NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

MARK D. MARTIN[1]

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ROBIN E. HUDSON
BARBARA A. JACKSON
CHERI BEASLEY
ROBERT N. HUNTER, JR[2]
SAMUEL J. ERVIN, IV[3]

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JAMES G. EXUM, JR.
BURLEY B. MITCHELL, JR.
HENRY E. FRYE
I. BEVERLY LAKE, JR.
SARAH PARKER[4]

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J. PHIL CARLTON
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JAMES A. WYNN, JR.
FRANKLIN E. FREEMAN, JR.
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PATRICIA TIMMONS-GOODSON

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Thomas P. Davis

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Marion R. Warren[7]

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David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Kimberly Woodell Sieredzki
Jennifer C. Peterson

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1. Appointed Chief Justice 19 August 2014; sworn in 1 September 2014. Elected Chief Justice 4 November 2014; sworn in 5 January 2015.
2. Appointed 6 September 2014. Term ended 31 December 2014.
3. Elected 4 November 2014; sworn in 1 January 2015.
4. Retired 31 August 2014.
5. Deceased 3 May 2015.
6. Retired 1 May 2015.
7. Appointed 1 May 2015.

THE COURT OF APPEALS

OF

NORTH CAROLINA

Chief Judge

LINDA M. McGEE

Judges

WANDA G. BRYANT
ANN MARIE CALABRIA
RICHARD A. ELMORE
SANFORD L. STEELMAN, JR.
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LINDA STEPHENS
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ROBERT N. HUNTER, JR.[1]
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CHRIS DILLON
MARK DAVIS
RICHARD D. DIETZ
JOHN M. TYSON[2]
LUCY INMAN[3]

Emergency Recall Judges

GERALD ARNOLD
RALPH A. WALKER

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN

Former Judges

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JAMES H. CARSON, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
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E. MAURICE BRASWELL
WILLIS P. WHICHARD
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
HUGH B. CAMPBELL, JR.
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JOHN S. ARROWOOD
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BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER[5]
LISA C. BELL[6]
SAMUEL J. ERVIN IV[7]

1. Appointed 1 January 2015.
2. Sworn in 1 January 2015.
3. Sworn in 1 January 2015.
4. Deceased 3 May 2015.
5. Retired 31 December 2014.
6. Resigned 31 December 2014.
7. Resigned 31 December 2014.

Clerk
JOHN H. CONNELL

Administrative Counsel
DANIEL M. HORNE, JR.

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis

Assistant Director
Daniel M. Horne, Jr.

Staff Attorneys

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Bryan A. Meer
Eugene H. Soar
Nikiann Tarantino Gray
David Alan Lagos
Michael W. Rogers
Lauren M. Tierney

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
	Marvin Blount	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	W. Douglas Parsons	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
	Howard E. Manning, Jr.	Raleigh
	Michael R. Morgan	Raleigh
	Paul C. Gessner	Raleigh
	Paul C. Ridgeway	Raleigh
	G. Bryan Collins, Jr.	Raleigh
14	Orlando F. Hudson, Jr.	Durham
	James E. Hardin, Jr.	Hillsborough
	Elaine Bushfan	Durham
	Michael O'Foghludha	Durham
15A	Wayne Abernathy	Burlington
	James Roberson	Burlington
	Carl R. Fox	Chapel Hill
	R. Allen Baddour	Chapel Hill

DISTRICT	JUDGES	ADDRESS
	Fourth Division	
11A	C. Winston Gilchrist	Lillington
11B	Thomas H. Lock	Smithfield
12	James F. Ammons, Jr.	Fayetteville
	Claire Hill	Fayetteville
	Gale M. Adams	Fayetteville
	Mary Ann Tally	Fayetteville
13A	Douglas B. Sasser	Whiteville
13B	Ola M. Lewis	Southport
16A	Richard T. Brown	Laurinburg
	Tanya T. Wallace	Rockingham
16B	Robert F. Floyd, Jr.	Fairmont
	James Gregory Bell	Lumberton
19D	James M. Webb	Southern Pines
	Fifth Division	
17A	Edwin Graves Wilson, Jr.	Eden
	Stanley L. Allen	Sandy Ridge
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
	Susan Bray	Greensboro
19B	Vance Bradford Long	Asheboro
21	L. Todd Burke	Winston-Salem
	David L. Hall	Winston-Salem
	Eric C. Morgan	Kernersville
	Richard S. Gottlieb	Winston-Salem
23	Michael Duncan	Wilkesboro
	Sixth Division	
19A	Martin B. McGee	Concord
19C	Anna Mills Wagoner	Salisbury
20A	Kevin M. Bridges	Oakboro
20B	W. David Lee	Monroe
	Christopher W. Bragg	Monroe
22A	Joseph Crosswhite	Statesville
	Julia Lynn Gullett	Statesville
22B	Mark E. Klass	Lexington
	Theodore S. Royster, Jr.	Lexington
	Seventh Division	
25A	Robert C. Ervin	Morganton
	Daniel A.Kuehnert	Morganton
25B	Nathaniel J. Poovey	Newton
	Gregory R. Hayes	Hickory
26	W. Robert Bell	Charlotte

DISTRICT	JUDGES	ADDRESS
	YVONNE MIMS EVANS	Charlotte
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	ERIC L. LEVINSON	Charlotte
	HUGH LEWIS	Charlotte
	LISA C. BELL	Charlotte
	CARLA ARCHIE	Charlotte
27A	JESSE B. CALDWELL III	Gastonia
	ROBERT T. SUMNER	Gastonia
27B	FORREST DONALD BRIDGES	Shelby
	W. TODD POMEROY	Lincolnton
	Eighth Division	
24	GARY GAVENUS	Burnsville
	R. GREGORY HORNE	Boone
28	ALAN Z. THORNBURG	Asheville
	MARVIN POPE	Asheville
29A	J. THOMAS DAVIS	Forest City
29B	MARK E. POWELL	Hendersonville
30A	WILLIAM H. COWARD	Highlands
30B	BRADLEY B. LETTS	Hazelwood

SPECIAL JUDGES

LOUIS A. BLEDSOE, III	Charlotte
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BEECHER GRAY	Durham
A. ROBINSON HASSELL	Greensboro
KENDRA D. HILL	Raleigh
JEFFERY P. HUNT	Brevard
JACK W. JENKINS	Morehead City
GREGORY P. MCGUIRE	Raleigh
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EBERN T. WATSON, III	Wilmington
REUBEN F. YOUNG	Raleigh

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BEVERLY T. BEAL	Lenoir
MICHAEL E. BEALE	Rockingham
RICHARD D. BONER, JR.[1]	Charlotte
C. PRESTON CORNELIUS	Mooresville
THOMAS D. HAIGWOOD	Greenville
CLARENCE E. HORTON, JR.	Kannapolis
ROBERT F. JOHNSON	Burlington
TIMOTHY S. KINCAID[2]	Newton
CHARLES C. LAMM, JR.	Terrell
RUSSELL J. LANIER, JR.	Wallace
JERRY CASH MARTIN	Pilot Mountain

DISTRICT	JUDGES	ADDRESS
	James W. Morgan[3]	Shelby
	Calvin Murphy	Charlotte
	J. Richard Parker	Manteo
	John W. Smith[4]	Raleigh
	Ronald E. Spivey[5]	Winston-Salem
	Ronald L. Stephens	Durham
	Kenneth C. Titus	Durham
	Joseph E. Turner	Greensboro
	William Z. Wood, Jr.[6]	Lewisville

RETIRED/RECALLED JUDGES

W. Douglas Albright	Greensboro
J. B. Allen, Jr.	Burlington
Henry V. Barnette, Jr.	Raleigh
Anthony M. Brannon	Durham
Frank R. Brown	Tarboro
Stafford G. Bullock	Raleigh
H. William Constangy	Charlotte
B. Craig Ellis	Laurinburg
Larry G. Ford	Salisbury
Marvin K. Gray	Charlotte
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Knox V. Jenkins	Four Oaks
John R. Jolly, Jr.	Raleigh
Robert D. Lewis	Asheville
Julius A. Rousseau, Jr.	Wilkesboro
Thomas W. Seay	Spencer
W. Ervin Spainhour	Concord
James C. Spencer	Burlington
Jack A. Thompson	Fayetteville
Ralph A. Walker, Jr.	Raleigh

1. Sworn in 7 April 2015.
2. Sworn in 24 March 2015.
3. Sworn in 17 April 2015.
4. Sworn in 29 April 2015.
5. Sworn in 14 April 2015.
6. Sworn in 15 April 2015.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	Edgar L. Barnes (Chief)	Manteo
	Amber Davis	Wanchese
	Eula E. Reid	Elizabeth City
	Robert P. Trivette	Kitty Hawk
	Meader W. Harris, III	Edenton
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
	G. Galen Braddy	Grimesland
	Brian DeSoto	Greenville
	Lee F. Teague	Greenville
3B	L. Walter Mills (Chief)	New Bern
	Paul M. Quinn	Atlantic Beach
	Karen A. Alexander	New Bern
	Peter Mack, Jr.	New Bern
	W. David McFadyen, III	New Bern
	Clinton Rowe	New Bern
4	Paul A. Hardison (Chief)	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	Jacksonville
	William B. Sutton[1]	Clinton
5	J. H. Corpening, II (Chief)	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	Wilmington
	Lindsey M. Luther	Wilmington
6	Brenda G. Branch (Chief)	Roanoke Rapids
	W. Turner Stephenson, III	Roanoke Rapids
	Teresa R. Freeman	Roanoke Rapids
	Vershenia B. Moody	Windsor
7	William Charles Farris (Chief)	Wilson
	John M. Britt	Tarboro
	Pell C. Cooper	Rocky Mount
	William G. Stewart	Wilson
	John J. Covolo	Rocky Mount
	Anthony W. Brown	Spring Hope
	Wayne S. Boyette	Tarboro
8	David B. Brantley (Chief)	Goldsboro
	R. Leslie Turner	Pink Hall

DISTRICT	JUDGES	ADDRESS
	Timothy I. Finan[2]	Goldsboro
	Elizabeth A. Heath	Kinston
	Charles P. Gaylor, III	Goldsboro
	Ericka Y. James	Goldsboro
9	Daniel Fredrick Finch (Chief)	Oxford
	J. Henry Banks	Henderson
	John W. Davis	Louisburg
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	Amanda Stevenson	Oxford
9A	Mark E. Galloway (Chief)	Roxboro
	L. Michael Gentry	Pelham
10	Robert Blackwell Rader (Chief)	Raleigh
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	Craig Croom	Raleigh
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	Christine M. Walczyk	Raleigh
	Eric Craig Chasse	Raleigh
	Jacqueline L. Brewer	Apex
	Anna Elena Worley	Raleigh
	Ned Wilson Mangum	Raleigh
	Margaret Eagles	Raleigh
	Keith O. Gregory	Raleigh
	Michael J. Denning	Raleigh
	Louis B. Meyer, III	Raleigh
	Daniel J. Nagle	Raleigh
	Vartan A. Davidian	Raleigh
	Jefferson G. Griffin[3]	Raleigh
11	Jacquelyn L. Lee (Chief)	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
	Paul A. Holcombe	Smithfield
	Caron H. Stewart	Smithfield
	Mary H. Wells	Smithfield
	Joy A. Jones	Smithfield
12	Robert J. Stiehl, III (Chief)	Fayetteville
	Edward A. Pone	Parkton
	Talmage Baggett	Fayetteville
	David H. Hasty	Fayetteville
	Laura A. Devan	Fayetteville
	Toni S. King	Fayetteville
	Lou Oliveria	Fayetteville
	Cheri Siler-Mack	Fayetteville
	Stephen C. Stokes	Fayetteville
	April M. Smith	Fayetteville
13	Jerry A. Jolly (Chief)	Tabor City
	Marion R. Warren	Ash

DISTRICT	JUDGES	ADDRESS
	William F. Fairley	Southport
	Scott Ussery	Elizabethtown
	Sherry D. Tyler[4]	Tabor City
	Pauline Hankins	Tabor City
	Willie Fred Gore	Whiteville
14	Marcia H. Morey (Chief)	Durham
	James T. Hill	Durham
	William Andrew Marsh III	Durham
	Brian C. Wilks	Durham
	Patricia D. Evans	Durham
	Doretta Walker	Durham
	Fred Battaglia, Jr.	Durham
15A	Bradley Reid Allen, Sr. (Chief)	Burlington
	David Thomas Lambeth, Jr.	Burlington
	Kathryn W. Overby	Burlington
	Steven H. Messick[5]	Burlington
15B	Joseph M. Buckner (Chief)	Chapel Hill
	Charles T. Anderson	Chapel Hill
	Beverly A. Scarlett	Durham
	Lunsford Long	Chapel Hill
	James T. Bryan	Hillsborough
16A	Scott T. Brewer (Chief)	Monroe
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	Regina M. Joe	Raeford
	Amanda L. Wilson	Rockingham
	Michael A. Stone	Laurinburg
	Christopher W. Rhue	Laurinburg
16B	J. Stanley Carmical (Chief)	Lumberton
	Herbert L. Richardson	Lumberton
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	Judith Milsap Daniels	Lumberton
	William J. Moore	Maxton
17A	James A. Grogan (Chief)	Reidsville
	Chris Freeman	Wentworth
	Christine F. Strader	Reidsville
17B	Charles Mitchell Neaves, Jr. (Chief)	Elkin
	Spencer Gray Key, Jr.	Elkin
	Angela B. Puckett	Westfield
	William F. Southern III	King
18	Wendy M. Enochs (Chief)	Greensboro
	H. Thomas Jarrell, Jr.	High Point
	Susan R. Burch	High Point
	Theresa H. Vincent	Summerfield
	Kimberly Michelle Fletcher	Greensboro
	Linda L. Falls[6]	Greensboro
	Angela C. Foster	Greensboro
	Avery Michelle Crump	Browns Summit
	Betty J. Brown	Greensboro
	Jan H. Samet	Greensboro
	Angela B. Fox	Greensboro
	Tabatha Holliday	Greensboro
	Randle L. Jones	High Point

DISTRICT	JUDGES	ADDRESS
19A	William G. Hamby, Jr. (Chief)	Kannapolis
	Donna G. Hedgepeth Johnson	Concord
	Brent Cloninger	Mount Pleasant
	Christy E. Wilhelm	Concord
19B	Jayrene Russell Maness (Chief)	Carthage
	Lee W. Gavin	Asheboro
	Scott C. Etheridge	Asheboro
	James P. Hill, Jr.	Asheboro
	Donald W. Creed, Jr.	Asheboro
	Robert M. Wilkins	Asheboro
	Steve Bibey	Carthage
19C	Charles E. Brown (Chief)	Salisbury
	Beth Spencer Dixon	Salisbury
	William C. Kluttz, Jr.	Salisbury
	Kevin G. Eddinger	Salisbury
	Roy Marshall Bickett, Jr.	Salisbury
	James Randolph	Salisbury
20A	William Tucker (Chief)	Albemarle
	John R. Nance	Albemarle
20B	N. Hunt Gwyn (Chief)	Monroe
	Joseph J. Williams	Monroe
	William F. Helms	Matthews
	Stephen V. Higdon	Monroe
21	Lisa V. L. Menefee (Chief)	Winston-Salem
	William Thomas Graham, Jr.	Kernersville
	Victoria Lane Roemer	Winston-Salem
	Laurie L. Hutchins	Winston-Salem
	Lawrence J. Fine	Clemmons
	Denise S. Hartsfield	Winston-Salem
	George Bedsworth	Winston-Salem
	Camille D. Banks-Payne	Winston-Salem
	David Sipprell	Winston-Salem
	Gordon A. Miller	Winston-Salem
	Theodore Kazakos	Winston-Salem
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	David V. Byrd (Chief)	Wilkesboro
	Jeanie Reavis Houston	Yadkinville
	William Finley Brooks	Wilkesboro
	Robert Crumpton	Wilkesboro
24	Theodore Wright McEntire (Chief)	Spruce Pine
	F. Warren Hughes	Burnsville
	Hal Gene Harrison	Spruce Pine
25	Buford A. Cherry (Chief)	Hickory

DISTRICT	JUDGES	ADDRESS
	Sherrie Wilson Elliott	Newton
	Amy Sigmon Walker	Newton
	Robert A. Mullinax, Jr.	Newton
	Mark L. Killian	Hickory
	Clifton H. Smith	Hickory
	David W. Aycock	Hickory
	Wesley W. Barkley	Newton
	Richard S. Holloway[7]	Lenoir
26	Regan A. Miller (Chief)	Charlotte
	Louis A. Trosch, Jr.	Charlotte
	Rickye McKoy-Mitchell	Charlotte
	Becky Thorne Tin	Charlotte
	Christy Townley Mann	Charlotte
	Ronald C. Chapman	Charlotte
	Donnie Hoover	Charlotte
	Paige B. McThenia	Charlotte
	Kimberly Y. Best-Staton	Charlotte
	Charlotte Brown-Williams	Cornelius
	Elizabeth Thornton Trosch	Charlotte
	Jena P. Culler	Charlotte
	Tyyawdi M. Hands	Charlotte
	Karen Eady-Williams	Charlotte
	Donald Cureton, Jr.	Charlotte
	Sean Smith	Charlotte
	Matt Osman	Charlotte
	Gary Henderson	Charlotte
	David Strickland	Charlotte
	Alicia D. Brooks	Charlotte
	Yolanda M. Trotman	Charlotte
27A	Ralph C. Gingles, Jr. (Chief)	Gastonia
	Angela G. Hoyle	Belmont
	John K. Greenlee	Gastonia
	James A. Jackson	Gastonia
	Michael K. Lands	Gastonia
	Richard Abernethy	Gastonia
	Pennie M. Thrower	Gastonia
27B	Larry James Wilson (Chief)	Shelby
	K. Dean Black	Denver
	Ali B. Paksoy, Jr.	Shelby
	Meredith A. Shuford	Lincolnton
	Jeanette R. Reeves	Shelby
28	J. Calvin Hill (Chief)	Asheville
	Patricia Kaufmann Young	Asheville
	Julie M. Kepple	Asheville
	Andrea Dray	Asheville
	Ward D. Scott	Asheville
	Edwin D. Clontz	Candler
	Susan Marie Dotson-Smith	Asheville
29A	C. Randy Pool (Chief)	Marion
	Laura Anne Powell	Rutherfordton
	Robert K. Martelle	Rutherfordton
29B	Athena F. Brooks (Chief)	Fletcher
	Thomas M. Brittain, Jr.	Mills River

DISTRICT	JUDGES	ADDRESS
	PETER KNIGHT	Hendersonville
	EMILY COWAN	Hendersonville
30	RICHARD K. WALKER (Chief)	Hayesville
	MONICA HAYES LESLIE	Waynesville
	DONNA FORGA	Clyde
	ROY WIJEWICKRAMA	Waynesville
	KRISTINA L. EARWOOD	Waynesville
	TESSA S. SELLERS	Murphy

EMERGENCY JUDGES

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SHERRY FOWLER ALLOWAY	Greensboro
KYLE D. AUSTIN	Pineola
SARAH P. BAILEY	Rocky Mount
C. CHRISTOPHER BEAN[8]	Edenton
REBECCA W. BLACKMORE[9]	Wilmington
JOSEPH A. BLICK	Greenville
ROBERT M. BRADY[10]	Lenoir
SAMUEL CATHEY	Charlotte
ALBERT A. CORBETT, JR.[11]	Smithfield
SHELLY H. DESVOUSGES	Raleigh
J. KEATON FONVIELLE	Shelby
THOMAS G. FOSTER, JR.	Pleasant Green
DAVID K. FOX	Hendersonville
NANCY E. GORDAN[12]	Durham
JANE POWELL GRAY	Raleigh
JOYCE A. HAMILTON	Raleigh
RICHLYN D. HOLT	Waynesville
SHELLY S. HOLT	Wilmington
JAMES M. HONEYCUTT	Lexington
A. ELIZABETH KEEVER[13]	Fayetteville
WAYNE G. KIMBLE	Jacksonville
DAVID Q. LABARRE	Durham
WILLIAM C. LAWTON	Raleigh
HAROLD PAUL MCCOY, JR.	Halifax
WILLIAM G. MCILWAIN[14]	Wagram
LAWRENCE MCSWAIN	Greensboro
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L. SUZANNE OWSLEY	Hickory
DENNIS J. REDWING	Gastonia
ANNE B. SALISBURY	Cary
J. LARRY SENTER	Raleigh
JOSEPH E. SETZER, JR.	Franklinton
RUSSELL SHERRILL III	Raleigh
CATHERINE C. STEVENS	Chapel Hill
LEONARD W. THAGARD[16]	Clinton
JERRY WADDELL	Bryson City
FREDRICK B. WILKINS, JR.[17]	Reidsville

RETIRED/RECALLED JUDGES

CLAUDE W. ALLEN, JR.	Oxford
GRAFTON G. BEAMAN	Elizabeth City

Hugh B. Campbell, Jr.	Charlotte
Chester C. Davis	Winston-Salem
M. Patricia DeVine	Hillsborough
James R. Fullwood	Raleigh
Samuel G. Grimes	Washington
Lawrence Hammond, Jr.	Asheboro
Jane V. Harper	Charlotte
Joesph J. Harper.	Tarboro
John H. Horne, Jr.	Laurinburg
Philip F. Howerton, Jr.	Charlotte
William K. Hunter	High Point
Lillian B. Jordan	Randleman
James E. Martin	Greenville
Edward H. McCormick	Lillington
Fritz Y. Mercer, Jr.	Summerfield
Thomas F. Moore	Charlotte
J. Bruce Morton	Greensboro
Otis M. Oliver	Dobson
Nancy C. Phillips	Elizabethtown
Margaret L. Sharpe	Greensboro
J. Kent Washburn	Burlington
Charles W. Wilkinson, Jr.	Oxford

1. Appointed 26 March 2015.
2. Died on 30 June 2015.
3. Appointed 17 June 2015.
4. Resigned 31 December 2014.
5. Appointed 26 March 2015.
6. Retired on 30 June 2015.
7. Appointed 25 February 2015.
8. Appointed 11 March 2015.
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ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
ROY COOPER

Chief of Staff
KRISTI JONES

Deputy Chief of Staff
NELS ROSELAND

Chief Deputy Attorney General
GRAYSON G. KELLEY

Special Counsel
WILLIAM C. MCKINNEY

Senior Policy Advisor
JULIA WHITE

Solicitor General
JOHN F. MADDREY

Senior Deputy Attorneys General

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ROBERT MONTGOMERY
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ALEXANDER PETERS
REGINALD L. WATKINS
KATHLEEN M. WAYLETT

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WARD A. ZIMMERMAN

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CAROLE BIGGERS
KATHLEEN N. BOLTON

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Kimberly Callahan
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Janelle Varley
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Gaines M. Weaver
James A. Webster
Elizabeth J. Weese
Oliver G.Wheeler
Christopher H. Wilson
Donna B. Wojcik
Arthur Yancey
Ryan Zellar
Tamara S. Zmuda

DISTRICT ATTORNEYS

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1	Andy Womble	Elizabeth City
2	Seth Edwards	Washington
3A	Kimberly Robb	Greenville
3B	Scott Thomas	New Bern
4	Ernie Lee	Clinton
5	Ben David	Wilmington
6	Valerie Asbell	Ahoskie
7	Robert Evans	Rocky Mount
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9A	Wallace Bradsher	Roxboro
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27B	Mike Miller	Shelby
28	Todd Williams	Asheville
29A	Ted Bell	Marion
29B	Greg Newman	Hendersonville
30	Ashley Welch	Waynesville

PUBLIC DEFENDERS

DISTRICT	PUBLIC DEFENDER	ADDRESS
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2	Thomas P. Routten (Interim)	Washington
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3B	James Q. Wallace, III	Beaufort
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CASES REPORTED

ORDERS

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. MARIO EDUARDO ORTIZ-ZAPE

No. 329PA11

(Filed 27 June 2013)

Constitutional Law—Confrontation Clause—expert testimony—based on non-testifying analyst's report

Defendant's Sixth Amendment right to confront witnesses against him in a drug possession case was not violated by the admission of an expert's opinion testimony that the substance seized from defendant's car was cocaine, even though the expert did not personally test or observe the testing of the substance. Defendant had the opportunity to cross-examine the expert witness at trial. Furthermore, even assuming admission of the expert's opinion violated defendant's rights under the Confrontation Clause, the alleged error was harmless given that defendant told a law enforcement officer that the substance was cocaine and defense counsel elicited testimony that the substance appeared to be cocaine. The unanimous decision of the Court of Appeals was reversed.

