Jr., James B. Hunt, Jr., James G. Martin, Willis P. Whichard, John L. Sanders, and Marvin Dorman, amici curiae.

Blanchard, Miller, Lewis & Isley, P.A., by E. Hardy Lewis, for Joe Hackney, Harold J. Brubaker, Hugh Holliman, Paul Stam, Marc Basnight, Dan Blue, Daniel G. Clodfelter, Fletcher L. Hartsell, Jr., Martin L. Nesbitt, Jr., and National Conference of State Legislatures, amici curiae.

PER CURIAM.

Justice TIMMONS-GOODSON took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three mem-

bers 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.*, *Formyduval v. Britt*, 361 N.C. 215, 639 S.E.2d 443 (2007); *Pitts v. Am. Sec. Ins. Co.*, 356 N.C. 292, 569 S.E.2d 647 (2002).

AFFIRMED.

STATE OF NORTH CAROLINA v. RAJOHN ALMANN CRUZ

No. 193A10

(Filed 8 October 2010)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 203 N.C. App. ——, 691 S.E.2d 47 (2010), finding no error in judgments entered on 29 May 2008 by Judge Stafford G. Bullock in Superior Court, Robeson County. Heard in the Supreme Court 9 September 2010.

Roy Cooper, Attorney General, by Sandra Wallace-Smith, Assistant Attorney General, for the State.

Duncan B. McCormick for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. MICHAEL BURNETTE SINGLETON

No. 51PA10

(Filed 8 October 2010)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 201 N.C. App. ——, 689 S.E.2d 562 (2010), reversing an order subjecting defendant to the satellite-based monitoring program for life entered on 29 August 2008 by Judge Henry E. Frye, Jr. in Superior Court, Guilford County. Heard in the Supreme Court 7 September 2010.

Attorney General Roy A. Cooper, III, by Joseph Finarelli and Special Counsel Hilary S. Peterson, for State-appellant.

Robert W. Ewing, for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STEINKRAUSE v. TATUM

[364 N.C. 419 (2010)]

KAREN STEINKRAUSE, PETITIONER v. GEORGE TATUM, COMMISSIONER OF THE NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT

No. 18A10

(Filed 8 October 2010)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 201 N.C. App. ___, 689 S.E.2d 379 (2009), affirming a judgment entered 27 March 2008 by Judge Orlando F. Hudson, Jr. in Superior Court, Wake County. Heard in the Supreme Court 7 September 2010.

George B. Currin for petitioner-appellant.

Roy Cooper, Attorney General, by Christopher W. Brooks, Assistant Attorney General, for respondent-appellee.

PER CURIAM.

AFFIRMED.

IN RE M.L.T.H.

[364 N.C. 420 (2010)]

IN THE MATTER OF M.L.T.H.

No. 497PA09

(Filed 8 October 2010)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 200 N.C. App. ——, 685 S.E.2d 117 (2009), reversing an order denying a motion to suppress entered on 3 April 2008 by Judge William G. Stewart, vacating a juvenile delinquency adjudication order entered on 5 May 2008 by Judge John Covolo, and remanding this matter to the District Court, Nash County for further proceedings. Heard in the Supreme Court 9 September 2010.

Roy Cooper, Attorney General, by LaToya B. Powell, Assistant Attorney General, for the State-appellant.

Kimberly P. Hoppin for juvenile defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. GARY F. MELLO

No. 490A09

(Filed 8 October 2010)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 200 N.C. App. ——, 684 S.E.2d 483 (2009), finding no error in a judgment entered on 10 December 2007 by Judge V. Bradford Long in Superior Court, Forsyth County. Heard in the Supreme Court 24 March 2010.

Roy Cooper, Attorney General, by Derrick C. Mertz, Assistant Attorney General, for the State.

James R. Glover for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. EDWARD JUNIOR WAGONER

No. 396A09

(Filed 8 October 2010)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 199 N.C. App. ——, 683 S.E.2d 391 (2009), affirming an order entered on 19 February 2008 by Judge Henry E. Frye, Jr. in Superior Court, Wilkes County. On 1 February 2010, defendant filed a motion for appropriate relief in this Court. Heard in the Supreme Court 17 February 2010.

Roy Cooper, Attorney General, by Yvonne B. Ricci, Assistant Attorney General, for the State.

Richard E. Jester for defendant-appellant.

PER CURIAM.

For the reasons stated in *State v. Bowditch*, —— N.C. ——, —— S.E.2d ——, slip op. (Oct. 8, 2010) (No. 448PA09), the decision of the Court of Appeals is affirmed.

AFFIRMED.

Chief Justice PARKER and Justices TIMMONS-GOODSON and HUDSON dissent for the reasons stated in the dissenting opinion in *State v. Bowditch*, —— N.C. ——, —— S.E.2d —— (Oct. 8, 2010) (No. 448PA09).

STATE OF NORTH CAROLINA v. RAYMOND CHARLES HAGERMAN

No. 491A09

(Filed 8 October 2010)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 200 N.C. App. ——, 685 S.E.2d 153 (2009), affirming orders entered on 15 October 2008 by Judge Thomas H. Lock in Superior Court, Onslow County. Calendared for argument in the Supreme Court on 22 March 2010, but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Roy Cooper, *Attorney General*, *by Joseph Finarelli*, *Assistant Attorney General*, *for the State.*

Jon W. Myers for defendant-appellant.

PER CURIAM.

For the reasons stated in *State v. Bowditch*, —— N.C. ——, —— S.E.2d —— (2010) (448PA09), the decision of the Court of Appeals is affirmed.

AFFIRMED.

Chief Justice PARKER and Justices TIMMONS-GOODSON and HUDSON dissent for the reasons stated in the dissenting opinion in *State v. Bowditch*, —— N.C. ——, —— S.E.2d —— (2010) (448PA09).

STATE OF NORTH CAROLINA v. JOSEPH DWAYNE MORROW

No. 461A09

(Filed 8 October 2010)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 200 N.C. App. ——, 683 S.E.2d 754 (2009), finding defendant's constitutional challenge to an order entered on 19 February 2008 by Judge Henry E. Frye, Jr. in Superior Court, Wilkes County, without merit but remanding for additional findings of fact and a determination of the duration of defendant's enrollment in satellite-based monitoring. Heard in the Supreme Court 17 February 2010.

Roy Cooper, Attorney General, by Peter A. Regulski, Assistant Attorney General, for the State.

Mark Montgomery for defendant-appellant.

PER CURIAM.

For the reasons stated in *State v. Bowditch*, —— N.C. ——, —— S.E.2d ——, slip op. (Oct. 8, 2010) (No. 448PA09), the decision of the Court of Appeals is affirmed.

AFFIRMED.

Chief Justice PARKER and Justices TIMMONS-GOODSON and HUDSON dissent for the reasons stated in the dissenting opinion in *State v. Bowditch*, —— N.C. ——, —— S.E.2d —— (Oct. 8, 2010) (No. 448PA09).

STATE OF NORTH CAROLINA v. ROBERT PETER VOGT, JR.

No. 465A09

(Filed 8 October 2010)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 200 N.C. App. ——, 685 S.E.2d 23 (2009), affirming an order entered on 3 July 2008 by Judge Beverly T. Beal in Superior Court, Mecklenburg County. Heard in the Supreme Court 17 February 2010.

Roy Cooper, Attorney General, by Peter A. Regulski, Assistant Attorney General, for the State.

William D. Auman for defendant-appellant.

PER CURIAM.

For the reasons stated in *State v. Bowditch*, —— N.C. ——, —— S.E.2d —— (2010) (448PA09), the decision of the Court of Appeals is affirmed.

AFFIRMED.

Chief Justice PARKER and Justices TIMMONS-GOODSON and HUDSON dissent for the reasons stated in the dissenting opinion in *State v. Bowditch*, —— N.C. ——, —— S.E.2d —— (2010) (448PA09).

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
BILLY RAYMOND ANDERSON	)	

No. 269A00

The motions filed by defendant with this Court on 10 August 2010 are determined as follows:

1. Defendant's Motion to Dismiss Appellant's Motion Filed in this Court Under the North Carolina Racial Justice Act Without Prejudice to File a Motion Under the Racial Justice Act in Post-Conviction Proceedings If Appellant Is Not [ ] Granted Relief on Direct Appeal or in His Pending MAR filed Pursuant to N.C. Gen. Stat. Sec. 15A-2006 is DISMISSED.

2. Defendant's Motion in the Alternative to Remand to the Superior Court of Craven County for an Evidentiary Hearing and Other Proceedings is DISMISSED.

3. Defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act is DISMISSED WITHOUT PREJUDICE.

Further proceedings in defendant's appeal before this Court are stayed until after the trial court's hearing and determination of defendant's Motion for Appropriate Relief pursuant to N.C.G.S. § 15A-2005, *see*, *State v. Anderson*, 355 N.C. 136, 558 S.E.2d 87 (2002), and defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act filed in Superior Court, Craven County.

By Order of the Court in Conference, this 7th day of September 2010.

Hudson, J.
For the Court

STATE v. BARDEN

[364 N.C. 427 (2010)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
IZIAH BARDEN	)	

No. 96A01-3

The motions filed by defendant with this Court on 10 August 2010 are determined as follows:

1. Defendant's Motion to Dismiss Appellant's Motion Filed in this Court Under the North Carolina Racial Justice Act Without Prejudice to File a Motion Under the Racial Justice Act in Post-Conviction Proceedings If Appellant Is Not [ ] Granted Relief on Direct Appeal is DISMISSED.

2. Defendant's Motion in the Alternative to Remand to the Superior Court of Sampson County for an Evidentiary Hearing and Other Proceedings is DISMISSED.

3. Defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act is DISMISSED WITHOUT PREJUDICE.

Further proceedings in defendant's appeal before this Court are stayed until after the trial court's hearing and determination of defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act filed in Superior Court, Sampson County.

By Order of the Court in Conference, this 7th day of September 2010.

Hudson, J.
For the Court

STATE v. LITTLE

[364 N.C. 428 (2010)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
JAMES RAY LITTLE III	)	

No. 221A09

The motions filed by defendant with this Court on 10 August 2010 are determined as follows:

1. Defendant's Motion to Dismiss Appellant's Motion Filed in this Court Under the North Carolina Racial Justice Act Without Prejudice to File a Motion Under the Racial Justice Act in Post-Conviction Proceedings If Appellant Is Not Granted Relief on Direct Appeal is DISMISSED.

2. Defendant's Motion in the Alternative to Remand to the Superior Court of [Forsyth] County for an Evidentiary Hearing and Other Proceedings is DISMISSED.

3. Defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act is DISMISSED WITHOUT PREJUDICE.

This case is removed from the 7 September 2010 oral arguments calendar, and further proceedings in defendant's appeal before this Court are stayed until after the trial court's hearing and determination of defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act filed in Superior Court, Forsyth County.

By Order of the Court in Conference, this 7th day of September 2010.

Hudson, J.
For the Court

STATE v. SHERRILL

[364 N.C. 429 (2010)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
MICHAEL WAYNE SHERRILL	)	

No. 246A09

The motions filed by defendant with this Court on 10 August 2010 are determined as follows:

1. Defendant's Motion to Dismiss Appellant's Motion Filed in this Court Under the North Carolina Racial Justice Act Without Prejudice to File a Motion Under the Racial Justice Act in Post-Conviction Proceedings If Appellant Is Not [ ] Granted Relief on Direct Appeal is DISMISSED.

2. Defendant's Motion in the Alternative to Remand to the Superior Court of Mecklenburg County for an Evidentiary Hearing and Other Proceedings is DISMISSED.

3. Defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act is DISMISSED WITHOUT PREJUDICE.

Further proceedings in defendant's appeal before this Court are stayed until after the trial court's hearing and determination of defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act filed in Superior Court, Mecklenburg County.

By Order of the Court in Conference, this 7th day of September 2010.

Hudson, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
HASSON JAMAAL BACOTE	)	

No. 360A09

The motions filed by defendant with this Court on 10 August 2010 are determined as follows:

1. Defendant's Motion to Dismiss Appellant's Motion filed in this Court Under the North Carolina Racial Justice Act Without Prejudice to File a Motion Under the Racial Justice Act in Post-Conviction Proceedings If Appellant Is Not [ ] Granted Relief on Direct Appeal is DISMISSED.

2. Defendant's Motion in the Alternative to Remand to the Superior Court of [Johnston] County for an Evidentiary Hearing and Other Proceedings is DISMISSED.

3. Defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act is DISMISSED WITHOUT PREJUDICE.

Further proceedings in defendant's appeal before this Court are stayed until after the trial court's hearing and determination of defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act filed in Superior Court, Johnston County.

By Order of the Court in Conference, this 7th day of September 2010.

Hudson, J.
For the Court

STATE v. REYNOLDS

[364 N.C. 431 (2010)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
JOHN ROSWELL REYNOLDS, JR.	)	

No. 1P10

The State's Petition for Writ of Certiorari to review the order of Caswell County, Superior Court, is allowed for the limited purpose of remanding to the trial court for reconsideration in light of *Jones v. Keller*, 364 N.C. 249, 698 S.E.2d 49 (2010).

By order of this Court in Conference, this 7th day of October, 2010.

Timmons-Goodson, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
MICHAEL PATRICK RYAN	)	

No. 366A10

The motions filed by defendant with this Court on 10 August 2010 are determined as follows:

1. Defendant's Motion to Dismiss Appellant's Motion Filed in this Court Under the North Carolina Racial Justice Act Without Prejudice to File a Motion Under the Racial Justice Act in Post-Conviction Proceedings If Appellant Is Not Granted Relief on Direct Appeal is DISMISSED.

2. Defendant's Motion in the Alternative to Remand to the Superior Court of Gaston County for an Evidentiary Hearing and Other Proceedings is DISMISSED.

3. Defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act is DISMISSED WITHOUT PREJUDICE.

Further proceedings in defendant's appeal before this Court are stayed until after the trial court's hearing and determination of defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act filed in Superior Court, Gaston County.

By Order of the Court in Conference, this 7th day of September 2010.

Hudson, J.
For the Court

STATE v. RAMSEUR

[364 N.C. 433 (2010)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
ANDREW DARRIN RAMSEUR	)	

No. 388A10

The motions filed by defendant with this Court on 10 August 2010 are determined as follows:

1. Defendant's Motion to Dismiss Appellant's Motion Filed in this Court Under the North Carolina Racial Justice Act Without Prejudice to File a Motion Under the Racial Justice Act in Post-Conviction Proceedings If Appellant Is Not Granted Relief on Direct Appeal is DISMISSED.

2. Defendant's Motion in the Alternative to Remand to the Superior Court of Iredell County for an Evidentiary Hearing and Other Proceedings is DISMISSED.

3. Defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act is DISMISSED WITHOUT PREJUDICE.

Further proceedings in defendant's appeal before this Court are stayed until after the trial court's hearing and determination of defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act filed in Superior Court, Iredell County.

By Order of the Court in Conference, this 7th day of September 2010.

Hudson, J.
For the Court

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

Beckles-Palomares v. Logan Case below: 202 N.C. App. —— (2 February 2010)	No. 098P10	Def's (City of Winston-Salem) PDR Under N.C.G.S. § 7A-31 (COA09-567)	Denied 10/07/10
Campbell v. Duke Univ. Health Sys., Inc. Case below: 203 N.C. App. —— (16 March 2010)	No. 199P10	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-581)	Denied 10/07/10
Crook v. KRC Mgmt. Corp. Case below: 206 N.C. App. —— (3 August 2010)	No. 387P10	Plts' Motion for Temporary Stay (COA09-936)	Allowed 09/07/10
Cury v. Mitchell Case below: 202 N.C. App. —— (16 February 2010)	No. 125P10	1. Def's (Mitchell) PDR (COA09-238) 2. Plt's (Cury) Conditional PDR	1. Denied 10/07/10 2. Dismissed as Moot 10/07/10
Hawkins v. SSC Hendersonville Operating Co., LLC Case below: 202 N.C. App. —— (2 March 2010)	No. 112P10	Plt-Appellant's Motion for Temporary Stay (COA09-23)	Allowed 03/17/10
In re J.H.K. & J.D.K. Case below: 205 N.C. App. —— (6 July 2010)	No. 369P10	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA10-12)	Allowed 10/07/10
In re Y.Y.E.T. Case below: 205 N.C. App. —— (6 July 2010)	No. 343P10	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA10-14)	Denied 10/07/10
Lawson v. Electronic Data Sys. Corp. Case below: 204 N.C. App. —— (18 May 2010)	No. 236P10	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-1106)	Denied 10/07/10

McCaskill v. Department of State Treasurer Case below: 204 N.C. App. —— (15 June 2010)	No. 292A10	1. Petitioner's NOA (Dissent) (COA09-778) 2. Petitioner's PDR as to Additional Issues	1. —— 2. Allowed 10/07/10
Munger v. State Case below: 202 N.C. App. —— (16 February 2010)A	No. 130P10	Plts' PDR Under N.C.G.S. § 7A-31 (COA09-375)	Allowed 10/07/10
Rice v. Coholan Case below: 205 N.C. App. —— (6 July 2010)	No. 346P10	1. Plts' (J. Frederick & Donna Rice) PDR Under N.C.G.S. § 7A-31 (COA09-326) 2. Defs' (Donald & Teresa Coholan) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 10/07/10 2. Dismissed as Moot 10/07/10
Rice v. Coholan Case below: 205 N.C. App. —— (20 July 2010)	No. 347P10	Plts' (J. Frederick & Donna Rice) PDR Under N.C.G.S. § 7A-31 (COA09-1034)	Denied 10/07/10
Scheerer v. Fisher Case below: 202 N.C. App. —— (19 January 2010)	No. 077P10	Defs' PDR Under N.C.G.S. § 7A-31 (COA09-236)	Denied 10/07/10
Scott v. City of Charlotte Case below: 203 N.C. App. —— (20 April 2010)	No. 224P10	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA09-893) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 10/07/10 2. Dismissed as Moot 10/07/10
Shay v. Rowan Salisbury Schools Case below: 205 N.C. App. —— (20 July 2010)	No. 312A10	Plt's Motion to Dismiss Appeal (COA09-1587)	Allowed 09/22/10
Shupe v. City of Charlotte Case below: 205 N.C. App. —— (6 July 2010)	No. 339P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1555)	Denied 10/07/10
State v. Allen Case below: 203 N.C. App. —— (16 March 2010)	No. 173P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1259)	Denied 10/07/10

State v. Anderson Case below: 198 N.C. App. —— (7 July 2009)	No. 326P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1523)	Denied 10/07/10
State v. Armstrong Case below: 203 N.C. App. —— (20 April 2010)	No. 188P10	1. Def's NOA Based Upon A Constitutional Question (COA09-1276) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/07/10 3. Denied 10/07/10
State v. Bare Case below: 196 N.C. App. —— (16 June 2009)	No. 297P09	Def-Appellant's PDR Under N.C.G.S. § 7A-31 (COA08-818)	Denied 10/07/10
State v. Biber Case below: 206 N.C. App. —— (7 September 2010)	No. 423A10	1. State's Motion for Temporary Stay (COA09-331) 2. State's Petition for Writ of Supersedeas	1. Allowed 09/27/10 2. Allowed 09/27/10
State v. Bombo Case below: 205 N.C. App. —— (6 July 2010)	No. 335P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1339)	Denied 10/07/10
State v. Brennan Case below: 203 N.C. App. —— (4 May 2010)	No. 211P10	State's Motion for Temporary Stay (COA09-1362)	Allowed 05/21/10
State v. Brewington Case below: 204 N.C. App. —— (18 May 2010)	No. 235P10	State's Motion for Temporary Stay (COA09-956)	Allowed 06/04/10
State v. Bunting Case below: 204 N.C. App. —— (15 June 2010)	No. 301P10	1. Def's NOA Based Upon a Constitutional Question (COA09-1679) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 10/07/10 2. Denied 10/07/10
State v. Cecil Case below: 202 N.C. App. —— (16 February 2010)A	No. 127P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-724)	Denied 10/07/10

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

State v. Chestang Case below: 206 N.C. App. —— (3 August 2010)	No. 375P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1500)	Denied 10/07/10
State v. Choudhry Case below: 206 N.C. App. —— (17 August 2010)	No. 409A10	1. Def's NOA (Dissent) (COA09-773) 2. Def's PDR as to Additional Issues (COA09-773)	1. —— 2. Denied 10/07/10
State v. Clodfelter Case below: 203 N.C. App. —— (16 March 2010)	No. 135P10	1. Def's (Jessup) PDR Under N.C.G.S. § 7A-31 (COA09-356) 2. Def's (Clodfelter) NOA Based Upon A Constitutional Question 3. State's Motion to Dismiss Appeal 4. Def's (Clodfelter) PDR Under N.C.G.S. § 7A-31	1. Denied 10/07/10 2. —— 3. Allowed 10/07/10 4. Denied 10/07/10
State v. Craven Case below: 205 N.C. App. —— (20 July 2010)	No. 322P10	State's Motion for Temporary Stay (COA09-1138)	Allowed 08/05/10
State v. Curry Case below: 203 N.C. App. —— (20 April 2010)	No. 201P10	1. Def's NOA Based Upon A Constitutional Question (COA09-547) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/07/10 3. Denied 10/07/10
State v. Elliott Case below: Moore County Superior Court	No. 184A04-2	Def's PWC to Review Order of Moore County Superior Court	Denied 10/07/10
State v. Goble Case below: 205 N.C. App. —— (6 July 2010)	No. 330P10	Def's Motion for PDR (COA09-1192)	Denied 10/07/10
State v. Goodwin Case below: 190 N.C. App. 570	No. 292P08-2	Def's Motion for Writ of Certiorari to Review Order of COA (COA07-1028 and COAP-10-521)	Dismissed 10/07/10

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

State v. Hagin Case below: 203 N.C. App. —— (20 April 2010)	No. 191P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1092)	Denied 10/07/10
State v. Jarrett Case below: 203 N.C. App. —— (4 May 2010)	No. 237P10	1. Def's NOA Based Upon a Constitutional Question (COA09-1036) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/07/10 3. Denied 10/07/10
State v. Jones Case below: 205 N.C. App. —— (6 July 2010)	No. 304P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1488)	Denied 10/07/10
State v. Lederer-Hughes Case below: —— N.C. App. —— (17 November 2009)	No. 512P09	Def's PDR Under N.C.G.S. § 7A-31 (COA09-280)	Denied 10/07/10
State v. Lewis Case below: 206 N.C. App. —— (17 August 2010)	No. 386P10	State's Motion for Temporary Stay (COA08-1595)	Allowed 09/07/10
State v. Lytle Case below: 204 N.C. App. —— (15 June 2010)	No. 295P10	1. Def's NOA Based Upon A Constitutional Question (COA09-1427) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/07/10 3. Denied 10/07/10
State v. Mabe Case below: 205 N.C. App. —— (6 July 2010)	No. 299P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1648)	Denied 10/07/10
State v. McCall Case below: 191 N.C. App. 612	No. 341P10	Def's Motion for PDR Under N.C.G.S. § 7A-31 (COA07-1252)	Denied 10/07/10
State v. McCravey Case below: 203 N.C. App. —— (4 May 2010)	No. 218P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-712)	Denied 10/07/10

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

State v. McNeill Case below: 205 N.C. App. —— (20 July 2010)	No. 324P10	State's Motion for Temporary Stay (COA09-1585)	Allowed 08/06/10
State v. Miller Case below: 184 N.C. App. 190	No. 403P10	Def's Motion for PWC, and/or Any Other Available Relief Pursuant to the All Writs Act (COA06-1373)	Denied 10/07/10
State v. Morrow Case below: 200 N.C. App. —— (6 October 2009)	No. 461A09	Def's Motion for Appropriate Relief (COA08-867)	Denied 10/07/10
State v. Murdock Case below: 202 N.C. App. —— (19 January 2010)	No. 082P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-615)	Denied 10/07/10
State v. Norman Case below: 202 N.C. App. —— (2 February 2010)	No. 103P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-564)	Denied 10/07/10
State v. O'Shields Case below: 204 N.C. App. —— (15 June 2010)	No. 310P10	Def's Motion for PDR (COA09-1342)	Denied 10/07/10
State v. Pastuer Case below: 205 N.C. App. —— (20 July 2010)	No. 327P10	State's Motion for Temporary Stay (COA09-1432)	Allowed 08/06/10
State v. Peppers Case below: 202 N.C. App. —— (2 February 2010)	No. 105P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-772)	Denied 10/07/10
State v. Pettigrew Case below: 204 N.C. App. —— (1 June 2010)	No. 277A10	1. Def's NOA Based Upon A Constitutional Question (COA09-1226) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed 10/07/10
State v. Phillips Case below: 203 N.C. App. —— (6 April 2010)	No. 177P10	State's PDR Under N.C.G.S. § 7A-31 (COA09-1105)	Denied 10/07/10

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

State v. Pinkerton Case below: 205 N.C. App. —— (20 July 2010)	No. 321A10	1. State's Motion for Temporary Stay (COA09-654) 2. State's Petition for Writ of Supersedeas	1. Allowed 08/06/10 2. Allowed 08/18/10
State v. Reynolds Case below: Caswell County Superior Court	No. 001PA10	1. State's Motion for Temporary Stay (COAP09-970) 2. State's Petition for Writ of Supersedeas 3. State's PWC to Review Order of Caswell County Superior Court 4. Defendant's Motion to Hold Matter in Abeyance in *Brown* and *Jones*	1. Allowed 01/05/10 Stay Dissolved 10/07/10 2. Denied 10/07/10 3. See Special Order Page 431 4. Dismissed as Moot 10/07/10
State v. Roach Case below: 200 N.C. App. —— (6 October 2009)	No. 457P09	State's PDR Under N.C.G.S. § 7A-31 (COA08-720)	Denied 10/07/10
State v. Rodriguez Case below: 205 N.C. App. —— (20 July 2010)	No. 361P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1194)	Denied 10/07/10
State v. Roughton Case below: 201 N.C. App. —— (22 December 2009)	No. 009P10	State's Motion for Temporary Stay (COA09-536)	Allowed 01/12/10
State v. Santiano Case below: 205 N.C. App. —— (6 July 2010)	No. 305P10	Def's Motion for Temporary Stay (COA09-506)	Allowed 07/26/10
State v. Stanley Case below: 205 N.C. App. —— (20 July 2010)	No. 316P10	1. Def's Motion for Temporary Stay (COA09-1263) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed 07/30/10 Stay Dissolved 10/07/10 2. Denied 10/07/10 3. Denied 10/07/10
State v. Stewart Case below: 202 N.C. App. —— (2 March 2010)	No. 109P10	State's PDR Under N.C.G.S. § 7A-31 (COA09-928)	Denied 10/07/10

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

State v. Turner Case below: 204 N.C. App. —— (18 May 2010)	No. 264P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1116)	Denied 10/07/10
State v. Vogt Case below: —— N.C. App. —— (3 November 2009)	No. 465A09	Def's Motion for Appropriate Relief (COA08-1441)	Denied 10/07/10
State v. Wagoner Case below: 199 N.C. App. —— (1 September 2009)	No. 396A09	Def's Motion for Appropriate Relief (COA08-982)	Denied 10/07/10
State v. Wiggins Case below: 205 N.C. App. —— (6 July 2010)	No. 338P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1650)	Denied 10/07/10
State v. Wooten Case below: 206 N.C. App. —— (17 August 2010)	No. 376P10	Def's Motion for Temporary Stay (COA09-1551)	Allowed 09/03/10
State v. Wray Case below: 206 N.C. App. —— (17 August 2010)	No. 382P10	State's Motion for Temporary Stay (COA09-304)	Allowed 09/07/10
State v. Wright Case below: 204 N.C. App. —— (18 May 2010)	No. 254P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1062)	Denied 10/07/10
State v. Yencer Case below: 206 N.C. App. —— (17 August 2010)	No. 365P10	1. State's Motion for Temporary Stay (COA09-1) 2. State's Petition for Writ of Supersedeas 3. State's NOA Based Upon A Constitutional Question 4. State's Alternative PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Dismiss Appeal 6. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 08/26/10 2. Allowed 10/07/10 3. Retained 10/07/10 4. Allowed 10/07/10 5. Denied 10/07/10 6. Allowed 10/07/10

State ex rel. Cooper v. Blue Ridge Tank Co. Case below: 206 N.C. App. —— (3 August 2010)	No. 391P10	State's PDR Under N.C.G.S. § 7A-31 (COA09-1025)	Denied 10/07/10
Stevenson v. N.C. Dep't of Corr. Case below: 205 N.C. App. —— (20 July 2010)	No. 326P10	1. Plt's NOA Based Upon A Constitutional Question (COA09-991) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 10/07/10 2. Denied 10/07/10
Union Land Owners Ass'n. v. County of Union Case below: 201 N.C. App. —— (8 December 2009)	No. 010P10	1. Def's PDR Under N.C.G.S. § 7A-31 (COA09-35) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 10/07/10 2. Dismissed as Moot 10/07/10
Washington v. Mahbuba Case below: 203 N.C. App. —— (20 April 2010)	No. 185A10	1. Plt's NOA Based Upon A Constitutional Question (COA09-968) 2. Plt's Motion for Temporary Stay 3. Plt's Petition for Writ of Supersedeas	1. Dismissed *Ex Mero Motu* 10/07/10 2. Dismissed 08/25/10 3. Dismissed 08/25/10
Williams v. Law Cos. Grp. Case below: 204 N.C. App. —— (18 May 2009)	No. 052P08-2	Def's PDR Under N.C.G.S. § 7A-31 (COA09-418)	Denied 10/07/10 **Hudson, J., Recused**

Petition to Rehear

Sisk v. Transylvania Cmty. Hosp., Inc. Case below: 364 N.C. App. 172	No. 067PA09-2	Plt's Petition for Rehearing	Denied 09/15/10

STATE OF NORTH CAROLINA v. BYRON LAMAR WARING

No. 525A07

(Filed 5 November 2010)

1. Criminal Law— motion to suppress—pretrial ruling—preliminary

The trial court's denial of a motion to suppress in a first-degree murder prosecution was subject to plain error review where defendant did not object at trial. Although defendant argued that the trial judge was bound by a hearing judge's ruling on the suppression motion, a pretrial motion to suppress is preliminary because different evidence may be admitted at trial.

2. Confessions and Incriminating Statements— first contact with officer—not custodial

The evidence supported the findings in the pretrial suppression hearing of a first-degree murder prosecution that the officer who first made contact with defendant was not privy to the details of the investigation and would have allowed defendant to walk away if defendant had so chosen.

3. Confessions and Incriminating Statements— pretrial suppression hearing—findings—voluntarily going with detectives

The finding of the trial court in a pretrial suppression hearing that defendant voluntarily agreed to accompany detectives to the Raleigh Police Department was supported by the evidence.

4. Confessions and Incriminating Statements— pretrial suppression hearing—findings—door of interview room not guarded

Competent evidence in a pretrial suppression hearing supported the court's findings that no one guarded the door during the initial interviews of defendant in a police department. The trial court's resolution of conflicting evidence will not be disturbed on appeal.

5. Confessions and Incriminating Statements— initial interrogation—custodial

Under the totality of the circumstances, a reasonable person in the position of defendant when he was originally detained

would not have believed that he was under arrest or was restrained in his movement to a significant degree.

6. Constitutional Law— right to silence—police car ride—no clear invocation of right

Defendant's right to silence was not violated during a three-hour police car ride in which defendant helped officers recover evidence. Defendant's statement of scruples against snitching was not a clear invocation of his right to silence.

7. Constitutional Law— effective assistance of counsel—limited intellectual functioning—no evidence presented

Defendant was not deprived of his right to the effective assistance of counsel where his lawyers failed to present evidence of his limited intellectual functioning at a hearing to suppress his statements to officers. The assignment of error was dismissed without prejudice to defendant's right to reassert it in a post-conviction motion for appropriate relief.

8. Jury— selection—peremptory challenges—racial discrimination—*Batson* claim

There was no error in a capital first-degree murder prosecution where the trial court effectively denied defendant's *Batson* challenge by allowing the State's peremptory challenge. The trial court applied the correct standard, despite a *lapsus linguae*.

9. Jury— selection—peremptory challenge—*Batson* claim

The trial court did not err by denying defendant's *Batson* claim during jury selection in a capital first-degree murder prosecution. The trial court found that the prosecutor's proffered explanation satisfied his burden of establishing nondiscriminatory reasons for the challenge and that defendant had failed to prove that the State acted in a racially discriminatory manner. Trial courts are encouraged to make findings when necessary to make clear aspects of the jury selection that are not preserved on the cold record.

10. Jury— capital voir dire—beliefs not clear—challenge for cause

The trial court did not abuse its discretion by allowing the State's challenge for cause in a capital first-degree murder prosecution where a prospective juror's beliefs about the death penalty could not be pinned down.

11. Constitutional Law— death qualifying jury—no constitutional violation

There was no constitutional violation in death qualifying a jury.

12. Jury— capital voir dire—prosecutor's statements to jury—no presumption favoring life sentence

North Carolina law does not establish a presumption in favor of a life sentence in a capital sentencing proceeding, and the trial court correctly barred defense counsel's statement to that effect during jury selection.

13. Jury— capital—voir dire—prosecutor's omission—remedied by instructions

Any omission by the State in its statements during a capital *voir dire* concerning aggravating circumstances were remedied by the trial court's correct instructions.

14. Jury— capital voir dire—unanimity—life sentence

There was no error during jury selection for a capital first-degree murder prosecution where the prosecutor indicated that the jury had to recommend a life sentence unanimously. Although defendant argued that the court would impose a life sentence if the court could not agree, the jury is not to be instructed about the result that follows the failure to reach a unanimous sentencing recommendation.

15. Evidence— autopsy—photographs—admissibility

The trial court did not abuse its discretion in a first-degree murder prosecution by allowing the State to introduce for illustrative purposes autopsy photographs of the victim.

16. Evidence— recross-examination—objection sustained—no abuse of discretion

Sustaining the State's objection to defendant's recross-examination of law enforcement officers was not an abuse of discretion in light of defendant's admissions.

17. Criminal Law— prosecutor's argument—supported by evidence

There was no gross impropriety in the guilt-innocence portion of a first-degree murder prosecution where the prosecutor argued that a mark on the victim's forehead in an autopsy photograph was made by defendant's shoe. Although the pathologist

did not identify the cause of the mark, the argument was supported by the evidence.

18. Criminal Law— prosecutor's opinion—not grossly improper

The trial court did not err by failing to intervene *ex mero motu* in the guilt-innocence phase of a first-degree murder prosecution where the prosecutor expressed his opinion that the evidence of guilt was overwhelming. Defendant did not object, and the argument was not grossly improper.

19. Criminal Law— prosecutor's opinion—intent to kill

The trial court did not err by failing to intervene *ex mero motu* in the prosecutor's closing argument in the guilt-innocence phase of a first-degree murder prosecution where the prosecutor argued that, in his opinion, stabbing the victim in the neck was an indication of intent to kill.

20. Criminal Law— prosecutor's comment—accomplice's conduct

The trial court did not err by failing to intervene *ex mero motu* in a first-degree murder prosecution where the prosecutor commented that an accomplice's mode of entry into the victim's apartment constituted burglary. Defendant did not show that the comment was fundamentally unfair or affected the outcome of the trial.

21. Constitutional Law— effective assistance of counsel—failure to timely object

The failure of a first-degree murder defendant's counsel to raise timely objections was not ineffective assistance of counsel. The evidence against defendant was overwhelming and there was no probability that the outcome was affected.

22. Criminal Law— prosecutor's argument—motive

The trial court did not err by failing to intervene during a first-degree murder prosecution where the prosecutor argued that defendant and an accomplice killed the victim to eliminate her as a witness.

23. Criminal Law— acting in concert—instructions

The trial court properly instructed the jury on acting in concert in a first-degree murder prosecution. Although defendant argued that these instructions did not require the jury to find intent by defendant, they were virtually identical to those in *State v. Barnes*, 345 N.C. 184.

24. Sentencing— capital—prosecutor's opening statement—victim's family

References to the victim and her family in the prosecutor's opening remarks in a capital sentencing proceeding, examined in the context of defendant's opening remarks, were a correct summary of the nature of the penalty proceeding and forecast of the evidence and were not improper.

25. Constitution Law— effective assistance of counsel—failure to object to argument

There was no ineffective assistance of counsel arising from the failure to object to a prosecutor's opening statement that was not improper.

26. Sentencing— capital—cross-examination of defendant's expert—malingering during tests

The trial court did not abuse its discretion in a capital sentencing proceeding by overruling defendant's objection to the State's cross-examination of defendant's expert about whether defendant was malingering during psychological tests. Defendant's mental capacity and possible neurological and psychological disorders were key issues and nothing in the record indicates that the questioning was in bad faith.

27. Sentencing— capital—questioning of defense expert—unethical conduct

Even if defendant had properly preserved the questions for appeal, the trial court did not err by failing to intervene *ex mero motu* in a capital sentencing proceeding where the prosecutor asked defendant's expert about unethical conduct and defendant's potential for future violence.

28. Sentencing— capital—defendant's I.Q.—lay testimony

The trial court properly sustained the State's objection to lay opinion testimony about defendant's intelligence in a capital sentencing proceeding. The witness was allowed to testify that defendant suffered a "lower I.Q.," but was not allowed to give a specific I.Q. range.

29. Sentencing— capital—prosecutor's closing argument—multiple circumstances—distinct evidence

The trial court did not err by failing to intervene in a capital sentencing proceeding during the prosecutor's closing argument

concerning three aggravating circumstances where there was substantial and distinct evidence of each circumstance. The failure to object was not ineffective assistance of counsel.

30. Sentencing— failure to give instruction—plain error review—not available

Plain error review was not available for the failure to give an instruction where defendant did not make a timely request for the instruction. The trial court did not have a duty to give the instruction in the absence of a request. The record was undeveloped about why the request was not made and an ineffective assistance of counsel issue was denied, but could be raised in a post-conviction proceeding.

31. Sentencing— capital—prosecutor's closing argument—personal opinion

The trial court did not err in a capital sentencing proceeding by allowing the State to make closing arguments expressing a personal opinion. While the prosecutor's argument contained improper material, the comments were a far cry from the type of inflammatory argument condemned in other cases, did not trigger an objection, and were not so grossly improper as to require the trial court to intervene *ex mero motu*.

32. Sentencing— capital—prosecutor's comments—ridiculing defense experts—not grossly improper

In a capital sentencing proceeding, the prosecutor's comments on defense experts may have been meant as ridicule, but were ambiguous and confusing in context, did not trigger an objection, and were not so grossly improper as to require the court to intervene *ex mero motu*.

33. Sentencing— capital—prosecutor's closing argument—efforts to help victim

The prosecutor did not argue outside the record and attempt to inflame the jury in a capital sentencing proceeding with an argument about the attempt of a neighbor to help the victim. The prosecutor used the victim's experience as a means of conveying the victim's suffering and the heinous, atrocious, or cruel nature of the crime.

34. Sentencing— capital—prosecutor's closing argument—imaginary conversation with victim's father

A prosecutor's closing argument in a capital sentencing proceeding was not so grossly improper as to require intervention *ex mero motu* where the prosecutor related an imaginary conversation with the victim's father. The prosecutor never indicated that the conversation had occurred and, in context, the argument was a permissible reminder from a different perspective of how the victim suffered and the nature of defendant's actions.

35. Sentencing— capital—prosecutor's closing argument—gang involvement

The prosecutor's closing arguments in a capital sentencing prosecution regarding defendant's gang involvement were supported by the evidence and were not improper.

36. Sentencing— capital—prosecutor's closing argument—credibility of defense case—proper inferences

There was no gross impropriety in a capital sentencing proceeding where the prosecutor argued that defendant's case for mitigation was a lie. The prosecutor's argument appropriately drew inferences from properly admitted evidence and was not so grossly improper as to require the trial court to intervene *ex mero motu*.

37. Sentencing— capital—prosecutor's closing argument—no cumulative error

There was no cumulative error in a prosecutor's closing argument in a capital sentencing proceeding where the arguments were not in error or did not rise collectively to the level of reversible error.

38. Sentencing— capital—peremptory instructions—not given—controverted evidence

The trial court did not err in a capital sentencing proceeding by refusing to instruct peremptorily on the (f)(2),(f)(6), and (f)(8) mitigating circumstances where the evidence supporting their submission was controverted.

39. Sentencing— capital—mitigating circumstances—no significant criminal activity—properly submitted

The trial court did not err in a capital sentencing procedure by submitting the (f)(1) mitigating circumstance (no significant

history of criminal activity) over defendant's objection. The evidence was limited to minor offenses and the trial court reasonably determined that a rational jury could conclude that defendant had no significant history of criminal activity.

40. Sentencing— capital—nonstatutory mitigating circumstances—peremptory instruction

The trial court did not err in a capital sentencing proceeding by failing to give peremptory instructions on nonstatutory mitigating circumstances where the evidence did not support the instructions.

41. Sentencing— capital—mitigating circumstance—defendant's mother—peremptory instructions not given

Any error in a capital sentencing proceeding in not giving peremptory instructions on mitigating instructions regarding defendant's mother was harmless. Several of the circumstances were controverted, and, while the court erred by not giving a peremptory instruction in one instance, other peremptory instructions relating to defendant's mother were given and the jury did not find mitigating effect.

42. Sentencing— death penalty—proportionate

The death penalty was proportionate where the jury found three aggravating circumstances, the evidence fully supported each aggravating circumstance, and nothing in the record suggested a sentence imposed arbitrarily or under the influence of passion or prejudice. Defendant participated in a brutal, prolonged, and merciless killing.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Paul G. Gessner on 9 July 2007 in Superior Court, Wake County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 9 September 2009.

Roy Cooper, Attorney General, by Joan M. Cunningham and Derrick C. Mertz, Assistant Attorneys General, for the State.

James P. Cooney III and Mary S. Pollard for defendant-appellant.

EDMUNDS, Justice.

In the early morning hours of 8 November 2005, Raleigh police were dispatched to an apartment complex near Walnut Creek Parkway to investigate a report of rape and possible assault. Officer David Naumuk was the first to arrive at the scene, along with members of the Raleigh Fire Department. As Officer Naumuk sought to locate the correct building in the complex, he saw a white male, later identified as Andrew Bennett Pipkin (Pipkin), who was holding a telephone to his ear and running toward the firefighters while calling for help. Officer Naumuk asked Pipkin to direct him to the victim, then followed him through a breezeway and down a set of stairs.

When Officer Naumuk reached the bottom of the stairs, he found Pipkin kneeling beside the victim, who was later identified as Lauren Redman, a twenty-three-year-old white female. Pipkin's hand was on the victim's stomach, attempting to hold in her intestines. She was sitting up "Indian style" on the sidewalk, covered in blood, with her arms stretched out over her knees, her head slumped over, and her hair completely covering her face. As EMS and fire personnel began to attend to the victim, Officer Naumuk guarded the door to the victim's apartment.

When Police Sergeant Munn arrived at the scene, he and Officer Naumuk entered the apartment to conduct a preliminary search. No one was inside, but they observed a large quantity of blood on the floor in the center of the living room. All the windows in the apartment were closed with no signs of forced entry.

At defendant's trial, Pipkin testified that he had been in an apartment above the victim's apartment, preparing for bed at approximately 2:20 a.m. after watching *Monday Night Football*. He heard loud classical music coming from the other side of the breezeway, followed a few moments later by knocking on the walls and cries for help. He initially assumed that the noise might be from intoxicated college students in one of the nearby apartments. However, when the noise continued, he dressed and opened his apartment door. He heard a girl crying out for help from the floor below, asking him to come down. When Pipkin went downstairs, he found the victim kneeling in the breezeway in a pool of blood, wearing no panties and with her nightgown pulled up. She was knocking on the door of Apartment B, the apartment just beneath Pipkin's. Across the breezeway he could see "a lot of blood" in Apartment A. The victim appeared to be holding a towel to her stomach, but on closer exami-

nation, Pipkin realized she was cut open and what he first thought was a towel were her exposed intestines.

The victim told him she had just been attacked, so Pipkin immediately ran back to his apartment to call 911. While making that call, Pipkin returned to the victim and asked who had injured her. According to Pipkin, she responded either, "[T]wo black men," or "held up two fingers to indicate the number." Because loud classical music coming from the victim's apartment was interfering with the call, the 911 dispatcher directed Pipkin to turn off the sound. At the further direction of the 911 dispatcher, Pipkin pressed a towel against the victim's wound, then held up the victim's back to relieve her pain. He remained holding her for about ten minutes until Officer Naumuk arrived.

When the paramedics reached the scene, Pipkin was with Officer Naumuk, still holding the towel to the victim's stomach. A paramedic testified that "[t]here was quite a bit of blood on the ground" and that the victim "did not appear to have any signs of life." After unsuccessfully performing CPR, the paramedics placed her in an ambulance, where they noticed tape and other material wrapped around her neck like a scarf. They also observed what appeared to be at least ten life-threatening wounds. The victim was pronounced dead in the ambulance at 2:42 a.m.

A state medical examiner later determined the victim's death resulted from multiple injuries. Grouping those injuries, the examiner found five stab wounds, abrasions, and contusions to the victim's head and neck; hemorrhages in the whites of her eyes associated with lack of oxygen that could have resulted from her mouth and nose having been covered; twenty-three stab wounds to her torso, including seventeen superficial wounds or "flecks" that were consistent with having been pricked by the tip of a knife; hemorrhaging in her abdominal cavity; contusions and incised wounds on her upper extremities; contusions of the torso; abrasions of her knees; and an abrasion of the wall of her vagina.

As detailed below, police investigators identified Byron Lamar Waring (defendant), a nineteen-year-old African-American male, as a suspect. On 9 November 2005, detectives located defendant at his 5120-A Vann Street residence in West Raleigh. Defendant agreed to accompany detectives to the Raleigh Police Department for an interview, where he made a series of statements on 9 November and 10 November 2005. The last two of these statements, one narrated to

jurors by investigators, the other tape-recorded and in defendant's own voice, were admitted at trial.

According to these statements, sometime during the late evening of Monday, 7 November and the early morning of Tuesday, 8 November 2005, defendant and Joseph Sanderlin (Sanderlin) walked from defendant's Vann Street apartment to the victim's apartment complex, taking with them duct tape they had purchased shortly before setting out. Defendant said that the two of them went to the victim's apartment "to do a favor for a friend of mine," which was "just to go get the money." When they arrived, defendant knocked on the door and told the victim that Brad Sasser had sent him over to retrieve a cord for Sasser's video game system along with some compact discs.[1] The victim responded that she thought she had already given those things to Sasser, then started looking in the apartment's living room. As she turned her back, defendant grabbed her from behind, putting her in a bear hug or "lock-hold."

While still holding the victim, defendant unlocked the sliding-glass back door and let Sanderlin in. Defendant and Sanderlin seized the victim's arms and put them behind her back, and defendant secured them with the tape he and Sanderlin had purchased earlier that evening. However, when defendant used the tape to gag the victim, she freed her hands and pulled the tape off. Defendant grabbed her again, put a towel around her mouth, and rebound her hands.

As defendant held the victim down, Sanderlin began pricking the victim in the side with a pocket knife, asking her, "Are you going to give me what I want?' " and "If you don't give me what I want, I will kill you." Sanderlin then began to rape the victim from behind. As defendant continued to restrain the victim, he noticed that the victim was turning blue and having difficulty breathing, so he removed the towel from her mouth. The rape lasted about five to eight minutes. After Sanderlin finished, stood, and pulled up his pants, the victim "flipped" defendant "off". Defendant "got mad" and "punched her in the face a couple of times," then "stomped her in the face like one or two times."

In the meantime, Sanderlin had gone to the kitchen and picked up a butcher knife. He slid that knife to defendant, then approached the victim from her blind side and started stabbing her in the neck "a

1. Details of Sasser's identity and relationship with the victim and defendant were developed during the pretrial hearing on defendant's suppression motion, as detailed later in this opinion, but were not provided to the jury.

couple of times" with his pocket knife. When that knife lodged in the victim's neck, she began rolling on the floor. Defendant used his sleeve to cover his hand as he picked up the butcher knife and "poked her like one or two times on her side." Defendant next stood over the victim and cut her across the throat, then handed the knife to Sanderlin, who "started working on her stomach." According to defendant, Sanderlin stabbed her to "the point that her intestines just fell out, it [sic] was just hanging out her stomach."

While Sanderlin was stabbing the victim, defendant "was already getting the wallet and stuff." Around this time, Sanderlin told defendant to "finish her" and left the apartment with the victim's keys to get her car. Defendant knelt and picked up the knife, again using his sleeve. The victim looked at him and said, "Please don't kill me," adding that she was about to die anyway. Defendant said, "I got to, Ma." She asked, "Can I please get some water?" but defendant told her, "No." The victim's "head tilt[ed] to the side a little bit, [and] her eyes done rolled back [in]to her head." Defendant walked out the back door of the apartment carrying the butcher knife.

Sanderlin drove defendant in the victim's car to Barringer Street, near defendant's Vann Street apartment. Defendant threw the knife into a street drain near the car, and then he and Sanderlin walked home. Defendant noticed blood on his clothes, so he took a shower. Defendant next removed between eighty and one hundred dollars from the victim's wallet, keeping twenty dollars while Sanderlin took the rest. Defendant put his bloody clothes in a bag and discarded them in a dumpster down the street and threw the victim's wallet into the woods behind his house. Finally, defendant drove the victim's car to a gas station to purchase cigarettes, then drove back to Barringer Street and, after using his shirt to wipe away any fingerprints on the car, walked home.

Defendant did not present evidence during the guilt-innocence portion of his trial, nor did he cross-examine six of the State's eleven witnesses. He did not dispute that his fingerprints were found at the victim's apartment and that blood was found on his shoes. He did not contest the manner and cause of the victim's death or the physical evidence that Sanderlin raped her. The jury found defendant guilty of first-degree murder based upon premeditation and deliberation and under the felony murder rule based upon the underlying offenses of robbery and rape.

At the subsequent sentencing proceeding, defendant presented sixteen witnesses. Manish Fozdar, M.D., an expert in neuropsychiatry, testified that defendant suffers from a disorder in the right hemisphere of the brain that affects his intellectual functioning, his ability to process information while under pressure, his ability to express his emotions and to read those of others, his behavior, his self-esteem, and his judgment. Dr. James Hilkey, an expert forensic psychologist, testified that defendant has a cognitive disorder and personality disorder with features of a schizotypal personality disorder and a dependent personality disorder. In addition, he diagnosed defendant with borderline intellectual functioning and added that defendant's understanding of the charges against him was simultaneously factual and irrational. Both experts testified that defendant was under a mental disturbance at the time of the crime and that his ability to conform his conduct to the requirements of the law was impaired. Various teachers, family members, and social workers testified that defendant struggled academically, had been slow to develop, and lacked structure and discipline in the home.

In rebuttal, the State presented Dr. Mark Hazelrigg, an expert forensic psychologist and Chief of Forensic Sciences at Dorothea Dix Hospital. Dr. Hazelrigg testified that defendant has borderline intellectual functioning but is not mentally retarded. Dr. Hazelrigg diagnosed defendant as having an antisocial personality disorder and saw evidence suggestive of malingering during some of the testing conducted in preparation for trial, although he did not diagnose malingering. He disagreed with defendant's experts' assessment that defendant has a mental or emotional condition that would interfere with his ability to understand wrongful acts or to conform his conduct to the requirements of the law.

