NORTH CAROLINA REPORTS

VOLUME 366

SUPREME COURT OF NORTH CAROLINA

14 JUNE 2012

13 JUNE 2013

RALEIGH
2015

CITE THIS VOLUME
366 N.C.

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THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice
SARAH PARKER

Associate Justices

MARK D. MARTIN
ROBERT H. EDMUNDS, JR.
PAUL MARTIN NEWBY
PATRICIA TIMMONS-GOODSON[1]
ROBIN E. HUDSON
BARBARA A. JACKSON
CHERI BEASLEY[2]

Former Chief Justices

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

Former Justices

ROBERT R. BROWNING
J. PHIL CARLTON
HARRY C. MARTIN
WILLIS P. WHICHARD
JAMES A. WYNN, JR.
FRANKLIN E. FREEMAN, JR.
G. K. BUTTERFIELD, JR.
ROBERT F. ORR
GEORGE L. WAINWRIGHT, JR.
EDWARD THOMAS BRADY

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JENNIFER C. PETERSON

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1. Retired 17 December 2012.
2. Appointed 18 December 2012; Sworn in 3 January 2013.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	Jerry R. Tillett	Manteo
	J. Carlton Cole	Hertford
2	Wayland Sermons	Washington
3A	W. Russell Duke, Jr.	Greenville
	Clifton W. Everett, Jr.[1]	Greenville
	Marvin Blount[2]	Greenville
6A	Alma L. Hinton	Roanoke Rapids
6B	Cy A. Grant, Sr.	Ahoskie
7A	Quentin T. Sumner	Rocky Mount
7BC	Milton F. (Toby) Fitch, Jr.	Wilson
	Walter H. Godwin, Jr.	Tarboro
	Second Division	
3B	Benjamin G. Alford	New Bern
	Kenneth F. Crow	New Bern
	John E. Nobles, Jr.	Morehead City
4A	Russell J. Lanier, Jr.[3]	Wallace
	W. Douglas Parsons[4]	Clinton
4B	Charles H. Henry	Jacksonville
5	W. Allen Cobb, Jr.	Wrightsville Beach
	Jay D. Hockenbury	Wilmington
	Phyllis M. Gorham	Wilmington
8A	Paul L. Jones	Kinston
8B	Arnold O. Jones II	Goldsboro
	Third Division	
9	Robert H. Hobgood	Louisburg
	Henry W. Hight, Jr.	Henderson
9A	W. Osmond Smith III	Semora
10	Donald W. Stephens	Raleigh
	Abraham P. Jones[5]	Raleigh
	Howard E. Manning, Jr.	Raleigh
	Michael R. Morgan	Raleigh
	Paul C. Gessner	Wake Forest
	Paul C. Ridgeway	Raleigh
	G. Bryan Collins, Jr.[6]	Raleigh
14	Orlando F. Hudson, Jr.	Durham
	Elaine Bushfan	Durham
	Michael O'Foghludha	Durham
	James E. Hardin, Jr.	Hillsborough
15A	Robert F. Johnson	Burlington
	Wayne Abernathy	Burlington

DISTRICT	JUDGES	ADDRESS
15B	Carl R. Fox	Chapel Hill
	R. Allen Baddour	Chapel Hill
	Fourth Division	
11A	Franklin F. Lanier[7]	Buies Creek
	C. Winston Gilchrist[8]	Buies Creek
11B	Thomas H. Lock	Smithfield
12	Claire Hill	Fayetteville
12B	Gregory A. Weeks[9]	Fayetteville
	Gale M. Adams[10]	Fayetteville
12C	James F. Ammons, Jr.[11]	Fayetteville
	Mary Ann Tally	Fayetteville
13A	Douglas B. Sasser	Whiteville
13B	Ola M. Lewis	Southport
16A	Richard T. Brown	Laurinburg
16B	Robert F. Floyd, Jr.	Lumberton
	James Gregory Bell	Lumberton
	Fifth Division	
17A	Edwin Graves Wilson, Jr.	Eden
	Richard W. Stone	Eden
17B	A. Moses Massey	Mt. Airy
	Andy Cromer	King
18	Lindsay R. Davis, Jr.	Greensboro
	John O. Craig III	High Point
	R. Stuart Albright	Greensboro
	Patrice A. Hinnant	Greensboro
	Joseph E. Turner[12]	Greensboro
	Susan Bray[13]	Greensboro
19B	Vance Bradford Long	Asheboro
19D	James M. Webb	Whispering Pines
21	Judson D. DeRamus, Jr.[14]	Winston-Salem
	William Z. Wood, Jr.[15]	Troutman
	L. Todd Burke	Winston-Salem
	Ronald E. Spivey	Winston-Salem
	David L. Hall[16]	Winston-Salem
23	Edgar B. Gregory	Wilkesboro
	Sixth Division	
19A	W. Erwin Spainhour	Concord
19C	Anna Mills Wagoner	Salisbury
20A	Tanya T. Wallace	Rockingham
	Kevin M. Bridges	Oakboro
20B	W. David Lee	Monroe
	Christopher W. Bragg	Monroe
22A	Christopher Collier[17]	Statesville
	Joseph Crosswhite[18]	Statesville
	Alexander Mendaloff III[19]	Statesville
	Julia Lynn Gullett[20]	Statesville
22B	Mark E. Klass	Lexington
	Theodore S. Royster, Jr.	Lexington

DISTRICT	JUDGES	ADDRESS
	Seventh Division	
25A	Beverly T. Beal[21]	Lenoir
	Robert C. Ervin[22]	Morganton
	C. Thomas Edwards[23]	Lenoir
25B	Timothy S. Kincaid	Newton
	Nathaniel J. Poovey	Newton
26	Richard D. Boner	Charlotte
	W. Robert Bell	Charlotte
	Yvonne Mims Evans	Charlotte
	Linwood O. Foust	Charlotte
	Eric L. Levinson	Charlotte
	H. William Constangy	Charlotte
	Hugh Lewis	Charlotte
27A	Jesse B. Caldwell III	Gastonia
	Robert T. Sumner	Gastonia
27B	Forrest Donald Bridges	Shelby
	James W. Morgan	Shelby
	Eighth Division	
24	Charles Phillip Ginn	Boone
	Gary Gavenus	Boone
28	Alan Z. Thornburg	Asheville
	Marvin Pope	Asheville
29A	Laura J. Bridges[24]	Rutherfordton
	J. Thomas Davis[25]	Forest City
29B	Mark E. Powell	Hendersonville
30A	James U. Downs	Franklin
30B	Bradley B. Letts	Sylva

SPECIAL JUDGES

Sharon T. Barrett	Asheville
Marvin K. Blount	Greenville
Craig Croom[26]	Raleigh
Richard L. Doughton	Sparta
James L. Gale	Greensboro
A. Robinson Hassell	Greensboro
Kendra D. Hill[27]	Raleigh
D. Jack Hooks, Jr.	Whiteville
Lucy Noble Inman	Raleigh
Jack W. Jenkins	Morehead City
John R. Jolly, Jr.	Raleigh
Shannon R. Joseph	Raleigh
Calvin Murphy	Charlotte
William R. Pittman	Raleigh
Gary E. Trawick, Jr.	Burgaw
Reuben F. Young[28]	Raleigh

EMERGENCY JUDGES

DISTRICT	JUDGES	ADDRESS
	W. Douglas Albright	Greensboro
	James L. Baker, Jr.[29]	Marshall
	Steve A. Balog	Burlington
	Michael E. Beal[30]	Lenoir
	Michael E. Beale	Rockingham
	Henry V. Barnette, Jr.	Raleigh
	Stafford G. Bullock	Raleigh
	C. Preston Cornelius	Mooresville
	B. Craig Ellis	Laurinburg
	Clifton W. Everett, Jr.[31]	Greenville
	Ernest B. Fullwood	Wilmington
	Thomas D. Haigwood	Greenville
	Clarence E. Horton, Jr.	Kannapolis
	Charles C. Lamm, Jr.	Terrell
	Russell J. Lanier, Jr.[32]	Wallace
	Gary Lynn Locklear[33]	Pembroke
	Jerry Cash Martin	Mt. Airy
	J. Richard Parker	Manteo
	A. Leon Stanback[34]	Durham
	Ronald L. Stephens	Durham
	Kenneth C. Titus	Durham
	Jack A. Thompson	Fayetteville
	Joseph E. Turner[35]	Greensboro
	John M. Tyson	Fayetteville
	George L. Wainwright	Morehead City
	Dennis Winner	Asheville

RETIRED/RECALLED JUDGES

	J. B. Allen	Burlington
	Anthony M. Brannon	Durham
	Frank R. Brown	Tarboro
	James C. Davis	Concord
	Larry G. Ford	Salisbury
	Marvin K. Gray	Charlotte
	Zoro J. Guice, Jr.	Hendersonville
	Knox V. Jenkins	Four Oaks
	John B. Lewis, Jr.	Farmville
	Robert D. Lewis	Asheville
	Julius A. Rousseau, Jr.	Wilkesboro
	Thomas W. Seay	Spencer
	Ralph A. Walker, Jr.	Raleigh

1. Retired 21 December 2012.
2. Appointed 28 December 2012.
3. Retired 1 April 2012.
4. Appointed 1 June 2012.
5. Term ended 31 December 2012.
6. Sworn in 2 January 2013.
7. Retired 31 December 2011.
8. Appointed 12 April 2012.
9. Retired 31 December 2012.
10. Sworn in 1 January 2013.
11. Appointed Senior Resident Superior Court Judge 1 January 2013.

12. Appointed 1 April 2011; Retired 31 December 2012.
13. Sworn in 1 January 2013.
14. Retired 31 December 2012.
15. Appointed Senior Resident Superior Court Judge 1 January 2013.
16. Sworn in 1 January 2013.
17. Deceased 8 February 2012.
18. Appointed Senior Resident Superior Court Judge 13 February 2012.
19. Appointed 15 June 2012; Term ended 31 December 2012.
20. Sworn in 1 January 2013.
21. Retired 1 December 2012.
22. Appointed Senior Resident Superior Court Judge 2 December 2012.
23. Appointed 14 December 2012.
24. Retired 31 December 2012.
25. Sworn in 1 January 2013.
26. Term ended 30 December 2012.
27. Appointed 31 December 2012.
28. Appointed 31 December 2012.
29. Resigned 31 January 2012.
30. Appointed 17 December 2012.
31. Appointed 28 December 2012.
32. Appointed 5 April 2012.
33. Resigned 3 May 2011.
34. Resigned 4 February 2012.
35. Appointed 7 January 2013.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	C. Christopher Bean (Chief)	Edenton
	Edgar L. Barnes	Manteo
	Amber Davis	Wanchese
	Eula E. Reid	Elizabeth City
	Robert P. Trivette	Kitty Hawk
2	Michael A. Paul (Chief)	Washington
	Regina Rogers Parker	Williamston
	Christopher B. McLendon	Williamston
	Darrell B. Cayton, Jr.	Washington
3A	David A. Leech (Chief)	Greenville
	Patricia Gwynett Hilburn	Greenville
	Joseph A. Blick, Jr.	Greenville
	G. Galen Braddy	Grimesland
	Charles M. Vincent[1]	Greenville
	Brian DeSoto[2]	Greenville
3B	Jerry F. Waddell (Chief)[3]	New Bern
	Cheryl Lynn Spencer[4]	New Bern
	Paul M. Quinn	Atlantic Beach
	Karen A. Alexander	New Bern
	Peter Mack, Jr.	New Bern
	L. Walter Mills[5]	New Bern
	Kirby Smith, II[6]	New Bern
	Clinton Rowe[7]	New Bern
	W. David McFadyen, III[8]	New Bern
4	Leonard W. Thagard (Chief)	Clinton
	Paul A. Hardison	Jacksonville
	William M. Cameron III	Richlands
	Louis F. Foy, Jr.	Pollocksville
	Sarah Cowen Seaton	Jacksonville
	Carol Jones Wilson	Kenansville
	Henry L. Stevens IV	Warsaw
	James L. Moore, Jr.	Jacksonville
5	J. H. Corpening II (Chief)	Wilmington
	John J. Carroll III[9]	Wilmington
	Rebecca W. Blackmore	Wilmington
	James H. Faison III	Wilmington
	Sandra Criner	Wilmington
	Richard Russell Davis	Wilmington
	Melinda Haynie Crouch	Wrightsville Beach
	Jeffrey Evan Noecker	Wilmington
	Chad Hogston	Wilmington
	Robin W. Robinson[10]	Wilmington
6A	Brenda G. Branch (Chief)	Roanoke Rapids
	W. Turner Stephenson III	Roanoke Rapids
	Teresa R. Freeman	Roanoke Rapids
6B	Thomas R. J. Newbern (Chief)[11]	Aulander
	William Robert Lewis II	Winton
	Thomas L. Jones	Ashoskie
	Vershenia B. Moody[12]	Windsor
7	William Charles Farris (Chief)	Wilson

DISTRICT	JUDGES	ADDRESS
	Joseph John Harper, Jr.	Tarboro
	John M. Britt	Tarboro
	Pell C. Cooper	Rocky Mount
	William G. Stewart	Wilson
	John J. Covolo	Rocky Mount
	Anthony W. Brown	Spring Hope
8	David B. Brantley (Chief)	Goldsboro
	Lonnie W. Carraway[13]	Walstonburg
	R. Leslie Turner	Pink Hall
	Timothy I. Finan	Goldsboro
	Elizabeth A. Heath	Kinston
	Charles P. Gaylor III	Goldsboro
	Ericka Y. James[14]	Goldsboro
9	Daniel Frederick Finch (Chief)	Oxford
	J. Henry Banks	Henderson
	John W. Davis	Louisburg
	Randolph Baskerville	Warrenton
	S. Quon Bridges[15]	Oxford
	Carolyn J. Yancey	Creedmoor
	Amanda Stevenson[16]	Oxford
9A	Mark E. Galloway (Chief)	Roxboro
	L. Michael Gentry	Pelham
10	Robert Blackwell Rader (Chief)	Raleigh
	James R. Fullwood	Raleigh
	Kristin H. Ruth[17]	New Hill
	Jennifer M. Green	Raleigh
	Monica M. Bousman	Garner
	Jane Powell Gray[18]	Raleigh
	Jennifer Jane Knox	Raleigh
	Debra Ann Smith Sasser	Raleigh
	Lori G. Christian	Raleigh
	Christine M. Walczyk	Raleigh
	Eric Craig Chasse	Raleigh
	Ned Wilson Mangum	Raleigh
	Jacqueline L. Brewer	Apex
	Anna Elena Worley	Raleigh
	Margaret Eagles	Raleigh
	Keith O. Gregory	Raleigh
	Vinston M. Rozier, Jr.	Raleigh
	Michael J. Denning	Raleigh
	Kris D. Bailey	Cary
	Erin M. Graber[19]	Raleigh
	Louis B. Meyer[20]	Raleigh
	Dan Nagle[21]	Raleigh
11	Albert A. Corbett, Jr. (Chief)	Smithfield
	Jacquelyn L. Lee	Smithfield
	Jimmy L. Love, Jr.	Sanford
	O. Henry Willis, Jr.	Dunn
	Addie M. Harris-Rawls	Clayton
	Resson O. Faircloth II	Erwin
	Robert W. Bryant, Jr.	Selma
	R. Dale Stubbs	Clayton
	Charles Patrick Bullock[22]	Coats

DISTRICT	JUDGES	ADDRESS
	Paul A. Holcombe	Smithfield
	Charles Winston Gilchrist	Clayton
	Caron H. Stewart[23]	Smithfield
	Mary H. Wells[24]	Smithfield
12	A. Elizabeth Keever (Chief)	Fayetteville
	Robert J. Stiehl III	Fayetteville
	Edward A. Pone	Parkton
	Kimbrell Kelly Tucker	Fayetteville
	John W. Dickson[25]	Fayetteville
	Talmage Baggett	Fayetteville
	George J. Franks	Fayetteville
	David H. Hasty	Fayetteville
	Laura A. Devan	Fayetteville
	Toni S. King	Fayetteville
	Lou Oliveria[26]	Fayetteville
13	Jerry A. Jolly (Chief)	Tabor City
	Napoleon B. Barefoot, Jr.[27]	Supply
	Marion R. Warren	Ash
	William F. Fairley	Southport
	Scott Ussery	Elizabethtown
	Sherry D. Tyler	Tabor City
	Pauline Hankins[28]	Tabor City
14	Marcia H. Morey (Chief)	Durham
	James T. Hill	Durham
	Nancy E. Gordon	Durham
	William Andrew Marsh III	Durham
	Brian C. Wilks	Durham
	Pat Evans	Durham
	Doretta Walker	Durham
15A	James K. Roberson (Chief)	Burlington
	Bradley Reid Allen, Sr.	Burlington
	Kathryn W. Overby	Burlington
	David Thomas Lambeth, Jr.	Burlington
15B	Joseph M. Buckner (Chief)	Chapel Hill
	Charles T. Anderson	Chapel Hill
	Beverly A. Scarlett	Durham
	Page Vernon[29]	Chapel Hill
	Lunsford Long	Chapel Hill
	James T. Bryan[30]	Hillsborough
16A	William G. McIlwain (Chief)	Wagram
	Regina M. Joe	Raeford
	John H. Horne, Jr.	Laurinburg
16B	J. Stanley Carmical (Chief)	Lumberton
	Herbert L. Richardson	Lumberton
	John B. Carter, Jr.	Lumberton
	Judith Milsap Daniels	Lumberton
	William J. Moore	Maxton
17A	Fredrick B. Wilkins, Jr. (Chief)	Reidsville
	Stanley L. Allen	Sandy Ridge
	James A. Grogan	Reidsville
17B	Charles Mitchell Neaves, Jr. (Chief)	Elkin
	Spencer Gray Key, Jr.	Elkin
	Angela B. Puckett	Westfield

DISTRICT	JUDGES	ADDRESS
	William F. Southern III	King
18	Wendy M. Enochs (Chief)[31]	Greensboro
	Susan Elizabeth Bray[32]	Greensboro
	H. Thomas Jarrell, Jr.	High Point
	Susan R. Burch	High Point
	Theresa H. Vincent	Summerfield
	William K. Hunter	High Point
	Sherry Fowler Alloway	Greensboro
	Polly D. Sizemore[33]	Greensboro
	Kimberly Michelle Fletcher	Greensboro
	Betty J. Brown	Greensboro
	Angela C. Foster	Greensboro
	Avery Michelle Crump	Browns Summit
	Jan H. Samet	Greensboro
	Angela B. Fox[34]	Greensboro
	Tabatha Holloway[35]	Greensboro
	Linda L. Falls[36]	Greensboro
19A	William G. Hamby, Jr. (Chief)	Kannapolis
	Donna G. Hedgepeth Johnson	Concord
	Martin B. McGee	Concord
	Brent Cloninger	Mount Pleasant
19B	Michael A. Sabiston (Chief)[37]	Troy
	James P. Hill, Jr.	Asheboro
	Jayrene Russell Maness[38]	Carthage
	Lee W. Gavin	Asheboro
	Scott C. Etheridge	Asheboro
	Donald W. Creed, Jr.	Asheboro
	Robert M. Wilkins	Asheboro
	William Heafner[39]	Asheboro
19C	Charles E. Brown (Chief)	Salisbury
	Beth Spencer Dixon	Salisbury
	William C. Kluttz, Jr.	Salisbury
	Kevin G. Eddinger	Salisbury
	Roy Marshall Bickett, Jr.	Salisbury
20A	Lisa D. Thacker (Chief)	Polkton
	Scott T. Brewer	Monroe
	Amanda L. Wilson	Rockingham
	William Tucker	Albemarle
20B	N. Hunt Gwyn (Chief)	Monroe
	Joseph J. Williams	Monroe
	William F. Helms	Matthews
	Stephen V. Higdon	Monroe
21	William B. Reingold (Chief)	Clemmons
	Chester C. Davis[40]	Winston-Salem
	William Thomas Graham, Jr.	Kernersville
	Victoria Lane Roemer	Winston-Salem
	Laurie L. Hutchins	Winston-Salem
	Lisa V. L. Menefee	Winston-Salem
	Lawrence J. Fine	Clemmons
	Denise S. Hartsfield	Winston-Salem
	George Bedsworth	Winston-Salem
	Camille D. Banks-Payne	Winston-Salem
	David Sipprell[41]	Winston-Salem

DISTRICT	JUDGES	ADDRESS
22A	L. Dale Graham (Chief)	Taylorsville
	H. Thomas Church	Statesville
	Deborah Brown	Mooresville
	Edward L. Hendrick IV	Taylorsville
	Christine Underwood	Olin
22B	Wayne L. Michael (Chief)	Lexington
	Jimmy L. Myers	Advance
	April C. Wood	Lexington
	Mary F. Covington	Thomasville
	Carlton Terry	Advance
	J. Rodwell Penry	Lexington
23	Mitchell L. McLean (Chief)	Wilkesboro
	David V. Byrd	Wilkesboro
	Jeanie Reavis Houston	Yadkinville
	Michael D. Duncan	Wilkesboro
24	Alexander Lyerly (Chief)	Banner Elk
	William A. Leavell III[42]	Bakersville
	R. Gregory Horne	Boone
	Theodore Wright McEntire	Spruce Pine
	F. Warren Hughes[43]	Burnsville
25	Robert M. Brady (Chief)	Lenoir
	Gregory R. Hayes	Hickory
	L. Suzanne Owsley	Hickory
	C. Thomas Edwards[44]	Morganton
	Buford A. Cherry	Hickory
	Sherrie Wilson Elliott	Newton
	Amy R. Sigmon	Newton
	J. Gary Dellinger	Newton
	Robert A. Mullinax, Jr.	Newton
	Mark L. Killian[45]	Newton
26	Lisa C. Bell (Chief)	Charlotte
	Rickye McKoy-Mitchell	Charlotte
	Louis A. Trosch, Jr.	Charlotte
	Regan A. Miller	Charlotte
	Becky Thorne Tin	Charlotte
	Thomas Moore, Jr.[46]	Charlotte
	Christy Townley Mann	Charlotte
	Ronald C. Chapman	Charlotte
	Donnie Hoover	Charlotte
	Paige B. McThenia	Charlotte
	Jena P. Culler	Charlotte
	Kimberly Y. Best-Staton	Charlotte
	Charlotte Brown-Williams	Cornelius
	John Totten, III[47]	Charlotte
	Elizabeth Thornton Trosch	Charlotte
	Theofanis X. Nixon	Charlotte
	Karen Eady-Williams	Charlotte
	Donald Cureton, Jr.	Charlotte
	Sean Smith	Charlotte
	Matt Osman	Charlotte
	Tyyawdi M. Hands[48]	Charlotte
	Gary Henderson[49]	Charlotte

DISTRICT	JUDGES	ADDRESS
	David Strickland[50]	Charlotte
27A	Ralph C. Gingles, Jr. (Chief)	Gastonia
	Angela G. Hoyle	Belmont
	John K. Greenlee	Gastonia
	James A. Jackson	Gastonia
	Thomas Gregory Taylor[51]	Belmont
	Michael K. Lands	Gastonia
	Richard Abernethy	Gastonia
	Pennie M. Thrower[52]	Gastonia
27B	Larry James Wilson (Chief)	Shelby
	Anna F. Foster	Shelby
	K. Dean Black	Denver
	Ali B. Paksoy, Jr.	Shelby
	Meredith A. Shuford	Lincolnton
28	J. Calvin Hill (Chief)	Asheville
	Rebecca B. Knight[53]	Asheville
	Patricia Kaufmann Young	Asheville
	Sharon Tracey Barrett	Asheville
	Ward D. Scott[54]	Asheville
	Edwin D. Clontz[55]	Candler
	Julie M. Kepple	Asheville
	Andrea Dray	Asheville
	Susan Marie Dotson-Smith[56]	Asheville
29A	C. Randy Pool (Chief)	Marion
	Laura Anne Powell	Rutherfordton
	J. Thomas Davis[57]	Forest City
	Robert K. Martelle[58]	Rutherfordton
29B	Athena F. Brooks (Chief)	Fletcher
	David Kennedy Fox[59]	Hendersonville
	Thomas M. Brittain, Jr.	Mills River
	Peter Knight	Hendersonville
	Emily Cowan[60]	Hendersonville
30	Richlyn D. Holt (Chief)	Waynesville
	Monica Hayes Leslie	Waynesville
	Richard K. Walker	Hayesville
	Donna Forga	Clyde
	Roy Wijewickrama	Waynesville
	Kristina L. Earwood	Waynesville

EMERGENCY JUDGES

Thomas V. Aldridge, Jr.	Ocean Isle Beach
Kyle D. Austin	Pineola
Sarah P. Bailey	Rocky Mount
Grafton G. Beaman	Elizabeth City
Ronald E. Bogle[61]	Raleigh
Steven J. Bryant[62]	Bryson City
Samuel Cathey	Charlotte
Chester C. Davis[63]	Winston-Salem
Danny E. Davis[64]	Waynesville
Shelly H. Desvouges	Raleigh
M. Patricia DeVine	Hillsborough
John W. Dickerson[65]	Fayettesville

J. Keaton Fonvielle	Shelby
Thomas G. Foster, Jr.	Pleasant Green
Earl J. Fowler, Jr.	Asheville
David K. Fox[66]	Hendersonville
Jane Powell Gray[67]	Raleigh
Samuel G. Grimes[68]	Washington
Joyce A. Hamilton	Raleigh
Lawrence Hammond, Jr.	Asheboro
Jane V. Harper	Charlotte
Resa Harris[69]	Charlotte
Robert E. Hodges	Nebo
Shelly S. Holt	Wilmington
James M. Honeycutt	Lexington
William G. Jones[70]	Charlotte
Wayne G. Kimble	Jacksonville
David Q. LaBarre	Durham
William C. Lawton	Raleigh
Harold Paul McCoy, Jr.	Halifax
Lawrence McSwain	Greensboro
Fritz Y. Mercer, Jr.	Summerfield
Thomas F. Moore[71]	Charlotte
William M. Neely[72]	Asheboro
Thomas R.J. Newbern[73]	Aulander
Nancy C. Phillips	Elizabethtown
Dennis J. Redwing	Gastonia
Michael A. Sabiston[74]	Troy
Anne B. Salisbury	Cary
J. Larry Senter	Raleigh
Joseph E. Setzer, Jr.	Franklinton
Russell Sherrill III	Raleigh
Polly D. Sizemore[75]	Greensboro
Catherine C. Stevens	Chapel Hill
J. Kent Washburn	Burlington
Charles W. Wilkinson, Jr.	Oxford

RETIRED/RECALLED JUDGES

Claude W. Allen, Jr.	Oxford
Donald L. Boone	High Point
Joyce A. Brown	Supply
Hugh B. Campbell, Jr.	Charlotte
Daphene L. Cantrell[76]	Huntersville
T. Yates Dobson, Jr.	Smithfield
Harley B. Gaston, Jr.[77]	Belmont
James W. Hardison	Williamston
Jane V. Harper	Charlotte
James A. Harrill, Jr.	Winston-Salem
Roland H. Hayes	Gastonia
Philip F. Howerton, Jr.	Charlotte
Lillian B. Jordan	Randleman
James E. Martin	Greenville
Edward H. McCormick	Lillington
J. Bruce Morton	Greensboro

Otis M. Oliver	Dobson
Stanley Peele	Chapel Hill
Margaret L. Sharpe	Greensboro
Samuel M. Tate	Morganton
John L. Whitley	Wilson

1. Retired November 2012.
2. Sworn in 2 January 2013.
3. Retired 31 January 2012.
4. Term ended 31 December 2012.
5. Appointed Chief District Court Judge 8 February 2012.
6. Appointed 11 April 2012; Term ended 31 December 2012.
7. Sworn in 1 January 2013.
8. Sworn in 1 January 2013.
9. Deceased 25 May 2011.
10. Appointed 31 August 2011.
11. Retired 31 December 2012.
12. Sworn in 1 January 2013.
13. Term ended 31 December 2012.
14. Sworn in 1 January 2013.
15. Term ended 31 December 2012.
16. Sworn in 1 January 2013.
17. Resigned 18 May 2012.
18. Retired 28 February 2012.
19. Appointed 15 May 2012; Term ended 31 December 2012.
20. Appointed 30 August 2012.
21. Sworn in 1 January 2013.
22. Term ended 31 December 2012.
23. Appointed 11 June 2012.
24. Sworn in 2 January 2013.
25. Retired 31 December 2012.
26. Sworn in 1 January 2013.
27. Retired 31 December 2012.
28. Sworn in 1 January 2013.
29. Resigned 31 October 2011.
30. Appointed 3 February 2012.
31. Appointed Chief District Court Judge 6 May 2011.
32. Term ended 31 December 2012.
33. Term ended 31 December 2012.
34. Appointed 22 August 2011.
35. Sworn in 1 January 2013.
36. Sworn in 1 January 2013.
37. Retired 31 August 2012.
38. Appointed Chief District Court Judge 1 September 2012.
39. Appointed 1 December 2012.
40. Retired 31 December 2012.
41. Sworn in 1 January 2013.
42. Retired 1 August 2011.
43. Appointed 31 October 2011.
44. Appointed to Superior Court 14 December 2012.
45. Appointed 14 January 2013.
46. Retired 31 December 2012.
47. Term ended 31 December 2012.
48. Appointed 14 April 2011.
49. Sworn in 1 January 2013.
50. Sworn in 1 January 2013.
51. Term ended 31 December 2012.
52. Sworn in 1 January 2013.
53. Retired 1 August 2012.
54. Appointed 20 April 2011.
55. Appointed 21 April 2011.
56. Appointed 8 November 2012.
57. Term ended 31 December 2012.
58. Appointed 5 April 2013.
59. Retired 31 December 2012.
60. Sworn in 1 January 2013.
61. Resigned 24 May 2011.
62. Resigned 22 May 2012.
63. Appointed 10 January 2013.
64. Resigned 9 January 2012; Reappointed 6 August 2012; Resigned 17 April 2013.
65. Appointed 4 January 2013.
66. Appointed 8 January 2013.
67. Appointed 4 May 2012.
68. Appointed 11 March 2011.
69. Deceased 2 May 2011.
70. Resigned 12 April 2012.
71. Appointed 8 April 2013.
72. Resigned 28 July 2011.
73. Appointed 7 January 2013.
74. Appointed 5 September 2012.
75. Appointed 7 January 2013; Resigned 28 February 2013.
76. Deceased 16 October 2011.
77. Deceased 31 December 2011.

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CASES REPORTED

ORDERS

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

JENNIFER RAY, ADMINISTRATRIX OF THE ESTATE OF MICKELA NICHOLSON; LINDA JUDGE, ADMINISTRATRIX OF THE ESTATE OF MARIANNE DAUSCHER; AND EILEEN AND ROGER LAYAOU, CO-ADMINISTRATORS OF THE ESTATE OF MICHAEL LAYAOU v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 28A12

(Filed 14 June 2012)

Tort Claims Act— public duty doctrine—negligent design and execution of road—failure to repair—gross negligence from failure to inspect

The public duty doctrine did not bar plaintiffs' negligence claims against defendant North Carolina Department of Transportation (DOT) under the State Tort Claims Act (STCA) arising from a fatal automobile accident based on DOT's alleged negligent design and execution of the narrowing of a road, failure to repair, and gross negligence from failure to inspect. N.C.G.S. § 143-299.1A clarified the legislature's intent as to the role of the public duty doctrine under the STCA. The public duty doctrine is a defense only if the injury alleged is the result of: (1) a law enforcement officer's negligent failure to protect the plaintiff from actions of others or an act of God, or (2) a State officer's, employee's, involuntary servant's, or agent's negligent failure to perform a health or safety inspection required by statute.

Justice HUDSON concurring in part and dissenting in part.

Chief Justice PARKER dissenting.

Justice TIMMONS-GOODSON dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 720 S.E.2d 720 (2011), reversing and remanding an order entered by the North Carolina Industrial Commission on 13 July 2010. Heard in the Supreme Court on 17 April 2012.

Zaytoun Law Firm, PLLC, by Matthew D. Ballew and Robert E. Zaytoun, for plaintiff-appellees.

Roy Cooper, Attorney General, by Amar Majmundar, Special Deputy Attorney General, for defendant-appellant.

Patterson Harkavy LLP, by Burton Craige; and Kirby & Holt, L.L.P., by Isaac Thorp, for North Carolina Advocates for Justice, amicus curiae.

NEWBY, Justice.

In this case we must determine whether the public duty doctrine bars plaintiffs' claims against defendant North Carolina Department of Transportation ("DOT") under the State Tort Claims Act ("STCA"). To answer this question we must consider the impact of the limitation placed on the use of the public duty doctrine by the General Assembly's 2008 amendment to the STCA. *See* N.C.G.S. § 143-299.1A (2011). Because we hold that N.C.G.S. § 143-299.1A clarified the legislature's intent as to the role of the public duty doctrine under the STCA, the limitation on the doctrine in that statute applies here. Consequently, the doctrine does not bar plaintiffs' claims.

Plaintiffs allege the following facts. On 31 August 2002 Mickela S. Nicholson was driving on RP 1010, a state-maintained road, in Johnston County, North Carolina. Nicholson had three passengers, Marianne Dausher, Michael Layaou, and Steven Carr. Nicholson was operating her automobile within the posted speed limit and with a proper lookout when she lawfully entered an eroded section of the highway near the shoulder. The condition of the road caused her vehicle to veer off the roadway. When she attempted to return to the highway, the erosion caused her to overcorrect. She lost control of

the car, crossing the center line and striking an oncoming automobile head-on. Nicholson and all her passengers were killed.

Plaintiffs, the estates of Nicholson, Layaou, and Dauscher, sued DOT for negligence under the STCA. Plaintiffs claim that DOT was negligent in designing and executing the narrowing of RP 1010 from three lanes to two and that the erosion defect "had existed for a substantial period of time prior to" the wreck such that DOT personnel knew or should have known of its existence and "failed to make appropriate repairs." DOT responded that the public duty doctrine bars the claims and moved for dismissal for failure to state a claim upon which relief can be granted under North Carolina Rule of Civil Procedure 12(b)(6). Deputy Industrial Commissioner Stephen T. Gheen denied DOT's motion, concluding that the claims were not barred. In a 13 July 2010 order, however, the Full Commission determined that plaintiffs' claims are barred by the doctrine and granted DOT's motion to dismiss.

The Court of Appeals reversed and remanded. After reviewing our public duty doctrine cases, the Court of Appeals concluded that the doctrine prohibits government liability for "failure to prevent the acts of third parties or failure to protect the general public from harm from an outside force" and for "important discretionary decision[s]" that involve "the allocation of limited resources." *Ray v. N.C. Dep't of Transp.*, —— N.C. App. ——, ——, 720 S.E.2d 720, 723, 724 (2011) (citations and quotation marks omitted). The Court of Appeals held that in this case the harm alleged was not from an outside source but from the actions of the State itself. *Id.* at ——, 720 S.E.2d at 724. Furthermore, according to the Court of Appeals, road maintenance is not a discretionary decision but an important duty of the State. *Id.* at ——, 720 S.E.2d at 724. Therefore, under our prior cases the public duty doctrine is inapplicable to plaintiffs' claims. *Id.* at ——, 720 S.E.2d at 724. Since it concluded that the doctrine did not bar plaintiffs' claims, the Court of Appeals declined to consider whether the 2008 amendment to the STCA had any role here. *Id.* at ——, 720 S.E.2d at 724. The dissenting judge found no distinction between the present case and *Myers v. McGrady*, 360 N.C. 460, 628 S.E.2d 761 (2006), in which we held that the public duty doctrine barred the plaintiff's negligence claim. *Ray*, —— N.C. App. at ——, 720 S.E.2d at 724 (Hunter, Robert C., J., dissenting). DOT appealed on the basis of the dissenting opinion.

The controlling question here is whether the public duty doctrine bars plaintiffs' claims. To answer that question we must consider

whether, as plaintiffs contend, the 2008 amendment to the STCA was a clarifying one, making it applicable to the case before us. Making that determination in this particular case requires a review of the history of sovereign immunity and the public duty doctrine in North Carolina.

This Court has long recognized the common law doctrine of sovereign immunity, acknowledging that "[i]t is an established principle of jurisprudence . . . that a state may not be sued . . . unless by statute it has consented to be sued or has otherwise waived its immunity from suit." *Smith v. Hefner*, 235 N.C. 1, 6, 68 S.E.2d 783, 787 (1952) (citations omitted). Unless waived this protection extends to state agencies. *Id.* (citations omitted). The STCA, enacted in 1951, provides a limited waiver of sovereign immunity for the

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

N.C.G.S. § 143-291 (2011); *see also Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 479, 495 S.E.2d 711, 714 (noting that the STCA "permit[s] suit[s] in derogation of sovereign immunity"), *cert. denied*, 525 U.S. 1016, 119 S. Ct. 540, 142 L. Ed. 2d 449 (1998).

The public duty doctrine is a common law negligence doctrine that exists apart from the doctrine of sovereign immunity. *See Myers*, 360 N.C. at 465, 628 S.E.2d at 766 (describing the doctrine as "a separate rule of common law negligence that may limit tort liability, even when the State has waived sovereign immunity"). When it was enacted the STCA did not specifically address the public duty doctrine. Lacking legislative guidance, our Court turned to the common law. *See State v. Bass*, 255 N.C. 42, 47, 120 S.E.2d 580, 584 (1961) ("The common law prevails in this State unless changed by statute."). We first recognized the common law public duty doctrine in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991). In that case the estate of a woman killed by her husband sued a county sheriff for negligently failing to protect the victim from her husband. *Id.* at 366-67, 410 S.E.2d at 899. We held that the public duty doctrine barred her claim, stating, "The general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals." *Id.* at 370, 410

S.E.2d at 901 (citing *Coleman v. Cooper*, 89 N.C. App. 188, 193, 366 S.E.2d 2, 6, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 275 (1988)). Because the public duty doctrine says that there is a duty to the public generally, rather than a duty to a specific individual, the doctrine operates to prevent plaintiffs from establishing the first element of a negligence claim—duty to the individual plaintiff. *See Kientz v. Carlton*, 245 N.C. 236, 240, 96 S.E.2d 14, 17 (1957) (citations omitted). We recognized two exceptions in which there is a duty to a particular individual, noting that the public duty doctrine does not apply to bar a claim

> (1) where there is a special relationship between the injured party and the police . . . ; and (2) "when a municipality . . . creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered."

Braswell, 330 N.C. at 371, 410 S.E.2d at 902 (quoting *Coleman*, 89 N.C. App. at 194, 366 S.E.2d at 6).

In *Stone v. North Carolina Department of Labor*, we recognized the doctrine's applicability to state agencies and to governmental functions other than law enforcement. 347 N.C. at 481, 495 S.E.2d at 716. *Stone* involved a chicken plant fire that killed a number of workers and injured others. *Id.* at 477, 495 S.E.2d at 713. Surviving workers and the estates of some deceased workers brought suit under the STCA, alleging that the North Carolina Department of Labor negligently failed to inspect the plant. *Id.* at 476-77, 495 S.E.2d at 713. An inspection would have revealed violations of the Occupational Safety and Health Act of North Carolina, "including the plant's inadequate and blocked exits and inadequate fire suppression system." *Id.* at 477, 495 S.E.2d at 713. Noting that the statutory requirement to inspect did not create a duty to specific individuals, we held that the public duty doctrine barred the claims. *Id.* at 477, 482-83, 495 S.E.2d at 714, 716-17.

Later that year we were faced with another negligence claim against the State's Department of Labor, this time by a plaintiff who was injured in a go-kart accident at an amusement park. *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 194-95, 499 S.E.2d 747, 748 (1998). The brakes failed on the go-kart that the plaintiff was operating, and he crashed into a pole. *Id.* at 194, 499 S.E.2d at 748. The seat belt tightened on his abdominal area, causing severe injuries. *Id.* at 194-95, 499 S.E.2d at 748. The plaintiff claimed that a Department employee had negligently allowed the go-kart to pass inspection even though the

seat belt was not in compliance with the Administrative Code and that the employee had negligently failed to inform the park's manager of the problem. *Id.* at 195, 499 S.E.2d at 748-49. We determined that the public duty doctrine shielded the Department from liability because there was no duty to a specific person. *Id.* at 199, 499 S.E.2d at 751.

In our most recent case to hold that the public duty doctrine barred a negligence claim, thick smoke from a forest fire combined with fog to obscure the southbound lanes of Interstate Highway 95 ("I-95") in Northampton County, North Carolina. *Myers*, 360 N.C. at 461, 628 S.E.2d at 763. Shirley McGrady was driving on I-95 at approximately 4:40 a.m. on 9 June 2002 when she stopped the car in the southbound lane of travel because she could not see due to the smoke and fog. *Id.* Another driver collided with the rear of the car she had been driving, setting in motion a four-car wreck that led to Darryl Myers's death. *Id.* The plaintiff, Myers's estate, alleged that the North Carolina Division of Forest Resources was aware of the fire, knew that the smoke it produced could be dangerous to motorists, and nonetheless failed to control the fire, to warn motorists, and to monitor the conditions. 360 N.C. at 461-62, 628 S.E.2d at 763. We held that the public duty doctrine prevented the Division from being liable for failing to control the smoke because of a lack of duty to a specific individual. *Id.* at 463, 468, 628 S.E.2d at 763-64, 767.

After these cases were decided, the General Assembly codified the public duty doctrine. In 2008 the legislature added N.C.G.S. § 143-299.1A to the STCA, which states:

> (a) Except as provided in subsection (b) of this section, the public duty doctrine is an affirmative defense on the part of the State department, institution, or agency against which a claim is asserted if and only if the injury of the claimant is the result of any of the following:
>
> (1) The alleged negligent failure to protect the claimant from the action of others or from an act of God by a law enforcement officer as defined in subsection (d) of this section.
>
> (2) The alleged negligent failure of an officer, employee, involuntary servant or agent of the State to perform a health or safety inspection required by statute.

(b) Notwithstanding subsection (a) of this section, the affirmative defense of the public duty doctrine may not be asserted in any of the following instances:

(1) Where there is a special relationship between the claimant and the officer, employee, involuntary servant or agent of the State.

(2) When the State, through its officers, employees, involuntary servants or agents, has created a special duty owed to the claimant and the claimant's reliance on that duty is causally related to the injury suffered by the claimant.

(3) Where the alleged failure to perform a health or safety inspection required by statute was the result of gross negligence.

N.C.G.S. § 143-299.1A. In enacting this provision the legislature incorporated much of our public duty doctrine case law. Subdivision 143-299.1A(a)(1) includes the *Braswell* holding for law enforcement officers.[1] Subdivision 143-299.1A(a)(2) aligns with *Stone's* holding that there is no liability for negligent failure to inspect under the public duty doctrine. Finally, subdivisions 143-299.1A(b)(1) and (b)(2) codify the exceptions to the public duty doctrine we have recognized since our first acknowledgment of the doctrine. *See Braswell*, 330 N.C. at 371, 410 S.E.2d at 902; *see also Multiple Claimants v. N.C. Dep't of Health & Human Servs.*, 361 N.C. 372, 374, 646 S.E.2d 356, 357-58 (2007).

By incorporating much of our public duty doctrine case law into the STCA, the General Assembly recognized that our Court was correct in utilizing the doctrine in our STCA analysis. The General Assembly also made clear that the doctrine is to be a more limited one than the common law might have led us to understand. Having

1. N.C.G.S. § 143-299.1A(d) defines "law enforcement officer" for the purposes of the public duty doctrine. That statute provides: "For purposes of this section, 'law enforcement officer' means a full time or part time employee or agent of a State department, institution, or agency or an agent of the State operating under an agreement with a State department, institution, or agency of the State who is any of the following: (1) Actively serving in a position with assigned primary duties and responsibilities for prevention and detection of crime or the general enforcement of the criminal laws of the State or serving civil processes. (2) Possesses the power of arrest by virtue of an oath administered under the authority of the State. (3) Is a juvenile justice officer, chief court counselor, or juvenile court counselor. (4) Is a correctional officer performing duties of custody, supervision, and treatment to control and rehabilitate criminal offenders. (5) Is a firefighter as defined in G.S. 106 955(1). (6) Is a probation officer appointed under Article 20 of Chapter 15 of the General Statutes." N.C.G.S. § 143-299.1A(d).

relied on the common law in the absence of legislative guidance, we must now revisit the statute in light of the amendment. *See Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 81, 347 S.E.2d 824, 828 (1986) ("Legislative intent controls the meaning of a statute . . . .").

The language of N.C.G.S. § 143-299.1A reflects an intent to limit the public duty doctrine's application under the STCA. By the plain language of the statute, the public duty doctrine is a defense only if the injury alleged is the result of (1) a law enforcement officer's negligent failure to protect the plaintiff from actions of others or an act of God, or (2) a State officer's, employee's, involuntary servant's, or agent's negligent failure to perform a health or safety inspection required by statute. N.C.G.S. § 143-299.1A(a); *see also Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993) ("If the language used is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language."). In all other cases the public duty doctrine is unavailable to the State as a defense. The instances in which the doctrine is not a defense include not only the three specific exclusions listed in subsection (b), but also situations not listed explicitly. *See* N.C.G.S. § 143-299.1A(a) ("[T]he public duty doctrine is an affirmative defense . . . *if and only if* the injury of the claimant is the result of any of the following . . . . (emphasis added)).

That the goal of the amendment was to limit the use of the public duty doctrine as an affirmative defense is also suggested by the amendment's title. We have previously held that even when the language of a statute is plain, "the title of an act should be considered in ascertaining the intent of the legislature." *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 812, 517 S.E.2d 874, 879 (1999) (citing *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 764 (1992)). Here the title of the enactment amending the STCA, "Limit use of public duty doctrine as an affirmative defense," indicates that N.C.G.S. § 143-299.1A is designed to decrease the number of factual scenarios in which the public duty doctrine is used to bar a claim. Taken together, the plain language of the amendment, listing only two instances in which the affirmative defense of the public duty doctrine applies, and the title, suggesting an intention to constrict the use of the doctrine, demonstrate that the legislature meant to recognize the doctrine as one of limited applicability.

Having determined that section 143-299.1A limits the use of the public duty doctrine as an affirmative defense, we must identify the cases in which this limitation will operate. "In construing a statute

with reference to an amendment it is presumed that the legislature intended either (a) to change the substance of the original act, or (b) to clarify the meaning of it." *Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 483 (1968) (citation omitted). A clarifying amendment, unlike an altering amendment, is one that does not change the substance of the law but instead gives further insight into the way in which the legislature intended the law to apply from its original enactment. *See Ferrell v. Dep't of Transp.*, 334 N.C. 650, 659, 435 S.E.2d 309, 315-16 (1993). As a result, in addition to applying to all cases brought after their effective dates, such amendments apply to all cases pending before the courts when the amendment is adopted, regardless of whether the underlying claim arose before or after the effective date of the amendment. *See Wells v. Consol. Jud'l Ret. Sys. of N.C.*, 354 N.C. 313, 318, 553 S.E.2d 877, 880 (2001); *Ferrell*, 334 N.C. at 661-62, 435 S.E.2d at 317 (applying a 1992 clarifying amendment to a claim arising and filed in 1989); *Childers*, 274 N.C. at 260, 263, 162 S.E.2d at 483-84, 486 (finding an amendment to be clarifying and applying the statute at issue as amended to a cause of action arising pre-amendment).

Here we are faced with an amendment to the STCA that specifies an effective date of 1 October 2008 and that it is to apply to claims arising on or after that date. As concluded in the cases cited above, if the General Assembly meant these changes substantively to amend the STCA, the changes would apply only to claims arising on or after 1 October 2008. If, however, the legislature intended the statute to clarify the application of the public duty doctrine to the STCA, section 143-299.1A will apply to all claims pending or brought before our State's courts after the amendment's passage.

It is this Court's job to determine whether an amendment is clarifying or altering. *See In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) ("Questions of statutory interpretation are ultimately questions of law for the courts . . . ."). The General Assembly's inclusion of an effective date in the session law does not alter this outcome. All statutes are given an effective date by the General Assembly, either in the statute itself or under N.C.G.S. § 120-20, and the default rule provides statutes with a prospective effective date. *See* N.C.G.S. § 120-20 (2011) ("Acts of the General Assembly shall be in force *only from and after* 60 days after the adjournment of the session in which they shall have passed, unless the commencement of the operation thereof be expressly otherwise directed." (emphasis added)). Given that all statutes have such effec-

tive dates, an effective date, standing alone, is insufficient information for our Court to conclude, in carrying out the task of interpreting the statute, that the statute is a substantive change in the law. Unless the legislature provides guidance more specific than a prospective effective date as to whether an amendment is clarifying or altering, the General Assembly cannot know what the Court will ultimately conclude on that matter. *See Childers*, 274 N.C. at 260, 162 S.E.2d at 484 ("Even 'the action of the legislature in amending a statute so as to make it directly applicable to a particular case is not a conclusive admission that it did not originally cover such a case.' " (citation omitted)). In the event that the amendment is a substantive change in the law, the effective date will apply. However, when the amendment is determined to be clarifying by this Court, the effective date does not supersede the law that governs how clarifying amendments control. *See Ferrell*, 334 N.C. at 661-62, 435 S.E.2d at 317 (finding an amendment clarifying and applying it to a claim arising before the Session Law's specified effective date of 20 July 1992 even when the statute did not provide for retroactive application); *Childers*, 274 N.C. at 263, 162 S.E.2d at 486.

"To determine whether the amendment clarifies the prior law or alters it requires a careful comparison of the original and amended statutes." *Ferrell*, 334 N.C. at 659, 435 S.E.2d at 315. If the statute initially "fails expressly to address a particular point" but addresses it after the amendment, "the amendment is more likely to be clarifying than altering." *Id.* For example, in *Ferrell v. Department of Transportation* we considered the price at which DOT was required to reconvey to its original owners land taken by eminent domain but no longer needed. 334 N.C. at 652-53, 435 S.E.2d at 311. The land at issue was taken in 1972, and DOT made the initial offer to reconvey to the original owners, the plaintiffs in the case, in 1989. *Id.* at 652-53, 435 S.E.2d at 311-12. At that time the relevant statute governing reconveyance of land after an eminent domain taking did not specify the sell-back price. *See* N.C.G.S. § 136-19 (1986). By the time the action reached our Court in 1993, however, the General Assembly had amended N.C.G.S. § 136-19 to state that the selling price was to be "the full price paid to the owner when the property was taken, the cost of any improvements, together with interest at the legal rate to the date when the decision was made to offer the return of the property." Act of July 20, 1992, ch. 979, sec. 1, 1991 N.C. Sess. Laws (Reg. Sess. 1992) 907, 907-10. This Court decided that the price to be paid for the pre-1992 purchase and reconveyance was as specified by the 1992 amendment, concluding:

> Since here the statute before amendment provided no express guidance as to selling price, the amendment which addresses the selling price is best interpreted as clarifying the statute as it existed before the amendment. It is, therefore, strong evidence of what the legislature intended when it enacted the original statute.

Ferrell, 334 N.C. at 659, 435 S.E.2d at 315-16. Likewise, here, before the 2008 amendment, the STCA did not address the application of the public duty doctrine to claims made under it. Now section 143-299.1A specifically addresses use of the doctrine, making it "strong evidence" of the General Assembly's original intent regarding the public duty doctrine when the legislature enacted the STCA. *See id.*

The codification of nearly all of our public duty doctrine jurisprudence further suggests that the amendment is a clarifying one. Clarifying amendments are distinct from altering amendments in that they do not "change the substance of" the original law. *See Childers*, 274 N.C. at 260, 162 S.E.2d at 483. Before the amendment the public duty doctrine was, because of a lack of guidance from the legislature, purely a matter of judicial recognition of the common law. With the amendment the General Assembly has affirmed that the public duty doctrine is to apply in virtually the same manner as we have recognized since *Braswell*. Because the legislature left essentially all our pre-amendment cases intact, there has not been a complete change in the law but instead only an explanation of the limited role of the public duty doctrine.

This conclusion is consistent with the overall goal of the STCA. The STCA was passed to give greater access to the courts to plaintiffs in cases in which they were injured by the State's negligence. *See Stone*, 347 N.C. at 485, 495 S.E.2d at 718 (Orr, J., dissenting). The General Assembly amended the STCA to prevent an overly broad application of a doctrine that would limit that access. Since the goal of both the STCA and the amendment was to increase plaintiffs' ability to pursue recovery, it would be wholly inequitable to allow a person who was injured on or after 1 October 2008 to recover from the State but to deny that same benefit to a person similarly injured before the amendment was enacted. To do so would unnecessarily close a door to recovery that the STCA meant to open. Consistent with its goal when it enacted the STCA, the General Assembly has signaled that the 2008 amendment is a clarification in pursuit of that end. *See Trs. of Rowan Technical Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 240, 328 S.E.2d 274, 280 (1985) (finding support

for the conclusion that an amendment was a clarifying one by examining the purpose for enacting the amendment).

Viewed broadly, we are faced here with a situation in which the General Assembly enacted a measure allowing negligence claims against the State, but did not include a provision specifying whether and how the public duty doctrine was to apply. In the absence of such a provision this Court, as it should, looked to the common law. The General Assembly reacted, speaking on a topic that it had not previously addressed and stating that, while our Court had largely properly applied the doctrine, the doctrine is to be a limited one. Taken together, these facts indicate that the General Assembly intended to clarify the role of the public duty doctrine in the STCA with N.C.G.S. § 143-299.1A. Because the legislature has now specifically explained how the public duty doctrine is to be applied, the amendment clarifies the General Assembly's intention regarding the public duty doctrine from the time of the original enactment of the STCA.

Knowing now that the amendment applies to the case at bar, we must consider whether the public duty doctrine blocks plaintiffs' claims. At this stage we take plaintiffs' allegations as true, and any inferences are resolved in their favor. *See Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 351, 416 S.E.2d 166, 168 (1992) (citing *Jackson v. Bumgardner*, 318 N.C. 172, 174-75, 347 S.E.2d 743, 745 (1986)). On the face of their complaints, plaintiffs appear to make three types of claims. To the extent plaintiffs make a claim for negligent "design and execution" of the narrowing of RP 1010 from three lanes to two, that claim is not barred by the public duty doctrine. Similarly, to the extent that plaintiffs claim negligent failure to repair, that claim is not barred. Neither claim is for negligent failure to inspect pursuant to a statute, so N.C.G.S. § 143-299.1A(a)(2) will not allow the doctrine to be an affirmative defense. Likewise, as DOT does not fit within the definition of a law enforcement officer, subdivision (a)(1) will not operate to bar the claims. *See* N.C.G.S. § 143-299.1A(d).

Plaintiffs also claim that DOT should have known of the defect because it had existed for a substantial period of time before the accident in question. Here a claim that DOT should have known of the defect amounts to a claim that DOT negligently failed to inspect the roadway for such defects. Assuming *arguendo* that N.C.G.S. § 143B-346 creates a statutory requirement to inspect state roads for safety, for their claim to survive the public duty doctrine defense plaintiffs must, under the amendment, allege that DOT was grossly

negligent in their failure to inspect. *See id.* § 143-299.1A(a)(2), (b)(3). By exempting ordinary negligent failure to inspect from liability the General Assembly made it clear that it did not intend for every circumstance in which a state agency failed to inspect for safety to give rise to liability. Nonetheless, under the statute, at some level the negligence becomes gross and therefore, actionable. *See id.* § 143-299.1A(b)(3). Gross negligence is determined based on the facts and circumstances of each case and is a matter generally left to the jury. *See Smith v. Stepp*, 257 N.C. 422, 425, 125 S.E.2d 903, 906 (1962). Our Court has described the difference between ordinary and gross negligence as follows:

> [T]he difference between the two is not in degree or magnitude of inadvertence or carelessness, but rather is intentional wrongdoing or deliberate misconduct affecting the safety of others. An act or conduct rises to the level of gross negligence when the *act* is done purposely and with knowledge that such act is a breach of duty to others, i.e., a *conscious* disregard of the safety of others.

Yancey v. Lea, 354 N.C. 48, 53, 550 S.E.2d 155, 158 (2001).

In their complaints plaintiffs allege that "[t]he defective roadway condition and drop-off had existed for a substantial period of time prior to the collision." This assertion indicates that a considerable period of time passed without DOT inspecting the road or noticing any defect in it. Though the test for gross negligence turns on the totality of the circumstances, two factors are especially relevant—purposeful conduct and disregard for the safety of others. *See id.* Reading the allegations in the light most favorable to the plaintiffs, the passage of a substantial period of time since development of the defect without its being noticed by DOT gives rise in this case to the inference that DOT intentionally avoided traveling on or inspecting RP 1010, which would have provided an opportunity to become aware of the defect and make a decision on whether to repair it. That inference, combined with the awareness that an uninspected road can present a danger to travelers, is sufficient to support a claim for gross negligence at this stage.

Because we hold that N.C.G.S. § 143-299.1A clarifies the role of the public duty doctrine under the STCA, the doctrine does not bar plaintiffs' claims, and those claims can go forward. The Court of Appeals decision is affirmed as modified.

MODIFIED AND AFFIRMED.

Justice HUDSON concurring in part and dissenting in part.

I agree with Chief Justice Parker and Justice Timmons-Goodson that the majority's analysis is flawed regarding the retroactivity of the 2008 amendment; I share the concern that serious and extensive unintended consequences could flow from this decision. However, I agree with the majority that two types of plaintiffs' claims should not be dismissed. Accordingly, I concur in part and dissent in part.

I agree with both dissenting opinions that the 2008 amendment cannot be construed as a clarifying amendment. I am especially convinced by the plain language of the statute, which states that the 2008 amendment "becomes effective October 1, 2008, and applies to claims arising on or after that date." Act of Aug. 4, 2008, Ch. 170, Sec. 2, 2008 N.C. Sess. Laws 690, 691. Second, the caption of the amendment states that its purpose is to "limit the use of the public duty doctrine as an affirmative defense," indicating an intent to change (by limiting) the existing law. *Id.* at 690. In my view, it is not our role to disregard this plain expression of legislative intent and this plain statutory language and apply the amendment here to cases that arose in 2002. Further, I fear that by so doing the majority jeopardizes the status of any number of other substantive amendments throughout the general statutes. I would hold that the 2008 amendment does not apply to this case.

However, I would hold that the public duty doctrine, as previously articulated by this Court, does not bar plaintiffs' claims. As pointed out by the majority, plaintiffs made three types of claims in their complaints. The first two claims are for (1) negligent design and execution and (2) negligent failure to repair. I see no authority that would apply the public duty doctrine to bar these two claims.

To date, this Court has only examined the public duty doctrine as an affirmative defense in five cases. In two of those cases, we examined the doctrine as it related to the actions of law enforcement and other public safety officers. *See Myers v. McGrady*, 360 N.C. 460, 467-68, 628 S.E.2d 761, 766-67 (2006); *Braswell v. Braswell*, 330 N.C. 363, 370-71, 410 S.E.2d 897, 901-02 (1991). In another, we found that an exception to the public duty doctrine applied. *Multiple Claimants v. N.C. Dep't of Health & Human Servs.*, 361 N.C. 372, 378-79, 646 S.E.2d 356, 360-61 (2007). The two cases most relevant here addressed the public duty doctrine in the context of state agencies

and the duty to inspect. *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998); *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 495 S.E.2d 711, *cert. denied by* 525 U.S. 1016 (1998). In both cases we held that the public duty doctrine was available as an affirmative defense to state agencies in cases of negligent inspection. *Hunt*, 348 N.C. at 197-99, 499 S.E.2d at 750-51 (holding that the public duty doctrine barred a plaintiff's suit for negligent inspection of go-karts); *Stone*, 347 N.C. at 483, 495 S.E.2d at 717 (holding that the public duty doctrine barred the plaintiffs' suit for negligent inspection of a chicken plant). Here two of the plaintiffs' claims do not stem from negligent inspection. Instead, plaintiffs' allegations describe claims based on negligent design and negligent failure to repair. Therefore, I would hold that the public duty doctrine cannot apply to bar plaintiffs' first two claims, and I would allow plaintiffs' case to go forward on those two claims. The Tort Claims Act generally waives the State's sovereign immunity and provides that negligence claims, including these, may be pursued against the State. Thus, I concur in the part of the majority opinion that affirms the Court of Appeals' reversal of the Full Commission's dismissal of these two claims.

For these reasons, I respectfully concur in part and dissent in part.

Chief Justice PARKER, dissenting.

Although the Tort Claims Act represents "a limited waiver of [the State's] sovereign immunity," *Myers v. McGrady*, 360 N.C. 460, 464, 628 S.E.2d 761, 764 (2006), its enactment in 1951 did not abrogate the public duty doctrine. *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 479, 495 S.E.2d 711, 714 (holding that "the plain words of the statute indicate an intent that the [public duty] doctrine apply to claims brought under the Tort Claims Act"), *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449 (1998). Rather, "the Tort Claims Act . . . incorporat[ed] the existing common law rules of negligence, including [the public duty] doctrine." *Id.* at 479, 495 S.E.2d at 715; *cf. Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 196, 499 S.E.2d 747, 749 (1998) (adopting our reasoning in *Stone*). Although we first recognized the public duty doctrine in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), which involved a negligence suit against law enforcement, in subsequent decisions we reiterated the doctrine's applicability and permitted its logical coverage of other government actors. *Stone*, 347 N.C. at 481, 495 S.E.2d at 716; *see also Multiple Claimants v. N.C. Dep't of Health & Human Servs.*, 361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) (holding that DHHS, although within public duty doctrine's scope, was liable

to victims of prison fire because applicable statutes created "special relationship" of duty owed by DHHS to inmates as a class); *Myers*, 360 N.C. at 468, 628 S.E.2d at 767 (holding Division of Forest Resources did not owe specific duty to plaintiffs injured when mismanaged forest fire smoke occluded roadways); *Hunt*, 348 N.C. at 199, 499 S.E.2d at 751 (holding Department of Labor's statutory duties did not create a private right of action and that to hold otherwise would result in the State becoming a "virtual guarantor" of safety of every go-kart subject to inspection).

These cases demonstrate that the Tort Claims Act did not eliminate the public duty doctrine, which continued to exist in a form not limited by the strictures of the amendment passed by the General Assembly in 2008. Consequently, the same analysis we applied in *Multiple Claimants*, *Myers*, *Hunt*, and *Stone* is applicable here. Under that framework, the key question is "whether the language of the relevant statutes and regulations clearly mandates a standard of conduct owed by an agency to the complainant." *Multiple Claimants*, 361 N.C. at 376, 646 S.E.2d at 359. As recognized by the dissenting judge at the Court of Appeals, *Ray v. N.C. Dep't of Transp.*, —— N.C. App. ——, ——, 720 S.E.2d 720, 724-25 (2011) (Hunter, Robert C., J., dissenting), plaintiffs cannot prevail under that analysis.

To avoid the result compelled by our precedents, the majority has endeavored to superimpose the amended Tort Claims Act—and thus a more limited form of the public duty doctrine—upon claims that antedate it. Specifically, the majority gives the 2008 amendment retroactive effect by construing it as a "clarification" of what the legislature believed the law already was. That interpretation is unsupportable.

"An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute." 1A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 22:31, at 374-75 (7th ed. 2009) [hereinafter Singer & Singer] (footnote omitted). In this instance the General Assembly did not make this supposed clarification until ten years after *Stone* and *Hunt* and seventeen years after *Braswell*. Thus, timing weighs against the majority's interpretation. Most significant, however, is that the 2008 amendment does not "construe" or "clarify" the Tort Claims Act at all. Rather, the amendment changes the law by limiting a preexisting common law doctrine not mentioned in the initial iteration of the Tort Claims Act.

Moreover, the plain language of the amendment states that it only applies to "claims arising on or after" its effective date. Act of July 9, 2008, ch. 170, sec. 2, 2008 N.C. Sess. Laws 690, 691. "This language is too plain for construction." *Pac. Mut. Life Ins. Co. v. Ins. Dep't*, 144 N.C. 305, 307, 144 N.C. 442, 444, 57 S.E. 120, 121 (1907). "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it plain and definite meaning . . . ." *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980) (citations omitted). The text of the amendment leaves nothing to implication. "[T]hat which is expressed makes that which is implied to cease." *Howell v. Travelers Indem. Co.*, 237 N.C. 227, 231-32, 74 S.E.2d 610, 614 (1953) (internal quotation marks omitted). By expressly limiting the effect of the amendment to claims arising "on or after" its effective date of 1 October 2008, the General Assembly manifested an intention not to impose these limitations on the public duty doctrine for antecedent tort claims. Plaintiffs' wrongful death claims are among the latter category.

This plain language also prohibits reading the amendment as a "clarification" of what the law already was. We have addressed the issue before:

> In construing a statute with reference to an amendment, the presumption is that the legislature intended to change the law. . . . We also consider it significant that [the act in question] provide[s] that the amendment shall not be applied retroactively. This is strong evidence that the legislature understood that the amendment occasioned a change in, rather than a clarification of, existing law.

State ex rel. Utils. Comm'n v. Pub. Serv. Co. of N.C., 307 N.C. 474, 480, 299 S.E.2d 425, 429 (1983) (citing *Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 483-84 (1968)). Similarly, in the instant case, the legislature's insertion of a proviso prescribing only prospective application serves as "strong evidence" refuting the notion that the 2008 amendment was intended to clarify existing law. Of note, the session law amending the statute in *Ferrell v. Department of Transportation*, 334 N.C. 650, 435 S.E.2d 309 (1993), cited by the majority, stated that it would be effective upon ratification without any specific reference to prospective or retrospective application. Act of July 2, 1992, ch. 979, sec. 2, 1991 N.C. Sess. Laws 907, 910.

Additional evidence that the General Assembly understood it was limiting a preexisting doctrine rather than clarifying it can be found in the caption to the amendment, which reads as follows:

> An act to limit the use of the public duty doctrine as an affirmative defense for claims under the State Tort Claims Act in which the injuries of the claimant are the result of the alleged negligent failure of certain parties to protect claimants from the action of others.

Ch. 170, 2008 N.C. Sess. Laws at 690. As we recognized long ago, a statute's caption is relevant to its construction. *Smith v. Davis*, 228 N.C. 172, 178, 45 S.E.2d 51, 56 (1947). "[W]hen the meaning of an act of the General Assembly is in doubt, reference may be had to the title and context of the act of legislative declarations of the purpose of the act,—the intent and spirit of the act controlling in its construction." *Id.* at 179, 45 S.E.2d at 57 (citing *inter alia*, *State v. Woolard*, 119 N.C. 485, 119 N.C. 779, 25 S.E. 719 (1896)). Here the caption or title of the 2008 amendment shows us that the legislature sought to "limit" the public duty doctrine—an affirmative defense that had survived North Carolina's adoption of the Tort Claims Act.

Despite this strong evidence of the legislature's intent and understanding of the law, the majority's opinion gives retroactive life to an amendment that has the effect of depriving the Department of Transportation of a common law defense. Our rules of construction do not permit this result. *Smith v. Mercer*, 276 N.C. 329, 337, 172 S.E.2d 489, 494 (1970) ("It is especially true that [a] statute or amendment will be regarded as operating prospectively . . . where it is in derogation of a common-law right, or where the effect of giving it a retroactive operation would be to . . . *invalidate a defense which was good when the statute was passed* . . . ." (quoting 50 Am. Jur. *Statutes* § 478) (internal quotation marks omitted)); *see also* 2 Singer & Singer § 41:4, at 415-16 ("A statutory amendment . . . cannot be given retroactive effect in the absence of a clear expression of legislative intent to do so.").

The original Tort Claims Act did not speak to the public duty doctrine at all. The doctrine continued to exist, in the form in which it was applied in *Hunt* and *Stone*, at the time plaintiffs' decedents had their accident. If the legislature had intended to "clarify" the relationship between the Tort Claims Act and the public duty doctrine—a subject on which it had not yet spoken—it could have made that intention manifest. If it had intended to give the 2008 amendment retroactive scope, it could have done so. It did neither. I therefore respectfully dissent.

Justice TIMMONS-GOODSON, dissenting.

In its analysis, the majority disregards this Court's prior precedent and incorrectly applies a well-established canon of statutory interpretation involving the construction of amendatory acts. Accordingly, I respectfully dissent.

I.

As explained by the dissent at the Court of Appeals, this case is controlled by *Myers v. McGrady*, 360 N.C. 460, 628 S.E.2d 761 (2006). I agree with the essence of that dissent and will not repeat it here. *See Ray v. N.C. Dep't of Transp.*, —— N.C. App. ——, ——, 720 S.E.2d 720, 726 (2011) (Hunter, Robert C., J., dissenting) ("[B]ecause the DOT owes a recognized duty to the general public and not to plaintiffs individually, I must conclude plaintiffs have failed to state claims in negligence.").

II.

I write further to express my concern regarding the majority's retrospective application of N.C. Session Law 2008-170, codified as N.C.G.S. § 143-299.1A (2011), which the majority mistakenly views as a clarification of the State Tort Claims Act, N.C.G.S. § 143-291(a) (2011). Section 143-299.1A, which I will refer to as the "2008 Amendment," does ***not*** apply here.

Whether the 2008 Amendment applies to this case is a matter of legislative intent. *See Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 81, 347 S.E.2d 824, 828 (1986) ("Legislative intent controls the meaning of a statute . . . ."). "If the language used is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language." *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993). By its own terms the 2008 Amendment "becomes effective October 1, 2008, and ***applies to claims arising on or after that date.***" Act of Aug. 4, 2008, Ch. 170, Sec. 2, 2008 N.C. Sess. Laws 690, 691 (emphasis added). The facts giving rise to this case took place, and the case was filed, prior to 1 October 2008. Thus, the plain language of the 2008 Amendment indicates that the 2008 Amendment does not apply to this case.

Rather than address the language of the 2008 Amendment itself, however, the majority invokes the doctrine of legislative clarification. This is a canon of statutory construction in which we use a later legislative enactment to assist in determining the meaning of a former

ambiguous legislative enactment. *See Childers v. Parker's, Inc.*, 274 N.C. 256, 263, 162 S.E.2d 481, 486 (1968) (concluding that a statutory alteration was a clarifying amendment when it "merely made specific that which had theretofore been implicit").[2]

The doctrine operates as follows: When the legislature alters a statute, we presume that the legislature intended either to "(1) change the substance of the original act or (2) clarify the meaning of it." *Trs. of Rowan Technical Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 240, 328 S.E.2d 274, 280 (1985) (citing *Childers*, 274 N.C. at 260, 162 S.E.2d at 483). If the legislature altered an ***unambiguous*** statute, a further presumption arises that the legislature intended to change the existing law. *Childers*, 274 N.C. at 260, 162 S.E.2d at 484. Alternatively, if the legislature altered an ***ambiguous*** statute, the presumption arises that the legislature only intended to " 'clarify that which was previously doubtful.' " *Trs. of Rowan Technical Coll.*, 313 N.C. at 240, 328 S.E.2d at 280 (quoting *Childers*, 274 N.C. at 260, 162 S.E.2d at 484).

This distinction between a substantive alteration in the original statute and a clarifying alteration is a meaningful one. We have concluded that a clarifying amendment, unlike an altering amendment, applies to all cases pending or brought before the courts prior to the passage of the clarifying amendment. *Wells v. Consol. Jud'l Ret. Sys. of N.C.*, 354 N.C. 313, 318, 553 S.E.2d 877, 880 (2001); *Ferrell v. Dep't of Transp.*, 334 N.C. 650, 659, 435 S.E.2d 309, 315-16 (1993) (applying a 1992 clarifying amendment to a claim arising and filed in 1989); *Childers*, 274 N.C. at 263, 162 S.E.2d at 485-86 (applying clarifying amendment to a cause of action arising pre-amendment). Consequently, if, as the majority contends, the 2008 Amendment is a clarification of the Tort Claims Act, the 2008 Amendment applies to the instant matter, even though the action arose and was filed prior to 1 October 2008, the effective date of the 2008 Amendment. Thus, whether the 2008 Amendment is a clarification of the Tort Claims Act, and therefore to be applied retrospectively, turns on whether there is

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2. *See* also 1A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 22:30, at 369 (7th ed. 2009) [hereinafter Singer, *Statutes*] ("[T]he time and circumstances surrounding the enactment of an amendment may indicate that the change wrought by the amendment was formal only—that the legislature intended merely to interpret the original act."); 73 Am. Jur. 2d *Statutes* § 132, at 341-42 (2001) ("[E]very change in phraseology does not indicate a change in substance and intent. [T]hus, a change in phraseology may be only to improve the diction, or to clarify that which was previously doubtful." (footnotes omitted)).

an ambiguity in the Tort Claims Act illuminated by the 2008 Amendment.[3]

Enacted in 1951, and still in effect today, the Tort Claims Act adopted a partial waiver of the State's sovereign immunity for tort liability.[4] The 1951 Tort Claims Act did not address the public duty doctrine. This is hardly surprising. The public duty doctrine was not recognized in our jurisprudence until this Court adopted it in 1991 in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), and made clear that the State could, under certain circumstances, rely on the doctrine as an affirmative defense. As the majority opinion correctly points out, after 1991, and until the 2008 Amendment, our case law made clear the circumstances under which the public duty doctrine applied. Consequently, there was never an ambiguity in the Tort Claims Act as to the applicability of the public duty doctrine. Between 1951 and 1991 the doctrine was nonexistent in State jurisprudence and therefore inapplicable. Between 1991 and 2008 the doctrine was recognized in State jurisprudence and therefore applicable as per our case law. Accordingly, because there was no ambiguity in the Tort Claims Act to clarify, the 2008 Amendment was an amendatory act to be applied prospectively. *See Alliance Co. v. State Hosp.*, 241 N.C. 329, 332, 85 S.E.2d 386, 389 (1955) ("The wording in the [Tort Claims Act] is clear, certain and intelligible."); *Smith v. McDowell Cnty. Bd. of Educ.*, 68 N.C. App. 541, 545, 316 S.E.2d 108, 111 (1984) (concluding that "the wording in the Tort Claims Act generally . . . is clear and unambiguous").

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3. *See Taylor v. Crisp*, 286 N.C. 488, 497, 212 S.E.2d 381, 387 (1975) (stating that it is logical to infer that an amendment to an unambiguous provision evinces an intent to change the law); *Childers*, 274 N.C. at 260, 162 S.E.2d at 484 ("Whereas it is logical to conclude that an amendment to an unambiguous statute indicates the intent to change the law, no such inference arises when the legislature amends an ambiguous provision."); *see also* Singer, *Statutes* § 22:30, at 369 ("[T]he time and circumstances surrounding the enactment of an amendment may indicate that the change wrought by the amendment was formal only—that the legislature intended merely to interpret the original act.").

4. Today the Tort Claims Act empowers the Industrial Commission to hear and determine claims against the State arising:

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

N.C.G.S. § 143-291(a) (2011).

Moreover, a careful comparison of our public duty doctrine case law and the 2008 Amendment reveals that rather than clarifying the Tort Claims Act, the 2008 Amendment instituted numerous material substantive changes in the governing case law regarding the public duty doctrine. Decisions of this Court prior to the 2008 Amendment made clear that the public duty doctrine could bar negligence claims against not only law enforcement, *see*, *e.g.*, *Braswelll*, 330 N.C. at 370-71, 410 S.E.2d at 901-02, but also against many State agencies under a variety of alleged circumstances, *see*, *e.g.*, *Myers*, 360 N.C. at 467-68, 628 S.E.2d at 766-67 (concluding that public duty doctrine barred claims against North Carolina Division of Forest Resources, a division of the Department of Environment and Natural Resources, for failure to control a naturally occurring forest fire or failing to make safe a public highway adjacent to the fire); *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 199, 499 S.E.2d 747, 751 (1998) (concluding that the public duty doctrine barred claims that the Department of Labor negligently inspected go-karts); *Stone v. N.C. Dep't. of Labor*, 347 N.C. 473, 482-83, 495 S.E.2d 711, 716-17 (concluding that the public duty doctrine barred claims that the Department of Labor negligently inspected a chicken processing plant), *cert. denied*, 525 U.S. 1016, 119 S. Ct. 540, 142 L. Ed. 2d 449 (1998). Likewise, our Court of Appeals expanded the public duty doctrine further, for example, by holding that it could operate to bar claims for gross negligence. *See*, *e.g.*, *Little v. Atkinson*, 136 N.C. App. 430, 434, 524 S.E.2d 378, 381 (concluding that "[i]t is clear that the [public duty] doctrine bars claims of gross negligence" (citation omitted)), *cert. denied*, 351 N.C. 474, 543 S.E.2d 492 (2000).

In contrast, the 2008 Amendment materially changes the law by reducing the applicability of the public duty doctrine as an affirmative defense. In essence, the 2008 Amendment permits the State to raise this affirmative defense ***"if and only if"*** the claimant alleges a (1) "failure to protect the claimant from the action of others or from an act of God by a ***law enforcement officer***" or (2) the negligent failure of a State agent to "perform a ***health or safety inspection*** required by statute." N.C.G.S. § 143-299.1A(a) (emphases added). This is a significant departure from our prior articulation of the public duty doctrine, which we broadly described as providing that "when a governmental entity owes a duty to the general public, particularly a statutory duty, individual plaintiffs may not enforce the duty in tort." *Myers*, 360 N.C. at 465-66, 628 S.E.2d at 766. The 2008 Amendment also makes clear that ***gross negligence*** amounting to a "failure to perform a health or safety inspection required by statute"

will ***not*** be barred by the public duty doctrine. N.C.G.S. § 143-299.1A(b)(3). As explained, this was not the law of our State prior to 1 October 2008. It is thus necessary to conclude that the 2008 Amendment changed the law with respect to the public duty doctrine.

In determining whether a statutory amendment was a clarification or an alteration, we have also sought guidance in the title of the amendment. In *State ex rel. Cobey v. Simpson*, for example, we placed significant emphasis upon a title that clearly indicated a legislative intent to clarify existing legislation. 333 N.C. 81, 90, 423 S.E.2d 759, 763-64 (1992) (finding a clarification, rather than an amendatory change, when the act in question "was entitled 'An Act to Clarify the Development, Delegation, and Injunctive Relief Provisions of the Coastal Area Management Act' ").

Here, the amendment in question is captioned "An Act to Limit the Use of the Public Duty Doctrine as an Affirmative Defense for Claims Under the State Tort Claims Act in Which the Injuries of the Claimant Are the Result of the Alleged Negligent Failure of Certain Parties to Protect Claimants from the Actions of Others." Ch. 170, 2008 N.C. Sess. Laws at 690. Thus, there is no indication in this title that the legislature sought to "clarify" the Tort Claims Act by enacting the 2008 Amendment. Instead, the title of the 2008 Amendment indicates that the legislature intended to "limit" the application of the public duty doctrine. Therefore, even if I agreed with the majority that the Tort Claims Act implicitly adopted the public duty doctrine in 1951, which I do not, I would still view the 2008 Amendment as an amendatory act to be applied prospectively. A "limitation" of the public duty doctrine is a ***change in the substantive law***. The legislature must have intended a material, substantive change in the public duty doctrine; otherwise, it would not have "limited" its application.

The majority opinion concerns me for a number of additional reasons. First, the majority contends that "the [2008] amendment clarifies the General Assembly's intention regarding the public duty doctrine from the time of the original enactment of the [Tort Claims Act]." But, as explained above, it is unlikely the legislature considered the public duty doctrine at all when it enacted the Tort Claims Act in 1951, over sixty years ago. It bears repeating that the public duty doctrine was not recognized in our jurisprudence until 1991. *Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901-02. Consequently, I do not see how the 2008 Amendment clarifies the 1951 General Assembly's intent to adopt via the Tort Claims Act an affirmative defense absent from State jurisprudence until 1991.

Second, the majority states that the public duty doctrine "exists apart from the doctrine of sovereign immunity" and apart from the State's partial waiver of sovereign immunity. Yet, the majority also claims that the public duty doctrine lay hidden in the silence of the Tort Claims Act since 1951. I do not understand how the majority reconciles these two opposing views.

Third, in concluding that the 2008 Amendment is a clarifying rather than an amending act, the majority cites to no cases factually analogous to this matter. The legislature first enacted a partial waiver of sovereign immunity in 1951. Roughly forty years later we recognized an affirmative defense limiting the tort liability of the State that had previously not been part of our common law. Nearly two decades passed and our legislature then codified this affirmative defense, adopting some appellate case law articulating the public duty doctrine, while rejecting other case law on the same issue, and narrowing the application of the doctrine considerably. The cases cited in the majority opinion merely compare two sections of legislation and do not address situations when, as here, intervening case law affects the analysis.

Finally, for the reasons set forth above, I am concerned that in an effort to preserve plaintiffs' claims, the majority stretches the doctrine of legislative clarification too far. While we may not have these plaintiffs before us again, we will certainly employ this canon of construction in the future. The next time we consider whether a legislative amendment is a clarification or an alteration to existing statutory law, and therefore determine whether a statute is to be applied retrospectively or prospectively, we will be required to contend with the majority's misapplication of a hereunto well-established canon of construction. I fear troubling unintended consequences may stem from the majority opinion.

JANET E. MOORE v. DANIEL H. PROPER; SHAUN O'HEARN; DR. SHAUN O'HEARN, DDS, P.A.; AND AFFORDABLE CARE, INC.

No. 443A11

(Filed 14 June 2012)

Medical Malpractice— Rule 9(j)—proffered expert witness— reasonably expected to quality under Rule 702

The Court of Appeals properly reversed the trial court order dismissing plaintiff's malpractice claim for failure to comply with N.C.G.S. § 1A-1, Rule 9(j). Because plaintiff's proffered expert witness could have been "reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence," as required by Rule 9(j)(1) of the North Carolina Rules of Civil Procedure, the decision of the Court of Appeals was affirmed.

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. ——, 715 S.E.2d 586 (2011), reversing an order granting summary judgment for defendants entered on 20 August 2010 by Judge James L. Baker, Jr. in Superior Court, Madison County, and remanding for additional proceedings. On 8 December 2011, the Supreme Court allowed defendants' petition for discretionary review of additional issues. Heard in the Supreme Court on 16 April 2012.

Long, Parker, Warren, Anderson & Payne, P.A., by Steven R. Warren, for plaintiff-appellee.

Cranfill Sumner & Hartzog LLP, by Samuel H. Poole, Jr., Jaye E. Bingham-Hinch, and M. Janelle Lyons, for Daniel H. Proper; and Shumaker, Loop & Kendrick, LLP, by Scott M. Stevenson and Scott A. Heffner, for Shaun O'Hearn, Dr. Shaun O'Hearn, DDS, P.A., and Affordable Care, Inc.; defendant-appellants.

Zaytoun Law Firm, PLLC, by Matthew D. Ballew; and Ferguson Stein Chambers Gresham & Sumter, P.A., by Adam Stein; for North Carolina Advocates for Justice, amicus curiae.

Carruthers & Roth, P.A., by Norman F. Klick, Jr. and Robert N. Young, for North Carolina Association of Defense Attorneys, amicus curiae.

MARTIN, Justice.

This suit arises from plaintiff's visit to the dentist for a routine tooth extraction, which plaintiff alleges resulted in a broken jaw. The trial court granted defendants' motions for summary judgment "because Plaintiff failed to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure in that no reasonable person would have expected Dr. Joseph Dunn to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence." The sole question presented by this case is whether the Court of Appeals properly reversed the trial court order dismissing plaintiff's malpractice claim for failure to comply with N.C.G.S. § 1A-1, Rule 9(j). Because we find that plaintiff's proffered expert witness could have been "reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence," as required by Rule 9(j)(1) of the North Carolina Rules of Civil Procedure, we affirm the Court of Appeals. We need not address any other issues raised by the parties.

On 16 January 2006, plaintiff went to the dental office of Dr. Shaun O'Hearn in Asheville, North Carolina, complaining of a toothache. Plaintiff was seen by Dr. Daniel H. Proper. At plaintiff's request, Dr. Proper performed a tooth extraction. Plaintiff alleges that Dr. Proper fractured her jaw during the routine extraction, discharged her from his care without advising her of the fracture, failed to provide appropriate care following the fracture, and ignored her efforts to seek his assistance in treating her injury.

On 5 March 2009, plaintiff filed a complaint asserting a claim for dental malpractice, naming Daniel H. Proper; Shaun O'Hearn; Dr. Shaun O'Hearn, DDS, P.A.; and Affordable Care, Inc. as defendants. The complaint asserted that defendants were negligent in the performance of her tooth extraction and in failing to provide follow-up care. Plaintiff claimed that defendants' actions and inactions constituted a breach of the standard of care for dental professionals. The complaint included a Rule 9(j) certification stating:

> The medical care in this case has been reviewed by Dr. Joseph C. Dunn, who is reasonably expected to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence and who is willing to testify that the medical care provided by the Defendants did not comply with the applicable standard of care.

In response to plaintiff's complaint, defendants filed answers denying all allegations of negligence and breach of the standard of care. Defendants further asserted as an affirmative defense that plaintiff failed to comply with Rule 9(j).

Pursuant to the discovery scheduling order issued by the trial court, plaintiff submitted an expert witness designation identifying Dr. Joseph C. Dunn as her only expert witness and summarizing his qualifications. Dr. Dunn completed his undergraduate work at the University of North Carolina at Chapel Hill in 1966. He completed dental school at the University of Louisville School of Dentistry in 1970. From 1970 to 1973 Dr. Dunn served in the Dental Corps of the United States Navy. Following his military service, Dr. Dunn practiced dentistry in Asheville from 1973 until his retirement from full-time practice in 1997. The expert witness designation stated that Dr. Dunn would testify that plaintiff

> was not treated in accordance with the expected standard of care for treatment by a General Dentist in North Carolina in that she was not advised of the risks of a fractured jaw occurring from any treatment which was to be afforded by Dr. Proper, Dr. Proper did not take any steps to prevent the fracture of the jaw and he failed to provide for her proper follow up care after she experienced pain as a result of the extraction.

Defendants elicited more information about Dr. Dunn through interrogatories and a deposition. Discovery revealed that after his retirement from full-time clinical practice, Dr. Dunn served as director of the clinic at the local health department from 1998 to 2000. During his time at the clinic, Dr. Dunn performed "a lot of oral surger[ies]," including "a lot of extractions." Dr. Dunn maintained his license to practice general dentistry following his retirement, which required him to participate in continuing education courses each year. Since retiring, including the year preceding the alleged injury, Dr. Dunn practiced general dentistry on a fill-in basis, usually for dentists in the Asheville area who were ill. When defendants' attorney asked how many days Dr. Dunn had filled in between January 2005 and January 2006, Dr. Dunn at first estimated thirty days, though he stated that he was not sure because it was a number of years earlier. However, Dr. Dunn subsequently testified that he filled in for a dentist on a full-time basis for approximately two and one-half months, which he thought was during the same time period. Responding to another question, Dr. Dunn stated that one-hundred percent of his time practicing general dentistry on a fill-in basis constituted active clinical practice. Defendants' attorney then rephrased the question to ask what percentage of time Dr. Dunn spent working in the active clinical practice of dentistry, assuming an eight-hour

work day with a four-day work week, to which Dr. Dunn responded, "[L]ess than five percent, I guess." Dr. Dunn repeatedly explained his uncertainty, stating that it was difficult "to nail down percentages" and "[t]hat is just a thrown out number." Dr. Dunn did not spend any time teaching, researching, performing administrative tasks, or consulting in the field of dentistry. He testified that he spent a lot of time away from the dental profession serving on the city council, running for mayor, and enjoying time with his grandchildren.

Following the deposition, defendants filed motions for summary judgment under Rule 9(j). A hearing on the motions was scheduled for 9 August 2010. Before the hearing, on 6 August 2010, plaintiff filed a motion to qualify Dr. Dunn as an expert witness under Rule 702(e). On 9 August 2010, Dr. Dunn filed an affidavit purporting to clarify his deposition testimony, asserting that he was engaged in active clinical practice one hundred percent of his professional time between January 2005 and January 2006.

On 20 August 2010, the trial court entered an order granting defendants' motions for summary judgment and dismissing plaintiff's case for failure to comply with Rule 9(j). The order also denied plaintiff's motion to qualify Dr. Dunn under Rule 702(e), which allows expert qualification under extraordinary circumstances. N.C.G.S. § 8C-1, Rule 702(e) (2009). The order contained no written findings of fact. In response to plaintiff's motion for relief from summary judgment, the trial court filed a subsequent order on 21 September 2010 denying plaintiff's requested relief. Although the trial court stated in its August 2010 order that "no reasonable person would have expected Dr. Joseph Dunn to qualify as an expert witness under Rule 702," neither order made a determination as to whether Dr. Dunn *actually* qualified as a witness under Rule 702(b).

On appeal, a divided panel of the Court of Appeals reversed the trial court, concluding that Dr. Dunn could have been reasonably expected to qualify under Rule 702 as required by Rule 9(j)(1) and (2). *Moore v. Proper*, —— N.C. App. ——, ——, 715 S.E.2d 586, 590-91 (2011). The Court of Appeals majority expressly stated that it was not ruling on whether Dr. Dunn would ultimately qualify as an expert witness under Rule 702. *Id.* at ——, 715 S.E.2d at 590-91. Because the trial court made no written findings of fact, the Court of Appeals majority construed the factual evidence in the light most favorable to the nonmoving party and reviewed the ultimate conclusions of law de novo.

Id. at ——, ——, 715 S.E.2d at 590, 592. The dissenting opinion stated that plaintiff did not fulfill the requirements of Rule 9(j)(2) because she did not file a Rule 702(e) motion with the complaint. *Id.* at ——, 715 S.E.2d at 593 (Stephens, J., dissenting). The dissenting opinion further stated that plaintiff could not fulfill the requirements of Rule 9(j)(1) because, with the exercise of reasonable diligence, plaintiff could not reasonably expect Dr. Dunn to qualify as an expert as he neither maintained an active clinical practice nor spent a majority of his professional time engaged in active clinical dentistry. *Id.* at ——, 715 S.E.2d at 593-96.

The outcome of this case hinges on the interaction between N.C.G.S. § 1A-1, Rule 9(j) and N.C.G.S. § 8C-1, Rule 702(b). The relevant parts of Rule 9(j) provide:

> (j) *Medical malpractice.*——Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts 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 and who is willing to testify that the medical care did not comply with the applicable standard of care;
>
> (2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
>
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

N.C.G.S. § 1A-1, Rule 9(j) (2009).[1]

Rule 702(b) provides, in pertinent part:

> (b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate

1. Rule 9(j) was amended in 2011; however, the general requirements remain substantially unchanged.

standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:

. . . .

(2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:

a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or

b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

N.C.G.S. § 8C-1, Rule 702(b) (2009).

This Court has stated that "medical malpractice complaints have a distinct requirement of expert certification with which plaintiffs must comply." *Thigpen v. Ngo*, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002). Those complaints "receive strict consideration by the trial judge," and "[f]ailure to include the certification necessarily leads to dismissal." *Id.* When expert testimony is offered, including those cases in which the complaint contains a Rule 9(j) certification, the trial court will generally be "afforded wide latitude" in determining whether the proffered expert testimony will be admissible. *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). Nonetheless, when a trial court's determination relies on statutory interpretation, our review is de novo because those matters of statutory interpretation necessarily present questions of law. *In re Foreclosure of Vogler Realty, Inc.*, —— N.C. ——, ——, 722 S.E.2d 459, 462 (2012).

Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review *before* filing of the action. *Thigpen*, 355 N.C. at 203-04, 558 S.E.2d at 166. Rule 9(j) thus operates as a preliminary qualifier to "control pleadings" rather than to act as a general mechanism to exclude expert testimony. *See id.* Whether an expert will ultimately qualify to testify is controlled by Rule 702. The trial court has wide discretion to allow or exclude testimony under that rule. *Bullard*, 312 N.C. at 140, 322 S.E.2d at 376. However, the preliminary, gatekeeping question of whether a proffered expert witness is "reasonably expected to qualify as an expert witness under Rule 702" is a different inquiry from whether the expert *will actually* qualify under Rule 702. *See* N.C.G.S. § 1A-1, Rule 9(j)(1) (citation omitted). We "presum[e] 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). Therefore, to "give every word of the statute effect," we must ensure that the two questions are not collapsed into one. *See id.* Ignoring the term *reasonably expected* would thus contravene the manifest intent of the legislature. Accordingly, a trial court must analyze whether a plaintiff complied with Rule 9(j) by including a certification complying with the Rule before the court reaches the ultimate determination of whether the proffered expert witness actually qualifies under Rule 702.

Because Rule 9(j) requires certification at the time of filing that the necessary expert review has occurred, compliance or noncompliance with the Rule is determined at the time of filing. *See Thigpen*, 355 N.C. at 203-04, 558 S.E.2d at 166; *Sharpe v. Worland*, 147 N.C. App. 782, 783-84, 557 S.E.2d 110, 112 (2001), *disc. rev. denied*, 356 N.C. 615, 575 S.E.2d 27 (2002). The Court of Appeals has held that when conducting this analysis, a court should look at "the facts and circumstances known or those which should have been known to the pleader" at the time of filing. *Trapp v. Maccioli*, 129 N.C. App. 237, 241, 497 S.E.2d 708, 711, *disc. rev. denied*, 348 N.C. 509, 510 S.E.2d 672 (1998). We find this rule persuasive, as any reasonable belief must necessarily be based on the exercise of reasonable diligence under the circumstances. *See Fort Worth & Denver City Ry. Co. v. Hegwood*, 198 N.C. 309, 317, 151 S.E. 641, 645 (1930) (discussing knowledge in the context of an action for fraud). As a result, the Court of Appeals has correctly asserted that a complaint facially valid under Rule 9(j) may be dismissed if subsequent discovery establishes that the certification is not supported by the facts, *see Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238,

255, 677 S.E.2d 465, 477 (2009); *Ford v. McCain*, 192 N.C. App. 667, 672, 666 S.E.2d 153, 157 (2008), at least to the extent that the exercise of reasonable diligence would have led the party to the understanding that its expectation was unreasonable. Therefore, to evaluate whether a party reasonably expected its proffered expert witness to qualify under Rule 702, the trial court must look to all the facts and circumstances that were known or should have been known by the party at the time of filing. *See Ewbank v. Lyman*, 170 N.C. 505, 508-09, 87 S.E. 348, 349-50 (1915) (discussing a party's inability to use willful ignorance of facts in the context of a fraud action to secure an advantage).

Though the party is not necessarily required to know all the information produced during discovery at the time of filing, the trial court will be able to glean much of what the party knew or should have known from subsequent discovery materials. *See Barringer*, 197 N.C. App. at 255, 677 S.E.2d at 477; *Ford*, 192 N.C. App. at 672, 666 S.E.2d at 157. But to the extent there are *reasonable* disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage of determining whether the party *reasonably expected* the expert witness to qualify under Rule 702. *See* N.C.G.S. § 1A-1, Rule 56 (2009) (stating that summary judgment is proper when there is no genuine issue of material fact for trial); *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (stating that when considering a motion for summary judgment, a trial court must draw all inferences of fact in favor of the party opposing the motion). When the trial court determines that reliance on disputed or ambiguous forecasted evidence was not reasonable, the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination. *See Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). We note that because the trial court is not generally permitted to make factual findings at the summary judgment stage, a finding that reliance on a fact or inference is not reasonable will occur only in the rare case in which no reasonable person would so rely. *See Forbis*, 361 N.C. at 523-24, 649 S.E.2d at 385.

Having described the meaning of the term *reasonably expected*, we turn to the requirements of Rule 702(b). Because Dr. Dunn did not claim that he taught in the field of clinical dentistry, we need only

examine Rule 702(b)(2)(a). According to Rule 702(b)(2)(a), the proffered expert witness must, during the year immediately preceding the date of the injury, "have devoted a majority of his or her professional time to . . . [t]he active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered." N.C.G.S. § 8C-1, Rule 702(b)(2)(a). As recognized by the dissenting opinion in the Court of Appeals, this requirement can be broken into three relevant inquiries: (1) whether, during the year immediately preceding the incident, the proffered expert was in the same health profession as the party against whom or on whose behalf the testimony is offered;[2] (2) whether the expert was engaged in active clinical practice during that time period; and (3) whether the majority of the expert's professional time was devoted to that active clinical practice. *See Moore*, ___ N.C. App. at ___, 715 S.E.2d at 594 (Stephens, J., dissenting).

The first inquiry will rarely be at issue and does not warrant discussion here. The second inquiry requires that the expert have been engaged in *active* clinical practice in the year preceding the incident. N.C.G.S. § 8C-1, Rule 702(b)(2). As the dissent at the Court of Appeals noted, *clinical* means "actual experience in the observation and treatment of patients"—not activities simply relating to the health profession, such as administration or continuing education. *Moore*, ___ N.C. App. at ___, 715 S.E.2d at 595 (Stephens, J., dissenting) (citations and quotation marks omitted). A continuum exists between active and inactive clinical practice. On the one hand, there is inactive practice, an extreme example of which would be a professional performing one hour of clinical practice per year. On the other hand, there is active practice, an extreme example of which would be a full-time practitioner devoting eighty hours to clinical practice each week. Whether a professional's clinical practice is considered *active* during the relevant time period will necessarily be decided on a case-by-case basis considering, among other things, the total number of hours engaged in clinical practice, the type of work the professional is performing, and the regularity or intermittent nature of that practice. No one factor is likely to be determinative. Instead, the court must look to the totality of the circumstances when making this determination.

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2. It is important to note that if the party against whom or on whose behalf the testimony is offered is a specialist, the Rule requires that the proffered expert witness be in the same or similar specialty. N.C.G.S. § 8C-1, Rule 702(b)(2)(a). Because that part of the Rule is not relevant to this case, it will not be discussed.

Having defined active clinical practice, we now examine the third inquiry—whether the professional's active clinical practice constituted the majority of his or her professional time during the year in question. When referring to the expert witness, Rule 702 states that the court should look to "*his or her* professional time." N.C.G.S. § 8C-1, Rule 702(b)(2). Therefore, *professional time* is the professional's *actual* time spent engaged in the profession of which he or she is being proffered as an expert. This time may include time spent in clinical practice, administration, continuing education, or any other capacity related to the field—necessarily excluding time spent outside the profession. *See, e.g.*, *Cornett v. Watauga Surgical Grp.*, 194 N.C. App. 490, 494-95, 669 S.E.2d 805, 808 (2008) (analyzing the actual work week of the proffered expert witness). Using the aggregate time spent in the profession, the trial court must determine the proportion of that time during which the proffered expert was engaged in active clinical practice,[3] as defined above, and whether this time constituted at least a majority of his or her total professional time. Whereas the second inquiry is concerned with quantity and quality, this third inquiry is concerned with proportionality. *See* N.C.G.S. § 8C-1, Rule 702(b)(2). Having considered these three inquiries, the trial court then must determine whether it was reasonable for the plaintiff to expect the proffered expert to qualify under Rule 702, based on what the plaintiff knew or should have known at the time of filing the complaint. *See id.* § 1A-1, Rule 9(j).

The interaction between the second and third inquiries prevents absurd results. For instance, a professional likely would not qualify under Rule 702(b) if he or she spent one hundred percent of his or her professional time in clinical practice but practiced only ten hours during the relevant year. Similarly, a professional who spent eighty hours per week in the profession as an administrator but very little time performing clinical work likely would not qualify under Rule 702(b). In both cases, the professional would fail the second prong by not having engaged in an *active* clinical practice. At the same time, the interaction between these inquiries is meant to prevent absurd outcomes in which practitioners who are familiar with the local standard of care are unable to qualify.

We now turn to the facts of this case. Because the trial court dismissed the action for failure to comply with Rule 9(j), we need only consider the preliminary matter of whether Dr. Dunn was *reasonably*

3. We note that if the proffered expert witness instructed students, that time would also be included under Rule 702(b)(2)(b).

expected to qualify under Rule 702(b) based on the facts and circumstances that were known or should have been known by plaintiff at the time of filing her complaint. *See id.*, Rule 9(j)(1). Because the trial court made no written findings of fact, we assume that any disputes or ambiguities in the factual record were at least reasonable and construe them in favor of plaintiff, the nonmoving party, at this stage of the litigation. We do not consider, or in any way express an opinion on, whether Dr. Dunn would *actually* qualify as an expert witness under Rule 702(b), leaving that determination to the discretion of the trial court, subject to appellate review. *See Bullard*, 312 N.C. at 140, 322 S.E.2d at 376.

At the time of filing, plaintiff knew or should have known that Dr. Dunn was a licensed dentist with over thirty-five years of full-time experience. During that period, he served as a dentist in the United States Navy and then spent the remainder of his career practicing general dentistry in Asheville. Following his retirement from full-time practice, he continued to perform clinical dentistry as director of a local clinic. To maintain his license to practice dentistry, Dr. Dunn participated in required continuing education courses each year, which would give him at least some degree of insight into the current standard of care for his profession. Plaintiff also knew that since Dr. Dunn's retirement, he had continued to practice general clinical dentistry on a fill-in basis. The extent of Dr. Dunn's fill-in work from January 2005 to January 2006 was somewhat unclear. Dr. Dunn's deposition testimony revealed that during that one-year period he could have practiced as few as thirty days, or even more than two and one-half months when he filled in full time for a friend. Based on that conflicting information, it was at least reasonable to infer that Dr. Dunn engaged in fairly regular clinical dental practice for a substantial number of hours, the totality of which was reasonably likely to amount to active clinical practice. Additionally, all of Dr. Dunn's time in the dental profession was spent engaged in clinical practice.[4] Because activities completely unrelated to dentistry, such as running for mayor, are not included as part of Dr. Dunn's professional time, it was thus reasonable for plaintiff to infer that Dr. Dunn had devoted a majority of his professional time to the active clinical practice of dentistry. As a result, we can conclude that, at the time of filing, plaintiff

4. Dr. Dunn stated in his deposition testimony that he spent one hundred percent of the time during which he performed fill-in work practicing general dentistry. Therefore, we need not consider whether Dr. Dunn's affidavit was a clarifying affidavit and whether it was properly before the trial court.

reasonably expected that Dr. Dunn devoted a majority of his professional time to the active clinical practice of dentistry during the relevant time period. Thus, plaintiff's complaint satisfied the requirements of Rule 9(j)(1), because she reasonably expected Dr. Dunn to qualify as an expert witness under Rule 702(b)(2). Again, we emphasize that we are merely deciding the preliminary issue of whether the complaint satisfied the Rule 9(j) certification requirement, and we in no way express an opinion as to whether Dr. Dunn would qualify as an expert witness under Rule 702(b). We note that, having satisfied the Rule 9(j) pleading requirements, plaintiff has survived the pleadings stage of her lawsuit and may, at the trial court's discretion, be permitted to amend the pleadings and proffer another expert if Dr. Dunn fails to qualify under Rule 702 at trial or under a pretrial ruling on a motion *in limine*. *See* N.C.G.S. § 1A-1, Rules 15, 26(f), (f1) (2009). In light of this holding, we need not consider any other arguments asserted by the parties.

For the foregoing reasons, plaintiff has satisfied the preliminary requirements of Rule 9(j). Accordingly, we affirm the ruling of the Court of Appeals on that issue and remand to that court for further remand to the trial court for additional proceedings not inconsistent with this opinion.

AFFIRMED IN PART AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice NEWBY concurring in part and concurring in the result.

Rule 9(j)(1) of the North Carolina Rules of Civil Procedure requires a plaintiff to have a person who is "reasonably expected" to qualify as an expert under Rule 702 of the North Carolina Rules of Evidence review the medical care at issue prior to the filing of the complaint. N.C.G.S. § 1A-1, Rule 9(j)(1) (2009). Plaintiff's proffered expert in the case *sub judice* cannot be "reasonably expected" to qualify as an expert under Rule 702 as this Court articulates the meaning of Rule 702 today. However, because plaintiff did not have the benefit of this Court's interpretation of Rule 702 at the time she filed her complaint in this matter, I believe that her complaint should not be subject to dismissal for a violation of Rule 9(j)(1). Accordingly, I concur in the result that her complaint is reinstated.

Our General Assembly added Rule 9(j) to our Rules of Civil Procedure and the relevant provision of Rule 702 to our Rules of Evidence in a 1995 session law designed "to prevent frivolous med-

ical malpractice actions." Act of June 20, 1995, ch. 309, 1995 N.C. Sess. Laws 611, 611. The General Assembly essentially imposed two additional requirements on those seeking to pursue a medical malpractice action. *Id.* First, the legislature mandated that an expert witness must review the conduct at issue and be willing to testify at trial that it amounts to malpractice before a lawsuit may be filed. Ch. 309, sec. 2, 1995 N.C. Sess. Laws at 613. Second, the legislature limited the pool of appropriate experts to those who spend most of their time in the profession teaching or practicing. *Id.*, sec. 1, at 611-13. With this second requirement the General Assembly wanted to ensure that experts would be "qualified practitioners of a competence similar to those of the practitioners who are the object of the suit" and "to eliminate the use of professional witnesses whose careers are dedicated to testifying opposed to those practitioners who practice medicine." Minutes, *Meeting on H. 636 & H. 730 Before the House Select Comm. on Tort Reform*, 1995 Reg. Sess. (Apr. 19, 1995) [hereinafter *Minutes*] (comments by Rep. Charles B. Neely, Jr., Member, House Select Comm. on Tort Reform). Those reasons are behind similar requirements in other jurisdictions. *E.g.*, *Seisinger v. Siebel*, 220 Ariz. 85, 90, 203 P.3d 483, 488 (2009) (en banc) (observing a legislative desire to prevent retired physicians from testifying against practicing physicians); *McDougall v. Schanz*, 461 Mich. 15, 25 n.9, 597 N.W.2d 148, 153 n.9 (1999) (noting a legislative intention to exclude "hired gun" expert witnesses, those "who travel the country routinely testifying" (citation and internal quotation marks omitted)).

Rule 9(j) of our Rules of Civil Procedure prevents the filing of a medical malpractice action without the medical care at issue first being reviewed by an appropriate expert. *Thigpen v. Ngo*, 355 N.C. 198, 203-04, 558 S.E.2d 162, 166 (2002). Rule 9(j)(1), the portion of the rule at issue here, requires a medical malpractice complaint to assert that the medical care at issue has "been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence 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)(1). A medical malpractice complaint without this statement will be dismissed. *Thigpen*, 355 N.C. at 202, 558 S.E.2d at 165. Further, because this rule is designed to prevent complaints regarding care that has not been reviewed by an appropriate expert, even complaints containing a Rule 9(j) statement will be dismissed if the statement was unreasonably included. *See, e.g.*, *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 255, 677 S.E.2d 465, 477 (2009).

Rule 702 of our Rules of Evidence provides that only certain health care providers may serve as expert witnesses in medical malpractice cases. Generally speaking, any person may be an expert witness if his or her "knowledge, skill, experience, training, or education" would be helpful to the jury. N.C.G.S. § 8C-1, Rule 702(a) (2009); *State v. Smith*, 221 N.C. 278, 288, 20 S.E.2d 313, 319 (1942) (explaining that whether a proffered expert witness is competent to testify depends not "upon the fact that he belongs to a certain profession to which opinion evidence of that character is necessarily confined, but upon a principle that must lie behind the competency of all opinion testimony—the fact that the witness has special experience in matters of the kind, and his conclusions may, therefore, be helpful to the less experienced jury"). However, Rule 702(b)(2)(a), the portion of that rule at issue here, provides that in a medical malpractice action an expert witness must be "a licensed health care provider" who "[d]uring the year immediately preceding the date of the occurrence that is the basis for the action . . . devoted a majority of his or her professional time to . . . [t]he active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered." N.C.G.S. § 8C-1, Rule 702(b)(2)(a) (2009).[5] This mandate serves as a limitation on the general rule regarding who may be an expert witness. Accordingly, an individual may possess the "knowledge, skill, experience, training, or education," *id.* Rule 702(a), that would enable him to serve as an expert in a medical malpractice action but be unable to actually qualify as an expert because of his inability to meet one or more of the requirements of Rule 702(b)(2)(a), *see*, *e.g.*, *Seisinger*, 220 Ariz. at 90, 203 P.3d at 488 (explaining that a physician who has not recently practiced may "remain[ ] qualified through 'knowledge, skill, experience, training, or education' " to testify regarding a standard of care that has not materially changed since he left practice but nonetheless be prohibited from serving as an expert by a similar statute).

The majority opinion interprets Rule 702(b)(2)(a) to have three basic requirements. First, the proffered expert must be "in the same health profession as the party against whom or on whose behalf" he intends to testify "during the year immediately preceding the incident." The majority opinion does not elaborate on what it means to be "in the same health profession" but assures that requirement "will

5. Of course there are other activities with which an individual may fill his or her professional time. *See*, *e.g.*, N.C.G.S. § 8C-1, Rule 702(b)(2)(b). Those are not, however, at issue in this case.

rarely be at issue and does not warrant discussion here." Perhaps it is within this statement the majority opinion contemplates Rule 702(b)'s mandate that the proffered witness be "a licensed health care provider in this State or another state." Second, the proffered expert must have "engaged in active clinical practice during that time period." The majority opinion defines the word "clinical" as " 'actual experience in the observation and treatment of patients' " and states that a "continuum exists between active and inactive clinical practice." Whether an individual's practice is "active" depends upon a number of circumstances, including the amount of time devoted to it, the type of work being performed, and the regularity of the practice, with no single factor controlling. Third, a majority of the proffered expert's "professional time" must have been "devoted to that active clinical practice." This requirement is satisfied if more than half of the time the proffered expert spends "engaged in the profession of which he or she is being proffered as an expert" is devoted to clinical practice.

I agree with the majority opinion's interpretation of Rule 702 in this case. The requirement that the proffered expert witness is in the "same health profession" as the one for or against whom he intends to testify is consistent with the plain language of the rule. *See* N.C.G.S. § 8C-1, Rule 702(b)(2). Additionally, the requirement that a proffered expert spend a majority of "*his or her*," as opposed to some hypothetical individual's, "*professional* time," as opposed to personal time, engaged in active clinical practice is consistent with the text of the rule. *See id.* Rule 702(b)(2)(a) (emphases added). That requirement also preserves the balance struck by the legislature that prevents the use of "hired gun" expert witnesses but nonetheless allows an individual who engages in active clinical practice on a part-time basis possibly to qualify as an expert. *Minutes* (comments by Rep. Neely).

Perhaps most importantly, by recognizing that the word "active" modifies the phrase "clinical practice," the majority opinion realizes the legislature's intention to have qualified practitioners testifying in medical malpractice cases. *See* N.C.G.S. § 8C-1, Rule 702(b)(2)(a). As the majority opinion explains, ascertaining whether a proffered expert's clinical practice is "active" depends on a number of factors, none of which is likely to be dispositive. These factors include the amount of time that individual spends observing and treating patients and the frequency and regularity with which the proffered expert engages in those activities. The more infrequently or intermittently the proffered expert observes and treats patients, the more likely that

individual does not qualify as an expert under Rule 702(b)(2)(a). The most important factor in this inquiry is the type of work the individual is performing. An individual who is not performing the activities of other clinical practitioners of the same health profession likely will not qualify as an expert. For example, an individual who observes or diagnoses patients but who does not regularly perform the various treatments done by other members of that health profession likely would not qualify as an expert under this rule. Allowing an individual who does not function as do the vast majority of the other members of the same health profession to qualify as an expert under this rule would contravene the General Assembly's intention to ensure that experts in medical malpractice cases would be "qualified practitioners of a competence similar to those of the practitioners who are the object of the suit." *Minutes* (comments by Rep. Neely).

When ascertaining whether Rule 9(j) is satisfied a reviewing court must determine whether one who is "reasonably expected" to qualify as an expert under Rule 702 reviewed the medical care at issue prior to filing. Whether that individual actually qualifies under Rule 702 is a different inquiry, as the majority opinion notes. Because Rule 9(j) is a pleading rule, focusing on and regulating the filing of a complaint in a medical malpractice action, *Thigpen*, 355 N.C. at 203, 558 S.E.2d at 166, compliance is measured by what was known or through the exercise of reasonable diligence should have been known by the pleader at the time the medical malpractice complaint was filed, *Trapp v. Maccioli*, 129 N.C. App. 237, 241, 497 S.E.2d 708, 711, *disc. rev. denied*, 348 N.C. 509, 510 S.E.2d 672 (1998). As the majority opinion explains, a court may look to subsequent discovery materials to ascertain what was known and what reasonably should have been known at the time of filing, but should view reasonable factual ambiguities in favor of the plaintiff. With these considerations in mind I now turn to the relevant inquiry in the case *sub judice*.

At the time of filing the complaint plaintiff knew or should have known that Dr. Dunn practiced dentistry an insubstantial number of days in the year preceding the alleged malpractice. Dr. Dunn retired from the general practice of dentistry in July 1997, some twelve years before the complaint was filed and some nine years prior to the conduct at issue in the case. In the year preceding the alleged malpractice Dr. Dunn practiced dentistry on a "fill-in" basis. As the majority opinion notes, the number of days he actually "filled in" for another dentist in that year is unclear. Dr. Dunn estimated at one point he worked "maybe" thirty days that year but later stated that he

"covered for one gentleman . . . for three—almost two and one-half months" in the "general neighborhood" of the year preceding the alleged malpractice in this case. While the exercise of reasonable diligence requires a determination whether this work actually occurred during the relevant year, this explanation was given prior to our decision today. Accordingly, I, like the majority opinion, will treat this as a reasonable factual ambiguity and assume Dr. Dunn filled in for more than two and one-half months during the year preceding the alleged malpractice. That figure amounts to roughly twenty-five percent of the relevant time period.

Dr. Dunn engaged in the practice of dentistry rarely and with little regularity during the period from January 2005 to January 2006, stating at his deposition that he did "fill-in work for dentists who are on vacation or ill." Dr. Dunn explained that he was "not in the business of doing" fill-in work and did not "earn[ ] a living doing it." Instead, he explained that he had a group of "about five or six guys that [he is] friends with" for whom he would perform this fill-in work, but that he does not "want to do anymore than [he has] to." The days where Dr. Dunn performs this work "are scattered" and "just here and there." In fact, there are times when Dr. Dunn will go "several months without filling in." Dr. Dunn seemed to indicate that some of his work occurred when dentists vacationed in the summer but explained that more of his work tended to occur in the winter months "when [dentists would] get sick," which by its nature is irregular and unanticipated. These facts indicate that Dr. Dunn's work in the dental profession is sporadic and seldom.

Most importantly, Dr. Dunn performed very few of the activities undertaken by practitioners of general dentistry. In his deposition Dr. Dunn described general dentistry as involving "endodontics, oral surgery, [and] restorative dentistry." He elaborated, stating these include such activities as performing "root canals," "fix[ing] teeth to crown them, fill them or whatever," "taking out teeth," executing "soft tissue surgeries," and undertaking "apicoectomies." By contrast, Dr. Dunn described his fill-in work as "just routine dental care, emergency treatment, whatever comes down the road that you need to do." He explained that when he is filling in he "is mostly checking hygiene patients" and to a lesser extent he "provide[d] emergency dental care[ ] and refer[red] patients that may need to go to an orthodontist." He stated that he would not perform much "clinical dentistry," that is, treatment, mainly because "patients you are filling in for are used to a certain dentist" and "[t]hey don't feel comfortable with a

stranger coming in there and working." Dr. Dunn clarified that if a patient was "comfortable with [him] then [he would] do the work" but acknowledged that "most . . . patients don't want a dentist they don't know taking out teeth or doing a lot of stuff." Given his description both of general dentistry and his own fill-in work it seems Dr. Dunn's dental activities are not entirely consistent with the activities of general dentistry practitioners.

Dr. Dunn did not engage in "active clinical practice" during the period from January 2005 to January 2006. Resolving factual ambiguities in favor of plaintiff, Dr. Dunn spent approximately twenty-five percent of the work days in the year engaged in the clinical practice of dentistry. Moreover, because when he worked largely depended on the illness or vacation of others, Dr. Dunn did not practice with much consistency or frequency. Finally, Dr. Dunn acknowledged that he spent most of his time in clinical practice checking hygiene patients and did not undertake most of the treatments and procedures normally performed by dental clinicians. Considering these factors together, it is unreasonable to expect Dr. Dunn to be deemed to have engaged in the active clinical practice of dentistry during the relevant time period. And, as a result, he is not "reasonably expected" to qualify as an expert witness under Rule 702.

Nonetheless, the majority opinion concludes that Dr. Dunn is reasonably expected to qualify as an expert under Rule 702. The majority opinion relies principally on Dr. Dunn's more than thirty-five years of experience as a general dentist, his current license to practice, and the number of days he filled in for other dentists during the period from January 2005 to January 2006 to support its conclusion. Also, the majority opinion notes that "all of Dr. Dunn's time in the dental profession was spent engaged in clinical practice." While certainly implicating Rule 702's third requirement that a proffered expert spend a majority of his professional time in clinical practice, this observation is not particularly relevant to Rule 702's second requirement, whether the proffered expert engaged in *active* clinical practice. Moreover, Dr. Dunn's current license is irrelevant to whether he engaged in active clinical practice. Rule 702 explicitly requires a proffered expert witness to be licensed in order to testify as an expert in a medical malpractice action. N.C.G.S. § 8C-1, Rule 702(b). Finally, while Dr. Dunn's education and experience practicing general dentistry in the United States Navy and in Asheville, North Carolina, are certainly impressive and instructive as to whether he is in a better position than the jury to understand the applicable stan-

dard of care, a requirement of Rule 702(a), events prior to the year preceding the alleged malpractice simply are not relevant to the inquiry under Rule 702(b)(2)(a). Accordingly, the pertinent factual circumstance supporting the majority opinion's conclusion that Dr. Dunn engaged in "active clinical practice" during the year preceding the alleged malpractice is the number of days Dr. Dunn spent filling in. In my view, that simply is not enough.

Nonetheless, plaintiff in this case did not have the benefit of today's decision when choosing an expert witness. Accordingly, while I disagree with the majority opinion's conclusion that Dr. Dunn satisfies Rule 9(j)'s standard of being "reasonably expected" to qualify as an expert under Rule 702, I concur in the result that plaintiff's complaint is reinstated.

THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY v. ROBERT M. TALFORD

No. 379A11

(Filed 14 June 2012)

Hospitals and Other Medical Facilities— amount billed for services—reasonable—summary judgment

Plaintiff-hospital's motion for summary judgment on an action to collect payment for medical services was correctly granted by the trial court and incorrectly reversed by the Court of Appeals where only the amount of the services was in dispute and plaintiff's affidavits that the amount defendant owed was reasonable were minimally sufficient given the affiants' positions in plaintiff's organization and the inference that they had the requisite personal knowledge and would be competent to give the testimony contained in their affidavit. Defendant's affidavit in opposition to summary judgment listed the amounts plaintiff billed for certain medicines and the lower prices defendant could find a retail pharmacy; however, plaintiff-hospital and a retail pharmacy were selling two different products in two different markets and the price differences were not relevant to the issue of whether the amount charged was reasonable.

Justice HUDSON dissenting.

Justice TIMMONS-GOODSON joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 714 S.E.2d 476 (2011), affirming in part and reversing in part an order of summary judgment entered on 1 April 2010 by Judge Timothy L. Patti in Superior Court, Mecklenburg County, and remanding for further proceedings. Heard in the Supreme Court on 13 February 2012.

McIntosh Law Firm, P.C., by Prosser D. Carnegie, James C. Fuller, and Robert G. McIntosh, for plaintiff-appellant.

Robert M. Talford, pro se, defendant-appellee.

Ott Cone & Redpath, P.A., by Thomas E. Cone and Brandon W. Leebrick, for Duke University Medical Center, Mission Hospitals, Inc., Moses H. Cone Memorial Hospital Operating Corporation, North Carolina Baptist Hospital, and WakeMed Medical Center; and Linwood Jones, General Counsel, for North Carolina Hospital Association, amici curiae.

NEWBY, Justice.

In this action to collect payment for the provision of medical services we must ascertain whether the trial court properly entered summary judgment for plaintiff. To do so, we must first determine whether a medical services provider forecasts sufficient evidence of its right to payment when it submits only affidavits from its employees that state the amount of its bill and assert the amount is reasonable. Second, we must decide whether a patient's affidavit that illustrates the differences between the retail price of, and the amount charged by the medical center for, certain medications establishes an issue of material fact regarding the reasonableness of the medical center's fee, thus preventing entry of summary judgment on that issue. We hold that the medical center's affidavits are minimally sufficient and that the patient's affidavit, standing alone, fails to show that an issue of material fact remains for trial. Accordingly, we reverse the decision of the Court of Appeals.

On 15 October 2009, plaintiff sued defendant seeking to recover the value of medical services it provided him while he was admitted to its medical center from 5 November to 8 November 2007. Plaintiff alleged that it "provided hospital care, medical treatment services, medical supplies, and other goods and services" to defendant while he was a patient at the facility. Pleading several theories of recovery,

plaintiff contended that defendant owed it "not less than" $14,419.57, which, according to plaintiff, represented the "fair and reasonable value of the goods and services" it provided to defendant. James D. Robinson, plaintiff's Manager of Patient Financial Services, Legal Accounts, verified the complaint and further supported the allegations by a personal affidavit. Plaintiff attached to the complaint a document entitled "Legal Account Balance Summary Sheet" for patient Robert M. Talford, showing an account balance of $14,419.57.

Defendant answered plaintiff's complaint on 28 December 2009, admitting that from 5 November to 8 November 2007 he was a patient at plaintiff's medical center and that plaintiff "provided hospital care, medical treatment services, medical supplies, and other goods and services" to him during that time. Defendant denied, however, that the "fair and reasonable value" of those goods and services was $14,419.57.

On 2 February 2010, plaintiff moved for summary judgment against defendant in the amount of $14,419.57 for the medical care he had received. Plaintiff informed the trial court in its motion that defendant had admitted in his answer to its verified complaint that he had received treatment at plaintiff's facility, but that defendant had made no counterclaim, nor had he admitted the amount owed. Accordingly, the only unresolved issue was the amount of plaintiff's recovery. In support of its contention that it should receive the amount sought, plaintiff submitted several affidavits. Mr. Robinson swore that according to plaintiff's business records, defendant owed $14,419.57. John Baker, M.D., plaintiff's Vice President, Medical Education, stated in his affidavit that the "treatment reflected in [defendant's] medical record was reasonable and medically necessary for the health and well-being of" defendant. Sunny Sain, plaintiff's Director, Revenue Management, averred that the amount plaintiff charged defendant was reasonable because it was consistent with amounts charged to all similarly situated patients, was "within industry norms for similar facilities providing similar services at similar levels of care," and was "compliant with various published billing and charging regulations and guidelines, including those of the Center for Medicare and Medicaid Services."

On 24 March 2010, defendant responded by affidavit and unsuccessfully urged the trial court to deny plaintiff's summary judgment motion. In his affidavit defendant asserted that the amount plaintiff charged him "exceed[ed] the charges made and paid by other patients in the defendant's medical condition" and that plaintiff's

"charges are not reasonable for the medical care necessary to control the defendant's medical condition." Additionally, defendant said

> 2. That [his] hospital bill has a cost of $18.40 for one tablet of Diltiazem, and [his] prescription from CMC Pharmacy cost $23.00 for thirty (30) tablets;
>
> 3. That [his] hospital bill has a cost of $406.50 for one unit of Enoxaparin sodium, 120 mg syringe, and the cost for this item is $278.00 for ten units; [and]
>
> 4. That [his] hospital bill has a cost of $1.45 per unit for a folic acid 1 mg tablet, and the cost at a local pharmacy is $4.00 for thirty 1 mg tablets[.]

On 1 April 2010, the trial court determined that there was no genuine issue of material fact and that plaintiff was entitled to judgment in the principal amount of $14,419.57, plus interest. Defendant gave notice of appeal.

The Court of Appeals reversed the trial court's decision only on the issue of damages, stating that though defendant did not contest liability, an issue of material fact remained on the amount owed. *Charlotte-Mecklenburg Hosp. Auth. v. Talford*, —— N.C. App. ——, ——, 714 S.E.2d 476, 478 (2011). The Court of Appeals observed that in North Carolina, a medical provider is generally entitled to recover the " 'reasonable value of his services.' " *Id.* at ——, 714 S.E.2d at 479 (quoting *Forsyth Cnty. Hosp. Auth. v. Sales*, 82 N.C. App. 265, 266, 346 S.E.2d 212, 214, *disc. rev. denied*, 318 N.C. 415, 349 S.E.2d 594 (1986)). The majority concluded, however, that plaintiff had not forecast sufficient evidence to establish that the amount of its invoice represented the reasonable value of its services, primarily questioning the credibility of plaintiff's affiants. *Id.* at ——, ——, 714 S.E.2d at 480, 483-84. The Court of Appeals majority also observed that defendant generally challenged the reasonableness of the amount he was billed for plaintiff's services and specifically asserted facts indicating that plaintiff billed him an unreasonable amount, thus precluding summary judgment on this issue. *Id.* at ——, ——, 714 S.E.2d at 480, 485-86. The dissenting judge would have affirmed the trial court's decision to grant summary judgment on this issue, *id.* at ——, 714 S.E.2d at 487 (Ervin, J., dissenting), contending that plaintiff "forecast sufficient evidence tending to show . . . that the amount of that bill was reasonable in light of prevailing market conditions," *id.* at ——, 714 S.E.2d at 492, and that the factual information contained in

defendant's affidavit was irrelevant in determining the reasonableness of plaintiff's bill, *id.* at ——, 714 S.E.2d at 494. Plaintiff gave notice of appeal based on that dissenting opinion.

Our task now is to determine whether the trial court properly entered summary judgment in favor of plaintiff on the issue of damages. To do so we will analyze de novo the evidentiary forecast on which the trial court relied in making its decision that the fee charged by plaintiff was reasonable. *See Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, —— N.C. ——, ——, 723 S.E.2d 744, 747 (2012) (citation omitted). Before we do so, however, a brief review of our relevant Rules of Civil Procedure and precedent on summary judgment is in order.

Rule 56 of our Rules of Civil Procedure addresses summary judgment. N.C.G.S. § 1A-1, Rule 56 (2011). Rule 56 states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Id.* Rule 56(c). Though affidavits are not required, any affidavits submitted in support of or in opposition to a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Id.* Rule 56(e).

A trial court may enter summary judgment on a claim in favor of a movant that has the burden of proof so long as certain conditions are met. *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976).

> To be entitled to summary judgment the movant must still succeed on the basis of his own materials. He must show that there are no genuine issues of fact; that there are no gaps in his proof; that no inferences inconsistent with his recovery arise from his evidence; and that there is no standard that must be applied to the facts by the jury. Further, if the affidavits seem inherently incredible; if the circumstances themselves are suspect; or if the need for cross-examination appears, the court is free to deny the summary judgment motion.

Id. If a movant makes an adequate showing, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in [Rule 56], must set

forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." N.C.G.S. § 1A-1, Rule 56(e). Particularly relevant to the case *sub judice*, this Court has previously held that

> summary judgment may be granted for a party with the burden of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize Rule 56(f); and (3) when summary judgment is otherwise appropriate.

Kidd, 289 N.C. at 370, 222 S.E.2d at 410.

Plaintiff had the burden to demonstrate the reasonable value of the medical services it provided defendant. Plaintiff's complaint states two causes of action against defendant addressing its provision of medical care: (1) "Implied Contract and Quantum Meruit"; and (2) "Guaranty of Payment." But neither plaintiff's motion for summary judgment nor the trial court's order allowing that motion stated on which claim defendant is required to pay plaintiff $14,419.57. The Court of Appeals majority stated that the trial court entered summary judgment on plaintiff's *quantum meruit* claim and determined that on such a claim plaintiff would be entitled to damages equal to the reasonable value of the medical services provided. *Charlotte-Mecklenburg Hosp. Auth.*, —— N.C. App. at ——, 714 S.E.2d at 478-80 (majority). The dissenting judge reasoned that the trial court granted summary judgment on a theory of express contract, but explained that because the amount to be paid was not sufficiently definite, plaintiff was entitled to the reasonable value of its services. *Id.* at ——, 714 S.E.2d at 487-90 (Ervin, J., dissenting). As a result, both the majority opinion and the dissenting opinion conducted the same analysis of the damages issue. *Id.* at ——, 714 S.E.2d at 478 (majority); *id.* at ——, 714 S.E.2d at 489-93 (Ervin, J., dissenting). It seems neither party has challenged this approach. Accordingly, we will examine the forecasted evidence to see if there is a genuine issue of material fact regarding whether plaintiff's bill represents the reasonable value of plaintiff's medical services.

The reasonable value of a service is ascertained by examining the market for that service. *Cline v. Cline*, 258 N.C. 295, 300, 128 S.E.2d 401, 404 (1962) ("Many factors serve to fix the market value of an article offered for sale. Supply, demand, and quality (which is synonymous with skill when the thing sold is personal services) are prime

factors."). This Court has said that it is appropriate when determining what a service is "reasonably worth" to look to "the time and labor expended, skill, knowledge and experience involved, and other attendant circumstances, rather than . . . the benefit to the person for whom the services are rendered." *Turner v. Marsh Furn. Co.*, 217 N.C. 695, 697, 9 S.E.2d 379, 380 (1940) (citations omitted). Those "other attendant circumstances" include the rates charged by similar market participants in similar geographic areas to perform similar work at the relevant time. *See Envtl. Landscape Design Specialist v. Shields*, 75 N.C. App. 304, 307, 330 S.E.2d 627, 629 (1985) (citations omitted). But while a party's bill for services may be some evidence of the value of the work performed, *Hood v. Faulkner*, 47 N.C. App. 611, 617, 267 S.E.2d 704, 707 (1980) (citations omitted), a ledger sheet showing the amount an individual wants to be paid for a service the provider contends was performed is not sufficient, standing alone, to establish a service's market value, *Harrell v. W.B. Lloyd Constr. Co.*, 41 N.C. App. 593, 596, 255 S.E.2d 280, 281-82 (1979), *aff'd*, 300 N.C. 353, 266 S.E.2d 626 (1980). A service provider's speculative estimate of the market value of the service, without some reference or comparison to a "community or industry standard," is similarly insufficient, standing alone, to establish a service's market value. *Paxton v. O.P.F., Inc.*, 64 N.C. App. 130, 134, 306 S.E.2d 527, 530 (1983). These principles apply equally when determining the reasonable value of medical services. *E.g.*, *Sherman Hosp. v. Wingren*, 169 Ill. App. 3d 161, 164, 523 N.E.2d 220, 222 (1988) ("A hospital must establish that its charges are reasonable in that they are the usual and customary charges of that particular hospital and are comparable to the charges of other area hospitals." (citation omitted)).

Plaintiff forecasted evidence that the amount it billed defendant represented the reasonable value of the services it provided. Plaintiff alleged in its complaint that defendant owed $14,419.57 and that the amount defendant owed was reasonable "given that they are standard charges rendered to all patients receiving similar types of services, they are within industry norms for similar facilities providing similar services at similar levels of care, and they are compliant with various published billing and charging regulations and guidelines, including those of the Center for Medicare and Medicaid Services." Plaintiff's complaint was verified by plaintiff's Manager of Patient Financial Services, Legal Accounts. Along with its motion for summary judgment, plaintiff submitted an affidavit from its Director, Revenue Management, who said that the amounts plaintiff charged defendant

were reasonable for the same reasons as stated in the verified complaint. Our Rules of Civil Procedure require that affidavits submitted in support of a motion for summary judgment "be made on personal knowledge . . . and . . . show affirmatively that the affiant is competent to testify to the matters stated therein." N.C.G.S. § 1A-1, Rule 56(e). These affidavits do not say expressly that the affiant is familiar either with the amounts other similar facilities charge for medical services or with various published billing regulations and guidelines. Nor do they provide itemized comparisons of the amounts plaintiff charged for a particular service and either the amounts other facilities charge for the same service or any applicable regulations or guidelines regarding such charges. Nonetheless, because of the affiants' positions in plaintiff's organization, we may infer that they have the requisite personal knowledge of those matters and would be competent to give the testimony contained in their affidavits. We do, however, take this opportunity to emphasize that the better practice would be to state explicitly this information to the extent allowed by applicable law and not leave it to this or any other court to make inferences.

These sworn statements were minimally sufficient to satisfy plaintiff's burden on the issue of damages. Plaintiff forecasted more than simply the amount it charged defendant. Its verified complaint and the Sain affidavit illustrate that plaintiff's evidence that its bill was a reasonable amount was based on knowledge of the amounts other similarly situated market participants charged similarly situated patients. Moreover, plaintiff asserted its bill was consistent with various published billing guidelines and regulations. It is reasonable to conclude that the applicable guidelines and the amounts charged by other similarly situated providers are indicative of the monetary value of the skill, labor, and other relevant factors necessary to provide this type of service. Accordingly, all plaintiff's forecasted evidence, taken together, is minimally sufficient to carry plaintiff's burden on this issue. *See Turner*, 217 N.C. at 697, 9 S.E.2d at 380. This conclusion is not altered by plaintiff's submission of and reliance on the sworn statements of its own employees. Such a relationship raises no more than a latent doubt regarding the affiants' credibility. *See Kidd*, 289 N.C. at 371, 222 S.E.2d at 411. And, because these statements asserted a comparison of the amount plaintiff charged with the prices commanded by similar institutions or fixed in published regulations, the information contained in them was not "peculiarly within [plaintiff's] knowledge," *id.* at 366, 222 S.E.2d at 408 (citation and

internal quotation marks omitted). That comparison could have been performed by any individual who was familiar with the hospital pricing market or the published regulations and to whom defendant had given a copy of his bill.

Defendant's affidavit submitted in opposition to plaintiff's motion for summary judgment contained five assertions of fact addressing the issue of damages. Defendant first listed amounts plaintiff billed him for Diltiazem, Enoxaparin, and folic acid, and then detailed the much lower retail price at which he could obtain these items at a local pharmacy. Defendant then asserted that plaintiff billed him a total amount in excess of "the charges made and paid by other patients in the defendant's medical condition" and that "plaintiff's charges are not reasonable for the medical care necessary to control the defendant's medical condition." Defendant seems to argue that the differences between the retail prices and the amounts he was billed by plaintiff for these three medications establishes that he was charged an unreasonable amount overall.

Defendant's affidavit failed to demonstrate that an issue of material fact remained. Like plaintiff's sworn statements, defendant's affidavit must comply with Rule 56. In other words, the affidavit "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C.G.S. § 1A-1, Rule 56(e). No doubt defendant's recitation of the differences between the retail prices and the amounts charged by plaintiff was based on personal knowledge, and his affidavit indicates that he is competent to testify to what he asserts; however, these price differences simply are not relevant to the issue of whether the amount charged by plaintiff is reasonable.

Plaintiff and a retail pharmacy are selling two different products in two different markets. Plaintiff's product is comprehensive medical care, which includes the administration of certain medicines. The process of administering medicines in a comprehensive care center may include: a physician interacting with the patient; a physician prescribing a medicine; someone delivering the order to the pharmacy; a pharmacist determining whether the particular medicine prescribed will cause an adverse reaction in the patient because of some other medicine or nutrient the patient is receiving; a pharmacist ensuring the medicine is appropriate given the patient's vital statistics; a pharmacist placing the medicine in a single-dose container;

someone timely delivering the medicine; and a nurse administering the medicine and then observing the patient for unintended symptoms. The products listed by defendant, on the other hand, are individual medicines sold in a retail environment without the multitude of associated services required in an inpatient medical setting. In other words, while plaintiff may have provided certain medicines to defendant, plaintiff's product, for which it is due a reasonable fee, is comprehensive, inpatient medical care; its products are not simply individual medicines.

It is the market for comprehensive, inpatient medical care by which the amount plaintiff billed defendant is judged to determine whether the charges are reasonable. Minus the irrelevant price differences cited therein, defendant's affidavit merely asserts that the amount he was charged was unreasonable. Unlike plaintiff's affiants, the record provides no basis for us to infer that defendant has personal knowledge of the relevant market or of the amounts charged to other similarly situated patients such as enable defendant to testify regarding such matters. Accordingly, defendant has failed to demonstrate that there is a genuine issue of material fact. Moreover, defendant failed to offer "any specific grounds for impeachment" of plaintiff's affiants, *Kidd*, 289 N.C. at 371, 222 S.E.2d at 411, and did not avail himself of Rule 56(f). Therefore, the trial court properly entered summary judgment against him. *See id.* at 370, 222 S.E.2d at 410.

The Court of Appeals correctly left undisturbed the trial court's grant of summary judgment for plaintiff on the issue of defendant's liability. But because the Court of Appeals erroneously overturned the trial court's ruling in relation to the issue of damages, the opinion of the Court of Appeals on that issue is reversed, and that court is instructed to reinstate the judgment of the trial court.

REVERSED.

Justice HUDSON dissenting.

Because I would hold that plaintiff hospital's affidavits are insufficient to support entry of summary judgment, I respectfully dissent. I would hold that the affidavits are insufficient for two reasons: (1) it is not clear that they are made on personal knowledge, *see* N.C.G.S. § 1A-1, Rule 56(e) (2011), and (2) they are "inherently suspect" as defined by this Court, *see Kidd v. Early*, 289 N.C. 343, 370-71, 222 S.E.2d 392, 410-11 (1976).

First, as the majority correctly states, any affidavits submitted regarding a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C.G.S. § 1A-1, Rule 56(e). Here, as also pointed out by the majority, the

> [a]ffidavits do not say expressly that the affiant is familiar either with the amounts other similar facilities charge for medical services or with various published billing regulations and guidelines. Nor do they provide itemized comparisons of the amounts plaintiff charged for a particular service and either the amounts other facilities charge for the same service or any applicable regulations or guidelines regarding such charges.

While the majority is willing to "infer that [the affiants] have the requisite personal knowledge of those matters" because of their employment positions with plaintiff's hospital, I am not. In particular, I am concerned with the affidavit of Sunny Sain, the Director of Revenue Management. Because the main issue here is the reasonableness of defendant's bill, her affidavit is essential to the case in that it avers that defendant's charges were reasonable,

> given that that they are standard charges rendered to all patients receiving similar types of services, they are within industry norms for similar facilities providing similar services at similar levels of care, and they are compliant with various published billing and charging regulations and guidelines, including those of the Center for Medicare and Medicaid Services.

Nothing in the affidavit sheds any light on what Ms. Sain's job as Director of Revenue Management entailed; there is nothing to suggest that she had personal knowledge or indeed any basis for her assertions and opinions stated in the affidavit. She may have had the personal knowledge to compare defendant's charges to other similar charges, but that does not appear simply from her job title, nor from anything else in the affidavit. While an affidavit does not need to state explicitly that it is based on personal knowledge, it is required to "show affirmatively that the affiant is competent to testify" about its contents. *Id.* Rule 56(e). I would hold that a job title alone, with no description of experience or duties, does not suffice to make that showing or to enable a court to ascertain if the affiant has personal knowledge or competence to testify, as required by Rule 56(e).

Our Court of Appeals has routinely adopted this practice. For example, in *Hylton v. Koontz*, 138 N.C. App. 629, 532 S.E.2d 252 (2000), *disc. rev. denied*, 353 N.C. 373, 546 S.E.2d 604 (2001), the Court of Appeals rejected affidavits because the source of the affiant's knowledge was unclear. That court held that although the affidavits indicated that

> the assertions contained therein are based on a review of facts with which [the affiant] is familiar[,] [t]here is no statement the information contained in the affidavits are based on [the affiant]'s "personal knowledge," nor is it clear from the content and context of the affidavits that the information was based on his personal knowledge. . . . we cannot ascertain the source of the information [the affiant] reviewed and on which he based his affidavits.

Id. at 635, 532 S.E.2d at 256-57 (footnotes omitted). *See*, *e.g.*, *Eugene Tucker Builders*, *Inc. v. Ford Motor Co.*, 175 N.C. App. 151, 156, 622 S.E.2d 698, 701-02 (2005) (holding that an affidavit was not based on personal knowledge because the affidavit did not make it clear how the affiant had personal knowledge), *cert. denied*, 360 N.C. 479, 630 S.E.2d 926 (2006). Here it is similarly difficult to ascertain the basis of Ms. Sain's personal knowledge. She provides no details about her work duties or about anything she may have reviewed to compare defendant's charges with those of other similarly situated patients. I would hold that plaintiff's affidavit does not satisfy the personal knowledge requirement of N.C.G.S. § 1A-1, Rule 56(e).

Even if the affidavits were based on personal knowledge, I would still hold that they are insufficient to support entry of summary judgment because of the affiants' inherent interest in the outcome of the case. The majority again correctly states our law on the value of affidavits from a moving party in summary judgment proceedings:

> We hold that summary judgment may be granted for a party with the burden of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize Rule 56(f); and (3) when summary judgment is otherwise appropriate.

Kidd, 289 N.C. at 370, 222 S.E.2d at 410. The Court in *Kidd* continued on to define latent doubts as "doubts which stem from the fact that plaintiffs are interested parties." *Id.* at 371, 222 S.E.2d at 411. In addi-

tion, the Court held that a motion for summary judgment ordinarily should be denied, even if the opposing party makes no response, if " 'the movant's supporting evidence is self contradictory or circumstantially suspicious or *the credibility of a witness is inherently suspect . . . because he is interested in the outcome of the case and the facts are peculiarly within his knowledge.' " *Id.* at 366, 222 S.E.2d at 408 (emphasis added).