HUDSON, J., dissenting.

PARKER, C.J., joins in the dissenting opinion.

BEASLEY, J., did not participate in the consideration or decision of this case.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 714 S.E.2d 275 (2011), reversing in part and vacating a judgment entered on 19 February 2010 by Judge Jerry Cash Martin in Superior Court, Mecklenburg County. Heard in the Supreme Court on 13 February 2013.

Roy Cooper, *Attorney General*, *by Amy Kunstling Irene and Daniel P. O'Brien*, *Assistant Attorneys General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Charlesena Elliott Walker*, *Assistant Appellate Defender*, *for defendant-appellee.*

MARTIN, Justice.

An expert in forensic science testified as to her opinion that a substance was cocaine, based upon her independent analysis of testing performed by another analyst in her laboratory. The Court of Appeals held that this testimony violated defendant's Sixth Amendment right to confront witnesses against him. We disagree and reverse.

On the night of 16 May 2007, Officer Craig Vollman of the Charlotte Mecklenburg Police Department (CMPD) was on patrol duty in the University City area. Around 10:30 p.m. a car driven by defendant pulled into an Exxon gas station. Officer Vollman observed that the car's thirty-day temporary tag was "ratty and old" and the "dates looked to be tampered with." When defendant parked in front of the gas station store, Officer Vollman pulled his patrol car behind defendant's vehicle and approached him to speak about the thirty-day tag. While defendant looked through the glove compartment for the car's registration paperwork, Officer Vollman shined his flashlight around the car to check for weapons. Upon shining the light in the storage compartment of the open driver's door, he saw what he believed to be cocaine packaged in a plastic bag.

Officer Vollman asked defendant what was in the bag. According to Officer Vollman's testimony, defendant stated, "It's mine," and responded affirmatively that it was cocaine but that "it was for personal use." Officer Vollman placed defendant under arrest. He then found "eight separate plastic sandwich baggies" in the same door compartment as the cocaine. He also searched defendant and found $304 in cash in his pocket. After defendant had been transported to the Mecklenburg County jail, another officer weighed the confiscated

substance and recorded the result as 4.5 grams. The substance was subsequently sent to the department's crime lab for analysis. Defendant was indicted for possession with intent to sell or deliver cocaine.

At trial the State sought to introduce Tracey Ray of the CMPD crime lab as an expert in forensic chemistry. During voir dire proceedings on the matter, defendant sought to exclude admission of a lab report created by a non-testifying analyst and any testimony by any lab analyst who did not perform the tests or write the lab report. Defendant based this motion primarily on Sixth Amendment grounds, arguing that admission of this evidence would violate his right to confront witnesses against him. The trial court ruled that Ray could testify about the practices and procedures of the CMPD crime lab, her review of the testing in this case, and her independent opinion concerning the testing. But the trial court excluded admission of the non-testifying analyst's lab report under Rule of Evidence 403.

Before the jury, the State introduced Ray as an expert in forensic chemistry. Ray testified she had been a forensic chemist for approximately eleven years and had analyzed substances more than one thousand times for trial purposes. Ray explained the standard procedures for receipt and storage of substances sent to the CMPD crime lab. She testified that, based on the initials and control number on the plastic bag containing the white substance—which had been admitted into evidence as Item Number 9—the substance had been sent to the CMPD crime lab. She stated the initials "JPM" on the item indicated to her that a chemist named Jennifer Mills, who formerly had worked at the crime lab, "was in receipt of this evidence and that she sealed this particular piece of evidence."

Ray then explained, based on her knowledge of the lab's standard procedures, what would happen to an item such as Item Number 9 when it arrived for testing: First, the analyst would ensure that the control numbers on the property report and the actual property matched. Then, the analyst would weigh the substance and perform what is called a "presumptive test" to give an indication of what the substance might be. For substances suspected to be cocaine, the presumptive test is a cobalt thiocyanate test. If the substance turns blue, this indicates that cocaine may be present. Next, the analyst would perform a "confirmatory test" to determine the identity of the substance, using a gas chromatograph mass spectrometer (GCMS) or an infrared spectrometer (FTIR). The instruments that perform these tests record the results and data within the machine, allowing for

review later in time. According to Ray's testimony, it is not possible to alter this reviewable data. After completing the testing, the laboratory analyst prepares a report and puts it in the item's case file, along with all notes and data created during the testing. As part of the lab's standard operating procedure, an administrative and a technical review are performed on nearly every case file by another analyst in the lab. As part of this review, the second analyst examines all the data in the case file to ensure he or she would have come to the same conclusion as to the identity of the substance.

Ray also explained that the lab has standard procedures for ensuring that the testing instruments are in working order. CMPD lab procedure dictates that all instruments be tested weekly and monthly, with the results recorded in each instrument's maintenance log. Ray testified that she had reviewed the maintenance logs and determined that all the instruments appeared to have been in working order when Item Number 9 was tested.

Ray testified that she conducted a "peer review" on the chemical analysis of Item Number 9 for defendant's trial. She reviewed all the lab notes and data from the testing instrument. She stated that the color test and the GCMS test performed on the substance are tests that "experts in the field of forensic chemistry would rely upon . . . in performing [sic] the opinion as to the identity of a chemical substance." The prosecutor asked Ray whether, based on her training and experience and her review of the case file here, she had formed an independent expert opinion about the substance at issue in this case. Defense counsel objected and was overruled. Ray testified, "My conclusion was that the substance was cocaine."

On cross-examination defense counsel further clarified that "any opinions [Ray] g[a]ve in court about the nature of this substance [were] based entirely on testing done by someone else" and that Ray was not present when the tests were performed. Defense counsel also further clarified that Ray's testimony assumed the testing analyst, Mills, had followed standard lab procedures in her testing of Item Number 9.

The jury convicted defendant of possession of cocaine. The Court of Appeals reversed the trial court, relying on *State v. Williams*, 208 N.C. App. 422, 702 S.E.2d 233 (2010). *State v. Ortiz-Zape*, ___ N.C. App. ___, 714 S.E.2d 275, 2011 WL 2848792 (2011) (unpublished). The court observed Ray "did not conduct any tests on the substance, nor was she present when [the testing chemist] did," and concluded that

Ray "could not have provided her own admissible analysis of the relevant underlying substance." *Ortiz-Zape*, 2011 WL 2848792 at *2 (alteration in original) (citations and quotation marks omitted). The court held "it was error for Ms. Ray to testify as to [the testing chemist's] findings." *Id.* (citation omitted). We allowed the State's petition for discretionary review.

"Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations omitted). Defendant argues that, because Ray did not test the substance at issue herself or personally observe any testing, she could form no independent opinion regarding the identity of the substance, and thus admission of her opinion identifying the substance as cocaine violated defendant's rights under the Confrontation Clause. The State argues that there was no Confrontation Clause violation because the expert testified to her own opinion about the identity of the substance. We find no error in the trial court's decision to allow the expert to state her opinion, and we reverse the decision of the Court of Appeals.

To resolve the issue raised in this case, we must examine the North Carolina Rules of Evidence in light of recent Confrontation Clause jurisprudence. The North Carolina Rules of Evidence allow for expert testimony "in the form of an opinion, or otherwise," if the expert's "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," provided: "(1) The testimony is based upon sufficient facts or data[;] (2) The testimony is the product of reliable principles and methods [and] (3) The witness has applied the principles and methods reliably to the facts of the case." N.C. R. Evid. 702(a). The expert may base the opinion on facts or data "made known to him at or before the hearing." *Id.* R. 703. "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." *Id.*

While the North Carolina Rules of Evidence permit an expert to present an opinion based on substantively inadmissible information, this evidentiary rule must comport with constitutional requirements. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The jurisprudence interpreting this clause has undergone significant changes in recent years.

In 2004 the Supreme Court of the United States concluded that testimonial statements of a witness who is absent from trial may be admitted only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 (2004). *Crawford* overturned the former rule from *Ohio v. Roberts*, which "condition[ed] the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.' " *Id.* at 60, 124 S. Ct. at 1369 (quoting *Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 2539 (1980)). While application of the *Crawford* rule depends on which statements qualify as testimonial hearsay, the Court declined to "spell out a comprehensive definition of 'testimonial.' " *Id.* at 68, 124 S. Ct. at 1374. The Court noted, however, "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* The Court further noted, "The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. at 60 n.9, 124 S. Ct. at 1369 n.9.

Since 2004 the Court has considered the application of *Crawford* in several cases involving forensic reports. In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527 (2009), the trial court admitted into evidence three " 'certificates of analysis' " "showing the results of the forensic analysis"—that the substance in the seized bags was cocaine of a certain weight. *Id.* at 308, 129 S. Ct. at 2530-31. These certificates were sworn to before a notary public and admitted pursuant to state law as " 'prima facie evidence of the composition, quality, and the net weight of the narcotic.' " *Id.* at 308-09, 129 S. Ct. at 2531 (quoting Mass. Gen. Laws ch. 111, § 13). The defendant was not given the opportunity to cross-examine the analysts who performed the tests and certified the results. *Id.* at 309, 129 S. Ct. at 2531. Citing *Crawford*, the Court concluded that "the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that [the defendant] had a prior opportunity to cross-examine them, [the defendant] was entitled to 'be confronted with' the analysts at trial." *Id.* at 311, 129 S. Ct. at 2532 (quoting *Crawford*, 541 U.S. at 54, 124 S. Ct. at 1365).

In 2011 the Court considered "whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of prov-

ing a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." *Bullcoming v. New Mexico*, ___ U.S. ___, ___, 131 S. Ct. 2705, 2710 (2011). At trial the State called an analyst who had not done the testing to introduce a lab report certifying the defendant's blood-alcohol concentration. *Id.* at ___, 131 S. Ct. at 2710. The Court held that "surrogate testimony of that order does not meet the constitutional requirement." *Id.* at ___, 131 S. Ct. at 2710.

In her concurring opinion in *Bullcoming*, Justice Sotomayor highlighted some of the scenarios *not* presented in that case: (1) The State presents an alternate purpose for the report; (2) The in-court witness "is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue"; (3) "[A]n expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence"; and (4) The State "introduced only machine-generated results, such as a printout from a gas chromatograph." *Id.* at ___, 131 S. Ct. at 2722 (Sotomayor, J., concurring in part).

Most recently, the Supreme Court considered *Crawford*'s application in *Williams v. Illinois*, ___ U.S. ___, ___, 132 S. Ct. 2221, 2227 (2012). At trial an expert testified that "a DNA profile produced by an outside laboratory, Cellmark, matched a profile produced by the state police lab using a sample of [the defendant's] blood." *Id.* at ___, 132 S. Ct. at 2227 (Alito, J., Roberts, C.J., Kennedy, & Breyer, JJ., plurality). The expert did not perform or witness the testing that produced the DNA profile. *Id.* at ___, 132 S. Ct. at 2245 (Breyer, J., concurring). The Court's "fractured decision," *id.* at ___, 132 S. Ct. at 2265 (Kagan, Scalia, Ginsburg, & Sotomayor, JJ., dissenting), produced a plurality opinion of four Justices, a dissenting opinion of four Justices, and two concurring opinions (with one Justice concurring in the plurality's judgment only). *See Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 993 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (citation and internal quotation marks omitted)).

The four-Justice plurality concluded that (1) as the basis of the expert's opinion, the statement was not admitted for the truth of the matter asserted, and (2) the Cellmark report "plainly was not prepared for the primary purpose of accusing a targeted individual." *Id.* at ___, ___, 132 S. Ct. at 2240, 2243 (plurality). In other words, the plu-

rality determined that the statement was neither hearsay nor testimonial and therefore did not violate the Confrontation Clause. Justice Thomas concurred in the result reached by the plurality because "Cellmark's statements lacked the requisite formality and solemnity to be considered testimonial for purposes of the Confrontation Clause." *Id.* at ___, 132 S. Ct. at 2255 (Thomas, J., concurring in the judgment) (citation and internal quotation marks omitted). But he would have held the expert presented an out-of-court statement for the truth of the matter. *Id.* at ___, 132 S. Ct. at 2256. The four-Justice dissent agreed with Justice Thomas on that point, arguing that the expert's statement constituted an out-of-court statement for the truth of the matter asserted. *Id.* at ___, 132 S. Ct. at 2268-72 (dissenting opinion). But the dissent disagreed with the plurality's and Justice Thomas's separate conclusions that the statements were not testimonial. As testimonial hearsay, the dissent argued, the statement was subject to the demands of the Confrontation Clause. *Id.* at ___, 132 S. Ct. at 2272-77. Justice Kagan closed the dissent by predicting that the Court's fractured decision would cause "significant confusion" for lawyers and judges. *Id.* at ___, 132 S. Ct. at 2277.

Despite the lack of definitive guidance on the issue before us, a close examination of *Williams v. Illinois* seems to indicate that a qualified expert may provide an independent opinion based on otherwise inadmissible out-of-court statements in certain contexts. Both the plurality and dissent agreed that an expert's opinion may ultimately be admissible, but they disagreed as to the foundational information required. *See id.* at ___, ___, 132 S. Ct. at 2228, 2236 (plurality) ("Under settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true."); *id.* at ___, 132 S. Ct. at 2270 (dissenting opinion) ("[The witness] could have added that *if* the Cellmark report resulted from scientifically sound testing of [the victim's] vaginal swab, *then* it would link Williams to the assault."). We note the dissent's concern in *Williams* was the use of out-of-court statements by a declarant whom the criminal defendant had no opportunity to cross-examine. *Id.* at ___, ___, 132 S. Ct. at 2265, 2268. But when an expert states her own opinion, without merely repeating out-of-court statements, the expert is the person whom the defendant has the right to cross-examine.

We believe our prior holding on this issue is consistent with this conclusion. In 2001 we stated that when an expert gives an opinion, "[i]t is the expert opinion itself, not its underlying factual basis, that constitutes substantive evidence." *State v. Fair*, 354 N.C. 131, 162,

557 S.E.2d 500, 522 (2001) (citation omitted), *cert. denied*, 535 U.S. 1114, 122 S. Ct. 2332 (2002). Therefore, when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity " 'to fully cross-examine the expert witness who testifies against him,' " allowing the factfinder " 'to understand the basis for the expert's opinion and to determine whether that opinion should be found credible.' " *Id.* (citations omitted). Accordingly, admission of an expert's independent opinion based on otherwise inadmissible facts or data "of a type reasonably relied upon by experts in the particular field" does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert.[1] N.C. R. Evid. 703; *see Fair*, 354 N.C. at 162-63, 557 S.E.2d at 522; *see also United States v. Turner*, 709 F.3d 1187, 1190 (7th Cir. 2013). We emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely "surrogate testimony" parroting otherwise inadmissible statements. *See Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2710 (majority).

A related issue is whether an expert who bases an opinion on otherwise inadmissible facts and data may, consistent with the Confrontation Clause, disclose those facts and data to the factfinder. Machine-generated raw data, typically produced in testing of illegal drugs, present a unique subgroup of this type of information. Justice Sotomayor has noted there is a difference between a lab report certifying a defendant's blood-alcohol level and "machine-generated results, such as a printout from a gas chromatograph." *Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2722 (Sotomayor, J., concurring in part). The former is the testimonial statement of a person, *see id.* at ___, 131 S. Ct. at 2717 (majority), and the latter is the product of a machine. A number of courts have concluded that machine-generated raw data are not testimonial hearsay under the Confrontation Clause. One court wrote: "Nor is a machine a 'witness against' anyone. If the readings are 'statements' by a 'witness against' the defendants, then the machine must be the declarant. Yet how could one cross-examine [a machine]?" *United States v. Moon*, 512 F.3d 359, 362 (7th Cir.), *cert.*

1. The dissenting opinion would adopt the four-part analysis set out in *State v. Brewington*, 204 N.C. App. 68, 78, 693 S.E.2d 182, 189 (2010). We decline to adopt this test, as it is not generally applicable to cases such as the one before us. For example, under the dissent's proposed test, the first step is to "determine whether the underlying lab report is testimonial." But the Confrontation Clause is concerned with *testimonial hearsay*. *See, e.g.*, *Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374. If the challenged testimony is not hearsay—in other words, if the witness does not repeat out-of-court statements—then it is not necessary to determine whether a lab report is testimonial.

denied, 555 U.S. 812, 129 S. Ct. 40 (2008); *see also United States v. Washington*, 498 F.3d 225, 231 (4th Cir. 2007), *cert. denied*, 557 U.S. 934, 129 S. Ct. 2856 (2009); David H. Kaye et al., *The New Wigmore: A Treatise on Evidence* § 4.12.5 (Richard D. Friedman ed., Supp. 2013) [hereinafter *Wigmore on Evidence*]. Because machine-generated raw data, "if truly machine-generated," are not statements by a person, they are "neither hearsay nor testimonial." *Wigmore on Evidence* § 4.12.5, at 44; *see also Williams*, ___ U.S. at ___, 132 S. Ct. at 2259 (Thomas, J., concurring in the judgment) ("[T]he Confrontation Clause regulates only the use of statements bearing indicia of solemnity." (citation and internal quotation marks omitted)). We note that "representations[ ] relating to past events and human actions not revealed in raw, machine-produced data" may not be admitted through "surrogate testimony." *Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2714. Accordingly, consistent with the Confrontation Clause, if "of a type reasonably relied upon by experts in the particular field," N.C. R. Evid. 703, raw data generated by a machine may be admitted for the purpose of showing the basis of an expert's opinion.

We turn now to the instant case. Before reaching the dispositive legal issue, we must address matters of procedure. Defendant alleges that several portions of Ray's testimony were erroneously admitted, yet defendant objected only once during the course of Ray's testimony. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). While unpreserved evidentiary error in criminal cases may be reviewed for plain error, "the defendant must 'specifically and distinctly' contend that the alleged error constitutes plain error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (quoting N.C. R. App. P. 10(a)(4)). Defendant did not allege plain error; therefore, we review only the single alleged error to which he objected at trial and thereby preserved for appellate review: Agent Ray's statement that in her expert opinion the substance was cocaine.[2] We review this alleged constitutional error de novo.

2. The dissenting opinion argues Agent Ray "*testified to some of* [the] *contents*" of the report written by the non-testifying analyst. As an example, the dissent writes: "[The analyst] was later asked, '[C]an you tell us what [the original analyst's] result appears to have been?' She answered, '[O]n the color test, it has a positive sign with a circle around it and then says blue underneath that.' " The dissenting opinion fails to note, however, that this testimony was elicited by defendant's attorney on cross-examination—not by the State. Further, defendant objected *only* when the prosecution asked Ray, "What is your independent expert opinion?" "Generally speaking,

During voir dire defense counsel moved to exclude admission of the lab report, the lab tests, and any testimony by any lab analyst who did not personally perform the tests or write the reports, based on Confrontation Clause grounds. The court ruled that Ray could testify about her background, experience, education, and training; the practices and procedures of the CMPD crime lab; and her review of the testing done and her independent opinion. The court also ruled that the State could not admit the non-testifying analyst's report into evidence because of considerations under Rule of Evidence 403. Thus, unlike in *Melendez-Diaz* and *Bullcoming*, the reports produced by the non-testifying analyst were not admitted into evidence.

Before the jury Ray was certified as an expert in forensic chemistry and testified regarding the CMPD crime lab's standard procedures and her review of the tests associated with the substance at issue. The prosecutor then asked:

> Q. Based on your training and experience in the field of forensic chemistry and your employment at the CMPD crime lab as well as other labs prior to that and your review of the file in this case, did you have a chance to form your own independent expert opinion as to the identity of the substance in control number 16826?
>
> A. Yes, I did.
>
> Q. What is your independent expert opinion?
>
> [DEFENSE COUNSEL]: Objection, your Honor. I don't need to be heard further.
>
> THE COURT: Yes, ma'am. Objection overruled, you may answer.
>
> A. My conclusion was that the substance was cocaine.
>
> Q. Is that still your opinion currently?
>
> A. Yes, it is.

Based on defendant's arguments at the earlier voir dire hearing, it is clear that this objection was based on the Confrontation Clause.

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the appellate courts of this state will not review a trial court's decision to admit evidence unless there has been a timely objection. . . . [, which] must be contemporaneous with the time such testimony is offered into evidence." *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (internal citations and quotation marks omitted). Therefore, we review only the testimony to which defendant objected.

Defendant argues that this rendering of Ray's expert opinion on a substance she did not personally test or observe being tested violated his right to confront witnesses against him. We disagree. As we stated above, when an expert gives an opinion, the opinion is the substantive evidence and the expert is the witness whom the defendant has the right to confront. In accordance with Rule of Evidence 703, Ray gave her expert opinion that was based upon facts or data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." N.C. R. Evid. 703. The prosecutor laid the foundation for the Rule 703 testimony:

> Q. And are these tests [color test, melting point, and GCMS] standards such that other experts in the field of forensic chemistry would rely upon them in performing [sic] the opinion as to the identity of a chemical substance?
>
> A. Yes, they are.

Further, the prosecutor established that Ray's opinion was her own, independently reasoned opinion—not "surrogate testimony" parroting the testing analyst's opinion. *See Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2710.

> Q. And for trial today were you asked to review the chemical analysis that was performed on Item Number 9, control number 16826?
>
> A. Yes, I did.
>
> Q. And did you do that review?
>
> A. Yes.
>
> Q. And what complaint number is associated with that, this case and that control number?
>
> A. The complaint number is 20070516223000.
>
> Q. And what control number is that?
>
> A. 200716826.
>
> Q. When you conducted this peer review, specifically what documents did you review?
>
> A. I reviewed the drug chemistry worksheet or the lab notes that the analyst wrote her notes on and the data that came from the

> instrument that was in the case file and then I also reviewed the data that was still on the instrument and made sure that was all there too.

As part of her review, Ray analyzed the "reviewable data" generated by the GCMS machine. Ray testified that the machine internally records the data and there is no way to make alterations to what is recorded. As she stated on cross-examination, the GCMS machine produces a graph based on its testing, from which Ray was able to determine "the molecular weight of the substance and how it breaks down and relate that back to the chemical structure." Ray compared the machine-produced graph to the data from the lab's sample library and concluded that the substance was cocaine.

This expert opinion, from Ray's own analysis of the data, constituted the substantive evidence being presented against defendant. *See Fair*, 354 N.C. at 162, 557 S.E.2d at 522. Therefore, the testifying expert was the witness whom defendant had the right to confront. *Id.* Defendant was able to cross-examine Ray fully concerning all aspects of her testimony. *See id.* Indeed, the cross-examination made abundantly clear for the jury that Ray "didn't personally observe any of these tests being done" and that she "ha[d] to assume [the testing analyst] followed the standard operating procedures."[3] Accordingly, the admission of Ray's expert opinion did not violate defendant's right to confront witnesses against him.

Even assuming admission of Ray's expert opinion violated defendant's rights under the Confrontation Clause, the alleged error was harmless, providing a separate, adequate, and independent state law ground for the judgment of the Court. "When violations of a defendant's rights under the United States Constitution are alleged, harmless error review functions the same way in both federal and state courts." *Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331. "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C.G.S. § 15A-1443(b) (2011).

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3. Viewing the separate opinions in *Williams v. Illinois* in their totality, we suggest that prosecutors err on the side of laying a foundation that establishes compliance with Rule of Evidence 703, as well as the lab's standard procedures, whether the testifying analyst observed or participated in the initial laboratory testing, what independent analysis the testifying analyst conducted to reach her opinion, and any assumptions upon which the testifying analyst's testimony relies.