The jury unanimously found the three submitted aggravating circumstances: that the murder was committed during the commission of a felony (rape), pursuant to N.C.G.S. § 15A-2000(e)(5); that the murder was committed for pecuniary gain, pursuant to N.C.G.S. § 15A-2000(e)(6); and that the murder was especially heinous, atrocious, or cruel, pursuant to N.C.G.S. § 15A-2000(e)(9). Of the eight statutory mitigating circumstances submitted, one or more jurors found four: that defendant acted under duress, pursuant to N.C.G.S. § 15A-2000(f)(5); that defendant acted under the domination of another person, also pursuant to N.C.G.S. § 15A-2000(f)(5); that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired,

pursuant to N.C.G.S. § 15A-2000(f)(6); and that defendant aided in the apprehension of another capital felon, pursuant to N.C.G.S. § 15A-2000(f)(8). Of fifty-nine submitted nonstatutory mitigating circumstances, and the catchall, § 15A-2000(f)(9), one or more jurors found two that had mitigating value: that defendant suffers from borderline intellectual functioning, and that defendant suffers from cognitive functioning impairments. The jury subsequently found the mitigating circumstances insufficient to outweigh the aggravating circumstances and concluded that the aggravating circumstances were sufficiently substantial to call for imposition of the death penalty. Accordingly, the jury unanimously recommended a sentence of death and the trial court imposed a death sentence upon defendant on 9 July 2007. That same day, defendant entered Notice of Appeal to this Court pursuant to N.C.G.S. § 7A-27(a).

Additional facts will be set forth as necessary for the discussion of specific issues.

PRETRIAL ISSUES

Defendant's first set of issues relates to his contention that the trial court erred in denying his pretrial motion to suppress his 9 November and 10 November 2005 statements to law enforcement officers, along with the physical evidence gathered as a result. Defendant argues that the statements were made while he was in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), but that he was given no *Miranda* warnings until after he had confessed to murder and been placed under arrest. In addition, because the State did not offer into evidence any statements defendant made before he was advised of his *Miranda* rights, defendant contends that, pursuant to *Missouri v. Seibert*, 542 U.S. 600, 159 L. Ed. 2d 643 (2004), any statements he made and any evidence obtained after the *Miranda* rights were administered were tainted by the prior illegally obtained confession and therefore were inadmissible. Further, defendant contends that officers did not honor his right to re-invoke his right to silence when he refused to give the correct name of the second suspect. Finally, defendant claims his attorneys provided ineffective assistance at the suppression hearing when they failed to present evidence that he was not mentally competent to waive his *Miranda* rights. The State responds that, except for his claim of ineffective assistance of counsel, defendant has not preserved these issues because he failed to object when this evidence was offered at trial.

The trial court conducted a pretrial evidentiary hearing on defendant's motion to suppress his statements. The State presented evidence that, in the immediate aftermath of the murder, police questioned the victim's former roommate, Brad Sasser. Sasser had been seen at the victim's apartment with two black men and a white woman a few hours before the killing. When questioned, Sasser identified the two black men as "Joey" and "By," and the white woman as his girlfriend Ashley Hobgood. Sasser identified a photograph of defendant as "By" and police found defendant's fingerprint in the victim's apartment. Accordingly, investigators sought to interview defendant.

On the morning of Wednesday, 9 November 2005, Raleigh Police Officer Christopher Robb (Robb) was conducting surveillance of a house at 5120-A Vann Street while attempting to locate defendant. The officer was alone in an unmarked car parked near that address. At about 8:00 a.m., he observed defendant step out from the 5120-A Vann Street residence. Knowing that defendant was a person of interest as a possible suspect, Robb called his sergeant to inform him defendant was on the street. The sergeant instructed Robb to make contact with defendant.

Robb drove up to defendant and exited his car. The officer was in civilian clothes with his shirt untucked to conceal his weapon. He called out defendant's name and walked up to defendant, who was standing about twenty to thirty feet away. Robb identified himself as a police officer and told defendant he needed to talk with him. When defendant asked what he wanted to talk about, Robb replied that detectives were on the way to speak with defendant. Robb told defendant that he "was being detained" and that he "was not under arrest." Robb made no attempt to restrict defendant's movement and later testified that he would have allowed defendant to leave had defendant chosen to do so. Robb added that he was not familiar with all aspects of the case and tries to be a "soft hand" when he locates witnesses or suspects for investigators to avoid having an impact on the investigation.

When Robb asked defendant if he had any weapons on him, defendant responded that he had a knife in his pocket. Robb asked if he could retrieve the weapon and defendant voluntarily consented. Robb then asked defendant to have a seat on the curb until the detectives arrived, and defendant complied.

Less than ten minutes later, Raleigh Police Detectives Ken Copeland and Jacquie[2] Taylor arrived in an unmarked car and wearing civilian clothes. Defendant was sitting on the curb while Robb stood nearby, looking towards the 5120-A Vann Street residence. Detectives Taylor and Copeland intended to ask defendant to accompany them voluntarily to the Raleigh Police Department for an interview.

Detective Copeland approached Robb, who directed him to defendant. Detective Copeland introduced himself and Detective Taylor to defendant and shook defendant's hand. Detective Copeland told defendant he was not under arrest and not in trouble, then asked if he had a few minutes to talk. Defendant responded, "No problem." He added that the night before, Sasser had contacted him to report that police were looking for defendant and that he should "get out of town." According to defendant, he told Sasser he had "nothing to hide." However, when he asked Sasser for the detectives' telephone number, Sasser said he had lost it. Defendant told the officers he "was anxious to talk to the police and answer [their] questions because he had nothing to do with the girl getting hurt."

Detective Copeland asked defendant if he would come with them to the police department for an interview, and defendant voluntarily agreed. Detective Copeland received defendant's permission to pat him down for weapons before defendant entered the officers' car. With defendant in the front passenger seat and Detective Taylor in the back, Detective Copeland drove to the nearby police station, arriving at approximately 9:00 a.m. Defendant, who had not been handcuffed, walked freely into the building, unassisted by either detective. Detectives Copeland and Taylor escorted defendant through security and up to the Investigative Division on the fourth floor, where he was offered coffee.

Detective Copeland directed defendant to a well-illuminated interview room furnished with a table and a few chairs. The room was approximately eight feet on each side. Detective Copeland asked defendant to have a seat, then left to go to court on an unrelated matter, leaving defendant unattended in the interview room. Defendant was not handcuffed and no one guarded the door.

At approximately 9:15 a.m., Detective Taylor entered the room and began to interview defendant. She was wearing plain clothes

2. Spelled "Jackie" in some transcripts.

and unarmed. After taking down preliminary biographical information, Detective Taylor asked defendant about his relationship with the victim's roommate Brad Sasser and whether defendant knew the victim. Defendant responded that he had met Sasser, Sasser's girlfriend Ashley Hobgood, and the victim through a mutual friend, Matt Johnson, at a party thrown by Johnson two or three weeks previously. Since then, he had been hanging out with Sasser somewhat regularly.

Detective Taylor asked about defendant's activities on Monday, 7 November 2005, the day before the murder. Defendant responded that at about 10:00 p.m., he had gone with Sasser, Hobgood, and a person named "Dominic Copeland" to the victim's apartment to pick up some of Sasser's belongings. Defendant stated that he was at the apartment for about ten minutes. Once they left the apartment, Sasser took Dominic and defendant back to defendant's house on Vann Street, and Dominic caught a cab home. The following day, Matt Johnson told defendant the victim had been killed.

When Detective Taylor asked defendant whether he knew anyone named "Joey," defendant responded that he had a cousin by that name who lived in New York. The detective asked whether Joey had gone to the victim's apartment with them. Defendant replied that Joey had not gone there, but that Dominic had. Detective Taylor then asked if Sasser and the victim had been having any problems. Defendant responded that Sasser had been staying at the victim's apartment for about two weeks. However, the victim had become upset with Sasser for throwing a party at the apartment a few days earlier and told him he had to move out.

When Detective Taylor told defendant she knew the person he had been with was named "Joey" and not "Dominic," defendant stated that his cousin Joey from New York had been with them. Defendant said Joey knew Sasser from the party they had attended at Matt Johnson's house and that they had all been hanging out since the party. Defendant said Joey's full name was "Joey Jose" and that Joey had taken the train back to New York the previous morning. When Detective Taylor pointed out that she could check the train records for Joey's name, defendant suggested that perhaps Joey had gone to Durham to visit family.

Detective Taylor continued to focus her questions on Joey, defendant, and the period from Monday, 7 November to Tuesday, 8 November 2005. Defendant denied returning to the victim's apart-

ment after Sasser dropped him off at defendant's house. Defendant claimed he would not hurt anyone because that "is not what he does," adding that he "breaks into houses and cars."

Detective Taylor then informed defendant that footprint impressions had been observed at the victim's apartment and asked defendant if he would mind if they compared them with the shoes he was wearing. Defendant responded that he did not mind, then removed his shoes and handed them to Detective Taylor. She left the interview room with the shoes, closing but not locking the interview room door behind her, and gave them to her superior, Sergeant Clem Perry. No law enforcement officer stood guard or otherwise remained near the door.

While Detective Taylor was away from the interview room, she was informed that the victim's driver's license had been recovered from a storm drain in front of defendant's Vann Street residence. Detective Taylor and Sergeant Perry also noticed what appeared to be traces of blood on defendant's shoes.

At 10:35 a.m., Detective Taylor and Sergeant Perry returned to the interview room and informed defendant that the victim's driver's license had been recovered and that blood appeared to be on defendant's shoes. In response, defendant repeated the narrative he had previously given, adding that Sasser had "flipped out" at the victim's apartment when she told him to move out. The officers stopped defendant and reminded him that he had already given one statement and that he needed to be truthful. Sergeant Perry asked defendant if he was at the victim's apartment when she was hurt, and defendant nodded his head affirmatively. Defendant stated that after Sasser had dropped defendant off at his house, defendant called Sasser. Sasser asked defendant to return with him to the victim's apartment. Defendant declined to go with Sasser and instead walked to the victim's apartment. He arrived sometime between 11:55 p.m. and 12:30 a.m., after which Sasser and the victim began arguing. Defendant said that when he saw Sasser pick the victim off the couch and throw her on the floor, he went out the back door and sat down. He heard the victim scream, looked inside, and saw her running naked from Sasser. Defendant said he left and returned home. Defendant denied seeing Sasser kill the victim. After making this statement, defendant diagrammed the victim's apartment for Detective Taylor.

At this point they took another break. Detective Taylor asked defendant if he needed to go to the bathroom or if he wanted any-

thing to drink, but defendant declined. For approximately ten minutes, the investigators left defendant unattended in the interview room with the door closed but unlocked.

At 11:15 a.m., Detective Taylor returned to the interview room and began to confront defendant with some of the inconsistencies in his statements. Detective Taylor truthfully informed defendant that she had validated Sasser's alibi the previous evening and thus knew Sasser had not been at the victim's apartment when she was killed. Defendant responded that at times he did some work for Sasser and that Sasser had sent him to the victim's apartment because she owed Sasser sixty dollars. Defendant stated that after Sasser dropped him off, he walked back over to the victim's apartment and told her he was there to pick up some of Sasser's possessions. When the victim started to look for the items, defendant approached her and demanded the money. He and the victim argued briefly, began fighting, and fell wrestling to the floor. Defendant stated he hit the victim in the face and stomped her in the head before he "blanked out and ran out." Defendant held out his hand and showed Detective Taylor a fingernail that he said had been broken during the altercation.

Sergeant Perry then entered the interview room and informed defendant "that detectives had located his jacket over at the Vann Street address and that the jacket had blood on it." Defendant responded that the blood must have come from the victim's mouth and lip, which had been injured when he hit her in the face. Detective Taylor and Sergeant Perry left the interview room and requested that defendant's hands be photographed. Detective Taylor returned and again asked defendant if he needed to go to the bathroom or if he wanted something to eat or drink, and defendant again declined the offers. For about the next ten minutes defendant apparently was left alone in the interview room.

The investigators resumed their interview with defendant at approximately noon. They told defendant they knew he was not being completely honest and that "someone else was with him." They again asked about "Joey." Defendant was reluctant to identify Joey and eventually wrote the name "Joey Richardson" on Detective Taylor's notepad, along with a birthday and age. Defendant said he and Joey went to the victim's apartment together. While repeating the essence of his previous story, defendant now added that Joey stood outside while defendant went into the apartment to get the money and subsequently fought with the victim. Defendant stated that he and Joey left after the fight. Defendant then changed his story and said that he

left the apartment once the victim was on the floor. Then, according to defendant, Joey entered through the sliding-glass back door of the apartment as defendant was on his way out. Defendant denied being present when the victim was stabbed.

At around 12:40 p.m., they took another break. Detective Taylor left the interview room while defendant remained unattended with the door closed but not locked. No one stood watch at the door. Detective George Passley brought food to defendant sometime between 12:40 p.m. and 1:00 p.m., then left defendant alone for a short break with the door open. At around 1:00 p.m., Detective Passley walked by the interview room and, when defendant looked up at him, asked defendant if he wanted to talk. Defendant lowered his head and said, "Yes." Detective Passley asked defendant if he was going to tell the truth. Defendant looked up and repeated, "Yes." Detectives Passley and Taylor then discussed defendant's background with him briefly before returning to the subject of the victim's apartment. The detectives again encouraged defendant to tell the truth but did not advise him of his *Miranda* rights. Defendant was asked whether the sliding-glass back door of the victim's apartment had been locked. Defendant said that it was locked and that he had to release a latch and remove a security pole to open it. In response to a question from Detective Passley, defendant reported that the television's volume had been turned up.

When the investigators once more asked defendant whether he stabbed the victim, he answered again that he did not touch her after he beat her. He said he had put his clothes in a grocery bag and thrown them in a trash can near some brick apartments, describing the clothes and adding that he would show police where he had discarded them. Asked about the victim's wallet, defendant provided the new information that he had put it in his pocket. After later removing twenty dollars, he threw the wallet in some woods.

Because defendant's several statements had been inconsistent, the investigators continued to question him and again encouraged him to be truthful. In response, defendant made another statement in which for the first time he implicated himself in the murder. Defendant said he and Joey were sent by Sasser to obtain Sasser's money from the victim and to "get rid of her." They walked to the victim's apartment and, when she opened the door in response to defendant's knock, he told her Sasser had sent him to get a cord for his game system. Once inside, defendant opened the back door to admit Joey, who grabbed the victim and began to beat her. According

to defendant, Joey removed some of the victim's clothes and defendant held her while Joey raped her. After completing the rape, Joey picked up a knife from the kitchen and handed it to defendant. Defendant took the knife with his sleeve to avoid putting fingerprints on it. Joey said to defendant, "You know what you have to do." When the victim looked at defendant and said, "Please don't," defendant related that he "couldn't do it" and dropped the knife. Defendant told the investigators that Joey then grabbed the knife and stabbed the victim in the stomach until her intestines came out.

Detectives asked defendant clarifying questions about whether he had bound the victim with tape, whether he had stabbed her, and the current location of the knife and the victim's car. Defendant acknowledged that he and Joey bound and gagged the victim with the tape they had purchased that day and brought with them, then admitted that he stabbed the victim once on her throat, once on the chest, and once in the stomach.

While giving this statement defendant became upset, said he did not mean to hurt her, then dropped his head and began to cry. He said that Joey left in the car and took the twenty dollars defendant gave him from the victim's wallet. When investigators again asked defendant whether Sasser had sent Joey and him to the victim's apartment, defendant now said Sasser had not sent them but that earlier in the day Sasser had told defendant he needed his money. Finally, defendant was asked if he knew where Joey could be found, and defendant responded that he did not know.

At this point, between 2:00 p.m. and 2:15 p.m., Detectives Taylor and Passley left the interview room and closed the door. When the detectives returned to the interview room at approximately 2:20 p.m., they advised defendant that he was under arrest and, at 2:26 p.m., gave him his *Miranda* rights both orally and in writing. They reviewed the written form with defendant in its entirety, and defendant acknowledged each right by marking "yes" and initialing the form beside each listed right. This form was entered into evidence during the suppression hearing.

The detectives then showed defendant a picture of Joseph Sanderlin, an African-American male, but defendant denied that the person depicted was Joey. Detective Passley asked defendant if he would be willing to show where he had thrown the wallet and the clothing he had discarded, and defendant agreed. Detective Passley and Officer B.A. Lindsey left the police station at 3:05 p.m. with

defendant to locate various pieces of evidence. Defendant, who was handcuffed and wearing leg irons, was placed in the rear of the car beside Detective Passley. Officer Lindsey drove while defendant gave directions. Defendant told Detective Passley what he had been wearing and where he discarded those clothes. The officers recovered defendant's baseball cap from one of the dumpsters he identified. Defendant also showed where he had thrown the victim's purse, which the police recovered.

At 4:20 p.m., defendant asked if he could say good-bye to his girlfriend. In response, Detective Passley allowed defendant to talk with his girlfriend as she stood at the vehicle door while defendant remained in the back seat. The two spoke briefly in an encounter that was "a little emotional." Afterwards, defendant requested to use the bathroom and was taken to a police district station house for that purpose. Detective Passley then asked defendant if he wanted food. Defendant declined, but asked for something to drink, so Officer Lindsey drove to a nearby McDonald's, where Detective Passley bought him a soft drink.

Officer Lindsey began driving towards Apex to look for the victim's car. As he drove, Officer Lindsey remarked that "[i]t sure would be nice to drive up at the house in Apex and see that car in the driveway." Detective Passley then said to defendant, "You know where the car is located. I know you know." Defendant responded, "Make a right," and directed Officer Lindsey to Barringer Drive, where, at 5:05 p.m., they located the victim's vehicle.

While waiting for evidence technicians to arrive and process the vehicle, Detective Passley asked defendant what he had done with the knife. After defendant answered that he had thrown it in a storm drain nearby, Detective Passley was able to recover it. A substance that appeared to be blood was on the knife blade.

Once the evidence technicians arrived, Officer Lindsey again began driving towards Apex to locate the second suspect, whom defendant was now identifying as "Tony Martinez," a cousin from New York. Defendant claimed that this person was with him on the night of the murder. However, defendant could not provide any specific information about Tony Martinez, and once they arrived in Apex, defendant admitted no suspect was there. When asked why he had given false information after being truthful about the car and the knife, defendant said that he "just had to." Detective Passley told defendant he would have to disclose the real name of the sec-

ond suspect, but defendant said he "was not going to snitch on anyone" and that Detective Passley "would not understand." Detective Passley told defendant he should not be the only one charged with the death.

At about 6:15 p.m., they arrived back at the Raleigh Police Department. Defendant was returned to the interview room, where his handcuffs and leg restraints were removed. Defendant declined Detective Passley's offer of food or drink. When Detective Passley said he would be back to talk about the second suspect, defendant responded, "Okay."

About 6:30 p.m., Detective Passley returned to the interview room to discuss the second suspect. He asked defendant to make another statement to "firm up" some things he had said while on the way to recover the purse and the clothing, and defendant agreed. Defendant then made a statement substantially consistent with his earlier confession to Detective Taylor. In this statement defendant did not mention "Joey," but continued to implicate "Tony" as the second suspect. Detective Passley told defendant that no one named Tony was involved in the case, that he knew it was Joey Sanderlin, and that defendant should tell the truth. Finally, defendant responded: "It was Joey. He cut her first. He cut her the most. I only cut her, like, three or four times." Detective Passley asked if Sandlerlin had raped the victim and defendant responded, "Yeah." Defendant, however, denied having sex with the victim and claimed he only held her down. Defendant stated that he only went to the victim's apartment "to get the green." When Detective Passley asked defendant why he stabbed the victim, he responded that he did not know and "[i]t all happened so fast, and it all got out of hand."

Detective Passley then asked if anyone else was with defendant and the second suspect, and defendant responded, "No." At this point, sometime before 8:20 p.m., Detective Passley concluded the interview and left the room. At 8:20 p.m., Detective Passley returned with one of the shoes defendant had been wearing when the police picked him up. Defendant stated that he used soap and water to wash his shoes at Vann Street, but he did not know where Joey had cleaned up.

No further questions were asked of defendant on 9 November, and defendant was taken by a uniformed officer to the magistrate's office for an initial appearance. He was admitted into the Wake County Jail at 11:26 p.m.

The next morning, 10 November, Detectives Passley and Montague retrieved defendant from the Wake County Jail and returned him to the same interview room at the Raleigh Police Department. At 10:48 a.m., Detectives Copeland and Passley re-advised defendant of his *Miranda* rights both verbally and in writing, again using a standard form. Detective Passley reviewed the form aloud to make sure defendant understood his rights and recorded defendant's answers to each right by marking "yes" on the form beside the appropriate listing. Defendant added his initials beside each right. Defendant stated that he was willing to speak to detectives without an attorney and signed the waiver of rights form. This second form was also introduced into evidence as an exhibit at the suppression hearing.

Detective Passley asked defendant about Sunday, 6 November 2005, and defendant provided a statement detailing the prelude to the murder, the murder itself, and the events following the murder. Defendant concluded this statement, which was written down by Detective Copeland, at 12:26 p.m. Detectives Passley and Copeland left the interview room, closing and locking the door behind them.

When the detectives returned, defendant consented to a tape-recorded interview. His recorded confession, which was consistent with his final verbal statement, began at 12:45 p.m. and ended at 1:01 p.m. During his audiotaped confession, defendant stated his accomplice was a cousin named Joey Santiago.

Based on the evidence presented at this suppression hearing, the trial court entered a written order that recited one hundred and seven findings of fact. Among these findings were that defendant was first placed in custody on 9 November 2005 when, after he admitted in the course of the 1:00 p.m. interview with Detectives Passley and Taylor that he had stabbed the victim, the investigators locked him in the investigation room; that defendant had been polite and cooperative; and that defendant had not refused to answer any questions, did not ask for the interview to terminate, and did not ask to consult an attorney.

As to defendant's 9 November 2005 statement, the trial court found that defendant was coherent, did not appear to be under the influence of any impairing substance, and seemed to be of at least average intelligence; that no law enforcement officer raised his voice while questioning defendant; that defendant was not threatened nor was any promise of reward made to him during the interviews; that

defendant was never misled, deceived, or confronted with false accusations or false evidence; that defendant never requested an attorney, never asked to make a telephone call, and never requested to stop answering questions; that the investigators regularly inquired about defendant's comfort; that defendant never appeared scared or intimidated during the interviews; and that at the time of defendant's statements, he was familiar with the criminal justice system. The trial court further found no evidence that defendant was impaired or unable fully to understand his rights or his situation. As to defendant's 10 November 2005 audiotaped statement, the trial court further found as fact that defendant was not subject to coercion, that the tone was conversational, that defendant had not been threatened and no rewards or inducements were promised him, and that defendant's statements were voluntary.

Based upon these and other extensive findings of fact, the trial court concluded as a matter of law that at the time Detective Taylor, both individually and with Detective Passley, interviewed defendant at the Raleigh Police Department before 2:20 p.m. on 9 November 2005, defendant was not under arrest or otherwise restricted in his movement to the degree associated with a formal arrest. The trial court further concluded that a reasonable person in defendant's position would not have believed he was in custody or under formal arrest while being interviewed by Detective Taylor and Detective Passley. Therefore, because statements made by defendant before administration of his *Miranda* rights were given voluntarily, and because there had been no misconduct or abuse by investigators, none of defendant's state or federal constitutional rights had been violated by the noncustodial interviews. In addition, the trial court concluded that defendant was in custody when he was interviewed after 2:20 p.m. on 9 November 2005 and again on 10 November 2005, and on both occasions, defendant was advised of his *Miranda* rights and voluntarily and knowingly waived those rights. Accordingly, the trial court denied defendant's motion to suppress his statements.

[1] Defendant argues that the trial court made numerous errors in its order. Generally, an appellate court's review of a trial court's order on a motion to suppress is limited to a determination of whether its findings are supported by competent evidence and, in turn, whether the findings support the trial court's ultimate conclusions of law. *E.g.*, *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). However, here, as noted above, the State argues that defendant failed to preserve the issue because he did not object at trial. Defendant coun-

ters that no objection was necessary, distinguishing our recent opinion in *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (holding that "a trial court's evidentiary ruling on a pretrial motion is *not* sufficient to preserve the issue . . . for appeal unless a defendant renews the objection during trial"). Defendant's contention is that the judge who heard and denied the motion to suppress specifically ruled that "[s]uch statements may be received into evidence in the trial of this action." As a result, defendant argues, the judge who presided over defendant's trial was bound by the hearing judge's ruling on the suppression motion and no renewed objection at trial was necessary.

A pretrial ruling on a motion to suppress evidence is preliminary. *State v. Hill*, 347 N.C. 275, 293, 493 S.E.2d 264, 274 (1997), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1998). Because the evidence may be different when offered at trial, a party has the responsibility of making a contemporaneous objection. *Id.* This rule sensibly acknowledges the realities of trial practice and we see no reason to change it now. Thus, *Oglesby* controls here. Therefore, to the extent defendant failed to preserve issues relating to the motion to suppress, we review for plain error. We begin by addressing defendant's challenges to the trial court's findings of fact.

[2] Defendant contests the trial court's findings that Officer Robb, who made the first police contact with defendant outside his residence the morning of 9 November 2005, "would have allowed the Defendant to walk away if the Defendant had chosen to leave," and that Robb "was not privy to the details of an investigation." Defendant claims these findings of fact were not supported by the evidence. At the hearing, Robb described his position with the Fugitive Task Force (FTF) of the Raleigh Police Department, where his duties included assisting the Major Crimes Task Force in locating subjects, giving those subjects a general idea what is going on, and, if no arrest warrant had been issued, asking if they would be willing to speak with detectives. Robb testified that without a warrant for defendant's arrest, he would not have had the authority to stop defendant had he chosen to leave. In addition, Robb stated that it is not the responsibility of the FTF to investigate crimes and FTF members are not privy to every aspect of an investigation. Here, he knew only such basic information as that "there had been a murder and that a female had been stabbed" and that defendant "was a person of interest in the case." After reviewing the record, we conclude that the trial court's findings as to Robb's encounter with defendant are fully supported by competent evidence.

[3] Defendant next argues the trial court incorrectly found that defendant "voluntarily" agreed to accompany detectives to the Raleigh Police Department. Although defendant phrases this argument in terms of whether a reasonable person would have believed he had any choice in accompanying the officers, the reasonable person standard is properly used in determining whether one is in custody, an issue we address below. *See State v. Garcia*, 358 N.C. 382, 396-97, 597 S.E.2d 724, 736-37 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). For now, we consider the trial court's finding that defendant acted voluntarily. The investigators testified that when they arrived at defendant's Vann Street location, they introduced themselves, shook hands, and told him he was not under arrest and was not in trouble. Detective Copeland told defendant they would like to talk with him and asked defendant if he would mind taking a ride downtown. Defendant replied he "wanted to come down" and added that he had asked Brad Sasser for the detectives' phone number the night before and was eager to answer their questions "because he had nothing to do with the girl getting hurt." This evidence from the hearing supported the trial court's finding of fact that defendant "voluntarily agreed" to accompany detectives to the police station.

[4] Finally, defendant contests the trial court's finding of fact that no guard was at the door of the interrogation room at various points during defendant's questioning. Defendant points to statements made by Detective Copeland on cross-examination that Raleigh Police Department protocol called for having an officer by the door when someone was in the interrogation room, and a person in the room was not permitted to leave without an escort. However, Detective Taylor testified at the suppression hearing that when defendant was left alone in the room, no one was standing guard. In addition, Detective Taylor testified that "after the confession, [defendant] was much more confined" in that "now he's being watched by somebody, being locked in the room when people are leaving. Before that, he had free movement." While the protocol described by Detective Copeland may not have been followed here, Detective Taylor's testimony about specific aspects of defendant's questioning was not contradicted. "[A] 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 quotations marks omitted). The trial court's resolution of conflicting evidence will not be disturbed on appeal. *State v. Braxton*, 344 N.C. 702, 709, 477 S.E.2d 172, 176 (1996) (cita-

tion omitted). Because competent evidence supported the trial court's findings that no one guarded the door during the initial interviews of defendant, these findings are binding on appeal.

[5] We now turn to the trial court's conclusions of law. Defendant contends that the trial court erred when it concluded as a matter of law that he was not in custody for *Miranda* purposes prior to his admission that he stabbed the victim. Whether an individual is in custody for purposes of *Miranda* is a mixed question of law and fact. *Thompson v. Keohane*, 516 U.S. 99, 110-13, 133 L. Ed. 2d 383, 393-94 (1995). Accordingly, we review the trial court's pertinent findings of fact to determine whether they are supported by competent evidence from the record, and we review whether its conclusions of law are proper and "reflect[] a correct application of [law] to the facts found." *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997).

"[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977) (per curiam). "The proper inquiry for determining whether a person is 'in custody' for purposes of *Miranda* is 'based on the totality of the circumstances, whether there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." ' " *State v. Barden*, 356 N.C. 316, 337, 572 S.E.2d 108, 123 (2002) (quoting *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828 (citations omitted)), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323, 128 L. Ed. 2d 293, 298 (1994) (per curiam). "We must therefore determine whether, based upon the trial court's findings of fact, a reasonable person in defendant's position would have believed that he was under arrest or was restrained in his movement to that significant degree." *Garcia*, 358 N.C. at 396-97, 597 S.E.2d at 736-37 (citation omitted).

Defendant argues that a reasonable person who was detained for questioning, transported to the secure floor in the police department while having no ability to communicate with anyone outside the station, unable to return to his residence, and deprived of his shoes after 10:30 a.m., would have believed he was constrained "to a degree com-

mensurate with arrest." Because "no single factor is necessarily controlling" when we consider whether an individual is in custody for *Miranda* purposes, *see Barden*, 356 N.C. at 338, 572 S.E.2d at 123-24, we must examine the totality of the circumstances surrounding defendant's interrogation, *Garcia*, 358 N.C. at 396, 597 S.E.2d at 736. This Court has considered such factors as whether a suspect is told he or she is free to leave, *State v. Kemmerlin*, 356 N.C. 446, 457, 573 S.E.2d 870, 880 (2002), whether the suspect is handcuffed, *State v. Greene*, 332 N.C. 565, 577-78, 422 S.E.2d 730, 737 (1992), whether the suspect is in the presence of uniformed officers, *Garcia*, 358 N.C. at 397, 597 S.E.2d at 737, and the nature of any security around the suspect, *State v. Jackson*, 348 N.C. 52, 56, 497 S.E.2d 409, 411, *cert. denied*, 525 U.S. 943, 142 L. Ed. 2d 301 (1998).

Defendant is an adult male with prior experience with the state's criminal justice system. *See Garcia*, 358 N.C. at 397, 597 S.E.2d at 737. When first approached by Officer Robb, defendant was told he was being detained until detectives arrived but that he was not under arrest. When he was again advised by the detectives upon their arrival that he was not under arrest, defendant voluntarily agreed to accompany them to the police station, affirmatively telling them he was "anxious" to talk with them and answer their questions. Defendant was never restrained from the time of his initial encounter with Detectives Copeland and Taylor until the door of the investigation room was locked after defendant admitted stabbing the victim. Until then, defendant was frequently left alone in the interview room with the door unlocked and no guard posted. Throughout the interview he was given several bathroom breaks and was offered food and drink. Defendant was cooperative and allowed investigators to examine his shoes. Although detectives encouraged defendant to tell the truth, they did not raise their voices and they neither threatened defendant nor wheedled statements from him with promises. Defendant was never misled, deceived, or confronted with false evidence. Once defendant implicated himself by acknowledging his direct participation in the killing, the interview ended and defendant was given his *Miranda* rights. Under these circumstances, we agree with the trial court that defendant was not formally arrested or otherwise subjected to the restraint on his freedom of movement associated with a formal arrest.

Defendant correctly points out he was told by Officer Robb that he was "detained" while he waited on the curb for the detectives to arrive. However, any custody associated with the detention ended

when defendant left Robb and voluntarily accompanied Detectives Copeland and Taylor. Robb also told defendant more than once that he was not under arrest, a status investigators confirmed when they arrived, and any conflict engendered in defendant's mind by being told at the outset that he was being detained pending the investigators' arrival necessarily dissipated when those investigators appeared and specifically told defendant he was not under arrest. *See State v. Gaines*, 345 N.C. 647, 658-63, 483 S.E.2d 396, 402-06 (holding that the juvenile defendants who voluntarily left their homes in the middle of night to ride to the police department in patrol cars and who were told they were not under arrest were not in custody), *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997); *State v. Lane*, 334 N.C. 148, 154, 431 S.E.2d 7, 10 (1993) (holding that a defendant who was told several times he was not under arrest and who never asked to leave during an interview with investigators was not in custody); *State v. Phipps*, 331 N.C. 427, 443-45, 418 S.E.2d 178, 185-87 (1992) (holding that a defendant who voluntarily rode to the station with officers in a police car, waited in a lobby with unlocked external doors, and was told more than once he was not under arrest, was not in custody).

Although defendant focuses on his inability to leave the interview room without supervision or escort, we believe it unlikely that any civilian would be allowed to stray through a police station. Defendant was in an area not open to the public, and the prevention of unsupervised roaming in such a space is hardly the type of restriction that a reasonable person would associate with a formal arrest. *See State v. Medlin*, 333 N.C. 280, 290-92, 426 S.E.2d 402, 407-08 (1993) (holding that the defendant, who was constantly in the presence of officers and escorted to the rest room, was not in custody and "[i]t is also unlikely that anyone would have been permitted to wander unmonitored around police headquarters").

Thus, under the totality of the circumstances, we do not find that "a reasonable person in defendant's position would have believed that he was under arrest or was restrained in his movement to that significant degree." *Garcia*, 358 N.C. at 396-97, 597 S.E.2d at 737. As a result, defendant was not in custody when he arrived at the Raleigh Police Station on the morning of 9 November 2005, nor was he placed in custody upon entering the interview room or during the interviews prior to his acknowledgment that he stabbed the victim. Because these statements were voluntary and would have been admissible if offered into evidence, no issue arises under *Missouri v. Seibert*. 542

U.S. 600 *passim*, 159 L. Ed. 2d 643 *passim* (holding that a statement given after *Miranda* warnings have been administered may be inadmissable when police have elicited a previous unwarned statement during a custodial interrogation). Accordingly, the statements made after defendant was taken into custody and advised of his rights under *Miranda*, including his tape-recorded confession, as well as any physical evidence derived therefrom, were properly admitted into evidence.

[6] Defendant next contends that his invocation of his right to silence was not scrupulously honored while he was with Detective Passley and Officer Lindsey. The three were together in a police car for approximately three hours while defendant assisted the officers in recovering evidence. The investigators told defendant they did not believe the other participant in the killing was "Tony Martinez," as defendant claimed, and urged him to provide the correct name. Defendant responded that he "was not going to snitch on anyone" and declined to reveal the name of the other person involved. Defendant argues that giving investigators notice of his scruples against snitching invoked his right to silence and that all interrogation should have ceased.

"[A] criminal defendant who has been advised of and has waived his rights has the right to terminate a custodial interrogation by indicating 'in any manner, [and] at any time prior to or during questioning, that he wishes to remain silent.' " *State v. Murphy*, 342 N.C. 813, 823, 467 S.E.2d 428, 433-34 (1996) (quoting *Miranda*, 384 U.S. at 473-74, 16 L. Ed. 2d at 723 (alteration in original)). However, "[a]lthough custodial interrogation must cease when a suspect unequivocally invokes his right to silence, an ambiguous invocation does not require police to cease interrogation immediately." *State v. Forte*, 360 N.C. 427, 438, 629 S.E.2d 137, 145, *cert. denied*, 549 U.S. 1021, 166 L. Ed. 2d 413 (2006). Defendant's statement that he "was not going to snitch" when asked the correct name of an accomplice is not a clear invocation of his right to silence. At most, his response was ambiguous and did not require officers to cease their questioning or seek clarification. *See Davis v. United States*, 512 U.S. 452, 459, 129 L. Ed. 2d 362, 371-72 (1994) (holding that a suspect must unambiguously request counsel).

[7] Finally, defendant contends that he was deprived of his constitutional right to effective assistance of counsel as the result of his lawyers' failure to present evidence at the suppression hearing of defendant's limited intellectual functioning. Although defense coun-

sel did not raise any issue concerning defendant's intellectual functioning at the hearing, no evidence indicated that defendant was confused or incapable of understanding either the detectives or his rights. In contrast, the evidence indicates he was coherent, gave cogent answers that were responsive to the questions asked, and made his statements knowingly, freely, and voluntarily. Moreover, the record plainly reveals that defense counsel was aware of evidence of defendant's mental condition, suggesting that failure to pursue the issue during the pretrial suppression hearing may have been a strategic decision. *See State v. Frogge*, 359 N.C. 228, 245, 607 S.E.2d 627, 637 (2005) (holding that defense counsels' decision to abandon a defense based upon brain dysfunction and pursue a different approach was a "reasonable professional judgment" (citations and internal quotation marks omitted)). Nevertheless, because the record is silent as to why this issue was not raised at the suppression hearing, we dismiss this assignment of error without prejudice to defendant's right to reassert it in a post-conviction motion for appropriate relief. *See State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

JURY SELECTION ISSUES

[8] We next turn to issues pertaining to selection of the jury. In his first related argument, defendant contends that the State improperly used peremptory challenges to strike prospective African-American jurors Glenda Rogers and Francine Johnson on the basis of race.

Our review of race-based or gender-based discrimination during petit jury selection has been the same under both the Fourteenth Amendment to the United States Constitution and Article 1, Section 26 of the North Carolina Constitution. *State v. Maness*, 363 N.C. 261, 271-72, 677 S.E.2d 796, 803 (2009) (citations omitted), *cert. denied*, —— U.S. ——, 176 L. Ed. 2d 568 (2010). The Supreme Court of the United States has held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79, 89, 90 L. Ed. 2d 69, 83 (1986). A defendant's claim that a peremptory challenge is improperly based upon race triggers a three-step inquiry. First, the party raising the claim must make a prima facie showing of intentional discrimination under the "totality of the relevant facts" in the case. *Id.* at 94, 90 L. Ed. 2d at 86. Second, if a prima facie case is established, the burden shifts to the State to present a race-neutral explanation for the

challenge. *Rice v. Collins*, 546 U.S. at 333, 163 L. Ed. 2d at 831. Finally, the trial court must then determine whether the defendant has met the burden of proving "purposeful discrimination." *Miller-El v. Dretke*, 545 U.S. 231, 239, 162 L. Ed. 2d 196, 213 (2005). The trial court's ruling will be sustained "unless it is clearly erroneous." *Snyder v. Louisiana*, 552 U.S. 472, 477, 170 L. Ed. 2d 175, 181 (2008) (citations omitted).

In *Miller-El* the Supreme Court confirmed that this process is not a formality:

> A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

545 U.S. at 252, 162 L. Ed. 2d at 221. Thus, "in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S. at 478, 170 L. Ed. 2d at 181. Accordingly, this Court has been sensitive to *Batson's* requirements. *See, e.g.*, *Barden*, 356 N.C. at 342-45, 572 S.E.2d at 126-28; *State v. Hoffman*, 348 N.C. 548, 553-56, 500 S.E.2d 718, 722-23 (1998).

Defendant first contends that a *Batson* violation occurred when the prosecutor exercised a peremptory challenge against Glenda Rogers, an African-American female. Rogers was the seventeenth prospective juror and the fourth African-American examined on voir dire. The first three African-Americans were successfully challenged for cause by the State on the basis of their opposition to the death penalty. At the time Ms. Rogers was examined, four white jurors had been accepted by the State and seated on the jury.

The first question the prosecutor asked each prospective juror during voir dire was whether he or she opposed the death penalty. When that question was posed to Ms. Rogers, she initially expressed unequivocal opposition:

> Prosecutor: . . . [L]et me start with your personal views about the death penalty. Are you opposed to the death penalty?
>
> Ms. Rogers: I am.
>
> Prosecutor: You are. Are—are your —is your opposition to the death penalty a strong personal belief?

> Ms. Rogers: The fact that I believe people are going to be punished for what they do. And it's because the death penalty, I don't believe in that.

However, as voir dire proceeded, Ms. Rogers's apparent conviction wavered. When asked whether, knowing no details of the case, she would be predisposed to vote for life imprisonment without parole rather than death, Ms. Rogers responded, "No, I don't think I would be predisposed." The prosecutor then asked if she could vote for the death penalty in any case on which she might be required to sit, and she answered, "I don't know." The prosecutor next explained to her the juror's role in a capital sentencing proceeding and asked if she could personally vote to sentence someone to death. Ms. Rogers responded, "I don't think so." However, when the prosecutor rephrased the question, Ms. Rogers answered: "If—if I'm picked, and I'm sitting on the jury, and all the evidence and everything following the law, I could. I could. . . . I mean, I could vote for the death penalty." Ms. Rogers acknowledged that her responses had been inconsistent and, when the prosecutor probed further, stated: "Personally if I—if you asked me, and I'm not sitting on the case, no, I wouldn't go with the death penalty. . . . But if I'm here, and I'm hearing the case and understanding the laws, I feel like I could do it."

The prosecutor turned to other subjects, and Ms. Rogers answered routine questions about her employment and personal life. She stated that she was single, worked at the State Employees' Credit Union as a debit card specialist, and was her church's videographer. When the prosecutor asked Ms. Rogers whether she read the local newspaper, she responded that she did not, but watched the local news on television. The prosecutor then referred to her jury questionnaire and asked Ms. Rogers if she had not checked "No" when asked whether she watched television regularly. Ms. Rogers confirmed her response to the questionnaire, clarifying that "[o]nly when I have time, I might turn [the television] on." Questioned further, she explained that she actually watched the local news "just about" every night, adding that "[u]sually at night I turn it on when I'm getting ready to go to bed."

During additional questioning by the prosecutor, Ms. Rogers revealed that one of her brothers had been a murder victim in New York approximately twenty years earlier. She had left blank the question on her jury questionnaire that asked if any family member or close friend had been a victim of a crime.

Before concluding his voir dire, the prosecutor returned to the death penalty, asking what her views were now that she had been directly questioned on the issue. She responded that she had thought about it and elaborated, "Well, when you first said to me, do you believe in the death penalty . . . [,] I said no. But you know, given the laws and the penalties that goes with the laws, I feel like I could." The State then exercised its first peremptory challenge to strike Ms. Rogers, and defendant raised a *Batson* objection. Defendant acknowledged that this was the State's first peremptory challenge, but pointed out that Ms. Rogers is an African-American woman and argued that the language she used regarding the death penalty was "consistent with language that the prosecutor [had] passed for accepting jurors on that were not black or of African-American persuasion." Defendant referred to jurors Metz, a white male, and Skiff, a white female. According to defendant, both of these jurors had expressed similar positions on the death penalty during voir dire, but had not been challenged by the State and were seated on the jury. The only difference here, defendant contended, appeared to be Ms. Rogers's race. In addition, defendant argued that all four jurors seated at this point were white and Ms. Rogers had "clearly expressed that she could follow the law, and if appropriate, recommend a death punishment."

The trial court determined that defendant failed to make a prima facie showing of racial discrimination and overruled his *Batson* objection:

> I don't think that the defense has made a prima facie showing requiring the second or third steps of the three-part Batson analysis, and I am going to deny your request, in my discretion. I think that you have failed to show that the State has exercised a peremptory—a peremptory challenge that was motivated by improper—they were not removing based solely on the fact that she was an African-American female.

Defendant objected, and the court allowed the prosecutor to proffer race-neutral reasons for the strike. The State noted that Detectives Passley and Montague, lead investigators in the murder and witnesses at the guilt portion of the trial, are both African-American. The prosecutor then addressed Ms. Rogers's views on the death penalty:

> Judge, Ms. Rogers said that she was opposed to the death penalty, and that she believed people were going to be punished

> by God, ultimately, but she was personally opposed to the death penalty. I have not passed anyone that has said that they were personally opposed to the death penalty.
>
> The State is looking for jurors that are not personally opposed to the death penalty. But then, also, Ms. Rogers, who has been thinking about this since last Tuesday, and after I inquire, she's equivocal about this. Not enough for the State to make a challenge for cause, but her initial answers to me, this is her first time to come down to this court and talk about it is she doesn't think she can do it, no, I can't do it, then she could do it. Okay.
>
> Those are—those are reasons why I'm not comfortable with Ms. Rogers, who is opposed to the death penalty, unlike Mr. Metz—and I'm not going to go back and piecemeal every juror I have—I have passed or not. But I have not passed anyone that is personally opposed to the death penalty, and will continue to look for people that are not personally opposed to the death penalty.

The prosecutor also noted the inconsistencies between Ms. Rogers's answers on her jury questionnaire and her voir dire testimony regarding whether any of her family members had been a crime victim, as well as details of her television viewing habits. The prosecutor concluded:

> I didn't get a good sense that Ms. Rogers had a good sense of herself, of whether she could participate in this process. And she was opposed to the death penalty, gave extremely equivocal responses, and her last ones were that she could participate.

This Court has noted that "a *prima facie* showing of racial discrimination[] is not intended to be a high hurdle for defendants to cross. Rather, the showing need only be sufficient to shift the burden to the State to articulate race-neutral reasons for its peremptory challenge." *Hoffman*, 348 N.C. at 553, 500 S.E.2d at 722. We have identified several relevant factors that may be considered in determining whether a defendant has met his or her burden, including:

> the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecu-

tion's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State's acceptance rate of potential black jurors.

State v. Quick, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995) (citation omitted). Although the State proffered reasons to support its exercise of a peremptory challenge against Ms. Rogers, the trial court did not rule on these reasons. Instead, the trial court, in its discretion, effectively denied defendant's *Batson* challenge by allowing the State's peremptory challenge. Therefore, " '[w]here the trial court rules that a defendant has failed to make a *prima facie* showing, our review is limited to whether the trial court erred in finding that defendant failed to make a *prima facie* showing, even if the State offers reasons for its exercise of the peremptory challenges.' " *Barden*, 356 N.C. at 343, 572 S.E.2d at 127 (quoting *State v. Smith*, 351 N.C. 251, 262, 524 S.E.2d 28, 37, *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000)).

In raising his *Batson* challenge, defendant argued that Ms. Rogers's language regarding the death penalty was "consistent with language that the prosecutor has passed for accepting jurors on that were not black or of African-American persuasion," specifically referring to jurors Metz and Skiff, both of whom during voir dire had "expressed various opinions about the death penalty and various concerns about their level of comfortability with it." Defendant noted that juror Metz had voiced some personal issues with the death penalty but ultimately stated he could follow the law. Defendant argued that juror Metz's position was "essentially the same position that Ms. Rogers has taken, the difference between the two appearing to be race." In addition, defendant pointed out that juror Skiff had indicated that she was "predisposed to life without parole" and that "the death penalty would not be [her] 'plan A.' "

Because Ms. Rogers was the first prospective juror peremptorily challenged by the State, no pattern of disproportionate use of peremptory challenges against African-Americans had been established. However, "the Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder*, 552 U.S. at 478, 170 L. Ed. 2d at 181 (citation and quotation marks omitted); *State v. Robbins*, 319 N.C. 465, 491, 356 S.E.2d 279, 295 ("Even a single act of invidious discrimination may form the basis for an equal protection violation."), *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). Therefore, we consider other relevant facts to determine if defendant established a prima facie case of racial discrimination.

We note that while prospective jurors Metz, Skiff, and Rogers all indicated they could follow the law and vote to impose capital punishment, Ms. Rogers is the only one of the three who stated when first asked that she was personally opposed to the death penalty. By contrast, when the prosecutor initially asked prospective juror Skiff, "Are you opposed to the death penalty?," her answer was "I—no." Similarly, when the prosecutor asked prospective juror Metz at the outset of his voir dire, "Are you opposed to the death penalty?," his answer was "No." Consequently, a definable difference was apparent in the personal views on the death penalty as expressed by prospective juror Rogers on one hand and prospective jurors Skiff and Metz on the other. Balanced against this difference are the factors that this case involved an African-American defendant and a white victim; all three African-American prospective jurors previously examined had been excused for cause on grounds that they opposed the death penalty; and four white jurors had been seated. In light of the responses of the prospective jurors to the key voir dire questions about their views on the death penalty, and considering the absence of any pattern of discrimination in the exercise of the State's peremptory challenges at the time the prosecutor peremptorily challenged prospective juror Rogers, we conclude that defendant failed to meet his burden of establishing a prima facie case that the State's action was motivated by race. Accordingly, the trial court did not err in denying this *Batson* challenge.

Our inquiry as to this challenge does not end here, however. Defendant also contends the trial court applied the wrong standard when it stated that defendant failed to show that the State's challenge was "based *solely* on the fact that she was an African-American female." (Emphasis added.) As stated in *Miller-El*, the third step in a *Batson* analysis is the less stringent question whether the defendant has shown "race was *significant* in determining who was challenged and who was not." 545 U.S. at 252, 162 L. Ed. 2d at 221 (emphasis added). The entire record indicates that, despite this misstatement, the trial judge applied the correct standard. When explaining to defense counsel its initial burden of establishing a prima facie case, the trial judge stated: "My understanding is that you have the burden of making a prim[a] facie showing that [the State] has exercised the challenge, and it was *motivated* by discriminatory purposes." (Emphasis added.) Later in the jury selection process, defendant again raised a *Batson* objection when the prosecutor exercised a peremptory challenge against prospective juror Francine Johnson. The trial court heard defendant's reasons, then asked the prosecutor

to "provide rebuttal reasons why the peremptory challenge was not *motivated by* racial or gender discrimination." (Emphasis added.) These statements demonstrate that the trial court did not consider defendant's *Batson* challenges in the mistaken belief that defendant was required to establish that race was the sole reason for the State's peremptory challenge of a prospective juror. Accordingly, we conclude that the trial court's *lapsus linguae* did not indicate that it was applying an incorrect standard to defendant's *Batson* challenges.

Moreover, the record shows the trial court found defendant failed to meet the initial *Batson* requirement of demonstrating a prima facie case that the prosecutor's challenge of prospective juror Rogers was based upon improper racial discrimination. The trial court's ruling that defendant had not made a sufficient initial showing preceded, and thus was not based on, the State's subsequently proffered race-neutral reasons for its peremptory challenge.

[9] Defendant next argues that the State impermissibly used a peremptory challenge against prospective juror Francine Johnson based on her race. Johnson, an African-American female, was the thirtieth prospective juror and the eighth African-American prospective juror to be examined. Although two African-American jurors ultimately were chosen (one sat as a juror, the other as an alternate), at this point none had been selected, with six having been excused for cause and one excused peremptorily by the State.

After the trial court obtained initial background and biographical information, the State began its voir dire by asking Johnson her views on the death penalty and whether she had thought about it since being asked to consider it when she first reported for jury duty the previous week:

> Prosecutor: . . . [L]et me start with your personal views about capital punishment. Are you opposed to the death penalty?
>
> Ms. Johnson: I really haven't thought about it one way or the other.
>
> Prosecutor: Okay. Before—before you were called here last Tuesday morning, you really hadn't considered your views about the death penalty, ma'am?
>
> Ms. Johnson: Yes.
>
> Prosecutor: Is that correct?
>
> Ms. Johnson: Yes.

Prosecutor: And on Tuesday, do you recall the judge saying if you hadn't thought about it, you need to start thinking about it?

Ms. Johnson: Yes.

Prosecutor: And have—you still haven't had the opportunity to formulate your personal opinion about the death penalty?

Ms. Johnson: No, not really.