I would hold that plaintiff's affidavits raise more than latent doubts because the affiants are interested in the outcome of the case and the affidavits allege facts particularly within the knowledge of the affiants. In her affidavit Ms. Sain avers that defendant's charges are similar to charges of other patients and are in line with various regulations and guidelines. These are facts that are not known to the average consumer; they are facts likely not known to defendant. This type of knowledge is particular to hospital staff and hospital administrators. Our Court of Appeals has applied this logic in *Carson v. Sutton*, 35 N.C. App. 720, 242 S.E.2d 535 (1978). There the court determined that a plaintiff's self-serving affidavits were not suspect because they contained facts that were "equally available to the defendants." *Id.* at 723, 242 S.E.2d at 537. There the affidavits submitted by the plaintiff referred to the terms and conditions of a note, facts which, as the Court of Appeals noted, were equally available to both parties. Here, however, the amounts charged to other patients and the regulatory guidelines for patient charges are not "equally available" to defendant. Therefore, I would find plaintiff's affidavits insufficient to support summary judgment, consistent with our language in *Kidd*. As the Court cautioned, "[n]eedless to say, the party with the burden of proof, who moves for summary judgment supported only by his own affidavits, will ordinarily not be able to meet these requirements and thus will not be entitled to summary judgment." *Kidd*, 289 N.C. at 370-71, 222 S.E.2d at 410.

While the majority acknowledges that the "better practice" would be for the hospital to state cost comparisons explicitly, I would hold that Rule 56 and our previous decisions require it here. Without such information in the affidavits, I would hold that summary judgment is not appropriate. I see no need to address the evidentiary value of defendant's affidavit because I would hold that plaintiff has failed to meet its initial burden for entry of summary judgment. Therefore, I respectfully dissent.

Justice TIMMONS-GOODSON joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. PATRICK LOREN TOWE

No. 121PA11

(Filed 14 June 2012)

Evidence— expert testimony—bolstered victim's credibility—admission plain error—plain error standard

The trial court committed plain error in a first-degree sexual offense with a child under the age of thirteen and first-degree statutory rape of a child under the age of thirteen case by admitting conclusory expert testimony on whether the juvenile victim had been sexually abused. The erroneous admission of the testimony had a probable impact on the jury's finding that defendant was guilty. The Supreme Court disavowed the formulation of the plain error test as stated in *State v. Towe*, —— N.C. App. —— (2011), and instead applied the test set out in *Lawrence*, —— N.C. ——, (2012), and *Odom*, 307 N.C. 655. The decision of the Court of Appeals was modified and affirmed.

NEWBY, J. dissenting.

On discretionary review pursuant to N.C.G.S. § 7A 31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 707 S.E.2d 770 (2011), finding reversible error in judgments entered on 10 November 2009 by Judge Ronald E. Spivey in Superior Court, Surry County, and ordering that defendant receive a new trial. Heard in the Supreme Court on 9 January 2012.

Roy Cooper, *Attorney General*, *by Laura E. Crumpler*, *Assistant 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 Court of Appeals correctly held that the trial court committed plain error when it admitted conclusory expert testimony on whether the juvenile victim had been sexually abused. The Court of Appeals found plain error and reversed defendant's convictions, concluding that "it [was] highly plausible that the jury could have reached a different result" absent the expert testimony. *State v. Towe*, —— N.C. App. ——, ——, 707 S.E.2d 770, 775 (2011). Although we hold that admission of the testimony was plain

error, the plain error standard requires a determination that the jury *probably would have* returned a different result. Accordingly, we modify and affirm the decision of the Court of Appeals.

Defendant was indicted for three counts of first-degree sexual offense with a child under the age of thirteen, in violation of N.C.G.S. § 14-27.4(a)(1), and two counts of first-degree statutory rape of a child under the age of thirteen, in violation of N.C.G.S. § 14-27.2(a)(1). At trial, the State presented evidence that defendant had been married to the victim's mother and was the father of the victim, who was nine years old at the time of the alleged offenses. The victim's mother testified that after she and defendant separated in 1999, defendant's participation in their children's lives was sporadic until early 2007, when defendant began to make regular child support payments and reestablished visitation with their children.

The victim testified that during the summer of 2007, defendant rubbed her vagina and penetrated her digitally at least three times, and climbed on top of her and put his penis in her vagina at least twice. The victim's mother related that on 1 November 2007, she and the victim went to see pediatrician Sarah Ryan, M.D. (Dr. Ryan), because the victim had been complaining of abdominal pains and because her mother had observed blood spotting in the victim's underwear and believed that her daughter may have entered menarche. Dr. Ryan described her qualifications to the jury and was accepted by the trial court as an expert in the field of pediatric medicine. She testified that she was concerned that the prepubescent victim was spotting and showing signs of having begun to menstruate, which was abnormal for a girl at her stage of physical development. During her examination of the victim, Dr. Ryan noted that the inner lips of the victim's vagina were red and inflamed. In addition, she observed "a questionable scar" at the "back of the vaginal area" or, more specifically, on the posterior fourchette, which is at the lowest part of the vagina and is distinct from the hymen. Dr. Ryan clarified that "often times you can have a line there that looks shiny. And that was why I did not want to call it a scar." Nevertheless, because the results of the physical examination indicated the possibility of sexual abuse, Dr. Ryan asked additional pertinent questions. The mother then spoke with the victim, who revealed that defendant had been touching her private parts "all the time." The victim's mother relayed this information to Dr. Ryan.

Mount Airy Police Captain Alan Freeman (Freeman) testified that he spoke with the victim's mother, who described what her daughter

had told her. Believing that the victim might be more comfortable with a female officer, Freeman followed police protocol and asked Officer Vanessa Vaught (Vaught) to interview the victim in a separate room. The victim told Vaught that her father had touched her genitals with his hand and penis and had asked if he could put his penis into her vagina. Nicole Alderfer (Alderfer) testified that she had been employed at Wake Medical Center (Wake Med) as a clinical social worker with the child sexual abuse team. After being recognized by the court as an expert in the field of clinical social work, she described an interview she had with the victim in November 2007. The victim told Alderfer that defendant had on more than one occasion penetrated her vagina with his finger and on more than one occasion penetrated her vagina with his penis. The State also elicited testimony from the younger sister of the victim's mother, who described an incident that occurred when the sister was nine years old. At that time, the victim's mother was married to defendant and was pregnant with the victim. The sister testified that, while she was visiting the victim's mother, defendant awoke her one night and carried her into the nursery, where he rubbed her underwear over her vagina.

The State also called Vivian Denise Everett, M.D. (Dr. Everett), as a witness. By the time Dr. Everett took the stand, several witnesses for the State had mentioned her in their testimony. Child Protective Services investigator Audrey Richardson, who had been assigned to the victim's case, had testified that she and others associated with the Department of Social Services routinely referred victims of suspected child sexual abuse to Dr. Everett to conduct child medical examinations. Dr. Ryan had testified that she referred female patients such as the victim to Dr. Everett because of Dr. Everett's extensive experience examining the vaginal areas of children. Alderfer had testified that, as a clinical social worker at Wake Med, she would coordinate with the child sexual abuse team, which included Dr. Everett; interview possible sexual abuse victims and their parents about their background, social history, and the details of any alleged abuse; and then provide the information from those interviews to Dr. Everett.

Following extensive questioning by the State about her education and experience, the trial court recognized Dr. Everett as an expert in the field of pediatrics and child sexual abuse. Dr. Everett testified that on 19 November 2007, she conducted a child medical evaluation of the victim. Such examinations are requested by Departments of Social Services following allegations of sexual abuse inflicted by a parent or caretaker. Dr. Everett began the process by obtaining infor-

mation from the mother regarding the victim's medical history and by remotely observing Alderfer's interview of the victim through a two-way mirror. She then conducted a physical examination of the victim. Dr. Everett testified that, aside from some small bumps on the victim's legs, the examination was normal. Her careful scrutiny of the victim's hymen revealed that the edges were thin, but no tears were to be seen. Although Dr. Everett was not asked specifically about the posterior fourchette of the victim's vagina, she stated that she did not see a scar or line of the type described by Dr. Ryan. However, she also testified that the hymen of a young girl can heal quickly after either digital or penile penetration. When asked by the prosecutor, "If there was a scar or a tear[1] to [the victim's] tissue at or near the hymen observed by Dr. Ryan on her exam on November 1, is it likely or possible that that scar could have healed by the time you saw [the victim] in your clinic?" Dr. Everett responded, "That would be possible. Because I actually saw her on November 19th, and she was seen by Dr. Ryan on November 1st."

Although most of Dr. Everett's testimony was admissible, her direct examination by the State concluded with the following exchange:

> Q Dr. Everett, do you have an opinion, ma'am, satisfactory to yourself and based upon your knowledge, training and experience, as to whether lack of physical findings in [the victim's] examination is inconsistent with having been sexually abused?
>
> A Yes.
>
> Q What is that opinion?
>
> A The lack of any findings would not be inconsistent with sexual abuse.
>
> Q Have you done research, or read treatises, or otherwise studied physical findings in children that claim sexual abuse?
>
> A Yes. There have been articles in the literature.
>
> Q And do you have an opinion, ma'am, based upon your knowledge, experience and training, and the articles that you have read in your professional capacity as to the percentage of children who report sexual abuse who exhibit no physical findings of abuse?

1. Earlier in the trial, both Dr. Ryan and Dr. Everett had testified explicitly that they saw no tears.

A I would say approximately 70 to 75 percent of the children who have been sexually abused have no abnormal findings, meaning that the exams are either completely normal or very non-specific findings, such as redness.

Q And that's the category that you would place [the victim] in; is that correct?

A Yes, correct.

Defense counsel did not object to any of the testimony quoted above.

After the State rested its case-in-chief, defendant presented testimony from Rebecca Peters, a social worker who had interviewed defendant and his girlfriend following the allegations and who testified that defendant denied ever touching the victim inappropriately. Dana Mitchell, defendant's girlfriend, testified that she had been living with defendant at the time of the alleged offenses and that the victim had mentioned to her that she used tampons. Mitchell denied observing any inappropriate behavior between defendant and the victim. One of defendant's sons, who also had been living with defendant and defendant's girlfriend at the time of the alleged offenses, testified that he had seen no untoward contact between the victim and defendant. Defendant did not testify.

The jury found defendant guilty of all charges. The trial judge sentenced defendant to 346 to 425 months of imprisonment for the statutory rape charges, to 346 to 425 months of imprisonment for the statutory sex offenses to run consecutive to the statutory rape charges, and ordered defendant to enroll in lifetime satellite-based monitoring following his release from prison. Defendant appealed.

Before the Court of Appeals, defendant argued, *inter alia*, that the trial court committed plain error in admitting Dr. Everett's testimony that the victim was in the category of sexually abused children who do not exhibit physical signs of such abuse. The Court of Appeals agreed and ordered a new trial. *Towe*, —— N.C. App. at ——, 707 S.E.2d at 775-76. Although the Court of Appeals also addressed issues likely to arise on retrial, those matters are not before us.

In considering Dr. Everett's testimony, the Court of Appeals relied on this Court's opinion in *State v. Stancil*, noting that "an expert may not testify that sexual abuse has occurred without physical evidence supporting her opinion" and if an expert "has a 'proper foun-

dation,' " the expert may testify "as to the characteristics of sexually abused children and whether a particular victim has symptoms 'consistent therewith.' " *Towe*, ___ N.C. App. at ___, 707 S.E.2d at 774-75 (citing and quoting *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) (per curium)). The Court of Appeals found that by placing the victim in the group of asymptomatic sexually abused children, Dr. Everett "testified [the victim] was sexually abused, but showed no physical symptoms of abuse." *Id.* at ___, 707 S.E.2d at 775. "*Stancil* plainly prohibits this type of testimony." *Id.* at ___, 707 S.E.2d at 775.

Turning then to the question of whether the trial court's failure to intervene *sua sponte* in the face of such erroneous testimony constituted plain error, the Court of Appeals noted that in light of the lack of physical evidence of sexual abuse, the case against defendant revolved around the victim's credibility. *Id.* at ___, 707 S.E.2d at 775. As a result, because "Dr. Everett's testimony placed a stamp of approval on [the victim's] testimony," the Court of Appeals determined that it was "highly plausible that the jury could have reached a different result" without the expert testimony. *Id.* at ___, 707 S.E.2d at 775. Accordingly, the Court of Appeals found that the trial court committed plain error, entitling defendant to a new trial. *Id.* at ___, ___, 707 S.E.2d at 774-75, 776.

We allowed the State's petition for discretionary review as to whether the Court of Appeals incorrectly stated and applied the plain error standard and as to whether the Court of Appeals erred when it found plain error. We conclude that the Court of Appeals mischaracterized the plain error test but nevertheless determine that, when the test is correctly stated and applied, admission of this evidence constituted plain error.

We first consider whether Dr. Everett's testimony was improper. In *Stancil*, a case in which "a thorough examination and a series of tests revealed no physical evidence of sexual abuse," we held that "[i]n 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." 355 N.C. at 266-67, 559 S.E.2d at 789 (citations omitted). Moreover, even when physical evidence of abuse existed and was the basis of an expert's opinion, where the expert added that she would have determined a child to be sexually abused on the basis of the child's story alone even had there been no physi-

cal evidence, we found this additional testimony inadmissible. *State v. Hammett*, 361 N.C. 92, 97, 637 S.E.2d 518, 522 (2006). However, if a proper foundation has been laid, an expert may testify about the characteristics of sexually abused children and whether an alleged victim exhibits such characteristics. *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789.

Here, Dr. Everett testified that she observed no injuries during her physical examination of the victim, that the victim's hymen appeared normal and smooth, and that the victim displayed no physical symptoms diagnostic of sexual abuse. Although aware that Dr. Ryan had noticed an anomaly that Dr. Ryan characterized as a "questionable" scar or line on the victim's lower vagina, Dr. Everett did not observe any physical abnormalities herself. In the absence of physical evidence of sexual abuse in this case, the only bases for Dr. Everett's conclusory assertion that the victim had been sexually abused were the victim's history as relayed to Dr. Everett by the victim's mother and the victim's statements to Alderfer that were observed by Dr. Everett——evidence that, standing alone, is insufficient to support an expert opinion that a child was sexually abused. Therefore, Dr. Everett's expert testimony was improper when she stated that the victim fell into the category of children who had been sexually abused but showed no physical symptoms of such abuse.

We next consider whether admission of this testimony constituted plain error. This Court recently conducted a comprehensive review of the plain error doctrine in *State v. Lawrence*, —— N.C. ——, 723 S.E.2d 326 (2012). Applying *Lawrence* to the case at bar, to establish plain error defendant must show that a fundamental error occurred at his trial and that the error " 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* at ——, 723 S.E.2d at 333 (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "Moreover, because plain error is to be 'applied cautiously and only in the exceptional case,' the error will often be one that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " *Id.* at ——, 723 S.E.2d at 334 (alteration in original) (citation omitted) (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). Accordingly, we disavow the formulation of the plain error test as stated in the Court of Appeals opinion before us and instead apply the test set out in *Lawrence* and *Odom*.

Thus, we must consider whether the erroneous admission of expert testimony that impermissibly bolstered the victim's credibility

had the "prejudicial effect necessary to establish that the error was a fundamental error." *Id.* at ——, 723 S.E.2d at 335. While the State presented testimony both from the mother, describing the behavior of the victim, and testimony from the mother's sister, presented under N.C.G.S. § 8C-1, Rule 404(b) (2009) for the limited purpose of "showing either the identity of the person who committed a crime charged in this case . . . , or that the defendant had a motive for the commission of the crime charged in this case," describing a similar sexual assault on her by defendant, this case turned on the credibility of the victim, who provided the only direct evidence against defendant. As a result, we are also persuaded that this error is one that "seriously affects the fairness, integrity, [and] public reputation of judicial proceedings." *Lawrence*, —— N.C. at ——, 723 S.E.2d at 335.

The record indicates that the victim's recitations of defendant's actions were not entirely consistent. The victim testified at trial that defendant penetrated her vagina both digitally and with his penis, and Alderfer similarly testified that the victim told her that defendant had penetrated her vagina both with his finger and with his penis. In contrast, the victim told Dr. Ryan only that defendant had penetrated her vagina with his finger and told Vaught that defendant had touched her but had not put his penis in her vagina. While the young victim's reticence in describing her experience is surely understandable, we cannot overlook these discrepancies in the record when evaluating the probable impact of Dr. Everett's testimony on the jury's verdict. *See Hammett*, 361 N.C. at 99, 637 S.E.2d at 523 (considering the consistency of a victim's statements along with other evidence presented at trial as a factor in determining whether an expert's opinion vouching for the victim's credibility constituted plain error).

When Dr. Everett was called as a witness, the State declined defendant's offer to stipulate simply that she is an expert in pediatrics and, to qualify her further as an expert on child sexual abuse, the State presented extensive evidence of Dr. Everett's education, her service as a chief resident in pediatrics at Moses Cone Hospital in Greensboro, her directorship of the child sexual abuse team at Wake Med, her teaching as a clinical professor in the Department of Pediatrics at the University of North Carolina at Chapel Hill School of Medicine, her board certification and recertifications in pediatrics, and her publications on the sexual exploitation of children. In addition, Dr. Everett testified that she had examined over five thousand children for sexual abuse, had testified in over one hundred court proceedings, and had been accepted as an expert in pediatrics and

child sexual abuse in previous Superior Court cases. When this testimony was coupled with that of other State's witnesses, Dr. Everett was presented to the jury not only as a physician who is extraordinarily well-versed and experienced in the field of child sexual abuse, but also as the doctor to whom other professionals and experts in the field routinely direct cases when such abuse is suspected. In light of Dr. Everett's unquestioned stature in the fields of pediatric medicine and child sexual abuse, and her expert opinion that, even absent physical symptoms, the victim had been sexually abused, we are satisfied that Dr. Everett's testimony stilled any doubts the jury might have had about the victim's credibility or defendant's culpability, and thus had a probable impact on the jury's finding that defendant is guilty.

We note that virtually identical testimony from Dr. Everett previously has been found to constitute reversible error. In *State v. Bates*, the defendant was charged with indecent liberties. 140 N.C. App. 743, 744-45, 538 S.E.2d 597, 598-99 (2000), *disc. rev. denied*, 353 N.C. 383, 547 S.E.2d 20 (2001). The alleged victim in *Bates* exhibited no physical symptoms, and Dr. Everett based her expert opinion that sexual abuse had occurred solely upon the victim's statements to a psychologist with the Wake Med sexual abuse team. *Id.* at 748, 538 S.E.2d at 600-01. The Court of Appeals found that Dr. Everett's testimony lacked a proper foundation, concluded that the erroneous admission of the testimony "most likely resulted in a different result than would have been reached otherwise," and ordered a new trial. *Id.* at 748-49, 538 S.E.2d at 601. However, when Dr. Everett properly limited her testimony in a later case by stating that her examination of the victim "was 'consistent with' " the history of sexual abuse provided by the victim, the Court of Appeals found no error. *State v. Caufman*, 184 N.C. App. 378, 646 S.E.2d 442, 2007 N.C. App. LEXIS 1448, at *2-3 (unpublished), *disc. rev. denied*, 361 N.C. 698, 652 S.E.2d 921 (2007). These cases indicate to us that both the State and Dr. Everett are aware of the permissible range of expert testimony in child sexual abuse cases.

Because defendant was prejudiced by the erroneous admission of the portion of Dr. Everett's testimony characterizing the victim as sexually abused, we affirm as modified herein the opinion of the Court of Appeals that reversed defendant's convictions and remanded the matter to the trial court for a new trial.

MODIFIED AND AFFIRMED.

Justice NEWBY dissenting.

"[P]lain error is to be 'applied cautiously and only in the exceptional case,' " *State v. Lawrence*, —— N.C. ——, ——, 723 S.E.2d 326, 334 (2012), when a review of the entire record reveals a " '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 103 S. Ct. 381, 74 L. Ed. 2d 513 (1982)). Despite this Court's very recent affirmance of our rigorous plain error standard in *State v. Lawrence*, the majority abruptly departs from that precedent to find plain error here in the isolated misstatement of one witness, which was clarified on cross-examination and occurred over the course of a three-day trial in which the State presented overwhelming evidence of defendant's guilt. The majority's holding places an untenable burden on our trial courts in child sexual abuse cases to unilaterally discern and correct, without the benefit of an objection, possible misstatements made during trial. Our plain error jurisprudence does not demand that result. Accordingly, I respectfully dissent.

Two months ago in *State v. Lawrence* this Court clarified plain error review, first established in *State v. Odom*. Under *Lawrence* "a defendant must demonstrate that a fundamental error occurred at trial" and "must establish prejudice that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Lawrence*, —— N.C. at ——, 723 S.E.2d at 334 (quoting and citing *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). Our decision in *Lawrence* reaffirmed that plain error review is to be applied cautiously and should lead to a reversal only in exceptional cases in which the 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.' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *McCaskill*, 676 F.2d at 1002 (brackets in original) (footnotes omitted)); *see also United States v. Olano*, 507 U.S. 725, 735-37, 113 S. Ct. 1770, 1778-79, 123 L. Ed. 2d 508, 520-21 (1993). We have also noted that plain error may exist when the error is "so fundamental as to amount to a miscarriage of justice[,] . . . probably resulted in the jury reaching a different verdict," *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987) (citations omitted), *cert. denied*, 485 U.S. 1036, 108 S. Ct. 1598, 99 L. Ed. 2d 912 (1988), or " 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *McCaskill*, 676 F.2d at 1002).

Applying the principles set forth in *Odom* and *Lawrence*, it is clear that Dr. Everett's statement on direct examination in this case does not rise to the level of plain error. The majority points to the following exchange on direct examination to establish that the trial court committed plain error by admitting Dr. Everett's testimony:

> Q And do you have an opinion, ma'am, based upon your knowledge, experience and training, and the articles that you have read in your professional capacity as to the percentage of children who *report* sexual abuse who exhibit no physical findings of abuse?
>
> A I would say approximately 70 to 75 percent of the children who have been sexually abused have no abnormal findings, meaning that the exams are either completely normal or very non-specific findings, such as redness.
>
> Q And that's the category that you would place [the victim] in; is that correct?
>
> A Yes, correct.

(Emphasis added.) The State asks for the "percentage of children who *report* sexual abuse who exhibit no physical findings of abuse" while Dr. Everett's answer seems to address the percentage of "children who *have been* sexually abused." While Dr. Everett's statement is not responsive to the question asked, a review of the entire record reveals that Dr. Everett's statement had little, if any, impact on the jury and on the jury's verdict.

The impact of this statement by Dr. Everett was mitigated by defendant's cross-examination. Defendant revisited this subject on cross-examination and clarified Dr. Everett's previous misstatement for the jury. On cross-examination, the following occurred:

> Q 70 to 75 percent of the—I think the question Mr. Beal asked you, 70 to 75 percent of the findings on physical examinations of children who *allegedly* have been sexually abused come back with no abnormal findings; is that correct?
>
> A Correct. Yes.
>
> Q Thank you.

(Emphasis added.) Dr. Everett answers affirmatively the same question on cross-examination as it relates to children who report or "allege" sexual abuse. Given Dr. Everett's stature in her field, as the majority notes, the jury no doubt listened attentively to all her testi-

mony, both on direct and cross-examination, before reaching a conclusion regarding the information she conveyed. As a result, the impact of Dr. Everett's nonresponsive answer on direct examination was greatly diminished by effective cross-examination.

The jury additionally heard overwhelming evidence in this case that defendant perpetrated sexual abuse upon the victim. The jury heard testimony that the child victim in this case reported abnormal physical symptoms and independently sought medical care. Dr. Ryan testified that the victim had spotting, which is atypical in a prepubertal girl only nine years old. Further, Dr. Ryan observed during her examination that the inner lips of the victim's vagina were red and inflamed and an area of the victim's genitals appeared scarred. The abnormalities Dr. Ryan noted prompted her to question the victim about the possibility of sexual abuse, which led to the victim reluctantly disclosing that defendant had been sexually abusing her. During the three-day trial, the jury heard evidence tending to show defendant's commission of the sexual abuse from eleven witnesses for the State, including three social workers, two law enforcement officers, two doctors, and two of the victim's relatives. These witnesses helped establish defendant's motive and detailed the child's characteristics and symptoms for the jury. Given the volume of evidence presented against defendant, it cannot be asserted fairly that the entire case turned on one statement made during Dr. Everett's direct testimony.

The jury in this case heard one nonresponsive statement from Dr. Everett on direct examination. Notwithstanding that the statement was clarified and its impact mitigated on cross-examination and that the statement occurred during a three-day trial in which the State presented overwhelming evidence of defendant's guilt, the majority concludes that allowing the jury to consider that statement constitutes an error so basic, so prejudicial, and so fundamental as to amount to a miscarriage of justice. I disagree. Given the statement's clarification on cross-examination and the other evidence presented against defendant, it seems impossible that the statement " 'had a probable impact on the jury's finding that the defendant was guilty,' " or "that a fundamental error occurred at trial." *Lawrence*, ___ N.C. at ___, 723 S.E.2d at 334 (quoting and citing *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). This Court should remain true to our long-standing mandate to find plain error only in exceptional cases and only after a cautious application of the aforementioned standard. Because it has not done so, and as a result has left our trial judges in an untenable position, I respectfully dissent.

STATE OF NORTH CAROLINA v. MELVIN CHARLES KING

No. 385A11

(Filed 14 June 2012)

Evidence— recovered memory—expert testimony

The trial court properly granted defendant's motion to suppress expert testimony of recovered memory in a prosecution for first-degree rape, felony child abuse by committing a sexual act, incest, and indecent liberties where the trial judge assiduously sifted through expert testimony that lasted two days, thoughtfully applied the requirement of *Howerton v. Arai Helment, Ltd.*, 358 N.C 440, and then applied the N.C.G.S. § 8C-1, Rule 403 balancing test, explaining his reasoning at each step. Expert testimony is not an automatic prerequisite to the admission of lay evidence of sexual abuse so long as the lay evidence does not otherwise violate the statutes of North Carolina or the Rules of Evidence. However, unless supported by admissible expert testimony, the lay witness may testify only that he or she did not recall the incident for some period of time and may not testify that the memories were repressed or recovered.

Justice TIMMONS-GOODSON concurring.

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. ——, 713 S.E.2d 772 (2011), affirming an order entered on 23 April 2010 by Judge John O. Craig, III in Superior Court, Moore County. Heard in the Supreme Court on 13 March 2012.

Roy Cooper, Attorney General, by Anne M. Middleton, Assistant Attorney General, for the State-appellant.

Van Camp, Meacham & Newman, PLLC, by Patrick M. Mincey, for defendant-appellee.

EDMUNDS, Justice.

In this case we consider whether the trial court abused its discretion when it granted defendant's motion to suppress expert testimony regarding repressed memory. Although we affirm the holding of the Court of Appeals majority that the trial court properly granted defendant's motion, we disavow the portion of the opinion that, relying on an earlier opinion of that court, requires expert testimony always

to accompany the testimony of a lay witness in cases involving allegedly recovered memories.

On 12 September 2005, defendant was indicted for first degree rape in violation of N.C.G.S. § 14-27.2(a)(1). Four years later, on 21 September 2009, he was indicted for additional charges of felony child abuse by committing a sexual act on a child, in violation of N.C.G.S. § 14-318.4(a2); incest, in violation of N.C.G.S. § 14-178; and indecent liberties with a child, in violation of N.C.G.S. § 14-202.1. Averments in pretrial motions filed in the case indicate that the victim, who is defendant's daughter and was born in 1988, began suffering panic attacks and pseudoseizures in March 2005. As these episodes continued, the victim began acting as if she were a young child, speaking of a "mean man" she worried would hurt her. During one episode, she identified a photograph of her father as the "mean man." After several visits to a variety of doctors and other medical providers, the victim was diagnosed with conversion disorder and referred to therapy.

Although the victim initially denied having experienced any sexual abuse, she recounted during a therapy session an event that occurred when she was seven years old and visiting defendant for the weekend in accordance with the custody arrangement between defendant and the victim's mother. The victim told the therapist that she recalled getting out of the bathtub and hurting herself in her "private area." She did not remember the exact facts of the incident or how the injury occurred, though she did remember her father telling her she had fallen. She also remembered bleeding and being taken to the emergency room by her mother, where she was treated for a superficial one-centimeter laceration to her vagina. When the therapist asked the victim what she would think about the incident if a friend had told her about it, the victim responded that she would "wonder about abuse," but added that she did not believe her father would do such a thing to her. The therapist then discussed with the victim how the mind can protect itself by "going somewhere else when something very difficult or painful might be happening."

About three weeks after this therapy session, the victim experienced her first "flashback" to the alleged events underlying the charges in this case. She said that when her boyfriend's arm brushed against her neck, the memory "hit" her that as she had been getting out of the bathtub, defendant entered the bathroom, lifted her up against the wall, threw her on the floor, put his arm across her chest to hold her down, and raped her. The victim also recalled that her

father had threatened to hurt her if she told anyone. After reporting this memory to her therapist, the victim was referred to the Moore County Department of Social Services, which initiated an investigation that resulted in the 2005 and 2009 indictments.

Defendant was scheduled to be tried on 1 February 2010. On 28 January 2010, he filed a motion to exclude testimony about " 'repressed memory,' 'recovered memory,' 'traumatic amnesia,' 'dissociative amnesia,' 'psychogenic amnesia' or any other synonymous terms the witnesses may adopt."[1] In his motion and in two memoranda submitted to support the motion, defendant argued that the phenomenon of repressed memory has generated significant controversy in the scientific community and thus is not sufficiently reliable to meet this Court's requirements for admission of expert testimony, as set out in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004). Defendant contended that the theory of repressed memory is based upon "untested and flawed methods and unproved hypotheses" and is analogous to hypnotically refreshed testimony or polygraph test results, both of which this Court has found lack sufficient reliability to be admissible. *See State v. Peoples*, 311 N.C. 515, 532, 319 S.E.2d 177, 187 (1984) (rejecting hypnotically refreshed testimony); *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983) (same for lie detector tests).

In response, the State submitted a memorandum in which it argued that dissociative amnesia is a legitimate scientific diagnosis that has been recognized by several other jurisdictions and by numerous highly respected scientific organizations, including the American Psychiatric Association, World Health Organization, and American Psychological Association. The State indicated that it intended to call as expert witnesses James A. Chu, M.D., an associate clinical professor of psychiatry at Harvard Medical School, and Desmond Runyan, M.D., a professor of Social Medicine and of Pediatrics at the University of North Carolina at Chapel Hill. Dr. Chu testified at the suppression hearing, as detailed below, and Dr. Runyan was expected to testify at trial that neither falling in the bathtub nor straddling its rim would be likely to cause the type of injury the victim suffered, and that sexual abuse was a more plausible explanation.

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1. Although the parties and witnesses skirmished over the meaning of some of these terms, the trial court stated in its suppression order that "[b]oth parties agree that 'repressed memory' and synonymous terms are at issue when a witness intends to testify about a memory that he or she alleges to have about a traumatic event, is literally unable to remember the event for a long period of time afterwards, and then is later able to 'recover' the memory." Neither side has challenged the trial court's characterization and we will follow the trial court's convention.

The trial court conducted an evidentiary hearing on defendant's motion to suppress on 12 and 13 April 2010. Defendant presented Harrison G. Pope, Jr., M.D., a professor of psychiatry at Harvard Medical School, who was qualified as an expert in psychiatry, specifically on the issue of repressed memory. The State presented Dr. Chu, who also qualified as an expert in repressed memory. Each expert described his extensive experience and background in psychiatry and the field of repressed memory. Each also presented lengthy and detailed testimony about the nature of memory and the acceptance and status of the theory of repressed memory within the medical community. They disagreed about almost everything.

Although Dr. Pope has treated patients who report memory problems, the majority of his work has consisted of research. His testimony regarding repressed memory focused on his review of and opinion about studies that have been conducted on the topic, articles that he has authored assessing the methodologies of these studies, and a description of the frequency of reports of repressed memories. His study, which reviewed articles published between 1984 and 2003, found "practically no articles about repressed memory or dissociative amnesia up until 1992." A surge of reports followed, peaking in 1997, then falling off to "a fraction of their previous level." Although Dr. Pope acknowledged that some reputable scientists disagree with him, he was deeply skeptical of the existence of repressed memory as the term was used in this proceeding and testified that the theory of repressed memory is not generally accepted in the scientific community.

In contrast, Dr. Chu is primarily a clinician. He testified that in his clinical practice he frequently observed cases of repressed memory. Citing instances in which repressed memories of sexual abuse have been corroborated by family members who either committed or knew of the abuse, he stated that the condition, which he described generally as a conversion disorder, can be genuine and unfeigned. He testified that the "vast majority" of those in the scientific community, including academics and clinicians, accept the theory of repressed memory.

After hearing arguments from the State and from defendant, the trial court granted defendant's motion to suppress in an extensive oral order issued from the bench on 13 April 2010. On 23 April 2010, the trial court entered a written order making findings of fact and conclusions of law. In its written order, the court began by citing North Carolina Rule of Evidence 702, which controls admission of

expert testimony. N.C.G.S. § 8C-1, Rule 702 (2009).[2] The court then reviewed the three-step inquiry set out in *Howerton* to determine whether expert testimony is admissible under Rule 702. *See 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 three prongs of the inquiry are: (1) whether the expert's proffered method of proof is sufficiently reliable; (2) whether the witness presenting the evidence qualifies as an expert in the applicable area; and (3) whether the testimony is relevant. *Id.* At the outset, the trial court readily concluded that the State's witness was an expert in the area of repressed memory, meeting the requirements of the second prong.

Turning then to the first prong, the judge reviewed case law from other jurisdictions pertaining to admission of expert testimony on repressed memory theory and summarized the expert testimony presented at the hearing on defendant's motion to suppress. The court found as fact that other jurisdictions have been inconsistent in whether, and on what bases, they have admitted expert testimony on repressed memory. The court further found that, while a significant dispute in the scientific community over the validity of the concept of repressed memory foreclosed a conclusion that the theory of repressed memory is generally accepted in the relevant scientific community, *Howerton* does not "dictate[ ] the degree to which a scientific theory must be accepted so as to make it established." Accordingly, the court concluded that "the theory of repressed memory may still be generally accepted enough to satisfy *Howerton's* reliability element."

In its consideration of the third prong, whether the evidence was relevant, the court noted that *Howerton* "defers to the traditional definition" set out in N.C.G.S. § 8C-1, Rule 401, and found that the evidence was relevant. However, the court then quoted N.C.G.S. § 8C-1, Rule 403 and observed that even relevant evidence may be inadmissible if the probative value of the testimony " 'is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.' " The trial court voiced three particular concerns. First, the court observed that purportedly repressed memories recovered during therapy are not validated by the treating clinician

2. We note that the General Assembly has amended Rule 702, adopting language similar to the corresponding Federal Rule of Evidence. *See* N.C.G.S. § 8C-1, Rule 702 (2011); *see also* Act of June 17, 2011, ch. 283, sec. 1.3, 2011 N.C. Sess. Laws 1048, 1049. Because the case at bar was decided under the earlier version of Rule 702, we need not now consider the impact of those amendments.

because the goal of clinical therapy is to treat the patient, not to determine if the patient's memories are accurate. Second, the reliability of the memories recovered is contingent upon the training and skill of the clinician treating the patient, subjective traits that are not dependable safeguards for assuring the veracity of the memories recovered. Finally, the court noted that the experts had discussed numerous alternative explanations for sudden memory recovery other than repressed memory, adding that "[t]hese alternate possibilities . . . create an additional layer of confusion that cannot be corroborated in a retrospective fashion that can assist the jury." Therefore, the trial court concluded as a matter of law that, even though evidence of repressed memory was relevant and "technically met" the *Howerton* test, the evidence must be excluded under Rule 403 because its probative value was outweighed by its prejudicial effect.

The State immediately appealed the trial court's suppression order to the Court of Appeals, believing it could not proceed to trial because of the holding of that court in *Barrett v. Hyldburg*, 127 N.C. App. 95, 100, 487 S.E.2d 803, 806 (1997). *State v. King*, —— N.C. App. ——, 713 S.E.2d 772 (2011). In *Barrett*, a civil action for assault and battery, intentional infliction of emotional distress, and negligent infliction of emotional distress, all based upon the plaintiff's memories that allegedly had been repressed for over forty years, the Court of Appeals held that "testimony regarding recovered memories of abuse may not be received at trial absent accompanying expert testimony on the phenomenon of memory repression," 127 N.C. App. at 100, 487 S.E.2d at 806, because such expert testimony would be needed "to afford the jury a basis upon which to understand the phenomenon and evaluate the reliability of testimony derived from such memories," *id.* at 101, 487 S.E.2d at 806. The State indicated in its argument to the Court of Appeals that it believes that, once the trial court refused to admit expert testimony of repressed memory, *Barrett* would prevent the victim from testifying in the case. *King*, —— N.C. App. at ——, 713 S.E.2d at 777.

Although the Court of Appeals majority below "agree[d] with the [S]tate that *Barrett* held that repressed memory testimony 'must be accompanied by expert testimony,' " the majority noted that *Barrett* did not diminish the gatekeeping function of the trial court in determining the fundamental question of whether testimony is admissible. *Id.* at ——, 713 S.E.2d at 777 (quoting *Barrett*, 127 N.C. App. at 101, 487 S.E.2d at 806). Relying on our opinions in *Howerton*, 358 N.C. 440, 597 S.E.2d 674, and *Crocker v. Roethling*, 363 N.C. 140, 675 S.E.2d 625

(2009), the Court of Appeals majority stated that a trial court is required to "decide preliminary questions regarding the qualifications of experts to testify or regarding the admissibility of expert opinion." *King*, —— N.C. App. at ——, 713 S.E.2d at 777 (citing *Crocker*, 363 N.C. at 144, 675 S.E.2d at 629). The majority then considered whether the trial court abused its discretion when it excluded evidence of repressed memory because of the prejudicial effect of the evidence. *Id.* at ——, 713 S.E.2d at 777. The Court of Appeals majority held that the trial court's "detailed and specific findings of fact," its recognition of the duty *Howerton* imposes upon trial courts, its examination of authority from other jurisdictions, its careful consideration of the extensive yet conflicting expert testimony, and its expressed concerns about problematic aspects of repressed memory evidence, all led to the conclusion that the trial court's decision to grant defendant's motion "was not arbitrary" and was "fully support[ed]" by the record. *Id.* at ——, 713 S.E.2d at 777-78. Accordingly, the majority affirmed the trial court's order granting defendant's motion to suppress. *Id.* at ——, 713 S.E.2d at 778.

The dissenting judge disagreed, arguing that once the trial court determined the evidence was admissible under Rule 702 and *Howerton*, the court abused its discretion when it nevertheless excluded the evidence under Rule 403. *Id.* at ——, 713 S.E.2d at 778 (Hunter, Robert C., J., dissenting). The dissenting judge acknowledged that not all Rule 403 safeguards are removed once a preliminary decision is made regarding admissibility, but contended that a trial court "should not be permitted to arbitrarily invoke Rule 403 because the trial court judge is 'troubled' by the existence of controversy surrounding the science involved." *Id.* at ——, 713 S.E.2d at 779. The dissent pointed out that " 'questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility.' " *Id.* at ——, 713 S.E.2d at 779 (quoting *Howerton*, 358 N.C. at 461, 597 S.E.2d at 688). Accordingly, the dissent argued, the trial court's order should be reversed. *Id.* at ——, 713 S.E.2d at 779. The State appealed to this Court as of right based on the dissent.

A leading treatise on evidence in North Carolina acknowledges that "there can be expert testimony upon practically any facet of human knowledge and experience." 1 Henry Brandis, Jr., *Stansbury's North Carolina Evidence* § 134, at 438 (rev. ed. 1973) [hereinafter Brandis, *Stansbury's North Carolina Evidence*]. When making preliminary determinations on the admissibility of expert testimony,

"trial courts are not bound by the rules of evidence." *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686 (citing N.C.G.S. § 8C-1, Rule 104(a) (2004)). In reviewing trial court decisions relating to the admissibility of expert testimony evidence, this Court has long applied the deferential standard of abuse of discretion. Trial courts enjoy "wide latitude and discretion when making a determination about the admissibility of [expert] testimony." *State v. Wise*, 326 N.C. 421, 432, 390 S.E.2d 142, 149 (citation omitted), *cert. denied*, 498 U.S. 853, 111 S. Ct. 146, 112 L. Ed. 2d 113 (1990); *see also State v. King*, 287 N.C. 645, 658, 215 S.E.2d 540, 548 (1975) (noting that " 'the determination of [whether to admit expert testimony] is ordinarily within the exclusive province of the trial judge' " (quoting Brandis, *Stansbury's North Carolina Evidence* § 133, at 429)), *judgment vacated in part*, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976). A trial court's admission of expert testimony " 'will not be reversed on appeal unless there is no evidence to support it.' " *King*, 287 N.C. at 658, 215 S.E.2d at 548-49 (quoting Brandis, *Stansbury's North Carolina Evidence* § 133, at 430). Thus, " 'the trial court is afforded wide discretion' in determining the admissibility of expert testimony and 'will be reversed only for an abuse of that discretion.' " *State v. Mackey*, 352 N.C. 650, 659, 535 S.E.2d 555, 560 (2000) (quoting *State v. Anderson*, 322 N.C. 22, 28, 366 S.E.2d 459, 463, *cert. denied*, 488 U.S. 975, 109 S. Ct. 513, 102 L. Ed. 2d 548 (1988)).

The test to determine whether proposed expert testimony is admissible was set out in *Howerton*, in which this Court rejected the federal standard for admission of expert testimony established by the United States Supreme Court 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 469, 597 S.E.2d at 693. *Howerton* approved the three-part test for determining admissibility of expert testimony described in *State v. Goode*. *Id.* at 458, 469, 597 S.E.2d at 686, 692 (citing *Goode*, 341 N.C. at 527-29, 461 S.E.2d at 639-41).

Applying this three-part test does not end the trial judge's inquiry, however, for even if the trial judge determines that expert testimony is relevant and admissible and otherwise meets the requirements of *Howerton* and Rule 702, "the trial court still must determine whether [the expert testimony's] probative value outweighs the danger of unfair prejudice to defendant" under Rule 403. *State v. Coffey*, 345 N.C. 389, 404, 480 S.E.2d 664, 673 (1997); *see also Anderson*, 322 N.C. at 28, 366 S.E.2d at 463 (noting that evidence may be excluded "if its probative value is outweighed by the danger that it would confuse the

issues before the court or mislead the jury"). "Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court." *State v. Penley*, 318 N.C. 30, 41, 347 S.E.2d 783, 789 (1986) (citing *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986)).

As detailed above, the trial court first acknowledged and then followed the requirements listed in *Howerton*. Upon reaching the question of general acceptance of the theory of repressed memory, the trial court observed that, although vigorous and even rancorous debate was ongoing within the relevant scientific community, *Howerton* did not require establishing either conclusive reliability or indisputable validity. As a result, the debate within the scientific community did not by itself prevent admission of evidence regarding repressed memory. Accordingly, the trial court turned to the final prong of *Howerton* and determined that the testimony was relevant. However, the court went on to conclude that, even though the *Howerton* test had been "technically met" and the evidence was relevant, the expert testimony was inadmissible under Rule 403 because recovered memories are of "uncertain authenticity" and susceptible to alternative possible explanations. The court further found that "the prejudicial effect [of the evidence] increases tremendously because of its likely potential to confuse or mislead the jury." The trial court therefore exercised its discretion to exclude the evidence about repressed memory on the grounds that the probative value of the evidence was outweighed by its prejudicial effect.

We conclude that the trial court did not abuse its discretion by granting defendant's motion to suppress after applying Rule 702, *Howerton*, and Rule 403. The test of relevance for expert testimony is no different from the test applied to all other evidence. Relevant evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2011). We agree with the trial court that the expert evidence presented was relevant. Nevertheless, like all other relevant evidence, expert testimony must satisfy the requirements of Rule 403 to be admissible. Although the dissenting judge in the Court of Appeals accurately pointed out that *Howerton* envisions admission of expert testimony on controversial theories, he also correctly noted that "not . . . all 403 safeguards are removed" when the *Howerton* factors apply. *King*, —— N.C. App. at ——, 713 S.E.2d at 779. If all other tests are satisfied, the ultimate admissibility of expert testimony in each case will still depend upon the relative weights of the prejudicial

effect and the probative value of the evidence in that case. Battles of the experts will still be possible in such cases. However, when a judge concludes that the possibility of prejudice from expert testimony has reached the point where the risk of the prejudice exceeds the probative value of the testimony, Rule 403 prevents admission of that evidence. The trial judge here assiduously sifted through expert testimony that lasted two days, thoughtfully applied the requirements set out in *Howerton* to that testimony, then applied the Rule 403 balancing test, explaining his reasoning at each step. We see no abuse of discretion and affirm the holding of the Court of Appeals that found no error in the trial court's decision to suppress expert testimony evidence of repressed memory.

In so holding, we stress that we are reviewing the evidence presented and the order entered in this case only. We promulgate here no general rule regarding the admissibility or reliability of repressed memory evidence under either Rule 403 or Rule 702. As the trial judge himself noted, scientific progress is "rapid and fluid." Advances in the area of repressed memory are possible, if not likely, and even Dr. Pope, defendant's expert, acknowledged that the theory of repressed memory could become established and that he would consider changing his position if confronted with a study conducted using reliable methodology that yielded evidence supporting the theory. Trial courts are fully capable of handling cases involving claims of repressed memory should new or different scientific evidence be presented.

Finally, we consider the holding of the Court of Appeals in *Barrett*, the case on which the State relied when it chose immediately to appeal the trial court's order of suppression rather than to continue to trial. *King*, —— N.C. App. at ——, 713 S.E.2d at 776 (majority) (citing *Barrett*, 127 N.C. App. at 95, 487 S.E.2d at 803). As noted above, *Barrett* was a civil case in which the plaintiff claimed that memories of improper sexual contact with her father, which had been repressed for approximately forty years, spontaneously emerged while she was watching a television program dealing with child sexual abuse. *Barrett*, 127 N.C. App. at 97, 487 S.E.2d at 804. The defendant father moved to exclude all evidence of the plaintiff's repressed memories, arguing that the evidence was inadmissible without accompanying expert testimony. *Id.* The trial court entered an order finding both that (1) the plaintiff's evidence of repressed memories would be precluded unless expert testimony was presented to explain the phenomenon, and (2) such expert testimony would be excluded because of the lack of scientific assurance that repressed

memories were reliable indicators of what actually had occurred in the past. 127 N.C. App. at 98-99, 487 S.E.2d at 805-06. The Court of Appeals affirmed the first part of the trial court's order, holding that the plaintiff could not testify as to recovered memories of abuse unless an expert also testified about the scientific basis of memory repression. *Id.* at 100, 487 S.E.2d at 806.

We agree with the holding in *Barrett* that the "plaintiff may not express the opinion [that] she herself has experienced repressed memory." *Id.* at 101, 487 S.E.2d at 806. As the trial court here noted, psychiatric theories of memory, and specifically of repressed and recovered memories, are arcane even to specialists and may not be presented without accompanying expert testimony to prevent juror confusion and to assist juror comprehension. That said, we believe the Court of Appeals went too far in *Barrett* when it added that "even assuming plaintiff were not to use the term 'repressed memory' and simply testified she suddenly in 1993 remembered traumatic incidents from her childhood, such testimony must be accompanied by expert testimony." *Id.* Although we know of no statute that guarantees a witness (other than a criminal defendant) the right to testify, if a witness is tendered to present lay evidence of sexual abuse, expert testimony is not an automatic prerequisite to admission of such evidence, so long as the lay evidence does not otherwise violate the statutes of North Carolina or the Rules of Evidence. *See* N.C.G.S. § 8C-1, Rule 601(a) (2011) (presuming a witness is competent to testify). However, unless qualified as an expert or supported by admissible expert testimony, the witness may testify only to the effect that, for some time period, he or she did not recall, had no memory of, or had forgotten the incident, and may not testify that the memories were repressed or recovered. Therefore, to the extent that the Court of Appeals majority here relied on the statement in *Barrett* that excluded *all* testimony based on recovered memory unless it was accompanied by expert testimony, we disavow that portion of the opinion.

Accordingly, should the State elect to retry the case on remand, the victim may testify as to her recollections. If so, the trial court may choose to reconsider its Rule 403 analysis in light of our holding. We are mindful that, in cases such as this, a defendant facing a witness who claims recently to have remembered long-ago events could seek to present an expert to address or refute the implications of the witness's purported sudden recall, thereby requiring the trial court to consider the admissibility of such evidence and possibly igniting a duel of experts. Because we believe such instances will be infrequent

and because the trial bench is fully capable of addressing such disputes as they arise, we do not attempt to catalog every possibility that could occur at trial.

For the reasons stated above, we modify and affirm the decision of the Court of Appeals that affirmed the trial court's grant of defendant's motion to suppress. We remand this case to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this opinion.

MODIFIED AND AFFIRMED; REMANDED.

Justice TIMMONS-GOODSON concurring.

I concur with both the disposition and reasoning of the majority opinion with one exception. We need not address the holding of the Court of Appeals in *Barrett v. Hyldburg*, 127 N.C. App. 95, 487 S.E.2d 803 (1997), to resolve the issue before us.

STATE OF NORTH CAROLINA v. TIMOTHY ALFRED SWEAT

No. 472A11

(Filed 14 June 2012)

1. Sexual Offenses— with child—motion to dismiss—sufficiency of evidence of fellatio—corpus delicti rule—trustworthiness

The Court of Appeals did not err by denying defendant's motion to dismiss two sexual offense charges based on fellatio. The State's evidence satisfied the *corpus delicti* rule based on defendant's confession to four incidents of fellatio with his minor niece and the State provided sufficient evidence of the trustworthiness of defendant's confession to all four incidents.

2. Sexual Offenses— with child—disjunctive jury instruction

The Court of Appeals erred by granting defendant a new trial for two convictions of sexual offense with a child. The disjunctive jury instruction was not error because the State presented evidence of four incidents of fellatio.

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. ——, 718 S.E.2d 655 (2011), finding no error in part in judgments entered on 2 July 2010 by Judge James U. Downs in Superior Court, Buncombe County, and ordering a new trial in part. On 8 December 2011, the Supreme Court allowed the State's petition for discretionary review of an additional issue. Heard in the Supreme Court on 16 April 2012.

Roy Cooper, Attorney General, by Margaret A. Force, Assistant Attorney General, for the State-appellee/appellant.

Russell J. Hollers III for defendant-appellant/appellee.

PARKER, Chief Justice.

The issue in this case is whether the Court of Appeals erred by holding that the State's evidence satisfied the *corpus delicti* rule and by granting defendant a new trial for two convictions of sexual offense with a child. For the reasons stated herein, we affirm the decision of the Court of Appeals in part and reverse in part.

Defendant, then forty-four years old, was arrested on 2 April 2009, following an investigation and his confession to sexual misconduct with his niece, then ten years old. Defendant was indicted for one count of rape of a child under N.C.G.S. § 14-27.2A(a), two counts of first-degree statutory sexual offense under N.C.G.S. § 14-27.4(a)(1), two counts of sexual offense with a child under N.C.G.S. § 14-27.4A(a), and five counts of indecent liberties with a child under N.C.G.S. § 14-202.1. Defendant was convicted of all charges and gave timely notice of appeal to the Court of Appeals.

At trial the State's evidence tended to show the following. In 2007, Tammy[1] was eight years old, in third grade, and living in a house on Brickyard Road in Asheville, North Carolina, with her adoptive mother, her adoptive mother's husband, her adoptive mother's daughter, and her uncle ("defendant") and his family. At some point during Tammy's third grade year, defendant began a pattern of sexual misconduct with Tammy when he unzipped his pants and pulled out his "private," and she touched his penis with her hands. On another occasion defendant touched her "boobs" with his hands in his bedroom of the house on Brickyard Road. In December 2008, defendant and his family moved to an apartment, but the pattern of abuse continued. Tammy testified that during her winter break that year, defend-

1. A pseudonym is used to protect the identity of the minor.

ant made her view pornographic movies and pictures with him. On 5 March 2009, Tammy's adoptive mother left her with defendant at his apartment. Defendant called Tammy to a bedroom and told her to lie down on the bed, and then he had both anal and vaginal intercourse with her and forced her to perform fellatio on him. Tammy testified that this was not the only instance of anal intercourse.

Tammy did not report defendant's conduct until 25 March 2009, when she wrote a note to her fourth grade teacher. The note stated that defendant "stuck his —— in mine. He kissed me and some other things. He did it to me since I was in the third grade. He also showed me some movies of it and his name is Big Tim." The Buncombe County Department of Social Services promptly began an investigation.

Later that same day, Child Protective Services Investigator Christine Nicholson interviewed Tammy, and her testimony was admitted at trial to corroborate Tammy's. Investigator Nicholson testified that Tammy told her that defendant's pattern of behavior began when she was in third grade, that defendant touched her "in the wrong way," that defendant engaged in anal intercourse, fellatio, and vaginal intercourse with her, and that defendant touched her "boobies."

On 26 March, the day following Tammy's report, Investigator Nicholson and Detective David Shroat of the Buncombe County Sheriff's Office interviewed defendant. Defendant initially denied the allegations, although he said that he had lived with Tammy and her family for six years and had babysat for her several times, both before and after he moved to the apartment.

On 27 March, registered nurse Cindy McJunkin ("Nurse McJunkin"), interviewed Tammy, and a video recording of the interview was played for the jury for corroborative purposes. During the interview, Tammy told Nurse McJunkin that on 5 March 2009, defendant engaged in fellatio and vaginal and anal intercourse with her. Tammy related at least three other incidents when defendant engaged in fellatio with her. Tammy declared that defendant often engaged in sexual conduct with her after school but before her parents got home.

On 30 March, defendant was questioned again. A third officer questioned defendant while Detective Shroat and Investigator Nicholson observed through a three-way mirror and watched and listened via a video and audio screen. The interview was not recorded. According to Detective Shroat, at this time defendant admitted to having had sex with [Tammy] on one occasion." Investigator

Nicholson testified that defendant "admitted having sexual contact with [Tammy], including anal and oral sex on approximately four occasions." After defendant finished his oral confession, he provided the following handwritten statement at Detective Shroat's request:

> Brickyard Road. She pulled out my p-e-n-d-s and sucked it. I said "no" but she wanted to t-y-e it. She l-e-n-k-s it. I had s-a-i-n-d "no," but she want to, so she did it. For s-u-o-c-d That happened two times. She put my p-l-a-n-s in her butt. B-e-a-c-k part we play on the bed and [Tammy] put her hand down in my pants, pull it out and t-y-e it or can I s-a-n-d, but she want to. I know she it out again. I s-a-i, "This is not r-i-n-t" to her. She s-u-i-n-d things. She tried to put it in her butt that day.

At trial the prosecutor questioned Investigator Nicholson about the content of the written statement, and she responded that the written statement "was a small portion of what he said, that he said more than he wrote."

On appeal to the Court of Appeals, defendant argued that the trial court erred in denying his motion to dismiss three of the four sexual offense charges. Defendant also argued that the trial court erred in instructing the jury on the sexual offense charges.

A divided panel of the Court of Appeals affirmed the trial court's denial of defendant's motion to dismiss, but agreed with defendant that the jury instructions were improper. *State v. Sweat*, —— N.C. App. ——, ——, 718 S.E.2d 655, 661-62 (2011). Relying on this Court's opinions in *State v. Smith*, 362 N.C. 583, 669 S.E.2d 299 (2008), and *State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985), the court below concluded that defendant's confession provided substantial evidence such that the trial court did not err in denying defendant's motion to dismiss. *Sweat*, —— N.C. App. at ——, 718 S.E.2d at 658-61. In *Parker* this Court held that under the *corpus delicti* rule, the State can rely solely on the defendant's confession to obtain a conviction in non-capital cases if the confession "is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime." 315 N.C. at 236, 337 S.E.2d at 495. However, we emphasized that if "independent proof of loss or injury is lacking, there must be *strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession." *Id.* The Court of Appeals reasoned here that since (1) defendant's confession established all the elements of fellatio; (2) Tammy informed two different people on two

different occasions that fellatio had occurred; and (3) "defendant was convicted of and does not contest on appeal numerous other criminal sexual acts occurring within the same time frame and with the same victim which were part of the same sexual encounters as the fellatio," defendant's confession was strongly corroborated as to two instances of fellatio. *Sweat*, ___ N.C. App. at ___, 718 S.E.2d at 660-61.

However, the majority below held that the trial court erred in instructing the jury. *Sweat*, ___ N.C. App. at ___, 718 S.E.2d at 661. The trial judge instructed the jury that for it to find defendant guilty of the four sexual offense charges, it must find that he engaged in "either anal intercourse and/or fellatio." Relying on *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E.2d 697, 699 (1973), the Court of Appeals declared that, for the judge to use the disjunctive instruction for all four sexual offense charges, the State must have presented evidence of four instances of fellatio. *Sweat*, ___ N.C. App. at ___, 718 S.E.2d at 661. The majority below held that, the State having presented evidence of only two instances of fellatio, defendant was prejudiced by the disjunctive jury instruction, and it ordered a new trial for his two convictions for sexual offense with a child. *Id.* at ___, 718 S.E.2d at 661.

The dissent below concluded that the *corpus delicti* rule was not satisfied with respect to the sexual offense charges based on fellatio. *Sweat*, ___ N.C. App. at ___, 718 S.E.2d at 664 (Hunter, Jr., Robert N.,J., dissenting). Judge Hunter would have held that Investigator Nicholson's and Nurse McJunkin's statements that were introduced solely to corroborate Tammy's testimony could not be used to corroborate defendant's confession. *Id.* at ___, 718 S.E.2d at 663-64. Concluding that there had been no evidence of fellatio and that the jury instructions in the disjunctive nevertheless included fellatio, Judge Hunter would have granted a new trial on all four sexual offense charges. *Id.* at ___, 718 S.E.2d at 664-65. Defendant appealed as of right based on the dissent, and we granted the State's petition for discretionary review of the Court of Appeals' decision.

Before this Court defendant argues that the Court of Appeals erroneously affirmed the trial court's denial of his motion to dismiss two of the four sexual offense charges and that an improper jury instruction entitles him to a new trial on all four sexual offense charges. We disagree. Because defendant confessed to four incidents of fellatio with Tammy and the State presented sufficient evidence of the trustworthiness of defendant's confession to all four incidents,

the *corpus delicti* rule was satisfied, and defendant's motion to dismiss was properly denied. Furthermore, because the State presented evidence of four incidents of fellatio, the disjunctive jury instruction was not error.

[1] Asserting that the State presented insufficient evidence of fellatio, defendant first argues that his motion to dismiss the two sexual offense charges based on fellatio should have been granted. Defendant was charged with two counts of first-degree statutory sexual offense under N.C.G.S. § 14-27.4(a)(1) and two counts of sexual offense with a child under N.C.G.S. § 14-27.4A(a). Under both statutes defendant can be convicted for engaging in a sexual act "with a victim who is a child under the age of 13 years." *See* N.C.G.S. §§ 14-27.4(a)(1), -27.4A(a) (2011). A "[s]exual act" includes fellatio. N.C.G.S. § 14-27.1(4) (2011). "Fellatio is defined as 'any touching of the male sexual organ by the lips, tongue, or mouth of another person.' " *Smith*, 362 N.C. at 593, 669 S.E.2d at 306 (quoting *State v. Johnson*, 105 N.C. App. 390, 393, 413 S.E.2d 562, 564, *appeal dismissed and disc. rev. denied*, 332 N.C. 348, 421 S.E.2d 158 (1992)).

Upon a defendant's motion to dismiss for insufficient evidence, "the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citing *State v. Roseman*, 279 N.C. 573, 184 S.E.2d 289 (1971), and *State v. Mason*, 279 N.C. 435, 183 S.E.2d 661 (1971)). "The evidence is to be considered in the light most favorable to the State," and "the State is entitled to . . . every reasonable inference to be drawn therefrom." *Id.* at 99, 261 S.E.2d at 117 (citing *State v. Thomas*, 296 N.C. 236, 250 S.E.2d 204 (1978), and *State v. McKinney*, 288 N.C. 113, 215 S.E.2d 578 (1975)).

Here the State relies solely on defendant's confession for the sexual offense charges based on fellatio. On 30 March 2009, following an interview, defendant confessed to four instances of fellatio with Tammy. As noted earlier, defendant produced the following written confession, which itself describes two instances of fellatio:

> Brickyard Road. She pulled out my p-e-n-d-s and sucked it. I said "no" but she wanted to t-y-e it. She l-e-n-k-s it. I had s-a-i-n-d "no," but she want to, so she did it. For s-u-o-c-d. That happened two times. She put my p-l-a-n-s in her butt. B-e-a-c-k part we play on the bed and [Tammy] put her hand down in my pants, pull it out

> and t-y-e it or can I s-a-n-d, but she want to. I know she it out again. I s-a-i, "This is not r-i-n-t" to her. She s-u-i-n-d things. She tried to put it in her butt that day.

Investigator Nicholson, who observed the interview, testified that defendant confessed to two additional instances of fellatio with Tammy. Such testimony may be admitted as substantive evidence as an admission by a party-opponent. N.C.G.S. § 8C-1, Rule 801(d) (2011); State v. Gregory, 340 N.C. 365, 401, 459 S.E.2d 638, 658 (1995) ("A statement made by [the] defendant and offered by the State against him is admissible as an exception to the hearsay rule as a statement of a party-opponent."), cert. denied, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). Specifically, Investigator Nicholson testified that defendant admitted during his interview that he had "sexual contact with [Tammy], anal and oral sex, on approximately four occasions, the last incident occurring when [Tammy] stayed at his [apartment]," and that defendant's written statement "was a small portion of what he said, that he said more than he wrote." In the light most favorable to the State, the State produced substantial evidence of four sexual offenses based on fellatio through defendant's confession.

However, because the State relies solely on defendant's confession, the State must meet the additional burden imposed by the *corpus delicti* rule. *See Parker*, 315 N.C. at 236, 337 S.E.2d at 495. The *corpus delicti* rule imposes different burdens on the State depending on whether there is independent proof of loss or injury. *Id.* If there is independent proof of loss or injury, the State must show that "the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime." *Id.* However, if there is no independent proof of loss or injury, "there must be *strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession. Corroboration of insignificant facts or those unrelated to the commission of the crime will not suffice." *Id.* Here, the State's only substantive evidence for the four sexual offenses based on fellatio is defendant's confession, so the State must strongly corroborate essential facts and circumstances embraced in defendant's confession.

Under the totality of the circumstances, the State strongly corroborated essential facts and circumstances embraced in defendant's confession. Defendant had ample opportunity to commit the crimes; he confessed to details likely to be known only to the perpetrator; incidents of fellatio fit within the pattern of defendant's other crimes

against Tammy; and Tammy related four incidents of fellatio to third parties in extrajudicial statements.

First, defendant had ample opportunity to commit the crimes, and opportunity to commit a crime was considered relevant in both *Parker* and *Smith*. In *Parker* the defendant was shown to have had the opportunity to commit the crime when both the confession and independent corroborative evidence placed the defendant and the victims at the same places at the same times. 315 N.C. at 236-38, 337 S.E.2d at 495-96 (holding that the State met its burden under the *corpus delicti* rule as to a confessed second armed robbery where evidence of two murders and one armed robbery placed the defendant at the same crime scene at the same time the second armed robbery was committed). Similarly, in *Smith* we found relevant, but not sufficient, that the defendant and the victim were alone in the same room at the time the alleged sexual offense took place. 362 N.C. at 595-96, 669 S.E.2d at 308 (holding that the "opportunity evidence" was "not strong enough" for the State to meet its burden with respect to first-degree sexual offense in light of the fact that the victim twice denied that a sexual offense occurred).

In this case defendant's opportunity to engage in fellatio with Tammy corroborates his confession. Defendant has a familial relationship with Tammy and he lived in the same house with her while she was in third grade, when some of the sexual offenses occurred. Even after defendant moved out of the house in 2008, Tammy spent time with him, including when her adoptive mother went to play bingo on 5 March 2009, the date of a purported sexual offense based on fellatio. Furthermore, defendant admitted that he would sometimes babysit Tammy, and defendant often had access to Tammy when Tammy's adoptive mother was not around. Defendant's opportunity to engage in the four sexual offenses based on fellatio corroborates essential facts embodied in the confession.

Second, the confession's trustworthiness is supported in that, as in *Parker*, defendant's confession evidenced familiarity with corroborated details likely to be known only by the perpetrator. In *Parker* the defendant corroborated numerous details, including the number of times each victim was shot; that one victim was both shot and stabbed; that both victims' bodies were disposed of in the Tar River; that one victim's body was disposed of by having a cinder block attached to its leg with a green clothesline; and that the body of the other victim was disposed of by having a concrete block attached to the ankle with a lightweight chain. 315 N.C. at 237, 337 S.E.2d at 495-96.

Here defendant's confession and the corroborating evidence show that defendant was familiar with details related to the crimes likely to be known only by the perpetrator. Tammy's testimony and extrajudicial statements agree that vaginal intercourse occurred and that it occurred only once; that anal intercourse occurred more than once; that some sexual acts occurred at the house on Brickyard Road; and that the last incident was on 5 March 2009. Defendant's familiarity with these details corroborates the trustworthiness of defendant's confession to four incidents of sexual offense based on fellatio.

Third, defendant's confession to four incidents of sexual offense based on fellatio fits within his pattern of sexual misconduct with Tammy. Tammy's testimony provides evidence of statutory rape and sexual offense based on anal intercourse. Tammy also testified to numerous instances of indecent liberties with a child, including multiple instances in which defendant touched her "boobs," occasions when defendant watched pornographic movies with her, and other times when defendant made her look at pornographic pictures. That incidents of fellatio would fit within this pattern of conduct corroborates defendant's confession.

Fourth, the confession's trustworthiness is corroborated by Tammy's extrajudicial statements to Investigator Nicholson and Nurse McJunkin describing instances of fellatio with defendant. Tammy reported to Investigator Nicholson that on 5 March 2009, defendant engaged her in fellatio. Additionally, a videotape of Tammy's 27 March 2009 interview with Nurse McJunkin was played for the jury in which Tammy described four separate instances of fellatio with defendant. During this interview Tammy related that the 5 March 2009 incident included fellatio; that the first incident of sexual conduct with defendant, which occurred when her adoptive mother went to play bingo, involved fellatio; that defendant engaged in fellatio with Tammy once in the den of the house on Brickyard Road while her adoptive mother was either at the store or at work; and that defendant engaged in fellatio with Tammy on another occasion during the summer on the day before she went to Dollywood. Tammy's extrajudicial statements strongly corroborate defendant's confession to four incidents of fellatio.

Defendant asserts that the victim's extrajudicial statements introduced as corroborative evidence of her testimony cannot be used to corroborate his confession. We disagree. In *Smith* we held that the alleged victim's extrajudicial statement denying that the defendant

committed a first-degree sexual offense against her was relevant in holding that the State did not meet its burden under the *corpus delicti* rule as to that charge. 362 N.C. at 593, 669 S.E.2d at 306; *see also State v. Gerlaugh*, 134 Ariz. 164, 170, 654 P.2d 800, 806 (1982) (en banc) (stating that one codefendant's extrajudicial statement was relevant for purposes of the *corpus delicti* rule even though the jury could not consider the statement to determine the defendant's guilt). Indeed, in *Smith* we reviewed "the entirety of the record" in holding that there was strong corroboration of the defendant's confession to the indecent liberties charge. 362 N.C. at 598, 669 S.E.2d at 309. Whether a confession is sufficiently corroborated under the *corpus delicti* doctrine is a legal question of admissibility to be determined by the trial judge. 7 John Henry Wigmore, *Evidence* § 2073(4)(b), at 530 (James H. Chadbourn rev. 1978) ("[U]nder [the] rule requiring the existence of some corroborative evidence of the corpus delicti, it is for the *trial judge* to say whether there has been introduced such evidence . . . ."); *see also*, *e.g.*, *State v. Hale*, 45 Haw. 269, 274, 367 P.2d 81, 85 (1961) ("[W]e consider the record as a whole at the close of the prosecution's case to see if the quantum of the proof of the corpus delicti was sufficient to justify the trial court's ruling admitting the [confession] into evidence."). Whether a defendant's confession satisfies the *corpus delicti* rule is a preliminary question of admissibility governed by Civil Procedure Rule 104(a). In ruling on this question of admissibility, a trial court "is not bound by the rules of evidence except those with respect to privileges." N.C.G.S. § 8C-1, Rule 104(a) (2011). Therefore, in considering the admissibility of a defendant's confession for a particular crime when the confession is the only evidence proffered by the State for that particular crime, hearsay statements can be considered in determining if the confession satisfies the *corpus delicti* rule. Thus, the Court of Appeals properly considered Tammy's extrajudicial statements.

Defendant asserts that the trustworthiness of the confession is not established, contending that, like the victim in *Smith*, Tammy twice denied that a sexual offense involving fellatio occurred. We disagree. In *Smith* a critical fact was the victim's denial on two occasions that a first-degree sexual offense had occurred. 362 N.C. at 593, 669 S.E.2d at 306. In contrast, Tammy never specifically denied that fellatio occurred, either at trial or in an extrajudicial statement. Defendant asserts that Tammy's responses to two of the prosecutor's questions amounted to an express denial that fellatio occurred with defendant. The first question inquired into what part of Tammy's body touched

defendant's penis, to which Tammy replied, "My hands." The second question inquired into whether any part of Tammy's body other than her hands touched defendant's penis, to which she replied, "No." Defendant's assertion takes Tammy's response out of context and conflicts with Tammy's testimony regarding rape and anal intercourse. The record discloses that Tammy interpreted the verb "touch" as requiring that Tammy have initiated the action. Tammy described the rape and sexual offense by anal intercourse, respectively, as follows: "what *he* was doing to me," which was "[p]utting his private in mine"; and "*he* put it in my butt." (Emphases added.) Further, in Tammy's extrajudicial statements regarding fellatio, Tammy declared that "*he* made me suck his private." (Emphasis added.) For the above reasons, we hold that the State met its burden under the *corpus delicti* rule.

[2] Defendant next argues that the trial judge erroneously instructed the jury by including fellatio in the jury instructions for all four charges of sexual offense when there was insufficient evidence of fellatio. We disagree. "A trial judge should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence. When such instructions are prejudicial to the accused he would be entitled to a new trial." *Lampkins*, 283 N.C. at 523, 196 S.E.2d at 699 (citations omitted). However, as discussed above, the State presented evidence of four instances of fellatio in the form of defendant's corroborated confession. Thus, we overrule defendant's assignment of error and hold that the Court of Appeals erred in ordering a new trial for two of defendant's sexual offense convictions.

For the reasons stated herein, the decision of the Court of Appeals is affirmed in part and reversed in part.

AFFIRMED IN PART AND REVERSED IN PART.

STATE OF NORTH CAROLINA v. SAMARIO ANTWAIN BRADSHAW

No. 456A11

(Filed 14 June 2012)

Criminal Law— constructive possession—nonexclusive control of room—circumstances sufficient

The Court of Appeals properly affirmed the trial court's denial of defendant's motion to dismiss charges of trafficking in cocaine by possession and possession of a firearm by a felon where the State presented sufficient evidence for the trier of fact to reach a reasonable inference that defendant constructively possessed cocaine and a firearm found in a bedroom of his mother's house at a time when defendant was absent. The State introduced substantial evidence that defendant lived in the bedroom and that he exercised dominion and control over the contraband found therein.

Justice HUDSON dissenting.

Justice TIMMONS-GOODSON joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 716 S.E.2d 440 (2011), affirming judgments entered on 1 April 2010 by Judge Joseph N. Crosswhite in Superior Court, Cabarrus County. Heard in the Supreme Court on 13 March 2012.

Roy Cooper, *Attorney General*, *by Stanley G. Abrams*, *Assistant Attorney General*, *for the State.*

James N. Freeman, *Jr. for defendant-appellant.*

MARTIN, Justice.

This appeal presents the question of whether the Court of Appeals properly affirmed the trial court's denial of defendant's motion to dismiss the charges of trafficking in cocaine by possession and possession of a firearm by a felon for insufficiency of the evidence. Because the State presented sufficient evidence to support the jury's determination that defendant constructively possessed the cocaine and rifle found in a bedroom—which also contained photographs, a Father's Day card, a cable bill, a cable installation receipt, and a pay stub, all linking defendant to the contraband—we affirm the Court of Appeals.

In June 2007, Detectives Patrick Tierney and Brian Kelly of the Concord Police Department began investigating drug activity in the Silver Hill community because of numerous complaints from residents living in the area. Their investigation led them to 487 Pharr Drive, a three-bedroom residence surrounded by a six-foot-high privacy fence containing several pit bull terriers. Two individuals had reported purchasing drugs from a male at this address. In response, on 19 June 2007, Detective Kelly applied for and obtained a warrant to search the residence. No person was named in the warrant, though it did authorize officers to seize indicia of domain found in the residence.

The officers executed the warrant on 19 June 2007, using a S.W.A.T. team because of the increased risk posed by the pit bulls and because firearms had been previously recovered in and around the property. Several individuals were apprehended in and around the yard as officers approached the residence. Upon entering the locked home, however, the officers found it unoccupied. During the course of their search, officers found crack cocaine, powder cocaine, marijuana, three handguns, a rifle, bullets, digital scales, and a lockbox containing $1,560.00 in cash, all scattered throughout the property.

Defendant, Samario Antwain Bradshaw, was charged with possession of the items located in the left front bedroom of the residence.[1] In that bedroom the officers found sixty-eight grams of cocaine in "cookie" form, one hundred fourteen grams of compressed powder cocaine, one-half of a gram of powder cocaine, and five rocks of crack cocaine. In total, the bedroom contained 182.5 grams of cocaine, excluding the relatively small weight of the five crack rocks. Some of the cocaine was found in plain view, while the remainder was found in a chest of drawers containing men's clothing. A .22 caliber long rifle also was found in a closet in the same bedroom. In addition to the cocaine and the firearm, officers found numerous items indicating that the bedroom belonged to defendant. Specifically, the officers found a Time Warner Cable receipt for installation of service, dated 30 March 2007, listing the name "Mario Bradshaw" and the address 487 Pharr Drive; a Time Warner Cable bill due on 19 May 2007 with the same name and address as the receipt; a paystub listing the name "Samario Bradshaw"; an envelope addressed to "BI" at 487 Pharr Drive; a Father's Day card; a gift card addressed to "BI" and "Daddy"; and at least two photographs of

1. Defendant was also charged with Maintaining a Dwelling Place to Keep/Store a controlled substance. Defendant was acquitted of this charge, and it is not relevant to this appeal.

defendant, one dated 15 April 2007 and another dated 13 May 2007. Pursuant to a 13 September 2007 arrest warrant, defendant was arrested on 17 October 2007 on a nearby street.

At trial, Detective Tierney testified that "BI" was an alias used by defendant. He also testified that defendant often shortened his name to "Mario." Detective Tierney had seen defendant at the Pharr Drive residence before and after the search. Two other males, defendant's brother and defendant's mother's boyfriend, were known to have lived in the residence previously, though neither of them had been there for over a year as a result of being imprisoned from 2006 to 2008 on separate convictions. According to Detective Tierney, the room looked "lived in" and, because of their value, the drugs could not have been left by the other males before they went to prison. The State also presented evidence, through a Time Warner Cable employee, showing that the name on the cable account at 487 Pharr Drive was Mario Bradshaw, the Social Security number on the account matched defendant's, and the account was disconnected on 25 October 2007. The employee further testified that it was normal practice for Time Warner Cable employees to verify a customer's identity when dealing face to face, though he admitted that the method used could vary in each case. Finally, the State introduced evidence that defendant had previously pled guilty to felony sale of cocaine in 1998.

On 1 April 2010, defendant was convicted by a jury of possession of a firearm by a felon and trafficking in cocaine by possession. He was sentenced to an active term of thirty-five to forty-two months for trafficking in cocaine, followed by a suspended sentence of twenty to twenty-four months for possession of the firearm. The Court of Appeals majority found no error in defendant's convictions. *State v. Bradshaw*, ___ N.C. App. ___, 716 S.E.2d 440, 2011 N.C. App. LEXIS 2196 (2011) (unpublished).

The sole issue before this Court is whether the trial court erred in denying defendant's motion to dismiss the charges of possession of a firearm by a felon and trafficking in cocaine by possession. Defendant contends that the State's evidence was insufficient to support the charges and therefore the charges should not have been submitted to the jury. We disagree.

The standard of review for a motion to dismiss for insufficient evidence is well settled. "[T]he trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d

592, 594 (2009) (citing *State v. McCullers*, 341 N.C. 19, 28-29, 460 S.E.2d 163, 168 (1995). All evidence, competent or incompetent, must be considered. *State v. Allen*, 279 N.C. 406, 407, 183 S.E.2d 680, 681 (1971). "Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *Miller*, 363 N.C. at 98, 678 S.E.2d at 594 (citations omitted). In its analysis, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990) (citing *State v. Mercer*, 317 N.C. 87, 96, 343 S.E.2d 885, 890 (1986)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation and internal quotations marks omitted). "When the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted." *Miller*, 363 N.C. at 99, 678 S.E.2d at 594 (citation omitted). "However, so long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence." *Id.* (citation and internal quotation marks omitted); *see also State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002) (stating that the evidence need not "rule out every hypothesis of innocence" (citations and quotations marks omitted)). "The test for sufficiency of the evidence is the same whether the evidence is direct, circumstantial or both." *Lynch*, 327 N.C. at 216, 393 S.E.2d at 814 (citation omitted).

Both of defendant's convictions involve the issue of possession. Because the firearm and drugs alleged to belong to defendant were found in the same bedroom, we may analyze both charges concurrently. To convict defendant of possession of a firearm by a felon the state must prove that defendant (1) was previously convicted of a felony and (2) subsequently possessed a firearm. N.C.G.S. § 14-415.1(a) (2011). To convict defendant of trafficking in cocaine, the State must prove that he "possesse[d] 28 grams or more of cocaine." *Id.* § 90-95(h)(3) (2011). The State's undisputed evidence shows that defendant was previously convicted of a felony, that a firearm was found in the bedroom closet, and that more than twenty-eight grams of cocaine were found in the bedroom. As a result, the only remaining issue is whether the State's evidence supports an inference that defendant possessed the firearm and cocaine.

It is well established that possession may be actual or constructive. *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986). Here,

the State proceeded on the theory that defendant constructively possessed the firearm and cocaine.

> A defendant constructively possesses contraband when he or she has "the intent and capability to maintain control and dominion over" it. *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986). The defendant may have the power to control either alone or jointly with others. *State v. Fuqua*, 234 N.C. 168, 170-71, 66 S.E.2d 667, 668 (1951). Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession. *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001).

Miller, 363 N.C. at 99, 678 S.E.2d at 594. The State concedes that defendant's control of the bedroom in which the cocaine and firearm were found was nonexclusive. Therefore, to have the charges submitted to a jury, the State must have introduced evidence of other incriminating circumstances sufficient to support a reasonable inference that defendant constructively possessed the contraband found in the room. *See id.* This inquiry is necessarily fact specific; each case will "turn on the specific facts presented," and no two cases will be exactly alike. *Id.*

"[T]his Court [has] considered a broad range of other incriminating circumstances" to determine whether an inference of constructive possession was appropriate when a defendant exercised nonexclusive control of contraband. *State v. McNeil*, 359 N.C. 800, 812, 617 S.E.2d 271, 279 (2005). Two of the most common factors are "the defendant's proximity to the contraband and indicia of the defendant's control over the place where the contraband is found." *Miller*, 363 N.C. at 100, 678 S.E.2d at 595.

While the defendant's proximity to the contraband is one factor to be considered, this Court has found adequate evidence of constructive possession when a defendant was absent at the time of the search. For example, in *State v. Baxter*, 285 N.C. 735, 208 S.E.2d 696 (1974), the defendant was absent during a search of an apartment in which the defendant and his wife had lived alone for about three years. *Id.* at 736, 208 S.E.2d at 697. In the apartment's bedroom, officers found marijuana in a dresser drawer containing men's and women's clothing and in the pocket of a man's coat hanging in a closet. *Id.* at 736-37, 208 S.E.2d at 697. Officers had not seen the defendant at the apartment during the preceding week. *Id.* at 736, 208

S.E.2d at 697. Though the defendant's wife was the only person present at the time of the search, this Court held that there was sufficient evidence that the defendant, who resided at the apartment with his wife, constructively possessed the contraband. *Id.* at 737-38, 208 S.E.2d at 697-98. Similarly, in *State v. Allen* we again found sufficient evidence of constructive possession when the defendant was absent at the time of the search. 279 N.C. at 408, 412, 183 S.E.2d at 682, 684-85. There, officers found heroin in a bedroom containing an Army identification card and personal papers with the defendant's name on them. *Id.* at 408, 412, 183 S.E.2d at 682, 684. In addition, the house's utilities were in the defendant's name and a witness testified that the defendant had told him where the heroin was located. *Id.* In that case, this Court found sufficient evidence to support a jury's finding that the defendant exercised dominion and control over the contraband, even though he was absent and three other individuals were present at the time of the search, and therefore upheld the trial court's denial of the defendant's motion for nonsuit. *Id.* at 408, 412, 183 S.E.2d at 682, 684-85.

In contrast, this Court has found insufficient evidence to withstand a motion to dismiss when the State failed to show "other incriminating circumstances linking" the defendant to the contraband. *State v. McLaurin*, 320 N.C. 143, 147, 357 S.E.2d 636, 638-39 (1987). In *McLaurin*, officers found contraband scattered throughout a residence, which officers had seen two adult males enter and leave shortly before the search. *Id.* at 144-45, 357 S.E.2d at 637. The female defendant gave the address of the residence as her own, and officers found an identification card bearing her name. *Id.* at 145, 357 S.E.2d at 637. While the defendant clearly exercised control over the residence, her control was nonexclusive. *Id.* at 146, 357 S.E.2d at 638. The Court held that, "because there was no evidence of other incriminating circumstances linking her to [the contraband], her control was insufficiently substantial to support a conclusion of her possession of the seized paraphernalia." *Id.* at 147, 357 S.E.2d at 638. In other words, no evidence linked the defendant to the contraband, which any of the residence's occupants could have possessed separately and exclusively from her. This Court also determined that the evidence in *State v. Finney*, 290 N.C. 755, 228 S.E.2d 433 (1976), did not sufficiently link the defendant to the contraband in question. In *Finney*, the evidence showed that the defendant had sublet his apartment and had not been present there for at least the previous forty-four days. *Id.* at 759-60, 228 S.E.2d at 435-36. Another man was living in the residence at the time of the search, and only one bedroom con-

tained a bed. *Id*. at 755-56, 228 S.E.2d at 433-34. The other bedroom appeared to be abandoned, containing a number of items but no bed, and, in fact, the man who was living at the residence on that date arrived with a key during the search. *Id*. at 756, 759, 228 S.E.2d at 434, 435. The other man testified that all the contraband belonged to him, not to the defendant. *Id*. at 756, 759, 228 S.E.2d at 434, 436. This Court found the evidence insufficient to support the charge against the defendant because "[a]ll the State has shown is that defendant Finney was in the apartment some 44 days before the search and that his name appeared on the lease at the time of the search." *Id*. at 760, 228 S.E.2d at 436. Thus, without evidence sufficiently linking a defendant to the contraband, a motion to dismiss should be granted.

Here, because defendant was absent at the time of the search, the State was required to present evidence of his nonexclusive control of the premises where the contraband was found, as well as evidence of other incriminating circumstances linking him to the contraband. The State introduced substantial evidence indicating that defendant lived in the bedroom at 487 Pharr Drive in which the cocaine and firearm were found and that he exercised dominion and control over the contraband found therein. The bedroom contained a receipt dated 30 March 2007 from Time Warner Cable for installation, listing defendant's name and the address of the residence. There also was a bill from Time Warner Cable, with defendant's name and the address of the residence on it, due on 19 May 2007, just one month before the 19 June 2007 search. Defendant's name and Social Security number were listed on the account. Those services were disconnected on 25 October 2007, shortly after defendant was arrested. Officers also found a paystub with defendant's name on it. In addition, the bedroom contained an envelope addressed to "BI," a known alias for defendant, with a Father's Day card and a gift card addressed to "BI" and "Daddy." Significantly, in 2007 Father's Day fell on June 17, just two days before the search warrant was executed. In the bedroom, officers also found two recent photographs of defendant. Detective Tierney testified that the room looked lived in and contained men's clothing, but the two other males known to have lived at the residence had been in prison for over a year. Detective Tierney also testified that he had seen defendant at the residence, his mother's house, both before and after the search. The cocaine was found throughout this bedroom—in plain view and in a chest of drawers containing men's clothing. The firearm was found in a closet in the bedroom. When defendant finally was arrested several months later, he was approximately fifty to one hundred yards from the residence and had

cocaine in his possession. As in *Baxter* and *Allen*, all this evidence, when viewed in the light most favorable to the State, supports a reasonable inference that defendant exercised dominion and control over the left front bedroom at 487 Pharr Drive and the 182.5 grams of cocaine and firearm found therein.

Rather than merely raising a suspicion that defendant could have possessed the contraband, the State's evidence allowed the jury to reasonably infer a link between defendant and the contraband. Whereas evidence showing a defendant's presence "some 44 days before the search" is insufficient, *Finney*, 290 N.C. at 760, 228 S.E.2d at 436, evidence placing the defendant in the left front bedroom within two days of the search provides a sufficient link between defendant and the contraband to survive a motion to dismiss. Unlike in *Finney*, in which another man was currently living in the residence and only one bedroom contained a bed, the defendant here had been seen at the residence—his mother's house—before and after the search, and the other males with apparently unrestricted access to the residence were in prison. In a similar manner, this case is unlike *McLaurin*, in which two adult males had entered and left the residence shortly before the search and there was no evidence linking the female defendant to the contraband, which was found throughout the residence. 320 N.C. at 144-46, 357 S.E.2d at 637-38. Instead, defendant here was charged only with the items found in the left front bedroom, the contents of which indicated that he alone resided there.

Because there was sufficient evidence for the trier of fact to reach a reasonable inference that defendant constructively possessed the cocaine and firearm, the motion to dismiss was properly denied and the ultimate question of defendant's guilt or innocence became one for the jury. The jury, in fact, drew that reasonable inference.

For the foregoing reasons, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice HUDSON dissenting.

In *State v. Miller*, 363 N.C. 96, 678 S.E.2d 592 (2009), I joined the dissent because I agreed that the State had failed to present sufficient evidence of the defendant's constructive possession of cocaine. Here I see even less. Accordingly, I respectfully dissent.

"Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." *Miller*, *id.* at 99, 678 S.E.2d at 594 (citation omitted). As in *Miller*, defendant here did not have exclusive control over the place in which the contraband was found, and the case turns on whether the State presented sufficient evidence of "other incriminating circumstances."

In *Miller* the majority concluded that the defendant constructively possessed cocaine that was located near him in a bedroom. As noted by Justice Timmons-Goodson in her dissenting opinion, there were only two "other incriminating circumstances" that led the majority to find constructive possession: "(1) defendant's proximity to the cocaine; and (2) the presence of defendant's birth certificate and identification card on top of a television stand." *Id.* at 111, 678 S.E.2d at 601 (Timmons-Goodson, J., dissenting). Here, by contrast, defendant was not present when the contraband was found by the police.

The majority cites to *State v. Baxter*, 285 N.C. 735, 208 S.E.2d 696 (1974), and *State v. Allen*, 279 N.C. 406, 183 S.E.2d 680 (1971), for the proposition that a defendant need not be present to establish constructive possession, even when a defendant is not in exclusive control of the location of the contraband. These cases also support the proposition that we require more when the defendant is not present. "A person is in constructive possession of a thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing." *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986) (citation omitted). In my view, the State has failed to make that showing here.

In *Baxter* this Court found constructive possession of contraband by a defendant husband who lived in a house with his wife and no one else. 285 N.C. at 737, 208 S.E.2d at 697. There, even though defendant was not present at the time of the search, the contraband was found under male clothing and in a man's jacket. *Id.* In addition, evidence showed that the defendant was living at the house. *Id.* In *Allen* we found sufficient evidence of other incriminating circumstances when a defendant was not present because the defendant's government I.D. card was found where the contraband was found, the utilities for the house were in the defendant's name, and a third party identified and connected defendant to the drugs. 279 N.C. at 412, 183 S.E.2d at 684.

Here we have no similar indicia of control or dominion over the premises or the contraband. First, the State was not able to establish that defendant was even living at the house at the time of the search. Evidence showed that the house belonged to defendant's mother. While the officer testified that he recalled seeing defendant at the house before and after the search, he could not state with specificity when that occurred. Other evidence showed that other men had lived at the house at other times. The police did find some papers with defendant's name (or alias) on them, which is consistent with defendant having been in the house at some point, but not much more. They found a cable bill with his name on it, along with a partial paystub, some photos of defendant, and cards apparently addressed to defendant. The majority finds constructive possession based on these personal papers. However, no government-issued I.D. was found. Defendant was not known to reside at the house. The utilities were not listed in defendant's name. And no third party tied defendant to the drugs or firearm. Even if the papers found here can give rise to an inference that defendant had been present in the house, I see nothing to suggest that he exercised control or dominion over the premises or contraband at the time of the search.

As in *Miller*, I conclude the evidence here points only to a mere suspicion of defendant's guilt.

> If the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion for nonsuit should be allowed. . . . This is true even though the suspicion so aroused by the evidence is strong."

State v. LeDuc, 306 N.C. 62, 75, 291 S.E.2d 607, 615 (1982) (alteration in the original) (citation omitted), *overruled in part on other grounds by State v. Childress*, 321 N.C. 226, 231-32, 362 S.E.2d 263, 267 (1987). When a defendant is not present at the seizure of the contraband, I would require, as we have stated in the past, other incriminating circumstances to establish that the defendant had "the intent and capability to maintain control and dominion over" the contraband. *See Beaver*, 317 N.C. at 648, 346 S.E.2d at 480. Therefore, I respectfully dissent.

Justice TIMMONS-GOODSON joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. RODNEY LEE MOORE

No. 524PA11

(Filed 14 June 2012)

1. Constitutional Law— right to remain silent—officer's testimony of defendant's exercise of his right—plain error review

The Court of Appeals properly concluded in a misdemeanor sexual battery case that there was no plain error when a State's witness testified that defendant exercised his right to remain silent. The prosecutor did not emphasize, capitalize on, or directly elicit the officer's prohibited responses; the prosecutor did not cross-examine defendant about his silence; the jury heard the testimony of all witnesses, including defendant; and the evidence against defendant was substantial and corroborated by the witnesses.

2. Constitutional Law— right to remain silent—officer's testimony of defendant's pre-arrest silence

There was no error in a misdemeanor sexual battery case in the admission of an officer's testimony regarding defendant's alleged pre-arrest silence. The prosecutor's questions established the scope of defendant's voluntary conversation with the officer. Further, the officer's testimony did not imply any refusal to speak from which any adverse inference of guilt could arise.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, —— N.C. App. ——, 718 S.E.2d 423 (2011), finding no error in defendant's trial that resulted in a judgment entered on 23 September 2009 by Judge J.B. Allen, Jr. in Superior Court, Alamance County, but vacating the trial court's order requiring that defendant register as a sex offender and remanding the case for a new sentencing hearing. Heard in the Supreme Court on 8 May 2012.

Roy Cooper, *Attorney General*, *by Caroline Farmer*, *Deputy Director*, *N.C. Department of Justice*, *for the State.*

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

PARKER, Chief Justice.

The issue in this case is whether the Court of Appeals erred by holding no plain error when a State's witness testified that defendant exercised his right to remain silent. For the reasons stated herein, we affirm the decision of the Court of Appeals.

Defendant, then forty-two years old, was charged in an arrest warrant on 2 February 2009 with committing a misdemeanor sexual battery under N.C.G.S. § 14-27.5A(a). T.B., the victim, was sixteen years old at the time.[1] Defendant was tried and found guilty in district court and appealed to superior court, where a jury found him guilty. Defendant was sentenced to one hundred fifty days' imprisonment and ordered to register as a sex offender for thirty years after his release from prison.

The evidence at trial tended to show the following. In 2009, defendant frequently visited his sister, Tanya Farrish, at her house in Burlington. Tanya had a teenage son named Terrance and was related through marriage to T.B.'s mother, Teia. T.B. and Terrance were cousins, good friends, and the same age, went to the same high school, and regularly spent time at each other's houses.

After school on 2 February 2009, T.B. went to the Farrish house with Terrance and began watching television in Terrance's bedroom. Terrance's bedroom was located directly across a narrow hallway from the living room and had a door that would not fully close or lock. No one else was at home. Sometime later that afternoon, Tanya Farrish, defendant, and three other adults came to the Farrish house and started watching television in the living room.

T.B. continued to watch television alone in Terrance's bedroom while Terrance performed chores in the kitchen. T.B. testified that defendant entered Terrance's bedroom, said "I heard that you wanted me," pushed her down on the bed, and got on top of her in a straddling position. According to T.B., defendant used one hand to hold T.B.'s hands behind her head, used his other hand to feel up and down her clothed body, including her breasts and "private area," and pressed his pelvis up against T.B.'s so that she could feel his penis through his jeans. T.B. struggled and pleaded with him to get off her. Defendant left T.B. alone upon hearing someone at the front door. She testified that the attack lasted approximately two to three minutes, but could have been shorter, and that defendant left the Farrish house immediately. T.B. smelled a strong odor of alcohol on defendant's breath.

1. A pseudonym is used to protect the identity of the minor victim.

T.B. testified that after defendant left, she got off the bed, went outside, and telephoned a friend for a ride home. T.B. told Terrance what had happened; Terrance texted T.B.'s mother about the incident. T.B. discussed the assault with her mother later that evening. When T.B.'s mother attempted to speak with defendant on the telephone, he hung up on her. Terrance and his mother, who also learned of the incident from T.B. and her mother, called defendant on the telephone and asked him why he assaulted T.B. Defendant denied the allegations. T.B. and her mother then went to the Burlington police station and spoke with Officer Doug Murphy.

The State called Officer Murphy to testify at trial as part of the State's case-in-chief. He testified that T.B. told him that defendant had thrown her down on the bed and "rubbed" her clothed body earlier that evening. Later, at about 8:45 p.m., defendant voluntarily came to the police station at another officer's request. Defendant was told that he was not under arrest and that he could leave at any time. Defendant denied assaulting T.B. and said that he went into Terrance's bedroom because Terrance had told him T.B. wanted marijuana from defendant. The prosecutor asked Officer Murphy if defendant told him "anything else about [defendant's] allegations that [T.B.] had asked for marijuana at the time, anymore, did [defendant] elaborate anymore on that?" Officer Murphy answered, "[N]o." Officer Murphy testified that he smelled alcohol on defendant's breath. After approximately twenty minutes, Officer Murphy released defendant.

At about 11:00 p.m. that same evening, Officer Murphy went to defendant's house, arrested him, and then read him his *Miranda* rights. Defendant exercised his constitutional right to silence by refusing to speak to Officer Murphy.

At trial, during the State's direct examination, Officer Murphy testified about defendant's arrest as follows:

> Q. And did you arrest [defendant] thereafter?
>
> A. Yes. I went to [defendant's] residence . . . and I took him into custody. Once he was in custody, I read him his Miranda Rights, but he refused to talk about the case at that time.
>
> Q. Have you ever spoken to the defendant or any of the other parties in this case since that time?
>
> A. No, I have not.

Defendant's evidence tended to show the following. Terrance Farrish testified that on the date in question, T.B. told him "to tell [defendant] to come" into the bedroom to see her. Terrance then relayed the message to defendant. When defendant walked into the bedroom to see what T.B. wanted, Terrance sat down in a chair in the living room near the door to his bedroom. Terrance testified that defendant was in the bedroom for "six seconds, at the most," and then came out of the bedroom, went into the living room, said, "I ain't buying that girl no blunt," and sat down.

Tanya Farrish testified that defendant went into Terrance's bedroom after being asked to do so. Tanya was sitting in the living room and could see the back of defendant's pants leg through the crack in the door while he was in the bedroom. Tanya never saw defendant get far from the doorway, but she did not watch him the entire time he was in the bedroom. Tanya testified that defendant was in the bedroom "less than a minute" and upon emerging from the bedroom said that T.B. "wanted for him to buy her a blunt."

Defendant testified on his own behalf. He acknowledged that he was at the Farrish house on 2 February and testified that Terrance told him that T.B. wanted to see him in the bedroom. Defendant testified that he entered the bedroom, stood at the doorway, and asked T.B., "[W]hat did she want?" Defendant declared that T.B. asked for money to buy a blunt, but he refused, left the room, and told the adults in the living room, "I'm not going to buy her a blunt." Defendant testified that the entire encounter lasted ten seconds at the most.

After his conviction defendant gave timely notice of appeal to the Court of Appeals. On appeal, defendant argued several issues, including that the trial court committed plain error by admitting Officer Murphy's testimony referring to defendant's exercise of his right to remain silent and that the trial court erroneously ordered thirty years of sex offender registration upon defendant's release from imprisonment.

The Court of Appeals found either no error or no reversible error on all issues relevant to the determination of guilt, but it vacated the trial court's order requiring defendant to register as a sex offender and remanded for a new sentencing hearing. *State v. Moore*, —— N.C. App. ——, 718 S.E.2d 423, 2011 WL 5148671, at *4, *6, *8-9, *11 (2011). The court below recognized that the right to remain silent is protected by the Fifth Amendment and is incorporated by the Fourteenth Amendment. *Moore*, 2011 WL 5148671, at *7 (citing *State*

v. Ward, 354 N.C. 231, 250, 555 S.E.2d 251, 264 (2001)). The Court of Appeals also recognized that "[a] defendant's post-arrest, post-*Miranda* warnings silence may not be used for any purpose." *Id.* (citing, *inter alia*, *Doyle v. Ohio*, 426 U.S. 610, 619, 49 L. Ed. 2d 91, 98 (1976)). The court then analogized to *State v. Mendoza*, 206 N.C. App. 391, 698 S.E.2d 170 (2010) (concluding that the State's questioning about the defendant's silence did not rise to the level of plain error) in determining that admission of Officer Murphy's statements was not plain error. 2011 WL 5148671, at *7-8. The Court of Appeals reasoned that since the error in the instant case was less prejudicial than the error in *Mendoza*, the error here also did not amount to plain error. *Id.* The Court of Appeals noted distinguishing factors rendering the inappropriately admitted evidence in this case less susceptible to a finding of plain error than the error committed in *Mendoza*. *Id.*

[1] Before this Court defendant argues that the admission as substantive evidence of Officer Murphy's testimony referring to defendant's post-*Miranda* exercise of his constitutional right to remain silent was plain error entitling defendant to a new trial. We agree that admission of the post-*Miranda* testimony was error, but we disagree that this error amounted to plain error.

A criminal defendant's right to remain silent is guaranteed under the Fifth Amendment to the United States Constitution and is made applicable to the states by the Fourteenth Amendment. *Ward*, 354 N.C. at 250, 555 S.E.2d at 264 (citing *Griffin v. California*, 380 U.S. 609, 14 L. Ed. 2d 106 (1965)). "We have consistently held that the State may not introduce evidence that a defendant exercised his [F]ifth [A]mendment right to remain silent." *State v. Ladd*, 308 N.C. 272, 283, 302 S.E.2d 164, 171 (1983) (citing *State v. McCall*, 286 N.C. 472, 212 S.E.2d 132 (1975), and *State v. Castor*, 285 N.C. 286, 204 S.E.2d 848 (1974)). If a defendant has been given his *Miranda* warnings, "his silence may not be used against him." *McCall*, 286 N.C. at 484, 212 S.E.2d at 139 (citing *State v. Fuller*, 270 N.C. 710, 155 S.E.2d 286 (1967), and *State v. Moore*, 262 N.C. 431, 437, 137 S.E.2d 812, 816 (1964)) (concluding that the trial court erred in admitting a law enforcement officer's testimony that the defendant exercised his right to remain silent and ordering a new trial). The rationale underlying this rule is that "[t]he value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." *Grunewald v. United States*, 353 U.S. 391, 425, 1 L. Ed. 2d 931, 955 (1957) (Black, J., Warren, C.J., Douglas & Brennan, JJ., concurring).

On direct examination Officer Murphy testified that after he read defendant his *Miranda* rights, defendant "refused to talk about the case at that time." Officer Murphy further answered that he had not spoken to "defendant or any of the other parties in this case since that time." This testimony referred to defendant's exercise of his right to silence, and its admission by the trial judge was error.

Noting that the comments on defendant's exercise of his right to remain silent were not made by the prosecutor, nor were they the result of a question by the prosecutor designed to elicit a comment on defendant's exercise of his right to silence, the State argues that the admission of the post-*Miranda* statements was not error. We disagree. Except in certain limited circumstances, "any comment upon the exercise of [the right to remain silent], nothing else appearing, [is] impermissible." *State v. Lane*, 301 N.C. 382, 384, 271 S.E.2d 273, 275 (1980) (citing *Castor*, 285 N.C. 286, 204 S.E.2d 848) (noting that there is an exception for impeachment by prior inconsistent statements). An improper adverse inference of guilt from a defendant's exercise of his right to remain silent cannot be made, regardless of who comments on it. *See*, *e.g.*, *United States v. Patterson*, 819 F.2d 1495, 1506 (9th Cir. 1987) (stating that it was improper for a codefendant's attorney to comment on the defendant's exercise of a Fifth Amendment right); *Payne v. State*, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) ("[A] co-defendant's counsel is held to the same standard because the importance of this protection is [to prevent] the effect [that] an indirect reference may have upon the jury regardless of whose counsel made the reference."). The Fifth Amendment "must be accorded liberal construction in favor of the right it was intended to secure." *Hoffman v. United States*, 341 U.S. 479, 486, 95 L. Ed. 1118, 1124 (1951) (citing *Counselman v. Hitchcock*, 142 U.S. 547, 562, 35 L. Ed. 1110, 1114 (1892), *superseded by statute*, Compulsory Testimony Act of 1893, Act of Feb. 11, 1893, 27 Stat. 443, 49 U.S.C. § 46, *as recognized in Kastigar v. United States*, 406 U.S. 441, 32 L. Ed. 2d 212 (1972), and *Arndstein v. McCarthy*, 254 U.S. 71, 72-73, 65 L. Ed. 138, 142 (1920)). Consideration of the way in which the evidence was presented or the prosecutor's use of the evidence is relevant to whether admission of the testimony at issue constituted plain error, but not to the threshold question of whether admission of the testimony was error.

Having determined that admission of the evidence was error, we turn to defendant's next argument that he is entitled to a new trial on account of the erroneously admitted testimony. Again we disagree. When, as in this case, a defendant fails to object to the admission of

the testimony at trial, we review only for plain error. N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection . . . may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error."); *State v. Lawrence*, ___ N.C. ___, ___, 723 S.E.2d 326, 333 (2012) (citing *State v. Melvin*, 364 N.C. 589, 593-94, 707 S.E.2d 629, 632-33 (2010)); *State v. Odom*, 307 N.C. 655, 659-60, 300 S.E.2d 375, 378 (1983).

Whether defendant is entitled to a new trial is to be determined by application of our plain error rule. Our plain error rule

> is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, 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.

Odom, 307 N.C. at 660, 300 S.E.2d at 378 (internal quotation marks omitted) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnotes omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). For unpreserved evidentiary error to be plain error, the defendant has the burden to show that "after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Lawrence*, ___ N.C. at ___, 723 S.E.2d at 334 (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378, and citing *State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986)).

In this case the admission of Officer Murphy's statements regarding defendant's post-*Miranda* exercise of his right to remain silent was not plain error. First, the prosecutor did not emphasize, capitalize on, or directly elicit Officer Murphy's prohibited responses. S*ee State v. Freeland*, 316 N.C. 13, 19-20, 340 S.E.2d 35, 38-39 (1986) (holding that the absence of an attempt by the prosecutor to directly elicit testimony or capitalize on the defendant's exercise of his Fifth Amendment rights weighed in favor of holding the error to be harmless). Officer Murphy's first statement regarding defendant's exercise of his rights was in response to the prosecutor's inquiry into whether

he arrested defendant after obtaining an arrest warrant from the magistrate. The prosecutor's question requested only a "yes" or "no" response. Officer Murphy's second statement came after an inquiry into whether he spoke to defendant or any party involved in the case after the arrest. While the wording of the question could be construed to be a reference to defendant's continued silence, the question appears likely to have been intended to establish the timeline of events and the extent of Officer Murphy's involvement in the case. In either event, the prosecutor did not emphasize or highlight defendant's exercise of his rights. Moreover, the prosecutor did not mention defendant's exercise of his rights when he cross-examined defendant or in his closing argument. That the prosecutor did not emphasize, capitalize on, or directly elicit Officer Murphy's prohibited responses militates against a finding of plain error. *See State v. Elmore*, 337 N.C. 789, 792-93, 448 S.E.2d 501, 502-03 (1994) (holding error harmless beyond a reasonable doubt where a federal agent testified that the defendant said he wanted to consult with an attorney before talking about the matter; and noting that the violation, if any, was *de minimis*, that the statement was not solicited by the prosecutor, and that the prosecutor did not cross-examine the defendant about exercising his right to remain silent, nor did he refer to the statement in closing arguments); *State v. Alexander*, 337 N.C. 182, 196, 446 S.E.2d 83, 91 (1994) (holding no plain error where the prosecutor asked a State's witness, a police officer, if the defendant spoke or talked to him, and noting that the comments were "relatively benign" and that the prosecutor did not emphasize that the defendant did not speak with law enforcement after his arrest). Here, given the brief, passing nature of the evidence in the context of the entire trial, the evidence is not likely to have " 'tilted the scales' " in the jury's determination of defend- ant's guilt or innocence. *See State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 807 (1983).

Second, the jury heard the testimony of all witnesses, including defendant. T.B. testified that defendant committed a sexual battery against her. Officer Murphy corroborated T.B.'s testimony, stating that T.B. did not waiver in her account in his interview with her and confirming the smell of alcohol on defendant's breath. Tanya Farrish testified that defendant was in Terrance's bedroom for less than a minute, which is not inconsistent with T.B.'s testimony that defendant was in the room with her for less than two or three minutes.

Defendant testified and told his version of events that he had stood in the doorway and that T.B. had asked him to buy marijuana

for her. However, on cross-examination the State impeached defendant's testimony on a number of matters, including how often he had seen T.B. prior to 2 February, the number and nature of his prior convictions carrying a sentence of more than sixty days, and his consumption of alcohol on the day of the alleged incident. The jury's role is to weigh evidence, assess witness credibility, assign probative value to the evidence and testimony, and determine what the evidence proves or fails to prove. *See*, *e.g.*, *Koury v. Follo*, 272 N.C. 366, 372-73, 158 S.E.2d 548, 554 (1968); *Brown v. Brown*, 264 N.C. 485, 488, 141 S.E.2d 875, 877 (1965) (per curiam). On the record before this Court, the jury had reason to doubt defendant's credibility and to believe T.B.'s evidence. Substantial evidence of a defendant's guilt is a factor to be considered in determining whether the error was a fundamental error rising to plain error. *See Alexander*, 337 N.C. at 196, 446 S.E.2d at 91 (considering that the evidence against the defendant was "substantial and corroborated by a number of eyewitnesses" in the Court's determination of no plain error for a Fifth Amendment violation).

Defendant also argues that the trial court's other alleged errors "compounded the plain error here." We disagree that errors can be "compounded" under plain error review. Plain error review requires the defendant to meet a heavier burden than harmless error review, which applies when the defendant objects and properly preserves an error for appellate review. *See* N.C.G.S. § 15A-1443 (2011); *Lawrence*, ___ N.C. at ___, 723 S.E.2d at 330. The purpose of the higher burden is to encourage defendants to bring errors to the trial judge's attention at the time they are made. *Cf. Odom*, 307 N.C. at 659-61, 300 S.E.2d at 378 (stating the purpose of the then-existing rule prohibiting review of certain unpreserved errors was to bring errors to the trial court's attention so that errors can be cured and new trials can be prevented). Allowing a defendant to cumulate errors when seeking plain error review undermines this purpose. We note that had defendant objected to the testimony, he would have been entitled to have it stricken and a curative instruction given by the judge. *See Freeland*, 316 N.C. at 19-20, 340 S.E.2d at 38-39 (discussing with approval the use of a cautionary instruction under remarkably similar circumstances); *McCall*, 286 N.C. at 487, 212 S.E.2d at 141 (stating that this Court has previously held that upon an improper comment on defendant's failure to testify, "the error may be cured by a withdrawal of the remark or by a statement from the court that it was improper, followed by an instruction to the jury not to consider the" accused's exercise of his Fifth Amendment rights).

In sum, the erroneous admission of Officer Murphy's testimony was not plain error. The prosecutor did not emphasize, capitalize on, or directly elicit Officer Murphy's prohibited responses; the prosecutor did not cross-examine defendant about his silence; the jury heard the testimony of all witnesses, including defendant; and the evidence against defendant was substantial and corroborated by the witnesses. For the above reasons, we hold that defendant has not carried his burden, and the admission of Officer Murphy's testimony referring to defendant's post-*Miranda* exercise of his right to remain silent, although error, was not plain error. Thus, defendant is not entitled to a new trial on this basis.

[2] Defendant also assigns error to the admission of Officer Murphy's testimony regarding defendant's alleged pre-arrest silence. According to defendant, Officer Murphy testified that defendant did not "tell [him] anything else about" and did not "elaborate anymore on" what happened on 2 February. However, when Officer Murphy's testimony is viewed in the proper context, it becomes apparent that he did not refer to any refusal to speak by defendant. The voluntary conversation referenced by Officer Murphy occurred after defendant willingly agreed to speak with law enforcement at the police station, which was approximately two hours before his arrest. Officer Murphy testified that as part of this conversation, defendant alleged that T.B. had asked him for marijuana. The prosecutor then asked Officer Murphy if defendant said "anything else about" or "elaborate[d] anymore on" those allegations. Officer Murphy responded, "No." The prosecutor's questions established the scope of defendant's voluntary conversation with Officer Murphy. Officer Murphy's testimony did not imply any refusal to speak from which any adverse inference of guilt could arise. Therefore, the admission of Officer Murphy's testimony regarding defendant's pre-arrest testimony was not error.

For the reasons stated herein, we affirm the decision of the Court of Appeals.

AFFIRMED.

STATE OF NORTH CAROLINA v. NORMA ANGELICA WILLIAMS

No. 384A11

(Filed 14 June 2012)

1. Search and Seizure— vehicular stop—reasonable suspicion to extend stop—denial of motion to suppress proper

The trial court did not err by denying defendant's motion to suppress evidence obtained from the stop of the vehicle in which she was riding. While the finding of fact that "[defendant] produced driver's licenses from the states of Arizona and Texas" was not supported by competent evidence, there was competent evidence to support the remaining challenged findings of fact. Under the totality of the circumstances, the officer had reasonable suspicion to extend the traffic stop until a canine unit arrived after his investigation of the window tint violation was complete.

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. ––, 714 S.E.2d 835 (2011), affirming a judgment entered on 3 November 2009 by Judge Christopher M. Collier in Superior Court, Iredell County. Heard in the Supreme Court on 12 March 2012.

Roy Cooper, *Attorney General*, *by J. Allen Jernigan*, *Special Deputy Attorney General*, *and Scott A. Conklin*, *Assistant Attorney General*, *for the State.*

Michele Goldman for defendant-appellant.

PARKER, Chief Justice.

The issue in this case is whether the Court of Appeals erred in affirming the trial court's denial of defendant's motion to suppress. For the reasons stated herein, we affirm the decision of the Court of Appeals.

Defendant was arrested in Iredell County, North Carolina, after sixty-five pounds of marijuana were found in an SUV in which she was traveling. Defendant was indicted under N.C.G.S. § 90-95(h)(1) for one count of trafficking in marijuana by possession and one count of trafficking in marijuana by transport. Defendant moved to suppress evidence of the recovered marijuana. After the trial court denied the motion, defendant entered into a plea agreement. Defendant reserved her right to appeal from the trial court's ruling on her motion to

suppress and then pleaded guilty to one trafficking count in exchange for the State's dismissing the second count. The trial court sentenced defendant to an active term of twenty-five to thirty months' imprisonment. Defendant gave timely notice of appeal to the Court of Appeals.

The State's evidence before the trial court at the suppression hearing tended to show the following. At 10:55 a.m. on 21 May 2008, Sergeant Randy Cass stopped an SUV traveling south on Interstate 77 for a window tint violation. Sergeant Cass directed the driver, Michelle Perez, to step to the front of his cruiser; he requested her driver's license and then asked her several questions. Perez told Sergeant Cass that the SUV belonged to defendant and that she was driving because defendant did not have a driver's license. When asked where she was coming from, Perez told Sergeant Cass that she just "flew out of Houston." Sergeant Cass told her that she was driving south on Interstate 77 and Houston was to the south. Perez was also not sure where she was going; she said that she was driving defendant so defendant could "DJ somewhere." Perez told Sergeant Cass to ask defendant where they were going because she "knows everything" and their destination was circled on defendant's map.

Sergeant Cass left the front of his cruiser and approached the SUV's passenger side to question defendant. Defendant declared that she did not own the SUV, but had arranged to purchase it from a friend. Defendant provided Sergeant Cass the SUV's registration and two state-issued identification cards from different states and with different addresses. Sergeant Cass determined that the SUV was registered to an Arkansas resident. Defendant also said that they were coming from Louisville, Kentucky, and that she was going to Club Kryptonite in Myrtle Beach, South Carolina. When asked how she knew Perez, defendant stated that she and Perez were cousins.

Sergeant Cass left defendant to ask Perez additional questions. Perez told him that she flew from Tucson, Arizona, to Houston and that she and defendant had hooked up at the airport. Perez initially said that she and defendant were cousins, but then said that they simply refer to each other as cousins because of their long-standing relationship. Sergeant Cass returned to defendant and asked her how she and Perez were cousins. Defendant first stated they were cousins on her dad's side, then said they were cousins on her grandmother's side, and finally said "that basically we grew up together." Sergeant Cass returned to Perez and asked her to have a seat inside his cruiser.

While inside the cruiser, Perez became nervous and "real fidgety." Sergeant Cass contacted a database to see if the SUV had been reported stolen and if either Perez or defendant had outstanding warrants or criminal histories. Several minutes later he learned that "everything was good." At some point while Perez was seated inside the cruiser, Sergeant Cass contacted other officers to assist with a search of the SUV. Sergeant Cass left his cruiser, returned defendant's identification cards, and then motioned for Perez to exit his cruiser. Once she exited, he handed her a warning citation for the tint violation and returned her driver's license. Sergeant Cass then asked Perez if there were any weapons, drugs, or large amounts of money inside the SUV. Perez answered, "[N]o," but declined to give consent to search the SUV. Sergeant Cass then requested that both defendant and Perez wait by his cruiser while a canine team arrived to conduct a sweep of the SUV. Once the team arrived, the drug dog alerted at the rear of the SUV, and law enforcement conducted a search, finding approximately sixty-five pounds of marijuana inside.

Sergeant Cass testified that he based his decision to search on several factors, including Perez's inability to articulate where she was coming from, "the conflict in the stories of being family," an absent third party's ownership of the SUV, and Perez's and defendant's consistency with aspects of the drug courier profile, such as the SUV's dark tinted windows and the use of an interstate highway.

At the conclusion of the evidence, the trial court made the following findings of fact:

> 1. That on May 21st, 2008 Sgt. Randy Cass with the Iredell County Sheriff's Department was working on patrol duty on Interstate 77 South here in Iredell County.
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> 2. That about 10:55 AM that he observed a white SUV with what appeared to be illegally tinted windows, at which time he initiated a traffic stop.
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> 3. Sgt. Cass approached the vehicle and spoke with the occupants briefly, then asked the driver, later identified as Perez, to step out of the vehicle.
>
> 4. The officer had Perez step to the front of his vehicle and asked where they were coming from. Perez eventually stated they were coming from Houston, Texas, even though they were traveling south on the interstate.

5. That during this conversation Perez could not articulate their destination, even in general terms, even though she was driving the vehicle. Perez further stated that she and the defendant were cousins.

6. Sgt. Cass then spoke with the passenger, later identified as Defendant Williams, who was still seated in the vehicle.

7. During this conversation Ms. Williams stated they were coming from Kentucky and headed to Club Kryptonite in Myrtle Beach.

8. When asked Williams said that Perez was her cousin and claimed a familial relationship initially, but then later stated they simply called each other cousins based on their close and long term relationship.

9. Ms. Williams produced driver's licenses from the states of Arizona and Texas and had indicated the car was owned by a friend of hers, that she intended to purchase it. The officer then at 11:04 AM told Perez that she was going to get a warning ticket, at which time she was seated in the vehicle.

10. At 11:08 he begins writing a warning ticket after calling in to check on the status of the vehicle, whether or not either the driver or the passenger had any outstanding warrants. At 11:15 the ticket was given to Perez while they were, Perez and Sgt. Cass were in front of the patrol car, and as she started to walk away the officer asked if she would answer further questions, at which time she was asked for consent to search the vehicle, to which she did not give consent.

11. At that time Sgt. Cass indicated he was going to call for a canine unit, which unit arrived at 11:28 AM and indicated positive on the car within a minute or two after arriving.

Based on these facts, the trial court concluded that Sergeant Cass had a reasonable and articulable suspicion based on the totality of the circumstances to call for the canine unit.

The trial court denied defendant's motion to suppress the marijuana, and defendant timely appealed to the Court of Appeals. *State v. Williams*, —— N.C. App. ——, ——, 714 S.E.2d 835, 837 (2011). A divided panel of the Court of Appeals affirmed the trial court, concluding that defendant's challenges to the trial court's findings of fact were either without merit or inconsequential and that Sergeant Cass had reasonable suspicion to extend the detention after Perez

received a warning for the tint violation. *Id.* at ——, 714 S.E.2d at 838-41. The dissent disagreed on all accounts. *Id.* at ——, ——, 714 S.E.2d at 842-45, 848 (McGee, J., dissenting). Defendant appeals to this Court as a matter of right based on the dissent. For the reasons stated herein, we affirm the decision of the majority below.

Before this Court defendant renews her challenge to three of the findings of fact and argues that the findings of fact do not support the trial court's conclusions of law. In evaluating the denial of a motion to suppress, the reviewing court must determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)). The trial court's findings of fact on a motion to suppress "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994) (citing *State v. Torres*, 330 N.C. 517, 523, 412 S.E.2d 20, 23 (1992), *overruled on other grounds by State v. Buchanan*, 353 N.C. 332, 340, 543 S.E.2d 823, 828 (2001); and *State v. Massey*, 316 N.C. 558, 573, 342 S.E.2d 811, 820 (1986)), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995). "Indeed, an appellate court accords great deference to the trial court in this respect because it is entrusted with the duty to hear testimony, weigh [the evidence,] and resolve any conflicts in the evidence . . . ." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619-20 (1982) (citations omitted). Conclusions of law are reviewed de novo and "are fully reviewable on appeal." *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993) (citation omitted), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

Defendant makes two challenges with respect to finding number four, which states, "[Sergeant Cass] had Perez step to the front of his vehicle and asked where they were coming from. Perez eventually stated they were coming from Houston, Texas, even though they were traveling south on the interstate." First, defendant argues that the use of the word "eventually" "inaccurately described a delay [by Perez in] providing information that she was coming from Houston" and "connotes evasiveness." We disagree. The term "eventually" fairly describes the exchange of information between Perez and Sergeant Cass in which Perez clarified where she was traveling from. When Sergeant Cass first asked Perez where she was coming from, she said that she "had just flew out of Houston." Sergeant Cass then asked her if she "flew *out* here," and she replied, "No, I flew out *to* Houston."

(emphasis added). Perez later explained that she had flown from Tucson, Arizona, to Houston. Perez's first response certainly permits the inference that she had flown from Houston to some other destination. Since Perez was driving a vehicle, Sergeant Cass understandably attempted to clarify where she was coming from most recently or right then, at which point Perez said she and defendant had driven from Houston. This evidence is competent evidence to support a finding that Perez "eventually" told Sergeant Cass that she was coming from Houston. That the word may connote evasiveness does not negate that the finding was supported by competent evidence. Defendant's argument is without merit.

Similarly, we reject defendant's second argument with respect to finding number four. Defendant argues that "[t]o the extent that . . . [the finding] misleadingly implies that Ms. Perez claimed that she was traveling directly from Houston, it is not supported by the evidence." However, Perez insisted she was coming from Houston, even after Sergeant Cass pointed out that she was driving south and that Texas was further south. When Sergeant Cass asked Perez, "[R]ight now you're coming from Houston?," she replied, "[Y]eah." Thus, competent evidence supported the trial court's finding that Perez said "they were coming from Houston, Texas, even though they were traveling south on the interstate."

Defendant also challenges finding of fact number five, which declares that during Sergeant Cass's initial conversation with Perez, she "could not articulate their destination, even in general terms, even though she was driving the vehicle." As defendant herself concedes, "Perez could not provide Sgt. Cass with the name of the city she was driving to." Sergeant Cass testified that when he asked Perez where she and defendant were going, she said "she wasn't sure." The most Perez could tell Sergeant Cass was that defendant was "going to DJ somewhere" at a location marked on a map that defendant had in her possession. Perez's response does not amount to even a general articulation of their destination. Finding number five was supported by competent evidence.

In addition, defendant challenges finding of fact number nine, which provides that "[defendant] produced driver's licenses from the states of Arizona and Texas." Although Sergeant Cass initially referred to the identification documents supplied by defendant as driver's licenses, he immediately changed the reference to identification cards. Also, the record reflects that defendant produced state-issued identification cards, not driver's licenses, from Arizona and

Texas. This finding of driver's licenses is not supported by the evidence. However, as defendant notes, this error was not outcome determinative in the Court of Appeals' analysis.

Having established that the trial court's findings of fact numbers four and five were supported by competent evidence, we now address whether defendant's constitutional rights were violated. Defendant argues that Sergeant Cass did not have reasonable suspicion to detain her after he completed his investigation of the window tint violation, and thus, her rights under the Fourth Amendment to the United States Constitution were violated. Defendant concedes that the initial stop was constitutional.

"A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Illinois v. Caballes*, 543 U.S. 405, 407, 160 L. Ed. 2d 842, 846 (2005). "After a lawful [traffic] stop, an officer may ask the detainee questions in order to obtain information confirming or dispelling the officer's suspicions." *State v. McClendon*, 350 N.C. 630, 636-37, 517 S.E.2d 128, 132-33 (1999) (citing, *inter alia*, *Berkemer v. McCarty*, 468 U.S. 420, 82 L. Ed. 2d 317 (1984)). Thus, to detain a driver beyond the scope of the traffic stop, the officer must have the driver's consent or reasonable articulable suspicion that illegal activity is afoot. *See Florida v. Royer*, 460 U.S. 491, 497-98, 75 L. Ed. 2d 229, 236 (1983) (declaring that, absent consent to a voluntary conversation or to a search, a law enforcement officer may not detain a person "even momentarily without reasonable, objective grounds for doing so"); *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968).

An officer has reasonable suspicion if a "reasonable, cautious officer, guided by his experience and training," would believe that criminal activity is afoot "based on specific and articulable facts, as well as the rational inferences from those facts." *State v. Watkins*, 337 N.C. 437, 441-42, 446 S.E.2d 67, 70 (1994) (citing *Terry*, 392 U.S. at 21-22, 20 L. Ed. 2d at 906; and *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979)). A reviewing court must consider "the totality of the circumstances—the whole picture." *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981). "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' " *United*

States v. Arvizu, 534 U.S. 266, 273, 151 L. Ed. 2d 740, 749-50 (2002) (quoting *Cortez*, 449 U.S. at 418, 66 L. Ed. 2d at 629). While something more than a mere hunch is required, the reasonable suspicion standard demands less than probable cause and considerably less than preponderance of the evidence. *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000) (citing *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)).

Examination of the trial court's findings of fact in light of these principles discloses several factors permitting inferences consistent with a reasonable suspicion in the mind of an experienced law enforcement officer who has attained the rank of Sergeant. First, Perez said she and defendant were coming from Houston, Texas, which was illogical because they were traveling south on Interstate 77, and Texas was further south. Second, defendant said they were coming from Kentucky and were traveling to Myrtle Beach. This inconsistency raises a suspicion as to the truthfulness of the statements and could cause a reasonable law enforcement officer to question why the two would travel from Houston to Myrtle Beach through Kentucky. Third, Perez could not say where they were going. Perez's inability to articulate where they were going, along with her illogical answer about driving from Houston, would permit an inference that Perez was being deliberately evasive, that she had been hired as a driver and intentionally kept uninformed, or that she had been coached as to her response if stopped. Fourth, in light of the above, defendant's effort to claim a familial relationship, followed by an admission that the two just called each other cousins based on their long-term relationship, could raise a suspicion that the alleged familial relationship was a prearranged fabrication. Finally, the SUV with illegally tinted windows was owned by a third person.

Viewed individually and in isolation, any of these facts might not support a reasonable suspicion of criminal activity. But viewed as a whole by a trained law enforcement officer who is familiar with drug trafficking and illegal activity on interstate highways, the responses were sufficient to provoke a reasonable articulable suspicion that criminal activity was afoot and to justify extending the detention until a canine unit arrived. "A determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct." *Arvizu*, 534 U.S. at 277, 151 L. Ed. 2d at 752 (citing *Wardlow*, 528 U.S. at 125, 145 L. Ed. 2d at 577); *see also Sokolow*, 490 U.S. at 9, 11, 104 L. Ed. 2d at 11, 13 (holding that factors which by themselves suggested innocent travel, considered collectively, amounted to reasonable suspicion).

Defendant cites *State v. Pearson*, 348 N.C. 272, 498 S.E.2d 599 (1998), *State v. Myles*, 188 N.C. App. 42, 654 S.E.2d 752, *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008), and *State v. Falana*, 129 N.C. App. 813, 501 S.E.2d 358 (1998), to argue that our courts have never found reasonable suspicion in a case with similar facts. Although each of those cases compares statements between the driver and the passenger, in two of them, *Myles* and *Falana*, the statements were not inconsistent. *Myles*, 188 N.C. App. at 51, 654 S.E.2d at 758 (noting that while the driver initially told the officer that he and the defendant-passenger were staying in Fayetteville for "about a week," he later said "he *may* stay longer if he found employment," which was consistent with the defendant's statement that they were "supposed to stay [in Fayetteville] for a week" (alteration in original)); *Falana*, 129 N.C. App. at 814-15, 501 S.E.2d at 359 (noting that the driver said that he and the passenger were in New Jersey for approximately three days and were returning home, and the passenger said that she and the driver were in New Jersey since Saturday or Sunday). In *Pearson* this Court held that where the defendant had been sitting in the officer's car for a period of time and had consented only to the search of his vehicle, the defendant did not consent and the officer did not have reasonable suspicion to frisk the defendant's person for weapons based on his nervousness and the inconsistent statements of the defendant and his passenger about where they had spent the previous night. 348 N.C. at 274, 276-77, 498 S.E.2d at 599-600, 601. Although nervousness was discussed in *Pearson*, 348 N.C. at 276, 498 S.E.2d at 601, *Myles*, 188 N.C. App. at 46-51, 654 S.E.2d at 755-58, and *Falana*, 129 N.C. App. at 817, 501 S.E.2d at 360, nervousness here is not a factor inasmuch as the trial court did not make a finding regarding Perez's nervousness. Thus, read in light of the totality of the circumstances, these cases are not determinative of the case under review. As Chief Justice Rehnquist noted in *Arvizu*, "To the extent that a totality of the circumstances approach may render appellate review less circumscribed by precedent than otherwise, it is the nature of the totality rule." 534 U.S. at 276, 151 L. Ed. 2d at 751.

We hold that, under the totality of the circumstances, Sergeant Cass had reasonable suspicion to extend the traffic stop after his investigation of the window tint violation was complete, and the trial court did not err in denying defendant's motion to suppress.

For the reasons stated herein, we affirm the decision of the Court of Appeals.

AFFIRMED.

STATE OF NORTH CAROLINA v. JOSE GUADALUPE SALINAS

No. 401A11

(Filed 14 June 2012)

Motor Vehicles— driving while impaired—reasonable suspicion—sufficiency of findings of fact

The superior court did not apply the correct legal standard and failed to make sufficient findings of fact to allow a reviewing court to apply the correct legal standard in a driving while impaired case. The case was remanded to the superior court to reconsider the evidence pursuant to the reasonable suspicion standard. On remand, when ruling upon a motion to suppress in a hearing held pursuant to N.C.G.S. § 15A-977, the trial court may not rely upon the allegations contained in defendant's affidavit when making findings of fact since the affidavit has a procedural rather than an evidentiary function.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 214 N.C. App. 408, 715 S.E.2d 262 (2011), reversing an order granting defendant's pretrial motion to suppress entered on 29 September 2010 by Judge Patrice A. Hinnant in Superior Court, Rockingham County, and remanding to the trial court for entry of a new suppression order. Heard in the Supreme Court on 13 March 2012.

Roy Cooper, *Attorney General*, *by Jess D. Mekeel*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Barbara S. Blackman*, *Assistant Appellate Defender*, *for defendant-appellee.*

JACKSON, Justice.

After defendant appealed his district court conviction for driving while impaired, the superior court granted defendant's motion to suppress based upon its conclusion that there was not probable cause to stop defendant's vehicle because of the contradictory testimony of the arresting officers and the allegations contained in defendant's affidavit. In this appeal, we consider whether the superior court applied the correct legal standard and made sufficient findings of fact regarding the testimony presented during the hearing. Because we hold that the superior court did not apply the correct legal standard and failed to make findings of fact sufficient to allow a reviewing

court to apply the correct legal standard, we modify and affirm the decision of the Court of Appeals majority.

At approximately 10:00 a.m. on 13 March 2009, the Reidsville Police Department received an anonymous 911 call about a small white car driving erratically in the vicinity of Way Street in Reidsville, North Carolina. During the call, the caller reported that the vehicle turned off Way Street and into a Food Lion parking lot. Officers Daniel Velasquez and Lynwood Hampshire were dispatched to the area.

Upon their arrival, the officers could not locate a small white car, so they pulled into a parking lot across the street from the Food Lion. At approximately 10:15 a.m., the officers observed a small white car matching the caller's description attempting to leave the Food Lion parking lot. The officers observed as defendant rolled the front passenger-side wheel of the vehicle over a curb and into the grass. Defendant then rolled the vehicle backwards off the curb, pulled forward to a stop sign, rolled back fifteen to twenty feet, and pulled forward again to the stop sign.

Officer Velasquez testified that defendant "made a right-hand turn onto Way Street, except he did a very wide turn and took up both lanes and part of the oncoming land [sic] to get onto Way Street." Officer Velasquez stated that "[a]lmost the entire vehicle" crossed the center line. Officer Hampshire testified that defendant's vehicle "crossed over both of the northbound lanes, crossed over the yellow line, not the complete vehicle, just the driver's side of the vehicle." After crossing the center line, defendant slowly corrected his vehicle and pulled back into the left lane. As defendant passed the location where the officers were parked, the officers pulled out behind defendant and stopped his vehicle. Both officers testified that defendant was not wearing his seat belt when he passed them. Nonetheless, Officer Hampshire stated that he decided to stop defendant "[b]ased on his driving" because he observed "signs that [defendant] was impaired or that there was something wrong with him."

After pulling over defendant, the officers approached and asked him several times to roll down his window. The pupils in defendant's "eyes were very constricted, even though it was overcast," and he appeared to have difficulty focusing since he was "[b]linking and just staring off past" Officer Velasquez. After defendant rolled down his window, Officer Hampshire observed that defendant's "actions were very slow" and "[h]is speech was very slurred." The officers also detected the "strong odor of burnt marijuana" coming from defendant's

vehicle. Officer Hampshire asked defendant if he had been smoking marijuana, and defendant responded that "he didn't smoke marijuana." When Officer Hampshire stated that he could smell marijuana, defendant admitted that he had smoked marijuana earlier that day.

Officer Hampshire asked defendant to step out of his vehicle and both officers observed that defendant "was unsteady on his feet." Officer Velasquez steadied defendant and stood next to him so that defendant "wouldn't fall over or cross into traffic." Based upon their observations, the officers believed that defendant was impaired by drugs, not alcohol. Defendant agreed to give a breath sample and blew a 0.00 on an Alco-Sensor test, which Officer Hampshire testified "further provided that the impairment that [he] saw per [defendant's] driving was from the drugs . . . and not any alcohol." Thereafter, defendant consented to a pat down by Officer Hampshire, which did not reveal any evidence. Officer Hampshire then searched defendant's vehicle. During the search, Officer Hampshire found: (1) two marijuana pipes; (2) several lighters; (3) a digital scale; (4) a green bottle cap with a hole cut in it and a metal screen on top, which Officer Hampshire testified is used for smoking narcotics; (5) a pill grinder; (6) several razor blades; (7) a small mirror; (8) rolling papers; (9) a rolling paper machine; and (10) a photograph of defendant smoking what Officer Hampshire believed to be marijuana.

Defendant was arrested and charged with driving while impaired, driving without a seat belt, and possessing drug paraphernalia. On 23 November 2009, defendant filed a motion to suppress in district court, which the district court denied. The district court then found defendant guilty of driving while impaired. The district court sentenced defendant to thirty days in jail, but suspended the sentence and placed defendant on supervised probation for twelve months. Defendant appealed to the Superior Court, Rockingham County.

On 1 July 2010, defendant filed a motion to suppress in superior court pursuant to section 15A-977 of the North Carolina General Statutes. In support of his motion, defendant submitted an affidavit as required by section 15A-977(a). In his affidavit, defendant asserted that the officers did not have probable cause to stop him because he was wearing his seat belt at the time of the stop.

On 18 August 2010, the superior court held a hearing to consider defendant's motion. Defendant did not present any evidence at the hearing. After considering the State's evidence, the superior court concluded that "there [were] discrepancies in the testimony of the

officers," and therefore "it appear[ed] that there [wa]s a question about the basis for the stop." Specifically, the superior court stated that "[o]ne officer said [defendant] was wearing his seat belt. Then he changed it to no, he wasn't wearing his seat belt. The other one said he wasn't wearing his seat belt." The superior court also noted that "[o]ne officer said that the reason that he stopped the—or what he charged the Defendant with was that he wasn't wearing the seat belt, but then he says the only reason that he stopped him was . . . because of the driving as he turned out of the lot." In addition, the superior court stated that "one officer testifie[d] that [defendant] just made a wide turn. The other one says that he went well over the double yellow line." As a result, the superior court orally granted defendant's motion to suppress, stating that "[d]efendant was arrested without probable cause and without warrant."

Thereafter, the superior court entered a written order on 29 September 2010. In its order, the court made findings of fact based in part upon defendant's affidavit. In addition, the court summarized the testimony of the officers and noted "[t]hat there were large discrepancies between the testimony of Officer Valesquez and Officer Hampshire." Specifically, the order stated that "[t]he testimony of Officers Valesquez and Hampshire contained discrepancies as to the movements of the defendant, as described by them, which goes to credibility as to the basis of the stop of the defendant from the Court's point of view." The superior court found that "the real basis for the stop [of defendant's vehicle] was an unsubstantiated report of a vehicle driving carelessly and recklessly." Based upon these findings of fact, the superior court concluded "[t]hat there was insufficient evidence for probable cause to stop and arrest the defendant." The State appealed to the Court of Appeals.

The Court of Appeals reversed and remanded in a divided opinion, concluding that the superior court erred by applying the probable cause standard instead of the reasonable suspicion standard to determine the validity of defendant's traffic stop. *State v. Salinas*, 214 N.C. App. 408, 409-10, 715 S.E.2d 262, 263-64 (2011). The majority noted that the superior court "did not make findings of fact that [would] allow [the Court of Appeals] to apply the correct legal standard on appeal" because the superior court "did *not* adopt as its own findings the substantive testimony of the [o]fficers concerning the facts surrounding the stop," but rather concluded that the officers' testimony contained inconsistencies. *Id.* at 414-15, 715 S.E.2d at 266-67. Therefore, the majority remanded "for the [superior court] to revisit the evidence pursuant to

the reasonable suspicion standard and make its ruling on the constitutionality of the stop, including receiving any additional evidence it chooses to receive in the exercise of its discretion, making any necessary credibility determinations." *Id.* at 413-14, 715 S.E.2d at 266.

The dissent agreed that the superior court applied the wrong legal standard, but disagreed that the case should be remanded for a new suppression hearing. *Id.* at 417-18, 715 S.E.2d at 268 (McCullough, J., dissenting). The dissent argued that the record contained findings of fact to which the Court of Appeals could apply the reasonable suspicion standard and that the superior court's "credibility determinations were superfluous." *Id.* at 417-20, 715 S.E.2d at 268-70. Therefore, the dissent concluded that the Court of Appeals should "review[ ] the record to determine if the actions of the police satisfied the [reasonable suspicion] standard." *Id.* at 417, 715 S.E.2d at 268. Based upon the dissent, the State appealed to this Court as of right pursuant to N.C.G.S. § 7A-30(2).

It is clear that the superior court erred by applying the probable cause standard to review defendant's traffic stop in this case. As we held in *State v. Styles*, "reasonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected." 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008). Ordinarily,

> the scope of appellate review of an order [regarding a motion to suppress] is strictly limited to determining whether the trial [court]'s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the [court]'s ultimate conclusions of law.

State v. Cooke, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Section 15A-977 of the North Carolina General Statutes sets forth the procedure for considering a motion to suppress in superior court. N.C.G.S. § 15A-977 (2011). Section 15A-977(d) states that "[i]f the motion is not determined summarily the [trial court] must make the determination after a hearing and finding of facts. Testimony at the hearing must be under oath." *Id.* § 15A-977(d). "The [trial court] must set forth in the record [its] findings of fact and conclusions of law." *Id.* § 15A-977(f). "[T]he general rule is that [the trial court] should make findings of fact to show the bases of [its] ruling." *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980). "If there is a material conflict in the evidence . . . [the trial court] *must* do so in order to resolve the con-

flict." *Id.* However, [i]f there is no material conflict in the evidence . . . it is not error to admit the challenged evidence without making specific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends." *Id.* In these situations, "the necessary findings are implied from the admission of the challenged evidence." *Id.* "Findings and conclusions are required in order that there may be a meaningful appellate review of the decision" on a motion to suppress. *State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984).

As the Court of Appeals majority noted, when the trial court fails to make findings of fact sufficient to allow the reviewing court to apply the correct legal standard, it is necessary to remand the case to the trial court. *See State v. McKinney*, 361 N.C. 53, 63-65, 637 S.E.2d 868, 875-76 (2006) (concluding that we "should afford the trial court an opportunity to evaluate the validity of the [search] warrant [that was at issue] using the appropriate legal standard" because the trial court's order contained "limited findings of fact," which made it unclear whether the trial court would have upheld the warrant's validity pursuant to the proper legal standard). Remand is necessary because it is the trial court that "is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred." *Cooke*, 306 N.C. at 134, 291 S.E.2d at 620.

In this case, the superior court did not resolve the issues of fact that arose during the hearing, but rather simply restated the officers' testimony. As a result, the superior court's order does not contain sufficient findings of fact to which this Court can apply the reasonable suspicion standard. Accordingly, this case must be remanded to the superior court so that it may reconsider the evidence pursuant to the reasonable suspicion standard. *See McKinney*, 361 N.C. at 65, 637 S.E.2d at 876.

As guidance on remand, we note that the superior court improperly relied upon the allegations presented in defendant's affidavit when making its findings of fact. Pursuant to section 15A-977 of the North Carolina General Statutes, a motion to suppress "must be accompanied by an affidavit containing facts supporting the motion. The affidavit may be based upon personal knowledge, or upon information and belief, if the source of the information and the basis for the belief are stated." N.C.G.S. § 15A-977(a). But section 15A-977 does

not state that the allegations in the affidavit may be considered as evidence by the trial court when making its findings of fact. To the contrary, we previously have stated that the affidavit required by section 15A-977(a) has a procedural, rather than an evidentiary, function. *See State v. Holloway*, 311 N.C. 573, 576-78, 319 S.E.2d 261, 264 (1984); *State v. Breeden*, 306 N.C. 533, 539, 293 S.E.2d 788, 792 (1982) ("Defendant satisfied his burden of going forward with the evidence by complying with the affidavit requirement of [N.C.]G.S. § 15A-977, at which time the burden shifted to the State to prove by a preponderance of the evidence that the evidence was admissible."), *superseded on other grounds by statute*, *N.C.G.S. § 8C-1*, *Rule 404(b) (1988)*, *as recognized in State v. Jeter*, 326 N.C. 457, 459, 389 S.E.2d 805, 806 (1990). As we noted in *Holloway*, the official commentary to section 15A-977 explains that the statute "is structured 'to produce in as many cases as possible a summary granting or denial of the motion to suppress. The defendant must file an affidavit as to the facts with his motion.' " 311 N.C. at 577, 319 S.E.2d at 264 (quoting N.C.G.S. § 15A-977 official cmt.). Read in isolation, this language could suggest that the affidavit has some evidentiary purpose; however, the Court in *Holloway* omitted the following portion of the official commentary, which states:

> [T]he State may file *an answer* denying or admitting facts alleged in the affidavit. If the motion cannot be otherwise disposed of, subsection (d) provides for a hearing at which testimony under oath will be given. Section 15A-976(c) would allow the hearing to be set for the day of the trial if this would be the time most convenient for the witnesses.