The arresting officer testified that when he found the plastic baggy containing a white substance, he picked it up and asked defendant, "What's this?" The officer further testified that defendant acknowledged it was his cocaine—and asserted it was for personal use and he was not dealing drugs. In the same compartment as the plastic baggy containing the white substance, the officer also found "eight separate plastic sandwich baggies, similar to the plastic baggy that was wrapped around the [white substance] [he] found." The officer testified that cocaine is typically packaged for sale in sandwich baggies. Defendant's explanation at trial for his possession of the substance was that he had stopped at a gas station to buy some milk and three men "knocked on the [car] door and they handed me [the substance and baggies] and told me give us money for this." He stated he was afraid he was being robbed, so he handed the men a portion of the $500 in cash from his pockets but "never imagined that it was drugs or something like that." Defense counsel elicited a statement from the arresting officer that the substance "appears to be powder cocaine." Under these facts, in which defendant told a law enforcement officer that the substance was cocaine and defense counsel elicited testimony that the substance appeared to be cocaine, any possible error in allowing the expert opinion was harmless. *See State v. Nabors*, 365 N.C. 306, 312-13, 718 S.E.2d 623, 627 (2011).

The Sixth Amendment guarantees that " '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' " *Crawford*, 541 U.S. at 38, 124 S. Ct. at 1357 (quoting U.S. Const. amend. VI). CMPD forensic chemist Tracey Ray analyzed the data pertaining to the seized substance and gave her independent expert opinion that the substance was cocaine. Defendant had the opportunity to cross-examine the witness against him: Tracey Ray. The admission of an independent expert opinion based on the expert's own scientific analysis is not the type of evil the Confrontation Clause was designed to prevent. We find no error and reverse the Court of Appeals.

REVERSED.

Justice BEASLEY took no part in the consideration or decision of this case.

Justice HUDSON dissenting.

The majority opinion here begins by declaring that the expert gave her opinion "based upon her independent analysis of testing per-

formed by another," without a clear explanation of why this matters in the context of Confrontation Clause analysis.[1] The majority goes on to cite *Williams v. Illinois* for the proposition that "a qualified expert may provide an independent opinion based on otherwise inadmissible out-of-court statements." The Court in *Williams* did not hold—nor do any other cases—that expert testimony like that here, based entirely on testing done by an absent analyst for the sole purpose of prosecuting this defendant, would be free of a Sixth Amendment Confrontation Clause violation if the expert claimed her opinion was "independent," when the record shows manifestly that it was not. Nor did the Court in *Williams* hold, as the majority here does, that "when an expert states her own opinion, without merely repeating out-of-court statements, the expert is the person whom the defendant has the right to cross-examine." In my view, the Supreme Court cases mean instead that the testimony Agent Ray gave here that the substance was cocaine—based on testing done by an absent analyst (Agent Mills) who was not cross-examined by defendant—violated defendant's right to confront Mills, as protected by the Sixth Amendment and explained in Supreme Court decisions from *Crawford* to *Williams*. Because I also conclude that this constitutional error is not harmless beyond a reasonable doubt, I would grant defendant a new trial. I respectfully dissent.[2]

Before engaging the substantive issue here, I believe a review of recent Confrontation Clause jurisprudence is in order, if only to high-

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1. The independence, or lack thereof, of the testifying expert's opinion is only relevant to the Confrontation Clause analysis if it is first established that the lab report underlying the expert's testimony is itself testimonial (it is) and that the analyst who prepared the report did not testify (she did not).

2. Before reaching the "dispositive issue," the majority addresses procedure and concludes that defendant has not adequately objected to the admission of Ray's testimony, which it says should be reviewed for plain error. In my opinion, this discussion, and any effort to couch this case in terms of plain error, is entirely misplaced. The State did not argue that review here should be for plain error; its argument heading in the brief is: "The Court of Appeals erred by finding any error was not harmless beyond a reasonable doubt." The argument then addresses what it appropriately notes is the proper standard for review of alleged constitutional error. Moreover, the State has not contended that the issue was not adequately preserved. Indeed, the trial court, at defendant's request, conducted voir dire on the admissibility of the testimony and reports and ruled the reports out, but found the testimony allowable. On direct examination, at the only point the witness was asked for an "opinion," defense counsel objected. After the testimony was admitted and cross-examined, defense counsel moved to strike the expert's testimony, and the transcript reveals several pages of colloquy before the motion to strike was denied. As such, defendant has preserved as well as he could the one issue that matters here, to wit, Agent Ray's opinion (based on another's testing) that the substance was cocaine.

light how far afield the majority has gone. In *Crawford v. Washington* the United States Supreme Court rejected as unsound its own earlier decision in *Ohio v. Roberts*, 448 U.S. 56, 65-66, 100 S. Ct. 2531, 2538-39 (1980). Instead, the Court concluded in *Crawford* that a defendant's Confrontation Clause rights are violated when out-of-court testimonial statements are admitted without a showing that the declarant is unavailable to testify and that the defendant had a prior opportunity to cross-examine that person. *Crawford*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365 (2004). In *Roberts* the Court allowed hearsay testimony if it possessed "adequate 'indicia of reliability,' " 448 U.S. at 66, 100 S. Ct. at 2539; however, in *Crawford* the Court stated that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination," 541 U.S. at 61, 124 S. Ct. at 1370. In rejecting the reliability standard the lower courts had applied in the case, the Supreme Court wrote in *Crawford* that "[e]ach of the courts also made assumptions that cross-examination might well have undermined." *Id.* at 66, 124 S. Ct. at 1372.

The Supreme Court declined to announce a complete definition of "testimonial" in *Crawford. Id.* at 68, 124 S. Ct. at 1374. Relevant here, however, the Supreme Court subsequently addressed the meaning of "testimonial" when discussing certified lab reports identifying a substance as cocaine in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307-08, 129 S. Ct. 2527, 2530-31 (2009). There the Court concluded that "[lab] analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment." *Id.* at 311, 129 S. Ct. at 2532. Again, the Court placed heavy emphasis on the power of cross-examination to expose weaknesses in such testimony: "Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony." *Id.* at 319, 129 S. Ct. at 2537. "Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." *Id.* at 320, 129 S. Ct. at 2537. *Melendez-Diaz* establishes that absent a stipulation or a statutory notice-and-demand waiver, a lab report of this type may not be admitted "without offering a live witness competent to testify to the truth of the statements made in the report." *Bullcoming v. New Mexico*, ___ U.S. ___, ___, 131 S. Ct. 2705, 2709 (2011).

In *Bullcoming*, the Supreme Court then addressed the next logical question flowing out of *Melendez-Diaz*, specifically

> whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification.

Id. at ___, 131 S. Ct. at 2710. Although the expert in *Bullcoming* was competent to testify to the lab processes, the Court held that such "surrogate testimony" did not satisfy the requirements of the Confrontation Clause. *Id.* at ___, 131 S. Ct. at 2710. The lower appellate court had held that such testimony was permissible because the analyst had " 'simply transcribed the resul[t] generated by the gas chromatograph machine' " and the real witness against the defendant was the actual machine. *Id.* at ___, 131 S. Ct. at 2714 (alteration in original). The Supreme Court rejected this argument, reasoning that the testing analyst's report was "more than a machine-generated number." *Id.* at ___, 131 S. Ct. at 2714. The Court noted that the testing analyst's affidavit certified facts such as an unbroken chain of custody, the particular test performed, and the analyst's adherence to protocol in performing that test. *Id.* at ___, 131 S. Ct. at 2714. "These representations, relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination." *Id.* at ___, 131 S. Ct. at 2714. The State also argued that its proposed testifying expert could properly testify because he was an expert with respect to the gas chromatograph machine and the laboratory's procedures. *Id.* at ___, 131 S. Ct. at 2715. The Court disagreed, recognizing that cross-examination of a surrogate analyst would be ineffective to expose any weaknesses in the lab reports, thus failing to satisfy the Confrontation Clause:

> But surrogate testimony of the kind [the testifying expert] was equipped to give could not convey what [the testing analyst] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part.

Id. at ___, 131 S. Ct. at 2715 (footnote omitted). Ultimately, the Supreme Court concluded that a defendant's right "is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." *Id.* at ___, 131 S. Ct. at 2710.

Most recently, in *Williams v. Illinois* the Supreme Court granted certiorari to address whether *Crawford* prohibits "an expert from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify," ___ U.S. ___, ___, 132 S. Ct. 2221, 2227 (2012) (plurality), or, as articulated by Justice Sotomayor in her concurrence in *Bullcoming*, to address the situation in which "an expert witness [is] asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence," *Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2722 (Sotomayor, J., concurring in part). In *Williams* an expert witness offered her opinion regarding a DNA match between samples analyzed in two separate reports, one of which was not entered into evidence. ___ U.S. at ___, 132 S. Ct. at 2229-30. The opinion in *Williams* revealed a fractured court, but a majority—the four Justice plurality and Justice Thomas—found that the underlying report was not testimonial, meaning there was no Confrontation Clause violation. *Id.* at ___, 132 S. Ct. at 2242-44 (plurality); *id.* at ___, 132 S. Ct. at 2255 (Thomas, J., concurring in the judgment).[3] Importantly, the plurality distinguished the earlier cases from the *Williams* testimony, in which the expert testified that the two DNA profiles were from the same person, not that either or both were accurate or true: "The Cellmark report is very different. It plainly was not prepared for the primary purpose of accusing a targeted individual." *Id.* at___, 132 S. Ct. at 2243 (plurality). "In *Hammon* and every other post-*Crawford* case in which the Court has found a violation of confrontation right, the statement at issue had the primary purpose of accusing a targeted individual." *Id.* at ___, 132 S. Ct. at 2243 (plurality).

In the *Williams* plurality opinion, Justice Alito noted that the Court's conclusion to allow the testimony of the DNA expert

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3. Though the majority acknowledges the split opinion in *Williams*, the majority still appears to ascribe precedential value to the plurality opinion, classifying it as the narrowest grounds among the concurring opinions. I disagree. Neither the plurality's reasoning nor Justice Thomas's concurrence is narrower; they are simply different. Justice Thomas agreed with the plurality that the report was not testimonial, but for a different reason—insufficient formality. On the other hand, he agreed with the four dissenters that the Cellmark report was offered for the truth of the matter asserted therein. Thus, I believe the only firm conclusions we can draw from *Williams* are that the lab report there was *not* testimonial and that five justices agreed it *was* offered for its truth. These conclusions appear to apply only to the precise facts in *Williams*. Because it is clear that the lab report here *was* testimonial, as well as offered for its truth, *Williams* gives us little additional guidance.

> is entirely consistent with *Bullcoming* and *Melendez–Diaz*. In those cases, the forensic reports were introduced into evidence, and there is no question that this was done for the purpose of proving the truth of what they asserted: in *Bullcoming* that the defendant's blood alcohol level exceeded the legal limit and in *Melendez–Diaz* that the substance in question contained cocaine. Nothing comparable happened here.

Id. at ___, 132 S. Ct. at 2240 (plurality). But in the case before us, something quite comparable happened—though the report itself was not admitted, its essential contents were delivered via surrogate testimony that depended entirely upon review of the reports and involved no independent analysis. Further, it cannot be questioned that the primary purpose of the lab report here was to accuse a targeted individual. As such, the result should be the same in that the testimony here violated the Sixth Amendment Confrontation Clause, as in *Bullcoming* and *Melendez-Diaz*.

Were there any indication in the record that Agent Ray did "independent analysis," I could perhaps agree with the majority. There is none. She testified on direct examination, based entirely on her review of tests and notes by Agent Mills:

> Q. And for trial today were you asked to review the chemical analysis that was performed on Item Number 9, control number 16826?
>
> A. Yes, I did.
>
> . . . .
>
> Q. When you conducted this peer review, specifically what documents did you review?
>
> A. I reviewed the drug chemistry worksheet or the lab notes that the analyst wrote her notes on and the data that came from the instrument that was in the case file and then I also reviewed the data that was still on the instrument and made sure that was all there too.

She then responded that, based upon this review, her "independent opinion" was that the substance "was cocaine." But, on cross-examination she testified, among other things, to the following:

> Q. All right. Now just to go back to the beginning, you have done no testing of your own on Item Number 9; correct?

A. No, I have not.

Q. And so any opinions you give in court about the nature of this substance are based entirely on testing done by someone else?

A. Correct.

Q. And you were not present when those tests were performed, were you?

A. No, I was not.

Q. And you didn't even work there until approximately two years later; correct?

A. Correct.

She acknowledged repeatedly that she could not personally verify anything about the way the tests were done and said, "I only know of what's on the drug worksheet," and "I can only say according to the worksheet." "[T]he [Confrontation] Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." *Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2716 (majority). Because the expert here (Agent Ray) simply viewed and agreed with the test results of another (Agent Mills), while she performed no testing and was not present for those tests, I must conclude her testimony violates the Confrontation Clause when analyzed according to the jurisprudence of *Crawford*, *Melendez-Diaz*, *Bullcoming*, and *Williams*. The defendant here had the right under the Sixth Amendment Confrontation Clause to cross-examine Mills, not just Ray.

As stated above, having implicitly acknowledged that the report was testimonial and knowing the testing analyst was absent, the majority asserts that Agent Ray offered an independent opinion on the identity of the substance tested based on the lab reports. As I understand the opinion, the only "evidence" the majority points to in support of this holding is the questioning by the State at trial. Agent Ray was asked, "What is your independent expert opinion?" She answered that "the substance was cocaine." However, careful review of the testimony, both on direct and cross-examination, demonstrates that her opinion was in no way independent—all her knowledge and opinions about the testing process and the substance were based entirely on the review and analysis by Agent Mills, who had left the

lab two years before Ray's employment even began. Ray testified that she conducted an "administrative" and a "technical" review of Mills's file (which the prosecutor characterized in his questions as a "peer review" of the testing analyst's work), including reading the report notes and results off the machine. Agent Ray was not asked about and did not explain any "analysis" that she performed; instead, she explained that her administrative and technical reviews were "to make sure there is [sic] no mistakes," as with spelling or data input, and to verify that she would have reached the same conclusion based on the data generated by the testing agent. In my view, this is not an "independent" opinion as that term is used by the Supreme Court.

The majority states that "[a]s part of her review, Ray analyzed the 'reviewable data' generated by the GCMS machine. Ray testified that the machine internally records the data, and *there is no way to make alterations to what is recorded.*" (Emphasis added.) The majority fails to consider how the original testing analyst may have handled or altered the substance *before* it was placed in the machine, or how it was entered into the machine. "Forensic evidence is not uniquely immune from the risk of manipulation." *Melendez-Diaz*, 557 U.S. at 318, 129 S. Ct. at 2536.

> Confrontation is one means of assuring accurate forensic analysis. While it is true, as the dissent notes, that an honest analyst will not alter his testimony when forced to confront the defendant, the same cannot be said of the fraudulent analyst. Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony. And, of course, the prospect of confrontation will deter fraudulent analysis in the first place.
>
> Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials. . . . Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination.

Id. at 318-19, 129 S. Ct. at 2536-37.[4] I would hold that the type of "peer

4. In North Carolina recent events have proved that these concerns about forensic testing are more than just mere speculation. *See* Chris Swecker & Michael Wolf, *An Independent Review of the SBI Forensic Laboratory* 4 (2010) ("This report raises serious issues about laboratory reporting practices from 1987-2003 and the potential that information that was material and even favorable to the defense of criminal charges filed was withheld or misrepresented."); *see also* Paul C. Giannelli, *The North Carolina*

review" conducted by Agent Ray in this case is constitutionally deficient because it brings in key substantive evidence from the lab report without allowing for the type of cross-examination required by the United States Supreme Court to avoid a violation of a defendant's Confrontation Clause rights.

The majority also states that "the testifying expert was the witness whom the defendant had the right to confront. Defendant was able to cross-examine Ray fully concerning all aspects of her testimony." But the United States Supreme Court has stated that "the [Confrontation] Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." *Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2716. Because she was not present, Agent Ray could not possibly testify to the procedures followed, or not followed, by Agent Mills, the nontestifying analyst; cross-examination of Agent Ray is not a "fair enough opportunity for cross-examination" under the Confrontation Clause. *Id.* at ___, 131 S. Ct. at 2716. Again, the defendant had the right to cross-examine Agent Mills.

The majority correctly states that "raw, machine-generated data" are neither hearsay nor testimonial. The majority relies heavily on the fact that Agent Ray looked at such "raw, machine-generated data" when forming her allegedly independent opinion. In doing so, the majority oversimplifies Agent Ray's review process and testimony and glosses over the portions that most clearly implicate the Confrontation Clause. Agent Ray did not simply look at graphs produced from machines and testify to those results. Rather, she testified:

> Q. When you conducted this peer review, specifically what documents did you review?
>
> A. I reviewed the drug chemistry worksheet or the lab notes that the analyst wrote her notes on and the data that came from the instrument that was in the case file and then I also reviewed the data that was still on the instrument and made sure that was all there too.

Immediately after this exchange, Agent Ray was asked to "list the tests that were conducted on the substance in control number 16826[.]" She responded, "A color test was performed, a melting point

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Crime Lab Scandal, 27 Crim. Just., Spring 2012, at 43, 43 ("This failure of the North Carolina criminal justice system is breathtaking.").

was performed, and then the GCMS was used." She was later asked, "[C]an you tell us what her result appears to have been?" She answered, "[O]n the color test it has a positive sign with a circle around it and then says blue underneath that." Agent Ray did not simply evaluate raw data—she reviewed the lab report and *testified to some of its contents*, specifically which tests the nontestifying analyst conducted and the results of those tests. Because Agent Ray was not present for those tests, she had to rely entirely on the certification of the testing analyst that those tests were in fact performed, and performed in compliance with operating procedure and without error. Because that certification "reported more than a machine-generated number . . . . [t]hese representations, relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination." *Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2714. Here, as in *Crawford* (and *Bullcoming*), it is clear from Agent Ray's testimony that she, and now the majority, have relied on "assumptions that cross-examination might well have undermined." *Crawford*, 541 U.S. at 66, 124 S. Ct. at 1372.[5] Had Agent Ray simply been provided the graphs and data printouts themselves, and come to conclusions based on that raw data, there might not have been a confrontation problem. *See Williams*, ___ U.S. at ___, 132 S. Ct. at 2240; *but see Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2715 ("[T]he comparative reliability of an analyst's testimonial report drawn from

5. Ray testified, for example:

> Q. You have to assume she followed the standard operating procedures, correct?
>
> A. Correct.
>
> Q. Can you personally verify anything about the conditions of her lab suite at the time?
>
> A. No, I cannot.
>
> Q. Can you verify anything about her state of mind at the time?
>
> A. No, I cannot.
>
> Q. Can you verify that she wore gloves when she performed these tests?
>
> A. No, I cannot.
>
> Q. Can you verify how many different samples she tested that day?
>
> A. No.
>
> Q. Have you run a GCMS on this substance?
>
> A. No, I did not.

machine-produced data does not overcome the Sixth Amendment bar."). But as soon as she testified to past events memorialized in the testing analyst's lab notes and drug worksheet, Agent Ray implicated the Confrontation Clause.

Further, even if she had only relied on raw data in forming her opinion, Agent Ray's expert opinion would be relevant only if the State provided the foundation for the data, such as how the data were generated—a foundation that would presumably require testimony from the nontestifying analyst anyway. *See Williams*, ___ U.S. at ___, 132 S. Ct. at 2241 (identifying as a safeguard against circumvention of the Confrontation Clause the rule that "if the prosecution cannot muster any independent admissible evidence to prove the foundational facts that are essential to the relevance of the expert's testimony, then the expert's testimony *cannot* be given any weight by the trier of fact" (emphasis added)). In *Williams*, this safeguard was satisfied by "independent circumstantial evidence showing that the Cellmark report was based on a forensic sample taken from the scene of the crime." *Id.* at ___, 132 S. Ct. at 2240-41. Here, without entering the report itself into evidence or allowing Agent Ray to testify from the report about chain-of-custody information, there is no independent evidence establishing that the data Agent Ray reviewed were generated in fact from the sample taken from the crime scene.

Agent Ray's testimony is also legally insufficient to prove that the substance was cocaine because her opinion was based on assumptions that the substance was properly logged and handled, the tests properly conducted, and the results properly recorded. Effectively, her opinion is "*if* everything was done properly, and *if* the report is accurate, *then* the substance is cocaine." Without other evidence to confirm those assumptions, there is no actual proof that defendant possessed cocaine.

While the majority acknowledges that the North Carolina Rules of Evidence "must comport with constitutional requirements," the substance of its opinion does not follow that mandate. Instead, the majority opinion relies heavily on the Rules of Evidence, which are irrelevant to the determination of whether defendant's Confrontation Clause rights have been violated.[6] As stated by the United States

6. At the heart of the majority opinion here is the assertion that as long as a testifying expert is cross-examined, the Confrontation Clause is satisfied. The majority appears to rely on *State v. Fair*, 354 N.C. 131, 557 S.E.2d 500 (2001), *cert. denied*, 535 U.S. 1114, 122 S. Ct. 2332 (2002), and *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied*, 471 U.S. 1009, 105 S. Ct. 1877 (1985), for this assertion. These cases were based entirely on the now-discredited reliability framework established by

Supreme Court: "Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." *Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364. "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . . ." *Id.* at 61, 124 S. Ct. at 1370. Defendant did not challenge the testimony here for violations of the Rules of Evidence but because it violated his Sixth Amendment right to confront witnesses against him. The North Carolina Rules of Evidence have no place in this discussion.

Finally, the majority has failed to set out a clear framework for lower courts to use in analyzing this type of complicated, fact-specific Confrontation Clause question. Part of our charge as a Court is to provide guidance to lower courts; thus, I have set out a methodical approach for cases in which an expert witness testifies about the results of a lab report, regardless of whether the underlying report is ultimately admitted into evidence. Viewing recent United States Supreme Court precedent as a whole, I apply a four-part analysis to address these types of cases.

First, we determine whether the underlying lab report is testimonial—if it is not, there is no Confrontation Clause violation. *Compare Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2217 (rejecting the prosecution's argument that the lab reports were not testimonial because, according to the Court, "[a] document created solely for an 'evidentiary purpose,' . . . made in aid of a police investigation, ranks as testimonial"), *with Williams*, ___ U.S. at ___, 132 S. Ct. at 2243 (deciding that the lab report in question was not testimonial because "the primary purpose of the Cellmark report, viewed objectively, was not to accuse [the defendant] or to create evidence for use at trial") (plurality).

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the United States Supreme Court in *Ohio v. Roberts*, 448 U.S. at 65-66, 100 S. Ct. at 2538-39. As pointed out by the majority, *Roberts* was explicitly overturned by the United States Supreme Court in *Crawford*: "The [*Roberts*] framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations." 541 U.S. at 63, 124 S. Ct. at 1371. *See also Whorton v. Bockting*, 549 U.S. 406, 416, 127 S. Ct. 1173, 1181 (2007) ("The *Crawford* rule is flatly inconsistent with the prior governing precedent, *Roberts*, which *Crawford* overruled."). Relying on *Fair* and *Huffstetler*, the majority concludes that because " '[i]t is the expert opinion itself, not its underlying factual basis, that constitutes substantive evidence,' " *Fair*, 354 N.C. at 162, 557 S.E.2d at 522, and that so long as the information relied upon by the testifying expert "[allows] the factfinder 'to understand the basis for the expert's opinion and to determine whether that opinion should be found credible,' " *Huffstetler*, 312 N.C. at 108, 322 S.E.2d at 121, there is no Confrontation Clause violation. To the extent that *Huffstetler* and *Fair* rely on the rejected *Roberts* framework, they cannot be considered good law and have no place in our discussion of this issue.

Second, we examine whether the testifying expert personally conducted the testing, and if not, whether the State has shown that the nontestifying analyst is unavailable and that the defendant had a prior opportunity to cross-examine. If the original testing analyst testifies, there would be no Confrontation Clause violation because she could be cross-examined on the procedures and protocols she followed in conducting the tests. *See Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2715. But if the original testing analyst does not appear as a witness, the State must show that she was unavailable and that defendant had a prior opportunity to cross-examine her. *See Melendez-Diaz*, 557 U.S. at 309, 129 S. Ct. at 2531. In the absence of such a showing, or a stipulation or waiver, neither the report itself nor the report's conclusions can be properly received as evidence without running afoul of the Confrontation Clause. *See id.* at 329, 129 S. Ct. at 2542; *see also Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2715.