Prosecutor: Well, have you—over this last week, at least since last Tuesday, it's Tuesday now. So over the last week, have you —have you been thinking about it?

Ms. Johnson: Yes.

Prosecutor: Okay. Well, what—what have you been thinking about? Tell me what's kind of been going through your mind over the last week about this issue of capital punishment?

Ms. Johnson: Well, I thought about it and I thought—I tried to think of it in a personal level, how I would feel if something were to happen to somebody in my family. And then I try to think of it as a person if something were to happen where one of my family members were accused—

Prosecutor: Accused?

Ms. Johnson: —of—yes.

Prosecutor: Okay, all right.

Ms. Johnson: And I still didn't come up with a position where I would be swayed in either way. So I just took the same position.

Prosecutor: All right. Same position, which is you don't quite know what your position is, is that fair?

Ms. Johnson: That's it.

The prosecutor then went on to describe a juror's responsibilities in a capital case and the circumstances under which a defendant can be sentenced to life imprisonment or death, and Johnson stated that she understood. The prosecutor then asked if she could participate in the process:

Prosecutor: . . . [T]ell me if you believe that you could participate in the process, and under the appropriate circumstances, personally vote to impose a sentence of death?

Ms. Johnson: Yes.

Prosecutor: Okay. And tell me if you could personally participate in the process and under the appropriate circumstances, personally vote to impose a sentence of life without parole?

Ms. Johnson: Yes.

Asked if she would have any reluctance performing her duties, Johnson responded, "No," and added that she would look at the evidence to help her decide the issue.

The prosecutor pursued other lines of questioning including her occupation, education, hobbies, and activities. Johnson responded that she drove a city bus, had some college education, belonged to a church, and enjoyed reading and watching cartoons and reality shows on television. Johnson acknowledged that she had been arrested for driving an automobile with an altered VIN number, but added that the charges were dropped when the person whose car she had been driving "stepped up." She responded, "No," when the prosecutor asked if she had any religious or personal objections to sitting in judgment of someone.

The prosecutor peremptorily challenged prospective juror Johnson. Defendant objected on *Batson* grounds, pointing out that this peremptory challenge was the State's second and that both such challenges had been against African-American females of about the same age who averred that they could impose the death penalty. Defendant argued that Johnson's answers were neutral and that she had said she could follow the law and vote to impose a recommendation of death. Defendant contended that "other than the race and perhaps gender, in combination thereof," there was no reason based on her answers to warrant a challenge. The trial court ruled that defendant had made a prima facie showing and directed the State to provide race-neutral reasons for the challenge.

The prosecutor responded:

First of all, Ms. Johnson, who was born in 1957 by her jury questionnaire, before last Tuesday, being called for jury duty, had never formulated her personal views or opinions about the death penalty. Your Honor specifically told all potential jurors that day, that's a week ago, as of this date—I think we can all agree that was last Tuesday, this is now the next Tuesday—you said if you hadn't, you need to start thinking about it, in formulating your opinions.

She came here, and she still couldn't tell me one way or the other what her opinions about capital punishment are. So I agree, as Ms. Godwin said, neutral, that begs the question.

I don't know what her personal views about the death penalty are, and it concerns me when someone who is born in 1957 can't articulate their own personal views about capital punishment, particularly after your Honor told them about a week ago, told them you need to start considering that because they're going to be asked that type of question.

The next thing that I thought—again, not to harp on the—some other things about her, and I'll go back about the death penalty, but she seems to be completely removed from any type of local, national news, or print media or anything. I was—I'm concerned about—not concerned, but she doesn't watch the news or read the news, but she does enjoy watching cartoons.

Again, you think of a lady that was born in 1957 who hasn't formulated opinions about [the] death penalty, these things are starting to concern the State.

And I'll be clear with your Honor, it's going to be the State's position in this case that at least felony murder seems to be a rather certain verdict. This is a confession case. I'm looking at the punishment phase, and I'm looking for jurors at this time who are not opposed to the death penalty, and who can obviously impose it under the appropriate circumstances.

Those—that's really what I've been looking at right now, particularly when I have the luxury of no perempts or one perempt[], or—up to this point being used, and the defendant has burned, I think maybe five, okay?

At some point you—you can't get too picky about the death penalty views and how personally strong you're looking for, but if—if you've got a pretty good comfort zone with the perempts, you can—you don't need to maybe start taking jurors whose views are not ideally what you're talking for about the death penalty. And I'm talking about the death penalty. I'm not talking about gender, I'm not talking about race.

Which brings up another question. I have never mentioned race in any of my remarks to any potential jurors. My question to all potential jurors—I would ask your Honor to observe, there's been no disparate treatment of any male, female or whatever race

in my questioning. And in fact, I have never mentioned race in any of my questions to any potential jurors.

The defense has, and that's fine. They should inquire of that, if they think that's appropriate, but I haven't. So I'd ask you to consider that.

Also, Judge, this juror has—she wrote down that she was arrested and VIN—I couldn't figure out what that meant, VIN number not correct, dropped.

She's been—we checked on the AOC. She, as she admitted, she was charged with a felony. Yes, your Honor, she was charged with a felony. I am trying not to, if I can help it—that's important to me, regardless of the disposition, someone has been charged with a felony. That's different than someone that's been charged or convicted of—of you know, DWI, okay?

That's—that's kind of the a whole 'nother little thing to look at. She proffered the reason, that was the extent of her criminal record, and it was dropped because someone else came and took the blame, something to that—someone else stepped up, or whatever her comment was. Someone else came and made a statement or took the blame.

Well, if you look on AOC, the case was actually arrested, Judge, September 20th of '95, in Wilson. She was indicted in October of '96. It wasn't dismissed until March of '98 in Superior Court. And if you look at the AOC, it says unable to locate victim in felony case. There [were] two charges, and if you look at the companion case, it says unable to locate the victim in a felony case.

That's—that's what I have on the AOC, Judge, okay? I've heard her explanation. On top of her explanation, it's a felony charge. On top of that, it's not something that was summarily quickly dispatched because there was an error. She, in fact, was indicted. It stayed pending for—I can't do the math—is that more than a year, two years, going into three years. And at least the AOC doesn't proffer the reason she said.

On top of that, if you want to keep looking on AOC, you'll find other convictions on there, Judge, including failure to return rental property in Edgecombe County with a Buena Vista Avenue address. She was convicted of that. There's also in that same—in that same Nash County, but again, her—there appears to be

> 2-18-57 same date of birth, so open container case on the street. That's not too concerning at all, but the return rental property, that's not mentioned. But all of that—and if you actually look, there's some other cases out of Rocky Mount. It's unclear if it's her or not, for some simple assault—a conviction and maybe a VL'd case.
>
> But let's just put that aside, let's say that's not her. I don't know, but the felony charge that wasn't quickly, you know, dropped because someone else stepped up, but that was, in fact, indicted and stayed pending for a couple years. And the AOC says unable to locate victim. These are concerns to the State.
>
> So when you add up that race neutral, gender neutral reason, her inability to say anything other than she doesn't have—hasn't been able to formulate an opinion about the death penalty, all of this leads me to believe—while I do have a pretty good number of peremptories left, that this is not a juror, given a case where it's [a] confession case, and I do believe we'll get into a penalty phase, I'm looking for some strong people on the death penalty.

Defendant responded that the prospective juror's answers to questions about the death penalty were neutral and reflected that she could follow the requirements of the law, and also that she appeared more comfortable and was more unequivocal in her responses than similarly situated white jurors passed by the State. As to the prosecutor's comments about Johnson's record, defendant pointed out that she had not been asked about some of the purported offenses and suggested she might not be the individual reflected in the criminal records. As to the charge involving an automobile's VIN, defendant noted that the resolution of that matter was unclear. Defendant added that other passed jurors had criminal charges or convictions and that Johnson's answers about the death penalty were consistent with, and perhaps less equivocal than, the answers given by jurors the prosecutor had not challenged.

After considering arguments of counsel, the trial court found that the prosecutor's proferred explanation of the challenge satisfied his burden of establishing nondiscriminatory reasons for the challenge and that defendant had failed to prove that the State was acting in a racially discriminatory manner.

In reviewing the trial court's finding, we note that during the entire course of jury selection, the prosecutor exercised nine peremptory challenges. Of these, two were against African-

Americans. Of the four African-American prospective jurors who were not excused for cause, two were challenged peremptorily by the prosecutor, one served as a juror, and one served as an alternate, yielding a fifty percent acceptance rate of African-American prospective jurors by the State. These numbers do not suggest a systematic effort on the part of the State to prevent African-Americans from serving as jurors.

Nevertheless, as detailed above, the improper peremptory challenge of even one prospective juror on racially improper grounds constitutes a *Batson* violation, so statistics tell only part of the story. *See Barden*, 356 N.C. at 344, 572 S.E.2d at 127-28 (noting that "numerical analysis . . . is not necessarily dispositive," but "can be useful" in determining "whether a *prima facie* case of discrimination has been established" (citations omitted)). We are mindful that "[m]ore powerful than . . . bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." *Miller-El*, 545 U.S. at 241, 162 L. Ed. 2d at 214. While a prosecutor's reason for exercising a peremptory challenge can appear race-neutral when standing alone, a comparative analysis may provide a more reliable gauge of its plausibility. "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." *Id.*

The prosecutor proffered as race-neutral reasons for his peremptory challenge of prospective juror Johnson that she had never formulated her views on the death penalty either over the course of her life or after being admonished to do so by the judge when she first reported for jury duty, that she did not read the newspaper or watch the news, and that she had been charged with a felony and both her jury questionnaire and testimony concerning the disposition of the charges were inconsistent with the "AOC records" (North Carolina Administrative Office of the Courts Automated Criminal/Infractions System). We will address each of these reasons in the context of the prosecutor's examination of similarly situated white jurors who were not peremptorily challenged by the prosecutor.

First, the prosecutor contended that he was concerned that Ms. Johnson did not have established views on the death penalty. Defendant responds that this proffered race-neutral reason is pretextual in light of similar answers given by jurors Metz, a white male, and Skiff, a white female, both of whom served on the jury. The record

shows that when the prosecutor asked as his first question if she was opposed to the death penalty, Johnson responded, "I really haven't thought about it one way or the other." Moreover, further questioning by the prosecutor revealed that Johnson was unable to articulate an opinion despite being instructed the previous week to consider the issue if she had not done so already. In contrast, as previously noted, prospective jurors Metz and Skiff each responded to the prosecutor's initial voir dire question by stating that they were not opposed to the death penalty. Specifically, prospective juror Metz indicated that he had never been opposed to the death penalty and, in fact, believed it was necessary, but too expensive: "I think it's necessary. It's a good deterrent for some crimes. I think it's too expensive right now." Although imposing capital punishment "would be a harder decision than I thought it would be . . . before I came in this courtroom," he had concluded that "it's necessary." Prospective juror Skiff also stated that she was not opposed to the death penalty, although she acknowledged that death would not be her "plan A." "I think it would be pretty hard, and thankfully there would be a bunch—you know, a jury to help with that."

Although Johnson, Metz, and Skiff all indicated they believed they could ultimately impose the death penalty under the appropriate circumstances, only juror Johnson had failed to define for herself her position on the death penalty at the time the prosecutor began his questioning. In fact, after a careful examination of the record, we find that no juror was accepted by the State who did not respond, "No," to the State's first voir dire question asking whether he or she was opposed to the death penalty. Accordingly, this reason offered by the State does not appear to be pretextual.

The prosecutor's second proffered race-neutral reason, that Johnson was "completely removed from any type of local, national news, or print media," also does not appear to be pretextual. While this reason may not be as compelling as the first, no prejudicial intent appears when Johnson's answers are compared with the voir dire responses of other prospective jurors who previously had been questioned and accepted by the State. For instance, juror Skiff answered that she received the newspaper daily, juror Metz indicated he subscribed to the local newspaper, juror Rickard responded that he read the newspaper every day, and juror Wilson advised that he watched local and national news daily.

The prosecutor also gave Johnson's prior criminal charges as a third race-neutral reason for his peremptory challenge. Defendant

argues that the State accepted white prospective jurors who had analogous criminal records and that this proffered reason was pretextual. Defendant's argument here is in two parts. First, defendant argues in his brief that the prosecutor had accessed AOC's records to check on Johnson's criminal history, but there was "no indication that the State had done this for any white juror; indeed, the indications are the opposite." To support this claim, defendant points out that the prosecutor advised the court during the voir dire of prospective juror Johnson that her responses pertaining to her criminal history were inconsistent with the criminal records maintained by AOC. In contrast, prospective juror Wilson, a white male who was ultimately seated, had checked the box on his jury questionnaire labeled "Yes" in response to the question whether he had been arrested, then further responded on the questionnaire that the charge had been "DUI" and the resolution had been "Guilty." As detailed below, the trial court later determined from AOC records that prospective juror Wilson had two DUI convictions, but the record does not indicate whether the prosecutor had accessed this prospective juror's AOC records prior to voir dire. Thus, argues defendant, the record suggests that the prosecutor was running record checks on minority jurors only.

Prospective juror Johnson's answer on her questionnaire to the question pertaining to prior charges against her was "VIN # not correct." The prosecutor stated to the court that he was uncertain what this response meant and, in the absence of additional information, further investigation by the State was neither inherently unreasonable nor indicative of racial discrimination. We are unwilling to conclude from this sparsely developed record that the prosecutor's pretrial clarification of prospective juror Johnson's criminal record was racially motivated.

The second part of defendant's argument is that other similarly situated white jurors with criminal records were not challenged peremptorily. As noted above, prospective juror Johnson indicated on her juror questionnaire that she had been charged with an incorrect vehicle identification number. When the prosecutor asked for details about this charge during voir dire, Johnson indicated that it had been dismissed because "[another] person said that, you know, they did it." However, the AOC records indicated that, over two years after she was charged, the case was dismissed because the State was unable to locate the victim. In addition, the State discovered in the AOC database other charges against prospective juror Johnson. The

prosecutor cited her felony charge, her other undisclosed charges, and her somewhat enigmatic and unsupported explanation for the resolution of the charge involving the false VIN number as grounds for his peremptory challenge.

Defendant compares the treatment of prospective juror Johnson with that accorded prospective juror Wilson, a white male who, as noted above, was not challenged, contending that the difference reveals the pretextual nature of the State's proffered reason. When asked via his jury questionnaire whether he had been arrested, Wilson checked the box labeled "Yes," then wrote that the charge had been "DUI" and the result was "Guilty." During his voir dire Wilson explained that he had received a DUI conviction in 1993. However, when the prosecutor advised that he was satisfied with prospective juror Wilson, the trial court asked Wilson to step out of the courtroom. The judge then advised counsel that, while the prosecutor was conducting his voir dire, the judge had used his laptop computer to check the AOC records on Wilson and had discovered that he had been convicted of two DUIs, one in 1990 and another in 1993. The prosecutor initially advised the court that the State did not wish to inquire further about those charges, but, after further discussion between the court and counsel, readdressed the issue when prospective juror Wilson returned to the courtroom. The prosecutor asked how many times he had been convicted of DUI and when and where they had occurred. Wilson responded, "Twice. . . . Here in Wake County 1990, 1993." When asked why he didn't list two DUIs on the questionnaire, Wilson responded, "No reason in particular, no." The prosecutor then again stated that he was satisfied with prospective juror Wilson.

Defendant argues that the disparate treatment of these prospective jurors reveals that the prosecutor's explanation for his peremptory challenge of prospective juror Johnson was pretextual. However, the record indicates that these two prospective jurors were not similarly situated. Wilson's voir dire testimony was ultimately consistent with the AOC records, while Johnson's voir dire responses were inconsistent and incomplete. Second, as the prosecutor noted, Wilson's unrevealed conviction was of a misdemeanor, while Johnson had been charged with a felony, and the prosecutor passed other jurors whose brushes with the law apparently involved only misdemeanors. Finally, Wilson stated forthrightly that he was not opposed to the death penalty, whereas Johnson equivocated. The pattern revealed in the treatment of these two prospective jurors is consist-

ent with the State's acceptance of only those jurors who were not opposed to the death penalty.

After considering all the relevant circumstances, we conclude that the State's proffered race-neutral reasons were not pretextual and that race was not a significant factor in the strike of Francine Johnson. Because there was no evidence of purposeful discrimination, the trial court was not clearly erroneous in denying defendant's *Batson* claim.

At oral argument, defendant contended that we should remand this case to the trial court for further findings of fact in light of *Snyder v. Louisiana*, in which the prosecutor peremptorily struck a prospective black juror who was a college senior attempting to complete a student teaching obligation. 552 U.S. at 478, 170 L. Ed. 2d at 181-82. The prosecutor proffered as race-neutral reasons for the strike that the prospective juror appeared nervous during the questioning and that the prospective juror's missing his student-teaching classes might impair his ability to be a fair and impartial juror. *Id.* at 478, 170 L. Ed. 2d at 182. The trial judge overruled the defendant's *Batson* objection, stating only that he was allowing the challenge. *Id.* at 479, 170 L. Ed. 2d at 182.

In reviewing the challenge, the Supreme Court did not discount the prosecutor's first reason, that the juror was nervous, but noted that "deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a [peremptory] strike." *Id.* The trial judge in *Snyder* allowed the challenge without making a specific finding about the prospective juror's nervousness, so the Supreme Court could not "presume that the trial judge credited the prosecutor's assertion that [the juror] was nervous." *Id.* Consequently, the Court could review only the State's second reason, that the juror might go along with a lesser verdict in order to complete jury duty more quickly and return to his teaching responsibilities. After comparing the circumstances presented by this prospective juror with other similarly situated white jurors who were not challenged peremptorily by the prosecutor, the Court held that the peremptory challenge was "motivated in substantial part by discriminatory intent." 552 U.S. at 485, 170 L. Ed. 2d at 186. Accordingly, the Court ruled that the trial court erred in overruling petitioner's *Batson* challenge.

We do not believe *Snyder* applies to the case at bar because the pertinent peremptory challenges do not involve demeanor or

any other intangible observation that cannot be gleaned from the record. Consistent with *Snyder*, we encourage the trial courts to make findings where necessary to elucidate aspects of the jury selection process that are not preserved on the cold record so that review of such subjective factors as nervousness will be possible. However, the absence of such a finding will not preclude appellate review when the record permits objective review of sufficient pertinent factors. Therefore, no remand is required.

[10] In addition to his issues relating to *Batson*, defendant raises other issues relating to jury selection. Defendant contends the trial court erred in allowing the State's challenge for cause of prospective juror Ewbank based on his beliefs concerning the death penalty. Here, Ewbank answered the prosecutor's first question, asking whether he was opposed to the death penalty, by stating that he had "two answers." He explained that his head and his heart were in conflict, and while his head understood that "the law is the law," his heart was "not for capital punishment." The prosecutor next summarized the procedures used in a capital trial and sentencing proceeding, then asked Ewbank if he could vote for capital punishment. When Ewbank responded that he was "still undecided," the prosecutor asked him a few more general questions, then again sought a more specific response:

> Prosecutor: . . . . What I'm hearing from you is that the conflict that you have going on inside you, between your heart and mind, is precluding you from being able to vote to impose a sentence of death and have someone executed, if you're required to sit as a juror in the case, that's what I'm hearing from you.
>
> Mr. Ewbank: I [sic] that's a fair assessment.

Additional questioning by the State led only to repeated assertions by Ewbank that he did not know if he could vote in favor of death in a sentencing proceeding.

When the State challenged prospective juror Ewbank for cause, the trial court asked him a few questions and received similarly hair-splitting and unilluminating responses. Defense counsel's attempts to rehabilitate Ewbank were unavailing, as indicated by the following exchange:

> Defense counsel: . . . . [W]hat I'm asking is if for you, if—if the State, under what I've just discussed with you as a first-degree murder, if you could ever consider a sentence of death if

the State brought you the quality and the quantity of evidence that fully satisfied and convinced you in your heart, beyond a reasonable doubt, that death was the appropriate punishment?

Mr. Ewbank: I think I answered that. I said [that] the word "ever" in the sense of an engineer can be some pretty long odds. And if you used the word "ever," I tend to have to answer "yes."

Defense counsel: Okay.

Mr. Ewbank: But almost any other word in there I'd say[,] "I don't know."

Based on this record, the trial judge concluded that Mr. Ewbank's demeanor and testimony showed that his views "would prevent or at least substantially impair his performance as a juror" and allowed the State's challenge for cause.

We have held that "[a] trial court has broad discretion to see that a competent, fair, and impartial jury is impaneled, and its rulings concerning jury selection will be reversed only upon a showing of abuse of discretion." *State v. Anthony*, 354 N.C. 372, 395, 555 S.E.2d 557, 574 (2001) (citation omitted), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002). If a juror's views about the death penalty would " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath,' " that juror may be excused for cause. *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)). Even when a juror's opinions toward the death penalty cannot be proven with " 'unmistakable clarity,' " *id.* at 424, 83 L. Ed. 2d at 852, the Supreme Court has recognized that situations will arise "where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law," *id.* at 425-26, 83 L. Ed. 2d at 852. In such situations deference must be given to the trial court's judgment. *Id.* at 426, 83 L. Ed. 2d at 853.

Prospective juror Ewbank's beliefs could not be pinned down. The trial court was in the best position to observe and evaluate his responses, and we defer to the court's ruling concerning Ewbank's ability to serve as a juror and follow the law applicable to a capital sentencing proceeding. Accordingly, the trial court did not abuse its discretion in allowing the State's challenge for cause.

[11] Defendant's next contention involving jury selection is that the trial court erred in denying his motion to dismiss on the basis of pur-

ported constitutional violations in the jury selection process. Specifically, defendant complains that the jury selection violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution because disproportionate numbers of prospective jurors who were African-American or who opposed the death penalty, or both, were excluded from the jury in violation of *Wainwright v. Witt* and *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968). Under *Witherspoon*, as clarified by *Witt*, a juror may not be excused for cause unless their views on the death penalty would " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Witt*, 469 U.S. at 424, 83 L. Ed. 2d at 851-52 (quoting *Adams*, 448 U.S. at 45, 65 L. Ed. 2d at 589).

As to defendant's *Witherspoon-Witt* argument, we note that the trial court applied virtually verbatim the test enunciated in *Witt*. As defendant concedes, this Court has held that death qualifying a jury in a capital case does not violate the United States Constitution or the North Carolina Constitution. *State v. Barts*, 316 N.C. 666, 677-78, 343 S.E.2d 828, 836-37 (1986). Although defendant asks that we reconsider *Barts*, we decline to do so.

[12] Next, defendant contends the trial court erred by barring statements made by defense counsel during voir dire concerning the jury's application of North Carolina law during the sentencing proceeding. Specifically, defense counsel stated to prospective juror Seitzinger that "there's a presumption that life without parole is the appropriate sentence." After Seitzinger was excused for cause, the State objected to any further such statements, arguing that because the jury had to be unanimous in imposing life or death, "[t]here is no presumption, one way or the other." The trial court sustained the objection. Later, during the voir dire of another prospective juror, the State again successfully objected to defense counsel's statement that

> the law is always satisfied with a life sentence. It never demands a death penalty for a first-degree murder case. And it would be the State's obligation to prove, to each and every juror, beyond a reasonable doubt, or all twelve unanimously agreed, that death is the appropriate punishment, before a jury can return a recommendation for a death sentence.

Defendant argues that the trial court's rulings were erroneous because, under North Carolina law, if the defendant is convicted of first-degree murder but the State fails to convince the jury unani-

mously beyond a reasonable doubt of the existence of aggravating circumstances, the trial court will impose a life sentence even if the jury is not unanimous that life is appropriate. Thus, argues defendant, until an aggravating circumstance is proven, life is not only the presumed sentence, it is the only sentence.

North Carolina General Statute section 15A-2000(b) provides that in a capital sentencing proceeding, "[t]he sentence recommendation must be agreed upon by a unanimous vote of the twelve jurors." N.C.G.S. § 15A-2000(b) (2010). However, "[i]f the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment." *Id.* We have observed that the General Assembly's statutory scheme has the "pronounced advantage" of allowing the trial court to impose a life sentence at the end of the trial "without encouraging any juror to vote for death or life without honestly deliberating with the other jurors, simply because he or she has been informed that he *alone* may *require* that a sentence of life be entered by holding out against the other eleven jurors." *State v. McCarver*, 341 N.C. 364, 393, 462 S.E.2d 25, 41 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996), *see also McKoy v. North Carolina*, 494 U.S. 433, 452, 108 L. Ed. 2d 369, 387 (1990) (Kennedy, J., concurring in judgment) (stating that the jury unanimity requirement "is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community"). Although the trial court will perforce impose a sentence of life imprisonment when a jury is unable to agree in a capital sentencing proceeding, this Court has held that it would be "improper" for a trial court so to inform a jury prior to its deliberations. *State v. Johnson*, 317 N.C. 343, 390, 346 S.E.2d 596, 622 (1986). North Carolina law does not establish a presumption in favor of a life sentence. The trial court's rulings were correct.

[13] In his final arguments related to jury selection, defendant contends that the State injected error in its voir dire of prospective jurors when it stated that the jury had to be unanimous in the sentencing proceeding as to a sentence either of death or life without parole. During his routine introduction of the capital sentencing process to each prospective juror, the prosecutor declared that the State has the sole burden of proving that aggravating circumstances exist, that the aggravating circumstances outweigh the mitigating circumstances, and that the aggravating circumstances are "sufficiently substantial" to warrant the death penalty. The prosecutor went on to explain to

each prospective juror that if the State failed to meet those burdens "in any respect, it would be the jurors' duty to impose life imprisonment without parole." Defendant objected and argued, as he does before this Court, that the prosecutor's comments omitted the requirement that the State must also establish that the aggravating circumstances found by the jury were sufficiently substantial to call for the death penalty when considered against the established mitigating circumstances. However, any omission by the State during voir dire was remedied by the trial court's correct instructions, which the jury is presumed to follow. *State v. Tirado*, 358 N.C. 551, 581, 599 S.E.2d 515, 535 (2004) (citations omitted), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005).

[14] Defendant further argues that the prosecutor's comments erroneously indicated that the jury had to recommend a life sentence unanimously, thus effectively placing a burden on defendant, when in fact the trial court will impose a life sentence if the jury cannot agree during a capital sentencing proceeding. As discussed above, any jury recommendation requiring a sentence of life in prison or death must be unanimous. N.C.G.S. § 15A-2000(b); *McCarver*, 341 N.C. at 388-94, 462 S.E.2d at 38-42. "[T]he jury should answer Issues One, Three, and Four on the standard [jury] form used in capital cases either unanimously 'yes' or unanimously 'no.' " *McCarver*, 341 N.C. at 390, 462 S.E.2d at 39. While defendant is correct that an inability to reach unanimity in a capital sentencing proceeding will result in a life sentence, we held in *McCarver* that the jury is not to be instructed as to the result of being unable to reach a unanimous sentencing recommendation. 341 N.C. at 394, 462 S.E.2d at 42. Accordingly, the prosecutor did not impose an additional burden of proof on defendant and the trial court did not err by overruling defendant's objection. Nor did the State reduce its burden when it asked some prospective jurors to presuppose that defendant had been found guilty. Such a supposition was a necessary prelude to voir dire questions relating to the sentencing proceeding, should one be needed.

TRIAL ISSUES

[15] We turn now to the issues defendant raises pertaining to the trial. Defendant argues that the trial court erred in permitting the State to introduce for illustrative purposes eighteen autopsy photographs of the victim. Defendant argues that the photographs were inflammatory and repetitive and that their probative value was outweighed by their prejudicial effect.

In determining whether to admit such photographs into evidence, the trial court must weigh their probative value against the danger of unfair prejudice to a defendant. N.C.G.S. § 8C-1, Rule 403 (2010). This determination rests in the sound discretion of the trial court and will not be reversed unless it is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted). Photographs are not inadmissible simply because they are gruesome or tend to inflame the jury, "even where the photographs depict remains in an advanced state of decomposition and where the cause of death is uncontroverted." *State v. Harris*, 323 N.C. 112, 127, 371 S.E.2d 689, 698 (1988) (citation omitted).

After eliciting testimony from Cynthia Gardner, M.D. regarding her findings from the autopsy performed on the victim, the State asked Dr. Gardner to identify autopsy photos marked as State's Exhibits Five through Twenty-two. The State asked whether the photos accurately depicted the victim's body during the autopsy, whether they would help her explain to the jury the location of the victim's injuries, and whether they accurately depicted all the injuries to which Dr. Gardner had previously testified. Based on Dr. Gardner's affirmative responses, the State moved to introduce the photos into evidence. When defendant objected that the photographs were excessive, repetitive, and inflammatory, the trial court reviewed the tendered photos, noted that they "appear to depict independent injuries" and "[do] not appear to be repetitive," and admitted them into evidence.

We have carefully reviewed the record and the photographs and conclude that the trial court did not abuse its discretion by admitting the photographs. They were relevant and probative of material facts in this case. The photos were not unnecessarily repetitive, were not unduly gruesome or inflammatory, and illustrated both Dr. Gardner's testimony pertaining to the autopsy and corroborating statements made by defendant to the investigators. Accordingly, the trial court did not err in admitting them.

[16] Defendant next contends the trial court erred in sustaining the State's objection to defense counsel's recross-examination of law enforcement officers concerning Joseph "Joey" Sanderlin, who participated with defendant in killing the victim. Defendant refers specifically to his question to Detective Taylor whether, when she first interviewed Sanderlin and obtained DNA samples from him, he

"denied any involvement in the rape or the murder of [the victim]." Defendant claims he sought this testimony regarding Sanderlin's lack of cooperation with police because this evidence was relevant to defendant's proposed (f)(8) mitigating circumstance, that defendant aided in the apprehension of a capital felon. Defendant also argues this evidence was relevant because the State was proceeding under the theory that defendant and Sanderlin acted in concert.

The range of cross-examination, though broad, is subject to the trial judge's discretionary powers "to keep it within reasonable bounds." *State v. Newman*, 308 N.C. 231, 254, 302 S.E.2d 174, 187 (1983) (citation omitted). The trial court's rulings on cross-examination "will not be held in error absent a showing that the verdict was improperly influenced thereby." *State v. Sams*, 317 N.C. 230, 240, 345 S.E.2d 179, 185 (1986) (citation omitted). After Detective Taylor identified in her direct examination a photograph of Joseph Sanderlin and the oral swabs she had taken from him for DNA testing, the prosecutor asked how she had obtained the samples. Taylor responded that she asked Sanderlin for them and he consented. She then described the process of taking and preserving the swabs. On cross-examination, defense counsel asked Taylor about obtaining similar samples from Sanderlin and had the detective identify a photo of him.

Defense counsel then asked whether "[w]hen you went and talked to Mr. Sanderlin and got his DNA samples, he denied any involvement in the rape or the murder of [the victim]?" When the State objected on the grounds that the answer would be inadmissible hearsay, defendant responded that the testimony was not being offered for the truth of the matter asserted but instead to indicate that Sanderlin was not cooperative. Defendant also contended that the State opened the door to the admission of this testimony during its direct examination of Taylor and by the admission of evidence from other witnesses who did not testify.

To the extent that the testimony pertained to the substance of Sanderlin's statements to Taylor, it is hearsay. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial, or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (2010). Defendant has not shown how Sanderlin's purported lack of cooperation or denial of his own culpability was relevant to defendant's guilt. At the time defendant sought to elicit this evidence, the question before the jury was whether defendant was guilty of first-degree murder either on the

basis of malice, premeditation, or deliberation, or under the felony murder rule. Defendant had already admitted that he had robbed the victim; that he had held her down while Sanderlin raped her; and that he had punched and stomped the victim in the face, stabbed her, and cut her throat. In light of this evidence, Detective Taylor's testimony relating to Sanderlin's response to a warrant would bear little, if any, relevance to the jury's consideration of defendant's culpability. Furthermore, the State's questions relating to Taylor's encounter with Sanderlin did not elicit any responses that required an explanation or rebuttal or otherwise opened the door for defendant to elicit Sanderlin's statement on cross-examination. *See, e.g.*, *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981).

Although defendant argues that he was asking the question only to demonstrate Sanderlin's lack of cooperation and thereby establish that the (f)(8) mitigating circumstance applied to defendant, the exchange occurred during the guilt portion of defendant's trial. At the subsequent sentencing proceeding, defendant's counsel argued to the jury that it should find the (f)(8) mitigating circumstance. The trial judge instructed on this statutory mitigating circumstance and told the jury that Sanderlin is a capital felon, and the verdict form indicated that one or more jurors found the existence of this mitigating circumstance. Accordingly, the trial court did not abuse its discretion in sustaining the State's objection to this evidence, and defendant was not prejudiced thereby.

[17] Next, defendant presents several issues relating to the State's closing arguments in the guilt-innocence portion of the trial. Of these, defendant first argues the trial court committed plain error when it failed to intervene *ex mero motu* during the State's purportedly improper closing argument. " '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 (citations omitted), *cert. denied*, 549 U.S. 960, 166 L. Ed. 2d 281 (2006). "Under this standard, '[o]nly 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.' " *Anthony*, 354 N.C. at 427, 555 S.E.2d at 592 (citation omitted). "To establish such an abuse, defendant must show that the prosecutor's

comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998) (citation omitted), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999).

In its closing argument, the State suggested that a mark seen on the victim's forehead in one of the photographs had been caused by defendant's shoe. Specifically, the prosecutor stated: "You can look at the forehead impression, is that a footprint, I don't know, but he even tells you he stomped on her face a couple [of] times." Earlier in the trial, forensic pathologist Gardner testified that the autopsy she performed on the victim identified "[o]n the right forehead . . . a red contusion" that "appear[ed] to be a pattern of linear red lines." While Gardner was unable to identify the cause of the mark, other evidence admitted at trial indicated that defendant acknowledged that he had punched and stomped the victim in the face. Thus, the evidence at trial supported the prosecutor's implication that defendant's shoe caused the mark. Because "[c]ounsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom," *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986) (citations omitted), the prosecutor's remark was not grossly improper.

[18] Defendant next contends the prosecutor injected his personal opinion as to defendant's guilt of first-degree murder based upon felony murder when the prosecutor argued:

> I think the evidence is overwhelming, the defendant is guilty under that theory of first-degree murder. I believe the evidence is overwhelming that the defendant is guilty of first-degree felony murder during the perpetration of a robbery, also. The evidence is clear, when you apply the law to the facts.

This argument was obviously improper. "During a closing argument to the jury an attorney may not . . . express his personal belief . . . as to the guilt or innocence of the defendant . . . ." N.C.G.S. § 15A-1230(a) (2010). However, this argument also related the strength of the evidence to the theories under which defendant was being prosecuted and which would be presented shortly to the jury on the verdict sheets. Defendant failed to object, and we do not believe this unfortunate argument was so grossly improper that it "infected the trial" so as to "render[] the conviction fundamentally unfair." *State v. Lemons*, 348 N.C. 335, 356, 501 S.E.2d 309, 322 (1998) (citation omitted), *judgment vacated on other grounds*, 527 U.S.

1018, 144 L. Ed. 2d 768 (1999). Accordingly, the trial court did not err by failing to intervene *ex mero motu*.

[19] Defendant also argues that the prosecutor made an improper argument about intent. Defendant refers to the prosecutor's comments on the location of one of the stab wounds suffered by the victim as evidence that Sanderlin intended to kill, which was relevant to the State's theory that Sanderlin and defendant acted in concert. The State argued:

> But during that time is when Joey [Sanderlin], using his knife that he's brought with him, according to the defendant, starts to stab [the victim] in the neck, in the neck. That's a vital area. It's a vital area. I think it's an excellent indication of Joey's intent, when you stab someone in the neck. And you can recall the pictures, I'm not going to bring them out here for you at this time. But that's an excellent indication.

We have stated that "[a]n intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred." *State v. Cauley*, 244 N.C. 701, 708, 94 S.E.2d 915, 921 (1956). Here the State was discussing application of the law to the circumstantial evidence that had been introduced. While, as above, the prosecutor's injection of his own opinion was an error, in the absence of an objection we do not find that the trial court erred in failing to intervene *ex mero motu*.

[20] Next, defendant contends that the State improperly argued that defendant committed burglary. During closing arguments, and in the context of describing premeditation and deliberation, the State remarked that Sanderlin's mode of entry, which the prosecutor characterized as "unlawfully breaking and entering [the victim's] dwelling . . . at night, with the intent to commit a felony," constituted "burglary." Defendant notes that the State's theory of felony murder was based upon the two underlying felonies of rape and robbery. Defendant argues that the State's argument both injected a third underlying felony and also proposed an aggravating circumstance that carried over to the sentencing proceeding. However, the reference was to Sanderlin only. Neither Sanderlin nor defendant was charged with burglary, and the trial court did not instruct the jury to consider burglary as an aggravating circumstance. Defendant has failed to show that this comment was fundamentally unfair or affected the outcome of the trial. Therefore, the trial court did not err in failing to intervene *ex mero motu*.

[21] As to these jury arguments by the State, defendant also makes the alternative contention that trial counsel's failure to raise timely objections deprived defendant of effective assistance of counsel. To make a successful ineffective assistance of counsel claim, a defendant must show that (1) defense counsel's "performance was deficient," and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984); *accord State v. Wilkerson*, 363 N.C. 382, 413, 683 S.E.2d 174, 193 (2009), *cert. denied*, —— U.S. ——, 176 L. Ed. 2d 734 (2010). Counsel's performance is deficient when it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 693. Deficient performance prejudices a defendant when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 80 L. Ed. 2d at 698; *see also Wilkerson*, 363 N.C. at 413, 683 S.E.2d at 193. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698. However, even assuming *arguendo* that trial counsel was deficient in failing to object during closing arguments, we do not find defendant was prejudiced as a result. The evidence against him was overwhelming and there was no probability that the outcome was affected by the improprieties in the prosecutor's argument.

[22] Defendant also asserts that the State improperly argued motive by suggesting that defendant and Sanderlin killed the victim to eliminate her as a witness. Although defendant cites *State v. Williams*, 317 N.C. at 481-83, 346 S.E.2d at 410-11, that case is distinguishable. In *Williams*, the defendant had been tried capitally once before, and we had vacated defendant's sentence and remanded for a new sentencing proceeding because the trial court erroneously submitted the (e)(4) aggravating circumstance, that the capital felony was committed for the purpose of avoiding or preventing an unlawful arrest. *Id.* at 479-80, 346 S.E.2d at 409. At the defendant's second capital sentencing proceeding, the trial court correctly refrained from submitting the (e)(4) circumstance. *Id.* at 480, 346 S.E.2d at 409. Despite the prior reversal, and even though the State had presented no evidence of such a motive, the State nevertheless argued that the defendant killed the victim to silence her. *Id.* at 480-81, 346 S.E.2d at 409-10. We found this argument grossly improper. *Id.* at 483, 346 S.E.2d at 410-11. In contrast, the argument here was made during the guilt portion of the trial, was a reasonable extrapolation of the evidence, and was made in the context of the prosecutor's explanation of premeditation

and deliberation. Accordingly, this statement was not grossly improper, and the trial court did not err in failing to intervene *ex mero motu*.

[23] In his final argument relating to the guilt-innocence portion of his trial, defendant contends that the court improperly instructed the jury on acting in concert. Defendant submitted in writing the proposed instruction: "[Y]ou must be convinced, beyond a reasonable doubt, that the defendant had the intent to commit robbery with a dangerous weapon or rape at the time the victim was killed." Defendant also argued to the trial court that it would be improper to instruct in a manner indicating that Sanderlin's intent to commit those offenses was imposed on defendant. Thus, the crux of defendant's contention is that the State should have been obligated to prove that defendant himself had the requisite intent.

The trial court denied defendant's request and instructed the jury:

> There is a principle in our law known as acting in concert. For a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together, with a common purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal, if the other commits that particular crime, but he is also guilty of any other crime committed by the other, in pursuance of the common purpose, or as a natural or probable consequence of the common purpose.

The trial court then defined the elements of first-degree murder based upon premeditation and deliberation:

> First, that the defendant, or someone with whom he was acting in concert, intentionally and with malice killed the victim with a deadly weapon. . . .
>
> If the State proves, beyond a reasonable doubt, that the defendant, or someone with whom he was acting in concert, intentionally killed the victim with a deadly weapon, or intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused his death, you may infer first, that the killing was unlawful; and second, that it was done with malice, but you're not compelled to do so.
>
> . . . .

> Fourth, that the defendant, or someone with whom he was acting in concert, acted after premeditation, that is that he formed the intent to kill the victim over some period of time, however short, before he acted.

The trial court gave similar acting-in-concert instructions as to felony murder based upon rape and upon robbery.

Defendant argues that these instructions did not require the jury to find that defendant had the necessary intent and allowed the jury to convict defendant on the basis of Sanderlin's intent. In *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), *and cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998), this Court, in approving instructions virtually identical to the instructions provided in the case at bar, gave the following "correct statement" of the doctrine of acting in concert:

> "[I]f 'two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.' "

Id. at 233, 481 S.E.2d at 71 (quoting *State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971) (alterations in original), *death sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972)). Although defendant argues that we should apply *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994), *Barnes* explicitly overruled *Blankenship*. *Barnes*, 345 N.C. at 230, 481 S.E.2d at 69. Accordingly, the trial court's instructions relating to intent were proper.

SENTENCING PROCEEDING

[24] We now turn to issues pertaining to sentencing. Defendant argues that the trial court committed plain error in failing to intervene *ex mero motu* during the State's opening statement in the sentencing proceeding. The State's brief opening remarks, quoted in their entirety, read:

> Yesterday, you labelled the defendant a murderer. The defendant murdered Lauren Redman.
>
> At this point in the proceedings, you're going to stop hearing much about Lauren Redman. Transition into the penalty phase, you're going to start hearing about the defendant.

> The victim and the victim's loved ones will not be heard from at this point. Certainly her parents have already been sentenced to grieve themselves to their own graves haunted by the memory of that little girl they loved so much.
>
> Now, you have to decide what will be the punishment for Lauren's killer. Thank you.

Defendant claims that this statement inflamed the passions of the jury, misled the jury into believing the State could not present evidence at sentencing, and indicated that the victim's loved ones could not be heard.

The control of opening statements rests in the discretion of the trial court. *See State v. Gibbs*, 335 N.C. 1, 40, 436 S.E.2d 321, 343 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994). "[T]he proper function of an opening statement is to allow the party to inform the court and jury of the nature of his case and the evidence he plans to offer in support of it." *State v. Paige*, 316 N.C. 630, 648, 343 S.E.2d 848, 859 (1986) (citation and internal quotation marks omitted). Because defendant did not object, we review opening statements to determine whether they were so grossly improper that the trial court abused its discretion by not intervening *ex mero motu*. *State v. Gladden*, 315 N.C. 398, 417, 340 S.E.2d 673, 685, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986).

The alleged errors in the statement must be examined in the context of defendant's own opening statements. *Id.* at 423, 340 S.E.2d at 689. The prosecutor's statement, to the effect that the jury would stop hearing about the victim and begin hearing about defendant, was consistent with defendant's opening statement at the beginning of the guilt-innocence portion of the trial when defense counsel advised the jury that it would first "hear the story of how this young woman died" and then at a later point it would hear defendant's story. The State's opening statement in the sentencing proceeding echoed defendant's earlier guilt-innocence opening statement and accurately described the shift in focus that would take place.

The State briefly mentioned that the victim's loved ones would not be heard from again. Although defendant claims that these statements evince the prosecutor's intent "solely to inflame the passions of the jury," the statement described the nature of the proceeding and provided the jury a forecast of what to expect. *See Paige*, 316 N.C. at 648, 343 S.E.2d at 859. Moreover, brief references to victims or their families in closing arguments are not grossly improper. *See State v.*

Haselden, 357 N.C. 1, 20-21, 577 S.E.2d 594, 607 (stating a prosecutor may remind the jury that it should also consider the life of the victim), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003); *State v. Moseley*, 338 N.C. 1, 50, 449 S.E.2d 412, 442 (1994) (brief references to victims or their families determined not grossly improper), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995). Here we do not find the prosecutor's references to the victim and her family improper, much less grossly so, when the statement is an otherwise correct summary for the jury of the nature of the penalty proceeding and forecast of the evidence to be put forth. *See Paige*, 316 N.C. at 648, 343 S.E.2d at 859.

[25] Defendant also claims ineffective assistance of counsel because trial counsel failed to object to this opening statement. Because the opening statement was not improper, defendant's counsel was not ineffective for failing to object.

[26] We now turn to defendant's assignments of error with respect to the State's cross-examination of Dr. James Hilkey, who testified as an expert on defendant's behalf during the sentencing proceeding. First, we address defendant's argument that the trial court erred when it overruled defendant's objection to a question asked by the State. Defendant contends that the State's cross-examination mischaracterized Dr. Hilkey's test results while attempting to induce Dr. Hilkey to admit defendant malingered.

In his direct examination, Dr. Hilkey testified that defendant suffers from attention deficit hyperactivity disorder and he provisionally diagnosed a cognitive disorder. In addition, Dr. Hilkey found features of a schizotypal personality disorder along with dependent personality disorder. In Dr. Hilkey's opinion, defendant's "behavior at the time of this alleged crime would . . . not have happened, had it not been for the influence of Mr. Sanderlin and his associates."

On cross-examination, the prosecutor asked if safeguards were in place to detect malingering and ensure accurate results. Dr. Hilkey responded that the results of defendant's memory malingering "TOMM" test did not indicate malingering. When the prosecutor asked why Dr. Hilkey had not used a score sheet for this particular exam and whether the failure to use such a sheet was ethical, Dr. Hilkey answered that he recorded defendant's answers "honestly" using a notepad and that his scoring method was neither "unusual" nor "unethical." The prosecutor then asked about another test known as the Milner Forensic Assessment of Symptoms, and Dr. Hilkey gave

his opinion that defendant's score on this test was not indicative of malingering for psychological symptoms.

The prosecutor then turned to a third test, the Millon Clinical Multiaxial Inventory (MCMI). Dr. Hilkey testified that he had invalidated this test because of defendant's report of an excessive number of symptoms. The prosecutor then noted that Dr. Hilkey did not print out the results of this test, and Dr. Hilkey replied, "It was an invalid test. The . . . information generated would not be of use to me." The prosecutor next asked, "Would it be of use to anybody to see what type of malingering answers that Byron Waring provided on that test to print out that sheet[?]" The trial court overruled defendant's objection, and Dr. Hilkey responded that doing so would not have been useful to him, but that the raw scores were available from which anyone could generate defendant's profile. He gave three potential reasons for invalidation of the test results: failure to comprehend the test sufficiently, extreme psychological vulnerability and an attempt to draw attention to his condition, and overt malingering. Dr. Hilkey added that he believed defendant's test was invalid for the second reason.

The significance of this cross-examination of Dr. Hilkey emerged during the prosecutor's subsequent questioning of Dr. Mark Hazelrigg, an expert forensic psychologist who was presented by the State as a rebuttal witness. Dr. Hazelrigg disagreed with Dr. Hilkey as to the question of defendant's malingering. With regard to the MCMI test result that Dr. Hilkey determined to be invalid, Dr. Hazelrigg noted that the results were internally inconsistent because "[defendant] reported having symptoms in virtually every category at a fairly high level," yielding results that were logically and medically incompatible. Dr. Hazelrigg interpreted defendant's over-reporting of symptoms as either "malingering or begging for help." Although "that's sort of a subjective judgment about which one," Dr. Hazelrigg's opinion was that defendant was exaggerating his symptoms rather than asking for help.

Because the experts disagreed on the extent, if any, of defendant's purported malingering, defendant's mental capacity and possible neurological and psychological disorders were key issues contested at sentencing. "The scope of cross-examination is governed by the sound discretion of the trial court and the requirement that the questions be asked in good faith." *State v. Fleming*, 350 N.C. 109, 139, 512 S.E.2d 720, 740 (citation omitted), *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999). The prosecutor's question appropriately sought

to elicit a concession from Dr. Hilkey that other experts might disagree with his opinions on this pertinent evidence. *See State v. Hipps*, 348 N.C. 377, 409, 501 S.E.2d 625, 644 (1998) (concluding that prosecutor's questions "designed to elicit that another conclusion could be drawn from the facts" were "well within the bounds of proper cross-examination of an expert witness"), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999). Nothing in the record indicates this questioning was conducted in bad faith, nor do we see any indication that the trial court abused its discretion in overruling defendant's objection.

[27] Next, we address defendant's argument that the trial court erred when it failed to intervene *ex mero motu*, first, when the State purportedly accused Dr. Hilkey of unethical conduct and later, when the State asked Dr. Hilkey about defendant's potential for future violence. When a defendant fails to object to a cross-examination question, but later contests the question on appeal, we review for plain error only. *See State v. Locklear*, 349 N.C. 118, 156, 505 S.E.2d 277, 299 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). "In criminal cases, a question which was not preserved by objection . . . nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(c)(4) (2009).[3] Defendant has not "specifically and distinctly" assigned plain error as to these issues and has thus failed to preserve them on appeal.

Even so, mindful that this case is capital, we have reviewed these issues and find them to be without merit. As to Dr. Hilkey's ethics, the record provides no basis for the prosecutor's cross-examination question to Dr. Hilkey asking whether he was ethically obligated to record some of defendant's test results on a score sheet, other perhaps than Dr. Hazelrigg's statement that "it really isn't possible to test without the scoring sheet and the materials." At any rate, Dr. Hilkey gave a full and appropriate response to the question, which the prosecutor accepted at face value. As to defendant's purported potential for future violence, the prosecutor asked Dr. Hilkey only: "And within the scales, the printout [from defendant's testing] gives you scales. The defendant was very elevated . . . in the scale for violence potential, is

3. Rule 10 of the Rules of Appellate Procedure was recently amended to eliminate assignments of error on appeal. However, the amended rule "appli[es] to all cases appealed on or after [1 October 2009]." N.C. R. App. P. 10 (2010). Because notice of appeal in the instant case was entered on 9 July 2007, we analyze this case under the version of Rule 10 applicable at that time.

that accurate?" The import of this question is ambiguous and could refer to defendant's past violent acts as well as any tendency toward the future. No evidence suggests that the question was asked in bad faith. Accordingly, the trial court did not err by failing to intervene *ex mero motu* as to either question.

In the alternative, defendant contends that trial counsel failed to provide effective assistance by failing to object to these questions. Because the record has not been developed on this issue, we dismiss these assignments of error without prejudice to raise them during post-conviction proceedings. *See Fair*, 354 N.C. at 167, 557 S.E.2d at 525.

[28] In an argument related to evidence presented about defendant's intelligence, defendant contends that the trial court erred in sustaining the State's objection when defendant sought to introduce opinion evidence of his actual intelligence quotient. Defendant called as a witness Ms. Harriet Borom, a special education teacher who had met defendant when he was eleven years old. She testified that he fell behind in his school work and became frustrated and angry. She added, without objection, that she did not believe the results of I.Q. tests taken by defendant at age eleven that placed him in the normal range. She described defendant's experiences in school and testified that an I.Q. test administered to defendant when he was in the sixth grade that yielded a score of 89 "ha[d] no foundation in reality." She added that he presented the traits of a person who is mentally handicapped. However, when Ms. Borom volunteered, "If I had to take a stab at it, and just from my working with [defendant], if I had to guess, I would say his I.Q. was somewhere in the neighborhood of the high seventies—I mean high—neighborhood of the high—mid to high sixties," the State successfully objected. Defendant argues that this testimony was admissible lay opinion testimony. However, the witness was allowed to offer her opinion that defendant suffered from a "lower I.Q.," and the State objected only when she gave an opinion about a specific score range. Because the witness had not been tendered as an expert and was admittedly guessing, her speculation as to a specific range of scores was inadmissible. *Compare State v. Fullwood*, 323 N.C. 371, 385, 373 S.E.2d 518, 527 (1988) (concluding that an expert's characterizing his opinion as a "guess" does not render the opinion inadmissible when the term implies uncertainty instead of "mere conjecture or speculation"), *judgment vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990). The objection was properly sustained.