N.C.G.S § 15A-977 official cmt. (emphasis added). This portion of the official commentary recognizes that the affidavit contains only allegations, which may or may not be true; but, consistent with the statute itself, it emphasizes the role of testimony at the motion hearing.

Considered as a whole, the text of the statute and the official commentary make clear that the information presented in a section 15A-977(a) affidavit is designed to assist the trial court in determining whether defendant's allegations merit a full suppression hearing. *See id.* § 15A-977(c)(2) (stating that the trial court "may summarily deny the motion to suppress evidence if . . . [t]he affidavit does not as a matter of law support the ground alleged"). The statute does not say that the affidavit may be considered as *evidence* at that hearing. In contrast, the text of section 15A-977(d) states that the facts sup-

porting the trial court's decision to grant or deny a defendant's suppression motion will be established at the suppression hearing on the basis of "*testimony*" given "*under oath.*" *Id.* § 15A-977(d) (emphases added). In this respect, the section 15A-977(a) affidavit functions merely as a procedural prerequisite to secure the summary granting, or avoid the summary denial, of the motion to suppress.

Moreover, this interpretation comports with the views of respected criminal law commentators. According to these commentators, the trial court's "findings [of fact] must be based upon testimony given under oath. Therefore, the defendant cannot rely upon the allegations contained in the motion and affidavit at the hearing. Rather, the defendant must present live evidence that supports his claim of constitutional deprivation." Irving Joyner, *Criminal Procedure in North Carolina* § 8.10[D], at 713 (3d ed. 2005) (footnote omitted); *see also* Maitri Klinkosum, *North Carolina Criminal Defense Motions Manual* ch. 8, pt. III, § B1, at 510 (2008) ("Because the findings of fact must be based on testimony, the defendant cannot rely on the allegations contained in the motion and affidavit at the hearing."). Therefore, we hold that when ruling upon a motion to suppress in a hearing held pursuant to section 15A-977 of the North Carolina General Statutes, the trial court may not rely upon the allegations contained in the defendant's affidavit when making findings of fact.

For the foregoing reasons we modify and affirm the decision of the Court of Appeals majority and remand this case to the Court of Appeals with instructions to further remand this matter to the Superior Court, Rockingham County for additional proceedings consistent with this opinion.

MODIFIED AND AFFIRMED; REMANDED.

STATE OF NORTH CAROLINA v. MATTHEW LEE BECKELHEIMER

No. 175PA11

(Filed 14 June 2012)

1. Appeal and Error— prior acts testimony—standards of review

Different inquires with different standards of review are used on appeal when analyzing rulings concerning prior acts evidence that apply N.C.G.S. § 8C-1, Rules 404(b) and 403. When the trial court has made findings and conclusions to support its Rule 404(b) ruling, appellate review looks to whether the evidence supports the findings and whether the findings support the conclusions. The legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b) is reviewed *de novo*. The trial court's Rule 403 determination is then reviewed for abuse of discretion.

2. Evidence— prior crimes or bad acts—modus operandi—temporal proximity

The trial court did not abuse its discretion by admitting prior acts testimony in a prosecution for indecent liberties and first-degree sex offense. The alleged crimes and the 404(b) witness's testimony contained key similarities that were sufficient to support the State's theory of *modus operandi;* the incidents need not be nearly identical but need only share some unusual facts that go to a purpose other than propensity. Given the similarities in the incidents, the remoteness in time was not so significant as to render the prior acts irrelevant as evidence of *modus operandi*, and thus temporal proximity was a question of evidentiary weight to be determined by the jury.

3. Evidence— prior crimes or bad acts—probative value not outweighed by prejudicial effect

It was not an abuse of discretion in a prosecution for first-degree sexual offense and indecent liberties for the trial court to determine that the danger of unfair prejudice from the testimony of the victim's half-brother did not substantially outweigh the probative value, given the similarities between the accounts of the victim and half-brother and the trial judge's careful handling of the process.

On discretionary review pursuant to N.C.G.S. § 7A 31 of a unanimous decision of the Court of Appeals, —– N.C. App. ——, 712 S.E.2d

216 (2011), reversing judgments entered on 7 August 2009 by Judge D. Jack Hooks, Jr. in Superior Court, Chatham County, and granting defendant a new trial. Heard in the Supreme Court on 7 May 2012.

Roy Cooper, Attorney General, by Anne M. Middleton, Assistant Attorney General, for the State-appellant.

Thomas R. Sallenger for defendant-appellee.

HUDSON, Justice.

Here we address whether evidence of prior acts was properly admitted against defendant under Rule 404(b). We conclude that the trial court, after carefully evaluating the evidence, correctly ruled that the prior acts had sufficient similarity and temporal proximity to those alleged in the charged crimes. Therefore, we reverse the Court of Appeals.

Defendant, who was twenty-seven years old at the time of the alleged offenses, was indicted in June 2008 for three counts of indecent liberties with a child and in June 2009 for one count of first-degree sexual offense. The alleged victim was defendant's eleven-year-old male cousin. At trial he testified that defendant had invited him into defendant's bedroom to play video games. Defendant then climbed on top of the victim, but pretended to be asleep. He placed his hands in the victim's pants, then unzipped the victim's pants and performed oral sex on him while holding him down. The victim testified that on at least two prior occasions, defendant had placed his hands on the victim's genital area outside of his clothes while pretending to be asleep.

The State informed defendant that it expected to call the victim's half-brother to the stand to offer evidence of prior acts under Rule 404(b). Defendant filed a motion *in limine* seeking to exclude the testimony of the 404(b) witness. The trial judge conducted a voir dire hearing and listened to the proferred testimony outside the presence of the jury. The trial court then made findings of fact and conclusions of law on the similarity and temporal proximity of the proferred testimony to the evidence in this case. Specifically, the trial court found as fact that "one of the acts occurred in the bedroom in the bed," "that it was with a younger child," "that the age range of that younger child was close to the age range of the alleged victim in this case," and that the evidence was offered in part to show "that there existed in the mind of the defendant a plan, scheme, system or design." The trial court concluded that "as to the acts which allegedly occurred

within the bedroom, that there is appropriate similarity for the admission" of the evidence. On the issue of temporal proximity, the trial judge noted that the alleged incident occurred "ten to 12 years ago," but concluded that "given the similarities, particularly the location of the occurrence, how the occurrences were brought about, and the age range of each of the alleged victims at the time of the acts which occurred in the bedroom, that temporal proximity is reasonable."

The judge excluded testimony about one incident that did not take place in the bedroom because that event did not bear sufficient similarity to the alleged crime, but he allowed the rest of the testimony and gave a limiting instruction to the jury regarding the 404(b) evidence.

Toward the end of its case, the State called the 404(b) witness to the stand. The witness, then twenty-four years old, testified that when he was younger than thirteen years old, defendant had performed various sexual acts on him. He testified that defendant, who is four and one-half years older than he, and he would play video games together and spend time in defendant's bedroom. The witness described a series of incidents during which defendant first touched the witness's genital area outside of his clothes while pretending to be asleep, then proceeded to reach inside his pants to touch his genitals, then performed oral sex on him. The witness also related an incident in which he performed oral sex on defendant in an effort to stop defendant from anally penetrating him digitally.

Testimony from a DSS investigator and defendant established that defendant spent almost all his time either at home or at work. The only socializing defendant apparently did was to "hang out with people at work." Outside of work he "tinker[ed] with computers," "watch[ed] action adventure and fantasy movies and pretty much stay[ed] to [him]self."

Defendant's evidence consisted entirely of his own testimony. He denied improper activity with either of the boys, and expressed bewilderment as to why they would say such things.

The jury convicted defendant, who was sentenced to 192 to 240 months of imprisonment for the first-degree sexual offense, plus a consolidated concurrent term of 16 to 20 months for the indecent liberties convictions. Defendant appealed based on the admission of the 404(b) evidence and the denial of his motions to dismiss. The Court of Appeals determined in a unanimous opinion that the acts described in the half-brother's testimony were not sufficiently similar to the alleged crimes to be admitted under Rule 404(b). *State v.*

Beckelheimer, —— N.C. App. ——, ——, 712 S.E.2d 216, 220 (2011). That court therefore reversed the convictions and ordered a new trial without addressing defendant's additional contentions regarding the denial of his motions to dismiss. *Id.* at ——, 712 S.E.2d at 221. The State appealed, and we now reverse.

[1] We first address the appropriate standard of review for a trial court's decision to admit evidence under Rule 404(b). The Court of Appeals has consistently applied an abuse of discretion standard in evaluating the admission of evidence under Rules 404(b) and 403. *See*, *e.g.*, *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907 (stating that "[w]e review a trial court's determination to admit evidence under N.C. R. Evid. 404(b) and 403, for an abuse of discretion" (citations omitted)), *appeal dismissed and disc. rev. denied*, 360 N.C. 653, 637 S.E.2d 192 (2006). Though this Court has not used the term de novo to describe its own review of 404(b) evidence, we have consistently engaged in a fact-based inquiry under Rule 404(b) while applying an abuse of discretion standard to the subsequent balancing of probative value and unfair prejudice under Rule 403. *See*, *e.g.*, *State v. Riddick*, 316 N.C. 127, 133-36, 340 S.E.2d 422, 426-28 (1986). For the purpose of clarity, we now explicitly hold that when analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, as it did here, we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

[2] Having explained the appropriate process and standards of review, we now review the admission of the 404(b) testimony de novo. Rule 404(b) is "a clear general rule of *inclusion*." *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990). The rule lists numerous purposes for which evidence of prior acts may be admitted, including "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C.G.S. § 8C-1, Rule 404(b) (2011). This list "is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53 (citation omitted), *cert. denied*, 516 U.S. 994, 116 S. Ct. 530 (1995). In addition, "this Court has been markedly liberal in admitting evidence of similar sex offenses by a defendant."

State v. Bagley, 321 N.C. 201, 207, 362 S.E.2d 244, 247 (1987) (citation omitted), *cert. denied*, 485 U.S. 1036, 108 S. Ct. 1598 (1988). Here the State articulated (among others) the purpose of showing modus operandi, a purpose we have recognized as permissible in other cases. *See, e.g.*, *Bagley*, 321 N.C. at 207-08, 362 S.E.2d at 248.

Though it is a rule of inclusion, Rule 404(b) is still "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). Prior acts are sufficiently similar "if there are some unusual facts present in both crimes" that would indicate that the same person committed them. *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890-91 (1991) (citations and internal quotation marks omitted). We do not require that the similarities "rise to the level of the unique and bizarre." *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593, *cert. denied*, 488 U.S. 900, 109 S. Ct. 247 (1988).

Here the alleged crimes and the 404(b) witness's testimony contained key similarities. The trial court found that "the age range of [the 404(b) witness] was close to the age range of the alleged victim," a finding supported by the evidence: the victim was an eleven-year-old male cousin of defendant, and the witness was also defendant's young male cousin who was around twelve years old at the time of the alleged prior acts. The trial court found similarities in "the location of the occurrence," a finding also supported by the evidence: defendant and the victim spent time playing video games in defendant's bedroom where the alleged abuse occurred, and defendant and the witness also spent time playing video games together and in defendant's bedroom where the alleged abuse occurred. Finally, the trial court found similarities in "how the occurrences were brought about," a finding supported by the evidence: the victim described two incidents during which the defendant placed his hands on the victim's genital area outside of his clothes while pretending to be asleep; he also described an incident during which defendant lay on him pretending to be asleep, then reached inside the victim's pants to touch his genitals, then performed oral sex on the victim. The witness testified to a similar progression of sexual acts, beginning with fondling outside the clothing and proceeding to fondling inside the pants and then to oral sex; he also described how defendant would pretend to be asleep while touching him. We conclude that these similarities are sufficient to support the State's theory of modus operandi in this case.

Instead of reviewing these similarities noted by the trial court, the Court of Appeals focused on the differences between the inci-

dents and determined they were significant. *Beckelheimer*, —— N.C. App. at ——, 712 S.E.2d at 219-20. The Court of Appeals found that the 404(b) witness's account resembled "apparently consensual" "[s]exual exploration" by young people rather than a forcible sexual offense, *id.* at ——, 712 S.E.2d at 220, a finding that was not made by the trial court and that we conclude is not supported by the record. The 404(b) witness did not testify that the acts were consensual and explained his single act of oral sex on the defendant as an attempt to stop defendant's efforts to penetrate him anally. Moreover, even if the record had shown voluntary actions by the witness, as a matter of law a child under age thirteen cannot consent to a sex act with a person more than four years older than he. *See* N.C.G.S. § 14-27.4(a)(1) (2011).

The Court of Appeals also focused on the age difference between the defendant and the victim in each case—four and a half years versus sixteen years. *Beckelheimer*, —— N.C. App. at ——, 712 S.E.2d at 220. We conclude, as did the trial court, that the similar ages of the victims is more pertinent in this case than the age difference between victim and perpetrator. The Court of Appeals' analysis seems to require circumstances to be all but identical for evidence to be admissible under Rule 404(b). Our case law is clear that near identical circumstances are not required, *Stager*, 329 N.C. at 304, 406 S.E.2d at 891; rather, the incidents need only share "some unusual facts" that go to a purpose other than propensity for the evidence to be admissible, *id.* at 304, 406 S.E.2d at 890. The prior acts here were sufficiently similar to the charged acts to be admissible under Rule 404(b).

On the issue of temporal proximity, defendant contends that the earlier incident, which he denies ever occurred, is too remote in time to be relevant to these charges. He cites to cases such as *State v. Jones*, in which this Court held that a seven year gap between prior acts and the charged acts rendered 404(b) evidence inadmissible. 322 N.C. 585, 587, 590-91, 369 S.E.2d 822, 823, 824-25 (1988). There are cases, however, with a similarly long lapse of years between incidents in which this Court has allowed the evidence. *E.g.*, *State v. Carter*, 338 N.C. 569, 588-89, 451 S.E.2d 157, 167-68 (1994) (affirming admissibility of 404(b) evidence of prior assault despite eight-year lapse between assaults), *cert. denied*, 515 U.S. 1107, 115 S. Ct. 2256 (1995). These varied results simply affirm the point that "[r]emoteness for purposes of 404(b) must be considered in light of the specific facts of each case." *State v. Hipps*, 348 N.C. 377, 405, 501 S.E.2d 625, 642 (1998), *cert. denied*, 525 U.S. 1180, 119 S. Ct. 1119 (1999). The purpose underlying the evidence also affects the analysis. "Remoteness

in time is less important when the other crime is admitted because its *modus operandi* is so strikingly similar to the *modus operandi* of the crime being tried as to permit a reasonable inference that the same person committed both crimes." *Riddick*, 316 N.C. at 134, 340 S.E.2d at 427. In such cases, remoteness in time goes to the weight of the evidence rather than its admissibility. *See Hipps*, 348 N.C. at 405, 501 S.E.2d at 642 (citing *Carter*, 338 N.C. at 589, 451 S.E.2d at 168).

From the evidence that defendant rarely left his mother's house except to go to work and that both victims were young male cousins of defendant who visited defendant at his mother's house, the jury here could infer that defendant acted as alleged when he had access to potential victims in the house. The trial court concluded that "given the similarities . . . temporal proximity is reasonable." We agree that, given the similarities in the incidents, the remoteness in time was not so significant as to render the prior acts irrelevant as evidence of modus operandi, and thus, temporal proximity of the acts was a question of evidentiary weight to be determined by the jury.

[3] Having determined that the 404(b) evidence was sufficiently similar and not too remote in time, we now review the trial court's Rule 403 determination for abuse of discretion. Here "a review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to defendant and was careful to give a proper limiting instruction to the jury." *Hipps*, 348 N.C. at 406, 501 S.E.2d at 642. The trial judge first heard the testimony of the 404(b) witness outside the presence of the jury, then heard arguments from the attorneys and ruled on its admissibility, stating: "[T]he Court, having considered probative value versus prejudicial effect, finds that the probative value for the purposes offered exceeds . . . any prejudicial effect." The judge excluded testimony about one incident that did not share sufficient similarity to the charged actions, thus indicating his careful consideration of the evidence. Moreover, the judge gave the appropriate limiting instruction. Given the similarities between the accounts of the victim and the 404(b) witness and the trial judge's careful handling of the process, we conclude that it was not an abuse of discretion for the trial court to determine that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. The trial court properly admitted the 404(b) evidence here.

The Court of Appeals decision is reversed, and we remand this case to that court for consideration of the remaining issues on appeal.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. MEGAN SUE OTTO

No. 523A11

(Filed 14 June 2012)

Search and Seizure— vehicular stop—reasonable suspicion—motion to suppress properly denied

The trial court did not err by denying defendant's motion to suppress evidence obtained from the stop of her vehicle in a driving while impaired case. While there was insufficient evidence to support the finding of fact that the officer "knew that Rock Springs Equestrian Center serves alcohol[,]" the fact that defendant was weaving "constantly and continuously" over the course of three-quarters of a mile and was stopped around 11:00 p.m. on a Friday night was sufficient to create reasonable suspicion.

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. ——, 718 S.E.2d 181 (2011), reversing a judgment entered on 30 September 2010 by Judge W. Russell Duke, Jr. in Superior Court, Pitt County. Heard in the Supreme Court on 16 April 2012.

Roy Cooper, Attorney General, by William P. Hart, Jr., Assistant Attorney General, and William P. Hart, Sr., Senior Deputy Attorney General, for the State-appellant.

Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant-appellee.

Isaac T. Avery, III for North Carolina Conference of District Attorneys; Tiffanie W. Sneed for North Carolina Association of Police Attorneys; and Edmond W. Caldwell, Jr. for North Carolina Sheriffs' Association, amici curiae.

HUDSON, Justice.

The State seeks review of a divided Court of Appeals opinion holding that one of the trial court's findings of fact was not supported by the evidence and reversing the trial court's denial of her motion to suppress evidence obtained from the stop of her vehicle. While we agree with the Court of Appeals that one of the trial court's findings of fact was not supported by the evidence, we hold that the trial court did not err in denying defendant's motion to suppress, because there was reasonable suspicion for the traffic stop.

Background

On 29 February 2008, Trooper A.B. Smith was working on preventive patrol near the intersection of NC 43 and NC 264 in Pitt County. Around 11:00 p.m., as the trooper sat on a cross street, he observed a burgundy Ford Explorer drive past him on NC 43 heading south. At that point, he was about a half mile from Rock Springs Equestrian Center ("Rock Springs"), and the vehicle was coming from its direction. But, because NC 43 is a busy road into and out of Greenville, Trooper Smith did not know specifically where the vehicle was coming from. He did know that Rock Springs was hosting a Ducks Unlimited Banquet that night, and he had heard from others that Rock Springs sometimes served alcohol.

Trooper Smith happened to turn onto NC 43 behind the Ford, and he did not notice anything out of the ordinary when he pulled onto the road behind it. But while driving about a hundred feet behind the Ford, he "immediately started noticing [it] was weaving" within its own lane. The vehicle never left its lane, but was "constantly weaving from the center line to the fog line." The Ford appeared to be traveling at the posted speed limit of fifty-five miles per hour. Trooper Smith watched it weave in its own lane for about three-quarters of a mile, and then he activated his lights and stopped defendant, the driver. During the traffic stop, Trooper Smith issued defendant a citation for driving while subject to an impairing substance.

After several proceedings in both the district court and superior courts in Pitt County, on 3 December 2009, defendant filed in Superior Court a motion to suppress the evidence obtained as a result of the traffic stop. The matter was heard on 27 September 2010, and an order was entered on 13 January 2011, *nunc pro tunc* 30 September 2010, denying the motion to suppress. Defendant pleaded guilty to driving while impaired, reserving her right to appeal. She was sentenced to sixty days imprisonment, suspended, with twenty-four months of supervised probation. Defendant appealed to the Court of Appeals, which, in a divided opinion, reversed the decision of the trial court. *State v. Otto*, —— N.C. App. ——, 718 S.E.2d 181 (2011). The State appealed.

Findings of Fact

In its 30 September 2010 order denying defendant's motion to suppress, the trial court made, *inter alia*, the following finding of fact:

5. Trooper Smith knew that there was a Ducks Unlimited Banquet being held at the Rock Springs Equestrian Center that evening, which was approximately four-tenths to five-tenths of a mile away from where he initially observed the vehicle, and *Trooper Smith knew that Rock Springs Equestrian Center serves alcohol.*

(emphasis added). Defendant argues here, as she did at the Court of Appeals, that the trial court erred in finding that Trooper Smith "knew" that Rock Springs served alcohol. The Court of Appeals majority held that the evidence did not support the finding that the trooper "knew" Rock Springs served alcohol.

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)).

At the suppression hearing, Trooper Smith testified that he had never personally been inside Rock Springs, nor had he ever witnessed anyone drinking alcohol there; however, he did state that he had "heard that they do serve alcohol." He further testified on cross-examination that he did not know what Rock Springs was like on the inside, but added that he would not classify the facility as creating the same atmosphere as the downtown area of Greenville where multiple bars are located.

We hold that this evidence does not support the trial court's finding that Trooper Smith "knew" that alcohol was served at Rock Springs. Accordingly, this finding of fact is not binding on this Court. However, we note that reliable information received or obtained by a law enforcement officer indicating that a facility serves alcohol may provide a basis for an officer's reasonable suspicion that a motorist has consumed alcohol. The better practice, which also facilitates appellate review, is for the trial court to set out the nature and extent of an officer's knowledge or belief when making findings of fact.

Motion to Suppress

Both the United States and North Carolina Constitutions protect against unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. I, § 20. Although potentially brief and limited in scope, a traffic stop is considered a "seizure" within the meaning of these

provisions. *See Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396 (1979). "Traffic stops have 'been historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).' " *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (citation omitted). Therefore, "reasonable suspicion is the necessary standard for traffic stops." *Id.* at 415, 665 S.E.2d at 440 (citations omitted). As articulated by the United States Supreme Court in *Terry*, the stop must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880 (citations omitted). "The only requirement is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.' " *State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994) (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585 (1989) (internal quotation marks omitted)).

Here the Court of Appeals majority determined that the traffic stop of defendant was unreasonable because it was supported solely by defendant's weaving within her own lane. *Otto*, —— N.C. App. at ——, 718 S.E.2d at 184-85. The dissenting judge would have held the stop was reasonable. *Id.* at ——, 718 S.E.2d at 186 (Ervin, J., dissenting). Looking to its own prior precedent, the Court of Appeals determined that in each case in which weaving in one's own lane was a basis for the traffic stop, reasonable suspicion was found only if the weaving was accompanied by some other factor. For example, in *State v. Aubin*, the Court of Appeals found that there was reasonable suspicion for the traffic stop when a driver was weaving within his own lane *and* traveling below the speed limit. 100 N.C. App. 628, 632, 397 S.E.2d 653, 655 (1990), *appeal dismissed and disc. rev. denied*, 328 N.C. 334, 402 S.E.2d 433, *cert. denied*, 502 U.S. 842, 112 S. Ct. 134 (1991). In *State v. Jacobs*, the Court of Appeals found reasonable suspicion for a traffic stop when the driver was weaving within his own lane *and* driving at 1:43 a.m. in the vicinity of several bars. 162 N.C. App. 251, 255, 590 S.E.2d 437, 440 (2004). On the other hand, in *State v. Fields*, the Court of Appeals determined that there was not reasonable suspicion when the driver was weaving within his own lane at 4:00 p.m. 195 N.C. App. 740, 746, 673 S.E.2d 765, 769, *disc. rev. denied*, 363 N.C. 376, 679 S.E.2d 390 (2009). Given this precedent, the majority here concluded that "[w]ithout any additional circumstances giving rise to a reasonable suspicion that criminal activity is afoot, stopping a vehicle for weaving is unreasonable." *Otto*, —— N.C. App. at ——, 718 S.E.2d at 184 (majority).

A court " 'must consider "the totality of the circumstances—the whole picture" in determining whether a reasonable suspicion' exists." *Styles*, 362 N.C. at 414, 665 S.E.2d at 440 (citations omitted). The totality of the circumstances here leads us to conclude that there was reasonable suspicion for the traffic stop. Unlike the Court of Appeals cases in which weaving within a lane was found to be insufficient to support reasonable suspicion, the weaving here was constant and continual. In *Fields* the defendant weaved only three times over the course of a mile and a half. 195 N.C. App. at 741, 673 S.E.2d at 766. Similarly, in *State v. Peele*, there was only one instance of weaving. 196 N.C. App. 668, 671, 675 S.E.2d 682, 685, *disc. rev. denied*, 363 N.C. 587, 683 S.E.2d 383 (2009). In contrast, defendant here was weaving "constantly and continuously" over the course of three-quarters of a mile. In addition, defendant was stopped around 11:00 p.m. on a Friday night. These factors are sufficient to create reasonable suspicion.

Accordingly, we reverse the Court of Appeals holding that there was no reasonable suspicion for the traffic stop, and we hold that the trial court correctly denied defendant's motion to suppress.

REVERSED.

Justice NEWBY concurring.

I agree with the majority that there was reasonable, articulable suspicion to stop defendant's vehicle. In my view, however, defendant's constant and continuous weaving standing alone is sufficient to support such a conclusion.

A law enforcement officer may conduct an investigatory stop when there is "a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 675, 145 L. Ed. 2d 570, 576 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884, 20 L. Ed. 2d 889, 911 (1968)). As this Court has explained:

Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. The standard is satisfied by some minimal level of objective justification. This Court requires that [t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.

State v. Styles, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (alterations in original) (internal citations and quotation marks omitted).

A criminal act need not occur before an officer may initiate a stop. In *Terry v. Ohio*, the law enforcement officer observed lawful conduct, "a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation." *Terry*, 392 U.S. at 22, 88 S. Ct. at 1880-81, 20 L. Ed. 2d at 907. Furthermore, the reasonable suspicion standard is a "commonsense, nontechnical conception[ ] that deal[s] with ' "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." ' " *Ornelas v. United States*, 517 U.S. 690, 695, 116 S. Ct. 1657, 1661, 134 L. Ed. 2d 911, 918 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213, 231, 103 S. Ct. 2317, 2328, 76 L. Ed. 2d 527, 544 (1983) (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 1310, 93 L. Ed. 1879, 1890 (1949))).

In this case, Trooper Smith followed behind defendant "for approximately three-quarters of a mile, during which time Trooper Smith observed the vehicle weaving constantly and continuously within the width of the travel lane." That alone provides the minimal level of objective justification required for reasonable suspicion. The specific and articulable fact that defendant weaved "constantly and continuously" for three-quarters of a mile is sufficient to cause a reasonable and prudent officer to infer that defendant may be driving while impaired. *See Terry*, 392 U.S. at 22-23, 88 S. Ct. at 1880-81, 20 L. Ed. 2d at 907 (concluding that a series of lawful acts, while seemly innocent in isolation, can warrant investigation when taken together); *see also*, *e.g.*, *State v. Barnard*, 362 N.C. 244, 248, 658 S.E.2d 643, 645, *cert. denied*, 555 U.S. 914, 129 S. Ct. 264, 172 L. Ed. 2d 198 (2008) (holding that a defendant's singular, but prolonged, delay in response at a green traffic signal gave rise to reasonable suspicion of criminal activity). While constant and continuous weaving within defendant's own lane could be innocent, lawful conduct, it also gives rise to reasonable suspicion that defendant is driving while impaired. Thus, there was reasonable, articulable suspicion for Trooper Smith to stop defendant's vehicle.

Although unnecessary to resolve this case, I believe the trial court had sufficient evidence to find that Trooper Smith "knew" when he stopped defendant's vehicle that Rock Springs Equestrian Center served alcohol. Under common-usage definitions of the word "know," actual certainty or first-hand knowledge is not required. *See Random House Webster's College Dictionary* 750 (1991) (defining "to know"

as "to be cognizant or aware of" or "to be acquainted or familiar with (a thing, place, person, etc.)"). Further, this is a matter on which our Court should defer to the trial court. *See*, *e.g.*, *Ornelas*, 517 U.S. at 699, 116 S. Ct. at 1663, 134 L. Ed. 2d at 920-21 (pointing out that a reviewing court should give due weight to inferences drawn from facts by resident judges and local law enforcement officers since a trial judge views the facts "in light of the distinctive features and events of the community" and a law enforcement officer views the facts "through the lens of his police experience and expertise").

In any event, defendant's constant and continuous weaving standing alone is sufficient to support reasonable suspicion.

Justice JACKSON joins in this concurring opinion.

DAVIS REX MAULDIN, EMPLOYEE v. AC CORPORATION, EMPLOYER, ARGONAUT INSURANCE, PMA INSURANCE, LIBERTY MUTUAL INSURANCE, THE NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, CARRIERS

No. 539A11

(Filed 14 June 2012)

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. ––, 719 S.E.2d 110 (2011), affirming in part and reversing and remanding in part an opinion and award filed on 28 September 2010 by the North Carolina Industrial Commission. Heard in the Supreme Court on 17 April 2012.

Wallace and Graham, P.A., by Edward L. Pauley, for plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., M. Duane Jones, for defendant-appellants AC Corporation and PMA Insurance.

McAngus, Goudelock & Courie, P.L.L.C., by Charles D. Cheney and Daniel L. McCullough, for defendant-appellee Argonaut Insurance.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed as to the appealable issue of right,

that is, whether the Industrial Commission properly found and concluded that Argonaut was the carrier on the risk for plaintiff's asbestosis. The remaining issues addressed by the Court of Appeals are not properly before this Court and the Court of Appeals' decision as to these matters remains undisturbed. This case is remanded to the Court of Appeals for further remand to the North Carolina Industrial commission for further proceedings not inconsistent with this opinion.

REVERSED IN PART AND REMANDED.

STATE OF NORTH CAROLINA v. CHAD JARRETT BARROW

No. 505A11

(Filed 14 June 2012)

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. ——, 718 S.E.2d 673 (2011), finding no error in defendant's conviction that resulted in a judgment entered on 7 December 2009 by Judge Nathaniel J. Poovey in Superior Court, Cleveland County, but reversing in part and remanding for further sentencing proceedings. On 26 January 2012, the Supreme Court allowed both the State's petition for discretionary review and defendant's conditional petition for discretionary review as to an additional issue. Heard in the Supreme Court on 8 May 2012.

Roy Cooper, *Attorney General*, *by Melissa L. Trippe*, *Special Deputy Attorney General*, *for the State-appellee/appellant.*

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

PER CURIAM.

As to the issue on direct appeal, we affirm. Discretionary review was improvidently allowed as to the other issues.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

LANVALE PROPERTIES, LLC AND CABARRUS COUNTY BUILDING INDUSTRY ASSOCIATION V. COUNTY OF CABARRUS AND CITY OF LOCUST

No. 438PA10

(Filed 24 August 2012)

1. Counties— enactment of ordinance—new residential construction—school construction fee—presumption of validity rebutted—no statutory authority

The trial court did not err in an action concerning defendant county's authority to enact an ordinance that conditioned approval of new residential construction projects on developers paying a fee to subsidize new school construction by granting summary judgment in favor of plaintiff developer. Plaintiff rebutted the ordinance's presumption of validity and the plain language of N.C.G.S. §§ 153A-340(a) and -341 did not give the county authority to enact the ordinance.

2. Counties— enactment of ordinance—new residential construction—school construction fee—no authority pursuant to session law—issue of enforcement not reached

The trial court did not err in an action concerning defendant county's authority to enact an ordinance that conditioned approval of new residential construction projects on developers paying a fee to subsidize new school construction by granting summary judgment in favor of plaintiff developer. Session Law 2004-39 did not authorize the county to enact its ordinance. The issue of whether the session law authorized the county to enforce the ordinance was not reached.

3. Counties— enactment of ordinance—new residential construction—school construction fee—not zoning ordinance —not barred by statute of limitations

The trial court did not err in an action concerning defendant county's authority to enact an ordinance that conditioned approval of new residential construction projects on developers paying a fee to subsidize new school construction by granting summary judgment in favor of plaintiff developer. Because the ordinance at issue was not a zoning ordinance, plaintiff's claims were not barred by the two-month statute of limitations provided in N.C.G.S. §§ 153A-348 and 1-54.1.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 206 N.C. App. 761, 699 S.E.2d 139 (2010), affirming orders entered on 19 August 2008 by Judge Mark E. Klass and on 17 August 2009 by Judge W. David Lee, both in Superior Court, Cabarrus County. Heard in the Supreme Court on 17 October 2011.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.A., by James R. DeMay and James E. Scarbrough, for plaintiff-appellee Lanvale Properties, LLC.

Brough Law Firm, by G. Nicholas Herman and Richard M. Koch, for defendant-appellant County of Cabarrus.

Hartsell & Williams, P.A., by Christy E. Wilhelm and Fletcher L. Hartsell, Jr., for defendant-appellee City of Locust.

J. Michael Carpenter, General Counsel, and Burns, Day & Presnell, P.A., by Daniel C. Higgins and James J. Mills, for North Carolina Home Builders Association, amicus curiae.

JACKSON, Justice.

In this appeal we consider whether defendant Cabarrus County ("the County") had the authority pursuant to its general zoning powers or, in the alternative, a 2004 law enacted by the General Assembly, to adopt an adequate public facilities ordinance ("APFO") that effectively conditions approval of new residential construction projects on developers paying a fee to subsidize new school construction to prevent overcrowding in the County's public schools. Because we hold that the County lacked this authority, we affirm the Court of Appeals.

I

Concerned about the effect of explosive population growth on the County's ability to provide adequate public facilities for its citizens, the Cabarrus County Board of Commissioners ("the Board") adopted an initial APFO in January 1998. In that form the APFO, which was enacted as an amendment to the County's subdivision ordinance, conditioned County approval of new residential developments on the existence of sufficient public facilities to support the developments. In concise language the ordinance stated: "To ensure public health, safety and welfare the [Cabarrus County] Planning and Zoning Commission shall review each subdivision, multi-family development, and mobile home park to determine if public facilities

are adequate to serve that development." Cabarrus County, N.C., Subdivision Ordinance ch. 4. § 17 (Jan. 1998). Pursuant to the ordinance, the County's Planning and Zoning Commission ("the Commission") reviewed all proposed residential developments, except those located within the territorial jurisdictions of Concord and Kannapolis,[1] to determine if the new homes would exacerbate overcrowding in the County's two public schools systems: the Cabarrus County Schools and Kannapolis City Schools.

The APFO first was applied when Westbrook Highland Creek, LLC ("Westbrook") sought preliminary approval from the Commission for a single family development of approximately 800 units located in an unincorporated area of the County. The Commission denied Westbrook's application based upon insufficient public school capacity. Westbrook appealed to the Board, which ultimately approved the development after Westbrook agreed to place $400,000.00—$500.00 per unit—into an escrow account for the purchase of property for a new high school.

Over the next five years, the Commission denied preliminary approval applications for a number of proposed developments based upon insufficient public school capacity. However, as with the Westbrook development, the Board ultimately approved these developments on appeal once developers executed consent agreements designed to mitigate the impact of their developments on public school capacity. Developers typically agreed to pay an adequate public facilities fee of $500.00 per residential unit; however, some developers agreed to make an in-kind donation of land for future school sites or construct improvements to existing school facilities.

Following the APFO's enactment, county staff began monitoring the number of new residential developments being built in Concord and Kannapolis because these municipalities were not cooperating fully with the County in enforcing the APFO. In some instances, these cities voluntarily annexed residential developments, which precluded the County from collecting adequate public facilities fees. Jonathan Marshall, Director of the Commerce Department of Cabarrus County,

1. The Cabarrus County towns of Harrisburg, Midland, and Mt. Pleasant have authorized the County to enforce its zoning and subdivision ordinances within their territorial jurisdictions pursuant to section 160A-360(d) of the North Carolina General Statutes. *See* N.C.G.S. § 160A-360(d) (2011). The County, which furnishes planning services to these three municipalities, enforced its APFO in those towns at their request. The record indicates that to date, the cities of Concord, Kannapolis, and Locust have not granted this authority to the County.

stated in his affidavit in support of the County's motion for summary judgment that this practice frustrated the Board because approximately seventy percent of new residential developments in the County were located within municipal jurisdictions.

In part to address these frustrations, the Board adopted a resolution on 25 August 2003 expressing its desire that all Cabarrus County municipalities should cooperate with the County in enforcing the APFO. Cabarrus County, N.C., Res. No. 2003-26 (Aug. 25, 2003). The resolution also increased the minimum value of the adequate public facilities fee from $500.00 per residential unit to not less than $1,008.00 per unit. *Id.* Further, the resolution defined the term "school adequacy" to mean "estimated enrollment not exceeding 110% of capacity as determined by the Kannapolis and Cabarrus School Systems." *Id.*

On 30 June 2004, the General Assembly enacted Chapter 39 of the 2004 North Carolina Session Laws ("Session Law 2004-39" or "the session law"), which authorized the annexation of several properties in Cabarrus County. Section 5 of the session law attempted to clarify the authority of municipalities to enforce the APFO. Act of June 30, 2004, ch. 39, sec. 5, 2004 N.C. Sess. Laws 42, 47. About a month and a half later, during its 16 August 2004 meeting, the Board adopted a resolution linking the APFO to the session law. *See* Cabarrus County, N.C., Res. No. 2004-30 (Aug. 16, 2004).

Over the next few months, the Board made several more revisions to the APFO. On 20 September 2004, the Board adopted a resolution that increased the value of the adequate public facilities fee from not less than $1,008.00 per residential unit to not less than $4,034.00 per single family unit and $1,331.00 per multifamily unit. Cabarrus County, N.C., Res. No. 2004-37 (Sept. 20, 2004). The resolution also indexed the fee to reflect annual changes in the cost of public school construction. *Id.* During the Board's discussion concerning the resolution, several Board members stated that developers should be required to pay for the cost of constructing new public schools in the County. The sentiment among most commissioners was "whoever creates the problems pays the bills." One commissioner expressed the view that "[t]he people using [subdivision developments] should pay for the school[,] not 93 year-olds. If [developers] are going to build $150-$300 thousand dollar house [sic] they should pay for the schools." The Board's vice chair voted against the resolution, citing concerns about "the legality of the [APFO's] advancement requirement" and the potential for litigation.

In August 2005 the Board began considering the possibility of making further changes to the APFO. Almost two years later, on 20 August 2007, the Board adopted the APFO in its current form. Cabarrus County, N.C., Zoning Ordinance No. 2007-11 (Aug. 20, 2007). Notably, the revised APFO was added as a new chapter to the County's zoning ordinance. *Id.* As a result, the revised APFO superseded the version that appeared in the County's subdivision ordinance. The Board also attempted to tie the new version of the APFO to the session law, stating that "Per Session Law 2004-39, H.B. 224, Cabarrus County may review proposed developments within an incorporated area of the County for compliance with the Level of Service standards for schools." Cabarrus County, N.C., Zoning Ordinance ch. 15, § 9(1)(b) (Aug. 20, 2007). Less than a month later, the Board amended its subdivision ordinance by inserting a cross-reference to the newly revised APFO. Cabarrus County, N.C., Subdivision Ordinance No. 2007-12 (Sept. 17, 2007).

The current APFO is more sophisticated than the earlier version. Covering over twenty pages, the ordinance goes into great detail about the process for review of the County's school capacity. The current APFO includes thirty-four definitions, *see* Zoning Ordinance ch. 15, § 3, illustrates the ordinance's Reservation of Capacity Process with a flow chart, *id.* ch. 15, § 8, and describes the complex statistical formula used to calculate the estimated enrollment impact of a proposed development, *id.* ch. 15, §§ 9-11. In contrast, the prior version occupied only two paragraphs in the County's subdivision ordinance. *See* Cabarrus County, N.C., Subdivision Ordinance, ch 4. § 17 (June 24, 2004).

Notwithstanding its complexity, the current APFO operates in much the same manner as the prior version; that is, it links residential development approval to the availability of space for students in the County's public school systems.[2] Pursuant to the ordinance, proposed residential developments, except those located in Concord, Kannapolis, and Locust, are reviewed to determine whether local elementary, middle, and high schools have sufficient student capacity to support the development. Zoning Ordinance ch. 15, § 7.

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2. All residential developments, including single family units, townhouses, multi-family units (e.g., apartments), and mobile home parks, that impact public school capacity are subject to the APFO. Zoning Ordinance ch. 15, § 4(1). However, residential developments which are unlikely to impact public school enrollment, such as retirement homes and subdivisions of five lots or less, do not fall within its jurisdiction. *Id.*

If there is sufficient unused student capacity to support a proposed development, the Board is *required* to approve the development without additional APFO conditions. *Id.* ch. 15, § 7(1). But if available student capacity is insufficient to support the development, the Board may either deny the developer's application or approve it subject to several "conditions that reduce or mitigate the impacts of the proposed development." *Id.* ch. 15, § 7(2)-(3). These conditions include: (1) deferring approval of final plats, building permits, or certificates of occupancy for a maximum of five years or until sufficient student capacity becomes available; (2) phasing construction of the development in increments that coincide with available capacity; (3) reducing density or intensity of the development; (4) entering into a consent agreement involving a monetary contribution, the donation of land, or construction of a school; or (5) "any other reasonable conditions to ensure that all [public schools] will be adequate and available." *Id.* ch. 15, §§ 7, 8.

When a developer enters into a consent agreement with the County, the developer receives a Reservation of Capacity Certificate that requires the developer to secure proof of development approval from any other local jurisdiction within one year of issuance. *Id.* ch. 15 §§ 6-8. Once the developer submits proof of approval to the Board, the consent agreement is approved, executed, and recorded. *Id.* ch. 15, §§ 6(6)(d), 8. At this point the developer may proceed to review of construction drawings, permitting, and ultimately, construction. *Id.* ch. 15., § 8.

The ordinance's reference to a monetary contribution continued the practice of developers paying an adequate public facilities fee to secure Board approval of their projects. Pursuant to the current version of the APFO, these fees are dedicated to the construction of public schools in the specific areas that are impacted by particular developments. Eventually, these fees became known as voluntary mitigation payments ("VMPs"). In 2008 the Board increased the VMP from not less than $4,034.00 per single family unit and $1,331.00 per multifamily unit to $8,617.00 per single family unit, $4,571.00 per townhouse, and $4,153.00 per multifamily unit. Between 2003 and 2008, the Board increased the APFO's fee for single family units by more than 1,600 percent. As a result of these fees, the APFO has provided the County a substantial source of alternative funding for public schools. Since enactment of the APFO, the County has spent or budgeted over $267 million for school construction.

II

Plaintiff Lanvale Properties, LLC plans to construct a residential development on fifty-four acres located within the territorial jurisdiction of the City of Locust ("Locust"). Most of the site is in Cabarrus County; however, a small portion is in Stanly County. Plaintiff alleges that Cabarrus County has refused to issue a building permit for its development until it complies with the APFO.

On 4 April 2008, plaintiff filed a declaratory judgment action[3] against Cabarrus County and Locust[4] challenging the validity of the County's APFO on various statutory and constitutional grounds.[5] The County answered plaintiff's first amended complaint on 8 June 2008,[6] asserting, *inter alia*, that: (1) plaintiff's complaint should be dismissed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state any claim upon which relief can be granted; and (2) plaintiff's claims are barred by the two-month statute of limitations set forth in sections 153A-348 and 1-54.1 of the North Carolina General Statutes. The trial court denied defendant's motions to dismiss on 19 August 2008 and further concluded that the statute of limitations did not bar plaintiff's claims for relief.

On 18 May 2009 and 20 May 2009, plaintiff and the County filed cross-motions for summary judgment regarding all claims in the case. After hearing the motions on 1 June 2009, the trial court allowed

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3. In accordance with Rule 40 of the North Carolina Rules of Appellate Procedure, the Court of Appeals consolidated plaintiff's declaratory judgment action with two similar actions filed against Cabarrus County. *See Lanvale Props., LLC v. Cnty. of Cabarrus*, 206 N.C. App. 761, 699 S.E.2d 139, 2010 WL 3467567, at *1 (2010) (unpublished) (consolidating with *Craft Dev., LLC. v. Cnty. of Cabarrus*, No. COA09-1610 (N.C. Ct. App.) and *Mardan IV v. Cnty. of Cabarrus*, No. COA09-1611 (N.C. Ct. App.)). Craft Development, LLC plans to develop a 15.56 acre tract of land located in Midland into a multifamily project. Mardan IV intends to develop a 168 unit apartment complex on an 11.23 acre parcel of land located within the corporate boundaries of Concord. *Id.* at *2.

4. Locust's territorial jurisdiction overlaps the border between Cabarrus and Stanly Counties. On 20 September 2004, the Stanly County Board of Commissioners adopted an APFO that is similar to the Cabarrus County APFO. Notably, Stanly County's minimum VMP is $1,500.00 per residential unit.

5. Plaintiff subsequently amended its complaint on 23 April 2008 and 29 August 2008. In addition, on 19 August 2008, the trial court allowed the Cabarrus County Building Industry Coalition to intervene in this matter as a party plaintiff pursuant to Rule 24 of the North Carolina Rules of Civil Procedure. Because Lanvale is the only plaintiff participating in this appeal, we will refer to plaintiff in the singular throughout this opinion.

6. Locust filed its answers on 27 June 2008 and 26 September 2008.

plaintiff's summary judgment motion and denied the County's motion in an order entered on 17 August 2009. In its written order the trial court concluded as a matter of law that: (1) the County did not have inherent authority to enact its APFO pursuant to North Carolina's general zoning or subdivision statutes; and (2) even if the County had authority to enact the APFO, Session Law 2004-39 did not authorize the County to enforce the APFO within the territorial jurisdictions of Concord, Midland, and Locust. The County appealed.[7]

The Court of Appeals unanimously affirmed the trial court's ruling in an unpublished opinion issued on 7 September 2010. *Lanvale Props., LLC v. Cnty. of Cabarrus*, 206 N.C. App. 761, 699 S.E.2d 139, 2010 WL 3467567 (2010) (unpublished). We allowed the County's petition for discretionary review on 15 June 2011.

III

Entry of summary judgment by a trial court 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) (2011); *see also Blades v. City of Raleigh*, 280 N.C. 531, 544-45, 187 S.E.2d 35, 42-43 (1972). Because the parties do not dispute any material facts, "[w]e review [the] trial court's order for summary judgment de novo to determine . . . whether either party is 'entitled to judgment as a matter of law.' " *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007) (quoting *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003)). When applying de novo review, we "consider[ ] the case anew and may freely substitute" our own ruling for the lower court's decision. *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjust.*, 365 N.C. 152, 156, 712 S.E.2d 868, 871 (2011) (citing *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)).

IV

The County urges us to reverse the decisions below for three reasons: (1) The County was authorized to adopt the APFO pursuant to its "general zoning power"; (2) Session Law 2004-39 authorized the County to "adopt and enforce its APFO countywide, including within

7. Although plaintiff named Locust as a defendant, Locust did not join in the County's appeal. Instead, Locust filed a brief persuasively arguing that the County lacks authority to enact its APFO.

incorporated areas of the county and without the request or consent of any municipality in the County"; and (3) Plaintiff's claims were barred by the applicable statute of limitations. We reject each of these arguments.

V

We first must look to the nature of counties and their role within the structure of State government. This Court clearly has stated that:

> In the exercise of ordinary governmental functions, [counties] are simply agencies of the State constituted for the convenience of local administration in certain portions of the State's territory, and in the exercise of such functions they are subject to almost unlimited legislative control except where this power is restricted by constitutional provision.

Jones v. Madison Cnty. Comm'rs, 137 N.C. 579, 596, 50 S.E. 291, 297 (1905). As such, a county's "powers . . . both express and implied, are conferred by statutes, enacted from time to time by the General Assembly." *Martin v. Bd. of Comm'rs of Wake Cnty.*, 208 N.C. 354, 365, 180 S.E. 777, 783 (1935). A county "is not, in a strict legal sense, a municipal corporation, as a city or town. It is rather an instrumentality of the State, by means of which the State performs certain of its governmental functions within its territorial limits." *Id.* With these limitations in mind, we begin our analysis of the County's arguments on appeal.

[1] We first consider the County's argument that its APFO is authorized by sections 153A-340(a) and 153A-341 of the North Carolina General Statutes. At the outset, we note that county zoning ordinances enjoy a presumption of validity. *Orange Cnty. v. Heath*, 278 N.C. 688, 691-92, 180 S.E.2d 810, 812 (1971). As a result, the party challenging the validity of a zoning ordinance must rebut this presumption. *Id.*; *see also Wally v. City of Kannapolis*, 365 N.C. 449, 451, 722 S.E.2d 481, 482 (2012). Similar arguments to those raised by the County have been rejected. *See Amward Homes, Inc. v. Town of Cary*, 206 N.C. App. 38, 53, 698 S.E.2d 404, 416 (2010), *aff'd per curiam without precedential value by an equally divided court*, 365 N.C. 305, 716 S.E.2d 849 (2011); *Union Land Owners Ass'n v. Cnty. of Union*, 201 N.C. App. 374, 380-81, 689 S.E.2d 504, 507-08 (2009), *disc. rev. denied*, 364 N.C. 442, 703 S.E.2d 148 (2010); *see also FC Summers Walk, LLC v. Town of Davidson*, No. 3:09-CV-266-GCM, 2010 WL 4366287, at *3 (W.D.N.C. Oct. 28, 2010) (order remanding case to Superior Court,

Mecklenburg County) (stating that "North Carolina law does appear to be settled" regarding the invalidity of "school APFOs"). After careful consideration, we conclude that plaintiff has rebutted the APFO's presumption of validity, *see Wally*, 365 N.C. at 451, 722 S.E.2d at 482, and that the County lacked statutory authority to enact the ordinance.

We look further at several foundational principles defining the structure of our State government. The Constitution of North Carolina vests the State's legislative power in the General Assembly, N.C. Const. art. II, § 1, and permits the legislature to delegate some of its "powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable," *id.* art. VII, § 1 para. 1; *see also Chrismon v. Guilford Cnty.*, 322 N.C. 611, 617, 370 S.E.2d 579, 583 (1988). As we have noted, counties "are instrumentalities of the State government . . . subject to its legislative control." *Comm'rs of Dare Cnty. v. Comm'rs of Currituck Cnty.*, 95 N.C. 189, 191 (1886). As such, "[c]ounties have no inherent authority to enact zoning ordinances." *Jackson v. Guilford Cnty. Bd. of Adjust.*, 275 N.C. 155, 162, 166 S.E.2d 78, 83 (1969).

In accordance with this constitutional framework, the General Assembly has given counties the general authority to enact ordinances. *See* N.C.G.S. § 153A-121(a) (2011) ("A county may by ordinance define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county . . . ."). Counties may, therefore, restrict the use of real property when there is a "reasonable basis to believe that [the restrictions] will promote the general welfare by conserving" property values and promoting the "most appropriate use" of land. *Blades*, 280 N.C. at 546, 187 S.E.2d at 43. Based on these general principles, the General Assembly has authorized counties to enact zoning ordinances. *See* N.C.G.S. § 153A-340(a) (2011). But counties do not possess unlimited zoning authority. As the Court of Appeals has observed, "[T]he General Assembly has enacted the zoning and subdivision regulation statutes for the purposes of delineating the authority of county governments to regulate the development of real estate." *Union Land Owners*, 201 N.C. App. at 378, 689 S.E.2d at 506.

Two statutes in particular establish the boundaries of county zoning power. Section 153A-340(a) of the North Carolina General Statutes provides that county zoning ordinances may:

> regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

N.C.G.S. § 153A-340(a). Section 153A-341 describes the "public purposes" that zoning regulations may address:

> Zoning regulations shall be designed to promote the public health, safety, and general welfare. To that end, the regulations may address, among other things, the following public purposes: to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to lessen congestion in the streets; to secure safety from fire, panic, and dangers; and to facilitate the efficient and adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. The regulations shall be made with reasonable consideration as to, among other things, the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the county. In addition, the regulations shall be made with reasonable consideration to expansion and development of any cities within the county, so as to provide for their orderly growth and development.

Id. § 153A-341 (2011). Thus, county zoning ordinances are valid when they conform to the contours of the authority described in these enabling statutes.

Based on their plain language, sections 153A-340(a) and 153A-341 do not expressly authorize the County's APFO. Consequently, the County contends that these statutes convey implied authority for the ordinance. In support of its position, the County urges us to construe these provisions in light of section 153A-4 of the North Carolina General Statutes, which states:

> It is the policy of the General Assembly that the counties of this State should have adequate authority to exercise the powers, rights, duties, functions, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power.

Id. § 153A-4 (2011). The County argues that the Court of Appeals and the trial court erred by failing to apply section 153A-4. We disagree.

This Court's general approach to construing the legislative authority of local governments has evolved over time. Early in our history, we broadly construed the State's grant of legislative authority to municipalities. *See* David W. Owens, *Local Government Authority to Implement Smart Growth Programs*, 35 Wake Forest L. Rev. 671, 680 n.47, 682 (2000) [hereinafter Owens, *Local Gov't Auth.*] (citing *Whitfield v. Longest*, 28 N.C. (6 Ired.) 268 (1846); *Hellen v. Noe*, 25 N.C. (3 Ired.) 493 (1843); *Shaw v. Kennedy*, 4 N.C. (Taylor) 591 (1817)). However, in the 1870s this Court adopted a more restrictive approach known as "Dillon's Rule." *Smith v. City of Newbern*, 70 N.C. 14, 18 (1874); *see also* David W. Owens, *Land Use Law in North Carolina* 22-23 (2d ed. 2011) [hereinafter Owens, *Land Use Law*]. Dillon's Rule is a rule of statutory construction that is based on the

> general and undisputed proposition of law, that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in *express words;* second, those *necessarily or fairly implied in or incident* to the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation.

Smith, 70 N.C. at 18. Nonetheless, this Court's application of Dillon's Rule did not always constrain local government authority. *See* Owens, *Local Gov't Auth.*, at 680-693 (describing the application of Dillon's Rule in North Carolina from the mid-1860s to 1971). Still, the rule "was applied more stringently to interpretation of grants of authority for taxes and *fees* and local government service provision than to grants of regulatory authority." Owens, *Land Use Law*, at 23 n.17 (emphasis added).

In 1973 the General Assembly enacted section 153-4 (now codified as section 153A-4) of the North Carolina General Statutes two years after it adopted section 160A-4, a similar provision relating to municipal governments. *See* Act of May 24, 1973, ch. 822, sec. 1, 1973 N.C. Sess. Laws 1233, 1234; Act of June 30, 1971, ch. 698, sec. 1, 1971 N.C. Sess. Laws 724, 725. Our initial application of these provisions to zoning cases was inconsistent. In *Porsh Builders, Inc. v. City of Winston-Salem*, one of our first decisions following enactment of these statutes, we did not apply section 160A-4, but rather used Dillon's Rule to analyze whether the city was required by statute to accept "the highest responsible bid" for a parcel of land that it

owned. 302 N.C. 550, 552, 554, 276 S.E.2d 443, 444, 445 (1981) (stating that "it is generally held that statutory delegations of power to municipalities should be strictly construed, resolving any ambiguity against the corporation's authority to exercise the power"). Subsequently, we stated that section 160A-4 established a "legislative mandate that we are to construe in a broad fashion the provisions and grants of power" conferred upon municipalities. *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 109, 388 S.E.2d 538, 543 (1990). Thereafter, in *Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte* we applied section 160A-4 to uphold the city's imposition of user fees in conjunction with the provision of regulatory services and the use of public facilities because the user fees were "reasonably necessary or expedient to the execution of the City's power to regulate the activities for which the services are provided." 336 N.C. 37, 45, 442 S.E.2d 45, 50 (1994).

Relying on *Homebuilders* and *River Birch*, the County argues that the decisions below conflict with our "repeated pronouncements that [section 153A-4's broad construction] mandate must *always* be faithfully applied in interpreting the powers conferred by the Legislature to counties and cities in enacting zoning regulations." (emphasis added). The principal flaw in the County's argument is that section 153A-4 is a rule of statutory construction rather than a general directive to give our general zoning statutes the broadest construction possible. As we long have held, " 'Statutory interpretation properly begins with an examination of the plain words of the statute.' " *Three Guys Real Estate v. Harnett Cnty.*, 345 N.C. 468, 472, 480 S.E.2d 681, 683 (1997) (quoting *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)). " 'If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms.' " *Id.* (quoting *Hyler v. GTE Prods. Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993)). Thus, " '[w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning.' " *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 811, 517 S.E.2d 874, 878 (1999) (quoting *Lemons v. Old Hickory Council, BSA, Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988)). Therefore, "a statute clear on its face must be enforced as written." *Bowers v. City of High Point*, 339 N.C. 413, 419-20, 451 S.E.2d 284, 289 (1994) (citing *Peele v. Finch*, 284 N.C. 375, 382, 200 S.E.2d 635, 640 (1973)).

Consequently, section 153A-4 applies only when our zoning statutes are ambiguous, *see Smith Chapel*, 350 N.C. at 811, 517 S.E.2d at 878 (citing *Lemons*, 322 N.C. at 276, 367 S.E.2d at 658), or when its application is necessary to give effect to "any powers that are reasonably expedient to [a county's] exercise of the power," *see* N.C.G.S. § 153A-4.[8] Sections 153A-340(a) and 153A-341 express in unambiguous language the General Assembly's intent to delegate general zoning powers to county governments. Thus, section 153A-4 is inapposite in the instant case.

Accordingly, we must ascertain whether the plain language of our enabling statutes gives the County implied authority to enact its APFO. We hold that it does not. When interpreting a statute we "presume that the legislature acted with care and deliberation, and, when appropriate," we consider "the purpose of the legislation." *Bowers*, 339 N.C. at 419-20, 451 S.E.2d at 289 (citations omitted). As we have noted above, the purpose of sections 153A-340(a) and 153A-341 is to give counties general authority to enact zoning ordinances. Consequently, these provisions articulate basic zoning concepts. In so doing, these statutes impose reasonable constraints on how county governments may exercise their zoning powers. *See Union Land Owners*, 201 N.C. App. at 378, 689 S.E.2d at 506. Although we acknowledge that counties have "considerable latitude" in implementing these powers, we previously have stressed that a county's "zoning authority cannot be exercised in a manner contrary to the express provisions of the zoning enabling authority." *Cnty. of Lancaster, S.C. v. Mecklenburg Cnty., N.C.*, 334 N.C. 496, 509, 434 S.E.2d 604, 613 (1993).

The dissent also posits that the "statutory language [in sections 153A-340(a) and 153A-341] does not plainly define the limits of the powers delegated, and must be read in light of the General Assembly's intent for the entire Chapter as conveyed in sections 153A-4 and section 153-124." As a result, the dissent concludes that the plain language of sections 153A-340(a) and 153A-341 is ambiguous. This is a curious conclusion. The dissent's position appears to be premised upon an apparent lack of specificity in the statutory language. In the absence of this more precise language—it is unclear from the dis-

8. The dissent argues that we should apply section 153A-4 because the APFO is a "reasonably expedient" means of providing funds for public school construction. We disagree. Without belaboring the point, after thoroughly reviewing the record, we observe that the Board's actions between 2003 and 2008 to increase the VMP for single family units by 1,600 percent (from $500.00 per unit in 2003 to $8,617.00 per unit in 2008) were anything but reasonable.

sent's opinion how much more specific the language must be—the dissent argues for the broadest construction of county power possible, relying upon sections 153A-4 and 153A-124. But this argument overlooks the fact that the plain language of sections 153A-340(a) and 153A-341 provides clear guidance to counties regarding the extent of their zoning powers. Accordingly, sections 153A-4 and 153A-124 simply cannot be employed to give authority to county ordinances that do not fit within the parameters set forth in the enabling statutes. *See Cnty. of Lancaster, S.C.*, 334 N.C. at 509, 434 S.E.2d at 613 (stating that counties enjoy "considerable latitude" in exercising their powers, but recognizing that a county's "zoning authority cannot be exercised in a manner contrary to the express provisions of the zoning enabling authority"). Moreover, the dissent's argument, if adopted, would fundamentally alter the relationships between counties, which are creations of the General Assembly, and the General Assembly itself, whose power emanates directly from Article II of the North Carolina Constitution.

Notwithstanding the dissent's assertion, the General Assembly, in the past, has enacted session laws authorizing Chatham and Orange Counties to enact impact fee ordinances, which we discuss in more detail below. Act of 23 June 1987, ch. 460, secs. 4-12, 17-18.1, 1987 N.C. Sess. Laws 609, 611-13, 616-622. As a result, we conclude that the County's enactment of its APFO in this case was not within the purview of sections 153A-4 and 153A-124, but rather must be the subject of specific enabling legislation. This conclusion is bolstered by the fact that Union County (which had enacted an APFO that is almost identical to the APFO at issue here) sought—and was denied—such authority from the General Assembly on three occasions. *See Union Land Owners*, 201 N.C. App. at 375-76, 689 S.E.2d at 505 (noting that Union County had unsuccessfully sought legislative approval of school impact fees in 1998, 2000, and 2005).

The dissent contends that we "minimize the unqualified and expansive powers that the General Assembly has given counties to oversee and control development and school construction." Nothing could be farther from the truth because the legislative powers of county governments in these areas are not as broad as the dissent characterizes them. As we noted above, counties "are instrumentalities of the State government . . . subject to its legislative control," *see Comm'rs of Dare Cnty.*, 95 N.C. at 191, a proposition the dissent endorses in its opening line. As a result, counties must exercise their legislative powers within the confines of the enabling statutes

enacted by the General Assembly. We recognize that counties enjoy flexibility in enacting ordinances, but the dissent's interpretation of sections 153A-4 and 153A-124—carried to its logical conclusion—would give counties virtual carte blanche to enact an unlimited range of ordinances affecting the use of real property no matter how tenuous the connection between the ordinance and our zoning statutes. We are not persuaded that the General Assembly intended to give counties such expansive legislative power.

The dissent further asserts that the "particular instructions" contained in section 153A-4 "are mandatory." In support of its view, the dissent cites *Homebuilders*, which states that section 160A-4 (relating to the extent of municipal authority) constitutes a "legislative mandate that we are to construe in a broad fashion the provisions and grants of power contained in section 160A." 336 N.C. at 44, 442 S.E.2d at 50 (quoting *River Birch*, 326 N.C. at 109, 388 S.E.2d at 543). But in *Smith Chapel* we did not apply section 160A-4 because the statute at issue there was "clear and unambiguous." 350 N.C. at 811, 517 S.E.2d at 878. In a footnote, the dissent attempts to brush aside our decision in *Smith Chapel* by referring to the dissenting opinion in that case. Interestingly enough, *Homebuilders* also featured a dissenting opinion. *See* 336 N.C. at 48, 442 S.E.2d at 52 (Mitchell and Webb, JJ., dissenting). But the existence of a dissenting opinion in our decisions does not undermine the decision's status as binding precedent. The statutes at issue here—section 153A-340(a) and 153A-341—are clear and unambiguous articulations of county zoning powers. As a result, *Smith Chapel* governs this case no matter how much the dissent wishes otherwise.

In reality, this case is more straightforward than the dissent's sweeping interpretation would lead the casual reader to believe. The starting point of our analysis is to establish the distinction between zoning ordinances and subdivision ordinances. "Zoning, as a definitional matter, is the regulation by a local governmental entity of the use of land within a given community, and of the buildings and structures which may be located thereon, in accordance with a general plan." *Chrismon*, 322 N.C. at 617, 370 S.E.2d at 583; *accord* 1 Arden H. Rathkopf & Daren A. Rathkopf, *Rathkopf's The Law of Zoning and Planning* § 1:3, at 1-15 (Edward H. Ziegler, Jr. ed. 2011). According to one commentator, "[t]he principal characteristic of a zoning ordinance is division of the city or county's land area into districts with a separate set of development regulations for each zone or district." Owens, *Land Use Law*, at 40. Although specific regulations may vary

by district, the essential difference between zoning districts "is the range of land uses permitted to be located in that district." *Id.* Fundamentally, the primary purpose of county zoning ordinances is to specify the types of land use activities that are permitted, and prohibited, *within particular zoning districts*. *See Chrismon*, 322 N.C. at 617, 370 S.E.2d at 583. Thus, county zoning ordinances typically divide the land within a county's territorial jurisdiction into broad use categories, including, for example, agricultural, commercial, office-institutional, and residential. *See* N.C.G.S. § 153A-342(a) (2011) ("A county may divide its territorial jurisdiction into districts of any number, shape, and area that it may consider best suited to carry out the purposes of this Part. *Within these districts* a county may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land." (emphasis added)).

As a result, general zoning ordinances are distinct from subdivision ordinances. Pursuant to section 153A-330 of the North Carolina General Statutes, a county may enact ordinances to "regulate the subdivision of land within its territorial jurisdiction." *Id.* § 153A-330 (2011). Section 153A-335 of the North Carolina General Statutes defines the term "subdivision" in part to "mean[ ] all divisions of a *tract or parcel of land* into two or more lots, building sites, or other divisions when any one or more of those divisions are created for the *purpose of sale or building development* (whether immediate or future)." *Id.* § 153-335(a) (2011) (emphases added). Thus, as a general matter, subdivision ordinances are designed to "regulate the creation of new lots or separate parcels of land." Owens, *Land Use Law*, at 49. "Unlike zoning, which controls the use of land and remains important before, during and after development, subdivision regulation generally refers to controls implemented during the development process." Julian Conrad Juergensmeyer & Daren E. Roberts, *Land Use Planning and Development Regulation Law* § 7:2, at 395 (2d ed. 2007). To this end, subdivision ordinances have several purposes, including, among other things, "facilitat[ing] record keeping regarding land ownership"; establishing "standards on the size and shape of new lots and the layout of public facilities (such as street location, intersection design, and the like)"; and "requir[ing] the provision of essential infrastructure (such as roads, utilities, recreational lands, and open space) and the details of how [that infrastructure] is to be laid out and constructed." *Id.* at 49-50 (footnote omitted). Therefore, county subdivision ordinances control the development of specific parcels of land while general zoning ordinances regulate land use

activities over multiple properties located within a distinct area of the county's territorial jurisdiction. *See Union Land Owners*, 201 N.C. App. at 378, 689 S.E.2d at 507 (citing David W. Owens, *Introduction to Zoning* 3, 129 (3d ed. 2007)).

Surprisingly, the dissent argues that "we do not need to label this ordinance as either a zoning or subdivision ordinance." The dissent's contention that the APFO's non-VMP provisions are "unremarkable" exercises of the County's zoning power also relies upon this flawed reasoning. Additionally, the dissent overstates the purposes of unified development ordinances ("UDOs"), which counties are authorized to enact pursuant to section 153A-322(d) of the North Carolina General Statutes. As a result, the dissent states that "[t]he question on the merits is not whether the APFO is a zoning ordinance or a subdivision ordinance, but whether *any* of the powers delegated by the General Assembly to counties in Chapter 153A would support the voluntary mitigation payments provision."

The dissent's contentions, however, are at odds with the County's primary argument that its APFO is authorized by its general *zoning* power. They also reflect a lack of understanding about the purpose of unified development ordinances. As Professor David W. Owens notes, "Subdivision ordinances are most commonly adopted as separate ordinances, but they are occasionally combined with zoning and other development regulations into a single ordinance regulating multiple aspects of land development (often termed a 'unified development ordinance')." Owens, *Land Use Law*, at 49. However, the functional distinctions between zoning ordinances and subdivision ordinances remain intact even when they are adopted as part of a UDO. In enacting section 153A-322(d), the General Assembly did not give counties the authority to eliminate the differentiation between zoning and subdivision ordinances. Rather, the General Assembly was providing counties with a means of compiling certain ordinances together to ensure the uniform use of "definitions and procedures." N.C.G.S. § 153A-322(d).

An understanding of the distinctions between zoning ordinances and subdivision ordinances is critical because, while both types of ordinances regulate the use of real property, they do so in very different ways. The dissent's severance argument can survive only by confusing this long-standing distinction. Severance is not an appropriate remedy because the entire APFO simply does not fall within the ambit of zoning; that is, it has little or nothing to do with the County's ability to divide its land into districts—or zones—based on

specific land uses, *see Chrismon*, 322 N.C. at 617, 370 S.E.2d at 583; N.C.G.S. § 153A-342(a) (2011), which are applicable "before, during and after development," Juergensmeyer, *Land Use Planning*, at 395.

Here the purpose and effect of the County's APFO do not fall within the purview of the County's general zoning authority. In contrast to the basic zoning concepts articulated in the plain language of sections 153A-340(a) and 153A-341, the APFO does not define the specific land uses that are permitted, or prohibited, within a particular zoning district. *See* N.C.G.S. § 153A-340(a). Instead, the APFO links County approval of residential developments to the availability of space for students in the County's public schools. If the local public schools have insufficient capacity to serve the development, developers, more often than not, are required to pay a substantial sum to the County to secure project approval.[9] Even though the ordinance allows developers to secure development approval by other means, such as waiting up to five years until the public school overcapacity issue is resolved, making significant changes to development plans, or donating land to the county's school systems, *see* Zoning Ordinance ch. 15, §§ 7, 8, the record indicates that only a few developments have been approved upon complying with these alternative conditions. In our view, the County's APFO cannot be classified as a zoning ordinance because, as plaintiff correctly observes, "the APFO simply does not 'zone.' " As a result, the County cannot rely upon its general zoning authority to enact its APFO.

The dissent argues that section 153A-342 is inconsistent with "the majority's narrow interpretation of zoning." Once again, the dissent's criticism is based on a misunderstanding of basic land use law. The first sentence of section 153A-342(a) addresses the power of counties with respect to their geography by authorizing the division of each county's "territorial jurisdiction into districts of any *number*, *shape*, *and area* that [the county] may consider best suited to carry out the purposes of this Part.[10] " N.C.G.S. § 153A-342(a) (emphasis added). In

9. As an illustration, in early April 2008, county staff determined that local schools were insufficient to support the Mardan IV development, *see* n.5, which comprised 168 apartment units. On 21 April 2008, the Board approved a Reservation of Capacity Certificate for the project on the condition that the Mardan IV developers pay the $4,153.00 per unit VMP. As a result, the Mardan IV developers would have been required to make a payment of $697,704.00 to secure development approval. The Mardan IV developer's Reservation of Capacity Certificate expired on 22 April 2009 because the developer failed to submit to the County the requisite development approval from Concord.

10. As further evidence of the distinction between zoning and subdivision ordinances, we observe that the statutes conveying zoning and subdivision powers on

the second sentence, the General Assembly provided counties with the power to determine the overarching land use activities that are permitted or prohibited within each district. *Id.* ("*Within these districts* a county may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land."). As previously noted, these activities govern general land uses such as agricultural, commercial, office-institutional, and residential. The dissent, however, reads the second sentence in isolation from the context of the first sentence. In essence, the dissent concludes that because the APFO is tied to the approval of residential developments it is a zoning ordinance. But this argument fails to account for the very specific purpose of our zoning statues. The APFO does nothing to organize the County's territorial jurisdiction into districts or zones and it does not govern specific categories of land use activities. Therefore, it cannot be classified a zoning ordinance.

In operation the APFO is a very effective means of generating revenue, as the Board's public actions demonstrate. Between 1998 and mid-August 2003, developers seeking approval of their residential developments paid the County an adequate public facilities fee of $500.00 per residential unit. On 25 August 2003, the Board increased that amount to not less than $1,008.00 per residential unit. Res. No. 2003-26. Slightly over a year later, the Board raised the APFO fee to not less than $4,034.00 per single family unit and $1,331.00 per multifamily unit. Cabarrus County, N.C., Res. No. 2004-37 (Sept. 20, 2004). In 2008 the Board increased the minimum VMP to $8,617.00 per single family unit, $4,571.00 for townhouses, and $4,153.00 per multifamily unit. Looking at just the five year period between 2003 and 2008, the Board increased the APFO's fee for single family units by more than 1,600 percent. According to the county manager's 2008 annual budget statement, the Board's decision to increase the VMP to $8,617.00 per single family unit "will produce millions more in revenue over time and help defray the amount of debt required for school construction." As noted above, the County has spent or budgeted over $267 million for school construction since the first APFO was enacted in 1998. Therefore, we must conclude that the APFO is a carefully crafted revenue generation mechanism that effectively establishes a "pay-to-build" system for developers.

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counties are treated separately in the General Statutes. The subdivision statutes appear in Part Two of Article 18. *See* N.C.G.S. §§ 153A-330 to -336. Meanwhile, the zoning statutes are contained in Part Three of the same article. *See* N.C.G.S. §§ 153A-340 to -349.

Moreover, we cannot accept the County's argument that the APFO's VMP is "voluntary." Several statements made by county commissioners and staff illustrate this point. At the Board's 20 September 2004 meeting, one commissioner acknowledged making a statement at a previous meeting that the APFO was designed to ensure that "whoever creates the problems pays the bills." During the same meeting, the Board's vice chair stated that the APFO's consent agreements "are forced," meaning, as he expressed it, that the agreements "may be consensual in the legal forms, but in reality [they are] not." Further, at the Board's 10 July 2006 meeting, a commissioner and the county attorney had an exchange in which the county attorney explained that, although the Board could approve without conditions a development that would result in school overcrowding, construction on the project could not begin until school capacity became adequate:

"Commissioner: If that is the case we will not get the fee."

"Attorney: They will not be building either."

In light of these statements, it is clear that the VMP operates much like the mandatory school impact fee that the Court of Appeals invalidated in *Durham Land Owners Ass'n v. County of Durham*, 177 N.C. App. 629, 638, 630 S.E.2d 200, 206 (determining that Durham County could not rely on its general zoning and police powers to impose a mandatory school impact fee on developers and home builders) *disc. rev. denied*, 360 N.C. 532, 633 S.E.2d 678 (2006). *See also* Michael F. Roessler, *Public Education, Local Authority, and Democracy: The Implied Power of North Carolina Counties to Impose School Impact Fees*, 33 Campbell L. Rev. 239, 242 n.9 (2011) (noting the differences between Durham County's school impact fee and Union County's APFO but stating that the "essence of both ordinances . . . was the same: the imposition of a per-housing-unit fee on new residential development designed to generate funds to build and renovate schools"). Recognizing that the County's APFO could generate significant amounts of revenue from a possibly unpopular group—residential developers—the Board substantially increased its adequate public facilities fee over a five year period. These increases illustrate the precise harm that may occur when APFOs are adopted absent specific enabling legislation.

We also observe that the APFO's revenue generation characteristics conflict with our State's current approach to funding public education. The General Assembly has authorized counties to obtain revenue for public schools and other services from various sources,

including property taxes, *see* N.C.G.S. § 153A-149(b)(7) (2011); special assessments against property, *see id.* § 153A-185 (2011); and local government sales and use taxes, *see id.* §§ 105-495, -502 (2011). With respect to each of these sources of revenue, the burden of funding public schools is spread among a large number of individuals, including county residents and those traveling through or doing business in that county. Conversely, the APFO concentrates the majority of the financial burden for school construction on residential developers. *See Union Land Owners*, 201 N.C. App. at 381, 689 S.E.2d at 508 (stating that Union County's APFO "use[d] a VMP and other similar measures[ ] to shift impermissibly a portion of the burden for funding school construction onto developers seeking approval for new developments").

We recognize the difficulty that county governments currently face as they try to meet their statutory obligation to provide adequate public school facilities, *see* N.C.G.S. § 115C-408(b) (2011), and we applaud the County's commitment to securing additional funds for school construction. But we believe the General Assembly is best suited to address the complex issues involving population growth and its impact on public education throughout the State. We note that the General Assembly has not addressed this precise issue to date. *See Union Land Owners*, 201 N.C. App. at 375, 689 S.E.2d at 505. Without expressing an opinion on the policy merits of APFOs, we stress that absent *specific* authority from the General Assembly, APFOs that effectively require developers to pay an adequate public facilities fee to obtain development approval are invalid as a matter of law. Accordingly, we conclude that the County's first argument lacks merit.

VI

[2] We now turn to the County's argument that its APFO was authorized by Session Law 2004-39, which states:

> Notwithstanding the provisions of Article 19 of Chapter 160A of the General Statutes, the County of Cabarrus or any municipality therein may enforce, within its jurisdiction, any provision of the school adequacy review performed under the Cabarrus County Subdivision Regulations, including approval of a method to address any inadequacy that may be identified as part of that review.

Ch. 39, sec. 5, 2004 N.C. Sess. Laws at 47. The County argues that Session Law 2004-39 provides "special authorization to 'adopt' and 'enforce' its APFO as an exception to the general zoning and subdivision-regulation statutes." The County asserts that its power to

"enforce" the APFO "necessarily and logically includes" the authority to adopt the APFO. We are not persuaded.

"When interpreting a statute, we ascertain the intent of the legislature, first by applying the statute's language and, if necessary, considering its legislative history and the circumstances of its enactment." *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 460, 665 S.E.2d 449, 451 (2008). Applying these rules of statutory construction to Session Law 2004-39, we identify several flaws in the County's arguments.

First, our review of the session law's plain language belies the County's "adopt and enforce" argument. Most notably, the word "adopt" does not appear anywhere in the text of the session law. If the legislature had intended to authorize the County to adopt an APFO such as the one at issue, it could have done so expressly. In 1987 the General Assembly expressly authorized Chatham and Orange Counties to impose impact fees on residential developers to support the provision of public facilities, including schools. Act of June 23, 1987, ch. 460, secs. 4-12.1, 17-18.1, 1987 N.C. Sess. Laws 609, 611-13, 616-622. For example, with respect to Chatham County, the General Assembly stated:

> The Board of Commissioners of a county may provide by ordinance for a system of impact fees to be paid by developers to help defray the costs to the county of constructing certain capital improvements, the need for which is created in substantial part by the new development that takes place within the county.

Id., sec. 4(a). This language conclusively demonstrates that the General Assembly knows how to convey upon counties specific authority to adopt ordinances similar to the one before us. With respect to APFOs in general, our research discloses no instance in which the General Assembly has acted upon the requests of county governments for legislation authorizing them to adopt these ordinances. *See Union Land Owners*, 201 N.C. App. at 375, 689 S.E.2d at 505 (noting that Union County had unsuccessfully sought legislative approval of school impact fees in 1998, 2000, and 2005). As we previously observed, Union County's APFO was almost identical to the one we consider and reject today. *Id.* at 375-76, 689 S.E.2d at 505. Therefore, in the absence of express language authorizing the adoption of the APFO, we cannot accept the County's strained interpretation of Session Law 2004-39.

Even assuming that the session law's language is ambiguous enough to allow us to entertain the County's position, the circum-

stances surrounding enactment of Session Law 2004-39 indicate that the General Assembly did not intend for the session law to authorize the County to adopt its APFO. Rather, the record shows that the session law was an effort to address the confusion between the County and several municipalities regarding enforcement of the APFO. The record contains ample evidence that Concord and Kannapolis chose not to enforce the ordinance within their municipal jurisdictions because of the fees themselves and concerns about whether the County had authority to collect the fees within their jurisdictional boundaries. On 12 August 2004, the county manager sent letters to the city managers of Concord and Kannapolis informing them that pursuant to the new session law, the APFO now applied to all municipalities in the County. The next day—13 August 2004—Concord's city manager sent a memorandum to Concord's mayor, members of the city council, and the city attorney expressing doubt that Session Law 2004-39 clarified "the municipalities' ability to collect [the APFO] fee," but stating that the city staff "thought there was a way it could be done." The city manager also wrote that he had explained to the county manager during a telephone call that attempts by the County to revise the APFO without consulting Concord "would not be received well." According to the memorandum, the county manager understood these concerns, but felt that the County "needed to go ahead [with the revisions] so [it] c[ould] position [itself] to try to get the [APFO] fees from the developers."

On 16 August 2004, slightly over a month after Session Law 2004-39 was enacted, the county manager told the Board during its monthly meeting that the session law "authorized Cabarrus County to enforce its school adequacy requirements countywide, including within the corporate limits of the municipalities." Following the county manager's statement and a presentation by a member of the County's planning department staff regarding school construction capital costs, the Board engaged in a discussion about its adequate public facilities policy. Several issues were raised, including "enforcement [of the APFO] within municipalities." During this exchange the Board's vice chair expressed "concerns about the legality of the [APFO's] advancement requirement and stated [that] a higher fee would have a negative impact on the building industry and the economy of Cabarrus County." Notwithstanding this statement, the commission voted four to one, with the vice chair in dissent, to approve a resolution that, among other things, stated:

> New development within the corporate limits of any of the cities and towns located in Cabarrus County shall also be subject to the

> adequacy review through the Cabarrus County Subdivision Regulations Chapter 4, Section 17 "Adequate Public Facilities Standards," as provided for by Session Law 2004-39, House Bill 224, which became effective June 30, 2004.

Res. No. 2004-30. According to the meeting minutes and the text of this resolution, the Board and county staff believed Session Law 2004-39 was intended to address APFO enforcement concerns involving the municipalities located within Cabarrus County, not to give the County authority to enact the APFO.

This point is corroborated by correspondence between county and municipal staff following the Board's 16 August 2004 meeting. On 20 August 2004, the interim city manager for Kannapolis responded to the county manager's 12 August 2004 letter by saying that he was "not convinced that" Session Law 2004-39 "authorize[d] the County to collect [APFO] fees within our City limits in the manner in which you have described to me." On 26 October 2004, the County's planning and zoning manager sent a letter to the Kannapolis planning director stating in part: "In [Session Law 2004-39], authority was granted to the County to enforce Adequate Public Facility standards through all areas within the County including those areas within municipal boundaries." Additionally, the planning and zoning manager wrote that the Board's 16 August 2004 resolution expressed "the County's intent to enforce Adequate Public Facility standards within the municipalities." None of this correspondence shows that Session Law 2004-39 was intended to give the County authority to *adopt* its APFO.

Apparently anticipating the weakness of its argument, the County contends in its brief that "it would have made no sense for the [General Assembly] to use the word 'adopt' when the APFO had already been in existence for a number of years." Ironically, the existence of the County's APFO before enactment of Session Law 2004-39 further undermines the County's "adopt and enforce" theory. The record demonstrates that county officials believed (mistakenly) that the County already had statutory authority to enact the APFO. The County's commerce director admitted in his 24 April 2009 deposition that the County did not rely upon Session Law 2004-39 as authority for the APFO stating, "We had an APFO prior to that." Notably, the commerce director's deposition was taken several months before the Court of Appeals invalidated Union County's APFO in *Union Land Owners*. Thus, it appears that the County's "adopt and enforce" argument is a relatively recent development.

As a final note, even if we assume *arguendo* that Session Law 2004-39 authorized the County to adopt its APFO, we do not believe that the legislature intended to give the County unfettered authority to enact this revenue-driven ordinance. Our conclusion is derived from the substantial differences between the APFO's initial version and its current iteration, the General Assembly's reluctance to authorize the imposition of school impact fees, and the Court of Appeals' decision in *Durham Land Owners*.

The current APFO effectively requires developers to pay a substantial adequate public facilities fee to receive development approval. In practice, the Board has leveraged this dynamic to generate substantial revenues for the County, which once again, demonstrates the precise harm that APFOs may inflict on unpopular groups. Such government action should not be permitted without specific enabling legislation enacted by the General Assembly.

Moreover, as noted above, when the session law was enacted, the General Assembly already had rejected requests by another county to authorize the imposition of school impact fees. *See Union Land Owners*, 201 N.C. App. at 375, 689 S.E.2d at 505 (noting that Union County had unsuccessfully sought legislative approval of school impact fees in 1998, 2000, and 2005). In addition, in 2006 the Court of Appeals invalidated Durham County's mandatory school impact fee. *Durham Land Owners*, 177 N.C. App. at 638, 630 S.E.2d at 206 (determining that Durham County could not rely on its general zoning and police powers to impose a mandatory school impact fee on developers and home builders).

One of the implied premises of the County's "adopt and enforce" argument is that by enacting Session Law 2004-39, the General Assembly intended to grant the County unconditional authority to expand substantially the scope of its APFO, from a simple adequacy review process into a complex revenue generating system. We reject this proposition. Again, assuming *arguendo* that Session Law 2004-39 authorized adoption of the APFO, we simply do not believe that the General Assembly intended for the session law to give the County the power to adopt an APFO with the broad scope that we consider and reject today.

In sum, we hold that Session Law 2004-39 did not authorize the County to enact its APFO. As a result, we do not address the parties' arguments regarding whether the session law actually authorized the County to enforce the APFO within the corporate boundaries of the County's municipalities.

VII

[3] Finally, we consider the County's argument that plaintiff's action was barred by the statutes of limitations that were in effect when plaintiff filed its initial complaint on 4 April 2008. Specifically, the County contends it was entitled to summary judgment pursuant to sections 153A-348 (2009) and 1-54.1 (2009) of the North Carolina General Statutes.[11] We disagree.

Pursuant to section 153A-348: "A cause of action as to the validity of any zoning ordinance, or amendment thereto, adopted under this Part or other applicable law shall accrue upon adoption of the ordinance, or amendment thereto, and shall be brought within two months as provided in G.S. 1-54.1." N.C.G.S. § 153A-348 (2009). Section 1-54.1 requires a party to file:

> Within two months an action contesting the validity of any zoning ordinance or amendment thereto adopted by a county under Part 3 of Article 18 of Chapter 153A of the General Statutes or other applicable law or adopted by a city under Chapter 160A of the General Statutes or other applicable law.

Id. § 1-54.1 (2009).

The County argues that plaintiff filed its complaint well over two months after the County revised the APFO on 20 August 2007. In addition, the County asserts that the Court of Appeals erred by relying on its decision in *Amward Homes, Inc. v. Town of Cary* to reject the County's statute of limitations argument. *See Amward Homes*, 206 N.C. App. at 53-54, 698 S.E.2d at 416 (holding that the two-month statute of limitations governing municipal ordinances did not bar the plaintiff's cause of action "because [the ordinance at issue was] a subdivision ordinance rather than a zoning ordinance"). In support of its position, the County urges us to consider "the substance of the [APFO] to determine whether it regulates those matters set out in the zoning enabling statute . . . , or those matters set out in the subdivision-regulation statutes."

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11. The General Assembly substantially revised sections 153A-348 and 1-54.1 in 2011. *See* Act of June 17, 2011, ch. 384, secs. 2, 3, 2011 5 N.C. Adv. Legis. Serv. 465, 465-66 (LexisNexis). These revisions do not apply to this case. *See id.*, sec. 7 at 467 ("This act becomes effective July 1, 2011, but the provisions of Sections 1 through 4 of this act, to the extent they effect a change in existing law, shall not apply to litigation pending on that date."). We therefore analyze the County's statute of limitations argument using the versions of these statutes that were in effect when plaintiff filed its initial complaint.

As discussed above, after reviewing the substance of the APFO, we conclude that it is not a zoning ordinance. Rather, the APFO impermissibly places the burden of funding public school construction on developers by using a revenue generating mechanism that is disguised as a zoning ordinance. Because the APFO is not a zoning ordinance, plaintiff's action is not time barred by sections 153A-348 and 1-54.1.

VIII

In conclusion, we hold that (1) the County did not have statutory authority to adopt its APFO; (2) Session Law 2004-39 did not authorize enactment of the APFO; and (3) plaintiff's cause of action is not time barred. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice HUDSON dissenting.

I agree with the majority that counties are instrumentalities of the State, with powers granted by the General Assembly. "But it is also true that a municipal corporation may exercise all the powers within the fair intent and purpose of its creation which are reasonably necessary to give effect to the powers expressly granted, and in doing this it may exercise discretion as to the means to the end." *Riddle v. Ledbetter*, 216 N.C. 491, 493, 5 S.E.2d 542, 543 (1939) (citations omitted). I respectfully dissent because (1) the majority opinion is overly broad, striking down the entire APFO and effectively foreclosing all future APFO-like efforts when it only needed to sever the voluntary mitigation payment provision, and (2) the majority's decision conflicts with the plain language of N.C.G.S. Chapter 153A, as well as its intent.

I. Severance

The majority here strikes down the entire APFO based primarily on its determination that the voluntary mitigation payments provision of the APFO exceeds the county's authority under the General Statutes. In doing so, the majority passes over, with minimal explanation, the obvious remedy required when only one provision of an ordinance is statutorily unauthorized: severance of the offending provision.[12]

The majority opinion analyzes only one provision of the entire twenty page APFO: the voluntary mitigation payment provision, to

12. The County specifically requested severance as an alternative outcome at the Court of Appeals and before this Court.

which it refers as a "carefully crafted revenue generation mechanism" "disguised as a zoning ordinance." Underlying the analysis in the majority opinion is its characterization of the VMP as a mandatory fee.[13] As will be discussed below, the VMP is not mandatory; it is one of five options in the APFO from which a developer may choose if current school capacity is determined to be inadequate for the proposed development. If the VMP is truly the only problematic provision, then the majority could easily reach the same result by severing that provision, without undermining the county's authority to provide for orderly growth and development.

"The test for severability is whether the remaining portion of the legislation can stand on its own and whether the [legislative body] would have enacted the remainder absent the offending portion." *Pope v. Easley*, 354 N.C. 544, 548, 556 S.E.2d 265, 268 (2001) (per curiam) (citation omitted). As described in Section III.A below, the APFO without the voluntary mitigation payment provision can "stand on its own," *id.*, as it is an unremarkable exercise of the powers granted to counties under Chapter 153A of the North Carolina General Statutes. As to whether the legislative body "would have enacted the remainder absent the offending portion," "the inclusion of a severability clause within legislation will be interpreted as a clear statement of legislative intent to strike an unconstitutional provision and to allow the balance to be enforced independently." *Id.* (citation omitted). Here section 15-21 of the APFO explicitly states that "[i]f any portion, clause or sentence of this ordinance shall be determined to be invalid or unconstitutional, such declaration of invalidity shall not affect the remaining portions of this ordinance." Because the remainder of the APFO here is sound, the voluntary mitigation payment provisions are severable, and the majority's sweeping rejection of the entire APFO is unnecessary as well as contrary to the enabling statutes at issue.

The majority states that "[s]everance is not an appropriate remedy because the entire APFO simply does not fall within the ambit of zoning." The entire APFO, with or without the VMP provision, contains extensive provisions detailing methods of calculating school impact and various mitigation measures developers could take to address inadequate school capacity. These provisions and others appear to me to be within the scope of regulating and restricting the use of land and

13. The majority states its holding as follows: "[A]bsent specific authority from the General Assembly, APFO's that effectively require developers to pay an adequate public facilities fee to obtain development approval are invalid as a matter of law."

buildings for residence and other purposes, as intended by the General Assembly. N.C.G.S. § 153A-340(a) (2011). At no point does the majority explain how denying a development application in light of inadequate school capacity, delaying development until school capacity is adequate, or requiring the developer to modify the development application to address inadequate school capacity are not authorized by statute.

By failing to sever the VMP provision, the majority appears to have created a situation in which the county is powerless to delay or deny development applications in light of inadequate school capacity, and now has few choices beyond raising property taxes on existing residents to pay for schools that will serve the new residents who move into the new development.

"The history of the Supreme Court of North Carolina has been one of judicial restraint . . .." *State v. Waddell*, 282 N.C. 431, 476, 194 S.E.2d 19, 48 (1973) (Sharp, J., concurring in part and dissenting in part). In my view, this Court could and should exercise such restraint and uphold the remaining inoffensive, uncontroversial, and statutorily authorized provisions of the APFO. Severing the voluntary mitigation payment provisions while upholding the remainder of the APFO is the most the Court should have done here in light of the plain language of N.C.G.S. Chapter 153A. But in light of other provisions of the statute and the special legislation affecting Cabarrus County ("Session Law 2004-39"), I further conclude that the Court should uphold the entire APFO as written.

II. Matters Preliminary to the Merits

A. The Interpretive Framework

To explain why the entire APFO should be upheld, I begin with a discussion of the provisions in Chapter 153A in which the General Assembly specifically and clearly articulated the intent behind these statutory delegations of authority. By ignoring these provisions, the majority misreads the individual provisions of the statute at issue here. Legislative intent "is the guiding star in the interpretation of statutes." *Moore v. Adams Elec. Co.*, 264 N.C. 667, 673, 142 S.E.2d 659, 665 (1965) (citations and quotation marks omitted). The legislature's intent in delegating certain powers to counties is clearly indicated in two important provisions of Chapter 153A, one of which the majority regards as "inapposite" (section 153A-4), and the other of which the majority ignores entirely (section 153A-124). Section 153A-4 reads:

> It is the policy of the General Assembly that the counties of this State should have adequate authority to exercise the powers, rights, duties, functions, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of local acts *shall be broadly construed* and grants of power *shall be construed to include any powers that are reasonably expedient* to the exercise of the power.

N.C.G.S. § 153A-4 (emphases added) (2011). Section 153A-124 drives home the same point:

> The enumeration in this Article or other portions of this Chapter of specific powers to define, regulate, prohibit, or abate acts, omissions, or conditions *is not exclusive*, nor is it a limit on the general authority to adopt ordinances conferred on counties by G.S. 153A-121.

Id. § 153A-124 (emphasis added) (2011). The plain language of these two sections indicates a specific legislative will that all provisions of Chapter 153A be read broadly to effectuate the goals of the General Assembly in granting numerous powers to local governments.

The sections of the statute at issue here read in pertinent part:

> A zoning ordinance may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

N.C.G.S. § 153A-340(a).

> Zoning regulations shall be designed to promote the public health, safety, and general welfare. To that end, the regulations may address, among other things, the following public purposes: to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to lessen congestion in the streets; to secure safety from fire, panic, and dangers; and to facilitate the efficient and adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. The regulations shall be made with reasonable consideration as to, among other things, the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the

> most appropriate use of land throughout the county. In addition, the regulations shall be made with reasonable consideration to expansion and development of any cities within the county, so as to provide for their orderly growth and development.

Id. § 153A-341 (2011).

The majority circumvents section 153A-4 by claiming that the statutory language in these zoning enabling statutes, N.C.G.S. §§ 153A-340, et seq., is plain, and therefore, no construction is necessary and section 153A-4 does not apply. This interpretive evasion is untenable for two reasons: first, because section 153A-4 is not an optional provision, and second, because the language in the zoning statutes is not plain.

First, section 153A-4 is not an optional provision of the statute. While interpretive instructions in statutes are not generally binding upon this Court, we have previously ruled—twice—that these particular instructions are mandatory: "We treat this language as a 'legislative mandate that we are to construe in a broad fashion the provisions and grants of power contained' " in the statute. *Homebuilders Ass'n of Charlotte v. City of Charlotte*, 336 N.C. 37, 44, 442 S.E.2d 45, 50 (1994) (quoting *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 109, 388 S.E.2d 538, 543 (1990)) (discussing an identical provision in N.C.G.S. § 160A-4, which relates to city powers). The language of section 153A-4 is abundantly clear in *mandating* that we read all other sections of Chapter 153A broadly, not just when we decide they are ambiguous, but all the time.[14] The majority states, without citing authority, that this provision is not a "general directive" but instead is a "rule of statutory interpretation" that only applies if another section is ambiguous. This view is contrary to the rulings of this Court cited above and imposes limitations the General Assembly did not enact. Moreover, the majority acknowledges that section 153A-4 applies "when its application is necessary to give effect to any powers that

14. Admittedly, this is not the first time this Court has ignored its precedent in *Homebuilders Ass'n* and avoided applying the General Assembly's interpretive mandate. In *Smith Chapel Baptist Church v. City of Durham* this Court declared the language of a city authority statute plain without any mention of section 160A-4 (the provision in the municipal powers statute identical to section 153A-4). 350 N.C. 805, 811, 517 S.E.2d 874, 878 (1999). In *Smith Chapel*, the majority's avoidance of the interpretive mandate drew a sharp rebuke from three dissenting justices. *See id.* at 819, 517 S.E.2d at 883 (Frye, J., Mitchell, C.J., & Parker, J., dissenting) ("[T]he majority takes an unduly narrow view of the City's authority."); *id.* at 821, 517 S.E.2d at 884 ("N.C.G.S. § 160A-4 and *Homebuilders Ass'n of Charlotte* require us to interpret the applicable public enterprise statutes broadly . . . .").

are reasonably expedient to [a county's] exercise of the power." Here the APFO exercises powers—delaying development and collecting payments in exchange for expedited development rights—reasonably expedient to the exercise of the express power to regulate and restrict land use for the purpose of providing adequate public schools. The application of section 153A-4 is necessary to "give effect" to these reasonably expedient measures.[15] As such, even within the majority's own narrow view of N.C.G.S. § 153A-4, that section applies here.

The majority completely omits any discussion of section 153A-124, which states that the enumerated list of powers is not exclusive. The majority's interpretation—that the lack of an explicit provision enabling voluntary mitigation payments means that such payments are not authorized—is frankly inexplicable in light of this provision. Section 153A-124 expressly states that the enumeration of powers in the statutes that compose Chapter 153A "is not exclusive, nor is it a limit on the general authority to adopt ordinances." N.C.G.S. § 153A-124. This language can only mean that the General Assembly did not intend to limit county powers to those it specifically named in each statute at the time of its passage, but rather anticipated giving local governing bodies significant discretion in how to exercise their "general authority to adopt ordinances." *Id.* As with section 153A-4, nothing in section 153A-124 suggests it should be applied only when the statutory language at issue is ambiguous; it is rather a general guideline that the provisions of the Chapter should always be read broadly to meet the purposes expressed by the General Assembly. Sections 153A-4 and 153A-124 are not optional provisions, and the majority ignores the express will of the General Assembly by failing to apply those provisions in this case.

As such, when I turn to the particular zoning (and subdivision) provisions at issue here, I read them in the context of these expressions of intent by the General Assembly. But even if these sections only apply to ambiguous statutory language, they must still be applied here because the language in sections 153A-340 and 153A-341 is ambiguous. The majority concludes that "[s]ections 153A-340(a)

15. The majority dismisses this argument, noting that the County repeatedly raised the VMP amounts, which it claims are not "reasonable." The statutory text clearly uses the phrase "powers that are reasonably expedient," with the word "expedient" modifying "powers" and the word "reasonably" (not "reasonable") modifying "expedient." The reasonableness of the VMP amounts has no bearing on whether the measure is "reasonably expedient to the exercise of" the expressly granted powers. *See* N.C.G.S. § 153A-4.

and 153A-341 express in unambiguous language the General Assembly's intent to delegate general zoning powers to county governments," and thus declares section 153A-4 "inapposite." While I agree that these provisions "express in unambiguous language" an "intent to delegate general zoning powers," that is not the appropriate question here. The appropriate question is whether the language *describing the general zoning powers to be delegated* is plain. It is the content and extent of the delegation that must be plainly expressed if we are to avoid any statutory construction. In these sections, the General Assembly authorizes counties to adopt ordinances which "regulate and restrict the . . . use of buildings, structures, and land for trade, industry, residence, or other purposes." N.C.G.S. § 153A-340(a). Moreover, counties "may address, among other things . . . the efficient and adequate provision of schools . . . ." N.C.G.S. § 153A-341.

I conclude that this statutory language does not plainly define the limits of the powers delegated and must be read in light of the General Assembly's intent for the entire Chapter as conveyed in sections 153A-4 and 153A-124. The plain language of sections 153A-340(a) and 153A-341 does no more than simply and broadly authorize, among other things, the regulation and restriction of the use of land for residence purposes and gives examples of the types of public purposes counties may address. The question before us, therefore, is whether this general language authorizes the particular regulation and restriction of the use of land created in the ordinance at issue. *See Offutt Hous. Co. v. Cnty. of Sarpy*, 351 U.S. 253, 260, 76 S. Ct. 814, 819 (1956) ("[Congress] has preferred to use general language and thereby requires the judiciary to apply this general language to a specific problem. To that end we must resort to whatever aids to interpretation the legislation in its entirety and its history provide."). The statute here is conspicuously silent on the reach of the general power to "regulate and restrict" land use under section 153A-340(a), leaving significant discretion in the hands of the counties. Therefore, the specific limit of that general grant of power in this context is unmistakably a question of statutory construction. Sections 153A-4 and 153A-124 must be applied and all provisions must be construed broadly.

These mandates from the General Assembly to read Chapter 153A broadly have real significance. Most statutes do not contain such interpretive guidance. "These provisions evince an evident legislative purpose to give local governments considerable flexibility

and discretion . . . ." *Maready v. City of Winston-Salem*, 342 N.C. 708, 729, 467 S.E.2d 615, 628 (1996). The General Assembly intentionally gave counties very broad powers to operate in those areas assigned to them, one of which is the provision of capital facilities for schools. *See* N.C.G.S. § 115C-408 (2011). Whether we agree with the policy advanced or not, we should be very cautious in second-guessing, and even negating, the General Assembly's decisions on this legislative matter.

B. General Discussion of Zoning

Regarding another general matter, I am troubled by the majority's broad discussion of the definitions of zoning and subdivision ordinances. As an initial point, given the statutory framework, we do not need to label this ordinance as either a zoning or subdivision ordinance. Clearly, zoning and subdivision powers are distinct, but the General Statutes also authorize unified development ordinances that include powers found throughout Chapter 153A:

> A county may elect to combine any of the ordinances authorized by this Article into a unified ordinance. Unless expressly provided otherwise, *a county may apply any of the definitions and procedures authorized by law to any or all aspects of the unified ordinance* and may employ any organizational structure, board, commission, or staffing arrangement authorized by law to any or all aspects of the ordinance.

N.C.G.S. § 153A-322(d) (2011) (emphasis added). *See also* N.C.G.S. §§ 153A-330 (2011), -340(a). Because counties are specifically authorized to select and combine powers from throughout Chapter 153A in a unified development ordinance, the question on the merits is not whether the APFO is a zoning ordinance or a subdivision ordinance, but whether *any* of the powers delegated by the General Assembly to counties in Chapter 153A would support the voluntary mitigation payments provision.

Nevertheless, to the extent the majority determines that the APFO is clearly not a zoning ordinance, I disagree: it certainly contains some elements of a zoning ordinance.[16] The majority claims that

16. The majority addresses the statute of limitations issue by holding that the APFO is not a zoning ordinance and thus the challenge is not time-barred. But even calling the APFO a zoning ordinance does not create an issue with the statute of limitations. Three days before plaintiff filed the complaint, the Cabarrus County Board of Commissioners amended the Cabarrus County Zoning Ordinance by deleting the existing APFO and adding a substantially revised APFO. In my view, this action reset the two-month statute of limitations.

"the County's APFO cannot be classified as a zoning ordinance because . . . 'the APFO simply does not 'zone.' " This conclusion seems to arise from the majority's determination that the "principal characteristic" or "primary purpose" of zoning is the division of land into zones for various uses. In its discussion the majority appears to hold, or at least to strongly suggest, that zoning is limited to that regulation which relates to the creation of districts for land use.

While zoning may be theoretically about creating land use districts, in reality zoning is whatever the General Assembly has said it is. And the General Assembly has granted to counties zoning power much broader and more nuanced than just what is needed to create general zoning districts. In subsection 153A-340(a), quoted in part above, the General Assembly defines the zoning power as including the power to "regulate and restrict" many things, including "the location and use of buildings, structures, and land for trade, industry, residence, or other purposes." In section 153A-341, also quoted in part above, the General Assembly adds that "regulations may address" a host of "public purposes" including "to facilitate the efficient and adequate provision of . . . schools." Most inconsistent with the majority's narrow interpretation of zoning is section 153A-342:

> A county may divide its territorial jurisdiction into districts of any number, shape, and area that it may consider best suited to carry out the purposes of this Part. *Within these districts a county may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land.*

Id. § 153A-342(a) (2011) (emphasis added). The majority quotes but does not recognize the significance of the emphasized portion. The APFO clearly "regulate[s] and restrict[s]" the "erection" and "use of buildings" and "land" within residential zoning districts. Section 153A-342(a) illustrates the process the County followed here: first, it created zoning districts wherein residential development may occur; second, it applied the APFO, which "regulate[s] and restrict[s] the . . . use of . . . land" specifically "within these [residential] districts." *Id.* The majority's excessively narrow definition of zoning—that "the ambit of zoning" is limited to "the County's ability to divide its land into districts—or zones—based on specific land uses"—recognizes only the first sentence of section 153A-342(a).

All these provisions fall under what the General Assembly labeled as the "Zoning" part of Article 18 of Chapter 153A. Whether or

not scholars and theorists define zoning narrowly, our legislature has defined it broadly. What Cabarrus County has created is an ordinance that unmistakably exercises zoning powers as defined and delegated by the General Statutes.

Moreover, even applying the majority's definition of zoning as "regulat[ing] land use activities over multiple properties," this APFO does just that. In particular, I find curious the following statement in the majority opinion: "[T]he APFO does not define the specific land uses that are permitted, or prohibited, within a particular zoning district. *See* N.C.G.S § 153A-340(a). Instead, the APFO links County approval of residential developments to the availability of space for students in the County's public schools." The problem with this approach is that the language of section 153A-340(a) does not specifically limit zoning ordinances to those which "define the specific land uses that are permitted, or prohibited, within a particular zoning district." Rather, the statute authorizes counties to "regulate and restrict the . . . use of . . . land for . . . residence . . . purposes." N.C.G.S. § 153A-340(a). It seems clear to me that conditioning approval of residential development on the existence of adequate public school capacity is the very definition of a regulation ("[t]he act or process of controlling by rule or restriction," *Black's Law Dictionary* 1311 (8th ed. 2004)) or restriction of the use of land. Thus, the APFO does "regulate and restrict" the use of land within land use districts that allow residential development. Linking approval of residential development to school adequacy is a textbook example of an exercise of the zoning power granted in Article 18 of Chapter 153A, and the distinction the majority attempts to draw is simply illusory. Consistent with sections 153A-340(a) and -341, the alternative mitigation options in the ordinance reflect the county's "consideration of expansion and development . . ." so as "to address the . . . adequate provision of . . . schools." N.C.G.S. §§ 153A-340(a), -341.

The majority seems to conclude that Cabarrus County's APFO is a subdivision ordinance. Applying the same logic the majority uses—that the APFO cannot be called a zoning ordinance because it "simply does not zone"—one would conclude that the County's APFO cannot be classified as a subdivision ordinance because it "simply does not" subdivide. As the majority notes, subdivision is defined as "all *divisions* of a tract or parcel of land into two or more lots." N.C.G.S. § 153A-335 (2011) (emphasis added). The APFO here does not regulate *divisions* of a tract or parcel of land. Rather, it regulates the *use* of the lots, specifically the number of housing units planned by the devel-

oper. The APFO is concerned with the number of housing units (a zoning issue), not the number of subdivided lots (a subdivision issue).

The majority states that "county subdivision ordinances control the development of specific parcels of land while general zoning ordinances regulate land use activities over multiple properties located with a distinct area of the county's territorial jurisdiction." Even this attempt to draw a clear distinction between subdivision and zoning regulations fails to explain how this APFO is not a zoning regulation. The APFO clearly "regulate[s] land use activities"—by controlling the approval process for large residential construction and development projects. It acts "over multiple properties"—all properties in any residential district in the county that are going to be developed into more than five housing units. The properties regulated are "located within a distinct area of the county's territorial jurisdiction"—the area served by a particular public school within that residential district. Thus, even under the majority's new and limited definition of zoning, the APFO still zones.

In sum, the majority's efforts to distinguish subdivision and zoning are unnecessary in light of N.C.G.S. 153A-322(d), and the majority fails to explain how this APFO does not directly implicate the statutorily granted power to "regulate and restrict the . . . use of . . . land for . . . residence . . . purposes," a power expressly found in the zoning enabling statute. N.C.G.S. § 153A-340(a).

III. Authority for the APFO

A. General Authority for the APFO without VMPs

As noted in Section I regarding severance, the majority does not at any point substantively address the nearly twenty pages of Cabarrus County's APFO that do not involve VMPs. It appears to me that the APFO provisions other than the VMP provision are well within the authority granted by the General Assembly to counties in Chapter 153A. Minus the VMPs, Cabarrus County's APFO simply allows the county to review large residential development proposals for their impact on the public school system and, when a significant negative impact is found, allows the county to temporarily delay some or all of the development to help mitigate that negative impact.

In my view, the power to temporarily delay development in light of inadequate public school capacity falls squarely within the statutory powers delegated to counties by the General Assembly. Counties are expressly granted the authority to "*regulate and restrict* . . . the location and *use of* buildings, structures, and *land for* trade, industry,

residence, or other purposes." *Id.* § 153A-340(a) (emphases added). The General Assembly also specifically names some of the purposes for which the powers granted in section 153A-340 may legitimately be used, one of which is "to facilitate the efficient and adequate provision of . . . schools." *Id.* § 153A-341. Notably, the General Assembly does not define the exact types of regulations and restrictions that can be imposed on the use of land for residential purposes, nor does it specify how a county might create zoning regulations to facilitate the adequate provision of schools. The General Assembly has left the creation of these regulations to the sound discretion of local governments, while requiring that they be made with

> reasonable consideration as to, among other things, the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the county. In addition, the regulations shall be made with reasonable consideration to expansion and development of any cities within the county, so as to provide for their orderly growth and development.

Id. I have seen no analysis, and the majority provides none,[17] that would place the basic power to delay or withhold development approval to mitigate impact on overcrowded public schools outside of the express statutory authority to regulate or restrict land use so as to provide for counties' orderly growth and development and "to facilitate the efficient and adequate provision of . . . schools." *Id.*

In addition, the General Assembly has expressly given counties the power to temporarily halt all development in a county. N.C.G.S. § 153A-340(h) (2011) (stating that "counties may adopt temporary moratoria on any county development approval required by law").[18] Certainly, if the County can temporarily halt all development to address a given concern, it can temporarily delay specific develop-

17. Even the majority's specific response to the severance discussion in this dissent provides no detailed analysis of any non-VMP provision of the APFO. The majority simply asserts that "the entire APFO simply does not fall within the ambit of zoning." The majority provides no reasoning, statutory authority, or case citations for the idea that a county may not deny development applications, delay development, or require developers to modify non-conforming development applications, in light of inadequate school capacity.

18. This APFO is not a temporary moratorium because it is narrowly conditioned on specific inquiries into school adequacy in the particular area proposed for development, and because it involves discretion rather than a blanket ban. However, the APFO conforms in broad terms to the requirements described in section 153A-340(h) for valid temporary moratoria.

ment that particularly affects that concern. Our Court of Appeals has previously upheld a county's denial of a development application because of school capacity concerns. *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 223, 488 S.E.2d 845, 851 (upholding the Board of Commissioners' decision to deny development permit for 601-lot subdivision when, *inter alia*, "substantial competent evidence in the record supported the Board's . . . conclusion that petitioner's proposed development 'fail[ed] to meet the provision of Section 1402(2)(e) of the [County's Unified Development Ordinance] because it exceeds the county's ability to provide adequate public school facilities' " (first set of brackets in original)), *disc. rev. denied*, 347 N.C. 409, 496 S.E.2d 394 (1997). If a county may deny development applications outright based on school capacity concerns, surely it can insist on reasonable delays of development to allow for new school construction as well. The APFO without the voluntary mitigation payment provision does exactly that, which is well within the statutory grant of power found in Chapter 153A.

B. General Authority for Voluntary Mitigation Payments

With the interpretive framework described in Section II.A in mind, it is an easy step from the general and uncontroversial authority to review school adequacy and delay development to the more specific and controversial authority to offer builders the choice either to delay development or to engage in voluntary mitigation measures, one of which is the payment of fees.[19] The voluntary mitigation measures prescribed by the ordinance, which include phasing or modifying the development plans, as well as the possibility of paying for schools, are "reasonably expedient" measures in the exercise of the power to regulate or restrict the use of land for residences with the purpose of providing adequate schools. Thus, applying section 153A-4, we should construe the voluntary mitigation measures to be included with the express textual grants of power.

Our decision in *Homebuilders Ass'n of Charlotte* is closely analogous to the reasoning here. There, a homebuilders association chal-

19. The majority states that "we cannot accept the County's argument that the APFO's VMP is 'voluntary.' " This conclusion is not supported by the record. The majority acknowledges that the county ordinance provides alternative conditions on development should a developer refuse to pay the VMP. Though the majority casts these situations as rare—"the record indicates that only a few developments have been approved upon complying with these alternative conditions"—the fact that any developments at all have been approved without VMPs shows that the VMPs are, in fact, voluntary. The majority's determination that the fee is not voluntary is not supported by the language of the ordinance, nor is it supported by the record.

lenged the city's imposition of user fees for certain regulatory services and access to public facilities on grounds that no statute expressly authorized those specific fees. The plaintiff bolstered its argument by pointing to the express inclusion of certain fees for sewer usage as evidence that other user fees were not authorized. The Court in *Homebuilders Ass'n* rejected that analysis:

> [T]he Court of Appeals noted that the General Assembly has expressly authorized county water and sewer districts to charge user fees for furnished services while it has remained silent on the authority to impose user fees for other services. Here again, *the General Assembly did not specify that sewer services were the only services for which user fees could be charged and we find no basis for such a strained reading of this statute.*

336 N.C. at 45, 442 S.E.2d at 51 (emphasis added) (internal citations omitted). That final statement applies equally well to this case: nowhere in Chapter 153A does the General Assembly forbid counties from accepting voluntary contributions or fees-in-lieu from developers in exchange for expedited development rights, much less from delaying or phasing development to achieve a legitimate policy goal. Rather, the General Assembly expressly and broadly authorizes counties to regulate and restrict development for the purpose of ensuring adequate schools, which is exactly what this APFO does.

It should be noted at this point that, despite the majority's juxtaposition of the two ("[I]t is clear that the VMP operates much like the mandatory school impact fee that the Court of Appeals invalidated in *Durham Land Owners Ass'n v. County of Durham*."), Cabarrus County's APFO is significantly different from the school impact fee ordinance struck down by the Court of Appeals in *Durham Land Owners*. Under the Durham ordinance builders had to pay a mandatory fee for every dwelling unit built. The fee was required irrespective of existing school capacity, location of the development, or the county's future school construction plans. There was no requirement that the fees be spent to build a school in the area of the development, so future residents of the development might not even see the benefit of the fees paid by the developer. By contrast, Cabarrus County's APFO is carefully crafted and narrowly tailored, and payment can be avoided. Cabarrus County engages in an individualized school adequacy review for each proposed development based on the specific high school feeder area in which the development would be built. The review is based on hard data and mathematical formulae

that show the expected impact of the development, to the precision of fractions of a pupil, as well as the per-pupil cost of new capital facilities. Only if the capacity of the specific high school feeder area is inadequate for the development is any action taken at all. And even then, the developer has choices: delay development, phase development, modify the development plan, *or* make a mitigation payment to offset school impact. All the mitigation measures in the ordinance are geared toward providing school facilities that will accommodate the specific demand generated by the proposed development, not school needs countywide. The two cases are quite different, and our views of the mandatory Durham school impact fees should not influence our analysis of Cabarrus County's finely tuned, research-based regulatory scheme.

IV. Session Law 2004-39

Even if the Court is unconvinced that the broad construction provisions of sections 153A-4 and 153A-124 apply and lead us to uphold the voluntary mitigation measures, the Court should still approve the entire APFO based on the additional grant of power contained in Session Law 2004-39. While it is arguable whether the session law provides authority to *adopt* the APFO,[20] it undoubtedly authorizes the *enforcement* of the APFO: "[T]he county of Cabarrus . . . may *enforce* . . . any provision of the school adequacy review performed under the Cabarrus County Subdivision Regulations, *including approval of a method* to address any inadequacy that may be identified as part of that review." Act of June 30, 2004, Ch. 39, Sec. 5, 2004 N.C. Sess. Laws 42, 47 (emphases added). The key language in the bill is the phrase "including approval of a method to address any inadequacy." This is another broad grant of power by the General Assembly. If Cabarrus County has authority to engage in the APFO's school adequacy review without VMPs—and as described in Section III.A it clearly does—then Session Law 2004-39 becomes the special legislation needed to support the VMP provision. Voluntary mitigation payments, as well as the other optional mitigation measures, are, without doubt, "method[s] to address any inadequacy" revealed by the school adequacy review.

The majority suggests that the session law did not authorize the adoption of an APFO. This conclusion ignores the fact that Cabarrus County had already adopted an APFO—without the VMP provision—

20. Though the majority does not reach the issue, I would agree with the plaintiffs that the session law does not give the County authority to act within municipalities without their permission.

pursuant to the statutory authority described in detail above. Only the VMP provision added after the session law raises any questions about statutory authority, as the APFO in effect at the time of the session law did not have such a provision. The session law clearly authorizes enforcement of the school adequacy review described in the preexisting, statutorily authorized APFO. But more importantly, the session law authorizes "approval of a method to address any inadequacy that may be identified as part of that review." *Id.* This clause, in the context of enforcing an APFO, indicates the legislature's awareness that future action might need to be taken; I see no functional distinction between "approval" and adopting, by a vote to approve, a method to address school inadequacy. Whatever the label, the session law specifically authorized Cabarrus County to create a method of addressing any inadequacy in school capacity it found during review. The VMP provision is exactly that: a method to address inadequacies identified in the school adequacy review. The General Assembly unequivocally authorized Cabarrus County to approve such a method through Session Law 2004-39.

Thus, even absent general statutory authority for the voluntary mitigation measures, Cabarrus County had authority under Session Law 2004-39 to modify its existing APFO by approving a method—voluntary mitigation payments—to address inadequacies revealed by school reviews.

V. Conclusion

The majority's opinion minimizes the expansive powers that the General Assembly has given counties to oversee and control development and school construction. The opinion overlooks the clear language of the General Statutes in Chapter 153A, and misreads the broad enabling language of Session Law 2004-39. Finally, the majority opinion ignores the increasingly desperate situation of many county governments in North Carolina, which are faced with rising populations, diminishing state funding for schools, and already burdensome property taxes. These county governments will be, by the majority's opinion, deprived of an innovative but statutorily authorized tool to help meet their constitutional obligations regarding education. In my view, a carefully crafted ordinance like this one before us is exactly the kind of creative regulation of growth to keep pace with school capacity that the General Assembly intended. Therefore, I respectfully dissent.

Justice TIMMONS-GOODSON joins in this dissenting opinion.

MUSSA v. PALMER-MUSSA

[366 N.C. 185 (2012)]

JUMA MUSSA v. NIKKI PALMER-MUSSA

No. 10A12

(Filed 24 August 2012)

Annulment— not a bigamous marriage—person not authorized to perform marriage ceremonies in North Carolina

Plaintiff could not annul his twelve-year marriage to defendant on grounds that their marriage was bigamous when the uncontested finding was that defendant's alleged first marriage was not done by a person authorized to perform marriage ceremonies in North Carolina. The trial court did not err by dismissing plaintiff husband's annulment action.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 217 N.C. App. 339, 719 S.E.2d 192 (2011), reversing and remanding an order dismissing plaintiff's complaint entered on 27 July 2010 by Judge Christine Walczyk in District Court, Wake County. Heard in the Supreme Court on 17 April 2012.

Steven K. Griffith for plaintiff-appellee.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg and Elizabeth Brooks Scherer, for defendant-appellant.

JACKSON, Justice.

In this action plaintiff Juma Mussa seeks to annul his twelve-year marriage to defendant Nikki Palmer-Mussa on grounds that their marriage was bigamous. After conducting a bench trial, the district court made findings of fact, which are uncontested on appeal. Based on these findings, the district court concluded that plaintiff failed to present sufficient evidence to support his claim. As a result, the district court dismissed the case. Because the district court's unchallenged findings of fact support its conclusions of law, we affirm the district court's order. *See Carolina Power & Light Co. v. Emp't Sec. Comm'n*, 363 N.C. 562, 564, 681 S.E.2d 776, 777 (2009). Accordingly, we reverse the decision of the Court of Appeals.

Plaintiff and defendant were married on 27 November 1997 during a ceremony at the Islamic Center of Raleigh. The ceremony was performed by an imam who was authorized to perform marriages pursuant to both the laws of North Carolina and the tenets of Islam. The couple obtained a marriage license before the ceremony and the

imam signed it. Following the ceremony, the couple held themselves out as husband and wife during the next twelve years. Plaintiff listed defendant as his wife on both his health and dental insurance policies. The couple filed joint tax returns, purchased real property together, and had three children who now are fourteen, ten, and eight years old.

On 4 December 2008, defendant filed a complaint for divorce from bed and board in the District Court, Wake County. Approximately two months later, on 3 February 2009, plaintiff sought a domestic violence protection order against defendant. The district court issued the protection order on 12 February 2009, finding, among other things, that plaintiff and defendant were married. Two days after requesting the domestic violence protection order, plaintiff filed an answer to defendant's complaint for divorce from bed and board. In his answer plaintiff asserted several counterclaims in which he requested divorce from bed and board, custody of the couple's children, child support, and equitable distribution. Both parties admitted in their pleadings that they were married.

On 17 February 2009, plaintiff filed motions for a psychological evaluation of defendant, temporary child custody, and possession of the marital residence. In response defendant filed a motion for child custody, child support, postseparation support, alimony, equitable distribution, and attorney's fees. The trial court conducted a hearing on defendant's motions on 1 September 2009. On 30 September 2009, the trial court entered an order that, among other things: (1) awarded defendant $212.24 per month in child support and $250.00 per month in postseparation support; and (2) declared plaintiff in arrears as to his support obligations. Notably, the order found that plaintiff and defendant were married on 27 November 1997 and that neither party had challenged the validity of their union at the time of the hearing or the entry of the order.

Approximately three months later, on 3 December 2009, plaintiff filed this annulment action, alleging that his marriage to defendant was bigamous pursuant to section 51-3 of the North Carolina General Statutes. Plaintiff's complaint stated that his marriage to defendant was void because defendant had married Khalil Braswell in early 1997 and the alleged union had not been dissolved by divorce, annulment, or death. In an answer filed on 2 February 2010, defendant asserted several affirmative defenses and made two motions to dismiss plaintiff's case. Defendant's answer admitted, among other things, that: (1) she and Braswell had participated "in a ceremony" in

early 1997; (2) neither she nor Braswell had obtained an annulment or divorce from any jurisdiction; and (3) Braswell was still living when she married plaintiff. Defendant's answer also stated that, notwithstanding her participation in the ceremony, she and Braswell had not established a legally valid marriage because the ceremony was conducted by a person who "was not authorized to perform marriage ceremonies." Additionally, defendant noted that she and Braswell had not obtained a marriage license prior to the ceremony and that there was no other documentation of the event.

The district court held a bench trial on plaintiff's annulment action on 17 March 2010. Plaintiff called six witnesses to testify: defendant, an imam who presented expert testimony regarding Islamic marriage practices, two of defendant's acquaintances, defendant's mother, and himself. Defendant and her mother were the only witnesses who attended the ceremony involving defendant and Braswell.[1]

Defendant testified that in early 1997 she and Braswell participated in a marriage ceremony at the Islamic Center of Raleigh during which they freely and seriously gave their consent to take the other as husband and wife before a friend of Braswell's named Kareem.[2] Defendant stated that, even though she and Braswell expected to enter into a long-term marriage, they did not obtain a marriage license prior to the ceremony because they only intended to establish a religious union. Defendant testified that following the ceremony she and Braswell attended a wedding reception at a historic home in Raleigh and then honeymooned in West Virginia. Defendant told the district court that she lived with Braswell in Maryland for "a couple of months," after which the couple separated and defendant moved back to Raleigh. Defendant stated that the couple never consummated their marriage. Defendant also said that while she had not filed an action for divorce or annulment in North Carolina, Maryland, or any other jurisdiction, she and Braswell had taken steps to divorce in accordance with their religious beliefs.

Defendant testified that she had met Kareem before the ceremony, but had not known him long. She could not remember Kareem's last name. Defendant stated that Kareem was a Maryland

1. The remaining witnesses testified about other matters relating to the case, none of which are relevant to this appeal.

2. The man's name is spelled "Kerim" throughout the narrative of the trial proceedings that appears in the record. However, the district court and Court of Appeals both spelled the man's name "Kareem." To maintain consistency, we adopt the spelling used by the courts below.

resident whose primary occupation was nonresidential construction. She testified that Kareem was not employed by the Islamic Center of Raleigh and he had not led any of the prayers that she had attended at the center. Defendant also testified that to her knowledge Kareem was not an imam.

After plaintiff rested his case, defendant renewed her motions to dismiss. The district court then rendered an oral order involuntarily dismissing plaintiff's annulment action for insufficiency of the evidence. On 27 July 2010, the district court entered a written order detailing its ruling. The district court noted that the case was governed by the version of section 51-1 of the North Carolina General Statutes that was in effect in 1997. The statute provided:

> The consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, and in the presence of an ordained minister of any religious denomination, minister authorized by his church, or of a magistrate, and the consequent declaration by such minister or officer that such persons are husband and wife, shall be a valid and sufficient marriage . . . .

N.C.G.S. § 51-1 (Cum. Supp. 1977).[3] The order also listed several relevant findings of fact that were based on the testimony presented at trial:

> 14. The Defendant and Mr. Braswell made preparations over a period of weeks for a "marriage" ceremony. Defendant and Mr. Braswell took part in a ceremony with the intent to become husband and wife in early 1997. Defendant and Mr. Braswell took a honeymoon trip to West Virginia after the ceremony and reception. The "marriage" was not consummated either during that trip or subsequent time together in Maryland.
>
> 15. Neither Defendant nor Mr. Braswell obtained a marriage license prior to the ceremony.

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3. In addition to the requirements quoted above, the current version of section 51-1 recognizes marriages that are performed "[i]n accordance with any mode of solemnization recognized by any religious denomination, or federally or State recognized Indian Nation or Tribe." N.C.G.S. § 51-1(2) (2011). In addition to analyzing this case pursuant to the prior version of section 51-1, the district court considered whether the alleged marriage between defendant and Braswell was valid pursuant to the current statute and determined that it was not. This additional analysis is unnecessary to resolve this case; therefore, our review is limited to the district court's application of section 51-1 as it read in 1997.

16. The "marriage" ceremony was conducted by a friend of Mr. Braswell named Kareem who came with Mr. Braswell from Maryland. The Court did not receive evidence of the last name of Kareem and he was not present during the trial. There was insufficient evidence presented for the Court to find that Kareem had the status of either "an ordained minister" or a "minister authorized by his church" as those terms would apply to the Sunni Islamic faith. There was no evidence presented that Kareem was a magistrate.

. . . .

21. With the exception of the Defendant, no one present during the ceremony was in court to testify about the ceremony. There was no evidence presented about Kareem's authorization or qualification to perform the ceremony.

Based on these findings, the district court made several relevant conclusions of law[4]:

5. Because no marriage license was obtained by or issued to Defendant and Khalil Braswell, and there is insufficient evidence that the marriage ceremony met the requirements for a valid marriage, the Court cannot find that Defendant married Mr. Braswell as contemplated by the statute. The purported marriage between Defendant and Mr. Braswell did not require an annulment or divorce or death of either party for termination.

6. Even in a light most favorable to the Plaintiff, the Court cannot find based on the evidence presented that the Defendant married Mr. Braswell, and therefore, the marriage between the parties is not bigamous and an annulment is not warranted as a matter of law. Defendant's Motions to Dismiss Plaintiff's claim for Annulment, made at the close of Plaintiff's evidence, should be granted. The Plaintiff has failed to meet his burden in establishing that his marriage was bigamous. Plaintiff has failed to establish that the Defendant was previously legally married.

7. Plaintiff's Complaint for an Annulment must be denied.

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4. In its third conclusion of law the district court expressed its "concern[ ] about the unfairness of the Plaintiff's inconsistent positions in the earlier proceedings" as to the validity of his marriage to defendant. Although this conclusion is not relevant to our analysis below, we share the district court's view especially in light of record evidence that suggests plaintiff may have been aware of defendant's relationship with Braswell before plaintiff married defendant.

Plaintiff appealed the district court's order to the Court of Appeals, which reversed and remanded in a divided opinion. *Mussa v. Palmer-Mussa*, 217 N.C. App. 339, 343, 719 S.E.2d 192, 193, 195 (2011). The Court of Appeals majority concluded that the "dispositive issue" on appeal was "whether the defendant's first marriage was void *ab initio* or merely voidable because of the status of the person who performed the ceremony." *Id.* at 341, 719 S.E.2d at 193. Although the majority acknowledged that "the evidence presented at trial supported the trial court's finding that Kareem was not authorized to conduct the marriage," the majority determined that "the court's finding does not support its' [sic] conclusion of law that defendant and Mr. Braswell were not married." *Id.* at 342, 719 S.E.2d at 194. Relying on "[t]he well-established law in North Carolina . . . that only bigamous marriages are void and all other marriages are voidable," *id.* at 342, 719 S.E.2d at 194 (citing *Fulton v. Vickery*, 73 N.C. App. 382, 387, 326 S.E.2d 354, 358, *disc. rev. denied*, 313 N.C. 599, 332 S.E.2d 178 (1985)), the majority concluded that "even though defendant and Mr. Braswell did not have a marriage license and the ceremony failed to meet statutory requirements, the marriage is merely voidable." *Id.* at 342, 719 S.E.2d at 194. Noting defendant's admissions that she had not secured a divorce or annulment from Braswell in North Carolina or any other jurisdiction and that Braswell was still alive when she married plaintiff, the majority concluded that "at the time of defendant's marriage to plaintiff, she was still married to Mr. Braswell and thus any marriage between plaintiff and defendant was bigamous, and consequently void." *Id.* at 342, 719 S.E.2d at 194.

The dissenting judge agreed with the majority that plaintiff had failed to present sufficient evidence that defendant and Braswell had participated in a valid marriage ceremony pursuant to section 51-1. *Id.* at 344, 719 S.E.2d at 195 (Bryant, J., dissenting). Nevertheless, the dissenting judge stated that "the dispositive issue is not whether defendant's first marriage was void *ab initio* or merely voidable but, rather, whether plaintiff met his burden of proof establishing that defendant's first marital union was valid and remained in existence at the time defendant married plaintiff." *Id.* at 344, 719 S.E.2d at 195. Citing the presumption favoring the validity of second marriages, the dissenting judge would have affirmed the district court because "[p]laintiff's direct evidence failed to establish the existence of a valid prior marriage as a result of the early 1997 ceremony." *Id.* at 344, 719 S.E.2d at 195-96 (citing *Kearney v. Thomas*, 225 N.C. 156, 163-64, 33 S.E.2d 871, 876-77 (1945)). Defendant appeals on the basis of the dissenting opinion.

As explained above, after hearing plaintiff's evidence, the trial court allowed defendant's motion to dismiss plaintiff's annulment action for insufficient evidence. Although the district court's order did not reference the applicable procedural rule, Rule 41(b) of the North Carolina Rules of Civil Procedure governs motions that "challenge[ ] the sufficiency of plaintiff's evidence to establish plaintiff's right to relief." *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 218 (1983). Pursuant to Rule 41(b), the trial court, "as trier of the facts," "render[ed] judgment on the merits against the plaintiff" and made "findings [of fact] as provided in Rule 52(a)" of the Rules of Civil Procedure. N.C.G.S. § 1A-1, Rule 41(b) (2011). The district court also made conclusions of law, in accordance with Rules 41(b) and 52(a)(2). *See id.*; N.C.G.S. § 1A-1, Rule 52(a)(2) (2011) ("Findings of fact and conclusions of law are necessary on decisions of any motion . . . as provided by Rule 41(b).").

When reviewing a trial court's ruling to dismiss involuntarily an action on the merits pursuant to Rule 41(b), our appellate courts must determine whether the trial court's findings of fact are supported by competent evidence and whether those findings support the court's conclusions of law. *See*, *e.g.*, *Lumbee River*, 309 N.C. at 740-42, 309 S.E.2d at 218-19. "The well-established rule is that findings of fact by the trial court supported by competent evidence are binding on the appellate courts even if the evidence would support a contrary finding. Conclusions of law are, however, entirely reviewable on appeal." *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994) (citation omitted). A trial court's unchallenged findings of fact are "presumed to be supported by competent evidence and [are] binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). If the trial court's uncontested findings of fact support its conclusions of law, we must affirm the trial court's order. *See Carolina Power & Light*, 363 N.C. at 564, 681 S.E.2d at 777.

As a starting point, we observe that plaintiff generally does not contest the district court's findings of fact; therefore, we are bound by them. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. At most, plaintiff raises the issue "[w]hether the trial court erred by concluding that the failure of Defendant and Mr. Braswell to obtain a marriage license was proof of the invalidity of their marriage." In his brief to the Court of Appeals, plaintiff's argument regarding this issue consisted of the bare statement that "[b]ecause a marriage performed without a license is valid, the lack of a license authorizing [Kareem]

to perform the wedding ceremony between Mr. Braswell and Ms. Palmer should not have been a factor in the trial court's conclusion that their marriage was invalid." Standing alone, this statement was insufficient to challenge the trial court's findings of fact. Consequently, the only issue before us is whether the district court's findings support its conclusions of law. *See Carolina Power & Light*, 363 N.C. at 564, 681 S.E.2d at 777.

This Court set forth the appropriate analytical framework for reviewing the instant case almost seventy years ago in *Kearney v. Thomas*, which involved a dispute between Alexander Kearney's second wife and the children of his first wife over two parcels of land that Kearney owned when he died intestate in 1943. 225 N.C. 156, 157-58, 33 S.E.2d 871, 873 (1945). At trial, the children asserted that Kearney's second wife did not have a legal interest in the properties because her marriage to Kearney was bigamous. *Id.* at 158, 33 S.E.2d at 873. On appeal, we affirmed the trial court's judgment following the jury's verdict that Kearney's second wife had a legal interest in the properties, notwithstanding the fact that Kearney was still married to his first wife at the time of his second marriage. *Id.* at 161, 165, 33 S.E.2d at 875, 877. In the process we recognized two principles of law that control here.

First, we stated that when the existence of a second marriage is established before the finder of fact, the second marriage is presumed valid until the "*attacking party*" demonstrates that the second marriage is invalid. *Id.* at 163, 33 S.E.2d at 876 (emphasis added). Second, we noted that the attacking party cannot rely on the presumption favoring the continuation of a prior marriage to satisfy its burden because "[t]he laws of evidence do not recognize a presumption on a presumption." *Id.* Moreover, we observed that the presumption favoring the continuation of the prior marriage, if applicable, must yield to the presumption favoring the second marriage. *Id.* at 164, 33 S.E.2d at 877. As we explained: " 'A second or subsequent marriage is presumed legal until the contrary be proved, and he who asserts its illegality must prove it. In such case[s] the presumption[s] of innocence and morality prevail over the presumption of the continuance of the first or former marriage.' " *Id.* (quoting Leslie J. Tompkins, *Trial Evidence: The Chamberlayne Handbook* § 416, at 376 (2d ed. 1936)).

Plaintiff argues that, although Kareem was not authorized to perform marriage ceremonies, defendant's marriage to Braswell was valid because it was voidable at the option of defendant or Braswell.

Thus, plaintiff argues that his marriage to defendant is bigamous and void because, as defendant admitted at trial, she had not dissolved her marriage to Braswell and Braswell was alive when she married plaintiff. *See* N.C.G.S. § 51-3 (2011). We disagree. Relying upon our long line of cases discussing the distinction between void and voidable marriages, *see, e.g.*, *Ivery v. Ivery*, 258 N.C. 721, 726-30, 129 S.E.2d 457, 460-63 (1963); *Pridgen v. Pridgen*, 203 N.C. 533, 536-37, 166 S.E. 591, 593 (1932), plaintiff essentially asks us to presume the continuation of defendant's alleged marriage to Braswell as a means of invalidating his marriage to defendant notwithstanding *Kearney's* express rejection of this argument. 225 N.C. at 164, 33 S.E.2d at 877.

As *Kearney* instructs, our analysis must begin by analyzing *plaintiff's marriage* to defendant, not defendant's alleged marriage to Braswell. If sufficient evidence is presented to establish plaintiff's marriage to defendant, that marriage is presumed valid. *Id.* at 163, 33 S.E.2d at 876. The burden then shifts to plaintiff to overcome this presumption. *Plaintiff* must attack the validity of *his marriage*, showing that (1) defendant and Braswell were married lawfully and (2) this union had not been dissolved at the time when plaintiff and defendant were wed. *See id.*; N.C.G.S. § 51-3. Therefore, pursuant to the *Kearney* framework, ascertaining whether defendant's purported marriage to *Braswell* is void or voidable is irrelevant to determining whether plaintiff has met his burden of proof.

We now review the district court's order by applying *Kearney*. As noted previously, the district court found that in prior proceedings it had concluded that plaintiff and defendant were married on 27 November 1997. Plaintiff does not challenge this finding; therefore, it is binding on appeal. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. Even if plaintiff had contested the finding, the record contains ample evidence showing that plaintiff and defendant were married. Defendant stated that she and plaintiff participated in a marriage ceremony officiated by an imam who was authorized to perform marriages pursuant to section 51-1. Both plaintiff and defendant testified that they had obtained a marriage license prior to their wedding. Indeed, "[t]here can be no question about the performance of a second marriage ceremony in the instant case." *Stewart v. Rogers*, 260 N.C. 475, 481, 133 S.E.2d 155, 159 (1963). Further, over a twelve-year period, the couple filed joint tax returns, purchased real property together, and had three children. Plaintiff listed defendant as his wife on his health and dental insurance policies. Consequently, plaintiff's marriage to defendant meets the test of presumptive validity set forth in *Kearney*. *See* 225 N.C. at 163-64, 33 S.E.2d at 876-77.

As the attacking party, plaintiff then had the burden to demonstrate that his marriage to defendant was bigamous. *See id.* at 163, 33 S.E.2d at 876. But based upon the evidence presented at trial, the district court concluded that defendant and Braswell never were married because Kareem was not authorized to perform marriage ceremonies pursuant to the version of section 51-1 that was in effect in 1997. As we have stated previously, the prior version of section 51-1 required parties participating in a marriage ceremony to "express their solemn intent to marry in the presence of (1) 'an ordained minister of any religious denomination,' or (2) a 'minister authorized by his church' or (3) a 'magistrate.' " *State v. Lynch*, 301 N.C. 479, 487, 272 S.E.2d 349, 354 (1980).

The district court made several uncontested findings of fact regarding Kareem's qualifications to conduct marriages. Most notably, the court found that "[t]here was insufficient evidence presented for [it] to find that Kareem had the status of either 'an ordained minister' or a 'minister authorized by his church' . . . . There was no evidence presented that Kareem was a magistrate." The court also found that "[t]here was no evidence presented about Kareem's authorization or qualification to perform the ceremony." These uncontested findings are binding, *see Koufman*, 330 N.C. at 97, 408 S.E.2d at 731, but we also observe that according to defendant's testimony, Kareem was an out-of-state friend of Braswell's whose primary occupation was construction—he was not an imam. Additionally, in finding of fact fifteen, the court noted that defendant and Braswell did not "obtain[ ] a marriage license prior to the ceremony." Based upon these findings, the court concluded that: "Because no marriage license was obtained by or issued to Defendant and Khalil Braswell, and there is insufficient evidence that the marriage ceremony met the requirements for a valid marriage, the Court cannot find that Defendant married Mr. Braswell as contemplated by the statute." The district court also concluded that plaintiff "failed to meet his burden in establishing that his marriage was bigamous" because he had not shown that defendant "was previously legally married."

In sum, we are bound by the district court's uncontested finding that Kareem was not authorized to perform marriage ceremonies in North Carolina. From this finding it follows that plaintiff failed to show that his marriage to defendant was bigamous because he could not demonstrate that defendant married Braswell during a marriage ceremony that met the requirements of section 51-1. As a result, the

district court properly dismissed plaintiff's annulment action. We conclude that the district court's uncontested findings of fact support its conclusions of law; therefore, we are compelled to affirm the district court's order. *See Carolina Power & Light*, 363 N.C. at 564, 681 S.E.2d at 777. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

ESTATE OF ERIK DOMINIC WILLIAMS, BY AND THROUGH EASTER WILLIAMS OVERTON, PERSONAL REPRESENTATIVE v. PASQUOTANK COUNTY PARKS & RECREATION DEPARTMENT AND PASQUOTANK COUNTY

No. 231PA11

(Filed 24 August 2012)

Immunity— governmental immunity—negligence—services provided by nongovernmental entities—fact intensive inquiry

The Court of Appeals erred in a negligence case by denying defendants' limited motion for summary judgment based upon governmental immunity. It appeared that the decision that defendants were not entitled to governmental immunity turned solely or predominantly upon the fact that the services defendants provided could also be provided by nongovernmental entities. The proper designation of a particular action of a county or municipality is a fact intensive inquiry and may differ from case to case.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 711 S.E.2d 450 (2011), affirming an order denying defendants' limited motion for summary judgment entered on 4 November 2009 by Judge Alma L. Hinton in Superior Court, Pasquotank County. Heard in the Supreme Court on 12 March 2012.

Dixon & Thompson Law PLLC, by Sanford W. Thompson, IV and Samuel B. Dixon; and Law Offices of Janice McKenzie Cole PLLC, by Janice M. Cole, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, LLP, by Burley B. Mitchell, Jr. and Robert T. Numbers, II, for defendant-appellants.

Wanda M. Copley, County Attorney, and Sharon J. Huffman, Assistant County Attorney, for New Hanover County; and Nelson Mullins Riley & Scarborough, LLP, by Leon Killian, III, for Haywood County, amici curiae.

Sharon G. Scudder, General Counsel, for North Carolina Association of County Commissioners, amicus curiae.

Walker, Allen, Grice, Ammons & Foy, L.L.P., by Jerry A. Allen, Jr., for North Carolina Association of EMS Administrators, amicus curiae.