Third, if the testifying analyst is relying on another analyst's reports, we decide whether the testifying expert offered an independent opinion based on the lab report or merely acted as a surrogate witness. The decision in *Bullcoming* appears to leave room for an expert who did not conduct the testing in question to offer an "independent opinion" on the fact at issue. *See* ___ U.S. at ___, 131 S. Ct. at 2716 (noting that the State did not "assert that [the substitute expert] had any 'independent opinion' concerning Bullcoming's [blood alcohol content]"). But the opinion must be truly independent—"surrogate testimony" that brings in the absent analyst's test results and conclusions but cannot "convey what [the testing analyst] knew or observed about the events his certification concerned" is constitutionally insufficient. *Id.* at ___, 131 S. Ct. at 2715.

Fourth, we decide whether any error is reversible, applying the appropriate standard of review.

In applying that structure for analysis here, I would hold that: (1) the lab report underlying Agent Ray's statements was testimonial; (2) Agent Ray did not personally conduct the testing on the cocaine sample, and the State has not shown that the testing analyst (Mills) was unavailable and that defendant had a prior opportunity to cross-examine; (3) Agent Ray offered no independent opinion based on the lab report, merely communicating to the jury the lab report's contents under the guise of an expert opinion; and (4) the error was not harmless beyond a reasonable doubt.

In addressing the fourth component, the majority assumes for the sake of argument that admission of the testimony violated the Confrontation Clause, but finds the error harmless. As the majority acknowledges, the State bears the burden of proving that this constitutional error was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (2011). Under subsection 15A-1443(b), this Court presumes such a violation to be prejudicial. *Id.* Our case law shows that in order to overcome this presumption, we often require "overwhelming" evidence of a defendant's guilt. *See, e.g.*, *State v. Bunch*, 363 N.C. 841, 845-46, 689 S.E.2d 866, 869 (2010) (" '[T]he presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt.' " (alteration in original) (quoting *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988))). Here, because I would hold that Agent Ray's testimony was inadmissible, the only remaining evidence the State presented to prove that the substance was cocaine was (1) the officer's testimony that defendant admitted the fact to him at the scene of the crime, and (2) the officer's testimony that the substance "appear[ed] to be powder cocaine." This is hardly overwhelming evidence because it turns entirely on the officer's credibility.

Further, in its harmless error analysis the majority misapplies *State v. Nabors*, 365 N.C. 306, 718 S.E.2d 623 (2011). There, we applied the plain error standard of review, not constitutional harmless error review as we do here. There, unlike here, the defendant put on affirmative evidence that the substance in question was cocaine but that it belonged to someone else; in addition, he challenged the sufficiency of the evidence through a motion to dismiss, rather than by objecting to the testimony identifying the controlled substance. *Id.* at 312-13, 718 S.E.2d at 626-27. For sufficiency purposes we consider all of the evidence—including incompetent evidence—in the light most favorable to the State. Thus, in *Nabors*, the defendant had to prove that the trial court's error in admitting lay testimony identifying a controlled substance had a probable impact on the outcome of trial, which he could only do by showing that all other competent and incompetent evidence, taken in the light most favorable to the State, was likely insufficient to support the charges. Here, by contrast, the State bears the burden of proving the constitutional error was harmless beyond a reasonable doubt. As such, these cases are entirely different.

Here the entire prosecution of defendant depends on Agent Ray's testimony to prove that the substance was cocaine. Without her testimony all that remains is an uncorroborated assertion by an officer on

the witness stand that defendant agreed the substance was cocaine. Yet defendant also testified and denied that he had said the substance was cocaine. Here the credibility of all those statements must be weighed by the jury, by contrast to the sufficiency analysis in *Nabors*, in which only evidence supporting the State's case can be considered. The officer's testimony cannot be considered overwhelming under the constitutional harmless error standard we apply here. I conclude that the State has failed to show that the constitutional error here was harmless beyond a reasonable doubt and would hold that defendant should receive a new trial on the charge of possession of cocaine.

This case can be summarized quite simply: Agent Ray provided the only substantive evidence about the central issue in the case—the identity of a chemical substance found in defendant's possession—based entirely on test results produced and reported by another analyst (Agent Mills), whom defendant had no opportunity to cross-examine. As such, he had no way to question the reliability of the process by which those test results were obtained. Under *Crawford*, *Melendez-Diaz*, *Bullcoming*, and *Williams*, this is a quintessential Sixth Amendment violation. "The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience." *Melendez-Diaz*, 557 U.S. at 325, 129 S. Ct. at 2540. Offering defendant the opportunity to cross-examine Agent Mills, not just Agent Ray, was required by the Sixth Amendment. Accordingly, I respectfully dissent.

Chief Justice PARKER joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. JOHN EDWARD BREWINGTON

No. 235PA10

(Filed 27 June 2013)

Constitutional Law—Confrontation Clause—laboratory analysis

The Confrontation Clause rights of a defendant in a cocaine prosecution were not violated where the SBI agent who performed the laboratory analysis did not testify, but another agent presented an independent opinion formed as a result of her own analysis of the first agent's testing. The laboratory report was not admitted. As in *State v. Ortiz-Zape*, the testifying agent presented an independent opinion formed as a result of her own analysis, not mere surrogate testimony, and defendant was able to conduct a vigorous and searching cross-examination.

Justice HUDSON dissenting.

Chief Justice PARKER joins in this dissenting opinion.

Justice BEASLEY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 204 N.C. App. 68, 693 S.E.2d 182 (2010), finding prejudicial error in a judgment entered on 13 February 2009 by Judge Arnold O. Jones, II in Superior Court, Wayne County, and ordering that defendant receive a new trial. Heard in the Supreme Court on 12 February 2013.

Roy Cooper, Attorney General, by Robert C. Montgomery, Special Deputy Attorney General, and Daniel P. O'Brien, Assistant Attorney General, for the State-appellant.

Anna S. Lucas for defendant-appellee.

EDMUNDS, Justice.

Defendant John Edward Brewington's conviction for possession of cocaine was reversed by the Court of Appeals on the grounds that his right to confront the witnesses against him, guaranteed by the Sixth Amendment to the Constitution of the United States, was violated. Because we conclude that defendant's confrontation rights were adequately preserved, we reverse.

At about 10:15 p.m. on 18 January 2008, Goldsboro Police Officer James Serlick observed defendant riding a bicycle on Potley Street.

None of the lights or reflectors legally required for riding after dark were on the bicycle, so the officer stopped defendant and asked for identification. When the officer further asked defendant if he was carrying either drugs or a weapon, defendant gave Officer Serlick consent to search his person. During the ensuing pat-down, the officer touched something that "felt like a rock" on the inside of defendant's left leg. Officer Serlick pulled defendant's sock down and a napkin fell out. The officer opened the napkin and saw "an offwhite rock-like substance" that he believed to be cocaine. Officer Serlick seized the substance, then arrested defendant and transported him to the magistrate's office. Defendant was indicted for possession of cocaine, in violation of N.C.G.S. § 90-95(a)(3).

At defendant's trial, the State presented evidence to establish chain of custody of the seized substance. Officer Serlick testified that he placed the rock-like substance in a plastic bag, initialed it, added such routine information as the case number, defendant's name, the item number, and the date and time the item was recovered, and then secured the plastic bag in an evidence locker. The material subsequently was transported to the North Carolina State Bureau of Investigation (SBI) laboratory, where it was analyzed by Assistant Supervisor in Charge Nancy Gregory. However, at trial, evidence of the identity of the material found in defendant's sock was presented through the testimony of SBI Special Agent Kathleen Schell.

Before Agent Schell reached the crux of her testimony as to the chemical analysis of the substance, defense counsel objected and moved to exclude her testimony on the grounds that Agent Schell "didn't actually do the analysis in the case," and, as a result, defendant was "not able to cross-examine this person . . . . because her opinion is not going to be based on an actual test done to the item of evidence . . . , her opinion is going to be based solely on what some other person did and wrote down in a report." The trial court allowed an extensive voir dire of Agent Schell, then denied defendant's motion.

Continuing her testimony before the jury, Agent Schell described how an item submitted to the SBI laboratory is given a unique identification number and how the progress of such an item is tracked. She identified Agent Nancy Gregory as her supervisor and described Agent Gregory's training and experience. Agent Schell then reported how preliminary color tests are performed on a substance, followed by more specific tests tailored to the results of the color tests. She advised that the chemist who does the testing prepares a report and that the data and resulting report are reviewed by another SBI

chemist, adding that her own duties include conducting such reviews. The record indicates that Agent Gregory's laboratory report was not admitted into evidence. Agent Schell's direct testimony concluded with the prosecutor asking whether she had formed an opinion, based upon her review of the results of Agent Gregory's testing, as to the identity of the substance. Defendant again objected but his objection was overruled. Agent Schell testified that, in her opinion, the substance was cocaine base. Defendant thereafter cross-examined Agent Schell carefully and extensively, leaving no doubt that Agent Schell did not personally perform or observe any of the tests she relied on in forming her opinion.

On appeal, defendant argued that his rights secured under the Confrontation Clause of the Sixth Amendment were violated when the trial court permitted Agent Schell to testify that the substance found on defendant was cocaine based solely on Agent Gregory's notes and lab report. Relying heavily on the Supreme Court of the United States' decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), the Court of Appeals found that the admission of Agent Schell's testimony constituted "an expert utilizing data collected by another person to form an independent opinion," *State v. Brewington*, 204 N.C. App. 68, 77, 693 S.E.2d 182, 188 (2010), and determined that admission of the testimony violated the Confrontation Clause, *id.* at 82-83, 693 S.E.2d at 191-92.

The Court of Appeals noted that Agent Schell testified that she " 'would have come to the same conclusion that [Agent Gregory] did,' " but only "if Agent Gregory followed procedures" and "if [she] did not make any mistakes." *Id.* at 80, 693 S.E.2d at 190. The court continued that "it is precisely these 'ifs' that need to be explored upon cross-examination to test the reliability of the evidence" and concluded that permitting Agent Schell to testify about the composition of the substance tested, and to identify it as cocaine, was error. *Id.* The Court of Appeals further found that no other concrete evidence identified the substance as cocaine and concluded that the admission of Agent Schell's testimony was not harmless error. Accordingly, the Court of Appeals ordered a new trial. *Id.* at 82-83, 693 S.E.2d at 192.

We allowed the State's petition for discretionary review and now reverse the holding of the Court of Appeals. This Court has recently considered the scope of protections provided by the Confrontation Clause of the Sixth Amendment in *State v. Ortiz-Zape*, ___ N.C. ___, ___ S.E.2d ___ (2013) (329PA11). In *Ortiz-Zap*e, after conducting an exhaustive review of current Confrontation Clause jurisprudence, we

determined that "when an expert gives an opinion, the opinion is the substantive evidence and the expert is the witness whom the defendant has the right to confront." *Id.* at ___, ___ S.E.2d at ___. In addition, we stated that "admission of an expert's independent opinion based on otherwise inadmissible facts or data 'of a type reasonably relied upon by experts in the particular field' does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert." *Id.* at ___, ___ S.E.2d at ___. Here, Agent Gregory's lab notes were not admitted into evidence. Instead, as in *Ortiz-Zape*, Agent Schell presented an independent opinion formed as a result of her own analysis, not mere surrogate testimony. *See Id.* at ___, ___ S.E.2d at ___. Defendant was able to conduct a vigorous and searching cross-examination that exposed the basis of, and any weaknesses in, Agent Schell's opinion. Accordingly, we conclude that defendant's Confrontation Clause rights were not violated.

The decision of the Court of Appeals is reversed.

REVERSED.

Justice HUDSON dissenting.

Because the majority here relies entirely on what I see as the flawed analysis in *State v. Ortiz-Zape*, ___ N.C. ___, ___ S.E.2d ___ (2013) (329PA11), I will not repeat the discussion from my dissenting opinion there. I write specifically to draw attention to the ways in which the majority here has gone even farther astray than in *Ortiz-Zape*.

In *Ortiz-Zape* Agent Ray described her review of the testing analyst's work. According to the majority's opinion, "Ray compared the machine-produced graph to the data from the lab's sample library and concluded that the substance was cocaine." *Ortiz-Zape*, ___ N.C. at ___, ___ S.E.2d at ___. Although it is clear from the testimony that Ray merely gleaned the conclusion from the report (She admitted that "I can only say according to the worksheet."), she was asked, "What is your independent expert opinion?" and answered, "My conclusion was that the substance was cocaine." *Id.* at ___, ___ S.E.2d at ___. Here, by contrast, Agent Schell was not asked and made no attempt to characterize her testimony as an "independent expert opinion." Rather, she was asked if she had "reviewed . . . the results of the examinations" performed by the testing analyst and if she had "also reviewed Agent Gregory's conclusion[.]" She testified that "[b]ased upon all the data that [Agent Gregory] obtained from the analysis of that particular item . . . *I would have come to the same conclusion that she did.*" (Emphasis added.) This testimony is problematic.

As with every other Confrontation Clause case we decide today, a central question is whether the analyst's opinion is independent or not. The independence of the testifying expert's opinion becomes crucial when, as here, the lab report underlying that opinion is testimonial and the analyst who prepared the report did not testify. Under these circumstances, the report and its conclusions are usually inadmissible under the Confrontation Clause. A truly independent expert opinion may serve as evidence in the case, while an opinion based solely on review of and agreement with the inadmissible report is constitutionally infirm. Here, Agent Schell did nothing more than review Agent Gregory's notes and results and agree with her conclusion. Agent Schell's opinion was entirely based on another's work and notes, and involved no independent analysis whatsoever.

Moreover, while Agent Ray in *Ortiz-Zape* avoided reference to the original analyst's conclusions, Agent Schell actually introduced through her testimony Agent Gregory's conclusion from the lab report—the very conclusion that the trial court had explicitly ruled was inadmissible without testimony from Agent Gregory. Agent Schell testified that she "[came] to the same conclusion that [Agent Gregory] did," and then reported to the jury that conclusion: that the substance was 0.1 grams of cocaine base. In so testifying, Agent Schell informed the jury of the absent analyst's testimonial conclusion and thereby acted as a surrogate rather than an independent witness. This directly violates the rule in *Bullcoming*, in that Agent Gregory, not Agent Schell, should have been made available for cross-examination to satisfy the Confrontation Clause. "[S]urrogate testimony . . . could not convey what [the certifying analyst] knew or observed about the events this certification concerned, *i.e.*, the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." *Bullcoming v. New Mexico*, ___ U.S. ___, ___, 131 S. Ct. 2705, 2715 (2011) (footnote omitted).

Finally, the majority in *Ortiz-Zape* purports to find independent state law grounds to uphold the conviction, claiming that any possible constitutional error was harmless in light of other evidence establishing the chemical identity of the substance. Even if that analysis were correct—and it is not—no such escape valve exists in this case. Here, the officer testified on direct examination that he arrested defendant because he observed something he "believed" to be crack cocaine fall out of defendant's sock during a pat-down and that he took "the cocaine" into evidence. Even if visual identification of

crack cocaine by a layperson were permissible—a question this Court has not addressed, though the Court of Appeals has consistently ruled that it is not—such visual identification could hardly be considered "overwhelming evidence" of guilt sufficient to rebut the strong presumption that constitutional error is prejudicial. *See State v. Autry*, 321 N.C. 392, 399-400, 364 S.E.2d 341, 346 (1988). I would hold that the State has failed to prove harmless error beyond a reasonable doubt.

Through this and the other opinions released today, the majority has declined to follow the guidance of the U.S. Supreme Court's recent Sixth Amendment opinions, from *Crawford* through *Williams*, and has thus failed to protect a defendant's right to confront witnesses against him. The majority asserted in *Ortiz-Zape*, and again here, that "when an expert gives an opinion, the opinion is the substantive evidence and the expert is the witness whom the defendant has the right to confront." This statement completely ignores the Supreme Court's explanations of the scope of the Sixth Amendment's Confrontation Clause. Indeed, if that statement were law, any expert could give an opinion based on any outside inadmissible evidence, no matter how clearly testimonial or pointedly designed to prove an element of the State's case, without running afoul of the Confrontation Clause. This is precisely the type of problem that the Supreme Court has repeatedly addressed since *Crawford*, and most recently in *Williams*. The majority may disagree with the rulings of the United States Supreme Court, but we are nonetheless bound by them, as we are bound by the Constitution of the United States. Because in my view this decision, as that in *Ortiz-Zape*, is inconsistent with this Supreme Court jurisprudence, I must respectfully dissent.

Chief Justice PARKER joins in this dissenting opinion.

Justice BEASLEY dissenting.

Because defendant's right to confront the witnesses against him as guaranteed by the Sixth Amendment to the Constitution of the United States was violated, I respectfully dissent. The majority's rule allowing a substitute expert to provide the sole evidence of a critical element of the charged offense through an "independent opinion" diminishes our Confrontation Clause analysis. Instead, I would examine whether the information offered is critical to the State's case so

as to determine its true and actual purpose and thus, whether the Confrontation Clause was violated.

The following facts are necessary for a proper decision in this case. At trial, Agent Schell testified that Agent Gregory is her supervisor. She then testified as to her knowledge of Agent Gregory's experience and training, in addition to her own. Agent Schell then outlined the general testing procedure for determining whether a substance is cocaine. She described the security measures in place to track the reports that are produced and ensure they are not changed. The State next produced the sample sent to the lab for testing and the envelope in which it was returned to law enforcement. Referring to Agent Gregory's notes, Agent Schell testified to when testing was performed and what kinds of tests were performed, describing the testing procedure and reason for each test. The first test described was a color test:

> Q. And concerning this particular sample, can you just explain first the first color test, what kind of test that was and how it was performed?
>
> . . . .
>
> Q. And from the notes that you retrieved were you able to determine what the result was of this particular color test?
>
> A. In this particular test it did not turn any color.

Agent Schell testified that the failure to change color is a negative result, indicating particular chemicals are not present. She then explained that a second color test was performed, testifying as to how one typically performs it and what it indicates.

> Q. And when you reviewed this particular case, did you see the results of this test?
>
> A. I did.
>
> Q. And what was the result of that test?
>
> A. It turned blue.

Again, she testified as to the results of the next test:

> Q. And based on your review of the lab report, were you able to determine what the result was of this particular test?
>
> A. Yes, crosses were obtained. Those specific crosses were obtained.

She testified that this indicates the substance is cocaine. Yet again, Agent Schell testified as to the last test: although this time, the question asked and her testimony spoke more directly to the specific process employed:

> Q. And was any other test performed then?
>
> A. A more specific instrumental test was performed.
>
> Q. Can you describe how that test was performed?
>
> . . . .
>
> Q. And in this particular case did you review the results of that particular test?
>
> A. I did.
>
> Q. And what were the results?
>
> A. In this case the graph produced, there was a mixture of cocaine base and bicarbonate, which is just baking soda. So further tests had to be conducted.
>
> . . . .
>
> Q. And what happened when that was done?
>
> A. A graph was produced using that same instrument and it was a clean graph of just cocaine base.
>
> Q. Now during your tests—during your explanation of the tests . . . ?

Agent Schell then testified that she reviewed the tests performed and the results obtained and provided her opinion:

> A. Based upon all the data that [Agent Gregory] obtained from the analysis of that particular item, State's Exhibit 1B, I would have come to the same conclusion that she did.
>
> Q. And what is your opinion as to the identity of the substance that was submitted as State's Exhibit 1B?
>
> [objection/overruled]
>
> . . . .
>
> A. State's Exhibit 1B is the Schedule II controlled substance cocaine base. It had a weight of 0.1 gram.

On cross-examination Agent Schell testified that she did not personally perform the tests, as noted by the majority. Most significantly, defense counsel asked, "And they sent you here to testify from that person's notes who actually did the test; is that right?" to which Agent Schell responded, "That is correct."

Based on these facts and the Confrontation Clause precedent that is binding on this Court, I would hold that it is a violation of the Confrontation Clause to offer a substitute analyst's opinion on the identity of a controlled substance when that opinion relies upon testing performed by another analyst and seeks to serve as evidence or proof of a critical element of the offense, though purportedly not offered for the truth of the matter asserted. I would hold it is a further violation to admit the report of the testing analyst as the basis for that expert opinion.

The Confrontation Clause mandates that defendants have the right to ensure that any evidence, let alone essential evidence, be vulnerable to its shortcomings and exposed for any falsities that underlie it. *See* U.S. Const. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004). When the report at issue, entered into evidence or not, addresses a critical element of the offense charged, it inherently operates "against" the defendant, and any person responsible for authoring that evidence becomes a witness against him. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009) ("[U]nder our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment."). In these cases the very nature of the details of the lab report go beyond testimonial evidence; these details are essential evidence required by statute and are thus valuable for the truth of the matter asserted. Consequently, when the truth of the matter asserted in a lab report is critical to the State's case, and not merely evidence to bolster the State's case, any attempt to reveal the substance of that report, regardless of the stated purpose, without making its author available for cross-examination necessarily violates the defendant's right to confront witnesses against him. *See Bullcoming v. New Mexico*, ___ U.S. ___, ___, 131 S. Ct. 2705, 2710 (2011) ("The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—*made for the purpose of proving a particular fact*—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the con-

stitutional requirement." (emphasis added)); *Melendez-Diaz*, 557 U.S. at 311 fn. 1 ("It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must . . . be introduced live."). It is not sufficient to only permit the defendant to expose the inadequacies in the testifying expert's opinion, for this fails to address concerns regarding the critical evidence itself. In fact there will likely not be any inadequacies to expose in the testifying expert's opinion when the opinion is merely recitation of factual results obtained from the tests of another.

The rule and principles that I set forth above are consistent with the decision of the United States Supreme Court in *Bullcoming*:

> Principal evidence against Bullcoming was a forensic laboratory report certifying that Bullcoming's blood-alcohol concentration was well above the threshold for aggravated DWI. At trial, the prosecution did not call as a witness the analyst who signed the certification. Instead, the State called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample.
>
> The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

Bullcoming, ___ U.S. at ___, 131 S. Ct. at 2709-10. The facts presented to this Court today fall squarely under the ruling in *Bullcoming*.

Just as in *Bullcoming*, here the principal evidence against defendant was that which the State submitted through the testifying expert. The evidence at issue—a substance identified as a controlled substance—is most assuredly critical to the State's case: without it a conviction is not statutorily possible. The State made no showing that the testing analyst was unavailable, and defendant did not have a prior opportunity to cross-examine the testing analyst. Because the evidence at issue is directly prohibited by *Bullcoming* and is central to defend-

ant's conviction, a violation of the Confrontation Clause occurred, and the violation was not harmless beyond a reasonable doubt.

The majority in *State v. Ortiz-Zape*, ___ N.C. ___, ___ S.E.2d ___ (2013) (329PA11), upon which the majority here relies, held that the "admission of an expert's independent opinion based on otherwise inadmissible facts or data 'of a type reasonably relied upon by experts in the particular field' does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert." *Ortiz-Zape*, ___ N.C. at ___, ___ S.E.2d at ___. In this case the majority determines that the expert opinion was independent and the underlying information relied upon was not offered for the truth of the matter asserted. This holding contradicts the United States Constitution, United States Supreme Court precedent, and this Court's precedent.

To permit independent opinion testimony on a critical element of the offense when that opinion is based on evidence presented at trial "not for the truth of the matter asserted" is to permit the North Carolina Rules of Evidence to preempt the Confrontation Clause. Rules 703 and 705 of the North Carolina Rules of Evidence generally allow expert testimony in the form of an opinion, including provision of the information reasonably relied upon to reach the expert opinion. But these Rules are entirely without effect when they contradict the Confrontation Clause. The Supremacy Clause of the United States Constitution has long required, as recognized by this Court on numerous occasions, such a hierarchy of authority:

> This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

U.S. Const. art. VI, cl. 2; *Stephenson v. Bartlett*, 355 N.C. 354, 369, 562 S.E.2d 377, 388 (2002) ("When federal law preempts state law under the Supremacy Clause, it renders the state law invalid and without effect."). In sum, the majority's opinion bypasses the Confrontation Clause by using the North Carolina Rules of Evidence; such an outcome is impermissible under the Supremacy Clause.

In *Crawford* the United States Supreme Court held that rules of evidence cannot be used to escape the Confrontation Clause:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, *but it is a procedural rather than a substantive guarantee.* It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

541 U.S. at 61 (emphasis added) (citations omitted) (overruling its prior decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), which permitted testimonial evidence to be admitted so long as it was deemed reliable, regardless of whether there was an opportunity for confrontation). Thus, not only did the Court hold that rules of evidence are secondary to the Confrontation Clause, but the Court expressed that the Confrontation Clause is concerned not just with whether the information was *reliable*, but with whether the information can be determined to be *truthful* in open court. The only way to make that determination is to confront the individual from whom the information originated.