[29] Defendant next argues that the trial court abused its discretion by failing to intervene *ex mero motu* during the prosecutor's closing argument in the sentencing proceeding. Defendant claims that the prosecutor incorrectly advised the jury that the same evidence could be used to find more than one aggravating circumstance. In the State's closing arguments, the prosecutor discussed the facts of the case, then turned to the issue of punishment, explicitly foreshadowing the instructions that the trial court would later provide. The prosecutor informed the jury that it would consider three separate aggravating circumstances: that the murder was committed while defendant was engaged in the commission of a rape (N.C.G.S. § 15A-2000(e)(5)); that the murder was committed for pecuniary gain (N.C.G.S. § 15A-2000(e)(6)); and that the murder was especially heinous, atrocious, or cruel (N.C.G.S. § 15A-2000(e)(9)). The prosecutor's initial description of the (e)(5) and (e)(6) circumstances was short and straightforward. However, when the prosecutor turned to the (e)(9) circumstance, he supported his contention that the victim's ordeal and knowledge of her impending death justified a finding of this circumstance by playing for the jury a tape recording of defendant's confession to the crime, during which defendant said:

> "I moved back beside her, . . . and he told me to finish her. I got on my knees, I picked up the knife. . . . I had the knife again in my sleeves, my hands in my sleeves again holding the knife. I looked at her and then she looked at me and she said, 'please don't kill me.' She said she was about to die anyway. The last words she said to me was, 'can I please get some water.' And I said, 'no.' . . . and I walked out."

The prosecutor argued that the victim did not die "a quick and painless death," but continued to suffer, and that her last moments awaiting death would have, for her, seemed "an eternity."

After discussing these three aggravating circumstances individually, the prosecutor addressed them together:

> Collectively, these three aggravating circumstances, a rape, pecuniary gain, especially heinous, atrocious and cruel, provide the following context of some important factors for you to consider.
>
> Number one, victimized in home at night, that distinguishes other killings. Defendant Byron Waring's consent was by fraud, lied to her to get inside the house. Then he assisted codefend-

ant Joseph Sanderlin in his burglary, breaking and entering at night with intent to commit a felony. Victimized in one's own home at night.

Two, not just one, but two attackers, two men. It's very important, strength in numbers. That sets this case apart from others.

Three, a blameless victim. Young, her whole life ahead of her. Certainly confused why this was happening to her. There really is no explanation on the facts of this case.

Four, standing alone by itself is an overwhelming circumstance in this case. The actual rape. Rape, nonetheless, on her own living room floor, face down. This defendant choking her, holding her down on her back while Joseph Sanderlin is raping her. One of these exhibits has the trauma Dr. Gardner pointed out that she found to her vagina, not to be expected.

Five, Lauren Redman was taped. She was tortured, taped up and tortured. Tortured physically, tortured psychologically. Recall the seventeen knife flecks, give me what—here it is, going to give me what I want, going to give me what I want. Just torture. Physically knowing this has happened to you psychologically and the after[e]ffects. And what are the after[e]ffects of this point from the facts?

Number six, the defendant decides to start punching her in the face and stomping her on the face, after she'd been raped.

Number seven, keep in mind, I have one to show you, but there were two knives involved, two knives. Whichever way she turned, whichever way she was flipping, there was a knife to defend against. Two knives, the number, the severity of the stab wounds.

Recall Dr. Gardner's testimony. I think if you added [it] up you have—on top of the seventeen flecks, you have the twenty-three stab wounds to the torso, five to the head and neck, and the two actual cuttings. Thirty wounds, thirty stab and cutting wounds, seventeen flecks, forty-seven wounds.

The level of other violence in this case can be distinguished from other ordinary murders. This is not to be expected. This is especially heinous, atrocious and cruel.

> Number eight, pecuniary gain, robbed for money, robbed for money. While Mr. Pipkin is making a 911 call, you don't know the timeframe, is the defendant using the twenty dollars that he got from Ms. Redman's wallet to buy cigarettes about that time? Human life reduced to money. It's particularly contemptible, particularly contemptible. That distinguishes this murder from others.
>
> Finally, prolonged conscious suffering. As I depicted to you, from being attacked in her living room for however long that lasted, make it most conservative short time by her perception, how long was that?
>
> After her attackers leave, she's still fighting and willing to live. She gets outside and goes on to apartment B, Andy Pipkin and the 911 call. She dies at the end of that 911 call, all the evidence shows to you that. Officer David Naumuk, when he gets there doesn't see a sign. EMS gets there on his heels, and she's dead, placed in the ambulance.
>
> Lauren was tortured, absolutely tortured. The 911 call, as she told Andy Pipkin on that call, you can hear it, it's tough, your stomach hurts. I remember asking Mr. Pipkin on the stand, what was she doing while you were on the phone with 911, his response was, "just trying not to bleed to death." That speaks for itself.
>
> Individually, these aggravating circumstances are weighty, important, substantial. Collectively, they cannot be defeated. They just can't.

Defendant argues that the trial court committed plain error by failing to intervene because, defendant contends, the State improperly argued that the jury could use the same evidence to find the (e)(9) aggravating circumstance (murder especially heinous, atrocious, or cruel) that it would also use to find the (e)(5) aggravating circumstance (murder committed during commission of the felony of rape) and the (e)(6) aggravating circumstance (murder committed for pecuniary gain).

"In a capital case the trial court may not submit multiple aggravating circumstances supported by the same evidence." *State v. Lawrence*, 352 N.C. 1, 29, 530 S.E.2d 807, 825 (2000) (citation omitted), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001). However, while the submission of two aggravating circumstances based upon

the same evidence is impermissible "double counting," *State v. Kandies*, 342 N.C. 419, 450, 467 S.E.2d 67, 84, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996), *judgment vacated on other grounds*, 545 U.S. 1137, 162 L. Ed. 2d 884 (2005), "[a]ggravating circumstances are not considered redundant absent a complete overlap in the evidence supporting them," *State v. Moseley*, 338 N.C. at 54, 449 S.E.2d at 444 (citations omitted).

A review of the State's argument indicates that the prosecutor did not ask the jury to double count. Although defendant contends that the above-quoted argument pertained only to the (e)(9) aggravating circumstance, the prosecutor at the outset of this portion of his argument advised jurors they would be considering three aggravating circumstances that would be submitted to them. The prosecutor then set out nine aspects of the case to support those three aggravating circumstances. The fourth aspect that was argued related to the rape, supporting (e)(5). The eighth aspect that was argued related to pecuniary gain, supporting (e)(6). Several other aspects related to the violence inflicted on the victim, supporting (e)(9). The prosecutor closed by saying that each of the statutory aggravating circumstances was, by itself, "weighty, important, [and] substantial" and that the three together "cannot be defeated."

Thus, the argument distinguished the three aggravating circumstances and the evidence supporting each. A similar closing argument was made in *State v. Miller*, 357 N.C. 583, 596-97, 588 S.E.2d 857, 867 (2003), *cert. denied*, 542 U.S. 941, 159 L. Ed. 2d 819 (2004), in which this Court considered whether the State's (e)(9) argument was proper when the prosecutor asked the jury to imagine the victim's feelings during a kidnapping that was also the factual basis for a separate (e)(5) aggravating circumstance. We noted that, while there was "some overlap" between the (e)(9) and (e)(5) aggravating circumstances in that case, "separate and distinct evidence exist[ed]" for each circumstance, and the prosecutor's exhortation to the jury to consider the victim's thoughts during the kidnapping "was not a request for the jury to consider the exact same evidence to find aggravating circumstances (e)(5) and (e)(9)." *Id.* at 597, 588 S.E.2d at 867.

Here, as in *Miller*, there was substantial "separate and distinct evidence" for the (e)(5), (e)(6), and (e)(9) aggravating circumstances. Because the prosecutor's argument was proper, the trial court had no reason to intervene. In addition, defendant's contention that trial counsel's neglect to object to this argument constituted

ineffective assistance fails because counsel had no basis for raising an objection.

[30] Defendant contends that the trial court committed plain error by failing to instruct the jury that the same evidence could not be used to support the existence of more than one aggravating circumstance. We have held that a defendant seeking such an instruction must make a request to the trial court. *State v. Roache*, 358 N.C. 243, 325-26, 595 S.E.2d 381, 433 (2004). No timely request was made here. Because the trial court was under no duty to give such an instruction in the absence of a request, plain error review is not available to defendant. *Cf.*, *State v. Peterson*, 350 N.C. 518, 529, 516 S.E.2d 131, 138 (1999) (no plain error review conducted when trial court found not to have a duty to give a peremptory instruction), *cert. denied*, 528 U.S. 1164, 145 L. Ed. 2d 1087 (2000).

In the alternative, defendant argues ineffective assistance of counsel for trial counsel's failure to request such an instruction. Because the record is undeveloped as to the reasons why no such request was made, we dismiss this issue without prejudice to defendant to raise it in post-conviction proceedings. *See Fair*, 354 N.C. at 167, 557 S.E.2d at 525.

[31] Defendant next contends that the trial court plainly erred in failing to prevent the State from making grossly improper closing arguments during the sentencing proceeding. In this line of argument, defendant first asserts that the prosecutor improperly injected his personal beliefs on three occasions when he used the words "I think" or "I believe" while commenting on the mitigating circumstances presented by defendant. In discussing the (f)(6) statutory mitigating circumstance, the State argued:

> I think anyone that can take the roll of packaging tape over to her apartment, do what you do, leave, discard the evidence, recognize and tell Joey, "we have blood on our clothes," take a shower, throw away the clothes, . . . we never got the clothes, get rid of this car, get rid of the knife, get rid of the property, and then when the officers arrive at your house, initially denying any involvement in this.
>
> And when you grab this knife during the course of committing the murder, you're using the shirt sleeve to avoid fingerprints, I think you can appreciate the criminality of your conduct.

Then, in addressing the statutory (f)(8) mitigating circumstance, the prosecutor argued:

> But as to "the defendant aided in the apprehension of another capital felon," I think the evidence is the defendant is at [the Raleigh Police Department], obviously the initial denial of what he did.

Finally, in summarizing his view of the defense mitigation case, the prosecutor referred to the testimony of various lay witnesses who had spoken about the hardships defendant faced in his youth:

> The essence of what I believe is that the defendant had numerous people that tried the best they could to no avail, and that he suffered from academic problems. That describes a lot of people.

As a general rule, it is improper for an attorney to inject his or her personal beliefs into a closing argument. "During a 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.G.S. § 15A-1230(a). While prosecutors are permitted to argue as to "the circumstances of the murder and whether these circumstances warrant imposition of the death penalty," *see*, *e.g.*, *Haselden*, 357 N.C. at 25, 577 S.E.2d at 609, they may not " 'inject [their] personal experiences, [their] views and [their] opinions into the argument before the jury,' " *State v. Jones*, 355 N.C. 117, 130, 558 S.E.2d 97, 105 (2002) (citation omitted).

Although the State argues that the words "I think" and "I believe" were used merely to introduce permissible arguments regarding the facts and characteristics of this murder, we have no doubt that the prosecutor crossed the line when he shared with the jury "[t]he essence of what I believe." While the phrases "I think" and "I believe" often are no more than verbal padding in oral argument, they can, as happened here, bleed over into a violation of N.C.G.S. § 15A-1230 and should be avoided when a party is seeking directly to persuade a jury.

Nevertheless, while the prosecutor's argument contained improper material, our review of the record satisfies us that his comments were a far cry from the type of inflammatory argument we condemned in *Jones*. *Id.* at 132-34, 558 S.E.2d at 106-08 (finding error when prosecutor made a "thinly veiled attempt" to compare the defendant's acts to the killing of students at Columbine High School and the bombing of the federal courthouse in Oklahoma City, then

argued that the defendant was "lower than the dirt on a snake's belly"). The argument here did not trigger an objection and was not so grossly improper as to require the trial court to intervene *ex mero motu*. Therefore, the trial court did not err in failing to intervene *ex mero motu*.

[32] In his second related argument, defendant claims "the State openly mocked and laughed at Dr. Fozdar's opinions after (wrongly) implying that Dr. Hilkey had doubted Dr. Fozdar's diagnosis" when the prosecutor argued during the sentencing proceeding:

> Is [Dr. Hilkey's] bright line of Dr. Fozdar's confident opinion, beyond a reasonable doubt, laugh, laugh. I don't know. These are things for you to consider.

While this statement, standing alone, is somewhat opaque, a review of the context reveals that the comment was part of the prosecutor's discussion of defendant's experts' opinions, which the prosecutor suggested were inconsistent and ill-founded.

" 'When the prosecutor becomes abusive, injects his personal views and opinions into the argument before the jury, he violates the rules of fair debate . . . .' " *Id.* at 130, 558 S.E.2d at 105 (quoting *State v. Smith*, 279 N.C. 163, 166, 181 S.E.2d 458, 460 (1971)). However, "it is not improper for the prosecutor to impeach the credibility of an expert during his closing argument." *State v. Roache*, 358 N.C. at 300, 595 S.E.2d at 417 (citation and internal quotation marks omitted). The prosecutor here was impeaching the credibility of an expert witness during closing arguments. While the phrase "laugh, laugh" may well have been meant to ridicule the defense experts, these words are ambiguous and confusing in context and did not trigger an objection. This argument was not so grossly improper as to require the court to intervene *ex mero motu*.

[33] In his third related argument, defendant contends the prosecutor argued outside the record and attempted to inflame the jury with an unfairly prejudicial argument about "clearly irrelevant evidence." Defendant refers to two portions of the State's closing argument relating to aggravating circumstances. While discussing the (e)(9) aggravating circumstance, the prosecutor described how the victim, after being raped and stabbed, dragged herself to a neighboring apartment. The prosecutor then described how Pipkin had tried to help:

> Certainly Andy Pipkin did the best he could. Decent guy, stranger, trying to help out. I told you he'd never knew her, certainly will never forget her. He's been affected, you can tell by his

> testimony, his demeanor. He told you he never returned to sleep another night at that apartment.
>
> He called 911. He applied the towel to Ms. Redman. I suspect if he didn't, the blood outside on State's [Exhibit] 87 will be a lot more. I don't know how you can get a lot more, that's a lot of blood, but that's what [sic] the towel covering your open wound.
>
> You heard [the] 911 tape. You heard the interaction going on between Mr. Pipkin, who I suspect, I assume was shell-shocked with Ms. Redman. It's not like the movies, it's not like the movies.

Defendant contends that the State improperly argued that the effect of the crime on Pipkin justified the (e)(9) aggravating circumstance. However, this Court has found not improper an argument offered in support of the (e)(9) circumstance stating that the victim's survivors were present at the time of her death and "even attempted to stop [the] defendant from killing her." *State v. Fisher*, 336 N.C. 684, 699-700, 445 S.E.2d 866, 874-75 (1994), *cert. denied*, 513 U.S. 1098, 130 L. Ed. 2d 665 (1995). Here, as in *Fisher*, the prosecutor used Pipkin's experience as a means of conveying the victim's suffering and the heinous, atrocious, or cruel nature of the crime. Thus, this portion of the State's closing argument was not improper.

[34] Defendant next complains about the prosecutor's description, presented at the end of his argument on aggravating circumstances, of "a highly emotional—and completely imagined—conversation with [victim] Lauren Redman's father":

> When a father hears a daughter has been murdered, what does he ask? What's the first thing does he want to know? Did she suffer? Did she suffer? And then after that, I suspect what's the next question? You fumble for the word, was she, you know, abuse—was she raped? The answer on these facts to both of those, Mr. Redman, are yes, she suffered, and she was raped.

Defendant contends that this argument improperly strays outside the record.

In a closing argument in a criminal trial, "an attorney may not . . . make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice." N.C.G.S. § 15A-1230(a). However, this Court has also observed that "hypothetical examples, by their very nature, are fictional and do not purport to contain facts of record or otherwise." *State v. Chapman*,

359 N.C. 328, 372, 611 S.E.2d 794, 826 (2005). "Thus, it is unlikely that jurors were misled . . . ." *Id.*; *see also State v. Moseley*, 338 N.C. at 49-50, 449 S.E.2d at 441 (concluding that the argument, "You don't think this woman wouldn't have been loving to a child if he had given her a chance to have one?," was not "so egregious as to require intervention by the trial court *ex mero motu*").

The prosecutor never indicated that such a conversation had occurred. In context, this argument was another permissible reminder from a different perspective of how the victim had suffered and the nature of defendant's actions. *See State v. Tyler*, 346 N.C. 187, 206, 485 S.E.2d 599, 609 (speculation about what would have happened if a child had walked into his mother's murder scene held not grossly improper), *cert. denied*, 522 U.S. 1001, 139 L. Ed. 2d 411 (1997). This argument was not so grossly improper as to require the trial court to intervene *ex mero motu*.

[35] Defendant also contends that the State improperly accused defendant of being "a principal in a street gang" and asserted that the victim's death "was in fact a gang killing":

> [Defendant] comes to live with [his mother]. Was that the best thing? Who knows. But he comes to live with her, and at some point, he asserts himself. He starts making his own decisions. He starts running wild, the gang life. This culminates in November 8th, 2005 of the death of Lauren Redman.

Defendant argues that the "record was devoid of any evidence that [d]efendant was actually involved in any significant way in a street gang."

As noted above, in a closing argument in a criminal trial, "an attorney may not . . . make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice." N.C.G.S. § 15A-1230(a). " 'Counsel may, however, argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom.' " *Wilkerson*, 363 N.C. at 423, 683 S.E.2d at 199 (quoting *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709-10 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996)). The prosecutor did not argue that defendant had any significant involvement in a gang or that the killing was gang-related. The term "gang life" is shorthand for a lawless and unrestrained existence. Even so, defendant himself admitted to Dr. Hazelrigg that he had been involved in a gang for about three years. In addition, trial evidence indicated that defendant had been suspended from school

for his involvement in a snowball fight between the Bloods and an Hispanic gang. While the record is ambiguous as to whether defendant himself had flashed gang signs during the altercation, such signs were used by participants in the melee. Other evidence indicated that codefendant Sanderlin had been charged with recruiting potential members to join a gang. Thus, the prosecutor's statements were supported by evidence in the record and were not improper.

[36] In his final contention relating to the prosecutor's closing argument, defendant asserts that the prosecutor committed a gross impropriety when he argued that defense counsels' entire mitigation case was a "lie" based on "half-truths" and omitted information. The State argued that the defense had made defendant's mother the "fall guy" and that her failure to testify was deliberate because the defense did not want the jury to hear from her. The prosecutor summed up with the "[o]ld saying, a lie can travel halfway around the world while the truth is still putting on its shoes." While the prosecutor then qualified his argument by adding, "I'm not for a moment suggesting anyone in the world has intentionally deceived this jury, that's not what I'm suggesting," he subsequently reintroduced the theme that the defense had presented an incomplete picture:

> And then [defendant's] grandfather told you, he wanted to come back to Raleigh, the big city and all that entails. These are his decisions. Homeless by design.
>
> Again, half the truth equals a whole lie. Consider the fuller presentation of all the evidence.

As detailed above, counsel may argue the facts admitted into evidence as well as any reasonable inference that can be drawn therefrom. *Wilkerson*, 363 N.C. at 423, 683 S.E.2d at 199. Arguments against a defendant's mitigating circumstances are not an improper denigration of mitigating evidence, but constitute legitimate argument on the weight of that evidence. *State v. Robinson*, 336 N.C. 78, 129, 443 S.E.2d 306, 332 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995). However, we have also held that calling a witness or opposing counsel a liar when no evidence supports the epithet is a gross impropriety. *State v. Rogers*, 355 N.C. 420, 462-63, 562 S.E.2d 859, 885 (2002).

A closing argument is to be considered as a whole. *See Moseley*, 338 N.C. at 50, 449 S.E.2d at 442 (noting that a prosecutor's arguments are not to be reviewed in isolation and consideration must be

given to the context of the remarks and to the overall factual circumstances). At this point in his argument, the prosecutor's theme was that defendant's mitigating evidence failed to present a complete picture. Although defendant's mother had not been called to testify, at least eighteen of the sixty-eight mitigating circumstances submitted to the jury at sentencing related to defendant's mother and her deficiencies as a parent. The prosecutor acknowledged that there was evidence of abuse and neglect on her part while contending there was also evidence of her positive effort and involvement in defendant's life. Thus, the prosecutor properly asked the jury to consider the credibility of those testifying as well as the "fuller presentation of some of this proposed mitigation evidence."

Regarding defendant's homelessness, ample evidence in the record supported the prosecutor's contention that defendant was homeless "by design." Defendant never responded to an offer from his teacher to assist him with living accommodations. In 2004, the year defendant claimed homelessness, he spent no less than eighty days in jail and at least a month living at his grandparents' house. Although defendant declared he had been put out of his mother's home, interviews with family members indicated defendant did not want to follow the house rules. Accordingly, we find the prosecutor's argument appropriately drew inferences from properly admitted evidence and was not so grossly improper as to require the trial court to intervene *ex mero motu*.

[37] Defendant also asks that we find cumulative error in the prosecutor's closing argument. As discussed above, several of the prosecutor's arguments were not erroneous in any sense. The collective impact of other errors in the closing argument does not rise to the level of reversible error.

Next, we address defendant's argument that the trial court erred by refusing to give peremptory instructions on certain statutory mitigating circumstances. Specifically, during the charge conference defense counsel requested peremptory instructions on several statutory mitigating circumstances, including the following three: that "[t]he capital felony was committed while the defendant was under the influence of mental or emotional disturbance," pursuant to N.C.G.S. § 15A-2000(f)(2); that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired," pursuant to N.C.G.S. § 15A-2000(f)(6); and that "[t]he defendant aided in the apprehension of another capital felon," pursuant to N.C.G.S. § 15A-2000(f)(8). The

trial court declined to give the requested instructions peremptorily, but did provide nonperemptory instructions on each of these mitigating circumstances. Relating to the (f)(2) mitigating circumstance, the trial court also gave peremptory instructions regarding both the nonstatutory mitigating circumstance that "Byron Waring suffers from borderline intellectual functioning," which at least one juror found, and the nonstatutory mitigating circumstance that "Byron Waring suffers from right hemisphere brain dysfunction," which no juror found. One or more jurors found the (f)(6) and (f)(8) circumstances, but no juror found the (f)(2) circumstance.

[38] We have held that a " 'trial court should, if requested, give a peremptory instruction for any mitigating circumstance, whether statutory or nonstatutory, if it is supported by uncontroverted and manifestly credible evidence.' " *Maness*, 363 N.C. at 291, 677 S.E.2d at 815 (citation omitted); *State v. Gay*, 334 N.C. 467, 492-93, 434 S.E.2d 840, 854-55 (1993). Evidence supporting the (f)(2) and (f)(6) mitigating circumstances was presented by Dr. Hilkey, a psychologist, and Dr. Fozdar, a neuropsychiatrist, who testified on defendant's behalf. Dr. Hilkey stated that at the time of the crime, defendant was suffering from a cognitive disorder and personality disorder with schizotypal and dependent features. According to Dr. Hilkey, defendant also has borderline intellectual function that limits his ability to function and solve problems. Dr. Fozdar testified that defendant suffers from a neurodevelopmental and neuropsychiatric disorder that affects the right hemisphere of his brain, which regulates behavior and judgment. Dr. Fozdar explained that, as a result of this condition, defendant has impaired judgment and insight and has difficulty processing information, especially in stressful situations. Both of these experts testified that, in their opinion, defendant was under the influence of a mental or emotional disturbance at the time he committed the crime and that he lacked the capacity to conform his conduct to the requirements of the law.

However, this evidence was not uncontested. Other evidence presented during the guilt portion of the trial, the cross-examination of defendant's experts, and the rebuttal testimony presented on behalf of the State by Dr. Hazelrigg, all contradicted defendant's experts. Dr. Fozdar's acknowledgment that defendant knows right from wrong and concession that he did not believe defendant's disorder caused him to commit murder were at least somewhat inconsistent with his assessment that defendant's mental or emotional disturbance "influenced" the murder. Also, Dr. Hazelrigg, testifying for the State, contradicted the opinions of defendant's experts and did

not find any mental disorder or dysfunction that would interfere with defendant's ability to control his behavior or understand right from wrong. *See also State v. Duke*, 360 N.C. 110, 131-32, 623 S.E.2d 11, 25 (2005) (holding that the trial court correctly refused to give the jury a peremptory instruction on the (f)(2) mitigating circumstance when an expert testified about inconsistent diagnoses of the defendant, thereby making "evidence of [the] defendant's mental or emotional disturbance . . . not uncontroverted"), *cert. denied*, 549 U.S. 855, 166 L. Ed. 2d 96 (2006).

The trial court also noted that defendant's covering his hand with his sleeve as he picked up the knife was evidence contradicting defendant's argument that he was unable to appreciate the criminality of his conduct. The trial court further found that defendant's evidence that he prayed and asked for forgiveness after the murder was inconsistent with his decision initially to lie about his involvement. *See State v. Badgett*, 361 N.C. 234, 257-58, 644 S.E.2d 206, 219-20 (holding the trial court's refusal to submit the (f)(2) mitigating circumstance was appropriate when "[t]he events before, during, and after the killing suggest[] deliberation, not the frenzied behavior of an emotionally disturbed person" and that "[i]n particular, defendant's initial lies to police about his involvement in the murder and his washing and disposal of the murder weapon are especially relevant on the (f)(6) mitigator, because they tend to show that defendant fully appreciated the criminality of his conduct" (internal quotation and citations omitted) (first alteration in original)), *cert. denied*, 552 U.S. 997, 169 L. Ed. 2d 351 (2007). Because the evidence supporting submission of the (f)(2) and (f)(6) mitigating circumstances was not uncontroverted, the trial court did not err by refusing to instruct peremptorily.

In addition, the evidence supporting submission of the (f)(8) mitigating circumstance was not uncontroverted. Although some evidence supported defendant's claim that he aided in the apprehension of Sanderlin, other evidence indicated that defendant provided several different names and identities for the other man involved in the murder, led police officers on a wild goose chase in Apex, and stated that he was not going to snitch. Accordingly, the evidence that defendant aided in the apprehension of Sanderlin was not uncontroverted and the trial court did not err when it refused to give a peremptory instruction on the (f)(8) mitigating circumstance.

[39] Defendant next contends the trial court erred when it instructed the jury to consider, over his objection, whether he had

"no significant history of prior criminal activity," pursuant to N.C.G.S. § 15A-2000(f)(1). Defendant argues that this circumstance was not supported by the evidence and its submission invited ridicule by the prosecutor. Defendant originally submitted the (f)(1) mitigating circumstance at the charge conference, but later moved to withdraw it. The State argued against its withdrawal, contending that the trial court had a duty to offer the circumstance when the evidence supported it. The trial court reviewed several cases along with defendant's criminal history, then concluded the evidence supported submission of the mitigating circumstance.

The statute governing capital sentencing proceedings requires that:

> In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence . . . .

N.C.G.S. § 15A-2000(b). In the context of the (f)(1) mitigating circumstance, although this Court has long "held that the trial court has no discretion and must submit the statutory circumstance when sufficient supporting evidence is presented," *State v. Hurst*, 360 N.C. 181, 193, 624 S.E.2d 309, 319 (citation omitted), *cert. denied*, 549 U.S. 875, 166 L. Ed. 2d 131 (2006), we have also acknowledged that this particular mitigating circumstance paradoxically can be used to a defendant's disadvantage, as defendant argues happened here, *id.* at 195-97, 624 S.E.2d at 320-22. Accordingly, we review the trial court's decision whether to submit the (f)(1) mitigating circumstance in light of the whole record. *Id.* at 197, 624 S.E.2d at 322.

In *Hurst* we acknowledged that "[o]ur trial judges are capable of making sensible assessments." *Id.* Defendant's prior criminal activity consisted of breaking and entering a motor vehicle (a Class I felony) and several misdemeanors, including misdemeanor larceny, public disturbance, defrauding an innkeeper, trespassing, carrying a concealed weapon, and possession of marijuana. There was also evidence of unspecified theft activity, mostly at school. Because the evidence related to submission of (f)(1) was limited to minor offenses, the trial court reasonably determined that a rational jury could conclude that defendant had no significant history of criminal activity.

Therefore, the trial court did not err in submitting the (f)(1) statutory mitigating circumstance.

[40] Defendant also argues that the trial court erred in failing to give peremptory instructions as to nine nonstatutory mitigating circumstances. The jury was given nonperemptory instructions on each of these circumstances, but no juror found that any of the nine circumstances existed. While we have held that a trial court's failure to give a peremptory instruction is reviewed for error that is harmless beyond a reasonable doubt, *Gay*, 334 N.C. at 494, 434 S.E.2d at 855, we also have noted the "draconian" effect of this standard of review and the practical difficulties faced by judges who may be required to recall, at the end of a lengthy trial, evidence that supports a proposed mitigating circumstance along with any evidence that may contradict it, *Barden*, 356 N.C. at 376, 572 S.E.2d at 146.

The first circumstance on which defendant argues the trial court should have given a peremptory instruction is that "Byron Waring's mother took, during her pregnancy, medicine prescribed for her brother, became ill, and did not seek medical attention." The pertinent evidence indicates that defendant's grandmother testified that, while pregnant, defendant's mother took a "high power medicine" that had been prescribed for her brother's bronchitis. The medicine is not otherwise identified, and the only stated effect on defendant's mother was that it made her "act different" and "shake." It is not clear to us from the record how this evidence was mitigating or that the evidence was manifestly credible. Accordingly, the trial court did not err in failing to instruct peremptorily.

Next, defendant argues that the trial court erred in failing to instruct peremptorily on the nonstatutory mitigating circumstance that "Byron Waring needed special education services in elementary school but was mainstreamed and placed in an academic environment where the expectations exceeded his ability to perform." However, evidence was presented that defendant was tested before entering kindergarten and placed in a special class. As a result, that mitigating circumstance was not supported by uncontradicted evidence.

The next circumstance was that "Byron Waring had a negative self image at an early age." Because testimony was presented that defendant was an active and happy child, the evidence supporting this circumstance was not uncontradicted. This same evidence contradicted the mitigating circumstance that "Byron Waring began having chronic feelings of inadequacy and rejection at an early age."

[41] Defendant argues that peremptory instructions should have been given on a related group of circumstances regarding his mother: "Byron Waring's mother did not accept his cognitive impairment and intellectual deficits"; "Byron Waring's mother consistently sabotaged his ability to obtain psychiatric treatment"; "Byron Waring's mother consistently sabotaged his ability to obtain necessary mental health treatment"; "Byron Waring's mother would not allow him to take medications for his mental disabilities"; and "Byron Waring was repeatedly rejected by his mother throughout his life." Because defendant's mother did not testify, she appears to us only as projected by others. After a careful review of the evidence and the arguments made by defendant and the State, we conclude that the trial court erred in failing to instruct peremptorily that defendant's mother did not accept his deficits. The evidence regarding the other circumstances was controverted, and thus, no peremptory instruction was needed.

However, in light of the fact that several of the mitigating circumstances submitted by defendant relating to his mother were virtually identical in effect, the fact that peremptory instructions were given as to three other mitigating circumstances relating to defendant's mother, the fact that the jury failed to find mitigating effect as to those circumstances relating to defendant's mother where the court gave a peremptory instruction, and the fact that the jury failed to find seventeen of the nineteen non-statutory mitigating circumstances where the court gave a peremptory instruction, we conclude that the trial court's error in failing to give this particular instruction peremptorily was harmless beyond a reasonable doubt.

PRESERVATION ISSUES

Defendant raises nine additional issues that he concedes have previously been decided contrary to his position by this Court: (1) whether the short-form indictment was adequate to confer jurisdiction on the trial court to try defendant for first-degree murder; (2) whether the trial court erred by denying defendant's motion to prohibit the State from seeking and obtaining the death penalty against him; (3) whether the trial court plainly erred by instructing jurors they "may" consider mitigating circumstances rather than instructing them they "must" do so; (4) whether the trial court plainly erred by instructing the jury that it was to determine whether nonstatutory mitigating circumstances found by one or more jurors had mitigating value; (5) whether the trial court plainly erred in its instructions on mitigating circumstances in that the burden of proof is too vague to

be understood by jurors and the use of the term "satisfies you" imposes too high a burden on defendant, thereby precluding the jury from giving effect to all mitigating circumstances and violating the Eighth and Fourteenth Amendments to the Constitution of the United States; (6) whether the trial court plainly erred by instructing jurors that they had to be unanimous to impose a sentence of life imprisonment; (7) whether the trial court plainly erred by instructing the jury that it was required to determine that the mitigating circumstances were insufficient to outweigh the aggravating circumstances; (8) whether the trial court plainly erred by instructing the jury that it had a "duty" to find 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; and (9) whether the trial court plainly erred by failing to instruct the jury that the State was required to prove beyond a reasonable doubt that the mitigating circumstances were insufficient to outweigh the aggravating circumstances.

Defendant raises these issues for purposes of urging this Court to re-examine its prior holdings and to preserve them for federal review. We have considered defendant's arguments on these issues and conclude that defendant has demonstrated no compelling reason to depart from our prior holdings.

PROPORTIONALITY

[42] Finally, we consider whether the record supports the aggravating circumstances found by the jury, whether the death penalty "was imposed under the influence of passion, prejudice, or any other arbitrary factor," and whether defendant's "sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (2010).

The jury found all three aggravating circumstances submitted: that the murder was committed for pecuniary gain; that the murder was especially heinous, atrocious, or cruel; and that the murder was committed while defendant was engaged in the commission of a rape. The evidence presented by the State during its case in chief fully supports each of these aggravating circumstances. In addition, nothing in the record of this case suggests that defendant's sentence was imposed arbitrarily or under the influence of passion or prejudice.

Concerning the proportionality of defendant's death sentence, we note that, in addition to the aggravating circumstances, at least

one juror found four statutory mitigating circumstances and at least one juror found two of the fifty-nine nonstatutory mitigating circumstances. In addition, no juror found the catchall mitigating circumstance.

In determining proportionality "[w]e 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. at 254, 624 S.E.2d at 344 (citation omitted). However, 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 id.* at 253, 624 S.E.2d at 344.

The aggravating circumstances found by the jury here are among those most commonly present when a sentence of death has been found proportionate. *State v. Bacon*, 337 N.C. 66, 129-31, 446 S.E.2d 542, 577-79 (1994) (Exum, C.J. & Frye, J., dissenting), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995). Of the four aggravating circumstances that, standing alone, have supported a death sentence, *see id.* at 110 n.8, 446 S.E.2d at 566 n.8 (majority), two were found here, that is, that the murder was especially heinous, atrocious, and cruel; and that the murder was part of a course of conduct in which the defendant committed a violent crime against another person. Moreover, defendant invaded the victim's home, where she had a right to feel secure. *See State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). In addition, this Court has affirmed death sentences after proportionality review in cases in which a codefendant received a life sentence. *See State v. McNeill*, 349 N.C. 634, 655, 509 S.E.2d 415, 427 (1998) ("We note that the fact that a defendant is sentenced to death while a codefendant receives a life sentence for the same crime is not determinative of proportionality." (citations omitted)), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999).

This Court has determined that the death penalty was disproportionate in eight cases. *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*,

309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). Each of these cases is distinguishable from the case at bar. Defendant participated in a brutal, prolonged, and merciless killing. The sentence of death in this case is not disproportionate.

CONCLUSION

Defendant received a fair trial and sentencing proceeding. We find no prejudicial error in his conviction or sentence. In addition, we find that defendant's sentence of death is not disproportionate.

NO ERROR

MICHAEL KINLAW v. JOHN J. HARRIS, JR., M.D.

No. 20A10

(Filed 5 November 2010)

Enforcement of Judgments— IRA exemption—requirement to place withdrawn IRA funds in escrow

Although the Court of Appeals did not err by concluding that N.C.G.S. § 1C-1601(a)(9) exempts defendant's IRAs from plaintiff's judgment against defendant, it erred by vacating the trial court's order requiring defendant to place in escrow any funds he may withdraw from his IRAs. The trial court did not abuse its discretion in fashioning an equitable mechanism to determine the exempt status of defendant's future withdrawals from his IRAs when both parties consented to the escrow arrangement ordered and it was only on appeal that defendant disputed the mechanism to which he agreed before the trial court. The trial court had a reasonable basis to believe that a mechanism for monitoring the exempt status of those funds was necessary to protect the plaintiff's judgment claim.

Justice EDMUNDS concurring in part and dissenting in part.

Chief Justice PARKER and Justice TIMMONS-GOODSON joining in this concurring and dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —– N.C. App. ——, 689 S.E.2d

428 (2009), affirming in part and vacating in part an order entered on 21 July 2008 by Judge Gary L. Locklear in Superior Court, Robeson County. On 28 January 2010, the Supreme Court allowed plaintiff's petition for discretionary review of an additional issue. Heard in the Supreme Court 8 September 2010.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Steven C. Lawrence, for plaintiff-appellant.

McCoy Wiggins Cleveland & O'Connor PLLC, by Jim Wade Goodman, for defendant-appellee.

NEWBY, Justice.

This case presents the question whether the trial court erred by declaring defendant's individual retirement accounts ("IRAs") exempt from execution and by ordering that any future withdrawals from defendant's Fidelity IRAs comply with an escrow arrangement. We conclude that the trial court properly applied N.C.G.S. § 1C-1601(a)(9) and acted within its broad equitable power. Therefore, we affirm the holding of the Court of Appeals that N.C.G.S. § 1C-1601(a)(9) exempts defendant's IRAs from plaintiff's judgment against defendant. We reverse, however, the decision of the Court of Appeals vacating the trial court's order requiring defendant to place in escrow any funds he may withdraw from his IRAs, as discussed below.

On 3 May 2004, the trial court entered a judgment in this case awarding plaintiff $567,000.00 in compensatory and punitive damages. In response to a notice of rights to claim exempt property, on 9 June 2004, defendant moved to claim certain property as exempt from plaintiff's judgment. By order entered 16 July 2004, the trial court declared defendant's two Fidelity IRAs and other items exempt from the judgment. Later, plaintiff again attempted postjudgment collection, obtaining a writ of execution against certain property that included defendant's two IRAs. On 21 November 2007, defendant moved to vacate the writ of execution and confirm that his IRAs are exempt from execution.

At a hearing on 25 June 2008, the parties presented evidence that defendant's two Fidelity IRAs are held solely in his name as part of an equitable distribution agreement with his former spouse. Pursuant to this arrangement, defendant's former wife retained most of the nonexempt property, while defendant kept the couple's exempt property and a Beachcraft Bonanza airplane (which was subse-

quently sold and the proceeds applied toward payment of a Medicare fraud claim).

In addition to plaintiff's judgment against him, defendant owes the federal government approximately $320,000.00 for Medicare fraud. Defendant testified that in 2004 he withdrew $50,000.00 from one IRA and paid the entire amount to the federal government in partial settlement of the Medicare fraud claim. Defendant also testified that in 2005 he withdrew $55,555.55 from his other IRA, applied $5,555.55 to tax penalties, and paid the balance for "hospital costs and costs to the government." Throughout the hearing, defendant could not estimate the allocation of this withdrawal between the Medicare settlement and the personal hospital expenses. In his 19 May 2008 affidavit, defendant stated that the 2004 and 2005 withdrawals were used "to pay off extraordinary business and personal medical expenses" but that he has no further intentions of taking any other distributions from either of his IRAs "until [he] reach[es] the age when [he] can do so without incurral of penalty."

Plaintiff maintains that defendant knowingly attempted to make himself judgment proof through his equitable distribution arrangement. Plaintiff further argues that by making the two withdrawals, defendant changed the nature of the IRAs such that they are no longer exempt accounts. Defendant contends that despite these actions, the IRAs retain their exempt status.

While the parties disagree about the protected status of the IRAs, both agreed to a mechanism to allow prior review of any future withdrawals from defendant's IRAs. At the 25 June 2008 hearing, defendant's attorney stated that defendant would be willing to give plaintiff notice of any intended withdrawals from the IRAs on the condition that the trial court declare the IRAs exempt and rule that any purported levy by the sheriff is invalid. After discussion with plaintiff's attorney, defendant's attorney summarized the agreed-upon escrow requirement for the trial court:

> If [defendant] makes a withdrawal . . . from his IRA, the money immediately has to go into my trust account and it has to stay there. We must give [plaintiff's attorney] notice as soon as possible of the withdrawal. He will then have five business days to decide whether to contest the withdrawal or seek some declaration as to the status of that withdrawn money. And then we would both agree to have that matter resolved by the Court as expeditiously as possible.

At the conclusion of the hearing, the trial court orally declared the IRAs exempt, vacated plaintiff's writ of execution and accompanying levy, and endorsed the implementation of the escrow arrangement proposed by the parties. On 21 July 2008, the trial court entered a written order consistent with its oral declaration.

Both plaintiff and defendant appealed from the trial court's order. The Court of Appeals unanimously affirmed the portion of the trial court's order vacating plaintiff's writ of execution and held that under N.C.G.S. § 1C-1601(a)(9), defendant's IRAs are exempt from plaintiff's judgment. *Kinlaw v. Harris*, ––– N.C. App. ––, ––, 689 S.E.2d 428, 433 (2009). Additionally, the majority vacated the portion of the trial court's order requiring defendant to place any funds withdrawn from the IRAs in an escrow or other trust account for a determination of the funds' exempt status. *Id.* at ––, 689 S.E.2d at 433.

The dissenting judge disagreed with the majority's conclusion that withdrawals from IRAs are automatically exempt. *Id.* at ––, 689 S.E.2d at 435-39 (Ervin, J., concurring in part and dissenting in part). Although he agreed with the majority's observation that "IRAs are not analogous to checking accounts or other non-restricted accounts" from which an individual may draw freely, *id.* at ––, 689 S.E.2d at 431 (majority) (citing, *inter alia*, *Rousey v. Jacoway*, 544 U.S. 320, 327-28, 125 S. Ct. 1561, 1566-67, 161 L. Ed. 2d 563, 571-72 (2005)), the dissenting judge opined that the majority's holding would place no limits on expenditures from IRA accounts, *id.* at ––, 689 S.E.2d at 436 (Ervin, J.). Thus, according to the dissent, a debtor would be allowed to insulate funds within an exempt IRA and then use any withdrawn monies as the debtor desires, without threat of execution by creditors. *Id.* at ––, 689 S.E.2d at 436 (stating that funds withdrawn from an IRA could even be used to freely purchase luxury items such as cars, yachts, or vacation homes).

Rather, the General Assembly's " 'purpose in enacting N.C. Gen. Stat. § 1C-1601(a)(9) was *to protect a debtor's right to receive retirement benefits[.]*' " *Id.* at ––, 689 S.E.2d at 436 (quoting *In re Grubbs*, 325 B.R. 151, 154-55 (Bankr. M.D.N.C. 2005) (alteration in original) (emphasis added)). Accordingly, the dissent stated, "To the extent that Defendant seeks to use monies from his individual retirement accounts in ways which are not consistent with the purposes sought to be accomplished by N.C. Gen. Stat. § 1C-1601(a)(9), such monies should not be protected from the claim of creditors." *Id.* at ––, 689 S.E.2d at 439. The dissenting judge concluded that as case-by-case analysis is the only way to determine which withdrawals are entitled

to the protection of N.C.G.S. § 1C-1601(a)(9), the trial court did not err in ordering an escrow arrangement. *Id.* at ——, 689 S.E.2d at 439.

Plaintiff appealed to this Court as of right based on the dissenting opinion's conclusion that the trial court properly ordered the creation of an escrow arrangement that would enable the assessment of future withdrawals. We allowed discretionary review of whether defendant's IRAs are exempt from plaintiff's judgment claim.

Under N.C.G.S. § 1C-1601(a)(9), a debtor's individual retirement plans and any other plans treated as such, are exempt from execution by creditors. N.C.G.S. § 1C-1601(a)(9) (2009).[1] Plaintiff maintains that defendant's withdrawal of funds in 2004 and 2005 amounts to treating the IRAs in a manner inconsistent with the purpose of IRAs and the protections given under N.C.G.S. § 1C-1601(a)(9). As such, plaintiff contends that defendant's behavior invalidates the IRAs' exempt status. While we do not conclude that such a claim would never be successful, on the facts of this case the trial court properly determined that the corpus of each of defendant's IRAs continues to maintain its exempt status.

Turning to the escrow arrangement, this case does not require us to determine whether funds removed in a particular withdrawal lose their exempt status. Rather, we must decide whether under any circumstances funds withdrawn from an IRA could lose their exempt status. Given the text of N.C.G.S. § 1C-1601(a)(9), which focuses its protection on "retirement plans," and the reasoning employed by the dissenting judge at the Court of Appeals, we believe there may be some circumstances under which withdrawn funds are no longer exempt from execution. Because such a scenario is possible, we must now consider whether the trial court acted within its equitable power when it established an escrow arrangement to preserve the funds while it determines the exempt status of any withdrawal from defendant's IRAs.

Trial courts have broad discretion to fashion equitable remedies to protect innocent parties when injustice would otherwise result. *See Lankford v. Wright*, 347 N.C. 115, 120, 489 S.E.2d 604, 607 (1997) ("[I]t is the unique role of the courts to fashion equitable remedies to protect and promote the principles of equity . . . ."). This discretion includes the power to " 'grant, deny, limit, or shape' " relief as neces-

1. The Court of Appeals decision cites to N.C.G.S. § 1C-1601(a)(9) (2005). We cite to the current version of the statute, N.C.G.S. § 1C-1601(a)(9) (2009), though there is no substantive difference in the two versions.

sary to achieve equitable results. *Sara Lee Corp. v. Carter*, 351 N.C. 27, 36, 519 S.E.2d 308, 314 (1999) (citation omitted) (holding that the trial court properly exercised its discretion in ordering that the defendant's workers' compensation benefits be placed in a constructive trust for the benefit of the plaintiff). In fashioning an equitable remedy, the conduct of both parties must be weighed by the trial court. *Creech v. Melnik*, 347 N.C. 520, 529, 495 S.E.2d 907, 913 (1998) (citations omitted).

Because the fashioning of equitable remedies is a discretionary matter for the trial court, we review such actions under an abuse of discretion standard. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (stating that appellate review of matters left to the discretion of the trial court "is limited to a determination of whether there was a clear abuse of discretion") (citations omitted). When undertaking this review, we afford the trial court great deference and will upset its decision only upon a showing that its actions were "manifestly unsupported by reason." *Id.* (citing *Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980)). We may not substitute our own judgment for that of the trial court. *See Worthington v. Bynum*, 305 N.C. 478, 486-87, 290 S.E.2d 599, 604-05 (1982).

We hold that the trial court did not abuse its discretion in fashioning an equitable mechanism to determine the exempt status of defendant's future withdrawals from his IRAs. We note that the record shows that both parties consented to the escrow arrangement ordered. It is only on appeal that defendant disputes the mechanism to which he agreed before the trial court. As such, the trial court had a reasonable basis to believe that a mechanism for monitoring the exempt status of those funds is necessary to protect the plaintiff's judgment claim. The trial court was not only acting pursuant to its broad discretionary authority to administer an equitable remedy, but also at the request of both parties affected. When parties consent to a particular remedy, the court generally will enforce that remedy. *See generally*, *State v. Philip Morris USA Inc.*, 363 N.C. 623, 643, 685 S.E.2d 85, 97-98 (2009) (declining to modify a trust and enforcing the remedy to which the parties agreed); *White v. White*, 289 N.C. 592, 596, 223 S.E.2d 377, 380 (1976) (holding that "a court may enforce . . . its order, entered by consent, that child support payments may be made beyond the time for which there is a duty to provide support"). This is particularly true where parties have asserted one position before the court and subsequently attempt to advocate for an inconsistent position that unfairly disadvantages the opposing

party. *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 28-29, 591 S.E.2d 870, 888-89 (2004) (stating that judicial estoppel may apply where parties assert a position inconsistent with a previous position and an unfair advantage may result).

In conclusion, we hold the trial court acted correctly in declaring the corpus of each IRA to be exempt from execution and in fashioning an equitable mechanism to determine the exempt status of future withdrawals from defendant's IRAs. Accordingly, we affirm the Court of Appeals' decision to exempt from plaintiff's judgment the corpus of each of defendant's Fidelity IRAs. We reverse the decision of the Court of Appeals vacating the trial court's order requiring defendant to place in escrow any funds he may withdraw from his IRAs. We remand this case to the Court of Appeals for further remand to the Superior Court, Robeson County, for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Justice EDMUNDS concurring in part and dissenting in part.

While I agree with the majority that the Court of Appeals correctly affirmed the portion of the trial court's order vacating plaintiff's Writ of Execution and finding the corpus of defendant's IRA accounts exempt under N.C.G.S. § 1C-1601(a)(9), I believe that all withdrawals from an IRA are similarly exempt. Accordingly, the parties and the trial court lacked legal authority to set up and enforce their escrow agreement.

The issue before us is not whether the escrow agreement is a good idea or whether the parties were acting in good faith. The issue is whether the agreement between the parties and endorsed by the trial court is legal. Because I believe all withdrawals are exempt under N.C.G.S. § 1C-1601(a)(9), the trial court had no power, equitable or otherwise, to participate in an agreement that treats some withdrawals as exempt but others as subject to the claims of creditors.

IRA accounts are unquestionably exempt. The pertinent statute provides that:

> Each individual, resident of this State, who is a debtor is entitled to retain free of the enforcement of the claims of creditors:
>
> . . . .

> (9) Individual retirement plans as defined in the Internal Revenue Code and any plan treated in the same manner as an individual retirement plan under the Internal Revenue Code, including individual retirement accounts and Roth retirement accounts as described in section 408(a) and section 408A of the Internal Revenue Code, individual retirement annuities as described in section 408(b) of the Internal Revenue Code, and accounts established as part of a trust described in section 408(c) of the Internal Revenue Code.

N.C.G.S. § 1C-1601(a)(9) (2009). While this portion of the statute is silent as to the status of early withdrawals from an IRA, in another subdivision of the statute the General Assembly demonstrated its ability to differentiate assets when it provided that exempted funds include: "Alimony, support, separate maintenance, and child support payments or funds that have been received or to which the debtor is entitled, *to the extent the payments or funds are reasonably necessary for the support of the debtor or any dependent of the debtor*." *Id.* § 1C-1601(a)(12) (2009) (emphasis added). Thus, in the context of alimony funds received by a debtor, the General Assembly permitted some receipts covered by subdivision (a)(12) to be exempt, but not others. Under the doctrine of statutory interpretation that *expressio unius est exclusio alterius*, because the General Assembly differentiated the treatment of (a)(12) funds but not (a)(9) funds, it follows that all withdrawals from an IRA are exempt from creditors without qualification. *See In re Investigation of the Death of Miller*, 357 N.C. 316, 325, 327, 584 S.E.2d 772, 780, 781-82 (2003) (applying the doctrine); *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498-99 (1987) (same).