Kimberly S. Hibbard, General Counsel, and Gregory F. Schwitzgebel, III, Senior Assistant General Counsel, for North Carolina League of Municipalities, amicus curiae.

Allison B. Schafer, General Counsel; and Yates, McLamb & Weyher, L.L.P., by Barbara B. Weyher and Andrew C. Buckner, for North Carolina School Boards Association, amicus curiae.

Edmond W. Caldwell, Jr., General Counsel, for North Carolina Sheriffs' Association, amicus curiae.

Roger A. Askew, Deputy County Attorney, and Scott W. Warren, County Attorney, for Wake County; and Michael Frue, County Attorney, for Buncombe County, amici curiae.

TIMMONS-GOODSON, Justice.

In this case we consider whether the trial court erred in denying a motion for summary judgment based upon governmental immunity. We take this opportunity to restate our jurisprudence of governmental immunity and, in light of our restatement, we vacate and remand the decision of the Court of Appeals for further remand to the trial court for proceedings not inconsistent with this opinion. In reaching our conclusion, we express no opinion whether defendants in this case, Pasquotank County and the Pasquotank County Parks & Recreation Department, are entitled to governmental immunity.

I. Background

Erik Dominic Williams drowned at a public park on 10 June 2007. The park, Fun Junktion, was owned by defendant Pasquotank County and maintained and operated by defendant Pasquotank County Parks & Recreation Department. Williams's estate filed a claim against defendants alleging that, as a result of defendants' negligence, Williams drowned in the "Swimming Hole," an area rented out to private

parties at Fun Junktion. On 9 December 2008, defendants answered plaintiff's complaint denying any negligence and alleging the affirmative defenses of governmental immunity, sovereign immunity, and contributory negligence. On 4 September 2009, defendants made a limited motion for summary judgment, contending that Williams's allegations were barred by the doctrines of governmental and sovereign immunity. The trial court denied defendants' limited motion for summary judgment, concluding that they were not entitled to governmental immunity because "defendants charged and collected a fee" "for the use of the Fun Junktion park, and defendants were providing the same type of facilities and services that private individuals or corporations could provide."

A unanimous panel of the Court of Appeals affirmed. The panel reasoned that governmental immunity applies to counties and municipalities acting in the performance of governmental, rather than proprietary, functions. *See Estate of Williams v. Pasquotank Cnty. Parks & Rec. Dep't*, ___ N.C. App. ___, ___, 711 S.E.2d 450, 452 (2011). To determine whether a function is governmental or proprietary, the Court of Appeals articulated a four-factor test considering: (1) whether an undertaking is one traditionally provided by local governments; (2) if the undertaking is one in which only a governmental agency could engage, or if any corporation, individual, or group of individuals could do the same thing; (3) whether the governmental unit charged a substantial fee; and (4) if a fee was charged, whether a profit was made. *Id.* at ___, 711 S.E.2d at 453 (citations and internal quotation marks omitted). The Court of Appeals described the second factor—whether nongovernmental actors could perform the same function provided by the county or municipality—as the "most important." *Id.* at ___, 711 S.E.2d at 453.

The Court of Appeals then applied these four factors, concluding that: (1) public parks have traditionally been provided by local government; (2) public parks could be provided by private, as well as public, entities; (3) defendants charged a fee ($75.00) for the use of Fun Junktion, though (4) defendants did not make a profit as a result of charging this or other rental fees for Fun Junktion. *Id.* at ___, 711 S.E.2d at 453-54. The Court of Appeals again opined that "the second factor is the most important" and concluded that "defendant was involved in a proprietary function in the operation of the party facilities at Fun Junktion." *Id.* at ___, 711 S.E.2d at 454. Accordingly, the Court of Appeals affirmed the trial court's denial of defendants' motion for summary judgment. *Id.* at ___, 711 S.E.2d at 454.

II. Analysis

In this case we review the trial court's denial of a motion for summary judgment. A motion for summary judgment "shall be" granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). We review the grant or denial of a motion for summary judgment de novo. *E.g.; Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs.*, LLC, —— N.C. ——, ——, 723 S.E.2d 744, 747 (2012); *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

Our jurisprudence has recognized the rule of governmental immunity for over a century. *See Moffitt v. City of Asheville*, 103 N.C. 191, 203-04, 103 N.C. 237, 254-55, 9 S.E. 695, 697 (1889) (adopting the doctrine of governmental immunity); *see also Koontz v. City of Winston-Salem*, 280 N.C. 513, 519, 186 S.E.2d 897, 902 (1972) (emphasizing that "[t]his Court has not departed from the rule of governmental immunity adopted in the year 1889 in the case of *Moffitt v. Asheville*"). Under the doctrine of governmental immunity, a county or municipal corporation " 'is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity.' " *Evans ex rel. Horton v. Hous. Auth.*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (quoting *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997)); *Moffitt*, 103 N.C. at 203, 103 N.C. at 254-55, 9 S.E. at 697 (stating a city or town "incurs no liability for the negligence of its officers" acting under authority conferred by its charter or for the sole benefit of the public).

This principle is derived from English law and is based on the premise that, as the creator of the law, "the king could do no wrong." *Steelman v. City of New Bern*, 279 N.C. 589, 592, 184 S.E.2d 239, 241 (1971). While we have acknowledged that this rationale is not as persuasive as it once was, this Court has declined to abrogate the common law doctrine of governmental immunity. Instead, we have reasoned that any change in our common law is more properly a task for the legislature.

More specifically, this Court has expressed the following:

> We suggested in *Steelman v. City of New Bern*, "It may well be that the logic of the doctrine of sovereign immunity is unsound and that the reasons which led to its adoption are

> not as forceful today as they were when it was adopted." 279 N.C. at 595; 184 S.E. 2d at 243. However, we declined to abrogate a municipality's governmental immunity from tort liability for the negligence of its agents acting in the scope of their authority. The rationale was that, albeit the doctrine was "judge-made," the General Assembly had recognized it as the public policy of the State by enacting legislation which permitted municipalities and other governmental bodies to purchase liability insurance and thereby waive their immunity to the extent of the amount of insurance so obtained. *Id.* at 594-96, 184 S.E. 2d at 242-43.

Smith v. State, 289 N.C. 303, 312, 222 S.E.2d 412, 418-19 (1976).

Nevertheless, governmental immunity is not without limit. "[G]overnmental immunity covers ***only*** the acts of a municipality or a municipal corporation committed pursuant to its governmental functions." *Evans*, 359 N.C. at 53, 602 S.E.2d at 670 (emphasis added) (citations omitted). Governmental immunity does not, however, apply when the municipality engages in a proprietary function. *Town of Grimesland v. City of Washington*, 234 N.C. 117, 123, 66 S.E.2d 794, 798 (1951) ("[W]hen a municipal corporation undertakes functions beyond its governmental and police powers and engages in business in order to render a public service for the benefit of the community for a profit, it becomes subject to liability for contract and in tort as in case of private corporations.") (citing, *inter alia*, *Millar v. Town of Wilson*, 222 N.C. 340, 23 S.E.2d 42 (1942)). In determining whether an entity is entitled to governmental immunity, the result therefore turns on whether the alleged tortious conduct of the county or municipality arose from an activity that was governmental or proprietary in nature.

We have long held that a "governmental" function is an activity that is "discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself." *Britt v. City of Wilmington*, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952) (citing *Millar*, 222 N.C. at 341, 23 S.E.2d at 44). A "proprietary" function, on the other hand, is one that is "commercial or chiefly for the private advantage of the compact community." *Id.; see also Evans*, 359 N.C. at 54, 602 S.E.2d at 671 (describing the test set forth in *Britt* as our "one guiding principle").

Our reasoning when distinguishing between governmental and proprietary functions has been relatively simple, though we have

acknowledged the difficulties of making the distinction. *Evans*, 359 N.C. at 54, 602 S.E.2d at 671 ("The difficulties of applying this principle have been noted." (citations omitted)). "When a municipality is acting 'in behalf of the State' in promoting or protecting the health, safety, security, or general welfare of its citizens, it is an agency of the sovereign. When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers." *Britt*, 236 N.C. at 450-51, 73 S.E.2d at 293.

Our case law demonstrates that a number of factors are relevant when ascertaining whether action undertaken by a county or municipality is governmental or proprietary in nature. First, in deference to our tripartite system of government, the appellate courts of this State should consider whether our legislature has designated the particular function at issue as governmental or proprietary. For example, in *Evans ex rel. Horton v. Housing Authority of the City of Raleigh we* considered the Housing Authorities Law, codified at N.C.G.S. §§ 157-1 to -39.8 (2003), in holding that a housing authority was protected by governmental immunity against allegations of lead paint-based injuries. 359 N.C. at 55-56, 602 S.E.2d at 671-72.

Specifically, we noted that in enacting the Housing Authorities Law at issue, the General Assembly provided

> "that unsanitary or unsafe dwelling accommodations exist in urban and rural areas throughout the State . . . ; that these conditions cannot be remedied by the ordinary operation of private enterprise; that the . . . providing of safe and sanitary dwelling accommodations for persons of low income are *public uses and purposes for which public money may be spent* and private property acquired; . . . and that the necessity for the provisions hereinafter enacted is hereby declared as a matter of legislative determination to be in the public interest."

Id. at 55, 602 S.E.2d at 672 (alterations in original) (citing N.C.G.S. § 157-2(a) (2003)). We considered the emphasized language a significant "statutory indication that the provision of low and moderate income housing is a governmental function." *Id.*

We therefore conclude that the threshold inquiry in determining whether a function is proprietary or governmental is whether, and to what degree, the legislature has addressed the issue. This is especially so given our pronouncement in *Steelman v. City of New Bern* that any change in the common law doctrine of governmental immu-

nity is a matter for the legislature. 279 N.C. at 595, 184 S.E.2d at 243 ("[W]e feel that any further modification or the repeal of the doctrine of sovereign immunity should come from the General Assembly, not this Court.").

Defendants contend that N.C.G.S. § 160A-351 is dispositive in this case because it asserts that "the operation of public parks is a 'proper governmental function.' " North Carolina's Recreation Enabling Law, codified in section 160A-351, gives municipalities the power to create, fund, and maintain recreation facilities. Section 160A-351 states the following:

> The lack of adequate recreational programs and facilities is a menace to the morals, happiness, and welfare of the people of this State. Making available recreational opportunities for citizens of all ages is a subject of general interest and concern, and a function requiring appropriate action by both State and local government. ***The General Assembly therefore declares that the public good and the general welfare of the citizens of this State require adequate recreation programs, that the creation, establishment, and operation of parks and recreation programs is a proper governmental function, and that it is the policy of North Carolina to forever encourage, foster, and provide these facilities and programs for all its citizens.***

N.C.G.S. § 160A-351 (2011) (emphasis added). Here the Court of Appeals made a passing reference to section 160A-351, which is clearly ***relevant*** to the question of whether defendants' conduct—maintaining and operating the Swimming Hole at Fun Junktion—is a governmental or proprietary endeavor. While we reserve comment on whether N.C.G.S. § 160A-351 is ***ultimately determinative in light of*** the facts at hand, we remand to the Court of Appeals for further remand to the trial court for detailed consideration of the degree of effect, if any, of section 160A-351. Whether defendants are entitled to governmental immunity in this case turns on the facts alleged in the complaint. Thus, even if the operation of a parks and recreation program is a governmental function by statute, the question remains whether the specific operation of the Swimming Hole component of Fun Junktion, in this case and under these circumstances, is a governmental function. *See*, *e.g.*, *Glenn v. City of Raleigh*, 246 N.C. 469, 477, 98 S.E.2d 913, 918-19 (1957) (concluding that a municipality was not entitled to governmental immunity despite existence of statute

declaring parks and recreational facilities to be a proper governmental function in light of other factors pleaded in the complaint).[1]

We recognize that not every nuanced action that could occur in a park or other recreational facility has been designated as governmental or proprietary in nature by the legislature. We therefore offer the following guiding principles going forward. When the legislature has not directly resolved whether a specific activity is governmental or proprietary in nature, other factors are relevant. We have repeatedly held that if the undertaking is one in which ***only*** a governmental agency could engage, it is perforce governmental in nature. *See Evans*, 359 N.C. at 54, 602 S.E.2d at 671; *see also Britt*, 236 N.C. at 451, 73 S.E.2d at 293 ("If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature."). This principle remains true. So, when an activity has not been designated as governmental or proprietary by the legislature, that activity is necessarily governmental in nature when it can only be provided by a governmental agency or instrumentality.

We concede that this principle has limitations in our changing world. Since we first declared in *Britt*, over half a century ago, that an activity is governmental in nature if it can only be provided by a governmental agency, many services once thought to be the sole purview of the public sector have been privatized in full or in part. Consequently, it is increasingly difficult to identify services that can only be rendered by a governmental entity.

Given this reality, when the particular service can be performed both privately and publicly, the inquiry involves consideration of a number of additional factors, of which no single factor is dispositive. Relevant to this inquiry is whether the service is traditionally a service provided by a governmental entity,[2] whether a substantial fee is charged for the service provided,[3] and whether that fee does more

1. *Glenn* cited N.C.G.S. § 160-156 (1957), the predecessor statute to N.C.G.S. § 160A-351. *See* N.C.G.S. § 160-156 (1957) ("The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this State require an adequate recreation program and that the creation, establishment and operation of a recreation system is a governmental function . . . .").

2. *See, e.g.*, *Sides v. Cabarrus Mem'l Hosp., Inc.*, 287 N.C. 14, 25-26, 213 S.E.2d 297, 304 (1975) ("[O]peration of a public hospital is not one of the 'traditional' services rendered by local governmental units. Accordingly, . . . we hold that the construction, maintenance and operation of a public hospital by either a city or a county is a proprietary function.").

3. *See, e.g.*, *Koontz v. City of Winston-Salem*, 280 N.C. at 530, 186 S.E.2d at 908 (holding that City was engaged in a proprietary capacity in operation of a sanitary

than simply cover the operating costs of the service provider.[4] We conclude that consideration of these factors provides the guidance needed to identify the distinction between a governmental and proprietary activity. Nevertheless, we note that the distinctions between proprietary and governmental functions are fluid and courts must be advertent to changes in practice. We therefore caution against overreliance on these four factors.

Analysis of the factors listed above when considering whether the action of a county or municipality is governmental or proprietary in nature is particularly important in light of two points we have previously emphasized.

> First, although an activity may be classified in general as a governmental function, liability in tort may exist as to certain of its phases; and conversely, although classified in general as proprietary, certain phases may be considered exempt from liability. Second, it does not follow that a particular activity will be denoted a governmental function even though previous cases have held the identical activity to be of such a public necessity that the expenditure of funds in connection with it was for a public purpose.

Sides v. Cabarrus Mem'l Hosp., Inc., 287 N.C. 14, 21-22, 213 S.E.2d 297, 302 (1975) (citations and emphases omitted). Consequently, the proper designation of a particular action of a county or municipality is a fact intensive inquiry, turning on the facts alleged in the complaint, and may differ from case to case.

Here, it appears that the decision of the Court of Appeals that defendants were not entitled to governmental immunity, turned solely or predominantly upon the fact that the services defendants provided could also be provided by nongovernmental entities. As

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landfill, in part because City was receiving revenues "over and beyond incidental income"); *Hare v. Butler*, 99 N.C. App. 693, 699, 394 S.E.2d 231, 235 ("Charging a substantial fee to the extent that a profit is made is strong evidence that the activity is proprietary."), *disc. rev. denied*, 327 N.C. 634, 399 S.E.2d 121 (1990).

4. *See, e.g.*, *Rich v. City of Goldsboro*, 282 N.C. 383, 386, 192 S.E.2d 824, 826 (1972) ("[T]he City of Goldsboro received from the Kiwanis Club the sum of $1,200.00 which was less than one percent of the operating costs. The trial court properly concluded the Kiwanis Club's donation was incidental income, totally insufficient to support a conclusion the city was operating Herman Park as a proprietary or business venture."); *James v. Charlott*e, 183 N.C. 674, 677, 183 N.C. 630, 632-33, 112 S.E. 423, 424 (1922) (concluding that the city engaged in governmental function in removing garbage of inhabitants for a fee covering only actual collection and disposal expenses).

noted, this distinction lacks the utility it once had. Accordingly, we vacate and remand the decision of the Court of Appeals for further remand to the trial court for proceedings not inconsistent with this opinion. Again, in so doing, we express no position on whether defendants in this case are ultimately entitled to governmental immunity.

III. Conclusion

This case is vacated and remanded to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

CRAFT DEVELOPMENT, LLC v. COUNTY OF CABARRUS

No. 436PA10

(Filed 24 August 2012)

On discretionary review pursuant to N.C.G.S. § 7A 31 of a unanimous, unpublished decision of the Court of Appeals, —— N.C. App. ——, 699 S.E.2d 139 (2010), affirming orders entered on 19 August 2008 by Judge Mark E. Klass and on 17 August 2009 by Judge W. David Lee, both in Superior Court, Cabarrus County. Heard in the Supreme Court on 17 October 2011.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.A., by James R. DeMay and James E. Scarbrough, for plaintiff-appellee.

Brough Law Firm, by G. Nicholas Herman and Richard M. Koch, for defendant-appellant.

J. Michael Carpenter, General Counsel, and Burns, Day & Presnell, P.A., by Daniel C. Higgins and James J. Mills, for North Carolina Home Builders Association, amicus curiae.

PER CURIAM.

For the reasons stated in *Lanvale Properties, LLC v. County of Cabarrus*, —— N.C. ——, —— S.E.2d —— (2012) (438PA10), the decision of the Court of Appeals is affirmed.

AFFIRMED.

MARDAN IV, LLC v. COUNTY OF CABARRUS

No. 437PA10

(Filed 24 August 2012)

On discretionary review pursuant to N.C.G.S. § 7A 31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 699 S.E.2d 139 (2010), affirming orders entered on 19 August 2008 by Judge Mark E. Klass and on 17 August 2009 by Judge W. David Lee, both in Superior Court, Cabarrus County. Heard in the Supreme Court on 17 October 2011.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.A., by James R. DeMay and James E. Scarbrough, for plaintiff-appellee.

Brough Law Firm, by G. Nicholas Herman and Richard M. Koch, for defendant-appellant.

J. Michael Carpenter, General Counsel, and Burns, Day & Presnell, P.A., by Daniel C. Higgins and James J. Mills, for North Carolina Home Builders Association, amicus curiae.

PER CURIAM.

For the reasons stated in *Lanvale Properties, LLC v. County of Cabarrus*, ___ N.C. ___, ___ S.E.2d ___ (2012) (438PA10), the decision of the Court of Appeals is affirmed.

AFFIRMED.

MARGRET DICKSON, ALISHA CHISOLM, ETHEL CLARK, MATTHEW A. MCLEAN, MELISSA LEE ROLLIZO, C. DAVID GANTT, VALARIA TRUITT, ALICE GRAHAM UNDERHILL, ARMIN JANCIS, REBECCA JUDGE, ZETTIE WILLIAMS, TRACEY BURNS-VAN, LAWRENCE CAMPBELL, O. EVERETTE ROBINSON, JR., LINDA GARROU, HAYES MCNEILL, JIM SHAW, SIDNEY E. DUNSTON, ALMA ADAMS, STEVEN R. BOWDEN, JASON EDWARD COLEY, KARL BERTRAND FIELDS, PAMLYN STUBBS, DON VAUGHN, BOB ETHERIDGE, GEORGE GRAHAM, JR., THOMAS M. CHUMLEY, AISHA DEW, GENEAL GREGORY, VILMA LEAKE, RODNEY W. MOORE, BRENDA MARTIN STEVENSON, JANE WHITLEY, I.T. (TIM) VALENTINE, LOIS WATKINS, RICHARD JOYNER, MELVIN C. MCLADWHORN, RANDALL S. JONES, BOBBY CHARLES TOWNSEND, ALBERT KIRBY, TERRENCE WILLIAMS, NORMAN C. CAMP, MARY H. POOLE, STEPHEN T. SMITH, PHILIP BADDOUR, ALICIA CHISHOLM, VALERIA TRUITT, ROBINSON O. EVERETT, JR. DOUGLAS A. WILSON, MARY F. POOLE)

v.)

CHAIRMAN NC SENATE REDISTRICTING COMMITTEE, CHAIRMAN OF NC HOUSE OF REPRESENTATIVES REDISTRICTING CO, CO CHAIRMAN 1 OF THE NC REDISTRICTING COMM., PRESIDENT PRO TEMPORE OF THE NC SENATE, SPEAKER OF THE NC HOUSE OF REPRESENTATIVE, NC STATE BOARD OF ELECTIONS, NC)

STATE OF, CO CHAIRMAN 2 OF NC HOUSE OF REPRESENTATIVE REDISTRICTING CO

NC NAACP, LEAGUE OF WOMEN VOTERS OF NC, DEMOCRACY NC, NC A PHILIP RANDOLPH INSTITUTE, REVA McNAIR, MATTHEW DAVIS, TRESSIE STANTON, ANNE WILSON, SHARON HIGHTOWER, KAY BRANDON, GOLDIE WELLS, GRAY NEWMAN, JOEL FORD, YVONNE STAFFORD, ROBERT DAWKINS, SARA STOHLER, HUGH STOHLER, OCTAVIA RAINEY, CHARLES HODGE, MARSHALL HARDY, MARTHA GARDENHIGHT, BEN TAYLOR, KEITH RIVERS, ROMALLUS O. MURPHY, CARL WHITE, ROSA BRODIE, HERMAN LEWIS, CLARENCE ALBERT, EVESTER BAILEY, ALBERT BROWN, BENJAMIN LANIER, NC STATE CONFERENCE OF THE BRANCHES OF THE NAACP, GILBERT VAUGHN, AVIE LESTER, THEODORE MUCHITIENI, WILLIAM HOBBS, JIMMIE RAY HAWKINS, HORACE P. BULLOCK, ROBERTA WADDLE, CHRISTINA DAVIS McCOY, JAMES OLIVER WILLIAMS, MARGARET SPEED, LARRY LAVERNE BROOKS, CAROLINA S. ALLEN, WALTER ROGERS, SR., SHAWN MEACHAM, MARY GREEN BONAPARTE, SAMUEL LOVE, COURTNEY PATTERSON, WILLIE D. SINCLAIR, CARDES, HENRY BROWN, JR., JAMES STEPHENS

v.

NC STATE OF, NC STATE BD OF ELECTIONS THE, SPEAKER OF NC HOUSE OF REPRESENATIVES, PRESIDENT PRO TEMPORE OF THE NC SENATE

From Wake County

No. 201P12

(Filed 14 June 2012)

ORDER

Defendants' Motion for Temporary Stay and Petition for Writ of Supersedeas are allowed.

As to defendants' notice of appeal filed 24 April 2012, the Court expedites hearing of the appeal, as follows:

The record on appeal shall be settled pursuant to the Rules of Appellate Procedure and filed with the Clerk of the Supreme Court on or before 1 June 2012.

Defendants'/appellants' briefs shall be filed with this Court on or before 15 June 2012.

Plaintiffs'/appellees' briefs shall be filed with this Court on or before 29 June 2012.

Any reply briefs shall be filed with this Court on or before 6 July 2012.

The matter is set for oral argument at 9:30 a.m. on 10 July 2012.

By order of the Court in Conference, this 11th day of May, 2012.

s/Jackson, J.
For the Court

INLAND HARBOR HOMEOWNERS ASS'N, INC. v. ST. JOSEPHS MARINA, LLC

[366 N.C. 209 (2012)]

INLAND HARBOR HOMEOWNERS ASSOCIATION, INC.	)	
v.	)	From New Hanover County
ST. JOSEPHS MARINA, LLC, RENAISSANCE HOLDINGS, LLC, ST JOSEPHS PARTNERS, LLC DEWITT REAL ESTATE SERVICES, INC., DENNIS BARBOUR, RANDY GAINEY, THOMAS A. SAIEED, JR., TODD A. SAIEED, ROBERT D. JONES, and THE NORTH CAROLINA COASTAL RESOURCES COMMISSION	)	

No. 156P12

(Filed 14 June 2012)

ORDER

It appearing that the Court of Appeals has not addressed the issue, briefed on appeal, of whether or not defendant's motion for summary judgment was properly granted by the trial court, plaintiff's Petition for Discretionary Review is ALLOWED for the limited purpose of remanding to that court to address the issue. Defendant's Conditional Petition for Discretionary Review is DISMISSED as moot.

By order of this Court in Conference, this 13th day of June, 2012.

Hudson, J.
For the Court

STATE v. BOYD

[366 N.C. 210 (2012)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Orange County
	)	
BRYANT LAMONT BOYD	)	

No. 354P11

(Filed 14 June 2012)

ORDER

The State's Petition for Discretionary Review is allowed for the limited purpose of remanding to the Court of Appeals for application of plain error review pursuant to *State v. Lawrence*, ––– N.C. ––––, 723 S.E.2d 326 (2012). The State's Petition for Writ of Supersedeas is denied and defendant's Conditional Petition for Discretionary Review is dismissed as moot.

By order of the Court in Conference, this 13th day of June 2012.

s/Martin, J.
For the Court

STATE v. COX

[366 N.C. 211 (2012)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Wayne County
	)	
RONALD PRINCEGERALD COX	)	

No. 57P12

(Filed 14 June 2012)

ORDER

The State's Petition for Discretionary Review is allowed for the limited purpose of remanding to the Court of Appeals for reconsideration in light of our decision in *State v. Sweat*, No. 472A11 (June 14, 2012).

By order of the Court in Conference, this 13th day of June June 2012.

s/Martin, J.
For the Court

STATE v. EL SHABAZZ

[366 N.C. 212 (2012)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Guilford County
	)	
TIMOTHY LEE HARRIS EL SHABAZZ	)	

No. 205P12

(Filed 14 June 2012)

ORDER

This matter being before this Court on defendant's Petition for Writ of Certiorari seeking a belated appeal, the Court enters the following order:

On its own motion, the Court hereby ALLOWS defendant to proceed *in forma pauperis*;

Defendant's Petition for Writ of Certiorari is ALLOWED for the limited purpose of remanding to the Court of Appeals so that defendant may pursue his appeal in that court.

By order of this Court in Conference, this 13th day of June, 2012.

s/Martin, J.
For the Court

STATE v. ROBINSON

[366 N.C. 213 (2012)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Stanly County
	)	
WILLIAM EUGENE ROBINSON	)	

No. 142A12

(Filed 14 June 2012)

ORDER

Defendant William Eugene Robinson submitted a "Motion for Appropriate Relief Pursuant to the Racial Justice Act" to this Court following his conviction on 1 December 2011 and death sentence on 9 December 2011. On 12 April 2012 this Court granted a stay of proceedings in defendant's direct appeal in light of defendant's Racial Justice Act motion pending in the superior court.

Ordinarily, a motion for appropriate relief filed while the case is pending review in the appellate division and more than 10 days after entry of judgment must be filed in the appellate court. N.C.G.S. § 15A-1418(a). However, the hearing procedures detailed in the Racial Justice Act in section 15A-2012 provide that a defendant may seek relief under the Racial Justice Act "notwithstanding any other provision or time limitation contained" in the statutes governing motions for appropriate relief. N.C.G.S. § 15A-2012(b).

Accordingly, it is hereby ORDERED that defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act is DISMISSED without prejudice to defendant's right to pursue in superior court his previously filed motion for appropriate relief.

By order of this Court in Conference, this 13th day of June, 2012.

s/Jackson, J.
For the Court

STATE v. JAMES

[366 N.C. 214 (2012)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Mecklenburg County
	)	
HARRY SHAROD JAMES	)	

No. 514P11

(Filed 24 August 2012)

ORDER

Defendant's Petition for Discretionary Review as amended is allowed for the limited purpose of remanding to the Court of Appeals for further remand to the trial court for resentencing pursuant to Article 93 of Chapter 15A of the General Statutes of North Carolina.

The State's Motion to Dismiss defendant's Notice of Appeal is allowed. Defendant's Motion to Continue or Hold in Abeyance Pending Resolution of Issues by the Supreme Court of the United States is dismissed as moot.

By order of the Court in Conference, this 23rd day of August, 2012.

s/Jackson, J.
For the Court

STATE v. LOWERY

[366 N.C. 215 (2012)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Robeson County
	)	
JAMIE DAQUAN LOWERY	)	

No. 135P12

(Filed 24 August 2012)

ORDER

Defendant's Petition for Discretionary Review is ALLOWED for the limited purpose of remanding to the Court of Appeals for further remand to the trial court for resentencing pursuant to Article 93 of Chapter 15A of the General Statutes of North Carolina.

The State's Motion to Dismiss defendant's Notice of Appeal is ALLOWED. Defendant's Motion to Amend Notice of Appeal and Petition for Discretionary Review is ALLOWED.

By Order of the Court in Conference, this 23rd day of August, 2012.

s/Jackson, J.
For the Court

STATE v. POOLE

[366 N.C. 216 (2012)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Carteret County
	)	
EDWARD EUGENE POOLE, JR.	)	

No. 420P11

(Filed 24 August 2012)

ORDER

The Motion to Strike filed by the State of North Carolina is DENIED. The Motion to Deny the Motion to Strike filed by defendant is DISMISSED AS MOOT. The Petition for Writ of Supersedeas filed by the State of North Carolina is ALLOWED. The Motion to Dismiss Appeal filed by defendant is ALLOWED. The Petition for Discretionary Review filed by the State of North Carolina is ALLOWED for the limited purpose of vacating the decision of the Court of Appeals and remanding this case to that court for reconsideration in light of this Court's decisions in *State v. Nabors*, 365 N.C. 306 (2011), and *State v. Lawrence*, —— N.C. —— (2012).

By Order of the Court in Conference, this 23rd day of August, 2012.

s/Jackson, J.
For the Court

STATE v. RANDALL

[366 N.C. 217 (2012)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Durham County
	)	
ROBERT LANCE RANDALL	)	

No. 305P12

(Filed 24 August 2012)

ORDER

On 16 July 2012 pro se Defendant filed a petition for writ of mandamus in his case. On or about 4 November 2008, the Court of Appeals ordered a new trial. *State v. Randall*, 193 N.C. App. 611, 670 S.E.2d 644, 2008 N.C. App. LEXIS 1960, at *1 (Nov. 4, 2008) (COA07-1470) (unpublished). To date the case has not been calendared for trial.

Defendant's petition for writ of mandamus is allowed and the District Attorney, Fourteenth Judicial District is directed to calendar the case of *State v. Robert Lance Randall* within ninety days of this order.

"By order of the Court in Conference, this 26th day of July 2012."

Timmons-Goodson, J.
For the Court

Jackson, J., Recused.

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

13 JUNE 2012

018P02-2	State v. Cedric Terrell	1. Def's *Pro Se* PWC to Review Order of COA (COAP11-715) 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
024P12	Dewey D. Mehaffey, Employee v. Burger King, Employer, Liberty Mutual Group, Carrier	1. Plt's Motion for Temporary Stay (COA10-1421) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/17/2012** 2. Allowed 3. Allowed
025P12	State v. William Raymond Miller	Def's PDR Under N.C.G.S. § 7A-31 (COA11-431)	Denied
028A12	Jennifer Ray, Administratrix of the Estate of Mickela Nicholson; Linda Judge, Administratrix of the Estate of Marianne Dauscher; and Eileen and Roger Layaou, Co-Administrators of the Estate of Michael Layaou v. North Carolina Department of Transportation	1. State's Motion to Strike 2. State's Motion in the Alternative for Leave to File a Reply Brief	1. Denied 2. Allowed
046PA12-2	State v. Marva Denyse Gillis	Def's PWC to Review Order of COA (COAP11-1049)	Denied
048P11-2	State v. Brian Wendell Rhodes, Jr.	State's PDR Under N.C.G.S. § 7A-31 (COA11-1355)	Allowed **Jackson, J., Recused**
057P12	State v. Ronald Princegerald Cox	1. State's Motion for Temporary Stay (COA11-609) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/17/12**; Dissolved the Stay **06/13/12** 2. See Special Order 3. See Special Order
058P12	State v. Earl Wayne Flowers	Def's *Pro Se* Motion for PDR (COAP12-22)	Dismissed

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

13 JUNE 2012

068P12	In the Matter of: S.R. and E.Q.R. Minor Children	Respondent-Father's PDR Under N.C.G.S. § 7A-31 (COA11-1109)	Denied
069P12	Duncan C. Day and Ashley-Brook Day, as Co Administrators of the Estate of Duncan C. Day, Jr., Deceased v. Thomas Alan Brant, M.D., Edward William Hales, P.A., Mid-Atlantic Emergency Medical Associates, P.A., and Mooresville Hospital Management Associates, Inc. d/b/a Lake Norman Regional Medical Center	Defs' (Brant, Hales, and Mid-Atlantic Emergency Medical Associates, P.A.) PDR Under N.C.G.S. § 7A-31 (COA09-573-2)	Denied
071P12	State v. Jennie Lee White and Katherine Ann White	Def's (Katherine Ann White) PDR Under N.C.G.S. § 7A-31(COA11-558)	Denied
081P12	State v. William Latham Reynolds	1. State's Motion for Temporary Stay (COA11-536) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Dissolve Temporary Stay	1. Allowed **02/27/12;** Dissolved the Stay **06/13/12** 2. Denied 3. Denied 4. Dismissed as Moot
090P07-4	State v. Lindo Nickerson	Def's *Pro Se* Motion for NOA (COAP11-768)	Dismissed **Jackson, J., Recused**
095P12	State v. Dustin Lewis Monti and Joshua L. Thornton	1. State's Motion for Temporary Stay (COA11-836) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's (Thornton) Motion to Dissolve Temporary Stay 5. Def's (Monti) Motion to Dissolve Temporary Stay	1. Allowed **03/12/12**; Dissolved the Stay **06/13/12** 2. Denied 3. Denied 4. Dismissed as Moot 5. Dismissed as Moot

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

13 JUNE 2012

096P12	State v. Lawrence Collins Johnson	1. Def's NOA Based Upon a Constitutional Question (COA11-898) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex Mero Motu* 2. Denied
103A12	Victoria Klotz Greco v. Penn National Security Insurance Company, et al.	Plt's Motion to Deem Brief Timely Filed	Allowed
107P12	State v. Michael Dorsey Needham	Def's PDR Under N.C.G.S. § 7A-31 (COA11-892)	Denied
112P12	The Estate of Akel Davis, by William Mills, Administrator; and Shamekia Davis, Individually v. Amy O. Groff, M.D. and Mid-Carolina Obstetrics & Gynecology, P.C.	Def's PDR Under N.C.G.S. § 7A-31 (COA11-948; COA11-1024)	Denied
114A12-2	Neil Allran, et al. v. Wells Fargo, Robinson Bradshaw & Hinson, P.A., Louis A. Bledsoe, III, and Karl Doerr	Plts' Motion for Court to Initiate Disciplinary Measures	Denied
117P12	State v. James Swinson	Def's PDR Under N.C.G.S. § 7A-31 (COA11-557)	Denied
119P12	State v. David Wemyss	1. Def's Motion for Temporary Stay (COA11-947) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 4. State's Motion to Dissolve Temporary Stay	1. Allowed **03/19/12**; Dissolved the Stay **06/13/12** 2. Denied 3. Denied 4. Dismissed as Moot
121P12	In the Matter of: K.M.	1. Petitioner's (Mecklenburg County DSS) Motion for Temporary Stay (COA11-837) 2. Petitioner's (Mecklenburg County DSS) Petition for *Writ of Supersedeas* 3. Petitioner's (Mecklenburg County DSS) PDR Under N.C.G.S. § 7A-31	1. Allowed **03/22/12**; Dissolved the Stay **06/13/12** 2. Denied 3. Denied

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

13 JUNE 2012

124P12	State v. Jerry Lamont Lindsey	1. State's Motion for Temporary Stay (COA11-612) 2. State's Petition for *Writ of Supersedeas* 3. State's NOA Based Upon a Dissent 4. State's PDR as to Additional Issues	1. Allowed **03/23/12** 2. Allowed 3. - - - 4. Allowed
129P12	State v. Endy Rafael Lopez	1. Def's NOA Based Upon a Constitutional Question (COA11-957) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
137P12	State v. Ellerek Dermot Vaughters	1. Def's PDR Under N.C.G.S. § 7A-31 (COA11-1042)	Denied
139P12	State v. Gary Lavan Daniels	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1032)	Denied
140P12	State v. Jeffrey Allan Gill	Def's *Pro Se* Motion for PDR (COA10-1198)	Denied
141P12	State v. Joseph Doyle Dulaney	1. Def's P*ro Se* Motion for NOA 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
142A12	State v. William Eugene Robinson	1. Def's Motion for Stay of Appellate Proceedings in Light of Pending Racial Justice Act Motion 2. Def's Motion for Appropriate Relief Pursuant to the Racial Justice Act	1. Allowed **04/12/12** 2. See Special Order
144P12	State v. William Earl Allen, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA11-670)	Denied
146P12	Jeffrey Lee Whitlow, Jr., *pro se* Jeffrey Lee Whitlow, Jr. EL, *inpropria persona*, *suijuris* v. Mr. George Zoley & The GoeGroup, Inc. d.b.a. Rivers Correctional Institution	Plaintiff-Petitioner's *Pro Se* Motion to Exhaust and transfer 28 U.S.C. 2254 to U.S. District Court and Hold Complaint for Fraud $500 Million Dollars for Trial in Abeyance (COAP12-275)	Dismissed **04/17/12**

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

13 JUNE 2012

148P10-4	Lance Adam Goldman v. Reuben F. Young	1. Plt's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Plt's *Pro Se* Motion to Appoint Counsel	1. Denied **06/08/12** 2. Allowed **06/08/12** 3. Dismissed as Moot **06/08/12**
149P12	State v. David Andrew Blackley	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1133)	Denied
151P12	State v. Samuel James Cooper	1. Def's NOA Based Upon a Constitutional Question (COA11-809) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
152P12	State v. Jermaine Pittman	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-1143)	Denied
153P12	State v. Lorraine Lewis Blackwell	Def's *Pro Se* Motion for NOA and Request to Void Judgment	Dismissed
156P12	Inland Harbor Homeowners Association, Inc. v. St. Josephs Marina, LLC, Renaissance Holdings, LLC, St. Josephs Partners, LLC, Dewitt Real Estate Services, Inc., Dennis Barbour, Randy Gainey, Thomas A. Saieed, Jr., Todd A. Saieed, Robert D. Jones, and The North Carolina Coastal Resources Commission	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA11-715) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. See Special Order 2. Dismissed as Moot
162P12	State v. Amanda Lea Rose	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA12-28)	Denied
165P12	State v. James Curtis Townsend	1. Def's *Pro Se* PWC to Review Order of COA (COAP12-172) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot

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

13 JUNE 2012

166P12	State v. William Arthur Brown	Def's *Pro Se* Motion for Emergency *Writ* Motion for Immediate Release	Denied **05/04/12**
169P12	Diane K. Troum, Inc. v. Amini Innovation Corporation	1. Def's Motion for Temporary Stay (COA11-1045) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/18/12**; Dissolved the Stay **06/13/12** 2. Denied 3. Denied
170P12	In the Matter of: Lorenzo Richardson	Respondent's PDR Under N.C.G.S. § 7A-31 (COA11-1124)	Denied
171P12	State v. Dong Jin Kim	1. Def's PDR Under N.C.G.S. § 7A-31 (COA11-963) 2. Def's Motion to Amend PDR	1. Denied 2. Allowed
172P12	State v. Clinton Jackson	Def's PDR Under N.C.G.S. § 7A-31 (COA11-959)	Denied
173P12	State v. Woody James Allison	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied **04/24/12**
175P12	State v. Aaron Pittman	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1114)	Denied
177P12	Irene Pait, Employee v. Southeastern General Hospital, Employer, North Carolina Insurance Guaranty Association, Statutory Insurer	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-1286)	Denied
180P12	State v. Charles Audrey	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1155)	Denied
181P12	State v. Terrence Lamar Rucker	Def's PDR Under N.C.G.S. § 7A-31 (COA11-740)	Denied
182P12	McK Enterprises, LLC. v. Michael A. Levi and wife, Susan B. Levi	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA11-1070) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Withdraw PDR	1. - - - 2. Dismissed as Moot 3. Allowed

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

13 JUNE 2012

183P12	State v. Doyle Hoyle Dockery, aka Doyle Hoyte Dockery	1. Def's NOA Based Upon a Constitutional Question (COA11-961) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
185P12	Victor Howard v. Midland Mortgage Co.	Plt's *Pro Se* Motion for NOA (COA12-246)	Denied
186P12	State v. James Tyler Ellerbe	Def's *Pro Se* PWC to Review Order of COA (COAP11-366)	Dismissed
187P12	State v. Robert Wayne Smith	Def's *Pro Se* Motion for Appropriate Relief	Dismissed
191P12	State v. Anthony Junior Barnhill	Def's *Pro Se* Motion for PDR (COAP11-1056)	Denied **Jackson, J., Recused**
194P12	State v. Kent Hammonds	1. Def's *Pro Se* PWC to Review Order of COA (COAP12-163) 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
195P12	Friends of Joe Sam Queen, a Political Committee v. Ralph Hise for NC Senate, a Political Committee; and North Carolina Republican Party, a Political Committee	Defs' PDR Prior to Determination by COA	Denied
196P12	State v. Allan Comeaux	1. State's Motion for Temporary Stay (COA11-1289) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. State's Motion to Withdraw PDR and *Writ of Supersedeas*	1. Allowed **05/03/12**; Dissolved the Stay **06/13/12** 2. - - - 3. - - - 4. Allowed

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

13 JUNE 2012

197P12	Portfolio Recovery Associates, LLC v. Barbara A. Hammonds	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA11-1260) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's *Pro Se* Motion for Temporary Stay 4. Def's *Pro Se* Petition for *Writ of Supersedeas*	1. Dismissed *ex Mero Motu* 2. Denied 3. Allowed **05/10/12**; Dissolved the Stay **06/13/12** 4. Denied
198P12	State v. Jermaine Moses	1. Def's *Pro Se* PWC to Review the Decision of the COA (COA11-976) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as Moot
200P12	State v. Abdelfettah Louali	Def's PWC to Review the Decision of COA (COA10-1590)	Denied
201P12	Margaret Dickson, et al. v. Robert Rucho, et al. ——— North Carolina State Conference of Branches of the NAACP, et al. v. The State of North Carolina, et al.	1. Defs' (Robert Rucho, et al.) Motion for Temporary Stay 2. Defs' (Robert Rucho, et al.) Petition for *Writ of Supersedeas*	1. See Special Order **05/11/12** 2. See Special Order **05/11/12**
202P12	Robert B. Broughton v. Celeste G. Broughton	Def's Motion for Temporary Stay (COAP12-363)	Denied **05/04/12**
205P12	State v. Timothy Lee Harris El Shabazz	Def's PWC to Review Order of COA (COAP11-285)	See Special Order
207P12	State v. Jasmine N. Corbett	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1129)	Denied

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

13 JUNE 2012

209P12	State Farm Mutual Automobile Insurance Company, as Subrogee of Ronald Thompson v. Arthur Hill	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-1125) 2. Def's *Pro Se* Motion to Suspend Rules and Consider PDR Timely Filed 3. Def's *Pro Se* Motion in the Alternative to Consider PDR a Petition for *Writ of Mandamus* 4. Def's *Pro Se* Motion in the Alternative to Consider PDR a Petition for *Writ* of Prohibition 5. Def's *Pro Se* Motion in the Alternative to Consider PDR a PWC	1. Denied 2. Denied 3. Denied 4. Denied 5. Denied
210P12	State v. Shamakh Alshaif	Def's Petition for Expedited Review Under Art. IV. § 12(1) of the North Carolina Constitution (COA11-817)	Dismissed **05/09/12**
211P12	State v. Charles Thomas West	Def's *Pro Se* Motion for PDR (COAP10-854)	Dismissed
212P12	State v. Michael Anthony Kerr	Def's *Pro Se* PDR (COA11-749)	Denied
213A12	In the Matter of the Foreclosure of Deed of Trust Executed by Jennifer L. Wilson in the Original Amount of $94,900.00 Dated January 16, 2007, Recorded in Book 21672, Page 355, Mecklenburg County Registry, Substitute Trustee Services, Inc., Substitute Trustee	1. Respondent's *Pro Se* NOA Based Upon a Constitutional Question (COA11-1487) 2. Petitioner's Motion to Dismiss Appeal	1. - - - 2. Allowed
214P12	State v. Timothy Lamont Evans	1. Def's *Pro Se* PWC to Review the Order of Durham County Superior Court 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 **Jackson, J., Recused**

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

13 JUNE 2012

215P12	State v. Luther Daniel Stidham	Defendant-Appellant's *Pro Se* Motion for *Writ of Habeas Corpus*	Denied 05/18/12
216P12	State v. Timothy S. McKendall	1. State's PWC to Review the Order of COA (COAP12-166) 2. Def's Motion to Dismiss State's PWC as Moot 3. State's Motion to Withdraw State's PWC	1. - - - 2. Dismissed as Moot 3. Allowed
217P12	James Ronald Peggs v. State of North Carolina	Plt's *Pro Se* Motion for NOA and Request to Void Judgment	Dismissed
223P12	State v. Mikel Shannon Arms	Def's PDR Under N.C.G.S. § 7A-31 (COA11-764)	Denied
226P12	State v. James Emmett Long, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA11-962)	Denied
232P12	State v. Samuel Covington	Def's *Pro Se* Motion for NOA	Dismissed
242P07-3	State v. Yilien Osnarque	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **05/30/12**
276P11-2	State v. Michael Earl Rogers-Bey	1. Def's *Pro Se* Motion for an "Avernment" of Jurisdiction 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
305P97-4	State v. Egbert Francis, Jr.	Def's *Pro Se* PWC to Review Order of Superior Court of Wake County	Denied
331P11	In the Matter of: R.H. & M.H.	Respondent's PDR Under N.C.G.S. § 7A-31 (COA11-13)	Denied
347P11	Sugar Creek Charter School, Inc., et al. v. State of North Carolina, et al.	1. Plts' NOA Based Upon a Constitutional Question (COA10-965) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. Defs' (School Boards) Motion to Dismiss Appeal 5. Defs' (Counties) Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed 4. Allowed 5. Allowed

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

13 JUNE 2012

354P11	State v. Bryant Lamont Boyd	1. State's Motion for Temporary Stay (COA10-1072) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 08/22/11; Dissolved the Stay **06/13/12** 2. See Special Order 3. See Special Order 4. See Special Order
355P09-3	Gary Lewis Miller-El v. North Carolina Judicial Standards Commission and Robert F. Floyd, Jr.	Def's *Pro Se* Motion for *Habeas Corpus*	Denied
357P11	State v. Victor Jerome Wade ——————— State v. Roderick Jermaine Young	1. Def's (Roderick Jermaine Young) PDR Under N.C.G.S. § 7A-31 (COA10-412) 2. Def's (Victor Jerome Wade) PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
370P04-10	State v. Anthony Leon Hoover	Def's *Pro Se* Motion for *Writ* of Relief	Dismissed **Hudson, J., Recused**
370P04-11	State v. Anthony Leon Hoover	Def's *Pro Se* Motion for *Writ of Mandamus* on Motion *Writ of Habeas Corpus ad Duces Testifu Candum*	Dismissed **Hudson, J., Recused**
380PA11	State v. Nicholas Brady Heien	Def's Motion to Allow Visual Aid for Oral Argument	Allowed **05/07/12**
385P08-2	Robert Jones (Superintendent) v. John Christopher Green	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **05/01/12**
386P04-3	State v. Stuart A. Middleton	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **04/30/12**
400P09-3	State v. Juan Cabrera Flores	Def's *Pro Se* Motion for PDR	Dismissed

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432P11	Wake Radiology Services, LLC; Wake Radiology Diagnostic Imaging, Inc.; Wake Radiology Consultants, PA; Smithfield Radiology, Inc.; and Raleigh MR Imaging, LP v. N.C. Dept. of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section and Pinnacle Health Services of North Carolina, LLC d/b/a Raleigh Radiology at Cedarhurst, Intervenor	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA10-1129)	Denied
435P10-2	State v. William Littleton	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-224) 2. Def's *Pro Se* PWC to Review Decision of COA 3. Def's *Pro Se* Motion for Amendment	1. Denied 2. Denied 3. Allowed
435P11-2	State v. Ronnie Leon Brooks, Jr.	Def's *Pro Se* Motion for PDR (COA10-1244)	Denied
443P03-2	State v. Richard Lee Peak	Def's *Pro Se* PWC to Review Order of the COA (COAP12-238)	Dismissed
500P11	State v. Thaddeus Dee Jones	1. State's Motion for Temporary Stay (COA11-22) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **11/17/11**; Dissolved the Stay **06/13/12** 2. Denied 3. Denied 4. Dismissed as Moot
531PA11	State v. Darrell Lamar Sullivan, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA11-297)	Denied

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532P06-2	State v. Johnnie Dee Allen	Def's *Pro Se* Motion for PDR (COAP11-170)	Dismissed
532P11	State v. Douglas Harold McMickle	Def's PDR Under N.C.G.S. § 7A-31 (COA11-215)	Denied
545P11	State v. Jason Thomas Dail	1. State's PDR Under N.C.G.S. § 7A-31 (COA11-384) 2. Def's Conditional PDR as to an Additional Issue	1. Denied 2. Dismissed as Moot
550P11	State v. Tawaunn Grady Jackson	1. Def's NOA Based Upon a Constitutional Question (COA11-70) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss NOA	1. - - - 2. Denied 3. Allowed
551P11	Terri Ginsberg v. Board of Governors of the University of North Carolina	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-506)	Denied
580P05-4	In re: David Lee Smith	1. Def's *Pro Se* Petition for *Writ of Mandamus* (COAP12-176) 2. Def's *Pro Se* Petition for Writ of Mandamus	1. Denied 2. Denied

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002P12	State v. Brian Daniel Barker	Def's PDR Under N.C.G.S. § 7A-31 (COA11-630)	Denied
008PA11-2	State v. Chris Alan Jones	1. Def's NOA Based Upon a Constitutional Question (COA10-475-2) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
013P12	State v. Simon Lamar Clark	Def's PDR Under N.C.G.S. § 7A-31 (COA11-75)	Denied
022A02-2	State v. Marcus Douglas Jones	Def's Motion for Extension of Time to File PWC	Allowed **07/11/12**
023P12	In Re: Fifth Third Bank, National Association-Village of Penland Litigation	Plts' (Jerome E. Williams, Jr., M.D., Jerome E. Williams, Jr., M.D. Consulting LLC, and Adelle A. Williams, M.D.) PWC to Review Decision of COA (COA11-310)	Denied
031P12	Jose Guadalupe Vargas Morales, Employee, by and through his Guardian *ad Litem*, Joseph W. Hart v. Greensboro Contracting Corporation, Employer, Key Risk Management Services, Inc., Carrier, The Cincinnati Casualty Company and/or The Cincinnati Insurance Company, Carrier	Def's (Key Risk) PDR Under N.C.G.S. § 7A-31 (COA11-376)	Denied

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035P12	Connie Chandler, Employee, by her Guardian *ad Litem*, Celeste M. Harris v. Atlantic Scrap & Processing, Employer and Liberty Mutual Insurance Company, Carrier	1. Defs' Motion for Temporary Stay (COA11-618) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Plt's Motion for Expedited Consideration 5. Plt's Motion for Relief from Stay 6. Plt's Motion to Dismiss PDR 7. Plt's Motion for Attorney's Fees 8. Plt's Supplemental and Amended Motion for Relief from Temporary Stay 9. Plt's Supplemental and Amended Motion for Attorney Fees	1. Allowed 0**1/25/12** 2. Allowed 3. Allowed 4. Dismissed as Moot 5. Denied 6. Dismissed as Moot 7. Dismissed 8. Denied 9. Denied
041P11-3	State v. Vernon Russell Kirk	1. Def's *Pro Se* Motion for NOA (COAP12-553) 2. Def's *Pro Se* PWC to Review Order of COA 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 4. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed *Ex Mero Motu* 2. Dismissed 3. Allowed 4. Dismissed as Moot **Jackson, J., Recused**
042P10-2	State v. David Henry Rogers	1. Def's NOA Based Upon a Constitutional Question (COA11-482) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
044P12	Judy St. John v. Tammy Brantley --- Judy St. John v. Vicky Brantley	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA11-635) 2. Defs' PWC to Review Decision of COA	1. Dismissed 2. Denied

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056P12-2	State v. Kareem Abdullah Kirk	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-1285)	Denied
063P12	State v. Herbert Marshall Pender, Jr.	1. Def's NOA Based Upon a Constitutional Question (COA11-647) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
067P12	State v. Roderickiou Jermand Davis	1. Def's NOA Based Upon a Constitutional Question (COA11-412) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
074P12-2	Harold N. Orban and Victoria L. Orban v. Steven C. Wilkie, Substitute Trustee and T.D. Bank, N.A.	Plts' *Pro Se* PWC to Review Decision of COA (COA11-678, 11-901)	Denied
078A12	State v. Jonathan Lynn Burrow	1. State's Motion for Temporary Stay (COA11-773) 2. State's Petition for *Writ of Supersedeas* 3. State's NOA Based Upon a Dissent 4. State's Motion to Amend Record on Appeal	1. Allowed **02/24/12** 2. Allowed 3. - - - 4. Allowed
090P07-5	State v. Lindo Nickerson	1. Def's *Pro Se* PWC to Review the Order of the COA (COAP11-768) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel 4. Def's *Pro Se* Motion to Dismiss PWC	1. - - - 2. Allowed 3. Dismissed as Moot 4. Allowed **Jackson, J., Recused**
091P12	State v. Douglas Bernard Spearman	Def's PDR Under N.C.G.S. § 7A-31 (COA11-991)	Denied

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097P12	Deborah Lynn Jackson, Administratrix of the Estate of the Late Joel Edward Tripp v. ES&J Enterprises, Inc., Town of Lake Waccamaw, Larry Carlisle, Esther Faye Carlisle, and Sandra Carroll Williams	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-225)	Denied
106P12	State v. Shaylon Monquice Springs	1. State's Motion for Temporary Stay (COA11-799) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Take Judicial Notice 5. State's Motion to Strike Any Reference to Material Outside the Record	1. Allowed **03/14/12**; Dissolved the Stay **08/23/12** 2. Denied 3. Denied 4. Dismissed as Moot 5. Dismissed as Moot
108P12	Gwendolyn Harris Lane v. Linwood Earl Lane	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-608)	Denied
109P12	State v. William Spruill	Def's PDR Under N.C.G.S. § 7A-31 (COA11-430)	Denied
110P12	In the Matter of: The Appeal of: Joshua McLamb From the Order of the Sampson County Board of Commissioners Adopting the Schedule of Values, Standards, and Rules for the 2011 General Reappraisal	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA11-1007)	Denied
111P12	State v. Anthony Hudson	Def's PDR Under N.C.G.S. § 7A-31 (COA11-444)	Denied
118A12	Veronica Filipowski v. Melissa Oliver (Lieu)	1. Def's NOA Based Upon a Constitutional Question (COA11-996) 2. Plt's Motion to Dismiss Appeal	1. - - - 2. Allowed

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120P12	State v. William Edward Hemphill, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA11-639)	Denied
127A12	IMT, Inc., et al. v. City of Lumberton, et al.	1. N.C. Institute for Constitutional Law's Motion for Leave to File *Amicus Brief* 2. Def's Motion to Strike N.C. Institute for Constitutional Law's *Amicus Curiae* Brief as Being Untimely Filed	1. Allowed **08/07/12** 2. Denied **08/09/12**
130P12	Howard H. Pierce, Sr. v. The Atlantic Group, Inc. d/b/a DZ Atlantic, Day & Zimmermann LLC d/b/a DZ Atlantic Group and/or DZ Atlantic, and Duke Energy Carolinas, LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-494)	Denied
131P12	James W. Pendergraph, on Behalf of Himself and All Others Similarly Situated, and Teresa C. Rogers, on Behalf of Herself and All Others Similarly Situated v. N.C. Department of Revenue, Kenneth R. Lay, Secretary of the N.C. Department of Revenue (in His Official Capacity), N.C. Department of State Treasurer, Janet Cowell, Treasurer of the State of N.C. (in Her Official Capacity), and the State of N.C.	Plts' PDR Under N.C.G.S. § 7A-31 (COA11-848)	Denied
132P11-7	State v. Gregory Lynn Gordon	Def's *Pro Se* Motion for Direct Appeal (COAP11-153)	Dismissed *Ex Mero Motu*

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135P12	State v. Jamie Daquan Lowery	1. Def's NOA Based Upon a Constitutional Question (COA11-673) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. Defendant-Appellant's Motion to Amend NOA and PDR	1. - - - 2. Special Order 3. Allowed 4. Allowed
155P12	State v. Lino Antonio Errichiello	Def's PDR Under N.C.G.S. § 7A-31 (COA11-857)	Denied
157P12	State v. Terrell Davez Cornelius	1. Def's NOA Based Upon a Constitutional Question (COA11-94) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
158P12	Kight's Medical Corp., Plaintiff / Counterclaim Defendant v. Ginger Kight Pickett, Defendant / Counterclaim Plaintiff and Kight's Medical of Virginia, Inc., d/b/a Atlantic Home Medical, Defendant / Third Party Plaintiff v. John A. Kight, Plaintiff / Third Party Defendant	1. Def's PDR Under N.C.G.S. § 7A-31 (COA11-954) 2. Def's PWC to Review the Decision of the COA	1. Denied 2. Denied
163P12	Ross A. Panos v. Timco Engine Center, Inc.	Def's PDR Under N.C.G.S. § 7A-31 (COA11-803)	Denied
167P12	Henry O. Lingerfelt, Employee v. Advance Transportation, Inc., Employer, Noninsured; and/or Superior Transfer, Inc., Employer, Noninsured; and Raymond Camero, Chris North, James L. North, Jr., and Jerrye North, Individually and/or Southern Insurance Company, Carrier (Firstcomp Underwriters Group, Inc., Administrator/ Servicing Agent)	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA11-983) 2. Plts' Motion to Deem PDR Timely Filed 3. Plt's Petition in the Alternative for PWC to Review Decision of COA 4. Def's Motion to Dismiss Appeal for Failure to Take Timely Action	1. Dismissed 2. Denied 3. Denied 4. Dismissed as Moot

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168P09-8	State v. Clyde Kirby Whitley	1. Def's *Pro Se* Motion for *Writ of Mandamus* (COAP11-794) 2. Def's *Pro Se* Motion for Declaratory Judgment 3. Def's *Pro Se* Motion for Clarification 4. Def's *Pro Se* Motion for Enforcement of Plea Agreement and Judgment and Commitment	1. Denied 2. Dismissed 3. Dismissed 4. Dismissed
168P12	State v. Joshua Wray Walker	1. Def's NOA Based Upon a Constitutional Question (COA11-1093) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
176P11-2	State v. Floyd Calvin Cody	Def's *Pro Se* Motion for Notice of Arrest of Judgment (COA10-961)	Denied
176P12	State v. Mark Anthony Miller	Def's PWC to Review the Order of the COA (COA12-90)	Dismissed
178P12	Marvin McDonald, Cornelius Ford, Anthony Koonce, Perry Jones, Aaron Petty, and Annie Polk v. North Carolina Department of Correction (Currently Division of Adult Correction), a North Carolina State Agency; North Carolina Department of Correction Management Information Systems, a Division of the North Carolina Department of Correction; Alvin W. Keller (Currently Reuben Young), Secretary, North Carolina Department of Correction; Bob Brinson, Chief Information Officer, North Carolina Department of Correction Management Information Systems	Plts' PDR Under N.C.G.S. § 7A-31 (COA11-1280)	Denied **Jackson, J., Recused**

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179P12	State v. Landon Dupree Anderson	1. Def's NOA Based Upon a Constitutional Question (COA11-1061) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
181A93-3	State v. Rayford Lewis Burke	1. Def's PWC to Review the Order of Iredell County Superior Court 2. Def's *Pro Se* PWC to Review the Order of Iredell County Superior Court	1. Denied 2. Dismissed
188P12	State v. Jose Alberto Beiza Tapia	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA11-461)	Denied
189P12	State v. Marcus Piere Johnson and Darrell Jerome Lavine	1. Def's (Lavine) *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-1014) 2. Def's (Johnson) PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
193P12	State v. David Carl Marlow	Def's *Pro Se* Motion for NOA (COAP12-312)	Dismissed
199P12	Elizabeth Coomer v. Lee County Board of Education	1. Plt-Petitioner's PDR Under N.C.G.S. § 7A-31 (COA11-1105) 2. Respondent's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
218P12	State v. Jahmise N. Allen	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-917)	Denied
219P12	Meherrin Tribe of North Carolina a/k/a/ Meherrin Indian Tribe v. North Carolina State Commission of Indian Affairs	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA11-885)	Denied **Jackson, J., Recused**
220P12	State v. David Roland Conley	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1251)	Denied
224P12	In Re Honorable Christy T. Mann	1. Petitioner's PWC to Review the Order of COA (COAP12-231) 2. Respondent's Motion for Sanctions Under Rule 34	1. Denied 2. Denied

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225P12	State v. Michael Lee Ellis, Jr.	1. Def's NOA Based Upon a Constitutional Question (COA11-1084) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
227P12	Bonita Cole v. The City of Charlotte	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-1307)	Denied
229P12	State v. Danita Mitchell	1. Def's NOA Based Upon a Constitutional Question (COA11-890) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied
230P12	EHP Land Co., Inc. v. Virginia W. Bosher, Christina Bosher Herz, Carolyn Bosher Maloney, Robert M. Bosher, Jr., Jennifer L. Bosher, John P. Dooley, Michael C. Dooley, Sarah E. Herz, Andrew T. Herz, Christina P. Maloney, Virginia M. Maloney, Clifton H.W. Maloney, Phil Upton, Cindy W. Bosher, Individually and in her Capacity as Executrix of the Estate of Robert M. Bosher, Arthur R. Robb, Jr., and Christine Bosher, as Co-Executors of the Estate of Ralph G. Bosher, Deceased, and HPB Enterprises, a North Carolina General Partnership	Defs' (Virginia W. Bosher and Cindy W. Bosher) PDR Under N.C.G.S. § 7A-31 (COA11-1220)	Denied
231P12	State v. Sherita Nicole McNeil	1. Def's NOA Based Upon a Constitutional Question (COA11-708) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed

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233P12	State v. Montrez Benjamin Williams	1. Def's NOA Based Upon a Constitutional Question (COA11-1496) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Deem NOA and PDR Timely Filed 4. Def's PWC to Review Decision of COA	1. Dismissed *Ex Mero Motu* 2. Dismissed 3. Denied 4. Denied
234P12	State v. Titus Lamont Batts	Def's *Pro Se* Motion for PDR (COAP12-418)	Dismissed
240P12	State v. Curtis Eugene Wilds	Def's *Pro Se* PWC to Review Order of COA (COAP12-377)	Dismissed **Edmunds, J., Recused**
242P12	Massie Horsley and Denny Horsley v. Halifax Regional Medical Center, Inc.	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1443)	Denied
244P12	Heidi Dawn Trivett v. Ruby W. Stine, Administratrix of the Estate of Lorrie Ann Zook, and Christine Owen, Administratrix of the Estate of Christopher W. Rawlings, Jr.	Plt's PDR Under N.C.G.S. § 7A-31	Denied
245P12	State v. Jerome Demond Wright	1. Def's NOA Based Upon a Constitutional Question (COA11-841) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
246P12	In the Matter of: Appeal of: David H. Murdock Research Institute (DHMRI) from the Decision by the Cabarrus County Board of Equalization and Review Denying the Application for Property Tax Exemption for Certain Property for Tax Year 2008	Def's (Cabarrus County) PDR Under N.C.G.S. § 7A-31 (COA11-1480)	Denied

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247P12	Mary A. Craver; Jean A. Kitchen; James C. Granoff and wife, Kathryn Granoff; Patrick Cartwright and wife, Patricia Cartwright; and Kimberly W. Young, as Trustee Under Agreement Dated October 8, 2003 v. Karen M. Raymond, et al.	Plts' PDR Under N.C.G.S. § 7A-31 (COA11-600)	Denied
248A12	State v. Alvin Michael Watkins	1. Def's NOA Based Upon a Constitutional Question (COA11-1176) 2. State's Motion to Dismiss Appeal	1. - - - 2. Allowed
250P12	State v. Cesar Armando Laurean	1. Def's NOA Based Upon a Constitutional Question (COA11-569) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
251P12	Rink & Robinson, PLLC v. Catawba Valley Enterprises, LLC; Data Storage Technology, Inc.; P. Aaron Blizzard; and Brian S. Dye	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA11-955) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
252P12	Waste Industries USA, Inc., and Black Bear Disposal, LLC v. State of North Carolina and NC Dep't of Environmental (sic) and Natural Resources and NC State Conference of Branches of the NAACP and Rogers-Eubanks Neighborhood Association, Intervenors and NC Coastal Federation and the NC Chapter of the Sierra Club, Intervenors	1. Plts' NOA Based Upon a Constitutional Question (COA11-246) 2. Plts' Petition in the Alternative for PDR Under N.C.G.S. § 7A-31 3. Plts' PDR as to Additional Issues 4. State's Motion to Dismiss Appeal 5. Intervenors' Motion to Dismiss Appeal	1. - - - 2. Denied 3. Denied 4. Allowed 5. Allowed

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253P12	In the Matter of: C.M. and B.M.	Respondent-Mother's *Pro Se* Motion for NOA (COA11-1356)	Dismissed *Ex Mero Motu*
254P12	State v. Jerry Dehart	1. Def's *Pro Se* Motion for Appropriate Relief 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
256P12	State v. Demario Jaquinta Rollins	1. Def's NOA Based Upon a Constitutional Question (COA11-969) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
257P12	State v. Tony Larette Bristow	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1423)	Denied
259P05-2	State v. Kunta Kinte Windley	Def's *Pro Se* Petition for *Writ of Mandamus* (COAP11-54)	Dismissed as Moot **07/19/12**
259P12	Jada Marie Lampkin by and through her GAL, Stephen Lapping, and James Conrad v. Housing Management Resources, Inc., Catawba-Hickory Limited Partnership, and Silver Street Development Corporation and Housing Management Resources, Inc., and Catawba-Hickory Limited Partnership, Third-Party Plaintiffs v. Valerie Raulerson, a/k/a Valerie Davis, Third-Party Defendant	Plts' PDR Under N.C.G.S. § 7A-31 (COA11-1062)	Denied
261P12	State v. Demeatrius Antonio Montgomery	1. Def's NOA Based Upon a Constitutional Question (COA11-1134) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed

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262P12	State v. Geraldo Ramirez-Romero AKA: John Doe # 1045	Def's PDR Under N.C.G.S. § 7A-31 (COA11-920)	Denied
263P12	State v. Dorsey Booker	Def's *Pro Se* PWC to Review the Order of the COA (COAP12-370)	Denied
264P12	State v. Kevin Steffon Pegues	1. Def's *Pro Se* Motion for PDR (COA10-329) 2. Def's *Pro Se* PWC to Review Decision of COA (COA10-329)	1. Dismissed 2. Denied
265P12	State v. Theodore Morris Foust	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **06/20/12**
266P12	Ernie David Russ v. Donald Ray Long and Helen Long	1. Plt's *Pro Se* Motion for NOA (COA12-401) 2. Defs' Motion to Dismiss Appeal 3. Defs' Motion for Sanctions	1. - - - 2. Allowed 3. Denied
267P12	State v. Andre Sharrod Sharpless	1. State's Motion for Temporary Stay (COA11-1343) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/20/12**; Dissolved the Stay **08/23/12** 2. Denied 3. Denied
269PA09-2	Travis T. Bumpers and Troy Elliott, on Behalf of Themselves and All Others Similarly Situated v. Community Bank of Northern Virginia	1. Def's Motion for Temporary Stay (COA08-1135-2) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 4. Plts' Motion to Dissolve Temporary Stay	1. Allowed **09/30/11** 2. Allowed 3. Allowed 4. Denied **10/13/11**
269P12	Burrell Y. Artiste v. Butch Jackson, Admin.	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **06/21/12**
270P12	In the Matter of: L.A.T. and L.M.T.	1. Appellant's PDR Under N.C.G.S. § 7A-31 (COA12-26) 2. Guardian *ad Litem's* Motion to Withdraw and Substitute Counsel	1. Denied 2. Allowed

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271P12	J. Reed Fisher, et al. v. Town of Nags Head	1. Plts' NOA Based Upon a Constitutional Question (COA11-1140) 2. Plts' Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
273P12	Cher McCleary v. N.C. Court of Appeals; Gaston County Superior Court, Presiding Judge; Gaston County Clerk of Court, Hon. Lawrence N. Brown, Jr.; Deutsche Bank National Trust Company, Trustee	Petitioner's *Pro Se* Petition for *Writ of Mandamus* (COAP12-10)	Dismissed **06/28/12**
274P12	State v. Robert Billy Ramos	Def's PWC to Review Order of COA (COA11-1551)	Denied
276P07-2	State v. Anthony T. Smith, Jr.	Def's *Pro Se* PWC to Review Order of COA (COAP12-369)	Dismissed
276P12	State v. Ralph David Surridge	Def's PWC to Review Order of COA (COA12-576)	Denied
277P12	State v. Darnell Jermaine Hill	Def's *Pro Se* PWC to Review Order of COA (COAP12-421)	Dismissed
278P12	State v. Timothy Hugh Lindsey	1. Def's *Pro Se* Motion for PDR (COAP12-93) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
279A12	Michael Topp; Duncan Thomasson; Martin Kooyman; and Black Pearl Enterprises, LLC v. Big Rock Foundation, Inc.; Crystal Coast Tournament, Inc.; Carnivore Charters, LLC; Edward Petrilli; Jamie Williams; Tony R. Ross; and John Doe	1. Plts' NOA Based Upon a Dissent (COA11-681) 2. Plts' PDR as to Additional Issues	1. - - - 2. Allowed

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280P12	Ranim Muhammad aka Robert Hinton v. State of N.C. and Michael Hardee, Superintendent	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied **07/02/12**
281P12	In the Matter of: T.W.	1. State's Motion for Temporary Stay (COA11-878) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/02/12**; Dissolved the Stay **08/23/12** 2. Denied 3. Denied
282P01-3	Bruce Jerome Holmes v. Butch Jackson, Admin.	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **06/29/12**
283P12	Thomas M. Stern, as Guardian of the Estate of Armani Wakefall, a Minor v. Michael Ira Cinoman, M.D.	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1106)	Denied
284P12	State v. Tyquan Sanchez Scriven	1. Def's *Pro Se* PWC to Review Order of COA (COAP12-325) 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
286P12	State v. Jackie Edward Watts	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **07/05/12**
287P12	State v. Nathan Roy Webb	Def's PDR Under N.C.G.S. § 7A-31 (COA12-88)	Denied
289P12	Kara Raprager v. Justin C. Raprager	1. Def's Motion for Temporary Stay (COAP12-474) 2. Def's Petition for *Writ of Supersedeas*	1. Denied **07/09/12** 2. Denied **07/09/12**
292P12	State v. Alonzo Greene	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
293P12	State v. Thomas Joseph Shields	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **07/09/12**

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296P12	Robert L. Sanford v. Roger Williams, Sr., and wife Kesia H. Williams, and the City of Hickory, a North Carolina Municipal Corporation	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-1066)	Denied
297P12	William Anthony Adkins II, Fiduciary and Administrator of the Estate of Nicholas Alexander Adkins, Deceased v. Judy Earlene Stilwell and The Southern Finishing Company, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-1468)	Denied
299P12	Nick Ochsner v. Elon University and North Carolina Attorney General Roy Cooper	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-1571)	Allowed **Timmons-Goodson, J. and Jackson, J., Recused**
304P12	State v. David Otis Mercer	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1532)	Denied
305P12	State v. Robert Lance Randall	Def's *Pro Se* Petition for *Writ of Mandamus*	Allowed see Special Order **07/26/12** **Jackson, J., Recused**
305PA12-2	State v. Robert Lance Randall	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **Jackson, J., Recused**
306P12	State v. Adrian Lamont Pendergrass	Def's PDR Under N.C.G.S. § 7A-31 (COA12-128)	Denied
307P12	State v. Leon D. Heyward, Jr.	Def's *Pro Se* Motion for NOA Pursuant to Constitutional Questions (COAP12-525)	Dismissed
308P12	State v. Adam Troy Kittrell	Def's *Pro Se* Motion for Application of Plain Error Review	Dismissed
309P12	In the Matter of the Will of Nelle W. Barron, Deceased	Caveator's PDR Under N.C.G.S. § 7A-31 (COA11-1472)	Denied

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310P12	Experienceone Homes, LLC and Lados, LLC v. Town of Morrisville	Plts' PDR Under N.C.G.S. § 7A-31 (COA11-1193)	Denied
313A12	State v. Jerome Robinson, Jr.	Def's Motion to Withdraw Appeal (COA11-1163)	Allowed
317P12	State v. Dominick James Jordan	1. Def's NOA Under N.C.G.S. § 7A-30 (COA12-2) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
320P12	State v. Kenneth Wayne Mills	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-3)	Denied
322P12	Boyce Moneyham v. Ennis Oates	Def's *Pro Se* Motion for PDR (COAP12-506)	Denied **08/01/12**
330P12	Carl Alston, as Administrator of the Estate of Jearlene Alston v. Granville Health System (Formerly Granville Medical Center, a County Owned Hospital and Agency of Granville County), Granville Medical Center Board of Trustees, and Dr. Reginald Hall	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA11-1522) 2. Def's (Dr. Reginald Hall) Motion to Dismiss PDR	1. - - - 2. Allowed
331P12	State v. Cole Reeves Williams	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-1326)	Denied
332A11	In the Matter of: T.A.S.	ACLU of NC, et al.'s Motion to Substitute Counsel	Allowed **06/25/12**
335P03-2	State v. James Arthur Monroe	Def's *Pro Se* NOA Based Upon a Constitutional Question (COAP12-535)	Dismissed *Ex Mero Motu*
335P12	Derald Hafner v. Jo Ann C. Averette, Clerk of Superior Court	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Dismissed

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370P04-12	State v. Anthony Leon Hoover	Def's *Pro Se* Motion for a *Writ of Habeas Corpus Ad Testificandum*	Denied **07/06/12** **Hudson, J., Recused**
370P04-13	State v. Anthony Leon Hoover	Def's *Pro Se* Motion for *Writ* Relief	Dismissed **Hudson, J., Recused**
376A11-3	State v. Charles David Becton	Def's *Pro Se* Motion for NOA (COAP12-373)	Dismissed
379A11	Charlotte Mecklenburg Hospital Authority v. Robert M. Talford	Def's Petition for Rehearing	Denied **07/24/12**
382P10-2	State v. John Lewis Wray, Jr.	Def's *Pro Se* Petition for *Writ of Mandamus* (COAP12-566)	Denied **08/21/12**
386P11	Courtney S. Graham v. James David Keith, Jr. and Sandra Faye Keith	Defs' PDR Under N.C.G.S. § 7A-31 (COA10-917)	Denied
387P11	Brian W. Meehan v. American Media International, LLC; DNA Security, Inc.; and Richard Clark	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-1091)	Denied
402P11-3	Sylvester Eugene Harding, III v. Clerk of Court, Superior Court of Cumberland County	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion for Appropriate Relief as to the Presenting of a *Writ of Mandamus*	1. Dismissed 2. Dismissed
403A11	Dianne Michele Carter v. Noah Maximov	Plt's *Pro Se* Motion for Reconsideration of Appeal and to Set Aside a Void Judgment Under FRCP Rule 60(b)(4)	Dismissed *Ex Mero Motu*

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420P11	State v. Edward Eugene Poole, Jr.	1. State's Motion for Temporary Stay (COA11-21) 2. State's Petition for *Writ of Supersedeas* 3. State's NOA Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Dismiss Appeal 6. State's Motion to Strike Def's Untimely Response to State's NOA/PDR 7. Def's Motion to Deny State's Motion to Strike Def's Response to State's NOA/PDR	1. Allowed **10/07/11** 2. Special Order 3. Special Order 4. Special Order 5. Special Order 6. Special Order 7. Special Order
429P11	State v. Anthony Lashawn McSwain	1. Def's PDR Under N.C.G.S. § 7A-31 (COA10-1595) 2. Def's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA	1. Denied 2. Denied
437P11	Unitrin Auto and Home Insurance Company v. Elrita Ann McNeill, Integon National Insurance Company, and Pennsylvania National Mutual Casualty Insurance Company	Def's (Pennsylvania National Mutual Casualty Insurance Company) PDR Under N.C.G.S. § 7A-31 (COA10-1192)	Denied
442P09-2	State v. William Lee Walker	1. Def's *Pro Se* Motion for PDR (COAP11-745) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
449P11-3	State v. Charles Everette Hinton	1. Def's *Pro Se* PWC to Review Order of Superior Court of Mecklenburg County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed

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476P11	Donald E. Sellers, Employee v. FMC Corporation, Employer; National Union Fire Insurance Company and Insurance Company of the State of Pennsylvania, Carriers	1. Defs' Motion for Temporary Stay (COA11-12) 2. Defs' Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/07/11**; Dissolved the Stay **08/23/12** 2. Denied 3. Denied
485P10-2	Teresa W. Wood, on Behalf of Herself and All Others Similarly Situated v. Teachers' and State Employees' Retirement System, et al.	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-784)	Denied
507P11	State v. David Allen Carter	1. State's PDR Under N.C.G.S. § 7A-31 (COA11-36) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31 3. Def's NOA Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Appeal	1. Allowed 2. Denied 3. - - - 4. Denied 5. Allowed
514P11	State v. Harry Sharod James	1. Def's NOA Based Upon a Constitutional Question (COA11-244) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. Def's Motion to Continue or Hold Petition in Abeyance Pending Resolution of Issues by the Supreme Court of the United States 5. Def's Motion to Amend PDR	1. Special Order 2. Special Order 3. Special Order 4. Special Order 5. Special Order

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526P11-2	Keith Russell Judd v. State Board of Elections of North Carolina, Secretary of State of North Carolina, and State of North Carolina	1. Plt's *Pro Se* Motion for Court Order to Register All Convicted and Incarcerated Felons to Vote in Federal Elections and Caucuses 2. Plt's *Pro Se* Motion to Remove Barack Obama from North Carolina's 2012 Presidential Primary Ballot/Caucus and Award All Delegates to Keith Judd, Democratic Presidential Candidate	1. Denied 2. Denied
536P11	Diversified Financial Services, LLC, a Nebraska Limited Liability Company v. F&F Excavating and Paving, Inc., Jayne Barnes, and Fred Barnes	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA11-292) 2. Defs' PWC to Review Decision of COA	1. Dismissed 2. Denied
543P11	N.C. Farm Bureau Mutual Insurance Company v. Jarvis Sentell Lynn and Michael Adams	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-227)	Allowed
555P08-2	State v. Johnny Ray Pope	1. Def's *Pro Se* Motion for *Writ of Certiorari* to Review Order of COA (COA11-323) 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 **Jackson, J., Recused**
563A99-4	State v. Ronald Lee Poindexter a/k/a Ronald Pugh	Def's PWC to Review Decision of Superior Court of Randolph County	Dismissed Without Prejudice
614P05-2	State v. David Earl Jones	1. Def's *Pro Se* Motion for NOA (COAP12-543) 2. Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 3. Def's *Pro Se* PWC to Review Order of COA 4. Def's *Pro Se* Motion for Petition to Amend	1. Dismissed *Ex Mero Motu* 2. Dismissed 3. Denied 4. Dismissed as Moot

IN RE FORECLOSURE OF JOHNSON

[366 N.C. 1 (2012)]

IN THE MATTER OF THE PROPOSED FORECLOSURE OF CLAIM OF LIEN FILED AGAINST JEFFREY J. JOHNSON, DONNA N. JOHNSON, GARY PROFFIT, AND JO PROFFIT BY STARBOARD ASSOCIATION, INC., DATED APRIL 30, 2008, RECORDED IN DOCKET NO. 08-M-676 IN THE OFFICE OF THE CLERK OF SUPERIOR COURT FOR BRUNSWICK COUNTY

No. 268A11

(Filed 5 October 2012)

Associations— homeowners—assessment—lien

Petitioner's lien and foreclosure claim against respondents' condominium unit was invalid because the lien and claim were based upon an assessment that was not applied uniformly nor calculated in accord with respondents' percentage undivided interest in the common areas and facilities, as required by the Unit Ownership Act and the amended Declaration. The assessment was not a valid debt and the trial court did not err by granting an involuntary dismissal.

Justice MARTIN dissenting.

Justices NEWBY and JACKSON 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, 212 N.C. App. 535, 714 S.E.2d 169 (2011), vacating and remanding orders entered on 11 December 2009 and 21 May 2010, both by Judge Richard D. Boner in Superior Court, Mecklenburg County. Heard in the Supreme Court on 15 November 2011.

Sellers, *Hinshaw*, *Ayers*, *Dortch & Lyons*, *P.A.*, *by Michelle Price Massingale*, *for petitioner-appellant.*

Kenneth T. Davies for respondent-appellees.

TIMMONS–GOODSON, Justice.

In this case we consider whether the trial court erred in granting a judgment and dismissal in favor of respondents pursuant to Rule 41 of the North Carolina Rules of Civil Procedure, reasoning that petitioner's lien and foreclosure claim against respondents' condominium unit was invalid. We conclude that petitioner's lien and foreclosure claim were based upon an improperly administered assessment and

not a valid debt. Accordingly, we affirm the decision of the Court of Appeals.

I. Background

Petitioner Starboard Association, Inc. incorporated in 1981 by filing its Articles of Incorporation with the Secretary of State. Its stated purpose is to administer and manage Starboard By The Sea Condominium, a property located in Ocean Isle Beach, North Carolina. The property, which we refer to here as "Starboard," houses 139 residential units in 33 separate buildings. Petitioner is regulated by the Unit Ownership Act, set forth in Chapter 47A of the North Carolina General Statutes. Petitioner is also governed according to its Declaration of Condominium and its By-Laws, both filed with the Brunswick County Register of Deeds.

Petitioner's Declaration has been amended a number of times over the years. The fifth amendment, adopted in 1982 as "Phase V beachfront property," provided for the addition of three condominium units in a single building, Building 33, and provided Starboard with a second swimming pool. Each unit in Building 33 was determined to have a 1.06160 percentage of undivided interest in Starboard's common areas and facilities. After the amendment, petitioner recalculated the individual undivided interests of the other units in the common areas to reflect the market value of each unit in relation to the aggregate market value of all units.

In late 1997 petitioner's general membership amended the By-Laws, authorizing petitioner to make, levy, and collect assessments against members to defray costs, as provided in Article XXIII of the Declaration. In pertinent part, Article XXIII provided "[a]ll assessments levied against the Unit Owners and their Condominium Units shall be uniform." Article XXIII provided further that unless otherwise set forth in the Declaration, all assessments made by petitioner and levied against a unit owner and its condominium unit "shall bear the same ratio to the total assessment made against all Unit Owners and their Condominium Units as the undivided interest in Common Property appurtenant to each Condominium." Article III of the amended By-Laws required petitioner's Board of Directors to adopt a yearly budget to estimate common expenses for the operation, management, and maintenance of the common property.

On 6 August 2004, respondents Jeffrey J. Johnson and Donna N. Johnson, along with Gary A. Proffit and Betty Jo Proffit, acquired

Unit B of Building 33, Phase V, as tenants in common. Two months later, at the annual meeting of petitioner's general membership, an extensive renovation for all of Starboard's buildings, except Building 33, was proposed. The renovation was not approved until the 8 October 2005 annual meeting. The attending members approved the renovation project by a vote of 33 to 29 as a non-binding vote to guide the new Board of Directors. Following the annual meeting, the Board entered into a contract to renovate all the buildings except Building 33 and levied a special assessment against the unit owners of all the buildings except Building 33. The capital renovation project included: (1) replacing the exterior siding, windows, and sliding glass doors; (2) installing new stairways, landings, decks, and wiring; and (3) other repairs.

In early to mid-2006 respondents and the other unit owners in Building 33 requested renovations for Building 33. The Board notified the unit owners in Building 33 to expect renovations "in the near future." Prior to the renovations for Building 33, the Board received three bids, then entered into a contract with Puckett Enterprises, Inc. to renovate Building 33. The renovations included: (1) new vinyl siding, windows, and doors; (2) renovation of the stairways and decks; (3) pylon repairs; and (4) other capital repairs and renovations.

The Board approved a special assessment for the renovations on 8 November 2007 in the amount of $55,000.00 per unit for all unit owners in Building 33. That amount was later lowered to $54,000.00 each. The Board thereafter adopted a unanimous written resolution ratifying the assessment in late 2008. In December 2007 respondents paid $27,000.00 of the assessment under protest. Respondents made no additional payments.

In August 2008 petitioner filed a notice of lien against respondents' unit and initiated foreclosure proceedings under N.C.G.S. Chapter 47C based on respondents' alleged "failure to timely pay assessments and other charges levied by [Starboard]." In response, respondents filed an Objection to Foreclosure of Claim of Lien, contesting petitioner's right to proceed with foreclosure proceedings. Respondents further objected to the validity of the alleged debt that formed the basis of the foreclosure proceeding.

Specifically, respondents asserted that the assessment against them was not uniform and was not included in any annual budget or special assessment budget ratified by the Association, as required by the Articles of Incorporation, the Declaration, the amended By-Laws,

and Chapter 47C of the North Carolina General Statutes. Respondents asked the trial court to dismiss the foreclosure proceeding with prejudice and award respondents reasonable attorney's fees. The trial court transferred the matter from Brunswick County to Superior Court, Mecklenburg County "due to the complexity of the issues."

After an evidentiary hearing on 3 August 2009, the trial court concluded that the assessment violated the Unit Ownership Act and the Declaration. The trial court reasoned that because the assessment was not computed in accordance with respondents' percentage undivided interest in the common areas and facilities, it was unlawful. For this reason, the trial court concluded further that the alleged debt underlying petitioner's claim of lien and resulting foreclosure of respondents' unit were invalid. The trial court entered an order and judgment on 11 December 2009 dismissing petitioner's action with prejudice under Civil Procedure Rule 41 and entered another order on 21 May 2010, awarding respondents reasonable attorney's fees in the amount of $19,780.83. Petitioner appealed both orders.

On 21 June 2011, the Court of Appeals vacated and remanded this matter to the trial court for further proceedings. *In re Foreclosure against Johnson*, 212 N.C. App. 535, 714 S.E.2d 169, 170, 176 (2011). The Court of Appeals majority held that the trial court correctly concluded that petitioner's assessment against respondents' unit for the Building 33 renovations was unlawful, in that it was not uniform, nor was it calculated in accord with respondents' percentage undivided interest in the common areas and facilities, as required by the Unit Ownership Act and the amended Declaration. *Id.* at ——, 714 S.E.2d at 174. Nevertheless, the Court of Appeals concluded further that petitioner did have the authority to assess against respondents the costs of those renovations which were "exclusively" for the benefit of the condominium unit owned by respondents. *Id.* at ——, 714 S.E.2d at 169. Finally, the Court of Appeals vacated the trial court's order awarding attorney's fees to respondents because that court lacked jurisdiction to enter such an order. *Id.* at——, 714 S.E.2d at 175-76. One member of the panel dissented in part, however, disagreeing with the majority's holding that the trial court correctly concluded that petitioner's assessment was "unlawful" because it was not uniform and not levied on a pro rata basis. *Id.* at ——, 714 S.E.2d at 176 (Hunter, Robert C., J., concurring in part and dissenting in part). Petitioner brings the appeal to us based upon this dissent.

II. Analysis

Petitioner argues that because its assessment was lawful, uniform, and levied pro rata, the trial court erred in dismissing its lien foreclosure action under North Carolina Rule of Civil Procedure 41. We disagree.

"The proper standard of review for a motion for an involuntary dismissal under Rule 41 is (1) whether the findings of fact by the trial court are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and its judgment." *Dean v. Hill*, 171 N.C. App. 479, 483, 615 S.E.2d 699, 701 (2005) (citing *McNeely v. S. Ry. Co.*, 19 N.C. App. 502, 505, 199 S.E.2d 164, 167, cert. denied, 284 N.C. 425, 200 S.E.2d 660 (1973)). Absent objection, factual findings are presumed supported by competent evidence and are binding on appeal, *Dealers Specialties, Inc. v. Neighborhood Hous. Servs., Inc.*, 305 N.C. 633, 635-36, 291 S.E.2d 137, 139 (1982), while conclusions of law are reviewable de novo on appeal, *Riley v. Ken Wilson Ford, Inc.*, 109 N.C App. 163, 168, 426 S.E.2d 717, 720 (1993). Neither party has lodged an objection to any of the trial court's twenty-seven findings of fact in the 2009 order. These facts are thus binding on appeal.

By executing and recording a declaration of unit ownership, petitioner subjected its condominium project to the provisions of Chapter 47A of the General Statutes. *See Dunes S. Homeowners Ass'n v. First Flight Builders, Inc.*, 341 N.C. 125, 129, 459 S.E.2d 477, 479 (1995).[1] Petitioner's claims are therefore governed by the Unit Ownership Act, N.C.G.S. §§ 47A-1 to -28. Section 47A-9 of the Act addresses the handling of maintenance, repairs, and improvements at facilities such as Starboard and provides that these matters are governed by the Act and the bylaws. N.C.G.S. § 47A-9 (2011) ("The necessary work of maintenance, repair, and replacement of the common areas and facilities and the making of any additions or improvements thereto shall be carried out only as provided herein and in the bylaws.").

The Act also requires unit owners to contribute pro rata towards the administration, maintenance, and repair of common areas and facilities, providing that:

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1. This case is governed by the provisions of Chapter 47A of the General Statutes, rather than Chapter 47C, because Chapter 47A applies to all condominiums created within this state before 1 October 1986. *Dunes S. Homeowners Ass'n*, 341 N.C. at 127 n.1, 459 S.E.2d at 477 n.1.

> The unit owners are bound to contribute pro rata, in the percentages computed according to G.S. 47A-6 of this Article, toward the expenses of administration and of maintenance and repair of the general common areas and facilities and, in proper cases of the limited common areas and facilities, of the building and toward any other expense lawfully agreed upon.

Id. § 47A-12 (2011). Section 47A-12 is designed "to ensure the orderly, reliable and fair government of condominium projects and to protect each owner's interest in his or her own unit as well as the common areas and facilities." *Dunes S. Homeowners Ass'n*, 341 N.C. at 130, 459 S.E.2d at 479. To this end, we have emphasized that "the provisions of section 47A-12 are designed to protect unit owners from shouldering a disproportionate share of the maintenance expenses for common areas." *Id.*

Section A of Article XXIII of the Declaration, as incorporated into the amended By-Laws, also speaks to the administration, maintenance, and repair of common areas and facilities, providing in pertinent part:

> All assessments levied against the Unit Owners and their Condominium Units shall be uniform and, unless specifically otherwise provided for in this Declaration of Condominium, all assessments made by the Association shall be in such an amount that any assessment levied against a Unit Owner and his Condominium Unit shall bear the same ratio to the total assessment made against all Unit Owners and their Condominium Units as the undivided interest in Common Property appurtenant to each Condominium bears to the total undivided interest in Common Property appurtenant to all Condominium Units.

Accordingly, Article XXIII provides that assessments levied against unit owners must be "uniform" and "bear the same ratio to the total assessment made against all Unit Owners and their Condominium Units as the undivided interest in Common Property appurtenant . . . to all Condominium Units." Thus, both the Unit Ownership Act and Article XXIII of the amended Declaration require unit owners to uniformly contribute, pro rata, based on the percentage of their respective undivided interests in the common area and facilities, towards the expenses of the administration and maintenance and repair of the general common areas and facilities, and, in proper cases, of the limited common areas and facilities.

Here we agree with the trial court and the majority of the Court of Appeals that the 2007 special assessment was invalid because it was neither uniform, nor levied on a pro rata basis. Put differently, the 2007 assessment was not assessed against all members of the Association according to their pro rata share as required by the Unit Ownership Act and Article XXIII of the amended Declaration. In reaching this conclusion, it is critical to note that no party challenges the findings of fact in the trial court's Order of Dismissal and Judgment. The trial judge found that following the 2005 annual association meeting, the petitioner's board levied a special assessment for the renovation of thirty-two of Starboard's buildings, but not Building 33.[2] At that time owners of the units in Buildings 1 through 32 were levied a special assessment for those renovations. Then in 2007, roughly two years later, the Board ratified a second assessment against the owners of three units in Building 33 effective 8 November 2007 in the sum of $162,000.00, or $54,000.00 per unit in Building 33.[3] The 2007 assessment was for extensive repairs and renovations to the exterior of Building 33, including new vinyl siding, pylon repairs, new windows and doors, renovation of the stairways and decks, and other capital repairs and renovations.

Thus, according to the uncontested findings of fact, there were two assessments here, rather than one, and the assessments were

2. The trial court found as fact in its Order of Dismissal and Judgment that:

> 19. On 8 October 2005, the annual meeting of the Starboard By the Sea Association was held. A re-vote was taken on the original renovation package with the understanding that cost would change, and the attending members approved the renovation project by a vote of 33 to 29, as a non-binding vote to guide the new Board of Directors.
>
> 20. Following the annual meeting, the Board of Directors entered into a contract for the renovations of all the buildings except Building 33, and levied a special assessment against the unit owners of all the buildings except Building 33 unit owners.

3. The trial court found as fact in its Order of Dismissal and Judgment that:

> 23. Sometime in the fall of 2007, the Board of Directors of Starboard approved a construction contract with Puckett Enterprises, Inc[.] for renovation of Building 33, to include new vinyl siding, pylon repairs, new windows and doors, renovation of the stairways and decks, and other capital repairs and renovations. The Board also approved a special assessment to be levied against the owners of the three units in Building 33, in the amount of fifty five thousand dollars ($55,000.00) per unit on or about 8 November 2007. Although there are no written meeting minutes reflecting the board's approval of the alleged assessment on or about November 8, 2007, the Board did adopt a unanimous written resolution ratifying the assessment on or about October 31, 2008, in accordance with N.C.G.S. §55A-8-21.

conducted a few years apart (2005 and 2007, respectively). The 2007 special assessment, which was levied against only owners in Building 33, was not uniformly assessed against all members of the Association according to their pro rata share as required by the Unit Ownership Act and Article XXIII of the amended Declaration.

We do not find petitioner's arguments to the contrary convincing. Petitioner's contentions are essentially twofold. First, petitioner argues that both the 2005 and 2007 assessments were actually just piecemeal phases of a single larger assessment that took place over two years. This single assessment was ostensibly levied uniformly, albeit with a $134.00 difference, against the owners of Buildings 1 through 33, including respondents. Consequently, petitioner concludes, the trial court erred in concluding that the debt upon which petitioner sought to foreclose was invalid. Were it true, this would be a strong argument. The problem with petitioner's position, however, is that the trial court found as fact that there were two separate assessments. As explained, according to the Act and Starboard's own amended Declaration and amended By-Laws, **each** assessment must be levied pro rata and uniformly upon **each** owner. Such was not the case here.

Second, petitioner contends that there was an implied contract between respondents and it for the assessments in question. Such a claim is generally cognizable under North Carolina law. *See, e.g.*, *James River Equip., Inc. v. Tharpe's Excavating, Inc.*, 179 N.C. App. 336, 346, 634 S.E.2d 548, 556 (2006) ("An implied contract rests on the equitable principle that one should not be allowed to enrich himself unjustly at the expense of another and on the principle that what one ought to do, the law supposes him to have promised to do." (citation and quotation marks omitted)). Nonetheless, we express no opinion on the merits of such a claim here. Even assuming such a claim could be properly pleaded here, the matter was never pleaded in this proceeding as required by Rule 8 of the North Carolina Rules of Civil Procedure, nor was the issue raised at the trial court. We therefore decline to consider the matter further. *See, e.g.*, *Pue v. Hood*, 222 N.C. 310, 313, 22 S.E.2d 896, 898 (1942); *Brown v. Woodrun Ass'n*, 157 N.C. App. 121, 126, 577 S.E.2d 708, 712 (2003) (declining to consider an implied contract theory of recovery for the first time on appeal, noting that "the possible existence of an implied contract between the parties raises a separate issue that can be determined in a separate action").

III. Conclusion

The trial court's findings of fact support its conclusions of law that the assessment levied against respondents was invalid because it violated N.C.G.S. § 47A-12 and Article XXIII of the amended Declaration. Consequently, we affirm the decision of the Court of Appeals that petitioner's assessment against respondents' unit for the Building 33 renovations was unlawful, because it was not applied uniformly nor calculated in accord with respondents' percentage undivided interest in the common areas and facilities, as required by the Unit Ownership Act and the amended Declaration. The remaining issues addressed by the Court of Appeals are not properly before this Court and its decision as to those matters remains undisturbed. This case is remanded to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this opinion.

AFFIRMED AND REMANDED.

Justice MARTIN dissenting.

The majority decision relieves respondents of the statutory duty to contribute pro rata toward the expenses for renovating their condominium common areas. This decision contravenes the legislative purpose behind the enactment of N.C.G.S. § 47A-12, which requires all unit owners to pay their pro rata share of common expenses. This outcome-determinative provision states succinctly: "[U]nit owners are bound to contribute pro rata . . . . No unit owner may exempt himself from contributing toward such expense . . . ." N.C.G.S. § 47A-12 (2011). In reversing an assessment imposed to recoup expenses for common area renovations, the majority unjustifiably excuses respondents from contributing their pro rata share. Respondents' neighboring owners and the Starboard By the Sea Condominium (Starboard) complex are thus left to bear respondents' lawful burden.

Respondents own a unit in Building 33 and a 1.06160 percent undivided interest in Starboard's common areas and facilities. The Starboard Association approved renovations to Starboard's entire complex, except Building 33, on 8 October 2005. These renovations improved common areas and facilities in which respondents have an ownership interest. All unit owners, except for those in Building 33, were charged for the renovations at that time. Respondents did not object to this omission. When respondents and the other Building 33 unit owners subsequently requested that their building be renovated,

they were told renovations to their building would begin "in the near future." The board approved renovations to respondents' building in November 2007, two years after it approved renovations to the other buildings. The total cost of all the renovations to the Starboard complex was $5,074,000. Divided among all unit owners on a pro rata basis, as specified by both the Unit Ownership Act (Act) and Starboard's Declaration of Condominium, the amount owed by respondents for the renovations to the Starboard complex was $53,865.54.

Starboard did not charge respondents $53,865.54 when it began renovating the other buildings in the complex. Instead, Starboard waited until renovations began on respondents' building and charged them $54,000.00—$134.46 more than they owed as owners of a unit, an overcharge of about .25 percent. Respondents paid $27,000.00 of the amount owed, but then refused to pay the balance. Because of respondents' refusal, Starboard paid for the remainder of the renovation contract and initiated foreclosure proceedings against respondents' unit to recoup the unpaid assessment

"[T]he provisions of section 47A-12 are designed to protect unit owners from shouldering a disproportionate share of the maintenance expenses for common areas when other unit owners . . . attempt to unilaterally exempt themselves from contributing their pro rata share of maintenance expenses." *Dunes S. Homeowners Ass'n v. First Flight Builders, Inc.*, 341 N.C. 125, 130, 459 S.E.2d 477, 479-80 (1995).

The majority apparently believes that section 47A-12 mandates a specific procedure for assessments. This construction, however, is not supported by the language of the statute. Section 47A-12 is concerned not with procedure but with outcome, and imposes an obligation on all unit owners to pay their pro rata share of expenses for maintenance and repair of common areas: "[U]nit owners are bound to contribute pro rata . . . . No unit owner may exempt himself from contributing toward such expense . . . ." N.C.G.S. § 47A-12. Significantly, the Act requires that the association's bylaws specify the "[m]anner of collecting from the unit owners their share of the common expenses." N.C.G.S. § 47A-19(4) (2011). Section 47A-12 does not include any procedural requirements regarding the timing or manner of assessments. Instead, the statute incorporates guidelines designed to ensure proportional contributions by unit owners. Starboard's Declaration similarly states that assessments against unit owners shall be uniform and in the same ratio as the ownership interest.

In addition to not providing a specific assessment *procedure*, the Act does not provide a remedy for an improperly calculated assessment. Allowing respondents to avoid paying the correct amount of $53,865.54, as the majority does here, allows them to avoid their statutory duty to contribute pro rata for common area expenses under section 47A-12. This result defies the " 'simple logic and obvious fairness that owner-members should not be permitted to demand services for which they can refuse to make payment.' " 6A Patrick J. Rohan, *Real Estate Transactions: Home Owner Associations and Planned Unit Developments* § 9.01, at 9-4 (Matthew Bender & Co. June 2012) [hereinafter Real Estate Transactions] (citation omitted).

Just as the statute does not support the majority decision, neither does our case law. In *Dunes South Homeowners Ass'n* the defendant developer, like respondents in this case, challenged the validity of an assessment and subsequent lien imposed by the homeowners association. 341 N.C. at 128, 459 S.E.2d at 478. Noting "the legislature's intent to ensure the orderly, reliable and fair government of condominium projects," we held that the developer could not escape its statutory duty to pay for its share of the costs of maintaining the complex. *Id.* at 130-31, 459 S.E.2d at 479. Like the developer in *Dunes South*, respondents are not excused from their statutory duty to contribute their pro rata share because of a minor computational error.

Starboard's assessment for renovations was authorized by statute, and its mistaken overcharge of less than one percent does not invalidate the assessment. *See, e.g.*, *Oronoque Shores Condo. Ass'n No. 1 v. Smulley*, 114 Conn. App. 233, 238-41, 968 A.2d 996, 999-1000 (2009) (concluding that a unit owner was not excused from paying a valid assessment simply because of a miscalculation that was later corrected). As long as the outcome of an assessment against unit owners is representative of their ownership percentage, as required by section 47A-12 and Starboard's Declaration, this Court should not exempt respondents from paying their share of the requested renovations. Respondents cannot use the miscalculation to "justify unilaterally withholding or refusing to pay assessments." *Wayne S. Hyatt, Condominium and Homeowner Association Practice: Community Association Law* § 607(a), at 117 (3d ed. 2000). The majority decision to excuse respondents from paying their pro rata share necessarily "forces other owners to carry the burden of these unpaid assessments in addition to their normal assessments." *Real Estate Transactions* § 9.01, at 9-4.

Finally, the facts of this case do not require the result reached by the majority, which heavily rests on its reading of the trial court's findings of fact. Contrary to the majority assertion that the trial court found "there were two assessments here, rather than one," the trial court made no such explicit finding. Instead, the trial court found:

> 20. Following the annual meeting, the Board of Directors entered into a contract for the renovations of all the buildings except Building 33, and levied a special assessment against the unit owners of all the buildings except Building 33 unit owners.
>
> . . . .
>
> 23. Sometime in the fall of 2007, the Board of Directors of Starboard approved a construction contract . . . for renovation of Building 33 . . . . The Board also approved a special assessment to be levied against the owners of the three units in Building 33 . . . .

The trial court did not find, as the majority suggests, that there were two discrete and unrelated assessments. The renovations to be made under both contracts were substantially similar: new siding, new windows and doors, new stairways and decks, and other improvements. The $54,000.00 charged to respondents was the amount Starboard would have billed them if Starboard had charged all owners for the entire project at the outset, though with a .25 percent discrepancy. These facts tend to show that the assessment levied against the Building 33 unit owners, including respondents, was indeed part of one larger transaction, and that Starboard merely waited to charge the respondents until work began on their building. The facts do not lead to the conclusion that Starboard wrongfully charged respondents, particularly to such an extent that they should be excused from their statutory duty to contribute pro rata under section 47A-12.

N.C.G.S. § 47A-12 requires all unit owners to pay their pro rata share of common expenses. The majority decision ignores the outcome-determinative provisions of section 47A-12 and shields unit owners who were content to allow their neighbors to bear the cost of renovating their common property. This case should be remanded and respondents required to contribute their correct pro rata assessment. Accordingly, I respectfully dissent.

Justices NEWBY and JACKSON join in this dissenting opinion.

STATE OF NORTH CAROLINA v. ANDREW JACKSON OATES

No. 397PA11

(Filed 5 October 2012)

Appeal and Error—notice of appeal—criminal case—window of appeal—date of rendition of order or judgment—fourteen days after entry of order or judgment

The Court of Appeals erred by dismissing the State's appeal from the trial court's order granting defendant's motion to suppress. The State's notice of appeal, filed seven days after the trial judge in open court orally granted defendant's pretrial motion to suppress but three months before the trial judge issued his corresponding written order of suppression, was timely. Under Rule 4 of the North Carolina Rules of Appellate Procedure and N.C.G.S. § 15A-1448, the window for the filing of a written notice of appeal in a criminal case opens on the date of rendition of the judgment or order and closes fourteen days after entry of the judgment or order.

On discretionary review pursuant to N.C.G.S. § 7A 31 of a unanimous decision of the Court of Appeals, 215 N.C. App. ——, 715 S.E.2d 616 (2011), dismissing the State's appeal from an order filed on 22 March 2010 by Judge Russell J. Lanier, Jr. in Superior Court, Sampson County. Heard in the Supreme Court on 7 May 2012.

Roy Cooper, *Attorney General*, *by Robert C. Montgomery*, *Special Deputy Attorney General*, *for the State-appellant.*

Anne Bleyman for defendant-appellee.

EDMUNDS, Justice.

The Court of Appeals concluded that the State's notice of appeal, filed seven days after the trial judge in open court orally granted defendant's pretrial motion to suppress but three months before the trial judge issued his corresponding written order of suppression, was untimely. We hold that, under Rule 4 of the North Carolina Rules of Appellate Procedure and N.C.G.S. § 15A-1448, the window for the filing of a written notice of appeal in a criminal case opens on the date of *rendition* of the judgment or order and closes fourteen days after *entry* of the judgment or order. Here, the State's appeal, filed within this window, was timely. We vacate the Court of Appeals' dismissal of the State's appeal and remand this case to that court to address the substantive issues raised by the parties.

The underlying facts are not germane to the narrow procedural issue before us and can be related summarily. On 7 September 2007, officers of the Clinton Police Department executed a search warrant at defendant's residence after receiving two anonymous telephone calls alleging that defendant's stepson was keeping illegal drugs and firearms there. Although officers found neither the drugs nor the firearms described in the search warrant, they seized two firearms and ammunition that belonged to defendant. Defendant was indicted on 25 February 2008 for possession of a firearm by a convicted felon, in violation of N.C.G.S. § 14-415.1.

On 19 November 2009, defendant filed a pretrial motion to suppress the evidence seized pursuant to the search warrant, arguing both that the seizure was without probable cause and that the application submitted in support of the search warrant was flawed. At the conclusion of defendant's pretrial suppression hearing on 15 December 2009, the trial judge allowed the motion to suppress, stating, "I'm uncomfortable with [the basis for the search warrant]. I would have never signed it, not under the circumstances. I'd have had to have more. I'm going to enter the order suppressing." The trial court then told the prosecutor: "You can enter you[r] notice of appeal. And you and [defense counsel] can have fun in Raleigh." The prosecutor responded, "Yes, sir," but did not give oral notice of appeal.

The State later filed a written notice of appeal dated 22 December 2009 and certified the notice to the Court of Appeals on the same day. On 18 March 2010, approximately three months later, the trial judge signed a written order *nunc pro tunc* to his 15 December 2009 oral order granting defendant's motion to suppress. The written order was filed with the clerk of court on 22 March 2010. The State did not file an additional notice of appeal following the issuance of the written order. *State v. Oates*, —— N.C. App. ——, ——, 715 S.E.2d 616, 618 (2011).

In an opinion filed on 6 September 2011, the Court of Appeals sua sponte dismissed the State's appeal. In reaching that result, the court analyzed Appellate Rule 4, which addresses procedures for appealing criminal cases. Rule 4(a) states that

> [a]ny party entitled by law to appeal from a judgment or order of a superior or district court *rendered* in a criminal action may take appeal by

(1) giving oral notice of appeal at trial, or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment or order . . . .

N.C. R. App. P. 4(a) (emphases added).

The Court of Appeals found that the trial judge's order was entered when the trial judge filed the order with the clerk of court. *Oates* ,—— N.C. App. at ——, 715 S.E.2d at 618. Because the State neither gave oral notice of appeal in open court at the conclusion of the hearing nor filed written notice within the fourteen days following the filing of the trial court's order with the clerk of court, the Court of Appeals concluded that the State's notice of appeal was untimely. *Id.* at ——, 715 S.E.2d at 618. As a result, the Court of Appeals held that it had no jurisdiction over the case. *Id.* at ——, 715 S.E.2d at 618. We allowed the State's petition for discretionary review.

Compliance with the requirements for entry of notice of appeal is jurisdictional. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197-98, 657 S.E.2d 361, 365 (2008). We review issues relating to subject matter jurisdiction de novo. *See*, *e.g.*, *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007).

Rule 4 treats orders and judgments in criminal cases identically. *Rendering* a judgment or an order "means to 'pronounce, state, declare, or announce' [the] judgment" or order, *Kirby Bldg. Sys., Inc. v. McNiel*, 327 N.C. 234, 239-40, 393 S.E.2d 827, 830 (1990) (quoting *Black's Law Dictionary* 1165 (5th ed. 1979)), and "is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy," *Seip v. Wright*, 173 N.C. 55, 58, 173 N.C. 14, 17, 91 S.E. 359, 361 (1917) (citation and quotation marks omitted). *Entering* a judgment or an order is "a ministerial act which consists in spreading it upon the record." *Id.* (citation and quotation marks omitted); *see also Stachlowski v. Stach*, 328 N.C. 276, 278-79, 401 S.E.2d 638, 640 (1991) (citing *Kirby Bldg. Sys.*, 327 N.C. at 239-40, 393 S.E.2d at 830). For the purposes of entering notice of appeal in a criminal case under Rule 4(a), a judgment or an order is rendered when the judge decides the issue before him or her and advises the necessary individuals of the decision; a judgment or an order is entered under that Rule when the clerk of court records or files the judge's decision regarding the judgment or order.

In considering the pertinent language of Rule 4, the Court of Appeals accurately noted that in *State v. Boone*, this Court defined "entry of judgment" in a criminal case by reference to Rule 58 of the North Carolina Rules of Civil Procedure, which addresses entry of judgment in a civil case. *Oates*, —— N.C. App. at ——, 715 S.E.2d at 617 (citing *State v. Boone*, 310 N.C. 284, 290, 311 S.E.2d 552, 556 (1984)). The Court of Appeals then applied the *Boone* analysis to the instant order. Id. at ——, 715 S.E.2d at 617. However, while *Boone* has never been overruled, it has been overtaken by events. For instance, when Boone was decided, the procedures for taking either a civil or a criminal appeal were virtually identical, *see* N.C. R. App. P. 3, 4 (1988), while as a result of subsequent amendments, oral notices of appeal are now allowed in criminal cases only, *see id.* at R. 3, 4 (2012). Moreover, not only does Rule 58 apply exclusively to judgments, that Rule has been amended substantially since *Boone* was decided and now requires that all civil judgments be in writing. *Compare* N.C.G.S. § 1A-1, Rule 58 (2011), *with id.* Rule 58 (1983). No such requirement is found in N.C.G.S § 15A-977(f), which applies to orders on motions to suppress. As a result, our analysis in *Boone* relating to "entry of judgment" in a criminal case has been superseded and the Court of Appeals' statement that "[e]ntry of an order [in the criminal context] occurs when it is reduced to writing" is incorrect. *Oates*, —— N.C. App. at ——, 715 S.E.2d at 617 (first alteration in original) (quoting *State v. Gary*, 132 N.C. App. 40, 42, 510 S.E.2d 387, 388, *cert. denied*, 350 N.C. 312, 535 S.E.2d 35 (1999)) (internal quotation marks omitted).

Consequently, the Court of Appeals misinterpreted Rule 4 to find that the Rule provides two separate windows during which a party may appeal a criminal case. *See id.* at ——, 715 S.E.2d at 618. Under the Court of Appeals' analysis, the first window opened when the trial judge rendered his decision at the conclusion of the suppression hearing, giving the State the opportunity to give immediate oral notice of appeal in open court, and closed when the hearing ended. *See id.* at ——, 715 S.E.2d at 618 (interpreting N.C. R. App. P. 4(a)(1)). The second window opened when the trial judge entered his order by filing it with the clerk of court, beginning the time during which the State could file written notice of appeal, and closed fourteen days later. *See id.* at ——, 715 S.E.2d at 618 (interpreting N.C. R. App. P. 4(a)(2)). The Court of Appeals determined that, because neither window was open when the State filed its notice of appeal, the notice was improper.

We believe this interpretation of Rule 4 would discourage thoughtful litigation and could lead to absurd results. For example, a judge ruling on a suppression motion that is not determined summarily is required to "set forth in the record his findings of facts and conclusions of law." N.C.G.S. § 15A-977(f) (2011). While a written determination is the best practice, nevertheless the statute does not require that these findings and conclusions be in writing. *See State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984). As a result, under the holding of the Court of Appeals, a party considering whether to appeal an adverse result would either be required to enter oral notice of appeal at once even if uncertain of the basis of the judge's decision or the merits of the appeal, or, after considering the wisdom of an appeal and deciding to proceed, be forced to monitor the clerk's office for an indeterminate period of time while waiting for an order (that may or may not be in writing) to be entered on the record. We cannot adopt such a technical reading of Rule 4(a) that not only would encourage unnecessary oral notices of appeal but also would jeopardize the right of appeal of a party who might not receive notice of the entry of a judgment or order.

Instead, we believe Rule 4 authorizes two modes of appeal for criminal cases. The Rule permits oral notice of appeal, but only if given at the time of trial or, as here, of the pretrial hearing. N.C. R. App. P. 4(a)(1). Otherwise, notice of appeal must be in writing and filed with the clerk of court. *Id.* R. 4(a)(2). Such written notice may be filed at any time between the date of the rendition of the judgment or order and the fourteenth day after entry of the judgment or order. *Id.* Here, the suppression order was rendered on 15 December 2009 when the trial judge stated, "I'm going to enter the order suppressing," thereby deciding the issue before him. The order was entered on 22 March 2010 when the clerk of superior court in Sampson County filed the judge's written order in the records of the court. As a result, the span within which the State could have filed its written notice of appeal extended from 15 December 2009 until 5 April 2010. The State's 22 December 2009 appeal was timely.

VACATED AND REMANDED.

IN RE T.A.S.

[366 N.C. 18 (2012)]

IN THE MATTER OF: T.A.S. FROM BRUNSWICK COUNTY

No. 332A11

(Filed 5 October 2012)

ORDER

The opinion of the Court of Appeals is vacated. This matter is remanded to that court for further remand to the trial court. The trial court is ordered to make additional findings of fact, including but not necessarily limited to: the names, occupations, genders, and involvement of all the individuals physically present at the "bra lift" search of T.A.S.; whether T.A.S. was advised before the search of the Academy's "no penalty" policy; and whether the "bra lift" search of T.A.S. qualified as a "more intrusive" search under the Academy's Safe School Plan.

If, after entry of an amended judgment or order by the trial court, either party enters notice of appeal, counsel are instructed to ensure that a copy of the Safe School Plan, discussed at the suppression hearing and apparently introduced into evidence, is included in the record on appeal.

By order of the Court in Conference, this 4th day of October, 2012.

s/Jackson, J.
For the Court

COREY MCADAMS, EMPLOYEE v. SAFETY KLEEN SYSTEMS, INC., EMPLOYER, AMERICAN INSURANCE COMPANY, CARRIER, SEDGWICK CMS, SERVICING AGENT

No. 55A12

(Filed 5 October 2012)

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. ——, 720 S.E.2d 896 (2012), remanding an opinion and award filed on 24 March 2011 by the North Carolina Industrial Commission. Heard in the Supreme Court on 5 September 2012.

Thomas and Godley, PLLC, by Ben S. Thomas, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Melissa R. Cleary and Tara D. Muller, for defendant-appellees.

PER CURIAM.

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

REVERSED

STATE OF NORTH CAROLINA v. NICHOLAS BRADY HEIEN

No. 380PA11

(Filed 14 December 2012)

Search and Seizure— motion to suppress cocaine—totality of circumstances—reasonable suspicion—officer's objectively reasonable mistake of law

The Court of Appeals erred by concluding that there was no reasonable suspicion for the stop that led to defendant's convictions for attempting to traffic in cocaine by transportation and possession. The totality of circumstances revealed that there was an objectively reasonable basis to suspect that illegal activity was taking place. When the stop at issue in this case occurred, neither our Supreme Court nor our Court of Appeals had ever interpreted our motor vehicle laws to require only one properly functioning brake light. The Fourth Amendment's reasonable suspicion standard is not offended by an officer's objectively reasonable mistake of law. The case was remanded for additional proceedings.

Justice HUDSON dissenting.

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

On discretionary review pursuant to N.C.G.S. § 7A 31 of a unanimous decision of the Court of Appeals, 214 N.C. App. 515, 714 S.E.2d 827 (2011), reversing an order signed on 25 March 2010 by Judge Vance Bradford Long and vacating judgments entered on 26 May 2010 by Judge A. Moses Massey, both in Superior Court, Surry County. Heard in the Supreme Court on 7 May 2012.

Roy Cooper, Attorney General, by Derrick C. Mertz, Assistant Attorney General, for the State-appellant.

Michele Goldman for defendant-appellee.

NEWBY, Justice.

In this case we must decide whether there was reasonable suspicion for the stop that led to defendant's convictions for attempting to traffic in cocaine by transportation and possession. After reviewing the totality of the circumstances, we conclude that there was an objectively reasonable basis to suspect that illegal activity was taking

place. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for additional proceedings.

On the morning of 29 April 2009, Sergeant Matt Darisse of the Surry County Sheriff's Department performed a routine traffic stop of a vehicle in which defendant was a passenger. Sergeant Darisse was observing traffic on Interstate 77 when he noticed a Ford Escort approach a slower moving vehicle, forcing the driver of the Escort to apply the car's brakes. When the driver engaged the brakes, Sergeant Darisse saw that the right rear brake light failed to illuminate. As a result, Sergeant Darisse decided to stop the Escort. As the Escort rolled to a stop, Sergeant Darisse noticed the right rear brake light "flickered on." Sergeant Darisse informed the driver, Maynor Javier Vasquez, that he stopped the car "for a non-functioning brake light." After a few moments of conversation Sergeant Darisse informed Vasquez that he would issue a warning citation for the brake light if Vasquez's drivers' license and registration were valid. After learning that his drivers' license and registration checked out, Sergeant Darisse returned Vasquez's documents and gave him a warning ticket for the brake light.

During the stop Sergeant Darisse apparently began to suspect that the Escort might contain contraband. During conversation Vasquez informed Sergeant Darisse that defendant and he were travelling to West Virginia. Defendant, however, offered differing information regarding their ultimate destination. He stated that the duo were headed to Kentucky to pick up a friend. Based in part on this conflicting information, Sergeant Darisse decided to ask Vasquez if he could search the vehicle. Vasquez had no objection, but explained it was defendant's Escort so Sergeant Darisse should ask defendant. Sergeant Darisse then received defendant's permission to search the vehicle.

A search of the vehicle revealed, among other things, cocaine. According to Sergeant Darisse, he found "a cellophane wrapper with a white powder residue" in the door panel on the driver's side and "burnt marijuana seeds in the ashtray." Sergeant Darisse then searched a blue duffle bag in the "back hatch" area of the Escort. In "one of the side compartments" of the bag, Sergeant Darisse located "a white plastic grocery bag" containing "a sandwich bag wrapped in a paper towel." He discovered inside "the sandwich bag . . . a white powder[ed] substance . . . [that] appeared to be . . . cocaine." A field test of the white, powdered substance indicated that it was, in fact,

cocaine. Both the driver and defendant were then arrested and charged with trafficking in cocaine.

Defendant sought to suppress the evidence obtained during the search of the Escort, alleging that the stop was an illegal seizure in violation of the Fourth Amendment to the United States Constitution and Sections 19 and 20 of Article I of the North Carolina Constitution. Apparently, defendant argued that our General Statutes require a vehicle neither to have all brake lights in good working order nor to be equipped with more than one brake light, and, as a result, a traffic stop for the reason asserted here should be unconstitutional.

When the traffic stop at issue in this case occurred, Chapter 20 of our General Statutes, which addresses motor vehicles, contained several sections regulating vehicle brake lights. First, section 20-129 required that "[e]very motor vehicle . . . have all originally equipped rear lamps or the equivalent in good working order, which lamps shall exhibit a red light plainly visible under normal atmospheric conditions from a distance of 500 feet to the rear of such vehicle." N.C.G.S. § 20-129(d) (2009). That section also mandated, in language perhaps familiar when the provision was first enacted more than a half century ago, that "[n]o person shall sell or operate on the highways of the State any motor vehicle . . . unless it shall be equipped with a stop lamp on the rear of the vehicle. The stop lamp . . . shall be actuated upon application of the service (foot) brake. The stop lamp may be incorporated into a unit with one or more other rear lamps." *Id.* § 20-129(g) (2009). Second, section 20-129.1 provided that "[b]rake lights (and/or brake reflectors) on the rear of a motor vehicle shall have red lenses so that the light displayed is red." *Id.* § 20-129.1(9) (2009). Finally, section 20-183.3 also dictated that a motor vehicle safety inspection include a determination that the lights required by sections 20-129 or 20-129.1 are present and in a safe operating condition. *Id.* § 20-183.3(a)(2) (2009).

The trial court denied defendant's motion to suppress. The trial court found, among other things, that

> Darisse observed the right brake light of the vehicle not to function as the left brake light of the vehicle came on as the subject vehicle slowed. Darisse upon making this observation, activated his blue light and instigated a stop of the subject vehicle.
>
> The subject vehicle's right brake light was not functioning at the time of the instigation of the stop by observation of the video,

taken from Darisse's patrol car, which began at the time of the instigation of the stop.

Immediately prior to the vehicle coming to a complete stop on the shoulder the right brake light flickered on.

Based on its findings the trial court concluded, *inter alia*, that Sergeant Darisse had a "reasonable and articulable suspicion that the subject vehicle and the driver were violating the laws of this State by operating a motor vehicle without a properly functioning brake light" and "that the seizure . . . was constitutionally valid."

The Court of Appeals disagreed with the trial court's determination that all vehicular brake lights must function properly. *State v. Heien*, 214 N.C. App. 515, 714 S.E.2d 827, 829-31 (2011). The Court of Appeals, addressing a novel issue of statutory interpretation, employed a long statutory analysis and then held that Chapter 20 requires a motor vehicle to have only one brake light. *Id.* at —, 714 S.E.2d at 829-31. That court explained that section 20-129 requires only " 'a' " brake light. *Id.* at —, 714 S.E.2d at 829 (quoting N.C.G.S. § 20-129(g) (emphasis added)). The court observed that the brake light " 'may be incorporated into a unit with *one* or more other rear lamps.' " *Id.* at —, 714 S.E.2d at 829 (quoting N.C.G.S. § 20-129(g) (emphasis added)). Given the "use of the articles 'a' and 'the' before the singular" term "stop lamp," which is used to describe a brake light throughout the statutes, the Court of Appeals reasoned that subsection 20-129(g) requires only one brake light. *Id.* at —, 714 S.E.2d at 829. Further, the court determined that the mandate of section 20-129 that vehicles " 'have all originally equipped rear lamps or the equivalent in good working order' " does not apply to brake lights because brake lights are distinct from rear lamps. *Id.* at —, 714 S.E.2d at 830 (quoting N.C.G.S. § 20-129(d)). Finally, the Court of Appeals explained that the vehicle inspection statute does not alter the number of brake lights required by section 20-129. *Id.* at —, 714 S.E.2d at 831.

Then, relying on its decision in *State v. McLamb*, 186 N.C. App. 124, 649 S.E.2d 902 (2007), *disc. rev. denied*, 362 N.C. 368, 663 S.E.2d 433 (2008), the Court of Appeals held that the traffic stop was unconstitutional. *Heien*, — N.C. App. at —, 714 S.E.2d at 829-31. The court explained that at the time of the stop "there was no violation of N.C.G.S. § 20-129(g), N.C.G.S. § 20-129(d), or N.C.G.S. § 20-183.3." *Id.* at ___, 714 S.E.2d at 831. As a result, the court reasoned that "[b]ecause the initial stop was based upon Sergeant Darisse's observation that the right brake light of the vehicle malfunctioned, the jus-

tification for the stop was objectively unreasonable, and the stop violated [d]efendant's Fourth Amendment rights." *Id.* at —, 714 S.E.2d at 831 (citing *McLamb*, 186 N.C. App. at 127-28, 649 S.E.2d at 904). Essentially, the court held that a police officer's mistaken belief about the requirements of the substantive traffic law is per se objectively unreasonable. And, when the factual circumstances fail to indicate a violation of the substantive law as interpreted by a reviewing court, the stop of an individual is unconstitutional.

We allowed the State of North Carolina's Petition for Discretionary Review. *State v. Heien*, 365 N.C. 545, 720 S.E.2d 389 (2012). It is important to note at the outset that the State of North Carolina has chosen not to seek review of the Court of Appeals' statutory interpretation. Accordingly, how many brake lights are required by our General Statutes and whether they must be in good working order are issues not presented to this Court; for purposes of our decision, we assume that the Court of Appeals correctly held that our General Statutes require only one brake light and that not all originally equipped brake lights must function properly. It is also worth noting that, were driving with an improperly functioning brake light a traffic violation then, without question, Sergeant Darisse would have had, at least, reasonable suspicion to conduct the stop. *E.g.*, *State v. Styles*, 362 N.C. 412, 417, 665 S.E.2d 438, 441 (2008) ("Officer Jones' observation of defendant's traffic violation gave him the required reasonable suspicion to stop defendant's vehicle."). Indeed, a routine traffic stop by an officer who observes an individual commit a traffic violation is supported by probable cause. *E.g.*, *Whren v. United States*, 517 U.S. 806, 819, 116 S. Ct. 1769, 1777, 135 L. Ed. 2d 89, 101 (1996). The question remains, however, whether an officer's mistake of law may nonetheless give rise to reasonable suspicion to conduct a routine traffic stop.

The issue presented in this case is one of first impression for this Court; however, considering a related question in *State v. Barnard*, 362 N.C. 244, 658 S.E.2d 643, *cert. denied*, 555 U.S. 914, 129 S. Ct. 264, 172 L. Ed. 2d 198 (2008), we held that an officer's mistake of law will not invalidate a stop otherwise supported by reasonable suspicion to believe an actual law was being violated. In Barnard a police officer observed an individual, who was operating a vehicle that had stopped for a red light, and then remained stopped for approximately thirty seconds after the light turned green before making a legal left turn. *Id.* at 245, 658 S.E.2d at 644. The officer decided to stop the vehicle based in part on "a perceived, though apparently non-existent, statu-

tory violation of impeding traffic." *Id.* at 248, 658 S.E.2d at 645. At the suppression hearing the officer testified also that remaining stopped for thirty seconds after a light turns green "definitely would be an indicator of impairment." *Id.* at 247, 658 S.E.2d at 645. This Court, citing *Whren* and *State v. McClendon*, 350 N.C. 630, 517 S.E.2d 128 (1999), for the proposition that the "constitutionality of a traffic stop depends on the objective facts, not the officer's subjective motivation," concluded that because the circumstances present in the case "gave rise to a reasonable, articulable suspicion that defendant may have been driving while impaired, the stop of defendant's vehicle was constitutional." 362 N.C. at 248, 658 S.E.2d at 645-46. As a result, the rule in this state is that an officer's subjective mistake of law will not cause the traffic stop to be unreasonable when the totality of the circumstances indicates that there is reasonable suspicion that the person stopped is violating some other, actual law. *Id.* The question presented today is whether a stop is likewise permissible when an officer witnesses what he reasonably, though mistakenly, believes to be a traffic violation but, this time, the conduct fails simultaneously to indicate another law is being violated. In other words, does the former still hold when the latter is absent?

Various federal and state courts have provided different answers to this question. Some courts hold that a police officer's mistaken interpretation of the applicable substantive law cannot give rise to reasonable suspicion to support a traffic stop. *E.g.*, *United States v. McDonald*, 453 F.3d 958, 961-62 (7th Cir. 2006) (stating that an officer's decision to stop a vehicle "based on a subjective belief that a law has been broken, when no violation actually occurred, is not objectively reasonable"); *State v. Anderson*, 683 N.W.2d 818, 823-24 (Minn. 2004) (en banc) (holding "that an officer's mistaken interpretation of a statute may not form the particularized and objective basis for suspecting criminal activity necessary to justify a traffic stop"). Other courts have held that an officer's mistake of law can form the reasonable suspicion required to justify a traffic stop, so long as the mistake is objectively reasonable. *E.g.*, *United States v. Sanders*, 196 F.3d 910, 913 & n.3 (8th Cir. 1999) (concluding a traffic stop was constitutional when the officer reasonably believed the individual was violating the traffic law, even though the officer's belief about the law's requirements may have been incorrect); *State v. Rheinlander*, 286 Ga. App. 625, 626, 649 S.E.2d 828, 829-30 (2007) (" 'If the officer acting in good faith believes that an unlawful act has been committed, his actions are not rendered improper by a later legal determination that the defendant's actions were not a crime according to a techni-

cal legal definition or distinction determined to exist in the penal statute. The question to be decided is whether the officer's motives and actions at the time and under all the circumstances, including the nature of the officer's mistake, if any, were reasonable and not arbitrary or harassing.' " (citation omitted)); *Moore v. State*, 2005-CT-02063-SCT (¶21), 986 So. 2d 928, 935 (Miss. 2008) (en banc) ("In other words, based on the totality of the circumstances with which Officer Moulds was confronted, including a valid, reasonable belief that [the defendant] was violating a traffic law, Officer Moulds had sufficient probable cause to pull [the defendant] over, although, as it turns out, Officer Moulds based his belief of a traffic violation on a mistake of law.").

Two cases from the federal circuit courts of appeals illustrate the varying approaches. In *United States v. Martin*, 411 F.3d 998 (8th Cir. 2005), the United States Court of Appeals for the Eighth Circuit confronted a situation similar to the one presently at bar. In *Martin* an officer observed that a vehicle's right brake light failed properly to illuminate when the vehicle's brakes were engaged. *Id.* at 1000. Believing that he was witnessing a violation of a traffic law, the officer stopped the vehicle and subsequently arrested the driver for a different, more serious crime. *Id.* As it turns out, the applicable statute appeared to require only one properly functioning brake light. 411 F.3d at 1001. The court, however, reasoned that the "determinative question is not whether Martin actually violated the Motor Vehicle Code by operating a vehicle with one defective brake light, but whether an objectively reasonable police officer could have formed a reasonable suspicion that Martin was committing a code violation." *Id.* Then, pointing out that it was " 'common knowledge' " in the region that multiple brake lights are required, and that the language of the applicable statute was "counterintuitive and confusing," the court determined that the officer had an objectively reasonable basis to believe he had witnessed a traffic violation and that the stop was constitutionally permissible. 411 F.3d at 1001-02. On the other hand, in *United States v. Chanthasouxat*, 342 F.3d 1271 (11th Cir. 2003), the United States Court of Appeals for the Eleventh Circuit concluded that there was no reasonable suspicion to stop a vehicle for lacking an inside rearview mirror because the city ordinance the officer believed had been violated did not actually require such an inside mirror. *Id.* at 1278-80. The court found that the officer's mistaken belief regarding the statute's requirements was reasonable because (1) his training instructed that such a mirror was required;

(2) a magistrate had informed him that an inside mirror was necessary; and (3) he had "written more than 100 tickets for lack of an inside rear-view mirror." *Id.* at 1279. The court explained, however, that "a mistake of law, no matter how reasonable or understandable, . . . cannot provide reasonable suspicion . . . to justify a traffic stop." *Id.*

Each court offered persuasive justifications for its decision. The Eleventh Circuit explained that its rule is consistent with the principle that any ambiguity or vagueness in a statute should not be used against a defendant. *Chanthasouxat*, 342 F.3d at 1278-79. That reasoning is consistent with rationale from other courts, discussed approvingly by the Eleventh Circuit, indicating that to be permissible under the Fourth Amendment a stop must be objectively grounded in the actual, governing law. *Id.* at 1277-78 (citing *United States v. Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000), and *United States v. Lopez-Valdez*, 178 F.3d 282 (5th Cir. 1999)). The Eighth Circuit, on the other hand, reasoned that its view is in keeping with the foundational principle that an officer's actions must be "objectively reasonable in the circumstances." *Martin*, 411 F.3d at 1001 (citation and quotation marks omitted). Moreover, the court observed that courts " 'should not expect state highway patrolmen to interpret the traffic laws with the subtlety and expertise of a criminal defense attorney,' " *id.* (quoting *Sanders*, 196 F.3d at 913), or "a federal judge," *id.* That observation is perhaps somewhat supported by an earlier decision of the Supreme Court of the United States on a different, but related, issue. *See Michigan v. DeFillippo*, 443 U.S. 31, 37-40, 99 S. Ct. 2627, 2632-33, 61 L. Ed. 2d 343, 349-51 (1979) (holding that the arrest of an individual for violating a city ordinance later found to be unconstitutional nonetheless complied with the Fourth Amendment, in part because the Court reasoned that the "enactment of a law forecloses speculation by enforcement officers concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws" and based on that reasoning, believed that "[a] prudent officer . . . should not have been required to anticipate that a court would later hold the ordinance unconstitutional").

We find the Eighth Circuit's reasoning to be more compelling. To begin, that rationale seems to us, as it did to the Eighth Circuit, to be consistent with the primary command of the Fourth Amendment—that law enforcement agents act reasonably. *See Delaware v. Prouse*, 440 U.S. 648, 653-54, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660, 667 (1979) (noting that the purpose of the Fourth Amendment "is to impose a

standard of reasonableness upon the exercise of discretion by government officials, including law enforcement agents, in order to safeguard the privacy and security of individuals against arbitrary invasions" (footnote call number, citations, and internal quotation marks omitted)). An officer may make a mistake, including a mistake of law, yet still act reasonably under the circumstances. As stated above, when an officer acts reasonably under the circumstances, he is not violating the Fourth Amendment. So long as the officer's mistake of law is objectively reasonable, then, the Fourth Amendment would seem not to be violated. Accordingly, requiring an officer to be more than reasonable, mandating that he be perfect, would impose a greater burden than that required under the Fourth Amendment.

Moreover, the reasonable suspicion standard does not require an officer actually to witness a violation of the law before making a stop. *See*, *e.g.*, *Terry v. Ohio*, 392 U.S. 1, 22, 88 S. Ct. 1868, 1880-81, 20 L. Ed. 2d 889, 907 (1968) (holding that an officer can constitutionally make a stop after witnessing "a series of acts, each of them perhaps innocent in itself, but which taken together warrant[ ] further investigation"). That rule generally applies regardless of the particular substantive law at issue, *Styles*, 362 N.C. at 414-16, 665 S.E.2d at 439-41, and results in part because *Terry* stops are conducted not only to investigate past crime but also to halt potentially ongoing crime, to thwart contemplated future crime, and, most importantly in these circumstances, to protect the public from potentially dangerous activity. *See* 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.1(e), at 281 (4th ed. 2004) (footnotes omitted).

Indeed, because we are particularly concerned for maintaining safe roadways, we do not want to discourage our police officers from conducting stops for perceived traffic violations. A routine traffic stop, based on what an officer reasonably perceives to be a violation, is not a substantial interference with the detained individual and is a minimal invasion of privacy. In fact, it seems to us that most motorists would actually prefer to learn that a safety device on their vehicle is not functioning properly. And particularly when judged against society's countervailing interest in keeping its roads safe, we think it prudent to endorse the reasonable interpretation of our traffic safety laws. It would, at a minimum, work at cross-purposes if we were to require our law enforcement officers to narrowly interpret our traffic safety statutes when deciding whether to conduct a stop for fear that a possible subsequent prosecution for the violation could be imperiled. That approach would undermine our officers'

important efforts in keeping our roads safe. And because we do not perceive such a Fourth Amendment requirement, we decline to create one.

For that reason we find the Eleventh Circuit's justifications inapposite. Police officers should be entitled to interpret our motor vehicle laws reasonably when conducting routine traffic stops. Of course, we are mindful that statutes may not be unconstitutionally vague and agree that it may be unreasonable to conduct a stop if the substantive statute is too vague. *Cf. DeFillippo*, 443 U.S. at 38, 99 S. Ct. at 2632, 61 L. Ed. 2d at 350 ("The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws."). But concerns about the rules of construction regarding the substantive statutes at issue seem to us to be more applicable to the subsequent judicial interpretation of a statute and not to a routine traffic stop that needs to be based only on reasonable suspicion. A *post hoc* judicial interpretation of a substantive traffic law does not determine the reasonableness of a previous traffic stop within the meaning of the state and federal constitutions. Such a *post hoc* determination resolves whether the conduct that previously occurred is actually within the contours of the substantive statute. But that determination does not resolve whether the totality of the circumstances present at the time the conduct transpired supports a reasonable, articulable suspicion that the statute was being violated. It is the latter inquiry that is the focus of a constitutionality determination, not the former. Respectfully disagreeing with the Eleventh Circuit, we think the Fourth Amendment's reasonable suspicion standard is not offended by an officer's objectively reasonable mistake of law.

Furthermore, we note that a decision to the contrary would be inconsistent with the rationale underlying the reasonable suspicion doctrine. "[R]easonable suspicion" is a "commonsense, nontechnical conception[ ] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Ornelas v. United States*, 517 U.S. 690, 695, 116 S. Ct. 1657, 1661, 134 L. Ed. 2d 911, 918 (1996) (citations and internal quotation marks omitted). And while "reasonable suspicion" is more than "an inchoate and unparticularized suspicion or hunch of criminal activity," *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 676, 145 L. Ed. 2d 570, 576 (2000) (citation and internal quotation marks omitted), " 'some minimal level of objective justification' " is all that

is demanded, *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1, 10 (1989) (quoting *INS v. Delgado*, 466 U.S. 210, 217, 104 S. Ct. 1758, 1763, 80 L. Ed. 2d 247, 255 (1984)). To require our law enforcement officers to accurately forecast how a reviewing court will interpret the substantive law at issue would transform this "commonsense, nontechnical conception" into something that requires much more than "some minimal level of objective justification." We would no longer merely require that our officers be reasonable, we would mandate that they be omniscient. This seems to us to be both unwise and unwarranted.

Our approach also preserves the historical nature of the inquiry into whether an officer's conduct satisfies the Fourth Amendment. The question of whether reasonable suspicion exists has historically been answered by considering the totality of the circumstances present in each individual case rather than on the basis of bright-line rules. As the Supreme Court of the United States has observed, "The concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules.' " *Sokolow*, 490 U.S. at 7, 109 S. Ct. at 1585, 104 L. Ed. 2d at 10 (quoting *Illinois v. Gates*, 462 U.S. 213, 232, 103 S. Ct. 2317, 2329, 76 L. Ed. 2d 527, 544 (1983)). It follows then that if we were to treat an officer's reasonable mistake of law differently from other circumstances in the reasonable suspicion analysis, we would be declaring essentially that any legal mistake by police resulting in a traffic stop could violate our federal and state constitutions regardless of how objectively reasonable the police conduct. Such a rule would insert rigidity into a fluid concept, which we think inappropriate.

Endorsing disparate treatment of police mistakes of law would not only create a bright-line rule, but also alter the analysis courts employ to determine whether reasonable suspicion is present. The traditional constitutional inquiry is to determine whether a traffic stop is reasonable under all the circumstances. *United States v. Southerland*, 486 F.3d 1355, 1358 (D.C. Cir.) (citing *Whren*, 517 U.S. at 810, 116 S. Ct. at 1772-73, 135 L. Ed. 2d at 95-96), *cert. denied*, 552 U.S. 965, 128 S. Ct. 414, 169 L. Ed. 2d 290 (2007). If one circumstance, such as whether the officer made an objectively reasonable mistake of law, proved to be dispositive, then the reasonable suspicion analysis would change. A new threshold question would develop—whether the police had correctly forecast how the reviewing court would interpret the applicable law. If, and only if, this question were answered in the affirmative would the traditional totality of the cir-

cumstances analysis follow. This framework would seem to be a departure from the traditional reasonable suspicion analysis.

Finally, our approach allows reviewing courts to treat all police mistakes the same. The Supreme Court of the United States does not demand factual accuracy from our police when determining whether reasonable suspicion exists. *Illinois v. Rodriguez*, 497 U.S. 177, 185-86, 110 S. Ct. 2793, 2800, 111 L. Ed. 2d 148, 159 (1990) ("[I]n order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable."). Neither do the federal circuit courts of appeals. *See, e.g.*, *Chanthasouxat*, 342 F.3d at 1276 (collecting cases and observing that a "traffic stop based on an officer's incorrect but reasonable assessment of facts does not violate the Fourth Amendment"). Instead, reasonableness is all that is required. *E.g.*, *id.* at 1276-77. Of course, the federal circuits are divided on whether officers are permitted to make reasonable mistakes of law. We, however, find no constitutional requirement to distinguish between mistakes of fact and mistakes of law in this context. And, in part also because it is not always clear whether a mistake is one of fact or of law, *e.g.*, *United States v. Miguel*, 368 F.3d 1150, 1153-54 (9th Cir. 2004), we decline to create such a distinction in this state. We believe the correct rule is that so long as an officer's mistake is reasonable, it may give rise to reasonable suspicion.