Here the majority relies on the North Carolina Rules of Evidence to admit evidence about the identity of a chemical substance on the grounds that "basis information" is admissible when an expert lays the foundation that the information on which she relied is the same as that on which others in her field would rely in forming an opinion on the identity of the substance. The first problem with this rationale is that the majority focuses on whether the information was reliably obtained and reliably used, or used in a reliable and common manner. This question is not among the concerns raised in *Crawford* that serve as the basis for the Court's application of the Confrontation Clause; instead, this question directly aligns with the concerns of *Ohio v. Roberts* that *Crawford* overruled. *See id.* Reliability of this kind is an *evidentiary* question. The Confrontation Clause addresses a *procedural* question: whether the defendant has the opportunity to determine, in front of the jury, if the information relied upon is reliable at all or is in fact a lie. *See id.*; *see also Bullcoming*, ___ U.S. at

___, 131 S. Ct. at 2715 ("[S]urrogate testimony of the kind [the testifying expert] was equipped to give could not convey what [the testing analyst] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." (footnote omitted)).

Our Court has previously recognized this procedural concern. *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010) ("The practical effect of the *Melendez-Diaz* ruling is that through cross-examination more light is being shed on the procedures expert witnesses use to support their testimony. In some instances, when practices are illuminated 'in the crucible of cross-examination,' their shortcomings become apparent." (citation omitted)); *id.* at 156, 694 S.E.2d at 752 (Newby, J., dissenting) ("The Confrontation Clause is a 'procedural . . . guarantee.' Those accused of criminal offenses are entitled to cross-examine the witnesses against them." (alteration in original) (internal citation omitted)). Furthermore, in cases such as this, the ability to cross-examine the testifying expert does not adequately address the procedural concern at issue: whether the testing analyst performed the tests correctly. *See Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2716 ("[T]he Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination."). The likelihood of a procedural violation becomes especially important when the evidence or information in question goes to a critical element of the offense.

It is true that an expert would rely upon the tests performed by the testing analyst, as relied on here by Agent Schell, to show the identity of a substance. These tests comply with the generally accepted scientific methods of proving that a substance is indeed an illicit drug. But this truth addresses an evidentiary question of reliability and not the procedural one at issue in Confrontation Clause analysis. With respect to the procedural concern, the testifying expert cannot verify that no mistakes were made in the testing or that the results generated by the testing analyst were not based on false information, error, or lies. This information cannot be ascertained without the right to confront the testing expert. It is precisely because of these lapses in procedure that the Confrontation Clause commands that the State present the testing analyst to testify. Because the State did not present such a witness in this case, it violated defendant's Sixth Amendment rights.

While the majority here, relying on *Ortiz-Zape*, contends that *Bullcoming* is distinguishable because the expert here is not a surrogate but is testifying to her own "independent" opinion about the reports, *Bullcoming* is directly on point with this case. Nothing in Agent Schell's opinion is "independent"; in fact, the veracity of Agent Schell's testimony is dependent on the validity and accuracy of Agent Gregory's testing methods. If Agent Gregory's testing was faulty, Agent Schell's testimony is inaccurate. Thus, without Agent Gregory's testimony, there is no reliable way to determine that the identity of the substance to which Agent Schell is testifying is accurate. The United States Supreme Court provided a very appropriate visual in *Bullcoming* that describes exactly what the State is attempting to do here and very clearly precludes it:

> Most witnesses, after all, testify to their observations of factual conditions or events, *e.g.*, "the light was green," "the hour was noon." Such witnesses may record, on the spot, what they observed. Suppose a police report recorded an objective fact—Bullcoming's counsel posited the address above the front door of a house or the read-out of a radar gun. Could an officer other than the one who saw the number on the house or gun present the information in court—so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures? As our precedent makes plain, the answer is emphatically "No." *See Davis v. Washington*, 547 U.S. 813, 826, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (Confrontation Clause may not be "evaded by having a note-taking police[officer] recite the . . . testimony of the declarant" (emphasis deleted)); *Melendez-Diaz*, 557 U.S., at ___, 129 S.Ct., at 2546 (KENNEDY, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second.").

Bullcoming, ___ U.S. at ___, 131 S. Ct. at 2714-15 (alterations in original) (internal citation omitted).

Here, much like the radar gun hypothetical, Agent Schell is merely testifying to the observations of another witness. *Bullcoming* directly forbids this. *Id.* Agent Schell even admits on cross-examination to such a recitation of Agent Gregory's notes. In fact, the majority of Agent Schell's testimony recites the recordation of visual observations made by Agent Gregory, exactly like the Supreme Court's radar gun example. She testified with respect to the color

tests: "In this particular test it did not turn any color," and, "It turned blue." Again, Agent Schell testified: "Yes, crosses were obtained. Those specific crosses were obtained." These are visual observations. There is no difference between this testimony and testifying, "It read fifty-five miles per hour," with respect to an officer's notes about what he saw on the radar gun. The only way to know the accuracy of the result of these tests is to *observe* them. The same logic applies to the weight of the substance: "It had a weight of 0.1 gram." Agent Schell could not know this with any sense of "independent" knowledge unless she personally verified that the scales were calibrated, personally executed the testing protocol properly, and observed the weight on the scale itself. In fact, the State's phrasing of the questions to Agent Schell indicates a request for exact recitation of Agent Gregory's notes and visual observations: "And *from the notes* that you retrieved were you able to determine what the result *was* of this particular color test?"; "[W]ere you able to determine what the result *was* of this particular test?"; "[D]id you *see* the results of this test?" (Emphases added.) This testimony directly violates the rule in *Bullcoming*. Whether referred to as an independent opinion or a peer review, testimony regarding these matters could only be based on the analyst's actual observance of a factual and visual occurrence.

When a jury is capable of drawing the same conclusions as the substitute expert if given the same information (*i.e.*, the report), this is indicative that the expert is merely parroting the testing analyst's results. Here if the jury were handed the report that stated the sample "turned blue" and told that blue indicated the presence of cocaine, a jury would conclude that the sample was cocaine. No expert knowledge is necessary and could not possibly produce an "independent" opinion outside that provided in the report. We must not create a back door to evade the Confrontation Clause by merely changing the diction from "surrogate" to "independent opinion."

Furthermore, there is no difference between handwritten notes to document an officer's observation of radar gun results and machine-produced data to document the results of a chemical test prepared and set up by a live person. Both leave room for falsification, entry error, sample error, or any number of other errors. The majority in *Ortiz-Zape* declares that machine-generated results may not operate as a witness against a defendant and thus are impervious to the Confrontation Clause:

> Because machine-generated raw data, "if truly machine-generated," are not a statement by a person, they are "neither

> hearsay nor testimonial." We note that "representations[] relating to past events and human actions not revealed in raw, machine-produced data" may not be admitted through "surrogate testimony." Accordingly, consistent with the Confrontation Clause, if "of a type reasonably relied upon by experts in the particular field," raw data generated by a machine may be admitted for the purpose of showing the basis of an expert's opinion.[1]

Ortiz-Zape, ___ N.C. at ___, ___ S.E.2d at ___ (internal citations omitted). The same majority reiterates this conclusion in *State v. Brent*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2013) ("Thus, machine-generated raw data, if of a type reasonably relied upon by experts in the field, may be admitted to show the basis of an expert's opinion."). Yet, such data serves as a receipt of human action the same way a note does.

In fact, the majority's opinions completely obscure the very safeguard the majority's own rule regarding such machine-generated data puts in place: the concerns of the Confrontation Clause are alleviated only when the data are "*truly* machine-generated." *Ortiz-Zape*, ___ N.C. at ___, ___ S.E.2d at ___. It is precisely that limitation that recognizes the procedural concern of the Confrontation Clause. Because the majority ignores this limitation, as is apparent by its lack of analysis in *Ortiz-Zape* and in *Brent*, the majority obscures the fact that the Confrontation Clause necessarily applies here. The Supreme Court made clear in *Crawford* that reliability (an evidentiary concern) does not preclude the fact that the concern of the Confrontation Clause (a procedural one) may still be present. *See Crawford*, 541 U.S. at 61. The Confrontation Clause is not concerned with whether the machine itself reliably produced the results (the evidentiary concern); it is concerned with whether the testing analyst actually followed a reliable procedure in order to allow the machine to produce a reliable result (the procedural concern).

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1. This assertion grows out of the majority's reference to Justice Sotomayor's concurring opinion in *Bullcoming*, which notes that *Bullcoming* did not present a question of an independent opinion or reliance on results that were purely machine-generated. *Id.* at ___, 131 S. Ct. at 2722 (Sotomayor, J., concurring). Such a reference provides no support to the majority's position. This Court is not bound by the dicta within a concurring opinion of a single Justice of the Supreme Court. Further, the plurality opinion in *Williams*, authored by Justice Alito, made the same attempt to distinguish its case from *Bullcoming* by using Justice Sotomayor's observation. Justice Alito declared, "We now confront that question." *Williams*, ___ U.S. at ___, 132 S. Ct. at 2233. Yet, Justice Sotomayor joined Justice Kagan in the dissent in *Williams*, declaring that a Confrontation Clause violation had occurred. *See id.* at ___, 132 S. Ct. at 2264-65 (Kagan, J., dissenting). Thus, while Justice Sotomayor may have observed that the question would be different when it involved an "independent" opinion or machine-generated results, she declared that the answer is the same.

Here the majority concludes that the expert opinion was "independent" and, by way of reference to the majority opinion in *Ortiz-Zape*, that the report was not used for the truth of the matter asserted because it was only used to support this "independent opinion" of a qualified expert. It is necessary to note that the majority acknowledges that without qualifying as "basis information" for the expert's opinion, the information is "otherwise inadmissible." *Brewington*, ___ N.C. at ___, ___ S.E.2d at ___; *see also Ortiz-Zape*, ___ N.C. at ___, ___ S.E.2d at ___. This inadmissibility stems directly from the fact that the evidence violates the Confrontation Clause if it is used for the truth of the matter asserted. Thus, it is necessary to determine whether the report was indeed used for the truth of the matter asserted. This determination is informed by the critical role the report plays in the State's case and by the testimony.

In *State v. Llamas-Hernandez*, 363 N.C. 8, 673 S.E.2d 658 (2009) (per curiam), this Court adopted the dissenting opinion from the Court of Appeals concluding that chemical testing was required to identify a substance as powder cocaine. *Id.* In *Ward* this Court extended that rule to cover pills requiring "very technical and specific chemical designation[s]" that "imply the necessity of performing a chemical analysis to accurately identify controlled substances." *Ward*, 364 N.C. at 143, 694 S.E.2d at 744 (majority opinion) (alterations in original) (citations and internal quotation marks omitted). Further,

> [b]y imposing criminal liability for actions related to counterfeit controlled substances, the legislature not only acknowledged that their very existence poses a threat to the health and well-being of citizens in our state, but that a scientific, chemical analysis must be employed to properly differentiate between the real and the counterfeit. . . . As such, a scientifically valid chemical analysis of alleged controlled substances is critical to properly enforcing the North Carolina Controlled Substances Act.

Id. at 143-44, 694 S.E.2d at 745. Thus, this Court has held that chemical testing is required to establish the identity of any alleged controlled substance *and* that such testing must be "scientifically valid." *Id.* The State did not introduce any such substantive evidence of chemical testing; thus, the Confrontation Clause was violated.

In addition to conflicting with the precedent of this Court, the majority's opinion, through the majority opinion in *Ortiz-Zape*, relies on case law that is without effect or weight here. First among these is the United States Supreme Court's recent decision in *Williams v. Illinois*, ___ U.S. ___, 132 S. Ct. 2221 (2012).

In *Williams* the Supreme Court failed to reach a majority opinion. Instead, it decided the case with a four-one-four plurality, with Justice Thomas concurring in the judgment, but offering an alternative rationale. Justice Thomas directly rejected the reasoning used by the plurality and its conclusion that the report was not used for the truth of the matter asserted and instead concurred solely on the basis that the report lacked the formality required of testimonial statements. *Id.* at ___, 132 S. Ct. at 2256 (Thomas, J., concurring in the judgment) ("[T]here was no plausible reason for the introduction of Cellmark's statements other than to establish their truth."). "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . ." *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation and internal quotation marks omitted). In *Williams* the only common, and thereby narrowest, ground between Justice Thomas's concurrence and the plurality opinion is that there is no Confrontation Clause violation in a case having the exact fact pattern of *Williams*. *Williams*, thus, is simply not binding upon this case.[2]

The majority next relies on *State v. Fair*, 354 N.C. 131, 557 S.E.2d 500 (2001), *cert. denied*, 535 U.S. 1114 (2002) and, by implication, also on *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied*, 471 U.S. 1009 (1985). In *Huffstetler* this Court opined that "[t]he admission into evidence of expert opinion based upon information not itself admissible into evidence does not violate the Sixth Amendment guarantee of the right of an accused to confront his accusers where the expert is available for cross-examination." 312 N.C. at 108, 322 S.E.2d at 120 (citations omitted). In *Fair* this Court stated that "[a]n expert may properly base his or her opinion on tests performed by another person, if the tests are of the type *reasonably relied upon* by experts in the field." 354 N.C. at 162, 557 S.E.2d at 522

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2. In fact, the only certainty that can be derived from *Williams* that is applicable to this case is that, had the report in *Williams* possessed the testimonial qualities of solemnity and formality that Justice Thomas was looking for, Justice Thomas would have likely found a Confrontation Clause violation. *See* ___ U.S. at ___, 132 S. Ct. at 2259-61. Here the report was certified by Agent Gregory's supervisor and prepared for the purpose of serving as evidence against defendant. There is no question that it is testimonial in nature, even under Justice Thomas's standards. *See id.*; *Bullcoming*, ___ U.S. at ___, ___, 131 S. Ct. at 2710, 2713-14 (holding a laboratory report that contained a "Certificate of Analyst" was testimonial); *Melendez–Diaz*, 557 U.S. at 308, 310 (finding laboratory reports testimonial when they were sworn to before a notary public by the testing analysts).

(emphasis added) (citations omitted). The majority relies on these cases for its position that the information upon which an expert relies to formulate his or her opinion may be admitted as the basis for that opinion without violating the Confrontation Clause because the defendant has the opportunity to cross-examine the testifying expert on the substantive evidence, which is only the opinion of the testifying expert.

Foremost, these cases predate *Melendez-Diaz*, *Bullcoming*, and this Court's own decision in *State v. Locklear*, 363 N.C. 438, 681 S.E.2d 293 (2009). *Huffstetle*r was decided in 1984, well before the Supreme Court's 2004 ruling in *Crawford* that changed the Confrontation Clause landscape. *Fair*, decided in 2001, also predates *Crawford*. To the extent either conflicts with *Crawford* and its progeny, they are overruled. With respect to *Huffstetler*, this conflict with *Crawford* is most apparent in the references to reliability.

Ohio v. Roberts permitted the admission of testimony without confrontation when the statements satisfied various indicia of reliability. 448 U.S. at 66. In *Crawford* the Supreme Court unambiguously overruled *Roberts*, regardless of what the Rules of Evidence may dictate. 541 U.S. at 60, 61, 63, 65, 68-69. Because this Court's entire evaluation of the Confrontation Clause claim in *Huffstetler* concerned the reliability of the expert opinion and its status as an exception to the hearsay rule, 312 N.C. at 106-08, 322 S.E.2d at 119-21 (concluding that because the information was "inherently reliable" and "reasonably relied upon" by other experts in the field there could be no violation of the Confrontation Clause (internal citations omitted)), *Crawford* directly overrules any precedent set by *Huffstetler*, making it entirely invalid for purposes of Confrontation Clause jurisprudence. In turn, because this Court's opinion in *Fair* relied almost exclusively on the rationale developed in *Huffstetler*, *Fair*, 354 N.C. at 162-63, 557 S.E.2d at 522, *Fair* is also void.

Further, *Huffstetler* and *Fair* are entirely distinguishable from this case. In both, the testifying expert had actually seen and directly examined the sample in question at some point. *Fair*, 354 N.C. at 163, 557 S.E.2d at 522 (noting that the testifying expert physically examined the clothing cutouts and held them up to the clothing to confirm from where they were cut); *Huffstetler*, 312 N.C. at 105-06, 322 S.E.2d at 119 (noting that the testifying expert had performed some of the tests on the samples to determine the blood grouping). Thus, these testifying experts were not working *solely* from the reports of the

testing analysts and added some of their own *independent* work to the information derived from the underlying reports. In contrast, here the expert had *only* the report of the testing analyst, had *never* personally tested the actual sample, and had *never* touched or seen it until trial. Her opinion was entirely *dependent* upon the work of the testing analyst, in direct contradiction to the holding in *Bullcoming*.

That the evidence in question here goes to the heart of what the State is required to prove further distinguishes this case from those upon which the majority relies. *Williams* dealt with DNA matching that amounted to "bolstering evidence" to suggest that the defendant was the perpetrator. The defendant could have been convicted without DNA evidence; thus, the DNA was not evidence needed to prove an essential element of the crime. Similarly, *Huffstetler* and *Fair* were both homicide cases in which the evidence in question was not direct proof required to establish an essential element of the crime. *See Fair*, 354 N.C. at 136-39, 557 S.E.2d at 507-08 (examining testimony regarding DNA testing with respect to the Confrontation Clause evidence, amid other evidence implicating the defendant in the victim's murder, including possession of the alleged murder weapon, use and possession of the victim's credit cards, lay witness testimony, and prior statements made by the defendant); *Huffstetler*, 312 N.C. at 96-99, 105-06, 322 S.E.2d at 114-15, 119 (addressing evidence of blood matches with respect to the Confrontation Clause, amid a slew of other evidence implicating the defendant in the victim's murder, including the alleged murder weapon). Conversely, in *Bullcoming* the evidence at issue went to prove an essential element of the crime—an elevated blood alcohol level—without which the defendant could not be convicted. *Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2709 ("Principal evidence against Bullcoming was a forensic laboratory report certifying that *Bullcoming's* blood-alcohol concentration was well above the threshold for aggravated DWI."). Thus, this case is bound by *Bullcoming*.[3]

3. Our Court's decision in *Locklear* is both valid and factually applicable to this case as well. In *Locklear* this Court recognized the firm precedent set by *Crawford* and concluded that it was a violation of the Confrontation Clause to admit the opinion testimony of a forensic analyst as to the reports and findings of two nontestifying forensic analysts with respect to the cause of death and identity of the victim. 363 N.C. at 451-52, 681 S.E.2d at 304-05. This Court, however, found that the violation was harmless because the State had presented "other evidence of" a second, unrelated murder allegedly committed by the same defendant, and "[n]either fact [provided by the testifying expert regarding the other victim] was *critical* . . . to the State's case against defendant for the murder [for which the defendant was being tried]." *Id.* at 453, 681 S.E.2d at 305 (emphasis added). As mentioned above, the evidence presented in this case through Agent Schell's testimony was most certainly "critical" to the State's case.

The parallel to *Bullcoming* becomes more apparent in the context of the majority's opinion in *State v. Craven*, ___ N.C. ___, ___ S.E.2d ___ (2013) (holding that the testifying expert was a mere "surrogate"), decided concurrently with this case. That the majority in *Craven* holds a Confrontation Clause violation occurred under the precedent of *Bullcoming*, but fails to do so here, is a remarkable demonstration of the semantics embodied in the term "independent opinion." In *Craven* the State asked the substitute analyst, who coincidentally was also Agent Schell, whether she reviewed the reports of the testing analyst and whether she agreed with the results of the report. She answered both questions affirmatively. *Craven*, ___ N.C. at ___, ___ S.E.2d at ___. That exact same procedure was followed here: Agent Schell stated that she did not perform the tests, but reviewed the reports of the testing analyst and agreed with the conclusions. In both *Craven* and the case *sub judice* the information at issue goes to a critical element of the offense charged. Yet, in *Craven* the fatal error to achieving the classification of "independent opinion" as observed by the majority was that the State then asked, "What was [the testing analyst's] conclusion?" Here the State asked for Agent Schell's opinion. This is mere semantics.

In overruling *Roberts*, the Supreme Court made clear that the Confrontation Clause is concerned with more than just hearsay. *Crawford*, 541 U.S. at 51 ("[N]ot all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them."). Thus, it is not enough to only examine the diction that a witness employs to provide another's statement; our courts must examine the substance of what is said as well. When both opinions are determined to be the same by the substitute expert's own statement of agreement with the testing analyst, and when the substitute analyst's opinion is entirely dependent upon the information provided by the testing analyst, there is no practical or logical basis for excluding one opinion over the other: the *substance* is still a violation of the Confrontation Clause because of the procedural concern raised under the circumstances. The defendant's constitutional right to confrontation must not hinge on such a charade of diction.

Further, the majority's inconsistency between *Craven* and this case actually encourages the State to produce *less* evidence in order

to secure a conviction while circumventing the Confrontation Clause. This paradox is a result of the factual nuance between the cases: in *Craven* the testimonial reports of the nontestifying testing analyst were admitted into evidence without the pretext of their serving as "basis information," whereas here the reports were not admitted. The majority's opinion does not turn on this nuance but by virtue of the result, the majority elevates this nuance[4] to significance. Yet the form in which the testimonial statements are admitted should have no bearing on our Confrontation Clause analysis, especially when the information at issue goes to a critical element of the offense charged.

Lab reports are "testimonial in nature." *Melendez-Diaz*, 557 U.S. at 311 (concluding that "[lab] analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment"). When the substance of the testimony presented by the substitute analyst is specifically derived from the lab reports such that there can be no independent opinion because this information is admitted for the truth of the matter asserted, as demonstrated above is the case here, the information too is testimonial in nature. The form does not change the substance, nor does form change the original source. Whether the information contained in the lab reports was admitted in written form, or in oral form through Agent Schell's testimony, our Court must address the Confrontation Clause procedural concern. The jury still receives the same information without presenting a defendant the opportunity to expose the potential falsities or weaknesses therein. Consequently, it appears an even more egregious violation of the Confrontation Clause to permit only oral testimony of this critical element of the charged offense, eviscerating the importance of the admission of the signed lab report, especially considering the statutory requirements.

The rule I propose today would not unreasonably impede the State's opportunity to offer proof of all necessary elements of the crime. Under *Crawford* the State may utilize such testimonial evidence when it can show "unavailability and a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 68. While perhaps inconvenient, this is not too high a hurdle to impose to protect our citizens' constitutional rights. *See Melendez-Diaz*, 557 U.S. at 325 ("The Confront-

4. The majority in *Craven* holds that it is not the admission of the reports that trigger the Confrontation Clause, but the admission of the surrogate analyst's statements themselves: "[T]he *statements* introduced by Agent Schell constituted testimonial hearsay, triggering the protections of the Confrontation Clause." ___ N.C. at ___, ___ S.E.2d at ___.

ation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience."). Moreover, I fear our lower courts will be left with no guidance on what constitutes an "independent opinion" when data are "truly machine-generated," and when a violation of the Confrontation Clause has occurred. The rule I propose would provide clear guidance to the lower courts when determining what constitutes a violation of the Confrontation Clause, consistent with the United States Constitution, the previous guidance of both this Court and the United States Supreme Court, and common sense.

In the exercise of that rule, it is clear that today we are presented with a case in which the State offered a testifying expert to parrot the report of the nontestifying testing analyst in order to admit evidence of a critical element of the offense charged. Today we are presented with a case that mimics *Bullcoming*. Today we are presented with a case that clearly violates the Confrontation Clause.

STATE OF NORTH CAROLINA v. MARCUS ARNELL CRAVEN

No. 322PA10

(Filed 27 June 2013)

1. Constitutional Law—right to confront witnesses—laboratory analysis—surrogate testimony

Defendant's Sixth Amendment right to confront the witnesses against him in a cocaine prosecution was violated by the admission of lab reports through the testimony of a substitute analyst. The testifying analyst recited the testing analysts' opinions rather than providing her own independent opinion.

2. Conspiracy—selling drugs—lab analysis—erroneous admission—not prejudicial

There was no prejudice to convictions for conspiracy to sell or deliver cocaine from the admission of testimony about laboratory analysis that violated defendant's right to confrontation. That testimony was not necessary for the State to prove conspiracy.