This interpretation is consistent with the intent of the statute. "[T]he North Carolina General Assembly's purpose in enacting N.C.[G.S.] § 1C-1601(a)(9) was to protect a debtor's right to receive retirement benefits . . . ." *In re Grubbs*, 325 B.R. 151, 154-55 (Bankr. M.D.N.C. 2005). Statutory exemptions should be given a liberal construction in favor of the debtor. *See Elmwood v. Elmwood*, 295 N.C. 168, 185, 244 S.E.2d 668, 678 (1978) ("The humane and beneficent provisions of the law in regard to exemptions, being remedial in their nature and founded upon a sound public policy, should always receive a liberal construction so as to embrace all persons coming fairly within their scope." (citations and quotation marks omitted)). This interpretation is also sound public policy. Escrow agreements of

the type employed in this case would not only subject debtors to litigation over every withdrawal from an IRA account, they would also entangle trial courts in the day-to-day supervision of those withdrawals. The substantial penalties for early withdrawals provide sufficient disincentive to discourage debtors from using an IRA as a ready source of exempt funds.

Defendant's appeal is not foreclosed by judicial estoppel. That doctrine, discussed in detail in *Whitacre Partnership v. Biosignia, Inc.*, 358 N.C. 1, 591 S.E.2d 870 (2004), is a "discretionary equitable doctrine" that effectively precludes a party from asserting inconsistent positions before a tribunal. *Id.* at 27-30, 591 S.E.2d at 887-89. Although the record does not indicate who initiated the proposed escrow agreement, both parties agreed to it on the record before the trial court. Nevertheless, plaintiff filed notice of appeal on 20 August 2008, while defendant did not respond with its notice of appeal until 29 August 2008. A discretionary doctrine of equity should not be invoked to deprive defendant of the right to defend his position after his opponent, who also agreed to the escrow arrangement, appealed.

The majority's holding both thwarts the General Assembly's intent to exempt retirement funds and puts trial courts in the untenable position of determining which withdrawals from a debtor's IRA represent legitimate retirement expenses. Accordingly, I respectfully dissent from that portion of the majority opinion reversing the opinion of the Court of Appeals.

Chief Justice PARKER and Justice TIMMONS-GOODSON join in this concurring and dissenting opinion.

BOSEMAN v. JARRELL

[364 N.C. 537 (2010)]

JULIA CATHERINE BOSEMAN, PLAINTIFF v. MELISSA ANN JARRELL, DEFENDANT AND MELISSA ANN JARRELL, THIRD-PARTY PLAINTIFF v. JULIA CATHERINE BOSEMAN AND NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, THIRD-PARTY PLAINTIFF

No. 416PA08-2

(Filed 20 December 2010)

1. Adoption— subject matter jurisdiction—unmarried couple—artificial insemination—prior parental rights not terminated

An adoption decree was void *ab initio* where the petition sought relief that does not exist under the North Carolina statutes. Plaintiff became an adoptive parent without the termination of defendant's relationship with the child after the unmarried couple planned and conceived their son through an anonymous sperm donor.

2. Child Support, Custody, and Visitation—custody—artificial insemination—voluntarily creating new family unit—best interests of child test

The trial court did not err by applying the best interests of the child standard in a custody decision where defendant and plaintiff were not married but decided to bring a child into their relationship through an anonymous sperm donor and acted together as parents to the child. Defendant intentionally and voluntarily created a family unit in which plaintiff acted as a parent, with no indication that defendant intended the family unit to be temporary.

Justice TIMMONS-GOODSON dissenting.

Justice HUDSON dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 681 S.E.2d 374 (2009), affirming in part, vacating in part, and remanding in part judgments and orders entered on 14 January 2008, 6 February 2008, 14 February 2008, 20 March 2008, and 16 April 2008, all by Judge Lillian B. Jordan in District Court, New Hanover County. Heard in the Supreme Court 8 September 2010.

Lea, Rhine & Rosbrugh, PLLC, by James W. Lea, III, Lori W. Rosbrugh, and Holli B. Newsome, for plaintiff/third-party defendant-appellee.

Ward and Smith, P.A., by John M. Martin and Leslie G. Fritscher, for defendant/third-party plaintiff-appellant.

Roy Cooper, Attorney General, by Mabel Y. Bullock, Special Deputy Attorney General, for North Carolina Department of Health and Human Services, third-party defendant-appellee.

Tami L. Fitzgerald, Lloyd T. Kelso, Julee T. Flood, and Deborah J. Dewart, for American College of Pediatricians, Christian Action League of North Carolina, North Carolina Family Policy Council, NC4Marriage, and Christian Family Law Association, amici curiae.

Tharrington Smith, L.L.P., by Jill Schnabel Jackson, for American Psychological Association, National Association of Social Workers, and North Carolina Chapter, National Association of Social Workers, amici curiae.

Gailor Wallis & Hunt PLLC, by Cathy C. Hunt, for Evan B. Donaldson Adoption Institute, National Center for Adoption Law and Policy, Barton Child Law & Policy Center, Center for Adoption Policy, and Katharine T. Bartlett, Naomi Cahn, June Carbone, Maxine Eichner, Joan Heifetz Hollinger, and Barbara Woodhouse, amici curiae.

Kenneth S. Broun, UNC School of Law, for Law Professors;[1] *and Ellen W. Gerber for North Carolina Association of Women Attorneys, amici curiae.*

McGuire Woods LLP, by Bradley R. Kutrow and Monica E. Webb; and Cleary Gottlieb Steen & Hamilton LLP, by Carmine D. Boccuzzi, pro hac vice, for North Carolina Chapter of American Academy of Pediatrics, amicus curiae.

Ellis & Winters, LLP, by Jonathan D. Sasser, for American Civil Liberties Union, American Civil Liberties Union of North Carolina Legal Foundation, Equality North Carolina Foun-

1. These professors are Jennifer Collins, Michael Kent Curtis, Shannon Gilreath, and Suzanne Reynolds, Wake Forest University School of Law; John Martin Conley, Maxine Eichner, Holning Lau, Gene R. Nichol, and Phillip A. Pucillo, University of North Carolina School of Law; Adrienne M. Fox, Susan E. Hauser, Lydia E. Lavelle, and Kia H. Vernon, North Carolina Central University School of Law; and Sonya Garza, Elon University School of Law.

dation, and Lambda Legal Defense and Education Fund, Inc., amici curiae.

Alliance Defense Fund, by Austin R. Nimocks, pro hac vice; and Law Offices of Keith A. Williams PA, by Keith A. Williams, for Family Research Council, amicus curiae.

NEWBY, Justice.

In this case we must determine the validity of an adoption decree entered in the Durham County District Court at the request of Wilmington residents. If the decree is invalid, we must also determine whether defendant acted inconsistently with her constitutionally protected, paramount parental status. Because the General Assembly did not vest our courts with subject matter jurisdiction to create the type of adoption attempted here, we hold that the adoption decree at issue is void *ab initio*. However, we also conclude that by intentionally creating a family unit in which defendant permanently shared parental responsibilities with plaintiff, defendant acted inconsistently with her paramount parental status. Thus, the District Court, New Hanover County, ("the trial court") did not err by utilizing the "best interest of the child" standard to make its custody award. As such, we reverse the Court of Appeals' decision that the adoption decree is valid and affirm as modified its conclusion leaving undisturbed the trial court's decision that the parties are entitled to joint custody of the child.

Plaintiff and defendant (collectively, "the parties") met in 1998. At that time, plaintiff lived in Wilmington, North Carolina, and defendant lived in Rhode Island. The first time they met, they "discussed their desires to have children." Roughly one month later, the parties began a romantic relationship. From the outset, the parties continued to voice their desires to have a child. In the spring of 1999, defendant moved from Rhode Island to Wilmington, and the parties began living together as domestic partners.

In May of 2000 the parties initiated the process of having a child. They decided that defendant would actually bear the child, but both parties would otherwise jointly participate in the conception process. The parties agreed to choose an anonymous sperm donor and researched and discussed the available options. They also attended the medical appointments necessary both to impregnate defendant and to address her prenatal care. Plaintiff read to the minor child "in the womb and played music for him." Plaintiff also cared for defendant during the pregnancy and was present for the delivery. Defendant

eventually gave birth to the minor child in October of 2002, and the parties jointly selected his first name.

Following the child's birth, the parties held themselves out as the parents of the minor child. They gave the minor child a hyphenated last name composed of both their last names. They also "had a baptismal ceremony for the child at the plaintiff's church during which they publicly presented themselves to family and friends as parents of the child." Further, each of the parties integrated the minor child into their respective families and each family accepted the minor child.

Within the home, the parties shared "an equal role" in parenting. Plaintiff's parenting skills were found to be "very attentive, very loving, hands on and fun." Defendant was found to be "very hands-on and patient in parenting" and to "reprimand[] [the minor child] by talking to him in a nice way." As a result of occupational responsibilities, each party was occasionally required to be temporarily away from their home. During such an absence, the party at home would care for the child. Moreover, the minor child treated each of the parties as a parent. The child refers to plaintiff as "Mom" and to defendant as "Mommy." As the trial court stated, the minor child "shows lots of love and respect for both parties." "Each party agrees that the other is and has been a good parent," and defendant even "testified that she thinks it is important for the plaintiff to be in" the minor child's life.

In 2004 the parties discussed the prospect of plaintiff adopting the minor child. The parties sought an adoption by which plaintiff would become a legal, adoptive parent while defendant would remain the minor child's legal, biological parent. According to defendant, in 2005 plaintiff stated "that she had 'found a way' " to adopt the minor child. Plaintiff informed defendant that the type of adoption they sought was "being approved in Durham County, NC."

Shortly thereafter, in June of 2005, the parties asked the District Court, Durham County, ("the adoption court") to make plaintiff an adoptive parent of the minor child while not also terminating defendant's relationship with the child. To accomplish their goal, the parties requested in the petition and accompanying motions that the adoption court not comply with (1) the statutory requirement under N.C.G.S. § 48-3-606(9) that defendant's written consent to the adoption contain an acknowledgment that the adoption decree would terminate her parental rights and (2) the statutory requirement of

N.C.G.S. § 48-1-106(c) that an adoption decree "severs the relationship of parent and child between the individual adopted and that individual's biological or previous adoptive parents." Defendant's consent to the adoption reiterated these conditions and was contingent on the non-enforcement of these statutory provisions.

On 10 August 2005, the adoption court agreed to the parties' request, determined defendant's limited consent was sufficient, and entered an adoption decree. The decree stated that it "effects a complete substitution of families for all legal purposes and establishes the relationship of parent and child . . . between . . . petitioner and the individual being adopted," while simultaneously "not sever[ing] the relationship of parent and child between the individual adopted and that individual's biological mother." After finding that the Division of Social Services would not index this type of adoption, the adoption court instructed the clerk "not . . . to comply with" a statutory requirement that the clerk of court transmit a copy of the adoption decree to the Division, instead ordering that the clerk "securely maintain this file in the clerk's office."

In May of 2006, the parties ceased their relationship. Subsequently, plaintiff, without being ordered to do so, continued to provide "most of the financial support for the partnership" and for the minor child. Nonetheless, defendant limited plaintiff's contact with the minor child following the parties' separation. She did so while admitting "that the plaintiff is a very good parent who loves [the minor child] and that [the minor child] loves [plaintiff]."

Relying in part on the adoption decree, plaintiff filed in the trial court a complaint and an amended complaint seeking custody of the minor child. In response, defendant attacked the adoption decree, arguing that it was void *ab initio*, and contended that plaintiff otherwise could not seek custody of the minor child.

The trial court ultimately awarded the parties joint legal custody of the minor child. That court did not reach the merits of defendant's contention regarding the validity of the Durham County adoption decree. The trial court reasoned that it did "not have jurisdiction to declare void" another District Court Judge's order entered in another judicial district in North Carolina. Thus, the court determined that plaintiff "is a parent of the minor child . . . in that the aforementioned Decree of Adoption has not been found to be void by this court or any other court." The court also concluded that "defendant has acted inconsistent with her paramount parental rights and responsibilities."

Then, after determining that the "parties are fit and proper persons to have custody of their minor son," the court applied the "best interest of the child" standard to conclude that the parties should have "joint legal custody of the minor child." Defendant appealed.

The Court of Appeals concluded that the adoption decree in this case is valid and left intact the trial court's custody determination. *Boseman v. Jarrell*, ––– N.C. App. –––, 681 S.E.2d 374 (2009). After reviewing Chapter 48 of our General Statutes, the Court of Appeals concluded that the adoption in this case comports with the "intent and purposes" of both our adoption law as a whole and "the specific provisions" of it at issue here. *Id.* at –––, 681 S.E.2d at 381. The Court of Appeals stated that N.C.G.S. § 48-2-607(a) prevents defendant from otherwise challenging the adoption decree's propriety, and, therefore, the decree causes plaintiff to be a legal parent of the minor child. *Id.* at –––, 681 S.E.2d at 381-82. The Court of Appeals also determined that plaintiff's status as a parent and the trial court's conclusion that the parties "are fit and proper persons for custody of the child, fully support [the trial court's] custody award." *Id.* at –––, 681 S.E.2d at 381. On 28 January 2010, we allowed defendant's petition for discretionary review of the Court of Appeals' decision.

[1] Defendant contends that a court is prohibited from choosing not to enforce the provisions of N.C.G.S. § 48-1-106(c) and N.C.G.S. § 48-3-606(9). Defendant argues that these provisions are mandatory in an adoption proceeding under Chapter 48 of our General Statutes. Because the adoption court crafted a remedy not recognized by the adoption statutes, defendant maintains that the adoption court lacked subject matter jurisdiction to enter the adoption decree at issue in this case, and the decree is, therefore, void *ab initio*. Plaintiff responds that the adoption court "was acting within its subject matter jurisdiction to preside over adoption proceedings" as set forth in N.C.G.S. § 48-2-100. Further, plaintiff asserts that, given the General Assembly's desire to have Chapter 48 "liberally construed and applied to promote its underlying purposes and policies," N.C.G.S. § 48-1-100(d) (2009), these statutory provisions do not have to be enforced in every adoption proceeding because they are designed only to protect the biological parent.

The law governing adoptions in North Carolina is wholly statutory. *Wilson v. Anderson*, 232 N.C. 212, 215, 59 S.E.2d 836, 839 (1950). "Adoption is a status unknown to common law . . . ." *Id.* Thus, to determine whether a court may proceed under Chapter 48 while choosing not to enforce the requirements of N.C.G.S. § 48-1-106(c)

and N.C.G.S. § 48-3-606(9), we must examine the text of our adoption statutes.

Through Chapter 48 of our General Statutes, our legislature has provided for three types of adoptions of minor children. The first is referred to as a "direct placement" adoption. N.C.G.S. § 48-3-202(a) (2009). In that type of adoption, our legislature envisioned a complete substitution of families. *Id.* § 48-1-106(a) (2009). A "parent or guardian must personally select a prospective adoptive parent," *id.* § 48-3-202(a), and is required to "execute a consent to the minor's adoption pursuant to [N.C.G.S. §§ 48-3-601 to 48-3-610]," *id.* § 48-3-201(b) (2009), acknowledging that the adoption will terminate the child's relationship with the parent, *id.* § 48-3-606(9) (2009). The second is referred to as an "[a]gency placement" adoption. *Id.* § 48-3-203 (2009). In such an adoption, the "agency may acquire legal and physical custody of a minor for purposes of adoptive placement only by means of a relinquishment pursuant to [N.C.G.S. §§ 48-3-701 to 48-3-707] or by a court order terminating the rights and duties of a parent or guardian of the minor." *Id.* § 48-3-203(a). The agency is then responsible for placing the minor for adoption. *See id.* § 48-3-203(b), (d). The third type is the stepparent adoption. *Id.* § 48-4-100 (2009). A stepparent is defined as "an individual who is the spouse of a parent of a child, but who is not a legal parent of the child." *Id.* § 48-1-101(18) (2009). Generally speaking, when a stepparent adopts the child of his or her spouse, the child must consent if twelve or more years of age, and the child's parents and any guardian must consent. *Id.* § 48-4-102 (2009). Indicating the comprehensive and limiting nature of this statutory procedure, the General Assembly has also explicitly provided for the adoption of adults, *id.* §§ 48-5-100 to 48-5-103 (2009), and the readoption by former parents of both adults and minors, *id.* §§ 48-6-100 to 48-6-102 (2009). According to plaintiff, the parties here presented a modified direct placement adoption that explicitly omitted the requirements of N.C.G.S. §§ 48-1-106(c) and 48-3-606(9).

In N.C.G.S. § 48-1-106, the General Assembly declared the "[l]egal effect of [a] decree of adoption" in a direct placement adoption. *Id.* § 48-1-106 (2009). That statute provides in pertinent part:

> (a) A decree of adoption effects a complete substitution of families for all legal purposes after the entry of the decree.
>
> (b) A decree of adoption establishes the relationship of parent and child between each petitioner and the individual being

> adopted. From the date of the signing of the decree, the adoptee is entitled to inherit real and personal property by, through, and from the adoptive parents in accordance with the statutes on intestate succession and has the same legal status, including all legal rights and obligations of any kind whatsoever, as a child born the legitimate child of the adoptive parents.
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> (c) A decree of adoption severs the relationship of parent and child between the individual adopted and that individual's biological or previous adoptive parents. After the entry of a decree of adoption, the former parents are relieved of all legal duties and obligations due from them to the adoptee, except that a former parent's duty to make past-due payments for child support is not terminated, and the former parents are divested of all rights with respect to the adoptee.

Id. § 48-1-106(a)-(c). With this statute the legislature provided, *inter alia*, that a direct placement adoption decree terminates the adoptee's relationship with his or her former parent or parents. *Id.* § 48-1-106(c).

The provisions of N.C.G.S. § 48-1-106 establish the relief that may be issued by a court in an adoption proceeding. The legislature instructed that in a direct placement adoption the court may issue only an adoption decree that "effects a complete substitution of families." *Id.* § 48-1-106(a). The General Assembly directed our courts to enter adoption decrees that "sever[] the [former] relationship of parent and child," *id.* § 48-1-106(c), and "establish[] the [new] relationship of parent and child," *id.* § 48-1-106(b). Our legislature expressly required the dictates of N.C.G.S. § 48-1-106 to be stated in a direct placement adoption decree. *Id.* § 48-2-606(a)(6) (2009) ("A decree of adoption *must state* at least . . . [t]he effect of the decree of adoption *as set forth in G.S. 48-1-106* . . . ." (emphasis added)). There is no language in our statutes authorizing the issuance of any other relief. Accordingly, direct placement adoption decrees issued under Chapter 48 must have the effect the General Assembly established in N.C.G.S. § 48-1-106.

Further, the legislature requires that when consenting to the direct placement adoption of their children, parents acknowledge the effect an adoption decree has on their rights and responsibilities. In N.C.G.S. § 48-3-606, titled "Content of consent; *mandatory provisions*," the legislature provides that a parent's consent to the adoption of her child

> must be in writing and state . . . [t]hat the individual executing the consent understands that *when the adoption is final, all rights and obligations of the adoptee's former parents or guardian with respect to the adoptee will be extinguished*, and every aspect of *the legal relationship between the adoptee and the former parent or guardian will be terminated.*

Id. § 48-3-606(9) (emphasis added). Thus, this statute ensures that a parent understands the direct placement adoption will totally sever her relationship with the child being adopted.

If " 'the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.' " *In re D.L.H.*, 364 N.C. 214, 221, 694 S.E.2d 753, 757 (2010) (citation omitted). This is especially true in the context of adoption, which is purely a creation of statute. *See Wilson*, 232 N.C. at 215, 59 S.E.2d at 839. With direct placement adoptions, the General Assembly stated in these statutes that an adoption decree must sever the former parent-child relationship. Further, the legislature included no language allowing for the issuance of a decree that does not fulfill this mandate. It did so despite allowing for the alteration of other provisions of Chapter 48. *See*, *e.g.*, N.C.G.S. § 48-3-501 (2009) ("*Unless the court orders otherwise*, when a parent . . . ." (emphasis added)); *id.* § 48-3-502(a) (2009) ("*Unless the court orders otherwise*, during a proceeding . . . ." (emphasis added)); *id.* § 48-4-101(3) (2009) (allowing a court to dispense with several specific statutory requirements "[f]or cause"). Because the General Assembly's chosen language in these statutes is clear and unambiguous, courts are without power to "liberally construe[]," *id.* § 48-1-100(d), that language. Accordingly, a court is without authority to disregard these statutes.

In N.C.G.S. § 48-2-100, titled "Jurisdiction," our General Assembly established prerequisites for our courts to obtain jurisdiction over adoption proceedings. *Id.* § 48-2-100 (2009). At the relevant time, that statute stated in pertinent part:

> (b) Except as provided in subsection (c) of this section, jurisdiction over adoption proceedings commenced under this Chapter exists if, at the commencement of the proceeding:
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> (1) The adoptee has lived in this State for at least the six consecutive months immediately preceding the filing of

the petition or from birth, and the prospective adoptive parent is domiciled in this State; or

(2) The prospective adoptive parent has lived in or been domiciled in this State for at least the six consecutive months immediately preceding the filing of the petition.

Id. § 48-2-100 (2005).[2] Thus, pursuant to the text of this statute, our courts have subject matter jurisdiction of adoption proceedings "commenced under" Chapter 48 of our General Statutes.

To commence an adoption proceeding under Chapter 48 of our General Statutes, a petitioner must be seeking an adoption available under Chapter 48. *See id.* § 48-2-301(a) (2009); *Wilson*, 232 N.C. at 215, 59 S.E.2d at 839 ("Adoption . . . can be accomplished only in accordance with provisions of statutes enacted by the legislative branch of the State government."). In defining both "[w]ho may adopt" and "[w]ho may be adopted," the legislature emphasized that adoptions may occur only as provided in Chapter 48. N.C.G.S. § 48-1-103 (2009) ("Any adult may adopt another individual *as provided in this Chapter* . . . ." (emphasis added)); *id.* § 48-1-104 (2009) ("Any individual may be adopted *as provided in this Chapter*." (emphasis added)). Further, under N.C.G.S. § 48-2-301, titled "Petition for adoption; who may file," the legislature provided only that "[a] prospective adoptive parent," someone who is attempting an adoption "provided in" Chapter 48, *id.* § 48-1-103, may file an adoption petition, *id.* § 48-2-301(a).

Plaintiff was not seeking an adoption available under Chapter 48. In her petition for adoption, plaintiff explained to the adoption court that she sought an adoption decree that would establish the legal relationship of parent and child with the minor child, but not sever that same relationship between defendant and the minor child. As we have established, such relief does not exist under Chapter 48. *Id.* §§ 48-1-106, 48-2-606(a)(6), 48-3-606(9). Because plaintiff was seeking relief unavailable under our General Statutes, the adoption proceeding at issue in this case was not "commenced under" Chapter 48 of our General Statutes. *Id.* § 48-2-100 (2005).

A court's subject matter jurisdiction over a particular case is invoked by the pleading. *In re K.J.L.*, 363 N.C. 343, 346-47, 677 S.E.2d 835, 837 (2009) (" 'The purpose . . . of the pleadings[is] to give juris-

2. The subsequent amendments to this statute are immaterial to our analysis. *See* N.C.G.S. § 48-2-100 (2009).

diction of the *subject matter* of litigation . . . .' " (quoting *Peoples v. Norwood*, 94 N.C. 144, 149, 94 N.C. 167, 172 (1886))). The adoption petition filed in this case explained that plaintiff was seeking relief unknown to our adoption law. As the petition sought relief that does not exist under our statutes, the petition did not invoke the adoption court's subject matter jurisdiction. All actions in the proceeding before the adoption court, including the entry of the decree, were therefore taken without subject matter jurisdiction. *See In re T.R.P.*, 360 N.C. 588, 593, 636 S.E.2d 787, 792 (2006) (determining that a court did not have subject matter jurisdiction over a subsequent custody review hearing since the court's subject matter jurisdiction was not invoked at the outset of a juvenile case). Accordingly, the adoption decree at issue in this case is void *ab initio*. *Id.* at 590, 636 S.E.2d at 790 (citations omitted).

Plaintiff contends that the legality of the adoption decree notwithstanding, defendant may no longer contest its validity. In support of this contention, plaintiff cites N.C.G.S. § 48-2-607(a), which states in part that "after the final order of adoption is entered, no party to an adoption proceeding nor anyone claiming under such a party may question the validity of the adoption because of any defect or irregularity, jurisdictional or otherwise, in the proceeding, but shall be fully bound by the order." *Id.* § 48-2-607(a) (2009). We note that the Court of Appeals rejected this argument in its opinion below, recognizing that this statute does not preclude a challenge to a court's subject matter jurisdiction. *Boseman*, —— N.C. App. at ——, 681 S.E.2d at 378 ("[T]he only avenue by which [defendant] can contest the adoption is to show that it was void *ab initio*, a legal nullity."). As we have long held, a void judgment has no legal effect; it is a legal nullity that may be challenged at any time. *In re T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790 (citation omitted); *Stroupe v. Stroupe*, 301 N.C. 656, 662, 273 S.E.2d 434, 438 (1981); *City of Monroe v. Niven*, 221 N.C. 362, 365, 20 S.E.2d 311, 313 (1942) ("The passage of time, however great, does not affect the validity of a judgment; it cannot render a void judgment valid." (citations and quotation marks omitted)); *Casey v. Barker*, 219 N.C. 465, 467-68, 14 S.E.2d 429, 431 (1941) (citations omitted); *Ellis v. Ellis*, 190 N.C. 418, 422, 130 S.E. 7, 9 (1925) (citation omitted); *Clark v. Carolina Homes, Inc.*, 189 N.C. 703, 708, 128 S.E. 20, 23-24 (1925) (citations omitted); *Carter v. Rountree*, 109 N.C. 21, 23, 109 N.C. 29, 32, 13 S.E. 716, 717 (1891).

Moreover, the General Assembly intended for N.C.G.S. § 48-2-607 to shield from further review only those decrees entered by courts

having subject matter jurisdiction. "It is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law." *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970) (citations omitted). " 'A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity,' " *In re T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790 (quoting *Burgess ex rel. Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964)), and without subject matter jurisdiction, "a court has no power to act," *id.* (citing *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956)). Because we assume the General Assembly enacted N.C.G.S. § 48-2-607 with full knowledge that subject matter jurisdiction "cannot be conferred upon a court by consent, waiver or estoppel," 360 N.C. at 595, 636 S.E.2d at 793 (citations and quotation marks omitted), the legislature's words "no party," "defect" and "irregularity" indicate that this statute is designed to foreclose challenges other than subject matter jurisdiction. *See* N.C.G.S. § 48-2-607(a). The adoption court in this case had no authority to act in a proceeding seeking relief unknown to Chapter 48. *See State v. Verrier*, 173 N.C. App. 123, 130, 617 S.E.2d 675, 680 (2005) ("It is outside the realm of this Court's function as the judiciary to modify statutory law."). Because the adoption court had no authority to act, N.C.G.S. § 48-2-607 does not apply to its decree.

The argument that the child will lose legal benefits if the adoption is not upheld must also be rejected. The record shows that this new form of judicially-created adoption may have been available only in Durham County and not available in the other counties of North Carolina. If our uniform court system is to be preserved, a new form of adoption cannot be made available in some counties but not all. This Court has the responsibility to ensure that the law is applied uniformly in all our counties. N.C. Const. art. IV. Accordingly, any best interests evaluation is limited to legal benefits that are equally available under the law to all children. *See State v. Holden*, 64 N.C. 702, 704, 64 N.C. 829, 831 (1870) ("The intention of the Legislature and the remedy aimed at are manifest, and under such circumstances it is the duty of Judges to give such an interpretation of the law as shall 'suppress the mischief and advance the remedy, putting down all subtle inventions and evasions for continuance of the mischief . . . and adding force and life to the cure and remedy, according to the true intent of the makers of the act . . . .' " (citation omitted)).

We recognize that many policy arguments have been made to this Court that the adoption in this case ought to be allowed.

However, adoption is a statutory creation. *Wilson*, 232 N.C. at 215, 59 S.E.2d at 839. Accordingly, those arguments are appropriately addressed to our General Assembly. Until the legislature changes the provisions of Chapter 48, we must recognize the statutory limitations on the adoption decrees that may be entered. Because the adoption decree is void, plaintiff is not legally recognized as the minor child's parent.

[2] We are now left with a custody dispute between a parent and a third party. The Court of Appeals did not pass upon this issue. The trial court, however, concluded that defendant "has acted inconsistent with her paramount parental rights and responsibilities" before determining that the parties "are fit and proper persons to have custody" of the minor child "and it is in the best interest of the child for the parties to have joint legal custody of him," providing an alternative basis for its custody decision. Defendant contends that the trial court erred by concluding that she has acted inconsistently with her constitutionally protected, paramount parental status. As defendant does not challenge the findings on which this decision is based, we review this conclusion de novo, *see Adams v. Tessener*, 354 N.C. 57, 65, 550 S.E.2d 499, 504 (2001), and determine whether it is supported by "clear and convincing evidence," *id.* at 63, 550 S.E.2d at 503 (citation omitted).

A parent has an "interest in the companionship, custody, care, and control of [his or her children that] is protected by the United States Constitution." *Price v. Howard*, 346 N.C. 68, 73, 484 S.E.2d 528, 531 (1997); *Petersen v. Rogers*, 337 N.C. 397, 400, 445 S.E.2d 901, 903 (1994). So long as a parent has this paramount interest in the custody of his or her children, a custody dispute with a nonparent regarding those children may not be determined by the application of the "best interest of the child" standard. *Price*, 346 N.C. at 79, 484 S.E.2d at 534 (citations omitted).

A parent loses this paramount interest if he or she is found to be unfit or acts inconsistently "with his or her constitutionally protected status." *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005). However, there is no bright line beyond which a parent's conduct meets this standard. *See Price*, 346 N.C. at 79, 484 S.E.2d at 534-35. As we explained in *Price*, conduct rising to the "statutory level warranting termination of parental rights" is unnecessary. *Id.* at 79, 484 S.E.2d at 534. Rather, "[u]nfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct . . . can also rise to this level

so as to be inconsistent with the protected status of natural parents." *Id.* at 79, 484 S.E.2d at 534-35.

As the trial court found, this is not a case in which the natural parent is unfit, or has abandoned or neglected the child. The trial court found that defendant is a fit parent with whom the minor child has a "very loving and respectful relationship." Accordingly, we must determine whether defendant has engaged in some other conduct inconsistent with her paramount parental status. Though determining whether the trial court erred is a fact-sensitive inquiry, we are guided in our analysis by decisions of this Court and the Court of Appeals.

In *Price v. Howard* we observed a custody dispute between a natural mother and a nonparent. The child in that case was born into a family unit consisting of her natural mother and a man who the natural mother said was the child's father. *Id.* at 83, 484 S.E.2d at 537 ("Knowing that the child was her natural child, but not plaintiff's, she represented to the child and to others that plaintiff was the child's natural father."). The mother "chose to rear the child in a family unit with plaintiff being the child's *de facto* father." *Id.*

After illustrating the creation of the family unit in *Price*, we focused our attention on the mother's voluntary grant of nonparent custody. *Id.* We stated:

> This is an important factor to consider, for, if defendant had represented that plaintiff was the child's natural father and voluntarily had given him custody of the child for an indefinite period of time with no notice that such relinquishment of custody would be temporary, defendant would have not only created the family unit that plaintiff and the child have established, but also induced them to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated.
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> However, if defendant and plaintiff agreed that plaintiff would have custody of the child only for a temporary period of time and defendant sought custody at the end of that period, she would still enjoy a constitutionally protected status absent other conduct inconsistent with that status.

Id. (citation omitted). Thus, under *Price*, when a parent brings a nonparent into the family unit, represents that the nonparent is a parent, and voluntarily gives custody of the child to the nonparent without creating an expectation that the relationship would be termi-

nated, the parent has acted inconsistently with her paramount parental status.

In *Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008), our Court of Appeals applied our decision in *Price* to facts quite similar to those in the case *sub judice*. In *Mason* the parties "jointly decided to create a family and *intentionally* took steps to identify [the nonparent] as a parent of the child." *Id.* at 222, 660 S.E.2d at 67. These steps included "using both parties' surnames to derive the child's name, allowing [the nonparent] to participate in the pregnancy and birth, [and] holding a baptismal ceremony at which [the nonparent] was announced as a parent." *Id.* at 222-23, 660 S.E.2d at 67. After the child's birth, the parties acted as a family unit. *Id.* at 223, 660 S.E.2d at 67. They shared "caretaking and financial responsibilities for the child." *Id.* As a result of the parties' creation, the nonparent "became the only other adult whom the child considers a parent." *Id.* (internal quotation marks omitted).

The parent in that case also relinquished custody of the minor child to the nonparent with no expectation that the nonparent's relationship with the child would be terminated. *Id.* The parent "chose to share her decision-making authority with [the nonparent]." *Id.* The parent also executed a "Parenting Agreement" in which she "agreed that [the nonparent] should participate in making 'all major decisions regarding their child.' " *Id.* In that document the parent also stated that

> she and [the nonparent] had committed to "jointly parent" the child; that [the parent] would consent to [the nonparent]'s adoption of the child if allowed by North Carolina law; that "although [the nonparent] is not the biological mother, she is a *de facto* parent who has and will provide the parties' child with a stable environment and she has formed a psychological parenting relationship with the parties' child;" that the child's relationship with [the nonparent] "should be protected and promoted to preserve the strong emotional ties that exist between them;" and that the purpose of the document was to make provisions for the continuation of the relationship should [the parties] cease to live together.

190 N.C. App. at 224, 660 S.E.2d at 67-68. As such, the natural parent created along with the nonparent a family unit in which the two acted as parents, shared decision-making authority with the nonparent, and manifested an intent that the arrangement exist indefinitely.

The Court of Appeals recognized that the degree of custody relinquishment in *Mason* differed from that in *Price*. *Id.* at 225, 660 S.E.2d at 68. In *Price*, though there remained a factual issue regarding whether the relinquishment was intended to be only temporary, the natural parent completely relinquished custody of the child for some period of time. 346 N.C. at 82-83, 484 S.E.2d at 536-37. In *Mason*, on the other hand, the natural parent did not completely relinquish custody. 190 N.C. App. at 225, 660 S.E.2d at 68. However, the natural parent in *Mason* did completely relinquish her paramount parental right to make decisions regarding her child by voluntarily "sharing decision-making" authority with the nonparent. *Id.* at 225, 660 S.E.2d at 68-69. After observing this difference in degree, the Court of Appeals explained, and we think rightly so, that the similarity in both cases is that if a parent cedes paramount decision-making authority, then, so long as he or she creates no expectation that the arrangement is for only a temporary period, that parent has acted inconsistently with his or her paramount parental status. *See id.* at 225-28, 660 S.E.2d at 68-70.

The record in the case *sub judice* indicates that defendant intentionally and voluntarily created a family unit in which plaintiff was intended to act—and acted—as a parent. The parties jointly decided to bring a child into their relationship, worked together to conceive a child, chose the child's first name together, and gave the child a last name that "is a hyphenated name composed of both parties' last names." The parties also publicly held themselves out as the child's parents at a baptismal ceremony and to their respective families. The record also contains ample evidence that defendant allowed plaintiff and the minor child to develop a parental relationship. Defendant even "agrees that [plaintiff] . . . is and has been a good parent."

Moreover, the record indicates that defendant created no expectation that this family unit was only temporary. Most notably, defendant consented to the proceeding before the adoption court relating to her child. As defendant envisioned, the adoption would have resulted in her child having "two legal parents, myself and [plaintiff]." In asking the adoption court to create such a relationship, defendant represented that she and plaintiff "have raised the [minor child] since his birth and have jointly and equally provide[d] said child with care, support and nurturing throughout his life." Defendant explained to the adoption court that she "intends and desires to co-parent with another adult who has agreed to adopt a child and share parental responsibilities." Thus, defendant shared parental responsibilities

with plaintiff and, when occurring in the family unit defendant created without any expectation of termination, acted inconsistently with her paramount parental status. The record contains clear and convincing evidence in support of that conclusion.

The Court of Appeals erred in determining that the adoption decree at issue in this case is valid. We hold that the decree is void *ab initio* and that plaintiff is not a legally recognized parent of the minor child. However, because defendant has acted inconsistently with her paramount parental status, the trial court did not err by employing the "best interest of the child" standard to reach its custody decision. Thus, we reverse the Court of Appeals' decision regarding the validity of the adoption decree and affirm as modified its conclusion leaving undisturbed the trial court's custody award. We remand this case to the Court of Appeals for further remand to the trial court for actions not inconsistent with this opinion.

MODIFIED AND AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Justice TIMMONS-GOODSON dissenting.

> [A]fter the final order of adoption is entered, no party to an adoption proceeding nor anyone claiming under such a party may question the validity of the adoption because of any defect or irregularity, *jurisdictional or otherwise*, in the proceeding, but shall be fully bound by the order.

N.C.G.S. § 48-2-607(a) (2009) (emphasis added).

Because Melissa Ann Jarrell is statutorily barred from challenging the adoption decree, I dissent.

The legislature identified two narrow situations when challenges are allowed, and neither permits Jarrell's challenge. *Id.* First, Jarrell did not appeal within thirty days of the final adoption decree. *Id.* § 48-2-607(b) (2009). Second, she failed to move to set aside the decree within six months of a discovery that her consent to the adoption was obtained by fraud or duress. *Id.* § 48-2-607(c) (2009). Instead, Jarrell challenged the adoption nearly two years after entry of the final adoption decree. This she cannot do. The plain language of N.C.G.S. § 48-2-607(a) bars her claim.

This Court must respect the statutory limitations imposed by the legislature and should not reach substantive issues not before it. The

legislature determined it to be in the best interest of minors that adoptions be final, *see id.* §§ 48-1-100(b)(1) (2009), 48-2-607(a), and allowed challenges in narrow circumstances, none of which are satisfied in this case. The wisdom of these restrictions to adoption challenges is an issue for the legislature to decide, not this Court. And if the members of our General Assembly wish to modify these restrictions, it is their prerogative and role to do so.

Justice HUDSON dissenting.

Today a majority of this Court acts contrary to explicit statutory language and legislative intent in order to achieve this outcome. Because I am not willing to read into statutes language that simply is not there, I dissent.

By its unambiguous language, the General Assembly has emphasized the overriding legislative goals of promoting the finality of adoptions and making primary the best interests of the child when construing Chapter 48. N.C.G.S. § 48-1-100 (2009). To that end, a final adoption decree that was not appealed may be set aside at a date as late as the one here only if the natural parent shows by clear and convincing evidence within six months of the reasonable date of discovery that his or her consent was obtained by fraud or duress. *Id.* § 48-2-607(c) (2009). Defendant Melissa Ann Jarrell has made no such allegations, and indeed, the record plainly shows her active, informed, and voluntary consent to plaintiff Julia Boseman's adoption of the minor child. As such, defendant can present no serious argument that any provision in Chapter 48 would authorize a court to set aside the adoption after the passage of so much time.

Instead, defendant contends that the adoption is void *ab initio*, despite conceding that the jurisdictional requirements set forth in N.C.G.S. § 48-2-100 were fully satisfied here. According to defendant, in reasoning largely adopted by the majority opinion, the trial court stripped itself of subject matter jurisdiction by exceeding its statutory authority under Chapter 48 when it allowed defendant to waive the provisions in N.C.G.S. § 48-1-106(c) (stating that a legal effect of an adoption decree is to sever the relationship between the adoptee and his natural parents) and § 48-3-606(9) (requiring the natural parent's consent to include a recognition that the adoption decree will terminate all parental rights with respect to the minor child). Defendant offers no authority for this approach to subject matter jurisdiction, and I have found none. Instead, the majority opinion

today creates an entirely new formulation of the law of subject matter jurisdiction.

The underlying premise of the majority's holding, that the trial court was not authorized under Chapter 48 to waive the provisions of N.C.G.S. § 48-1-106(c) and § 48-3-606(9) concerning termination of defendant's parental rights, at most could amount to an error of law. Our case law makes clear that any such error would neither divest the trial court of, nor even implicate, its subject matter jurisdiction or authority to grant the relief sought by the parties, namely, plaintiff's adoption of the minor child. As such, I conclude that the adoption decree was not void, but merely voidable and subject to the statutory time limits for appeal. Because this challenge is time-barred, I would affirm the Court of Appeals.

When outlining the general adoption procedure in Chapter 48, the General Assembly specifically included a section titled "Jurisdiction," which states in pertinent part:

> (b) Except as provided in subsection (c) of this section, *jurisdiction over adoption proceedings commenced under this Chapter exists* if, at the commencement of the proceeding:
>
> (1) The adoptee has lived in this State for at least the six consecutive months immediately preceding the filing of the petition or from birth, and the prospective adoptive parent is domiciled in this State; or
>
> (2) The prospective adoptive parent has lived in or been domiciled in this State for at least the six consecutive months immediately preceding the filing of the petition.

Id. § 48-2-100 (2005) (emphasis added).[3] These are the only statutory requirements before a North Carolina court may exercise jurisdiction over adoption proceedings. Here the trial court found as fact, properly affirmed by the Court of Appeals, that plaintiff, defendant, and the minor child all fulfilled the North Carolina residency requirements necessary to establish the trial court's subject matter jurisdiction over the adoption under N.C.G.S. § 48-2-100. No party disputes

3. This statutory language was in effect when the petition for adoption was filed in this case, and subsequent amendments to remove barriers to adoption of North Carolina children by residents of other states, *see* Act. of Oct. 1, 2007, ch. 151, sec. 2, 2007 N.C. Sess. Laws 255, 255-56; N.C.G.S. § 48-2-100 (2009), do not affect my analysis here.

that these statutory requirements were met, or challenges the trial court's personal jurisdiction over the parties.

The majority acknowledges that the General Assembly specifically enacted a section in Chapter 48 entitled "Jurisdiction" and that those requirements were fully met here. The majority then reads into that section an additional requirement that does not actually appear in Chapter 48, to wit: that the trial court may not enter an order waiving certain statutory provisions. Based upon this new requirement, the majority then determines that the district court divested itself of jurisdiction by entering such an order, even though the statutory requirements for jurisdiction were satisfied. As such, reasons the majority, this adoption decree is void *ab initio* rather than potentially voidable for error. This new approach to subject matter jurisdiction—to ignore the statutory requisites and instead create our own—runs counter to the language of N.C.G.S. § 48-2-100, and decades of jurisprudence on subject matter jurisdiction. Indeed, had the General Assembly intended such a requirement, the "Jurisdiction" section makes obvious that legislators are more than capable of drafting it.

The Court's holding today implies that a court may be stripped of subject matter jurisdiction by its own action, a conclusion inconsistent with long-standing case law:

> Once the jurisdiction of a court . . . attaches, the general rule is that it will not be ousted by subsequent events. . . . Jurisdiction is not a light bulb which can be turned off or on during the course of the trial. Once a court acquires jurisdiction over an action it retains jurisdiction over that action throughout the proceeding. . . . If the converse of this were true, it would be within the power of the defendant to preserve or destroy jurisdiction of the court at his own whim.

See In re Peoples, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978) (third alteration in original) (citations and internal quotation marks omitted), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). Moreover, if the trial court lacked jurisdiction *ab initio*, then the order defendant now uses to challenge the validity of the adoption must itself be void and of no effect. As such, that order could not serve as the basis for successfully challenging the jurisdiction of the court. In holding that the order does so serve, the majority adopts circular reasoning and has allowed this defendant to "destroy jurisdiction of the court at

[her] own whim," by asking the district court to enter the order she now claims deprived it of jurisdiction.[4] *Id.*

In my view, defendant's arguments that the adoption is void *ab initio*, making it "a nullity [which] may be attacked either directly or collaterally," *State v. Sams*, 317 N.C. 230, 235, 345 S.E.2d 179, 182 (1986) (citations omitted), must necessarily fail in light of the long-established rule that "[a]n order is void *ab initio* only when it is issued by a court that does not have jurisdiction," *id.*; *see also Travis v. Johnston*, 244 N.C. 713, 719-20, 95 S.E.2d 94, 99 (1956) ("To have validity a judgment must be rendered by a court which has authority to hear and determine the questions in dispute and control over the parties to the controversy or their interest in the property which is the subject matter of the controversy. When these tests are met, the judgment rendered by the court is not void." (citations omitted)).

A judgment is not rendered void *ab initio*, nor is a trial court divested of subject matter jurisdiction or authority to enter a judgment, because of a failure to follow proper procedure or even because of an error of law. *See Ellis v. Ellis*, 190 N.C. 418, 422, 130 S.E. 7, 9 (1925) (noting "the established principle that where the court has jurisdiction of both the subject-matter and the parties and acts within its power, the binding force and effect of a judgment is not impaired because the same has been erroneously allowed, though the error may be undoubted and apparent on the face of the record" (citations omitted)); *Peoples v. Norwood*, 94 N.C. 162, 166, 94 N.C. 167, 172 (1886) ("[W]hen the parties are voluntarily before the [c]ourt, and . . . a judgment is entered in favor of one party and against another, such judgment is valid, although not granted according to the orderly course of procedure." (citations omitted)).

While a void judgment "is in legal effect no judgment," as "[i]t neither binds nor bars any one, and all proceedings founded upon it are worthless," *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956) (citation and quotation marks omitted), "[a]n erroneous judgment should be corrected by appeal or *certiorari*," *Ellis*, 190 N.C. at 422, 130 S.E. at 9; *see also Daniels v. Montgomery*

4. Although not argued here, this Court in an unrelated case has applied the doctrine of judicial estoppel to bind a party to a settlement he acknowledged (unsworn) in open court and later refused to perform. *Powell v. City of Newton*, —— N.C. ——, —— S.E.2d —— (2010) (No. 482A09). The Court of Appeals and ultimately this Court applied the doctrine even though it was not argued in the trial court or the Court of Appeals. Here, Jarrell sought, in a verified pleading, the order she now repudiates, arguably an even clearer scenario in which to apply estoppel.

Mut. Ins. Co., 320 N.C. 669, 676, 360 S.E.2d 772, 777 (1987) (" 'An irregular order, one issued contrary to the method of practice and procedure established by law, is voidable.' . . . An erroneous order may be remedied by appeal; it may not be attacked collaterally." (citations omitted)); *Worthington v. Wooten*, 242 N.C. 88, 92, 86 S.E.2d 767, 770 (1955) (stating that a judgment, "even if irregular or even erroneous was binding on the parties, unless set aside or reversed on appeal . . . provided the court had jurisdiction of the person and the subject matter." (citations omitted)); *see also Sawyer v. Slack*, 196 N.C. 697, 146 S.E. 864 (1929) (holding that, partly because of the strong public policy in favor of marriage and maintaining familial relationships and rights, the marriage of an underage female without the parental consent required by statute was not void but voidable).

The time limits for appeal or challenge to this adoption must be read in accordance with the General Assembly's forceful statement of legislative intent in the opening section of Chapter 48, notably not mentioned in the majority opinion:

> **Legislative findings and intent; construction of Chapter**
>
> (a) The General Assembly finds that it is in the public interest to establish a clear judicial process for adoptions, *to promote the integrity and finality of adoptions*, *to encourage prompt, conclusive disposition of adoption proceedings*, and to structure services to adopted children, biological parents, and adoptive parents that will provide for the needs and protect the interests of all parties to an adoption, particularly adopted minors.
>
> (b) With special regard for the adoption of minors, the General Assembly declares as a matter of legislative policy that:
>
> (1) The *primary purpose* of this Chapter is to advance the welfare of minors by (i) *protecting minors from unnecessary separation from their original parents*, (ii) facilitating the adoption of minors in need of adoptive placement by persons who can give them love, care, security, and support, (iii) protecting minors from placement with adoptive parents unfit to have responsibility for their care and rearing, and (iv) *assuring the finality of the adoption*; and
>
> (2) Secondary purposes of this Chapter are (i) to protect biological parents from ill-advised decisions to relinquish a child or consent to the child's adoption, (ii) to protect

> adoptive parents from assuming responsibility for a child about whose heredity or mental or physical condition they know nothing, (iii) to protect the privacy of the parties to the adoption, and (iv) to discourage unlawful trafficking in minors and other unlawful placement activities.

N.C.G.S. § 48-1-100 (emphases added); *see also In re Adoption of Anderson*, 360 N.C. 271, 275-76, 624 S.E.2d 626, 628 (2006) (noting that "the General Assembly recognized the public interest in establishing a clear judicial process for adoptions" and "promoting the integrity and finality of adoptions" (citation, internal quotation marks, and brackets omitted)).

Consistent with its legislative intent "to establish a clear judicial process for adoptions," including the "prompt, conclusive disposition of adoption proceedings," *id.* § 48-1-100(a), and its primary purpose of "assuring the finality of" adoptions, *id.* § 48-1-100(b)(1), the General Assembly mandated carefully delineated time limits and circumstances for appeals or challenges to a final adoption. Direct appeal of an adoption decree entered by a district court judge is allowed if filed within thirty days after the adoption becomes final, *id.* § 48-2-607(b) (2009), or within six months of the time a natural parent's consent or relinquishment "was obtained" or "ought reasonably to have been discovered" to have been obtained "by fraud or duress," *id.* § 48-2-607(c). A natural parent may also revoke his or her consent within seven days of a consent to adoption, *id.* § 48-3-608(a) (2009), or within five days after receipt of a preplacement assessment in a direct placement adoption, *id.* § 48-3-608(b) (2009). A consent is void if clear and convincing evidence establishes that it was obtained by fraud or duress, or if the parties mutually agree to set it aside, if the petition to adopt is voluntarily dismissed with prejudice, or if the court dismisses the petition to adopt and either no appeal is taken or the dismissal is affirmed on appeal and all appeals have been exhausted. *Id.* § 48-3-609(a) (2009).

Outside these specific situations, however, the General Assembly explicitly prohibits any challenge after a final order of adoption is entered. Through the unequivocal language of the section of Chapter 48 titled "Appeals," the legislature has established its preference for the finality of adoptions over correcting procedural irregularities:

> (a) Except as provided in subsections (b) and (c) of this section, *after the final order of adoption is entered, no party to an adoption proceeding nor anyone claiming under such a party*

> *may question the validity of the adoption because of any defect or irregularity, jurisdictional or otherwise, in the proceeding, but shall be fully bound by the order.* No adoption may be attacked either directly or collaterally because of any procedural or other defect by anyone who was not a party to the adoption. The failure on the part of the court or an agency to perform duties or acts within the time required by the provisions of this Chapter shall not affect the validity of any adoption proceeding.

Id. § 48-2-607(a) (2009) (emphasis added).[5] This strong preference is further evidenced in provisions that sanction final adoption decrees despite omissions of required information and vesting courts with a certain degree of leeway to determine compliance with statutory requirements. *See, e.g.*, *id.* § 48-2-306(b) (2009) ("After entry of a decree of adoption, omission of any information required [to be in the adoption petition, including consent and/or relinquishments] by G.S. 48-2-304 and G.S. 48-2-305 *does not invalidate the decree*." (emphasis added)); *id.* § 48-2-603(a)(4) (2009) (providing that, at the hearing on or "[e]ach necessary consent, relinquishment, waiver, or judicial order terminating parental rights, has been obtained and filed . . . and the time for revocation has expired").