Applying this rule to the facts of this case, we observe that the following objective circumstances were present at the time of the stop. Our General Statutes mandated that each "motor vehicle . . . have all originally equipped rear lamps or the equivalent in good working order." N.C.G.S. § 20-129(d). Our legislature permitted a vehicle's brake lighting system to be "incorporated into a unit with one or more other rear lamps." *Id.* § 20-129(g). It is reasonable to read these two provisions of section 20-129 to say that, because it may be "incorporated into a unit with . . . other rear lamps," *id.*, a brake light is a rear lamp which, like all "originally equipped rear lamps," must be kept "in good working order," N.C.G.S. § 20-129(d). Such a reading is particularly reasonable in light of both the federal requirement that a passenger vehicle maintain two red brake lights on the rear of the vehicle "at the same height, symmetrically about the vertical centerline, as far apart as practicable," 49 C.F.R. § 571.108, at S7.3.1 & Table I-a (2011), and the reference in N.C.G.S. § 20-129.1 to the required color of the lenses of multiple "brake *lights*," N.C.G.S. § 20-129.1(9)

(emphasis added). When the stop at issue in this case occurred, neither this Court nor the Court of Appeals had ever interpreted our motor vehicle laws to require only one properly functioning brake light. Given these circumstances, Sergeant Darisse could have reasonably believed that he witnessed a violation of our motor vehicle laws when he observed that the Escort had an improperly functioning brake light.

After considering the totality of the circumstances, we conclude that there was reasonable, articulable suspicion to conduct the traffic stop of the Escort in this case. We are not persuaded that, because Sergeant Darisse was mistaken about the requirements of our motor vehicle laws, the traffic stop was necessarily unconstitutional. After all, reasonable suspicion is a "commonsense, nontechnical conception[ ] . . . on which reasonable and prudent men, not legal technicians, act," *Ornelas*, 517 U.S. at 695, 116 S. Ct. at 1661, 134 L. Ed. 2d at 918 (citations and internal quotation marks omitted), and the Court of Appeals analyzed our General Statutes at length before reaching its conclusion that the officer's interpretation of the relevant motor vehicle laws was erroneous. After considering the totality of the circumstances, we hold that Sergeant Darisse's mistake of law was objectively reasonable and that he had reasonable suspicion to stop the vehicle in which defendant was a passenger. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for additional proceedings.

REVERSED AND REMANDED.

Justice HUDSON dissenting.

Because the majority's opinion here significantly, and in my view unnecessarily, alters our Fourth Amendment jurisprudence by introducing subjectivity and vagueness into our Fourth Amendment analysis and effectively overruling this Court's prior precedent, I respectfully dissent.

As a starting point, there is no doubt in my mind that, when he stopped defendant's vehicle, Sergeant Darisse acted upon a reasonable belief that defendant violated the law by operating a vehicle with one malfunctioning brake light. It is my guess that, before the COA's surprising decision below, most citizens of this state believed that a malfunctioning brake light represented legal grounds for a traffic stop and a citation. This belief was the only reason given for the stop;

there was otherwise nothing to indicate that the vehicle, which was not being driven by defendant, was being operated improperly. The trial court's findings on denying defendant's motion to suppress remain unchallenged and are therefore binding on appeal. They include the finding that Sergeant Darisse activated his blue light upon observing "the right brake light of the vehicle not to function." The trial court then concluded that the officer had reasonable articulable suspicion that the vehicle and driver were violating laws by having a brake light that was not functioning properly. The Court of Appeals held that there was no violation of any of the applicable statutes, N.C.G.S. §§ 20-129(d), 20-129(g), and 20-183.3, and therefore no legal or constitutional basis for the stop.

In the Court of Appeals the State argued that the trooper "actually observed a violation of N.C.[G.S.] § 20-129(d)" and that "[d]efendant's reliance on 'mistaken belief' cases . . . is therefore misplaced." Defendant argued, and the Court agreed, that there was no violation of the statutes. It was neither argued nor held that the trooper had a "reasonable if mistaken belief," just whether there was or was not a violation of the statutes.

Instead of bringing to this Court the issue of statutory interpretation, the State presented its single issue to be reviewed as: "Did the Court of Appeals err in holding that a stop based on a mistaken belief is not objectively reasonable and cannot support reasonable suspicion to stop the vehicle?" This Court allowed review of an issue not decided by the Court of Appeals and has now opened a Pandora's box by approving of the use of evidence obtained solely because of a traffic stop based upon an officer's mistake of law. I must respectfully dissent.

There are many problems with the majority's decision—it introduces subjectivity into what was previously a well-settled objective inquiry and creates an interpretive role regarding state statutes for police officers and police departments. The danger in adopting a new constitutional rule here is that this particular case seems so innocuous: *Of course* it is reasonable that an officer would pull over a vehicle for a malfunctioning brake light. But this new constitutional rule will also apply in the next case, when the officer acts based on a misreading of a less innocuous statute, or an incorrect memo or training program from the police department, or his or her previous law enforcement experience in a different state, or his or her belief in a nonexistent law.

There is ample precedent for the decision the majority could have made here, both in this state and in federal courts. This Court has repeatedly and recently stated that what an officer believes is irrelevant to Fourth Amendment analysis—only the objective facts and the actual law matter. In *State v. Barnard* we stated that it was "irrelevant" that the officer stopped the car for a perceived, but actually nonexistent, statutory violation, saying that "[t]he constitutionality of a traffic stop depends on the objective facts, not the officer's subjective motivation." 362 N.C. 244, 248, 658 S.E.2d 643, 645-46, *cert. denied*, 555 U.S. 914, 129 S. Ct. 264 (2008). In *State v. Ivey* we invalidated a stop when the objective facts showed that there was no actual statutory violation. 360 N.C. 562, 565, 633 S.E.2d 459, 461-62 (2006), *abrogated on other grounds*, *State v. Styles*, 362 N.C. 412, 415 n.1, 665 S.E.2d 438, 440 n.1 (2008). The majority implicitly overrules both of these cases today.

While the majority quotes the United States Supreme Court's decision in *Ornelas v. United States* as if that decision supports its position, the Court in *Ornelas* actually said the precise opposite a few sentences after the quote in the majority opinion: When evaluating a stop based on reasonable suspicion, "the issue is whether the facts satisfy the . . . statutory . . . standard, or to put it another way, whether the rule of law as applied to the established facts *is or is not violated*." 517 U.S. 690, 696-97, 116 S. Ct. 1657, 1662 (1996) (emphasis added) (citation and quotation marks omitted). There is no room for reasonable mistakes of law under the *Ornelas* articulation of the rule; either the law was violated and the stop is reasonable, or the law was not violated and the stop is not reasonable. Under our law and the law according to the United States Supreme Court, it does not matter what the officer subjectively thinks the law is. What matters is whether the objective facts show an actual violation of the law.

Further, the majority supports its reasoning with case law from the Court of Appeals for the Eighth Circuit, *see United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005), and contrasts that decision with the reasoning in the Eleventh Circuit's decision in *United States v. Chanthasouxat*, 342 F.3d 1271, 1278-79 (11th Cir. 2003). Though the majority does not acknowledge so, it should be emphasized that the Eighth Circuit stands alone among the federal circuits on this issue. The First, Third, Fifth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits all apply some form of the rule that an officer's mistake of law cannot be the basis for reasonable suspicion, though many allow that a stop based on a mistake of law may be constitutional if it can

be justified objectively notwithstanding the mistake of law. *See United States v. Coplin*, 463 F.3d 96, 101 (1st Cir. 2006), cert. denied, 549 U.S. 1237, 127 S. Ct. 1320 (2007); *United States v. Mosley*, 454 F.3d 249, 260 n.16 (3d Cir. 2006); *United States v. Miller*, 146 F.3d 274, 279 (5th Cir. 1998); *United States v. McDonald*, 453 F.3d 958, 961 (7th Cir. 2006); *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000); *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005); *Chanthasouxat*, 342 F.3d at 1279; *cf. United States v. Debruhl*, 38 A.3d 293, 299 (D.C. Cir. 2012) (noting that court's refusal to "lead this jurisdiction toward acceptance of the discredited 'mistake of law' justification for Fourth Amendment violations").[1] The Second, Fourth, and Sixth Circuits appear not to have decided the issue explicitly yet, though district courts in the Second Circuit apply the majority rule. *See United States v. Williams*, No. 11 Cr. 228, 2011 WL 5843475, at *5 (S.D.N.Y. Nov. 21, 2011) (stating that "[a] mistake of law cannot provide objectively reasonable grounds for suspicion"); *see also United States v. McHugh*, 349 F. App'x 824, 828 n.3 (4th Cir. 2009) (per curiam) ("[W]e assume, without deciding, that an officer's reasonable mistake of law may not provide the objective grounds for reasonable suspicion to justify a traffic stop."); *United States v. Jones*, 479 F. App'x 705, 712 (6th Cir. 2012) ("This court has not yet answered whether an officer's objectively reasonable mistake of law can establish reasonable suspicion for a search or seizure."). While using an imprecise tool like circuit-counting to justify a position should be done with care, the overwhelming acceptance of the position directly opposite that taken by the majority today should give us all pause.

Most troubling is that this decision imports into our jurisprudence a concept we have expressly rejected. Allowing an officer's "reasonable mistake of law" to support a warrantless stop is the functional equivalent of a "good faith exception" for stops conducted in contravention of the law—as long as the officer acted in good faith, that is, he is reasonably unaware that his actions are inconsistent with the law, the illegality of the stop will not require suppression of

1. Of note, a middle-of-the-road approach would alleviate the majority's concerns about a per se rule while preserving traditional Fourth Amendment protections. We could easily adopt a principle like that expressed in *United States v. Booker*: "Stops premised on a mistake of law, even a reasonable, good-faith mistake, are generally held to be unconstitutional. A stop is lawful despite a mistake of law, however, if an objectively valid basis for the stop nonetheless exists." 496 F.3d 717, 722 (D.C. Cir. 2007), *vacated on other grounds*, 556 U.S. 1218, 129 S. Ct. 2155 (2009) (citation and quotation marks omitted). In fact, this Court applied this exact reasoning, if less explicitly, in *State v. Barnard*. *See* 362 N.C. at 248, 658 S.E.2d at 645-46.

the obtained evidence. In *State v. Carter*, 322 N.C. 709, 720-24, 370 S.E.2d 553, 560-62 (1988), this Court discussed at length the value of the exclusionary rule and the reason for this Court's rejection of a good faith exception to that rule.[2] One of those reasons is that "the exclusionary rule is responsible for the systematic, in-depth training of police forces in the law of search and seizure. It can be no part of our constitutional duties to signal a retreat from these salutary advances in constitutional compliance which have guided police practice in this state since 1937." 322 N.C. at 721, 370 S.E.2d at 560 (footnote call number omitted). Yet such a retreat is exactly what the Court embraces today.[3]

The majority's concern that we would be asking omniscience of our police if we invalidated this stop is overblown. We would merely be asking that our police be diligent in studying the law and remaining current on changes to the law, as I am certain they already are. While the majority claims that "we do not want to discourage our police officers from conducting stops for perceived traffic violations," it is entirely unclear to me how a rule invalidating stops not based on the law would chill traffic stops generally, and the majority does not elaborate other than to mention the "fear that a subsequent prosecution for the violation would be imperiled." Other decisions by this Court that have upheld traffic stops based on observations amounting to "reasonable suspicion" illustrate how little it takes to satisfy this standard. *See*, *e.g.*, *State v. Otto*, 366 N.C. 134, 726 S.E.2d 824, 828 (2012). Because officers (rightfully) face no punishment for a stop based on a mistake of law, and because there would be no prosecution at all absent the stop, this alleged "fear" is not very compelling. Our police forces consist of trained professionals who carefully apply the law as laid down by the General Assembly and who are fully capable of adapting to changes in the law.

By adopting the majority's rule, we are not only potentially excusing mistakes of law in the exceedingly rare case when the Court of

2. In 2011 the General Assembly created a statutory "good faith exception" in N.C.G.S. § 15A-974 and explicitly requested that this Court revisit *Carter*. Act of Mar. 8 2011, ch. 6, 2011 N.C. Sess. Laws 10. This statute was enacted after this defendant's charges were filed; however, even in the statute, the exception requires that the good faith belief be "objectively reasonable." N.C.G.S. § 15A-974(a)(2) (2011).

3. The same concern prompted the Ninth Circuit to reject exactly this argument in *United States v. Lopez-Soto*: "To create an exception here would defeat the purpose of the exclusionary rule, for it would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey." 205 F.3d at 1106.

Appeals divines a novel interpretation of a statute, but also those mistakes of law that arise from simple misreadings of statutes, improper trainings, or ignorance of recent legislative changes. There is simply no reason to go to such lengths here, especially when the General Assembly has recently spoken to clarify this issue, which will undoubtedly come before us in due course. This decision is not merely unnecessary here; it is premature in light of the recent amendment to N.C.G.S. § 15A-974.

The flaws in the majority's opinion are perhaps most apparent in its single statement that "[p]olice officers should be entitled to interpret our motor vehicle laws reasonably when conducting routine traffic stops." Separation of powers doctrine dictates otherwise: It is the legislature's job to write the law and the judiciary's job to interpret the law. The job of the police is to *enforce* the law as it has been written by the legislature and interpreted by the courts. Proper enforcement of the law requires accurate knowledge of the law; as the Eleventh Circuit cogently noted in *United States v. Chanthasouxat*, to decide otherwise is to endorse "the fundamental unfairness of holding citizens to the traditional rule that ignorance of the law is no excuse while allowing those entrusted to enforce the law to be ignorant of it." 342 F.3d at 1280 (internal citation and quotation marks omitted).

Had the State petitioned for review on the issues of statutory interpretation addressed by the Court of Appeals, we could have based our decision on such an interpretation. In my view, that would have been the more appropriate course, and one by which we could stand firm on the protections of the Fourth Amendment. Then the General Assembly, should it so desire, could rewrite the brake light statute to clearly require that all brake lights operate properly, which it could do with alacrity. Then our police officers could continue the long-standing practice of stopping cars with malfunctioning brake lights; stops like this one would be constitutional; and we would have avoided eviscerating the "objectively reasonable" standard of the Fourth Amendment, and of our own amended N.C.G.S. § 15A-974. Because the majority has taken this unnecessary route, I respectfully dissent.

CHIEF JUSTICE PARKER and JUSTICE TIMMONS-GOODSON join in this dissenting opinion.

HEST TECHNOLOGIES, INC. AND INTERNATIONAL INTERNET TECHNOLOGIES, LLC V. STATE OF NORTH CAROLINA EX REL. BEVERLY PERDUE, GOVERNOR, IN HER OFFICIAL CAPACITY; NORTH CAROLINA DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY; SECRETARY OF CRIME CONTROL AND PUBLIC SAFETY REUBEN YOUNG, IN HIS OFFICIAL CAPACITY; ALCOHOL LAW ENFORCEMENT DIVISION; DIRECTOR OF ALCOHOL LAW ENFORCEMENT DIVISION JOHN LEDFORD, IN HIS OFFICIAL CAPACITY

No. 169A11-2

(Filed 14 December 2012)

1. Constitutional Law— First Amendment—electronic sweepstakes machines—regulation of conduct not speech

N.C.G.S. § 14-306.4, which bans the operation of electronic machines that conduct sweepstakes through the use of an "entertaining display," regulates conduct, with only incidental burdens on associated speech, and is therefore constitutional. The Court of Appeals' decision to declare the statute an overbroad restriction on protected speech and to strike it down as unconstitutional was reversed.

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. ——, 725 S.E.2d 10 (2012), affirming in part and reversing in part an order and final judgment entered on 30 November 2010 by Judge John O. Craig, III in Superior Court, Guilford County. Heard in the Supreme Court on 17 October 2012.

Kilpatrick Townsend & Stockton LLP, by Adam H. Charnes, Richard S. Gottlieb, and Richard D. Dietz, and Grace, Tisdale & Clifton, P.A., by Michael A. Grace and Christopher R. Clifton, for International Internet Technologies, LLC; and Smith Moore Leatherwood LLP, by Richard A. Coughlin and Elizabeth B. Scherer, for Hest Technologies, Inc., plaintiff-appellees.

Roy Cooper, Attorney General, by John F. Maddrey, Solicitor General, and Hal F. Askins, Special Deputy Attorney General, for defendant-appellants.

HUDSON, Justice.

[N]o sooner is a lottery defined, and the definition applied to a given state of facts, than ingenuity is at work to evolve some scheme of evasion which is within the mischief, but not quite

> within the letter of the definition. But, in this way, it is not possible to escape the law's condemnation, for it will strip the transaction of all its thin and false apparel and consider it in its very nakedness. It will look to the substance and not to the form of it, in order to disclose its real elements and the pernicious tendencies which the law is seeking to prevent. The Court will inquire, not into the name, but into the game, however skillfully disguised, in order to ascertain if it is prohibited . . . . It is the one playing at the game who is influenced by the hope enticingly held out, which is often false or disappointing, that he will, perhaps and by good luck, get something for nothing, or a great deal for a very little outlay. This is the lure that draws the credulous and unsuspecting into the deceptive scheme, and it is what the law denounces as wrong and demoralizing.

State v. Lipkin, 169 N.C. 323, 329, 169 N.C. 265, 271, 84 S.E. 340, 343 (1915).

In an effort to curtail the use of a perceived loophole in the State's gambling laws, the General Assembly passed N.C.G.S. § 14-306.4, which bans the operation of electronic machines that conduct sweepstakes through the use of an "entertaining display." *See* N.C.G.S. § 14-306.4(b) (2011). Claiming an unconstitutional restriction on their freedom of speech, plaintiffs challenged the new law. The Court of Appeals declared the statute an overbroad restriction on protected speech and struck it down as unconstitutional. We conclude that this legislation regulates conduct and not protected speech and now reverse.

Since the founding of this nation, states have exercised the police power to regulate gambling. *See, e.g.*, *Calcutt v. McGeachy*, 213 N.C. 1, 7, 195 S.E. 49, 52 (1938) (stating that "the Legislature under the police power vested in it has considered it necessary in suppressing and prohibiting gambling to enact laws from time to time to meet changing machines and devices tending to and fostering gambling"). State legislatures have weighed the social costs of gambling against the economic benefits and chosen different paths according to each legislature's conclusions. North Carolina's approach has evolved from a total ban on casino gaming and lotteries to authorization of a State-run education lottery and limited casino activity on Native American lands within the state. *See* Act of July 8, 2010, ch. 103, pmbl., 2009 N.C. Sess. Laws (Reg. Sess. 2010) 408, 408.

As new technology has developed, the General Assembly has faced the advent of "video poker" and other forms of gambling involving

computers and the Internet. In 2006 the General Assembly banned video poker and all other forms of electronic gambling. Since that time companies have developed systems that appear to sidestep traditional gambling restrictions by combining legal sweepstakes with video games that simulate a gambling environment, thus purportedly removing the "bet" or consideration element of gambling.[1] Faced with the proliferation of these systems in North Carolina, and having concluded that these systems—while not fitting the traditional definition of gambling—give rise to the same concerns as traditional gambling, the General Assembly enacted N.C.G.S. § 14-306.3 in 2008 and N.C.G.S. § 14-306.4 in 2010 in an effort to ban them.

Originally, plaintiffs' systems used simulations of poker or traditional slot machine games to reveal the sweepstakes result; however, law enforcement officers around the state began to take action against establishments using plaintiffs' systems, treating the devices as illegal slot machines. On 4 March 2008, plaintiffs sought a declaration that their systems are legal and an injunction prohibiting defendants from taking adverse action against retailers selling their products, which had included seizing equipment, closing down shops, and initiating criminal prosecutions. That same day the trial court heard the matter and issued a temporary restraining order. The trial court held a second hearing on 14 March, and granted a preliminary injunction on 16 April 2008. On 18 July 2008, the General Assembly enacted Senate Bill 180, which made it unlawful to possess a game terminal that simulates slot machine games or games like video poker. Plaintiffs modified their systems to substitute gaming displays that did not involve simulations of traditional gambling games like slot machines or video poker. They sought a modification of the preliminary injunction to reflect these adjustments on 31 October 2008 and received such a modification on 5 December 2008.

On 8 July 2010, the General Assembly enacted House Bill 80, captioned "An Act to Ban the Use of Electronic Machines and Devices for Sweepstakes Purposes," which is now codified as N.C.G.S. § 14-306.4. Ch. 103, 2009 N.C. Sess. Laws (Reg. Sess. 2010), 408. The Preamble to

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1. Gambling is traditionally understood to contain three elements: chance, consideration, and prize or reward. *See*, *e.g.*, *Ward v. W. Oil Co.*, 387 S.C. 268, 278, 692 S.E.2d 516, 522 (2010) (quoting and citing *State v. 158 Gaming Devices*, 304 Md. 404, 425, 499 A.2d 940, 951 (1985) (identifying "[t]he three elements of gambling—consideration, chance and reward")). The North Carolina statute defining gambling, while using different words, is quite similar in its effect. *See* N.C.G.S. § 14-292 (2011) (including in definition of gambling any "game of chance . . . at which any money, property or other thing of value is bet").

the Session Law includes a statement of purpose underlying the new law. After briefly reviewing the history of gambling laws in the state and recent efforts to ban video poker and similar games, the General Assembly noted that "companies have developed electronic machines and devices to gamble through pretextual sweepstakes relationships with Internet service, telephone cards, and office supplies, among other products," and that "such electronic sweepstakes systems utilizing video poker machines and other similar simulated game play create the same encouragement of vice and dissipation as other forms of gambling . . . by encouraging repeated play, even when allegedly used as a marketing technique." *Id.*, pmbl., at 408.

In relevant part, Chapter 103 of the 2010 Session Laws makes it unlawful to "operate, or place into operation, an electronic machine or device" to "[c]onduct a sweepstakes through the use of an entertaining display." *Id.*, Sec. 1, at 409-10. An "electronic machine or device" is defined as "a mechanically, electrically or electronically operated machine or device . . . that is intended to be used by a sweepstakes entrant, that uses energy, and that is capable of displaying information on a screen or other mechanism." *Id.*, at 408. An "entertaining display" is defined as "visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play." *Id.*, at 409. The statute contains a nonexclusive list of examples of such displays, including, among others, "video poker" and "video bingo," as well as a catch-all provision covering "[a]ny other video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes." *Id.*

Plaintiffs are companies that, according to their motion for a preliminary injunction, "market and sell prepaid products, primarily long-distance telephone and/or high-speed internet service." As a promotion, plaintiffs have developed electronic sweepstakes systems. Sweepstakes participants obtain entries from a predetermined, finite pool of entries—some of which are associated with a prize value and some of which are not—either after a qualifying purchase of plaintiffs' products or at no charge upon request.[2] Participants receive a magnetic stripe card which allows them to access a gamestation terminal and stores the information related to their individual sweepstakes entries. At the terminal "the program reveals the content of

1. Free entries are limited to one entry per day if requested in person and one entry per mailed-in request if sought by mail; the number of mail-in requests for entries is unrestricted.

the sweepstakes entry using different displays that simulate various game themes." These simulated games do not determine, and cannot modify, the sweepstakes outcome or any prize that might be associated with a sweepstakes entry. Any prize amount won through the sweepstakes may be claimed in cash at the counter of the establishment or may be used at the game terminal to purchase more of the product in one-dollar increments, thereby enabling the customer to immediately receive more sweepstakes entries.

On 1 October 2010, after the General Assembly enacted the current version of N.C.G.S. § 14-306.4, plaintiffs filed an amended complaint challenging the constitutionality of the statute under the First Amendment to the United States Constitution and Article I, Section 14 of the North Carolina Constitution. On 30 November 2010, the trial court concluded that the law is constitutional in all aspects except for the catch-all provision found in N.C.G.S. § 14-306.4(a)(3)(i), which it declared overbroad. Based upon that conclusion, the court dissolved the preliminary injunction and allowed law enforcement activity to proceed in accordance with its order. Both parties appealed.

The Court of Appeals majority concluded that both the announcement of the sweepstakes result and the video games are protected speech and that the definition of "entertaining display" in the statute is virtually unlimited. *Hest Techs., Inc. v. State ex rel. Perdue*, ___ N.C. App. ___, ___, 725 S.E.2d 10, 12-14 (2012). Based upon these conclusions, the court held the entire statute unconstitutionally overbroad. *Id.* at ___, 725 S.E.2d at 14-15. The State appealed, and we now reverse.

This case has arisen in the context of repeated efforts by the General Assembly to combat the perceived "vice and dissipation" of gambling, as noted in the preamble to the legislation. The statute banning this type of sweepstakes and video game combination is the culmination of a protracted effort by the General Assembly to eradicate electronic gambling. In 2006 the legislature banned video poker and similar video gambling games. In response, businesses reformatted their machines to include sweepstakes rather than direct betting, but used the same video gambling interfaces to simulate the gambling experience. In 2008 the General Assembly banned the use of simulated slot machines and simulated video gambling in "server-based electronic game promotion[s]," which were defined to encompass these sweepstakes. *See* Act of July 18, 2008, ch. 122, sec. 1, 2007 N.C. Sess. Laws (Reg. Sess. 2008) 464, 464. In response, sweepstakes businesses altered their video game displays to avoid traditional gambling

themes like poker. The General Assembly responded with House Bill 80, a more general ban on electronic sweepstakes promotions. In many ways, this entire saga—and ultimately our decision here—were foretold with uncanny accuracy by this Court nearly one hundred years ago in *State v. Lipkin*, quoted at the outset of this opinion. A similar theme arose in 1923 when the General Assembly first specifically banned slot machines. *See Calcutt*, 213 N.C. at 6, 195 S.E. at 52.

While one can question whether these systems meet the traditional definition of gambling—because plaintiffs have ostensibly separated the consideration or "bet" element from the game of chance feature by offering "free" sweepstakes entries—it is clear that the General Assembly considered these sweepstakes systems to be the functional equivalent of gambling, thus presenting the same social evils as those it identified in traditional forms of gambling. *See* Ch. 103, pmbl., 2009 N.C. Sess. Laws (Reg. Sess. 2010) at 408 ("[E]lectronic sweepstakes systems utilizing video poker machines and other similar simulated game play create the same encouragement of vice and dissipation *as other forms of gambling* . . . by encouraging repeated play, even when allegedly used as a marketing technique[.]" (emphasis added)). In effect, the General Assembly determined that plaintiffs' business models, involving sales of Internet time and telephone cards with accompanying "free" sweepstakes entries, are a mere pretext for the conduct of a de facto gambling scheme. The Preamble to the Session Law contains legislative findings to this effect, and "[a]lthough the legislative findings and declaration of policy have no magical quality to make valid that which is invalid, and are subject to judicial review, they are entitled to weight in construing the statute." *Redev. Comm'n of Greensboro v. Sec. Nat'l Bank of Greensboro*, 252 N.C. 595, 611, 114 S.E.2d 688, 700 (1960).

Elsewhere in the country, other courts facing challenges to the enforcement of similar laws have upheld them precisely because the Internet sweepstakes systems have been viewed as gambling in disguise. In *United States v. Davis* the Fifth Circuit Court of Appeals concluded that "the main purpose and function of [the] Internet cafés was to induce people to play the sweepstakes, and that the Internet time sold by the cafés—albeit at fair market value—was not the primary subject of the transaction, but instead mere subterfuge." 690 F.3d 330, 339-40 (5th Cir. 2012). The court then upheld the defendants' convictions for illegal gambling. *Id.* at 342. Similarly, in *Telesweeps of Butler Valley, Inc. v. Kelly*, the court concluded that "Plaintiff's attempt to separate the consideration from the chance to

win by inserting a step between the two elements is clever, but it merely elevates form over substance. At bottom, what Telesweeps is doing constitutes gambling." No. 3:12-CV-1374, 2012 WL 4839010, at *9 (M.D. Pa. Oct. 10, 2012).

It would be convenient for this Court to similarly declare that plaintiffs' systems constitute gambling because "gambling[ ]implicates no constitutionally protected right; rather, it falls into a category of 'vice' activity that could be, and frequently has been, banned altogether." *United States v. Edge Broad. Co.*, 509 U.S. 418, 426, 113 S. Ct. 2696, 2703 (1993).[3] Notably, the federal courts in both *Davis* and *Telesweeps*, as well as state courts that have addressed Internet sweepstakes businesses, had evidentiary records before them showing that the Internet time and telephone calling cards allegedly constituting the cafés' primary products were not actually used by the customers and therefore, represented pretextual transactions that merely enabled the gambling scheme. *See Davis*, 690 F.3d at 335 (citing testimony that less than $100 of the $27,770 of Internet time sold at one establishment during a representative week was actually used); *Telesweeps*, 2012 WL 4839010, at *4 (stating that Telesweeps, which claimed its "primary business" was selling telephone calling cards, kept no record "of how many cards or minutes ha[d] been sold or used"); *see also State v. Vento*, 2012-NMCA-99, ¶¶ 5, 23, —— N.M. ——, ——, ——, 286 P.3d 627, 630, 635 (Ct. App. 2012) (citing evidence that 99.75% of Internet time purchased went unused). While common sense indicates that similar patterns are present in Internet sweepstakes cafés throughout the country, the factual record here does not show whether the telephone or Internet time that sweepstakes participants purchase is ever used. Thus, legislative findings and common sense notwithstanding, we cannot on this record summarily conclude that these plaintiffs are involved in an illegal gambling operation that uses the sale of legal products as a pretext to avoid state gambling laws.

In the end, though, the label the General Assembly has placed on this activity is not dispositive. What matters is that the General Assembly has identified a threat to the public and acted to address it.

3. Plaintiffs argue that the General Assembly is not free to attach a "vice" label to any particular activity and therefore render it unprotected by the First Amendment. While in general this assertion may be true, plaintiffs' argument fails here. If plaintiffs were correct that the government cannot regulate any vices that involve speech, then North Carolina's ban on video poker would also be unconstitutional. Video poker involves a video game and a results announcement just as much as plaintiffs' systems do here, but no one questions whether the State can constitutionally ban video poker.

"It is well settled that the police power of the state may be exerted to preserve and protect the public morals. It may regulate or prohibit any practice or business the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it or to encourage idleness instead of habits of industry." *State v. Felton*, 239 N.C. 575, 581, 80 S.E.2d 625, 630 (1954). Here the General Assembly exercised its police power to address the problem it saw; as long as the General Assembly has not contravened a constitutional prohibition in the process, the law is valid. *State v. Arnold*, 147 N.C. App. 670, 673, 557 S.E.2d 119, 121 (2001) (citations omitted), *aff'd per curiam*, 356 N.C. 291, 569 S.E.2d 648 (2002). After careful constitutional analysis, we conclude that N.C.G.S. § 14-306.4 as enacted in 2010 does not violate the First Amendment because it regulates conduct, not protected speech.

The central issue we face here is whether to characterize what N.C.G.S. § 14-306.4 actually regulates as conduct or protected speech. Plaintiffs argue that the law prohibits the video games involved in their sweepstakes systems, and that these video games are entertainment and thus merit full First Amendment protection. Plaintiffs in the companion case, *Sandhill Amusements, Inc. v. State of North Carolina*, assert that the law is primarily a restriction on the announcement of the sweepstakes result, which they contend is protected speech. The State maintains that the law only prohibits specific conduct, namely, placing into operation an electronic machine that conducts sweepstakes using an entertaining display.

We are convinced that N.C.G.S. § 14-306.4 primarily regulates noncommunicative conduct rather than protected speech. This conclusion turns directly on how we describe what N.C.G.S. § 14-306.4 does. The statute here makes it "unlawful for any person to operate, or place into operation, an electronic machine or device" to "[c]onduct a sweepstakes through the use of an entertaining display." N.C.G.S. § 14-306.4(b). Operating or placing into operation an electronic machine is clearly conduct, not speech. We conclude that the act of running a sweepstakes is conduct rather than speech, despite the fact that sweepstakes participants must be informed whether they have won or lost. " '[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.' " *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S. Ct. 1912, 1918 (1978) (citation omitted).

Plaintiffs maintain that the video games, or "entertaining display," involved in the sweepstakes systems represent speech protected by the First Amendment. The flaw in this argument is that the statute does not prohibit the video games, only the conduct of a sweepstakes that happens to announce its result through such video games. As the federal district court in the Middle District of Florida decided in a nearly identical case, plaintiffs "are free to provide the video games to their patrons and their patrons are free to play them—and thus make and receive whatever protected message is communicated by the video game—so long as the games are not associated with the conduct of a payoff." *Allied Veterans of the World, Inc. v. Seminole Cnty.*, 783 F. Supp. 2d 1197, 1202 (M.D. Fla. 2011), *aff'd per curiam*, 468 F. App'x 922 (11th Cir. 2012). We find that reasoning compelling here.[4] Unfortunately, our determination that the primary target of this regulation is conduct rather than speech does not neatly end the inquiry. Because regulations that legitimately restrict conduct may still unduly burden speech rights, we must carefully evaluate the plaintiffs' assertions that the speech at issue here implicates the First Amendment.

The First Amendment to the United States Constitution reads in part that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The North Carolina Constitution states: "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained . . . ." N.C. Const. art. I, § 14. Read without context, these provisions appear to be crystal clear, bright-line rules. History, necessity, and judicial precedent have proven otherwise: "Freedom of speech is not an unlimited, unqualified right." *State v. Leigh*, 278 N.C. 243, 250, 179 S.E.2d 708, 712 (1971) (citation omitted).

The first complicating factor here is that not all speech is protected speech. There exist "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 62 S. Ct. 766, 769 (1942). The United States Supreme Court has outlined particular categories of speech that receive no First Amendment protection; these categories include "obscenity, defamation, fraud, incitement, and speech inte-

4. We note that plaintiffs do not actually permit their customers to play their video games outside the context of the sweepstakes. Plaintiffs have chosen to make acquisition of sweepstakes entries a prerequisite to playing the video games.

gral to criminal conduct." *United States v. Stevens*, 559 U.S. 460, 130 S. Ct. 1577, 1584 (2010) (internal citations omitted).

The second complicating factor is that not all protected speech actually involves words. The United States Supreme Court has "acknowledged that conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.' " *Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 2539 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 409, 94 S. Ct. 2727, 2730 (1974) (per curiam)). On the other hand, the Court has also refused to accept the view "that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 1678 (1968). As the Court has noted, "It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S. Ct. 1591, 1595 (1989).

In short, what at first glance appears to be a bright-line prohibition on laws restricting speech relies, in operation, on careful application of the proper level of scrutiny based on the nature of the speech and the importance of the governmental interest involved. Regulation of so-called pure speech, a term that most often refers to political advocacy, must pass strict scrutiny: the government must show a compelling interest in the regulation, and the regulation must be narrowly tailored to achieve that interest. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, —— U.S. ——, ——, 131 S. Ct. 2806, 2817 (2011) (citations omitted). Regulation of many other types of speech, including rules governing commercial speech, *see Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 183-84, 119 S. Ct. 1923, 1930 (1999), measures directed at conduct that involves both speech and nonspeech elements, *see O'Brien*, 391 U.S. at 376-77, 88 S. Ct. at 1678-79, and regulations that only affect the time, place, or manner of speech, *see Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2753 (1989), must pass only intermediate scrutiny. Articulations of intermediate scrutiny vary depending on context, but tend to require an important or substantial government interest, a direct relationship between the regulation and the interest, and regulation no more restrictive than necessary to achieve that interest. *See Greater New Orleans*, 527 U.S. at 183, 119 S. Ct. at 1930. Regulation of conduct that is not " 'sufficiently imbued with elements

of communication' " to earn First Amendment protection, *Johnson*, 491 U.S. at 404, 109 S. Ct. at 2539, needs only bear " 'some rational relationship to a legitimate state purpose.' " *Stanglin*, 490 U.S. at 23, 109 S. Ct. at 1594 (citation omitted).

Plaintiffs argue that two recent First Amendment decisions from the United States Supreme Court require that we hold their systems to be protected under the First Amendment: *Brown v. Entm't Merchs. Ass'n*, —— U.S. ——, 131 S. Ct. 2729 (2011); and *Sorrell v. IMS Health, Inc.*, —— U.S. ——, 131 S. Ct. 2653 (2011). The Court in *Sorrell* determined that a law restricting marketers' use of prescriber-identifiable prescription data was an impermissible content- and speaker-based restriction. —— U.S. at ——, 131 S. Ct. at 2672. In *Brown* the Court ruled that a law banning the sale of violent video games to minors was an impermissible content-based restriction on protected speech. —— U.S. at ——, 131 S. Ct. at 2738. Plaintiffs cite *Sorrell* in an effort to attach First Amendment protection to the sweepstakes result itself, and *Brown* in an effort to attach First Amendment protection to the video games used by the sweepstakes system to entertain customers before revealing the sweepstakes result.

We conclude that *Sorrell* does not apply here. First, *Sorrell* did not definitively determine that the prescriber-identifiable prescription data at issue in that case was actually protected speech, allowing only that there is "a strong argument that prescriber-identifying information is speech for First Amendment purposes." —— U.S. at ——, 131 S. Ct. at 2667. Rather, the decision of the Court turned on the fact that the law at issue "imposed content- and speaker-based restrictions on the availability and use of prescriber-identifying information." *Id.* at ——, 131 S. Ct. at 2667. Here there is no speaker-based restriction: anyone can conduct a sweepstakes and offer video games independently, and no one can combine the two. There is also no content-based restriction related to the sweepstakes result because the law applies regardless of the content of the announcement—the announcement could say "winner" or "you lose" or "good job" or "too bad" or simply show the amount of money won, and the law would still apply. More importantly, we are not convinced that the announcement is protected speech at all because the announcement is merely a necessary but incidental part of the overall noncommunicative activity of conducting the sweepstakes. That the conduct at issue relies upon words to announce the result does not automatically implicate the First Amendment. *See Ohralik*, 436 U.S. at 456, 98 S. Ct. at 1918.

We find the analysis of the Court of Appeals for the Seventh Circuit in *There to Care, Inc. v. Comm'r of Ind. Dep't of Revenue*, 19 F.3d 1165 (7th Cir. 1994), to be particularly apt here:

> Is bingo speech? People buy cards in the hope of winning back more than they spend. A voice at the front of the hall drones "B-2" and "G-49"; after a while someone at the back of the hall shouts "BINGO!" and gets a prize. These words do not convey ideas; any other combination of letters and numbers would serve the purpose equally well. They employ vocal cords but are no more "expression" than are such statements as "21" in a game of blackjack or "three peaches!" by someone who has just pulled the handle of a one-armed bandit.

Id. at 1167. Telling a sweepstakes participant that he or she has won or lost is no more protected speech than calling "Bingo!" or "21."

Similarly, *Brown* does not apply here. While *Brown* confirmed that First Amendment protection extends to video games, the Court struck down the state law at issue because it was a content-based restriction on violent video games. —– U.S. at —–, 131 S. Ct. at 2738. Here N.C.G.S. § 14-306.4 applies regardless of the content of the video game. In fact, plaintiffs emphasized that the video game is entirely unconnected to the sweepstakes result—this is by necessity because the predetermined nature of the sweepstakes results is a key part of plaintiff's avoidance of traditional gambling laws. Just as the sweepstakes operates irrespective of the video game outcome, the law operates irrespective of the content of the video game; the statute is concerned only with the attachment of an announcement of a sweepstakes result to the game, a juxtaposition that creates the functional equivalent of a gambling environment and thereby encourages the ills the General Assembly sought to remedy.

Plaintiffs argue that even if the statute ostensibly targets conduct, their speech (the result announcement or the video game) is still restricted in violation of the First Amendment. This argument also fails. Even if we were to conclude that section 14-306.4, while directed at conduct, burdens some speech, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell*, —– U.S. at —–, 131 S. Ct. at 2664. In such scenarios courts have traditionally applied the test from *United States v. O'Brien*. *See, e.g.*, *Hodgkins v. Peterson*, 355 F.3d 1048, 1057 (7th Cir. 2004) (applying *O'Brien* to general conduct regulation that incidentally burdens speech); *Jews for Jesus*,

Inc. v. Jewish Cmty. Relations Council of N.Y., Inc., 968 F.2d 286, 295 (2d Cir. 1992) (same).

Under *O'Brien* a regulation of conduct that incidentally burdens speech

> is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377, 88 S. Ct. at 1679. Courts have long held that the State's police power includes the power to address the health, safety, and welfare concerns presented by gambling operations, as well as activities that implicate the same concerns, even if they cleverly avoid the traditional definition of gambling. *See*, *e.g.*, *Felton*, 239 N.C. at 581, 80 S.E.2d at 630 (declaring that the State "may regulate or prohibit any practice or business the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it"). The State's interest in combatting the "encouragement of vice and dissipation" presented by these operations is an important or substantial interest. *See Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 341, 106 S. Ct. 2968, 2977 (1986) (stating that regarding prohibition of casino gambling, the legislature's "interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest"). The interest in combatting the social ills of gambling and gambling-like activities is unrelated to the suppression of free expression. As noted above, even the specific means of achieving that interest here are unrelated to the suppression of free expression because the statute targets the running of a particular type of sweepstakes operation and does not ban the video games employed except when they are used as a conduit for the sweepstakes. Finally, we conclude that the restriction imposed here is no greater than necessary because the statute burdens only sweepstakes conducted in a manner that encourages repeated, addictive, gambling-like play through the video display; the statute does not burden or ban any video games outside this context of sweepstakes operations.

The statute's compliance with this last prong of the *O'Brien* test effectively forecloses plaintiffs' overbreadth argument, which formed the basis of the Court of Appeals' decision. "[P]articularly where conduct and not merely speech is involved, we believe that the over-

breadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 2918 (1973). Here the statute's "plainly legitimate sweep," *id.*, includes plaintiffs' devices. We see no speech or conduct, other than that which is plainly the target of the legislation, that would be chilled or otherwise burdened by this statute. Perhaps tellingly, plaintiffs have provided no actual examples, in briefs or oral argument, of conduct or speech that was not intended to be covered by the statute yet still arguably falls within the statute's ambit. Though the language of the statute is admittedly broad, we decline to consider it substantially overbroad without any actual example of conduct or speech that is unintentionally regulated or burdened by the statute. *See Virginia v. Hicks*, 539 U.S. 113, 122, 123 S. Ct. 2191, 2198 (2003) ("The overbreadth claimant bears the burden of demonstrating, from the text of [the law] and *from actual fact*, that substantial overbreadth exists.") (brackets in original) (emphasis added) (citation and internal quotation marks omitted).[5]

Ironically, plaintiffs concede that the State could ban all sweepstakes (despite the fact that such a ban would still burden their alleged speech) but they argue that the State cannot selectively ban particular sweepstakes that implicate specific legislative concerns. This Court has rejected that argument:

> [T]here is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied—that the Legislature must be held rigidly to the choice of regulating all or none. . . . It is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs.

Adams v. N.C. Dep't of Natural & Econ. Res., 295 N.C. 683, 693, 249 S.E.2d 402, 408 (1978) (alterations in original) (quoting *Silver v. Silver*, 280 U.S. 117, 123-24, 50 S. Ct. 57, 59 (1929)); *see also Posadas*, 478 U.S. at 346-47, 106 S. Ct. at 2979-80 ("Legislative regulation of products or activities deemed harmful . . . has varied from outright prohibition . . . to legalization of the product or activity with restrictions . . . . To rule out the latter, intermediate kind of response would require more than we find in the First Amendment.") (footnote and

5. The trial judge at the preliminary injunction hearing offered a scenario in which the statute might apply to a hypothetical restaurant sweepstakes involving an entertaining display, but hypothetical overbreadth is not sufficient to strike down an otherwise constitutional law.

internal citations omitted). The General Assembly has chosen, through N.C.G.S. § 14-306.4, to address a specific type of sweepstakes operation that exploits a loophole in the state's gambling laws but presents the same social evils as gambling, while deciding that the majority of sweepstakes operations (which do not pose the same risks) are legitimate marketing tools. This policy decision is within the legislature's purview, and we decline to weigh in on that decision other than to conclude that it is constitutional because there is a rational basis for it.

Plaintiffs have attempted to "skillfully disguise[ ]" conduct with a façade of speech to gain First Amendment protection for their conduct. *Lipkin*, 169 N.C. at 329, 169 N.C. at 271, 84 S.E. at 343. We have "strip[ped] the transaction of all its thin and false apparel and consider[ed] it in its very nakedness," *id.*, and have found plaintiffs' arguments unavailing. We conclude that N.C.G.S. § 14-306.4 regulates conduct, with only incidental burdens on associated speech, and is therefore constitutional.

Therefore, the decision of the Court of Appeals is reversed. This case is remanded to the Court of Appeals for further remand to the Superior Court, Guilford County, for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

JOAN F. TRIVETTE AND TERRY TRIVETTE, HUSBAND AND WIFE v.
PETER EDWARD YOUNT

No. 32A12

(Filed 14 December 2012)

1. Workers' Compensation— exclusivity—co-employee exception—school principal and secretary

The trial court correctly denied defendant's N.C.G.S. § 1A-1, Rule 12(b)(1) motion to dismiss a negligence action against a school principal by a school secretary on the grounds that the exclusivity provision of the Workers' Compensation Act deprived the trial court of jurisdiction. Considered in light of the *Pleasant* exception to the Workers' Compensation Act (injury by a co-

employee), and the statutes applicable to school personnel, both plaintiff and defendant were co-employees of the Board of Education.

2. Negligence— accidental discharge of fire extinguisher— willful, wanton, and reckless negligence—summary judgment

The trial court erred by denying summary judgment for defendant in a negligence action by a school secretary against a principal arising from the accidental discharge of a fire extinguisher. Although defendant was placed on notice that plaintiff was worried for her health, fearing that her myasthenia gravis might recur if anything happened with the extinguisher, plaintiff had to meet the high standard of willful, wanton, and reckless negligence under the *Pleasant* exception to the workers' compensation exclusivity rule. The evidence, taken in the light most favorable to plaintiff, did not support an inference that defendant was willfully, wantonly, and recklessly negligent, or that he was manifestly indifferent to the consequences of an accidental discharge.

Justice TIMMONS-GOODSON concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. —— , 720 S.E.2d 732 (2011), affirming an order denying defendant's motions to dismiss and for summary judgment entered on 16 November 2010 by Judge Richard D. Boner in Superior Court, Catawba County. On 8 March 2012, the Supreme Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court on 4 September 2012.

Law Offices of Amos & Kapral, LLP, by Stephen M. Kapral, Jr. and T. Dean Amos, for plaintiff-appellees.

Doughton & Rich PLLC, by Thomas J. Doughton and Amy L. Rich, for defendant-appellant.

EDMUNDS, Justice.

In this case, we consider the nature of the working relationship between Peter Edward Yount (defendant), the principal of William Lenoir Middle School, and Joan F. Trivette (plaintiff), who was a part-time secretary and office assistant at the school. Plaintiff claimed that she was injured on the job as a result of defendant's negligence.

Although we find that plaintiff and defendant were co-employees, allowing plaintiff to sue defendant personally under the exception to the Workers' Compensation Act's exclusivity provision established in *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985), we nevertheless conclude that plaintiff has failed to present sufficient evidence to survive defendant's motion for summary judgment. Accordingly, we affirm the decision of the Court of Appeals affirming the trial court's denial of defendant's motion to dismiss, but reverse the decision of the Court of Appeals affirming the trial court's denial of defendant's motion for summary judgment.

On 24 October 2008, plaintiff was sprayed "about her head and upper body" when a fire extinguisher defendant was handling abruptly discharged. Following the incident, plaintiff filed a complaint against defendant, alleging gross negligence and loss of consortium on the part of plaintiff's husband, who is also a plaintiff in this case.[1] In her complaint, plaintiff alleged that defendant "willfully and wantonly engag[ed] in reckless behavior" when he was "joking and horse playing around with the fire extinguisher," causing it to spray her. Plaintiff further alleged that the spraying aggravated a preexisting medical condition that had been in remission.

Defendant denied plaintiff's claim. On 8 October 2010, defendant filed a motion to dismiss under Rule of Civil Procedure 12(b)(1) in which he contended that the trial court lacked subject matter jurisdiction because the North Carolina Workers' Compensation Act ("the Act") provides the exclusive remedy for plaintiff's claim. In this motion, defendant also sought summary judgment, arguing that "the conduct alleged by the [p]laintiffs does not rise to the level of willful, wanton and reckless." The trial court denied both motions on 15 November 2010, and defendant appealed to the Court of Appeals.

In a divided opinion, the Court of Appeals majority first determined that defendant's interlocutory appeal affects a substantial right, allowing the court to consider defendant's arguments. *Trivette v. Yount*, ___ N.C. App. ___, ___, 720 S.E.2d 732, 734-35 (2011). The majority then turned to the merits of defendant's motions and noted that, in most instances, the Act, N.C.G.S. §§ 97.1 to -101.1 (2011), is the exclusive remedy for an employee injured on the job. *See* N.C.G.S. §§ 97-9, -10.1 (together, "the exclusivity provision"). As a result of the

1. Plaintiff also filed a claim with the North Carolina Industrial Commission, seeking a remedy under the Workers' Compensation Act; that claim is still pending and is not before this Court

exclusivity provision, " '[a]n employee cannot elect to pursue an alternate avenue of recovery, but is required to proceed under the Act with respect to compensable injuries.' " *Trivette*, ___ N.C. App. at ___, 720 S.E.2d at 736 (quoting *McAllister v. Cone Mills Corp.*, 88 N.C. App. 577, 580, 364 S.E.2d 186, 188 (1988)).

The majority in *Trivette* correctly noted that this Court has recognized two exceptions to the exclusivity provision of the Act. *Id.* at ——, 720 S.E.2d at 736. The first exception arises when a co-employee acts in a willful, wanton, and reckless manner, allowing an injured plaintiff to seek recovery from the co-employee in a common law action. Pleasant, 312 N.C. at 716-17, 325 S.E.2d at 249-50. Under the second exception, if an employer "intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death" and that conduct causes injury or death, a plaintiff can pursue a civil action against his or her employer. *Woodson v. Rowland*, 329 N.C. 330, 340, 407 S.E.2d 222, 228 (1991). Because plaintiff did not allege a *Woodson* claim, the Court of Appeals considered only the applicability of the *Pleasant* exception to the facts at bar. *See Trivette*, —— N.C. App. at ——, 720 S.E.2d at 736. This inquiry required the Court of Appeals to determine whether defendant was plaintiff's co-employee, in which case Pleasant could apply, or plaintiff's employer, in which case the exclusivity provision of the Act would foreclose plaintiff's suit. *Id.* at ——, 720 S.E.2d at 736.

The majority observed that, although a school principal is statutorily classified as the " 'executive head of the school,' " N.C.G.S. § 115C-5(7) (2011), "executive" and "employer" are not synonymous terms. *Trivette*, —— N.C. App. at ——, 720 S.E.2d at 736. After reviewing several statutes relating to school administration and school administrators, the majority determined that a principal acts as the supervisor of the school, with duties that include overseeing office assistants such as plaintiff. Id. at ——, 720 S.E.2d at 736. The majority also noted that both defendant and plaintiff were paid by the local school board and were considered employees of the school board. *Id.* at ——, 720 S.E.2d at 736-37.

These factors led the majority to conclude that defendant "is more properly classified as [plaintiff's] 'immediate supervisor' " than as her employer, and thus defendant is plaintiff's co-employee for purposes of the Act. *Id.* at ——, 720 S.E.2d at 737. Concluding that the Pleasant exception applies, allowing plaintiff to pursue her negligence claim against defendant, the majority affirmed the trial court's denial of defendant's motion to dismiss. *Id.* at ——, 720 S.E.2d at 737.

The dissent disagreed with the majority's characterization of defendant as a "co-employee" and argued that the classification of a school principal should be similar to that of a superintendent because both are public officers who are agents of the school board. *Id.* at —, 720 S.E.2d at 738-39 (Elmore, J., dissenting). The dissent would have held that, as an agent, the principal is an " 'alter-ego' of the school board" and thus should be considered plaintiff's employer. Id. at —, 720 S.E.2d at 739. As plaintiff's employer, defendant would fall within the exclusivity provision of the Act. *Id.* at —, 720 S.E.2d at 739.

Defendant appealed on the basis of the dissent, and we allowed his petition for discretionary review of additional issues. For the reasons that follow, we affirm in part and reverse in part.

[1] Because this appeal is from the trial court's denial both of defendant's motion to dismiss under Rule 12(b)(1) and of defendant's motion for summary judgment, we review de novo. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012); *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007). We begin by considering defendant's argument that, as an agent of the local school board, he was plaintiff's employer. The parties agreed at oral argument that defendant was an agent of the board. *See also Abell v. Nash Cnty. Bd. of Educ.*, 71 N.C. App. 48, 53, 321 S.E.2d 502, 506 (1984) ("By statute and under traditional common-law principles, then, the superintendent and principal are agents of the board."), *disc. rev. denied*, 313 N.C. 506, 329 S.E.2d 389 (1985). However, defendant's status as an agent of the local school board is not dispositive of the question whether he was plaintiff's employer or plaintiff's co-worker for purposes of determining whether plaintiff may bring a *Pleasant* claim.

In the past, this Court has held that an agent of the employer fell within the Act's exclusivity provision. For instance, in *McNair v. Ward*, the plaintiff employee brought suit against his employer, the Locker Company, and Lorenz, the company's general manager. 240 N.C. 330, 330-331, 82 S.E.2d 85, 85-86 (1954). We noted that the Locker Company ran its business "through the agency of" the individual defendant Lorenz and found that, because Lorenz was "conducting [the Locker Company's] business," the Act's exclusivity provision prevented a suit against Lorenz. *Id.* at 331, 82 S.E.2d at 85-86. Similarly, in *Essick v. City of Lexington*, plaintiff's intestate was killed while working as an employee of defendant Dixie Furniture

Company. 232 N.C. 200, 200-01, 60 S.E.2d 106, 107 (1950). The plaintiff administratrix sued the City of Lexington and the Lexington Utility Commission, which successfully moved to have Dixie Furniture Company and Dixie employees Link and Taylor added as defendants. *Id.* at 205, 60 S.E.2d at 110. We found that Link, who was Dixie's treasurer, and Taylor, who was Dixie's plant superintendent, fell within the Act's exclusivity provision because they were conducting Dixie's business and, as a result, were entitled to immunity under the Act. *Id.* at 209-11, 60 S.E.2d at 113-14.

However, after these cases were decided, this Court created the *Pleasant* exception to the exclusivity provision. *See Pleasant*, 312 N.C. at 716-17, 325 S.E.2d at 249-50. In *Pleasant*, this Court, after observing that an injured worker may sue a co-employee for intentional injuries, concluded that "injury to another resulting from willful, wanton and reckless negligence should also be treated as an intentional injury for purposes of our Workers' Compensation Act." *Id.* at 715, 325 S.E.2d at 248. The analysis in Pleasant does not turn on a defendant's employment status as an agent vel non, nor could it, because allowing the Act's exclusivity provision to apply to agents but not to other co-employees would thwart Pleasant's purpose of placing the blame for willful, wanton, and reckless negligence on the tortfeasor, "where it belongs." *Id.* at 717, 325 S.E.2d at 249. Accordingly, the applicability of the *Pleasant* exception is not dependent on whether an individual defendant is an agent of the defendant employer, and we conclude that defendant's position as an agent of the local school board does not determine whether plaintiff's *Pleasant* claim can proceed.

We note that the dissenting judge argued that, because defendant was an agent of the school board, he "may also be classified as an 'alter-ego' of the school board" and, as a consequence of this relationship, defendant was plaintiff's employer. *Trivette*, ___ N.C. App. at ___, 720 S.E.2d at 739. In his brief to this Court, defendant echoes this contention. However, despite the dissenting judge's interpretation of terms cited in *State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.*, 326 N.C. 522, 523, 391 S.E.2d 487, 488 (1990), *see Trivette*, ___ N.C. App. at ___, 720 S.E.2d at 739, agency and alter ego are distinct legal concepts. A principal-agent relationship is based upon delegation of authority from the principal to the agent so that the agent is said to be representing the principal, *see*, *e.g.*, *State v. Weaver*, 359 N.C. 246, 258, 607 S.E.2d 599, 606 (2005), while alter egos are seen in the law as being the same entity, *see*, *e.g.*, *Henderson v. Sec. Mortg. & Fin. Co.*, 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968). We reject the

theory that defendant is an alter ego of the school board, not only because of the possibility that an alter ego school principal could expose the school board to unexpected liability, but also because such an interpretation considers neither the statutorily dictated hierarchical relationship between local school boards and principals, nor the role of the local superintendent, who interacts with both the principal and the local board on a day to-day basis. *See, e.g.*, N.C.G.S. §§ 115C-47 (duties of local boards of education), -276 (duties of local school superintendents), -288 (duties of school principals) (2011).

Having determined that defendant's agency relationship with the school board is immaterial to the issue at hand, we now consider whether defendant was plaintiff's co-employee. The record pertaining to the nature of the working relationship between plaintiff and defendant is meager. Plaintiff's deposition indicates that her duties consisted of answering telephones and performing secretarial work, while defendant's deposition states that plaintiff worked in a cubicle in the front reception area about twenty feet from defendant's office. Defendant characterized plaintiff as an assistant rather than a secretary. Although defendant mentions in his deposition that plaintiff "was a volunteer previous to me hiring her," the record before us is otherwise silent as to how she became an employee and we find no authority in the statutes allowing a principal to hire or fire those who work at his or her school.

Instead, N.C.G.S. § 115C-276(j) provides that "[i]t shall be the duty of the superintendent to recommend and the board of education to elect all principals, teachers, and other school personnel in the administrative unit." This expansive language indicates that "[e]very person employed in North Carolina's public schools—other than charter schools—is an employee of a local board of education." Robert P. Joyce, *The Law of Employment in North Carolina's Public Schools* 3 (2000) (footnotes omitted). Viewing the record in light of the statutes applicable to school personnel, we do not believe that plaintiff was employed by, or an employee of, defendant. Accordingly, when the alleged incident occurred, both plaintiff and defendant were employees of the Caldwell County Board of Education.

As noted above, defendant had supervisory authority over plaintiff. Defendant's ability to direct plaintiff's work and call upon her assistance is consistent with his role as "executive head" of the school. N.C.G.S. § 115C-5(7). The Court of Appeals has long

accepted, and we agree, that for purposes of the Act, supervisors and those they supervise are treated as co-employees. S*ee*, *e.g.*, *Bruno v. Concept Fabrics*, *Inc.*, 140 N.C. App. 81, 87, 535 S.E.2d 408, 412 (2000) (observing that the individual defendant was "a supervisory employee over [the] plaintiff" and was the plaintiff's "co-employee"); *Echols v. Zarn*, *Inc.*, 116 N.C. App. 364, 375, 448 S.E.2d 289, 295 (1994) (finding that the individual defendant, a "supervisory employee," was the plaintiff's co-employee for purposes of the Act), aff'd per curiam, 342 N.C. 184, 463 S.E.2d 228 (1995), and abrogated on other grounds by *Mickles v. Duke Power Co.*, 342 N.C. 103, 110, 463 S.E.2d 206, 211 (1995); *Dunleavy v. Yates Constr. Co.*, 106 N.C. App. 146, 154, 416 S.E.2d 193, 198 (stating that a defendant "was merely a foreman and as such was [the decedent's] co-employee"), *disc. rev. denied*, 332 N.C. 343, 421 S.E.2d 146 (1992); *see also Abernathy v. Consol. Freightways Corp. of Del.*, 321 N.C. 236, 237, 362 S.E.2d 559, 560 (1987) (the plaintiff's supervisor assumed to be his co-employee). Consequently, we find that plaintiff and defendant were co-employees, that the trial court correctly denied defendant's Rule 12(b)(1) motion to dismiss on the grounds that the exclusivity provision of the Act deprived the trial court of jurisdiction, and that the Court of Appeals majority correctly affirmed the trial court on that issue.

[2] We now turn to defendant's motion for summary judgment. Defendant argues that, as a matter of law, plaintiff has failed to forecast evidence sufficient to establish a *Pleasant* claim. The *Pleasant* exception requires that a plaintiff establish that he or she suffered an injury as a result of the defendant's "willful, wanton and reckless negligence." *Pleasant*, 312 N.C. at 717, 325 S.E.2d at 249. Cases from this Court and the Court of Appeals indicate that the burden of proof is heavy on a plaintiff who seeks to recover under *Pleasant*. For instance, in *Pendergrass v. Card Care*, *Inc.*, the plaintiff, a Texfi Industries employee, was injured on the job when his arm was caught in a final inspection machine. 333 N.C. 233, 236, 424 S.E.2d 391, 393 (1993). Citing *Pleasant*, the plaintiff alleged that two other Texfi employees, the defendants Gibson and Lake, directed him to work at the machine, knowing the machine did not have the OSHA-required safety guards. Id. at 238, 424 S.E.2d at 394. The trial court allowed these defendants' motions to dismiss. *Id*. at 236, 424 S.E.2d at 393. This Court affirmed, finding that even if these defendants knew of the danger, no inference could be drawn that "they intended that [the plaintiff] be injured or that they were manifestly indifferent to the consequences" of the plaintiff's operation of a dangerous machine. *Id*. at 238, 424 S.E.2d at 394.

In *Echols v. Zarn, Inc.*, the plaintiff hurt her hand in a molding machine. 116 N.C. App. at 366, 448 S.E.2d at 290. The machine had a safety gate but the plaintiff alleged that the individual defendant, who was the plaintiff's supervisor, told her to reach under the safety gate to remove the parts produced by the machine, then demonstrated what she meant. *Id.* at 368-69, 448 S.E.2d at 291-92. Following the supervisor's demonstration, the plaintiff reached under the gate and the machine "caught," smashing her hand. *Id.* at 368, 448 S.E.2d at 291. Among other claims, the plaintiff alleged a *Pleasant* claim against the supervisor but the trial court allowed the individual defendant's motion for summary judgment. *Id.* at 366, 448 S.E.2d at 290. The Court of Appeals noted that "[e]ven if we assume that [the defendant supervisor] knew that reaching under the safety gate could be dangerous, we do not believe this supports an inference that [this defendant] intended that [the] plaintiff be injured or that [this defendant] was manifestly indifferent to the consequences of [the] plaintiff reaching under the safety gate." *Id.* at 376, 448 S.E.2d at 296. The Court of Appeals affirmed the grant of summary judgment, *id.* at 377, 448 S.E.2d at 296, and we later affirmed the Court of Appeals decision in a per curiam opinion. 342 N.C. at 185, 463 S.E.2d at 229.

In *Dunleavy v. Yates Construction Company*, the plaintiffs' decedent was killed when a portion of a trench collapsed and struck his head. 106 N.C. App. at 150, 416 S.E.2d at 195. One of the defendants, who was both a foreman and the decedent's co-employee, had left the area where the trench was being dug and a backhoe had excavated deeper than the defendant foreman anticipated. *Id.* at 155, 416 S.E.2d at 198-99. The decedent had not been issued a hard hat or other protective equipment. *Id.* at 150, 416 S.E.2d at 195. The trial court granted summary judgment for the defendant foreman on the plaintiffs' Pleasant claim and the Court of Appeals affirmed, finding that the defendant foreman's conduct, "although arguably negligent, was not willful, wanton, and reckless . . . [and] did not manifest reckless disregard for the rights and safety of the pipe crew, nor did it amount to the intentional failure to carry out a duty of care owed to the crew." *Id.* at 156, 416 S.E.2d at 199.

We turn now to the case at bar, in which the trial court denied defendant's motion for summary judgment. 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)

(2011). The trial court considers the evidence in the light most favorable to the nonmoving party. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004) (citation omitted).

In her complaint, plaintiff alleges that defendant's actions aggravated a preexisting medical condition. Other than the complaint, plaintiff's evidence before us consists of her deposition. According to this deposition, a student had pulled the safety pin on the fire extinguisher and sprayed it in a classroom. The extinguisher was brought into the area where plaintiff had her desk and defendant had his office. The next day, defendant picked up the extinguisher and put it on the corner of plaintiff's desk. Plaintiff asked defendant to remove it and told him several times to replace the safety pin, which plaintiff was "pretty sure" was still attached to the extinguisher. According to plaintiff, defendant scoffed, claimed the extinguisher would not go off, and continued to play with the extinguisher while joking with another secretary. Defendant had his hand on the extinguisher when it discharged. A fine powdery mist came out of the nozzle, which was initially aimed down, but moved up to point at plaintiff. The powder landed on plaintiff's "whole right side, front, part of [her] back." After the extinguisher discharged, defendant told plaintiff not to worry about it but plaintiff responded that she could not afford to get sick. Plaintiff also testified that defendant knew she had myasthenia gravis that was in remission. She stated: "We used to talk about it at work. And I explained to them—this was another reason I was upset with [defendant] with the fire extinguisher, because I told him, 'If you do anything to knock me out of remission,' that's what I was afraid of."

Interpreting this testimony in the light most favorable to plaintiff, we see that defendant was placed on notice that plaintiff was worried for her health, fearing that if anything happened with the extinguisher, her myasthenia gravis might recur. However, as the cases cited above indicate, even unquestionably negligent behavior rarely meets the high standard of "willful, wanton and reckless" negligence established in *Pleasant*. While the danger of immediate injury is obvious when a worker deliberately shows a co-worker how to evade the safety guards on heavy machinery, as in *Echols*, or allows a co-worker to excavate without safety gear, as in *Dunleavy*, the risk that the discharge of a fire extinguisher might cause a relapse of a neuromuscular disease is less apparent. Despite the assertion in the dissent that defendant created a hazardous environment and the fire extinguisher was "unsafe equipment," no evidence indicates that the extinguisher or its effluvium presented any danger, either immediate or

latent, and the record is silent as to whether the extinguisher bore any warning labels. Even if we assume that defendant knew that an unexpected discharge would be messy and unpleasant, we do not believe the evidence before us, taken in the light most favorable to plaintiff, supports an inference that defendant was willfully, wantonly, and recklessly negligent, or that he was manifestly indifferent to the consequences of an accidental outburst.

Accordingly, the trial court erred when it denied defendant's motion for summary judgment on plaintiff's *Pleasant* claim. In addition, because the loss of consortium claim of Terry Trivette is derivative of plaintiff's negligence claim, *see Nicholson v. Hugh Chatham Mem. Hosp., Inc.*, 300 N.C. 295, 304, 266 S.E.2d 818, 823 (1980), the trial court erred in denying defendant's motion for summary judgment as to this count. Therefore, the Court of Appeals erred when it affirmed the trial court's denial of defendant's summary judgment motion.

While plaintiff has stated a claim cognizable under *Pleasant*, she has failed to forecast evidence sufficient to withstand defendant's motion for summary judgment. Accordingly, we affirm the portion of the opinion of the Court of Appeals that affirmed the trial court's denial of defendant's motion to dismiss and we reverse the portion of the opinion of the Court of Appeals that affirmed the trial court's denial of defendant's motion for summary judgment. This case is remanded to the Court of Appeals for further remand to the Superior Court, Catawba County, for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Justice TIMMONS-GOODSON concurring in part and dissenting in part.

I agree with the majority that plaintiff has stated a cognizable claim under *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985), however, I write separately because the majority has taken away from the jury the determination of whether defendant was willfully, wantonly, or recklessly negligent.

This Court has long held that intent and negligence are questions of fact to be determined by the jury. *See, e.g., Journey v. Sharpe*, 49 N.C. (4 Jones) 165, 167 (1856) (stating that "intent is a matter of fact to be submitted to the jury"); *see also Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983) ("Negligence claims are rarely susceptible of summary adjudication, and should ordinarily be

resolved by trial of the issues." (citing *Vassey v. Burch*, 301 N.C. 68, 73, 269 S.E.2d 137, 140 (1980))). "We have emphasized that summary judgment is a drastic measure, and it should be used with caution. This is especially true in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case." *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979) (citations omitted); *see also Rouse v. Pitt Cnty. Mem'l Hosp., Inc.*, 343 N.C. 186, 191, 470 S.E.2d 44, 47 (1996) ("Summary judgment is a drastic measure, and is rarely appropriate in negligence cases." (citation and internal quotation marks omitted)). Furthermore, "summary judgment is inappropriate where reasonable minds might easily differ as to the import of the evidence." *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 223-24, 513 S.E.2d 320, 327 (1999) (citing *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972)).

We cannot say as a matter of law that defendant's conduct did not rise to the level of negligence required under *Pleasant*. The majority here relies on cases in which supervisors ordered employees to perform work-related tasks with unsafe equipment or under unsafe conditions. *See Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993); *Echols v. Zarn, Inc.*, 116 N.C. App. 364, 448 S.E.2d 289 (1994) aff'd per curiam, 342 N.C. 184, 463 S.E.2d 228 (1995); *Dunleavy v Yates Constr. Co.*, 106 N.C. App. 146, 416 S.E.2d 193 (1992) *disc. rev. denied*, 332 N.C. 343, 421 S.E.2d 146. Those cases involved hazardous work, such as operating industrial machinery or excavating trenches, and the plaintiffs in those cases failed to show that the defendants intended to scare or injure the employees or that they were indifferent to workplace hazards. Here, in contrast, defendant created a hazard in the otherwise safe environment of a middle school office by "joking and horse playing around" with a fully charged fire extinguisher without its safety pin. Presumably, horseplay with such unsafe equipment was entirely unrelated to defendant's work as the principal of a middle school.

In *Pleasant*, this Court determined that a reasonable jury could find that the defendant was willfully, wantonly, and recklessly negligent when the defendant was "horse playing" and "intended to scare" his co-employee. *Pleasant*, 312 N.C. 710, 711 325 S.E.2d 244, 246. This is exactly the situation we have before us now. Here, taking the evidence in the light most favorable to plaintiff, the principal of a middle school was "joking and horse playing around" with a fire extinguisher. He knew the fire extinguisher was fully charged, and he

knew the safety pin had been removed. A scared woman with a known lung condition begged him to "put the pin in the fire extinguisher and get it away from me." Defendant dismissed her warnings, declared "you're being such a baby," and continued taunting her until he triggered the fully charged fire extinguisher and sprayed her with a powdered chemical mixture.

Plaintiff has alleged and forecast, sufficiently to survive summary judgment, that, as in *Pleasant*, defendant was "horse playing" and "intended to scare" plaintiff. Was defendant willfully, wantonly, and recklessly negligent? That is a question about which reasonable minds might differ. It is a question for the jury. Therefore, it not appropriate to dispense with this question on summary judgment. I respectfully dissent.

HIGH ROCK LAKE PARTNERS, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, AND JOHN DOLVEN, PETITIONERS v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RESPONDENT

No. 262PA10-2

(Filed 14 December 2012)

Highways and Streets— driveway connection—conditions—railroad crossing improvement

The Department of Transportation (DOT) acted in excess of its statutory authority when it conditioned plaintiff High Rock's driveway permit on widening a railroad crossing one-quarter of a mile away from the driveway connection and on High Rock's obtaining consent from two railroad companies. The Driveway Permit Statute (N.C.G.S. § 136-18(29)) specifically and unambiguously provides an exclusive list of how DOT may regulate driveway connections, as well as an exclusive list of improvements it may require of an applicant. The statute is specific, clear, and unambiguous; statutory construction is not permitted. DOT's constitutional arguments were not addressed because the case was decided on statutory grounds.

On discretionary review pursuant to N.C.G.S. § 7A 31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 720 S.E.2d 706 (2011), affirming an order entered on 8 May 2008 by Judge Jesse

B. Caldwell, III and a judgment entered on 24 November 2010 by Judge F. Lane Williamson, both in Superior Court, Mecklenburg County. Heard in the Supreme Court on 4 September 2012.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus, for petitioner-appellants.

Roy Cooper, Attorney General, by James M. Stanley, Jr. and Scott K. Beaver, Assistant Attorneys General, for respondent-appellee.

NEWBY, Justice.

In this case we consider whether the North Carolina Department of Transportation (DOT) acted within its powers when it conditioned driveway access to a public road on the owner's (1) making improvements to a railroad crossing one-quarter of a mile away from the proposed driveway connection and (2) obtaining the owning and operating railroads' consent to the improvements. Section 136-18(29) of our General Statutes, the Driveway Permit Statute, lists the actions that DOT may demand in exchange for access to the public highway system. Since the conditions imposed by DOT in this case are not authorized by that statute, we hold that DOT exceeded its authority when it issued the conditional permit. Accordingly, we reverse the decision of the Court of Appeals.

In August 2005 the predecessor entity to High Rock Lake Partners, LLC (High Rock) purchased 188 acres in Davidson County with the intention of developing a lakefront subdivision. The property, which forms a peninsula, is partially surrounded by High Rock Lake. After finding the property was suitable for development, the Davidson County Board of Commissioners granted preliminary plat approval for sixty, single-family lots.

The property is accessed via State Road 1135 (SR 1135). SR 1135 crosses two sets of railroad tracks and travels another one-quarter of a mile before it dead-ends into High Rock's property. The crossing is fourteen feet wide and is protected by gates and flashing red lights. The crossing is "at-grade," meaning vehicles must drive on the tracks rather than crossing via a "grade separation," where cars travel under the tracks through a tunnel or over the crossing on a bridge. The North Carolina Railroad Company owns an easement over SR 1135 on which the crossing is located, and the Norfolk Southern Railway Company operates and manages the crossing and related rail lines and a switching yard near High Rock's property.

High Rock sought a driveway permit from DOT to connect its proposed subdivision's system of roads to SR 1135. The railroad companies opposed the permit, claiming that the rail traffic at the crossing, located approximately one-quarter of a mile away from the proposed driveway connection, might pose a safety hazard to future residents. As a result, DOT District Engineer Chris Corriher denied the permit.

High Rock appealed to DOT Division Engineer S.P. Ivey. He granted the permit request, subject to the following conditions:

> Widen the SR1135 railroad crossing of the North Carolina Railroad Company (NCRR) corridor from its existing width of approximately 14 feet to 24 feet to allow for safe passage of two-way traffic traversing the railroad. Said widening shall include additional right-of-way acquisition, relocation and acquisition of the flashers and gates and paving of the crossing and approaches to accommodate enhanced safety devices at the crossing.
>
> Obtain all required licenses and approvals from the owning railroad, NCRR, to widen the crossing and approaches on their right of way.
>
> Obtain all necessary agreements and approvals from the operating railroad, Norfolk Southern Railway Company (NSR), necessary to revise and acquire the automatic flashers, gates and enhanced devices that will enable the crossing to remain at the current "Sealed Corridor" level of safety consistent with the USDOT designation of the corridor for development of high-speed intercity passenger rail service. This may include, but not be limited to, the installation of a median separator or gate configuration per NCDOT and NSR specifications.
>
> Widen SR1135 from the railroad crossing to the new subdivision entrance to safely accommodate two-way vehicular traffic.
>
> All expenses and costs associated with the subject improvements shall be borne by the applicant.

High Rock first attempted to satisfy the permit conditions; however, High Rock was unsuccessful in obtaining the railroad companies' approval. Both companies refused to consent to any proposal to widen or improve the existing crossing that retained an at-grade crossing.

High Rock then sought relief from the Driveway Permit Appeals Committee, where High Rock argued that DOT lacked the statutory

authority to condition its driveway permit on the completion of improvements to the railroad crossing one-quarter of a mile away from the entrance to the proposed subdivision. High Rock informed the Committee that the railroad companies refused to consent to a plan that included an at-grade crossing and that High Rock otherwise lacked the means to meet the railroads' demand that High Rock build a grade separation (a bridge). According to High Rock, such an undertaking would cost in excess of three million dollars. Nevertheless, on 12 June 2006, the Committee denied High Rock's appeal and upheld the conditions set forth in the permit.

On 17 September 2007, High Rock filed a Petition for Judicial Review in Superior Court, Mecklenburg County, arguing that DOT lacked the authority to issue a driveway permit subject to these conditions. The trial court ruled in favor of DOT and found that the agency acted within the scope of its powers. On appeal, the Court of Appeals agreed and held that no statute specifically addresses DOT's authority to mandate improvements away from a proposed driveway connection. *High Rock Lake Partners, LLC v. N.C. DOT*, —— N.C. App. ——, ——, 720 S.E.2d 706, 711-13 (2011). Without a specific statute to rely on, the Court of Appeals looked to DOT's general statutory power to exercise control over roads and highways and its broad authority to make rules ensuring safe travel. *Id.* at ——, 720 S.E.2d at 712. Applying these general grants of power, the Court of Appeals concluded that DOT possessed the power it claims in this case. *Id.* at ——, 720 S.E.2d at 712. High Rock then petitioned this Court for discretionary review, which we allowed.

We must now determine whether DOT has the authority to condition a driveway permit on the applicant's completing off-site improvements and obtaining the consent of a third party. High Rock contends that the Driveway Permit Statute controls the outcome of this case. According to High Rock, the plain language of that statute does not grant DOT the power to condition a driveway permit on an applicant's improving an off-site railroad crossing or obtaining another property owner's consent. Conversely, DOT argues that it acted within the scope of its general authority and in accordance with its own policies. Therefore, to resolve this issue we must ascertain the extent of DOT's power to regulate driveway connections.

As a state administrative agency, DOT "is an inanimate, artificial creature of statute. Its form, shape, and authority are defined by the Act by which it was created. It is as powerless to exceed its authority as is a robot to act beyond the limitations imposed by its own mech-

anism." *Schloss v. State Highway & Pub. Works Comm'n*, 230 N.C. 489, 492, 53 S.E.2d 517, 519 (1949)). The DOT "possesses only those powers expressly granted to it by our legislature or those which exist by necessary implication in a statutory grant of authority." *Lee v. Gore*, 365 N.C. 227, 230, 717 S.E.2d 356, 359 (2011).

"[T]he 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 Broad & Gales Creek Cmty. Ass'n*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980) (citing *Garvey v. Freeman*, 397 F.2d 600 (10th Cir. 1968)); *see also Wells v. Consol. Jud'l Ret. Sys. of N.C.*, 354 N.C. 313, 319, 553 S.E.2d 877, 881 (2001) ("[I]t is ultimately the duty of courts to construe administrative statutes; courts cannot defer that responsibility to the agency charged with administering those statutes."). In making this determination we apply the enabling legislation practically so that the agency's powers include all those the General Assembly intended the agency to exercise. *In re Broad & Gales*, 300 N.C. at 280, 266 S.E.2d at 655. We give great weight to an agency's interpretation of a statute it is charged with administering, *e.g.*, *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999); *Wells*, 354 N.C. at 319-20, 553 S.E.2d at 881; however, "an agency's interpretation is not binding," *Lee*, 365 N.C. at 229-30, 717 S.E.2d at 358 (citations omitted). And, "[u]nder no circumstances will the courts follow an administrative interpretation in direct conflict with the clear intent and purpose of the act under consideration." *Watson Indus., Inc. v. Shaw*, 235 N.C. 203, 211, 69 S.E.2d 505, 511 (1952) (citations omitted).

Generally speaking, DOT is an administrative agency created by the legislature to manage the public highway system. *See* N.C.G.S. § 136-51 (2011). The DOT is charged with providing "for the necessary planning, construction, maintenance, and operation of an integrated statewide transportation system for the economical and safe transportation of people and goods as provided for by law." *Id.* § 143B-346 (2011). The DOT is not, however, omnipotent; our General Assembly has extensively defined and limited DOT's authority through the enactment of numerous other statutes. *See*, *e.g.*, *id.* § 136-18 (2011). Thus, DOT possesses only those enumerated powers along with any implied powers necessary to fulfill the agency's purpose. *See Lee*, 365 N.C. at 230, 717 S.E.2d at 359.

The General Assembly has spoken specifically regarding DOT's power to regulate driveway connections to private property. In 1987 the legislature enacted the Driveway Permit Statute. Act of June 8,

1987, ch. 311, 1987 N.C. Sess. Laws 401 ("An Act to Provide for Driveway Permit Process"). That statute, now codified at N.C.G.S. § 136-18(29), states:

> The Department of Transportation may establish policies and adopt rules about the size, location, direction of traffic flow, and the construction of driveway connections into any street or highway which is a part of the State Highway System. The Department of Transportation may require the construction and public dedication of acceleration and deceleration lanes, and traffic storage lanes and medians by others for the driveway connections into any United States route, or North Carolina route, and on any secondary road route with an average daily traffic volume of 4,000 vehicles per day or more.

This statute authorizes DOT to require applicants to construct and dedicate to the public use certain improvements in exchange for driveway access to, *inter alia*, secondary roads that average at least 4,000 cars per day. Those improvements are acceleration and deceleration lanes, traffic storage lanes, and medians. The statute additionally empowers DOT to establish policies and adopt rules that regulate the size, location, direction of traffic flow, and construction of connections of a private driveway to a public road. The terms of the statute authorize no further DOT regulation of driveway connections and do not permit the denial of reasonable access to the public highway system.

The Driveway Permit Statute balances the public interest in a safe highway system with an owner's right of access. "[T]he owner of land abutting a highway has a right beyond that which is enjoyed by the general public, a special right of easement in the highway for access purposes." *Snow v. N.C. State Highway Comm'n*, 262 N.C. 169, 173, 136 S.E.2d 678, 682 (1964). The right of access has long been recognized as one of the most important property rights. *See White v. Nw. N.C. R.R. Co.*, 113 N.C. 444, 446, 113 N.C. 611, 613, 18 S.E. 330, 330-31 (1893). Like most rights, though, it is subject to reasonable regulation to protect the public safety and welfare. Further, "[i]t is understood that absolute equality of convenience cannot be achieved, and those who take up their residence or purchase and occupy property in proximity to public roads or streets do so with notice that they may be changed as demanded by the public interest." *Sanders v. Town of Smithfield*, 221 N.C. 166, 170-71, 19 S.E.2d 630, 633 (1942). To ensure that entry onto and exit from our highway system are conducted in a safe manner, DOT is authorized to regulate

the size, location, direction of traffic flow, and construction of all driveway connections. The DOT can also mandate certain enumerated improvements on roads with higher traffic levels. To be clear, DOT has the authority under this statute to regulate the right of access, not completely eliminate it.

The conditions imposed by DOT in this case are not permitted under the Driveway Permit Statute. The statute authorizes no requirement to make improvements away from the applicant's property. It similarly fails to empower DOT to require an applicant to obtain another property owner's approval, giving that property owner veto power over the applicant's project as happened here. Consequently, we hold that DOT acted in excess of its statutory authority when it conditioned High Rock's driveway permit on widening a railroad crossing one-quarter of a mile away from the driveway connection and on High Rock's obtaining consent from two railroad companies.

To conclude otherwise would harm other common law property rights that this Court has a duty to protect. *See Morris Commc'ns Corp. v. City of Bessemer Zoning Bd. of Adjust.*, 365 N.C. 152, 157, 712 S.E.2d 868, 871 (2011) ("This Court has long held that governmental restrictions on the use of land are construed strictly in favor of the free use of real property." (citations omitted)); *State v. Haynie*, 169 N.C. 277, 282, 84 S.E. 385, 387 (1915) ("Statutes which restrict private rights or the use of property, and especially those which tend to destroy them, should be strictly construed in favor of the citizen." (citations omitted)). These rights include the right to freely use one's property in a lawful manner, *Vance S. Harrington & Co. v. Renner*, 236 N.C. 321, 324, 72 S.E.2d 838, 840 (1952), the right to improve one's property, 1 Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 1.04 (6th ed. Nov. 2011), and one's right to "the use and enjoyment of public highways," *see Price v. Edwards*, 178 N.C. 493, 500, 101 S.E. 33, 37 (1919), as well as due process rights that protect property owners from state delegations of power that give neighbors the authority to regulate the way another person uses his or her own property, *Wash. ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122, 49 S. Ct. 50, 52, 73 L. Ed. 210, 214 (1928) ("The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment."); *Eubank v. City of Richmond*, 226 U.S. 137, 143-44, 33 S. Ct. 76, 77, 57 L. Ed. 156, 159 (1912) ("The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the proper rights of others, creates no standard by which the power thus given

is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously."). The plain language of the Driveway Permit Statute is entirely consistent with these rights.

Nonetheless, DOT contends that it acted under its general grant of power to "make rules, regulations and ordinances for the use of, and to police traffic on, the State highways," N.C.G.S. § 136-18(5), and consistently with its general authority to "exercise complete and permanent control over such roads and highways," *id.* § 136-93 (2011). According to DOT, when construed *in pari materia* with the Driveway Permit Statute, these general grants of power conferred upon it the authority to enact its "Policy on Street and Driveway Access to North Carolina Highways," under which it issued High Rock's conditional permit.

The DOT's argument, however, ignores the plain language of the Driveway Permit Statute. This Court adheres to the long-standing principle that when two statutes arguably address the same issue, one in specific terms and the other generally, the specific statute controls. *State ex rel. Utils. Comm'n v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 193 (1977) (citing, *inter alia*, *State v. Baldwin*, 205 N.C. 174, 170 S.E. 645 (1933)). And when that specific statute is clear and unambiguous, we are not permitted to engage in statutory construction in any form. This Court may not construe the statute in pari materia with any other statutes, including those that treat the same issue generally. The Driveway Permit Statute specifically and unambiguously provides an exclusive list of how DOT may regulate driveway connections, as well as an exclusive list of improvements it may require of an applicant. *See State ex rel. Hunt v. N.C. Reins. Facil.*, 302 N.C. 274, 290, 275 S.E.2d 399, 407 (1981) ("Where a statute sets forth one method for accomplishing a certain objective, or sets forth the instances of its application or coverage, other methods or coverage are necessarily excluded . . . ." (citation and quotation marks omitted)). Because the Driveway Permit Statute treats an owner's access to the state highway system in specific terms, and because it is clear and unambiguous, we are not permitted to engage in statutory construction. We may look no further than the statute's plain language to determine whether DOT possessed the power it claims in this case. Walker v. Bd. of Trs. of the N.C. Local Gov'tal Emps.' Ret. Sys., 348 N.C. 63, 65-66, 499 S.E.2d 429, 430-31 (1998) (citations omitted); Watson Indus., 235 N.C. at 211, 69 S.E.2d at 511 ("It is only in cases of doubt or ambiguity that the courts may allow themselves to

be guided or influenced by an executive construction of a statute." (citation and quotation marks omitted)).

High Rock also advances several constitutional claims. But because we base our holding on statutory grounds, we decline to address those arguments at this time. See Hughey v. Cloninger, 297 N.C. 86, 95, 253 S.E.2d 898, 904 (1979) ("Since this case is decided on statutory grounds, further discussion of the constitutional questions raised by this appeal is unnecessary." (citations omitted)).

In conclusion, the Driveway Permit Statute is a narrow grant of power under which DOT may regulate only certain aspects of driveway connections and require applicants to complete only certain improvements. The conditions placed on High Rock's driveway permit are not authorized under the plain language of that statute. Thus, we hold that DOT exceeded its statutory authority. Accordingly, the decision of the Court of Appeals is reversed, and this case is remanded to that court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

SANDHILL AMUSEMENTS, INC.; CAROLINA INDUSTRIAL SUPPLIES; J&F AMUSEMENTS, INC.; J&J VENDING, INC.; MATTHEWS VENDING CO.; PATTON BROTHERS, INC.; TRENT BROTHERS MUSIC CO., INC.; S&S MUSIC CO., INC.; OLD NORTH STATE AMUSEMENTS, INC.; AND UWHARRIE FUELS, LLC v. STATE OF NORTH CAROLINA; GOVERNOR BEVERLY PERDUE, IN HER OFFICIAL CAPACITY; NORTH CAROLINA DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY; SECRETARY OF CRIME CONTROL AND PUBLIC SAFETY BRYAN E. BEATTY, IN HIS OFFICIAL CAPACITY; ALCOHOL LAW ENFORCEMENT DIVISION; DIRECTOR OF ALCOHOL LAW ENFORCEMENT DIVISION WILLIAM CHANDLER, IN HIS OFFICIAL CAPACITY

No. 170A11-2

(Filed 14 December 2012)

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. —–, 724 S.E.2d 614 (2012), reversing an order entered on 29 November 2010 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Supreme Court on 17 October 2012.

Daughtry, Woodard, Lawrence & Starling, by Kelly K. Daughtry, for plaintiff-appellees.

Roy Cooper, Attorney General, by John F. Maddrey, Solicitor General, and Hal F. Askins, Special Deputy Attorney General, for defendant-appellants.

PER CURIAM.

For the reasons stated in Hest Technologies, Inc. v. State ex rel. Perdue, 366 N.C. 289, 749 S.E.2d 429 (2012) (No. 169A11-2), the decision of the Court of Appeals is reversed.

REVERSED.

L&S WATER POWER, INC., BROOKS ENERGY, L.L.C., DEEP RIVER HYDRO, INC., HYDRODYNE INDUSTRIES LLC, WILLIAM DEAN BROOKS, AND HOWARD BRUCE COX v. PIEDMONT TRIAD REGIONAL WATER AUTHORITY

No. 198PA11

(Filed 14 December 2012)

On discretionary review pursuant to N.C.G.S. § 7A 31 of a unanimous decision of the Court of Appeals, 211 N.C. App. 148, 712 S.E.2d 146 (2011), affirming an order entered on 26 October 2009 by Judge Calvin E. Murphy and an order entered on 10 May 2010 by Judge Clarence E. Horton, Jr., both in Superior Court, Guilford County. Heard in the Supreme Court on 16 October 2012.

Boydoh & Hale, PLLC, by J. Scott Hale, for plaintiff-appellees.

Roberson Haworth & Reese, P.L.L.C., by Robert A. Brinson and Christopher C. Finan; and Hunton & Williams, LLP, by Charles D. Case, for defendant-appellant.

Len S. Anthony, General Counsel, for Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc.; and Robert B. Schwentker, General Counsel, for North Carolina Electric Membership Corporation, amici curiae.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by V. Randall Tinsley, for City of Salisbury, amicus curiae.

Kimberly S. Hibbard, NCLM General Counsel, and Gregory F. Schwitzgebel, III, NCLM Senior Assistant General Counsel; and Daniel F. McLawhorn, City of Raleigh Associate City Attorney, for North Carolina League of Municipalities, amicus curiae.

Hartsell & Williams, P.A., by Christy E. Wilhelm and Fletcher L. Hartsell, Jr., for Water and Sewer Authority of Cabarrus County, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. JERRY LAMONT LINDSEY

No. 124A12

(Filed 14 December 2012)

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. ——, 725 S.E.2d 350 (2012), reversing judgments entered on 13 May 2010 by Judge Timothy S. Kincaid in Superior Court, Caldwell County. On 13 June 2012, the Supreme Court allowed the State's petition for discretionary review of an additional issue. Heard in the Supreme Court on 13 November 2012.

Roy Cooper, Attorney General, by Kimberly N. Callahan, Assistant Attorney General, for the State-appellant.

James N. Freeman, Jr. for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion, and this case is remanded to the Court of Appeals for consideration of the remaining issues. Discretionary review was improvidently allowed as to the additional issue.

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Lincoln County
	)	
JONATHAN LYNN BURROW	)	

No. 78A12

(Filed 14 December 2012)

ORDER

On 5 April 2012, the State filed a motion to amend the record, asking leave to include a copy of the N.C.G.S. § 90-95 notice dated 27 January 2011 provided to defendant's trial counsel by the district attorney's office indicating an intent to introduce a copy of the crime lab report showing a substance to be oxycodone into evidence. The existence of this item was apparently not known to appellate counsel when the case was before the Court of Appeals.

Now, therefore, this Court allows the State's motion to amend the record and, on its own motion, ORDERS that the 7 February 2012 decision of the Court of Appeals is VACATED and REMANDS this matter to the Court of Appeals for reconsideration in light of the amended record.

By order of the Court in Conference, this 12th day of December, 2012.

s/Jackson, J.
For the Court

STATE OF NORTH CAROLINA v. FELIPE ALFARO RICO

No. 529A11-2

(FILED 14 December 2012)

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. ——, 720 S.E.2d 801 (2012), vacating a judgment entered on 18 March 2010 and an order denying defendant's motion for appropriate relief entered on 19 March 2010, both by Judge Russell J. Lanier, Jr. in Superior Court, Sampson County, and remanding for a new sentencing hearing. Heard in the Supreme Court on 16 October 2012.

Roy Cooper, *Attorney General*, *by Kathleen N. Bolton*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Daniel R. Pollitt*, *Assistant Appellate Defender*, *for defendant-appellee.*

PER CURIAM.

For the reasons stated in the dissenting opinion, 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 of Sampson County for disposition on the original charge of murder.

REVERSED IN PART AND REMANDED; NEW TRIAL.

KLINGSTUBBINS SOUTHEAST, INC. v. 301 HILLSBOROUGH STREET PARTNERS, LLC AND THEODORE R. REYNOLDS

No. 83PA12

(Filed 14 December 2012)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 721 S.E.2d 749 (2012), reversing in part an order entered on 16 February 2011 by Judge Carl Fox in Superior Court, Wake County. Heard in the Supreme Court on 15 October 2012.

Creech Law Firm, P.A., by Peter J. Sarda, for plaintiff-appellee.

Harris Winfield Sarratt & Hodges, LLP, by John L. Sarratt, for defendant-appellant Theodore R. Reynolds.

PER CURIAM.

The decision of the Court of Appeals is affirmed. This case is remanded to the Court of Appeals for further remand to the Superior Court, Wake County, for additional proceedings not inconsistent with this opinion.

AFFIRMED AND REMANDED.

STATE OF NORTH CAROLINA v. TRAVEN MARQUETTE LEE

No. 61PA12

(Filed 14 December 2012)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 720 S.E.2d 884 (2012), finding no prejudicial error in judgments entered on 3 November 2010 by Judge Cy A. Grant in Superior Court, Halifax County. Heard in the Supreme Court on 17 October 2012.

Roy Cooper, Attorney General, by Kathleen N. Bolton, Assistant Attorney General, for the State.

Kimberly P. Hoppin for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

HEATHER BARBARINO v. CAPPUCCINE, INC.

No. 160A12

(Filed 14 December 2012)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 722 S.E.2d 211 (2012), affirming in part and reversing in part an order entered on 1 November 2010 by Judge Theodore S. Royster in Superior Court, Cabarrus County. Heard in the Supreme Court on 15 October 2012.

Gardner & Hughes PLLC, by N. Renee Hughes and Nicole Gardner, for plaintiff-appellant.

Shumaker, Loop & Kendrick, LLP, by Frederick M. Thurman, Jr., for defendant-appellee.

PER CURIAM.

AFFIRMED.

BLUE RIDGE SAVINGS BANK, INC. v. GUY MITCHELL, AMY MITCHELL, AND ELOISE MITCHELL

No. 98A12

(Filed 14 December 2012)

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. ——, 721 S.E.2d 322 (2012), affirming entry of summary judgment for plaintiff on 16 November 2010 by Judge Alan Z. Thornburg in Superior Court, Buncombe County. Heard in the Supreme Court on 16 October 2012.

Dungan Law Firm, P.A., by James W. Kilbourne, Jr. and Alicia Gaddy-Vega, for plaintiff-appellee.

Frank G. Queen, PLLC, by Frank G. Queen; and Scott Taylor, PLLC, by J. Scott Taylor, for defendant-appellants.

PER CURIAM.

AFFIRMED.

MARGARET DICKSON, ALICIA CHISOLM, ETHEL CLARK, MATTHEW A. McLEAN, MELISSA LEE ROLLIZO, C. DAVID GANTT, VALERIA TRUITT, ALICE GRAHAM UNDERHILL, ARMIN JANCIS, REBECCA JUDGE, ZETTIE WILLIAMS, TRACEY BURNS-VANN, LAWRENCE CAMPBELL, ROBINSON O. EVERETT, JR., LINDA GARROU, HAYES McNEILL, JIM SHAW, SIDNEY E. DUNSTON, ALMA ADAMS, R. STEVE BOWDEN, JASON EDWARD COLEY, KARL BERTRAND FIELDS, PAMLYN STUBBS, DON VAUGHAN, BOB ETHERIDGE, GEORGE GRAHAM, JR., THOMAS M. CHUMLEY, AISHA DEW, GENEAL GREGORY, VILMA LEAKE, RODNEY W. MOORE, BRENDA MARTIN STEVENSON, JANE WHITLEY, I.T. ("TIM") VALENTINE, LOIS WATKINS, RICHARD JOYNER, MELVIN C. McLAWHORN, RANDALL S. JONES, BOBBY CHARLES TOWNSEND, ALBERT KIRBY, TERRENCE WILLIAMS, NORMAN C. CAMP, MARY F. POOLE, STEPHEN T. SMITH, PHILIP A. BADDOUR, AND DOUGLAS A. WILSON v. ROBERT RUCHO, IN HIS OFFICIAL CAPACITY ONLY AS THE CHAIRMAN OF THE NORTH CAROLINA SENATE REDISTRICTING COMMITTEE; DAVID LEWIS, IN HIS OFFICIAL CAPACITY ONLY AS THE CHAIRMAN OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES REDISTRICTING COMMITTEE; NELSON DOLLAR, IN HIS OFFICIAL CAPACITY ONLY AS THE CO-CHAIRMAN OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES REDISTRICTING COMMITTEE; JERRY DOCKHAM, IN HIS OFFICIAL CAPACITY ONLY AS THE CO-CHAIRMAN OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES REDISTRICTING COMMITTEE; PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY ONLY AS THE PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; THOM TILLIS, IN HIS OFFICIAL CAPACITY ONLY AS THE SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; THE STATE BOARD OF ELECTIONS; AND THE STATE OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, DEMOCRACY NORTH CAROLINA, NORTH CAROLINA A. PHILIP RANDOLPH INSTITUTE, REVA McNAIR, MATTHEW DAVIS, TRESSIE STANTON, ANNE WILSON, SHARON HIGHTOWER, KAY BRANDON, GOLDIE WELLS, GRAY NEWMAN, YVONNE STAFFORD, ROBERT DAWKINS, SARA STOHLER, HUGH STOHLER, OCTAVIA RAINEY, CHARLES HODGE, MARSHALL HARDY, MARTHA GARDENHIGHT, BEN TAYLOR, KEITH RIVERS, ROMALLUS O. MURPHY, CARL WHITE, ROSA BRODIE, HERMAN LEWIS, CLARENCE ALBERT, JR., EVESTER BAILEY, ALBERT BROWN, BENJAMIN LANIER, GILBERT VAUGHN, AVIE LESTER, THEODORE MUCHITENI, WILLIAM HOBBS, JIMMIE RAY HAWKINS, HORACE P. BULLOCK, ROBERTA WADDLE, CHRISTINA DAVIS-McCOY, JAMES OLIVER WILLIAMS, MARGARET SPEED, LARRY LAVERNE BROOKS, CAROLYN S. ALLEN, WALTER ROGERS, SR., SHAWN MEACHEM, MARY GREEN BONAPARTE, SAMUEL LOVE, COURTNEY PATTERSON, WILLIE O. SINCLAIR, CARDES HENRY BROWN, JR., AND JANE STEPHENS v. THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; THOM TILLIS, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE

No. 201PA12

(Filed 25 January 2013)

Evidence— attorney-client privilege—redistricting—no waiver by statute

Section 120-133 of the North Carolina General Statutes does not waive the right of legislators to assert the attorney-client privilege or work-product doctrine in litigation concerning redistricting where the statute is silent on the issue. Any waiver of such well-established legal principles must be clear and unambiguous and this statute in no way mentions, let alone explicitly waives, the attorney-client privilege or work-product doctrine. The phrase "notwithstanding any other provision of law" in the statute lacks a contextual definition; the ordinary meaning of "provision," determined by reference to a *Black's Law Dictionary*, refers to a statue.

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

Justice HUDSON dissenting.

Appeal pursuant to N.C.G.S. § 120-2.5 from an order entered on 20 April 2012 by a three-judge panel of the Superior Court, Wake County appointed by the Chief Justice pursuant to N.C.G.S. § 1-267.1, allowing plaintiffs' motion to compel production of certain documents. On 11 May 2012, the Supreme Court of North Carolina issued an order expediting hearing of the appeal. Heard in the Supreme Court on 10 July 2012.

Poyner Spruill LLP, by Edwin M. Speas, Jr., for Dickson plaintiff-appellees; and Edwin M. Speas, Jr., Southern Coalition for Social Justice by Anita S. Earls, and Ferguson Stein Chambers Gresham & Sumter, P.A. by Adam Stein, for NC NAACP plaintiff-appellees.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Thomas A. Farr and Phillip J. Strach, for legislative defendant-appellants; and Roy Cooper, Attorney General, by Alexander McC. Peters and Susan K. Nichols, Special Deputy Attorneys General, for all defendant-appellants.

Bussian Law Firm, PLLC, by John A. Bussian, for North Carolina Press Association, Inc.; and Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Mark J. Prak, for North Carolina Association of Broadcasters, Inc., amici curiae.

Stevens Martin Vaughn & Tadych, PLLC, by Hugh Stevens, for The North Carolina Open Government Coalition, Inc., amicus curiae.

JACKSON, Justice.

In this appeal we consider whether section 120-133 of the North Carolina General Statutes waives the right of legislators to assert the attorney-client privilege or work-product doctrine in litigation concerning redistricting. Because any waiver of such well-established legal principles must be clear and unambiguous, we conclude that the statute's silence on such waivers renders the statute ambiguous as to this issue. After further analysis, we conclude that the General Assembly did not intend to waive either the attorney-client privilege or work-product doctrine when it enacted section 120-133. While we acknowledge that the General Assembly may choose to waive its legal rights, we are unwilling to infer such a sweeping waiver unless the General Assembly leaves no doubt about its intentions. Accordingly, we affirm in part and reverse in part the order of the three-judge panel for the reasons stated below.

On 27 and 28 July 2011, the North Carolina General Assembly enacted new redistricting plans for the North Carolina House of Representatives, North Carolina Senate, and United States House of Representatives pursuant to Article II, Sections 3 and 5 of the North Carolina Constitution and Title 2, sections 2a and 2c of the United States Code. During the legislative process leading up to and following enactment, the defendant members of the General Assembly, including Senate President Pro Tempore Philip Berger, House Speaker Thom Tillis, Senate Redistricting Chair Robert Rucho, and House Redistricting Chair David Lewis, received legal advice from lawyers employed by the Attorney General of North Carolina and two private law firms, Ogletree, Deakins, Nash, Smoak & Stewart, P.C. ("Ogletree Deakins") and Jones Day. Like the lawyers who are employed by the Attorney General, the Ogletree Deakins and Jones Day attorneys were paid with State funds.

On 2 September 2011, the Attorney General filed an action to preclear the redistricting plans in the United States District Court for the District of Columbia pursuant to Section five of the Voting Rights Act of 1965, *North Carolina v. Holder*, No. 1:11-CV-01592 (D.D.C. Sept. 2, 2011), and simultaneously sought administrative preclearance from the United States Attorney General. The redistricting plans were precleared administratively by the United States Attorney General on 1

November 2011. As a result, the federal district court dismissed as moot the State's preclearance action on 8 November 2011.

On 1 November 2011, the General Assembly also alerted the United States Department of Justice that an error in the computer software program used to draw the redistricting plans had caused certain areas of the state to be omitted from the original plans. The General Assembly passed legislation on 7 November 2011 to cure this technical defect. The United States Attorney General precleared the revised plans on 8 December 2011.

Meanwhile, plaintiffs, the North Carolina State Conference of Branches of the NAACP, League of Women Voters of North Carolina, Democracy North Carolina, North Carolina A. Philip Randolph Institute, and individual registered voters, filed separate suits on 3 and 4 November 2011, challenging the constitutionality of the redistricting plans and seeking a preliminary injunction to prevent defendants from conducting elections using the redistricting plans. In accordance with section 1-267.1 of the North Carolina General Statutes, the Chief Justice appointed a three-judge panel to hear both actions.

On 19 December 2011, the panel consolidated the cases. On the same day defendants filed their answers and moved to dismiss the suit. Thereafter, on 20 January 2012, the panel entered an order denying plaintiffs' motion for a preliminary injunction. The panel also entered an order on 6 February 2012 allowing in part and denying in part defendants' motion to dismiss.

Most relevant to the issues before us, on 8 and 17 November 2011, plaintiffs served requests for production of documents on defendants pursuant to Rule 34 of the North Carolina Rules of Civil Procedure. These requests sought production of a variety of communications concerning enactment of the redistricting plans. After receiving an extension of time to respond, on 13 January 2012, defendants served written responses to plaintiffs' discovery requests, in which they objected to the production of certain categories of documents based upon the attorney-client privilege, legislative privilege, or work-product doctrine. On 24 February 2012, defendants amended their objections, providing additional information regarding their privilege claims. Specifically, defendants identified the following communications as privileged:

1. Emails to and from Tom Farr, Phil Strach, Alec Peters, and Tiare Smiley to or from Bob Rucho, David Lewis, Thom Tillis,

Phil Berger or their legislative staff members[1] acting on their behalf or at their direction regarding legal advice on the impact of census data on redistricting plans.

2. Emails to and from Tom Farr, Phil Strach, Alec Peters, and Tiare Smiley to or from Bob Rucho, David Lewis, Thom Tillis, Phil Berger or their legislative staff members acting on their behalf or at their direction regarding legal requirements for a fair process under section 5 of the Voting Rights Act.

3. Emails to and from Tom Farr, Phil Strach, Alec Peters, and Tiare Smiley to or from Bob Rucho, David Lewis, Nelson Dollar, Thom Tillis, Phil Berger or their legislative staff members acting on their behalf or at their direction regarding legal advice in preparation for meetings of the House and Senate Redistricting Committees.

4. Emails to and from Tom Farr, Phil Strach, Michael Carvin, Michael McGinley, Alec Peters, and Tiare Smiley to or from Bob Rucho, David Lewis, Nelson Dollar, Thom Tillis, Phil Berger or their legislative staff members acting on their behalf or at their direction regarding legal requirements for legislative and congressional districts.

5. Emails to and from Tom Farr, Phil Strach, Michael Carvin, Michael McGinley, Alec Peters, and Tiare Smiley to or from Bob Rucho, David Lewis, Nelson Dollar, Thom Tillis, Phil Berger or their legislative staff members acting on their behalf or at their direction regarding legal advice regarding any public statements about redistricting or proposed redistricting plans.

6. Emails to and from Tom Farr, Phil Strach, Michael Carvin, Michael McGinley, Alec Peters, and Tiare Smiley to or from Bob Rucho, David Lewis, Thom Tillis, Phil Berger or their legislative staff members acting on their behalf or at their direction regarding legal advice on the preclearance process for redistricting plans.

7. Emails to and from Tom Farr, Phil Strach, Michael Carvin, Michael McGinley, Alec Peters, and Tiare Smiley to or from Bob Rucho, David Lewis, Nelson Dollar, Thom Tillis, Phil

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1. Defendants also stated that the term "legislative staff members" was limited to: (1) Jason Kay, General Counsel for Representative Tillis; (2) Tracy Kimbrell, General Counsel for Senator Berger; (3) Jim Blaine, Chief of Staff for Senator Berger; and (4) Brent Woodcox, redistricting counsel for Senators Berger and Rucho.

> Berger or their legislative staff members acting on their behalf or at their direction regarding legal advice for the redistricting session of the General Assembly.

On 29 February 2012, plaintiffs filed a motion to compel discovery, seeking production of, among other things, "all communications between legislators and core staff and all lawyers or consultants paid with state funds, and unredacted invoices and time sheets." In support of their motion, plaintiffs cited section 120-133 of the North Carolina General Statutes, which reads:

> Notwithstanding any other provision of law, all drafting and information requests to legislative employees and documents prepared by legislative employees for legislators concerning redistricting the North Carolina General Assembly or the Congressional Districts are no longer confidential and become public records upon the act establishing the relevant district plan becoming law.

N.C.G.S. § 120-133 (2011).[2] Plaintiffs argued that section 120-133 constitutes a "broad and unambiguous" waiver by the General Assembly of "any privileges" relating to redistricting communications once the relevant act becomes law. Plaintiffs contended that section 120-133 compelled the production of documents prepared by defendants' counsel, including lawyers from the Attorney General's Office and private firms.

On 11 April 2012, defendants responded to plaintiffs' motion, denying that section 120-133 waives, or even addresses, the common law attorney-client privilege or work-product doctrine or that the statute applies to the Attorney General's Office. Defendants' response included an engagement letter executed in 1991 by Daniel T. Blue, Jr., who then was serving as Speaker of the North Carolina House of Representatives, and outside counsel James E. Ferguson, II of Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A ("Ferguson Stein"). In the letter, Ferguson Stein agreed to provide legal advice to the North Carolina House of Representatives concerning redistricting. The letter stated that "[b]ecause communications between the firm

2. The term "legislative employee" is defined to include "consultants and counsel to members and committees of either house of the General Assembly or of legislative commissions who are paid by State funds." N.C.G.S. § 120-129(2) (2011). However, the term "legislative employee" excludes "members of the Council of State." *Id.* In addition, the term "document[s]" is defined to include "all records, papers, letters, maps . . . or other documentary material regardless of physical form or characteristics." N.C.G.S. § 120-129(1) (2011).

and members of the House are privileged attorney-client communications, N.C.G.S. §[ ]120-133 shall not apply to communications, including written communications, between any attorneys in the firm and any member of the North Carolina House of Representatives."

On 20 April 2012, the three-judge panel entered a written order allowing plaintiffs' motion to compel. Most significantly, the panel concluded:

> 20. Although certain communications by and between members of the General Assembly and legal counsel pertaining to redistricting plans may have originally been cloaked with privilege, the General Assembly, by enacting N.C. Gen. Stat. § 120-133, expressly waived any and all such privileges once those redistricting plans were enacted into law.
>
> 21. This waiver is clear and unambiguous; it is applicable "notwithstanding any other provision of law." The waiver applies regardless of whether the privilege is claimed under a theory of attorney-client privilege, the work-product doctrine or legislative privilege.

Accordingly, the panel stated that "[a]ll drafting and information requests . . . to legislative employees" and "[d]ocuments . . . prepared by legislative employees" concerning the redistricting plans were " 'no longer confidential' " and became " 'public record' " when the redistricting plans were enacted. (underlining omitted). The panel concluded that counsel from Ogletree Deakins, Jones Day, and any legislative staff attorneys "were 'legislative employees' " because they "served as 'consultants and counsel' " to members of the General Assembly and were paid with State funds. The panel stated that this waiver of confidentiality "d[id] not extend to documents or communications to or from attorneys who were . . . members of the North Carolina Attorney General's staff because the Attorney General, [as] a member of the Council of State, is not a 'legislative employee' and neither are his staff attorneys."

The panel also concluded that any documents prepared "solely in connection with the *redistricting litigation*" remain confidential pursuant to the attorney-client privilege or work-product doctrine; however, the panel did not identify the specific documents to which the attorney-client privilege or work-product doctrine would apply. Instead, it invited the parties to negotiate "a reasonable means of identifying categories of documents that ought to remain confidential."

Defendants appealed to this Court as of right pursuant to section 120-2.5 of the North Carolina General Statutes. *See Pender Cnty. v. Bartlett*, 361 N.C. 491, 497, 649 S.E.2d 364, 368 (2007) (interpreting "N.C.G.S. § 120-2.5 to mean that any appeal from a three-judge panel dealing with apportionment or redistricting pursuant to N.C.G.S. § 1-267.1 is direct to" the Supreme Court of North Carolina), *aff'd sub. nom. Bartlett v. Strickland*, 556 U.S. 1, 173 L. Ed. 2d 173 (2009). Defendants also asked the three-judge panel to stay its discovery order during the pendency of this appeal. The panel issued a temporary stay, but set an expiration date of 11 May 2012. Consequently, defendants filed a motion for temporary stay and petition for writ of supersedeas with this Court on 4 May 2012. On 11 May 2012, we allowed defendants' motion for temporary stay and petition for writ of supersedeas and expedited the hearing of this appeal.

Before this Court plaintiffs argue that they are entitled to all pre-enactment communications and documents relating to redistricting pursuant to section 120-133 of the North Carolina General Statutes. Plaintiffs contend that section 120-133 is unambiguous and by its plain language waives the right of legislators to assert the attorney-client privilege or work-product doctrine for communications and documents made during redistricting. In contrast, defendants argue that, strictly construed, section 120-133 only operates as a narrow waiver of legislative confidentiality that is codified in Article 17, Chapter 120 of the North Carolina General Statutes. Defendants therefore contend that section 120-133 does not waive their right to invoke the attorney-client privilege or work-product doctrine for communications and documents made before enactment of the redistricting plans. The parties agree that the attorney-client privilege and work-product doctrine apply to relevant post-enactment communications and documents.

This matter presents a question of statutory interpretation, which we review de novo. In re Vogler Realty, Inc., 365 N.C. 389, 392, 722 S.E.2d 459, 462 (2012). "The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990). When there is no reference whatsoever to the attorney-client privilege in the statute, a clear and unambiguous waiver is absent, meaning the common law right to assert the privilege prevails. See N.C.G.S. § 4-1 (2011) ("All such parts of the common law as were heretofore in force and use within this State . . . and which has not been otherwise provided for in whole or

in part, not abrogated, repealed or become obsolete, are hereby declared to be in full force within this State."). After carefully reviewing the parties' arguments, we conclude that section 120-133 cannot reasonably be construed to waive these common law doctrines because the section in no way mentions, let alone explicitly waives, the attorney-client privilege or work-product doctrine.

"The attorney-client privilege is one of the oldest recognized privileges for confidential communications. The privilege is intended to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 141 L. Ed. 2d 379, 384 (1998) (citations and quotation marks omitted). As such, "[t]he public's interest in protecting the attorney-client privilege is no trivial consideration . . . . The privilege has its foundation in the common law and can be traced back to the sixteenth century." *In re Miller*, 357 N.C. 316, 328, 584 S.E.2d 772, 782 (2003) (citations omitted). Although the privilege "is well-grounded in the jurisprudence of this State," *id.*; *see also* N.C.G.S. § 4-1, we emphasize that the privilege "has not been statutorily codified," *in re Miller*, 357 N.C. at 329, 584 S.E.2d at 783.

"[W]hen the relationship of attorney and client exists, all confidential communications made by the client to his attorney on the faith of such relationship are privileged and may not be disclosed." *Id.* at 328, 584 S.E.2d at 782 (citations and quotation marks omitted). Given that the privilege advances complete and frank communications, it "encourag[es] clients to make the fullest disclosure to their attorneys [and] enables the latter to act more effectively, justly and expeditiously." *Id.* at 329, 584 S.E.2d at 782 (citations and quotation marks omitted).

We are unaware of—and neither plaintiffs nor defendants have identified—any decisions by this Court fully abrogating the attorney-client privilege in any context as plaintiffs advocate here; however, the General Assembly itself has abrogated the attorney-client privilege on three occasions. In each instance the waiver has been clear and unambiguous. See N.C.G.S. § 15A-1415(e) (2011) (stating that a criminal defendant who alleges ineffective assistance of prior counsel "shall be deemed to waive the attorney-client privilege" to the extent that prior counsel "reasonably believes" revealing these privileged communications is "necessary to defend against the allegations"); id. § 78C-97(c) (2011) (stating that a student-athlete who

enters into a representation agreement with an agent "will be deemed to waive the attorney-client privilege" regarding certain records retained by the agent); id. § 127A-62(h)(3) (2011) (stating that a defendant who alleges ineffective assistance of prior counsel in court-martial proceedings "shall be deemed to waive the attorney-client privilege" to the extent that prior counsel reasonably believes revealing these privileged communications is "necessary to defend against the allegations"). [3]

The text of section 120-133 includes no such clear and unambiguous waiver of the attorney-client privilege or work-product doctrine. Instead, section 120-133 states only:

> Notwithstanding any other provision of law, all drafting and information requests to legislative employees and documents prepared by legislative employees for legislators concerning redistricting the North Carolina General Assembly or the Congressional Districts are no longer confidential and become public records upon the act establishing the relevant district plan becoming law.

Id. § 120-133. There is no reference in this section to either the attorney-client privilege or work-product doctrine. "[I]t is always presumed that the Legislature acted with full knowledge of prior and existing law." Ridge Cmty. Investors, Inc. v. Berry, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977). Necessarily, this presumption must include the common law. See N.C.G.S. § 4-1. In contrast, the General Assembly has set a clear limitation on the attorney-client privilege in the Public Records Act. N.C.G.S. § 132-1.1(a) (2011). There the legislature placed a three-year restriction on the length of time that a confidential communication between an attorney and a public client—such as "any public board, council, commission or other governmental body of the State or of any county, municipality or

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3. In two additional instances the General Assembly has addressed the waiver of the attorney-client privilege more obliquely but nevertheless without ambiguity. In section 7A-450(d) the privilege is waived for indigent persons to the extent that if the "person . . . becomes financially able to secure legal representation and provide other necessary expenses of representation, he must inform the counsel appointed by the court to represent him of that fact . . . . and counsel must promptly inform the court of that information." N.C.G.S. § 7A-450(d) (2011). Such information is specifically excluded by the statute from the protection of the privilege. *Id.* In addition, section 44-50.1(a) mandates that "[if] the person distributing settlement or judgment proceeds [from a personal injury action] is an attorney, the accounting [of disbursements] required by . . . section [44-50.1] is not a breach of the attorney-client privilege." N.C.G.S. § 44-50.1(a) (2011).

other political subdivision or unit of government"—may remain unavailable for public inspection. *Id.*

Plaintiffs argue that the phrase "[n]otwithstanding any other provision of law" in section 120-133 waives "any privileges" regarding redistricting legislation. Nonetheless, we begin by observing that the statute does not define the term "provision" in Article 17. "In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute." *Perkins v. Ark. Trucking Servs., Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000). *Black's Law Dictionary* defines "provision" as "[a] clause in a statute, contract, or other legal instrument." *Black's Law Dictionary* 1345 (9th ed. 2009) (emphasis added). This definition suggests that the General Assembly's use of the word "provision" was meant to refer only to other statutory clauses and not to common law doctrines such as the attorney-client privilege and work-product doctrine. Plaintiffs' counsel conceded as much during oral argument. This interpretation is bolstered by the fact that the General Assembly repeatedly has demonstrated that it knows how to be explicit when it intends to repeal or amend the common law. *See, e.g.*, N.C.G.S. § 48A-1 (2011) ("The common-law definition of minor insofar as it pertains to the age of the minor is hereby repealed and abrogated."); *id.* § 50-6 (2011) ("Notwithstanding the provisions of G.S. 50-11, or of the common law, a divorce under this section shall not affect the rights of a dependent spouse with respect to alimony which have been asserted in the action or any other pending action."); *id* § 160A-626(b) (2011) ("The Authority may contract with any railroad to allocate financial responsibility for passenger rail services claims, . . . notwithstanding any other statutory, common law, public policy, or other prohibition against same . . . ."); *see also id.* § 36C-8-816.1(g) (2011) (recognizing that the phrase "provision of law" does not refer to the common law by stating: "Nothing in this section shall be construed to abridge the right of any trustee who has a power to appoint property in further trust that arises under the terms of the original trust or under any other section of this Chapter or under another provision of law or under common law.").

We read section 120-133 in the context of the entire article in which it appears. *See In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010). Doing so militates against the conclusion that the General Assembly intended to waive its attorney-client privilege and work-product doctrine. As we have noted in other cases, the title of an act may be an indication of legislative intent. *See, e.g.*, *State v. Flowers*,

318 N.C. 208, 215, 347 S.E.2d 773, 778 (1986) (relying on the title of N.C.G.S. § 15A-136 to support the Court's conclusion that the statute addresses a matter of venue). Section 120-133 appears in Chapter 120, Article 17 of the General Statutes and is entitled "Confidentiality of Legislative Communications." In light of this title, we may reasonably infer that Article 17 was intended to govern a specific class of communications. Indeed, a North Carolina House of Representatives Resolution introduced in 1983, shortly before Article 17 was enacted, requested a Legislative Research Commission study pertaining to confidentiality of "legislative communications." *See* H.R. Res. 1461, 1983 Gen. Assemb., Reg. Sess. (N.C. 1983). As such, Article 17 governs an important aspect of the General Assembly's internal operations. In contrast to the Public Records Act, which was designed to *disclose* documentary material of State government agencies or subdivisions to facilitate public inspection and examination, Article 17 was enacted to *protect* legislative communications from disclosure so as to preserve the integrity of the legislative process. *Compare* N.C.G.S. § 132-1(b) (2011) (stating that "public records and public information . . . are the property of the people" and "it is the policy of this State that the people may obtain copies of their public records and public information") *with id.* §§ 120-131, -131.1 (2011) (emphasizing that specified legislative communications "are confidential" or "shall be kept confidential"). In fact, according to a 1984 Legislative Research Commission report, Article 17 was created to address concerns that the General Assembly's common law legislative privilege could be eroded by an expansive reading of the Public Records Act. *See* N.C. Legislative Research Comm'n, *Confidentiality of Legislative Communications*, 1983 Gen. Assemb. (1984 Reg. Sess.) 2 (June 7, 1984) ("[S]ince its enactment in 1935, the public records law had been read much more broadly than originally intended."). We also note that the General Assembly's specific use of the term "confidential" thirteen times throughout Article 17, *see*, *e.g.*, N.C.G.S. § 120-130(a), -131(a), -131.1(a), (a1) (2011) (stating, for example, "is confidential," "are confidential," and "shall be kept confidential"), demonstrates that Article 17 was enacted to shield legislative communications from disclosure.

Operationally, Article 17 places a veil of confidentiality over several specific legislative communications: (1) drafting and information requests made to legislative employees by legislators, N.C.G.S. § 120-130 (2011); (2) documents produced by legislative employees upon the request of legislators, *id.* § 120-131 (2011); and

(3) requests from legislative employees to employees in other State agencies for assistance in the preparation of fiscal notes and evaluation reports, *id.* § 120-131.1 (2011). Article 17 also prohibits legislative employees from disclosing confidential information obtained in the legislative context. *Id.* § 120-132 (2011). Moreover, Article 17 expressly states that these legislative communications are *not* public records pursuant to the Public Records Act. *See id.* §§ 120-130(d), -131(b), -131.1(a1).

Section 120-133 provides a narrow exception to the protections generally established in Article 17 to help ensure the State's compliance with the requirements of the Voting Rights Act. *See* 42 U.S.C. § 1973c (2012) (outlining the preclearance procedure); 28 C.F.R. § 51.27 (2012) (listing the "[r]equired contents" of a "submitted change affecting voting"); *id.* § 51.28 (2012) (listing supplemental contents for submissions). In effect, section 120-133 permits "all drafting and information requests to legislative employees and documents prepared by legislative employees for legislators concerning redistricting" to become "public records" for this limited purpose. N.C.G.S. § 120-133. We observe that, in contrast to the other sections of Article 17, section 120-133 makes no reference to the Public Records Act. We presume that the General Assembly "carefully chose each word used" in drafting the legislation. *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009). The General Assembly could have referenced the Public Records Act in section 120-133, but chose not to do so. This omission demonstrates that the General Assembly intended for its redistricting communications to be made public in accordance with the narrow scope of section 120-133, rather than the broad scope of the Public Records Act. Given the limited purpose of section 120-133 as read within the full context of Article 17, we can discern no clear legislative intent by the General Assembly to waive the common law attorney-client privilege or work-product doctrine.

As a part of our analysis of section 120-133, we must also emphasize that this Court operates within a "tripartite system of government." *Bacon v. Lee*, 353 N.C. 696, 712, 549 S.E.2d 840, 851, *cert. denied*, 533 U.S. 975, 150 L. Ed. 2d 804 (2001). "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. "[T]he principal function of the separation of powers[ ] . . . is to maintain the tripartite structure of the . . . Government—and thereby protect individual liberty—by providing a safeguard against the

encroachment or aggrandizement of one branch at the expense of the other." *Bacon*, 353 N.C. at 715, 549 S.E.2d at 853 (alterations in original) (quotation marks omitted). As such, "the fundamental law guarantees to the Legislature the inherent right to discharge its functions and to regulate its internal concerns in accordance with law without interference by any other department of the government." *Person v. Bd. of State Tax Comm'rs*, 184 N.C. 499, 503, 115 S.E. 336, 339 (1922). "All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989). The General Assembly can waive its common law rights in addition to its statutory rights, and whether it chooses to do so is not within the purview of this Court. Nevertheless, we will not lightly assume such a waiver by a coordinate branch of government. Therefore, without a clear and unambiguous statement by the General Assembly that it intends to waive its attorney-client privilege or work-product doctrine, we are compelled to exercise judicial restraint and defer to the General Assembly's judgment regarding the scope of its legislative confidentiality. Such a clear and unambiguous statement is notably absent from section 120-133. Accordingly, we must conclude that the General Assembly did not intend to waive the attorney-client privilege or work-product doctrine with respect to redistricting litigation when it enacted section 120-133.

For the foregoing reasons, we reverse the three-judge panel's conclusion of law that the General Assembly waived the attorney-client privilege and work-product doctrine for pre-enactment communications and documents through section 120-133; however, we affirm the panel's conclusion that the attorney-client privilege and work-product doctrine apply to relevant post-enactment communications and documents. This case is remanded to the three-judge panel for additional proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED.

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

Justice HUDSON dissenting.

Because I am concerned that in its opinion the majority has abandoned the principle that confidentiality is the basis for attorney-client

privilege, I respectfully dissent. While the majority's extensive analysis of the history and purpose of the attorney-client privilege and Article 17 is interesting, it fails to address the fundamental premise that the attorney-client privilege applies only to confidential communications. In N.C.G.S. § 120-133, the General Assembly has explicitly stripped confidentiality from redistricting communications upon enactment of the redistricting law. For many years, our law has established that without confidentiality, no attorney-client privilege can apply.

It is well established that the attorney-client privilege "protects *confidential* communications made by a client to his attorney." *State v. Fair*, 354 N.C. 131, 168, 557 S.E.2d 500, 525 (2001) (emphasis added) (citation omitted), cert. denied, 535 U.S. 1114, 122 S. Ct. 2332 (2002). Importantly, "the attorney-client privilege covers only confidential communications." *State v. Brown*, 327 N.C. 1, 20, 394 S.E.2d 434, 446 (1990) (emphasis added) (citation omitted). Even communications between attorney and client made in public or in front of others can lose their confidential nature and thus the protection of the privilege. *See State v. Van Landingham*, 283 N.C. 589, 602, 197 S.E.2d 539, 547 (1973). Confidentiality is a *prerequisite* to application of the attorney-client privilege—information that is not confidential simply is not subject to the privilege.

Defendants seek to protect much of their legislative redistricting work from public scrutiny under the cloak of attorney-client privilege; however, the relevant statutory language could not be clearer in indicating that the privilege is *inapplicable* here, making waiver irrelevant. The pertinent language of the statute reads: "Notwithstanding any other provision of law, all drafting and information requests to legislative employees and documents prepared by legislative employees for legislators concerning redistricting . . . *are no longer confidential* and become public records upon the act establishing the relevant district plan becoming law." N.C.G.S. § 120-133 (2011) (emphasis added).

There is nothing unclear or ambiguous about the statutory phrase "are no longer confidential." This Court has long held that "when the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lanvale Props., LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 731 S.E.2d 800, 809-10 (2012) (citations and quotation marks omitted). The unequivocal statutory language here can be summed up quite simply: as of 7 November 2011, the dates that this

redistricting plan finally became law, all prior "drafting and information requests" and "documents" concerning redistricting ceased to be confidential. Therefore, these requests and documents cannot be covered by the attorney-client privilege, which applies only to confidential communications. This case does not concern a broad waiver of various privileges—the nonconfidential communications in question are simply beyond the protection of the attorney-client privilege, even if they once were protected.

The majority spends its entire opinion in a confusing and unnecessary attempt to prove a negative—that the phrase "attorney-client privilege" does not appear in the text of the statute and therefore, the privilege cannot be considered waived or abrogated thereby. Meanwhile, the majority never addresses, let alone explains, how communications that are "no longer confidential" (a phrase that actually is in the statutory text) can be covered by a common law privilege that has never applied to nonconfidential communications. The only way to reach this conclusion is by suggesting that the word "confidential" in the statute means something other than "confidential." And as the majority points out, we presume 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), and "that the Legislature acted with full knowledge of prior and existing law," *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977). Therefore, we must presume that the General Assembly deliberately used the words "are no longer confidential" with full knowledge that a requisite element of the common law attorney-client privilege is that the communications are, and remain, confidential.[4]

Even the authorities cited by the majority repeatedly and explicitly refer to confidentiality as the basis for this privilege. *See Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S. Ct. 2081, 2084 (1998) (noting that "[t]he attorney-client privilege is one of the oldest recognized privileges for confidential communications"); *In re Miller*, 357 N.C. 316, 328, 584 S.E.2d 772, 782 (2003) (stating that "this protection for confidential communications is one of the oldest and most revered in law"); N.C.G.S. §§ 120-129 to -139 (2011) (titled "Confidentiality of Legislative Communications"); N.C.G.S. § 132-1.1(a)

4. If, as the majority suggests, section 120-133 was written as a "narrow exception" solely intended to "ensure compliance with the requirements of the Voting Rights Act," surely the General Assembly could and would have said so. Courts "are without power to interpolate, or superimpose, provisions and limitations not contained [in the statute]." State v. Davis, 364 N.C. 297, 302, 698 S.E.2d 65, 68 (2010) (citations omitted).

(2011) (exempting certain "Confidential Communications" from the definition of "public records" for three years).

In this opinion the majority has either repudiated the long-standing rule that only confidential communications are entitled to the protection of the attorney-client privilege, which is inconsistent with all prior authority; or, it has rewritten N.C.G.S. § 120-133 to say, instead of "are no longer confidential," that redistricting communications "continue to be confidential," which is inconsistent with our role as a reviewing court rather than a legislative body. As a result, the majority has unnecessarily muddled the law in this area to reach its result, and made any future cases in this area of law unpredictable.

Because I conclude that the attorney-client privilege does not apply here, I find it necessary to briefly analyze what the statute renders nonconfidential—"drafting and information requests" and "documents" "concerning redistricting." N.C.G.S. § 120-133. While the statute does not define "drafting and information requests," it does provide a very specific and quite broad definition of "documents." For the purposes of this statute, "document" means "all records, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material regardless of physical form or characteristics." *Id.* § 120-129(1) (2011). While the statute does not explicitly use the term "e-mail," I conclude that this statutory definition that includes "letters . . . regardless of physical form or characteristics" necessarily includes electronic mail, which is what plaintiffs seek to discover here. Moreover, the statute expressly applies to outside counsel for members of the General Assembly. The definition of "[l]egislative employee" expressly includes "counsel to members and committees of either house of the General Assembly . . . who are paid by State funds." *Id.* § 120-129(2) (2011).

In sum, the plain and unambiguous terms of the statute provide that all documents (including e-mails) concerning redistricting, even those between legislators and outside counsel, ceased to be confidential upon final enactment of the law on 7 November 2011. Because N.C.G.S. § 120-133 renders these communications "no longer confidential" upon enactment of the districts (and because this litigation commenced after enactment of the law), the attorney-client privilege cannot apply.

While the majority offers no analysis of the work-product doctrine, I see no reason to believe that N.C.G.S. § 120-133 has any effect

on the application of that doctrine here because work-product doctrine is not premised upon the confidentiality of communications. Work-product doctrine is "designed to protect the mental processes of the attorney," specifically his "impressions, opinions, and conclusions or his legal theories and strategies." *State v. Hardy*, 293 N.C. 105, 126, 235 S.E.2d 828, 841 (1977). This Court has stated that work-product doctrine is "not a privilege," but rather a "qualified immunity" that "extends to all materials prepared in anticipation of litigation or for trial." *Willis v. Duke Power Co.*, 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976) (citation, emphasis, and quotation marks omitted).[5] It is important not to overstate this protection, however, as the phrase "prepared in anticipation of litigation" does not mean "prepared while anticipating litigation." The fact that redistricting litigation is virtually inevitable every ten years does not cloak every redistricting document with work-product protection. While work-product protection is broad for those materials prepared for litigation, it does not extend to any and all materials prepared in a situation in which litigation is likely. As the Fourth Circuit has stated, only those materials prepared specifically "*because of*" litigation are protected, not those that are created "with the general possibility of litigation in mind." *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992).

In addition, "[m]aterials prepared in the ordinary course of business are not protected." *Willis*, 291 N.C. at 35, 229 S.E.2d at 201 (citation omitted); *See Nat'l Union Fire Ins.*, 967 F.2d at 984. Maps, tables, plans, and other materials and discussions related to the actual writing of the redistricting legislation are obviously prepared in the ordinary course of business of the legislature. Even an analysis of the constitutional framework for redistricting would seem to me to be within the ordinary course of a legislature's fulfilling its constitutional responsibility to rewrite the districting legislation. Thus, any documents that relate to the *substance* of the redistricting legislation (decisions on where to draw district lines, analysis of census data, etc.) should not be covered by work-product protection. Communications regarding strategic preparation for preclearance litigation, for example, might well be covered, and the trial court can address such matters as document production moves forward.

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5. Other cases have referred to the doctrine as a "qualified privilege" while retaining the parameters of the protection described in *Willis*. *E.g. Hardy*, 293 N.C. at 126, 235 S.E.2d at 840.

Finally, the work-product doctrine gives only a "qualified immunity," not an absolute shield. *Willis*, 291 N.C. at 35, 229 S.E.2d at 201. "Upon a showing of 'substantial need' and 'undue hardship' involved in obtaining the substantial equivalent otherwise, plaintiff may be allowed discovery." *Id.* at 36, 229 S.E.2d at 201. Because the materials necessary to show whether the legislature violated the basic rules of redistricting as set forth by the U.S. Supreme Court may well lie among those documents now claimed as privileged, plaintiffs may have a reasonable claim to an exception to work-product protection. This determination should be left to the trial court. Here, as in *Willis*, "a large portion of the materials in defendant's . . . files may be subject to the trial preparation immunity. The record is insufficient for us to determine the extent to which this may be the case." *Id.*

In its order here, the trial court ruled that N.C.G.S. § 120-133 requires defendants to produce certain material pertaining to the redistricting process without regard to attorney-client privilege, legislative privilege, or work-product doctrine. The order states that "because the record before the Court at this time does not permit the Court to rule with any specificity which documents might be excluded from the scope of § 120-133 . . . the Court can only suggest that the parties consider and agree among themselves a reasonable means of identifying categories of documents that ought to remain confidential." In my opinion, the trial court erred in leaving responsibility for these determinations entirely in the hands of the parties; the trial court should conduct an in camera review and resolve any issues on which the parties cannot agree. *See In re Miller*, 357 N.C. at 336, 584 S.E.2d at 787 (stating that "the responsibility of determining whether the attorney-client privilege applies belongs to the trial court"). To the extent there is any argument about whether a particular communication meets the statutory definition of "document" or whether it is "concerning redistricting," the only appropriate remedy consistent with the rules of Civil Procedure and prior case law is an *in camera* review by the trial court. "If . . . there is disagreement about whether the order covers certain questionable documents or communications, the superior court must conduct an in camera review to determine the extent of the order as to those documents or communications." *State v. Buckner*, 351 N.C. 401, 411-12, 527 S.E.2d 307, 314 (2000). Here, it is the trial court's responsibility to determine whether disputed materials are "documents" within the meaning of

the statute, whether they are "concerning redistricting,"[6] and whether work-product doctrine protects such documents (or portions thereof) nonetheless. I would so hold and remand for the trial court to proceed accordingly.

In conclusion, the majority has analyzed at length an issue that is not really presented here while failing to address the substantial issues presented on appeal. I would hold that documents listed in N.C.G.S. § 120-133 are not subject to attorney-client privilege because, following enactment of the redistricting legislation on 7 November 2011, those documents are not confidential. I would reverse the trial court's order insofar as it found a broad waiver of privilege and remand for *in camera* review of any and all disputed documents. Those that relate to the legislative process of redistricting and were confidential before enactment should be open to discovery. Should defendants assert work-product protection of any material, any such claims should also be subject to *in camera* review and a ruling by the trial court.

For the reasons stated here, I respectfully dissent.

IN THE MATTER OF: APPEAL OF: OCEAN ISLE PALMS LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2010

No. 128A12

(Filed 25 January 2013)

Taxation— real property—county reassessment of value—improper reappraisal—permitted only in specified years

The North Carolina Property Tax Commission did not err by entering judgment in favor of Ocean Isle Palms LLC (Ocean Isle) arising from Brunswick County's (County) reassessment of the tax value of Ocean Isle's real property. Although the County argued that it was merely correcting an error in an existing appraisal that arose from a misapplication of its 2007 schedule of

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6. Obviously, any materials that are not "documents" or are not "concerning redistricting" would still be eligible for attorney-client privilege if they meet the common law requirements of that privilege.

values of land in the county, its 2008 action constituted an improper reappraisal. 2008 was not a year in which a general reappraisal was permitted. A North Carolina county may appraise property for taxation purposes only in specified years.

Justices HUDSON and BEASLEY did not participate in the consideration or decision of this case.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 723 S.E.2d 543 (2012), reversing an order entered on 24 June 2011 by the North Carolina Property Tax Commission and remanding for further proceedings. Heard in the Supreme Court on 15 October 2012.

Nelson Mullins Riley & Scarborough LLP, *by Charles H. Mercer, Jr. and Reed J. Hollander; and Elaine R. Jordan, General Counsel, The Coastal Companies, for taxpayer-appellant.*

Parker Poe Adams & Bernstein LLP, *by Charles C. Meeker and Jamie Schwedler, for respondent-appellee.*

EDMUNDS, Justice.

A North Carolina county may appraise property for taxation purposes only in specified years. Brunswick County ("the County") conducted such an authorized appraisal of all property in the County in 2007. In this case, we consider whether the County acted lawfully when it reassessed the tax value of real property belonging to taxpayer Ocean Isle Palms LLC ("Ocean Isle") in 2008, which was not a statutorily designated year for setting property values for tax purposes. Although the County argues that it was merely correcting an error in an existing appraisal that arose from a misapplication of its 2007 schedule of values of land in the County, we conclude that the County's 2008 action constituted an improper reappraisal. Because 2008 was not a year in which a general reappraisal was permitted, the North Carolina Property Tax Commission correctly entered judgment in favor of Ocean Isle. Accordingly, we reverse the decision of the Court of Appeals reversing the Commission's decision.

We begin our analysis by considering the statutes pertinent to the valuation of real property and the County's application of those statutes. To ensure accurate and uniform taxation of real property across North Carolina, the General Assembly has established "Standards for Appraisal and Assessment" of property that each

county must implement, N.C.G.S. §§ 105-283, -284 (2011), along with a framework setting out the "Time for Listing and Appraising Property for Taxation," *id.* §§ 105-285 to -287 (2011). Under these statutory standards, all real property must be appraised or valued "at its true value in money." *Id.* § 105-283. "True value" is defined as "market value," the price

> at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

Id.

The General Assembly required each county to conduct an initial valuation of all real properties within its borders, followed by subsequent revaluations of the property, in accordance with a schedule set by statute. N.C.G.S. § 105-286. During a year in which a revaluation is permitted, and only during such years, every property in a county is reappraised and its current taxable value established, reflecting any changes that may have occurred since the last revaluation to ensure that the new true value is accurate. *Id.*; *see also In re Allred*, 351 N.C. 1, 5-7, 519 S.E.2d 52, 55-56 (1999). Because of the need for consistency in these reappraisals, each county must develop and review uniform schedules of values, standards, and rules that detail the methodology appraisers will apply when determining a property's true value. N.C.G.S. § 105-317 (2011). These schedules must be revised by a county tax assessor and approved by a county board of commissioners before the arrival of each revaluation year. *Id.* § 105-317(b), (c). Any reappraisals must be complete as of the first day of January in a reappraisal year, when the current true value of all real property in a county is set. *Id.* § 105-285(d). These newly set values are carried forward until the next revaluation year unless specified circumstances arise that justify reassessment in an intervening year, such as the need to correct a clerical or mathematical error. *Id.* § 105-287(a).

Although revaluations are required every eight years, a county may elect to increase their frequency. *Id.* § 105-286. The record indicates that Brunswick County conducted revaluations in 1999, 2003, and 2007. For each of these revaluations, Brunswick County developed and approved a schedule of values setting out the methodologies its appraisers could apply. Under one methodology, known as the "sales comparison" or "lot price" method, true value is calculated

using recent sales price data for similarly situated parcels. However, because available sales data predominantly captured the value of developed parcels sold with completed infrastructure, the sales comparison method in its pure form failed accurately to reflect the true value of an undeveloped parcel.

To account for the difference in value between developed and undeveloped parcels, the County approved, and appraisers applied, a "condition factor" to the sales comparison method. The condition factor is an adjustment that allowed appraisers to account for the lower true value of undeveloped property. To derive the true value for an undeveloped parcel, the appraiser would first use the sales comparison method to determine a base value for the parcel. The appraiser would then calculate the condition factor, in the form of a decimal fraction, reflecting the property's degree of development. The base value of the property in question would be multiplied by the condition factor, yielding a lower amount that represented the value of the property in its undeveloped state. The condition factor (shorn of its decimal and treated as a whole number) would be entered on the property's tax card to adjust the value of the parcel to compensate for its undeveloped state. For example, a property without water, sewer, other utilities, or paved roads could be assigned a condition factor of .20, which would be entered on the property's tax card as "20." The sales comparison value of a developed but otherwise similarly situated parcel would be multiplied by .20, yielding a true value for the undeveloped lot of 20% of the base value of comparable developed property. Appraisers generally assigned a condition factor of 20 when vacant property in an area intended for residential use lacked water and sewer services, paved roads or curbing, or other amenities. As infrastructure was added to such property, the condition factor would increase, reflecting the rising true value of the property. This condition factor method had been used in Brunswick County since "at least since 1976" and was applied in a manner consistent with past practices during the 2007 revaluation.