3. Appeal and Error—equally divided appellate court—decision stood without precedential value

The decision of the Court of Appeals in a cocaine prosecution, which held that error was reversible as to a remaining conviction, stood without precedential value where the six participating members of the Supreme Court were equally divided on whether the error was harmless beyond a reasonable doubt.

4. Appeal and Error—remedy—violation of right to confrontation

The Court of Appeals ordered an erroneous remedy in a zcocaine prosecution where the results of a lab analysis were admitted in violation of the Sixth Amendment. Instead of vacating defendant's conviction for sale or delivery of cocaine, the Court of Appeals should have ordered a new trial. The decision regarding defendant's remaining convictions remained undisturbed.

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

Justice HUDSON concurring in the result.

Chief Justice PARKER 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, 205 N.C. App. 393, 696 S.E.2d 750 (2010), vacating in part and finding no error in part in judgments entered on 13 March 2009 by Judge Kenneth Titus in Superior Court, Chatham County, and remanding for resentencing. Heard in the Supreme Court on 13 February 2013.

Roy Cooper, Attorney General, by Daniel P. O'Brien, Assistant Attorney General, for the State-appellant.

Anne Bleyman for defendant-appellee.

Law Offices of John R. Mills NPC, by John R. Mills; and Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, for North Carolina Advocates for Justice, amicus curiae.

JACKSON, Justice.

In this appeal we consider whether the admission of lab reports through the testimony of a substitute analyst violated defendant's

Sixth Amendment right to confront the witnesses against him. Because the testifying analyst did not give her own independent opinion, but rather gave "surrogate testimony" reciting the testing analysts' opinions, we affirm the decision of the Court of Appeals holding that there was a Confrontation Clause violation. *See Bullcoming v. New Mexico*, ___ U.S. ___, ___, 131 S. Ct. 2705, 2716 (2011). Defendant is entitled to a new trial for the sale or delivery charge arising from the offense date of 6 March 2008. However, because the conspiracy convictions were not affected by the erroneous admission of the substitute analyst's testimony, we reverse the decision of the Court of Appeals vacating those convictions and reinstate defend-ant's conspiracy convictions arising from the offense dates of 3 March and 6 March 2008.

The State's evidence at trial tended to show the following: On 3 March 2008, officers of the Chatham County Sheriff's Department observed a controlled drug buy between undercover informant Daniel Zbytniuk and Christina Marie Smith. Defendant drove Smith in his mother's car to the buy location. Smith testified that she received crack cocaine from defendant, took a small portion of it for herself as payment for making the handoff, and then gave Zbytniuk the remainder of the substance in exchange for money. Smith then handed the money to defendant. On 6 March 2008, officers observed another buy arranged between Zbytniuk and Smith. Similar to the 3 March 2008 buy, defendant drove Smith in his mother's car, Smith gave a substance she testified to be crack cocaine to Zbytniuk in exchange for money, and Smith handed the money to defendant. On 21 March 2008, a third buy was arranged between Zbytniuk and Smith, this time for a larger amount and at a motel so that Zbytniuk could learn how to process crack cocaine. Officers set up surveillance in another room across the parking lot. Defendant dropped Smith off at the motel and left to get Zbytniuk's cocaine. Defendant later returned to the motel with cocaine, which he gave to Zbytniuk in exchange for money. Defendant also brought baking soda and a cigar in a glass tube, which Smith used to show Zbytniuk how to cook powder cocaine into crack cocaine. Defendant left to try to find more cocaine, but was unable to do so. Smith then left in defendant's mother's car to purchase cocaine, but the car broke down and she had to call Zbytniuk and defendant to come pick her up. Officers arrested defendant as the pair were on their way to pick up Smith.

On 6 October 2008, defendant was indicted in Chatham County for: (1) conspiracy to sell or deliver cocaine and maintaining a place

for the keeping of controlled substances on 3 March 2008; (2) conspiracy to sell or deliver cocaine, maintaining a place for the keeping of controlled substances, and sale or delivery of cocaine on 6 March 2008; and (3) manufacturing cocaine, possession with intent to manufacture, sell, or deliver cocaine, sale or delivery of cocaine, maintaining a place for the keeping of controlled substances, and possession of drug paraphernalia on 21 March 2008. The State dismissed the charges of maintaining a place for the keeping of controlled substances on 3 March and 6 March 2008 and the charge of possession of drug paraphernalia on 21 March 2008.

At trial the State introduced Special Agent Kathleen Schell of the State Bureau of Investigation as an expert in forensic chemistry. Agent Schell testified about the identity, composition, and weight of the substances recovered on each of the three buy dates. She personally had tested the sample from 21 March 2008. However, Agents Tom Shoopman and Irvin Allcox had performed the testing on the samples from 3 March and 6 March 2008. Defense counsel objected on Sixth Amendment grounds, arguing that Agent Schell's testimony and admission of the relevant lab reports violated defendant's right to confront the witnesses against him. The trial court overruled defense counsel's objection.

Defendant was convicted of multiple counts and sentenced to consecutive terms of: (1) thirteen to sixteen months for the consolidated offenses of two counts of conspiracy to sell or deliver cocaine on 3 March and 6 March 2008 and one count of sale or delivery of cocaine on 6 March 2008; and (2) sixteen to twenty months for the consolidated offenses of sale or delivery of cocaine, manufacturing cocaine, possession with intent to manufacture, sell or deliver cocaine, and maintaining a place for the keeping of controlled substances, all on 21 March 2008. Defendant appealed to the Court of Appeals, which vacated the convictions for two counts of conspiracy to sell or deliver cocaine on 3 March and 6 March 2008 and one count of sale or delivery of cocaine on 6 March 2008. *State v. Craven*, 205 N.C. App. 393, 405, 696 S.E.2d 750, 757 (2010). The Court of Appeals found no error in the convictions stemming from the events on 21 March 2008. *Id.* The State filed a Petition for Discretionary Review with this Court, seeking review of the decision vacating the 3 March and 6 March 2008 convictions.

[1] In *State v. Ortiz-Zape*, ___ N.C. ___, ___ S.E.2d ___ (2013) (329PA11), we summarized the Supreme Court of the United States' Confrontation Clause jurisprudence in deciding whether a defendant's Confront-

ation Clause rights were violated when an expert witness gave her opinion that a substance was cocaine, based upon testing performed by a non-testifying chemical analyst. There we held that "admission of an expert's independent opinion based on otherwise inadmissible facts or data 'of a type reasonably relied upon by experts in the particular field' does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert." *Ortiz-Zape*, ___ N.C. at ___, ___ S.E.2d at ___, slip op. at 13 (June 26, 2013) (quoting N.C.G.S. § 8C-1, Rule 703 (2011)). "We emphasize[d] that the expert must present an independent opinion obtained through his or her own analysis and not merely 'surrogate testimony' parroting otherwise inadmissible statements." *Id.*, slip op. at 13 (quoting *Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2710). Accordingly, we must determine whether the testimony objected to here was an independent opinion obtained through Agent Schell's own analysis or was merely surrogate testimony repeating testimonial out-of-court statements.[1] *See id.*, slip op. at 15 (discussing preservation of error).

Here, defense counsel objected to portions of Agent Schell's testimony about the substances recovered from the 3 March and 6 March 2008 buys. Regarding the 3 March 2008 sample, the State asked:

> Q. Now did you also bring with you notes and documentation for the date of offense March 3, 2008?
>
> A. I did.
>
> Q. And who—who completed that analysis?
>
> A. Mr. Tom Shoopman completed that analysis.
>
> . . . .
>
> Q. And did you bring his report?
>
> A. I did.
>
> Q. Did you have a chance to review it?
>
> A. I have.
>
> Q. Do you agree with its conclusions?
>
> A. I do.
>
> . . . .

1. Consistent with the approach adopted by the majority in *Ortiz-Zape*, we decline to adopt the concurrence's four-part test for determining whether there is a Confrontation Clause violation.

Q. *What was Mr. Shoopman's conclusion?*

[Objection by defense counsel]

. . . .

A. According to the lab report prepared by Tom Shoopman, the results for State's Exhibit Number . . . . 10 were cocaine base schedule two controlled substance with a weight of 1.4 grams.

The lab report then was admitted into evidence.

Similarly, regarding the 6 March 2008 sample, the State asked:

Q. Now turning to State's Exhibit Number 12 and offense date March 6th of 2008, did you bring a report from the SBI regarding that date of offense?

A. I did.

Q. Who conducted that analysis?

A. Mr. Irvin Allcox.

Q. And do you have that report in your hand?

A. I do.

Q. And do you have the underlying data supporting that conclusion?

A. I do.

Q. And you do agree with the conclusion stated in that report?

A. I do.

. . . .

Q. *And what conclusion did [Mr. Allcox] reach?*

[Objection by defense counsel]

A. The item . . . . twelve was cocaine base, schedule two controlled substance. And it had a weight of 2.5 grams.

That lab report also was admitted into evidence.

It is clear from this testimony that Agent Schell did not offer—or even purport to offer—her own independent analysis or opinion on the 3 March and 6 March 2008 samples. Instead, Agent Schell merely parroted Agent Shoopman's and Agent Allcox's conclusions from

their lab reports. Like the lab report in *Bullcoming*, these lab reports contained "[a]n analyst's certification prepared in connection with a criminal investigation or prosecution." *Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2713-14. Specifically, Agent Shoopman's and Agent Allcox's certifications stated: "This report represents a true and accurate result of my analysis on the item(s) described." There is no doubt that the lab reports were "document[s] created solely for an 'evidentiary purpose,' . . . made in aid of a police investigation, [and] rank[ ] as testimonial." *Id.* at ___, 131 S. Ct. at 2717 (quoting and citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311, 129 S. Ct. 2527, 2532 (2009)). Thus, the statements introduced by Agent Schell constituted testimonial hearsay, triggering the protections of the Confrontation Clause. "Absent a showing that [Agents Shoopman and Allcox] were unavailable to testify at trial *and* that [defendant] had a prior opportunity to cross-examine them, [defendant] was entitled to ' "be confronted with" ' the [agents] at trial." *Melendez-Diaz*, 557 U.S. at 311, 129 S. Ct. at 2532 (quoting *Crawford v. Washington*, 541 U.S. 36, 54, 124 S. Ct. 1354, 1365 (2004)); *see also Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2710. Here the State did not show that Agents Shoopman and Allcox were unavailable and that defendant had a prior opportunity to cross-examine them. Accordingly, admission of Agent Shoopman's and Agent Allcox's testimonial conclusions through Agent Schell's surrogate testimony violated defendant's Sixth Amendment right to confrontation. *See Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2710.

Having determined that admission of the out-of-court testimonial statements from the 3 March and 6 March 2008 lab reports was error, we now must determine whether that error was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (2011).

[2] With regard to the convictions for conspiracy to sell or deliver cocaine on 3 March and 6 March 2008, we reverse the decision of the Court of Appeals vacating those convictions. "A criminal conspiracy is an agreement between two or more people to do an unlawful act." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991). It is not necessary for the unlawful act to be completed. *Id.* "As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *Id.* Agent Schell's testimony regarding the substances obtained on 3 March and 6 March 2008 was not necessary for the State to prove beyond a reasonable doubt that defendant conspired to sell or deliver cocaine. Therefore, the erroneous admission of such testimony was harmless as to defendant's convictions for conspiracy to

sell or deliver cocaine on 3 March and 6 March 2008. Accordingly, we instruct the Court of Appeals to reinstate these convictions.

[3] With regard to the remaining conviction for sale or delivery of cocaine on 6 March 2008, the six participating members of the Court are equally divided on whether the error was harmless beyond a reasonable doubt. Consequently, the decision of the Court of Appeals, which held the error was reversible, remains undisturbed and stands without precedential value. *See*, *e.g.*, *Goldston v. State*, 364 N.C. 416, 700 S.E.2d 223 (2010) (per curiam).

[4] Nevertheless, the remedy ordered by the Court of Appeals was erroneous as a matter of law. Instead of vacating defendant's conviction for sale or delivery of cocaine, the Court of Appeals should have ordered a new trial. *See*, *e.g.*, *State v. Littlejohn*, 264 N.C. 571, 574, 142 S.E.2d 132, 134-35 (1965) (concluding that the defendants were entitled to a new trial, not dismissal of the charges against them, because the trial court, in denying their motion for nonsuit, acted upon incompetent evidence). Therefore, we reverse the Court of Appeals' opinion with respect to the remedy and order a new trial on the sale or delivery conviction dated 6 March 2008. The decision of the Court of Appeals regarding defendant's remaining convictions remains undisturbed.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

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

Justice HUDSON concurring in the result.

Though the majority here reaches the correct result, it does so by relying on *State v. Ortiz-Zape*, ___ N.C. ___, ___ S.E.2d ___ (2013) (329PA11), and by utilizing an approach which in my view is unnecessarily broad and confusing. I conclude that in this slice of cases—in which certified lab reports prepared for this prosecution are entered into evidence through a surrogate witness who was not involved in the testing—the approach can be quite simple. As such, I write separately to set out that approach as dictated by the United States Supreme Court in *Melendez-Diaz* and *Bullcoming*. Therefore, I respectfully concur in the result.

Because I have summarized the development of the Supreme Court's recent Sixth Amendment Confrontation Clause jurisprudence in the dissenting opinion in *Ortiz-Zape*, I will not do so again here. *See Ortiz-Zape*, ___ N.C. at ___, ___ S.E.2d at ___ (Hudson, J., dissenting). But because the majority's opinion does not offer the necessary discussion of the confrontation issues in this case but instead turns on whether the testimony fits under the umbrella of "independent opinion" the majority has constructed in *Ortiz-Zape*, I cannot agree with its reasoning here. I will endeavor to fill in the missing pieces of the analysis and offer a methodical approach that is simple to apply to future cases within this easily definable category.

Though the majority does not clearly explain this, two separate Confrontation Clause violations arise here: first, the admission of the lab reports without accompanying testimony by the analyst who prepared them; and second, admission of Agent Schell's testimony based entirely on her review of the lab reports. While the two are closely connected in this case, they require separate analyses for future cases that may involve one or the other.

First, we examine the admission of the lab reports themselves for constitutional error. "As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." *Bullcoming v. New Mexico*, ___ U.S. ___, ___, 131 S. Ct. 2705, 2713 (2011). There is no question that the lab reports are out-of-court statements and that the witnesses (Tom Shoopman and Irvin Allcox) who made those statements did not testify. In addition, the State made no showing that those witnesses were unavailable or that defendant had a prior opportunity to cross-examine them. The only question remaining from the *Bullcoming* rule quoted above, then, is whether the lab reports are "testimonial in nature." *Id.* at ___, 131 S. Ct. at 2713. Applying the analysis from *Melendez-Diaz* and *Bullcoming*, I conclude that the reports are undoubtedly testimonial and were prepared solely for the prosecution of this defendant.[1] As such, the test-

1. Although *Williams v. Illinois* does not control here because it involved a report not prepared for that particular prosecution, the four-member plurality's opinion noted what distinguished that case from *Bullcoming* and *Melendez-Diaz*: "In those cases, the forensic reports were introduced into evidence, and there is no question that this was done for the purpose of proving the truth of what they asserted: in *Bullcoming* that the defendant's blood alcohol level exceeded the legal limit and in *Melendez-Diaz* that the substance in question contained cocaine. Nothing comparable happened here." *Williams v. Illinois*, ___ U.S. ___, ___, 132 S. Ct. 2221, 2240 (2012) (plurality).

ing analysts are witnesses against defendant whom he is entitled to confront under the Sixth Amendment.

In *Melendez-Diaz v. Massachusetts* the Supreme Court opined that "certificates" of lab analysts were affidavits and therefore, testimonial. 557 U.S. 305, 310, 129 S. Ct. 2527, 2532 (2009). Further, the Court found that the certificates were "incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* (citations and internal quotation marks omitted). In *Bullcoming* the Supreme Court refused to distinguish between the "sworn" certificates in *Melendez-Diaz* and the "unsworn" lab reports in that case. Instead, the Court noted that "[i]n all material respects, the laboratory report in this case resembles those in *Melendez-Diaz.*" *Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2717. The Court went on to conclude that the lab reports were testimonial, stating that "[a] document created solely for an 'evidentiary purpose,' . . . made in aid of a police investigation, ranks as testimonial." *Id.* at ___, 131 S. Ct. at 2717 (citing *Melendez-Diaz*, 557 U.S. at 310-11, 129 S. Ct. at 2532). The same analysis applies here: the lab reports were created solely for the evidentiary purpose of establishing or proving that the substances in question were in fact cocaine in the State's case against this defendant. The forms at issue state near the bottom, in all capitals, that "THIS REPORT IS TO BE USED ONLY IN CONNECTION WITH AN OFFICIAL CRIMINAL INVESTIGATION." Directly under that statement is the printed attestation that: "This report represents a true and accurate result of my analysis on the item(s) described," followed by a signature. State's Exhibit 29, the analysis of State's Exhibit 10 (from the 3 March 2008 buy) is signed by "T.E. Shoopman"; State's Exhibit 30, the analysis of State's Exhibit 12 (from the 6 March 2008 buy) is signed by "Irvin Lee Allcox."

There can be no question that these lab reports are testimonial in nature. Because both reports were offered and received into evidence through Agent Schell's testimony without any limitation on purpose, over defendant's objection based on the Confrontation Clause, their admission into evidence without testimony from the testing analysts was a clear violation of the Confrontation Clause under *Bullcoming.*[2] This error allowed admission of the essential evidence of a central

2. State law provides that the State may properly introduce the report without the testimony of the original testing analyst if the State gives written notice to the defendant that it intends to do so and the defendant does not object in a timely fashion. N.C.G.S. § 90-95(g) (2012). The Supreme Court has endorsed such statutory waiver of confrontation rights in this context. *See Melendez-Diaz*, 557 U.S. at 326-27, 129 S. Ct. at 2540-41. The State did not make use of subsection 90-95(g) here.

element of the charge of sale or delivery of cocaine, namely, that the substance was cocaine. As such, the error cannot be considered harmless beyond a reasonable doubt unless there was other, independent evidence to establish the same crucial fact.

Second, then, we must examine Agent Schell's testimony regarding her review of the lab reports. The decision in *Bullcoming* leaves room for an expert who did not conduct the testing in question to offer an "independent opinion" on the fact at issue. *See* ___ U.S. at ___, 131 S. Ct. at 2716 (noting that the State did not "assert that [the substitute expert] had any 'independent opinion' concerning Bullcoming's [blood alcohol content]"). Justice Sotomayor emphasized that very point in her concurrence. *Id.* at ___, 131 S. Ct. 2722 (Sotomayor, J., concurring) (stating that "this is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence"). Despite the erroneous admission of the lab reports here, the State's case could perhaps have been salvaged if Agent Schell had presented such an independent expert opinion regarding the identity of the chemical substance. She did not.

When considering whether admission of an expert witness's opinion based on underlying lab reports is constitutionally permissible, I apply a methodical approach. This analysis is discussed at length in the dissenting opinion in *Ortiz-Zape*, ___ N.C. at ___, ___ S.E.2d at ___ (Hudson, J., dissenting), so I will abbreviate it here. First, we consider whether the underlying lab reports are testimonial—if they are not, there is no Confrontation Clause violation. Second, we examine the identity of the witness testifying based on the reports—if the original testing analyst does not appear as a witness, and the State does not show that she was unavailable and that defendant had a prior opportunity to cross-examine her, neither the report itself nor the report's conclusions can be admitted as evidence.

Third, we consider whether the testifying analyst has offered an independent opinion based on something other than her review of the reports. When the State offers an expert witness ostensibly testifying to an independent opinion based on review of inadmissible testimonial lab reports, we must carefully examine the testimony of the expert to determine whether she offers a truly independent expert opinion or merely acts as the surrogate analyst forbidden by *Bullcoming*.

The majority held in *Ortiz-Zape* that "admission of an expert's independent opinion based on otherwise inadmissible facts or data

'of a type reasonably relied upon by experts in the particular field' does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert." *Ortiz-Zape*, ___ N.C. at ___, ___ S.E.2d at ___ (majority opinion) (quoting N.C.G.S. § 8C-1, Rule 703 (2011)). The majority then "emphasize[d] that the expert must present an independent opinion obtained through his or her own analysis and not merely 'surrogate testimony' parroting otherwise inadmissible statements." *Id.* at ___, ___ S.E.2d ___ (citation omitted). The rule from *Ortiz-Zape* is incomplete at best, because it takes no account of the purpose for which the report was prepared and whether it is offered for its truth. *See Williams v. Illinois*, ___ U.S. ___, ___, ___, 132 S. Ct. 2221, 2235, 2243 (2012) (plurality). And even if the statements from *Ortiz-Zape* appear reasonable, in reality the majority has created a rule under which the State can circumvent the Confrontation Clause simply by asking the testifying analyst the question: "What is your independent expert opinion?" *See Ortiz-Zape*, ___ N.C. at ___, ___ S.E.2d at ___ (finding no confrontation problem when expert witness reported no independent analysis or knowledge beyond that presented in the inadmissible report, but was asked: "What is your independent expert opinion?"); *State v. Brewington*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2013) (235PA10) (finding no confrontation problem when expert witness testified that "[b]ased upon all the data that [Agent Gregory] obtained from the analysis of that particular item . . . I would have come to the same conclusion that she did"). The majority's rule, as applied in *Ortiz-Zape* and *Brewington*, does not actually require any independent analysis or work on the expert's part. The expert may simply review the nontestifying analyst's report and adopt its conclusions as her own. That rule is flatly inconsistent with United States Supreme Court precedent on this issue. I would instead insist that the expert have actually done independent analysis—either by doing his or her own analysis of raw data obtained by the nontestifying analyst or (preferably) retesting the substance and reporting his or her own results. Otherwise, the Sixth Amendment gives defendant the right to confront the testing analyst by cross-examination.

The final step in the analysis is to determine whether any preserved constitutional error is harmless beyond a reasonable doubt. The State bears the burden of making this showing, which generally requires that "overwhelming" evidence of guilt remain after removal of the constitutionally problematic evidence. *See State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988).

I now apply that analytical framework here. As discussed above, there is no question that the lab reports were created solely to be used as evidence in this prosecution and are therefore testimonial. Further, the original testifying analysts did not testify and the State made no effort to show that they were unavailable or subject to prior cross-examination. Because Agent Schell testified based on Agent Shoopman's and Agent Allcox's analyses and reports, we examine whether she has offered a truly independent opinion or has merely agreed with the nontestifying analysts' conclusions, which are testimonial opinions on a key element of the case against defendant. The latter violates the Confrontation Clause. *See Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2716.

The testimony quoted by the majority speaks for itself: Agent Schell testified specifically to the conclusions of two nontestifying analysts and offered no independent analysis or opinion at all. The only opinion she was asked to give was: "Do you agree with the conclusion stated in that report?" There is nothing independent about agreeing with a conclusion in an inadmissible report. This testimony is functionally indistinguishable from the testimony prohibited in *Bullcoming*, in that it deprives defendant of any meaningful cross-examination regarding either agent's testing procedures. Because Agent Schell did not observe the testing by Agent Shoopman or Agent Allcox, like the surrogate analyst in *Bullcoming*, she could not be cross-examined about "what [either analyst] knew or observed about the events [their reports] concerned, *i.e.*, the particular test and testing process [they] employed." *Id.* at ___, 131 S. Ct. at 2715. "Nor could such surrogate testimony expose any lapses or lies on [either Agent Shoopman's or Agent Allcox's] part." *Id.* at ___, 131 S. Ct. at 2715. Agent Schell's status as an expert witness does not allow the State to bypass the Confrontation Clause by simply asking her to read the conclusions of nontestifying witnesses into evidence. Nor has she provided any independent expert opinion—developed through her own analysis—for which the lab reports were a basis. Agent Schell's testimony regarding the nontestifying analysts' conclusions about the substances involved in the 3 March and 6 March 2008 transactions violates defendant's Confrontation Clause rights.

Having determined that the lab reports are testimonial; that Agent Schell did not personally conduct or participate in the testing on the 3 March and 6 March 2008 samples, and the State did not show that the testing analysts were unavailable and that defendant had a prior opportunity to cross-examine; and that Agent Schell offered no inde-

pendent opinion based on the lab reports, I agree with the majority's ultimate holding that Agent Schell's testimony violates the Confrontation Clause and admission of her opinions was prejudicial error as to the sale or delivery conviction. I therefore concur in the result.