Here, despite the passage of so much time, defendant would have us invalidate the adoption decree, even though she expressly consented to any irregularity, and even though taking such action is contrary to statutory language prioritizing finality over strict procedural compliance. Defendant first sought to challenge plaintiff's adoption of the minor child in a custody proceeding in May 2007, nearly two years after the final adoption decree was entered in August 2005, and well after expiration of the time limits for an appeal specified in N.C.G.S. § 48-2-607. The waivers she now disclaims should fall squarely within the General Assembly's prohibition against untimely

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5. Citing to, but not quoting, this statute, the majority maintains that "the legislature's words 'no party,' 'defect' and 'irregularity' indicate that this statute is designed to foreclose 'waivable' challenges in a court with subject matter jurisdiction." I reiterate that statement here, while including the actual statutory language, to highlight that the majority must necessarily read words (at least the word "waivable") into N.C.G.S. § 48-2-607, while ignoring the words "any" and "fully bound," as well as the lack of a qualifier for "jurisdictional," in order to reach its interpretation of this purported legislative intent.

This approach is at odds with the majority's reliance on *In re D.L.H.*, which states the maxim that when a statute is clear and unambiguous, "there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." 364 N.C. 214, 221, 694 S.E.2d 753, 757 (2010) (citation omitted).

appeals claiming "any defect or irregularity, jurisdictional or otherwise." *Id.* § 48-2-607(a). Nothing in the statutory language itself supports defendant's position, or the majority's endorsement of it. Rather, such a holding is contrary to the unequivocally stated primary legislative goal of assuring the finality of adoptions.[6]

The holding here likewise runs afoul of the General Assembly's categorical directive that Chapter 48 be construed in a manner to ensure that "the needs, interests, and rights of minor adoptees are *primary*." N.C.G.S. § 48-7-100(c) (emphasis added). Moreover, the legislature has instructed that "[a]ny conflict between the interests of a minor adoptee and those of an adult *shall be resolved in favor of the minor*," *id.* (emphasis added), and Chapter 48 should be "liberally construed and applied to promote its underlying purposes and policies," N.C.G.S. § 48-1-100(d), such as "the integrity and finality of adoptions" and the "prompt, conclusive disposition of adoption proceedings," *id.* § 48-1-100(a).

These provisions are plain and unambiguous, and appear in statutory text. By contrast, there is neither an explicit prohibition against, nor an explicit authorization of, the waivers at issue here. In the absence of any statutory language indicating legislative intent regarding these waivers, we must be guided by the legislative priorities we do know and thus act to safeguard the best interests of this child by barring this late challenge and promoting the finality of this adoption. Reading into Chapter 48 a jurisdictional requirement that is not there, the majority overlooks the interests of this child and promotes defendant's rights over those of the child, in direct contravention of the law as written.

CONCLUSION

The majority decision here is at odds with the timetables and express intent of Chapter 48, as well as prior case law on the finality of adoptions. I would hold that at all pertinent times the trial court had jurisdiction, that this appeal is time-barred, and that the adoption decree must stand. Accordingly, I would affirm the Court of Appeals.

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6. I note as well that this Court has previously considered, and rejected, untimely challenges to final adoption decrees that assert the decree is void for lack of jurisdiction. *See Hicks v. Russell*, 256 N.C. 34, 40-41, 123 S.E.2d 214, 219 (1961); *see also Fakhoury v. Fakhoury*, 171 N.C. App. 104, 613 S.E.2d 729 (rejecting as irrelevant due to the untimeliness of the appeal the argument that "public policy opposes a stepparent adoption when the stepparent, at the time of filing the petition for adoption, does not intend to stay in the marriage with the legal parent"), *disc. rev. denied*, 360 N.C. 62, 621 S.E.2d 622 (2005).

JAMES W. POWELL, JR., PLAINTIFF v. CITY OF NEWTON, A MUNICIPAL CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF v. SHAVER WOOD PRODUCTS, INC., A NORTH CAROLINA CORPORATION, AND W.K. DICKSON ENGINEERING, INC., A NORTH CAROLINA CORPORATION, THIRD-PARTY DEFENDANTS

No. 482A09

(Filed 20 December 2010)

Statute of Frauds— settlement agreement in open court— judicial estoppel

The Court of Appeals did not err by concluding that a settlement agreement reached between the parties in open court and orally ratified by those parties before the judge, but never memorialized by a signed writing, was enforceable even though the statute of frauds under N.C.G.S. § 22-2 would otherwise require a signed writing. The doctrine of judicial estoppel prevented plaintiff from reneging on his agreement. Otherwise, plaintiff would be allowed to evade a contractual obligation freely entered in open court.

Justice MARTIN concurring in separate opinion.

Justice BRADY joining in concurring opinion.

Justice HUDSON dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —– N.C. App. —–, 684 S.E.2d 55 (2009), affirming orders entered on 27 May 2008 by Judge Yvonne Mims Evans and on 19 August 2008 by Judge W. Robert Bell, both in Superior Court, Catawba County. Heard in the Supreme Court 23 March 2010.

Crowe & Davis, P.A., by H. Kent Crowe; and Sigmon, Isenhower, and Barkley, by W. Gene Sigmon, for plaintiff-appellant.

Baucom Claytor Benton Morgan & Wood, PA, by M. Heath Gilbert, Jr. and James F. Wood, III, for defendant-appellee City of Newton; and Pope, McMillan, Kutteh, Privette, Edwards & Schieck, PA, by William P. Pope and Martha N. Peed, for Shaver Wood Products, Inc., and Hamilton Moon Stephens Steele & Martin, PLLC, by Rebecca K. Cheney and David B. Hamilton, for W.K. Dickson Engineering, Inc., third-party defendant-appellees.

EDMUNDS, Justice.

In this case we consider whether a settlement agreement reached between the parties in open court and orally ratified by those parties before the judge, but never memorialized by a signed writing, is unenforceable as a violation of the statute of frauds. N.C.G.S. § 22-2 (2009). Because successful invocation of the statute of frauds would allow plaintiff to evade a contractual obligation that he freely entered in open court, subverting the finality of such agreements and undermining the judicial process, we conclude that even though the statute of frauds would otherwise require a signed writing, the doctrine of judicial estoppel prevents plaintiff from reneging on his agreement. Accordingly, we affirm the decision of the Court of Appeals as modified herein.

Shortly before January 2005, defendant City of Newton ("the city") began the process of constructing a park on land abutting plaintiff's property. The city hired Shaver Wood Products, Inc. ("Shaver") to clear and harvest timber on the park property and W.K. Dickson Engineering, Inc. ("Dickson") to carry out the design, development, and management of the project.

On 2 December 2005, plaintiff filed a complaint alleging, *inter alia*, that the city's agents had trespassed on his property and wrongfully cut and removed hardwood trees. The city subsequently filed a third-party complaint against Shaver and Dickson, seeking indemnification should it be held liable to plaintiff.

Trial began the week of 12 November 2007. On 14 November 2007, after the jury had begun hearing evidence, the city's attorney informed the court after a recess but before the jury returned to the courtroom that the parties had reached a settlement under which plaintiff agreed to quitclaim his interest in the disputed land in exchange for $30,000 from the city and $5,000 each from Shaver and Dickson. As the attorneys for all the parties discussed with the court how promptly the agreement could be implemented, the city's attorney added, "[I]t's just a technicality, but city council has to bless this."

The court directly addressed the participants. Attorneys for corporate parties Shaver and Dickson indicated their clients' assent. After plaintiff's counsel also confirmed the agreement, the court asked plaintiff directly: "That's your agreement, Mr. Powell? . . . Is that your agreement, sir?" Plaintiff[1] responded, "I don't have any

1. The trial transcript incorrectly identifies the speaker as "the defendant."

choice," but his counsel explained to plaintiff, "You do have a choice." The trial judge said, "I understand your sentiment, sir," then again asked plaintiff directly: "But is that your agreement?" Plaintiff responded to the judge: "Yes, that's my agreement." With all the parties having consented to the agreement, the court terminated the trial.

On 21 November 2007, the attorneys used electronic means (specifically, e-mail) to exchange a draft written document memorializing their 14 November 2007 agreement. The attorneys modified the document and forwarded it by e-mail to the parties on 27 November. Further e-mail correspondence was exchanged on 12 December, along with the final agreement. At the same time, the city delivered $40,000 to plaintiff's attorney, who deposited the funds into his firm's trust account. The exchanged document, titled "Settlement Agreement and Release," stipulated that it constituted the entire agreement between the parties. Plaintiff subsequently refused to execute the agreement and to consummate the settlement.

In a motion filed on 30 January 2008, the city moved for a court order to require plaintiff to meet his obligations under the 14 November 2007 settlement agreement. On 20 February, plaintiff, now represented by new counsel, filed a reply, asserting that he was not bound, both because the agreement was conditional upon the city council's approval and because his in-court statement agreeing to the settlement "was not knowingly, freely, and voluntarily made, and was coerced." Plaintiff subsequently amended his reply to add the affirmative defense that the settlement agreement, as a contract for the sale of land, was void under the statute of frauds, N.C.G.S. § 22-2, because it "was not in writing, and was not signed by the party to be charged, or any other person authorized by . . . [p]laintiff to sign on his behalf."

The trial court heard the matter during the 4 May 2008 civil term of Superior Court, Catawba County. The court found as fact that "[t]he terms and conditions of the settlement were recited into the record, and the presiding [j]udge . . . confirmed with [p]laintiff . . . that [plaintiff] knowingly and voluntarily entered into the settlement of all issues, and further, the Court confirmed the terms and conditions of the settlement with [p]laintiff." The hearing court further found as fact that the terms and conditions of the settlement were subsequently "confirmed in writing by electronic communication between counsel" for the parties and that the sum of $40,000 was delivered to counsel for plaintiff. Based upon these findings of

fact, the court concluded as a matter of law that "[p]laintiff entered into a valid and binding settlement of all issues" and defendant was entitled to specific performance. Accordingly, the trial court ordered plaintiff to execute the written Settlement Agreement and Release, along with a quitclaim deed, and to deliver those documents to counsel for the city.

Plaintiff appealed. A divided panel of the Court of Appeals affirmed the decision of the trial court, holding that the settlement agreement was not void under the statute of frauds. *Powell v. City of Newton*, —— N.C. App. ——, ——, 684 S.E.2d 55, 57 (2009). The majority held that because the parties had agreed in open court that defendants would pay plaintiff in exchange for plaintiff's execution of the settlement agreement and quitclaim deed, because the in-court terms of the agreement were transcribed, and because the parties exchanged e-mails to which the Settlement Agreement and Release was attached, "[t]here can be no doubt that the essential terms of the contract were reduced to writing." *Id.* at ——, 684 S.E.2d at 58. The majority stated that the statute of frauds " 'was not meant to be used by [a party] to evade an obligation based on a contract fairly and admittedly made.' " *Id.* at ——, 684 S.E.2d at 58 (quoting *House v. Stokes*, 66 N.C. App. 636, 641, 311 S.E.2d 671, 675, *cert. denied*, 311 N.C. 755, 321 S.E.2d 133 (1984)).

In addressing plaintiff's refusal to sign the documents memorializing the agreement, the Court of Appeals majority invoked judicial estoppel and concluded that the doctrine trumped the statute of frauds because the oral agreement was manifested in open court before the judge. *Id.* at ——, 684 S.E.2d at 58-59. The majority concluded that plaintiff's refusal to execute the agreement and quitclaim deed was "clearly . . . inconsistent" with his earlier acknowledgment that he accepted the terms of the agreement, adding that, "[i]f not estopped, plaintiff would impose an unfair detriment to defendants." *Id.* at ——, 684 S.E.2d at 59.

The majority went on to hold that, in any event, the agreement was signed electronically because the e-mail exchange between the attorneys that followed the in-court agreement satisfied the requirements of the Uniform Electronic Transactions Act, N.C.G.S. §§ 66-311 to -330 (2009). *Id.* at ——, 684 S.E.2d at 60. Considering together the hearing transcript, the draft agreement, the draft quitclaim deed, and the e-mails, the Court of Appeals majority concluded that the settlement agreement was "in total compliance with the statute of frauds." *Id.* at ——, 684 S.E.2d at 60.

The dissenting judge disagreed, arguing that the agreement did not satisfy the North Carolina statute of frauds. In addition, the dissent noted that our statute contains no exception for "judicial admissions" and that most states that recognize such an exception require the admission be made under oath. *Id.* at ––, 684 S.E.2d at 62 (Wynn, J., dissenting). The dissent also argued that the exchange of e-mails did not constitute an electronic signature by plaintiff because no e-mail originating from plaintiff or his counsel indicated an intent to sign the agreement. *Id.* at ––, 684 S.E.2d at 63. Finally, the dissent contended that the purported agreement discussed in open court was conditional and therefore not binding because "where an agreement is made subject to the approval of another promisor, there can be no implied promise, and thus there is no mutuality of obligation to support the agreement." *Id.* at ––, 684 S.E.2d at 63. Plaintiff appeals on the basis of the dissenting opinion.

I.

We begin by considering plaintiff's argument that there was no agreement because the settlement was contingent upon the city council's approval. A settlement agreement such as the one here is a contract subject to the ordinary rules governing such instruments. *Bolton Corp. v. T.A. Loving Co.*, 317 N.C. 623, 628, 347 S.E.2d 369, 372 (1986). Where parties enter a contract containing a condition precedent, they are bound when the condition is satisfied. *See, e.g.*, *Chavis v. S. Life Ins. Co.*, 318 N.C. 259, 264, 347 S.E.2d 425, 428-29 (1986) (describing a lapsed insurance policy as reinstated in law once specified conditions precedent were met); *Harris & Harris Constr. Co. v. Crain & Denbo, Inc.*, 256 N.C. 110, 117, 123 S.E.2d 590, 595 (1962) (observing that parties may impose any condition precedent when negotiating a contract and performance of the condition is essential before the parties become bound by the contract). "A condition precedent is an event which must occur before a contractual right arises, such as the right to immediate performance." *Foreclosure of Goforth Props., Inc. v. Birdsall*, 334 N.C. 369, 375, 432 S.E.2d 855, 859 (1993) (citation omitted). "The event may be largely within the control of the obligor or the obligee." *Id.*

Here, the parties announced in open court their intent to be bound. Even assuming that the comment by the city's attorney that the "city council has to bless this" constituted a condition precedent, that condition was satisfied when, before plaintiff refused to comply with the agreement, defendants' funds in the amount specified by the

agreement were transferred into plaintiff's attorney's trust account, concretely indicating that the city council had approved the agreement. Moreover, at the hearing to enforce the settlement agreement, when plaintiff's counsel suggested that the agreement would not be enforceable if the city council had not approved, the trial court responded: "But they did. I mean, that's really not the issue." Plaintiff therefore may not shield himself behind the purportedly conditional nature of the agreement.

II.

Plaintiff argues that the agreement is invalid because it violates the statute of frauds. Specifically, plaintiff contends that the Settlement Agreement and Release lacks the signature required by that statute. N.C.G.S. § 22-2. The city responds that plaintiff's in-court statements and the e-mail correspondence between counsel for the parties constitute an electronic signature as defined by the Uniform Electronic Transactions Act.

The statute of frauds provides:

> All contracts to sell or convey any lands . . . or any interest in or concerning them . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

Id. The settlement agreement constituted a contract for the sale of real property, and the existence of a memorandum is not in dispute, so we consider whether plaintiff's statements in open court and the subsequent e-mail correspondence between attorneys constitute the "signature" required by the statute of frauds.

An " '[e]lectronic signature' means an electronic sound, symbol, or process attached to, or logically associated with, a record and executed or adopted by a person with the intent to sign the record." *Id.* § 66-312(9). Electronic signatures are given the same legal recognition as traditional signatures and may satisfy the statute of frauds. *Id.* § 66-317(a), (d). However, the provisions of the Electronic Transactions Act apply only to "transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct." *Id.* § 66-315(b).

While the attorneys for the parties used e-mail and other electronic means to exchange documents and resolve details of the settlement agreement, their conduct indicated an understanding that the signature required by the statute of frauds for this conveyance of land would be plaintiff's physical signature. This understanding is reflected in an e-mail exchange of 12 December 2007. In response to a previous e-mail, plaintiff's counsel sent an e-mail to the city's attorney that opens: "[W]e had no deal with respect to" and lists several small but unresolved matters. The city's attorney answered by e-mail the same day that: "Ok. Got the changes. I am sending you the checks, the settlement agreement and a voluntary dismissal. Have [plaintiff] sign the agreement and send me back an executed copy. Also, you can send the quitclaim directly to Larry Pitts and he will file it. I am getting everything out to you today." In light of the express indication by the city's attorney that plaintiff should sign and forward the settlement documents, we conclude that the parties did not agree to the use of electronic signatures in lieu of physical signatures in this transaction.

Because the parties intended for plaintiff's physical signature to appear on the Settlement Agreement and Release, and because no signature is affixed, the writing is not signed. Accordingly, that document does not satisfy the signature requirement of the statute of frauds, and the Court of Appeals majority erred in finding the agreement to be "in total compliance with" that statute.

III.

The city argues that even if the statute of frauds is applicable, the agreement nevertheless is enforceable under the doctrine of judicial estoppel. We have observed that "in proper cases an estoppel predicated upon grounds of silence or fraud may override the statute of frauds." *Callaham v. Arenson*, 239 N.C. 619, 626, 80 S.E.2d 619, 625 (1954) (citations omitted). While there is no suggestion of fraud in this case, if silence may be grounds for an estoppel, plaintiff's positive statement that he accepted the agreement may also present a compelling basis for invoking the doctrine. Accordingly, we consider the applicability of judicial estoppel to the facts of this case.

Judicial estoppel "protect[s] the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749-50, 149 L. Ed. 2d 968, 977 (2001) (citations and internal quotation marks omitted). As the dissenting judge below accurately

pointed out, the North Carolina statute of frauds does not contain an exception to the signature requirement for agreements reached in court. However, equitable doctrines such as estoppel "serve[] to moderate the unjust results that would follow from the unbending application of common law rules and statutes." *Brooks v. Hackney*, 329 N.C. 166, 173, 404 S.E.2d 854, 859 (1991).

Broadly speaking, judicial estoppel prevents a party from acting in a way that is inconsistent with its earlier position before the court. *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 28-29, 591 S.E.2d 870, 888-89 (2004). This equitable doctrine, which may be invoked in a court's discretion, *id.*, is "inherently flexible" and requires weighing of relevant factors, 358 N.C. at 28, 591 S.E.2d at 888. It is limited to assertions of fact in civil proceedings and does not require an intent to deceive the court, though such intent may nevertheless be a consideration supporting invocation of the doctrine. *Id.* at 30-34 591 S.E.2d at 889-92. While many factors can affect a court's decision whether to invoke the doctrine, three frequently considered aspects of a case are whether: (1) the party's subsequent position is "clearly inconsistent with its earlier position," *id.* at 29, 591 S.E.2d at 888 (citations and internal quotation marks omitted); (2) judicial acceptance of a party's position might threaten judicial integrity because a court has previously accepted that party's earlier inconsistent position, *id.* at 29, 591 S.E.2d at 889 (citations omitted); and (3) "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party" as a result, *id.* (citation and quotation marks omitted).

Turning to the first inquiry, we consider whether plaintiff's later position "is clearly inconsistent with" an earlier position expressed in court. 358 N.C. at 29, 591 S.E.2d at 888. The record shows that plaintiff made a statement directly to the trial judge affirming that the arrangement described by counsel was his agreement. Plaintiff's later refusal to execute the written agreement or be bound by it is plainly inconsistent with his statement to the court.

The second factor is whether acceptance of the party's later inconsistent position would threaten judicial integrity because a court has already accepted the previous position. *Id.* at 29, 591 S.E.2d at 889. In evaluating this factor, we are mindful of such considerations as whether acceptance of the latter position would result in "inconsistent court determinations" or create "the perception that either the first or the second court was misled." *New Hampshire v. Maine*, 532 U.S. at 750-51, 149 L. Ed. 2d at 978 (citations and quota-

tion marks omitted), *quoted in Whitacre*, 358 N.C. at 29, 591 S.E.2d at 889. The settlement agreement reached in open court with plaintiff's consent purported to end the controversy between the parties. After all parties expressed their approval, the judge called off the trial and sent the jurors home. Any conclusion that plaintiff had not reached an agreement or that the matter had not been resolved would be inconsistent both with plaintiff's own words and with the actions of the trial court. Moreover, failure to estop plaintiff from asserting a contradictory position would indicate either that he misled the first court into believing he had agreed to the settlement or that he misled the second court into believing he had not agreed to the settlement.

Third, plaintiff sought to undo his assent to the agreement after a final version of the agreement was drafted and after defendants had transferred the designated payment(s) to plaintiff's attorney. Under such circumstances, failure to estop plaintiff from reversing his position after he agreed to the settlement in court would give plaintiff unfair power to extract additional concessions from the city and other defendants in any further settlement negotiations. Accordingly, while the resolution of these three factors is not necessarily conclusive in determining whether to apply judicial estoppel, our analysis of each consideration indicates that invocation of the doctrine is appropriate.

Plaintiff contends that because he did not give his assent to the settlement agreement while under oath, he cannot be bound by it. Plaintiff provides no North Carolina authority for his assertion, and we have observed that "most modern authorities agree that the purpose of judicial estoppel is to protect the integrity of the judicial process, not just the sanctity of the oath." *Whitacre*, 358 N.C. at 13-14, 591 S.E.2d at 879 (internal citations and quotation marks omitted). Thus, even unsworn statements made on the record may provide a sufficient level of formality to bind a party. Holding parties to their in-court statements made on the record reinforces the solemnity of the courtroom and the reliability of the proceedings therein.

We are mindful of the special nature of real property and that the laws of this State treat land differently from other types of property. The statute of frauds imposes heightened safeguards to protect contracts involving conveyances of land. However, the integrity of the judicial process must be similarly protected by the discriminating application of estoppel doctrines. Because the parties agreed to this settlement on the record in a court of law, specifically advising the judge that they concurred therein, we conclude that policies embod-

ied in the statute of frauds have been recognized and preserved. Plaintiff is judicially estopped to deny his in-court assent to the settlement agreement. Accordingly, we affirm as modified herein the decision of the Court of Appeals upholding the trial court's order enforcing the settlement agreement.

MODIFIED AND AFFIRMED.

Justice MARTIN concurring.

I concur in the majority opinion, but write separately to express my concerns regarding the manner in which plaintiff's real property interest was alienated in the instant case.

To illuminate my concerns, it is necessary to consider a slightly longer excerpt from the colloquy between the trial court and plaintiff, a seventy-three-year-old man who was hard of hearing and did not use a hearing aid during this exchange. At this point in the underlying trial, the jury had been excused from the courtroom. After a short recess, the parties reconvened at 11:35 a.m. outside the presence of the jury. Next, counsel for the municipal defendant announced the proposed settlement to the trial court. A brief discussion ensued, mainly regarding the scheduling of closing for the land transfer. Then the following exchange occurred:

> [PLAINTIFF'S ATTORNEY]: We'll do it by the 12th or on the 12th.
>
> THE COURT: That's your agreement, Mr. Powell?
>
> [PLAINTIFF'S ATTORNEY]: Stand up, James.
>
> THE COURT: Is that your agreement, sir?
>
> [PLAINTIFF]: I don't have any choice.
>
> THE COURT: Well—.
>
> [PLAINTIFF'S ATTORNEY]: You do have a choice.
>
> THE COURT: I understand your sentiment, sir. But is that your agreement?
>
> [PLAINTIFF]: Yes, that's my agreement.
>
> [CITY'S ATTORNEY]: Thank you, Your Honor.
>
> (These proceedings were concluded at 11:40 a.m.)

Collectively, the announcement of the proposed settlement, a brief discussion of its terms, negotiations about scheduling the closing date, and confirmation of plaintiff's assent took five minutes. At the end of this brief exchange, the trial court and all the participating attorneys had confirmed plaintiff's reluctant transfer of land.

Even if, speaking hypothetically, plaintiff later signed a deed transferring the land, this exchange would indeed remain troubling. While trial courts undoubtedly face large caseloads, the importance and sanctity of land ownership should always be respected. Trial courts faced with such a situation should exercise patience and deliberation. When a party who is presumably assenting to a settlement agreement involving the transfer of his real property states before the court, "I don't have any choice" or an equivalent phrase, the trial court should order a recess *ex mero motu* and request counsel to fully discuss the matter with the client. Even though the application of judicial estoppel is appropriate in the present case, in general, land should not be alienated in this manner.

Land is an extremely important and long-valued asset in this state and throughout this country. The singular nature of land's immense value was perhaps best expressed by the Supreme Court of Pennsylvania in 1852:

> Land is the most important and valuable kind of property. Or if it be not, there is no other stake for which men will play so desperately. In men and nations there is an insatiable appetite for lands, for the defence or acquisition of which money and even blood sometimes are poured out like water. The evidence of land-title ought to be as sure as human ingenuity can make it. But if left in parol, nothing is more uncertain, whilst the temptations to perjury are proportioned to the magnitude of the interest.
>
> The infirmities of memory, the death of witnesses, the corruptibility of witnesses, the honest mistakes of witnesses, and the misunderstandings of parties, these are all elements of confusion and discord which ought to be excluded from titles to the most coveted, if not most valuable of terrestrial objects. And it is the purpose of the statute of frauds and perjuries to exclude these elements, and to compel men to create testimonials of their intentions which are certain and enduring.

Moore v. Small, 19 Pa. 461, 465 (1852), *quoted in part in* 1 James A. Webster, Jr., Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's*

Real Estate Law in North Carolina § 9-6, at 284 (5th ed. 1999) [hereinafter *Webster's*]. As the Pennsylvania court summarized, the unparalleled value of land provides the basis and the inspiration for the writing requirement embodied in the statute of frauds.

The statute of frauds in North Carolina is a statutory enactment from 1819; it is not directly a part of the common or statutory law imported from England. *See Herring v. Volume Merch., Inc.*, 249 N.C. 221, 224, 106 S.E.2d 197, 200 (1958) (citing *Foy v. Foy*, 3 N.C. (2 Hayw.) 131, 132 (1801)). Nonetheless, the statute is derived from the original English statute of 1677 and, like the original, was enacted to prevent fraud and perjury in conveyances of land. *Webster's* § 9-6, at 284. A signed writing provides needed formality and solemnity to the divestment of a fee simple interest and signifies to even the most unaware layperson that a transaction of legal importance is occurring.

In the present case the lack of a signed writing results from plaintiff's desire to challenge the settlement agreement that he assented to, however reluctantly, before the trial court. The doctrine of judicial estoppel operates to prevent plaintiff's failure to sign from defeating the conveyance. Nevertheless, the facts of this case provide a cautionary tale for judges to consider as they work through their crowded dockets.

Ultimately, the trial court is in the best institutional position to slow court proceedings and protect the interests of a party reluctant to transfer his real property. Accordingly, to the extent that a party exhibits such reluctance, a trial judge should be prepared to order a recess *ex mero motu* to ensure that alienation of the fee occurs with the deliberation appropriate to the seriousness and significance of a real property transfer.

Justice BRADY joins in this concurring opinion.

Justice HUDSON dissenting.

I agree with the majority's conclusion that plaintiff did not sign the purported settlement agreement in accordance with the statute of frauds and that the Court of Appeals majority erred in determining that the agreement was "in total compliance with the statute of frauds." *Powell v. City of Newton*, —— N.C. App. ——, ——, 684 S.E.2d 55, 60 (2009) (majority). I also agree with the concurring opinion that it has long been established, both in this state and throughout this

country, that land is a special and unique asset, that land's importance and unparalleled value is a critical factor underlying the writing requirement contained in the statute of frauds, and that because of this, land should not ordinarily be alienated in the summary manner that occurred here. However, I am troubled by the Court of Appeals majority's creation, for the first time in our jurisprudence, of a judicial estoppel exception to the statute of frauds when neither defendant City of Newton ("the city") nor third-party defendants raised the issue in the trial court or argued it in the Court of Appeals. Even if we are to announce such an exception, I conclude that the trial court should have the opportunity to apply it, consistent with this Court's remand to consider the judicial estoppel issue in *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 37-39, 591 S.E.2d 870, 894-95 (2004). Moreover, even though plaintiff and his trial attorney testified under oath at the hearing on the "Motion to Enforce Settlement," the trial judge ruled and left the courtroom before this testimony was presented. As the facts showing the existence, or not, of the settlement remain disputed, I would remand this case to the trial court to conduct a new hearing on the Motion to Enforce Settlement. Therefore, I respectfully dissent.

As noted above, neither the city nor third-party defendants argued judicial estoppel in the trial court. It is well established that a party cannot raise an issue for the first time on appeal. *E.g.*, *Higgins v. Simmons*, 324 N.C. 100, 103, 376 S.E.2d 449, 452 (1989) ("Because a contention not made in the court below may not be raised for the first time on appeal, the . . . contention [by the party seeking to raise that issue on appeal] was not *properly* presented to the Court of Appeals for review and is therefore not properly before this Court." (internal citation omitted)); *see also* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make . . . . It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion."). Further, even if the city and third-party defendants had raised the issue in the trial court, the trial court's 27 May 2008 order is not based on judicial estoppel, and the city and third-party defendants failed to cross-assign that issue as error per then-applicable North Carolina Rule of Appellate Procedure 10(d), thus abandoning the issue. *See* N.C. R. App. P. 10(d) (2009) ("Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the

appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken."); *State v. Fuller*, 196 N.C. App. 412, 418, 674 S.E.2d 824, 829 (2009) (concluding that because the trial court had not denied the defendant's motion to suppress based on lack of standing and the State had not cross-assigned standing as an "alternative basis for upholding the trial court's order" under Appellate Rule 10(d), the State failed to preserve its argument for appellate review (citation omitted)). Here not only did the city and third-party defendants fail to raise this issue in the trial court or in a cross-assignment of error, they did not mention judicial estoppel in their arguments to the Court of Appeals. *See* N.C. R. App. P. 28(a) ("The function of all briefs . . . is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned."). As such, I do not believe this is an appropriate case upon which to base a new exception to the statute of frauds grounded in judicial estoppel.

I would also note that this Court has been reluctant in the past to recognize exceptions to the statute of frauds. The Court has repeatedly rejected exceptions, like the part performance doctrine, even when they are embraced by the vast majority of jurisdictions. *E.g.*, *Grantham v. Grantham*, 205 N.C. 363, 366, 171 S.E. 331, 333 (1933) ("The doctrine of part performance . . . has no place in our jurisprudence and will not dispense with the necessity of a writing," and "a parol contract for the conveyance of land cannot be enforced to the extent of decreeing a specific execution of the agreement." (citations omitted)); John N. Hutson, Jr. & Scott A. Miskimon, *North Carolina Contract Law* § 4-34, at 358 (2001) ("North Carolina is one of three states that does not recognize part performance as an exception to the statute of frauds." (footnote omitted)). Adopting this new exception on this record, particularly such a broad exception, appears inconsistent with our historical respect for the statute of frauds and is thus troubling.

Furthermore, it appears premature to apply this newly-created exception to these parties in that a number of key factual matters are in dispute. Here, evidence showed that if there was an offer by the city on 14 November 2007 (during a recess in the trial), it was conditional. Just before the trial court asked plaintiff if the arrangement was his agreement, the city's attorney informed the trial court and the

parties that the city council still had to vote on whether to approve the agreement, that their next meeting was not until 11 December 2007, and that he would "go ahead and get" the money to plaintiff's then-attorney, but the money could not be "disburse[d]" to plaintiff "until everything is signed." Some of these conditions may have been satisfied, but the record here does not reflect that they were.

The majority here concludes that the record establishes that the city council voted to approve the agreement because "funds in the amount specified by the agreement were transferred into" the trust account of plaintiff's then-attorney and because the trial court commented during the 5 May 2008 hearing that the city council had approved the agreement. The majority also concludes that the city council voted to approve the settlement agreement before plaintiff rejected it, thereby satisfying the conditions. Given the city attorney's statement in court that he would transfer the monies to plaintiff's attorney's trust account to await the vote and signing, I do not believe that the transfer of funds alone resolves these issues. Though the trial court's 27 May 2008 order contains a statement that these monies were deposited into the trust account of plaintiff's then-attorney, neither this pronouncement nor anything else in the record establishes the date on which the monies were deposited or whether the city council voted to accept the agreement at all, let alone when. Further, the record neither indicates the basis for the trial court's comment about the city council nor supports it. And, in any event, the trial court's conclusory statement, made in May 2008, still does not establish that the city council approved the agreement, allegedly reached on 14 November 2007, within the relevant time period. Because these factual issues are still unresolved, I believe a remand is most appropriate.

Even though plaintiff testified under oath, as did other witnesses, including his attorney at the time, it does not appear that the trial court's 27 May 2008 order was based on this evidence. The record and the order itself indicate the order is based on the arguments of respective counsel and a few pages of transcript from the 14 November 2007 in-court exchange. During the 5 May 2008 hearing, when plaintiff proffered evidence regarding what had transpired on 14 November 2007 and thereafter, the trial court had already ruled and indicated that such presentation was not "necessary." The sworn testimony was then presented and recorded by the court reporter "in the absence of" the judge. Counsel for the respective parties took testimony from plaintiff's trial attorney, from third-party defendant

Shaver's trial attorney, and from plaintiff. Under oath, plaintiff stated, *inter alia*, that he has a hearing problem, and because of this, could not hear much of what was said regarding the settlement agreement on 14 November 2007 and did not understand that it required him to deed over his land to the city. Plaintiff's trial counsel testified basically that he believed plaintiff understood the terms of the agreement on 14 November 2007 and reluctantly agreed to them. At the very least, this testimony raises issues of fact about the existence of an agreement and what plaintiff understood it to involve. In my view, the trial court should resolve these factual issues after hearing, or at least reviewing, the testimony.

For these reasons I would reverse the Court of Appeals and instruct that court to remand this case to the trial court to conduct further proceedings, as this Court ordered in *Whitacre P'ship*, 358 N.C. at 37-39, 591 S.E.2d at 894-95. Thus, I respectfully dissent.

RON MEDLIN CONSTRUCTION, A PARTNERSHIP, AND GEORGE RONALD MEDLIN, INDIVIDUALLY, PLAINTIFFS v. RAYMOND A. HARRIS AND SARAH N. HARRIS, DEFENDANTS, AND RON MEDLIN CONSTRUCTION, A PARTNERSHIP, AND GEORGE RONALD MEDLIN, INDIVIDUALLY, THIRD-PARTY PLAINTIFFS v. INTRACOASTAL SERVICE, INC; JOHN BIRD D/B/A BIRD ROOFING; LINDSAY WADE MILLSAPS D/B/A ENGINEERED PLUMBING; ED NEWSOME'S HARDWOOD FLOORING, INC.; AND THE PAINT DOCTOR, THIRD-PARTY DEFENDANTS

No. 417A09

(Filed 20 December 2010)

Construction Claims; Partnerships; Quantum Meruit— construction of home or building—contract executed by partner in licensed partnership engaged in construction business

A *de novo* review revealed the trial court did not err in a declaratory judgment action arising out of the construction of a house by granting summary judgment in favor of defendants on plaintiff's claim based on *quantum meruit*. Despite both parties' pleadings disavowing a contractual relationship between the partnership and defendants, Medlin Construction made no showing that Ron Medlin was not acting on behalf of the partnership in executing the contract with defendants. Without this showing, a licensed contractor partnership cannot recover in *quantum meruit*.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —– N.C. App. ——, 681 S.E.2d 807 (2009), affirming an order allowing summary judgment for defendants entered on 5 September 2006 by Judge B. Craig Ellis in Superior Court, Brunswick County. Heard in the Supreme Court 23 March 2010.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Robin K. Vinson, for plaintiff-appellants.

Shipman & Wright, L.L.P., by Gary K. Shipman and William G. Wright, for defendant-appellees Raymond and Sarah Harris.

PARKER, Chief Justice.

Plaintiffs Ron Medlin Construction and George Ronald Medlin appeal from the decision of a divided panel of the Court of Appeals affirming the trial court's entry of summary judgment for defendants on Ron Medlin Construction's claim for relief based on *quantum meruit*. For the reasons stated herein, we modify and affirm the decision of the Court of Appeals and remand this case to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this opinion.

Plaintiffs Ron Medlin Construction (Medlin Construction), a partnership, and George Ronald Medlin (Medlin), individually, instituted this civil action arising out of the construction of a house for defendants Raymond A. Harris and Sarah N. Harris. The complaint seeks a declaratory judgment defining the rights and liabilities of the parties, sets forth claims based on *quantum meruit*/unjust enrichment and negligent misrepresentation, and requests that the court impose a constructive trust on defendants' property for monies allegedly owed. In essence, plaintiffs' complaint asserts that Medlin Construction built a house for defendants, that defendants have refused to pay for materials and labor furnished, that defendants misrepresented certain financial information, and that defendants refinanced the house, but did not use the proceeds to pay Medlin Construction amounts owed to it.

Defendants answered the complaint, asserting that they entered into a contract for construction of the house with Medlin individually and that the contract is unenforceable in that Medlin is not a licensed contractor. Moreover, defendants denied that they have a contractual relationship with, or are indebted to, Medlin Construction. Defendants also counterclaimed against Medlin, asserting that the guar-

anteed maximum cost of construction under the contract as amended was $554,000, that defendants or others acting on their behalf have paid in excess of $626,000 for construction of the residence, that the house was not completed, that unpaid bills for labor and materials exceed $75,000, and that Medlin refused to complete construction of the residence. Defendants assert claims for negligence and unfair and deceptive practices against Medlin.

The agreement executed by Medlin and the Harrises, a copy of which is attached as an exhibit to defendants' answer and counterclaim, is known as a "cost plus" contract and provides that: (a) the "guaranteed maximum" cost of construction would not exceed $604,800,[1] "except as provided in Change Orders"; (b) the Harrises would pay Medlin a fee for contractor's profit and overhead in the amount of "13 percent of the Cost of Construction" to be paid monthly based on "an itemized statement" for the previous month delivered to the owner by the contractor; (c) Medlin, as contractor, would "obtain the building permit and provide all labor, material, and equipment and [would] construct the dwelling house"; (d) "[t]he parties may agree to written change orders in the construction of the House and the Compensation paid to Contractor and Time for Completion shall be adjusted as agreed to by both parties"; and (e) the "Contract Documents may not be assigned or transferred without the written agreement of Contractor and Owner."

Following discovery, defendants moved for summary judgment, and after hearing the motion, the trial court entered summary judgment for defendants and dismissed plaintiffs' complaint. The motion for summary judgment did not address, and the trial court did not rule on, defendants' counterclaim. Plaintiffs appealed the ruling, and the Court of Appeals issued an opinion reversing the summary judgment. *Ron Medlin Constr. v. Harris*, 189 N.C. App. 363, 658 S.E.2d 6 (2008). Thereafter, defendants petitioned for rehearing. The petition was allowed, and on rehearing the Court of Appeals in a divided decision entered a superseding opinion affirming the trial court's entry of summary judgment for defendants. *Ron Medlin Constr. v. Harris*, —— N.C. App. ——, 681 S.E.2d 807 (2009).

Plaintiffs appeal to this Court based on the dissenting opinion in the Court of Appeals, arguing that the express contract between

1. Documents produced in discovery contain two Addenda to the contract. One shows $604,800 stricken with $554,000 written below; another shows $933,624 without any indication of the $604,800. Neither of these Addenda has the figure initialed, and neither is dated.

Medlin and defendants does not preclude Medlin Construction from recovering based on *quantum meruit*.

This Court reviews a trial court's entry of summary judgment de novo. *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)). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2009). " 'When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001)). The moving party has the burden "to show the lack of a triable issue of fact and to show that he is entitled to judgment as a matter of law." *Moore v. Crumpton*, 306 N.C. 618, 624, 295 S.E.2d 436, 441 (1982) (citing *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 225 S.E.2d 797 (1976)).

Quantum meruit "operates as an equitable remedy based upon a quasi contract or a contract implied in law" which provides "a measure of recovery for the reasonable value of services rendered in order to prevent unjust enrichment." *Paul L. Whitfield, P.A. v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414–15 (1998) (citing *Potter v. Homestead Pres. Ass'n*, 330 N.C. 569, 578, 412 S.E.2d 1, 7 (1992)). *Quantum meruit* is "not an appropriate remedy when there is an actual agreement between the parties," *id.* at 42, 497 S.E.2d at 415, because "an express contract precludes an implied contract with reference to the same matter," *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962) (citing, *inter alia*, *Ranlo Supply Co. v. Clark*, 247 N.C. 762, 102 S.E.2d 257 (1958)).

Plaintiffs contend that because Medlin Construction did not enter into a contract with defendants for construction of defendants' residence, the principle that the existence of a contract covering the subject matter of the performance precludes recovery based on *quantum meruit* is inapplicable, and the dissenting opinion in the Court of Appeals is, thus, correct. Defendants contend, however, that the express contract for construction of defendants' home executed between defendants and Medlin, one of the two partners in Medlin Construction, precludes Medlin Construction's recovery under *quantum meruit* in that the express contract covers the same subject mat-

ter. Defendants further contend that even if preclusion requires that the claimant be a party, Medlin Construction is a party in that Medlin Construction is controlled by Medlin and Medlin now is seeking to do indirectly what he cannot do directly.

In this case the fact is undisputed that Medlin executed a contract with defendants to construct a home for them. The parties do not dispute that at the time Medlin signed the contract, he was not a licensed general contractor. Under the law in this state, "a contract illegally entered into by an unlicensed general construction contractor is unenforceable by the contractor." *Brady v. Fulghum*, 309 N.C. 580, 586, 308 S.E.2d 327, 331 (1983). Moreover, an "unlicensed person" is precluded from recovering damages "based on *quantum meruit*" for work performed pursuant to an unenforceable contract. *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 273, 162 S.E.2d 507, 512 (1968) (citing T.J. Oliver, Annotation, *Failure of Artisan or Construction Contractor to Procure Occupational or Business License or Permit as Affecting Validity or Enforcement of Contract*, 82 A.L.R.2d 1429, § 3(c) (1962); 53 C.J.S. *Licenses* § 59b (1948)). However, Medlin, individually, is not seeking either to enforce the contract or to obtain recovery based on *quantum meruit*. Plaintiffs emphasize in their brief to this Court that the complaint does not refer to the contract between Medlin and defendants. The complaint does, however, without identifying with whom defendants contracted, allege that "Defendants prepared and executed a construction contract for the construction of a residence on their property."

Plaintiffs' complaint also alleges numerous times that "Ron Medlin Construction reasonably believed that it had the right and responsibility to construct a residence on the property of Defendants." The complaint further alleges that, relying on this reasonable belief,

> Ron Medlin Construction established a checking account through which Ron Medlin Construction paid for materials and labor during the construction of the residence. In addition, on October 18, 2002, Ron Medlin Construction applied for and obtained a building permit for the work in question, and all inspections and certificates of occupancy were obtained by Ron Medlin Construction. Defendants had actual knowledge of these activities.

Plaintiffs further allege that "[i]n that the Defendants deny that there is [an] express or implied contract between Ron Medlin Construction

and Defendants, Ron Medlin Construction seeks equitable relief under the doctrines of *quantum meruit* and unjust enrichment." In their answer to the complaint, defendants admit that they "deny that there is an express or implied contract between them and Ron Medlin Construction." Although defendants deny in their answer to the complaint that Medlin Construction built their home, in their answer to plaintiffs' request for admissions defendants admit that Medlin Construction built the house. Thus, both plaintiffs and defendants in their pleadings take the position that Medlin Construction did not have a contractual relationship with defendants.

To put this case in context, we first note that resolution of this case implicates two sets of statutes—the general contractor licensing laws, Article 1, Chapter 87 of the North Carolina General Statutes, and the Uniform Partnership Act, Articles 2 through 4A, Chapter 59 of the North Carolina General Statutes.

Under N.C.G.S. § 87-10(b), the State Licensing Board for General Contractors shall issue an applicant a certificate to engage as a general contractor upon the applicant's satisfactory completion of an examination. Moreover, if the applicant for a general contractor's license is a "copartnership or corporation, or any other combination or organization," the examination shall be of "one or more of the responsible managing officers or members of the personnel of the applicant." N.C.G.S. § 87-10(c) (2009). Thus, under the licensing statute, a partnership can be a licensed unlimited building contractor without any partner being licensed. The partnership, Medlin Construction, was formed in 1990. The record reflects that Medlin was the qualifying person for Medlin Construction when Medlin Construction was issued an unlimited building contractor's license. The record also reflects that from 21 May 1986 through 31 December 1992, Medlin had a limited residential license to practice general contracting, and the partnership, Medlin Construction, was a licensed unlimited building contractor at all times relevant to this appeal.

Section 59-39 of the Uniform Partnership Act provides in pertinent part:

> (a) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the

> particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.
>
> (b) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

Id. § 59-39(a)–(b) (2009). Section 45 of Chapter 59 further states that "[e]xcept as provided by subsections (a1) and (b) [pertaining to limited liability partnerships and the rendering of professional services] of this section, all partners are jointly and severally liable for the acts and obligations of the partnership." *Id.* § 59-45(a) (2009).

Unlike a corporation that acts through its officers and directors, who may or may not be shareholders, *see id.* §§ 55-8-01(b), -8-41 (2009); 18B Am. Jur. 2d *Corporations* § 1166 (2003), partnerships act through their partners, *see* N.C.G.S § 59-39(a). Shareholders in a corporation are insulated from personal liability for acts of the corporation, *id.* § 55-6-22(b) (2009), but partners in a partnership are not insulated from liability, *id.* § 59-45(a). Stated differently, no corporate veil exists between a general partnership and its partners. *See Johnson v. Gill*, 235 N.C. 40, 44, 68 S.E.2d 788, 791 (1952) ("[T]he common law rule of joint and several liability of partners for a tort committed by one of the members of the partnership is incorporated in [North Carolina's] Uniform Partnership Act . . . .").

Plaintiffs argue that the partnership was a separate legal entity and that the dissenting opinion in the Court of Appeals was correct in stating that "[t]he party seeking to recover for the value of the house it constructed for defendants is Ron Medlin Construction—a separate and distinct legal entity from George Ronald Medlin—which is duly licensed as a general contractor." *Ron Medlin Constr. v. Harris*, —— N.C. App. at ——, 681 S.E.2d at 812 (Jackson, J., dissenting). Although a prior Court of Appeals opinion stated that "[a] partnership is a distinct entity from the individual members constituting it," *Trujillo v. N.C. Grange Mut. Ins. Co.*, 149 N.C. App. 811, 815, 561 S.E.2d 590, 593 (quoting *Okla. Farm Bureau Mut. Ins. Co. v. Mouse*, 1953 OK 212, ¶ 7, 268 P.2d 886, 889 (1953)) (quotation marks omitted), *disc. rev. denied*, 356 N.C. 176, 569 S.E.2d 280 (2002), this Court has not ruled that a partnership is a separate legal entity for all purposes under the Uniform Partnership Act.

The jurisdictions appear to be split as to whether a partnership is a separate legal entity, an aggregate of the partners, or a hybrid orga-

nization that is viewed as an aggregation of partners for some purposes and as a separate entity for others. 59A Am. Jur. 2d *Partnership* § 5 (2003). "The Uniform Partnership Act requires recognition that a partnership is a legal entity distinct from its member partners for some purposes, but the separate entity concept is not inflexible." *Id.* § 7 (footnote omitted). In our view, the treatment of a partnership as a hybrid organization that is considered an aggregate of the partners for some purposes and a separate entity for others more nearly reflects a correct interpretation of the Uniform Partnership Act than does the separate entity concept. The act of a partner in furtherance of the partnership's business binds the partnership unless the partner was not authorized to act. N.C.G.S. § 59-39(a). This construction is not inconsistent with *Roller v. McKinney*, 159 N.C. 257, 258, 159 N.C. 319, 320–21, 74 S.E. 966, 966–67 (1912), and *Godwin v. Vinson*, 251 N.C. 326, 327, 111 S.E.2d 180, 181 (1959) (per curiam), cited by plaintiffs, which hold that when property is owned by a partnership, the partnership is the real party in interest for purposes of pursuing a civil action pertaining to the partnership property.

The critical question then in resolving this dispute is whether Medlin was acting in his individual capacity in executing the contract with defendants, or whether Medlin was acting on behalf of the partnership in executing the contract. In *Brewer v. Elks*, 260 N.C. 470, 133 S.E.2d 159 (1963), a case involving collection by a third party on a note that was not signed in the partnership name, this Court said:

> [T]he note was not signed in the partnership name; it did not on its face purport to be for the benefit of the partnership. To establish liability, plaintiff must show that the partner was acting on behalf of the partnership in procuring the loan and was authorized to so act; or that the partners, with knowledge of the transaction, thereafter ratified the acts of their partner.

Id. at 472–73, 133 S.E.2d at 162. The Court further said:

> Partnership contracts are not usually made in the names of the individual partners. The usual way for a partnership to indicate its liability for money borrowed is to execute the note in its name. Since the note here sued on was not executed in the name of the partnership, plaintiff had the burden of showing . . . [the other partners] had authorized the transaction.

Id. at 473, 133 S.E.2d at 162.

Although the alignment of the parties in *Brewer* differs from the alignment of the parties in this case, the legal principle concerning acts of a partner vis-a-vis the partnership itself is applicable. In the present case, these facts are undisputed: one of the two partners in the general construction contracting partnership executed a contract in his individual name; the business of the partnership was construction; and the subject of the contract was construction of a residence for the other parties to the contract. Thus, Medlin's execution of the contract was "apparently [for] carrying on in the usual way the business of the partnership." N.C.G.S. § 59-39(a). Although Medlin Construction seeks to avoid existence of the contract, Medlin Construction does not assert that Medlin lacked authority to enter into the contract on behalf of the partnership. The partnership obtained the building permits, the subcontractors, the building materials, the inspections, and the certificate of occupancy. In sum, Medlin Construction performed the contract, thereby acknowledging that Medlin was authorized to enter into the contract with defendants. In its pleading the partnership alleges that it had a reasonable belief that it was authorized and obligated to construct the house on defendants' property. However, the record is devoid of any evidence upon which Medlin Construction could have premised this reasonable belief other than the contract executed by its partner. Medlin Construction's conduct evidences that Medlin Construction considered the contract to be a partnership obligation.

Plaintiffs cite numerous cases[2] in support of their position that for Medlin Construction to be barred from recovering in *quantum meruit* the partnership must have been a named party to the contract. These cases, however, are distinguishable on their facts because in each of them the party seeking equitable recovery, or the party's intestate, in fact entered into a contract. Plaintiffs are correct that these cases support the rule that when a party has entered into an express contract concerning the subject matter, that party cannot have equitable recovery in *quantum meruit*. The cases do not, however, on their facts support the position that when there is an express

2. *Bryan Builders Supply*, 274 N.C. 264, 162 S.E.2d 507; *Vetco Concrete Co.*, 256 N.C. 709, 124 S.E.2d 905; *McLean v. Keith*, 236 N.C. 59, 72 S.E.2d 44 (1952); *Lawrence v. Hester*, 93 N.C. 90, 93 N.C. 79 (1885); *Thigpen v. Leigh*, 93 N.C. 65, 93 N.C. 47 (1885); *Dula v. Cowles*, 52 N.C. 224, 7 Jones 290 (1859); *Niblett v. Herring*, 49 N.C. (4 Jones) 262 (1857); *Petty v. Owen*, 140 N.C. App. 494, 537 S.E.2d 216 (2000), *disc. rev. denied*, 353 N.C. 379, 547 S.E.2d 16 (2001); *Delta Envtl. Consultants of N.C., Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 510 S.E.2d 690, *disc. rev. denied*, 350 N.C. 379, 536 S.E.2d 70 (1999).

contract covering the subject matter, only a party to the contract can be precluded from recovering in *quantum meruit*.