To prepare for the 2007 revaluation, which was completed in February of that year, the County began appraising property eighteen months earlier. The Brunswick County Board of Commissioners also began reviewing the 2007 schedule of values and adopted it in November 2006. This 2007 schedule was compiled after reviewing schedules that had been approved for the revaluation years 1999 and 2003.

Between 2005 and 2006, the number of undeveloped parcels sold in the County rose, increasing the sales data available for assessing

the true value of such parcels. Even so, as in past years, the schedule adopted by the Board contained no details discussing the propriety of applying the condition factor, which was neither required nor prohibited in any particular situation. Instead, the schedule's text only described the numerical format of the condition factor and explained how the factor entered into the calculation of the total adjusted unit price. The schedule's text further stated that "[t]here exists no 'all encompassing' set of rules" to ensure accuracy and that ultimately, the County relies on appraisers' "experience and expertise . . . as well as their personal judgment" when applying the schedule.

During the 2007 revaluation, the appraisal supervisor was Marlon Long, who had worked as an appraiser in the County since 1996. The primary appraiser for vacant parcels, Jim Callahan, had worked as an appraiser for the County for eight or nine years. Both men had used the condition factor method to determine the true value of undeveloped property throughout their employment with the County. Callahan visited the undeveloped lots, observed the degree to which development had progressed, determined the condition factor in a manner consistent with its application in the revaluation years 1999 and 2003, and assigned a condition factor based on his observations. The County tax office was aware that condition factors ranging from 20% to 40% were being applied to unfinished properties and that the 2007 schedule of values was adopted in 2006 with an intention of maintaining consistency with this appraisal practice.

Against this background, we turn now to the property at issue in this action. Callahan appraised each of Ocean Isle's one hundred nine undeveloped parcels. Except for areas designated for common use, he assigned each parcel a condition factor of .20, causing the true values of those properties to be set at 20% of the base values of comparable developed properties. This approach to the appraisal of Ocean Isle's undeveloped lots resulted in the assignment of true values for the 2007 revaluation ranging from $45,000 to $60,000 per parcel.

Following the conclusion of the revaluation, Callahan continued to apply the condition factor in assessments of property value through the remainder of 2007. However, a newly appointed County tax assessor ordered that, effective 1 January 2008, a nonrevaluation year, the condition factor be removed from all tax cards and the value of all undeveloped properties be reset to 100% of their assigned base value. As a result, for the year 2008, Ocean Isle's parcels were reassessed at taxable values ranging from $191,250 to $718,630 per parcel.

Ocean Isle did not challenge the reassessment, but promptly approached the County and, after discussion between the parties, the tax values of the undeveloped parcels were decreased slightly. These values were carried forward for tax years 2009 and 2010. However, in 2010 Ocean Isle disputed the 2010 tax values before the Brunswick County Board of Equalization and Review, arguing that the values were unlawful because they were based on an invalid reassessment. Specifically, Ocean Isle argued that 2008 was not a year in which a general reappraisal was authorized and that the County used improper, arbitrary, and illegal methods while failing to follow the applicable statutes.

The County Board of Equalization and Review heard Ocean Isle's challenge and declined to change the valuations. On 26 July 2010, Ocean Isle appealed the Board's decision to the North Carolina Property Tax Commission ("the Commission"), where it moved for summary judgment, arguing that the 2008 reassessments were not permissible because they did not occur in a designated reappraisal year, in violation of N.C.G.S. §§ 105-286(c) and 105-287(a).[1] The County opposed Ocean Isle's summary judgment motion, arguing that the reassessment was proper under section 105-287(a)(2), which permits reappraisals in off years to "[c]orrect an appraisal error resulting from a misapplication of the schedules, standards, and rules used in the county's most recent general reappraisal." According to the County, application of the condition factor to Ocean Isle's undeveloped lots in 2007 constituted a misapplication of the schedule of values, thereby justifying changing the appraised value of property in a nonreassessment year pursuant to the statute.

On 24 June 2011, the Commission found that the 2007 schedule of values had not been misapplied. As a result, the Commission determined that the 2008 revaluation was unlawful and the values then set had not been carried forward legally in 2009 and 2010. The Commission granted Ocean Isle's summary judgment motion and ordered the County to value the parcels as of 1 January 2010 using the same condition factor adjustment applied for the 2007 revaluation.

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1. When the challenged reassessment took place in 2008, section 105-286(c) addressed the value to be assigned to real property during a year when that property was not subject to reappraisal and provided in pertinent part that "[i]n years in which real property within a county is not subject to appraisal or reappraisal under subsections (a) or (b), above, or under G.S. 105-287, it shall be listed at the value assigned when last appraised under this section or under G.S. 105-287." N.C.G.S. § 105-286(c) (repealed 2009) (codified as amended at N.C.G.S. § 105-287(a)).

The County appealed, arguing among other issues that the Commission erred in granting summary judgment for Ocean Isle because genuine issues of material fact exist as to whether the schedule of values was misapplied in 2007 and whether the 2008 assessment constituted a lawful correction. On 21 February 2012, a divided panel of the Court of Appeals reversed the Commission's order. *In re Ocean Isle Palms*, —— N.C. App. at ——, 723 S.E.2d at 551.

The majority found that a genuine issue of material fact existed as to whether a misapplication of the schedule had occurred under section 105-287(a)(2). *Id.* at ——, 723 S.E.2d at 550. Although the panel unanimously held that application of a condition factor was not itself erroneous, the majority focused on allegations that the factor had not been applied uniformly. *Id.* at ——, 723 S.E.2d at 550. The majority concluded that conflicting evidence had been presented as to whether application of the condition factor in 2007 had resulted in uniform, consistent, and accurate assessments of the true value of the lots. *Id.* at ——, 723 S.E.2d at 550. Accordingly, the majority reversed and remanded the Commission's order for further proceedings to determine whether the procedures used by the County, as established in the schedule of values, had been "applied in a uniform and equitable manner," *id.* at ——, 723 S.E.2d at 551, or whether the procedures had resulted "in lots being valued far below or far above their true values and in a manner inconsistent with the valuation of other lots in the same county," *id.* at ——, 723 S.E.2d at 550-51. The majority concluded that inaccurate and inconsistent application of a condition factor "is a misapplication of the schedule." *Id.* at ——, 723 S.E.2d at 551.

The dissenting judge disagreed. Observing that the County had used the condition factor method for decades and that its application had always required appraisers to use their sound discretion, *id.* at ——, 723 S.E.2d at 551 (Beasley, J., concurring in part and dissenting in part), the dissenting judge stated that she did "not believe there are any genuine issues of material fact regarding whether the County's 2007 Schedule of Values was misapplied" during the 2007 revaluation, *id.* at ——, 723 S.E.2d at 551. Instead, the dissent discerned that the real dispute between the parties was whether the condition factor could be applied at all. *Id.* at ——, 723 S.E.2d at 551. The dissenting judge believed that the County's action in 2008 was not simply a correction of a misapplication of the 2007 schedule of values but instead constituted "a new standard appraisal practice." *Id.* at ——, 723 S.E.2d at 551. Because the implementation of a new standard appraisal prac-

tice is not one of the circumstances listed in section 105.287(a) allowing an off-year change of an appraised value, the dissent would have affirmed the Commission's decision. *Id.* at —, 723 S.E.2d at 551. Ocean Isle filed its notice of appeal based on the dissenting opinion.

Before us, the County argues that summary judgment was improper because genuine issues of material fact exist regarding whether its schedule of values was misapplied in 2007, permitting the 2008 reassessment. Our review of the record indicates that no such disputed issues of fact exist and that summary judgment in favor of Ocean Isle was proper.

The County contends that more information was available by 2008 as to the true value of undeveloped lots because Ocean Isle had sold a number of undeveloped lots between 5 May 2006 and the revaluation date of 1 January 2007, and the revenue stamps on the deeds to those parcels indicated an average price significantly higher than the value for similar parcels derived in the 2007 revaluation. In addition, the County contends that some undeveloped lots in the County located in subdivisions other than Ocean Isle were assessed in 2007 without application of "an undeveloped lot discount," resulting in inconsistent valuations of similar parcels. As a result, the County argues, the condition factor was not uniformly applied and, when applied, did not yield an accurate value. Thus, according to the County, the off-year reassessment of Ocean Isle's property was permissible because it "[c]orrect[ed] an appraisal error resulting from a misapplication of the schedules, standards, and rules used in the county's most recent general reappraisal." N.C.G.S. § 105-287(a)(2).

Although the County attempts to frame its actions in 2008 as the correction of an error, we find that the County instead instituted a new revaluation system. According to the record, shortly after the 2007 revaluation, the County's tax assessor ordered appraisers to stop using the condition factor method of appraisal and to reset the value of the parcels at issue here without any consideration of, or adjustment for, the degree to which the property had been developed. In other words, the County's response to the alleged shortcomings of the 2007 appraisals of Ocean Isle's lots was not to correct the application of the condition factor to reflect new information but to throw out the condition factor altogether. Consequently, the County's reaction to the perceived erroneous revaluations cannot be seen as a mere correction of a methodology used with approval in the past. Instead, the County imposed a revised system of valuation. We must

now consider whether doing so in an off year violated the relevant statutes, a question of law.

Property values are not set in concrete. The statutes allow a county discretion to revise its standards, rules, and schedules to ensure that appraisals conducted in revaluation years reflect the true value of real property in light of changing conditions or available data. Here, if the County did not want the condition factor method to remain in use in 2007, its remedy was to revise the schedule of values for that revaluation year to reflect a change from its previously approved approach to undeveloped property appraisal. However, when no such timely change was made, the County may not retroactively label as error an historically approved methodology endorsed by the schedule.

The County also argues that the 2007 revaluation involved a correctable error because the condition factor, though applied to Ocean Isle's parcels, was not applied to all undeveloped properties in the County, resulting in a lack of uniformity. However, this argument does not affect the valuation of Ocean Isle's property, where the only question presented was whether appraisers could apply the condition factor at all. The Court of Appeals unanimously found no error in the County's decision to allow appraisers to use their discretion to decide whether or not to apply the condition factor during the 2007 revaluation, as had been done with the County's approval in past revaluations. Accordingly, if the County seeks to limit appraisers' use of their discretion in future revaluations, it may do so only prospectively.

Based on the record, we find that no misapplication of Brunswick County's schedule of values occurred during the 2007 revaluation. Consequently, the reassessment conducted in the nonreappraisal year 2008 violated section 105-287(a)(2), and the alteration of the taxable value of Ocean Isle's property under the 2008 reassessment was unlawful. Therefore, the Commission properly granted summary judgment in favor of Ocean Isle. We reverse the decision of the Court of Appeals.

REVERSED.

Justices HUDSON and BEASLEY did not participate in the consideration or decision of this case.

MARK W. WHITE v. ROBERT J. TREW

No. 33PA12

(Filed 25 January 2013)

Immunity— sovereign immunity—libel—ambiguous complaint—suit in official or individual capacity

The trial court erred in a libel action by denying defendant's motion to dismiss plaintiff's claim because the complaint indicated that plaintiff filed suit against defendant in his official, rather than individual capacity, and thus, sovereign immunity barred plaintiff's claim. When a complaint does not specify the capacity in which a public official is being sued for actions taken in the course and scope of his employment, the court will presume that the public official is being sued only in his official capacity.

On discretionary review pursuant to N.C.G.S. ' 7A 31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 720 S.E.2d 713 (2011), affirming an order denying defendant's motion to dismiss entered on 22 December 2010 by Judge W. Osmond Smith, III in Superior Court, Wake County. Heard in the Supreme Court on 16 October 2012.

Stevens Martin Vaughn & Tadych, PLLC, by C. Amanda Martin; and Everett Gaskins Hancock LLP, by James M. Hash, for plaintiff-appellee.

Roy Cooper, Attorney General, by Thomas J. Ziko, Senior Deputy Attorney General, and Brian R. Berman, Assistant Attorney General, for defendant-appellant.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by C. Matthew Keen, for North Carolina Associated Industries, Inc., amicus curiae.

JACKSON, Justice.

In this appeal we consider whether sovereign immunity bars a libel suit by a tenured public university professor against his department head for an unfavorable annual review when the complaint does not specify whether the department head is being sued in his official or individual capacity. We hold that when the complaint does not specify the capacity in which a public official is being sued for actions taken in the course and scope of his employment, we will pre-

sume that the public official is being sued only in his official capacity. Accordingly, we reverse the decision of the Court of Appeals.

During the 2006-2007 academic year, defendant Robert J. Trew was head of the Department of Electrical and Computer Engineering at North Carolina State University ("N.C. State"). Plaintiff Mark W. White was a tenured associate professor in the department. At that time N.C. State required that every faculty member receive an annual review. N.C. State, Reg. 05.20.3(1) (2005). Specifically, the University's regulation stated: "It is the responsibility of each department head to review the performance of each faculty member and to keep the appropriate dean apprised of the status of the reviews." *Id.* The regulation further provided that when writing the annual review, the department head "may consult with the tenured faculty of the department and may seek such other advice as the department head deems appropriate in the conduct of the review." *Id.* 05.20.3(2.3) (2005). The regulation also stated: "The department head will provide a written summary of the review and the faculty member may provide a written response. The written summary and any response will become part of the personnel file." *Id.* 05.20.3(2.4) (2005). Once it became part of the personnel file, this information was "open for inspection and examination" by "any individual in the chain of administrative authority above" the faculty member. 25 NCAC 1C .0304(d) (June 2008); *see also* N.C.G.S. § 126-24 (2011).

In accordance with N.C. State's regulations, defendant, in his role as department head, wrote an annual review of plaintiff for the 2006-2007 academic year. In the annual review defendant concluded that plaintiff did not meet the department's expectations and had "engaged in extremely disruptive behavior and conduct." Defendant also listed "[s]pecific instances of unprofessional behavior" by plaintiff. Defendant shared the annual review with College of Engineering Dean Louis Martin-Vega and N.C. State's in-house counsel.

On 17 September 2007, plaintiff received a copy of the annual review. In response, plaintiff sent a "rebuttal letter" to Dean Martin-Vega, demanding that the dean correct alleged "falsities" in the annual review. Dean Martin-Vega took no action. As a result, on 14 November 2007, plaintiff filed a university grievance petition pursuant to section 126-25 of the North Carolina General Statutes, alleging that defendant had made "highly inaccurate and misleading" statements in the annual review and demanding that the review be corrected or removed from plaintiff's personnel file.

Subsequently, on 11 September 2008, while the grievance process was on hold, plaintiff filed a complaint in Superior Court, Wake County, alleging that the annual review "contained numerous false and defamatory statements." Plaintiff alleged that these "statements ha[d] been published and made available to faculty and administrators at NCSU." Plaintiff further alleged that "defendant's false accusations about the plaintiff . . . were willful, unjustified and malicious, and were motivated by personal hatred, spite or ill-will vis-à-vis the plaintiff." On 13 October 2008, defendant filed an answer and motion to dismiss pursuant to various provisions of Rule 12(b) of the North Carolina Rules of Civil Procedure. Defendant denied the material allegations of the complaint and asserted a number of defenses, including qualified privilege and sovereign immunity. After a hearing the trial court denied defendant's motion to dismiss on 22 December 2010.

Defendant appealed to the Court of Appeals, which unanimously affirmed the trial court's order denying defendant's motion to dismiss. *White v. Trew*, ___ N.C. App. ___, ___, 720 S.E.2d 713, 720 (2011). The court concluded that sovereign immunity did not bar plaintiff's claim because "plaintiff sought to sue defendant in his individual capacity and drafted the complaint in such a way that clearly indicated this intent." *Id.* at ___, 720 S.E.2d at 718. The court also held that "giving the review to the Dean and the staff of the office of general counsel constitute[d] publication for the purposes of libel." *Id.* at ___, 720 S.E.2d at 720. We allowed defendant's petition for discretionary review.

Defendant argues that the trial court erred by denying his motion to dismiss because the complaint indicates that plaintiff filed suit against defendant in his official, rather than individual, capacity, and thus, sovereign immunity bars plaintiff's claim. Previously we have not set forth the appropriate standard of review for a trial court's denial of a motion to dismiss that raises sovereign immunity as grounds for dismissal; however, we have reviewed de novo a trial court's denial of other Rule 12 motions to dismiss that also were immediately appealable. *See Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007). Moreover, although not explicitly stated previously, it is apparent that we have employed a de novo standard of review in other cases involving sovereign immunity. *See, e.g.*, *Meyer v. Walls*, 347 N.C. 97, 104-14, 489 S.E.2d 880, 883-90 (1997); *Harwood v. Johnson*, 326 N.C. 231, 237-38, 388 S.E.2d 439, 442-43

(1990). Therefore, we review the trial court's denial of defendant's motion to dismiss de novo.

It is well settled that pursuant to "the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity." *Meyer*, 347 N.C. at 104, 489 S.E.2d at 884. The North Carolina Torts Claims Act provides a limited waiver of immunity and authorizes recovery against the State for negligent acts of its "officer[s], employee[s], involuntary servant[s] or agent[s]." N.C.G.S. § 143-291(a) (2011). But intentional acts of these individuals are not compensable. *Collins v. N.C. Parole Comm'n*, 344 N.C. 179, 183, 473 S.E.2d 1, 3 (1996) (citing *Jenkins v. N.C. Dep't of Motor Vehicles*, 244 N.C. 560, 94 S.E.2d 577 (1956)). A suit against a public official in his official capacity "is a suit against the State." *Harwood*, 326 N.C. at 238, 388 S.E.2d at 443. Therefore, sovereign immunity bars an intentional tort claim against a public official in his official capacity. *See id.*

In the case *sub judice* defendant, as head of the Department of Electrical and Computer Engineering at N.C. State, a public university position that certainly requires "deliberation, decision and judgment," falls within the definition of a public official. *Meyer*, 347 N.C. at 113, 489 S.E.2d at 889 (quotation marks omitted) (distinguishing a public official who "exercise[s] a certain amount of discretion" from an employee who "perform[s] ministerial duties" (quotation marks omitted)). Plaintiff is suing defendant for libel, an intentional tort. *See Dobson v. Harris*, 352 N.C. 77, 87, 530 S.E.2d 829, 837 (2000) (stating that in a defamation action, "the [defendant]'s state of mind, motive, or subjective intent is an element of [the] plaintiff's claim"). Therefore, plaintiff's claim is barred by sovereign immunity if it is one against defendant in his official capacity.

In *Mullis v. Sechrest*, 347 N.C. 548, 495 S.E.2d 721 (1998), we considered whether the "defendant Sechrest [wa]s being sued in his official capacity, individual capacity, or both" when both the initial and amended complaints "failed to specify in the caption whether [the] plaintiffs were suing [the] defendant Sechrest in his individual or official capacity." *Id.* at 551, 495 S.E.2d at 723. Ultimately, we concluded that "[t]aken as a whole, the amended complaint, along with the course of proceedings . . . indicate[d] an intent by [the] plaintiffs to sue [the] defendant Sechrest in his official capacity." *Id.* at 554, 495 S.E.2d at 725. We recognized that North Carolina is a notice pleading state and observed that "in order for [the] defendant Sechrest to have [had] an opportunity to prepare a proper defense, the pleading should

have clearly stated the capacity in which he was being sued." *Id.* at 554, 495 S.E.2d at 724. We added:

> It is a simple matter for attorneys to clarify the capacity in which a defendant is being sued. Pleadings should indicate in the caption the capacity in which a plaintiff intends to hold a defendant liable. For example, including the words "in his official capacity" or "in his individual capacity" after a defendant's name obviously clarifies the defendant's status. In addition, the allegations as to the extent of liability claimed should provide further evidence of capacity. Finally, in the prayer for relief, plaintiffs should indicate whether they seek to recover damages from the defendant individually or as an agent of the governmental entity. These simple steps will allow future litigants to avoid problems such as the one presented to us by this appeal.

Id. at 554, 495 S.E.2d at 724-25. Given the rationale underlying this language—namely, affording the defendant proper notice to prepare a defense—and our goal of avoiding similar uncertainty for future litigants, we conclude that *Mullis*'s directive is mandatory, rather than precatory. Therefore, we further conclude that if such clarity is lacking, we must presume that the defendant is being sued only in his official capacity. See id. at 552, 495 S.E.2d at 723; *see also Warren v. Guilford Cnty.*, 129 N.C. App. 836, 839, 500 S.E.2d 470, 472, *disc. rev. denied*, 349 N.C. 241, 516 S.E.2d 610 (1998).

In this case the complaint does not specify whether plaintiff is suing defendant in his individual or official capacity. The caption does not include the words "in his official capacity" or "in his individual capacity," nor do the allegations "provide further evidence of capacity." *Mullis*, 347 N.C. at 554, 495 S.E.2d at 724-25. In addition, plaintiff does not indicate in the prayer for relief whether he "seek[s] to recover damages from . . . defendant individually or as an agent of the governmental entity." *Id.* at 554, 495 S.E.2d at 725. Instead, the caption and prayer for relief merely name "ROBERT J. TREW, Defendant" and "Dr. Trew," respectively. Furthermore, the allegations detail actions taken by defendant in his capacity as department head and make no mention of "individual capacity." Because the indicia of capacity mandated by *Mullis* are absent from the caption, allegations, and prayer for relief, we must presume that defendant is being sued in only his official capacity. Consequently, plaintiff's claim is barred by sovereign immunity.

Even if defendant had been sued in his individual capacity, we note that deference must be paid to the statutory scheme that the General Assembly has put in place regarding state employees and the documents pertaining to their employment. The General Statutes mandate that each department of the State—including public universities—"shall maintain a record of each of its employees." N.C.G.S. § 126-23 (2011). These records are accessible to employee supervisors, and department heads may, in their discretion, allow others to read the records if doing so "is essential to maintaining the integrity of such department or to maintaining the level or quality of services provided by such department." N.C.G.S. § 126-24. It is clear that section 126-24 contemplates the circumstances when a department, or in this case a university, may release otherwise confidential information to the public in order to "maintain[ ] the integrity of such department or to maintain[ ] the level or quality of services provided by such department." *Id.* However, that is not the situation we confront in this case. Instead, the question presented is whether one individual in the employee's direct chain of command—the dean of the College of Engineering—may review plaintiff's performance review and whether the University's in-house counsel may be involved in the review as well

According to these statutory provisions, as well as the regulatory provisions discussed earlier, defendant, in his capacity as department head, was required to write and maintain a public record of plaintiff's official status at N.C. State. *See* N.C.G.S. § 126-23; N.C. State, Reg. 05.20.3(1). The dean of the College of Engineering had a clear statutory right to review the full contents of that record pursuant to section 126-24(2) and 25 NCAC 1C .0304(d), as well as a mandate to do so according to N.C. State, Reg. 05.20.3(1). In addition, we cannot say that it was unreasonable for defendant to seek guidance from the University's in-house counsel given the contentious nature of his relationship with plaintiff. In fact, were we to follow plaintiff's line of reasoning, supervisors in state government effectively would be prohibited from seeking legal counsel in preparing performance reviews for state employees without fear of being subjected to a lawsuit for seeking such counsel. This result is untenable.

Clearly, requiring defendant to keep information of plaintiff's allegedly hostile and aggressive workplace behavior to himself is contrary to the General Assembly's statutory and the regulatory directives that flow therefrom. It cannot be the case that, when state employees have statutory rights and obligations regarding the main-

tenance of employee records, communication in conformity with those rights and obligations constitutes publication for a libel suit.

As we have determined that plaintiff's claim is barred by sovereign immunity, we reverse the decision of the Court of Appeals.

REVERSED.

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

Justice EDMUNDS dissenting.

As the majority acknowledges, this Court has never before required that a complaint designate whether a defendant is being sued as an individual or in his or her official capacity. *See*, *e.g.*, *Meyer v. Walls*, 347 N.C. 97, 110-11, 489 S.E.2d 880, 887-88 (1997) (allegations in complaint reviewed to determine capacity in which a defendant is sued). While I agree that the best practice is for a complaint to be specific on that point, the Court today mandates what it only suggested yesterday. *See Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 724-25 (1998) (advising, but not requiring, that a complaint state the capacity in which a defendant is being sued).

In light of our deferential review of complaints under notice pleading, *see*, *e.g.*, *Embree Constr. Grp., Inc. v. Rafcor, Inc.*, 330 N.C. 487, 491, 411 S.E.2d 916, 920 (1992), I believe the complaint provided adequate notice that defendant was being sued in his individual capacity. For instance, the complaint states that "[t]his is an action against a natural person." Thus, when drafted, filed, and served, this complaint met every pleading requirement set out in the North Carolina Rules of Civil Procedure and in our cases. Although plaintiff acknowledges that his burden of proof in a libel action is high, I believe he should have the opportunity to make his case. If this Court chooses to impose an additional pleading requirement in future cases of this type, so be it. But I do not believe that plaintiff should lose his day in court because he was unable to predict what the majority would hold. I respectfully dissent.

Justice HUDSON joins in this dissenting opinion.

MARQUES COLE JONES v. NIAH DRAKE WHIMPER

No. 89A12

(Filed 25 January 2013)

1. Child Custody and Support— jurisdiction—Parental Kidnapping Prevention Act—Uniform Child Custody Jurisdiction and Enforcement Act

"[S]ubstantial compliance" with the federal Parental Kidnapping Prevention Act and the Uniform Child Custody Jurisdiction and Enforcement Act as enacted in this state requires our courts to determine whether the foreign state has substantially the same type of jurisdiction that we have.

2. Child Custody and Support— communications between courts—Parental Kidnapping Prevention Act—Uniform Child Custody Jurisdiction and Enforcement Act

N.C.G.S. § 50A-110 applies to all communications between courts attempting to determine jurisdiction in custody cases involving the Parental Kidnapping Prevention Act and the Uniform Child Custody Jurisdiction and Enforcement Act.

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. ——, 727 S.E.2d 700 (2012), affirming an order declining jurisdiction entered on 21 February 2011 by Judge P. Gwynett Hilburn in District Court, Pitt County. Heard in the Supreme Court on 5 September 2012.

Bishop & Smith, PLLC, by Keith A. Bishop, for plaintiff-appellant.

W. Gregory Duke for defendant-appellee.

PER CURIAM.

[1] The holding of the majority opinion of the Court of Appeals is affirmed; however, to the extent that the majority opinion has construed the federal Parental Kidnapping Prevention Act ("PKPA") and the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA") as enacted in this state as requiring a threshold of "substantial compliance" with these statutes, the majority opinion is vacated. Instead, "substantial compliance" as set forth in our General Statutes requires our courts to determine whether the foreign state has substantially the same type of jurisdiction that we have. N.C.G.S.

§ 50A-206(b) (2011). As the Court of Appeals properly noted, but misapprehended, "[i]f the court of the state having jurisdiction substantially in accordance with [the UCCJEA] does not determine that the court of this State is a more appropriate forum, the court of this State shall dismiss the proceeding." *Id.* Therefore, the subsection 50A-206(b) determination is limited to whether the court of the state having jurisdiction has the same type of jurisdiction that North Carolina has, not whether "the statutory prerequisites for determining child custody jurisdiction were substantially complied with in" a given case. *Jones v. Whimper*, —— N.C. App. ——, ——, 727 S.E.2d 700, 704 (2012).

[2] In addition, that portion of the Court of Appeals' opinion that holds that section 50A-110 of the General Statutes only applies to discretionary communications is vacated. We hold that section 50A-110 applies to *all* communications between courts attempting to determine jurisdiction in these circumstances. We find support in the official commentary to the section, which states that "[t]his section emphasizes the role of judicial communications. It authorizes a court to communicate concerning *any proceeding arising under this Act*." N.C.G.S. § 50A-110 official cmt. (2011) (emphasis added); *see Parsons v. Jefferson-Pilot Corp.*, 333 N.C. 420, 425, 426 S.E.2d 685, 689 (1993) (noting that "the commentary to a statutory provision can be helpful in some cases in discerning legislative intent" and that while not binding "could be given substantial weight in our efforts to discern legislative intent"). The commentary goes on to mention section 206 specifically, stating that "[c]ommunications between courts is required under Sections 204, 206, and 306, and is strongly suggested in applying Section 207." N.C.G.S. § 50A-110 official cmt.

Ultimately, North Carolina does not have jurisdiction here. As the New Jersey court declined to cede jurisdiction to North Carolina, the case remained in New Jersey. We therefore affirm the Court of Appeals' affirmation of the trial court's order declining to exercise jurisdiction. As such, remand would serve no purpose.

MODIFIED AND AFFIRMED.

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

TOPP v. BIG ROCK FOUND., INC.

[366 N.C. 369 (2012)]

MICHAEL TOPP, DUNCAN THOMASSON, MARTIN KOOYMAN, AND BLACK PEARL ENTERPRISES, LLC v. BIG ROCK FOUNDATION, INC.; CRYSTAL COAST TOURNAMENT, INC.; CARNIVORE CHARTERS, LLC; EDWARD PETRILLI; JAMIE WILLIAMS; TONY R. ROSS; AND JOHN DOE

No. 279A12

(Filed 25 January 2013)

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. ——, 726 S.E.2d 884 (2012), affirming an order transferring venue entered on 27 August 2010 by Judge J. Carlton Cole in Superior Court, Dare County, and an order granting summary judgment entered on 14 March 2011 by Judge John E. Nobles, Jr. in Superior Court, Carteret County. On 23 August 2012, the Supreme Court allowed plaintiffs' petition for discretionary review of additional issues. Heard in the Supreme Court on 8 January 2013.

Gay, Jackson & McNally, L.L.P., by Andy W. Gay and Darren G. Jackson, for plaintiff-appellants.

Ward and Smith, P.A., by E. Bradley Evans, for defendant-appellees Big Rock Foundation, Inc. and Crystal Coast Tournament, Inc.

Wheatly, Wheatly, Weeks, Lupton & Massie, P.A., by Claud R. Wheatly, III and Chadwick I. McCullen, for defendant-appellees Carnivore Charters, LLC, Edward Petrilli, Jamie Williams, and Tony R. Ross.

PER CURIAM.

For the reasons stated in the dissenting opinion, 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, Carteret County for additional proceedings not inconsistent with this opinion. Discretionary review was improvidently allowed as to the additional issues.

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

WALTER SUTTON BAYSDEN v. STATE OF NORTH CAROLINA

No. 522A11

(Filed 25 January 2013)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 217 N.C. App. 20, 718 S.E.2d 699 (2011), reversing a judgment entered on 11 February 2011 by Judge Lucy N. Inman in Superior Court, Wake County, and remanding for entry of summary judgment in favor of plaintiff. On 26 January 2012, the Supreme Court allowed plaintiff's petition for discretionary review. Heard in the Supreme Court on 8 May 2012.

Dan L. Hardway Law Office, by Dan L. Hardway, for plaintiff-appellee/appellant.

Roy Cooper, Attorney General, by John J. Aldridge, III, Special Deputy Attorney General, for defendant-appellant/appellee.

PER CURIAM.

Justice BEASLEY took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See, e.g., Goldston v. State*, 364 N.C. 416, 700 S.E.2d 223 (2010); *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.

MICRO CAPITAL INVESTORS, INC. v. BROYHILL FURNITURE INDUSTRIES, INC.

No. 294A12

(Filed 25 January 2013)

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. ——, 728 S.E.2d 376 (2012), affirming an order denying plaintiff's motion to amend complaint entered on 24 January 2011 by Judge Yvonne Mims Evans and an order granting summary judgment for defendant entered on 28 January 2011 by Judge Edgar B. Gregory, both in Superior Court, Caldwell County. Heard in the Supreme Court on 8 January 2013.

James, McElroy & Diehl, P.A., by John Parke Davis, Preston O. Odom, III, and Richard B. Fennell, for plaintiff-appellant.

Kilpatrick Townsend & Stockton LLP, by Susan Holdsclaw Boyles, Dustin T. Greene, and Katherine A. McCurry, for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. MARK BRADLEY CARVER

No. 301A12

(Filed 25 January 2013)

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. ——, 725 S.E.2d 902 (2012), finding no error in defendant's trial resulting in a judgment imposing a sentence of life imprisonment without parole entered on 18 March 2011 by Judge Timothy S. Kincaid in Superior Court, Gaston County, upon a jury verdict finding defendant guilty of first degree murder. Heard in the Supreme Court on 8 January 2013.

Roy Cooper, *Attorney General*, *by Danielle Marquis Elder*, *Special Deputy Attorney General*, *for the State.*

M. Gordon Widenhouse, *Jr. for defendant-appellant.*

PER CURIAM.

AFFIRMED.

STATE v. HUNTER

[366 N.C. 373 (2012)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Mecklenburg County
	)	
DRELLCO LAMONT HUNTER	)	

No. 518P07-2

ORDER

Defendant's request for expedited consideration of his petition for certiorari is allowed. Defendant's petition for certiorari is dismissed.

By order of the Court in Conference, this 5th day of September, 2012.

s/Hudson, J.
For the Court

Jackson, J., Recused

STATE v. HURST

[366 N.C. 119 (2012)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Bumcombe County
	)	
LATARA DESHEA HURST	)	

No. 430P11

ORDER

The defendant's petition for writ of certiorari in this matter is allowed for the limited purpose of remanding to the Court of Appeals for consideration of the merits of defendant's appeal. The petition for discretionary review filed by the defendant is dismissed as moot.

By Order of this Court in Conference, this 5th day of October, 2012.

s/Hudson, J.
For the Court

STATE v. VAUGHN

[366 N.C. 375 (2012)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Wake County
	)	
LATARA DESHEA HURST	)	

No. 237P12

ORDER

The State's petition for discretionary review in this matter is allowed for the limited purpose of remanding to the Court of Appeals for reconsideration in light of this Court's decision in *State v. Oates* (No. 397PA11, filed 5 October 2012). The stay of the mandate entered 4 June 2012 in this appeal is dissolved, and the writ of supersedeas filed by the State is denied.

By Order of this Court in Conference, this 5th day of October, 2012.

s/Hudson, J.
For the Court

INLAND HARBOR HOMEOWNERS ASSOCIATION, INC.	)	
v.	)	
ST. JOSEPHS MARINA, LLC, RENAISSANCE HOLDINGS, LLC, ST JOSEPHS PARTNERS, LLC DEWITT REAL ESTATE SERVICES, INC., DENNIS BARBOUR, RANDY GAINEY, THOMAS A. SAIEED, JR., TODD A. SAIEED, ROBERT D. JONES, and THE NORTH CAROLINA COASTAL RESOURCES COMMISSION	)	
v.	)	From New Hanover County
LATARA DESHEA HURST	)	

No. 156PA12-2

ORDER

It appearing that the Court of Appeals has not addressed the issue, briefed by plaintiff and defendants on appeal, of whether:

> The Trial Court erred in denying appellant's [plaintiff's] motion for summary judgment on appellant's claim for judicial reformation of the deed, and in granting appellee's motion on the same issue;

And it further appearing that in its PDR, plaintiff has restated the issue (Issue 3) to be briefed as follows:

> Whether genuine issues of material fact exist precluding summary judgment for Appellee-Respondents on Plaintiff-Petitioner's . . . deed reformation claim.

Plaintiff's Petition for Discretionary Review is ALLOWED for the limited purpose of remanding to that court to address the issue. Defendant's Conditional Petition for Discretionary Review is DISMISSED as moot.

By order of this Court in Conference, this 12th day of December, 2012.

s/Hudson, J.
For the Court

STATE v. RICHARDSON

[366 N.C. 377 (2012)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Mecklenburg County
	)	
RODERICK TYNELL RICHARDSON	)	

No. 402A12

ORDER

Upon consideration of the Notice of Appeal Based Upon a Constitutional Question filed by defendant on the 21st day of September 2012, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"The Court allows the Defendant's Notice of Appeal for the limited purpose of remanding to the Court of Appeals for reconsideration in light of our decision in State v. Moore, 366 N.C. 100, 726 S.E.2d 168 (2012). By order of the Court in conference, this the 12th day of December 2012."

Upon consideration of the Motion by the State of North Carolina to Dismiss Defendant's Notice of Appeal filed on the 3rd day of October 2012, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Dismissed as Moot by order of the Court in conference, this the 12th day of December 2012."

By order of the Court in Conference, this 12th day of December 2012.

s/Jackson, J.
For the Court

MONTY S. POARCH	)	
	)	
v.	)	From Wake County
	)	
N.C. DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY; NORTH CAROLINA HIGHWAY PATROL	)	

No. 476P12

ORDER

The motion titled "Motion For Leave To File An Amicus Curiae Brief By The National Troopers Coalition And The North Carolina Troopers Association In Support Of The Motion For Discretionary Review By Trooper Monty Poarch," filed 26 November 2012, is dismissed without prejudice to the movants' right to file a motion for leave to file an amicus curiae brief if the Court allows discretionary review in the underlying matter.

By order of the Court in Conference, this 12th day of December, 2012.

s/Timmons-Goodson, J.
For the Court

THE NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY	)	
v.	)	From Wilson County
CULLY'S MOTORCROSS PARK, INC. and LAURIE VOLPE	)	

No. 243P12

ORDER

The motion titled "Motion of the North Carolina Association of Defense Attorneys to File Amicus Curiae Brief," filed 15 June 2012, is dismissed without prejudice to the movants' right to file a motion for leave to file an amicus curiae brief if the Court allows discretionary review in the underlying matter.

By order of the Court in Conference, this 12th day of December, 2012.

s/Jackson, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Mecklenburg County
	)	
JOSEPH ALAN LAMBERT	)	

No. 426P12

ORDER

Defendant's petition for certiorari is allowed for the limited purpose of remanding this matter to the Court of Appeals for consideration of the merits of defendant's appeal from the final judgment of the trial court.

By order of the Court in Conference, this 12th day of December, 2012.

s/Jackson, J.
For the Court

STATE v. THOMPSON

[366 N.C. 381 (2012)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Guilford County
	)	
JOHN HENRY THOMPSON	)	

No. 142A03-2

ORDER

The defendant's petition for writ of certiorari in this matter is denied without prejudice to pursue his claim previously filed under the Racial Justice Act:

"Spec Order by order of this Court in Conference, this 12th day of December, 2012.

s/Newby, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Onslow County
	)	
BRYAN CHRISTOPHER BELL	)	

No. 86A02-2

ORDER

Defendant's Motion to Hold In Abeyance The Time In Which to File Petition For Writ of Certiorari is allowed. Defendant shall have sixty days from the time of the final ruling by the superior court on his Motion for Appropriate Relief (including defendant's claims made pursuant to the Racial Justice Act) within which to file and serve his Petition for Writ of Certiorari.

By order of the Court in Conference, this 24th day of January, 2013.

s/Beasley, J.
For the Court

STATE v. LAND

[366 N.C. 383 (2012)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Mecklenburg County
	)	
ROBIN EUGENE LAND	)	

No. 510A12

ORDER

The defendant's petition for discretionary review as to additional issues in this matter is allowed only as to the following issue: whether the Court of Appeals imposed a standard of review that is inconsistent with the standard set out in *Strickland v. Washington*. The remaining issues are denied.

By Order of this Court, this 24th day of January, 2013.

s/Beasley, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Craven County
	)	
MATTHEW VERNON RAWLS	)	

No. 502P12

ORDER

The defendant's *pro se* petition for writ of habeas corpus in this matter is allowed for the limited purpose of remanding to the Superior Court of Craven County, to conduct a habeas corpus proceeding within ten days of the date of this order. The defendant's *pro se* motion to proceed i*n forma pauperis* is allowed.

By Order of this Court, this 11th day of January, 2013.

s/Beasley, J.
For the Court

STATE v. RYAN

[366 N.C. 385 (2012)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Gaston County
	)	
MICHAEL PATRICK RYAN	)	

No. 366A10

ORDER

The defendant's motion for appropriate relief is remanded to the Superior Court, Gaston County, to hold an evidentiary hearing on defendant's motion for appropriate relief filed 21 December 2012.

The stay of appellate proceedings entered 9 September 2010 continues in effect.

By Order of this Court, this 24th day of January, 2013.

s/Beasley, J.
For the Court

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

4 OCTOBER 2012

024PA12	Dewey D. Mehaffey, Employee v. Burger King, Employer Liberty Mutual Group, Carrier	Def'-Appellees' Motion to Deem Brief Timely Filed	Allowed
033PA12	Mark W. White v. Robert J. Trew	Def's Motion for Leave to File Reply Brief	Allowed **09/27/12**
052P01-3	State v. Matthew James Rogers	Def's *Pro Se* PWC to Review Order of COA (COAP12-702)	Dismissed
061PA12	State v. Traven Marquette Lee	Def's Motion for Leave to File Reply Brief	Allowed **09/25/12**
104P11-2	State v. Titus Batts	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **09/12/12**
133P12	Town of Nags Head v. Cherry, Inc.	1. Plt's NOA Based Upon a Constitutional Question (COA11-931) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Amend PDR	1. Dismissed *ex Mero Motu* 2. Denied 3. Allowed
141P10	State v. Kerry McKinley Hough	1. Def's NOA Based Upon a Constitutional Question (COA09-790) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss 4. Def's Motion to Ame)nd NOA & PDR	1.- - - 2. Allowed 3. Allowed 4. Allowed **Jackson, J., Recused**

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

4 OCTOBER 2012

143P12	Fairway Forest Townhouses Association, Inc., a North Carolina Nonprofit Corporation; Vince Zarzaca, Burton Bloom, Frank Walker, and Larry Morgan, Each Individually and as Members of the Board of Directors of Fairway Forest Townhouses v. Fairfield Sapphire Valley Master Association, Inc., a North Carolina Nonprofit Corporation	Plts' PDR Under N.C.G.S. § 7A-31 (COA11-942)	Denied
154P12	Della Mae Wright and Phillip Emanuel Wright, Jr. v. Gary Oakley and Nina Oakley	Plt's (Della Mae Wright) Pro Se PDR Under N.C.G.S. § 7A-31 (COA11-426)	Denied
164P12	Theodore H. Gasper, Jr. v. The Board of Trustees of Halifax Community College, Frank V. Avent, III, in his official and individual capacity, Rachel K. Hux, in her official and individual capacity, Roger W. Dalton, in his official and individual capacity, William A. Pierce, III, in his official and individual capacity, Cary Whitaker, in his official and individual capacity, William O. White, Jr., in his official and individual capacity, Barry Wilson, in his official and individual capacity, and Leslie W. Merritt, Jr., in his official and individual capacity	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-675)	Denied

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

4 OCTOBER 2012

176P11-3	State v. Floyd Calvin Cody	1. Def's *Pro Se* Motion for New Trial for Newly Discovered Evidence 2. Def's *Pro Se* Motion and Motion Inquiry about Time Limitations for 28 USC § 2254 3. Def's *Pro Se* Motion for Petition and Request for Discovery Materials	1. Dismissed 2. Dismissed 3. Dismissed
192P12	Robert S. Clements v. Donna G. Clements, by and through Lawrence S. Craige and LaVaughn Nesmith, Director of the New Hanover County Department of Social Services	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1323)	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 5. Def's Motion to Deem Response in Opposition to the State's PDR Timely Filed	1. Allowed **05/21/10**; Dissolved the Stay **10/04/12** 2. Denied 3. Dismissed *Ex Mero Motu* 4. Denied 5. Allowed
234P12-2	State v. Titus Lamont Batts	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **09/12/12**
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 5. Def's Motion to Dismiss Appeal	1. Allowed **06/04/10** 2. Allowed 3. - - - 4. Allowed 5. Allowed

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

4 OCTOBER 2012

235P12	Philip Samuel Beeson v. Frank Palombo, Sandra Catherine McKenzie, and The City of New Bern	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-1324)	Denied
237P12	State v. Kenneth Wayne Vaughn	1. State's Motion for Temporary Stay (COA11-751) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/04/12**; Special Order **10/04/12** 2. Special Order 3. Special Order
241P12	State v. Ransom Martin Jones	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1330)	Denied
255P12	State v. Allard Bayles Brigman	1. Def's *Pro Se* PWC to Review Decision of COA (COA11-1174) 2. Def's *Pro Se* Motion to Withdraw PWC	1. - - - 2. Allowed
258P12	Catherine Marks v. R. Harrison Marks	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-1183)	Denied
268A12	State of North Carolina *Ex. Rel.* Utilities Commission; Duke Energy Carolinas, LLC, Utilities Commission, Intervenor v. Attorney General Roy Cooper, Intervenor and the City of Durham, North Carolina, Intervenor	1. Motion of Julie Nepreu to Appear *Pro Hac Vice* 2. AARP's Motion to Leave to File *Amicus* Brief	1. Allowed **08/23/12** 2. Allowed **08/23/12**

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

4 OCTOBER 2012

275P11	State v. Dewan Kenneth Brent	1. State's Motion for Temporary Stay (COA10-989) 2. State's Petition for Writ of Supersedeas 3. State's NOA Based Upon a Constitutional Question 4. State's Petition in the Alternative for Discretionary Review	1. Allowed 07/06/11 2. Allowed 3. Dismissed Ex Mero Motu 4. Allowed
282P12	State v. Tavieolis Eugene Hunt	1. Def' NOA Based Upon a Constitutional Question (COA11-1223) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
290P12	State v. Yajaira Libietana Joa	1. Def's Pro Se Motion for Temporary Stay (COA11-1573) 2. Def's *Pro Se* Petition for *Writ of Supersedeas*	1. Denied **07/09/12** 2. Denied
298PA09-2	State v. Andrew Chandler, Jr. a/k/a Junior Chandler	1. Def's PWC to Review Order of Superior Court of Buncombe County 2. Def's Motion to Amend PWC 3. State's Motion to Deem State's Response to Petitioner's Motion to Amend his PWC Timely Filed	1.Denied 2. Allowed 3. Allowed
298P12	State v. Tavaris Kinte Woresly	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1036)	Denied
301A12	State v. Mark Bradley Carver	Def's Motion to Deem Brief Timely Filed	Allowed **09/14/12**
308P06-2	State v. Christopher Lamont Bullock	Def's *Pro Se* Motion for Petition for Plain Error Review	Dismissed

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

4 OCTOBER 2012

311P12	State v. Ruby Rodriguez Lopez	1. Def-Appellant's NOA Under G.S. 7A-30 (COA11-722) 2. Def-Appellant's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
314P12	In the Matter of: Randy Alan Carpenter, License No. PE 021262 and PLS L-3814	1. Petitioner's NOA Based Upon a Constitutional Question (COA11-1459) 2. Petitioner's PDR Under N.C.G.S. § 7A-31 3. Respondent's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
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 7. Def's Motion to Amend Response to State's PDR	1. Allowed **08/05/10** 2. Allowed 3. - - - 4. Allowed 5. Allowed 6. Denied 7. Allowed
323A12	State v. Eddie Ray Loftin	1. Def's NOA Based Upon a Constitutional Question (COA12-154) 2. State's Motion to Dismiss Appeal	1. - - - 2. Allowed

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

4 OCTOBER 2012

325P12	State v. Lamont Kasheen Friend	1. State's Motion for Temporary Stay (COA11-1442) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/06/11;** Dissolved the Stay **10/04/12** 2. Denied 3. Denied
326P12	State v. Ryan Edward Casler	1. Def's NOA Based Upon a Constitutional Question (COA11-1142) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
327P12	State v. Charles Brandon Howell	State's PWC to Review Order of COA (COAP12-596)	Denied
329P11	State v. Mario Eduardo Ortiz-Zape	1. State's Motion for Temporary Stay (COA10-1307) 2. State's Petition for *Writ of Supersedeas* 3. State's NOA Based Upon a Constitutional Question 4. State's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31	1. Allowed **08/03/11** 2. Allowed 3. Dismissed *Ex Mero Motu* 4. Allowed
332P12	State v. Martin Dominquez Berrum	1. Def's NOA Based Upon a Constitutional Question (COA11-1440) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
333PA11-2	State v. Robert Lee Earl Joe	1. State's Motion for Temporary Stay (COA10-1037-2) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/24/12** 2. 3.

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

4 OCTOBER 2012

333P12	State v. Mohamed Saleh Ahmed	1. Def's NOA Based Upon a Constitutional Question (COA12-27) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
334P12	State v. Billy Ray Bridges	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-1196)	Denied
336P12	State v. Tony Antwain Burch	1. Def's *Pro Se* PWC to Review Decision of COA (COA10-1199) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Dismissed as Moot
338P12	State v. Timothy James Webster	1. Def's *Pro Se* Motion for PDR (COAP12-565) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
339P12	State v. Alfred Manga Bell	Def's PDR Under N.C.G.S. § 7A-31 (COA11-864)	Denied
341P12	State v. Donald Durant Farrow	Def's *Pro Se* PDR (COAP12-529)	Denied
342P12	James Hutchens, Employee v. Alex Lee, Employer, Self-Insured (Broadspire, a Crawford Co., Servicing Agent)	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA12-112) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
343P12	State v. Gary Lamont Pemberton	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1555)	Denied

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

4 OCTOBER 2012

344P12	State v. Leon Lavern Conyers	1. Def's *Pro Se* Motion for Appropriate Relief 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed without Prejudice 2. Allowed
345P12	State v. Marlon Rasheem Parker	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-1413)	Denied
350P12	John L. Fontana, M.D. v. Southeast Anesthesiology Consultants, P.A., Dr. Richard L. Gilbert; Dr. Michael T. Gillette; Dr. Joshua S. Miller; and Dr. Richard Yevak; American Anesthesiology of the Southeast, PLLC; Mednax Services, Inc.; and Mednax, Inc.	Defs' PDR Under N.C.G.S. § 7A-31 (COA11-1494)	Denied
352P12	Donald Edwin Matthieu, Jr., and Carol Carter Matthieu v. Steven M. Miller, Jennifer A. Miller, and J&S Electric Co., Inc.	Plts' PDR Under N.C.G.S. § 7A-31 (COA11-1287)	Denied
356P12	State v. Jason D. Hollis	1. Def's *Pro Se* PWC to Review Order of COA (COAP12-598) 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
357P12	State v. Steven Wayne Golden	Def's *Pro Se* PWC to Review Order of COA (COAP12-554)	Dismissed

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

4 OCTOBER 2012

358A12	State v. Bryant Lamont Boyd	1. State's Motion for Temporary Stay (COA-1072-2) 2. State's Petition for *Writ of Supersedeas* 3. State's NOA Based Upon a Dissent 4. Def's PDR Under N.C.G.S. § 7A-31 5. Def's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA 6. State's Conditional PDR as to an Additional Issue	1. Allowed **08/24/12** 2. Allowed **08/24/12** 3. - - - 4. 5. 6.
359A12	Clyde Vernon Lovette v. The North Carolina Department of Correction; Alvin Keller, in his capacity as Secretary of Correction; and Rudy Foster, in his capacity as Administrator of Dan River Prison Work Farm --- Charles Lynch v. The North Carolina Department of Correction; Alvin Keller, in his official capacity as Secretary of Correction; and Tim Kerlye, in his capacity as Administrator of Catawba Correctional Center	1. Respondents' Motion for Temporary Stay (COA11-1081) 2. Respondents' Petition for *Writ of Supersedeas* 3. Respondents' NOA Based Upon a Dissent	1. Allowed **08/24/12** 2. Allowed **08/24/12** 3. - - -
361P12	State v. William Wesley Sellar, Jr.	1. Def's Motion for Temporary Stay (COA11-1315) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **08/24/12** 2.

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

4 OCTOBER 2012

362P12	State v. Willie James Barnes	Def's *Pro Se* PWC to Review Order of COA (COAP12-446)	Dismissed
363P12	State v. Curtis Smith, Jr.	1. State's Motion for Temporary Stay (COA11-1335) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/29/12** 2. 3.
364P12	In re: Kathleen E. Morris, Relator	Petitioner's *Pro Se* Petition for *Writ of Mandamus* (COAP12-589)	Denied **09/05/12**
366P12	State v. James Stephens	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed as Moot **09/07/12** 2. Dismissed as Moot **09/07/12**
367P12	State v. Steven Darrell Landreth	1. Def's *Pro Se* PWC to Review the Order of the COA (COAP12-203) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
368P12	Sherif A. Philips, M.D. v. Pitt County Memorial Hospital, Inc., Paul Bolin, M.D., and Ralph Whatley, M.D.	1. Plt's Motion for Temporary Stay 2. Plt's Petition for *Writ of Supersedeas*	1. Allowed **09/07/12** 2.
371P12	State v. Kenn Logan	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-279)	Denied
372P12	State v. Javun Tykee Massey	Def's *Pro Se* Motion for PDR (COAP12-503)	Dismissed
378P12	Lynda Springs v. City of Charlotte, Transit Management of Charlotte, Inc., and Dennis Wayne Napier	1. Defs' (City of Charlotte and Transit Management of Charlotte, Inc.) PDR Under N.C.G.S. § 7A-31 (COA12-107) 2. Defs' (City of Charlotte and Transit Management of Charlotte, Inc.) Motion to Stay Execution of Bond Number 018 009 143	1. 2. Allowed **10/02/12**

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380P12	State v. Dewayne Avent	1. Def's Motion for Temporary Stay (COA11-1506) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Denied **09/12/12** 2. 3.
382P10-3	State v. John Lewis Wray, Jr.	Def's *Pro Se* Motion to Appeal (COAP12-566)	Dismissed **09/12/12**
391P12	Lacy Lee Williams, Jr. v. North Carolina Department of Public Safety, et al.	Plt's *Pro Se* Motion for Appeal (COAP12-480)	Denied
392P12	State v. Quadius Nathaniel Gaines	1. Def's *Pro Se* PWC to Review Decision of COA (COA12-31) 2. Def's *Pro Se* Motion to Proceed In Forma Pauperis 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as Moot
396P12	State v. Jason Alan Laws	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
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 and Deny PDR	1. Dismissed 11/04/10 2. - - - 3. Denied 4. Allowed
402P08-2	State v. James David Sizemore	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1489-2)	Denied

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409A12	Catryn Denise Bridges v. Harvey S. Parrish and Barbara B. Parrish	Plt's Motion for Extension of Time to File PDR	Dismissed **09/26/12**
416P12	Mary Ann Wilcox v. City of Asheville; William Hogan, individually and in his official capacity as the Chief of the City of Asheville Police Department; Stony Gonce, individually and in his official capacity as a Police Officer for the City of Asheville; Brian Hogan, individually and in his official capacity as a Police Officer for the City of Asheville; and Cheryl Intveld, individually and in her official capacity as a Police Officer for the City of Asheville	1. Defs' (Stony Gonce, Brian Hogan, and Cheryl Intveld) Motion for Temporary Stay (COA12-12) 2. Defs' (Stony Gonce, Brian Hogan, and Cheryl Intveld) Petition for *Writ of Supersedeas* 3. Defs' (Stony Gonce, Brian Hogan, and Cheryl Intveld) PDR Under N.C.G.S. § 7A-31	1. Allowed **10/04/12** 2. 3.
430P11	State v. Latara Deshea Hurst	1. Def's PWC to Review Decision of COA (COA11-145) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Special Order 2. Special Order
458P06-2	State v. Eric Kendall Gant	Def's *Pro Se* Motion for PDR (COAP11-302)	Denied **Jackson, J., Recused**
489P11	Nelson Campos-Brizuela, Employee v. Rocha Masonry, L.L.C., Employer and Builders Mutual Insurance Company, Carrier	1. Defs' NOA Based Upon a Constitutional Question (COA10-1571) 2. Defs' PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied **Hudson, J., Recused**

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505P10	State v. David Franklin Hurt	1. State's Motion for Temporary Stay (COA09-442) 2. State's Petition for *Writ of Supersedeas* 3. State's NOA Based Upon a Constitutional Question 4. State's Petition in the Alternative for Discretionary Review 5. Def's Motion to Dismiss Appeal 6. Def's Motion to Amend Response to State's PDR	1. Allowed **11/30/10** 2. Allowed 3. - - - 4. Allowed 5. Allowed 6. Allowed **Timmons-Goodson, J., Recused**
518P07-2	State v. Drellco Lamont Hunter	Def's Petition for Expedited Review (COAP12-150)	See Special Order **09/05/12** **Jackson, J., Recused**
524P04-3	State v. Christopher Deon Gattis	Def's *Pro Se* Motion for NOA	Dismissed **Hudson, J., Recused**
533P10	State v. Jarvis Leon Williams	1. State's Motion for Temporary Stay (COA10-58) 2. State's Petition for *Writ of Supersedeas* 3. State's NOA Based Upon a Constitutional Question 4. State's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31	1. Allowed **12/20/10** 2. Allowed 3. Dismissed *Ex Mero Motu* 4. Allowed
652P05-2	State v. Tommy Andrews	1. Def's *Pro Se* PWC to Review Order of COA (COAP11-586) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot

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011P10-2	In the Matter of Appeal of: IBM Credit Corporation from the Decision of the Durham County Board of County Commissioners concerning the valuation of business personal property for tax year 2001	Respondent's (Durham County) PDR Under N.C.G.S. § 7A-31 (COA11-1144)	Denied
016P07-3	State v. Joey Duane Scott	Def's *Pro Se* Motion for Petition for Redress of Law	Dismissed
031P11-4	State v. Julius Kevin Edwards	Def's *Pro Se* Motion for NOA (COAP11-307)	Dismissed
035PA12	Connie Chandler, Employee, by her Guardian ad Litem, Celeste M. Harris v. Atlantic Scrap and Processing, Employer and Liberty Mutual Insurance Company, Carrier	Plt's Motion for Consolidation	Allowed 10/29/12
039P12	State v. Ray Lee Ross	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA10-1503)	Denied
041P12	Edgewater Services, Inc. and Lucinda Dosher v. Epic Logistics, Inc., Don and Barbara Sherrill, and Jolie Anne Osgood	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA11-176) 2. Def's (Jolie Anne Osgood) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot **Jackson, J., Recused**
063P10-2	State v. Myron Roderick Nunn	1. Def's *Pro Se* Motion for NOA (COAP12-781) 2. Def's *Pro Se* PWC to Review Order of COA	1. Dismissed 2. Dismissed
090P07-6	State v. Lindo Nickerson	Def's *Pro Se* NOA	Dismissed **Jackson, J., Recused**

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090P07-7	State v. Lindo Nickerson	1. Def's *Pro Se* PWC to Review the Order of Granville County Superior Court 2. Def's *Pro Se* Motion to Proceed In Forma Pauperis 3. Def's *Pro Se* Motion to Appoint Counsel 4. Def's *Pro Se* Motion for Preservation of Notes, Tapes, and Other Evidence	1. Dismissed 2. Allowed 3. Dismissed as Moot 4. Dismissed **Jackson, J., Recused**
090P12	Thomas D. Bowers, Herman R. Guthrie, and Dorothy G. Guthrie v. Wayne Temple; Steve Hargis; James Fitts; Corky Jones; and William Whaley, in personam and as the Board of Directors of Leeward Harbor Homeowner's Inc. and Leeward Harbor Homeowner's Inc.	Plts' PDR Under N.C.G.S. § 7A-31 (COA11-566)	Denied
100P12	Samuel and Doris Fort, Julia Katherine Faircloth, and Raeford B. Lockamy, II v. County of Cumberland, North Carolina and TigerSwan, Inc., Intervenor	Respondents' (County of Cumberland and TigerSwan) PDR Under N.C.G.S. § 7A-31 (COA11-758)	Denied
122P12	State v. Perry Ross Schiro	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1092)	Denied
126P12-2	State v. Donnell Freeman	1. Def's *Pro Se* Motion for NOA (COAP12-130) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* PWC to Review Order of COA	1. Dismissed *Ex Mero Motu* 2. Dismissed 3. Dismissed

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137P12-2	State v. Ellerek Dermot Vaughters	1. Def's *Pro Se* PWC to Review Order of COA 2. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Dismissed as Moot
142A03-2	State v. John Henry Thompson	Def's PWC to Review Order of Guilford County Superior Court	See Special Order
145P12	State v. John Braver Friend	1. Def's Motion for Temporary Stay (COA11-572) 2. Def's Petition for *Writ of Supersedeas* 3. Def's NOA Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Appeal	1. Allowed **04/09/12;** Dissolved the Stay **12/12/12** 2. Denied 3. - - - 4. Denied 5. Allowed
148P10-5	State v. Lance Adam Goldman	1. Def's *Pro Se* Motion for Complaint (COAP12-225) 2. Def's *Pro Se* Motion for Complaint	1. Dismissed 2. Dismissed
148P10-6	State v. Lance Adam Goldman	1. Def's *Pro Se* Motion for Complaint 2. Def's *Pro Se* Motion for a Lawyer 3. Def's *Pro Se* Motion for a Trial by Jury	1. Dismissed 2. Dismissed as Moot 3. Dismissed
150P12	State v. Daniel Lee Fennell	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1148)	Denied
156PA12-2	Inland Harbor Homeowners Association, Inc. v. St. Josephs Marina, LLC, Renaissance Holdings, LLC, St. Josephs, LLC, Dewitt Real Estate Services, Inc., Dennis Barbour, Randy Gainey, Thomas A. Saieed, Jr., Todd A. Saieed, Robert D. Jones, and The North Carolina Coastal Resources Commission	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA11-715-2) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. See Special Order 2. See Special Order

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161A12	Applewood Properties, LLC and Apple Creek Executive Golf Club, LLC v. New South Properties, LLC, Apple Creek Village, LLC, Hunter Construction Group, Inc., and Urban Design Partners	Motion of the State of North Carolina as *Amicus Curiae* Leave to Participate in Oral Argument	Allowed 10/26/12
174P12	Benjamin Edwards and Lynn Owens, Owners of Live; George Beaman, Owner of Club 519, 5th Street Distillery, and Mac Billiards v. Pitt County Health Directory, John H. Morrow	1. Petitioners' NOA Based Upon a Constitutional Question (COA11-754) 2. Petitioners' PDR Under N.C.G.S. § 7A-31 3. Respondent's Motion to Dismiss Appeal 4. Respondent's Conditional PDR Under N.C.G.S. § 7A-31	1. - - - 2. Denied 3. Allowed 4. Dismissed as Moot
203P12	State v. Francisco Javier Pizano-Trejo	1. State's Motion for Temporary Stay (COA11-1085) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/07/12** 2. Allowed 3. Allowed
206P12	State v. Stacey Allen Glenn	1. State's Motion for Temporary Stay (COA11-897) 2. State's Petition for *Writ of Supersedeas* 3. State's NOA Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Dismiss Appeal	1. Allowed 05/07/12; Dissolved the Stay 12/12/12 2. Denied 3. - - - 4. Denied 5. Allowed

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208P12	In the Matter of the Foreclosure of a Real Estate Deed of Trust from Eagles Nest, A John Turchin Co LLC (nka Eagles Nest Banner Elk, LLC), Eagles Nest Equestrian Ranches LLC and JAJST LLC dated January 30, 2008 and recorded on January 31, 2008 in Book 422 at Page 2710, as Modified by Modification of Deed of Trust recorded in Book RE 447 at Page 816 of the Avery County Public Registry by Turner Law Office, PA (Substitute Trustee)	1. Respondents' (Eagle Nest, A John Turchin Company LLC (n/k/a Eagles Nest Banner Elk, LLC), Eagles Nest Equestrian Ranches LLC, JAJST LLC, and John Turchin) PWC to Review Order of COA (COA12-18) 2. Joint Motion to Dismiss Appeal	1. - - - 2. Allowed **10/31/12**
221P12	In the Matter of the Foreclosure of the Nine Deeds of Trust of Marshall and Madeline Cornblum, Grantors William Richard Boyd, Jr., Substitute Trustee and In the Matter of the Foreclosure of the Three Deeds of Trust of Longbranch Properties, LLC, Grantor William Richard Boyd, Jr., Substitute Trustee	1. Respondents' (Marshall Cornblum, Madeline Cornblum, Michael Cornblum, Carolyn Cornblum, and Longbranch Properties, LLC) PDR Under N.C.G.S. § 7A-31 (COA11-534) 2. Claimant's (United Community Bank) Conditional PDR Under N.C.G.S. § 7A-31 3. Claimant's (United Community Bank) PDR Under N.C.G.S. § 7A-31 4. Respondents' (Marshall Cornblum, Madeline Cornblum, Michael Cornblum, Carolyn Cornblum, and Longbranch Properties, LLC) Motion to Dismiss PDR 5. Claimant's (United Community Bank) Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA 6. Claimants' Motion for Temporary Stay 7. Claimants' Petition for *Writ of Supersedeas*	1. Denied 2. Dismissed as Moot 3. - - - 4. Allowed 5. Denied 6. Allowed **07/06/12**; Dissolved the Stay **12/12/12** 7. Denied

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221P12, cont'd		8. Claimants' Motion to Amend PDR / PWC to Include Additional Authority 9. Respondents' Motion to Dissolve Temporary Stay 10. Respondents' Motion to Expunge Affidavit of Esther Manheimer	8. Allowed 9. Dismissed as Moot 10. Denied
222P12	State v. William Daniel Thomas	Def's PDR Under N.C.G.S. § 7A-31 (COA11-832)	Denied
239P12	State v. Brandon Z. Joyner	Def's *Pro Se* PWC to Review Order of COA (COAP12-334)	Dismissed
241P09-3	State v. William Edward McKoy a/k/a Billy Ray McKoy	1. Def's *Pro Se* PWC to Review the Decision of the COA (COA08-923) 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 **Jackson, J., Recused**
241P11-2	State v. Delton Maynor	1. Def's *Pro Se* Motion for NOA (COAP12-266) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Motion to Proceed In Forma Pauperis 4. Def's *Pro Se* Motion for NOA 5. Def's *Pro Se* Motion for PDR 6. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed *Ex Mero Motu* 2. Dismissed 3. Allowed 4. Dismissed *Ex Mero Motu* 5. Dismissed 6. Allowed
243P12	The North Carolina Farm Bureau Mutual Insurance Company v. Cully's Motorcross Park, Inc. and Laurie Volpe	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA11-651) 2. N.C. Association of Defense Attorneys' Motion for Leave to File *Amicus* Brief	1. Allowed 2. See Special Order **12/7/12**

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249P12	Billy G. Patterson, Pearnell Patterson, and Keith Patterson v. City of Gastonia	1. Plts' (Billy G. Patterson and Pearnell Patterson) NOA Based Upon a Constitutional Question (COA11-520) 2. Plts' (Billy G. Patterson and Pearnell Patterson) PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
251P10-2	State v. Gregory Lee Sellers	1. Def's *Pro Se* Motion for NOA (COAP12-182) 2. Def's *Pro Se* Motion for PDR	1. Dismissed *Ex Mero Motu* 2. Dismissed
268A12	State of North Carolina ex rel. Utilities Commission; Duke Energy Carolinas, LLC, Applicant; Public Staff – N.C. Utilities Commission, Intervenor v. Attorney General Roy Cooper, Intervenor and the City of Durham, North Carolina, Intervenor	1. Duke Energy Carolinas, LLC's Motion to Dismiss Appeal 2. Attorney General's Conditional PWC	1. Denied **10/9/12** 2. Dismissed as Moot **10/9/12**
268A12	State *ex rel.* Utilities Commission, et al. v. Attorney General, et al.	Intervenor-Appellant's Motion for Leave to File Reply Brief	Allowed **10/23/12**
269A00-2	State v. Billy Raymond Anderson	1. Def's *Pro Se* PWC to Review the Order of Craven County Superior Court 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
269PA09-2	Travis T. Bumpers and Troy Elliott, on behalf of themselves and all others similarly situated v. Community Bank of Northern Virginia	Def's Consent Motion to Unseal Exhibit	Allowed **11/08/12**

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272P12	State v. Lisa Day Kramer	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-1524) (2 days late) 2. Def's Motion to Withdraw PDR	1. - - - 2. Allowed
278P05-3	In Re: William Van Trusell	Def's *Pro Se* Motion for Petition for Actual Innocence	Dismissed **Jackson, J., Recused**
285P12	State v. Mark Ackerman	Def's *Pro Se* PWC to Review Order of COA (COAP12-453)	Denied
300P12	State v. Ronald O. Smith and Mittie Smith	Defs' PDR Under N.C.G.S. § 7A-31 (COA11-1252)	Denied
302P12	State v. Tommy Edward Moody	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1435)	Denied
303P12	Shannon Fatta v. M&M Properties Management, Inc.	1. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-1397) 2. Def's Motion to Substitute Counsel	1. Denied 2. Allowed
305PA12-3	State v. Robert Lance Randall	Application for *Writ of Mandamus* Pursuant to N.C.G.S. and N.C. R. App. P. 22(B)	Denied **Jackson, J., Recused**
312A12	Jose Clemente Hernandez Gonzales, Employee v. Jimmy Worrell d/b/a Worrell Construction, Noninsured and Patrick Lamm and Co., LLC, Employer and Travelers Indemnity Co., Builders Mutual Ins. Co., Scott Ins. Agency, Sweiss Reinsurance Co., and Cincinnati Ins. Co., Carriers	1. Defs' (Patrick Lamm and Co., LLC and Builders Mutual Ins. Co.) NOA Based Upon a Dissent (COA11-1405) 2. Def's' (Cincinnati Ins. Co.) PDR Under N.C.G.S. § 7A-31	1. - - - 2. Allowed

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316P12	Mario Seguro-Suarez v. Southern Fiber and Key Risk Insurance Company	Defs' PWC to Review Order of COA	Denied
319P12	John Baker Warren v. North Carolina Department of Crime Control & Public Safety; North Carolina Highway Patrol	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA11-884) 2. Plt's Motion for Leave to File an Amended Response to the PDR Based Upon New Authority 3. Plt's Motion in the Alternative to Permit Rule 28(g) Notice of Additional Authority	1. Denied 2. Dismissed as Moot 3. Dismissed as Moot
321P12	State v. Christopher Patrick Jones	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1317)	Denied
329P12	State v. Vicente Juarez Huerta	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1401)	Denied
340P12	State v. Steven David Taylor	1. Def's *Pro Se* Motion for Appropriate Relief (COA09-1360) 2. Def's *Pro Se* PWC to Review Order of COA 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 4. Def's *Pro Se* Motion for an Order for Retrial 5. Def's *Pro Se* Motion to Suppress Articles of Prosecution 6. Def's *Pro Se* Motion for a New Hearing Before a New Grand Jury 7. Def's *Pro Se* Motion for a Change of Venue 8. Def's *Pro Se* Motion for Dismissal of Charges 9. Def's *Pro Se* Motion for an Immediate and Prompt Response 10. Def's *Pro Se* Motion for Counsel to be Appointed	1. Dismissed 2. Dismissed 3. Allowed 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed 8. Dismissed 9. Denied 10. Dismissed as Moot

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346P12	State v. Frank Boatswain	1. Def's *Pro Se* PWC to Review Order of COA (COAP12-641) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
347P12	Darryl Brown, Employee v. City of Burlington, Employer and Compensation Claims Solutions, Carrier	Plt's PWC to Review Decision of COA (COA11-1406)	Denied
349P12	State v. Harold Bright Harris, Jr.	1. Def's NOA Based Upon a Constitutional Question (COA11-829) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
351P12	Dennis E. Bullard, M.D., and Wendy Bullard v. Wake County, a body politic and corporate; Troy Howard Parrott, in his official capacity as a Wake County Building Inspector; John Dipetrio, in his official capacity as a Wake County Building Inspector; Steven Aden Branch, in his official capacity as a Wake County Building Inspector; and Edward Langston Savage, in his official capacity as a Wake County Building Inspector	Plts' PDR Under N.C.G.S. § 7A-31 (COA11-1022)	Denied **Martin, J., Recused**
353P12	Cameron James v. Charlotte-Mecklenburg County Board of Education	1. Petitioner's PDR (COA11-1376) 2. Respondent's Motion to Consider Response to Request for Supreme Court Review Timely Filed 3. Respondent's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Allowed 3. Dismissed as Moot

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355P12	State v. Angela Marie Williamson	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1282)	Denied
356P99-3	State v. Robert Allen Sartori	Def's *Pro Se* PWC to Review Order of COA	Dismissed
358A12	State v. Bryant Lamont Boyd	1. State's Motion for Temporary Stay (COA-1072-2) 2. State's Petition for *Writ of Supersedeas* 3. State's NOA Based Upon a Dissent 4. Def's PDR Under N.C.G.S. § 7A-31 5. Def's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA 6. State's Conditional PDR as to an Additional Issue	1. Allowed **08/24/12** 2. Allowed **08/24/12** 3. - - - 4. Denied 5. Denied 6. Dismissed as Moot
363P12	State v. Curtis Smith, Jr.	1. State's Motion for Temporary Stay (COA11-1335) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/29/12;** Dissolved the Stay **12/12/12** 2. Denied 3. Denied
368P12	Sherif A. Philips, M.D. v. Pitt County Memorial Hospital, Inc., Paul Bolin, M.D., and Ralph Whatley, M.D.	1. Plt's Motion for Temporary Stay (COA11-1482) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's NOA Based Upon a Constitutional Question 4. Plt's PDR Under N.C.G.S. § 7A-31 5. Defs' Motion to Dismiss Appeal 6. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **09/07/12;** Dissolved the Stay **12/12/12** 2. Denied 3. - - - 4. Denied 5. Allowed 6. Dismissed as Moot
369P12	State v. Anthony Eric Cogdell	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-1562)	Denied

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370P12	State v. Terrance Robert Whitley	Def's *Pro Se* Motion for Judicial Statement of Facts and Conclusion of Law With Stay of Proceedings (COAP12-620)	Dismissed **Jackson, J., Recused**
374P12	In the Matter of: Henry Edward Murdock	Def's PDR Under N.C.G.S. § 7A-31 (COA12-79)	Denied
375P12	Synovus Bank, formerly known as Columbus Bank and Trust Company, as successor in interest through name change and by merger with the National Bank of South Carolina v. The County of Henderson and Lexon Insurance Company	1. Def's (Lexon Insurance Company) PDR Under N.C.G.S. § 7A-31 (COA11-1601) 2. Def's (Lexon Insurance Company) Motion to Withdraw PDR	1. - - - 2. Allowed
376P12	State v. Edwardo Wong, II	Def's PDR Under N.C.G.S. § 7A-31 (COA11-994)	Denied
377P12	Daniel Tunell, Employee v. Resource MFG/Prologistix, Employer; American Casualty Company, Carrier; Gallagher Bassett, Third-Party Administrator	Defs' PDR Under N.C.G.S. § 7A-31 (COA12-103)	Denied
379P12	James and Lara Barnhill v. Richard W. Farrell and The Farrell Law Group, P.C.	Plts' PWC to Review Order of COA (COA12-766)	Denied
380P12	State v. Dewayne Avent	1. Def's Motion for Temporary Stay (COA11-1506) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Denied **09/12/12** 2. Denied 3. Denied

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380PA11	State v. Nicholas Brady Heien	Def's Motion to Strike State's Memorandum of Additional Authority (COA11-52)	Denied **12/12/12**
381P11	N.C. Department of Transportation v. Matthew J. Cromartie, Jr., Individually and as Co-Trustee of the Matthew and Annie Lee Cromartie Trust; Joyce Gooden; Alexander Cromartie and wife, Martha Cromartie; Margaret Cromartie; Bernard Bell; Francenia Cromartie Horne; and Known and Unknown Heirs	1. Plaintiff-Appellant DOT's PDR Under N.C.G.S. § 7A-31 (COA10-709) 2. Defs' Motion to Dismiss 3. Defs' Motion Requesting Supreme Court to Order Trial Court to Allow Defs' to Continue with their Damages Case	1. Denied 2. Dismissed as Moot 3. Dismissed as Moot
381P12	Dr. Janice Elizabeth Barron Rushing v. Dr. John I. Barron, Individually and as Co-Trustee of the Nelle W. Barron Revocable Trust Agreement; The Nelle W. Barron Amended Revocable Trust; William Ellis Barron, Individually and as Co-Trustee of the Nelle W. Barron Trust	1. Plt's NOA Based Upon a Constitutional Question (COA11-1471) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal 4. Def's Motion to Strike Response to Motion to Dismiss 5. Plt's *Pro Se* Motion to Deem Response to Motion to Dismiss Timely Filed 6. Plt's *Pro Se* Motion for Additional Time to Obtain an Attorney to Reply in Full to Motion to Strike Response to Dismiss Appeal	1. - - - 2. Denied 3. Allowed 4. Dismissed as Moot 5. Allowed 6. Denied
382P12	State v. Chad Ethmond Braswell	1. Def's NOA Based Upon a Constitutional Question (COA11-1366) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed

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383P12	State v. Timothy Marshall Vester	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1587)	Denied
385P12	The Fisher Housing Companies, Inc., d/b/a Home Headquarters v. Haywood J. Hendricks; Haywood J. Hendricks, as Administrator of the Estate of Haywood R. Hendricks; and Alice Hendricks	Defs' PDR Under N.C.G.S. § 7A-31 (COA12-120)	Denied
387P12	M Series Rebuild, LLC v. Town of Mount Pleasant, NC	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-194)	Denied
389P12	State v. Boyd Johnston Hicks	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1165)	Denied
390P12	State v. Todd Joseph Martin	Def's PDR Under N.C.G.S. § 7A-31 (COA11-941)	Denied
394P12	State v. Joseph Brian Tarleton	Def's *Pro Se* PWC to Review Order of COA (COA12-916)	Dismissed
395P12	State v. Willie Lee Mobley	Def's PDR Under N.C.G.S. § 7A-31 (COA12-54)	Denied
396P12-2	State v. Jason Alan Laws	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
398P12	State v. Sherrod La Dontae Whitaker and Trendell Limont Harris	Def's (Whitaker) PDR Under N.C.G.S. § 7A-31 (COA11-1449)	Denied
399A12	Sharon A. Keyes v. W. Glenn Johnson, Guardian of the Estate of Nelson T. Currin	1. Plt's *Pro Se* NOA Based Upon a Dissent (COA12-81) 2. Plt's *Pro Se* PDR as to Additional Issues	1. - - - 2. Allowed
400P12	State v. Bobby Leon Little	1. Def's *Pro Se* Motion to Extend Time to File MAR and State Habeas Petition 2. Def's *Pro Se* PWC 3. Def's *Pro Se* Motion for PDR	1. Denied 2. Denied 3. Dismissed

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402A12	State v. Roderick Tynell Richardson	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA11-1581) 2. State's Motion to Dismiss Appeal (COA11-1581)	1. See Special Order 2. See Special Order
403P12	State v. Julio Cesar Gutierrez-Gonzalez	1. Def's NOA Based Upon a Constitutional Question (COA11-1497) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
406P12	Delores Kay Garner Binder v. Rudolph Ludwig Binder, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1502)	Denied
410A12	State v. Keith Donnell Miles	1. Def's NOA Based Upon a Dissent (COA11-1383) 2. Def's PDR as to Additional Issues	1. - - - 2. Denied
411P12	State v. Joey L. Darden El	Def's *Pro Se* Motion for Alternative *Writ of Peremptory Mandamus*	Dismissed as Moot **12/12/12**
412P12	State v. Tommy W. Harris	Def's Pro Se Motion for Discretionary Review (COAP12-792)	Dismissed
413P12	State v. Darryl Thompson	1. Def's NOA Based Upon a Constitutional Question (COA11-1582) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
414P12	State v. Michael Ray Segal	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1201)	Denied
419P12	Michael Dennis Long v. State of North Carolina, Combine Records, etc., Alvin Keller, Jr., Secretary of Division of Adult Correction of the Department of Public Safety	1. Petitioner's *Pro Se* Motion for NOA (COAP12-720) 2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Petitioner's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as Moot **Jackson, J., Recused**

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420P12	Lacy Lee Williams, Jr. v. North Carolina Department of Public Safety, et al.	Plt's *Pro Se* Motion for Petition to Certify for Appeal (COAP12-471)	Denied
421P12	State v. David Thomas	Def's *Pro Se* Motion for NOA Presenting Constitutional Questions (COAP12-485)	Dismissed *Ex Mero Motu*
422P12	State v. Calvin Wayne Locklear	Def's *Pro Se* Motion for PDR (COAP12-779)	Denied
423P12	Warren E. Penny v. Marie Davis Penny (Deceased) and M. Scott Boyles	Def's *Pro Se* PWC to Review Order of COA (COAP12-587)	Denied
425P12	State v. Derrick Allen	1. Def's Motion for Temporary Stay (COA11-744) 2. Def's Petition for *Writ of Supersedeas* 3. Def's NOA Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Appeal	1. Denied **10/10/12;** Dissolved the Stay **12/12/12** 2. Denied 3. - - - 4. Denied 5. Allowed
426P12	State v. Joseph Alan Lambert	1. Def's PWC to Review Order of COA (COA11-1574) 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. See Special Order 2. - - - 3. Denied 4. Allowed
430P12	State v. Luis Angel Reyes Hernandez	1. Def's NOA Based Upon a Constitutional Question (COA12-5) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
431P12	State v. Eduardo Molina Arellano	Def's *Pro Se* Motion for PDR (COAP12-752)	Denied

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433P12	Andy J. Langston, Employee v. Eddie Rains D/B/A Mebco of Nashville, Inc., Employer; N.C. Mutual Employers Fund C/O Isurity Insurance Service, Carrier	1. Plt's Motion for Temporary Stay (COAP12-862) 2. Plt's Petition for *Writ of Supersedeas* 3. Defs' Motion to Dissolve Temporary Stay	1. Allowed **10/16/12**; Dissolved the Stay **10/26/12** 2. Dismissed **10/26/12** 3. Allowed **10/26/12**
434P12	State v. Martin Cornelius Mills	Def's *Pro Se* Motion for PDR (COA11-442)	Denied
435P12	Tracey Cline v. Judge Orlando F. Hudson, Jr.	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Dismissed Without Prejudice **10/22/12**
436PA10	Craft Development, LLC v. County of Cabarrus	Def's Petition for Rehearing	Denied **10/26/12**
437PA10	Mardan IV v. County of Cabarrus	Def's Petition for Rehearing	Denied **10/26/12**
437P12	State v. Tony Lee Locklear	1. Def's *Pro Se* Motion for NOA (COAP11-264) 2. Def's *Pro Se* PWC to Review the Order of COA	1. Dismissed *Ex Mero Motu* 2. Dismissed
438PA10	Lanvale Properties, LLC and Cabarrus County Building Industry Association v. County of Cabarrus and City of Locust	Def's (Cabarrus County) Petition for Rehearing	Denied **10/26/12**
438P12	Gregory S. Scadden v. Robert Holt, Individually, Robert Holt, in his official capacity, and the Town of Newport	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-303)	Denied
440A12	State v. Terrell Williams	1. Def's NOA Based Upon a Constitutional Question (COA12-257) 2. State's Motion to Dismiss Appeal	1. - - - 2. Allowed

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441P12	Diane Sood v. Ajit Bobby Sood	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA12-369) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's *Pro Se* PWC to Review Decision of COA 4. Def's *Pro Se* Motion to Strike Plt's Response to Def's PWC 5. Def's *Pro Se* Motion for Sanctions	1. Dismissed *Ex Mero Motu* 2. Denied 3. Denied 4. Denied 5. Denied
442P12	State v. Walter Alexander Love	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1578)	Denied
444P12	Suntrust Bank v. Bryant/Sutphin Properties, LLC, Calvert R. Bryant, Jr., and Donald H. Sutphin	1. Defs' (Bryant/Sutphin Properties, LLC and Donald H. Sutphin) PDR Under N.C.G.S. § 7A-31 (COA12-131) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31 3. Plt's Conditional PWC to Review Order of Superior Court of Forsyth County	1. Denied 2. Dismissed as Moot 3. Dismissed as Moot
445P12	Sonia Rapaport Peltzer v. David Eric Peltzer Def's PDR Under	N.C.G.S. § 7A-31 (COA12-41)	Denied
447P12	State v. Enrique Cardenas-Zavala	Def's *Pro Se* Motion for PDR (COA11-599)	Denied
448P12	Anthony Williams v. James J. Exum – Attorney	Plt's *Pro Se* Motion for Order and NOA to the Supreme Court with Stay of Proceedings (COAP12-845)	Dismissed
449P11-4	State v. Charles Everette Hinton	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **11/27/12**
451P12	State v. Kevin Earl Griffin	1. State's Petition for *Writ of Supersedeas* (COA12-390) 2. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed

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454P12	Reinaldo Olavarria v. Wake County District Attorney(s): Rusty Jacobs, District Attorney; Howard J. Cummings, First Assistant District Attorney; April Flythe, District Attorney	Plt's *Pro Se* Petition for *Writ of Mandamus*	Denied **11/1/12**
455P12	State v. Darryl Allen	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-189)	Denied
456P12	Bertha Turner, Administrator for the Estate of Clinton Harmon v. North Carolina Department of Transportation and Karia Hawkins, Administrator for the Estate of Damien S. Hawkins v. North Carolina Department of Transportation	Plts' PDR Under N.C.G.S. § 7A-31 (COA11-1514)	Denied
457P12	Wade Bryan Bulloch v. North Carolina Department of Crime Control & Public Safety; North Carolina Highway Patrol	1. Respondents' PDR Under N.C.G.S. § 7A-31 (COA12-115) 2. Petitioner's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
458P12	State v. Michael O'Neil Holman	Def's *Pro Se* Motion for State's Discovery	Denied **Jackson, J., Recused**
459P12	State v. Dominique V. Gray	1. Def's *Pro Se* Motion for PDR (COAP12-858) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as Moot

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460A12	John Conner Construction, Inc., R & G Construction Company, and Eggers Construction Company v. Grandfather Holding Company, LLC and Mountain Community Bank, a Branch of Carter County Bank	1. Plts' NOA Based Upon a Dissent (COA11-1228) 2. Plts' PDR as to Additional Issues 3. Def's (Mountain Community Bank) PWC to Review Order of COA (COA11-1228)	1. - - - 2. Allowed 3. Denied
461P12	In re: Robert E. Young	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Dismissed **11/13/12**
465P12	In re: Christopher M. Headen	Def's *Pro Se* Motion for Actual Innocence	Dismissed
475P12	State v. Robert Eugene Eason	1. Def's *Pro Se* PWC to Review Order of COA (COAP12-854) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as Moot
476P12	Monty S. Poarch v. N.C. Department of Crime Control and Public Safety, North Carolina Highway Patrol	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA11-1501) 2. National Troopers Coalition and The N.C. Troopers Association's Motion for Leave to File *Amicus* Brief	1. Denied 2. See Special Order **12/06/12**
477P12	State v. Romids Antwoin Miles	Def's PDR Under N.C.G.S. § 7A-31 (COA12-323)	Denied
481P12	State v. Colby Shane Gerrick	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed

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486P11	Irving Ehrenhaus, on Behalf of Himself and All Others Similarly Situated v. John D. Baker, II, Peter C. Browning, John T. Casteen, III, Jerry Gitt, William H. Goodwin, Jr., Maryellen C. Herringer, Robert A. Ingram, Donald M. James, Mackey J. McDonald, Joseph Neubauer, Timothy D. Proctor, Ernest S. Rady, Van I. Richey, Ruth G. Shaw, Lanty L. Smith, Dona Davis Young, Wachovia Corporation, and Wells Fargo & Company v. Norwood Robinson and John H. Loughridge, Jr., Objectors	1. Objectors' *Pro Se* NOA Based Upon a Constitutional Question (COA10-1034) 2. Objectors' *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal 4. Plt's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed 4. Allowed
488P12	State v. Keith E. Frasier	Def's *Pro Se* Motion for PDR (COAP12-879)	Dismissed
492P12	State v. Randy Locklear	1. Def's *Pro Se* PWC to Review the Order of the COA (COAP12-884) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
532P09-2	State v. David Louis Richardson	1. Def's *Pro Se* PWC to Review Order of COA 2. Def's *Pro Se* Motion for Application to Proceed in Supreme Court Without Prepaying Fees or Cost	1. Dismissed 2. Allowed
543PA11	North Carolina Farm Bureau Mutual Insurance Company v. Jarvis Sentell Lynn and Michael Adams	Joint Motion to Dismiss Appeal	Allowed **10/22/12**
548P11	State v. Lawrence Aldous Black	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA11-354) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied

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003P13	Charles M. Erthal, Delores Erthal, Jerome A. Budde, Jr., and Ilena Budde v. Frederick B. May and Francine L. Appel, a/k/a/ Francine L. May	1. Plts' (Jerome A. Budde, Jr., and Ilena Budde) NOA Based Upon a Dissent (COA12-603) 2. Plts' (Jerome A. Budde, Jr. and Ilena Budde) PDR Under N.C.G.S. § 7A-31 3. Defs' Conditional PDR Under N.C.G.S. § 7A-31 4. Plts' (Jerome A. Budde, Jr. and Ilena Budde) Motion to Deem a Concurring Opinion a Dissenting Opinion	1. Dismissed Ex Mero Motu 2. Denied 3. Dismissed as Moot 4. Denied **Beasley, J., Recused**
004P13	State v. Gregory Ellerbee	1. Def's *Pro Se* Motion for NOA (COAP12-947) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* PWC to Review Order of COA 4. Def's *Pro Se* Motion for Petition to Amend 5. Def's *Pro Se* Motion for Leave to Amend 6. Def's *Pro Se* Petition for *Writ of Habeas Corpus*	1. Dismissed *ex Mero Motu* **1/18/13** 2. Denied **1/18/13** 3. Denied **1/18/13** 4. Allowed **1/18/13** 5. Allowed **1/18/13** 6. Denied **1/18/13**
007P13	In the Matter of the Adoption of S.K.N., a minor child	1. Petitioners' Motion for Temporary Stay (COA12-275) 2. Petitioners' Petition for *Writ of Supersedeas* 3. Petitioners' NOA Based Upon a Constitutional Question 4. Petitioners' PDR Under N.C.G.S. § 7A-31	1. Allowed **01/08/13** 2. 3. 4.
010P13	State v. Marvin Junior Walton	1. Def's *Pro Se* Motion for PDR (COAP02-1196; COAP08-958) 2. Def's *Pro Se* Motion in the Alternative for a Remedial Writ	1. Dismissed 2. Denied

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011P13	Sir Walter Apartments v. John D. Johnson III	1. Def's *Pro Se* Motion for Temporary Stay (COAP13-18) 2. Def's *Pro Se* Petition for *Writ of Supersedeas*	1. Denied **1/9/13** 2. Denied **1/9/13**
017P13	State v. Ca'sey R. Tyler	Def's *Pro Se* Motion for PDR (COAP12-984)	Dismissed
018P13	Mitchell Dean Joines v. Alexander County Courthouse	Plt's *Pro Se* Petition for *Writ of Mandamus*	Denied
029A13	Richard M. Johnston v. State of North Carolina	1. State's Motion for Temporary Stay (COA12-45) 2. State's Petition for *Writ of Supersedeas* 3. State's NOA Bases Upon a Dissent 4. State's PDR as to Additional Issues	1. Allowed **01/17/13** 2. 3. 4. **Beasley, J., Recused**
030P13	State v. Brandi Lea Grainger	1. State's Motion for Temporary Stay (COA12-444) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **1/18/13** 2. 3. **Beasley, J., Recused**
040P13	In the Matter of: L.M.T., A.M.T.	1. Petitioners' (Cumberland County DSS; Guardian ad Litem) Motion for Temporary Stay (COA12-743) 2. Petitioners' (Cumberland County DSS; Guardian ad Litem) Petition for Writ of Supersedeas 3. Petitioners' (Cumberland County DSS; Guardian ad Litem) PDR Under N.C.G.S. § 7A-31	1. Allowed **01/22/13** 2. 3.
047P02-15	State v. George W. Baldwin	1. Def's *Pro Se* PWC to Review Order of Superior Court of Alamance County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as Moot

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052A13	State v. Bobby Lee McKenzie	1. State's Motion for Temporary Stay (COA12-436) 2. State's Petition for Writ of Supersedeas	1. Allowed 01/23/13 2. Allowed **01/23/13**
057PA12-2	State v. Ronald Princegerald Cox	1. State's Motion for Temporary Stay (COA11-609-2) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Deem Response Timely Filed	1. Allowed **08/20/12**; 2. Allowed 3. Allowed 4. Allowed
062P10-2	Cleo Edward Land, Sr., and Raymond Alan Land, on his own Behalf and Derivatively on Behalf of Eddie Land Masonry Contractor, Inc. v. Cleo Edward Land, Jr., Nancy K. Land, and Eddie Land Masonry Contractor, Inc.	1. Defs' Motion for Temporary Stay (COAP11-445) 2. Defs' Petition for *Writ of Supersedeas* 3. Plts' Motion to Dissolve Temporary Stay	1. Allowed **06/29/11** 2. 3. Denied **03/08/12**
086A02-2	State v. Bryan Christopher Bell	Def's Motion to Hold in Abeyance the Time in which to File Petition for Writ of Certiorari	See Special Order
089A12	Marques Cole Jones v. Niah Drake Whimper	1. Plt's Motion to Supplement Record (COA11-689) 2. Def's Motion to Supplement Record on Appeal	1. Allowed 2. Allowed
101P12	Krista Dawn Cox, Joshua Scott Wallace, and Chesapeake Microfilm, Inc. v. David Roach, The Rectors and Visitors of the University of Virginia, Joe William Adkins, Jr., William T. Schatzman, and Hartford Fire Insurance Company	Plts' PDR Under N.C.G.S. § 7A-31 (COA11-905)	Denied
132P12	State v. Hugo Marquez	Petitioner's (Accredited Surety and Casualty Company, Beasley Bail Bonding Company, Inc.) PDR Under N.C.G.S. § 7A-31 (COA11-729)	Denied

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138P12	State v. Dartanya Levon Eaton	1. State's Motion for Temporary Stay (COA11-956) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/02/12** 2. 3.
148P10-7	State v. Lance Adam Goldman	Def's *Pro Se* Motion for Complaint (COAP12-225; COAP12-760)	Dismissed
159P12	Jeffrey A. and Lisa S. Hill, Individually and on Behalf of all Others Similarly Situated v. Stubhub, Inc. d/b/a Stubhub! and/or Stubhub.com, Justin Holohan, and John Doe Sellers 2, et al.	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA11-685) 2. Def's (Stubhub, Inc.) Motion for Admission of David J. Lender *Pro Hac Vice*	1. Denied 2. Allowed **Beasley, J., Recused**
166P11-2	State v. Haiber V. Montehermoso	Def's *Pro Se* Motion for NOA to Grant *Certiorari* Motion (COAP11-227)	Dismissed
168P09-9	State v. Clyde Kirby Whitley	1. Def's *Pro Se* Motion for Petition to NC Supreme Court (COAP11-794) 2. Def's *Pro Se* Motion to Enforce Judgment 3. Def's *Pro Se* Motion to Enforce Plea Agreement 4. Def's *Pro Se* Motion for Clarification 5. Def's *Pro Se* Motion for Appointment of Counsel	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed as Moot
169A11-2	Hest Technologies, Inc., et al. v. State of North Carolina, et al.	1. Plts' Motion to Temporary Stay 2. Plts' Petition for *Writ of Supersedeas*	1. Denied **12/19/12** 2. Denied **12/19/12**
181P10-2	Brian Z. France v. Megan P. France	1. Plt's Motion for Temporary Stay (COA12-284) 2. Plt's Petition for *Writ of Supersedeas*	1. Allowed **1/14/13** 2. **Beasley, J., Recused**

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184P12	Best Cartage, Inc. v. Stonewall Packaging, LLC, and Jackson Paper Manufacturing Company and GGG, Inc. d/b/a Grisanti, Galef and Goldress as Receiver for Stonewall Packaging, LLC, Intervenor	1. Def's (Jackson Paper Manufacturing Company) PDR Under N.C.G.S. § 7A-31 (COA11-1153) 2. Def's (Jackson Paper Manufacturing Company) Motion for Admission of Gregory S. Brow *Pro Hac Vice* 3. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Allowed 3. Dismissed as Moot
190P07-2	Janse Eliot Cooke v. Bryan K. Wells	1. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Petitioner's *Pro Se* Motion for Appointment of Counsel	1. Denied **01/11/13** 2. Dismissed as Moot **01/11/13**
190P12	State v. Darien Fisher	1. Def's NOA Based Upon a Constitutional Question (COA11-980) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
195PA11-2	State v. Samuel Kris Hunt	1. State's Petition for *Writ of Supersedeas* 2. State's Motion for Temporary Stay 3. State's PDR Under N.C.G.S. § 7A-31	1. 2. Allowed **08/03/12** 3.
201PA12	Margaret Dickson, et al. v. Robert Rucho, et al. --- N.C. State Conference of Branches of the NAACP, et al. v. State of N.C., et al.	1. Legislative Defendants' Motion that the Court Take Judicial Notice of Public Records 2. Legislative Defendants' Motion in the Alternative to Supplement the Record on Appeal	1. Dismissed as Moot 2. Allowed **Beasley, J., Did Not Participate**
201PA12	Margaret Dickson, et al. v. Robert Rucho, et al. --- N.C. State Conference of Branches of the NAACP, et al. v. State of N.C., et al.	1. Plts' Motion for Recusal of Justice Paul Newby 2. Defs' Motion to Amend Response to Motion for Recusal of Justice Paul Newby	1. Denied **12/17/12** 2. Allowed **12/17/12**

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204P12	Estate of Robert E. Browne, III; Shelby V.T. Clark; Jeanne F. Clark; John H. Loughridge, Jr.; Elford Hamilton Morgan; Jane Smith Morgan; and Norwood Robinson v. G. Kennedy Thompson; Thomas J. Wurtz; Donald K. Truslow; Robert K. Steel; Wachovia Corporation; Wells Fargo & Company (as successor-in-interest to Wachovia Corporation); and KPMG, LLP	Plts' PDR Under N.C.G.S. § 7A-31 (COA11-852)	Denied
228P12	State v. Kevin Martel Laney	1. Def's NOA Based Upon a Constitutional Question (COA11-1173) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. State's Conditional PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Amend NOA and PDR 6. Def's Second Motion to Amend NOA and PDR	1. - - - 2. Denied 3. Allowed 4. Dismissed as Moot 5. Allowed 6. Allowed **Beasley, J., Recused**
238P12	State v. Tavaris Lamont Fowler	1. Def's NOA Based Upon a Constitutional Question (COA11-1414) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
260P12	Arthur C. Taddei and Elizabeth A. Teddei v. Village Creek Property Owners Association, Inc. and Allen E. Renz	Plts' PDR Under N.C.G.S. § 7A-31 (COA11-650-2)	Denied

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275P12	State v. Terrance Javarr Ross	1. State's Motion for Temporary Stay (COA11-1462) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/25/12** 2. 3.
291P12	State v. Glenn Edward Whittington	1. State's Motion for Temporary Stay (COA11-1197) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/09/12** 2. 3.
295P12	State v. Lawrence Donell Flood, Sr.	1. State's Motion for Temporary Stay (COA11-856) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/09/12;** Dissolved the Stay **01/24/13** 2. Denied 3. Denied
305P09-2	Carnell Tyrone Streater v. Dennis Daniel, Superintendent	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/14/12**
311P10-3	State v. Gregory Scott Grosholz	1. Def's *Pro Se* Motion for Writs of Perjury 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot **Beasley, J., Recused**
315P12	Deborah B. Harmon v. Donald G. Hunt, Jr., Jamie L. Vavonese, Jason M. Fearon, Kristen G. Atkins a/d/a/ Kristen G. Atkins-Momot & Akins Law Firm, P.C. f/k/a The Law Offices of Akins, Hunt & Fearon, PLLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-1395)	Denied **Beasley, J., Recused**
324P11-2	State v. Mark Daniel Stephens	Def's *Pro Se* PWC to Review Order of COA (COAP12-168)	Dismissed **Jackson, J., Recused**

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328P12	Estate of Gail S. Blackburn, by Kimberly Sue Phelps, Administratrix, Employee v. Stabilus, Employer and Fireman's Fund Insurance, Royal & Sunalliance Insurance, and Travelers Insurance Company	1. Def's' (Stabilus & Travelers Insurance Company) Motion for Temporary Stay (COA11-1589) 2. Defs' (Stabilus & Travelers Insurance Company) Petition for *Writ of Supersedeas* 3. Defs' (Stabilus & Travelers Insurance Company) PDR Under N.C.G.S. § 7A-31	1. Allowed **08/08/12**; Dissolved the Stay **01/24/13** 2. Denied 3. Denied **Beasley, J., Recused**
333PA11-2	State v. Robert Lee Earl Joe	1. State's Motion for Temporary Stay (COA10-1037-2) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/24/12** 2. Allowed 3. Allowed
334P12-2	State v. Billy Ray Bridges	Def's *Pro Se* PWC to Review the Decision of COA (COA11-1196)	Denied
348P12	State v. Christopher Guy	1. Def's NOA Based Upon a Constitutional Question (COA12-197) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
361P12	State v. William Wesley Sellar, Jr.	1. Def's Motion for Temporary Stay (COA11-1315) 2. Def's Petition for *Writ of Supersedeas* 3. Def's NOA Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Appeal	1. Allowed **08/24/12;** Dissolved the Stay **01/24/13** 2. Denied 3. - - - 4. Denied 5. Allowed
366A10	State v. Michael Patrick Ryan	Def's Motion for Appropriate Relief Pursuant to N.C.G.S. § 15A-1411 *et seq.*	See Special Order
378P12	Lynda Springs v. City of Charlotte, Transit Management of Charlotte, Inc., and Dennis Wayne Napier	1. Defs' (City of Charlotte and Transit Management of Charlotte, Inc.) PDR Under N.C.G.S. § 7A-31 (COA12-107) 2. Defs' (City of Charlotte and Transit Management of Charlotte, Inc.) Motion to Stay Execution of Bond Number 018 009 143	1. Denied 2. Allowed **10/02/12;** Dissolved the Stay **01/24/13** **Beasley, J., Recused**

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384P12	HCW Retirement and Financial Services, LLC, a North Carolina limited liability company; HCWRFS, LLC, formerly Hill, Chesson & Woody Retirement and Financial Services, LLC, a North Carolina limited liability company; and Wilton R. Drake, III v. HCW Employee Benefit Services, LLC, a North Carolina limited liability company; Hill, Chesson & Woody, Inc., a North Carolina corporation; Prestwick Six, LLC, a North Carolina limited liability company; Frank S. Woody, III; and Todd T. Yates	Defs' (Frank S. Wood, III and Todd T. Yates) PDR Under N.C.G.S. § 7A-31 (COA11-1479)	Allowed
386P12	Anthony E. Scott v. N.C. Department of Crime Control and Public Safety, North Carolina Highway Patrol	1. Respondent's PDR Under N.C.G.S. § 7A-31 (COA12-67) 2. Petitioner's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
393P12	State v. Jabar Ballard	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-159) 2. Def's Motion to Deem PDR Timely Filed 3. Def's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA	1. Dismissed 2. Denied 3. Denied
39P13	James Arthur Smith, Employee v. Denross Contracting, U.S., Inc., E,ployer, Dennis Barrett, Individually, and the New York State Insurance Fund, carrier; and Kapstone Kraft paper, Employer, Sentry Insurance, Carrier	1. Def's (New York State Ins. Fund) Motion for Temporary Stay 2. Def's (New York State Ins. Fund) Petition for Writ of Supersedeas	1. Allowed **01/23/13** 2.

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400P06-4	State v. Billy Ray Morrison	Def's *Pro Se* Motion for PDR (COAP11-575)	Dismissed
401P12	State v. Cleveland S. Harris	1. Def's *Pro Se* PWC to Review Order of COA (COAP12-753) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
402A12	State v. Roderick Tynell Richardson	1. Def's Pro Se NOA Based Upon a Constitutional Question (COA11-1581) 2. State's Motion to Dismiss Appeal (COA11-1581)	1. See Special Order **12/17/12** 2. See Special Order **12/17/12**
402P11-4	Sylvester Eugene Harding, III v. State of North Carolina	1. Def's *Pro Se* Motion for NOA (COA11-161) 2. Def's *Pro Se* PWC to Review the Decision of COA	1. Dismissed *Ex Mero Motu* 2. Dismissed
405P12	State v. Vernon David McAllister	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1515)	Denied **Beasley, J., Recused**
407P12	In the Matter of: M.G.C.	1. Respondent Father's PDR Under N.C.G.S. § 7A-31 (COA12-296) 2. Petitioner-Mother's Motion to Deem PDR Timely Filed	1. Denied 2. Allowed
408P12	Kimberly Cullen and William G. Harrison, Sr. v. Emanuel & Dunn, PLLC, a North Carolina professional limited liability company and N.C.G.S. § 75D-3(a) association-in-fact; Lee W. Bettis, Jr., Esq.; Robert L. Emanuel, Esq.; Raymond E. Dunn, Esq.; and Stephen A. Dunn, Esq.	Plts' PDR Under N.C.G.S. § 7A-31 (COA11-921)	Denied **Parker, C.J., Recused**

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416P12	Mary Ann Wilcox v. City of Asheville; William Hogan, individually and in his official capacity as the Chief of the City of Asheville Police Department; Stony Gonce, individually and in his official capacity as a Police Officer for the City of Asheville; Brian Hogan, individually and in his official capacity as a Police Officer for the City of Asheville; and Cheryl Intveld, individually and in her official capacity as a Police Officer for the City of Asheville	1. Defs' (Stony Gonce, Brian Hogan, and Cheryl Intveld) Motion for Temporary Stay (COA12-12) 2. Defs' (Stony Gonce, Brian Hogan, and Cheryl Intveld) Petition for *Writ of Supersedeas* 3. Defs' (Stony Gonce, Brian Hogan, and Cheryl Intveld) PDR Under N.C.G.S. § 7A-31	1. Allowed **10/04/12** 2. 3.
417P12	State v. Tereck Danielle Perry	1. State's Motion for Temporary Stay (COA12-322) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/5/12**; Dissolved the Stay **01/24/13** 2. Denied 3. Denied
429P12	State v. Collins Stephanie Wilson	Def's PWC to Review Decision of COA (COA09-815)	Denied
435A96-5	State v. Walic Christopher Thomas	1. Def's Motion to Stay PWC 2. Def's PWC to Review Decision of Superior Court of Guilford County 3. Def's *Pro Se* Motion to Withdraw All Appeals	1. 2. 3. Dismissed **12/15/10**
443P12	State v. David Dwight Raman, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1588)	Denied
448P12-2	Anthony Williams v. James J. Exum-Attorney	Plt's *Pro Se* Motion for N.C. Rule of App. P. Rule 60 Relief	Dismissed

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449P11-5	State v. Charles Everette Hinton	1. Def's *Pro Se* Motion for an Oral Hearing 2. Def's *Pro Se* Motion for Request for Disposition on Petition for *Writ of Habeas Corpus*	1. Dismissed **12/13/12** 2. Denied **12/13/12**
450P12	Barbara R. Duncan v. John H. Duncan	Def's PDR Under N.C.G.S. § 7A-31 (COA12-399)	Allowed **Beasley, J., Recused**
453P12	State v. Edin Amaury Benavides	Def's *Pro Se* Motion for PDR (COA10-135)	Dismissed
462P12	Charles Daniel Hillard v. Thi Den Hillard	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-353)	Denied
464P12	State v. Michael Wade Nidiffer	Def's PDR Under N.C.G.S. § 7A-31 (COA12-61)	Denied
466P12	State v. Trawick Hamilton Stubbs	1. Def's PWC to Review Order of COA (COA12-1115) 2. Def's Notice of Withdrawal of Appeal and Motion to Withdraw Petition for Certiorari to the North Carolina Supreme Court	1. Dismissed as Moot 2. Allowed
467P12	Stephanie Ritchie v. Christopher D. Ritchie	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Motion for Temporary Stay 3. Def's Petition for *Writ of Supersedeas*	1. 2. Allowed **11/9/12** 3.
468P12	State v. Michael K. Davis	1. Def's *Pro Se* Motion in Response to State's Response to PWC (COAP12-878) 2. Def's *Pro Se* Motion for Extension of Time to File a *Writ of Certiorari* 3. Def's *Pro Se* PWC to Review Order of COA	1. Dismissed 2. Dismissed as Moot 3. Dismissed
470P12	State v. Walter Hayes Graham	Def's PDR Under N.C.G.S. § 7A-31 (COA12-258)	Denied **Beasley, J., Recused**
471P12	State v. James Perry Capps	Def's PDR Under N.C.G.S. § 7A-31 (COA12-312)	Denied

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472P12	State v. James Lester Vasquez and Jimmy Dean Locklear	1. Def's (Locklear) *Pro Se* NOA Based Upon a Constitutional Question (COA12-346) 2. Def's (Locklear) *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's (Locklear) *Pro Se* Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA 4. Def's (Vasquez) PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied 3. Denied 4. Denied **Beasley, J., Recused**
473P12	State v. Cyrus Romale Davis	Def's *Pro Se* PWC to Review Decision of COA (COA11-694)	Denied
480P12	In Re: Charels Hollenback	Petitioner's *Pro Se* Motion for Petition for Actual Innocence (COAP12-937)	Dismissed
482P12	State v. Gary Clyde Keever	Def's PDR Under N.C.G.S. § 7A-31 (COA12-342)	Denied
483P12	State v. Jeffrey Scott Mullis	Def's PDR Under N.C.G.S. § 7A-31 (COA12-192)	Denied
485P12	State v. Phillip Torvin Hubbard	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1577)	Denied **Beasley, J., Recused**
487P12	State v. Steven Franklin Ryan	1. State's Motion for Temporary Stay (COA12-228) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **11/26/12** Dissolved the Stay **01/24/13** 2. Denied 3. Denied 4. Dismissed as Moot
488P10-2	State v. Juan Carlos Ramirez	Def's *Pro Se* Motion for Petition for Actual Innocence of First Degree Murder and Statutory Rape of a Child	Dismissed
491A93-3	State v. Daniel Peterson	1. Def's *Pro Se* PWC to Review the Order of Cumberland County Superior Court 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as Moot

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491P12	In the Matter of: Tracey E. Cline	Petitioner's PWC to Review Order of COA (COA12-974)	Denied
494P12	Francisco Javier Lopez Reynoso and Maribel Morales Jardon v. Mallard Oil Company	1. Plaintiff-Appellants' Motion for Temporary Stay 2. Plaintiff-Appellants' Petition for *Writ of Supersedeas* 3. Plaintiff'-Appellants' PDR	1. Allowed **12/06/12;** Dissolved the Stay **01/24/13** 2. Denied 3. Denied
497P12	State v. Jay Mikal Brooks-Bey	1. Def's *Pro Se* Motion for NOA (COAP12-994) 2. Def's *Pro Se* Petition for *Writ of Mandamus*	1. 2. Denied **12/14/12**
498P09-2	Sheryl Boylan, Employee v. Verizon Wireless, Employer Sedwick, CMS, Carrier	1. Defs' Petition for Writ of Supersedeas (COA12-856) 2. Defs' Notice of Appeal Based Upon a Dissent	1. Allowed **01/23/13** 2. - - - **Beasley, J., Recused**
498P12	State v. Timothy C. Autry	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA12-368) 2. Def's *Pro Se* Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied
499P12	State v. Wayne Anthony Huss	1. State's Motion for Temporary Stay (COA12-250) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/10/12** 2. 3. **Beasley, J., Recused**
500P12	State v. William Adam Payseur	Def's *Pro Se* Petition for Actual Innocence (COA11-692)	Dismissed
501P12	State v. Jerry Wade Grice	1. State's Motion for Temporary Stay (COA12-577) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/10/12** 2.

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502P12	State v. Matthew Vernon Rawls	1. Def's Petition for *Writ of Habeas Corpus* 2. Def's Motion for Proceed *In Forma Pauperis*	1. See Special Order **1/11/13** 2. See Special Order **1/11/13**
503P12	State v. Robert Keith Rainey	Def's *Pro Se* Motion to Dismiss	Dismissed
507P12	Executive Medical Transportation, Inc., T/A Executive Transportation of North Carolina, Inc. v. Jones County Department of Social Services and the County of Jones	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-573)	Denied **Beasley, J., Recused**
508P12	State v. Catrell Gerome Holloway	Def's PDR Under N.C.G.S. § 7A-31 (COA12-433)	Denied
510A12	State v. Robin Eugene Land	1. Def's NOA Based Upon a Dissent (COA11-1484) 2. Def's PDR as to Additional Issues Under N.C.G.S. § 7A-31	1. - - - 2. See Special Order
511P12	Marty L. Sellers, Employee v. McArthur Supply, Employer; Penn National Claims, Carrier	1. Defs' Motion for Temporary Stay (COA12-700) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **12/13/12** 2. 3.
512P12	State v. Chester Wayne Davis	Def's PDR Under N.C.G.S. § 7A-31 (COA12-301)	Denied
513P12	Michael Joseph Allender, Employee v. Starr Electric Company, Inc., Employer; General Casualty Insurance Company, Carrier	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA12-349) 2. Plt's Motion to Stay Consideration of PDR	1. 2. Denied **01/09/13**
514P12	State v. William Stevenson Phillips	Def's PDR Under N.C.G.S. § 7A-31 (COA12-415)	Denied

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515P12	Elona Nicole (Jarrell) Johnson v. Robert Opsitnick, Jr., and Anna Opsitnick	1. Defs' NOA Based Upon a Constitutional Question (COA12-328) 2. Defs' PDR as to Additional Issues 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Plt's Motion to Dismiss Appeal 5. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. - - - 2. Denied 3. Denied 4. Allowed 5. Dismissed as Moot
516P12	Yolanda Hernandez v. Coldwell Banker Sea Coast Realty; Elliot and Susan Tindal; Scott G. Avent b/d/a Avent Appraisals, Inc.; and Bank of America Home Loans	1. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-430) 2. Plt's *Pro Se* Motion for Petition to Deny Respondent's Response to PDR	1. Denied 2. Dismissed as Moot
517P12	State v. Torez Lavon Hughes	1. Def's *Pro Se* PWC to Review Order of COA (COAP12-828) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
518P12	State v. David Richard Aekins	Def's *Pro Se* Motion for PDR (COAP12-917)	Dismissed **Beasley, J., Recused**
520P12	Capital Resources, LLC and Institution Food House, Inc. v. Chelda, Inc.; Charlotte Metro Restaurants, LLC; Barn Dinner Theatre, Inc.; Make Sense Dining of Florida, LLC; Make Sense Dining, Inc.; Buster's Grill, LLC; Dabney C. Erwin; and Charles B. Erwin	1. Def's (Chelda, Inc.) PDR Under N.C.G.S. § 7A-31 (COA12-288) 2. Def's (Chelda, Inc.) Motion to Deem PDR Timely Filed 3. Def's (Chelda, Inc.) Motion, in the Alternative, for PDR to be Accepted as PWC 4. Def's (Chelda, Inc.) PWC	1. Dismissed 2. Denied 3. Allowed 4. Denied

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521P12	New Breed, Inc. v. Richard Matt Bowen, Matthew R. Conger, Marty Hall, and Darren S. Willie New Breed, Inc. v. Kiley Chet Lanning and Rahul S. Bide	1. Defs' Motion for Temporary Stay (COAP12-996) 2. Defs' Petition for *Writ of Supersedeas*	1. Allowed **12/19/12**; Dissolved the Stay **01/08/13** 2. Denied **01/08/13**
522P12	State v. George Williams, Jr.	Def's *Pro Se* Motion for PDR (COAP12-956)	Dismissed
523P12	In the Matter of: R.B., Jr.	Respondent-Father's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-858)	Denied
524P12	State v. Mandrey D. Davis	Def's *Pro Se* Motion for *Writ* of Constitutional Law Relief Redress (COAP12-883)	Dismissed
525P12	Nicholas R. Burnham, Employee v. McGee Brothers Company, Inc., Employer, Zurich American Insurance Company, Carrier	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA11-1359) 2. Plt's Motion to Deem PDR Timely Filed 3. Plt's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA	1. Dismissed 2. Denied 3. Denied
527A12	State v. Eric Steven Jones and Jerry Alvin White	1. State's NOA Based Upon a Dissent (COA12-282) 2. State's PDR as to Additional Issues 3. Def's (Jones) PDR Under N.C.G.S. § 7A-31	1. - - - 2. Allowed 3. Allowed
529P08-2	State v. John Henry Haith	1. Def's *Pro Se* PWC to Review Order of COA (COAP10-12) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
530P12	State v. Darrian Antoine Perry	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/21/12**

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532P12	State v. Nicholas Sergakis	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas* (COA12-336) 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/21/12**; Dissolved the Stay **01/24/13** 2. Denied 3. Denied
533P12	State v. Billy Boyett	1. State's Motion for Temporary Stay (COA12-222) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/21/12** 2. **Beasley, J., Recused**
535P12	State v. W.D. Hope	Def's PDR Under N.C.G.S. § 7A-31 (COA12-659)	Denied **Beasley, J., Recused**
536P12	Russell Jay Heath v. Bryan K. Wells	1. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Petitioner's *Pro Se* Motion for Appointment of Counsel	1. Denied **12/27/12** 2. Denied **12/27/12**
537P12	State v. Daniel Foster	Def's PDR Under N.C.G.S. § 7A-31 (COA12-367)	Denied
584P99-5	State v. Harry James Fowler	1. Def's *Pro Se* Motion for *De Novo* Review Direct Appeal (COA12-281) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied

STATE OF NORTH CAROLINA v. LEE ROY ELLISON STATE OF NORTH CAROLINA v. JAMES EDWARD TREADWAY

No. 363PA11

(Filed 8 March 2013)

Drugs— prescription pills—opium trafficking statute—applicable

The trial court did not err by sentencing defendants under the opium trafficking statute, N.C.G.S. § 90-95(h)(4), in a case involving prescription pharmaceutical pills. Although defendants argued that the opium trafficking statute was intended for large-scale distribution operations and not for amounts typical of individual users, the opium trafficking statute is clear and unambiguous and the statute's plain language must be applied.

Justice BEASLEY did not participate in the consideration of decision of the case.

Justice HUDSON concurring in the result only.

Justice JACKSON joins in this concurring opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 713 S.E.2d 228 (2011), finding no prejudicial error in judgments entered on 9 October 2009 by Judge Anderson D. Cromer in Superior Court, Ashe County, but remanding for correction of a clerical error in one judgment. Heard in the Supreme Court on 4 September 2012.

Roy Cooper, *Attorney General*, *by Brandon L. Truman and Robert D. Croom*, *Assistant Attorneys General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Andrew DeSimone*, *Assistant Appellate Defender*, *for defendant-appellant Lee Roy Ellison.*

Daniel F. Read for defendant-appellant James Edward Treadway.

Anne Bleyman, *and Rudolph Widenhouse & Fialko*, *by M. Gordon Widenhouse*, *Jr.*, *for North Carolina Advocates for Justice*, *amicus curiae.*

NEWBY, Justice.

This case presents the question whether N.C.G.S. § 90-95(h)(4) of the North Carolina Controlled Substances Act, N.C.G.S. §§ 90-86 to -113.8 (2011), applies in cases involving prescription pharmaceutical tablets and pills. Subdivision 90-95(h)(4), the opium trafficking statute, explicitly provides that a defendant's criminal liability shall be based on the total weight of the mixture involved. Because tablets and pills are mixtures, we conclude that defendants were properly sentenced under the opium trafficking statute. Accordingly, the decision of the Court of Appeals is affirmed.

The Ashe County Sheriff's Office received a tip from a confidential informant regarding an ongoing arrangement between defendants, Lee Roy Ellison and James Edward Treadway, to trade in prescription drugs. After a brief period of surveillance, officers stopped Ellison leaving Treadway's home with pill bottles from which the labels had been removed. The bottles appeared to contain prescription pharmaceuticals.

Later analysis revealed that the bottles held 90 pills of dihydrocodeinone, an opium derivative, and 80 pills of alprazolam. The dihydrocodeinone pills weighed a total of 75.3 grams. Using the aggregate weight of the dihydrocodeinone pills, the State charged defendants with a number of violations of the Controlled Substances Act, including trafficking in 28 grams or more of a mixture containing opium.

Defendants moved to dismiss the trafficking charges. They argued that the General Assembly did not intend that charges stemming from possession of prescription medications be based on total weight. The trial court denied defendants' motions, and the jury found defendants guilty of trafficking in 28 grams or more of a mixture containing opium. In accordance with the opium trafficking statute, the court sentenced each defendant to 225 to 279 months of imprisonment plus a $500,000 fine. Defendants appealed, arguing, *inter alia*, that the trial court erred by denying their motions to dismiss the trafficking charges. *State v. Ellison*, —— N.C. App. ——, ——, 713 S.E.2d 228, 241 (2011).

Relying on its own decisions in *State v. McCracken*, 157 N.C. App. 524, 579 S.E.2d 492 (2003) and *State v. Jones*, 85 N.C. App. 56, 354 S.E.2d 251, *disc. rev. denied*, 320 N.C. 173, 358 S.E.2d 61, *cert. denied*, 484 U.S. 969, 108 S. Ct. 465, 98 L. Ed. 2d 404 (1987), the Court of Appeals unanimously affirmed the trial court's decision. *Ellison*, —— N.C. App. ——, ——, 713 S.E.2d 228, 236, 246. That court held that under the Controlled Substances Act, "liability for trafficking cases

involving prescription medications hinges upon the total weight of the pills or tablets in question instead of the weight of the controlled substance contained within those medications." *Id.* at ——, 713 S.E.2d at 236 (citing *McCracken*, 157 N.C. App. 524, 579 S.E.2d 492). The court explained that "the ultimate responsibility for determining the manner in which criminal offenses should be punished lies with the General Assembly," and further concluded that a rational basis exists "for subjecting individuals involved in large scale distribution of mixtures containing controlled substances to more severe punishment." *Id.* at ——, 713 S.E.2d at 237 (citing, *inter alia*, *State v. Perry*, 316 N.C. 87, 101-02, 340 S.E.2d 450, 459 (1986)). We allowed defendants' petitions for discretionary review, *State v. Ellison*, —— N.C. ——, 722 S.E.2d 593 (2012); *id.* at ——, 722 S.E.2d at 594 (2012), to determine whether the total weight of pills and tablets should be used to calculate liability under the trafficking provisions of the Controlled Substances Act.

In 1980 the General Assembly amended the Controlled Substances Act by adding a provision to further deter the distribution and use of opium derivatives. Act of June 25, 1980, ch. 1251, sec. 6, 7, 1979 N.C. Sess. Laws (2d Sess. 1980) 173, 174-78. Now codified at N.C.G.S. § 90-95(h)(4), the opium trafficking statute reads:

> Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved:
>
> a. Is four grams or more, but less than 14 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);
>
> b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of 117 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of 279 months in the State's prison and shall be fined not less than five hundred thousand dollars ($500,000).

Under this statute a person will be punished at the maximum level "if the quantity of such controlled substance or mixture involved . . . [i]s 28 grams or more."

While "mixture" is not defined by the Controlled Substances Act, other courts have defined the term. In a case involving criminal prosecution under federal controlled substances laws, the Supreme Court of the United States said that "[a] 'mixture' is defined to include 'a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence.' " *Chapman v. United States*, 500 U.S. 453, 462, 111 S. Ct. 1919, 1926, 114 L. Ed. 2d 524, 536 (1991) (quoting *Webster's Third New International Dictionary* 1449 (1986)). Applying a similar definition in *McCracken*, our Court of Appeals reasoned that tablets, pills, and capsules are mixtures because they "contain commingled substances that are identifiable and thus regarded as retaining their separate existence." 157 N.C. App. at 527, 579 S.E.2d at 495 (applying the opium trafficking statute in a case involving tablets containing opium derivatives (citing, *inter alia*, *Jones*, 85 N.C. App. at 68, 354 S.E.2d at 258)). Likewise, in *Jones*, a case involving tablets containing opium derivatives where charges were brought under the opium trafficking statute, the Court of Appeals held that "[c]learly, the legislature's use of the word 'mixture' establishes that the total weight of the dosage units . . . is sufficient basis to charge a suspect with trafficking." 85 N.C. App. at 68, 354 S.E.2d at 258. Consequently, the pills at the heart of this case are, by definition, a "mixture" as contemplated by the opium trafficking statute.

Defendants nevertheless argue that the General Assembly intended for the opium trafficking statute to apply only to large-scale drug distribution operations, not cases involving "amounts typical of individual users." According to defendants, if the pills' total weight is determinative, then the weekly dosage recommended by physicians would trigger the highest level of punishment under the statute. Defendants thus contend that the sentences required by the plain language of the opium trafficking statute are absurd and unjust and not in accord with the statute's purpose. Defendants instead point

to a different provision of the Controlled Substances Act, N.C.G.S. § 90-95(d)(2), and assert that the rule of lenity requires courts to apply that statute in cases involving pills and tablets. Rather than total weight, subdivision 90-95(d)(2) calculates criminal liability based on the number of "tablets, capsules, or other dosage units" involved and apparently would have carried a lesser sentence in this case.

"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." *Perry*, 316 N.C. at 101, 340 S.E.2d at 459. When reviewing criminal sentencing, we seek to apply the law consistently with the intent of the General Assembly. And, the legislature's "actual words," codified in our General Statutes, "are the clearest manifestation of its intent." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) (citation omitted). Judicial construction, like the rule of lenity, only applies when a statute is ambiguous. *Lee v. Gore*, 365 N.C. 227, 230, 717 S.E.2d 356, 358 (2011) (stating that "there is no room for judicial construction" when the "language of a statute is clear and unambiguous"); *State v. Hinton*, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007) (applying the rule of lenity to an ambiguous criminal statute).

Because the opium trafficking statute is clear and unambiguous, we are required to apply the statute's plain language that prohibits trafficking in mixtures containing opium derivatives, such as the pills in this case. Even if we did consider other evidence of legislative intent, it appears the result would be the same. The statute defendants would have us apply instead, N.C.G.S. § 90-95(d)(2), explicitly states that it is subject to subsection (h), which includes the opium trafficking provisions in section 90-95. So the General Assembly plainly intended for the opium trafficking statute, not subdivision 90-95(d)(2), to control in cases involving "four grams or more" of a mixture containing opium derivatives. Moreover, in 2009, well after our Court of Appeals addressed this issue in *McCracken* and *Jones*, the General Assembly considered legislation that would have amended the opium trafficking statute so that criminal liability would be based on the number of prescription pills involved rather than total weight. H. 1307, 149th Gen. Assemb., Reg. Sess. (N.C. 2009) ("An Act To Clarify That Possession of Certain Prescription Drugs Is Not Punishable As Trafficking in Opium or Heroin and To Set Out the Criminal Penalty for That Offense"). The General Assembly, however, declined to make that change. Act of July 1, 2010, ch. 49, 2009 N.C. Sess. Laws (Reg. Sess. 2010) 255 (amending the state constitution on

an unrelated matter). While not dispositive, the General Assembly's consideration of the issue and decision not to amend the statute are at least some evidence of tacit approval for applying the statute to tablets and pills. *See, e.g.*, *State v. Jones*, 358 N.C. 473, 483-84, 598 S.E.2d 125, 131-32 (2004) (applying the concept of legislative acquiescence to the judicial interpretation of a criminal statute (citing *State v. Gardner*, 315 N.C. 444, 462, 340 S.E.2d 701, 713 (1986); *State v. Council*, 129 N.C. 511, 513, 39 S.E. 814, 815 (1901))); *Young v. Woodall*, 343 N.C. 459, 462-63, 471 S.E.2d 357, 359 (1996) ("The failure of a legislature to amend a statute which has been interpreted by a court is some evidence that the legislature approves of the court's interpretation.").

Thus, we hold that the opium trafficking statute applies in cases involving tablets and pills of prescription pharmaceutical drugs. Because defendants possessed more than 28 grams of a mixture containing an opium derivative, the trial court correctly sentenced defendants under the opium trafficking statute. Though we are not unmindful of the harsh results imposed by the statute, to conclude otherwise would encroach upon the role of the legislative branch. N.C. Const. art. I, § 6. Had the General Assembly intended for prescription tablets and pills to fall outside the scope of the statute, it could have easily included plain language to that effect. Defendants' argument therefore would be better addressed to the legislature, Evan M. Musselwhite, Comment, *One Tough Pill To Swallow: A Call To Revise North Carolina's Drug Trafficking Laws Concerning Prescription Painkillers*, 33 Campbell L. Rev. 451 (2011), or in a petition to the Governor for clemency, N.C. Const. art. III, § 5, cl. 6. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

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

Justice HUDSON, concurring in the result only.

I write separately because, while I concur that defendants' offenses are covered by the plain language of N.C.G.S. § 90-95(h)(4), I find the result troubling in that it may permit prosecution of some persons whose activities are beyond the intended reach of the original legislation.

The legislative intent behind subsection 90-95(h) shows that the law was meant to punish large-scale distributors of illegal drugs. The

public papers of Governor Hunt, who requested that the General Assembly enact the measure, show such intent:

> *We must strengthen our commitment to fighting the big-time drug dealer* who has been driven to North Carolina by strong laws which have been enacted in states like Florida.
>
> We need the same sort of tough laws in North Carolina. For that reason, we will present to the General Assembly next month emergency legislation which will impose extremely harsh mandatory prison terms and large fines for *those persons convicted of dealing in large quantities of four kinds of drugs which have become a serious problem. These are marijuana, methaqualone, cocaine, and opium derivatives.*
>
> This legislation will not change the penalties for those convicted of the possession, manufacture, or sale of those drugs in small quantities as provided in the current law. But for those who *are obviously dealing for profit*, the penalties will be very tough.

James Baxter Hunt, Jr., Governor of N.C., Statement on Increased Penalties for Drug Dealers (May 21, 1990), *in* 1 *Addresses and Public Papers of James Baxter Hunt, Jr.* (Memory F. Mitchell ed., 1982) at 735 (emphases added) (footnote omitted). Whether prescription pills were intended to be covered by the statute is immaterial: the point of subsection 90-95(h) was, and still is, to punish large-scale drug traffickers. Punishments for end users are codified in § 90-95(d).

But here defendants Ellison and Treadway were charged with trafficking when they were arrested for buying and selling, respectively, a single end-user amount of ninety Lorcet pills. Under this interpretation of the statute, a defendant would need to possess a mere five Lorcet pills (less than the daily maximum dosage) to be charged with trafficking. While the State maintained at oral argument that such an occurrence is unlikely, it has already happened. In *State v. Burrow*, —— N.C. App. ——, 721 S.E.2d 356, *vacated and remanded on other grounds*, —— N.C. ——, 736 S.E.2d 484 (2012) (per curiam order), argued a month after these cases, the defendant was convicted of trafficking by possessing only twenty-four oxycodone pills. In addition, this Court has considered numerous Petitions for Discretionary Review involving similar fact patterns. *See, e.g.*, *State v. McAllister*, —— N.C. App. ——, 731 S.E.2d 276, 2012 WL 3571069 (2012) (unpublished) (upholding a trafficking conviction based on nine oxycodone pills), *disc. rev. denied*, 736 S.E.2d 491 (2013); *State*

v. Seamster, —— N.C. App. ——, 716 S.E.2d 440, 2011 WL 4553120 (2011) (unpublished) (involving a conviction for twenty hydrocodone pills), *disc. rev. denied*, 722 S.E.2d 606 (2012). The Court of Appeals has also apparently seen these types of charges in cases that were not appealed to this Court. *See*, *e.g.*, *State v. Davis*, —— N.C. App. ——, ——, 733 S.E.2d 191, 192 (2012) (involving a conviction for trafficking by transportation and possession of 29 Percocet—a combination of oxycodone and non-controlled substances—pills); *State v. Romero*, —— N.C. App. ——, 729 S.E.2d 731, 2012 WL 3192738, at *1-2 (2012) (unpublished) (involving a conviction for trafficking by possession of 30.5 oxycodone pills). And even more unsettling, as noted by defendants, possession of one bottle of over-the-counter cough syrup containing codeine could be punished as trafficking under this literal application of the statute. This cannot be what the legislature intended.

The majority is also correct that the plain language of the statute allows for the mass of an entire "mixture" to be considered and that this definition could apply to prescription pills or tablets as well. But, this interpretation also leads to disturbing results. Taking total mass into account makes sense in the street drug context: drug dealers often "cut" their product with other substances to increase the number of customers and to thus make a larger profit. This practice was recognized by this Court in *State v. Perry*: "The mixing and packaging into dosage containers of a controlled substance with other noncontrolled substances indicates an intent to distribute the controlled substance on a large scale." 316 N.C. 87, 101, 340 S.E.2d 450, 459 (1986). However, that logic does not apply when examining prescription pills. Instead of the drug dealer mixing the substance, it is the pharmaceutical company, with different incentives, that creates the tablet or pill. Therefore, I would suggest that the General Assembly reconsider whether it intends that "mixtures" of illegal street drugs be treated differently from prescription pills for the purposes of subsection 90-95(h), and if so, to consider acting accordingly.

Finally, although the majority cites to a failed attempt to change this language in 2009 as evidence that the legislature has reviewed and approved our courts' interpretation of the statute, I do not see the failed legislation as providing compelling evidence of that fact. While the majority cites to *Young v. Woodall*, 343 N.C. 459, 462-63, 471 S.E.2d 357, 359 (1996) for the proposition that we may look to legislative inaction for support of this Court's decision, this Court has also pronounced that

> [w]e must be leery, however, of inferring legislative approval of appellate court decisions from what is really legislative silence. "Legislative inaction has been called a 'weak reed upon which to lean' and a 'poor beacon to follow' in construing a statute." 2A N. Singer, Sutherland Statutory Construction 407 (1984). "[It is] impossible to assert with any degree of assurance that [legislative inaction] represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice."

DiDonato v. Wortman, 320 N.C. 423, 425, 358 S.E.2d 489, 490 (1987) (last sentence quoting *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 672, 107 S. Ct. 1442, 1472 (Scalia, J. & Rehnquist, C.J., dissenting)); *see also 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."); *Styers v. Phillips*, 277 N.C. 460, 472-73, 178 S.E.2d 583, 589-91 (1971) ("[O]rdinarily the intent of the legislature is indicated by its actions, and not by its failure to act."). Though our precedent on this issue appears less than crystal clear, I find the reasoning in *DiDonato* more compelling than the reasoning in *Young*, and more in line with United States Supreme Court precedent. *See, e.g., United States v. Craft*, 535 U.S. 274, 287, 122 S. Ct. 1414, 1425 (2002) (stating that "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction" (alteration in original) (citation and quotation marks omitted)); *Schweiker v. Chilicky*, 487 U.S. 412, 440, 108 S. Ct. 2460, 2476 (1988) ("Inaction, we have repeatedly stated, is a notoriously poor indication of congressional intent . . . ." (Brennan, Marshall & Blackmun, J.J., dissenting) (citations omitted)); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 S. Ct. 2668, 2678 (1990) ("But subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law. Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.' " (internal citations omitted)). Therefore, I would not accord much weight, if any, to the General Assembly's failure to ultimately amend N.C.G.S. § 90-95(h)(4).

The illegal sale and use of prescription drugs is one of the most serious problems currently confronting law enforcement. Accordingly, traffickers in this market should be punished severely; however, our current application of N.C.G.S. § 90-95(h)(4) has led, in this case—and in others—to the prosecution and conviction of individuals who do not appear to fall within the intended class targeted by the statute: large-scale professional drug dealers. Instead, small-scale dealers and end users have been swept in by the broad language of the statute. I am confident that this is not what the General Assembly intended in enacting this statute. As such, I respectfully concur in the result only.

Justice JACKSON joins in this concurring opinion.

STATE OF NORTH CAROLINA v. AADIL SHAHID KHAN

No. 45A12

(Filed 8 March 2013)

Sentencing— aggravating factor—unambiguous stipulation—supported by the evidence

The trial court did not err in a murder and conspiracy to commit murder case by imposing an aggravated sentence for defendant's convictions resulting from his negotiated plea. Defendant unambiguously stipulated to the application of an aggravating factor on both indictments used to charge defendant and the application of the aggravating factor for both indictments was supported beyond a reasonable doubt by the evidence.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 721 S.E.2d 409 (2012), affirming in part and vacating and remanding in part judgments entered on 15 November 2010 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Supreme Court on 15 October 2012.

Roy Cooper, Attorney General, by Laura E. Parker and Teresa M. Postell, Assistant Attorneys General, for the State-appellant.

Tharrington Smith, L.L.P., by Douglas E. Kingsbery, Wade M. Smith, and Derick R. Vollrath, for defendant-appellee.

EDMUNDS, Justice.

Defendant was named in two indictments and entered a negotiated plea in each. We consider in this appeal whether the trial court properly imposed an aggravated sentence for defendant's convictions on one of these indictments. We find that defendant unambiguously stipulated to application of the aggravating factor for both indictments and that application of the aggravating factor for both indictments was supported beyond a reasonable doubt by the evidence. Accordingly, we reverse the holding of the Court of Appeals to the contrary.

The record indicates that the victim named in each indictment, Matthew Silliman, was a friend of defendant. In late October 2008, Ryan Hare devised a plan to kill Silliman and solicited defendant and others to help. On 25 November 2008, defendant and the coconspirators lured the unsuspecting victim into an automobile and drove him to a remote area where defendant was to use a Taser to incapacitate the victim while the others strangled him. Although the Taser failed to function and the attempt to kill Silliman was aborted mid-struggle, the victim remained with defendant and his other assailants because the victim still believed they were his friends. Defendant and the others convinced Silliman that a fictitious "Roger" was hunting him and wanted to kill him. They then helped Silliman hide from "Roger" by taking the victim to an abandoned house, where he stayed for the next five days. On 30 November 2008, defendant and the other coconspirators inveigled Silliman into drinking a concoction of wine and horse tranquilizers. When Silliman fell unconscious, his mouth was taped and a plastic bag tied over his head, asphyxiating him.

On 16 December 2008, defendant was charged in indictment 08 CRS 85094 with murder and conspiracy to commit murder ("the 2008 indictment"). This indictment was based upon the events of 30 November 2008. Later, on 9 February 2010, defendant was charged in indictment 10 CRS 652 with attempted first-degree murder and conspiracy to commit first-degree murder ("the 2010 indictment"). This second indictment alleged the events of 25 November 2008.

Defendant and the State negotiated a plea agreement. The terms of the plea were set out in a written Transcript of Plea form provided by the Administrative Office of the Courts, form AOC-CR-300. In the portion of the Transcript of Plea titled "Plea Arrangement," the prosecutor, defendant, and defense counsel initialed their agreement that the two counts in the 2010 indictment would be consolidated for judgment. In addition, the first-degree murder count in the 2008

indictment would be reduced to second-degree murder, and this reduced charge would be consolidated for judgment with the other count in that indictment. The agreement provided that the sentence imposed on the 2008 indictment would run consecutively to the sentence imposed on the 2010 indictment. This portion of the agreement also contained terms relating to continuation of judgment and defendant's anticipated cooperation.

Elsewhere in the Transcript of Plea form, Question 15 was checked so that the preprinted portion read, "Have you admitted the existence of the aggravating factors?" The answer, "Yes," is handwritten on the form beside the question, and in the space provided below the question was typewritten: "#15–The defendant took advantage of a position of trust or confidence to commit the offense." Similarly, Question 16 was checked so that it read, "Do you agree that the State has provided you with appropriate notice about the aggravating factors and/or sentencing points in your case?" The handwritten answer, "Yes," is entered beside the question. Question 17 was checked, indicating that defendant understood that the State was stipulating to three mitigating factors, which were typewritten below this question. Question 26 was checked so that it read, "Do you agree that there are facts to support your plea and admission to aggravating factors, and do you consent to the Court hearing a summary of the evidence?" Again, the answer, "Yes," is handwritten beside the question. The agreement implicitly left to the judge the balancing of the aggravating and mitigating factors, as well as the length of the sentence that would be imposed under each indictment.

Defendant entered his plea at a hearing held on 25 August 2010, at which time the Transcript of Plea was signed by the judge and ordered recorded. At the hearing, the trial judge asked defendant whether he understood that, under the plea agreement, the charge of first-degree murder would be reduced to second-degree murder, the two counts in each indictment would be consolidated for judgment, and the "[s]entence imposed in [the 2008 indictment] is to run at the expiration of the sentence imposed in [the 2010 indictment]." When defendant answered, "Yes," the trial court asked, "Is that what you understand to be your entire agreement with the [S]tate?" Defendant again responded, "Yes." Later in the colloquy, the trial judge asked defendant: "You also stipulate that there is—to the existence of aggravating factor number 15, that you took advantage of a position of trust or confidence to commit the offense?", to which defendant responded, "Yes." The prosecutor then presented the factual basis for

the plea, adding that "[a]s far as the aggravating factors, to put that in the record, . . . [defendant] was a close friend of [the victim]. I've read numerous computer transactions between them, and quite frequently they refer to each other as 'twins.' " The trial judge accepted defendant's guilty plea and continued judgment until after the conclusion of the trial of one of defendant's coconspirators.