Chief Justice PARKER joins in this concurring opinion.

STATE OF NORTH CAROLINA v. JARVIS LEON WILLIAMS

No. 533PA10

(Filed 27 June 2013)

Constitutional Law—Confrontation Clause—expert testimony—analyst testimony based on another analyst's files—harmless error

The Court of Appeals erred in a possession with intent to sell or deliver cocaine case by granting defendant a new trial on the basis that defendant's Sixth Amendment Confrontation Clause rights were violated. Even if admission of the challenged testimony and exhibits was erroneous, any error was harmless beyond a reasonable doubt because defendant testified in his own defense that the seized substance was cocaine and that he had been selling it.

Justice BEASLEY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 208 N.C. App. 422, 702 S.E.2d 233 (2010), finding prejudicial error in a judgment entered on 1 September 2009 by Judge Calvin E. Murphy in Superior Court, Mecklenburg County, and ordering that defendant receive a new trial. Heard in the Supreme Court on 12 February 2013.

Roy Cooper, Attorney General, by Amy Kunstling Irene and Daniel P. O'Brien, Assistant Attorneys General, for the State-appellant.

Don Willey for defendant-appellee.

PARKER, Chief Justice.

The issue in this case is whether the Court of Appeals erred by granting defendant a new trial on the basis that defendant's Sixth Amendment Confrontation Clause rights were violated. For the reasons stated herein, the decision of the Court of Appeals is reversed.

Defendant was arrested following a brief investigation that resulted in the discovery of cocaine in a flower pot near where defendant was standing. Defendant was indicted for possession with intent to sell or deliver cocaine and attaining habitual felon status. The jury convicted defendant of the cocaine charge, and defendant thereafter admitted his habitual felon status. The trial court entered judgment sentencing defendant to 107 to 138 months of imprisonment. At the conclusion of the trial proceedings, defendant orally entered his notice of appeal to the Court of Appeals.

At trial the State's evidence tended to show the following: On 2 April 2008, Sergeant Brian Scharf of the Charlotte-Mecklenburg Police Department (CMPD) received a telephone call from a confidential informant stating that a black male wearing all black and having long dreadlocks was selling cocaine from the porch of 429 Heflin Street. The informant said the cocaine would be in a flower pot hanging from the porch ceiling. Sergeant Scharf and Officer James Gilliland drove to the reported location, where they observed defendant, who matched the description provided by the informant. The officers also observed a flower pot hanging from the porch ceiling. Sergeant Scharf asked defendant if defendant had been selling crack cocaine, and defendant denied that he had been doing so. Both officers saw a clear plastic bag sticking out of the flower pot. Based on Sergeant Scharf's experience as a narcotics officer, he knew that clear plastic bags are the predominant means of packaging illegal narcotics. Sergeant Scharf handcuffed defendant, retrieved the bag from the flower pot, and then observed inside the bag a substance that, based on his training and experience, he believed to be crack cocaine. Sergeant Scharf also searched defendant, finding $195 in cash in his pocket.

The officers transported defendant to the police station, where they interviewed him after he waived his *Miranda* rights. Defendant said that a man named Chris had left the crack cocaine there for him to sell and that he had sold some that day. Sergeant Scharf prepared a written statement to that effect, which defendant reviewed and signed. The written statement declared:

> The cocaine that officer Scharf found at 429 Heflin St was put there by a black male named "Chris." He put it there to sell it.

> When I got there "Chris" told me the Cocaine was there so I could sell it for him until he got back. I sold about $30.00–40.00 worth today. The Cocaine was not mine. The Cocaine was in a clear plastic bag in a flower pot hanging from the porch ceiling.

The State presented Ann Charlesworth of the CMPD Crime Laboratory as an expert in forensic chemistry. Charlesworth testified that the crime lab is accredited. Charlesworth also testified to the crime lab's standard practices and procedures. Specifically, she testified to procedures regarding the chain of custody of suspected controlled substances, the chemical analysis of suspected controlled substances, the recording and reporting of chemical analysis results and conclusions, and the peer review process to review the results and conclusions of the chemical analysis.

Charlesworth testified that after an analyst receives a substance to be tested, the analyst subjects it to two rounds of testing: a preliminary test followed by a confirmatory test. The preliminary test is generally a "color test." There are different color tests for different controlled substances. A positive test result for a color test designed for a specific controlled substance indicates that the tested substance is likely to be the specific controlled substance for which the test is designed. Once a positive color test result is obtained, a confirmatory test is conducted using a gas chromatograph mass spectrometer (GC Mass Spec). The data from the GC Mass Spec would then be compared with a standard from the crime lab's library to determine if the substance is the substance suggested by the color test.

The crime lab's procedures require analysts to record the results of their analysis and their conclusions in a specific manner. The results of the color test are manually entered into a Chemistry Drug Worksheet, and the machine-generated results produced by the GC Mass Spec are printed. Analysts enter their conclusions as to the identity of the tested substances in a lab report, which is used by "the police and the attorneys." The Drug Chemistry Worksheet, the GC Mass Spec printout, and the lab report are placed in a file that corresponds to the case at issue.

The crime lab's procedures also mandate peer review of an analyst's results and conclusions. Once an analyst has completed a file, the analyst transfers the file to another analyst, who reviews the entire file to see if that analyst comes to the same conclusion. The second analyst then initials and dates the file to indicate concurrence with the results.

Charlesworth was asked to review for trial the file corresponding to the substance seized by Sergeant Scharf. DeeAnne Johnson, a chemist who no longer works for the crime lab, performed the analysis of the substance recovered from the flower pot. Charlesworth did the same type of review that she would have done if she had been the peer reviewer. The tests performed by Johnson were "the same tests that [Charlesworth] and other experts in the field reasonably rely upon as to forming an opinion as to the weight and nature of the substance tested." After Charlesworth described her review of the file, the prosecutor asked:

> [B]ased on your training and experience in the field of forensic chemistry and your course of your employment at CMPD and in Pennsylvania and your review of this case file, did you form your own expert opinion as to the substance that was present and the weight in this case?

Over defendant's objection, Charlesworth declared, "The substance was cocaine and it was 0.99 grams."

Next, the prosecutor moved to admit the Drug Chemistry Worksheet, the GC Mass Spec printout, and the lab report into evidence "as illustrative of Ms. Charlesworth's opinion in this case." Over defendant's objection, the trial court admitted the exhibits "for the purpose of illustrating the testimony of this witness in establishing what she relied upon in formulating her own opinion about the evidence in this case." The trial court instructed the jury that it "may consider [the exhibits] for that purpose, or those purposes, and only that purpose."

Defendant testified on his own behalf. Defendant testified that on 2 April 2008 he went to 429 Heflin Street. Defendant stated he knew that drug selling, prostitution, and gambling went on at that house. On the porch, defendant met a black male who said his name was Chris. Defendant testified that Chris repeatedly asked defendant to sell crack cocaine for him, but defendant refused each time. Before Chris left the house, he told defendant that the drugs were in the flower pot, gave defendant twenty dollars, and said, "[M]ake a sale for me until [I get] back." According to defendant, shortly after Chris left, a man pulled up in a truck asking for Chris. Defendant told the man that Chris had left. Then defendant "got the drugs" from the flower pot and gave the man the drugs in exchange for forty dollars. Defendant testified that as soon as the man in the truck left, Sergeant Scharf and Officer Gilliland pulled up to the house. Defendant testi-

fied that while being interviewed by Sergeant Scharf after waiving his *Miranda* rights, he said, "[T]he cocaine in the flower pot wasn't mine, it was a guy named Chris." Defendant also informed Sergeant Scharf that he "wasn't intending on selling any cocaine that day, and [he] was tricked by Chris."

As noted above, the jury convicted defendant of the cocaine charge, and defendant thereafter admitted his habitual felon status. On appeal to the Court of Appeals, defendant argued that Charlesworth's testimony regarding the results of a chemical analysis performed by Johnson violated his rights guaranteed by the Confrontation Clause of the Sixth Amendment to the United States Constitution. Relying heavily on its analysis of the Confrontation Clause in *State v. Brewington*, 204 N.C. App. 68, 693 S.E.2d 182 (2010), *rev'd*, ___ N.C. ___, ___ S.E.2d ___ (2013) (No. 235PA10), the unanimous court below reasoned that admission of Charlesworth's testimony was error. *State v. Williams*, 208 N.C. App. 422, 427, 702 S.E.2d 233, 237-38 (2010). Specifically, the Court of Appeals reasoned that because "the report detailing the tests done by Johnson and then 'peer reviewed' and testified about by Charlesworth is testimonial," "nothing in the record support[s] any conclusion that defendant was given the opportunity to cross-examine Johnson," and "Charlesworth's testimony detailing her 'peer review' was merely a summary of the underlying analysis done by Johnson," admission of the testimony at issue was error. *Id.* at 426-27, 702 S.E.2d at 236-38. The court below next determined that the error was not harmless beyond a reasonable doubt and granted defendant a new trial. *Id.* at 427-28, 702 S.E.2d at 238. The court reasoned that without Charlesworth's testimony as to the chemical composition of the substance seized, the State did not meet its burden of "present[ing] evidence as to the chemical makeup of the substance." *Id.* at 428, 702 S.E.2d at 238 (citing, *inter alia*, *State v. Nabors*, 207 N.C. App. 463, 471, 700 S.E.2d 153, 158 (2010), *rev'd*, 365 N.C. 306, 718 S.E.2d 623 (2011)). On 4 October 2012, this Court allowed the State's petition for discretionary review.

Before this Court the State argues that the Court of Appeals erred by holding that there was a Confrontation Clause violation since Charlesworth testified to her own opinion about the identity of the controlled substance based on the data and report of another expert analyst and the report itself was admissible as the basis for the testifying expert's opinion. The State further argues that the Court of Appeals erred in that any error was harmless beyond a reasonable doubt. We agree with the State that even if admission of the testimony

and exhibits at issue was error, any error was harmless beyond a reasonable doubt. Accordingly, we reverse the Court of Appeals without addressing whether defendant's Sixth Amendment rights were violated.

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C.G.S. § 15A-1443(b) (2011). Defendant's trial testimony was not that the substance was not cocaine, but rather that "the cocaine in the flower pot wasn't mine" and Chris had tricked him into selling it. Because defendant testified in his own defense that the seized substance was cocaine and that he had been selling it, any alleged error in admitting Charlesworth's testimony and the related exhibits was harmless beyond a reasonable doubt. *See State v. Nabors*, 365 N.C. 306, 312-13, 718 S.E.2d 623, 627 (2011).

For the reasons stated herein, the decision of the Court of Appeals is reversed.

REVERSED.

Justice BEASLEY dissenting.

For the reasons stated in my dissent in *State v. Brewington*, ___ N.C. ___, ___ S.E.2d ___ (2013), I respectfully dissent. I would affirm the decision of the Court of Appeals granting defendant a new trial. I would hold that, as prohibited by the Confrontation Clause under *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S. Ct. 2705 (2011), the expert testimony in this case amounts to mere surrogate testimony being used to explicitly introduce critical evidence of an element of the charged offense, and that this constitutional violation was not harmless beyond a reasonable doubt. The majority relies on *State v. Nabors*, 365 N.C. 306, 718 S.E.2d 623 (2011), to hold that defendant's use of the word "cocaine" alleviates any error presented by the failure to offer a competent expert witness to confirm the identity of the substance at issue. *Nabors* directly conflicts with the rulings in *State v. Llamas-Hernandez*, 363 N.C. 8, 673 S.E.2d 658 (2009) (per curiam), and *State v. Ward*, 364 N.C. 133, 694 S.E.2d 738 (2010). As such, *Nabors* should be narrowly construed. Contrary to the majority's position, this case does not fall within the narrow bounds of *Nabors*.

This case is distinguishable from *Nabors* in several respects. First, the standard of review in *Nabors* was different from that pre-

sented here. In *Nabors* this Court reviewed for plain error. 367 N.C. at 311-13, 718 S.E.2d at 626-27. Thus, the burden was on the defendant to prove that the jury probably would have reached a different result absent the error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). This case, however, requires review under the harmless beyond a reasonable doubt standard.

> When violations of a defendant's rights under the United States Constitution are alleged, harmless error review functions the same way in both federal and state courts: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." In other words, an error under the United States Constitution will be held harmless if "the jury verdict would have been the same absent the error." Under both the federal and state harmless error standards, the government bears the burden of showing that no prejudice resulted from the challenged federal constitutional error.

Id. at 513, 723 S.E.2d at 331 (alteration in original) (citations omitted). Thus, here the *State* bears the burden to show that no harm resulted from the error. The difference between these standards is marked and is determinative here.

Second, *Nabors* involved an appeal from the trial court's denial of defendant's motion to dismiss for insufficient evidence on the bases that the State failed to provide chemical testing and that all identification was based on lay opinion testimony by the officers. 365 N.C. at 310-11, 718 S.E.2d at 626-27. Part of this review mandates that "both competent and *incompetent* evidence that is favorable to the State . . . be considered by the trial court in ruling on a defendant's motion to dismiss." *Id.* at 312, 718 S.E.2d at 627 (emphasis added) (citations omitted). By contrast, the challenge here asserts a Confrontation Clause violation—the deprevation of a fundamental right. We do not need to, and in fact should not, consider incompetent evidence in determining whether defendant suffered *any* harm as a result of this violation of his constitutional right to confrontation.

Under the standard of review in *Nabors*, the Court held that the lay witness testimony by defendant's friend that the substance was cocaine was "an independent basis for upholding the trial court's denial of the motion." *Id.* at 313, 718 S.E.2d at 627. While one might assume this to be the same as stating that it is sufficient to provide lay witness testimony regarding the chemical identity of the crack cocaine

at issue here, the Court then directly knocked this assumption down by declaring that it would not decide whether testing is required. *Id.* The Court in *Nabors* found it unnecessary to do so precisely because the standard of review was plain error: "Assuming arguendo that admission of the lay testimony was error, defendant cannot satisfy his burden of showing plain error inasmuch as his own evidence established that the substance sold was cocaine." *Id.* Because this case does not involve plain error review, motions to dismiss, or consideration of incompetent evidence, this Court must declare whether chemical testing is required. As I discuss in my dissent in *Brewington*, this declaration has already been made by this Court in *State v. Ward*.

In *State v. Ward* this Court extended the requirement of chemical testing to verify the identity of any alleged controlled substance. 364 N.C. at 143-44, 694 S.E.2d at 744-45. While the facts in *Ward* specifically addressed tablets, the language used to state the rule and the rationale behind the rule apply generally to controlled substances governed by N.C.G.S. § 90-95. *Id.* Specifically, this Court expressed concern regarding counterfeit substances, which are subject to a lesser punishment by statute:

> By imposing criminal liability for actions related to counterfeit controlled substances, the legislature not only acknowledged that their very existence poses a threat to the health and well-being of citizens in our state, but that a scientific, chemical analysis must be employed to properly differentiate between the real and the counterfeit . . . . As such, a scientifically valid chemical analysis of alleged controlled substances is critical to properly enforcing the North Carolina Controlled Substances Act.

364 N.C. at 143-44, 694 S.E.2d at 745.

To hold defendant accountable for his belief that the substance in question was indeed cocaine directly nullifies the rationale presented in *Ward* that a substance may be alleged to be either real or counterfeit, but in fact be the opposite. Accordingly, defendant's belief whether a substance is real or counterfeit is irrelevant to the State's burden. When the State is required to provide evidence of chemical testing to verify the identity of a substance but fails to comply with the Confrontation Clause, a defendant's belief or assertion that the drug is real cannot, under the precedent of this Court, make the error harmless. The submission of chemical testing through the proper expert's testimony would determine the severity of the defendant's sentence irrespective of his belief regarding the chemical identity of the substance.

This finding that an error would not be harmless, of course, begs the question of whether defendant's Sixth Amendment right to confrontation was violated. Consistent with my dissenting opinion in *Brewington*, I submit that it was. Just as in *Brewington*, here the State presented a surrogate expert to testify conclusively about which tests were actually performed, how they were actually performed, and the results they actually yielded, despite having never examined the substance in question herself. Further, the opinion the surrogate expert purported to independently convey depended upon visual observations not made by the surrogate herself, predominantly that the substance was of a particular weight. This testimony directly violates the rule in *Bullcoming*. ___ U.S. at ___, 131 S. Ct. at 2710 ("The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—*made for the purpose of proving a particular fact*—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement." (emphasis added)). In contrast to *Brewington*, however, but precisely consistent with *Bullcoming*, here the report of the testing analyst was actually admitted into evidence, although under the pretense of serving as illustrative evidence of the surrogate expert's independent opinion. This is a most egregious violation of *Bullcoming* and of the Confrontation Clause. As discussed above, this violation could not be harmless because without any scientifically valid evidence regarding the chemical identity of the substance, the State is unable to show whether the substance in question was real or counterfeit, thus making the State unable to prove that defendant was guilty of the charged offense of felony possession of a controlled substance, as opposed to the lesser offense of felony possession of a counterfeit substance.

Lastly, this result does not conflict with *Nabors*. In *Nabors* this Court stated:

> While the State has the burden of proving every element of the charge beyond a reasonable doubt, when a defense witness's testimony characterizes a putative controlled substance as a controlled substance, the *defendant cannot on appeal escape the consequences of the testimony in arguing that his motion to dismiss should have been allowed.*

365 N.C. at 313, 718 S.E.2d at 627 (emphasis added) (citations omitted). There the consequences of the testimony were that incom-

petent evidence would be used against defendant and that the plain error standard would be applied. Here the consequences of the testimony are that defendant believed the substance was cocaine and that lay witness testimony was provided contending that the substance was actually cocaine. Defendant cannot escape these consequences. But these consequences do not prove the element of possession of actual cocaine as required by this Court's precedent and enactments of the General Assembly. Although, defendant cannot escape that he assisted the State's case, neither may the State escape that it did not present competent evidence on an essential element of the crime. Because the burden falls on the *State* here, and not on the defendant—as it did in *Nabors*—this difference is sufficient to alter the outcome.

STATE OF NORTH CAROLINA v. DEWAN KENNETH BRENT

No. 275PA11

(Filed 27 June 2013)

Constitutional Law—Confrontation Clause—expert opinion—independent analysis of testing performed by another analyst

The Court of Appeals erred in a possession of cocaine case by reaching the merits of defendant's argument that the admission of expert opinion that a substance was cocaine based upon an independent analysis of testing performed by another analyst in the laboratory violated the Confrontation Clause. Defendant did not present timely objections at trial and failed to allege plain error on appeal. Even if he had presented timely objections, he would not have been entitled to a new trial.

Justice BEASLEY took no part in the consideration or decision in this case.

Chief Justice PARKER, concurring in the result only.

Justice HUDSON, concurring in the result.

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 736 (2011), finding prejudicial error in a judgment

entered on 16 February 2010 by Judge Catherine C. Eagles in Superior Court, Forsyth County, and ordering that defendant receive a new trial. Heard in the Supreme Court on 13 February 2013.

Roy Cooper, *Attorney General*, *by Robert C. Montgomery*, *Special Deputy Attorney General*, *and Daniel P. O'Brien*, *Assistant Attorney General*, *for the State-appellant.*

Charlotte Gail Blake for defendant-appellee.

MARTIN, Justice.

At defendant's trial for possession of cocaine, a forensic scientist stated her expert opinion that a substance was cocaine, based upon her independent analysis of testing performed by another analyst in her laboratory. The Court of Appeals held that this testimony violated defendant's Sixth Amendment right to confront witnesses against him. Because defendant failed to preserve for appeal the issues he raises before this Court, we reverse.

The State's evidence at trial tended to show that on 2 April 2008 Corporal Michael Knight of the Winston-Salem Police Department detained defendant for trespassing on the premises of an apartment complex. After returning to his patrol vehicle to determine whether defendant had any outstanding arrest warrants, Corporal Knight walked back toward defendant, who was sitting on the curb. As Corporal Knight did so, he observed defendant's left hand drop to his side and an "off-white rocklike object actually roll from his left pants area where his hand was at." Officer Resendes, who had arrived to provide backup, also saw the object drop and noticed a white chalky substance on defendant's left hand. The officers confiscated the object and arrested defendant for trespassing.

At the Forsyth County magistrates' office, defendant signed a waiver of his *Miranda* rights and said he wished to speak with the officers. Corporal Knight and Officer Resendes then conducted an interview of defendant, during which defendant stated that the seized substance was cocaine which he had purchased for one hundred dollars. He further stated that he had intended to place the cocaine in his shoe but it rolled away and was seen by the officers. Defendant was subsequently indicted for felony possession of cocaine, second-degree trespass, and attaining habitual felon status.

At trial the State sought to present expert testimony from a forensic drug chemist, Agent Jennifer Lindley, who worked for the State

Bureau of Investigation. After conducting a voir dire hearing on the matter, the trial court permitted Agent Lindley to testify "as to her independent opinion" based upon laboratory tests performed by another analyst. During direct examination of Agent Lindley, the following exchange occurred:

> Q. [W]hen you reviewed the data that was generated in this case, were you able to form an opinion as to what the substance that was analyzed was?
>
> A. Yes, sir.
>
> Q. And what is your opinion?
>
> A. It's my opinion that the substance that was analyzed was cocaine base.

On cross-examination, defense counsel further clarified the assumptions upon which Agent Lindley's opinion rested. For example, the following exchange occurred:

> Q. Would it be fair to say that your opinion is based on these graphs and charts?
>
> A. Yes, ma'am, it is.
>
> Q. Not on any testing that you've done; correct?
>
> A. The opinion I formed is based off of the reviewable data which was generated by the tests performed in this case.

Defendant was found guilty of possession of cocaine and attaining habitual felon status. The Court of Appeals awarded him a new trial, holding that the expert opinion of Agent Lindley was a "mere summarization" of the report created by the non-testifying lab analyst and therefore the admission of the opinion was error. *State v. Brent*, ___ N.C. App. ___, 718 S.E.2d 736, 2011 WL 2462941, at *7 (2011) (unpublished). We allowed the State's petition for discretionary review to determine whether the lab analyst's opinion based on the non-testifying analyst's testing was admissible and whether any error was harmless.

Before this Court defendant argues that "admission of State's exhibit 6, the charts and graphs data prepared by [the non-testifying analyst], as well as Agent Lindley's testimony that the substance was cocaine violated Mr. Brent's right to confront and cross-examine witnesses against him." The State argues that admission of the expert's

independent opinion and the raw data the expert relied upon did not violate defendant's rights under the Confrontation Clause. We hold that defendant failed to make timely objections to preserve these issues for appeal. We reverse the decision of the Court of Appeals.

"Generally speaking, the appellate courts of this state will not review a trial court's decision to admit evidence unless there has been a timely objection." *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (citation omitted); *see also* N.C. R. App. P. 10(a)(1). To be timely, the objection "must be contemporaneous with the time such testimony is offered into evidence." *State v. Thibodeaux*, 352 N.C. 570, 581-82, 532 S.E.2d 797, 806 (2000) (citations omitted), *cert. denied*, 531 U.S. 1155, 121 S. Ct. 1106 (2011). "Moreover, [a] defendant los[es] his remaining opportunity for appellate review when he fail[s] to argue in the Court of Appeals that the trial court's admission of [the evidence] amounted to plain error." *Ray*, 364 N.C. at 277-78, 697 S.E.2d at 322 (citations omitted); *see also* N.C. R. App. P. 10(a)(4).

At trial defendant objected to the testimony related to the composition of the substance only outside the presence of the jury. Defendant did not object to admission of either Agent Lindley's opinion or the raw data exhibit at the time they were offered into evidence. Because an objection "must be contemporaneous with the time such testimony is offered into evidence," defendant failed to preserve the alleged errors for review. *Thibodeaux*, 352 N.C. at 581-82, 532 S.E.2d at 806. Therefore, the Court of Appeals erred by reaching the merits of defendant's argument on the issue of whether admission of the expert opinion violated the Confrontation Clause. *Ray*, 364 N.C. at 278, 697 S.E.2d at 322.