Defendants argue this case is controlled by *Bryan Builders Supply*, 274 N.C. 264, 162 S.E.2d 507, *Brady*, 309 N.C. 580, 308 S.E.2d 327, and *Joe Newton, Inc. v. Tull*, 75 N.C. App. 325, 330 S.E.2d 664 (1985). While these cases are instructive that an unlicensed contractor cannot enforce a contract or obtain recovery in *quantum meruit*, these cases standing alone do not resolve the determinative issue in this case. Indeed, this case appears to be one of first impression. Our research discloses no case, and neither party has cited any opinion, in which a licensed contractor asserted that it obtained a building permit and constructed a house or other structure on someone else's property in the absence of a contract to which the contractor was either a party or the assignee of a party.

This case brings into tension the interplay between the building contractor licensure requirements for a partnership and the provisions of the Uniform Partnership Act. As noted earlier, a partnership can only act through its partners, but a general contractor partnership may be licensed even though no partner is licensed. Given that no partner is required to be licensed for a partnership to obtain a building contractor's license, plaintiffs' position, if adopted, would permit a partnership to structure its dealings to collect under a contract entered into by a partner in his or her individual name and then sue in *quantum meruit* on the theory that the partnership was not a party to the contract. Nothing in the record discloses why Medlin executed the contract in his individual name rather than in the name of "Ron Medlin Construction, a partnership, by Ronald Medlin." We agree with plaintiffs that Medlin's lack of a general contractor's license is immaterial to resolution of the issue before this Court. The purpose of the licensing statutes is to protect consumers from incompetent contractors. *Bryan Builders Supply*, 274 N.C. at 270, 162 S.E.2d at 510–11. Here the entity that built the house was licensed.

Plaintiffs rely on *Beacon Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E.2d 434 (1966), to support their position that defendants have been unjustly enriched and are estopped to deny Medlin Construction's claim for *quantum meruit*. *Beacon Homes*, however, is distinguishable on its facts from the present case. In *Beacon Homes*, the plaintiff contractor entered into a contract with the defendant's mother to build a house on property that the mother represented she owned. *Id.* at 471, 146 S.E.2d at 437. In fact, the defendant daughter owned the property, and she refused to pay for the improvements made by the

plaintiff on the property. *Id.* After noting that the plaintiff in good faith built the house in reliance on the mother's warranty that she owned the property, this Court held that "where through a reasonable mistake of fact one builds a house upon the land of another, the landowner, electing to retain the house upon his property, must pay therefor the amount by which the value of his property has been so increased." 266 N.C. at 474, 146 S.E.2d at 439. In the present case plaintiff partnership did not operate under a mistake of fact as to who owned the property. Defendants had a contract executed by a partner, had a good faith belief that the house was being built according to the contract, and made payments in excess of $700,000. Hence, unlike in *Rhyne v. Sheppard*, also relied on by plaintiffs, defendants did not stand idly by and watch the improvements being erected on their property by mistake, nor did defendants have reason to prevent the contracted-for construction. 224 N.C. 734, 737, 32 S.E.2d 316, 318 (1944).

The difficulty with plaintiffs' position is that defendants were doing business with Medlin, plaintiff Medlin Construction's partner. The actions of a partner in furtherance of the partnership's business are attributable to the partnership. *See* N.C.G.S. § 59-39(a). Admittedly, the record permits different inferences concerning whether Medlin or Medlin Construction paid the subcontractors and suppliers. Contrary to the allegation in the complaint, exhibits in the record reflect that the checking account set up to pay construction costs was established in the names of "Raymond A. Harris Jr. or Sarah N. Harris[;] Ronald Medlin," not Ron Medlin Construction. The account was designated "Harris Residence Acct." Medlin in his individual name, not in the name of the partnership, signed checks made payable to suppliers, subcontractors, and himself individually. These checks were itemized in an accounting prepared on Medlin Construction letterhead. Issues, if any, regarding payments to Medlin individually are partnership issues, not issues between plaintiffs and these defendants in this action. Defendants undisputably had an express contract for construction of their residence.

What plaintiffs seek is for this Court to disregard the role of partners in the operation of a partnership, to endorse a fiction that this partnership would have built defendants' house without the contract executed by its partner, and to hold that because the contract was not executed in the name of the partnership, the partnership can recover in *quantum meruit* even though an express contract covers the subject matter. This approach in essence would ignore the agree-

ment that defendants made with the partner and give one of the parties benefits beyond the contract.

"Where there is a special contract there can be none implied by law." *Lawrence v. Hester*, 93 N.C. 90, 92, 93 N.C. 79, 81 (1885). We hold that, as a matter of law, a contract for the construction of a home or building executed by a partner in a licensed partnership engaged in the construction business is the contract of the partnership unless the remaining partners can show that the partner was not authorized to act on behalf of the partnership and, if not so authorized, the partnership did not ratify the contract. Without this showing, a licensed construction contractor partnership cannot recover in *quantum meruit*. On the record before this Court, Medlin Construction has made no showing that Medlin was not acting on behalf of the partnership in executing the contract with defendants. To the contrary, Medlin Construction performed the contract by obtaining the building permit, subcontractors, materials, inspections, and certificate of occupancy. In reviewing a summary judgment, this Court examines the record de novo to determine whether genuine issues of material fact exist, and if not, whether on the undisputed facts a party is entitled to judgment as a matter of law. Thus, notwithstanding both parties' pleadings disavowing a contractual relationship between the partnership and defendants, the undisputed evidence in the record discloses that, as a matter of law, plaintiff Medlin Construction had a contractual relationship with defendants and thus, cannot recover in *quantum meruit*.

For the reasons stated herein, we hold that the trial court did not err in entering summary judgment for defendants and affirm the decision of the Court of Appeals. This case is remanded to the Court of Appeals for further remand to the trial court for resolution of the remaining issues.

MODIFIED AND AFFIRMED; REMANDED.

STATE OF NORTH CAROLINA v. JIHAD RASHID MELVIN

No. 382PA09

(Filed 20 December 2010)

Homicide— instructions—first-degree murder and accessory after the fact—mutually exclusive

There was no plain error where the trial court should have instructed the jury that it could not convict defendant of both first-degree murder and accessory after the fact to murder, which are mutually exclusive offenses. A different result would not have been probable if the trial court had given proper instructions because the jury considered the offenses separately and convicted defendant of both, indicating an intent to hold defendant fully accountable and that it would have convicted defendant of the more serious offense had it been required to choose.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 682 S.E.2d 238 (2009), vacating a judgment entered on 4 August 2008 by Judge Charles H. Henry in Superior Court, Onslow County, and remanding the case for a new trial. Heard in the Supreme Court 11 May 2010.

Roy Cooper, *Attorney General*, *by Norma S. Harrell*, *Special Deputy Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Daniel R. Pollitt*, *Assistant Appellate Defender*, *for defendant-appellee.*

EDMUNDS, Justice.

In this case we consider whether the trial court erred by failing to instruct the jury that it could not convict defendant of both first-degree murder and accessory after the fact to murder. Although we conclude that the trial court should have given the instruction, defendant failed timely to object to its omission. Because we find no plain error, we reverse the decision of the Court of Appeals.

On 10 July 2007, defendant was indicted for one count of first-degree murder and one count of accessory after the fact to murder. Because no evidence suggested that defendant had fired the shots that killed the victim, the first-degree murder charge against him was based on the theories of acting in concert and aiding and abetting. At

a pretrial hearing held on 22 July 2008 to consider motions filed in the case, defendant argued that the two offenses in the indictment were inconsistent and moved to have the district attorney elect the State's theory of proof or, in the alternative, for the court to sever the offenses. During the discussion of these motions, the trial court asked counsel: "[I]s the jury instructed they can only—if they were to find the defendant guilty of first-degree murder, they would not consider accessory after the fact, or do you allow them both to go and then the court arrests one judgment, as opposed to the other?" The State cited *State v. Jewell*, 104 N.C. App. 350, 409 S.E.2d 757 (1991), *aff'd per curiam*, 331 N.C. 379, 416 S.E.2d 3 (1992), to support its position that the latter course was proper, and defense counsel, "as an officer of the court," conceded that he believed the State had correctly cited the controlling case. The trial court then denied defendant's motion to sever the two offenses and determined that the State had made an election to proceed on the theory of acting in concert.

At trial, the State presented evidence that, at approximately 11:00 a.m. on 21 March 2007, defendant drove Robert Ridges (Ridges) and Tony Cole (Cole) to the home of Ridges's brother, Elijah. As Ridges, Cole, and defendant were driving away after the visit, they spotted the victim, Almario Millander. They waved the victim over to their car, and Ridges sold him a quantity of what was purported to be crack cocaine. As they attempted to leave, however, the car stalled. The victim walked over to the immobilized car, claimed Ridges had sold him counterfeit crack, and demanded his money back. When Ridges denied the accusation, the victim pulled out a sawed-off shotgun and pointed it at Ridges, who was unarmed. Defendant was able to restart the car and drive away with Ridges and Cole without shots being fired.

In the aftermath of the encounter, an angry Ridges "swore on his son" that he was going to "get" the victim. Ridges left Cole and defendant for a time, then returned. As the three later "chilled" and smoked "weed" at a friend's house, Cole realized that Ridges had obtained a gun when he saw Ridges "pull[] it out" in defendant's presence. That same evening, defendant drove as he, Ridges, and Cole looked for the victim. They came across an individual named Ken Adams, who told them the victim was at Adams's residence. Cole exhorted Ridges: "[G]o in his house, you going to kill this man, you got to kill the other guy too. Can't be no eyewitnesses."[1] Defendant agreed with Cole but Ridges responded that the victim was the only

1. The "other guy" apparently was Ken Adams.

one he wanted. During this discussion, defendant briefly took possession of Ridges's pistol, but Ridges retrieved it. Ridges, Cole, and defendant exited the car and walked toward Adams's residence. Defendant climbed the steps to the rear of the residence, while Ridges entered through the back door. Adams, who was inside, saw Ridges open fire on the victim. As the victim tried to escape through a window, Ridges shot him twice, hitting the victim behind one knee and inflicting a fatal wound to the victim's chest.

Defendant then drove Ridges and Cole from the scene. They stopped at a gas station, where Cole and Ridges made purchases while defendant waited in the car. After they left, a law enforcement officer attempted to stop defendant's car using his blue lights and siren. Defendant turned onto a dirt road and accelerated, raising a cloud of dust that caused the pursuing officer to drop back. The car stalled again, so defendant pulled to the side of the road, and he, Ridges, and Cole fled into nearby woods. The officer, who was acting on information indicating only that the vehicle's registration was faulty, stopped at the abandoned car, but, unable to find the occupants and seeing no evidence of a crime, left after a short wait.

Once the officer departed, defendant, Ridges, and Cole returned to the car, wiped it down to remove fingerprints, and attempted to set it on fire. They then dismantled the murder weapon and wiped all fingerprints off the pieces. They caught a ride, and, as they were driven to the home of the mother of defendant's child, each of the three threw components of the dismantled pistol from the car. Parts of the weapon were recovered during the investigation and identified by State Bureau of Investigation agent Jessica Rosenberry as belonging to the gun used to shoot the victim.

Defendant was convicted by a jury of both first-degree murder and accessory after the fact to murder. The trial court arrested judgment on the conviction of accessory after the fact but sentenced defendant to life imprisonment without parole for the first-degree murder conviction. On appeal, the Court of Appeals concluded that the trial court committed plain error by failing to instruct the jury that it could convict defendant of either charge, but not both. ––– N.C. App. at –––, 682 S.E.2d at 246. Accordingly, the Court of Appeals vacated the judgment and ordered a new trial. This Court allowed the State's petition for discretionary review.

We begin by defining the pertinent doctrines. "First-degree murder is the intentional and unlawful killing of a human being with mal-

ice and with premeditation and deliberation." *State v. Thomas*, 350 N.C. 315, 346, 514 S.E.2d 486, 505 (citation omitted), *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999); *see also* N.C.G.S. § 14-17 (2009). The doctrine of acting in concert provides that "when two or more persons act together in pursuance of a common plan or purpose, each is guilty of any crime committed by any other in pursuance of the common plan or purpose." *State v. Thomas*, 325 N.C. 583, 595, 386 S.E.2d 555, 561 (1989). Specifically, acting in concert "allows a defendant acting with another person for a common purpose of committing some crime to be held guilty of a murder committed in the pursuit of that common plan even though the defendant did not personally commit the murder." *State v. Roache*, 358 N.C. 243, 306, 595 S.E.2d 381, 421 (2004) (citation omitted). A defendant is guilty of aiding and abetting another in the commission of an offense if:

> (i) the crime was committed by some other person; (ii) the defendant knowingly advised, instigated, encouraged, procured, or aided the other person to commit that crime; and (iii) the defendant's actions or statements caused or contributed to the commission of the crime by that other person.

State v. Goode, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999) (citation omitted). We have observed that "[t]he distinction between aiding and abetting and acting in concert, however, is of little significance. [Defendants convicted under either doctrine] are equally guilty and are equally punishable." *State v. Williams*, 299 N.C. 652, 656, 263 S.E.2d 774, 777 (1980) (internal citations omitted). On the other hand, "[a]n accessory after the fact is one who, knowing that a felony has been committed by another, receives, relieves, comforts or assists such felon, or who in any manner aids him to escape arrest or punishment." *State v. Oliver*, 302 N.C. 28, 55, 274 S.E.2d 183, 200 (1981) (citations omitted).

Murder and accessory after the fact to that murder are mutually exclusive offenses. *See State v. McIntosh*, 260 N.C. 749, 753, 133 S.E.2d 652, 655 (1963) ("A participant in a felony may no more be an accessory after the fact than one who commits larceny may be guilty of receiving the goods which he himself had stolen."), *cert. denied*, 377 U.S. 939, 12 L. Ed. 2d 302 (1964); *see also State v. Jewell*, 104 N.C. App. at 353, 409 S.E.2d at 759 (finding that murder and accessory after the fact to murder are mutually exclusive offenses). In addition, verdicts of guilty of both offenses would be both legally inconsistent and contradictory. *See State v. Mumford*, 364 N.C. 394, 398-402, 699

S.E.2d 911, 914-16 (2010) (reviewing the distinction between verdicts that are "merely inconsistent" and those that are "legally inconsistent and contradictory"). Accordingly, a defendant cannot be convicted of both offenses arising from a single killing.

Nevertheless, the State may join for trial two offenses when they "are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan," N.C.G.S. § 15A-926(a) (2009), even if the defendant cannot be convicted of both offenses "due to the mutually exclusive nature of those offenses," *State v. Speckman*, 326 N.C. 576, 578, 391 S.E.2d 165, 167 (1990) (citation omitted). When two such offenses are joined for trial and substantial evidence supports each offense, both should be submitted to the jury. *See id.* at 579, 391 S.E.2d at 167. "[H]owever, the trial court must instruct the jury that it may convict the defendant only of one of the offenses or the other, but not of both." *Id.* Because no such instruction was given here, the trial court erred.

Accordingly, we must now consider whether the error was prejudicial. During the charge conference conducted after the presentation of evidence and closing arguments, counsel and the trial judge discussed instructions on acting in concert, aiding and abetting, and accessory after the fact. Although defendant objected to other instructions, he neither requested an instruction that the jury could not convict of both first-degree murder and accessory after the fact nor objected to the absence of such an instruction. *See* N.C. R. App. P. 10(b)(2) (2008). When a party does not object to an omission from the jury charge despite having the opportunity to do so, we review for plain error. *See id.* 10(b)(4) (2008); *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 102-03 (2002).[2]

In reviewing for plain error, this Court has stated that:

> "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire

2. While defendant contends in a footnote to his brief that the error should be considered preserved because he objected repeatedly to joinder of the two offenses for trial, the issue of joinder *vel non* is entirely separate from issues pertaining to the correct jury instructions for two offenses that have been joined. In addition, because we conclude no plain error occurred here, we elect not to address the State's argument that defendant invited the error. *See State v. Rouse*, 339 N.C. 59, 81, 451 S.E.2d 543, 555 (1994) (finding no plain error in excluding evidence even though any error arguably had been invited), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995), *overruled in part on other grounds by State v. Hurst*, 360 N.C. 181, 199, 624 S.E.2d 309, 323, *cert. denied*, 549 U.S. 875, 166 L. Ed. 2d 131 (2006).

> 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, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks omitted) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (alternations in original), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Id.* at 661, 300 S.E.2d at 378 (quotation marks omitted) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)).

Defendant bears the burden of showing that an error rose to the level of plain error. *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). This burden is "much heavier . . . 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." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). In conducting plain error review, we normally examine the entire record to determine whether the error "had a probable impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79 (citation omitted). Because the error here led to mutually exclusive verdicts of guilty, we conduct the same review to determine whether the error had a probable effect on the outcome of the trial. *See, e.g.*, *State v. Nicholson*, 355 N.C. 1, 50, 558 S.E.2d 109, 142 (declining to "conclude a different result would have been probable even if the trial court had explicitly specified the evidence the jurors were to consider" pertaining to an aggravating circumstance), *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002); *State v. Abraham*, 338 N.C. 315, 347, 451 S.E.2d 131, 148 (1994) (concluding trial court did not commit plain error when erroneous jury instruction "had no effect on the outcome of the trial"). Our review of the whole record reveals no plain error requiring a new trial.

Defendant was convicted by the jury of first-degree murder and accessory after the fact. The evidence presented at trial showed that defendant was present at the original confrontation, heard Ridges swear "on his son" that he would "get" the victim, drove Ridges to find the victim knowing that Ridges had armed himself, joined Cole in encouraging Ridges to kill Adams along with the victim so there would be no witnesses, and walked with Ridges to the door of the residence where Ridges carried out the murder. This evidence was more than sufficient to support the murder conviction. Other discrete evidence supported the charge of accessory after the fact, such as defendant's helping Ridges dismantle the murder weapon and dispose of the parts.

The record reveals that defense counsel argued to the jury that the penalty for first-degree murder is life imprisonment without parole, confirming the jury's commonsense understanding that murder was the more serious offense. The jury, given the opportunity to consider separately the offenses of murder and accessory after the fact, convicted defendant of both, indicating its intent to hold defendant accountable to the fullest extent of the law. Accordingly, we are satisfied that the jury would have convicted defendant of the more serious offense had it been required to choose between the two charges. In light of the overwhelming evidence of first-degree murder, we cannot conclude that a different result would have been probable if the trial court had given a proper instruction. *See Nicholson*, 355 N.C. at 50, 558 S.E.2d at 142.

Because the trial court vacated defendant's conviction of accessory after the fact, he suffers no collateral consequences as a result of that conviction and has not been prejudiced. *Cf. Speckman*, 326 N.C. at 580, 391 S.E.2d at 168 (reversing the defendant's convictions for mutually exclusive offenses when, even though the offenses were consolidated into a single judgment, the defendant nevertheless could suffer potentially severe adverse collateral consequences). Defendant has not satisfied his burden of demonstrating that the trial court committed plain error. 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.

IN RE A.R.D.

[364 N.C. 596 (2010)]

IN THE MATTER OF A.R.D.

No. 303A10

(Filed 20 December 2010)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 694 S.E.2d 508 (2010), affirming orders entered on 26 June 2009 and 25 August 2009, both by Judge Mitchell McLean in District Court, Alleghany County. Heard in the Supreme Court 15 November 2010.

James N. Freeman, Jr. for petitioner-appellee Alleghany County Department of Social Services.

Pamela Newell, GAL Appellate Counsel, for appellee Guardian ad Litem.

Susan J. Hall for respondent-appellant mother.

PER CURIAM.

AFFIRMED.

IN RE H.N.D.

[364 N.C. 597 (2010)]

IN THE MATTER OF H.N.D.

(Filed 20 December 2010)

No. 359A10

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 696 S.E.2d 783 (2010), reversing adjudication and dispositional orders signed on 25 November 2009 and filed on 30 November 2009 by Judge Carol A. Jones-Wilson in District Court, Sampson County, and remanding to the trial court for further proceedings. Heard in the Supreme Court 16 November 2010.

Warrick and Bradshaw, P.A., by Frank L. Bradshaw; and Northen Blue, LLP, by Samantha H. Cabe, for petitioner-appellant Sampson County Department of Social Services.

Ryan McKaig for respondent-appellee mother.

PER-CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals.

REVERSED.

CUMMINGS v. ORTEGA

[364 N.C. 598 (2010)]

PENNY CUMMINGS	)	
	)	
v.	)	ORDER
	)	
AGNES ORTEGA, M.D. and WOMEN'S HEALTH CARE SPECIALISTS	)	

No. 417P10

The defendant's Petition for Discretionary Review is allowed on the following issue only: "Did the trial court err by relying on evidence contained within juror affidavits to grant plaintiff a new trial?"

By order of the Court in Conference, this 15th day of December, 2010.

Hudson, J.
For the Court

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

FILED 5 NOVEMBER 2010

009P10	State v. Michael Andrew Roughton	1. State's Motion for Temporary Stay (COA09-536) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/12/10** 2. 3.
013P10	State v. Robert MacFarlane Davison	State's PDR Under N.C.G.S. § 7A-31 (COA09-212)	Denied
047P02-13	George W. Baldwin v. Fay Daniels, Superintendent, et al.	Plt's *Pro Se* PWC to Review Order of COA (COAP08-125)	Denied
055P02-7	State v. Henry Ford Adkins	Def's *Pro Se* PWC to Review Order of COA	Denied
059P10-2	Horace K. Pope, Jr., Employee v. John Manville, Employer and St. Paul Travelers Indemnity Company, Carrier	Def's Motion for Temporary Stay (COA09-281-2)	Allowed **10/11/10**
064P10	State v. Kenneth Dilvern Rogers	1. Def's *Pro Se* Motion for Petition for Discretionary Review (COA08-1344) 2. Def's *Pro Se* Motion for PWC and/or Any Other Available Relief Pursuant to the All Writs Act	1. Denied 2. Denied
088P05-3	State v. Gay Eugene Blankenship	Def's *Pro Se* Petition for Writ of Habeas Corpus (COAP09-588)	Denied **Hudson, J., Recused**
112P10	Hazel Hawkins, as Personal Repres. of the Estate of Neal Hawkins, Jr., Deceased and as Personal Representative of Statutory Beneficiaries v. SSC Hendersonville Operating Company, LLC d/b/a The Brian Center Health & Rehab.-Hendersonville	1. Plt-Appellant's Motion for Temporary Stay 2. Plt-Appellant's Petition for Writ of Supersedeas 3. Plt-Appellant's PDR	1. Allowed **03/17/10** 2. 3.
118P96-3	State v. Thomas Franklin Cross, Jr.	Def's PWC to Review Order of COA (COAP10-644)	Dismissed

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

FILED 5 NOVEMBER 2010

143P10	State v. Andre Pertiller	Def's *Pro Se* PDR (COA09-88)	Denied
160P10	Banner Elk 10, LLC f/k/a Boone Boys, LLC, Lawrence E. Suchman, Clifford L. Suchman and Martin W. Schlosberg v. Shaunco, Inc. and Olin Wooten	Def's PWC to Review Order of COA (COA10-197)	Denied
168P09-6	State v. Clyde Kirby Whitley	1. Def's *Pro Se* PWC to Review Order of COA (COAP09-383, COAP09-234) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as Moot
172P10	Cary Creek Limited Partnership v. Town of Cary, N.C.	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-799)	Denied
186P09-3	Brown Brothers Harriman Trust Co. v. Anne P. Benson, et al.	1. Plt's Motion for Petition for Issuance of Per Curiam Order Approving Court of Appeal's Holding Per Rule 2 2. Defs' (John H. Benson, Anne H. Benson, and Linley C. Benson) Motion to Vacate Order of June 16 2010 Denying Appeal 3. Defs' (John H. Benson, Anne H. Benson, and Linley C. Benson) Motion Under Rule 2 to Treat Appeal as Based on Substantial Constitutional Question	1. Denied 2. Denied 3. Denied
200P10	State v. Gene Wayne Haymond	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1030)	Denied
211P10	State v. Thomas Lee Brennan	1. State's Motion for Temporary Stay (COA09-1362) 2. State's Petition for Writ of Supersedeas 3. State's NOA Based Upon a Constitutional Question 4. State's Alternative PDR Under N.C.G.S.§ 7A-31	1. Allowed **05/21/10** 2. 3. 4.

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FILED 5 NOVEMBER 2010

217P10	In the Matter of: S.T.F.	1. Respondent's *Pro Se* (Monika Frederic) NOA Based Upon A Constitutional Question (COA09-1569) 2. Respondent's *Pro Se* (Monika Frederic) PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied
219P10	State v. Phillip Anderson Williams	1. Def's PWC to Review Order of Guilford County Superior Court 2. Def's Motion to File Reply to State's Response to PWC 3. State's Motion to Strike Contents of Def's Motion	1. Dismissed 2. Dismissed as Moot 3. Dismissed as Moot
226P10	Fifth Third Mortgage Co. v. Alan Miller, Phyllis A. Miller, BB&T and Jeff D. Rogers, Substitute	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-961)	Denied **Martin, J., Recused**
230P09-2	State v. Kelvin W. Sellars-El	Def's *Pro Se* Motion for Discretionary Review on Certification by Supreme Court (COAP10-727)	Denied
235P10	State v. John Edward Brewington	1. State's Motion for Temporary Stay (COA09-956) 2. State's Petition for Writ of Supersedeas 3. State's NOA Based Upon a Constitutional Question 4. State's Alternative PDR	1. Allowed **06/04/10** 2. 3. 4.
245P10	State v. Jerry Wayne Edgeworth	Def's PDR Under N.C.G.S. § 7A-31 (COA09-523)	Denied
246P10	State v. Travis D. Sauls	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP10-290)	Dismissed
255P10	Renee Crocker, Joy Waldrop, Julie Sprouse, Renee Roof v. Carson Griffin, Individually and as Director of the Transylvania Department of Social Services and Transylvania Department of Social Services and Transylvania County, a Body Politic	Plts' PDR Under N.C.G.S. § 7A-31 (COA09-1000)	Denied

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

FILED 5 NOVEMBER 2010

256P10	Julianna Simmons Henry v. Peter Axel Knudsen	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-381)	Denied
260P09-2	State v. Mack Eugene Polk, Jr.	Def's *Pro Se* Motion for Petition for Discretionary Review (COAP10-688)	Dismissed
273P10	State v. Charles D. Dickerson	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1380)	Denied
278A10	State v. Larry Wayne Rominger, Jr.	1. Def's NOA Based Upon a Constitutional Question (COA09-855) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed
279P10	John Allen Taylor v. Town of Garner and N.C. League of Municipalities and N.C. State University and Key Risk Management Services	Defs' PDR Under N.C.G.S. § 7A-31 (COA09-1522)	Denied
280P09-5	State v. Bobby Joe Reid, Jr.	Def's *Pro Se* Motion for En Banc Motion Compelling Summary Judgment in Regards to Exculpatory Discovery and Evidentiary Hearing (COAP09-430)	Dismissed
280P09-6	State v. Bobby Joe Reid, Jr.	Def's *Pro Se* Motion for Appeal to the Supreme Court of "En Banc Writ of Mandamus" Against Prison and State Prison FCC and DCC Board Hearings (COAP09-430)	Dismissed
280P10	State v. Tyrone Matthew Delgado	Def's PDR Under N.C.G.S. § 7A-31 (COA09-973)	Denied
282P10	Aloha E. Bryson, M.D., PhD. v. Haywood Regional Medical Center, PrimeDoc Management Services, Inc., and PrimeDoc of Haywood County, P.A.	Def's PDR Under N.C.G.S. § 7A-31 (COA09-270)	Denied
283P10	Regina Long, Widow, and Guardian ad Litem for Gage Long and Callie Long, Minor Children, of Kent Long, Deceased Employee v. City of Charlotte, Employer	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1344)	Denied

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

FILED 5 NOVEMBER 2010

286P10	Wanda B. Knight v. Lloyd H. Knight	1. Petitioner's *Pro Se* Motion for Temporary Stay (COAP10-370) 2. Petitioner's *Pro Se* Petition for Writ of Supersedeas 3. Petitioner's *Pro Se* Motion for PDR 4. Petitioner's *Pro Se* Petition for Writ of Prohibition 5. Petitioner's *Pro Se* PWC to Review Order of COA	1. Denied **07/14/10** 2. 3. 4. Denied **07/13/10** 5.
291A10	State v. Dominique Maurice Arthur	1. Def's NOA Based Upon A Constitutional Question (COA09-1139) 2. State's *Pro Se* Motion to Dismiss Appeal	1. —— 2. Allowed
293P10	PPD Development, LP v. Cognition Pharmaceuticals, LLC	Def's PDR Under N.C.G.S. § 7A-31 (COA09-396)	Denied
294P10	Paul Ragsdale, Employee v. Lamar Outdoor Advertising, Employer and CNA Claims Plus, Carrier	Defs' PDR Under N.C.G.S. § 7A-31 (COA09-430)	Denied
296A10	State v. Durrel Jovan Palmer	Def's NOA Based Upon A Constitutional Question (COA09-1139)	Dismissed *Ex Mero Motu*
299P06-2	Mary Louise Diggs v. Forsyth Memorial Hospital, Inc.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA09-890) 2. Def's Motion to Strike Plt's "Reply to Defendant's Response to the PDR"	1. Denied 2. Allowed
302P10	State v. Nathaniel Rasberry	1. Def's *Pro Se* Motion for PDR (COAP10-384) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
305P10	State v. Justin Santiano	1. Def's Motion for Temporary Stay (COA09-506) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/26/10** Dissolved the Stay **11/04/10** 2. Denied 3. Denied
318P10	Lillian M. Hayes v. Elois N. Robbins, Muriel Diane Robbins, Ronald Lee Merrick, and Donald Lee Merrick	Plt's *Pro Se* PWC to Review the Order of the COA (COAP10-371)	Denied

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FILED 5 NOVEMBER 2010

319P10	In the Matter of: The Estate of Frances Faison Johnson	Propounder's PDR Under N.C.G.S. § 7A-31 (COA09-993)	Denied
322P10	State v. Marcus Arnell Craven	1. State's Motion for Temporary Stay (COA09-1138) 2. State's Petition for Writ of Supersedeas 3. State's NOA Based Upon a Constitutional Question 4. State's Alternative PDR Under N.C.G.S. § 7A-31 5. Def's Motion toDismiss Appeal 6. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **08/05/10** 2. 3. 4. 5. 6.
324P10	State v. Rodney Flynn McNeill	1. State's Motion for Temporary Stay (COA09-1585) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/06/10** 2. 3.
327P10	State v. Robert Lee Pastuer	1. State's Motion for Temporary Stay (COA09-1432) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/06/10** 2. 3.
331P10	Larry D. McCann v. Town of Sparta	1. Plt's *Pro Se* NOA Based Upon a Constitutional Question (COA10-192) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal	1. —— 2. Dismissed 3. Allowed
334P10	State v. Jeffrey Wayne Ethridge	Def's *Pro Se* Motion for Petition for Discretionary Review	Dismissed
337P10	State v. Christopher Allan Dallas	Def's PDR (COA09-644)	Denied
340P10	State v. Derrick Young	1. Def's *Pro Se* Motion for "Petition for Order to Prepare, Copy, Furnish, True Copy of Complete Verbatim Transcripts" 2. Def's *Pro Se* Motion for "Petition for Discretionary Review"	1. Dismissed 2. Dismissed
351P10	State v. Robert Antwon Smith	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1626)	Denied

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FILED 5 NOVEMBER 2010

351PA08-2	Robert Baxter, Employee v. Danny Nicholson, Inc., Employer Self-Insured, (Key Risk Management Services, Inc., Servicing Agent)	Def's Motion for Temporary Stay (COA07-865-2)	Allowed **10/13/10**
352P10	The North Carolina State Bar v. Elizabeth J. Wolfenden	Def's *Pro Se* Petition for Writ of Supersedeas (COAP10-224)	Denied **10/14/10**
356A10	State v. Derrick Lamont Watkins	1. Def's NOA Based Upon a Constitutional Question (COA09-1502) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed
363P10	Tina A. Carlton, as Personal Representative of the Estate of Adam Wayne Carlton, and Robert Brent Carlton and Tina A. Carlton, Individually v. Teresa B. Melvin, M.D., et al.	Plt's (Tina A. Carlton, as Personal Representative of the Estate of Adam Wayne Carlton) PDR Under N.C.G.S. § 7A-31 (COA09-930)	Denied
367P10	State v. Jamar Maurice Wilson	Def's PWC (COA09-1438)	Denied
368P09-3	State v. Ronnie Eugene Simpson	Def's *Pros Se* Motion for Petition for Writ of Mandamus (COA08-1059)	Denied **10/27/10**
371P10	Allen Richard Lowd v. Edmund Lloyd Reynolds, Individually and as Agent for S.T.S. of Florida, LLC, a/k/a S.T.S., LLC, and James Rolen Wheatley, Jr.	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-505)	Denied
374A10	Judy Cardwell, Employee v. Jenkins Cleaners, Inc., Employer and Midwest Employers Casualty Company, Carrier and Key Risk Insurance Company, Third-Party Administrator	North Carolina Advocates for Justice's Motion for Leave to File Amicus Brief	Allowed **10/25/10**

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

FILED 5 NOVEMBER 2010

376P10	State v. Cherron Wooten	1. Def's Motion for Temporary Stay (COA09-1551) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/03/10** Dissolved the Stay **11/04/10** 2. Denied 3. Denied
377P10	The Estate of Harry Kay Burgess, Jr., by the Executrix of his Estate Frances Louise Burgess, and Frances Louise Burgess in her individual capacity v. Raymond Hamrick, in his official capacity as Cleveland County Sheriff, Paul Leigh, in his individual and official capacity as a Sheriff's Deputy of Cleveland County, and Liberty Mutual Group, Inc., d/b/a Liberty Mutual Insurance Company	Plts' PDR Under N.C.G.S. § 7A-31 (COA09-1690)	Denied
378P10	William Brattain, Employee v. Nutri-Lawn, Inc., Employer, Non-Insured	Plt's *Pro Se* PWC to Review Decision of COA (COA09-377)	Denied
382P10	State v. John Lewis Wray, Jr.	1. State's Motion for Temporary Stay (COA09-304) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/07/10** 2. 3.
383P10	State v. Ludenia Danielle Archie	1. Def's NOA Based Upon a Constitutional Question (COA09-434) 2. Def's PDR UnderN.C.G.S. § 7A-31 3. State's Motion toDismiss Appeal	1. Dismissed as Moot 2. Denied 3. Allowed
385P10	State v. Daniel Wayne Scott	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1668)	Denied

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

FILED 5 NOVEMBER 2010

386P10	State v. Paul Brantley Lewis	1. State's Motion for Temporary Stay (COA08-1595) 2. State's Petition for Writ of Supersedeas 3. State's NOA Based Upon a Dissent 4. State's Alternative PDR 5. Def's Motion to Dismiss Appeal	1. Allowed **09/07/10** 2. 3. 4. 5.
387P10	Donna W. Crook and William B. Crook v. KRC Management Corporation, d/b/a Kimco Realty Company and Kir Cary Limited Partnership	1. Plts' Motion for Temporary Stay 2. Plts' Petition for Writ of Supersedeas (COA09-936) 3. Plts' PDR Under N.C.G.S. § 7A-31	1. Allowed **09/07/10** Dissolved the Stay **11/04/10** 2. Denied 3. Denied
389P10	Federated Financial Corporation of America v. Harold Rowell, Individually and d/b/a Harold's Plumbing	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-282)	Denied
393P10	State v. Tyus Sentell Headen	Def's PDR Under N.C.G.S. § 7A-31 (COA09-606)	Denied
394P10	State v. Robert Lane Windsor	Def's PDR Under N.C.G.S. § 7A-31 (COA09-713)	Denied
395P10	State v. Dalia T. Harrison	1. Def's NOA Based Upon a Constitutional Question (COA09-1334) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
397P10	Currituck Associates Residential Partnership and Currituck Club Property Owners Association, Inc. v. Coastland Corporation and James E. Johnson, Jr.	Defs' PWC to Review Decision of COA (COA09-1279)	Denied

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398P10	Louis G. Antonellis v. Cumberland County Schools Board of Education, and Dr. William C. Harrison, Superintendent, Donna Weeks, Human Resources, Jeff Jernigan, Principal	1. Plt's *Pro Se* NOA Based Upon a Constitutional Question 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA09-1618)	1. Dismissed *Ex Mero Motu* 2. Dismissed
399P10	State v. John Graylon Welch	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA09-1512) 2. Def's NOA Based Upon A Constitutional Question 3. Def's PDR Under N.C.G.S. § 7A-31 4. State's Motion to Dismiss Appeal	1. Dismissed 2. 3. 4.
402P10	State v. Curtis L. Gray	1. Def's *Pro Se* Motion for Notice of Appeal (COAP10-622) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
404P10	George Irwin, et al. v. Edward J. Sutton, et al.	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-68)	Denied
407P10	Roderick Miles, Employee v. Nano-Tex, Inc., Employer Travelers Property Casualty Company of America, Carrier	Plt's *Pro Se* PWC to Review the Order of the COA (COA10-817)	Denied
413P10	State v. William Michael Mack	Def's PDR Under N.C.G.S. § 7A-31 (COA09-672)	Denied
414P10	State v. Timothy Raynard Bivens	1. Def's *Pro Se* Motion for Petition for Writ of Certiorari and/or any other Relief Under the Provisions of the All Writs Act (COA09-483) 2. Def's *Pro Se* Motion for the appointment of Counsel	1. Denied 2. Dismissed as Moot
421P10-2	State v. Robert Alan Lillie	Def's *Pro Se* Motion for Reconsideration (COAP10-650)	Dismissed

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423A10	State v. Benzion Biber	1. State's NOA (Dissent) (COA09-331) 2. State's Motion for Temporary Stay (COA09-331) 3. State's Petition for Writ of Supersedeas 4. State's PDR as to Additional Issues 5. State's Motion to Amend State's PDR to Include Additional Authority	1. —— 2. Allowed **09/27/10** 3. Allowed **09/27/10** 4. Allowed 5. Dismissed as Moot
424P10	State v. Carlos D. McCombs	Def's *Pro Se* Motion for Petition for Discretionary Review (COA10-602)	Dismissed
427P10	State v. Lorenzo Richardson	1. Def's *Pro Se* Motion for Notice of Appeal (COAP10-175) 2. Def's *Pro Se* Motion for Petition for Discretionary Review	1. Dismissed 2. Dismissed
428P10	State v. James Ira Milling, III	Def's *Pro Se* Motion for Petition for Discretionary Review (COA09-1216)	Denied
440P10	State v. Thomas Wayne Livengood	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1414)	Denied
442P10	Griggs & Co. Homes, Inc. v. Linda Sharp Linda Sharp v. D. Ken Griggs, Deborah Griggs, Town of Kitty Hawk, North Carolina, James L. Harrison, T/A Island Design and Scott Newbern	Def and Third-Party Plt's *Pro Se* Motion for Petition for Discretionary Review (COA10-802)	Dismissed
446P10	State v. Andre McCray, a/k/a Andre L. McRae	Def's *Pro Se* PWC to Review Order of COA (COAP09-505)	Dismissed
447P10	State v. Thomas Randall McLaughlin	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA09-1418)	Denied
448PA09	State v. Kenny Bowditch, Kenneth Edward Plemmons, Mark Waters	Def's Motion to Stay Issuance of Mandate	Denied **10/12/10**

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449P10	State v. Ricky Jabar McCoy	1. State's Motion for Temporary Stay (COA10-10) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/20/10** 2. 3.
450P10	State v. Matthew Edward McCormick	Def's *Pro Se* Motion for Petition for Discretionary Review (COAP09-277)	Dismissed
451P10	Willard Warren v. Alvin W. Keller, Jr., Secretary, Department of Corrections and Cliff Johnson, Administrator, Craggy Correctional Institution	Plt's Petition for Writ of Habeas Corpus	Denied
452P10	William Baggett v. Alvin W. Keller, Jr., Secretary, Department of Corrections and Joseph Hall, Administrator, Harnett Correctional Institution	Plt's Petition for Writ of Habeas Corpus	Denied
453P10	James Powell v. Alvin W. Keller, Jr., Secretary, Department of Corrections and Sandra Thomas, Administrator, Lumberton Correctional Institution	Plt's Petition for Writ of Habeas Corpus	Denied
454P10	LeRoy Richardson v. Alvin W. Keller, Jr., Secretary, Department of Corrections and Herbert Jackson, Administrator, Brown Creek Correctional Institution	Plt's Petition for Writ of Habeas Corpus	Denied
455P10	David Lee Dollar v. Alvin W. Keller, Jr., Secretary, Department of Corrections and David Mitchell, Administrator, Mountain View Correctional Institution	Plt's Petition for Writ of Habeas Corpus	Denied

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458P10	State v. Nakia Nickerson	1. State's Motion for Temporary Stay (COA09-1511) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/25/10** 2. 3.
460P10	James Powell v. Alvin W. Keller, Jr., Secretary, Department of Corrections and Sandra Thomas, Administrator, Lumberton Correctional Institution	Plt's Petition for Writ of Habeas Corpus	Denied
461P10	Joseph Seaborn v. Alvin W. Keller, Jr., Secretary, Department of Corrections and Oliver Washington, Administrator, Tillery Correctional Center	Plt's Petition for Writ of Habeas Corpus	Denied
462P10	Larry Waddell v. Alvin W. Keller, Jr., Secretary, Department of Corrections and Herbert Jackson, Administrator, Brown Creek Correctional Institution	Plt's Petition for Writ of Habeas Corpus	Denied
463P10	Barry Holcomb v. Alvin W. Keller, Jr., Secretary, Department of Corrections and Butch Jackson, Administrator, Nash Correctional Institution	Plt's Petition for Writ of Habeas Corpus	Denied
468P10	Damon Owens-Bey v. State of North Carolina et al, Department of Correction et al, and Caswell Correctional Facility, et al	Plt's *Pro Se* Motion for Petition for Writ of Habeas Corpus	Denied

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477P10	In the Matter of: K.D.L.	1. State's Motion for Temporary Stay (COA09-1653) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/04/10** 2. 3.
495P09	State v. Rodney Labrinth Miller	1. Def's NOA Based Upon a Constitutional Question (COA09-623) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied
499P06-6	In Re: Arthur O. Armstrong	1. Plt's *Pro Se* Motion for Petition for Writ of Mandamus 2. Plt's *Pro Se* Motion for Leave to File Motion to reopen Case 3. Plt's *Pro Se* Motion for Leave to File Supplemental Complaint 4. Plt's *Pro Se* Motion for Leave to File Motion for Summary Judgment, With Supporting Affidavit and Documentation	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed
525A07	State v. Byron Lamar Waring	Def's Motion to Allow Filing of Supplemental Brief	Allowed
531A00-3	State v. David Gainey	State's PWC to Review Order of Harnett County Superior Court	Denied
589A01-2	State v. Ronnie Lane Stancil	Def's *Pro Se* PWC to Review Order of COA	Dismissed

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009P10	State v. Michael Andrew Roughton	1. State's Motion for Temporary Stay (COA09-536) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/12/10** Dissolved the Stay **12/15/10** 2. Denied 3. Denied
055P02-8	State v. Henry Ford Adkins	Def's Motion for Petition for Writ of Mandamus	Denied
059P10-2	Horace K. Pope, Jr., Employee v. Johns Manville, Employer and St. Paul Travelers Indemnity Company, Carrier	1. Defs' Motion for Temporary Stay (COA09-281-2) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31 (COA09-571) 4. North Carolina Association of Defense Attorneys' Motion for Leave to File Amicus Brief	1. Allowed **10/11/10** 2. 3. 4.
112P10	Hazel Hawkins, as Personal Repres. of the Estate of Neal Hawkins, Jr., Deceased and as Personal Representative of Statutory Beneficiaries v. SSC Hendersonville Operating Company, LLC d/b/a The Brian Center Health & Rehab. Hendersonville	1. Plt-Appellant's Motion for Temporary Stay 2. Plt-Appellant's Petition for Writ of Supersedeas 3. Plt-Appellant's PDR	1. Allowed **03/17/10** 2. 3.
114A10	State v. Kenneth Bernard Davis	1. Def's NOA Based Upon A Constitutional Question (COA09-278) 2. State's Motion to Dismiss Appeal 3. Def's Motion to File Motion for Appropriate Relief Pursuant to the All Writs Act	1. 2. 3. Dismissed
131P10	Jan Britt Lynn, Plaintiff v. James Gregory Lynn, et al. Defendant and James Gregory Lynn, Third Party Plaintiff v. Penny W. Lynn, et al., Third Party Defendants	Third Party Defs' PDR Under N.C.G.S. § 7A-31 (COA09-556)	Denied

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155P10	State v. Kenneth Bernard Davis	Def's Motion for Appropriate Relief and for any other Available Relief Pursuant to the All Writs Act	Dismissed
196P10	Brenda Jane Mace v. Monty Pyatt, Charles Cameron Flack, and Wade E. Flack	1. Def's (Charles Flack) PDR Under N.C.G.S. § 7A-31 (COA09-569) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
211P10	State v. Thomas Lee Brennan	1. State's Motion for Temporary Stay (COA09-1362) 2. State's Petition for Writ of Supersedeas 3. State's NOA Based Upon a Constitutional Question 4. State's Alternative PDR Under N.C.G.S. § 7A-31	1. Allowed **05/21/10** 2. 3. 4.
214P10	State v. Christopher Wayne Johnson	1. Def's Motion for PDR (N.C.G.S. Sec. 7A-31) (COA09-696) 2. Def's Motion for Extension of Time to File Motion for Appropriate Relief 3. Def's Motion for Appropriate Relief	1. Denied 2. Allowed 3. Dismissed as Moot
235P10	State v. John Edward Brewington	1. State's Motion for Temporary Stay (COA09-956) 2. State's Petition for Writ of Supersedeas 3. State's NOA Based Upon a Constitutional Question 4. State's Alternative PDR	1. Allowed **06/04/10** 2. 3. 4.
244P10	Hope-A Women's Cancer Center, P.A. and Raleigh Orthopaedic Clinic, P.A. v. State of NC, et al.	1. Plts' NOA Based Upon A Constitutional Question (COA09-844) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
248P10	Lavern Irwin v. Judy H. Sills	1. Plt's PWC to Review Order of COA (COAP10-298) 2. Plt's Motion for Leave to File Forma Pauperis 3. Plt's Motion for Leave to Supplement Petition for Writ of Certiorari	1. Dismissed 2. Allowed 3. Allowed

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275P10	The NC State Bar v. Rachel Lea Hunter	1. Def's NOA Based Upon A Constitutional Question (COA09-1014) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Josiah Neely's Motion to be Admitted *Pro Hac Vice* 4. James Bopp, Jr.'s Motion to be Admitted *Pro Hac Vice*	1. Dismissed *Ex Mero Motu* 2. Denied 3. Allowed 4. Allowed **Martin, J., Recused** **Newby, J., Recused**
276P10	Warren Follum v. N.C. State University	1. Plt's NOA Based Upon A Constitutional Question (COA09-1466) 2. Plt's Alternative Petition for Discretionary Review Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
286P10	Wanda B. Knight v. Lloyd H. Knight	1. Petitioner's Motion for Temporary Stay (COAP10-370) 2. Petitioner's Petition for Writ of Supersedeas 3. Petitioner's Motion for PDR 4. Petitioner's Petition for Writ of Prohibition 5. Petitioner's PWC to Review Order of COA	1. Denied **07/13/10** 2. Denied 3. Dismissed 4. Denied **07/13/10** 5. Denied
320P10	Jerry Owen v. Haywood County, Haywood Board of Commissioners, Haywood County Sheriff's Department, Sheriff Tom Alexander, Mike Shuler, Mark Williams	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-929)	Denied

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322P10	State v. Marcus Arnell Craven	1. State's Motion for Temporary Stay (COA09-1138) 2. State's Petition for Writ of Supersedeas 3. State's NOA Based Upon a Constitutional Question 4. State's Alternative PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Dismiss Appeal 6. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **08/05/10** 2. 3. 4. 5. 6.
324P10	State v. Rodney Flynn McNeill	1. State's Motion for Temporary Stay (COA09-1585) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/06/10** 2. 3.
325P10	Ernest Thames v. N.C. Department of Correction	Plt's Motion for Petition for Writ of Certiorari (COA09-1376)	Denied
327P10	State v. Robert Lee Pastuer	1. State's Motion for Temporary Stay (COA09-1432) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/06/10** 2. Allowed 3. Allowed
333P10	State v. Alfredo Alvardo	1. Def's Motion for Notice of Belated Appeal (COA09-428) 2. Def's Motion for Petition for Discretionary Review	1. Denied 2. Denied
336P10	In re: P.C.H.	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA10-148)	Denied
342P10	State v. Jeremy Lee Ebersole	Def's Motion for PDR (N.C.G.S. Sec. 7A-31) (COA09-617)	Denied
344P10	Tareek Dubose v. North Carolina Department of Correction	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-571)	Denied **Hudson, J., Recused**
345P10	In the Matter of: D.R.F., A Minor Child	1. Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA09-1716) 2. Respondent's (Father) PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed

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348P10	Ernest Todd Woodlift, Employee v. Thomas Fitzpatrick, d/b/a Custom Woodwork Unlimited, Employer (Non-Insured) and Thomas Fitzpatrick, Individually	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA09-1447) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal 4. Plt's Motion to Convert PDR into a Writ of Certiorari	1. Denied 2. Dismissed as Moot 3. Dismissed as Moot 4. Allowed
351PA08-2	Robert Baxter, Employee v. Danny Nicholson, Inc., Employer Self-Insured, (Key Risk Management Services, Inc., Servicing Agent)	1. Def's Motion for Temporary Stay (COA07-865-2) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Withdraw PDR and Petition for Writ of Supersedeas	1. Allowed **10/13/10** Dissolved the Stay 12/15/10 2. Dismissed as Moot 3. Dismissed as Moot 4. Allowed
357P10	Da Dai Mai v. Carolina Holdings, Inc. And R. Gregory Tomchin, Substitute Trustee	1. Def's (Carolina Holdings, Inc.) NOA Based Upon A Constitutional Question (COA09-1685) 2. Def's (Carolina Holdings, Inc.) PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied
358P10	Katherine M. McCraw, et al. v. George W. Aux, Jr. Individually, and George W. Aux, Jr. Trust Dated November 8, 2006	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA09-1238) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal	1. Denied 2. Dismissed as Moot 3. Dismissed Without Prejudice to Refile in Trial Court
360A10	State v. William Lee Pait, Jr.	1. Def's NOA Based Upon A Constitutional Question (COA09-870) 2. State's Motion to Dismiss Appeal	1. Dismissed *Ex Mero Motu* 2. Dismissed as Moot
369PA10	In the Matter of J.H.K. and J.D.K.	1. Motion by Janet Ledbetter to Withdraw as Counsel 2. Respondent's Motion for Extension of Time to File Brief	1. Allowed **11/23/10** 2. Allowed **11/23/10**

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372P10	Randy Lee Duckworth, Employee v. SGL Carbon, Employer and ACE USA/ESIS, Carrier	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1100)	Denied
379P10	State v. Ralph Franklin Fredrick	Def's Motion for Petition for Re-Hearing Because of the Premature Dismissal of his Petition for a Sentence Correction Without Allowing the Petitioner the Opportunity to Respond in Violation of His Constitutional Rights (COAP10-584)	Dismissed
381P10-2	State v. David E. Simpson	1. Def's Petition for Writ of Habeas Corpus 2. Def's Motion to Proceed In Forma Pauperis	1. Denied **12/14/10** 2. Allowed **12/14/10**
382P10	State v. John Lewis Wray, Jr.	1. State's Motion for Temporary Stay (COA09-304) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/07/10** 2. 3.
384P10	State v. Keith Ray Smith	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1393)	Denied
386P10	State v. Paul Brantley Lewis	1. State's Motion for Temporary Stay (COA08-1595) 2. State's Petition for Writ of Supersedeas 3. State's NOA Based Upon a Dissent 4. State's Alternative PDR 5. Def's Motion to Dismiss Appeal	1. Allowed **09/07/10** 2. 3. 4. 5.
392P10	Dorothy Harris v. Clarence Barefoot, Lucia Castaldo, and Richard Clyde, Jointly and Severally	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA09-1313) 2. North Carolina State Association of Letter Carriers' Motion for Leave to File Amicus Brief	1. Denied 2. Dismissed as Moot
399P10	State v. John Graylon Welch	1. Def's PDR Under N.C.G.S. § 7A-31 (COA09-1512) 2. Def's NOA Based Upon A Constitutional Question 3. Def's PDR Under N.C.G.S. § 7A-31 4. State's Motion to Dismiss Appeal	1. Dismissed 2. 3. 4.