Defendant was sentenced on 15 November 2010. The prosecutor presented testimony from several of the victim's family and friends, then asked the trial court to "find that this is an aggravated crime" and to sentence defendant "in the aggravated range to a sentence of 196 to 245 [months] followed by another sentence of 196 to 245 [months]," adding that the "plea agreement contemplates such an arrangement" and that defendant "has already received the benefit in not being tried for first-degree murder. I'd ask that you sentence him to the maximum time allowed." Although defendant presented two mitigating witnesses and made extensive arguments in favor of a mitigated sentence, defense counsel acknowledged the aggravating factor, stating that "I do not disagree that there was an abuse of trust here, and we've agreed to that absolutely." The trial judge found the mitigating factors to which the parties had stipulated, but also found beyond a reasonable doubt the aggravating factor that defendant took advantage of a position of trust, then sentenced defendant in the aggravated range for the convictions on both indictments:

> In File Number 10-CRS-652, for the conspiracy to commit murder and attempted murder of [the victim], occurring on or about November 25, 2008, I order you incarcerated for a term of 196 months minimum, 245 months maximum.
>
> In the file 08-CRS-85094, for the conspiracy to commit murder and the murder of [the victim] in the second degree, I order you incarcerated for a minimum term of 196 months and a maximum term of 245 months.

The trial judge prepared two judgments, one for each indictment, along with two corresponding "Felony Judgment Findings of Aggravating and Mitigating Factors." In the latter forms, the trial judge made separate findings as to the sentence imposed on each indictment. He determined that the aggravating factor was supported beyond a reasonable doubt and that the aggravating factor outweighed the mitigating factors, justifying an aggravated sentence on each indictment.

Defendant appealed to the Court of Appeals, arguing, *inter alia*, that he had stipulated to the aggravating factor in the 2008 indictment only and that the trial court erred in imposing an aggravated sentence on the 2010 indictment because he had entered no stipulation in that case. In a divided opinion, the Court of Appeals majority found that the Transcript of Plea was ambiguous. *State v. Khan*, —— N.C. App. ——, 721 S.E.2d 409, 2012 WL 121230, at *3 (2012). The majority noted that the "File No." box at the top of the Transcript of Plea form listed the single file number of the 2008 indictment, even though each of the charges in the 2008 and 2010 indictments were listed individually in the body of the plea agreement. *Khan*, 2012 WL 121230, at *2. The majority also pointed out that the trial court referred to "the offense," in the singular, when questioning defendant about the aggravating factor. *Id.* at *2-3. The Court of Appeals majority determined that defendant reasonably could have believed the aggravating factor to which he stipulated would apply only to the 2008 indictment. *Id.* at *3. Asserting that "the State [is held] to a higher degree of responsibility than the defendant for any ambiguities in the plea agreement," the majority concluded that the ambiguities should be construed against the State. *Id.* (citing *State v. Blackwell*, 135 N.C. App. 729, 731, 522 S.E.2d 313, 315 (1999), *remanded per curiam*, 353 N.C. 259, 538 S.E.2d 929 (2000)). The majority vacated the sentence imposed on the 2010 indictment and remanded the case for a new sentencing hearing on that indictment. *Id.*

The dissenting judge disagreed. 2012 WL 121230, at *4 (Steelman, J., concurring in part and dissenting in part). While acknowledging that only one indictment number was listed at the top of the Transcript of Plea, the dissenter pointed out that the document was a "general plea form" promulgated by AOC "to be used when a defendant pleads to one offense or to multiple offenses." *Id.* Accordingly, a reviewing court should consider "the totality of the document." *Id.* Both indictments and all four charges were detailed in the body of the agreement under Question 12, in which defendant was asked if he "under[stood] that [he was] pleading guilty to the charges shown below." *Id.* In addition, the preprinted language of the Transcript of Plea in Question 15 referred to "aggravating factors," while "[t]he language of the aggravating factor," added by the attorneys under Question 15, was "taken *verbatim* from [N.C.G.S.] § 15A-1340.16(d)(15), including the language referencing to 'the offense' in the singular." *Id.* The dissenting judge further observed that defendant acknowledged in the Transcript of Plea both that he had received proper notice of the aggravating factor and that there were facts supporting it. 2012

WL 121230, at *4-5. As a result, the dissenting judge concluded that "[t]here is absolutely nothing in the plea transcript limiting this aggravating factor to [the 2008 indictment]." *Id.* at *4. The dissenting judge would have determined the Transcript of Plea was not ambiguous and upheld the sentence imposed by the trial court. *Id.* at *5.

The State appealed to this Court on the basis of the dissent and argues that the Transcript of Plea was not ambiguous. Defendant responds that the Transcript of Plea and the colloquy at the plea hearing were fatally ambiguous. Defendant also raises additional arguments challenging the validity of the sentence imposed by the trial court. First, he argues that the State failed to present sufficient evidence to support imposition of the aggravating factor as to the 2010 indictment. Second, he argues that the trial court failed to follow statutorily mandated procedures during the hearing when the plea was taken. We begin by considering whether the Transcript of Plea was ambiguous, then turn to the other issues raised by defendant.

Whether a document is ambiguous is a question of law. *See, e.g.*, *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 123, 388 S.E.2d 538, 551 (1990). We review questions of law de novo. *See, e.g.*, *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

The use of plea agreements has been approved by the General Assembly. Article 58 of Chapter 15A of the General Statutes of North Carolina ("Procedures Relating to Guilty Pleas in Superior Court") regulates resolution of criminal charges when pleas of guilty are negotiated. Recognizing that a pleading defendant surrenders rights guaranteed under the constitutions of North Carolina and of the United States, the individual statutes in Article 58 set out a procedure that is transparent to the parties and to the public. *See State v. Agnew*, 361 N.C. 333, 335, 643 S.E.2d 581, 583 (2007) ("Because a guilty plea waives certain fundamental constitutional rights such as the right to a trial by jury, our legislature has enacted laws to ensure guilty pleas are informed and voluntary.").

The record establishes that the plea agreement here was negotiated, memorialized in the Transcript of Plea, and executed in accordance with the applicable statutes. Although defendant argues that the Court of Appeals majority correctly found that the Transcript of Plea was ambiguous, the only evidence of ambiguity we see is that the top line of the Transcript of Plea form lists the file number of the 2008 indictment but not that of the 2010 indictment. However, if the

stipulation to the aggravating factor was to apply to the 2008 indictment only, it follows that a separate Transcript of Plea form covering the 2010 indictment would also have been executed, omitting that stipulation. Instead, Question 12 of the Transcript of Plea asks, "Do you understand that you are pleading guilty to the charges shown below?" Beneath this question, the two counts in the 2010 indictment are set out individually, as are the two counts in the 2008 indictment. The word, "Yes," is handwritten in response to this question. The parties skirmish in their briefs over the fact that the paperwork, the judge, and attorneys referred sometimes to "the offense" and other times to "the offenses," but we do not find this differing wording persuasive. Instead, we conclude that, in light of the evidence found within the Transcript of Plea, along with the facts of the case and the behavior of the parties, defendant unambiguously stipulated that the aggravating factor would apply to both indictments.

Even if defendant initially misunderstood the plea or if the Transcript of Plea were ambiguous, the sentencing hearing ultimately provided clarity. Although defendant argues that the prosecutor's language at the sentencing hearing preserved the purported ambiguity in the Transcript of Plea because the prosecutor did not explicitly ask that both sentences be aggravated on the basis of the stipulation, the record indicates that the prosecutor sought aggravated sentences for each consolidated offense, asking the trial court to "find that this is an aggravated crime" and to sentence defendant "in the aggravated range to a sentence of 196 to 245 [months] followed by another sentence of 196 to 245 [months]," the maximum aggravated sentences available. *See* N.C.G.S. § 15A-1340.17 (2007). Moreover, defendant's presentation to the trial court at the sentencing hearing concerning the application of mitigating factors to the two indictments indicated an expectation that both the mitigating and aggravating factors to which the parties stipulated would be applied in each indictment. After asking the court to find three more mitigating factors in addition to the three to which the State had stipulated, defendant said: "I ask [the court] to find the presence of these six statutory factors in mitigation and that you find them present *in both of those cases*. My view of the matter is that when you add all those things up, they do outweigh the one aggravating factor." (Emphasis added.). Defendant never argued that the sentence on the 2010 indictment should not be aggravated; instead he argued that mitigating factors outweighed the stipulated aggravating factor. We believe defendant could have had little doubt that the Transcript of Plea's terms and conditions applied to all the charges brought against him.

Additionally, any belief on defendant's part that he had stipulated to an aggravated sentence only on the 2008 indictment was revealed to be mistaken when the trial court stated that "an aggravated sentence is justified for these offenses," then imposed consecutive aggravated sentences on both indictments. Despite defendant's contention that he did not have time to object after sentence was imposed because the judge immediately left the bench, the record shows defendant had ample opportunity to bring any confusion to the attention of the trial court during the sentencing hearing.

Defendant next contends that he did not realize that the sentence on the 2010 indictment was aggravated on the basis of the stipulation until he saw the corresponding "Felony Judgment Findings of Aggravating and Mitigating Factors" signed by the judge after the completion of the sentencing hearing. According to defendant, until he saw the form he believed the sentence in the 2010 indictment was aggravated because of the facts of the case, not the stipulation. Leaving aside the question whether the judge could have imposed an aggravated sentence without a jury finding or a stipulation, we note that this form was signed on 15 November 2010, the same day as the sentencing hearing. So even if defendant left the sentencing hearing without realizing the trial court's basis for aggravating the sentence on the 2010 indictment, the information that would have permitted him to file a timely Motion for Appropriate Relief pursuant to N.C.G.S. § 15A-1414 or take other appropriate remedial action was available shortly thereafter. Accordingly, we are not persuaded that defendant did not have an opportunity to object to the sentence.

Having concluded that the Transcript of Plea was not ambiguous, we now consider the other arguments raised by defendant. Defendant argues that the trial court did not follow the statutory requirements for taking a plea because it failed to determine whether the State intended to seek an aggravated sentence for each indictment, in accordance with N.C.G.S. § 15A-1022.1(a). The record indicates that at the plea hearing the trial court went over the terms of the plea agreement with defendant and asked defendant directly if he understood its terms, and defendant responded, "Yes." During the hearing, the trial court also asked defendant if he stipulated to the aggravating factor, and defendant again answered, "Yes." We find the trial court's procedure satisfied the requirements of section 15A-1022.1.

Finally, defendant contends that the State failed to present sufficient evidence to support an aggravated sentence for the offenses listed in the 2010 indictment. However, the evidence proffered to the

trial court indicated that defendant, who referred to the victim in e-mails as his "twin," was brought into the conspiracy as a friend of the victim, participated in hatching the details of the plan to strangle the victim, and agreed to incapacitate the victim so the others could finish him off. This evidence was sufficient to establish that, as to the evidence supporting both indictments, defendant took advantage of his position of trust or confidence to place the victim in a vulnerable position.

We find no evidence that defendant misunderstood the plea agreement, that he stipulated that the aggravating factor would be applied only to the 2008 indictment, or that the sentence was unlawfully imposed. We reverse the portion of the Court of Appeals opinion that vacated defendant's sentence on the 2010 indictment. We remand to the Court of Appeals to reinstate the original sentence imposed by the trial court and to consider the remaining issues raised by defendant on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

IMT, INC. D/B/A THE INTERNET BUSINESS CENTER v. CITY OF LUMBERTON

CITY OF LUMBERTON v. G&M COMPANY, LLC D/B/A INTERNET CAFÉ SWEEPSTAKES AND WINNER'S CHOICE

CITY OF LUMBERTON v. DANIEL PAUL STORIE D/B/A SWEEP-NET INTERNET BUSINESS CENTER

E.Z. ACCESS OF N.C., LLC v. CITY OF LUMBERTON

No. 127A12

(Filed 8 March 2013)

Constitutional Law— North Carolina—Just and Equitable Tax Clause—increase in privilege tax

The trial court erred by granting summary judgment for defendant City in an action challenging the constitutionality of an increase in the City's privilege license tax on businesses using electronic machines to conduct games of chance. The Just and Equitable Tax Clause of Article V, Section 22(1) of the North

Carolina Constitution, is a substantive constitutional protection against abuse of the taxing power and the tax increase of at least 59,900% in this case constituted an abuse of the City's tax-levying discretion. While the substantive claim was resolved as a matter of law because there was no need for further fact finding, the case was remanded for the resolution of remaining issues, such as the disposition of the taxes that were paid.

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

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 724 S.E.2d 588 (2012), affirming two grants of summary judgment on 10 May 2011, and two grants of summary judgment on 6 June 2011, all in favor of the City of Lumberton and entered by Judge Robert Frank Floyd, Jr. in Superior Court, Robeson County. Heard in the Supreme Court on 13 November 2012.

Kilpatrick Townsend & Stockton LLP, by Adam H. Charnes, Richard S. Gottlieb, and Richard D. Dietz; and Grace, Tisdale & Clifton, P.A., by Michael A. Grace and Christopher R. Clifton, for plaintiff-appellants IMT, Inc. and E.Z. Access of N.C., LLC and defendant-appellant G&M Company, LLC; and Law Offices of Lonnie M. Player, Jr., PLLC, by Lonnie M. Player, Jr., for plaintiff-appellants IMT, Inc. and E.Z. Access of N.C., LLC and defendant-appellants G&M Company, LLC and Daniel Paul Storie.

James C. Bryan for appellee City of Lumberton.

Jeanette K. Doran and Tyler Younts for North Carolina Institute for Constitutional Law, amicus curiae.

Kimberly S. Hibbard, General Counsel, and Gregory F. Schwitzgebel, III, Senior Assistant General Counsel, for North Carolina League of Municipalities, amicus curiae.

MARTIN, Justice.

The question before this Court is whether the City of Lumberton's privilege license tax violates the Just and Equitable Tax Clause of Article V, Section 2(1) of the North Carolina Constitution. While the decision to levy a privilege license tax is within the discretion of legislative entities, any tax so levied must be just and equitable. Because the Just and Equitable Tax Clause is a substantive constitutional protection against abuse of the taxing power, we hold that the City of

Lumberton's tax increase of at least 59,900% exceeds constitutional bounds.

The parties in this case are the City of Lumberton (the City) and four companies that run promotional sweepstakes as part of their business plans. Under N.C.G.S. §§ 105-109(e) and 160A-211, the City is authorized to levy privilege license taxes on companies doing business within the city limits. In 2010, the City amended its existing privilege license tax on "[a]ny for-profit business or enterprise, whether as a principal or an accessory use, where persons utilize electronic machines . . . to conduct games of chance, including . . . sweepstakes." The prior tax for these companies was a flat $12.50 per year. The new tax for these companies was $5,000 per business location plus $2,500 per computer terminal within each business location—making the minimum tax owed by each cyber-gambling establishment $7,500.[1] This change from a flat $12.50 to a $7,500 minimum imposes a 59,900% minimum increase per business location. In comparison, of the forty-four categories of privilege license taxes imposed by the City, the second highest was $500 for "Circuses, Menageries, Wild West, [and] Dog and Pony Shows" that visited town the same week as the county fair.

The new terms of the privilege tax dramatically increased the amount each company owed, ranging from $75,000 to $137,500.[2] The new tax represented an increase of approximately 600,000%–1,100,000% in the amount billed to the companies. Two of the four companies in this appeal filed complaints against the City, challenging the tax as unconstitutional. The City filed complaints against the other two companies for failure to pay the tax. In all four cases, the parties filed cross-motions for summary judgment. The trial court granted summary judgment for the City in each case.

The cases were consolidated at the Court of Appeals in *IMT, Inc. v. City of Lumberton*, —— N.C. App. ——, 724 S.E.2d 588 (2012). Addressing the Just and Equitable Tax Clause, the majority reviewed the City's tax under this Court's sparse precedent to determine whether the tax "amount[ed] to a prohibition" of the companies' businesses. *Id.* at ——, 724 S.E.2d at 595 (citing *State v. Razook*, 179 N.C. 708, 710, 103 S.E. 67, 68 (1920)). The majority noted that "[t]he only

1. This minimum amount owed assumes one business location and a single computer terminal.

2. The amounts levied were based on the companies' multiple business locations ($5,000 each) and multiple computer terminals ($2,500 each).

evidence [the companies] presented [was] the new amount of the privilege license tax on [their] businesses in comparison to the privilege license tax on [their] businesses in previous years as well as in comparison to the privilege license tax on other businesses." *Id.* at ——, 724 S.E.2d at 596. The majority then noted that the companies "presented no additional evidence that the privilege license tax was prohibitive on their particular businesses." *Id.* at ——, 724 S.E.2d at 596. Because "such evidence does not prove the tax's invalidity," *id.* at ——, 724 S.E.2d at 596 (citing *Razook*, 179 N.C. at 711, 103 S.E. at 69), the majority affirmed the decisions of the trial court, *id.* at ——, 724 S.E.2d at 596. The dissent, however, reasoned, "[T]he discrepancy between the tax imposed by the Ordinance upon Cyber Gambling establishments and all other businesses, while not conclusive evidence of the inequity of the tax, makes summary judgment improper." *Id.* at ——, 724 S.E.2d at 597 (Hunter, Robert C., J., dissenting).

The companies challenged the constitutionality of the privilege license tax levied on their cyber-gambling establishments. The question before this Court is whether the City's privilege license tax violates the Just and Equitable Tax Clause of Article V, Section 2(1) of the North Carolina Constitution. We review an appeal from summary judgment de novo. *E.g.*, *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

"The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away." N.C. Const. art. V, § 2(1). This provision "is a limitation upon the legislative power." *Foster v. N.C. Med. Care Comm'n*, 283 N.C. 110, 126, 195 S.E.2d 517, 528 (1973). In the past, we have construed two of the three limitations enumerated therein. The Public Purpose Clause limits the State's ability to use tax revenue for private enterprises. *See Maready v. City of Winston-Salem*, 342 N.C. 708, 716, 467 S.E.2d 615, 620 (1996); *Foster*, 283 N.C. at 126-27, 195 S.E.2d at 528-29. Similarly, the Contracting Away Clause limits the State's ability to delegate its taxing power. *See Bailey v. State*, 348 N.C. 130, 147-48, 500 S.E.2d 54, 64 (1998). The Just and Equitable Tax Clause, however, has avoided a similarly thorough analysis.

While the Just and Equitable Tax Clause has been cited in several decisions, it has not been directly addressed as a substantive claim in its own right. The City argues that a challenge to the amount of a tax is not a justiciable claim under the Clause. We disagree. Our cases under both the Public Purpose Clause and the Contracting Away

Clause show that these constitutional provisions impose distinct and enforceable limitations on the manner in which government entities may exercise their taxing power. *See Foster*, 283 N.C. at 127, 195 S.E.2d at 528-29 ("We hold that the expenditure of public funds raised by taxation to finance . . . the construction of a hospital facility to be privately operated, managed and controlled is not an expenditure for a public purpose and is prohibited by Article V, § 2(1) of the Constitution of North Carolina."). Treating the Just and Equitable Tax Clause as mere precatory language, rather than as a substantive limitation like the Public Purpose and Contracting Away Clauses, would create internal inconsistency within this constitutional provision. The people of North Carolina placed the Just and Equitable Tax Clause in their Constitution, and we are not at liberty to selectively dismiss its relevance.

Several cases relied upon by the parties and by the Court of Appeals were decided before the adoption of the Just and Equitable Tax Clause in 1935. Those cases concerned common law challenges to taxes. In *State v. Danenberg*, we considered whether a license tax on businesses selling "near beer" (low-alcohol beer) was "unreasonable and prohibitory." 151 N.C. 718, 721, 66 S.E. 301, 303 (1909). We reasoned that because the General Assembly had authorized the sale of near beer in the state, " 'the municipalit[y] may not . . . prohibit [its] sale entirely. [It] may, however, under the usual general-welfare clause, enact reasonable regulations governing its sale.' " *Id.* (citation omitted). Undergirding our decision was the principle that cities "cannot, directly, by taxation, prohibit or destroy a business legalized by the State." *Id.* (citations omitted). However, giving the license tax "a presumption of reasonableness," we concluded "there [were] no facts contained in the record sufficient to overcome this presumption." *Id.* at 724, 66 S.E. at 304. In *Razook*, we again addressed whether a license tax was "so unreasonable as to prohibit the business." 179 N.C. at 711, 103 S.E. at 68. And again, we stated that we " 'will not review the action of the lawmakers unless an abuse of such [tax-levying] discretion is obvious.' " *Id.* at 711, 103 S.E. at 69 (citation omitted). The Court of Appeals' analysis of the Just and Equitable Tax Clause in the instant case heavily relied on these cases. *See IMT*, —— N.C. App. at ——, 724 S.E. 2d at 595-96 (majority).

We observe that the 1935 amendment to Article V did not incorporate the "unreasonable and prohibitory" standard from the common law. Instead, the language ratified by the people stated "[t]he power of taxation shall be exercised in a just and equitable manner."

N.C. Const. of 1868, art. V, § 3 (1935) (now located in Article V, § 2); *see* Act of Apr. 29, 1935, ch. 248, sec. 1, 1935 N.C. Sess. Laws 270, 270. Since its adoption, no decision has rested solely on an interpretation of this language. The clause has been cited, but our cases have instead focused on other constitutional limitations in Section 2, such as the Section 2(5) requirement that taxes be applied uniformly. *See In re Martin*, 286 N.C. 66, 75-76, 209 S.E.2d 766, 773 (1974); *see also Smith v. State*, 349 N.C. 332, 340-41, 507 S.E.2d 28, 33 (1998) (applying "uniform rule" limitation in Section 2(2)).

We discussed the Just and Equitable Tax Clause in *Nesbitt v. Gill*, 227 N.C. 174, 41 S.E.2d 646, *aff'd per curiam*, 332 U.S. 749, 68 S. Ct. 61 (1947), in which we considered a challenge to a privilege tax levied on the purchase of horses or mules purchased for resale. Although the opinion primarily addressed whether the tax had been uniformly applied, the Court also discussed factors that could be considered when determining whether a tax was just and equitable, such as size of the city, sales volume, and exemptions from alternative taxes. *Id.* at 179-80, 41 S.E.2d at 650-51.

The instant appeal again requires us to determine how the Just and Equitable Tax Clause operates to limit the taxing power. The constitutional tension between the affirmative statement of the government's taxing authority and the limitation of the Just and Equitable Tax Clause must be resolved in a manner that protects the citizenry from unjust and inequitable taxes while preserving legislative authority to enact taxes without exposing the State or its subdivisions to frivolous litigation. We have articulated this need for balance before:

> The pervading principle to be observed by the General Assembly in the exercise of [the tax] powers is equality and fair play. It is the will of the people of North Carolina, as expressed in the organic law, that justice shall prevail in tax matters, with equal rights to all and special privileges to none. Of course, it is recognized that in devising a scheme of taxation, some play must be allowed for the joints of the machine . . . .

Cnty. of Rockingham v. Bd. of Trs. of Elon Coll., 219 N.C. 342, 344-45, 13 S.E.2d 618, 620 (1941) (citation and internal quotation marks omitted). The limitations of Section 2 cannot lightly be brushed aside, for "[t]he legislative power to tax is limited only by constitutional provisions." *Lenoir Fin. Co. v. Currie*, 254 N.C. 129, 132, 118 S.E.2d 543, 545, *appeal dismissed per curiam*, 368 U.S. 289, 82 S. Ct. 375 (1961).

Limitations on the State's taxing power are necessary to protect the public from abusive tax policies. Even under the substantial deference given to legislative tax classifications at common law, our decisions acknowledged that the State could not use its taxing power to prohibit otherwise legal endeavors. *Danenberg*, 151 N.C. at 721, 66 S.E. at 303. Without question, this principle is even more warranted when the State has been constitutionally charged with "the duty to tax in a just and equitable manner." *Lenoir Fin.*, 254 N.C. at 132, 118 S.E.2d at 545. "Taxation often involves the weighing of social policies and the determination of the respective values to be assigned various conflicting but legitimate business enterprises; under the doctrine of the separation of powers such functions have traditionally been allocated largely to the determination of the legislative branch of government . . . ." *E.B. Ficklen Tobacco Co. v. Maxwell*, 214 N.C. 367, 372, 199 S.E. 405, 409 (1938).

While these competing considerations might be difficult to reconcile in nuanced cases, the case at bar is hardly nuanced. Here, the City's 59,900% minimum—tax increase is wholly detached from the moorings of anything reasonably resembling a just and equitable tax. If the Just and Equitable Tax Clause has any substantive force, as we hold it does, it surely renders the present tax invalid. In light of the unusual facts we confront in the present case, and cognizant of the nearly universal deference by courts to legislative tax classifications, we do not attempt to define the full parameters of the Just and Equitable Tax Clause's limitations on the legislative taxing power. Rather, we conclude the companies here have shown that the present tax—representing a 59,900% minimum tax increase upon conduct viewed as putatively lawful at the time of the assessment—transgressed the boundaries of permissible taxation and constituted an abuse of the City's tax-levying discretion. We therefore hold the City of Lumberton's privilege tax at issue constitutes an unconstitutional tax as a matter of law and the trial court erred in granting summary judgment for the City. Accordingly, we reverse the decision of the Court of Appeals.

In cases arising under the Just and Equitable Tax Clause, trial courts should look to *Nesbitt* for guiding factors in assessing such claims. But those factors should not be viewed as exhaustive. For example, in the instant case, the stark difference between the amount of tax levied on cyber-gambling establishments and the amounts levied against other economic activities under the Ordinance militates in favor of our conclusion that the tax is unjust and inequitable.

We do not suggest, however, that any large increase in a tax, or simply a high tax, would alone be enough to run afoul of the Just and Equitable Tax Clause. Rather, challenges under the Just and Equitable Tax Clause must be determined on a case-by-case basis.

In the instant case, we have chosen to resolve the substantive claim rather than remand the issue because—even though trial courts have "institutional advantages over appellate courts in the application of facts to fact-dependent legal standards," *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 38, 591 S.E.2d 870, 894 (2004) (citation and internal quotation marks omitted)—the parties here have forecasted uncontested material facts under Rule 56. In situations like the present case, in which the material facts necessary to determine the legal question are uncontested, there is no need for further factfinding.[3] Here we address merely a question of law, which this Court can resolve as capably as a trial court. *See N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 664-65, 599 S.E.2d 888, 897-98 (2004). We do not assume this task lightly, but we do so here for the sake of clarity and judicial economy.

We are cognizant that our holding in *Hest Technologies, Inc. v. State ex rel. Perdue*, —— N.C. ——, —— S.E.2d ——, 2012 WL 6218202 (Dec. 14, 2012) (No. 169A11-2), alters the contextual landscape for this case. But there are still issues that need to be resolved, such as the disposition of the taxes that were paid and the administrative levies that were imposed between the implementation of this tax and our decision in *Hest Technologies*. Having resolved a legal issue common to these cases by holding this privilege license tax unconstitutional under the Just and Equitable Tax Clause, we reverse the decision of the Court of Appeals on that issue and remand to that court for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice BEASLEY took no part in the consideration or decision of this case.

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3. While most often it is inappropriate to grant summary judgment to the party with the burden of proof on the underlying issue, the undisputed facts in the record here present an appropriate opportunity to do so. *See Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976).

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY TONYA R. BASS IN THE ORIGINAL AMOUNT OF $139,988.00, DATED OCTOBER 12, 2005, RECORDED IN BOOK 4982, PAGE 86, DURHAM COUNTY REGISTRY SUBSTITUTE TRUSTEE SERVICES, INC., AS SUBSTITUTE TRUSTEE

No. 554PA11

(Filed 8 March 2013)

Mortgages and Deeds of Trust— foreclosure—stamp—transfer of mortgage instrument—no evidence of forgery or error—indorsements

The Court of Appeals erred by dismissing a foreclosure action. A mortgagor's bare assertion that "you have to have more than a mere stamp" to transfer a mortgage instrument from one lender to another lender did not excuse her from her debt obligation since she offered no evidence to demonstrate the actual possibility of forgery or error. The indorsements on the note unambiguously indicated the intent to transfer the note from each preceding lender, and finally to U.S. Bank.

Justice BEASLEY took no part in the consideration or decision of this case.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 720 S.E.2d 18 (2011), affirming an order entered on 14 September 2010 by Judge Abraham Penn Jones in Superior Court, Durham County. Heard in the Supreme Court on 5 September 2012.

K&L Gates LLP, by A. Lee Hogewood, III and Brian C. Fork, for petitioner-appellant U.S. Bank, National Association as Trustee, c/o Wells Fargo Bank, N.A.

Legal Aid of North Carolina, Inc., by E. Maccene Brown, Gregory E. Pawlowski, John Christopher Lloyd, and Andre C. Brown, for respondent-appellee.

Mallam J. Maynard for Financial Protection Law Center, Carlene McNulty for North Carolina Justice Center, Dawn T. Battiste for Land Loss Prevention Project, Stephanie M. Ceccato for Legal Services of Southern Piedmont, and William J. Whalen and Marjorie Beth Maynard for Pisgah Legal Services, amici curiae.

MARTIN, Justice.

This foreclosure case presents the question of whether a mortgagor's bare assertion that "you have to have more than a mere stamp" to transfer a mortgage instrument excuses her from her debt obligation. We hold that it does not.

In October 2005 Tonya Bass executed an adjustable rate promissory note (the Note) with Mortgage Lenders Network USA, Inc. (Mortgage Lenders) in the principal amount of $139,988.00 plus interest in monthly installments of $810.75. The loan terms specified that if Bass failed to "pay the full amount of each monthly payment on the date it is due," she would be in default.

The Note was then transferred several times: from Mortgage Lenders to Emax Financial Group, LLC (Emax), from Emax to Residential Funding Corporation (Residential Funding), and finally from Residential Funding to U.S. Bank. Page five of the Note evidences these transfers, shown by three stamped imprints. The first stamp, the one challenged by Bass, reads:

Pay to the order of:
Emax Financial Group, LLC
without recourse
By: Mortgage Lenders Network USA, Inc.

The second stamp reads:

Residential Funding Corporation
Chad Jones
Vice President.

This stamp is accompanied by what appears to be the handwritten initials of Chad Jones. The Allonge to Note, which concerns this second transfer, states in part:

Pay to the order of Without recourse: Residential Funding Corporation

By: [Signature]
Name: Michele Morales
Manager of Sales and Acquisitions
Emax Financial Group, LLC.

This allonge bears a handwritten signature on the line designated for Michele Morales. The final stamp reads:

Pay to the order of
U.S. Bank National Association as Trustee
without recourse
Residential Funding Corporation
By [Signature]
Judy Faber, Vice President.

This stamp is accompanied by the handwritten signature of Judy Faber. The first stamp, which transferred ownership from Mortgage Lenders to Emax, did not identify the individual making the transfer.

In March 2009 U.S. Bank[1] filed this foreclosure action after Bass failed to make timely payments. The Clerk of Superior Court of Durham County entered an order permitting the foreclosure to proceed. Bass appealed the order to the Superior Court. Prior to the hearing before the trial court, Bass served a brief on U.S. Bank alleging that the stamp transferring the Note from Mortgage Lenders to Emax was invalid because it lacked a signature. Bass also asserted that U.S. Bank was required to produce the original Note, not a photocopy, in court, and that without the original Note the foreclosure action should be dismissed.

At the hearing, U.S. Bank responded to the arguments from Bass's brief and produced the original Note. In response, Bass asserted, "[Y]ou have to have more than a mere stamp in order to pass ownership of commercial paper from one lender to another lender." She also asserted, "We don't know who had authority a[t] Mortgage Lenders Network to authorize the sale of (unintelligible) to E-Max." However, she "did not testify at the hearing or offer evidence."

The trial court found as fact: "On the original Promissory Note the [i]ndorsement from Mortgage Lenders Network, Inc. to Emax Financial Group, LLC is not signed[,] and the [i]ndorsement [from Emax] to Residential Funding Corporation does not indicate the source of the transfer to Residential Funding Corporation." The court concluded that because the Note "was not properly [i]ndorsed and conveyed to Emax Financial Group, LLC or Residential Funding Corporation," U.S. Bank was not the rightful holder of the Note and "lack[ed] the authority to pursue a foreclosure action against Respondent Tonya R. Bass under the subject Deed of Trust." Accordingly, the trial court dismissed the foreclosure action.

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1. U.S. Bank appointed Substitute Trustee Services, Inc. as substitute trustee for the foreclosure proceedings.

The Court of Appeals affirmed, relying on precedent from this Court that predated the adoption of the Uniform Commercial Code (UCC). The court held that "the facial invalidity of th[e] [first] stamp is competent evidence from which the trial court could conclude the stamp is 'unsigned' and fails to establish negotiation from Mortgage Lenders to Emax." *In re Foreclosure of Bass*, —— N.C. App. ——, ——, 720 S.E.2d 18, 27 (2011). We reverse.

When an appellate court reviews the decision of a trial court sitting without a jury, "findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary." *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968) (citations omitted). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) (citation omitted).

Under N.C.G.S. § 45-21.16(d), four elements must be established before the clerk of superior court authorizes a mortgagee or trustee to proceed with foreclosure by power of sale: "(i) [a] valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, [and] (iv) notice to those entitled to such . . . ." N.C.G.S. § 45-21.16(d) (2011).[2] Bass challenges only the first requirement: whether U.S. Bank is the holder of the Note evidencing her debt.[3] This issue is a question of law controlled by the UCC, as adopted in Chapter 25 of the North Carolina General Statutes. *See Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 203, 271 S.E.2d 54, 57 (1980); *see also In re Foreclosure by David A. Simpson, P.C.*, —— N.C. App. ——, ——, 711 S.E.2d 165, 171 (2011).

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2. We observe that there was a fifth requirement, effective until October 31, 2010, that the clerk find that the underlying loan was not a subprime loan under N.C.G.S. § 45-101(4), and that if it was a subprime loan, that notice was given under N.C.G.S. § 45-102. N.C.G.S. § 45-21.16(d) (2009). The parties agree that this element is not at issue in this case.

3. We also allowed discretionary review on whether the indorsement from Emax to Residential Funding was valid. Bass did not address this issue in her new Brief and even used Emax's indorsement as an example of a properly signed stamp to bolster her argument that the lack of a signature on the stamp transferring the Note from Mortgage Lenders to Emax rendered that stamp invalid. We observe that the stamp on the Allonge to Note was a valid indorsement under N.C.G.S. § 25-3-204(a) (2011); *see also id.* cmt. 1 (2011) ("An indorsement on an allonge is valid even though there is sufficient space on the instrument for an indorsement.")

The UCC defines the holder of a negotiable instrument to include "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." N.C.G.S. § 25-1-201(b)(21)(a) (2011). When the party in possession is not the original holder, if the instrument is payable to an identified person, transfer requires indorsement by each previous holder. *Id.* § 25-3-201(b) (2011).

An indorsement is "a signature . . . that alone or accompanied by other words is made on an instrument for the purpose of . . . negotiating the instrument." *Id.* § 25-3-204(a) (2011). "[A] signature and its accompanying words is an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances *unambiguously indicate* that the signature was made for a purpose other than indorsement." *Id.* (emphasis added). Without unambiguous evidence to the contrary, a signature that "is not qualified in any way and appears in the place normally used for indorsements . . . may be an indorsement" even if the signer intended the signature to be something else. N.C.G.S. § 25-3-204 cmt. 1 (2011). The UCC drafters' strong presumption in favor of the legitimacy of indorsements protects the transfer of negotiable instruments by giving force to the information presented on the face of the instrument. *See* 6B Lary Lawrence, *Anderson on the Uniform Commercial Code* § 3-204:8R (3d ed. 2003) [hereinafter 6B *Anderson*]; *see* also 6 William D. Hawkland & Lary Lawrence, U.C.C. Serv. (West) § 3-204:2 (Rev. Art. 3) [hereinafter Hawkland].

The UCC defines "signature" broadly, as "any symbol executed or adopted with present intention to adopt or accept a writing." N.C.G.S. § 25-1-201(b)(37) (2011). The official comment explains that,

> as the term "signed" is used in the Uniform Commercial Code, a complete signature is not necessary. The symbol may be printed, *stamped* or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. No catalog of possible situations can be complete and the court must use common sense and commercial experience in passing upon these matters. The question always is whether the symbol was executed or adopted by the party with present intention to adopt or accept the writing.

Id. § 25-1-201 cmt. 37 (2011) (emphasis added). Thus, the UCC does not limit a signature to a long-form writing of an individual person's name. *See* 1B Lary Lawrence, *Lawrence's Anderson on the Uniform*

Commercial Code § 1-201:385 (3d ed. 2012) [hereinafter 1B *Anderson*]. Under this broad definition, "[t]he authenticating intent is sufficiently shown by the fact that the name of a party is written on the line which calls for the name of that party." *Id.* § 1-201:390. Even if there might be some irregularities in the signature, the necessary intent can still be found based on the signature itself and other attendant circumstances. *Id.* § 1-201:405. To the extent cases such as *Mayers v. McRimmon*, 140 N.C. 640, 53 S.E. 447 (1906), are superseded by the UCC in this context, they are overruled.

U.S. Bank was not the original lender with which Bass executed the Note. Therefore, each transfer required indorsement of the Note from one holder to the next. *See* N.C.G.S. § 25-3-201(b). Bass challenged the indorsement on the first transfer, which was evidenced by a stamp. While she acknowledges that a stamp can be a valid indorsement of a negotiable instrument, she asserts the stamp by Mortgage Lenders does not qualify as an indorsement under N.C.G.S. § 25-3-204(a). She relies on, *inter alia*, *Econo-Travel*, 301 N.C. at 204, 271 S.E.2d at 58, for the proposition that an indorsement must include some representation of an individual signature to be valid. Her reliance is misplaced, however, as *Econo-Travel* involved a promissory note lacking any indicia of indorsement to the plaintiff whatsoever. *Id.* at 203, 271 S.E.2d at 57. As such, *Econo-Travel* does not affect our analysis in the present case.

The contested stamp indicates on its face an intent to transfer the debt from Mortgage Lenders to Emax:

Pay to the order of:
Emax Financial Group, LLC
without recourse
By: Mortgage Lenders Network USA, Inc.

In addition, the stamp appears on the page of the Note where other, uncontested indorsements were placed. We also observe that the original Note was indeed transferred in accordance with the stamp's clear intent. The stamp evidences that it was "executed or adopted by the party with present intention to adopt or accept the writing." N.C.G.S. § 25-1-201 cmt. 37. Under the broad definition of "signature" in N.C.G.S. § 25-1-201 and the accompanying official comment, the stamp by Mortgage Lenders constitutes a signature.

The stamp therefore was "an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other

circumstances *unambiguously indicate* that the signature was made for a purpose other than indorsement." *Id.* § 25-3-204(a) (emphasis added). With no unambiguous evidence indicating the signature was made for any other purpose, the stamp was an indorsement that transferred the Note from Mortgage Lenders to Emax.

Bass contends that U.S. Bank bore the burden of proving the indorsement was valid and authorized. We disagree. "[T]he authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings." *Id.* § 25-3-308(a) (2011). The official UCC comment to section 25-3-308 explains that "the signature is presumed to be authentic and authorized . . . until some evidence is introduced which would support a finding that the signature is forged or unauthorized." *Id.* § 25-3-308 cmt. 1 (2011). Until the defendant produces such evidence, "the plaintiff is not required to prove that [the signature] is valid." *Id.* "The defendant is therefore required to make some sufficient showing of the grounds for the denial before the plaintiff is required to introduce evidence." *Id.*; *see* 6B *Anderson* § 3-308:9R; Hawkland §§ 3-308:2, 3-308:4.

The official comment explains the rationale behind the presumption in favor of the signature being authentic and authorized: "[I]n ordinary experience forged or unauthorized signatures are very uncommon, and normally any evidence is within the control of, or more accessible to, the defendant." N.C.G.S. § 25-3-308 cmt. 1. Under the UCC's General Definitions and Principles of Interpretation, "[w]henever this Chapter creates a 'presumption' with respect to a fact, or provides that a fact is 'presumed,' the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence." *Id.* § 25-1-206 (2011); *see also* 1B *Anderson* §§ 1-206:4, 1-206:5.

In the trial court, Bass made the bare assertion, "We don't know who had authority a[t] Mortgage Lenders Network to authorize the sale of (unintelligible) to E-max." She asserted, "[Y]ou have to have something more than a mere stamp." Yet Bass offered no evidence to demonstrate the actual possibility of forgery or error. Her bare assertions, with no supporting evidence, did not amount to a "sufficient showing of the grounds for the denial." N.C.G.S. § 25-3-308 cmt. 1; *see also Dobson v. Substitute Tr. Servs., Inc.*, —— N.C. App ——, ——, 711 S.E.2d 728, 731 (concluding the mortgagor's statement, "I cannot confirm the authenticity of the copy of the [n]ote produced by the Defendants," was insufficient to cast doubt upon the bank's status as holder of the promissory note), *aff'd per curiam*, 365 N.C. 304, 716

S.E.2d 849 (2011). Because Bass did not produce evidence to "support a finding that the signature [was] forged or unauthorized," the presumption in favor of the signature prevails and U.S. Bank was "not required to prove that it [was] valid." N.C.G.S. § 25-3-308 cmt. 1. Accordingly, Bass failed to overcome the presumption in favor of the signature, and the trial court erred in concluding the Note was not properly indorsed and transferred to Emax.

Tonya Bass stopped making payments on her mortgage and the loan went into default. In an attempt to prevent foreclosure, Bass asserted that U.S. Bank—which possessed the original Note—was not the holder of the Note. The indorsements on the Note unambiguously indicated the intent to transfer the Note from each preceding lender and finally to U.S. Bank. We hold that U.S. Bank is the holder of the Note and reverse the decision of the Court of Appeals.

REVERSED.

Justice BEASLEY took no part in the consideration or decision of this case.

CLYDE VERNON LOVETTE, PETITIONER v. THE NORTH CAROLINA DEPARTMENT OF CORRECTION; ALVIN KELLER, IN HIS CAPACITY AS SECRETARY OF CORRECTION; AND RUDY FOSTER, IN HIS CAPACITY AS ADMINISTRATOR OF DAN RIVER PRISON WORK FARM, RESPONDENTS

CHARLES LYNCH, PETITIONER v. THE NORTH CAROLINA DEPARTMENT OF CORRECTION; ALVIN KELLER, IN HIS CAPACITY AS SECRETARY OF CORRECTION; AND TIM KERLEY, IN HIS CAPACITY AS ADMINISTRATOR OF CATAWBA CORRECTIONAL CENTER, RESPONDENTS

No. 359A12

(Filed 8 March 2013)

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. ——, 731 S.E.2d 206 (2012), affirming an order entered on 16 June 2011 by Judge Allen Baddour in Superior Court, Wake County, allowing petitioners' applications for writ of habeas corpus and ordering their unconditional release from prison. Heard in the Supreme Court on 14 February 2013.

N.C. Prisoner Legal Services, Inc., by Sarah Jessica Farber, for petitioner-appellees.

Roy Cooper, Attorney General, by Joseph Finarelli, Special Deputy Attorney General, for respondent-appellants.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals and remand this matter to that court for remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

NICK OCHSNER v. ELON UNIVERSITY AND NORTH CAROLINA ATTORNEY GENERAL ROY COOPER

No. 299PA12

(Filed 8 March 2013)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 725 S.E.2d 914 (2012), affirming two orders dismissing plaintiff's complaint entered on 1 August 2011 by Judge Michael J. O'Foghludha in Superior Court, Alamance County. Heard in the Supreme Court on 13 February 2013.

Whitley Law Firm, by Ann C. Ochsner, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, LLP, by Christopher W. Jones, Beth Tyner Jones, and Amanda G. Ray, for defendant-appellee Elon University.

Roy Cooper, Attorney General, by David L. Elliott, Assistant Attorney General, for defendant-appellee Roy Cooper.

Stevens Martin Vaughn & Tadych, PLLC, by C. Amanda Martin, for Boney Publishers, Inc.; The DTH Publishing Corp.; Capitol Broadcasting Company, Incorporated; and The News and Observer Publishing Company, amici curiae.

Teague Campbell Dennis & Gorham, LLP, by Henry W. Gorham, for North Carolina Association of Campus Law Enforcement

Administrators; Fred P. Baggett, for North Carolina Association of Chiefs of Police; and Edmond W. Caldwell, Jr., General Counsel, and Julie B. Smith, Associate General Counsel, for North Carolina Sheriffs' Association, Inc., amici curiae.

Poyner Spruill LLP, by Edwin M. Speas, Thomas R. West, and Pamela A. Scott, for North Carolina Independent Colleges and Universities, Inc., amicus curiae.

Kilpatrick Townsend & Stockton LLP, by Adam H. Charnes and Richard D. Dietz, for Student Press Law Center, Reporters Committee for Freedom of the Press, Society of Professional Journalists, Investigative Reporters & Editors, Inc., and VTV Family Outreach Foundation, amici curiae.

PER CURIAM.

Justice JACKSON took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See, e.g., Amward Homes, Inc. v. Town of Cary*, 365 N.C. 305, 716 S.E.2d 849 (2011); *State v. Pastuer*, 365 N.C. 287, 715 S.E.2d 850 (2011).

AFFIRMED.

STATE OF NORTH CAROLINA v. KEVIN EARL GRIFFIN

No. 451PA12

(Filed 12 April 2013)

Search and Seizure— traffic stop—turning away from checkpoint—totality of circumstances—reasonable suspicion

Defendant's constitutional rights were not violated by the traffic stop that led to his conviction for driving while impaired. Based on the totality of the circumstances, defendant's stopping in the middle of the roadway and turning away from a license checkpoint gave rise to a reasonable suspicion that defendant may have been violating the law.

Justice BEASLEY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, —— N.C. App. ——, 732 S.E.2d 394 (2012), reversing an order denying defendant's motion to suppress entered on 24 June 2011 by Judge Kenneth F. Crow and vacating a judgment entered on 3 October 2011 by Judge Marvin K. Blount, III, both in Superior Court, Pamlico County. Heard in the Supreme Court on 12 March 2013.

Roy Cooper, *Attorney General*, *by Kathryne E. Hathcock*, *Assistant Attorney General*, *for the State-appellant.*

Robert G. Raynor, *Jr. for defendant-appellee.*

NEWBY, Justice.

In this case we must determine whether defendant's constitutional rights were violated by the traffic stop that led to his conviction for driving while impaired. Based on the totality of the circumstances, we conclude that defendant's stopping in the middle of the roadway and turning away from a license checkpoint gave rise to a reasonable suspicion that defendant may have been violating the law. Because the subsequent stop of defendant's vehicle is constitutional, we reverse the decision of the Court of Appeals.

On the night of 5 January 2009, Trooper Scott Casner of the North Carolina Highway Patrol was conducting a license checkpoint on Highway 306 close to two intersections. The checkpoint was marked and illustrated by activated blue lights of patrol cars. Trooper Casner and at least one other law enforcement officer were present at the checkpoint at all times. At approximately 9:55 p.m. Trooper Casner observed a vehicle approaching the checkpoint from the west on Seafarer Road. Then the vehicle, although not at an intersection, stopped in the middle of the road and appeared to initiate a three-point turn by beginning to turn left and continuing onto the shoulder of the road. Trooper Casner testified that these actions caused him to suspect that the driver was attempting to avoid the checkpoint. Trooper Casner was able to stop the driver before he could complete the turn and leave the area. Trooper Casner approached the vehicle and asked for the driver's operator's license, at which time the trooper detected the odor of alcohol on defendant, the driver. Trooper Casner subsequently charged defendant with, *inter alia*, driving while impaired.

On 4 June 2010, defendant moved to suppress the evidence from the stop, arguing that his attempt to turn around did not provide reasonable suspicion for Trooper Casner to stop defendant's vehicle because the checkpoint was unconstitutional. The trial court concluded that the checkpoint was valid and that "Trooper Casner clearly had reasonable and articulable suspicion to stop the defendant," finding that Trooper Casner observed defendant approach the checkpoint, then "stop in the roadway and turn his vehicle around." As a result, the trial court denied defendant's motion to suppress. Defendant pled "no contest" to driving while impaired, reserving his right to appeal under N.C.G.S. § 15A-979(b). The Court of Appeals reversed the trial court's denial of defendant's motion to suppress and vacated the resulting judgment, holding the checkpoint to be unconstitutional. *State v. Griffin*, —— N.C. App. ——, 732 S.E.2d 394, 2012 WL 4501653, at *3 (2012) (unpublished). The Court of Appeals, however, did not comment on whether reasonable suspicion for the stop existed.

We allowed the State's petition for discretionary review to determine, *inter alia*, whether there was reasonable suspicion to initiate a stop of defendant's vehicle. *State v. Griffin*, —— N.C. ——, 734 S.E.2d 861 (2012). The State argues that, regardless of the checkpoint's constitutionality, defendant's attempt to evade the checkpoint gave Trooper Casner the requisite level of suspicion to further investigate the situation. As such, the State contends that the trial court was correct in denying defendant's motion to suppress the evidence from the stop. Defendant, on the other hand, argues that there was nothing unusual about his turn and therefore, there was no independent basis for making the stop.

Both the Fourth Amendment to the United States Constitution and the North Carolina Constitution protect individuals "against unreasonable searches and seizures." U.S. Const. amend. IV; accord N.C. Const. art. I, § 20. "A traffic stop is a seizure 'even though the purpose of the stop is limited and the resulting detention quite brief.' " *State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (quoting *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660, 667 (1979)), *cert. denied*, 555 U.S. 914, 129 S. Ct. 264, 172 L. Ed. 2d 198 (2008). Our Court has held that "reasonable suspicion is the necessary standard for traffic stops." *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008) (citations omitted).

> Reasonable suspicion is a "less demanding standard than probable cause and requires a showing considerably less than pre-

> ponderance of the evidence." Only " 'some minimal level of objective justification' " is required. This Court has determined that the reasonable suspicion standard requires that "[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." Moreover, "[a] court must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion" exists.

Barnard, 362 N.C. at 247, 658 S.E.2d at 645 (alterations in original) (internal citations omitted).

We examined a similar issue in *State v. Foreman*, in which an officer observed a vehicle travelling towards a checkpoint make a "quick left turn" onto a connecting street, after which the officer found the car parked in a residential driveway. 351 N.C. 627, 629, 527 S.E.2d 921, 922 (2000). In *Foreman* the defendant driver was charged with DWI, and she moved to suppress the evidence obtained from the stop. *Id.* at 628, 527 S.E.2d at 922. We concluded that, "[a]lthough a legal turn, by itself, is *not* sufficient to establish a reasonable, articulable suspicion, a legal turn in conjunction with other circumstances, such as the time, place and manner in which it is made, *may* constitute a reasonable, articulable suspicion which could justify an investigatory stop." *Id.* at 631, 527 S.E.2d at 923. This Court noted that " 'flight—wherever it occurs—is the consummate act of evasion: [i]t is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.' " *Id.* at 631, 527 S.E.2d at 924 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 676, 145 L. Ed. 2d 570, 576 (2000)).

Our decision in *Foreman* is in accord with precedent from the Fourth Circuit Court of Appeals. *See United States v. Smith*, 396 F.3d 579 (4th Cir.), *cert. denied*, 545 U.S. 1122, 125 S. Ct. 2925, 162 L. Ed. 2d 309 (2005). In *Smith* law enforcement officers conducting a license checkpoint observed a vehicle driving "about 985 feet from the checkpoint" appear to " 'slam on its brakes,' " and then "turn left onto a private gravel driveway leading to a single residence." *Id.* at 581. As a result, the police approached the vehicle and eventually charged the defendant driver with possession of a firearm by a convicted felon. *Id.* at 582. The federal district court denied the defendant's motion to suppress the evidence resulting from the stop. *Id.* The Fourth Circuit affirmed the district court, holding that "when law enforcement officers observe conduct suggesting that a driver is

attempting to evade a police roadblock—such as . . . behavior indicating the driver is trying to hide from officers—police may take that behavior into account in determining whether there is reasonable suspicion to stop the vehicle and investigate the situation further." 396 F.3d at 585 (citations omitted).

This case presents a situation comparable to the facts the courts encountered in *Foreman* and *Smith*. Defendant approached a checkpoint marked with blue flashing lights. Once the patrol car lights became visible, defendant stopped in the middle of the road, even though he was not at an intersection, and appeared to attempt a three-point turn by beginning to turn left and continuing onto the shoulder. From the checkpoint Trooper Casner observed defendant's actions and suspected defendant was attempting to evade the checkpoint. Defendant's turn in the middle of the road and onto the shoulder was more suspicious than the defendant's turn onto a connecting street in *Foreman* and the defendant's turn into a private driveway in *Smith*. It is clear that this Court and the Fourth Circuit have held that even a legal turn, when viewed in the totality of the circumstances, may give rise to reasonable suspicion. Given the place and manner of defendant's turn in conjunction with his proximity to the checkpoint, we hold there was reasonable suspicion that defendant was violating the law; thus, the stop was constitutional. Therefore, because the trooper had sufficient grounds to stop defendant's vehicle based on reasonable suspicion, it is unnecessary for this Court to address the constitutionality of the driver's license checkpoint. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

Justice BEASLEY, dissenting.

Because I disagree with the majority's holding that the stop of defendant's vehicle was justified by reasonable suspicion, I would remand the case to the trial court for further findings of fact regarding the constitutional and statutory validity of the checkpoint. Therefore, I respectfully dissent.

It is first necessary to clarify the facts surrounding defendant's left turn. The majority states several times that defendant "appeared to initiate a three-point turn" and notes that defendant was not at an intersection at the time in what appears to suggest that defendant's actions were illegal. However, a review of the transcript from the hearing on defendant's Motion to Supress reveals that, upon cross-

examination, Trooper Casner himself stated that defendant's actions were not illegal:

> Q. But he just made a left turn; is that correct?
>
> A. Onto the shoulder, yes.
>
> Q. That's not an illegal turn; is it?
>
> A. A left turn is not an illegal turn.
>
> Q. And you never gave him a moving violation for that; did you not?
>
> A. No.

(T. 25) Further, Trooper Casner in no way suggests that defendant was making a three-point turn. The trial court asked Trooper Casner if defendant's turn was "in the form of making a three-point turn like making a 180 degree direction change," and Trooper Casner replied, "It could have been. I'm not exactly sure what his intentions were." (T. 10) And, while it is clear that defendant did not turn at a major intersection of roadways, Trooper Casner's recollection of the point on the road at which defendant turned was inconsistent. On direct examination, he stated that he could not "remember if there was a driveway right there or not." (T. 10) Then on cross-examination, he stated, "I said when he traveled off the road—when he made that left turn into the open field that's when we made the traffic stop to find out why he was turning in there." (T. 26) Thus, defendant's turn was legal, and, by Trooper Casner's own admission, it was unclear whether defendant was indeed attempting to turn around. These facts help to frame a proper analysis of whether Trooper Casner's suspicions were reasonable.

Though *State v. Foreman*, 351 N.C. 627, 527 S.E.2d 921 (2000), is factually distinguishable, *Foreman* provides the rule to resolve this case. We held that "[a]lthough a legal turn, by itself, is *not* sufficient to establish a reasonable, articulable suspicion, a legal turn in conjunction with other circumstances, such as the time, place and manner in which it is made, *may* constitute a reasonable, articulable suspicion which could justify an investigatory stop." *Id.* at 631, 527 S.E.2d at 923. Perhaps, implicitly, the majority believes that the checkpoint itself is relevant to the "time, place, and manner" of defendant's turn. *Id.* I would agree that the existence of the checkpoint can be used in the trial court's determination of whether there is reasonable suspicion; however, the trial court must also determine

the validity of the checkpoint if it is to be used in determining whether there was reasonable suspicion to stop a vehicle because it turned away from the checkpoint. *See State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008) ("The Fourth Amendment protects individuals "against unreasonable searches and seizures." The North Carolina Constitution provides similar protection. A traffic stop is a seizure "even though the purpose of the stop is limited and the resulting detention quite brief." (internal citations omitted)); *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006) ("Fourth Amendment rights are enforced primarily through the 'exclusionary rule,' which provides that evidence derived from an unconstitutional search or seizure is generally inadmissible in a criminal prosecution of the individual subjected to the constitutional violation. . . . The 'fruit of the poisonous tree doctrine,' a specific application of the exclusionary rule, provides that '[w]hen evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the 'fruit' of that unlawful conduct should be suppressed.' " (internal citations omitted)); *State v. Mitchell*, 358 N.C. 63, 66, 592 S.E.2d 543, 545 (2004) ("Police officers effectuate a seizure when they stop a vehicle at a checkpoint."). Without the checkpoint, Trooper Casner would not have been in a position to observe defendant's turn and defendant would not have been in a position to allegedly avoid the checkpoint. Thus, because Trooper Casner, and the State, predicate Trooper Casner's reasonable suspicion to stop defendant upon Trooper Casner's presence at the checkpoint and defendant's suspected avoidance of the checkpoint, it is necessary to first determine whether the existence of that checkpoint was constitutional.

The constitutionality of the checkpoint, however, cannot be decided by this Court in the present appeal. The trial court concluded that the checkpoint was valid under both the North Carolina and United States Constitutions but failed to make findings of fact that would support this conclusion. Thus, this case must be remanded to the trial court for further findings of fact regarding the constitutional and statutory validity of the checkpoint.

This Court has been less than clear on how a trial court should approach a constitutional analysis of a checkpoint. The State contends that *State v. Mitchell*, 358 N.C. 63, 592 S.E.2d 543 (2004), recognized two factors: whether a supervisor approved the checkpoint and whether the officer conducting the checkpoint abided by the supervisor's instructions for the checkpoint. *Id.* at 68, 592 S.E.2d at 546.

While *Mitchell* provides some guidance, a proper and comprehensive analysis includes the rule set out in *Foreman*: "[T]he United States Supreme Court held that DWI checkpoints are constitutional if vehicles are stopped according to a neutral, articulable standard (e.g., every vehicle) and if the government interest in conducting the checkpoint outweighs the degree of the intrusion." *Foreman*, 351 N.C. at 631, 527 S.E.2d at 924 (2000) (citing *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990)).[1] Based on this Court's reliance on *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), the trial court should be guided by United States Supreme Court case law on the balancing test to be applied to checkpoints, including *Brown v. Texas*, 443 U.S. 47 (1979), and *Edmond v. City of Indianapolis*, 531 U.S. 32 (2000), as well as the two factors identified in *Mitchell*. I do not read *Mitchell* to overrule *Foreman's* reliance on United State Supreme Court case law.

The State also correctly points out that we have not adopted the non-exclusive factors identified by *State v. Rose*, 170 N.C. App. 284, 612 S.E.2d 336 (2005), and elaborated upon by *State v. Veazey*, 191 N.C. App. 181, 662 S.E.2d 683 (2008). The *Rose/Veazey* factors may be relevant to the trial court's analysis, but I would emphasize that they are non-exclusive. *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 690 (citing *Rose*, 170 N.C. App. at 295, 612 S.E.2d at 342-43).

Furthermore, the trial court's order has insufficient findings of fact and conclusions of law regarding the statutory validity of the checkpoint under N.C.G.S. § 20-16.3A (2011). Such findings and conclusions may be unnecessary, though, if the trial court determines that the checkpoint is unconstitutional. Contrary to the State's argument, the General Assembly did not define the standards for the constitutionality of a checkpoint in Section 20-16.3A. The General Assembly cannot interpret the North Carolina Constitution or United States Constitution; that is a power that belongs exclusively to the judicial branch. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Hoke v. Henderson*, 15 N.C. 1, 7-8 (1833) (discussing the supremacy of the constitution over acts of the legislature and the role of the courts), *overruled on other grounds*, *Mial v. Ellington*, 134 N.C. 131 (1903). Thus, mere compliance with Section 20-16.3A does not insulate a checkpoint from constitutional scrutiny. If the checkpoint violates the North Carolina Constitution, the United

1. I also acknowledge that the checkpoint at issue here is a driver's license checkpoint rather than a DWI checkpoint. Tp 15.

States Constitution, and/or N.C.G.S. § 20-16.3A, then the trial court should grant the motion to suppress.

It is also important to acknowledge, however, since reasonable suspicion may exist independent of the checkpoint. This was the case in *Mitchell* where we stated that the Court need not decide whether the checkpoint was constitutional because there was independent reasonable suspicion to justify the stop since the defendant disobeyed the officer's order to stop and nearly ran over the officer. 358 N.C. at 69-70, 592 S.E.2d at 547. Despite this alternative basis for affirming the trial court's order, I find this case distinguishable from *Mitchell* since there is no basis for reasonable suspicion independent of the checkpoint.

The *Mitchell* majority believed the dissent to be giving a "motorist who 'guesses' correctly that a checkpoint is not validly set up . . . c*arte blanche* to ignore the checkpoint absent circumstances unrelated to the checkpoint." *Id.* at 70, 592 S.E.2d at 547. The dissenting opinion did not agree that the reasonable suspicion the majority highlighted was, in fact, independent of the checkpoint:

> Motorists do not have carte blanche to ignore checkpoints that they suspect are invalid and to avoid responsibility if they guess correctly. Police officers may certainly develop reasonable articulable suspicion to stop a car based upon their observations, *unrelated to the checkpoint*, that a crime has been committed. Armed with such suspicion, the officers' seizure of the vehicle is proper regardless of the constitutionality of the checkpoint.

Id. at 71, 592 S.E.2d at 548 (Brady, J., dissenting) (emphasis added).

Here, the majority's holding would give police officers *carte blanche* to set up illegal checkpoints and stop motorists for no other reason than that they simply turned around. This ability is precisely the sort of unchecked power that the Fourth Amendment seeks to prevent.

As the dissenting justices noted in *Mitchell*, Trooper Casner lacked reasonable suspicion independent of the checkpoint. Unlike *Mitchell*, Trooper Casner did not identify a moving violation or other violation of law from observing defendant's turn. Tp 25. Had Trooper Casner been stationed along the highway to check for speeding or other traffic violations, he could not have stopped defendant based solely on his legal turn. Trooper Casner was suspicious only because there was a checkpoint. As discussed above, I believe the constitutionality of the checkpoint must be decided.

Additionally, I disagree with the majority's comparison of this case to *Foreman* and *United States v. Smith*, 396 F.3d 579 (2004). Defendant's behavior in the instant case differs from *Foreman* and *Smith*. It was evident in *Foreman* that, in addition to a legal left turn, the defendant deliberately eluded the pursuing trooper on the streets adjacent to the checkpoint and attempted to hide in a residential driveway at 2:00 a.m., giving rise to reasonable suspicion. 351 N.C. at 629, 527 S.E.2d at 922-23; *see also id.* at 633, 527 S.E.2d at 925 (Frye, J., concurring) (stating that "there was more than the left turn which justified the seizure"). The defendant in *Smith* slammed on his brakes at 3:05 a.m., "turn[ed] suddenly into a private gravel driveway," stopped, and then proceeded a bit farther down the driveway even after the officer activated his lights. 396 F.3d at 581, 585-86. The Fourth Circuit described Smith's behavior as "erratic" and "evasive." *Id.* at 585-87. The totality of the circumstances supported the district court's finding that the traffic stop was justified by reasonable suspicion. *Id.* at 586-87.

In contrast to *Foreman* and *Smith*, the trial court's order contains no findings that defendant was driving erratically, slammed on his brakes, or attempted to hide. Defendant was, in fact, not driving erratically, as Trooper Casner testified that defendant's turn was legal. Tp 25. The trial court found that Trooper Casner described defendant's driving as "a furtive attempt to avoid the checkpoint," but the order is devoid of facts that support this conclusion.

The time of night at which defendant was stopped also distinguishes the instant case from *Foreman* and *Smith*. An "unusual hour" is one factor in determining whether an officer had reasonable suspicion. *See State v. Rinck*, 303 N.C. 551, 560, 280 S.E.2d 912, 920 (1981). Our courts have used the "unusual hour" in examining reasonable suspicion when there are no businesses open nearby, *see, e.g.*, *State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994) (finding reasonable suspicion when officer observed activity at 3:00 a.m. in a rural area when nearby businesses were closed); when the defendant is weaving in his lane near bars, *see, e.g.*, *State v. Jacobs*, 162 N.C. App. 251, 255, 590 S.E.2d 437, 441 (2004) ("Officer Smith's observation of defendant's weaving within his lane for three-quarters of a mile at 1:43 a.m. in an area near bars was sufficient to establish a reasonable suspicion of impaired driving."); and when there are recent reports of illegal activity in the area, *see, e.g.*, *State v. Fox*, 58 N.C. App. 692, 692, 694-95, 294 S.E.2d 410, 411-12 (1982) (holding that an officer had reasonable suspicion when he observed the defendant at

12:50 a.m. in a high crime area when nearby businesses were closed), *aff'd*, 307 N.C. 460, 298 S.E.2d 388 (1983); *State v. Tillett*, 50 N.C. App. 520, 523-24, 274 S.E.2d 361, 363-64 (1981) (holding that an officer had reasonable suspicion based on activity at 9:40 p.m. in a seasonally unoccupied area where there had been recent reports of illegal hunting activity). Our courts have held that an officer lacked reasonable suspicion when only the hour is late and there are no other suspicious circumstances, such as the ones listed above. *See, e.g.*, *State v. Chlopek*, 209 N.C. App. 358, 364, 704 S.E.2d 563, 567 (2011) (reversing and remanding where the officer had only a "hunch" based on the time of night—12:50 a.m.—and had not received reports of copper thefts in the neighborhood); *State v. Murray*, 192 N.C. App. 684, 685, 666 S.E.2d 205, 206 (2008) (reversing and remanding where the officer "decided to go ahead and do an investigatory traffic stop" when "the vehicle was not violating any traffic laws, was not trespassing, speeding, or making any erratic movements, and was on a public street" at 3:41 a.m.).

Here, defendant was stopped at 9 p.m. Rp 7. Though 9 p.m. is close in time to 9:40 p.m., which the *Tillett* court found suspicious, this case is distinguishable from *Tillett* in that here there were no reports of illegal activity in the area. There is also no indication in the trial court's order or the testimony that this was a high crime area, differentiating the instant case from *Fox*. To the contrary, Trooper Casner testified that there was no particular reason this area of Pamlico County was selected for the checkpoint. Tp 20. This case is also distinguishable from *Watkins* and *Fox* based on Trooper Casner's description of the area as "residential and open country" with perhaps one convenience store in the area. Tp 7. There were multiple closed businesses in the area in *Watkins* and *Fox*, in contrast to the lone convenience store that Trooper Casner thought might be in the area. We do not know whether this convenience store, if it is in the area at all, was open or closed for business at 9 p.m. Finally, defendant was not weaving in his lane in an area near bars, unlike the defendant in *Jacobs*.

The majority asserts that defendant's legal turn was "more suspicious" than the defendant's turn in *Foreman* and the defendant's turn in *Smith*, but the majority fails to point to evidence in the record to support this assertion. Giving chase through a residential neighborhood (as in *Foreman*), abruptly stopping (as in *Smith*), and attempting to use a private driveway to hide from police at an unusual hour (as in *Foreman* and *Smith*) is more suspicious than a legal turn that defendant could not even complete before being stopped by Trooper

Casner. Though defendant used the shoulder of the road, Trooper Casner did not testify that using the shoulder was illegal or raised his suspicions. In all, there is no evidence to support the trial court's conclusion that the stop was justified by reasonable suspicion independent of the checkpoint.

In summary, I would remand this case to the trial court to make sufficient findings of fact and appropriate conclusions of law regarding the constitutional and statutory validity of the checkpoint. If the trial court were to conclude that the checkpoint was both constitutionally and statutorily valid, then the trial court may use the existence of the checkpoint as part of the "time, place, and manner" analysis to determine whether Trooper Casner possessed reasonable suspicion to stop defendant. *Foreman*, 351 N.C. at 631, 527 S.E.2d at 923. If the trial court were to conclude that the checkpoint was either constitutionally invalid or statutorily invalid, then the trial court should grant defendant's motion to suppress, as there are no facts supporting a finding of reasonable suspicion independent of the checkpoint.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; DUKE ENERGY CAROLINAS, LLC, APPLICANT; PUBLIC STAFF-NORTH CAROLINA UTILITIES COMMISSION, INTERVENOR v. ATTORNEY GENERAL ROY COOPER AND THE CITY OF DURHAM, NORTH CAROLINA, INTERVENORS

No. 268A12

(Filed 12 April 2013)

Utilities— retail electric service rate—return on equity—insufficient findings of fact—impact of changing economic conditions on customers

The North Carolina Utilities Commission's order in a retail electric service rate case was reversed and remanded so that it could make an independent determination regarding the proper return on equity based upon appropriate findings of fact that balance all the available evidence including the impact of changing economic conditions on customers.

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

On direct appeal as of right by intervenor Roy Cooper, Attorney General, pursuant to N.C.G.S. §§ 7A-29(b) and 62-90(d) from a final order of the North Carolina Utilities Commission issued on 27 January 2012 in Docket No. E-7, Sub 989. Heard in the Supreme Court on 13 November 2012.

K&L Gates LLP, by Kiran H. Mehta; Heather Shirley Smith, Deputy General Counsel, and Kendrick Fentress, Associate General Counsel, Duke Energy Carolinas, LLC; and Law Office of Robert W. Kaylor, by Robert W. Kaylor, for applicant-appellee Duke Energy Carolinas, LLC.

Robert P. Gruber, Executive Director, by Antoinette R. Wike, Chief Counsel, and William E. Grantmyre, Staff Attorney, for intervenor-appellee Public Staff-North Carolina Utilities Commission.

John F. Maddrey, Solicitor General; Phillip K. Woods, Special Deputy Attorney General; Margaret A. Force, Assistant Attorney General; and Kevin Anderson, Senior Deputy Attorney General, for intervenor-appellant Roy Cooper, Attorney General.

AARP Foundation Litigation, by Julie Nepveu, pro hac vice; and M. Jason Williams, P.A., by M. Jason Williams, for AARP, amicus curiae.

JACKSON, Justice.

In this case we consider whether the order by the North Carolina Utilities Commission ("the Commission") approving a 10.5% return on equity[1] ("ROE") for Duke Energy Carolinas, LLC ("Duke") contained sufficient findings of fact to demonstrate that it was supported by competent, material, and substantial evidence in view of the entire record. Because we conclude that the Commission failed to make the necessary findings of fact to support its ROE determination, we reverse the Commission's order and remand this case to the Commission so that it may enter sufficient findings of fact.

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1. ROE is the return that a utility is allowed to earn on its capital investment, which is realized through rates collected from its customers. The ROE affects profits to the utility's shareholders and has a significant impact on what customers ultimately pay the utility. The higher the ROE, the higher the resulting rates that customers will pay to the utility. *See State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 323 N.C. 238, 245, 372 S.E.2d 692, 696 (1988).

On 1 July 2011, Duke filed an application with the Commission requesting authority to increase its North Carolina retail electric service rates to produce additional annual revenues of $646,057,000, an increase of approximately 15.2% over then current revenues. The application requested that rates be established using an ROE of 11.5%. The Commission entered an order on 28 July 2011, declaring this matter to be a general rate case and suspending the proposed rate increase pending further investigation. The Commission scheduled six public hearings to receive public witness testimony in multiple locations throughout Duke's service territory. The Commission also scheduled an evidentiary hearing for 29 November 2011. The Attorney General of North Carolina and the Public Staff–North Carolina Utilities Commission intervened in this matter as allowed by law.

On 28 November 2011, the Public Staff and Duke filed an Agreement and Stipulation of Settlement with the Commission that "provide[d] for a net increase of $309,033,000" for annual revenues and an allowed "ROE of 10.5%." The Settlement addressed all issues between Duke and the Public Staff, but was contested by some of the other parties, including the Attorney General.

By the time the evidentiary hearing began on 29 November 2011, the Commission already had heard testimony from a total of 236 public witnesses. Many of these customers opposed the proposed rate increase and discussed the hardship that it would impose on the average residential customer in light of current economic conditions. At the evidentiary hearing the Commission heard more live testimony and also received prefiled testimony regarding the proposed ROE.

Specifically, Duke presented the testimony of Robert Hevert, President of Concentric Energy Advisors, Inc., a company that provides financial and economic advisory services to energy and utility clients across North America. Hevert initially recommended an ROE range of 11% to 11.75% and a specific ROE of 11.5%; however, in his rebuttal testimony Hevert lowered his recommended range to 10.75% to 11.5% and decreased his recommended ROE to 11.25%. Hevert testified that his analysis was based upon market data and the ROE requirements of investors. In particular, Hevert stated that he factored into his analysis the effect of macroeconomic conditions in the capital markets. Hevert's analysis primarily used discounted cash flow[2]

2. DCF modeling is an econometric method for estimating ROE whereby "the proper rate of return is determined by adding to the common stock's current yield a rate of increase which investors will expect to occur over time." *State ex rel. Utils. Comm'n v. Pub. Staff-N.C. Utils. Comm'n*, 322 N.C. 689, 693-94, 370 S.E.2d 567, 570 (1988).

("DCF") modeling, but also factored Duke-specific risks into the equation to produce a final recommended range and particular ROE. Hevert verified that when determining a reasonable ROE, he did not specifically consider factors such as the unemployment or poverty rates in Duke's service area, the impact of his recommendation on the company's fixed income customers or on cities and counties as ratepayers, or its effect on job creation in the region. Hevert further stated that although he reviewed "other witnesses testimony," he did not review any correspondence, petitions, or comments filed by customers. Hevert also testified that he was unfamiliar with the specific statutory requirements for establishing a fair and reasonable ROE in North Carolina and did not know whether the Commission was required to consider the effect of economic conditions on consumers when setting an ROE.

The Public Staff presented the testimony of Ben Johnson, Ph.D., President of Ben Johnson Associates, Inc., a consulting firm that specializes in public utility regulation. Johnson recommended an ROE range of 8.68% to 9.79% and a specific ROE of 9.25%. Johnson based his ROE analysis upon two approaches. First, Johnson followed the comparable earnings approach, which "estimate[s] the long-run cost of equity as being equivalent to the level of returns being earned, on average, by firms throughout the economy" and then adjusts for risk differences between such firms. Second, Johnson followed a market analysis approach, which included a DCF analysis along with other econometric analyses. Johnson's testimony focused on the potential effect of a rate increase on Duke's investors and did not include any analysis of economic conditions in Duke's service area and their impact on customers. Although Johnson included an overview of general economic trends in his prefiled direct testimony, Johnson explained that his calculations did not consider the economic impact on Duke's customers when he determined ROE, adding that such considerations are "beyond the scope of [his] work" and are within the purview of other participants in the process. Johnson stated that "[t]he focus of [his] testimony was more on how investors are dealing with economic conditions and less so on how customers are dealing with those same economic conditions." Johnson elaborated that he "was not doing a specific calculation of whether, say, a five percent rate increase is more acceptable than seven and what the impact might be." Nonetheless, Johnson agreed that the impact of economic conditions on customers is an appropriate analysis that should be undertaken by the Commission.

The Carolina Utility Customers Association, Inc. ("CUCA"), a coalition of industrial energy customers, presented the testimony of Kevin O'Donnell, President of Nova Energy Consultants, Inc., who recommended a specific ROE of 9.5%. O'Donnell recommended an ROE range of 8.75% to 9.75% based upon a DCF analysis and an ROE range of 8.5% to 9.5% based upon the comparable earnings approach. O'Donnell's testimony contained no analysis of economic conditions in Duke's service area and their impact on customers.

The Commercial Group, an ad hoc group of Duke's commercial energy customers, presented the testimony of Steve Chriss, Senior Manager for Energy Regulatory Analysis for Wal-Mart Stores, Inc., and Wayne Rosa, Energy and Maintenance Manager for Food Lion, LLC. Chriss and Rosa declined to recommend an ROE range or specific ROE, but did testify that the 11.5% ROE that Duke initially requested exceeded both Duke's currently authorized return and recently authorized returns across the country which averaged 10.32%. Chriss and Rosa did testify that rate increases directly affect retailers and their customers and that a rate increase "is a serious concern" given current economic conditions. Chriss and Rosa did not discuss the fairness of the proposed ROE given the impact of changing economic conditions on customers, but requested that the Commission "consider these impacts thoroughly and carefully in ensuring that any increase in [Duke's] rates is only the minimum amount necessary."

The Attorney General did not present any ROE evidence.

On 27 January 2012, the Commission issued an order, granting a $309,033,000 annual retail revenue increase for Duke and approving an ROE of 10.5%—the same revenue increase and ROE agreed to in the Stipulation. In support of these conclusions, the Commission summarized—but did not weigh—the testimony of Hevert, Johnson, O'Donnell, and Chriss. The Commission also acknowledged that it was required to consider whether the ROE is reasonable and fair to customers, stating:

> [T]he Commission is required to consider the economic effects of its ROE decision on a public utility's customers pursuant to G.S. 62-133(b)(4). In particular, G.S. 62-133(b)(4) states, in pertinent part, that in fixing rates the Commission must fix a rate of return on the utility's investment that "will enable the public utility by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors,

> including, but not limited to...to compete in the market for capital funds on terms that are reasonable and that are fair to its customers and to its existing investors." One of the "terms" on which a public utility competes in the market for capital funds is the utility's authorized ROE. Thus, the Commission must consider whether that term is reasonable and fair to the utility's customers.

But the Commission cited only the following evidence regarding this factor:

> Public Staff witness Johnson testified in depth concerning the economic downturn, including the unemployment rate. In addition, the Commission received extensive testimony from public witnesses concerning the impact of current economic conditions on Duke's customers. Therefore, the Commission has ample evidence to consider in determining whether the proposed ROE of 10.5% is fair to Duke's customers.

Ultimately, the Commission concluded that the 10.5% ROE set forth in the Stipulation is "just and reasonable to all parties in light of all the evidence presented." The Commission noted that, while an ROE of 10.5% had not specifically been recommended by any particular expert witness, it fell within the "range" between the Public Staff's initial position of 9.25% and Duke's requested ROE of 11.25%. The Commission further noted that the 10.5% ROE was within the range of ROEs recommended by the witnesses. The Attorney General appealed the Commission's order to this Court as of right pursuant to subsection 7A-29(b) of the North Carolina General Statutes.

Subsection 62-79(a) of the North Carolina General Statutes "sets forth the standard for Commission orders against which they will be analyzed upon appeal." *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n* (*CUCA I*), 348 N.C. 452, 461, 500 S.E.2d 693, 700 (1998). Subsection 62-79(a) provides:

> (a) All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include:
>
> (1) Findings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record, and
>
> (2) The appropriate rule, order, sanction, relief or statement of denial thereof.

N.C.G.S. § 62-79(a) (2011). "The purpose of the required detail as to findings, conclusions and reasons as mandated by this subsection is to provide the appellate court with sufficient information with which to determine under the scope of review the questions at issue in the proceedings." CUCA I 348 N.C. at 461, 500 S.E.2d at 700.

This Court previously has recognized that "[t]he decision of the Commission will be upheld on appeal unless it is assailable on one of the statutory grounds enumerated in [N.C.G.S. §] 62-94(b)." *Id.* at 459, 500 S.E.2d at 699 (citation omitted). Subsection 62-94(b) provides:

> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.

N.C.G.S. § 62-94(b) (2011). This Court has summarized its role pursuant to subsection 62-94(b) as follows:

> This Court's role under section 62-94(b) is not to determine whether there is evidence to support a position the Commission did not adopt. Instead, the test upon appeal is whether the Commission's findings of fact are supported by competent, material and substantial evidence in view of the entire record. Substantial evidence [is] defined as more than a scintilla or a permissible inference. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The Commission's knowledge, however expert, cannot be considered

> by this Court unless the facts and findings thereof embraced within that knowledge are in the record. Failure to include all necessary findings of fact is an error of law and a basis for remand under section 62-94(b)(4) because it frustrates appellate review.

CUCA I, 348 N.C. at 460, 500 S.E.2d at 699-700 (alteration in original) (citations and internal quotation marks omitted).

In the case *sub judice* the Attorney General argues that the Commission's order was legally deficient because it was not supported by competent, material, and substantial evidence, and did not include sufficient conclusions and reasoning. Specifically, the Attorney General contends that by merely adopting the ROE contained in the nonunanimous Stipulation, the Commission failed to undertake an independent analysis and reach its own conclusion regarding the ROE. In addition, the Attorney General contends that the Commission failed to consider changing economic conditions and their impact on consumers in determining the ROE.

"What constitutes a fair rate of return on common equity is a conclusion of law that must be predicated on adequate factual findings." *Id.* at 462, 500 S.E.2d at 701. This Court previously has set forth the procedure that the Commission must follow when making an ROE determination:

> In finding essential, ultimate facts, the Commission must consider and make its determination based upon all factors particularized in section 62-133, including "all other material facts of record" that will enable the Commission to determine what are reasonable and just rates. The Commission must then arrive at its "*own independent conclusion*" as to the fair value of the applicant's investment, the rate base, and what rate of return on the rate base will constitute a rate that is just and reasonable both to the utility company and to the public.

Id. In reaching this conclusion, the Commission may consider partial, as well as unanimous stipulations. "[A] stipulation entered into by less than all of the parties as to any facts or issues in a contested case proceeding under chapter 62 should be accorded full consideration and weighed by the Commission with all other evidence presented by any of the parties in the proceeding." *Id.* at 466, 500 S.E.2d at 703. Specifically,

> [t]he Commission must consider the nonunanimous stipulation along with all the evidence presented and any other facts the Commission finds relevant to the fair and just determination of the proceeding. The Commission may even adopt the recommendations or provisions of the nonunanimous stipulation as long as the Commission sets forth its reasoning and makes "its own independent conclusion" supported by substantial evidence on the record that the proposal is just and reasonable to all parties in light of all the evidence presented.

Id. Nonetheless, "only those stipulations that are entered into by all of the parties before the Commission may form the basis of informal disposition of a contested proceeding under section 62-69(a), *id.*, and such is not the case here.

Two cases previously decided by this Court provide useful guidance on the application of these principles. In *CUCA I* this Court concluded that "the Commission failed to adduce 'its own independent conclusion' as to the appropriate rate of return on equity." *Id.* at 467, 500 S.E.2d at 703. In its order, the Commission approved the same ROE that was contained in a nonunanimous stipulation without weighing all the available testimony. *Id.* This Court noted that:

> The stipulated 11.4% rate should have been considered and analyzed by the Commission along with all the evidence regarding proper rate of return, including the testimony of Mr. O'Donnell on behalf of CUCA that 10.55% was the appropriate return on equity. The only other evidence supporting the 11.4% rate was the rebuttal testimony of Mr. Lurie in defense of the stipulation that the stipulated rate was "just and reasonable."

Id. at 466-67, 500 S.E.2d at 703. This Court then determined that "[i]n light of the facts that Mr. Lurie's initial recommendation was 13.34% and that no other evidence supported the 11.4% rate, it is clear that the Commission adopted wholesale, without analysis or deduction, the 11.4% rate from the partial stipulation, as opposed to considering it as one piece of evidence to be weighed in making an otherwise independent determination." *Id.* at 467, 500 S.E.2d at 703.

In contrast, two years later this Court concluded that the Utilities Commission "adduced its own independent conclusion as to the appropriate rate of return on equity" and held that "this conclusion [was] fully supported by substantial evidence in view of the entire record." *State ex rel. Utils. Comm'n v. Carolina Util. Customers*

Ass'n (*CUCA II*), 351 N.C. 223, 235, 524 S.E.2d 10, 19 (2000). This Court noted that "[a] thorough review of the record . . . reveal[ed] that the Commission's 11.4% rate of return on common equity conclusion c[ame] from the direct testimony and exhibits of Public Staff witness Hinton." *Id.* at 233, 524 S.E.2d at 17. This Court then determined that the Commission "independently analyz[ed] the testimony of [the applicant company's] witness Andrews, CUCA witness O'Donnell, and Public Staff witness Hinton before reaching its conclusion that 11.4% was the appropriate cost of common equity." *Id.* Specifically, this Court noted that "the Commission accepted Public Staff witness Hinton's recommendation of 11.4% based on the credibility and objectivity of his PSNC-specific DCF analysis" "[a]fter *weighing* the conflicting evidence of the expert witnesses." *Id.* at 235, 524 S.E.2d at 19 (emphasis added).

Here although the 10.5% ROE contained in the nonunanimous Stipulation fell within the range of ROEs recommended by the witnesses at the evidentiary hearing, in contrast to *CUCA II*, none of the witnesses specifically recommended an ROE of 10.5% based upon their calculations. Johnson did testify that the stipulated ROE "was not unreasonable"; however, he also recommended a different ROE of 9.25%. In addition, in contrast to *CUCA II*, it does not appear that the Commission weighed any of the testimony presented at the evidentiary hearing. Instead, it appears that the Commission merely recited the witnesses' testimony before reaching an ROE conclusion in its order. Notably absent from the Commission's order is any discussion of why one witness's testimony was more credible than another's or which methodology was afforded the greatest weight. *See CUCA II*, 351 N.C. at 233-35, 524 S.E.2d at 17-19.

Without sufficient findings of fact as to these issues, we cannot say that the Commission "ma[de] 'its own independent conclusion' . . . that the propos[ed] [ROE] [wa]s just and reasonable to all parties in light of all the evidence presented." *CUCA I*, 348 N.C. at 466, 500 S.E.2d at 703. Instead, it appears that "the Commission adopted wholesale, without analysis or deduction," the 10.5% stipulated ROE, "as opposed to considering it as one piece of evidence to be weighed in making an otherwise independent determination." *Id.* at 467, 500 S.E.2d at 703. Accordingly, the Commission's order must be reversed and this case remanded to the Commission so that it can make an independent determination regarding the proper ROE based upon appropriate findings of fact that balance all the available evidence.

As guidance on remand, we further note that in making its ROE determination the Commission failed to make findings of fact regarding the impact of changing economic conditions on customers. "In fixing the rates to be charged by a public utility for its service, the Commission must . . . comply with the requirements of [Chapter 62 of the North Carolina General Statutes], *more specifically, [N.C.]G.S. [§] 62-133.*" *Id.* at 457, 500 S.E.2d at 698 (quotation marks omitted). Section 62-133 states that the Commission must, *inter alia*:

> (4) Fix such rate of return on the cost of the property ascertained pursuant to subdivision (1) of this subsection as will enable the public utility by sound management to produce a fair return for its shareholders, considering *changing economic conditions* and other factors, including, but not limited to, the inclusion of construction work in progress in the utility's property under sub-subdivision b. of subdivision (1) of this subsection, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms that are reasonable and that are *fair to its customers* and to its existing investors.

N.C.G.S. § 62-133(b)(4) (2011) (emphases added). "In finding essential, ultimate facts, the Commission must consider and make its determination based upon *all factors* particularized in section 62-133, including 'all other material facts of record' that will enable the Commission to determine what are reasonable and just rates." *CUCA I*, 348 N.C. at 462, 500 S.E.2d at 701 (emphasis added).

The Attorney General argues that section 62-133, in conjunction with Chapter 62 as a whole, mandates that the Commission consider the impact of changing economic conditions on customers when determining ROE. We agree.

"The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990). This Court previously has recognized that the legislature's "twin goals" in enacting section 62-133 were to "assur[e] sufficient shareholder investment in utilities while simultaneously maintaining the lowest possible cost to the using public for quality service." *CUCA I*, 348 N.C. at 458, 500 S.E.2d at 698. In addition, this Court has stated that "[t]he primary purpose of Chapter 62

of the General Statutes is not to guarantee to the stockholders of a public utility constant growth in the value of and in the dividend yield from their investment, but is to assure the public of adequate service at a reasonable charge." *State ex rel. Utils. Comm'n v. Gen. Tel. Co. of the Se.*, 285 N.C. 671, 680, 208 S.E.2d 681, 687 (1974). Moreover, this Court has explained that "[i]n its delegation of rate-making authority to the Commission, the legislature has established an elaborate procedural, hearing, and appeals process that contemplates the full consideration of *all* evidence put forth by each of the parties certified via the statute to have an interest in the outcome of contested proceedings." *CUCA I*, 348 N.C. at 463, 500 S.E.2d at 701 (emphasis added). "Once such considerations are afforded to all parties in a contested case, the Commission is required to embody its findings in an order sufficiently detailing the reasons for its determinations on *all* material and controverted issues of fact, law or discretion presented in the record." *Id.* (emphasis added) (citing N.C.G.S. § 62-94(b)).

It is undisputed that section 62-133 dictates that the Commission consider "changing economic conditions" when making an ROE determination. *See* N.C.G.S. § 62-133(b)(4). Although subdivision 62-133(b)(4) does not specifically reference "impact on customers," subsection 62-133(a) does emphasize that fairness to customers is a critical consideration in rate cases by including a directive that "the Commission shall fix such rates as shall be fair both to the public utilities *and to the consumer*." *Id.* § 62-133(a) (2011) (emphasis added). This is consistent with this Court's recognition of the customer-driven focus of Chapter 62 as a whole. *See Gen. Tel. Co.*, 285 N.C. at 680, 208 S.E.2d at 687. This Court previously has recognized that Chapter 62 "is a single, integrated plan. Its several provisions must be construed together so as to accomplish its primary purpose." *Id.* at 680, 208 S.E.2d at 687. Given the legislature's goal of balancing customer and investor interests, the customer-focused purpose of Chapter 62, and this Court's recognition that the Commission must consider *all* evidence presented by interested parties, which necessarily includes customers, it is apparent that customer interests cannot be measured only indirectly or treated as mere afterthoughts and that Chapter 62's ROE provisions cannot be read in isolation as only protecting public utilities and their shareholders. Instead, it is clear that the Commission must take customer interests into account when making an ROE determination. Therefore, we hold that in retail electric service rate cases the Commission must make findings of fact regarding the impact of changing economic conditions on customers when determining the proper ROE for a public utility.

For the foregoing reasons, we reverse the Commission's order and remand this case to the Commission with instructions to make an independent determination regarding the proper ROE based upon appropriate findings of fact that weigh all the available evidence.

REVERSED AND REMANDED.

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

STATE OF NORTH CAROLINA v. DAVID ALLEN CARTER

No. 507PA11

(Filed 12 April 2013)

Sexual Offenses— failure to instruct on lesser-included offense—no plain error

There was no plain error in a prosecution for first-degree sexual offense where the victim testified that defendant placed himself on or in the victim's anus and the trial court did not give an instruction on attempted first-degree sexual offense. The standard for plain error is whether there was a probable rather than a possible impact on the jury verdict, and defendant did not carry that burden.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 718 S.E.2d 687 (2011), following an appeal from two judgments entered on 27 May 2010 by Judge W. David Lee in Superior Court, Iredell County, in which the Court of Appeals found no error in a judgment following defendant's conviction for one count of first-degree sexual offense, but vacated an order requiring defendant to enroll in satellite-based monitoring and remanded for further proceedings, and reversed defendant's conviction for a second count of first-degree sexual offense and ordered a new trial on that charge. Heard in the Supreme Court on 7 January 2013.

Roy Cooper, Attorney General, by Anne M. Middleton, Assistant Attorney General, for the State-appellant.

Mark Montgomery for defendant-appellee.

BEASLEY, Justice.

In this appeal we consider whether the trial court's failure to give the jury an instruction on the lesser-included offense of attempted first-degree sexual offense constituted plain error in defendant's trial for two counts of first-degree sexual offense. This Court concludes that defendant failed to show plain error under the standard we set forth in *State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012). Consequently, we reverse the decision of the Court of Appeals and reinstate the jury's verdict and the trial court's judgment.

On 13 October 2008, defendant was indicted in Iredell County on two counts of first-degree statutory sexual offense with a child under the age of thirteen on the basis of acts alleged to have occurred in June of 2008 with defendant's eight-year-old stepdaughter. Defendant pleaded not guilty to both counts and the case proceeded to trial.

At trial the State's evidence tended to show the following facts. In 2007, while living with her family in South Carolina, the victim reported to her mother that defendant had come into her bed while she was asleep, cuddled with her, and "put his penis in her 'butt crack.' " Her mother did not report the incident. The family later moved to North Carolina. In August of 2008 the victim again informed her mother that defendant had sexually abused her. The victim's mother then took her to the Dove House Children's Advocacy Center for a medical examination and reported the abuse to the police department.

Tammy Carroll, a Dove House nurse, examined the victim and found a small anal fissure, which Ms. Carroll described at trial as a tear or erosion attributed to a trauma to that area. Ms. Carroll explained that a penis inside the "butt crack" or on the "butthole," or even on the "butt cheeks," could cause such a fissure, as could frequent diarrhea or constipation, although there was no evidence of either condition. While at Dove House the victim also spoke with Julie Gibson, an Iredell County Sheriff's Captain and backup forensic interviewer for Dove House, and told her that defendant "put his penis *in* [her] butt 50 times." (Emphasis added.)

At trial the victim testified and described several incidents in which defendant put his "doodle" either "on" or "in" her anus in some manner. She stated, "He took a certain part of his body and stuck it *on* another part of my body." (Emphasis added.) She was then asked, "You said he took a certain part of his body and stuck it *in* a certain part of your body," to which she replied, "Yes." (Emphasis added.)

She again replied, "Yes," when the State proffered, "You said he stuck a certain part of his body which you call his doodle or his penis *in* a certain part of your body." (Emphasis added.) The State asked her to explain how defendant's "doodle went, was stuck *into* [her] bottom," and she stated, "Well, it would be between my butt cheeks, as I call it, and like right there *over* my butthole or hole in my anus." (Emphases added.) In providing another description she said, "Well, my Daddy Dave was pushing his doodle *in* really, really hard, and for some reason I'm very, very delicate, and he was pushing it really hard and it would make it feel very sore and stuff. And sometimes it would feel like it would be bleeding." (Emphasis added.) The State later asked the victim if she remembered "drawing a picture" of defendant placing his penis "*in*" her "bottom" and she answered affirmatively. (Emphasis added.) She also demonstrated that she understood the difference between "in" and "on" by using a checkbook and blank checks and identifying when the checks were "in" or "on" the checkbook.

On cross-examination, in response to defendant's request that she clarify her testimony that he had put his penis "*on* [her] butthole," she stated, "Well, this is a bad example, but like he would put his doodle between my butt cheeks and it will be sort of pressing *on* my butt hole." (Emphases added.) She later testified that defendant put his penis "*in*" her butt fifty or one hundred times. When defense counsel asked which it was, she replied, "I'm not sure, but he did do it a lot."

Defendant did not request an instruction on attempt. On 27 May 2010, a jury convicted defendant of (1) first-degree sex offense based on "[i]nsertion of male sex organ into the mouth of the alleged victim" (File No. 08 CRS 057285) and (2) first-degree sex offense based on "[i]nsertion of the male sex organ into the anus of the alleged victim" (File No. 08 CRS 057286). The trial court found defendant to have a prior record level of I and sentenced him within the presumptive range to two consecutive terms of 192 to 240 months each. The trial court further required defendant to register as a sex offender upon his release from prison and ordered him to enroll in satellite-based monitoring (SBM) for life.

Defendant appealed both convictions and the order for SBM to the Court of Appeals, which, in a unanimous opinion, vacated and remanded the SBM order and held that there was no error with respect to the first offense. The Court of Appeals held, however, that the trial court's failure to give an instruction on the lesser-included offense was plain error and granted a new trial with respect to the

second offense. The Court of Appeals based its holding upon the existence of a conflict in the evidence presented at trial. In explaining its finding of plain error, the Court of Appeals wrote:

> Although certain portions of [the victim's] testimony tended to show that anal penetration had occurred, her statements that [d]efendant put his penis "on" or "between my butt cheeks" or that he "pressed against" her anus with his penis *support an inference* to the contrary. Moreover, although "evidence that no trauma occurred to [the victim] is not sufficient to establish a conflict of evidence as to penetration," Ms. Carroll's testimony indicated that [the victim's] anal fissure *could have resulted from attempted, as well as completed, penetration. As a result, a jury could rationally have found* [d]efendant guilty of attempted first-degree sexual offense in File No. 08 CrS 57286.

State v. Carter, —— N.C. App. ——, ——, 718 S.E.2d 687, 698 (2011) (third alteration in original) (internal citation omitted) (emphases added).

We allowed the State's petition for discretionary review of the Court of Appeals' holding with regard to the conviction for "insertion of the male sex organ into the anus of the alleged victim."

The State's argument is twofold. First, the State contends that the failure to give the instruction was not error because the State only needed to prove that penetration occurred, however slightly, on one occasion in that defendant was only charged with one count of the offense for multiple acts occurring sometime in June 2008. Thus, the victim's testimony did not raise a contradiction, but only reported the many different encounters with defendant, and as long as one of those reports used the word "in," the instruction is sufficient. Second, the State argues that even if it was error not to give the instruction, the error was not plain error because it was not a fundamental error and did not have a probable impact on the jury's verdict because the victim did use the word "in" in at least one description of the alleged events.

Defendant argues that error occurred because, as the Court of Appeals held, there was some evidence from which the jury could reasonably find him guilty of the attempt. He further argues that the jury probably would have found him guilty of attempt if given the option, because the victim's repeated use of the word "on," coupled with Ms. Carroll's testimony that the observed trauma likely came from contact "on" the anus or cheeks, resulted in weak evidence of

penetration and thus it would have been possible for the jury to conclude that only one encounter occurred. But this rationale is inconsistent with the plain error standard set by this Court.

We now hold that the Court of Appeals misconstrued the plain error standard. This Court recently clarified the plain error standard in *Lawrence*:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334 (alteration in original) (citations and internal quotation marks omitted). The necessary examination is whether there was a "*probable* impact" on the verdict, not a possible one. *Id.* (emphasis added). In other words, the inquiry is whether the defendant has shown that, "absent the error, the jury probably would have returned a different verdict." *Id.* at 519, 723 S.E.2d at 335. Thus, the Court of Appeals' consideration of what the jury "*could rationally have found*," *Carter*, —— N.C. App. at ——, 718 S.E.2d at 698 (emphasis added), was improper.

It is not necessary to engage in a discussion of whether an instruction on attempt should have been provided because defendant failed to show that any such error was prejudicial. Even if we were to agree with defendant that there is an inconsistency in the victim's testimony regarding whether defendant placed his penis "on" or "in" her anus, defendant still fails to meet his burden under *Lawrence*.

To establish a "probable impact" in this case, defendant would have to show that the jury would have disregarded any portions of the victim's testimony stating that he put his penis "in" her anus in favor of those instances in which she said "on." Yet the Court of Appeals itself found that the evidence of penetration was sufficient to support a verdict of guilty on the completed offense. *See Carter*, —— N.C. App. at ——, 718 S.E.2d at 693. Defendant has not shown that "the jury probably would have returned a different verdict" if the trial court had provided the attempt instruction. *Lawrence*, 365 N.C. at

519, 723 S.E.2d at 335. It therefore cannot be said that defendant was prejudiced by the failure to give the instruction under the plain error standard, even if failure to give the instruction was error.

Because defendant has failed to carry his burden, we hold that the trial court's instructions do not rise to the level of plain error. Accordingly, the decision of the Court of Appeals is reversed.

REVERSED.

JOSE CLEMENTE HERNANDEZ GONZALEZ, EMPLOYEE v. JIMMY WORRELL D/B/A WORRELL CONSTRUCTION, NONINSURED, AND PATRICK LAMM AND CO., LLC, EMPLOYER, TRAVELERS INDEMNITY CO., BUILDERS MUTUAL INSURANCE CO., SCOTT INSURANCE AGENCY, SWISS REINSURANCE COMPANY, AND CINCINNATI INSURANCE CO., CARRIERS

No. 312A12

(Filed 12 April 2013)

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. ––––, 728 S.E.2d 13 (2012), affirming an opinion and award filed on 5 August 2011 by the North Carolina Industrial Commission. On 12 December 2012, the Supreme Court allowed a petition by defendant Cincinnati Insurance Company for discretionary review of additional issues. Heard in the Supreme Court on 11 March 2013.

Thomas and Farris, P.A., by Albert S. Thomas, Jr. and Allen G. Thomas, Sr.; Paul N. Blake, III; and Morrison Law Firm, PLLC, by B. Perry Morrison, Jr., for plaintiff-appellee.

Lewis & Roberts, PLLC, by Jeffrey A. Misenheimer, Sarah C. Blair, and Melissa K. Walker, for defendant-appellants/appellees Patrick W. Lamm & Company, LLC and Builders Mutual Insurance Company.

Manning Fulton & Skinner P.A., by William S. Cherry III and Michael T. Medford, for defendant-appellee Scott Insurance Agency.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr. and Garth A. Gersten, for defendant-appellant/appellee Cincinnati Insurance Company.

Sumwalt Law Firm, *by Vernon Sumwalt; and Jay Gervasi*, *PA*, *by Jay A. Gervasi*, *Jr.*, *for North Carolina Advocates for Justice*, *amicus curiae.*

Orbock Ruark & Dillard, *PC*, *by Mark A. Leach*, *for North Carolina Association of Defense Attorneys*, *amicus curiae.*

PER CURIAM.

Justice BEASLEY took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See*, *e.g.*, *Amward Homes*, *Inc. v. Town of Cary*, 365 N.C. 305, 716 S.E.2d 849 (2011); *Goldston v. State*, 364 N.C. 416, 700 S.E.2d 223 (2010).

AFFIRMED.

SHARON A. KEYES v. W. GLENN JOHNSON, GUARDIAN OF THE ESTATE OF NELSON T. CURRIN

No. 399A12

(Filed 12 April 2013)

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. ___, 731 S.E.2d 269 (2012), affirming an order granting summary judgment entered on 30 August 2011 by Judge Lucy N. Inman in Superior Court, Harnett County. On 12 December 2012, the Supreme Court allowed plaintiff's petition for discretionary review as to additional issues. Heard in the Supreme Court on 11 March 2013.

Sharon A. Keyes, *pro se*, *plaintiff-appellant.*

Narron, *O'Hale & Whittington*, *PA*, *by James W. Narron and Matthew S. McGonagle*, *for defendant-appellee.*

PER CURIAM.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

STATE OF NORTH CAROLINA v. KEITH DONNELL MILES

No. 410A12

(Filed 12 April 2013)

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. ——, 730 S.E.2d 816 (2012), finding no error in defendant's trial resulting in a judgment imposing a sentence of life imprisonment without parole entered on 16 March 2011 by Judge Ronald E. Spivey in Superior Court, Wilkes County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court on 12 March 2013.

Roy Cooper, Attorney General, by Derrick C. Mertz, Assistant Attorney General, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse Jr., for defendant-appellant.

PER CURIAM.

AFFIRMED.

CEDAR GREENE, LLC AND O'LEARY GROUP WASTE SYSTEMS, LLC v.
CITY OF CHARLOTTE

No. 360A12

(Filed 12 April 2013)

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. ——, 731 S.E.2d 193 (2012), reversing a summary and declaratory judgment entered on 14 December 2011 by Judge H. William Constangy in Superior Court, Mecklenburg County, and remanding for further proceedings. Heard in the Supreme Court on 14 February 2013.

Robinson Bradshaw & Hinson, P.A., by Richard A. Vinroot, A. Ward McKeithen, and Matthew F. Tilley, for plaintiff-appellants.

Thomas E. Powers III, Assistant City Attorney, for defendant-appellee.

PER CURIAM.

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

REVERSED.

THE NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY v. CULLY'S MOTORCROSS PARK, INC., AND LAURIE VOLPE

No. 243PA12

(Filed 13 June 2013)

1. Malicious Prosecution— initiation of action—information reported to police officer

In a claim for malicious prosecution arising from the insurance investigation of a house fire, the dispositive issue was whether the trial court erred when it found as a matter of law that Farm Bureau initiated the prosecution of Volpe when its investigator reported his suspicions of arson to a police sergeant. The Court of Appeals' interpretation of the element of initiation in a malicious prosecution case did not adequately account for the roles played by police and prosecutorial discretion. Instead, a more comprehensive analysis found in the Restatement (Second) of Torts Section 653 was recognized and applied, allowing citizens to make reports in good faith to police and prosecutors without fear of retaliation if the information proves to be incomplete or inaccurate.

2. Appeal and Error— new analysis adopted—remand to trial court—analysis by appellate court

When the Supreme Court implements a new analysis to be used in future cases, it may remand the case to the lower courts to apply that analysis, which is particularly appropriate when additional findings of fact are necessary. However, when the new analysis relies upon conclusions of law rather than findings of fact, and when the findings of fact made by the trial court are unchallenged, the Supreme Court may elect to conduct the analysis rather than remand the case.

3. Malicious Prosecution— initiation of action—information furnished to police officer—officer's independent discretion

Farm Bureau did not institute a malicious prosecution and its actions did not constitute an unfair and deceptive practice in an action that arose from an arson investigation. The testimony left no doubt that while the prosecutor considered and used the information provided by the insurance investigator, he independently exercised his discretion to make the prosecution his own.

Justice BEASLEY, concurring in part and dissenting in part.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 725 S.E.2d 638 (2012), affirming a judgment and two orders, all entered on 7 February 2011 by Judge Wayland J. Sermons, Jr. in Superior Court, Wilson County. Heard in the Supreme Court on 16 April 2013.

Harris, Creech, Ward and Blackerby, P.A., by Jay C. Salsman, C. David Creech, and Luke A. Dalton, for plaintiff-appellant.

Hemmings & Stevens, PLLC, by Aaron C. Hemmings, for defendant-appellees.

Schulz Stephenson Law, by Bradley N. Schulz; and Wait Law, P.L.L.C., by John L. Wait, for North Carolina Advocates for Justice, amicus curiae.

Young Moore and Henderson P.A., by Glenn C. Raynor, for North Carolina Association of Defense Attorneys, amicus curiae.

Baucom, Claytor, Benton, Morgan & Wood, P.A., by James F. Wood, III, for North Carolina Insurance Crime Information Exchange, amicus curiae.

Bailey & Thomas, P.A., by Roger W. Marion, Jr. and David W. Bailey, Jr., for Property Casualty Insurers Association of America, amicus curiae.

EDMUNDS, Justice.

In the aftermath of a house fire on property belonging to defendant Cully's Motorcross Park, Inc. (Cully's), an investigator for plaintiff North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) found strong evidence of arson and reported his suspicions to a Wilson Police Department sergeant. These findings included allegations that defendant Laurie Volpe (Volpe), Cully's president and sole stockholder, had failed to report to Farm Bureau that there was a deed of trust on the property when she insured it, when she filed a claim of loss after the fire, or when she later sold the burned property to a purchaser who did not know it was still encumbered. Volpe thereafter was arrested and charged with obtaining property by false pretenses based upon her sale of the encumbered property. This

appeal involves Volpe's claim that the insurance investigator's report to a law enforcement officer constituted the initiation of a malicious prosecution. Because we conclude that the investigator did not initiate a criminal prosecution, we reverse the holding of the Court of Appeals that affirmed the trial court's finding to the contrary.

In the late evening of 5 September or early morning of 6 September 2008, a fire was set in the house at 314 Hill Street in Wilson, North Carolina. Responding Wilson Fire Department firefighters found a candle on the floor of the downstairs dining room and observed a distinctive pour pattern on some walls of the house. They followed the burn trail and pour pattern to a small room at the top of the stairs on the second floor of the house. Inside the room was a tipped red gas can labeled "Race Fuel." A pour pattern on the walls of the house led directly to the gas can.

The damaged property was owned by defendant Cully's. Defendant Volpe was the president and only shareholder of Cully's, and Volpe's husband, Louis R. Volpe, Jr. (Mr. Volpe), was the corporate secretary. Cully's originally was incorporated in Florida, where the Volpes operated a dirt bike racing track, using red gas cans labeled "Race Fuel" in the business. When the Volpes moved to North Carolina, they reincorporated, keeping the name Cully's Motorcross Park, but operating as a business renovating and reselling homes. They brought their red gas cans from Florida, and Mr. Volpe kept them to fuel equipment that he used for landscaping and lawn maintenance at the properties that Cully's owned and renovated.

Volpe, through Cully's, purchased the property at 314 Hill Street from James and Diane Skinner on 19 December 2007, paying in cash $25,000 of the $31,500 purchase price. The remaining $6,500 was to be paid via a balloon payment recorded in a deed of trust that required full payment to the Skinners no later than one year from the date of purchase or upon the sale of the home, whichever came first. Before signing the deed of trust, Volpe submitted an application to Farm Bureau to have the property added to her fire insurance policy. The application, which named the insured as "Laurie Volpe–Cullys [sic] Motorcross Park LLC" and was signed "Laurie A. Volpe," did not reveal the existence of a deed of trust on the property, and the box on the form that asked, "Does any other person or entity have an ownership interest in the property?" was checked "No." The property was added and the policy was issued by Farm Bureau with a policy limit of $60,000.

After the fire, on 17 September 2008, Volpe filed a Sworn Statement in Proof of Loss form with Farm Bureau on behalf of Cully's. In response, Farm Bureau initiated an investigation. In the days following the fire, the Farm Bureau Special Investigator Randall Loftin (Investigator Loftin) and other Farm Bureau investigators toured the fire scene. Investigator Loftin testified that he observed medium to heavy fire damage, extensive smoke damage, a pour pattern, and the candle that was still on the floor in the downstairs dining room. The circumstances of the fire led Farm Bureau to suspect arson, and Investigator Loftin quickly focused on Mr. Volpe.

Investigator Loftin interviewed both Volpes several times in the months following the fire, collecting financial information from them pertaining both to themselves and to Cully's, along with such materials as notes or deeds of trust and prior insurance claims. Volpe submitted to an examination under oath in January 2009, maintaining that she was cooperating fully with Farm Bureau and providing all the documents she understood had been requested and that she had in her possession. Mr. Volpe, on the other hand, refused to submit to an examination under oath, and Investigator Loftin was unable to obtain a sworn statement from him prior to Mr. Volpe's death in September 2010. Although Mr. Volpe was named in the litigation described below, he was dismissed as a party after he died.

As Investigator Loftin continued his investigation, on 6 November 2008, Cully's sold the property by means of a quitclaim deed signed by Volpe to José Giron, who knew of the fire damage. When deposed before trial, Volpe claimed she had made Mr. Giron aware of the balloon payment that she still owed on the original purchase, adding that she had told Mr. Giron she would pay off that balloon payment. However, James Skinner testified at trial that he had to work out a repayment plan with Mr. Giron because the Volpes never paid the $6,500.

Another point of contention at trial was whether Volpe had disclosed the deed of trust on 314 Hill Street during Farm Bureau's investigation. As noted above, Volpe failed to indicate on the insurance application form she signed and filed with Farm Bureau that the property was the subject of a mortgage, even though the form contained an explicit inquiry seeking such information. Volpe testified, and the trial court found as fact, that she had responded as she did because she did not consider a purchase money deed of trust that was due in one year and did not require monthly payments to be a mortgage. Although the trial court further found that Volpe disclosed

in the proof of loss form she filed after the fire that Cully's owed $6,500 on the property, we note that where the form asks for "all owners (and names of spouses) of the insured property, and all persons or companies which have any lien or encumbrances against the insured property, such as mortgagees, deeds of trust, judgments, etc.," Volpe wrote in only "Cully's Motorcross Park, Inc." while nowhere listing either the amount of $6,500 or the names of creditors James and Diane Skinner.

While Investigator Loftin worked, the Wilson Police Department opened a parallel investigation into the fire, which police and firefighters had classified as "suspicious." Police Sergeant J.C. Lucas (Sergeant Lucas) was the assigned investigator. He interviewed the Volpes and neighbors around 314 Hill Street. On 24 September 2008, he met Investigator Loftin and the Volpes at the house. Shortly after that meeting, however, Sergeant Lucas fell ill and did not return from sick leave until April 2009. As a result, the investigation was conducted primarily by Investigator Loftin on behalf of Farm Bureau.

After completing his investigation, Investigator Loftin submitted his report and recommendations to his superiors. Farm Bureau ultimately denied the claim on 23 February 2009, citing among other factors Mr. Volpe's failure to provide a sworn statement, Volpe's failure to disclose the deed of trust in favor of the Skinners, and Farm Bureau's suspicion that the fire had been intentionally set by one of the Volpes. The next day, Farm Bureau filed a complaint for declaratory judgment, seeking a judicial declaration that it had no obligation under the insurance policy to named defendants Cully's, Volpe, and Mr. Volpe. The complaint alleged that Farm Bureau acted reasonably and in good faith in investigating the fire and set out several reasons Farm Bureau was legally entitled to a declaratory judgment in its favor. These allegations included that Mr. Volpe, an officer and employee of Cully's, failed to submit to an examination under oath as required by the policy; that defendants failed to cooperate in the investigation by providing requested documents and records; and that defendants made material misrepresentations and attempted to conceal material facts, both by failing to provide the deed of trust on the property and by failing to produce the quitclaim deed that transferred the property after the fire. In addition, Farm Bureau alleged that evidence indicated that the Volpes had the opportunity and motive to set the fire, an act that, if established in court, also would relieve Farm Bureau of its duty to provide coverage.

On 23 March 2009, defendants filed a combined answer and counterclaim, denying Farm Bureau's right to decline coverage and asserting that Farm Bureau had breached the insurance contract, violated the Unfair Claims Settlement Practices provision of the North Carolina Insurance Law, committed unfair and deceptive acts or practices in or affecting commerce in violation of N.C.G.S. § 75-1.1, and acted in bad faith. Defendants sought treble damages, punitive damages, and attorney's fees.

On 16 April 2009, Investigator Loftin again met with Sergeant Lucas at Investigator Loftin's request. Investigator Loftin informed Sergeant Lucas, who by then had returned to duty from sick leave, of the results of his investigation, told Sergeant Lucas that the Volpes' insurance claim had been denied, and added that the property had been sold to Mr. Giron even though Volpe had not paid off the balloon payment owed and secured by a deed of trust on the property. Using the documentation provided by Investigator Loftin, Sergeant Lucas opened a separate investigation of fraud against Volpe. After meeting with Mr. Giron and Mr. Skinner, Sergeant Lucas concluded that Volpe had committed a crime by selling to Mr. Giron property that Volpe did not own.

Sergeant Lucas consulted with a real estate attorney and an assistant district attorney to discuss his findings, then presented the case to a Wilson County magistrate on 4 May 2009. The magistrate found probable cause and issued a warrant to arrest Volpe for the offense of obtaining property by false pretenses. The next day, Sergeant Lucas asked Volpe to come to the police station and give a statement. After interviewing her and asking her to write out a statement regarding the sale of 314 Hill Street to Mr. Giron, Sergeant Lucas had Volpe arrested pursuant to the warrant. However, on 19 May 2009, the district attorney dismissed the charge against Volpe. On 22 June 2009, Volpe and Cully's filed an amended answer and counterclaim, adding a claim that Farm Bureau had instituted a malicious prosecution against Volpe.

A bench trial on all claims and counterclaims was held in December 2010. After considering the evidence, arguments of counsel, and additional posttrial motions by the parties, the trial court found that Farm Bureau had neither breached the insurance contract nor engaged in unfair and deceptive practices by "refusing to pay the fire claim without conducting a reasonable investigation based upon all available information." The trial court also found that "[Mr.] Volpe, Jr. acting on behalf of Cully's Motorcross Inc., caused, conspired to

cause, or allowed to be caused the fire at 314 Hill Street." However, the trial court found that Volpe was not involved in the fire, that Volpe's actions as described to Sergeant Lucas by Investigator Loftin did "not amount to a crime," that Farm Bureau caused a criminal proceeding to be instituted against Volpe, and that Farm Bureau was liable to Volpe for malicious prosecution.

The trial court further found as fact that Volpe had made a statement pertaining to the debt on 314 Hill Street to a representative of Farm Bureau as early as 8 September 2008, that Farm Bureau knew of Volpe's debt to Mr. Skinner on the property as of that date, and that Farm Bureau did not provide this information to Sergeant Lucas until after Volpe filed her counterclaim. The trial court concluded as a matter of law that Farm Bureau withheld this information from the Wilson Police until after Volpe filed her counterclaim for the purpose of achieving leverage in the instant action, thereby committing an unfair and deceptive practice. The trial court awarded Volpe attorney's fees, damages in the amount of $26,075 for malicious prosecution, and damages in the amount of $10,000 (trebled to $30,000) for "the unfair and deceptive trade practice of malicious prosecution."

The Court of Appeals affirmed the trial court's decision. *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc.*, ––– N.C. App. –––, –––, 725 S.E.2d 638, 651 (2012). In reviewing Farm Bureau's argument that it did not initiate the criminal action against Volpe, but instead merely provided information to the police, the Court of Appeals focused on its finding that almost all the information used by Sergeant Lucas in making his decision to prosecute Volpe had been supplied by Farm Bureau's Investigator Loftin. *Id.* at –––, 725 S.E.2d at 643-44. Because it agreed with the trial court that a criminal prosecution would have been unlikely if Investigator Loftin had not contacted Sergeant Lucas, the Court of Appeals concluded that the trial court did not err by determining that Farm Bureau initiated criminal proceedings. *Id.* at –––, 725 S.E.2d at 644. The Court of Appeals then considered Farm Bureau's other issues and affirmed the trial court. *Id.* at –––, 725 S.E.2d at 651. We allowed Farm Bureau's petition for discretionary review.

[1] We begin by observing that all of Volpe's surviving claims are based upon a contention that Farm Bureau maliciously instigated a criminal prosecution against her and that the malicious prosecution was an unfair and deceptive practice, which the trial court found was instituted for the purpose of gaining leverage in the current action. Thus, if Investigator Loftin's report to Sergeant Lucas was proper,

Farm Bureau neither instituted a malicious prosecution nor committed an unfair and deceptive practice, and Volpe's claims fail. Accordingly, we consider the propriety of Investigator Loftin's actions.

No party has challenged the trial court's findings of fact. When a trial court sits without a jury, findings of fact are conclusive on appeal "if supported by any substantial evidence," *Carolina Milk Producers Ass'n Coop., Inc. v. Melville Dairy, Inc.*, 255 N.C. 1, 22, 120 S.E.2d 548, 563 (1961), while conclusions of law are reviewed de novo, *Davison v. Duke Univ.*, 282 N.C. 676, 712, 194 S.E.2d 761, 783 (1973). Here, while the trial court found as fact that Investigator Loftin initiated the prosecution of Volpe, we determine that this matter is instead a mixed question of fact and law. *State v. Sparks*, 362 N.C. 181, 185-86, 657 S.E.2d 655, 658 (2008) (conducting de novo review of a conclusion of law that the trial court mislabeled as a finding of fact); *see also In re Foreclosure of Gilbert*, 211 N.C. App. 483, 487-88, 711 S.E.2d 165, 169 (2011) (citations omitted) (observing that when the trial court has mislabeled findings of fact and conclusions of law, the reviewing court may reclassify them as necessary before applying the appropriate standard of review). The actions of Investigator Loftin and Sergeant Lucas are facts, but the trial court's determination that these actions constituted initiation of a criminal action is a conclusion of law we review de novo.

To prove that Farm Bureau is guilty of malicious prosecution, Volpe must establish that: "(1) [Farm Bureau] initiated the earlier proceeding; (2) malice on the part of [Farm Bureau] in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; and (4) termination of the earlier proceeding in favor of [Volpe]." *Best v. Duke Univ.*, 337 N.C. 742, 749, 448 S.E.2d 506, 510 (1994) (citing *Jones v. Gwynne*, 312 N.C. 393, 397, 323 S.E.2d 9, 11 (1984)). The dispositive issue in this case is whether the trial court erred when it found as a matter of law that Farm Bureau, through its agent Investigator Loftin, initiated the prosecution of Volpe.

The Court of Appeals cited one of its own cases for the proposition that " '[e]xcept for the efforts of [Farm Bureau], it is unlikely there would have been a criminal prosecution of [Volpe].' " *Cully's Motorcross*, ___ N.C. App. at ___, 725 S.E.2d at 644 (quoting *Williams v. Kuppenheimer Mfg. Co.*, 105 N.C. App. 198, 201, 412 S.E.2d 897, 900 (1992)). The court below noted that Investigator Loftin had provided to Sergeant Lucas almost all the information Sergeant Lucas knew about the case, that Sergeant Lucas had learned about the sale

of the property at 314 Hill Street and the quitclaim deed to Mr. Giron only as a result of the information Investigator Loftin had gathered, and that Sergeant Lucas had relied almost exclusively on the information provided by Investigator Loftin when Sergeant Lucas decided to interview Mr. Giron and Volpe. *Id.* at —, 725 S.E.2d at 644. Based on this chain of events, the Court of Appeals concluded that, but for Investigator Loftin's provision of information to Sergeant Lucas, Volpe probably would not have been charged. *Id.* at —, 725 S.E.2d at 644. Accordingly, the Court of Appeals affirmed the trial court's finding that Volpe's prosecution effectively had been initiated by Farm Bureau through its agent, Investigator Loftin. *Id.* at —, 725 S.E.2d at 644.

We believe that the Court of Appeals' interpretation of the element of initiation in a malicious prosecution case does not account adequately for the roles played by police and prosecutorial discretion. Instead, a more comprehensive analysis is that advocated by Farm Bureau and found in the Restatement (Second) of Torts. Section 653 of the Restatement sets out the requirements for a cause of action for malicious prosecution, and most relevant to this case, states in Comment (g):

> *Influencing a public prosecutor.* A private person who gives to a public official information of another's supposed criminal misconduct, of which the official is ignorant, obviously causes the institution of such subsequent proceedings as the official may begin on his own initiative, but giving the information or even making an accusation of criminal misconduct does not constitute a procurement of the proceedings initiated by the officer if it is left entirely to his discretion to initiate the proceedings or not. When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rule stated in this Section even though the information proves to be false and his belief was one that a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.

Restatement (Second) of Torts § 653 (cmt. g) (1977).

This formulation balances and protects important public interests. It allows citizens to make reports in good faith to police and

prosecutors without fear of retaliation if the information proves to be incomplete or inaccurate. If the information is false, this formulation only protects a reporting party who believes it to be true, thus preserving the element of malice both to deter those who would subvert to their own ends the power held by police and prosecutors and to protect citizens from "one [who] resorts to the process of the law without probable cause, willfully and maliciously, for the purpose of injuring his neighbor." *Chatham Estates v. Am. Nat'l Bank*, 171 N.C. 648, 651, 171 N.C. 579, 582, 88 S.E. 783, 785 (1916). This sensible approach encourages independent investigation by those in law enforcement who receive the information. Unlike the "but for" test employed by the trial court and the Court of Appeals, the Restatement recognizes that police and prosecutors have discretionary authority that can insulate from liability those who provide erroneous or mistaken information. Accordingly, we recognize and apply here the principles set out in Comment (g). *See Stanback v. Stanback*, 297 N.C. 181, 204, 254 S.E.2d 611, 626 (1979) (citing the Restatement of Torts for the proposition that to establish that the former proceeding terminated favorably, a plaintiff in a malicious prosecution action need assert only that the prior case was dismissed), *disapproved of for other reasons by Dickens v. Puryear*, 302 N.C. 437, 447-48, 276 S.E.2d 325, 331-33 (1981).

[2] When this Court implements a new analysis to be used in future cases, we may remand the case to the lower courts to apply that analysis. *See, e.g.*, *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 39, 591 S.E.2d 870, 895 (2004) (noting that because "the trial court did not have the benefit of the precise formulation of the doctrine we articulate in this opinion," the case should be remanded "for further proceedings consistent with this opinion"). Remand is particularly appropriate when additional findings of fact are necessary. *Id.* (remanding the case to the trial court because the "inquiry required here is a fact-intensive one"). However, when the new analysis relies upon conclusions of law rather than findings of fact, and when the findings of fact made by the trial court are unchallenged, this Court may elect to conduct the analysis rather than to remand the case.

[3] In its judgment, the trial court's finding of fact 61 states that Investigator Loftin withheld from Sergeant Lucas information about the debt on the property until after Volpe's amended counterclaim had been filed, thereby causing the criminal action to be instituted. However, in light of our recognition of the test enunciated above, whether the recited facts constitute initiation of a criminal action is

a conclusion of law that we review de novo. In addition, the "but for" test used in finding of fact 62, which states that Sergeant Lucas would "never" have pursued a criminal prosecution if Investigator Loftin had not reported his findings, is no longer appropriate.

Accordingly, we must determine whether, once Sergeant Lucas received information from Investigator Loftin about Volpe, Sergeant Lucas exercised his own discretion in deciding to seek criminal charges against Volpe. Our review of uncontested evidence presented at trial indicates that Investigator Loftin testified that the offense he believed Volpe had committed was insurance fraud, that he never asked Sergeant Lucas to arrest Volpe or initiate a prosecution against her, and that he never made any suggestions as to what Sergeant Lucas should do with Investigator Loftin's information. Sergeant Lucas testified that the decision to pursue a charge of false pretenses was "my decision, my decision only." He also stated that, "no one tells me, even my chief on down when I should—when I should make a charge or not." In addition, Sergeant Lucas testified that he interviewed Mr. Skinner and Mr. Giron during his investigation and that he consulted with an assistant district attorney and a real estate attorney after receiving information from Investigator Loftin and before taking the matter to a magistrate in pursuit of a warrant. All this testimony leaves no doubt that while Sergeant Lucas considered and used the information provided by Investigator Loftin, he independently exercised his discretion to make the prosecution his own. Consequently, Farm Bureau did not institute a malicious prosecution and its actions did not constitute an unfair and deceptive practice.

Because the remaining issues on appeal stem from the trial court's determination that Farm Bureau initiated a malicious prosecution, those issues are now moot. Those issues are dismissed, and the Court of Appeals' decision as to those matters is vacated. This case is remanded to the Court of Appeals for further remand to the trial court with instructions to vacate the two orders entered on 7 February 2011 and amend the judgment entered the same day in a manner consistent with this opinion.

REVERSED IN PART, VACATED IN PART, AND REMANDED.

Justice BEASLEY, concurring in part and dissenting in part.

I concur with the majority that Comment (g) in the Restatement (Second) of Torts § 653 (1977) is the proper standard to define

whether a party "initiated" the earlier proceeding in a malicious prosecution claim. I would, however, remand the case to the trial court to make findings of fact and conclusions of law applying the standard announced today, as is appropriate for a trial court rather than an appellate court, and therefore I dissent in part. *See Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 38, 591 S.E.2d 870, 894 (2004) ("This disposition [of remand] reflects trial courts' 'institutional advantages' over appellate courts in the 'application of facts to fact-dependent legal standards.' " (quoting *Augur v. Augur*, 356 N.C. 582, 586, 573 S.E.2d 125, 129 (2002)).

North Carolina law requires a plaintiff to prove four elements to prevail on a malicious prosecution claim: "(1) defendant initiated the earlier proceeding; (2) malice on the part of defendant in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; and (4) termination of the earlier proceeding in favor of the plaintiff." *Best v. Duke Univ.*, 337 N.C. 742, 749, 448 S.E.2d 506, 510 (1994) (citation omitted). This case provides clarity regarding the first element. *Id.*

> A private person who gives to a public official information of another's supposed criminal misconduct, of which the official is ignorant, obviously causes the institution of such subsequent proceedings as the official may begin on his own initiative, but giving the information or even making an accusation of criminal misconduct does not constitute a procurement of the proceedings initiated by the officer if it is left entirely to his discretion to initiate the proceedings or not. When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rule stated in this Section even though the information proves to be false and his belief was one that a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.

Restatement (Second) of Torts § 653 cmt. g (1977).

Whether plaintiff initiated the earlier proceeding is a conclusion of law, but this conclusion of law, like any other conclusion of law, is dependent upon factual support. *See, e.g., Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 722, 693 S.E.2d 640, 644 (2009), *cert. denied*, —— U.S. ——, 131 S. Ct. 2456 (2011). When a party has failed to challenge the findings of fact, the findings are binding on the appellate court.

Id. (citations omitted). The trial court's conclusions of law are reviewed de novo. *Id.* (citations omitted).

Here, plaintiff did not challenge the trial court's findings of fact *as findings of fact*; rather, plaintiff challenged what the trial court labeled "findings of fact," but argued such "findings" were actually conclusions of law. In essence, plaintiff challenged the trial court's conclusions of law and allowed the court's findings of fact to go unchallenged. Thus, the trial court's correctly labeled findings of fact are binding on this Court, though conclusions of law are reviewed de novo.

The majority's opinion, written under the guise of de novo review, necessarily requires findings of fact that the trial court did not make—findings whether Sergeant Lucas exercised "uncontrolled discretion" in charging defendant Volpe with obtaining property by false pretenses. Restatement (Second) of Torts § 653 cmt. g. Sergeant Lucas's exercise of discretion is evidenced by actions that, by the majority's own definition, are appropriately considered findings of fact. I cannot fault the trial court for not making findings of fact regarding whether Sergeant Lucas exercised independent discretion because we had not yet established that Comment (g) is the appropriate standard by which to determine whether plaintiff "initiated the earlier proceeding." The need for further fact-finding distinguishes the instant case from *IMT, Inc. v. City of Lumberton*, —— N.C. ——, 738 S.E.2d 156 (2013), "in which the material facts necessary to determine the legal question [were] uncontested." *Id.* at ——, 738 S.E.2d at 160. The trial court, if provided the opportunity to make the appropriate findings of fact, might agree that there is "no doubt" that Sergeant Lucas exercised independent discretion in charging defendant Volpe based on the evidence presented, but we are not a fact-finding court. We lack material findings of fact necessary to answer the legal question in this case, and this Court should not engage in the fact-finding process. *Godfrey v. Zoning Bd. of Adjust. of Union Cnty.*, 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986) ("Fact[-]finding is not a function of our appellate courts."). Therefore, remand is the only appropriate disposition.

For the reasons stated above, I respectfully concur with the majority's recognition of the Restatement to define when a party "initiated the earlier proceeding" and dissent from the majority's mandate to reverse rather than to remand for appropriate findings of fact and conclusions of law under the standard recognized today.

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

APPLEWOOD PROPERTIES, LLC AND APPLE CREEK EXECUTIVE GOLF CLUB, LLC v. NEW SOUTH PROPERTIES, LLC; APPLE CREEK VILLAGE, LLC; HUNTER CONSTRUCTION GROUP, INC.; AND URBAN DESIGN PARTNERS

No. 161A12

(Filed 13 June 2013)

Jurisdiction—standing—civil action—Sedimentation Pollution Control Act—citation for violation required

Plaintiffs lacked standing to bring a claim against defendant Hunter under the Sedimentation Pollution Control Act of 1973 (SPCA). Before an injured person can have standing to bring a civil action pursuant to section 113A-66 of the SPCA, the defendant must have been cited for a violation of a law, rule, ordinance, order, or erosion and sedimentation control plan. Although Hunter had received notices of noncompliance with the SPCA, Hunter had not been cited for a violation.

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. ——, 725 S.E.2d 360 (2012), affirming an order granting partial summary judgment for defendants entered on 16 April 2010 by Judge Jesse B. Caldwell, III in Superior Court, Gaston County. Heard in the Supreme Court on 14 November 2012.

Womble Carlyle Sandridge & Rice, LLP, by Raboteau T. Wilder, Jr. and Amanda G. Ray, for plaintiff-appellants.

Dean & Gibson, PLLC, by Jeremy S. Foster and Michael G. Gibson, for defendant-appellee Hunter Construction Group, Inc.

Roy Cooper, Attorney General, by John F. Maddrey, Solicitor General; James C. Gulick, Senior Deputy Attorney General; Jennie Hauser, Special Deputy Attorney General; and Anita LeVeaux, Assistant Attorney General, for State of North Carolina ex rel. Dee Freeman, Secretary of North Carolina Department of Environment and Natural Resources, Division of Land Resources, amicus curiae.

JACKSON, Justice.

In this appeal we consider whether an injured person may bring a civil action against a defendant pursuant to the civil relief provision of the Sedimentation Pollution Control Act of 1973 ("SPCA") when the defendant has received notices of noncompliance, but has not been cited for a violation of a relevant law, rule, order, or erosion and sedimentation control plan. We hold that before an injured person can have standing to bring a civil action pursuant to section 113A-66 of the SPCA, the defendant must have been cited for a *violation* of a law, rule, ordinance, order, or erosion and sedimentation control plan. Accordingly, we modify and affirm the opinion of the Court of Appeals majority.

On 1 September 2005, plaintiff Applewood Properties, LLC sold a parcel of land located adjacent to the Apple Creek Executive Golf Club, LLC to defendants New South Properties, LLC and Apple Creek Village, LLC for development as a residential community. Subsequently, New South hired defendant Urban Design Partners to design erosion control measures, site plans, storm water collection and control systems, and utilities for the project. On 15 September 2005, New South obtained approval of its erosion and sedimentation control plan from the Gaston County Natural Resources Department ("GNRD"). New South then hired defendant Hunter Construction Group, Inc. to prepare the parcel for construction of new homes in accordance with the approved plan. Hunter cleared and graded the parcel and built erosion control structures and devices, including a silt collection basin.

On 28 March 2006, the GNRD inspected the parcel and found that New South had "[f]ail[ed] to [t]ake [a]ll [r]easonable [m]easures" to control erosion and sedimentation as required by Title 15A, Chapter 04B, Section .0105 of the North Carolina Administrative Code. The GNRD indicated in its report that corrective actions were necessary, including "a revision with an added berm with stone wier to the draw in the center of the property to reduce the concentrated flow to the basin that is it's [sic] outlet." The GNRD sent New South a "Notice of Non-Compliance," which informed New South of its "[f]ailure to take all reasonable measures" and mandated that it take the aforementioned corrective actions by 11 April 2006. New South forwarded the notice to Hunter and instructed the contractor to correct the problems. After inspecting the parcel again on 5 May 2006, the GNRD found that the site was in compliance with the SPCA, but indicated

that additional corrective actions were needed, including "[m]ak[ing] sure all basins are cleaned and maintained, per our conversation."

On 27 June 2006, a dam that Hunter had constructed to form the silt collection basin ruptured, causing mud, water, and other debris to flood the golf course. The GNRD inspected the parcel and found that New South had taken "Insufficient Measures to Retain Sediment on Site" in violation of section 113A-57(3) of the North Carolina General Statutes and had "Fail[ed] to Take All Reasonable Measures" to control erosion and sedimentation. The GNRD noted in its report that sediment damage had occurred as a result of "Offsite sediment [being deposited] onto [the] neighboring golf course." The GNRD issued a "Notice of Non-Compliance" to New South, which informed New South of these findings and mandated that the company take corrective action, including "Restor[ing] adaquate [sic] sediment control measures, to retain sediment on site" by 6 July 2006. New South continued to forward these notices to Hunter.

Representatives from Hunter visited the site to assess the damage, and they told New South's project manager that "they were going to take care of it." Although Hunter initially undertook some cleanup and repair work following the rupture, it ultimately suspended its efforts several weeks later before completing the work. As a result, the silt collection basin repeatedly overflowed in the ensuing months, depositing more mud and silt onto the golf course. The GNRD issued New South another "Notice of Non-Compliance" on 13 July 2006, indicating that the company had "Fail[ed] to submit [a] revised Plan" that showed the "changes to topography and drainage area" that had occurred on the parcel. On 23 August 2006, the GNRD again issued New South a "Notice of Non-Compliance," indicating that the company had failed to: (1) "submit [a] revised Plan"; (2) "provide adequate ground cover"; (3) "take all reasonable measures"; and (4) "maintain erosion control measures." The GNRD also mandated corrective actions, including submission of a revised plan.

New South submitted a revised plan to the GNRD, but on 8 September 2006, the GNRD "disapproved" the plan. Nonetheless, on 25 October 2006, the Gaston County Environmental Review Board "resolved that no further action [wa]s required on [the] site, provided that vegetation [wa]s established and [the] site [wa]s adequate to retain sediment on site for the purpose of water quality." Meanwhile, the GNRD continued to issue "Notice[s] of Non-Compliance" to New South through March 2009. In addition, on 8 January 2007, the North Carolina Division of Water Quality issued New South a "Notice of Violation" for

failing to comply with the "State General Stormwater Permit" that was issued along with its approved erosion and sediment control plan.

As a result of the damage to the golf course, on 4 December 2006, plaintiffs filed an action against New South, Apple Creek Village, and Hunter, asserting claims of negligence, nuisance, trespass, violations of the SPCA, negligence per se, and intentional misconduct and gross negligence. Plaintiffs added Urban Design as a defendant on 17 April 2009. On 3 August 2009, Hunter moved for partial summary judgment on the SPCA claim. Apple Creek Village also moved for partial summary judgment, and New South moved for summary judgment on all claims against it. On 16 April 2010, the trial court granted these defendants' motions for summary judgment on the SPCA claim, but denied the motions as to all other claims.

The remaining claims were heard in the Superior Court, Gaston County beginning on 19 April 2010. At the conclusion of the evidence, the jury found that plaintiffs were damaged by defendants' negligence and concluded that plaintiffs were entitled to $675,000.00 in damages. On 10 June 2010, the trial court entered its judgment, awarding plaintiffs $675,000.00 in damages.

On 23 September 2010, plaintiffs appealed the trial court's order granting defendants' motions for summary judgment on the SPCA claim. Subsequently, plaintiffs filed a motion to withdraw their appeal against all defendants except Hunter. The Court of Appeals allowed plaintiffs' motion on 1 July 2011. The Court of Appeals later affirmed the trial court's order in a divided opinion. *Applewood Props., LLC v. New S. Props., LLC*, —— N.C. App. ——, 725 S.E.2d 360 (2012). The majority concluded that the SPCA did not apply because "a 'land-disturbing activity' requires an element of deposition into a body of water" and there was no evidence in this case that sediment had been deposited into a body of water. *Id.* at ——, 725 S.E.2d at 362. The dissent disagreed and argued that the relevant statutory provisions indicate that "a 'land-disturbing activity' subject to the provisions of the SPCA is one which '*may* cause or contribute to sedimentation,' rather than one which actually does result in sedimentation." *Id.* at ——, 725 S.E.2d at 366 (Ervin, J., dissenting) (citation omitted). Therefore, the dissent concluded that sedimentation "cannot be understood to incorporate a deposition into a body of water requirement." *Id.* at ——, 725 S.E.2d at 366 (quotation marks omitted).

Plaintiffs appealed to this Court as of right pursuant to section 7A-30(2) of the North Carolina General Statutes. Without considering

the merits of plaintiffs' appeal, we conclude that plaintiffs lacked standing to bring an SPCA claim against Hunter.

Whether plaintiffs had standing to bring an SPCA claim against Hunter hinges on the proper interpretation of section 113A-66 of the North Carolina General Statutes, which provides injured persons a private cause of action pursuant to the SPCA. As a result, "[t]his matter presents a question of statutory interpretation, which we review de novo. The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Dickson v. Rucho*, 366 N.C. 332, 339, 737 S.E.2d 362, 368 (2013) (citations and internal quotation marks omitted). It is well settled that:

> [W]hen 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. In these situations, the history of the legislation may be considered in connection with the object, purpose and language of the statute in order to arrive at its true meaning. However, [w]hen the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required.

In re Foreclosure of Vogler Realty, Inc., 365 N.C. 389, 392, 722 S.E.2d 459, 462 (2012) (alterations in original) (citations and internal quotation marks omitted).

Subsection 113A-66(a) states in pertinent part:

> (a) Any person injured by a *violation* of this Article or any ordinance, rule, or order duly adopted by the Secretary or a local government, or by the initiation or continuation of a land-disturbing activity for which an erosion and sedimentation control plan is required other than in accordance with the terms, conditions, and provisions of an approved plan, may bring a civil action against the person alleged to be in *violation* (including the State and any local government). The action may seek any of the following:
>
> (1) Injunctive relief.
>
> (2) An order enforcing the law, rule, ordinance, order, or erosion and sedimentation control plan *violated*.
>
> (3) Damages caused by the *violation*.

N.C.G.S. § 113A-66(a) (2011) (emphases added). The plain language of subsection 113A-66(a) indicates that the legislature intended to provide injured persons a private cause of action when there has been a *violation* of: (1) the SPCA; (2) a relevant ordinance, rule, or order; or (3) an erosion and sedimentation control plan. The first clause of subsection 113A-66(a) unambiguously states that a private cause of action will lie when there has been a violation of the SPCA or a relevant ordinance, rule, or order. Although the term "violation" does not appear in the second clause of subsection 113A-66(a), the legislature's use of the term "violated" in subdivision 113A-66(a)(2), which also refers to "law, rule, ordinance, [and] order," demonstrates the General Assembly's intent that a *violation* of, rather than mere noncompliance with, an erosion and sedimentation control plan must have occurred to give rise to a private cause of action pursuant to this clause. *See id.* § 113A-66(a)(2). Furthermore, the directive in subsection 113A-66(a) that injured persons "may bring a civil action against the person *alleged to be in violation*" evidences the legislature's intent that a defendant actually have been cited for a violation before a private cause of action can arise. *See id.* § 113A-66(a) (emphasis added). "We presume that the General Assembly carefully chose each word used in drafting the legislation." *Dickson*, 366 N.C. at 344, 737 S.E.2d at 371 (internal quotation marks omitted). The legislature could have used the word "noncompliance," or another broader term to describe the conduct necessary to trigger a private cause of action, but chose not to do so. Instead, it opted to use the narrow term "violation." As such, we conclude that the legislature intended to create a private cause of action only when the defendant has been cited for a violation pursuant to the SPCA.

This interpretation is consistent with our decision in *Holly Ridge Associates, LLC v. North Carolina Department of Environment & Natural Resources*, in which we recognized that an aggrieved party might be entitled to bring a civil action pursuant to section 113A-66 in a case in which the defendant had been cited for a violation of the SPCA. *See* 361 N.C. 531, 533, 538, 648 S.E.2d 830, 833, 836 (2007) (stating that the defendant previously had received "a Notice of Violations of" the SPCA and had been assessed a civil penalty by the Department of Environment and Natural Resources and observing that the intervening parties' "allegations of injury could be an appropriate basis . . . to file a private claim under the SPCA"). Moreover, this interpretation does not leave an injured person without recourse when the offending party has not been cited for a violation because the injured person alternatively may bring a traditional tort action in

nuisance for any damages caused by the offending party's actions. In fact, in the case *sub judice* plaintiffs did pursue such a successful claim. Therefore, we hold that for an injured person to have standing to bring a civil action against a defendant pursuant to section 113A-66, the defendant previously must have been cited for a *violation* of a law, rule, ordinance, order, or erosion and sedimentation control plan as described by this section. Were we to hold otherwise, a defendant could be subject to civil liability pursuant to the SPCA even if its actions had not risen to the level of a violation.[1] The legislature certainly did not intend such an absurd result, especially in cases such as this in which the enforcing agency has given the offending party an allotted time period in which to take corrective actions before being subjected to any penalties pursuant to the SPCA. *See Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 494, 467 S.E.2d 34, 41 (1996) ("[T]h[is] Court will, whenever possible, interpret a statute so as to avoid absurd consequences." (quotation marks omitted)).