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408P10	State v. Dave Anthony Hudson	Def's Motion for PDR Under N.C.G.S. § 7A-31 (COA09-1421)	Denied
411P10	Yaodong Ji v. City of Raleigh, NC; Supervisor of Special Victims Unit, Raleigh Police Department; Donna G. Bean	1. Plt's NOA Based Upon A Constitutional Question (COA09-1026) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied
415P10	Pierce Butler Irby, III and wife, Cindy Baker Irby v. Gail Wilkins Freese f/k/a Gail Brinn Wilkins, and Joseph P. Clark, Trustee for Truliant Federal Credit Union	Defs' PDR Under N.C.G.S. § 7A-31 (COA09-571)	Denied
416PA08-2	Julia Catherine Boseman v. Melissa Ann Jarrell and Melissa Ann Jarrell v. Julia Catherine Boseman, et al.	Def/Third-Party Plt's Motion for Extension of Time to File Reply Briefs	Allowed
417P10	Penny Cummings v. Agnes Ortega, MD and Women's Health Care Specialists	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1491)	See Special Order Page 598
427P10-2	State v. Lorenzo Richardson	Def's PWC to Review Order of COA (COAP10-175)	Dismissed
430P10	State v. James Lee Spellman	1. Def's NOA Based Upon A Constitutional Question (COA09-1636) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
431P10	State v. Kenneth Thomas Forte	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1591)	Denied
432P10	State v. Ronell Michael Bettis	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1345)	Denied
435A96-5	State v. Walic Christopher Thomas	1. Def's Motion to Stay Petition for Writ of Certiorari 2. Def's PWC to Review Decision of Superior Court of Guilford County 3. Def's Motion to Withdraw All Appeals	1. 2. 3. Dismissed

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441P92-4	State v. Johnnie L. Harrington	Def's Petition for Writ of Habeas Corpus	Denied **11/22/10**
445P10	In the Matter of: S.R. and N.R.	Respondent's PDR Under N.C.G.S. § 7A-31 (COA10-337)	Denied
449P10	State v. Ricky Jabar McCoy	1. State's Motion for Temporary Stay (COA10-10)	1. Allowed **10/20/10** Dissolved the Stay **12/15/10**
		2. State's Petition for Writ of Supersedeas	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Denied
456P10	State v. Brian Anthony Reavis	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1425)	Denied
458P10	State v. Nakia Nickerson	1. State's Motion for Temporary Stay (COA09-1511)	1. Allowed **10/25/10** Dissolved the Stay **11/30/10**
		2. State's Petition for Writ of Supersedeas	2. Dismissed as Moot **11/30/10**
		3. State's PDR Under N.C.G.S. § 7A-31	3. Dismissed as Moot **11/30/10**
		4. State's Motion to Withdraw PDR and Petition for Writ of Supersedeas	4. Dismissed as Moot **11/30/10**
		5. State's Motion for Temporary Stay	5. Allowed **11/30/10**
		6. State's Petition for Writ of Supersedeas	6.
		7. State's PDR Under N.C.G.S. § 7A-31	7.
467P10	State v. Gary Allen Lee	1. Def's NOA Based Upon A Constitutional Question (COA09-1533)	1. ———
		2. Def's PDR Under N.C.G.S. § 7A-31	2. Denied
		3. State's Motion to Dismiss Appeal	3. Allowed
469P10	State v. Cory L. Melvin	1. Def's PWC to Review Order of COA (COAP10-473)	1. Dismissed
		2. Def's Motion to Appoint Counsel	2. Dismissed as Moot
		3. Def's Motion to Proceed In Forma Pauperis	3. Allowed

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473P10	State v. Terrance Deon Johnson	1. Def's NOA Based Upon A Constitutional Question (COA10-143) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
474P09	State v. Kelly Leianne Mangino	10 Def's NOA Based Upon A Constitutional Question (COA08-1555) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
475P10	State v. Eric S. Mullis	Def's Motion for PDR (COAP10-702)	Dismissed
477P10	In the Matter of: K.D.L.	1. State's Motion for Temporary Stay (COA09-1653) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/04/10** 2. 3.
479P10	State v. Elijah Omar Nabors	1. State's Motion for Temporary Stay (COA10-176) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/05/10** 2. 3.
482P10	State v. Rodney McDonald Williams, Jr.	1. Def's Motion for Petition for Writ of Habeas Corpus and Testificandum 2. Def's Motion to Proceed In Forma Pauperis	1. Denied **11/23/10** 2. Allowed **11/23/10**
483P10	State v. Dennis Wayne Shaw	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1096)	Denied
486P10	Phyllis Dianne Smith v. Teachers' and State Employees' Retirement System, et al.	Plt's PDR Prior to Determination by the COA	Denied
487P10	State v. Jonathan Matthew Gould	Def's PDR Under N.C.G.S. § 7A-31 (COA10-194)	Denied
490P10	State v. Larry Dean Mintz	Def's Motion for PDR (COA08-1075)	Denied
504P10	State v. Joe Nathan Brown	Def's PWC to Review Decision of COA (COA10-15)	Denied

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

FILED 15 DECEMBER 2010

505P10	State v. David Franklin Hurt	1. State's Motion for Temporary Stay (COA09-942) 2. State's Petition for Writ of Supersedeas 3. State's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31	1. Allowed **11/30/10** 2. 3.
544P07-2	State v. Lisa Louise Greene	1. Def's PDR Under N.C.G.S. § 7A-31 (COA09-1327) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot

APPENDIXES

PRESENTATION OF
ASSOCIATE JUSTICE
FRANCIS IREDELL PARKER
PORTRAIT

PRESENTATION OF
ASSOCIATE JUSTICE
WILLIAM B. RODMAN, JR.
PORTRAIT

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING JUDICIAL
DISTRICT GRIEVANCE COMMITTEES

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 JUSTICE SYSTEM COMMITTEE

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

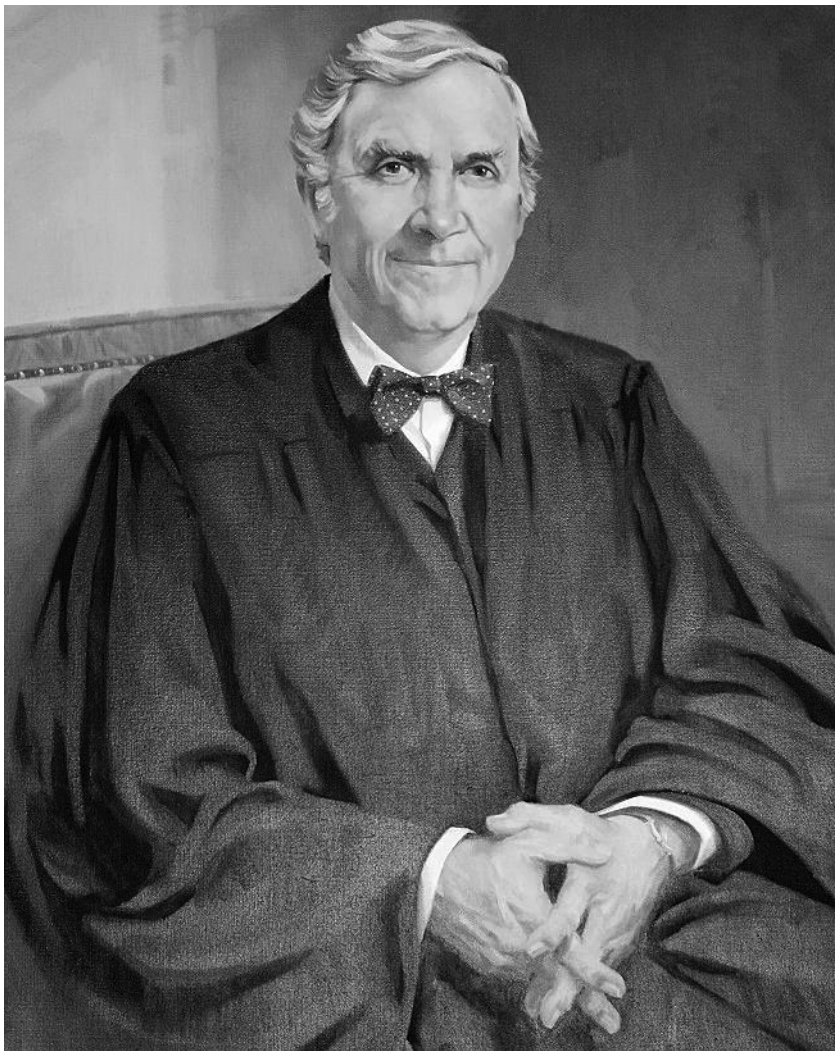
AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PRACTICAL TRAINING OF LAW STUDENTS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PREPAID LEGAL SERVICES PLANS

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING JUDICIAL DISTRICT BARS

RESTRUCTURE OF THE ALTERNATIVE DISPUTE RESOLUTION COMMITTEE OF THE STATE JUDICIAL COUNCIL



PRESENTATION OF THE PORTRAIT OF

FRANCIS IREDELL PARKER
Associate Justice

SUPREME COURT OF NORTH CAROLINA

1986

August 26, 2010

OPENING REMARKS
and
RECOGNITION of
WILLIAM FARTHING on behalf of SYDNOR THOMPSON
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 Francis Iredell Parker.

Today marks an important milestone in the history of the Court as we continue a tradition that was begun almost 125 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.

The presentation of Justice Parker's 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 William Farthing, on behalf of Sydnor Thompson, who will present the portrait to the Court.

PRESENTATION OF PORTRAIT
by
WILLIAM FARTHING on behalf of SYDNOR THOMPSON

Today the portrait of Justice Francis Iredell Parker, who graced this world from August 21, 1923, to March 5, 2008, is being hung here in the Supreme Court of North Carolina. Francis came from a distinguished family, including a long line of outstanding members of the legal profession. His father, the eminent jurist John Johnston Parker, served with distinction as Chief Judge of the United States Court of Appeals for the Fourth Circuit for nearly thirty years and as a judge at the Nuremberg War Crime trials after World War II. In fact, the highest honor that the North Carolina Bar Association can pay any of its members is named for him—the Judge John J. Parker Award.

Francis was also a descendent of Justice James Iredell, one of the original members of the United States Supreme Court appointed by President George Washington in 1790. Much of Justice Iredell's library has been recently restored through the efforts of the North Carolina Supreme Court Historical Society and many of his books are now on display in the History Center here in Raleigh.

In World War I, Francis' uncle, Samuel Iredell Parker, was awarded our country's highest honor for heroism, the Congressional Medal of Honor. Francis himself served with great distinction both in the Pacific near the conclusion of World War II and as a Navy Lieutenant in the Korean War.

An outstanding real estate lawyer, Francis may have been the last of the great title examiners for whom no challenge posed by the records of the Register of Deeds was too great. In that regard he continued in the tradition of such celebrated members of the Charlotte Bar as his contemporaries—the late John Shaw and the late Neal Pharr.

Beside specializing in real estate law, Francis was also a generalist, i.e., an outstanding student of jurisprudence. In fact, for fourteen years he served as a member and eventually as Chairman of the North Carolina Board of Law Examiners, at a time when some of you here were put to that test as applicants to the Bar. The members of the Board of Law Examiners continued to call on Francis to help them grade the bar exams long after he had resigned from that Board and they remained among his close friends.

Of course, Francis had the greatest opportunity to display his legal acumen when he was appointed by Governor James Martin in

1986 to the post of associate justice of the Supreme Court of North Carolina where he served as a highly valued member in the prime of his professional life.

Francis' other accomplishments are far too numerous to permit detailing them here, but they included serving as president of the Mecklenburg County Bar and as the first president of the Mecklenburg Bar Foundation.

He received the Distinguished Alumni Award from the University of North Carolina School of Law, having also attended UNC-Chapel Hill to earn an A.B. degree. In fact, as many of you know, he rarely missed a Tar Heel football game until serious illness intervened, and he followed the basketball team's contests with equal enthusiasm.

Justice Francis Parker's surname prominently graces the front door of the firm with which he and I practiced law for more than fifty years—Parker Poe Adams & Bernstein—and we who practiced with him treasure it as a daily reminder of the man himself.

Francis was devoted to, and in his last days grew to depend heavily upon, his wife, Mary Sommers Booth Parker. He was also devoted to his three children: son, John Johnston Parker, III, our fellow member of the Mecklenburg County Bar; son, William Booth Parker of Birmingham, Alabama; and daughter, Mary Sommers Parker Welch of Huntersville, North Carolina. They were his pride and joy as were his seven grandchildren: Virginia Booth Parker; John Johnston Parker, IV; Mary Laurens Welch; William Francis Parker; Virginia Sommers Welch; Elizabeth Ann Parker, and Parker Alexander Welch.

That is the official or biographical side of Justice Parker. There was another Francis whom I knew well and greatly admired. It was the Francis who could not abide the artificial, the contrived or the affected. He was constitutionally opposed to putting on airs. He drove his father's old Packard, "Bessie," until the wheels nearly fell off. In fact, Francis was perhaps the most genuine human being I have ever known, and on that account, one of my very best friends. Indeed, it was his practice to insist upon the genuine—the real—whenever afforded the opportunity. He delighted in puncturing any idea, any thing or any person that he considered unduly inflated. It was a service he regularly provided those of us who occasionally overstepped the bounds of self-importance. Fortunately he performed that service with a twinkle in his eye, reflecting the dry wit that we came to know so well.

I can think of no better example of Francis' own self-effacing manner than the request he made of the minister who conducted his

funeral service at Christ Episcopal Church and who told us that Francis had insisted: "I don't want any preaching at my funeral. If the Book of Common Prayer was good enough for King Henry VIII, it's good enough for me."

There was too the Francis who was a "gentleman's gentleman." His manners were exemplary—perhaps even courtly. He never failed to express his appreciation of a favor—often in writing. But Francis also embodied a broader definition of "gentleman." General Robert E. Lee, whom Francis greatly admired and whom, consciously or unconsciously, he emulated in many respects, once defined a gentleman as follows:

> "The manner in which an individual enjoys certain advantages over others, is a test of a true gentleman . . . A true man of honor feels humbled himself when he cannot help humbling others."

That was Francis. The persons who worked for him were among those who regarded him most highly. Security guards at the entrance to our office parking garage were greatly concerned about him during his last illness. To meet Francis Parker was certainly to respect and admire him, but it was also to regard him as an exceptionally congenial human being. Everyone liked Francis.

Not only were his manners always those of a gentleman but so was his attire.

Casual Fridays were not for Francis. We could see our reflection in his highly polished Navy shoes, though the customary bow tie reminded us that he refused to take himself too seriously.

I should like to close with a tribute I made to Francis on the occasion of a 70th birthday luncheon held in his honor. It was, I must say somewhat apologetically, cast in the form and meter known as a limerick. In it I sought to capsulize the nature of the exceptional individual we knew as Francis Iredell Parker:

Here's to a consummate gent
who, like Holmes, may often dissent.
With a pedigree
to match Bobby Lee
and hardly a sin to repent.

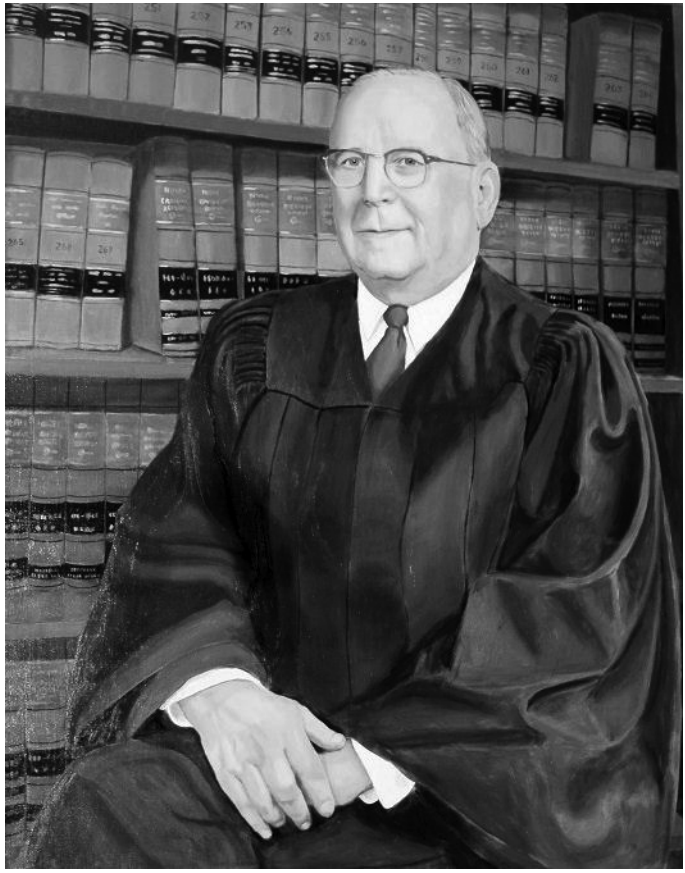
ACCEPTANCE OF JUSTICE PARKER'S PORTRAIT
by
CHIEF JUSTICE SARAH PARKER

Thank you Mr. Farthing, on behalf of Mr. Thompson, for that fitting tribute to our former colleague. At this time, I am privileged to call upon Justice Parker's grandchildren to unveil the portrait of their grandfather.

Thank you. 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 Parker 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 Parker's 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 Parker family, I invite all of you to a reception at the Parker Poe law firm. 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 the reception.



PRESENTATION OF THE PORTRAIT OF

WILLIAM B. RODMAN, JR.
Associate Justice

SUPREME COURT OF NORTH CAROLINA

1956-1965

September 1, 2010

OPENING REMARKS
and
RECOGNITION of
L.P. HORNTHAL
by
CHIEF JUSTICE SARAH PARKER

The Chief Justice welcomed the guests with the following remarks:

Good morning 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 William B. Rodman, Jr.

The presentation of portraits has a long tradition at the Court, beginning almost 125 years ago. The first portrait to be presented was that of Chief Justice Thomas Ruffin on March 5, 1888. Today the Court takes great pride in continuing this tradition into the 21st century. For those of you who are not familiar with the Court, the portraits in the courtroom are those of former Chief Justices and those in the hall here on the third floor are of former Associate Justices.

The presentation of Justice Rodman's 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 L.P. Hornthal who will present the portrait to the Court.

Presentation of Portrait
by
L.P. Hornthal

May it please the Court:

It is my distinct privilege and honor to present to this Honorable Court the portrait of Associate Justice William Blount Rodman, Jr. I first stood at this podium 46 years ago. I was arguing a case for the Attorney General, a position Judge Rodman had used his influence to get for me as his law clerk before I finished my tenure less than a month before. I am deeply grateful to Edith Rodman and the Rodman family for asking me to address the Court on this historic occasion.

With your leave, some acknowledgments of appreciation:

First, to John Becker, for his wonderful and life giving portrait of Judge Rodman to be shortly unveiled. This is the second portrait by Mr. Becker to hang in the Court, the first of Justice Lake the elder.

Second, to David Francisco and the Rodman Law Firm for their support in the fund raising efforts for the portrait and for their hosting of the reception which will follow.

Thirdly, to my fellow law clerks who served Judge Rodman and provided the substantial majority of the funding for the portrait's commissioning. In order of service they are:

Bill Brewer
Tom Bennett
Ted Reynolds
Ken Etheridge
Glen Pettijohn
Fountain Odom
Charlie Clement

I am also appreciative to them for sharing their observations about Judge Rodman. Our observations bore remarkable similarity. My discussions of Judge Rodman's fundamental characteristics are largely a composite of our recollections of this great man and jurist we were privileged to serve.

Judge Rodman served on the Court from 1956, when he was appointed by Governor Hodges, until his retirement in 1965. I refer him to "Judge Rodman", because this was the common address for Justices of that era and how they referred to each other.

A few words about the Supreme Court of Judge Rodman's era:

- It was our only appellate court and there was an automatic right of appeal to the court in all cases.
- For his first seven years, it was an all male court, all of who had been distinguished jurists or lawyers before their appointment. In 1963, Judge Sharp was the first woman appointed to the Court. Both before and after her appointment, there was an exceptional camaraderie among the Court.
- Each of them were appointed and re-elected without opposition. Thus, they had the wonderful luxury of being freed from political campaigning.
- The court had no law clerks until 1957. Before then, the Judges did their own research.
- About the time he came on the Court, robes were introduced instead of suits.
- There was no courtroom security. The public had access by elevator to the 3rd floor, housing the courtroom and chambers.
- Even so, visitors were rare and it was, then as now, a rather monastic place devoted to legal scholarship.

Judge Rodman's appointment to the Court in 1956 was widely acclaimed:

- His grandfather, William Blount Rodman, had been a justice on the Court after the Civil War.
- His father was a distinguished lawyer of great reputation.
- Judge Rodman had been recognized as a lion of the Bar for over 40 years; a great trial lawyer with broad experience in land suits; he was long known as a lawyer's lawyer to whom lawyers turned for advice.
- He had served as a legislator in both the House and Senate; was President of the North Carolina State Bar; and Attorney General.
- He had been at the seat of political power in North Carolina from the outset of his career.
- To use a modern term, it was as if he was cloned for the job.

Though never voiced by him, it was clear to all of us close to him that his service on the Supreme Court, in the footsteps of his grandfather, was the highlight and capstone of his distinguished career.

I would like to try to bring to you the humanity of this remarkable man. This composite of his most notable characteristics comes mostly from his law clerks.

First, he brought an infectious joy to his work.
He loved being a judge. He delighted in good lawyering.

His immense pleasure was manifest:

- Whether pouring over a complex record;
- Researching legal precedents, especially when yielding a "case on 4 legs" as he liked to say.
- When discussing and debating the law and facts of a case. He particularly enjoyed the give and take of oral arguments;
- Even in the arduous task of crafting his opinions, he seemed to be having a high time.

It *was infectious. What could be more fun than being a lawyer?* I am satisfied that the same heritage of delight and enjoyment of our professional work followed each of his law clerks into their careers.

Second was his complete and tireless devotion to his duties with the Court.

- At 7:30 a.m., he wanted his law clerks to join him in Chambers. Long known as the early bird of the Court, he was there long before our arrival. None of us managed to beat him there. Charlie Clement tells of arriving shortly after 6:00 a.m. one morning and finding the Judge hard at work in his chambers.
- Most days, he was there long after we left in the afternoon. On many days, the following morning, it was apparent to us law clerks that he had burned the midnight oil long after we had left.
- Likewise, on many Monday mornings, it was obvious to us that he had spent the weekend working on a case or cases.

In this, there was a lasting impression made on all of us:

What we were doing, being a lawyer or a judge, was important work. It was critical to get it right; and you could do that only with long hours and devoting yourself unequivocally to the tasks at hand.

Third, was the extraordinary breadth of his knowledge of the law.

He had been licensed in 1911. He had seen enormous changes in the law. Even so, he was able to convey that the fundamentals of good lawyering and judging; and how cases are put together, tried and decided, do not change.

- He had a prodigious memory. He would give you the name and citation of a case written many years before or might say, "I think my grandfather wrote an opinion in the 1870's on this point." Or, "I think you will find a case on this point by Stacy or Ervin, or Barnhill and he would give you a date and you would find the case and it would be right on the money.
- It was amazing how often he could point his clerk to a pivotal case which none of the lawyers had cited.

He especially delighted in dispatching us to track a principle back to English common law.

Fourth, Judge Rodman's commitment to stare decisis and precedent was the cornerstone of his judicial philosophy.

He liked to tell the story of an earlier court, on the mid-day walk down Fayetteville Street to lunch. They encountered Mr. Allen, a notable Raleigh railroad lawyer who had just had a wrongful death case where the court reversed a nonsuit in his favor. The opinion writer was supposed to have asked Mr. Allen, "Well Mr. Allen, what did you think of the recent case of so and so against the railroad?"

Allen: "To be honest, Judge, I had a hard time finding any acts of negligence on the part of the railroad."

The Judge replied: "Oh, my brother Allen, there were six notable acts of negligence."

Allen: "Really?"

Judge: "Yes, there was a widow and her five orphaned children."

Judge Rodman would smile wryly and say: "Judge so and so was never impeded by precedent from a result he wanted to reach."

The story was amusing, but the message was implicit: precedent should never be bent to reach a result, no matter how righteous.

- On Judge Rodman's watch, hard cases did not make bad law.
- He was a very spare opinion writer. He wrote out all his opinions in pencil to better accommodate the editing process. His editing

and re-editing almost always resulted in a shorter opinion. He was a firm believer that the more you said, the more you risked doing violence to precedent. He often observed to us, "We're not writing a law review article here."

Next, he had a wonderful sense of humor.

He was a delightful raconteur. At our early-morning meetings, he delighted in telling true and wonderful tales about cases he or other lawyers had tried; as well as anecdotes from the many years he had practiced in eastern North Carolina.

Each of his law clerks can recall him asking, with a smile: "Have you ever heard of the second civil war?" The answer as invariably, "No judge, I haven't." With mock seriousness, he would then say, "Do you mean to tell me you were never taught in school about the second civil war?" The second civil war he was talking about was the decades long struggle in Eastern North Carolina between John L. Roper Lumber Company and Richmond Cedar Works about competing claims and boundary disputes relating to the thousands and thousands of acres of timber land for which these two timber giants had deeds. This would allow the Judge to launch into a funny true story of lawyers and cases arising out of these struggles. He would tell these stories and sometimes laugh so hard that he would begin coughing enough to cause us alarm. I wish time permitted my relating to you some of the funnier of these great stories—I don't recall any short ones.

Tom Bennett shared this example of his humor: As was his habit, they had been debating points of law essential to an opinion the Judge was working on. At some point, the Judge called out to his legal secretary, "Miss Julia, please note Judge Bennett's dissent to this decision."

Lastly, he was his kindness and consideration of others.

We all especially remember his ability to put young lawyers at ease during oral arguments. A great example I remember is a case before the Court, essentially in a test case for the benefit of the IRS. A son was suing his mother to obtain a ruling from the highest court that the mother's marital status was such that the estate would be entitled to a marital deduction. The young lawyer representing the son had barely opened his mouth when Justice Hunt Parker began berating him: "Do you mean to tell me, young man, that you are here in court advancing the position of a son that his mother was not married to his father?" Justice Parker pressed on and on with this point, interrupting the lawyer's efforts to explain the posture of the case.

Finally, Judge Rodman interjected, in his deep bass voice: "Young man, this is what we call a friendly suit isn't it? You are here at the insistence of the IRS to get a court ruling to satisfy them that your mother and the estate of your father will qualify for the marital deduction? And it is your fervent hope that your mother wins this case?" The young lawyer almost sank to his knees in appreciation. "Yes. Thank you Judge Rodman. Thank you."

He was a wonderful but gentle mentor to his law clerks. He was not one to offer overt advice, but had a wonderful way of using stories and observations to frame matters of ethical import and sometimes relating to our career choices.

All of his law clerks feel a deep sense of gratitude for his behind-the-scenes efforts to assist us to start off and continue on the right foot In our profession.

It is a fair statement that Judge Rodman had a life long love affair with the law. Edith Rodman, widow of the Judge's son, Ed, shared with me this story. Ed, as most of you know, was a very distinguished lawyer in his own right: a great trial lawyer and a former president of the North Carolina Bar Association.

Even after he retired, Judge Rodman remained vitally interested in the workings of the Supreme Court. A particular decision had come down with which the Judge took issue. At the Judge's request, Ed had obtained a copy of the opinion.

The Judge was in the hospital and Ed brought along the opinion. They had a splendid time jousting about the opinion with the Judge arguing one side and Ed taking the other. As the Judge was driving home a favorable point in the debate, he coughed, and died with a smile on his face.

If he had been permitted to choose, Judge Rodman could not have picked a better way to end his distinguished life.

Thank you.

ACCEPTANCE OF JUSTICE RODMAN'S PORTRAIT
by
CHIEF JUSTICE SARAH PARKER

Thank you, Mr. Hornthal for that fitting tribute to our former colleague. At this time, I am privileged to call upon Justice Rodman's great-great-grandchildren to unveil the portrait of their great-great-grandfather.

Thank you. 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 Rodman as a part of our collection. We are pleased to have this fine work of art, and we sincerely appreciate the efforts of all who helped to make this presentation possible.

Justice Rodman's portrait will be hung in an appropriate place in this building as quickly as possible and will be a continuous reminder to us and our successors of the great history and traditions of this Court. Additionally, these proceedings will be printed in the North Carolina Reports.

On behalf of the Rodman family, I invite all of you to a reception in the History Center on the first floor of this building. I thank all of you for being with us today. The Justices and I look forward to having a chance to meet with you and to talk with you at the reception.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING JUDICIAL DISTRICT GRIEVANCE COMMITTEES

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 16, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning judicial district grievance committees, as particularly set forth in 27 N.C.A.C. 1B, Section .0200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, Section .0200, Rules Governing Judicial District Grievance Committees

.0201 Organization of Judicial District Grievance Committees

(a) . . .

(c) Appointment of District Grievance Committee Members

(1) Members of District Committees—Each district grievance committee shall be composed of not fewer than five nor more than ~~13~~ 21 members, all of whom shall be active members in good standing both of the judicial district bar to which they belong and of the North Carolina State Bar. In addition to the attorney members, each district grievance committee may also include one to ~~three~~ five public members who have never been licensed to practice law in any jurisdiction. Public members shall not perform investigative functions regarding grievances but in all other respects shall have the same authority as the attorney members of the district grievance committee.

. . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 16, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 25th day of August, 2010.

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 7th day of October, 2010.

s/ Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 7th day of October, 2010.

s/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 July 23, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rules of Professional Responsibility Rule 8.3 Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or the court having jurisdiction over the matter.

(b) . . .

(e) A lawyer who is serving as a mediator and who is subject to the North Carolina Supreme Court Standards of Professional Conduct for Mediators (the Standards) is not required to disclose information learned during a mediation if the Standards do not allow disclosure. If disclosure is allowed by the Standards, the lawyer is required to report professional misconduct consistent with the duty to report set forth in paragraph (a).

Comment

[1] . . .

[7] The North Carolina Supreme Court has adopted Standards of Professional Conduct for Mediators (the Standards) to regulate the conduct of certified mediators and mediators in court-ordered mediations. Mediators governed by the Standards are required to keep confidential the statements and conduct of the parties and other participants in the mediation, with limited exceptions, to encourage the candor that is critical to the successful resolution of legal disputes. Paragraph (e) recognizes the concurrent regulatory function of the Standards and protects the confidentiality of the mediation process. Nevertheless, if the Standards allow disclosure, a lawyer serving as a mediator who learns of or observes conduct by a lawyer that is a violation of the Rules of Professional Conduct is required to report consistent with the duty set forth in paragraph (a) of this Rule. In the

event a lawyer serving as a mediator is confronted with professional misconduct by a lawyer participating in a mediation that may not be disclosed pursuant to the Standards, the lawyer/mediator should consider withdrawing from the mediation or taking such other action as may be required by the Standards. See, e.g., N.C. Dispute Resolution Commission Advisory Opinion 10-16 (February 26, 2010).

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 23, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 25th day of August, 2010.

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 7th day of October, 2010.

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 7th day of October, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE JUSTICE SYSTEM 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 July 23, 2010.

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 Justice System Committee, as particularly set forth in 27 N.C.A.C. 1A, Section .0700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0700, Standing Committees of the Council

.0701 Standing Committees and Boards

(a) Standing Committees. Promptly after his or her election, the president shall appoint members to the standing committees identified below to serve for one year beginning January 1 of the year succeeding his or her election.…

(1) Executive Committee.

. . .

~~(6) Justice System Committee. It shall be the duty of the Justice System Committee to assist the council in identifying and advancing the appropriate role of the State Bar in connection with initiatives, programs, legislation and other actions intended to improve access to justice, simplify the law and judicial procedures, and enhance the justice system and the public's confidence in that system; to consider means and methods of enhancing the degree of professionalism exhibited in the practice and conduct of the lawyers of this State; and to perform such other duties and consider such other matters as the council or the president may designate.~~

(6) ~~(7)~~ Legal Assistance for Military Personnel (LAMP) Committee.

. . .

[Renumbering remaining paragraphs]

. . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules 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 23, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 25th day of August, 2010.

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 7th day of October, 2010.

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 7th day of October, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 23, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

.1517 Exemptions

(a) Notification of Board.

…

(d) Nonresidents. Any active member residing outside of North Carolina who does not practice in North Carolina for at least six (6) months and does not represent North Carolina clients on matters governed by North Carolina law shall be exempt from the requirements of these rules.

(e) Law Teachers.

…

.1520 Accreditation of Sponsors and Programs

(a) Accreditation of Sponsors.

(b) Presumptive Approval for Accredited Sponsors. (1) . . .

(2) The board may evaluate a program presented by an accredited sponsor and, upon a determination that the program does not satisfy the requirements of Rule .1519, notify the accredited sponsor that any presentation of the same program, the date for which was not included in the announcement required by Rule .1520(e) below, is not approved for credit. Such notice shall be sent by the board to the accredited sponsor within ~~30~~ 45 days after the receipt of the announcement. The accredited sponsor may request reconsideration of such a decision by submitting a letter

of appeal to the board within 15 days of receipt of the notice of disapproval. The decision by the board on an appeal is final.

. . .

(e) Program Announcements of Accredited Sponsors. At least ~~30~~ 50 days prior to the presentation of a program, an accredited sponsor shall file an announcement, on a form prescribed by the board, notifying the board of the dates and locations of presentations of the program and the sponsor's calculation of the CLE credit hours for the program.

(f) . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 23, 2010.

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Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 23, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Section .1600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1600, Regulations Governing the Administration of the Continuing Legal Education Program

.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 one substantially complete set of the written materials to be distributed at the course or program, shall be submitted at least ~~45~~ 50 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~~ 50 days after the date the course or program was presented or prior to the end of the calendar year in which the course or program was presented, whichever is earlier. Active members requesting credit must submit the application and supporting documentation within ~~45~~ 50 days after the date the course or program was presented or, if the ~~45~~ 50 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. .... Any sponsor, including an accredited sponsor, who expects to conduct a CLE activity for which suitable written materials will not be made available to all attendees may obtain approval for that activity only by application to the board at least ~~45~~ 50 days in advance of the presentation showing why written materials are not suitable or readily available for such a program.

(c) Facilities.

. . .

(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; provided, however, the board may waive such interest upon a showing of good cause by a sponsor; and

(3) . . .

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 23, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 25th day of August, 2010.

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 7th day of October, 2010.

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 7th day of October, 2010.

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 July 23, 2010.

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, Section .0200, Rules Governing the Practical Training of Law Students

.0207 Use of Student's Name

(a) A legal intern's name may properly

(1) . . .

(2) …; and

(3) be printed on a business card, provided the name of the supervising attorney also appears on the business card and there appears below the legal intern's name a clear statement 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 government agency;.

~~(2) on a business card bearing the name of a supervising attorney, legal aid clinic, or~~ 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 July 23, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 26th day of August, 2010.

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 7th day of October, 2010.

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 7th day of October, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PREPAID LEGAL SERVICES PLANS

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 23, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning prepaid legal services plans, as particularly set forth in 27 N.C.A.C. 1E, Section .0300, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1E, Section .0300, Rules Concerning Prepaid Legal Services Plans

.0304 Registration Procedures

To register with the North Carolina State Bar, a prepaid legal services plan must comply with all of the following procedures for initial registration:

(a) . . .

(c) The Authorized Practice Committee ("committee"), as a duly authorized standing committee of the North Carolina State Bar Council, shall ~~review the initial~~ oversee the registration ~~statements submitted by each~~ of prepaid legal services ~~plan~~ plans in accordance with these rules. ~~to determine if the plan, as represented in its registration statement, meets the definition of a prepaid legal services plan as defined in Rule .0303, and therefore should be registered in North Carolina. The committee may appoint a subcommittee to conduct an initial review and to recommend to the committee whether the plan meets the definition of a prepaid legal services plan.~~ The committee shall also establish any deadlines by when registrations may be submitted for review and any additional, necessary rules and procedures regarding the initial and annual registrations, and the revocation of registrations, of prepaid legal services plans.

.0305 Registration

Counsel will ~~The committee shall~~ review the plan's initial registration statement ~~form~~ to determine whether the registration statement is complete and the plan, as described in the registration statement, meets the definition of a prepaid legal services plan and otherwise satisfies the requirements for registration provided by Rule .0304. If, in the opinion of counsel, the plan, ~~as submitted,~~ clearly meets the definition and the registration statement otherwise

satisfies the requirements for registration, ~~the committee shall instruct~~ the secretary will ~~to~~ issue a certificate of registration to the plan's sponsor. If, in the opinion of counsel, the plan does not meet the definition, or otherwise fails to satisfy the requirements for registration, counsel will inform the plan's sponsor that the registration is not accepted and explain any deficiencies ~~the secretary shall advise the plan's sponsor of the committee's decision and the reasons therefore~~. Upon notice that the plan's registration has not been accepted, the plan sponsor may resubmit an amended plan registration form or request a hearing before the committee pursuant to Rule .0313 below. Counsel will provide a report to the committee each quarter identifying the plans submitted and the registration decisions made by counsel.

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 23, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 26th day of August, 2010.

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 7th day of October, 2010.

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 7th day of October, 2010.

Hudson, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

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 July 23, 2010.

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 obligations 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, Section .0200, Membership—Annual Membership Fees

.0202 Register of Members

(a) Initial Registration with State Bar.

. . .

(d) Updating Membership Information.

Each year before July 1, every member shall provide or verify the member's current name, mailing address, and e-mail address.

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 July 23, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 26th day of August, 2010.

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 7th day of October, 2010.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the

Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 7th day of October, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING 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 July 23, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning judicial district bars, as particularly set forth in 27 N.C.A.C. 1A, Section .1000, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .1000, Model Bylaws for Use by Judicial District Bars

.1007 Meetings

(a) Annual meetings:

. . .

(c) Notice for meeting to vote on annual membership fee: Notwithstanding the notice periods set forth in paragraphs (a) and (b) above, the written notice for any meeting at which the active members will vote on whether to impose or increase an annual membership fee shall be mailed or delivered to each active member of the district bar at the member's last known mailing address on file with the North Carolina State Bar at least 30 days before the date of the meeting.

(d) ~~(c)~~ Quorum:

. . .

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 23, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 26th day of August, 2010.

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 7th day of October, 2010.

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 7th day of October, 2010.

Hudson, J.
For the Court

In the Supreme Court of North Carolina

Restructure of the Alternative Dispute Resolution Committee of The State Judicial Council

On July 13, 2000, the Supreme Court created the Alternative Dispute Resolution Committee of the State Judicial Council composed of twenty-four members to advise the Council and the Court on policy directions for the court-sponsored dispute resolution programs and to provide coordination and evaluation of those programs from time to time as needed. The ADR Committee has met regularly to fulfill its charge until the budget crisis of 2006 cut off any funding for meetings.

During his tenure as Chair, Judge Ralph Walker appointed a subcommittee to review the structure, charge, and operation of the Committee. After the Subcommittee's report was submitted and discussed, the full Committee voted to recommend that its charge remain unchanged, its operations streamlined, and its membership reduced.

Upon this recommendation, the Supreme Court hereby adopts the following rule, restructuring the Alternative Dispute Resolution Committee of the North Carolina State Judicial Council.

1. The duties of the Committee shall remain the same, which are as follows:

- To provide ongoing coordination and policy direction for court-sponsored dispute resolution programs in the state;
- To provide a forum for the consideration of issues affecting the future direction of the court-sponsored dispute resolution movement within the North Carolina court system;
- To recommend to the State Judicial Council guidelines for the appropriate form of dispute resolution to be used as a case management tool in cases heard in the general Court of Justice;
- To monitor the effectiveness of dispute resolution programs and report its findings to the State Judicial Council;
- To provide a forum for the resolution of inter-program issues that arise among the various programs sponsored by the court system; and
- To serve as a clearing-house for rules that affect dispute resolution programs before they are submitted to the Supreme Court for review and adoption.

2. The membership of the Committee shall be reduced from twenty-four to fifteen members. The fifteen members shall be appointed by the Chief Justice as follows:

- Two Superior Court Judges, one from a single county district and one from a multi county district;
- Two District Court judges, one from a single county district and one from a multi county district;
- The Chair of the Dispute Resolution Commission or his/her designee from among the members of the Commission;
- Five attorneys licensed to practice law in NC recommended by the President of the NC Bar Association, two of whom shall be familiar with the operations and procedures of the District Court;
- The Chair of the Child Custody Mediation Advisory Committee or his/her designee from among the members of that committee;
- A Trial Court Administrator or Judicial Assistant;
- A citizen interested in dispute resolution programs;
- The Director of the Administrative Office of the Courts or his/her designee; and
- A person appointed by the Chief Justice as Chair.

3. All terms shall be for four years and that the fact that a person serves in any other official capacity in an activity related to a dispute resolution program does not disqualify that person from serving on the Committee if the person is otherwise qualified to serve.

4. The Chair is authorized to appoint as ex-officio members of the Committee persons who represent the following programs or entities: the Supreme Court, Court of Appeals, the Industrial Commission, the NCBA's Dispute Resolution Section, Dispute Settlement Centers, the Fourth Circuit mediation program, and any other group interested in court-sponsored dispute resolution programs and that those ex-officio members are permitted to serve and vote on sub-committees as established by the Committee.

5. A member whose term has expired, but whose replacement has not been appointed shall continue to serve until such replacement is appointed.

6. Any person interested in court sponsored dispute resolution programs, who makes that interest known to the Chair of the Committee,

shall be given notice of the meetings and business of the Committee whether those meetings are conducted in person or by phone.

7. It is recommended that there be at least two public meetings of the Committee each year, and that other meetings may be conducted by phone or in person as called by the Chair.

8. Routine rule changes and program modifications may be circulated among the membership and others who request notification by electronic means and that those changes be deemed approved unless a member objects to their adoption. In that event, an attempt should be made to circulate an amended draft in an effort to reach a decision without a meeting. In the event a meeting is necessary, the Chair may conduct a meeting by phone on issues that s/he determines are routine in nature.

9. The State Judicial Council may delegate other duties to the Committee and the State Judicial Council may also establish supplemental procedures and policies to regulate the work of the Committee.

Adopted by the Court in conference the 4th day of November, 2010. The Appellate Division Reporter shall publish this order at the earliest practicable date.

s/Timmons-Goodson, J.
For the Court

HEADNOTE INDEX

WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

ATTORNEYS—Continued

may consider the Rules of Professional Conduct when deciding whether to revoke *pro hac vice* status. The trial court's invocation of Rule 4.3 of the Rules of Professional Conduct for guidance in this case does not indicate either a misapprehension of the rule or an inappropriate reliance on it, and the conclusion that the *ex parte* contact with the defense witness constituted an appearance of impropriety and was inconsistent with the fair dealings reflected in Rule 4.3 was supported by the findings. **Sisk v. Transylvania Cmty. Hosp., Inc., 172.**

Pro hac vice admission—revoked for two attorneys for conduct of one— The trial court's discretionary decision to revoke the *pro hac vice* admission of two attorneys was justified, even though only one attorney had *ex parte* contact with a defense witness, where both attorneys had knowledge of and approved the contact, and both intended to keep the defense expert ignorant of the possible conflict of interest. **Sisk v. Transylvania Cmty. Hosp., Inc., 172.**

Pro hac vice admission revoked—plaintiff's right to select counsel—outweighed by conduct—Where the trial court revoked the *pro hac vice* admission of two attorneys, the conclusion that the attorneys' conduct outweighed the plaintiff's right to select counsel was fully supported by the findings. **Sisk v. Transylvania Cmty. Hosp., Inc., 172.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Custody—artificial insemination—voluntarily creating new family unit—best interests of child test—The trial court did not err by applying the best interests of the child standard in a custody decision where defendant and plaintiff were not married but decided to bring a child into their relationship through an anonymous sperm donor and acted together as parents to the child. Defendant intentionally and voluntarily created a family unit in which plaintiff acted as a parent, with no indication that defendant intended the family unit to be temporary. **Boseman v. Jarrell, 537.**

CONFESSIONS AND INCRIMINATING STATEMENTS

First contact with officer—not custodial—The evidence supported the findings in the pretrial suppression hearing of a first-degree murder prosecution that the officer who first made contact with defendant was not privy to the details of the investigation and would have allowed defendant to walk away if defendant had so chosen. **State v. Waring, 443.**

Initial interrogation—custodial—Under the totality of the circumstances, a reasonable person in the position of defendant when he was originally detained would not have believed that he was under arrest or was restrained in his movement to a significant degree. **State v. Waring, 443.**

Pretrial suppression hearing—findings—door of interview room not guarded—Competent evidence in a pretrial suppression hearing supported the court's findings that no one guarded the door during the initial interviews of defendant in a police department. The trial court's resolution of conflicting evidence will not be disturbed on appeal. **State v. Waring, 443.**

Pretrial suppression hearing—findings—voluntarily going with detectives—The finding of the trial court in a pretrial suppression hearing that defend-

INSURANCE—Continued

excludes injuries caused by false statements the insured makes about its own products, which were the only false statements alleged here. **Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C., 1.**

JUDGES

Discipline—confrontation with chief district court judge—sufficiency of basis—Respondent district court judge's inappropriate words and actions during a confrontation with the chief district court judge did not violate the Canons of the Code of Judicial Conduct and did not constitute a basis for discipline. **In re Belk, 114.**

Discipline—findings of fact—clear, cogent, and convincing evidence— Although respondent contends the entire proceeding should be dismissed based on the Judicial Standards Commission's alleged failure to make findings of fact based on clear, cogent and convincing evidence, a review of the record and the transcript revealed that the Commission applied the proper standard. **In re Belk, 114.**

Discipline—jurisdiction—intentional misrepresentations—absence of formal charge—due process—The Judicial Standards Commission did not lack jurisdiction to discipline respondent for alleged misrepresentations he made during the Commission's investigation because the statement of charges did not allege intentional misrepresentation. While the better practice would have been for the Commission to file an amended statement of charges to conform to the evidence, the Commission's finding without a formal charge that respondent misrepresented himself did not violate respondent's due process rights since it offered him the opportunity to explain the misleading statements during the hearing. **In re Belk, 114.**

Discipline—recusal of Chair of Judicial Standards Commission not required—The Chair of the Judicial Standards Commission was not required to recuse himself from a hearing conducted before the Commission even though respondent judge sent the Chair a letter requesting the opportunity to discuss respondent's service on a corporation's board of directors and the Chair sent a letter in response indicating that further meetings would not be of assistance in resolving the situation. **In re Belk, 114.**

Discipline—service as corporate director—mandatory prohibition—The prohibition in N.C. Code of Judicial Conduct Canon 5C(2) against a judge serving as a corporate director is not merely a "suggestion or guide" but is mandatory. **In re Belk, 114.**

Discipline—service on corporate board of directors—removal from office—A district court judge was removed from office for violations of Canons 1, 2A, and 5C(2) of the Code of Judicial Conduct and N.C.G.S. § 7A-376(b) based upon his failure to resign from a corporate board of directors even though he had been informed prior to the time he took the oath of office that his membership on the board violated Canon 5C(2), his intentional misrepresentation of the reasons for his continued membership on the board during the Judicial Standards Commission's investigation, and his continued service on the board at the time of the hearing more than nine months after his installation to office. **In re Belk, 114.**

SENTENCING—Continued

phases. There was no abuse of discretion in denying the motion to bifurcate in this case. **State v. Ward, 157.**

Capital—mitigating circumstance—defendant's mother—peremptory instructions not given—Any error in a capital sentencing proceeding in not giving peremptory instructions on mitigating instructions regarding defendant's mother was harmless. Several of the circumstances were controverted, and, while the court erred by not giving a peremptory instruction in one instance, other peremptory instructions relating to defendant's mother were given and the jury did not find mitigating effect. **State v. Waring, 443.**

Capital—mitigating—circumstances—no significant criminal activity—properly submitted—The trial court did not err in a capital sentencing procedure by submitting the (f)(1) mitigating circumstance (no significant history of criminal activity) over defendant's objection. The evidence was limited to minor offenses and the trial court reasonably determined that a rational jury could conclude that defendant had no significant history of criminal activity. **State v. Waring, 443.**

Capital—nonstatutory mitigating circumstances—peremptory instruction—The trial court did not err in a capital sentencing proceeding by failing to give peremptory instructions on nonstatutory mitigating circumstances where the evidence did not support the instructions. **State v. Waring, 443.**

Capital—peremptory instructions—not given—controverted evidence—The trial court did not err in a capital sentencing proceeding by refusing to instruct peremptorily on the (f)(2),(f)(6), and (f)(8) mitigating circumstances where the evidence supporting their submission was controverted. **State v. Waring, 443.**

Capital—prosecutor's closing argument—credibility of defense case—proper inferences—There was no gross impropriety in a capital sentencing proceeding where the prosecutor argued that defendant's case for mitigation was a lie. The prosecutor's argument appropriately drew inferences from properly admitted evidence and was not so grossly improper as to require the trial court to intervene *ex mero motu*. **State v. Waring, 443.**

Capital—prosecutor's closing argument—efforts to help victim—The prosecutor did not argue outside the record and attempt to inflame the jury in a capital sentencing proceeding with an argument about the attempt of a neighbor to help the victim. The prosecutor used the victim's experience as a means of conveying the victim's suffering and the heinous, atrocious, or cruel nature of the crime. **State v. Waring, 443.**

Capital—prosecutor's closing argument—gang involvement—The prosecutor's closing arguments in a capital sentencing prosecution regarding defendant's gang involvement were supported by the evidence and were not improper. **State v. Waring, 443.**

Capital—prosecutor's closing argument—imaginary conversation with victim's father—A prosecutor's closing argument in a capital sentencing proceeding was not so grossly improper as to require intervention *ex mero motu* where the prosecutor related an imaginary conversation with the victim's father. The prosecutor never indicated that the conversation had occurred and, in con-

SENTENCING—Continued

WORD AND PHRASE INDEX