In the case *sub judice* it is apparent that the GNRD issued New South numerous "Notice[s] of Non-Compliance" during the eight months leading up to the filing of plaintiffs' SPCA claim. These notices were sent to New South, but not Hunter, and informed the recipient of numerous violations of relevant ordinances, statutes, and administrative code provisions and recommended appropriate corrective actions. Although the GNRD repeatedly warned New South about these violations, neither New South nor Hunter ever was issued a "Notice of Violation" before plaintiffs initially brought their SPCA claim.[2] Instead, the GNRD repeatedly informed New South that it would have the opportunity to take corrective actions within a specified time period before being subject to any penalties pursuant to the SPCA. Although it is notable that none of these "Notice[s] of Non-

1. In the instant case, this holding is even more compelling because the notices of noncompliance were issued to New South, rather than Hunter. As such, Hunter never was directly put on notice that it potentially could be held responsible for any of the violations.

2. As we have noted, the record indicates that the Division of Water Quality issued New South a "Notice of Violation" for failing to comply with the "State General Stormwater Permit" on 8 January 2007, nearly one month after plaintiffs brought their SPCA claim on 4 December 2006. Since this notice was issued after plaintiffs filed their original complaint, it could not have conferred standing on plaintiffs to bring their SPCA claim on 4 December 2006. However, we also note that the record indicates that plaintiffs filed an amended complaint on 17 April 2009, well after New South was issued the "Notice of Violation." Nevertheless, we need not decide the effect of plaintiffs' amended complaint because the "Notice of Violation" was issued to New South, and we are concerned only with plaintiffs' standing to sue Hunter in the case *sub judice*.

Compliance" were directed at Hunter, that fact is immaterial in the case before us. Because Hunter never was cited for a violation, we must conclude that plaintiffs lacked standing to bring a civil action against Hunter pursuant to section 113A-66. Therefore, the trial court properly granted defendants' motions for summary judgment on plaintiffs' SPCA claim against Hunter. Accordingly, we modify and affirm the opinion of the Court of Appeals majority.

MODIFIED AND AFFIRMED

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

Justice EDMUNDS dissenting.

I believe the majority opinion incorrectly restricts the reach of N.C.G.S. § 113A-66(a) by giving State and local agencies gatekeeping powers nowhere found or implied in Chapter 113A. Under the majority's interpretation, a plaintiff may not seek redress against a party under this statute unless a violation notice has been issued to that party. In other words, a plaintiff must wait and see whether a governmental body such as the GNRD or the North Carolina Division of Water Quality will exercise its unbridled discretion to issue a violation notice before that plaintiff can bring a civil action under section 113A-66. Applying that reasoning here, the majority concludes that, because the GNRD chose for whatever reason not to issue a notice of violation to defendant Hunter, plaintiff has no recourse and simply has to write off section 113A-66 as a source of relief. I find problematic the majority's holding that the statute is triggered not by a plaintiff's injury but by an administrative decision whether to issue a violation notice. Allowing an injured plaintiff to seek redress is not an "absurd result" as the majority states; rather, it is precisely what the statute allows.

In its analysis, the majority misreads subsection 113A-66(a). That statute creates two bases for a claim. The first applies when a plaintiff is "injured by a violation of this Article or any ordinance, rule, or order duly adopted by the Secretary or a local government." N.C.G.S. § 113A-66(a) (2011). The second applies when a plaintiff is injured "by the initiation or continuation of a land-disturbing activity for which an erosion and sedimentation control plan is required other than in accordance with the terms, conditions, and provisions of an approved plan." *Id.* Under either circumstance, an injured plaintiff may bring suit using subsection 113A-66(a) "against the person

alleged to be in violation." *Id.* The statute as written does not require plaintiff to await action by the GNRD or by anyone else. Here, relying on the second basis, the injured plaintiff brought suit against a defendant alleged to be "engaged in land-disturbing activity . . . without installing erosion and sedimentation control devices" and "without filing or complying with erosion and sedimentation control plans with the governing agency." This allegation is sufficient to confer standing.

The gatekeeping function created today serves to limit the remedies available to an injured plaintiff. *Holly Ridge Associates, LLC v. North Carolina Department of Environment & Natural Resources*, 361 N.C. 531, 648 S.E.2d 830 (2007), cited by the majority, is not to the contrary. In *Holly Ridge*, the defendant had already been issued Notices of Violations and assessed several civil penalties by the time suit was brought under the Sedimentation Pollution Control Act. *Id.* at 533-34, 648 S.E.2d at 833. Consequently, *Holly Ridge* gives little guidance in the case at bar.

Because I believe that subsection 113A-66(a) gives plaintiff standing, I respectfully dissent from the majority holding.

Justice HUDSON joins in this dissenting opinion.

GROVER FRANKLIN MINOR AND CAROLEEN W. MINOR v. SANDRA ANN MINOR

No. 25A13

(Filed 13 June 2013)

Adverse Possession— jury instruction—portion of parcel—evidence of entire tract

The trial court did not err in an adverse possession case by failing to instruct the jury that it could find that defendant adversely possessed some portion of the pertinent parcel. The trial court's instructions were consistent both with defendant's pleading and with her evidence that she adversely possessed the entire tract.

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

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 737 S.E.2d 116 (2012), affirming a judgment entered on 30 August 2011 and an order denying post-trial motions entered on 23 September 2011, all by Judge Jan H. Samet in District Court, Guilford County. Heard in the Supreme Court on 6 May 2013.

Rossabi Black Slaughter, P.A., by Gavin J. Reardon and T. Keith Black, for plaintiff-appellees.

Tuggle Duggins P.A., by Jeffrey S. Southerland, Denis E. Jacobson, and Brandy L. Mills, for defendant-appellant.

EDMUNDS, Justice.

Although defendant-appellant Sandra Minor (defendant) alleged in her counterclaim and at trial that she became the owner of an entire parcel of land through adverse possession, she argued on appeal that the trial court erred in failing to instruct the jury that it could find she adversely possessed some portion of the parcel. We conclude that the trial court's instructions were consistent both with defendant's pleading and with her evidence that she adversely possessed the entire tract. Accordingly, we affirm the opinion of the Court of Appeals.

Plaintiff-appellees Grover and Caroleen Minor (plaintiffs) are the parents of defendant's former husband, Tyson Minor (Tyson). Plaintiffs have held title to the disputed property, 23.72 acres located at 7949 Valley Falls Road, Greensboro, North Carolina, since 19 April 1972. Approximately eight acres of the property are improved land surrounding and including a small cabin or house. The rest of the parcel is steep and heavily wooded in some parts and swampy in others.

Defendant married Tyson in 1980 and they began living on the property around 1984. They made several improvements to the site, including building a bridge over a ravine, adding heat, power, and running water to the house, and erecting an arbor. Defendant testified that plaintiffs neither gave permission for these improvements nor made any monetary contribution toward the work.

Defendant and Tyson separated in 2001. Tyson moved away from the property, while defendant continued living there alone. Plaintiffs did not question defendant's presence on and use of the property while she and Tyson were separated, but when Tyson began divorce proceedings in 2008, plaintiffs demanded defendant vacate the prop-

erty. She refused. In 2010, plaintiffs filed a complaint for summary ejectment against defendant and on 16 March 2010, obtained a judgment in their favor. On 25 March 2010, defendant appealed the summary ejectment judgment, then on 23 April 2010, filed an answer and counterclaim to, *inter alia*, quiet title by way of adverse possession.

Plaintiffs' complaint referred to the property at issue as 7949 Valley Falls Road in Greensboro. In her answer and counterclaim, defendant also described the contested area as the "7949 Valley Falls Road property" and averred that she has lived continuously on "the Property" "since on or before the mid-1980s." A pretrial order was filed on 20 July 2011, noting that the parties might include in their exhibits a survey of the property and a "Guilford County Tax Map reflecting location and boundaries of the Property." This order also contained a stipulation signed by counsel for both sides that the sole issue for the jury would be "[w]hether [defendant] Sandy Minor is entitled to the Property by adverse possession[.]"

Although defendant testified at trial that only approximately eight acres of the tract were developed and that the improvements she described had been limited to those eight acres, her testimony and supporting evidence consistently indicated that she contended she owned the entire parcel and that her adverse possession claim encompassed all the subject property. Defendant's tenth exhibit was a survey of the property. This survey is included in the appendix to defendant's new brief and is labeled "Preliminary." In her testimony identifying the survey prior to its introduction into evidence, defendant was asked about the extent of the property:

Q. How many acres is the 7949 Valley Falls Road property total?

A. 23.72.

Q. 23.72 acres[?]

A. Yes.

Q. That's the whole piece[?]

A. That's the whole piece.

Defendant added that the survey illustrated various zones and boundaries on the property and that a line drawn across the property in the survey separated the portion of the lot where the house and other improvements were situated from the swampy and hilly portions. When defendant was asked if she claimed all the land depicted in the

survey or just the portion on the side of the line that contained the house, she responded that she adversely possessed the entire tract. When asked if she made "any efforts to conceal the fact that you were living on this—the entire 23 acres," defendant responded, "No, I did not." Later, when defendant again was asked, "[Y]ou're not here saying you just own the house. You're saying you own that whole land," her response was unequivocal: "Right." The record is devoid of evidence even implying that defendant sought adverse possession of anything less than the 23.72 acres.

At the close of all the evidence, defendant submitted a proposed instruction that would have permitted the jury to find in the alternative that she adversely possessed only a portion of the property. Specifically, defendant's proposed instruction relating to the element of actual possession included the following: "If the other elements of adverse possession are met, [defendant] is entitled to adversely possess all property actually possessed by her." The other pertinent portion of defendant's proposed instruction reads:

> If on the first issue as to whether [defendant] is entitled to any of the real estate located at 7949 Valley Falls Road by way of adverse possession your answer is yes, it shall be your duty to determine what portion of the property [defendant] has adversely possessed and whether that portion is all or some lesser portion of the 23.72 acres comprised by the piece of property.

Plaintiffs' attorneys opposed defendant's requested instruction and drew the trial court's attention to the pattern jury instruction on adverse possession, which the trial court said it already had reviewed several times. The trial court declined to include defendant's proposed language in its instructions relating to adverse possession and generally followed the pattern instruction as to the elements of the claim.

At the conclusion of the instructions but before the jury began deliberating, defendant again objected to the omission of the proposed language that would "allow[ ] the jury to determine if she possessed something less than the entire 23-acre parcel in the event that that portion of the property was actually possessed." Plaintiffs' counsel responded that the request did not conform to defendant's evidence that she was seeking possession of the entire tract. The trial court again denied defendant's request.

During deliberations, the jury sent out several questions, one of which was: "Is it within our power to divide the property?" After con-

sulting with counsel, the trial court responded to the question by instructing the jury that:

> Now, you've asked about the—was it—was it in your power to divide the property. And my answer to that question is my instruction said to you initially that you were to decide the question of whether or not the property located at 7949 Valley Falls Road was actually possessed by—by [defendant]. And that is as far as I am able to go today.

The jury thereafter returned a verdict finding that defendant did not meet all requirements to own the property by adverse possession.

Defendant appealed, arguing that the trial court's refusal to give the requested instruction regarding adverse possession of some of the property was prejudicial error. In a divided decision, the Court of Appeals majority affirmed "the trial court's decisions and the jury's verdict." *Minor v. Minor*, —— N.C. App. ——, ——, 737 S.E.2d 116, 120 (2012). In response to defendant's argument that "the trial court erred in denying her request for an instruction on acquiring title to less than the entire tract," the majority opinion concluded that she "failed to show that the jury was misled or that the verdict was affected by the trial court's failure to give the instruction." *Id.* at ——, 737 S.E.2d at 118. In addition, the majority opinion stated that "[a]ny error in failing to so instruct the jury is harmless in light of the insufficiency of the evidence" as to the elements of "hostility and duration of" defendant's possession. *Id.* at ——, 737 S.E.2d at 118.

The dissenting judge argued that adverse possession may arise from a " 'claim [that] is limited to ***the area actually possessed*** ' " by the claimant. *Id.* at ——, 737 S.E.2d at 120 (Elmore, J., dissenting) (quoting *Wallin v. Rice*, 232 N.C. 371, 373, 61 S.E.2d 82, 83 (1950) (emphasis added)). Thus, according to the dissent, the area actually possessed may represent only a portion of the " 'land embraced within the bounds of another's deed.' " *Id.* at ——, 737 S.E.2d at 120 (quoting *Wallin*, 232 N.C. at 373, 61 S.E.2d at 83). After summarizing defendant's evidence suggesting that she possessed the developed part of the property, the dissent concluded, *inter alia*, that this evidence was "sufficient to allow a reasonable inference by the jury that [defendant] actually possessed at least some portion of the property." *Id.* at ——, 737 S.E.2d at 121. In addition, the dissenting judge argued that the error was prejudicial in light of the jury's finding that defendant's possession was hostile. *Id.* at ——, 737 S.E.2d at 120-21. Defendant appeals as of right on the basis of the dissent.

We have stated that:

> [W]hen a request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in substance at least, and unless this is done . . . the failure will constitute reversible error.

Calhoun v. State Highway & Pub. Works Comm'n, 208 N.C. 424, 426, 181 S.E. 271, 272 (1935) (citations omitted); *see also State v. Davis*, 291 N.C. 1, 13-14, 229 S.E.2d 285, 293-94 (1976); *Bass v. Hocutt*, 221 N.C. 218, 219-20, 19 S.E.2d 871, 872 (1942). Accordingly, we consider whether the instruction requested is correct as a statement of law and, if so, whether the requested instruction is supported by the evidence. *Calhoun*, 208 N.C. at 426, 181 S.E. at 272.

North Carolina recognizes claims for adverse possession of an identified portion of property owned by another. *Wallin*, 232 N.C. at 373, 61 S.E.2d at 83 ("One may assert title to land embraced within the bounds of another's deed . . . ."). A party seeking to prove adverse possession of a portion of a parcel has the burden of pleading and proving all elements of the claim, including that the possession was under "known and visible lines and boundaries" and that "[the] claim is limited to the area actually possessed." *Id.* Accordingly, if defendant's counterclaim had specifically identified the portion of the 23.72 acre tract that she was claiming, and if she had presented evidence at trial to support all the elements of the claim, the trial court would have been obligated to give a jury instruction permitting the jury to find defendant adversely possessed that portion.

Turning to the question whether the evidence supported the proposed instruction, we find that defendant did not plead adverse possession of a specified portion of the tract in her counterclaim and did not present evidence at trial that she adversely possessed only an identified portion of the property. Defendant testified that the house and other buildings were on a part of the lot that she described as generally corresponding to a buried electronic dog fence marked with some flags apparently protruding from the ground for the edification of the dog. However, even if we were to assume that this testimony describes a known and visible line or boundary, *see* N.C.G.S. § 1-40 (2011); *Dockery v. Hocutt*, 357 N.C. 210, 217-19, 581 S.E.2d 431, 436-37 (2003), this line does not correspond to defendant's claim. When specifically asked, defendant instead testified that she claimed property extending beyond the buried fence, but gave the jury no

additional guidance as to where the property should be divided. As a result, even if the jury had been sympathetic to the notion that defendant adversely possessed a part of the parcel, she failed to meet her burden of establishing a claim under "known and visible lines and boundaries" and "limited to the area actually possessed." *Wallin*, 232 N.C. at 373, 61 S.E.2d at 83.

To the contrary, at each opportunity defendant claimed every bit of the 23.72 acres, and all her evidence supported this claim. Her initial counterclaim for adverse possession defined the property in dispute as "7949 Valley Falls Road" and set out the elements for adverse possession without identifying then or later any subpart to which she limited her claim. The parties agreed in the pretrial order that the only disputed issue was whether defendant was entitled to "the Property" by adverse possession. Although defendant had numerous opportunities during the trial to present evidence that she sought adverse possession of a part of the property, she rebuffed every such invitation and left no doubt that she was seeking possession of the entire parcel.

Accordingly, defendant was not entitled to an instruction on adverse possession of a portion of the property, and the trial court did not err when it declined to give her proposed instruction. The holding of the Court of Appeals is affirmed.

AFFIRMED.

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

STATE OF NORTH CAROLINA v. BRIAN W. RHODES, JR.

No. 48PA11-2

(Filed 13 June 2013)

Evidence— not newly discovered—available to defendant before trial—new trial improperly granted

The trial court erred in a drug possession case by granting defendant a new trial after his conviction. Defendant's father's statement after the trial that the contraband belonged to him was not

newly discovered evidence under N.C.G.S. § 15A-1415(c) because the statement was available to defendant before his conviction.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 724 S.E.2d 148 (2012), affirming an order entered on 29 July 2011 by Judge Richard W. Stone in Superior Court, Rockingham County. Heard in the Supreme Court on 7 January 2013.

Roy Cooper, *Attorney General*, *by Kimberly N. Callahan*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Daniel R. Pollitt*, *Assistant Appellate Defender*, *for defendant-appellee.*

MARTIN, Justice.

After defendant was convicted of drug possession offenses, his father stated outside of court that the contraband belonged to him. The trial court concluded this statement was newly discovered evidence under N.C.G.S. § 15A-1415(c) and granted defendant a new trial. Because the information implicating the father was available to defendant before his conviction, the statement was not newly discovered evidence under N.C.G.S. § 15A-1415(c). Accordingly, we reverse the opinion of the Court of Appeals affirming the trial court's decision to award defendant a new trial.

On 6 February 2008, officers of the Reidsville Police Department executed a search warrant at 1001 Fawn Circle. Brian Rhodes, Jr. (defendant) and his father, Brian Rhodes, Sr., were the subjects of the warrant. When the officers forced entry into the locked house, they found defendant and his mother, Angela Rhodes, downstairs. The officers detained them while they checked the house for other occupants. During this time defendant asked officers to retrieve his medication from his bedroom, which he stated was to the left at the top of the stairs. An officer checked the bedroom and found a bottle of medication on the dresser. On that same dresser were defendant's driver's license and a box that contained a bag of crack cocaine. The address on the driver's license was 1001 Fawn Circle, the address of the residence being searched. In the closet of the bedroom, officers also found a shoebox containing a large bag of a white powdery substance, a small bag of a green vegetable substance, scales, a strainer, and money.

Defendant was charged with possession with intent to manufacture, sell, or deliver cocaine and possession of drug paraphernalia. At trial several officers testified about the events that occurred during execution of the search warrant. A drug chemist with the State Bureau of Investigation testified that the substances seized from the bedroom were 9.9 grams of cocaine base and 12.9 grams of cocaine hydrochloride. The defense presented testimony by defendant, Angela Rhodes, and Rhodes, Sr. Defense counsel asked Angela Rhodes whether the contraband belonged to "Mr. Rhodes," and she responded, "I'm not going to answer that. That's my husband." When defense counsel clarified that he was referring to defendant, not Rhodes, Sr., she stated that the contraband did not belong to defendant. Defense counsel did not pursue a line of questioning about whether the drugs belonged to Rhodes, Sr. Defense counsel then called Rhodes, Sr. He testified the drugs did not belong to defendant. When Rhodes, Sr. was asked whether the drugs belonged to him, he pleaded his Fifth Amendment privilege against self-incrimination. Last, defense counsel called defendant, Rhodes, Jr. Defense counsel questioned defendant about the execution of the search warrant but did not ask him about the ownership of the contraband.

On 5 March 2010 the jury found defendant guilty of possession with intent to manufacture, sell, or deliver cocaine and possession of drug paraphernalia. The court sentenced him to a term of six to eight months of imprisonment, suspended subject to thirty months of supervised probation. Defendant appealed, and the Court of Appeals found no error in his trial. *State v. Rhodes*, 209 N.C. App. 207, 707 S.E.2d 264, 2011 WL 39053 (2011) (unpublished).

On 28 May 2010 defendant filed a motion for appropriate relief based upon newly discovered evidence. *See* N.C.G.S. § 15A-1415(c) (2011). In the motion defendant alleged that, after the trial, Rhodes, Sr. told a probation officer that the contraband belonged to him. The motion came before the trial court for a hearing on 25 July 2011. Defendant and the probation officer testified, but Rhodes, Sr. did not. The trial court made the following conclusions of law:

1. The witness-probation officer will give newly discovered evidence.

2. The newly discovered evidence is probably true.

3. The newly discovered evidence is competent, material, and relevant.

4. Due diligence was used and proper means were employed to procure the testimony at trial.

5. The newly discovered evidence is not merely cumulative.

6. The newly discovered evidence does not tend only to contradict a former witness or impeach such witness.

7. The newly discovered evidence is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail.

The trial court set aside defendant's conviction and awarded a new trial.

The State appealed from the trial court's order. *See* N.C.G.S. § 15A-1445(a)(2) (2011). The Court of Appeals held that the trial court did not abuse its discretion in awarding defendant a new trial. *State v. Rhodes*, —— N.C. App. ——, ——, 724 S.E.2d 148, 154 (2012). We allowed the State's petition for discretionary review.

Before this Court, the State challenges the trial court's conclusion of law that "[d]ue diligence was used and proper means were employed to procure the testimony at the trial." Because defense counsel failed to exercise due diligence, the State argues, the trial court erred in concluding that Rhodes, Sr.'s post-trial statement constituted newly discovered evidence as defined by N.C.G.S. § 15A-1415(c). Defendant argues that the trial court did not abuse its discretion in concluding that defense counsel employed due diligence to procure the testimony at trial. We agree with the State that the trial court's conclusion of law was erroneous.

"The decision of whether to grant a new trial in a criminal case on the ground of newly discovered evidence is within the trial court's discretion and is not subject to review absent a showing of an abuse of discretion." *State v. Wiggins*, 334 N.C. 18, 38, 431 S.E.2d 755, 767 (1993) (citation omitted). "[W]e review the trial court's order to determine whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (citation and internal quotation marks omitted). "While this Court is bound by the findings of fact made by the [trial court] if supported by evidence, it is not bound by that court's conclusions of law based on the facts found." *State v. Wheeler*, 249 N.C. 187, 192, 105 S.E.2d 615, 620 (1958) (citation omitted), *superseded by statute*, Act

of June 23, 1977, ch. 711, sec. 1, 1977 N.C. Sess. Laws 853, 880-84; *see also Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047 (1996) ("[A]n abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction. A [trial] court by definition abuses its discretion when it makes an error of law." (citations omitted)), *superseded in part on other grounds by statute*, PROTECT Act of 2003, Pub. L. No. 108-21, § 401, 117 Stat. 650, 670 (2003). Accordingly, we review the trial court's conclusions of law de novo.

Our Criminal Procedure Act provides that

> a defendant at any time after verdict may by a motion for appropriate relief, raise the ground that evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, including recanted testimony, and which has a direct and material bearing upon . . . the defendant's guilt or innocence.

N.C.G.S. § 15A-1415(c). "This section of the statute codifies substantially the rule previously developed by case law for the granting of a new trial for newly discovered evidence." *State v. Powell*, 321 N.C. 364, 371, 364 S.E.2d 332, 336 (citing *State v. Beaver*, 291 N.C. 137, 229 S.E.2d 179 (1976)), *cert. denied*, 488 U.S. 830, 109 S. Ct. 83 (1988). Our case law stated:

> In order for a new trial to be granted on the ground of newly discovered evidence, it must appear by affidavit that (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial.

Beaver, 291 N.C. at 143, 229 S.E.2d at 183 (citing *State v. Casey*, 201 N.C. 620, 161 S.E. 81 (1931)).

"[A] new trial for newly discovered evidence should be granted with the utmost caution and only in a clear case, lest the courts should thereby encourage negligence or minister to the litigious passions of men." *State v. Davis*, 203 N.C. 316, 323, 166 S.E. 292, 296

(internal quotation marks omitted), *cert. denied*, 287 U.S. 668, 53 S. Ct. 291 (1932). The defendant "has the laboring oar to rebut the presumption that the verdict is correct and that he has not exercised due diligence in preparing for trial." *Casey*, 201 N.C. at 624, 161 S.E. at 83. Under the rule as codified, the defendant has the burden of proving that the new evidence "could not with due diligence have been discovered or made available at [the time of trial]." N.C.G.S. §§ 15A-1415(c), -1420(c)(5) (2011); *State v. Eason*, 328 N.C. 409, 434, 402 S.E.2d 809, 823 (1991).

When the information presented by the purported newly discovered evidence was known or available to the defendant at the time of trial, the evidence does not meet the requirements of N.C.G.S. § 15A-1415(c). *Wiggins*, 334 N.C. at 38, 431 S.E.2d at 767. In *State v. Powell* we found no error in a trial court's conclusion that a defendant failed to exercise due diligence when "the defendant knew of the statement of [the witness] during the trial" but failed to procure her testimony. 321 N.C. at 371, 364 S.E.2d at 336. We also agreed there was no newly discovered evidence when a defendant learned after trial that his blood sample had been destroyed before trial, yet he made no inquiry about the blood sample before or during trial. *State v. Dixon*, 259 N.C. 249, 250-51, 130 S.E.2d 333, 334 (1963) (per curiam). In another case we agreed there was no newly discovered evidence when the defendant learned during his trial that two detectives had located his former roommate before the trial began. *Beaver*, 291 N.C. at 144, 229 S.E.2d at 183. We wrote: "Defendant had ample opportunity to examine [the detectives] as to their knowledge of the whereabouts of [his former roommate]. This he failed to do." *Id.* We further wrote: "[I]f [the] defendant considered [the former roommate] an important and material witness, he should have filed an affidavit before trial so stating and moved for a continuance to enable him to locate this witness. This he did not do." *Id.*

Like these previous cases, the case before us does not present newly discovered evidence. The facts are not disputed.[1] Rhodes, Sr. invoked the Fifth Amendment at defendant's trial when asked whether the contraband belonged to him. After defendant was convicted, Rhodes, Sr. made an out-of-court statement that the drugs

1. The Court of Appeals noted that the trial court made both a finding of fact and a conclusion of law that the testimony by the probation officer presented "newly discovered evidence." *Rhodes*, —— N.C. App. at ——, 724 S.E.2d at 152. The court determined the finding of fact was mislabeled and reclassified it as a conclusion of law. *Id.* at ——, 724 S.E.2d at 152. We agree with this determination.

belonged to him. He did not testify at defendant's hearing on the motion for appropriate relief. The warrant executed by the officers named both defendant and Rhodes, Sr. The house searched was owned by Rhodes, Sr. and Angela Rhodes. Rhodes, Sr. had a history of violating drug laws. Even though Rhodes, Sr. invoked the Fifth Amendment at trial, the information implicating him as the sole possessor of the drugs could have been made available by other means. *See Wiggins*, 334 N.C. at 38, 431 S.E.2d at 767. On the direct examination of Angela Rhodes, defendant did not pursue a line of questioning about whether the drugs belonged to Rhodes, Sr. In addition, though defendant testified at trial, he gave no testimony regarding the ownership of the drugs. Under the facts before us, the trial court erred in concluding as a matter of law that "[d]ue diligence was used and proper means were employed to procure the testimony at the trial." The purported newly discovered evidence was not evidence "which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time." N.C.G.S. § 15A-1415(c).

Our Criminal Procedure Act requires a showing of due diligence so that the adversarial process functions properly. Because information implicating Rhodes, Sr. was available to defendant before his conviction, the trial court erred in concluding that defendant had newly discovered evidence under N.C.G.S. § 15A-1415(c). Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

Justices JACKSON and BEASLEY took no part in the consideration or decision of this case.

CATRYN DENISE BRIDGES v. HARVEY S. PARRISH AND BARBARA B. PARRISH

No. 409A12

(Filed 13 June 2013)

Firearms and Other Weapons— negligence—duty to secure firearms—mere possession does not create automatic liability

The trial court did not err by granting defendants' motion to dismiss a negligence claim alleging defendants breached a common law duty to secure their firearms from their fifty-two-year-old son. The mere possession of a legal yet dangerous instrumentality does not create automatic liability when a third party takes that instrumentality and uses it in an illegal act as long as the dangerous instrumentalities are kept in accordance with statutory regulations.

Justice BEASLEY took no part in the consideration or decision of this case.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 731 S.E.2d 262 (2012), affirming an order dismissing plaintiff's complaint entered on 3 November 2011 by Judge Thomas D. Haigwood in Superior Court, Johnston County. Heard in the Supreme Court on 6 May 2013.

Wake Forest University School of Law Appellate Advocacy Clinic, by John J. Korzen, for plaintiff-appellant.

Poyner Spruill LLP, by Steven B. Epstein, for defendant-appellees.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Christopher R. Kiger, for North Carolina Association of Defense Attorneys, amicus curiae.

MARTIN, Justice.

Plaintiff, Catryn Bridges, seeks money damages from defendants, Harvey and Barbara Parrish, for the criminal acts of their 52-year-old son Bernie. Plaintiff alleges that Harvey and Barbara negligently stored their firearm, which Bernie wrongfully took from their home

and used to shoot plaintiff. We hold these parents are not liable for the criminal conduct of their 52-year-old son.

Plaintiff made the following allegations in her complaint: Plaintiff dated Harvey and Barbara's son, Bernie, for seven months in 2010. At that time she was unaware that Bernie had a history of escalating violence towards the women with whom he had romantic relationships and he had been charged with, among other things, first-degree kidnapping, assault with a deadly weapon with intent to kill or inflict serious injury, and possession of a firearm by a felon in 2007. During the events at issue here, Bernie lived in a building on Harvey and Barbara's property, while they attempted to provide their son with guidance, advice, and financial assistance. Harvey and Barbara owned a number of firearms, to which Bernie occasionally had access. During Bernie's relationship with plaintiff, Harvey and Barbara met her on many occasions.

According to the complaint, plaintiff ended her relationship with Bernie in November 2010 because he exhibited "controlling, accusatory and risky" behavior. They resumed their relationship in January 2011. The dysfunctional relationship dynamics again escalated. In a conversation on 7 March 2011, Bernie accused plaintiff of seeing other men. The next day Bernie drove to plaintiff's workplace and shot her in the abdomen with one of Harvey and Barbara's guns.

Following the assault, rather than suing Bernie, plaintiff filed a civil complaint alleging that Harvey and Barbara "knew or should have known that Bernie Parrish posed a risk of serious harm to Plaintiff" yet "failed to take reasonable and/or necessary steps to keep [their] guns in a safe and secure place, or otherwise adequately locked and located such that Bernie Parrish could not get access to and possession of any such guns." Harvey and Barbara filed a motion to dismiss, which the trial court allowed. Plaintiff appealed to the Court of Appeals.

On appeal plaintiff proposed three theories of liability against Harvey and Barbara, only one of which is before us: a negligence claim alleging Harvey and Barbara breached a common law duty to secure their firearms from their son. *Bridges v. Parrish*, —— N.C. App. ——, ——, 731 S.E.2d 262, 264-65 (2012). The Court of Appeals majority declined to find that such a duty arose under North Carolina common law. *Id.* at ——, 731 S.E.2d at 266-67. The dissenting judge would have reversed the trial court's decision and allowed plaintiff to proceed with a claim for negligent storage of a firearm. *Id.* at ___, 731

S.E.2d at 268-69 (Geer, J., concurring in part and dissenting in part). We affirm.

Our review of the grant of a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is de novo. We consider "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Coley v. State*, 360 N.C. 493, 494-95, 631 S.E.2d 121, 123 (2006) (citation and internal quotation marks omitted).

Plaintiff has asserted a common law negligence claim. To state a common law negligence claim, plaintiff must show "(1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Stein v. Asheville Bd. of Educ.*, 360 N.C. 321, 328, 626 S.E.2d 263, 267 (2006) (citation omitted). In the case before us, the only element contested is whether Harvey and Barbara owed plaintiff a legal duty.

We have stated that "[n]o legal duty exists unless the injury to the plaintiff was foreseeable and avoidable through due care." *Id.* at 328, 626 S.E.2d at 267 (citing *Estate of Mullis v. Monroe Oil Co.*, 349 N.C. 196, 205, 505 S.E.2d 131, 137 (1998)). The criminal acts of a third party are generally considered "unforeseeable and independent, intervening cause[s] absolving the [defendant] of liability." *Id.* at 329, 626 S.E.2d at 268 (alterations in original) (quoting *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638, 281 S.E.2d 36, 38 (1981)) (internal quotation marks omitted). For this reason, the law does not generally impose a duty to prevent the criminal acts of a third party. *Id.* at 328, 626 S.E.2d at 268.

As an exception to this rule, our common law may allow a defendant to be held liable for the criminal acts of a third party in cases of "special relationships"—"when the defendant's relationship with the plaintiff or the third person justifies making the defendant answerable civilly for the harm to the plaintiff." *Id.* at 329, 626 S.E.2d at 268. Plaintiff has waived her argument that Harvey and Barbara had a special relationship with *Bernie. Bridges*, —— N.C. App. at —— n.1, 731 S.E.2d at 265 n.1 (majority opinion). Accordingly, to state a claim for negligence based on a special relationship, plaintiff's complaint must allege facts sufficient to show that her relationship with *Harvey and Barbara* justified requiring them to use due care to prevent the attack on her.

Special relationships create a responsibility to take "affirmative action for the aid or protection of another," 2 Restatement (Second) of Torts § 314 A cmt. b (1965), and they arise only in narrow circum-

stances. For example, "the parent of an unemancipated child may be held liable in damages for failing to exercise reasonable control over the child's behavior if the parent had the ability and the opportunity to control the child and knew or should have known of the necessity for exercising such control." *Moore v. Crumpton*, 306 N.C. 618, 623, 295 S.E.2d 436, 440 (1982) (citations omitted). In addition, a landowner has a "duty to safeguard his business invitees from the criminal acts of third persons" if those criminal acts are foreseeable. *Foster*, 303 N.C. at 640, 281 S.E.2d at 39 (citation omitted). Further, common carriers owe a duty "to provide for the safe conveyance of their passengers as far as human care and foresight can go." *Smith v. Camel City Cab Co.*, 227 N.C. 572, 574, 42 S.E.2d 657, 658 (1947) (citations and internal quotation marks omitted). Other special relationships include those between innkeepers and their guests and people who voluntarily accept custody of another. *See* 2 Restatement (Second) of Torts § 314 A. In these cases special relationships creating liability have arisen through circumstances such as voluntary assumption of another's care and well-being or the ability to control the third person at the time of the criminal acts.

Here, plaintiff's complaint is devoid of any allegations that, if taken as true, demonstrate that Harvey and Barbara had a special relationship with her that gave rise to a legal duty. Like the defendants in *Moore*, Harvey and Barbara did not prevent their child from accessing a deadly weapon that the child used to harm another person. *Moore*, 306 N.C. at 620, 295 S.E.2d at 438. While parents may be held liable for the actions of their children in some circumstances, we noted in *Moore* that "[t]he opportunity to control a young man of [17 years] obviously is not as great as with a younger child. . . . Short of standing guard over the child twenty-four hours a day, there was little that the defendant father could do to prevent" the harm to the plaintiff. *Id.* at 626, 295 S.E.2d at 442. We did not hold the parents in *Moore* responsible for the criminal actions of their 17-year-old son. *Id.* at 626, 628, 295 S.E.2d at 441-42, 443. Even more so, Harvey and Barbara are not liable for the criminal actions of their 52-year-old son.

Because plaintiff has not stated a claim that supports a finding of negligence based on a special relationship, the only remaining theory of liability is that Harvey and Barbara negligently breached a duty owed to plaintiff as a member of the general public. Relying on previous cases that have characterized firearms as dangerous instrumentalities, plaintiff argues that Harvey and Barbara had a duty to secure their firearms. We disagree. While our prior cases articulate a

duty to exercise due care in the use of dangerous instrumentalities, they do not mandate a home storage requirement. *Cf. Edwards v. Johnson*, 269 N.C. 30, 35, 152 S.E.2d 122, 126 (1967) ("It is settled law with us that the highest degree of care is exacted of those handling firearms." (emphasis added)); *Belk v. Boyce*, 263 N.C. 24, 31, 138 S.E.2d 789, 794 (1964) ("[A] very high degree of care is required from all persons *using* firearms in the immediate vicinity of others regardless of how lawful or innocent such use may be." (emphasis added)). The mere possession of a legal yet dangerous instrumentality does not create automatic liability when a third party takes that instrumentality and uses it in an illegal act. As long as the dangerous instrumentalities are kept in accordance with statutory regulations, the law does not impose civil liability under the present allegations.

The General Assembly has enacted a myriad of statutes relating to the use and storage of firearms. *See*, *e.g.*, N.C.G.S. §§ 14-269.2 (prohibiting firearms on educational property or at school-sponsored activities), -269.7 (prohibiting persons under the age of eighteen from possessing handguns), -315.1 (making it a crime to not secure firearms in premises shared with a minor), -415.11 (2011) (regulating concealed carry permits). The General Assembly, however, has not elected to impose civil liability in the circumstances presented in the case before us. Moreover, as defendants observe, "not a single appellate court has recognized a cause of action for negligent storage of a firearm broad enough to encompass the claim Plaintiff pleads here."

As amicus curiae aptly explains, "under Plaintiff's theory, a negligent-based cause of action would exist against a homeowner virtually any time a gun (or any other object that could be used to injure someone) was stolen from the homeowner's premise[s] and then used in the commission of a violent crime that injures another person." It logically follows that holding gun owners responsible for the criminal use of their guns by unauthorized adult users would unfairly burden those who lawfully own and store guns in their homes. *Cf. Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998).

Even when all plaintiff's allegations are taken as true, Harvey and Barbara cannot be held liable for their 52-year-old son's criminal actions, which are "unforeseeable and independent, intervening cause[s] absolving [defendants] of liability." *Stein*, 360 N.C. at 329, 626 S.E.2d at 268 (first alteration in original) (citation and internal quotation marks omitted). Our General Assembly is a "far more appropriate forum than the courts for implementing policy-based changes to our laws," *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594

S.E.2d 1, 8 (2004), so long as such policy-based changes are kept within constitutional bounds, *see Britt v. State*, 363 N.C. 546, 550, 681 S.E.2d 320, 323 (2009). Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice BEASLEY took no part in the consideration or decision of this case.

BARBARA R. DUNCAN v. JOHN H. DUNCAN

No. 450PA12

(Filed 13 June 2013)

Appeal and Error— interlocutory orders and appeals—alimony order—attorney fees reserved—appeal not interlocutory

An unresolved request for attorney fees and costs did not render interlocutory an appeal from a trial court's alimony order because attorney fees and costs were collateral to a final judgment on the merits.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 732 S.E.2d 390 (2012), dismissing an appeal from an order entered on 15 October 2007 by Judge Monica Leslie, an order entered on 18 September 2009 and a judgment entered on 2 September 2010 by Judge Steven J. Bryant, and orders entered on 31 March 2008, 4 September 2008, 14 April 2011, and 18 January 2012 by Judge Richard K. Walker, all in District Court, Macon County. Heard in the Supreme Court on 16 April 2013.

Siemens Family Law Group, by Jim Siemens; and Ruley Law Offices, by Douglas A. Ruley, for plaintiff-appellee.

Hyler & Lopez, P.A., by Stephen P. Agan and George B. Hyler, Jr., for defendant-appellant.

NEWBY, Justice.

Today we clarify the effect of an unresolved request for attorney's fees on an appeal from an order that otherwise fully determines the action. Once the trial court enters an order that decides all substantive claims, the right to appeal commences. Failure to appeal from that order forfeits the right. Because attorney's fees and costs are collateral to a final judgment on the merits, an unresolved request for attorney's fees and costs does not render interlocutory an appeal from the trial court's order. Accordingly, we reverse the decision of the Court of Appeals.

After filing for divorce from defendant, plaintiff sought alimony and attorney's fees. As a result, the District Court, Macon County, ordered defendant to pay plaintiff alimony in the amount of five hundred dollars per month. With regard to plaintiff's request for attorney's fees, the court "ma[de] no order" and "reserve[d] this issue for later determination." Defendant appealed, but the Court of Appeals reasoned that the outstanding claim for attorney's fees made defendant's appeal interlocutory. *Duncan v. Duncan*, —— N.C. App. ——, ——, 732 S.E.2d 390, 392 (2012) (citing *Bumpers v. Cmty. Bank of N. Va.*, 364 N.C. 195, 204, 695 S.E.2d 442, 448 (2010)). Because defendant failed to have the order certified as immediately appealable under North Carolina Rule of Civil Procedure 54(b), the Court of Appeals dismissed defendant's appeal as untimely. *Id.* at ——, 732 S.E.2d at 391. We allowed defendant's petition for discretionary review to determine whether defendant's right to appeal had accrued, thus making Rule 54(b) inapplicable. *Duncan v. Duncan*, —— N.C. ——, 736 S.E.2d 186 (2013).

Upon entry of final judgment in a civil matter, appeals may be taken as of right to the Court of Appeals. N.C.G.S. § 1-277(a) (2011); *id.* § 7A-27(c) (2011). A final judgment " 'generally is one which ends the litigation on the merits.' " *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199, 108 S. Ct. 1717, 1720, 100 L. Ed. 2d 178, 183 (1988) (citation omitted); *see also 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." (citations omitted)). Certification under Rule 54(b) permits an interlocutory appeal from orders that are final as to a specific portion of the case, but which do not dispose of all claims as to all parties.

Though an open request for attorney's fees and costs necessitates further proceedings in the trial court, the unresolved issue " 'does not prevent judgment on the merits from being final.' " *Bumpers*, 364 N.C. at 200, 695 S.E.2d at 446 (quoting *Budinich*, 486 U.S. at 202, 108 S. Ct. at 1722, 100 L. Ed. 2d at 185)). An order that completely decides the merits of an action therefore constitutes a final judgment for purposes of appeal even when the trial court reserves for later determination collateral issues such as attorney's fees and costs. *See Budinich*, 486 U.S. at 202-03, 108 S. Ct. at 1722, 100 L. Ed. 2d at 185 ("Courts and litigants are best served by the bright-line rule, which accords with traditional understanding, that a decision on the merits is a 'final decision' for purposes of [appeal] whether or not there remains for adjudication a request for attorney's fees attributable to the case."). Because an order resolving all substantive claims is a final judgment, Rule 54(b) certification is superfluous, and such a final order is immediately appealable as of right. N.C.G.S. § 1-277(a); *id.* § 7A-27(c). Failure to file a timely notice of appeal from the final judgment waives the right to appeal. *Id.* § 1-279.1 (2011); N.C. R. App. P. 3 ("Appeal in Civil Cases—How and When Taken"). This bright-line rule applies to all cases in which a trial court enters an order disposing of the parties' substantive claims yet leaves open a request for attorney's fees and costs. To promote clarity and uniformity, we disavow any language in *Bumpers v. Community Bank of Northern Virginia* that may be read to conflict with our holding in the case at hand. 364 N.C. 195, 695 S.E.2d 442.

In this instance, the trial court resolved the merits of all the claims between the parties with the exception of attorney's fees. While the trial court could have determined the attorney's fee issue contemporaneously with plaintiff's alimony demand, the failure to do so did not negate the finality of the trial court's order. We hold that the trial court's order was final and immediately appealable because attorney's fees were not part of the substantive claims. As a party to a final judgment on the merits, defendant preserved his right to appeal by giving timely notice thereof. Accordingly, the decision of the Court of Appeals dismissing defendant's appeal is reversed. This case is remanded to that court for consideration of the remaining issues.

REVERSED AND REMANDED.

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

JOHN CONNER CONSTRUCTION, INC., R&G CONSTRUCTION COMPANY, AND EGGERS CONSTRUCTION COMPANY, INC. v. GRANDFATHER HOLDING COMPANY, LLC AND MOUNTAIN COMMUNITY BANK, A BRANCH OF CARTER COUNTY BANK

460A12

(Filed 13 June 2013)

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. ——, 732 S.E.2d 367 (2012), affirming an order entered on 15 February 2011 by Judge Marvin P. Pope, Jr. in Superior Court, Avery County. On 12 December 2012, the Supreme Court allowed a petition by plaintiffs for discretionary review of additional issues. Heard in the Supreme Court on 15 April 2013.

Tricia Wilson Law Firm, PLLC, by Patricia L. Wilson; and J. Thomas Dunn, Jr., for plaintiff-appellants.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell, Christopher C. Finan, and Matthew A. L. Anderson, for defendant-appellee Mountain Community Bank.

PER CURIAM.

Justice BEASLEY took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals stands without precedential value. *See, e.g., Amward Homes, Inc. v. Town of Cary*, 365 N.C. 305, 716 S.E.2d 849 (2011); *Goldston v. State*, 364 N.C. 416, 700 S.E.2d 223 (2010). As to the issue allowed in plaintiffs' petition for discretionary review, we hold that discretionary review was improvidently allowed.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. BRYANT LAMONT BOYD

No. 358A12

(Filed 13 June 2013)

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. ——, 730 S.E.2d 193 (2012), on remand from this Court, 366 N.C. 210, 734 S.E.2d 838 (2012), vacating defendant's conviction for second-degree kidnapping that resulted in part in a judgment entered on 14 April 2010 by Judge Abraham Penn Jones in Superior Court, Orange County, and ordering a new trial on the charge of second-degree kidnapping. Heard in the Supreme Court on 11 March 2013.

Roy Cooper, *Attorney General*, *by Robert C. Montgomery*, *Special Deputy Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Andrew DeSimone*, *Assistant Appellate Defender*, *for defendant-appellee.*

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion, and this case is remanded to the Court of Appeals for consideration of the remaining issues.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. JAMES RICHARD KOCHUK

No. 493A12

(Filed 13 June 2013)

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. ——, 741 S.E.2d 327 (2012), affirming an order entered on 3 October 2011 by Judge Carl R. Fox in Superior Court, Durham County. Heard in the Supreme Court on 15 April 2013.

Roy Cooper, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellant.

Russell J. Hollers III for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals and remand this matter to that court for remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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

STATE OF NORTH CAROLINA v. ROBIN EUGENE LAND

No. 510A12

(Filed 13 June 2013)

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. —–, 733 S.E.2d 588 (2012), finding no error after appeal of judgments entered on 14 December 2010 by Judge Eric L. Levinson in Superior Court, Mecklenburg County. On 24 January 2013, the Supreme Court allowed defendant's petition for discretionary review of an additional issue. Heard in the Supreme Court on 16 April 2013.

Roy Cooper, Attorney General, by Ebony J. Pittman and Daniel P. O'Brien, Assistant Attorneys General, for the State.

Don Willey for defendant-appellant.

PER CURIAM.

AFFIRMED.

HULYA GARRETT v. CHARLES W. BURRIS

No. 9A13

(Filed 13 June 2013)

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. ——, 735 S.E.2d 414 (2012), affirming an order entered on 6 May 2009 by Judge Edward L. Hedrick, IV in District Court, Iredell County. Heard in the Supreme Court on 6 May 2013.

Hunt Law, PLLC, by Gregory Hunt, for plaintiff-appellant.

M. Clark Parker, P.A., by M. Clark Parker, for defendant-appellee.

PER CURIAM.

AFFIRMED.

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

STATE v. BEAN

[366 N.C. 552 (2013)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	RANDOLPH COUNTY
	)	
TAWARA McDANIEL BEAN	)	

No. 37P13

ORDER

Upon consideration of the Petition for Discretionary Review filed by plaintiff on the 18th day of January 2013, the Court allows Defendant's Petition for Discretionary Review for the limited purpose of remanding to the Court of Appeals for reconsideration. Upon reconsideration, the Court of Appeals should review the instruction and evidentiary issues for plain error in light of our decision in *State v. Lawrence*, —— N.C. ——, 723 S.E.2d 326 (2012), and the Rules of Appellate Procedure, Rule 10(a)(4); and the court should review the closing argument issue for gross impropriety in light of *State v. Campbell*, 359 N.C. 644 (2005).

By Order of this Court in Conference, this 7th day of March, 2013.

Beasley, J., Recused.

s/Jackson, J.
For the Court

THE TOWN OF SANDY CREEK, Plaintiff,	)	
v.	)	
EAST COAST CONTRACTING, INC., MICHAEL D. HOBBS, ENGINEERING SERVICES, PA, CHARLES DAVID DICKERSON, TODD S. STEELE and RLI INSURANCE COMPANY, Defendants,	)	BRUNSWICK COUNTY
and	)	
EAST COAST CONTRACTING, INC., Third-Party Plaintiff v. THE CITY OF NORTHWEST, Third-Party Defendant.	)	

No. 48P13

ORDER

The third-party defendant's petition for discretionary review is allowed for the limited purpose of remanding to the Court of Appeals for reconsideration in accordance with this Court's decision in *Williams v. Pasquotank Co. Parks & Recreation Dep't*, ___ N.C. ___, 732 S.E.2d 137 (2012). The third-party plaintiff's conditional petition for discretionary review is hereby dismissed.

By Order of this Court, this 7th day of March, 2013.

s/Beasley, J.
For the Court

LASHANDA SHAW	)	
	)	
v.	)	From Cumberland County
	)	
THE GOODYEAR TIRE & RUBBER COMPANY	)	

No. 89P13

ORDER

Plaintiff's Motion to Amend Petition for Discretionary Review is allowed. Plaintiff is ordered to file a complete, amended version of her PDR reflecting the substitutions that she submitted with her motion no later than 7 days after this order is issued.

By order of the Court in Conference, this 7th day of March, 2013. Beasley, J., recused.

s/Jackson, J.

For the Court

STATE v. CHAPMAN

[366 N.C. 555 (2013)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Duplin County
	)	
GREGORY R. CHAPMAN	)	

No. 104P12

ORDER

The State's Petition for Writ of Certiorari is allowed for the limited purpose of remanding this case to the Court of Appeals to allow the State's Petition for Writ of Certiorari for consideration of the merits.

By order of the Court in Conference, this 7th day of March, 2013.

s/Jackson, J.
For the Court

JEFFREY SMITH, ET AL.	)	
	)	
v.	)	CUMBERLAND COUNTY
	)	
CITY OF FAYETTEVILLE	)	

No. 236A12

ORDER

Upon consideration of the Notice of Appeal Based Upon a Constitutional Question filed by plaintiffs on the 1st day of June 2012, the Court allows Defendant's Notice of Appeal for the limited purpose of remanding to the Court of Appeals for reconsideration in light of our decision in *IMT Inc. v. City of Lumberton*, —— N.C. ——, —— S.E.2d —— (8 March 2013).

By Order of this Court in Conference, this 7th day of March, 2013.

Beasley, J., Recused.

s/Jackson, J.
For the Court

STATE v. STOKES

[366 N.C. 557 (2013)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	CRAVEN COUNTY
	)	
GEORGE VICTOR STOKES	)	

No. 94P13

ORDER

The State's petition for discretionary review is allowed for the limited purpose of remanding the matter to the Court of Appeals for consideration of whether defendant's actions satisfy the remaining elements of either restraint or confinement under N.C.G.S. § 14-39(a)(3), and, if applicable, for consideration of whether defendant's actions satisfy the elements of attempted kidnapping under N.C.G.S. § 15-170. Accordingly, the State's Motion for Temporary Stay allowed on 25 February 2013 is dissolved, and the State's petition for Writ of Supersedeas is denied.

By Order of this Court, this 11th day of April, 2013.

s/Beasley, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland County
	)	
MARCUS REYMOND ROBINSON	)	

No. 411A94-5

ORDER

The State's petition for writ of certiorari to review the order of the Superior Court, Cumberland County, is allowed. N.C. Const. art. IV sec. 12; N.C.G.S. § 7A-32(b). The petitioning and responding parties are directed to file and serve briefs in accordance with the requirements of the Rules of Appellate Procedure. In addition, other interested persons may file and serve briefs to assist the Court in its resolution of this matter as permitted by applicable law.

By order of the Court in Conference, this 11th day of April, 2013.

s/Beasley, J.
For the Court

STATE v. BLAKE

[366 N.C. 559 (2013)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland County
	)	
SHAWN ODELL BLAKE	)	

No. 103P13

ORDER

Defendant's petition for writ of certiorari is allowed for the limited purpose of remanding to the trial court for determination of whether the trial judge represented defendant on the underlying charge and, if so, for the trial court's order on the motion for appropriate relief to be vacated and the motion to be reassigned. Defendant's Notice of Appeal is dismissed ex mero motu, and defendant's Motion to Appoint Counsel is dismissed as moot.

By order of the Court in Conference, this 12th day of June, 2013.

s/Beasley, J.
For the Court

STATE v. BOYETT

[366 N.C. 560 (2013)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From New Hanover County
	)	
BILLY BOYETT	)	

No. 533P12

ORDER

Upon consideration of the petition filed by Attorney General for Writ of Supersedeas and Motion for Temporary Stay of the judgment of the Court of Appeals in this matter, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

1. The Motion for Stay is dissolved and Petition for Writ of Supersedeas is denied.

2. The Motion to Deem Petition for Discretionary Review Timely Filed by Attorney General in this matter is denied.

3. The Petition for Discretionary Review filed by Attorney General pursuant to G.S. § 7A-31 in this matter is dismissed.

4. The Motion in the Alternative to Consider Petition for Discretionary Review as a Petition for Writ of Certiorari filed by Attorney General in this matter is allowed and the Petition for Writ of Certiorari itself is allowed for the limited purpose of remanding to the North Carolina Court of Appeals for reconsideration in light of *State v. Carter*, —— N.C. ——, 739 S.E.2d 548 (2013).

By order of the Court in conference, this the 12th day of June 2013.

Beasley, J., recused.

s/Martin, J.
For the Court

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002P11-2	State v. Ricky Bartlett	Def's *Pro Se* Motion for Appropriate Relief (COA11-647)	Dismissed **Beasley, J. Recused**
002P13	State v. Jason C. Johnson	1. Def's *Pro Se* PWC to Review order of Superior Court of Swain County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as Moot
005P12-2	Hoke County Board of Education, et al, and Asheville City Board of Education, et al, Intervenors v. State of North Carolina & State Board of Education	State's PDR Under N.C.G.S. § 7A-31 (COA11-1545)	Allowed
012P13	Ada Morgan, Ray Morgan, Judith Scull a/k/a Judith Thompson Scull, David Scull, Roger Parker a/k/a Billy Roger Parker, Jr., and The City of Wilson, a North Carolina municipal corporation v. Nash County	Plt's (City of Wilson) PDR Under N.C.G.S. § 7A-31 (COA11-1544-2)	Denied
014P13	State v. Jimmy Boyd Standridge	Def's PDR Under N.C.G.S. § 7A-31 (COA12-546)	Denied
016P13	Trevor Mohammed v. Honorable Lorrin Freeman, Clerk of Superior Court for Wake County; Honorable Roy Cooper, Attorney General for North Carolina	1. Petitioner's *Pro Se* Motion for NOA (COAP12-1012) 2. Petitioner's *Pro Se* Motion for PDR 3. Petitioner's *Pro Se* Motion to Proceed in *Forma Pauperis*	1. Dismissed *ex mero motu* 2. Denied 3. Allowed

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019P13	Clifton Bowman, Employee, v. Cox Toyota Scion, Employer Stonewood Insurance Co., Carrier	1. Defs' Motion for Temporary Stay (COA12-709) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **01/14/13** Dissolved the Stay **03/07/13** 2. Denied 3. Denied
022P13	In the Matter of: T.W.B., Jr., a minor child	Respondent Father's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-615)	Denied **Beasley, J. Recused**
024A13	State v. Henry Tyrone Randolph	1. Def's NOA Based Upon a Constitutional Question (COA12-688) 2. State's Motion to Dismiss Appeal	1. - - - 2. Allowed
027P13	State v. Matthew Lee Elmore	Def's PDR Under N.C.G.S. § 7A-31 (COA12-459)	Denied
029A13	Richard M. Johnston v. State of North Carolina	1. State's Motion for Temporary Stay (COA12-45) 2. State's Petition for *Writ of Supersedeas* 3. State's NOA based Upon a Dissent 4. State's PDR as to Additional Issues 5. Plt's NOA Based Upon a Constitutional Question	1. Allowed **01/17/13** 2. Allowed 3. - - - 4. Denied 5. Dismissed *ex mero motu* **Beasley, J., Recused**
032P13	State v. Jivon Jacquele Darden	Def's PDR Under N.C.G.S. § 7A-31 (COA12-595)	Denied
033A13	State v. Robert Lamar McFadden	1. Def's NOA Based Upon a Constitutional Question (COA12-302) 2. State's Motion to Dismiss Appeal	1. - - - 2. Allowed

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034P13	Deylan T. Grier, by and through his Guardian Ad Litem, Leslie A. Brown and Leslie A. Brown, Individually v. Donna L. Guy, Robin Jenkins, and Leroy Jenkins, Jr.	Def's (Robin Jenkins) PDR Under N.C.G.S. § 7A-31 (COA12-416)	Denied **Beasley, J. Recused**
037P13	State v. Tamara McDaniel Bean	1. Def's NOA Based Upon a Constitutional Question (COA12-697) 2. Def's PDR Under N.C.G.S. § 7A-31	1. See Special Order 2. See Special Order **Beasley, Jr. Recused**
038P13	Matthew Jenner and Julia Markson v. Ecoplus, Inc.	Def's PDR under N.C.G.S. § 7A-31 (COA12-719)	Denied
040P13	In the Matter of: L.M.T., A.M.T.	1. Petitioners' (Cumberland County DSS; Guardian ad Litem) Motion for Temporary Stay (COA12-743) 2. Petitioners' (Cumberland County DSS; Guardian ad Litem) Petition for *Writ of Supersedeas* 3. Petitioners' (Cumberland County DSS; Guardian ad Litem) PDR Under N.C.G.S. § 7A-31	1. Allowed **01/22/13** 2. Allowed 3. Allowed
042P13	State v. Caleb Nathaniel Brown	Def's PDR Under N.C.G.S. § 7A-31 (COA12-84)	Denied
048P13	The Town of Sandy Creek, Plaintiff v. East Coast Contracting, Inc., Michael D. Hobbs, Engineering Services, PA, Charles David Dickerson, Todd S. Steele and RLI Insurance Company, Defendants and East Coast Contracting, Inc., Third-Party Plaintiff v. The City of Northwest, Third-Party Defendant	1. Third-Party Def's PDR Under N.C.G.S. § 7A-31 (COA12-561) 2. Third-Party Plt's (East Coast Contracting, Inc. and Engineering Services, PA) Conditional PDR Under N.C.G.S. § 7A-31	1. See Special Order 2. See Special Order

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049P13	State v. Cassius Renay Jones	Def's *Pro Se* Motion for Petition for Appropriate Relief Under N.C.G.S. § 7A-28	Dismissed
053P13	State v. Cody Ryan Sasser	1. Def's NOA Based Upon a Constitutional Question (COA12-446) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
055P13	State v. James Lappies	1. Def's *Pro Se* PWC to Review Order of COA (COAP13-3) 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
056P13	State v. Ashley Terrese Parks	Def's PWC to Review Decision of COA (COA12-460)	Denied
057P10-2	State v. Sylvester Leon Little	Def's *Pro Se* Motion for Application for Actual Innocence Relief	Dismissed
059P13	Cameron Hospitality, Inc. and John W. Powers, Plaintiffs v. Cline Design Associates, PA, Inland Construction Company, Saber Engineering, PA, Ross & Witmer, Inc., Columbia Cameron Village, LLC, and York Properties Inc. of Raleigh, Defendants, Ross & Witmer, Inc., Columbia Cameron Village, LLC, and York Properties Inc. of Raleigh, Third-Party Plaintiffs v. Ricky Hall's Plumbing, Inc., Third-Party Defendant.	Defs' (Saber Engineering, PA, and Ross & Witmer, Inc.) PDR Under N.C.G.S. § 7A-31 (COA12-522)	Denied

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061P13	State v. Michael Wayne Coley	1. Def's *Pro Se* PWC to Review Order of Superior Court of Rowan County (COAP10-852) 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
062P10-2	Cleo Edward Land, Sr., and Raymond Alan Land, on his own Behalf and Derivatively on Behalf of Eddie Land Masonry Contractor, Inc. v. Cleo Edward Land, Jr., Nancy K. Land, and Eddie Land Masonry Contractor, Inc.	1. Defs' Motion for Temporary Stay (COAP11-445) 2. Defs' Petition for *Writ of Supersedeas* (COAP11-445) 3. Plts' Motion to Dissolve Temporary Stay 4. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **06/29/11** Dissolved the Stay **03/07/13** 2. Denied 3. Denied **03/08/12** 4. Denied
064P13	State v. Jesse Virgil Patton	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-507) 2. Def's PWC to Review Decision of COA	1. Dismissed 2. Dismissed **Beasley, J., Recused**
065P13	State v. Andrew Aaron Brown	Def's PDR Under N.C.G.S. § 7A-31 (COA12-469)	Denied **Beasley, J. Recused**
066P13	State v. William P. Daniels	1. Def's NOA Based Upon a Constitutional Question (COA12-417) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed **Beasley, J. Recused**

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067P13	Robert Allen Sartori v. County of Jackson, et al (JCJ), Doctor Steven P. Deweese, and Nurse Cathy Barnes	1. Plt's *Pro Se* PWC to Review Order of COA (COA11-1398) 2. Plt's *Pro Se* Motion to Amend the Record	1. Denied 2. Denied
069P13	Albert C. Burgess, Jr. v. Ebay, Inc., et al	Plt's *Pro Se* Motion for Petition for Writ of Discretionary Review (COAP12-777)	Denied
073P13	Granvil Wayne Holt and wife, Patricia Lynn Holt v. Elizabeth Ann Barnes and husband, Shonti Lukan Barnes	1. Defs' PWC to Review Order of COA (COA12-948) 2. Plts' Motion to Dismiss PWC 3. Plts' Motion to Expedite Review of PWC	1. --- **02/19/13** 2. Allowed **02/19/13** 3. Dismissed as Moot **02/19/13**
074P13	James Edward Speller v. Raleigh	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* (COAP12-1063)	Denied **02/21/13**
084P12-2	Harvey Wilson Johnson, Sean Johnson, Bruce Charles Johnson, Sarah Johnson Tuck, Mark Johnson, Richard M. Johnson, Virginia Fisk Johnson, and Grace Johnson McGoogan v. N.C. Department of Cultural Resources, the North Carolina State Archives, Bradford White Johnson, Herbert S. Harriss, Johnson Harriss, Kirby Harriss Rigsby, Patricia Harriss Holden, and Margaret Harriss	Defs' (N.C. Department of Cultural Resources and the N.C. State Archives) PDR Under N.C.G.S. § 7A-31 (COA12-173)	Denied
084P13	State v. David Harold Johnson	1. Def's *Pro Se* Motion for Appropriate Relief (COA12-827) 2. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed 2. Dismissed

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089P13	LaShanda Shaw v. The Goodyear Tire & Rubber Company	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA12-338) 2. Plt's Motion to Amend PDR	1. 2. See Special Order **03/07/13** **Beasley, J. Recused**
090P07-8	State v. Lindo Nickerson	1. Def's *Pro Se* Motion for PDR (COAP11-768) 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 **Jackson, J. Recused**
090P13	State v. Edy Charles Banks, Jr.	1. State's Motion for Temporary Stay (COA12-531) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/22/13** 2. 3. **Jackson, J. Recused**
092P13	State v. Sherman Lee Young	1. Def's *Pro Se* Petition for *Writ of Mandamus* (COAP13-43) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Dismissed as Moot
094P13	State v. George Victor Stokes	1. State's Motion for Temporary Stay (COA12-810) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR under N.C.G.S. § 7A-31	1. Allowed **02/25/13** 2. 3.
098P13	State v. Vernon Pete Gray, III	1. State's Motion for Temporary Stay (COA12-153) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/26/13** 2. 3.

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099P13	Christopher Manley Thompson v. State of North Carolina	Pet's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **02/26/13**
100P13	State v. Dana Michael Berrier	1. Def's *Pro Se* PWC to Review Order of Superior Court of Davidson County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot **Beasley, J. Recused**
104P12	State v. Gregory R. Chapman	1. State's PDR under N.C.G.S. § 7A-31 (COA11-229) 2. State's Petition in the Alternative for *Writ of Certiorari* to Review Order of COA	1. Dismissed 2. See Special Order
104P13	State v. Jimmy Kevin Brittain	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **03/04/13**
138P12	State v. Dartanya Levon Eaton	1. State's Motion for Temporary Stay (COA11-956) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/02/12** Dissolved the Stay **03/07/13** 2. Denied 3. Denied
168P09-10	State v. Clyde Kirby Whitley	Def's *Pro Se* Motion for Petition for Rehearing (COAP11-794)	Dismissed
195PA11-2	State v. Samuel Kris Hunt	1. State's Petition for *Writ of Supersedeas* (COA10-666-2) 2. State's Motion for Temporary Stay 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's NOA Based Upon a Dissent 5. Def's NOA Based Upon a Constitutional Question 6. Def's PDR as to Additional Issues 7. State's Motion to Dismiss Appeal 8. State's Conditional PDR as to Additional Issues	1. Allowed 2. Allowed **08/03/12** 3. Allowed 4. - - - 5. - - - 6. Denied 7. Allowed 8. Dismissed as Moot

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236A12	Jeffrey Smith, Chris Marion, Tanya Marion, Thi Quoc Tran, Seok Cho, Crafty Corner, LLC, a North Carolina Limited Liability Company, Triumph Entertainment, LLC, a North Carolina Limited Liability Company, Michael M. Courson, LLC, a North Carolina Limited Liability Company, Kelly Monsour, Tim Moore, Douglas Guy, Danny Dye, Beverly K. Harris, Harris Management Services, Inc., a North Carolina Corporation, JB&H Consulting, Inc., a North Carolina Corporation, Charles Shannon Silver, and Randy Griffin v. The City of Fayetteville, North Carolina	Plts' (Smith, C. Marion, T. Marion, Tran, Crafty Corner, LLC, Triumph Entertainment, LLC, Tim Moore, Douglas Guy, Danny Dye, Beverly K. Harris, Harris Management Services, Inc., JB&H Consulting, Inc., Charles Shannon Silver, and Randy Griffin) NOA Based Upon a Constitutional Question (COA11-1263)	See Special Order **Beasley, J., Recused**
241P11-3	State v. Delton Maynor	Def's *Pro Se* PWC to Review Order of COA (COAP12-266)	Dismissed **Beasley, J. Recused**
249P11-2	State v. Bobby R. Grady	Def's *Pro Se* Motion for *Writ* of Discretionary Review	Denied **03/04/13**
265P12-2	State v. Theodore Morris Foust-el	1. Def's *Pro Se* Motion for Averment of Jurisdiction 2. Def's *Pro Se* Motion for Federal Question Jurisdiction	1. Dismissed 2. Dismissed

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275P12	State v. Terrance Javarr Ross	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* (COA11-1462) 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/25/12** Dissolved the Stay **03/07/13** 2. Denied 3. Denied
288P12	Patricia Colyer Birtha, as administratrix of the Estate of Sarah Lenon Colyer, deceased; James West Lindsay, as administrator of the Estate of Lottie Mae Lindsay and William Lindsay, deceased; Montez Nelson, next of kin of Rebecca Grier and James Grier, deceased on behalf of themselves and all other persons similarly situated v. Stonemor, North Carolina, LLC; Stonemor, North Carolina Funeral Services, Inc.; Stonemor, North Carolina Subsidiary, LLC; Alderwoods Group, Inc.; Service Corporation International, a/k/a SCI, d/b/a York Memorial Cemetery	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA11-79) 2. Plt's Motion for Leave to Amend PDR Based on Misapplication of the Law	1. Denied 2. Allowed **Beasley, J., Recused**
291P12	State v. Glenn Edward Whittington	1. State's Motion for Temporary Stay (COA11-1197) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/09/12** 2. Allowed 3. Allowed

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318P12	Edwin L. Eubank v. Antoinette L. Van-Riel and the Law Offices of Antoinette L. Van-Riel, P.A.	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31(A) (COA11-1088)	Denied
324P12	Anita R. Leveaux-Quigless v. Heather Nicole Pilgrim, Katie Elizabeth Hampton, and John William Hampton	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA11-1456) 2. Def's Motion to Dismiss PDR	1. Denied 2. Dismissed as Moot **Beasley, J., Recused**
327P02-8	Guy Tobias LeGrande v. State of N.C.	Def's *pro se* Petition for *Writ of Habeas Corpus*	Denied **02/13/13**
337P12	Timothy L. Hardin, Administrator of the Estate of Verna Cathey Hardin, Dennis C. Hardin, Tammy F. Hardin, Randall M. Hardin, and Timothy L. Hardin, the Next of Kin v. York Memorial Park, and Alderwoods Group, Inc., Service Corporation International a/k/a/ SCI	Plts' PDR Under N.C.G.S. § 7A-31 (COA11-80)	Denied **Beasley, J., Recused**
354P12	Kathy Lynn Sisk v. Glenn L. Sisk, Sr.	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-1320)	Denied
363PA11	State v. Ellison and Treadway	Def's (Ellison) Motion to Amend Record on Appeal	Allowed **Beasley, J., Did Not Participate**
365A12	Prouser, et al v. Bituminous Casualty, et al	Joint Motion to Dismiss Appeal	Allowed **02/14/13**

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373P12	Jason B. Lamb and Andrea Lamb v. D.S. Duggins Welding, Inc., and Mabe Steel, Inc.	Plts' PDR Under N.C.G.S. § 7A-31 (COA12-129)	Denied
388P12	State v. Omsar Rivera and Jose Maureco Canales	1. Def's (Rivera) NOA Based Upon a Constitutional Question (COA11-1209) 2. Def's (Rivera) PDR under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
390P11-2	Beroth Oil Company, Paula and Kenneth Smith, Barbara Clapp, Pamela Moore Crockett, W.R. Moore, N&G Properties, Inc., and Elton V. Koonce v. North Carolina Department of Transportation	1. Plt's NOA based Upon a Constitutional Question (COA11-1012) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal	1. - - - 2. Allowed 3. Allowed
394P12-2	State v. Joseph Brian Tarleton	1. Def's *Pro Se* Motion for Judicial Notice (COA12-916) 2. Def's *Pro Se* Motion for Injunctive Relief	1. Dismissed 2. Dismissed
396P12-3	State v. Jason Alan Laws	1. Def's *Pro Se* Motion for *Mandamus* 2. Def's *Pro Se* Motion for *Mandamus*	1. Denied 2. Denied
397P12	James D. Creed v. Brett A. Smith and Carolyn Jeanette Wyatt	Unnamed Defs' (Liberty Mutual Insurance Company and Integon National Insurance Company) PDR Under N.C.G.S. § 7A-31 (COA11-1469)	Denied

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404P12	Marie Albright and Maurice Albright, as co-trustees on behalf of the Marie Albright Trust; Jean Bissette; Kevin Bright; Sandra Bright; David Byerly; Elizabeth Byerly; Daniel Cantu; Nancy Cantu; Faye Daniel; Stephen Daniel; George Desanto; Micheline Desanto; Vanise Hardee; Deborah Hardee; John Leposa; Tammy Leposa; Joseph Lybrand; Amy Lybrand; Davis Miller a/k/a Thomas Davis Miller; Jeaneen Miller; Ada Morgan; Ray Morgan; Judith Scull a/k/a/ Judith Thompson Scull; David Scull; Melinda Moseley a/k/a Melinda Schmitz; Raymond Schmitz; Gail Sullivan; Lawrence Sullivan a/k/a Larry Sullivan; Bernard White; Toni White; Kathy Williamson; Thomas Williamson; Roger Parker a/k/a Billy Roger Parker, Jr.; and the City of Wilson, a North Carolina municipal corporation v. Nash County	Plt's (City of Wilson) PDR Under N.C.G.S. § 7A-31 (COA11-1530)	Denied
404P12	Catryn Denise Bridges v. Harvey S. Parrish and Barbara B. Parrish	1. Plt's NOA Based Upon a DISSENT (COA12-181) 2. Plt's Motion for Extension of Time to File PDR 3. Plt's PWC to Review the Decision of the COA	1. - - - 2. Dismissed **09/26/12** 3. Denied **Beasley, J. Recused**

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416P12	Mary Ann Wilcox v. City of Asheville; William Hogan, individually and in his official capacity as the Chief of the City of Asheville Police Department; Stony Gonce, individually and in his official capacity as a Police Officer for the City of Asheville; Brian Hogan, individually and in his official capacity as a Police Officer for the City of Asheville; and Cheryl Intveld, individually and in her official capacity as a Police Officer for the City of Asheville	1. Defs' (Stony Gonce, Brian Hogan, and Cheryl Intveld) Motion for Temporary Stay (COA12-12) 2. Defs' (Stony Gonce, Brian Hogan, and Cheryl Intveld) Petition for *Writ of Supersedeas* 3. Defs' (Stony Gonce, Brian Hogan, and Cheryl Intveld) PDR Under N.C.G.S. § 7A-31 4. Plt's NOA Based Upon a Constitutional Question 5. Plt's PDR Under N.C.G.S. § 7A-31 6. Defs' (City of Asheville, Stony Gonce, Brian Hogan, and Cheryl Intveld) Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **10/04/12** Dissolved the Stay **03/07/13** 2. Denied 3. Denied 4. Dismissed *ex mero motu* 5. Denied 6. Dismissed as Moot
418P12	Mark Elliott, Tor and Michelle Gabrielson, Michihiro and Yoko Kashima, on behalf of themselves and all others similarly situated v. KB Home North Carolina, Inc. and KB Home Raleigh-Durham, Inc. and KB Home Raleigh-Durham, Inc., Third-Party Plaintiff v. Stock Building Supply, LLC, Third-Party Defendant	Def's (KB Home Raleigh-Durham, Inc.) PWC to Review Order of COA (COA12-769)	Denied

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424A12	Michael A. Green and Daniel J. Green v. Jack L. Freeman, Jr.; Corinna W. Freeman; Piedmont Capital Holding of N.C., Inc.; Piedmont Express Airways, Inc.; Piedmont Southern Air Freight, Inc., and NAT Group, Inc. v. Lawrence J. D'Amelio, III, Third-Party Defendant	1. Def's (Corinna W. Freeman) NOA Based Upon a Dissent (COA11-548) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Plts' Motion for Petition for Remand to the COA	1. - - - 2. Denied 3. Denied
436A12	Jacob Ginsburg, Esq. v. Douglas D. Pritchard, MD; Statesville Pain Associates, PLLC; Robin Pritchard, RN; Carolina Pain Consultants; and Bobby Kearney, MD	Plt's *Pro Se* NOA Based Upon a Constitutional Question (COA12-304)	Dismissed *ex mero motu* **Beasley, J. Recused**
439P12	State v. Tion LaMichael Bradley	Def's PDR Under N.C.G.S. § 7A-31 (COA12-139)	Denied
450PA12	Barbara R. Duncan v. John H. Duncan	Plt's Motion for Remand to the COA for Decision on the Merits	Denied **02/21/13** **Beasley, Jr. Recused**
467P12	Stephanie Ritchie v. Christopher D. Ritchie	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-157) 2. Def's Motion for Temporary Stay 3. Def's Petition for *Writ of Supersedeas*	1. Denied 2. Allowed **11/09/12** Dissolved the Stay **03/07/13** 3. Denied

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

7 MARCH 2013

478P12	State v. Patricia Ann Black	1. Def's NOA Based Upon a Constitutional Question (COA11-1342) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
479P12	State v. Detarvis Travis Farrow	Def's PDR Under N.C.G.S. § 7A-31 (COA12-174)	Denied
484P12	State v. Mohssen Almogaded	1. Def's NOA Based Upon a Constitutional Question (COA12-220) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
486P12	Maritta Louise Hudgins v. RLB Management, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-218)	Denied
495P12	State v. Antonio Ramille Ryans	Def's *Pro Se* Motion for Petition for Actual Innocence (COAP11-307)	Denied
497P12	State v. Jay Mikal Brooks-Bey	1. Def's *Pro Se* Motion for NOA (COAP12-994) 2. Def's *Pro Se* Petition for *Writ of Mandamus* 3. Def's *Pro Se* Motion for Writ of Discovery 4. Def's *Pro Se* Motion for Petition for Writ of Inquiry and Correction of Records	1. Dismiss *ex mero motu* 2. Denied **(12/14/12)** 3. Dismissed 4. Dismissed
504P12	State v. Tyrone Johnson	1. Def's NOA Based Upon a Constitutional Question (COA12-221) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismiss *ex mero motu* 2. Denied **Beasley, J. Recused**
505P12	State v. Salman Aslam Chaudhry	Def's PDR under N.C.G.S. § 7A-31 (COA12-161)	Denied

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7 MARCH 2013

509P12	Marion S. Braden, Administratrix of the Estate of Gregory Alan Braden, M.D., Deceased v. Stephan B. Lowes, M.D.; Orthopaedic Specialists of the Carolinas, P.A.; Novant Health, Inc.; Forsyth Memorial Hospital, Inc.; Novant Health; Forsyth Medical Center; Carolina Medicorp Enterprises, Inc.; Piedmont Medical Specialists, P.L.L.C.; and Richard S. Marx, M.D.	1. Defs' (Stephen B. Lowe, M.D. and Orthopedic Specialists of the Carolinas, P.A.) PDR Under N.C.G.S. § 7A-31 (COA12-211) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot **Beasley, J., Recused**
528P12	State v. Thomas Ray Blevins	Def's PDR Under N.C.G.S. § 7A-31 (COA12-447)	Denied
532P09-3	State v. David Louis Richardson	1. Def's *Pro Se* PWC to Review Order of Superior Court of Pitt County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as Moot
538P12	Novant Health, Inc., Forsyth Memorial Hospital, Inc. d/b/a Forsyth Medical Center, and Medical Park Hospital, Inc. v. N.C. Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section and North Carolina Baptist Hospital, Intervenor	1. Petitioner-Appellants' PDR Under N.C.G.S. § 7A-31 (COA-12-57) 2. Respondent and Respondent-Intervenor's Conditional PDR Under N.C.G.S. § 7A-31 3. Petitioner's Motion to Amend their PDR	1. Denied 2. Dismissed as Moot 3. Allowed
554PA11	In the Matter of: Bass	Respondent's Motion to Supplement the Record on Appeal	Allowed

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

11 APRIL 2013

005P13	State v. Nathaniel Canty	1. State's Motion for Temporary Stay (COA12-804) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/07/13;** Dissolved the Stay **04/11/13** 2. Denied 3. Denied **Beasley, J. Recused**
006P13	State v. Garland Christopher Mitchell	1. Def's NOA Based Upon a Constitutional Question (COA12-499) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed **Beasley, J., Recused**
013P13	State v. Terrence Termaine Oakley	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-325) 2. State's Motion to Deem Response to PDR Timely Filed 3. State's Motion to Amend Docket Sheet	1. Denied 2. Allowed 3. Dismissed as Moot **Beasley, J., Recused**
015P13	State v. Wilfredo Moreno Moreno	1. Def's NOA Based Upon a Constitutional Question (COA12-530) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
017P08-2	In re: Stanley Lorenzo Williams v. N.C. Court of Appeals, et al	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **03/12/13**
023P13	State v. Eric L. Martinez	Def's *Pro Se* Motion for Petition of Actual Innocence of Being a Habitual Felon	Dismissed

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

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028P13	In the Matter of: Theodore J. Williams	Def's *Pro Se* Motion for Petition for Appropriate Relief	Dismissed
039P13	James Arthur Smith, Employee v. Denross Contracting, U.S., Inc., Employer, Noninsured, Dennis Barrett, Individually, and the New York State Insurance Fund, Carrier; and Kapstone Kraft Paper, Employer, Sentry Insurance, Carrier	1. Def's (New York State Ins. Fund) Motion for Temporary Stay (COA12-169) 2. Def's (New York State Ins. Fund) Petition for *Writ of Supersedeas* 3. Def's (New York State Ins. Fund) PDR under N.C.G.S. § 7A-31	1. Allowed **01/23/13;** Dissolved the Stay **04/11/13** 2. Denied 3. Denied
041P13	State v. Paul Stephen Glover, II	Def's PDR Under N.C.G.S. § 7A-31 (COA12-361)	Denied
044P13	Kay R. Hamilton, on behalf of herself and all others similarly situated v. Mortgage Information Services, Inc., and First American Title Insurance Company	1. Def's Motion for Temporary Stay (COA12-584) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 4. Plt's Conditional PDR Under N.C.G.S. § 7A-31 5. Plt's Conditional PWC to Review Order of Superior Court of Wake County	1. Allowed **01/22/13;** Dissolved the Stay **04/11/13** 2. Denied 3. Denied 4. Dismissed as Moot 5. Dismissed as Moot **Beasley, J., Recused**
046P13	John B. Sollis v. Ronald A. Holman	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-712)	Denied
050P13	State v. Jason Wright	Def's PDR Under N.C.G.S. § 7A-31 (COA12-633)	Denied **Beasley, J., Recused**

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063P13	Alonza Herbert Ward, Jr. v. Laura Cuthrell Ward	Def's PDR Under N.C.G.S. § 7A-31 (COA12-844)	Denied
068P13	State v. Archie Edward Hoskins	Def's PDR Under N.C.G.S. § 7A-31 (COA12-799)	Denied
071A13	State v. Jimmy Ray Lemons	1. Def's NOA Based Upon a Constitutional Question (COA12-913) 2. State's Motion to Dismiss Appeal	1. - - - 2. Allowed
074P98-4	State v. William T. Barnes	1. Def's *Pro Se* PWC to Review Order of Superior Court of Rockingham County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as Moot
077P13	State v. Jose DeJesus Santibanz	1. Def's NOA Based Upon a Constitutional Question (COA12-177) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
078P13	State v. Robert Thompson Broom	Def's PDR Under N.C.G.S. § 7A-31 (COA12-209)	Denied
080A13	State v. Timothy Charles Wilkes	1. Def's NOA Based Upon a Dissent (COA12-387) 2. Def's PDR as to Additional Issues Under N.C.G.S. § 7A-31	1. - - - 2. Denied
081P13	State of N.C. ex rel. Utilities Commission; Public Staff – Utilities Commission, Intervenor v. Carolina Water Service, Inc. of North Carolina, Applicant and Charlotte-Mecklenburg Utilities, a Department of the City of Charlotte, Intervenor	1. Applicant's NOA Based Upon a Constitutional Question (COA12-475) 2. Applicant's PDR Under N.C.G.S. § 7A-31 3. Intervenor's (Public Staff) Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed

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082P13	Michael McAdoo v. University of North Carolina at Chapel Hill; H. Holden Thorp, in his official capacity as Chancellor of the University of North Carolina at Chapel Hill; and National Collegiate Athletic Association	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA12-256) 2. Student Athlete Human Rights Project's Motion for Leave to File *Amicus Curiae* Brief	1. Denied 2. Dismissed as Moot
083P13	Wake Med v. N.C. Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section and Rex Hospital, Inc. d/b/a Rex Healthcare, Intervenor	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA12-364) 2. Respondent and Intervenor's Conditional PDR Under N.C.G.S. § 7A-31 3. Petitioner's Motion to Withdraw PDR	1. Dismissed as Moot **03/28/13** 2. Dismissed as Moot **03/28/13** 3. Allowed **03/28/13**
084A02-2	State v. Clifford Miller	Def's PWC to Review Order of Onslow County Superior Court	Denied
086P13	State v. Michael Anthony Maberson	Def's PDR Under N.C.G.S. § 7A-31 (COA12-227)	Denied
087P13	State v. Douglas Edward Jackson	Def's PDR Under N.C.G.S. § 7A-31 (COA12-490)	Denied
088P13	State v. Luis Antonio Nunez Garcia	Def's *Pro Se* Motion to Request for Plea Transcripts (COA12-973)	Dismissed
094P13	State v. George Victor Stokes	1. State's Motion for Temporary Stay (COA12-810) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/25/13;** Dissolved the Stay **04/11/13** 2. See Special Order 3. See Special Order

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102P13	State v. Charles Anthony Ball	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-610) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as Moot **Beasley, J., Recused**
105P13	State v. Travis Lavern Jackson	Def's *Pro Se* Motion for NOA (COAP13-100)	Dismissed
106P13	Nancy Holloway, Employee v. CV Industries, Inc., Employer Aegis Administrative Services, TPA, Carrier	Defs' PDR Under N.C.G.S. § 7A-31 (COA12-868)	Denied
107P13	Wendell Auto Brokers, Inc. v. A&S Collection Associates, Inc.	Def's PWC to Review Order of COA (COA12-1445)	Denied
107P98-3	State v. Randolph Wilson	Def's *Pro Se* Motion for NOA	Dismissed
108P13	JCS Financial Services, L.L.C. v. A&S Collection Associates, Inc.	Def's PWC to Review Order of COA (COA12-446)	Denied
113P13	State v. James Deonte McGirt	Def's *Pro Se* Motion for Petition for Writ of Actual Innocence	Dismissed
124P13	State v. Acie Terry Moore	Def's PDR Under N.C.G.S. § 7A-31 (COA12-365)	Denied
125P13	State v. Tony Memije	1. Def's NOA Based Upon a Constitutional Question (COA12-263) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed

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134A11-2	State v. Eugene Tate Hill	1. Def's *Pro Se* Motion for PDR (COAP12-1031) 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 **Beasley, J., Recused**
134P13	State v. Maurice L. Bigelow	Def's *Pro Se* Motion for Petition for *Writ of Habeas Corpus* (COAP12-998)	Denied **03/15/13**
140P13	In the Matter of: B.C.V., A Minor Child	Respondent-Father's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-914)	Denied
156A13	Paul E. Walters v. Roy A. Cooper, III, in his official capacity as Attorney General for the State of N.C.	1. Def's NOA (Dissent) 2. Def's Motion for Temporary Stay 3. Def's Petition for *Writ of Supersedeas*	1. - - - 2. Allowed **04/03/13** 3. Allowed **04/03/13**
161P13	James Yingling, Employee v. Bank of America, Employer, Self-Insured (Gallagher Basset Services, Inc., Servicing Agent)	1. Def's Motion for Temporary Stay 2. Defendant's Petition for *Writ of Supersedeas*	Allowed **04/10/13**
171P11-2	State v. Sidney Evans, III	Def's *Pro Se* PWC to Review Order of COA (COAP13-149)	Denied

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181P10-2	Brian Z. France v. Megan P. France	1. Plt's Motion for Temporary Stay (COA12-284)	1. Allowed **01/14/13**; Dissolved the Stay **04/11/13**
		2. Plt's Petition for *Writ of Supersedeas*	2. Denied
		3. Plt's NOA Based Upon a Constitutional Issue	3. - - -
		4. Plt's PDR Under N.C.G.S. § 7A-31	4. Denied
		5. Def's Motion to Dismiss Appeal	5. Allowed
		6. Charlotte Observer and WCNC-TV's Motion to Dismiss Appeal	6. Dismissed as Moot
		1. Motion for Admission of John E. Stephenson, Jr. *Pro Hac Vice*	1. Allowed **01/14/13**
		2. Motion for Admission of Jeffrey J. Swart *Pro Hac Vice*	2. Allowed **01/14/13** **Beasley, J., Recused**
196P12-2	State v. Allan Comeaux	Def's PDR Under N.C.G.S. § 7A-31 (COA11-1289)	Denied
243PA12	The North Carolina Farm Bureau Mutual Insurance Company v. Cully's Motorcross Park, Inc. and Laurie Volpe	Plt's Motion for Leave to File New Reply Brief	Allowed **03/26/13**
249P11-3	State v. Bobby R. Grady	Def's *Pro Se* PWC to Review Order of Superior Court of Wayne County	Denied **03/15/13**
328A11	State v. Tony Savalis Summers	Attorney Jonathan Broun's Motion to Withdraw and Authorize the OAD to Appoint Substitute Counsel	Allowed **03/20/13**
329P10-2	State v. Ralph Wilson	1. Def's *Pro Se* PWC to Review Order of Superior Court of Iredell County	1. Dismissed
		2. Def's *Pro Se* Motion to Appoint Counsel	2. Dismissed as Moot

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360A09	State v. Hasson Jamaal Bacoti	Attorney Jonathan E. Broun's Motion to Withdraw and Authorize OAD to Appoint Substitute Counsel	Allowed **03/20/13**
360A12	Cedar Greene, LLC and O'Leary Group Waste Systems, LLC v. City of Charlotte	1. Def's Motion to Dismiss Appeal (COA12-212) 2. Def's Motion to Consider New Brief as Timely	1. Denied 2. Allowed
365A12	James W. Prouse and Carol D. Prouse v. Bituminous Casualty Corporation and State Farm Mutual Automobile Insurance Company	Def's' Motion to Strike Memorandum of Additional Authority	Dismissed as Moot
397PA11-2	State v. Andrew Jackson Oates	1. Def's NOA Based Upon a Constitutional Question (COA10-725-2) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed **Beasley, J., Recused**
411A94-5	State v. Marcus Raymond Robinson	State's PWC to Review the Order of Cumberland County Superior County	See Special Order
415P12	Amos Tyndall, As Guardian *ad Litem* for Che-Val Batts v. Ford Motor Company and Alejandro Ortiz Rios	1. Def's (Ford Motor Company) PWC to Review Order of COA (COA12-321) 2. N.C. Association of Defense Attorneys and N.C. Chamber's Motion for Leave to File *Amicus* Brief 3. Def's (Ford Motor Company) Motion to Admit Robert L. Wise *Pro Hac Vice*	1. Allowed 2. Allowed 3. Allowed **Beasley, J., Recused**

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11 APRIL 2013

449P12	Charles Lester Thorpe and Mary Louise Thorpe, Administrators of the Estate of Charles Leamon Thorpe v. TJM Ocean Isle Partners, LLC; Coastal Structures Corporation; Coastal Carolina Construction and Development, Inc.; and Development, Inc.; and Unidentified Vessel	Plts' PDR Under N.C.G.S. § 7A-31 (COA12-99-2)	Denied
450P10-2	State v. Matthew Edward McCormick	1. Def's *Pro Se* PWC to Review the Order of Guilford County Superior Court 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
469P12	State v. James Calvin Boyd	1. Def's NOA Based on a Constitutional Question (COA12-75) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. State's Motion to Deem Response to NOA and PDR Timely Filed	1. Dismissed *Ex Mero Motu* 2. Denied 3. Dismissed 4. Dismissed
474P12	Kenneth B. Darty v. Timothy George Kohuth	1. Def's *Pro Se* Motion for NOA (COA12-705) 2. Def's *Pro Se* Motion for PDR	1. Dismissed *Ex Mero Motu* 2. Denied
489P12	State v. Ramone Dangelo Cunningham	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-23)	Denied **Beasley, J., Recused**
490P12	Corria Thompson v. Charlotte-Mecklenburg Board of Education	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-93)	Denied

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506P12	State v. Jonathan Russ Minton	Def's PDR Under N.C.G.S. § 7A-31 (COA12-243)	Denied
513P12	Michael Joseph Allender, Employee v. Starr Electric Company, Inc., Employer; General Casualty Insurance Company, Carrier	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA12-349) 2. Plt's Motion to Stay Consideration of PDR	1. Denied 2. Denied **01/09/13**
519P12	In the Matter of: E.S.P. and M.N.P.	1. Respondent-Father's PDR Under N.C.G.S. § 7A-31 (COA12-357) 2. Respondent-Father's Motion to Deem Timely the PDR 3. Respondent-Father's Petition in the Alternative For *Writ of Certiorari* to Review Decision of COA	1. Dismissed 2. Denied 3. Denied **Beasley, J., Recused**
523P06-6	Freeman Hankins v. Jon David, et al, Brunswick County D.A. Officials	Def's *Pro Se* Petition for Writ of Mandamus (COAP11-594)	Dismissed
526P12	State v. Jonathan Douglas Richardson	1. Def's PWC to Review Order of Superior Court of Johnston County 2. State's Motion for Extension of Time Within Which to File Response to PWC	1. Denied 2. Allowed
529P12	State v. William Ronnie Barnett	Def's PDR Under N.C.G.S. § 7A-31 (COA12-381)	Denied **Beasley, J., Recused**
531P12	In the Matter of Complaints Against Officials of Kill Devil Hills Police Department	1. Judge Tillett's PDR Under N.C.G.S. § 7A-31 (COA12-398) 2. Judge Tillett's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA 3. Judge Tillett's Motion for Leave to File a Reply to Response to PDR and Alternative *Writ of Certiorari* 4. Town of Kill Devil Hills Motion to Strike the Reply Filed as an Exhibit to Judge Tillett's Motion 5. Judge Tillett's Motion for Withdrawal of PDR and Alternative *Writ of Certiorari*	1. - - - 2. - - - 3. - - - 4. - - - 5. Allowed **03/12/13**
576P07-2	State v. Moses Leon Faison	Def's *Pro Se* Motion for Petition for Actual Innocence of First Degree Murder	Dismissed

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12 JUNE 2013

003P09-3	State v. Reginald Lee Rogers	1. Def's *Pro Se* Motion for Appropriate Relief	1. Dismissed
		2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	2. Allowed
		3. Def's *Pro Se* Motion to Appoint Counsel	3. Dismissed as Moot
		4. Def's *Pro Se* PWC to Review Order of Superior Court of Davidson County	4. Dismissed
003P09-4	State v. Reginald Lee Rogers	1. Def's *Pro Se* Motion for Objection to Joinder	1. Dismissed
		2. Def's *Pro Se* Motion for Severance	2. Dismissed
005PA12-2	Hoke County Board of Education, et al v. State of North Carolina, et al	Intervenor's Motion to Withdraw as Counsel	Allowed **05/29/13**
007P13	In the Matter of the Adoption of: S.K.N., a Minor Child	1. Petitioners' Motion for Temporary Stay (COA12-275)	1. Allowed **01/08/13** Dissolved the Stay **06/12/13**
		2. Petitioners' Petition for *Writ of Supersedeas*	2. Denied
		3. Petitioners' NOA Based Upon a Constitutional Question	3. Dismissed *Ex Mero Motu*
		4. Petitioners' PDR Under N.C.G.S. § 7A-31	4. Denied
010P07-3	State v. Robert Lewis Jordan	1. Def's *Pro Se* PWC to Review Order of COA (COAP13-130)	1. Dismissed
		2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	2. Allowed

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12 JUNE 2013

030P13	State v. Brandi Lea Grainger	1. State's Motion for Temporary Stay (COA12-444) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/18/13** 2. Allowed 3. Allowed **Beasley, J., Recused**
040PA13	In the Matter of: L.M.T. and A.M.T.	Cumberland County DSS and GAL's Motion to Deem Brief Timely Filed	Allowed
040PA13	In the Matter of: L.M.T. and A.M.T.	1. Office of Parent Representation's Motion for Leave to File *Amicus* Brief 2. Cumberland County DSS and GAL's Motion to Deny Office of Parent Representation's Motion for Leave to File *Amicus* Brief	1. Allowed 2. Dismissed
043P13	Donald King v. Jimmy Lee Brooks, Tommy Lee Brooks a/k/a Tommie Lee Brooks, Frankie Lee Southerland a/k/a Frankie Lee Southland, Jessica Fawn Chavez a/k/a Jessica Free, Henderson Rachman, Nicholas Jones, William Wright and William Wright d/b/a Wright's Coin Shop	Def's (William Wright and William Wright d/b/a Wright's Coin Shop) PDR Under N.C.G.S. § 7A-31 (COA12-533)	Denied **Beasley, J., Recused**
045P13	Rufus Stark and Betty Stark v. N.C. Department of Environment and Natural Resources, Division of Land Resources, Harrison Construction, Division of APAC Atlantic, Inc., and the North Carolina Mining Commission	1. Petitioners' PDR Under N.C.G.S. § 7A-31 (COA12-449) 2. Petitioner's PWC to Review Decision of COA	1. Denied 2. Dismissed as Moot

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070P13	State v. Rodney Lamont Fraley, Sr.	1. Def's NOA Based Upon a Constitutional Question (COA12-832) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
072P13	Maurice L. Alcorn, Jr. v. Hazel Bland, Susan Norman, and Linda Haymes	Plt's PWC to Review Decision of COA (COA12-613)	Denied
088P11-2	State v. Stephen Eric Snipes	1. Def's NOA Based Upon a Constitutional Question (COA12-542) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
091P13	State v. Charlayne Annette Crawford	Def's PDR Under N.C.G.S. § 7A-31 (COA12-565)	Denied
095P13	Jim Andrews, Roxian Andrews, Tracy Baker, Clay Baker, Sondra Bradford, Rob Bradford, Christopher Chin, Emily Snapp, Joseph Coniglio, Sydell Coniglio, Daniel Efenecy, Carol Efenecy, Mike Failor, Kathy Failor, John Famolari, Bonnie Famolari, Royce Harmon, Melinda Harmon, Angela Hosking, Jeffrey Scott Hosking, Mike Lincoln, Wendi Lincoln, Greg Miller, Kim Miller, Candice Northrup, Mike Patterson, Kathy Patterson, Katie Patterson, Dixie Patterson, Winston D. Patterson, Poplar Ridge Farm, Mark Skinner, Holly Skinner, James Stitt, Susan Stitt, Patricia Stitt, Dana Wilson, and Hal Wilson, Individually v. Michael Roy Land	Plt's PDR (COA12-847)	Denied **Beasley, J., Recused**

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101P13	State v. Terrell Raynor	Def's PWC to Review the Order of COA (COAP12-513)	Dismissed
103P13	State v. Shawn Odell Blake	1. Def's *Pro Se* Motion for NOA (COAP13-98) 2. Def's *Pro Se* PWC to Review the Order of the COA 3. Def's *Pro Se* Motion to Appoint Counsel	1. See Special Order 2. See Special Order 3. See Special Order
104P11-3	State v. Titus Batts	Def's *Pro Se* Motion to Dismiss Indictment	Dismissed
107P98-4	State v. Randolph Wilson	Def's *Pro Se* PWC to Review Order of COA (COAP13-146)	Denied
110P13	TD Bank, N.A., Successor-in-Interest to Carolina First Bank, a South Carolina Corporation v. Crown Leasing Partners, LLC, a North Carolina Limited Liability Company; Melvin Russell Shields; and Timothy J. Blanchat	1. Plt's NOA Based Upon a Constitutional Question (COA12-648) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied
111P13	State v. Zavier Charles Chisholm	Def's PDR Under N.C.G.S. § 7A-31 (COA12-901)	Denied
114P13	Wendy Sue Pender, Executrix of the Estate of Rochelle Boswell Pender v. Joshua Max Lambert, Sean Respass, Wal-Mart Stores East, LP, Wal-Mart Stores, Inc., and Wal-Mart Associates, Inc.	Plt's PDR Under N.C.G.S § 7A-31 (COA12-714)	Denied
119P13	State v. Ryan Ansley Rendleman	Def's PDR Under N.C.G.S. § 7A-31 (COA12-463)	Denied

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120P13	In the Matter of: T.J.C., K.K.C., B.N.C., Minor Children	1. Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA12-927) 2. Respondent-Father's PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
122A92-6	State v. Sherman Elwood Skipper	1. Def's *Pro Se* PWC to Review Order of COA (COAP05-810) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as Moot
127P13	State v. Jarrod Willis	Def's PDR Under N.C.G.S. § 7A-31 (COA12-689)	Denied
128P13	Housecalls Home Health Care, Inc., Housecalls Healthcare Group, Inc., and Terry Ward, Individually v. State of North Carolina, Department of Health and Human Services, and Albert Delia, Acting Secretary, in his Capacity	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA12-839) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot **Jackson, J., Recused**
129P13	Henry B. Kopf v. Smartflow Technologies Inc., f/k/a NCSRT, Inc. ——————— Henry Kopf, III v. Smartflow Technologies, Inc. f/k/a NCSRT, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-612) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
130P13	State v. Jomri Jarelle Wilson	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-954) 2. N.C. Center of Actual Innocence Motion for Leave to File *Amicus* Brief	1. Denied 2. Dismissed as Moot

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131P13	Ann W. Beck v. Leonard James Beck, Sr. and Maritime Yacht Brokerage, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-685)	Denied
132P13	Michael J. McCrann, Kelly C. McCrann, Henry W. Dirkmaat, Larilyn L. Dirkmaat, Robert C. Anderson, Jr., and Anne M. Anderson v. Pinehurst, LLC, Village of Pinehurst, and the Village Chapel a/k/a Village Chapel, Inc.	Plts' PDR Under N.C.G.S. § 7A-31 (COA12-680)	Denied **Beasley, J., Recused**
135P13	State v. James Earl Richardson	Def's PDR Under N.C.G.S. § 7A-31 (COA12-731)	Denied
136P13	State v. Arnaud Steve Babella Mahoukou	1. Def's *Pro Se* Motion to Reopen, Vacate, or Dismiss a Conviction 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
137P13	State v. Ellis Garett Toone	1. Def's *Pro Se* Motion for PDR (COAP11-1079) 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
138P13	State v. Rodney Lamar Robinson	Def's *Pro Se* Motion for a New Trial	Dismissed
142P13	State v. Thomas Brant Gee	Def's *Pro Se* Motion for PDR (COA11-1507)	Denied
143P13	State v. Brandon Lee Gross	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-951)	Denied

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145P13	State v. Frederick Karl Taft. Jr. and Fernandez Kabrer Taft	1. Defendant Fernandez Kabrer Taft NOA Based Upon a Constitutional Question (COA12-646) 2. Defendant Fernandez Kabrer Taft's PDR Under N.C.G.S. § 7A-31 3. Defendant Frederick Karl Taft., Jr.'s NOA Based Upon a Constitutional Question 4. Defendant Frederick Karl Taft, Jr.'s PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Both Appeals	1. - - - 2. Denied 3. - - - 4. Denied 5. Allowed
148P13	State v. Edgar Patino	Def's *Pro Se* Motion for NOA (COAP13-154)	Dismissed
151P13	State v. Michael Dorman, II	1. Def's NOA Based Upon a Constitutional Question (COA12-97) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. State's Conditional PDR Under N.C.G.S. § 7A-31	1. - - - 2. Denied 3. Allowed 4. Dismissed as Moot
152P13	In the Matter of: Kevin M. Smith, et al. v. State of North Carolina, et al.	Petitioner's *Pro Se* Motion for NOA (COAP13-109)	Dismissed
153P13	Clorey Eugene France v. Cabarrus County Sheriff's Office and Sheriff Brad Riley	1. Plt's *Pro Se* Motion for NOA (COA13-102, 13-103) 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Plt's *Pro Se* Motion to Withdraw Original NOA 4. Plt's *Pro Se* Motion to File Amended NOA 5. Plt's *Pro Se* Motion for NOA (Amending Notice) 6. Plt's *Pro Se* Motion for Joinder	1. - - - 2. Allowed 3. Allowed 4. Allowed 5. Dismissed *Ex Mero Motu* 6. Dismissed As Moot

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154P13	State v. Byron Green	1. Def's *Pro Se* PWC to Review Order of Superior Court of Surry County (11 CRS 1050, 1051) 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
155P13	State v. Christopher Lamont Bullock	Def's *Pro Se* Motion for Petition for Actual Innocence (COAP12-865)	Dismissed
156PA12-3	Inland Harbor Homeowners Association, Inc. v. St. Josephs Marina, LLC, Renaissance Holdings, LLC, St. Josephs, LLC, Dewitt Real Estate Services, Inc., Dennis Barbour, Randy Gainey, Thomas A. Saieed, Jr., Todd A. Saieed, Robert D. Jones, and The North Carolina Coastal Resources Commission	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-715-3)	Denied **Beasley, J., Recused**
157P13	State v. Master Maurice Alston	Def's PDR Under N.C.G.S. § 7A-31 (COA12-815)	Denied
160P13	State v. John Earl Dew, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA12-642)	Denied
161P13	James Yingling, Employee v. Bank of America, Employer, Self-Insured (Gallagher Basset Services, Inc., Servicing Agent)	1. Def's Motion for Temporary Stay (COA12-1031) 2. Defendant's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Withdraw PDR	1. Allowed **04/11/13** Dissolved the Stay **06/12/13** 2. Dismissed as Moot 3. - - - 4. Allowed

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163P13	State v. Jaquan Rasean Weathers	Def's PWC to Review Decision of COA (COA11-1132)	Denied **Beasley, J., Recused**
164P13	State v. Devacea Navarea Bass	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-828) 2. PWC to Review Decision of COA 3. Conditional PDR Under N.C.G.S. § 7A-31	1. Dismissed 2. Denied 3. Dismissed as Moot
165P13	State v. Gregory Allen Boykin	Def's PDR Under N.C.G.S. § 7A-31 (COA12-816)	Denied
166P13	State v. Ray Dean Combs	Def's PDR Under N.C.G.S § 7A-31 (COA12-1008)	Denied
167P13	State v. George Allen Locklear	1. Def's *Pro Se* Motion for NOA (COAP13-85) 2. Def's *Pro Se* PWC to Review Order of COA 3. Def's *Pro Se* Motion for Leave to Amend 4. Def's *Pro Se* Petition for *Writ of Habeas Corpus*	1. Dismissed **04/17/13** 2. Dismissed **04/17/13** 3. Allowed **04/17/13** 4. Denied **04/17/**

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169P13	Kristin Berrier, individually and in her capacity as Administrator of the Estate of Jacob Alexander Berrier, deceased, and Justin Berrier, in his capacity as Administrator of the Estate of Jacob Alexander Berrier, deceased v. Carefusion 203, Inc., Carefusion Corporation, Lincare, Inc. d/b/a Pediatric Specialists, Lincare Holdings, Inc. d/b/a Pediatric Specialists, Jonmark Mayes, Shelley R. Boyd, Masimo Corporation, Masimo Americas, Inc., and Quality Medical Rentals, Co.	1. Plt's PWC to Review Order of COA (COA13-251) 2. Plt's Motion to Dissolve Stay	1. Denied **04/18/13** 2. Denied **04/18/13**
171P13	State v. Earl Jackson Barts	Def's *Pro Se* Motion for Appropriate Relief (COAP13-190)	Dismissed
172A13	David B. Wind v. The City of Gastonia, North Carolina, a Municipal Corporation	1. N.C. Association of Chiefs of Police's Motion for Leave to File *Amicus* Brief 2. N.C. Association of Chiefs of Police's Motion for Extension of Time to File *Amicus* Brief	1. Allowed **05/20/13** 2. Allowed **05/20/13**
174P13	State v. Antoine Jamel Martin	1. Def's *Pro Se* PWC to Review Order of Superior Court of Scotland County 2. Def's *Pro Se* Motion for Appropriate Relief 3. Def's *Pro Se* Motion for NOA 4. Def's *Pro Se* Motion for Petition to Amend an Application for *Writ of Habeas Corpus* 5. Def's *Pro Se* Petition for *Writ of Habeas Corpus*	1. Dismissed **4/24/13** 2. Dismissed **4/24/13** 3. Dismissed *Ex Mero Motu* **4/24/13** 4. Allowed **4/24/13** 5. Denied **4/24/13**

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175P13	State v. Caleb Josiah Haire	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-1806)	Denied
176P13	John D. McCallister v. Ernie R. Lee, Joseph B. Gilbert, Dewey Hudson, Cara Tussey	1. Plt's *Pro Se* NOA Based Upon a Constitutional Question (COA12-1168) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
177P13	William David Carden v. Owle Construction, LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA-12-493)	Denied
178P13	Mary Jane Williard v. Coy Orville Williard	Plaintiff-Appellant's PDR Under N.C.G.S. § 7A-31 (COA12-931)	Denied
179P13	State v. Kevin Kraig Taylor	1. Def's NOA Under N.C.G.S. § 7A-30 (COA12-529) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. Attorney's Motion to Withdraw from Representation 5. Attorney's Motion to Appoint The Office of Appellate Defender	1. - - - 2. Denied 3. Allowed 4. Allowed 5. Dismissed as Moot
180P13	State v. Julio Cesar Naverrete-Garcia	Def's PDR Under N.C.G.S. § 7A-31(c) (COA12-1039)	Denied
181P13	State v. Paul Evan Seelig	Defendant-Appellant's PDR (COA12-442)	Denied
182P13	State v. William C. Klinger	Def's PDR Under N.C.G.S. § 7A-31 (COA12-798)	Denied
188P13	Clorey Eugene France v. North Carolina Department of Correction	Plt's *Pro Se* Motion for NOA (COA12-1425)	Dismissed *Ex Mero Motu*
189P13	Niche Marketing, Inc., and The Robbins Company, Inc. v. Jilson R. Daniels	Def's *Pro Se* Motion for NOA (COA13-156)	Dismissed *Ex Mero Motu*

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192P13	Lisa Criswell v. Robert Hunter Wheatley, Ronald Wheatley, and Robbie Lentz Scarboro	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-786)	Denied
193A13	State v. Thomas Woodrow Rice	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA12-735) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed *Ex Mero Motu* 2. Dismissed as Moot
194P13	N.C. Dept. of Correction v. Jonas Allen Strickland	1. Def's *Pro Se* Motion for Petition for Relief 2. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Dismissed as Moot
195P13	State v. Travis Doran Ramseur	1. Def's NOA Based Upon a Constitutional Question (COA12-62) 2. Def's PDR Under N.C.G.S. § 7A-31 (COA12-62) 3. Def's PWC to Review Order of COA (COA12-62) 4. State's Motion to Dismiss Appeal (COA12-62)	1. - - - 2. Dismissed 3. Denied 4. Allowed
199P13	State v. Roger Stevenson	*Def'sPro Se* PWC to Review Order of Superior Court of Pitt County	Dismissed **05/09/13**
201P13	Robert James Petrick v. Brad Perritt, Admin., Lumberton Correctional Inst.	1. Plt's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied **05/06/13** 2. Allowed **05/06/13**
203P13	State v. Robert Henry Gaffney	1. Def's NOA Based Upon a Constitutional Question (COA12-707) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed

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208P13	State v. Stacy Lamar Chambers	Def"s *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA10-1101)	Denied **Beasley, J., Recused**
209P13	In the Matter of: Wells Fargo Bank, NA, *via* their newly appointed Substitute Trustee: Grady I. Ingle or Elizabeth B. Ellis v. Myer and Dana Davis	Def's *Pro Se* Motion for Judicial Complaint	Dismissed
212P13	State v. Lionel A. Telfort	1. Def's *Pro Se* PWC to Review Order of COA (COAP13-234) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Dismissed as Moot
214P06-2	State v. Richard Marlo Melvin	Def's *Pro Se* Motion for PDR (COAP12-646)	Dismissed
214P13	State v. Horace Lee Shelton	Def's *Pro Se* Motion for Petition for Actual Innocence (COA12-968)	Dismissed
215P13	State v. James E. Benefield	1. Def's *Pro Se* Motion for NOA (COAP13-235) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* PWC to Review Order of COA 4. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed *Ex Mero Motu* 2. Dismissed 3. Denied 4. Dismissed as Moot
217P13	In the Matter of: Kevin McClain	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA12-1258)	Denied
223P13	State v. Sammy Davis Woods	1. Def's *Pro Se* PWC to Review Order of Superior Court of Alamance County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot

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231P13	Rodney McDonald Williams, Jr. v. State of North Carolina	1. Petitioner's *Pro Se* Motion for a Settlement Conference 2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
236P13	The North Carolina State Bar v. Geoffrey H. Simmons, Attorney	1. Def's Motion for Temporary Stay (COAP13-350) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **05/30/13** Dissolved the Stay **06/12/13** 2. Denied
303P12-2	Shannon Fatta v. M&M Properties Management, Inc.	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-694)	Denied
341P12-2	State v. Donald Durrant Farrow	Def's *Pro Se* Motion for PDR (COAP13-247)	Dismissed
380A11-2	State v. Nicholas Brady Heien	Def's Motion for Leave to File Amended New Brief	Allowed **06/05/13**
387P05-2	State v. Earl James Watson	Def's PWC to Review Order of COA (COAP12-87)	Dismissed
393P12-2	State v. Jabar Ballard	Def's *Pro Se* Motion for *Writ* of Innocence	Dismissed
399P06-3	State v. James Albert Coley, Jr.	1. Def's *Pro Se* Motion for Court to Order the Withdrawal of His Plea of Guilty to (1) Count of Indecent Liberty with a Child (COAP12-240) 2. Def's *Pro Se* Motion to Dismiss Charge with Prejudice on January 25, 2013	1. Dismissed 2. Dismissed
426PA12-2	State v. Joseph Alan Lambert	1. Def's NOA Based Upon a Constitutional Question (COA11-1574-2) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed

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427P12	Marie Wyatt Whitworth v. Estate of Wesley Todd Whitworth; Tammy Whitworth, Individually and as Executor of the Estate of Wesley Todd Whitworth; and Window World, Inc.	1. Plt's NOA Based Upon a Constitutional Question (COA11-989) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
428P12	WakeMed v. NCD-HHS, Division of Health Service Regulation, Certificate of Need Section and Rex Hospital, Inc., d/b/a/ Rex Healthcare, Holly Springs Surgery Center, LLC, and Novant Health, Inc. Respondent-Intervenors ——————— Rex Hospital, Inc., d/b/a Rex Healthcare v. NCD-HHS, Division of Health Service Regulation, Certificate of Need Section and WakeMed, Holly Springs Surgery Center, LLC, and Novant Health, Inc., Respondent/ Intervenors	1. Petitioner's (Rex Hospital, Inc., d/b/a Rex Healthcare) PDR Under N.C.G.S. § 7A-31 (COA11-1588) 2. Petitioner's (WakeMed) PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied **Beasley, J., Recused**
432P12	In the Matter of M.M.	State's PWC to Review Order of COA (COAP12-537)	Denied
446P12	Tradewinds Airlines, Inc., Tradewinds Holdings, Inc., and Coreolis Holdings, Inc., Third-Party Plaintiffs v. C-S Aviation Services, Third-Party Defendant	Third-Party Def's PDR Under N.C.G.S. § 7A-31 (COA11-739)	Denied

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452P12	American Towers, Inc. v. Town of Morrisville	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA11-1455) 2. PCIA – The Wireless Infrastructure Association's Motion for Leave to File *Amicus* Brief	1. Denied 2. Dismissed as Moot **Beasley, J., Recused**
460A12	John Conner Construction, Inc., R&G Construction Company, and Eggers Construction Company, Inc. v. Grandfather Holding Company, LLC and Mountain Community Bank, a Branch of Carter County Bank	Def's (Mountain Community Bank) Motion to Strike Reply Brief	Dismissed as Moot **Beasley, J., Recused**
496P12	State v. Samuel Francis White	Def's *Pro Se* Motion for PDR (COAP12-891)	Dismissed
497P12-2	State v. Jay Mikal Brooks-Bey	Def's *Pro Se* Motion for NOA (COAP12-994)	Dismissed *Ex Mero Motu*
499P12	State v. Wayne Anthony Huss	1. State's Motion for Temporary Stay (COA12-250) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/10/12** 2. Allowed 3. Allowed **Beasley, J., Recused**
501P12	State v. Jerry Wade Grice	1. State's Motion for Temporary Stay (COA12-577) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/10/12** 2. Allowed 3. Allowed
511P12	Marty L. Sellers, Employee v. McArthur Supply, Employer; Penn National Claims, Carrier	1. Defs' Motion for Temporary Stay (COA12-700) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **12/13/12** Dissolved the Stay **06/12/13** 2. Denied 3. Denied

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533P12	State v. Billy Boyett	1. State's Motion for Temporary Stay (COA12-222)	1. Allowed **12/21/12** Dissolved the Stay **06/12/13;** See Special Order
		2. State's Petition for *Writ of Supersedeas*	2. See Special Order
		3. State's PDR Under N.C.G.S. § 7A-31	3. See Special Order
		4. State's Motion to Deem PDR Timely Filed	4. See Special Order
		5. State's Motion in the Alternative to Consider PDR as a PWC	5. See Special Order
		6. State's PWC to Review Decision of COA	6. See Special Order **Beasley, J., Recused**
534P12	James O. Dixon, II v. Jennifer Brooke Gordon (now McLeod)	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-660)	Denied
556A99-2	State v. Carlette Elizabeth Parker	Def's PWC to Review Order of Superior Court of Wake County	Denied

APPENDIXES

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING ELECTION AND APPOINTMENT OF STATE BAR COUNCILORS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING REINSTATEMENT FROM SUSPENSION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PARALEGAL CERTIFICATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PARALEGAL CERTIFICATION

SECOND SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURES FOR THE NORTH CAROLINA EFILING PILOT PROJECT

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING ELECTION AND APPOINTMENT OF STATE BAR COUNCILORS

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 19, 2013.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning election and appointment of State Bar councilors, as particularly set forth in 27 N.C.A.C. 1A, Section .0800, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0800, Election and Appointment of State Bar Councilors

.0802 Election—When Held; Notice; Nominations

(a) Every judicial district bar, in any calendar year at the end of which the term of one or more of its councilors will expire, shall fill said vacancy or vacancies at an election to be held during that year.

…

(e) The notice shall state the date, time, and place of the election, give the number of vacancies to be filled, identify how and to whom nominations may be made before the election, and advise that all elections must be by a majority of the votes cast. If the election will be held at a meeting of the bar, the notice will also advise that additional nominations may be made from the floor at the meeting itself.

In judicial districts that permit elections by mail or early voting, the notice to members shall advise that nominations may be made in writing directed to the president of the district bar and received prior to a date set out in the notice. Sufficient notice shall be provided to permit nominations received from district bar members to be included on the printed ballots.

.0806 Procedures Governing Early Voting

(a) Judicial district bars may adopt bylaws permitting early voting for up to 10 business days prior to a councilor election, in accordance with procedures approved by the NC State Bar Council and as set out in this subchapter.

(b) Only active members of the judicial district bar may participate in early voting.

(c) In districts that permit early voting, the notice sent to members referred to in Rule .0802(e) of this subchapter shall advise that early voting will be permitted, and shall identify the locations, dates, and hours for early voting. The notice shall also advise that nominations may be made in writing directed to the president of the district bar and received prior to a date set out in the notice. Sufficient notice shall be provided to permit nominations received from district bar members to be included on the printed ballots.

(d) The notice sent to members referred to in Rule .0802(e) of this subchapter shall be placed in the United States Mail, postage prepaid, at least 30 days prior to the first day of the early voting period.

(e) Write-in candidates shall be permitted during the early voting period and at the election, and the instructions shall so state.

(f) Early voting locations and hours must be reasonably accessible to all active members of the judicial district.

~~.0806~~ .0807 Vacancies

[Rule is unchanged.]
[Re-numbering remaining rules in this section.]

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 19, 2013.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 27th day of August, 2013.

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 27th day of August, 2013.

s/Cheri Beasley
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING REINSTATEMENT FROM SUSPENSION

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 19, 2013.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning reinstatement from suspension, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

.0904 Reinstatement from Suspension

(a) Compliance Within 30 Days of Service of Suspension Order.

…

(f) Reinstatement by Secretary of State Bar. At any time during the year after the effective date of a suspension order ~~and prior to the next meeting of the Administrative Committee~~, a suspended member may petition for reinstatement pursuant to paragraphs (b) and (c) of this rule and may be reinstated by the secretary of the State Bar upon a finding that the suspended member has complied with or fulfilled the obligations of membership set forth in the order; there are no issues relating to the suspended member's character or fitness; and the suspended member has paid the costs of the suspension and reinstatement procedure including the costs of service and the reinstatement fee. Reinstatement by the secretary is discretionary. If the secretary declines to reinstate a member, the member's petition shall be submitted to the Administrative Committee at its next meeting and the procedure for review of the reinstatement petition shall be as set forth in Rule .0902(c)-(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 April 19, 2013.

Given over my hand and the Seal of the North Carolina State Bar, this 13th day of August, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 27th day of August, 2013.

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 27th day of August, 2013.

s/Cheri Beasley
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 19, 2013.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .1700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1700, The Plan of Legal Specialization

.1720 Minimum Standards for Certification of Specialists

(a) To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the board for the particular area of specialty.

(1) The applicant must be licensed in a jurisdiction of the United States for at least five years immediately preceding his or her application and must be licensed in North Carolina for at least three years immediately preceding his or her application. The applicant must be currently in good standing to practice law in this state and the applicant's disciplinary record with the courts, the North Carolina State Bar, and any other government licensing agency must support qualification in the specialty.

(2) …

(b) …

.1721 Minimum Standards for Continued Certification of Specialists

(a) The period of certification as a specialist shall be five years. During such period the board or appropriate specialty committee may require evidence from the specialist of his or her continued qualification for certification as a specialist, and the specialist must consent to inquiry by the board, or appropriate specialty committee of lawyers and judges, the appropriate disciplinary body, or others in the community regarding the specialist's continued competence and qualification to be certified as a specialist. Application for and approval of continued certification as a spe-

cialist shall be required prior to the end of each five-year period. To qualify for continued certification as a specialist, a lawyer applicant must pay any required fee, must demonstrate to the board with respect to the specialty both continued knowledge of the law of this state and continued competence and must comply with the following minimum standards.

(1) The specialist's disciplinary record with the courts, the North Carolina State Bar, and any other government licensing agency supports qualification in the specialty.

~~(1)~~ (2) …

[Re-numbering 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 April 19, 2013.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 27th day of August, 2013.

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 27th day of August, 2013.

s/Cheri Beasley
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PARALEGAL CERTIFICATION

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 19, 2013.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

.0122 Right to Review and Appeal to Council

(a) Lapsed Certification.

An individual whose certification has lapsed pursuant to Rule .0120(c) of this subchapter for failure to complete all of the requirements for renewal within the prescribed time limit shall have the right to request reinstatement for good cause shown. A request for reinstatement shall be in writing, must state the personal circumstances prohibiting or substantially impeding satisfaction of the requirements for renewal within the prescribed time limit, and must be made within 90 days of the date notice of lapse is mailed to the individual. The request for reinstatement shall be reviewed on the written record and ruled upon by the board. There shall be no other right to review by the board or appeal to the council under this rule.

(b) ~~(a)~~ Denial of Certification or Continued Certification.

An individual who is denied certification or continued certification as a paralegal or whose certification is suspended or revoked shall have the right to a review before the board pursuant to the procedures set forth below and, thereafter, the right to appeal the board's ruling thereon to the council under such rules and regulations as the council may prescribe.

(1) ~~(b)~~ Notification of the Decision of the Board.

(2) ~~(c)~~ Request for Review by the Board.

(3) ~~(d)~~ Review by the Board.

(A) ~~(1)~~ Review on the Record.

(B) ~~(2)~~ Review Hearing.

(C) ~~(3)~~ Decision of the Panel.

(**c**) ~~(e)~~ **Failure of Written Examination.**

(1) ~~(f)~~ Request for Review by the Board.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 19, 2013.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 27th day of August, 2013.

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 27th day of August, 2013.

s/Cheri Beasley
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PARALEGAL CERTIFICATION

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 19, 2013.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning paralegal certification, as particularly set forth in 27 N.C.A.C. 1G Section .0200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Section .0200 The Plan for Certification of Paralegals

.0203 General Course Approval

(a) Approval—Continuing education activities, not otherwise approved or accredited by the North Carolina State Bar Board of Continuing Legal Education, may be approved upon the written application of a sponsor, or of a certified paralegal on an individual program basis. An application for continuing paralegal education (CPE) approval shall meet the following requirements:

(1) If advance approval is requested by a sponsor, the application and supporting documentation (i.e., the agenda with timeline, speaker information, and a description of the written materials) shall be submitted at least 45 days prior to the date on which the course or program is scheduled. If advance approval is requested by a certified paralegal, the application need not include a complete set of supporting documentation.

(2) <u>If more than five certified paralegals request approval of a particular program, either in advance of the date on which the course or program is scheduled or subsequent to that date, the program will not be accredited unless the sponsor applies for approval of the program and pays the accreditation fee set forth in Rule .0204.</u>

(3) (<u>2</u>)

[Re-numbering remaining paragraphs.]

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 19, 2013.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 27th day of August, 2013.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 27th day of August, 2013.

s/Cheri Beasley
For the Court

IN THE SUPREME COURT OF NORTH CAROLINA

SECOND SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE NORTH CAROLINA eFILING PILOT PROJECT

Adopted May 26, 2009, *nunc pro tunc* May 15, 2009, and Amended August 27, 2013, *nunc pro tunc* June 24, 2013

RULE 1 – INTRODUCTION

1.1—Citation to Rules. These rules shall be known as the "Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project," and may be cited as the "eFiling Rules." A particular rule may be cited as "eFiling Rule ___."

1.2—Authority and Effective Date. The eFiling Rules are promulgated by the Supreme Court of North Carolina pursuant to G.S. 7A-49.5. They are effective as of May 15, 2009, and as amended from time to time.

1.3—Scope and Purpose. The eFiling Rules apply to civil superior court cases and to foreclosures under power of sale filed on or after the effective date in Chowan and Davidson Counties. Upon addition of Wake County to the pilot project by the North Carolina Administrative Office of the Courts (the "AOC"), these rules shall apply to civil superior court cases and to foreclosures under power of sale filed in Wake County on or after the effective date of the implementation of the pilot project in Wake County, and the public announcement thereof by AOC. In addition, these rules apply to any designated case types and in any counties upon the implementation of the eFiling project in any other counties and the public announcement thereof by the AOC. In general, these rules initially allow, but do not mandate, electronic filing by North Carolina licensed attorneys and court officials of pleadings and other documents required to be filed with the court by the North Carolina Rules of Civil Procedure ("Rules of Civil Procedure"), or otherwise under North Carolina law, and permit electronic notification of the electronic filing of documents between attorneys. Initially, they do not permit electronic filing by *pro se* parties or attorneys not licensed by the State of North Carolina, and they do not permit electronic filing of documents in cases not initially filed electronically. Upon the addition of Alamance County or other counties to the pilot project by the AOC, the electronic filing of civil domestic violence cases by pro se parties, acting through domestic violence center personnel approved by the Chief District Court Judge, shall be permitted upon the implementation of the eFiling project in any such counties and the public announcement thereof by AOC.

1.4—Integration with Other Rules. These rules supplement the Rules of Civil Procedure and the General Rules of Practice for Superior and District Courts (the "General Rules"). The filing and service of documents in accordance with the eFiling Rules is deemed to comply with the Rules of Civil Procedure and the General Rules. If a conflict exists between the eFiling Rules and the Rules of Civil Procedure or the General Rules, the eFiling Rules shall control.

RULE 2 – DEFINITIONS

2.1—"Cloak" means the process by which portions of an original document within the court's document management system are obscured when viewed electronically by all non-court personnel other than parties to the case.

2.2—"Document" means data filed electronically under the eFiling Rules.

2.3—"eFiler" means a holder who makes, or who attempts, under eFiling Rule 5, to make an electronic filing or who authorizes another person to make an electronic filing using the holder's electronic identity.

2.4—"Electronic Identity" means the combination of username and password issued to a person by the AOC under eFiling Rule 3.1.

2.5—"Holder" means a person with an AOC approved electronic identity.

RULE 3 – ELECTRONIC IDENTITIES

3.1—Issuance. Upon application and upon completion of the training, if any, required by the AOC, the AOC shall issue an electronic identity to clerk personnel, judicial support staff, domestic violence center personnel, county sheriff personnel, magistrates, and judges in the affected counties, who are approved by the Chief District Court Judge and Senior Resident Superior Court Judge (and, for inquiry purposes only, law enforcement officers or other authorized users), as well as to any attorney who

(a) is licensed to practice law in this state;

(b) has pending or intends to file or appear in a civil superior court case or a foreclosure under power of sale in a pilot county;

(c) designates a valid and operational email address; and

(d) provides all other information required by the AOC.

3.2—Scope of Electronic Identity. Electronic identities are not case specific.

3.3—Responsibility of Holder. Each holder is responsible for the confidentiality, security, and use of the holder's electronic identity. If an electronic identity becomes compromised, or any organization or affiliation change occurs, the holder shall immediately notify the AOC and request a change to the holder's user name, password or profile information as appropriate.

3.4—Effect of Use. Use of an electronic identity constitutes:

(a) an agreement by the holder to comply with the eFiling Rules;

(b) an appearance in the matter by the holder; and

(c) acknowledgement that the holder's designated email address is current.

3.5—Use by Others. If a holder authorizes another person to file using the holder's electronic identity, the holder retains full responsibility for any filing by the authorized person, and the filing has the same effect as use by the holder. An electronic filing by use of an electronic identity is deemed to have been made with the authorization of the holder unless the contrary is shown by the holder to the satisfaction of the trier of fact by clear and convincing evidence. A filing made by use of an electronic identity without authorization of the holder is void.

RULE 4—SIGNATURES AND AUTHENTICITY

4.1—Signatures. An electronically filed document requiring a signature is deemed to be signed by the eFiler pursuant to Rule 11 of the Rules of Civil Procedure, regardless of the existence of a handwritten signature on the paper, and must contain the name, postal address, e-mail address, and State Bar number of the eFiler, and the name of the eFiler preceded by the symbol "/s/" in the location at which a handwritten signature normally would appear. However, affidavits and exhibits to pleadings with the original handwritten signatures must be scanned and filed in Portable Document Format (PDF) or TIFF format. Verification or notarization of documents to be filed by domestic violence victims may be done in person or before a magistrate or authorized clerk personnel via telephone audio/visual transmission through an AOC approved system.

4.2—Signature of Person(s) Other than eFiler. An eFiler who files a document signed by two or more persons representing different parties shall confirm that all persons signing the document have agreed to its content, represent to the court in the body of the document or in an accompanying affidavit that the agreement has been obtained, and insert in the location where each handwritten signature otherwise would appear the typed signature of each person, other than the person filing, preceded by the symbol "/s/" and followed by the words "by permission." Thus, the correct format for the typed signature of a person other than the person filing is: "/s/ Jane Doe by permission." Unless required by these Rules, a document filed electronically should not be filed in an optically scanned format displaying an actual signature.

4.3—Authenticity. Documents filed electronically in accordance with the eFiling Rules and accurate printouts of such documents shall be deemed authentic.

4.4—Preservation of Originals. The eFiler shall retain originals of each filed document until a final determination of the case is made by a court of competent jurisdiction. The court may order the eFiler to produce the original document.

RULE 5—ELECTRONIC FILING AND SERVICE

5.1—Permissive Electronic Filing. Pending implementation of revised rules by the North Carolina Supreme Court, electronic filing is permitted only to commence a proceeding or in a proceeding that was commenced electronically. Electronic filing is not required to commence a proceeding. Subsequent filings made in a proceeding commenced electronically may be electronic or non-electronic at the option of the filer.

5.2—Exceptions to Electronic Delivery. Pleadings required to be served under Rule 4 and subpoenas issued pursuant to Rule 45 of the Rules of Civil Procedure must be served as provided in those rules and not by use of the electronic filing and service system. Unless otherwise provided in a case management order or by stipulation, filing by or service upon a *pro se* party is governed by eFiling Rule 5.3.

5.3—*Pro se* Parties. Except as otherwise permitted in these Rules, a party not represented by counsel shall file, serve and receive documents pursuant to the Rules of Civil Procedure and the General Rules.

5.4—Format. Documents must be filed in PDF or TIFF format, or in some other format approved by the court, in black and white only, unless color is required to protect the evidentiary value of the document, and scanned at 300 dots per inch resolution.

5.5—Cover Sheet Not Required. Completion of the case initiation requirements of the electronic filing and service system, if it contains all the required fields and critical elements of the filing, shall constitute compliance with the General Rules as well as G.S. 7A-34.1, and no separate AOC cover sheet is required.

5.6—Payment of Filing Fees. Payment of any applicable filing and convenience fees must be done at the time of filing through the electronic payment component of the electronic filing and service system. Payments shall not include service of process fees or any other fees payable to any entity other than the clerk of superior court.

5.7—Effectiveness of Filing. Transmission of a document to the electronic filing system in accordance with the eFiling Rules, together with the receipt by the eFiler of the automatically generated notice showing electronic receipt of the submission by the court, constitutes filing under the North Carolina General Statutes, the Rules of Civil Procedure, and the General Rules. An electronic filing is not deemed to be received by the court without receipt by the eFiler of such notice. If, upon review by the staff of the clerk of superior court, it appears that the filing is inaccessible or unreadable, or that prior approval is required for the filing under G.S. 1-110, or for any other authorized reason, the clerk's office shall send an electronic notice thereof to the eFiler. Upon review and acceptance of a completed filing, personnel in the clerk's office shall send an electronic notice thereof to the eFiler. If the filing is of a case initiating pleading, personnel in the clerk's office shall assign a case number to the filing and include that case number in said notice. As soon as reasonably possible thereafter, the clerk's office shall index or enter the relevant information into the court's civil case processing system (VCAP).

5.8—Certificate of Service. Pending implementation of the court's document management system, and the integration of the electronic filing and service system with the court's civil case processing system, a notice to the eFiler showing electronic receipt by the court of a filing does not constitute proof of service of a document upon any party. A certificate of service must be included with all documents, including those filed electronically, indicating thereon that service was or will be accomplished for applicable parties and indicating how service was or will be accomplished as to those parties.

5.9—Procedure When No Receipt Is Received. If a receipt with the status of "Received" is not received by the eFiler, the eFiler should assume the filing has not occurred. In that case, the eFiler shall make a paper filing with the clerk and serve the document on all other parties by the most reasonably expedient method of transmission available to the eFiler, except that pleadings required to be served under Rule 4 and subpoenas issued pursuant to Rule 45 of the Rules of Civil Procedure must be served as provided in those rules.

5.10—Retransmission of Filed Document. After implementation of the court's document management system, if, after filing a document electronically, a party discovers that the version of the document available for viewing through the electronic filing and service system is incomplete, illegible, or otherwise does not conform to the document as transmitted when filed, the party shall notify the clerk immediately and, if necessary, transmit an amended document, together with an affidavit explaining the necessity for the transmission.

5.11—Determination of Filing Date and Time. Documents may be electronically filed 24 hours a day, except when the system is down for maintenance, file saves or other causes. For the purpose of determining the timeliness of a filing received pursuant to Rule 5.7, the filing is deemed to have occurred at the date and time recorded on the receipt showing a status of "Received."

5.12—Issuance of Summons. At case initiation, the eFiler shall include in the filing one or more summons to be issued by the clerk. Upon the electronic filing of a counterclaim, crossclaim, or third-party complaint, the eFiler may include in the filing one or more summons to be issued by the clerk. Pursuant to Rule 4 of the Rules of Civil Procedure, the clerk shall sign and issue those summons and scan them into the electronic filing and service system.In civil domestic violence cases, magistrates are authorized to sign and issue summons electronically or in paper form. The eFiler shall print copies of the filed pleading and summons to be used for service of process. Copies of documents to be served, any summons, and all fees associated with service shall be delivered by the eFiler to the process server. Copies of civil domestic violence summons, complaints, orders, and other case documents may be transmitted by the magistrate or clerk to the sheriff electronically or in paper form for service of printed copies thereof. Documents filed subsequent to the initial pleading shall contain a certificate of service as provided in Rule 5.8. Returns of service by sheriff's personnel of civil domestic violence summons, complaints, orders, and other case documents may be transmitted to and filed with the clerk of superior court via the electronic filing system or in paper form.

RULE 6—SEALED DOCUMENTS AND PRIVATE INFORMATION

6.1—Filing of Sealed Documents. A motion to file a document under seal may be filed electronically or in paper form and designated "Motion to Seal." A document which is the subject of a motion to seal must be submitted to the court in paper form for *in camera* review. Documents submitted under seal in paper form shall be retained by the clerk under seal until a final ruling is made on the motion to seal. The court may partially grant the motion and order the submission of a redacted version to be made a part of the record. If the court authorizes the filing of a redacted version, the filer shall perform the redaction authorized by the court, and re-file the redacted version in paper form. A paper copy of any order authorizing the filing of a document under seal or the filing of a redacted document must be attached to the document and delivered to the clerk's office. Upon implementation of the court's document management system, documents for which a motion to seal was denied, documents

ments unsealed by order of the court, and redacted versions ordered filed by the court shall be scanned into the electronic filing and service system by personnel in the clerk's office as soon as reasonably possible. Sealed documents and original versions of documents later ordered filed in redacted form shall be retained in paper form under seal pending further orders of the court.

6.2—Requests by a Party for Sealing of Previously Filed Documents. Any attorney licensed in North Carolina and representing a party may file, electronically or in paper form, a motion to seal all or part of any previously filed document, regardless of who previously filed that document. A party not represented by counsel may file such a motion in paper form only. The court may partially grant the motion and order the movant to submit a redacted version to be made a part of the record. A paper copy of any order authorizing the filing of a redacted replacement document must be attached to the redacted version and delivered to the clerk's office. As soon as practicable after receiving the order sealing a previously filed document or replacing it with a newly filed redacted version, the clerk shall print, seal and retain the original document in paper form pending further orders of the court, and, when so ordered, remove and replace the original document in the electronic filing and service system with the redacted version.

6.3—Private Information. Except where otherwise expressly required by law, filers must comply with G.S. 132-1.10(d) to exclude or partially describe sensitive, personal or identifying information such as any social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords from documents filed with the court. In addition, minors may be identified by initials, and, unless otherwise required by law, social security numbers may be identified by the last four numbers. It is the sole responsibility of the filer to omit or redact non-public and unneeded sensitive information within a document. The clerk of superior court will not review any document to determine whether it includes personal information.

6.4—Requests for Redaction or Removal of a Document by a Non-party. Any person not a party to a proceeding has the right to request the removal or redaction of all or part of a document previously filed and available on-line for public viewing in the electronic filing and service system, if the document contains sensitive, personal or identifying information about the requester, by filing a request in compliance with G.S. 132-1.10(f). As soon as practicable after the receipt of such a request, the clerk shall (1) prepare a redacted ver-

redacted version of the electronic document removing the identifying information identified by the requester, or (2) otherwise cloak the affected portions of the document in the electronic filing and service system, so that the designated portions of the document are not viewable by the public on-line. The request for redaction or removal is not a public record and access thereto is restricted to the clerk of superior court or the clerk's staff, or upon order of the court. The original unredacted or uncloaked electronic version of the document shall remain available to parties to the proceeding.

RULE 7—COMMUNICATION OF MATERIAL NOT FILED

7.1—Communication with Court. A communication with the court that is not filed electronically must be simultaneously sent by the author to all attorneys for parties in the case. If a party is not represented by counsel, or if an attorney cannot receive e-mail, the communication shall be sent to such party or attorney by the most reasonably expedient method available to the sending party. The communication to other parties shall contain an indication, such as "cc via e-mail," indicating the method of transmission.

7.2—Discovery. Discovery and other materials required to be served on other counsel or a party, and not required to be filed with the court, shall not be electronically filed with the court.

RULE 8—GOOD FAITH EFFORTS

Parties shall endeavor reasonably, and in good faith, to resolve technical incompatibilities or other obstacles to electronic communications among them, provided that no extensive manual reformatting of documents is required. If a party asserts that it did not receive an e-mail communication or could not fully access its contents, the sending party shall promptly forward the communication to the party by other means. Any attempt or effort to avoid, compromise or alter any security element of the electronic filing and service system is strictly prohibited and may subject the offending party to civil and criminal liability. Any person becoming aware of evidence of such an occurrence shall immediately notify the court.

RULE 9—ORDERS, DECREES AND JUDGMENTS

9.1—Proposed Order or Judgment. Any proposed order or judgment shall be tendered to the court in paper form or as an electronic filing in Microsoft Office Word 2000 format or other file format approved by the court.

9.2—Entry of Order, Judgment and Other Matters. Upon implementation of the document management component of the elec-

tronic filing and service system, a judge, or the clerk of superior court when acting as the trier of fact, or a magistrate in civil domestic violence matters, may file electronically all orders, decrees, judgments and other docket matters. Such filing shall constitute entry of the order, decree, judgment or other matter pursuant to Rule 58 of the Rules of Civil Procedure. Each order, judgment, or decree, or other document must bear the date and the name of the judge, or clerk, or magistrate issuing the order. Signed orders, decrees, ~~and~~ judgments, and other matters in paper form shall be forwarded as soon as reasonably possible by the judge or magistrate to the clerk of superior court, and shall be deemed entered under Rule 58 of the Rules of Civil Procedure when filed with the clerk. As soon as reasonably possible, personnel in the clerk's office shall scan the document into the electronic filing and service system.

9.3—Notice of Entry. After implementation of the court's document management system and the integration of the electronic filing and service system with the court's civil case processing system, immediately upon the electronic entry of an order, decree, judgment or other matter, the electronic filing and service system shall broadcast a notification of electronic filing to all persons registered electronically to participate in the case. Transmission of the notice of entry constitutes service pursuant to Rule 58 of the Rules of Civil Procedure.

These Second Supplemental Rules for the North Carolina eFiling Pilot Project shall be effective on the 24th day of June, 2013.

Adopted by the Court in Conference this 27th day of August, 2013, *nunc pro tunc* 24 June 2013. These Rules shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These Rules shall also be published as quickly as practicable on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

s/Beasley, J.
Beasley, J.
For the Court

Witness my hand and the Seal of the Supreme Court of North Carolina, this the 7th, day of November, 2013.

s/Christie Speir Roeder
Christie Speir Roeder

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