Further, the other issue defendant raises before this Court—that the trial court erred by admitting the raw data upon which the expert relied—was not considered by the Court of Appeals because defendant failed to raise it in his brief before that court. Thus, defendant not only failed to preserve that issue through objection at trial but, had he preserved the issue, also would have abandoned the issue by failing to raise it in his brief before the Court of Appeals. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.") Because defendant has waived appellate review of the issues he raises, he is not entitled to a new trial.

Moreover, even if defendant had preserved the issues he now raises, he would not be entitled to a new trial. As for the issue of the expert stating her opinion, we held in *State v. Ortiz-Zape* that

"admission of an expert's independent opinion based on otherwise inadmissible facts or data 'of a type reasonably relied upon by experts in the particular field' does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert." *State v. Ortiz-Zape*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2013) (citations omitted). We emphasized that "the expert must present an independent opinion obtained through his or her own analysis and not merely 'surrogate testimony' parroting otherwise inadmissible statements." *Id.* at ___, ___ S.E.2d at ___ (citation omitted). At trial the prosecutor handed Agent Lindley State's exhibit number 6, which Agent Lindley explained contained three machine-produced graphs showing the results of infrared scans. Agent Lindley further explained that these graphs are produced when the machine passes a beam of light through a sample. "And depending on the interactions of the sample with that beam of light, we're able to show a graph based on the absorbents of that sample at each different wavelength. We compare that graph to known standards and are able to make a determination based off of our comparison." According to Agent Lindley's testimony, she reviewed the data generated in this case, shown in State's exhibit 6, and formed an "opinion that the substance that was analyzed was cocaine base." Agent Lindley formed an independent opinion based on her analysis of data reasonably relied upon by experts in her field. In stating her opinion, Agent Lindley did not repeat any out-of-court statements by a non-testifying analyst. Accordingly, Agent Lindley was the person whom defendant had the right to cross-examine, and her testimony stating her opinion did not violate defendant's rights under the Confrontation Clause. *See id.* at ___, ___ S.E.2d at ___.

The trial court also admitted State's exhibit number 6, the machine-generated graphs showing the results of infrared scans. As we stated in *Ortiz-Zape*, machine-generated raw data, "if truly machine-generated," are not statements by a person; they are "neither hearsay nor testimonial." *Id.* at ___, ___ S.E.2d at ___ (citations omitted). Thus, machine-generated raw data, if of a type reasonably relied upon by experts in the field, may be admitted to show the basis of an expert's opinion. *See id.* at ___, ___ S.E.2d at ___. Here, consistent with the standard procedure in her crime laboratory, Agent Lindley analyzed the machine-produced graphs to form her opinion that the substance was cocaine. Admission of these machine-produced graphs to show the basis of Agent Lindley's opinion did not violate defendant's rights under the Confrontation Clause.

Defendant did not present timely objections at trial and thereby failed to preserve the issues he argues before this Court. He lost his remaining opportunity for appellate review by failing to allege plain error before the Court of Appeals. Even if he had presented timely objections at trial, he would not be entitled to a new trial because the trial court did not err in admitting either the expert's opinion that the substance was cocaine or the exhibit showing the raw data from the testing instruments. We reverse the decision of the Court of Appeals.

REVERSED.

Justice BEASLEY took no part in the consideration or decision of this case.

Chief Justice PARKER, concurring in the result only.

Defendant having failed to preserve the alleged errors for appellate review, I concur in the result only.

Justice HUDSON, concurring in the result.

I agree with the majority's analysis of the waiver issue. However, the extended discussion of the merits of the case is entirely dictum, with which I do not agree for the reasons I have stated in dissenting opinions in *State v. Ortiz-Zape*, ___ N.C. ___, ___ S.E.2d ___ (2013) (329PA11) (Hudson, J., dissenting), and *State v. Brewington*, ___ N.C. ___, ___ S.E.2d ___ (2013) (235PA10) (Hudson, J., dissenting), and in a concurring opinion in *State v. Craven*, ___ N.C. ___, ___ S.E.2d ___ (2013) (322PA10) (Hudson, J., concurring). Therefore, I concur in the result.

STATE OF NORTH CAROLINA v. KERRY McKINLEY HOUGH

No. 141PA10

(Filed 27 June 2013)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 202 N.C. App. 674, 690 S.E.2d 285 (2010), finding no error in judgments entered on 10 December 2008 by Judge Calvin E. Murphy in Superior Court, Mecklenburg County. Heard in the Supreme Court on 12 February 2013.

Roy Cooper, Attorney General, by Daniel P. O'Brien, Assistant Attorney General, and Daniel D. Addison, Special Deputy Attorney General, for the State.

Robert W. Ewing for defendant-appellant.

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); *Goldston v. State*, 364 N.C. 416, 700 S.E.2d 223 (2010).

AFFIRMED.

STATE OF NORTH CAROLINA v. DAVID FRANKLIN HURT

No. 505PA10

(Filed 27 June 2013)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 208 N.C. App. 1, 702 S.E.2d 82 (2010), finding prejudicial error in a judgment entered on 4 April 2008 by Judge Thomas D. Haigwood in Superior Court, Caldwell County, and remanding for a new sentencing trial. Heard in the Supreme Court on 12 February 2013.

Roy Cooper, *Attorney General*, *by Daniel P. O'Brien*, *Assistant Attorney General*, *for the State-appellant.*

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

PER CURIAM.

For the reasons stated in *State v. Ortiz-Zape*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2013), the decision of the Court of Appeals is reversed. The case is remanded for consideration of the remaining issues on appeal.

REVERSED AND REMANDED.

Chief Justice PARKER and Justice HUDSON dissent for the reasons stated in Justice Hudson's dissenting opinions in *State v. Ortiz-Zape*, ___ N.C. ___, ___ S.E.2d ___ (2013) (329PA11) and *State v. Brewington*, ___ N.C. ___, ___ S.E.2d ___ (2013) (235PA10).

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

BUMPERS v. CMTY. BANK OF N. VA.

[367 N.C. 81 (2013)]

TRAVIS T. BUMPERS AND TROY ELLIOTT, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED V. COMMUNITY BANK OF NORTHERN VIRGINIA

No. 269PA09-2

(Filed 28 August 2013)

1. Unfair Trade Practices—misrepresentation—reliance by borrower—no discounted interest rate

The Court of Appeals erred in an unfair and deceptive trade practices case by failing to consider whether plaintiffs presented conclusive evidence of their actual and reasonable reliance on defendant's alleged misrepresentations. An action for misrepresentation under N.C.G.S. § 75-1.1 requires reliance by a borrower who accuses a lender of collecting a fee for a discounted loan without actually charging a discounted interest rate. Summary judgment on the loan discount claims was inappropriate.

2. Unfair Trade Practices—excessive pricing—fees for closing services

The Court of Appeals erred in an unfair and deceptive trade practices case by holding that N.C.G.S. § 75-1.1 recognizes a claim for excessive pricing that would prohibit the fees plaintiffs paid for closing services. While there may be circumstances other than those described in N.C.G.S. § 75-38 where an unreasonably excessive price would constitute a violation of N.C.G.S. § 75-1.1, such circumstances were not present in this case.

Justice HUDSON dissenting.

Justice BEASLEY dissenting.

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 408 (2011), affirming in part and reversing, vacating, and remanding in part orders granting partial summary judgment for plaintiffs and awarding damages entered on 28 April 2008 and 15 May 2008, both by Judge John B. Lewis, Jr. in Superior Court, Wake County. Heard in the Supreme Court on 7 January 2013.

Hartzell & Whiteman, L.L.P., by J. Jerome Hartzell, for plaintiff-appellees.

Ellis & Winters LLP, by Matthew W. Sawchak, Stephen D. Feldman, Kelly Margolis Dagger, and Meghan Skirving Thelen, for defendant-appellant.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester and Adam K. Doerr, for NC Chamber, amicus curiae.

NC Justice Center, by Carlene McNulty, and Center for Responsible Lending, by Michael D. Calhoun, amici curiae.

North Carolina Department of Justice, by Gary R. Govert, Assistant Solicitor General, and Philip A. Lehman, Assistant Attorney General, for Roy Cooper, Attorney General, amicus curiae.

NEWBY, Justice.

In this case we explore the application of section 75-1.1 of our General Statutes, the unfair and deceptive practices statute, to the consumer loan market. First, we must decide whether an action for misrepresentation under section 75-1.1 requires reliance by a borrower who accuses a lender of collecting a fee for a discounted loan without actually charging a discounted interest rate. Second, we must determine whether section 75-1.1 imposes a price ceiling on the fees a closing services provider may charge in connection with closing a loan.

Section 75-1.1 has long encompassed conduct tantamount to fraud, which requires reliance, and we see no reason for departure from that requirement when the actions alleged include the misrepresentation of a loan transaction that caused injury. Even so, there are issues of material fact regarding whether the conduct proscribed by the first claim actually occurred in this case. Further, section 75-1.1 does not prescribe the amount of fees that may be charged in exchange for closing a loan transaction that was freely entered in the open market. Because the trial court improperly allowed summary judgment for plaintiffs on both claims which the Court of Appeals did not correctly reverse, we reverse the decision of the Court of Appeals.

In 1999 plaintiffs Travis Bumpers (Bumpers) and Troy Elliott (Elliott) obtained loans from defendant Community Bank of Northern Virginia (Community Bank). According to Bumpers, he received a mailed solicitation from Community Bank inviting him to apply for a loan. At that time he had credit card debt carrying a high interest rate, and he also wanted to perform some home improvements. Bumpers

sought a loan from Community Bank, which ultimately gave him a loan with an interest rate of 16.99%. Reasoning that this interest rate was decidedly lower than the rate on his credit card debt, Bumpers borrowed $28,450.00 from Community Bank, executing a promissory note for that principal amount, which was secured by a second deed of trust on his main residence. Bumpers completed this loan transaction without first asking about the amount of the discount he was receiving or considering whether another lender would have offered better terms, though he was aware that he was free to do so.

In connection with the issuance of the loan, Bumpers paid various fees totaling $4,827.88. Community Bank charged him a total of $3,622.88, including a $1,280.25 loan discount fee, for services associated with originating the loan,[1] and Title America, LLC, a settlement agent affiliated with Community Bank, imposed the remaining fees.[2] Bumpers stated that he "thought the fees would be a little more" because a second mortgage places more "risk" on the bank. Further, Bumpers was not concerned with the services he received in exchange for each fee; rather, he focused only on the total amount necessary to obtain the loan. And as with the loan itself, Bumpers declined to shop around for a less expensive settlement service provider, even though he was aware that he was free to do so. Bumpers paid the fees imposed, and in September 2002 he repaid his loan.

Elliott similarly obtained a loan after receiving a mailing from Community Bank. Elliott compared the interest rates of competing institutions with that available from Community Bank. Elliott then decided to obtain a loan from Community Bank because of its lower interest rate. Ultimately, Elliott agreed to borrow $35,000.00 at an interest rate of 12.99%. In connection with that loan, Elliott paid $5,650.00 in fees, including a $1,400.00 loan discount fee to Community Bank and $1,145.00 in closing fees to Title America, LLC.[3] After obtaining this loan, Elliott acknowledged, but did not exercise, his right to cancel the loan without cost.

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1. Bumpers paid Community Bank a loan origination fee of $2,062.63, a loan discount fee of $1,280.25, an application fee of $95.00, and an underwriting fee of $185.00.

2. Bumpers paid Title America, LLC a settlement or closing fee of $225.00, an abstract or title search fee of $120.00, a title examination fee of $300.00, an overnight fee of $25.00, a document review fee of $275.00, and a processing fee of $260.00.

3. Elliott also paid Community Bank a $2,800.00 loan origination fee, a $95.00 application fee, and a $185.00 underwriting fee. Title America, LLC charged Elliott $225.00 for a settlement or closing fee, $120.00 for an abstract or title search, $300.00 for a title examination, $25.00 for an overnight fee, $250.00 for a document review fee, and $250.00 for a processing fee.

In 2001 plaintiffs, on behalf of themselves and all those similarly situated, filed a complaint in the Superior Court, Wake County, alleging in relevant part that Community Bank's loan transactions violated North Carolina's unfair and deceptive practices statute. More specifically, plaintiffs asserted that they paid loan discount fees, but did not receive discounted loans. Plaintiffs also alleged that the fees they were charged in connection with origination of their loans were unnecessary and unreasonable. Plaintiffs contended that Community Bank's conduct amounted to a violation of section 75-1.1 of our General Statutes, which prohibits "unfair or deceptive acts or practices in or affecting commerce." N.C.G.S. § 75-1.1 (2011).

On 5 February 2008, plaintiffs moved for partial summary judgment against Community Bank.[4] Arguing in support of their motion, plaintiffs first addressed their claims regarding Community Bank's loan discount fees.[5] They argued that the HUD-1A Settlement Statements completed in connection with their loans from Community Bank show that they paid loan discount fees in excess of $1,000.00 each—$1,280.25 for Bumpers and $1,400.00 for Elliott—in addition to other loan origination fees. Plaintiffs alleged that according to the United States Department of Housing and Urban Development, which promulgates the HUD-1A form, "the term 'loan discount' as used in line 802 of [the HUD-1A] . . . is 'a one-time charge imposed by the lender or broker to lower the rate at which the lender or broker would otherwise offer the loan to you.' " Plaintiffs stated that Mary Jo Speier, President of Title America, LLC, agreed with the federal government's definition. Plaintiffs asserted that Community Bank did not, however, provide discounted loans, pointing to Community Bank's loan transmittal documents which had a checked box next to the word "no" under the heading "Buydown." Plaintiffs maintained that this checked box showed that they did not receive discounted loans. As a result, plaintiffs contended they were entitled to summary judgment on their

4. This case has travelled some distance through the courts of both North Carolina and the United States. While we discuss the procedural history of the case to the extent necessary for a full understanding of the issues presented, it is decidedly more extensive than is set forth in the text here. See our earlier opinion, *Bumpers v. Cmty. Bank of N. Va.* (*Bumpers I*), 364 N.C. 195, 695 S.E.2d 442 (2010), for a more detailed discussion, and see the opinions of the United States Court of Appeals for the Third Circuit, *In re Cmty. Bank of N. Va.*, 418 F.3d 277 (3d Cir. 2005), and *In re Cmty. Bank of N. Va.*, 622 F.3d 275 (3d Cir. 2010), for additional background.

5. Plaintiffs did not move for summary judgment on behalf of the class of those individuals similarly situated. The United States District Court for the Western District of Pennsylvania had previously entered an order barring plaintiffs from attempting to obtain certification of this case as a class action.

claims that Community Bank charged them for services it did not provide, in violation of section 75-1.1 of our General Statutes.

Second, plaintiffs also forecast evidence in support of their excessive pricing claims. Plaintiffs alleged that they paid over $1,000.00 each—$1,180.00 for Bumpers and $1,145.00 for Elliott—in closing costs to Title America, LLC. They asserted, however, that during the relevant time period the average cost in North Carolina "for an attorney to handle a second mortgage loan, including title search and 'live closing,' ranged between $258 and $324." Plaintiffs averred that Community Bank's closings were quite cursory and much less involved than if conducted by attorneys. Finally, plaintiffs asserted that $400 is "the upper limit of reasonable charges for the settlement agent." As a result, the fees charged for the closings were excessive, in violation of section 75-1.1. Plaintiffs also claimed that, though the closing fees were charged by Title America, LLC, Community Bank should be responsible because of its relationship with Title America, LLC.

Community Bank opposed plaintiffs' motion for partial summary judgment. Community Bank argued, *inter alia*, that plaintiffs failed to demonstrate reliance on its alleged misrepresentations that discounted loans would be provided, which Community Bank contended is required to prevail on a misrepresentation claim under section 75-1.1. Further, Community Bank responded that a statement from its former Mortgage Operations Officer, John Grace, at least created an issue of material fact regarding whether plaintiffs actually received discounted loans. Mr. Grace's statement explained that the box indicating that there was no "buy-down" actually does not address whether plaintiffs received discounted interest rates. Rather, that checked box referenced "whether the borrower obtained a temporary buy-down of the interest rate, a feature which was" inapplicable to second mortgage loans, including plaintiffs'. He concluded by stating that "[t]his section does not in any way address whether the borrower's interest rate was a discounted interest rate." Regarding plaintiffs' excessive pricing claims, Community Bank argued that such claims were simply not actionable under section 75-1.1.

On 28 April 2008, the trial court allowed plaintiffs' motion for partial summary judgment. First addressing the loan discount claims, the trial court determined that each plaintiff paid a loan discount fee, which is a fee to reduce a loan's interest rate. Nonetheless, the trial court found that Community Bank's loan documents, which had "the 'no' block checked under 'Loan buydown,' " showed that no dis-

counted interest rates were given. This, according to the trial court, constituted an unfair or deceptive practice under section 75-1.1. The trial court acknowledged Mr. Grace's statement about the inapplicability of the provision, but reasoned that the statement "does not contradict the materials put forward by plaintiffs: Mr. Grace does not state that [plaintiffs] in fact received . . . 'discounted' or 'bought down' interest rate[s], but rather confirms that [plaintiffs] did not receive one sort of 'bought down' interest rate.' " As a result, the trial court determined that there was "no dispute in the evidence" that plaintiffs did not receive loans with bought down interest rates in exchange for the loan discount fees they paid.

The trial court also entered summary judgment on plaintiffs' excessive pricing claims. The trial court found that Bumpers paid $1,180.00 and Elliott paid $1,145.00 for closing services, which was in excess of the $400 "maximum reasonable charge" for those services during the relevant time period. The trial court ultimately concluded that the various itemized fees, which collectively composed the amount paid for closing services, appeared to be redundant and duplicative and that Community Bank engaged in systematic overcharging in violation of section 75-1.1.

On 15 May 2008, the trial court entered a final order, directing Community Bank to pay Bumpers damages equal to the amount he paid for a loan discount, which with interest totaled $1,864.78, and damages in the amount of the difference between the price plaintiff paid for closing services and the maximum reasonable price, which with interest totaled $1,136.13. Using a similar computation, the trial court awarded Elliott damages of $3,243.96. Because the trial court determined Community Bank's conduct violated section 75-1.1, the trial court trebled the award of damages under section 75-16, awarding Bumpers $9,002.72 and Elliott $9,731.88. Community Bank appealed.

The Court of Appeals affirmed in part and reversed in part the trial court's orders on summary judgment.[6] *Bumpers v. Cmty. Bank*

6. The Court of Appeals initially dismissed Community Bank's appeal as interlocutory because the trial court had not resolved the issue of attorney's fees. *Bumpers v. Cmty. Bank of N. Va.*, 196 N.C. App. 713, 675 S.E.2d 697 (2009). In *Bumpers I* we reversed that decision and remanded the case to the Court of Appeals for consideration of the merits of Community Bank's appeal. 364 N.C. at 204-05, 695 S.E.2d at 448-49. We noted in our decision in *Bumpers I* that Elliott was not a participant in that appeal. *Id.* at 196 n.1, 695 S.E.2d at 443 n.1. Elliott has represented to this Court that his nonparticipation was the result of an order by the United States District Court for the Western District of Pennsylvania. Elliott's involvement, however, is immaterial for purposes of our decision, and, given our disposition of this case, Elliott's relationship to this case should crystalize upon remand.

of N. Va., ___ N.C. App. ___, ___, 718 S.E.2d 408, 415 (2011). First, regarding plaintiffs' loan discount claims, the Court of Appeals agreed with Community Bank that generally a plaintiff asserting a claim under section 75-1.1 based on misrepresentation must show reliance to establish proximate cause. *Id.* at ___, 718 S.E.2d at 413 (citation omitted). The Court of Appeals reasoned, however, that plaintiffs' claims were not based on misrepresentations, and thus the court did not consider whether reliance was present. *Id.* at ___, 718 S.E.2d at 413. Rather, the court viewed the claims as essentially claims for systematic overcharging based on its earlier decision in *Sampson-Bladen Oil Company. v. Walters. Bumpers*, ___ N.C. App. at ___, 718 S.E.2d at 412-13. After characterizing the claims, the Court of Appeals concluded that the "undisputed evidence in the record demonstrates that plaintiffs did not receive a discounted interest rate on the[ir] loan[s] as a *quid pro quo* for paying the loan discount fee[s]." *Id.* at ___, 718 S.E.2d at 413. As a result, the court affirmed entry of summary judgment on plaintiffs' loan discount claims. *Id.* at ___, ___, 718 S.E.2d at 412-13, 415. The court, however, reversed the trial court's decision regarding the excessive fees claims, explaining that an issue of material fact remained about whether Title America, LLC actually overcharged for its services. *Id.* at ___, 718 S.E.2d at 414-15. By doing so, the Court of Appeals implicitly recognized that section 75-1.1 provides a cause of action for excessive pricing. *See id.* at ___, 718 S.E.2d at 414-15. Community Bank then sought discretionary review in this Court, which we allowed. *Bumpers v. Cmty. Bank of N. Va.*, 366 N.C. 243, 731 S.E.2d 141 (2012).

[1] Now we must decide whether the Court of Appeals erred by affirming the entry of summary judgment on plaintiffs' loan discount claims and in recognizing a claim for excessive pricing. In making this determination we review the trial court's order de novo to ascertain whether summary judgment was properly entered. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004) (citation omitted). "Summary judgment is appropriate '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.' " *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012) (quoting N.C.G.S. § 1A-1, Rule 56(c) (2011)). Our review necessarily begins with an examination of our unfair and deceptive practices statute and applicable precedent.

Section 75-1.1 of our General Statutes states in pertinent part that "unfair or deceptive acts or practices in or affecting commerce[ ] are

declared unlawful." N.C.G.S. § 75-1.1(a). This statute is broader and covers more than traditional common law proscriptions on tortious conduct, though fraud and deceit tend to be included within its ambit. *See Marshall v. Miller*, 302 N.C. 539, 543-44, 276 S.E.2d 397, 400 (1981). The statute does not, however, prohibit all wrongful conduct stemming from commercial transactions; section 75-1.1 does not, for example, apply to an individual who merely breaches a contract. *Mitchell v. Linville*, 148 N.C. App. 71, 74, 557 S.E.2d 620, 623 (2001) ("Neither an intentional breach of contract nor a breach of warranty . . . constitutes a violation of Chapter 75." (citations omitted)).

The General Assembly has provided a means to enforce the mandate of section 75-1.1. Section 75-16 allows any individual who has been "injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter" to bring a civil action. N.C.G.S. § 75-16 (2011). "In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001) (citation omitted). For purposes of plaintiffs' loan discount claims, the proximate cause element is at issue here.

Community Bank argues that, to establish proximate cause in a claim for misrepresentation under section 75-1.1, a plaintiff must show reliance on the allegedly misrepresented statement. Community Bank asserts that plaintiffs' loan discount claims in this case are based on an alleged misrepresentation on which plaintiffs have failed to adequately establish their reliance. Community Bank argues that plaintiffs did not enter into their loan transactions because they believed they were receiving discounted loans, but instead decided to obtain their loans based on the total fees and the interest rates. As a result, Community Bank contends that summary judgment was entered improperly.

We agree with Community Bank that a claim under section 75-1.1 stemming from an alleged misrepresentation does indeed require a plaintiff to demonstrate reliance on the misrepresentation in order to show the necessary proximate cause. Such a requirement has been the law of this state for quite some time. *See Pearce v. Am. Defender Life Ins. Co.*, 316 N.C. 461, 471, 343 S.E.2d 174, 180 (1986) ("It must be shown that the plaintiff suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation."

(citation omitted)). The Court of Appeals agreed with Community Bank on this contention as well, stating that when " 'an unfair or deceptive practice claim is based upon an alleged misrepresentation by the defendant, the plaintiff must show "actual reliance" on the alleged misrepresentation in order to establish that the alleged misrepresentation "proximately caused" the injury of which plaintiff complains.' " *Bumpers*, ___ N.C. App. at ___, 718 S.E.2d at 413 (quoting *Tucker v. Blvd. at Piper Glen LLC*, 150 N.C. App. 150, 154, 564 S.E.2d 248, 251 (2002)). But, after correctly citing the controlling rule, the Court of Appeals mischaracterized plaintiffs' claims as based not on misrepresentations but as claims for systematic overcharging similar to those at issue in *Sampson-Bladen Oil Co. v. Walters*. *Id*. at ___, 718 S.E.2d at 413. By doing so, the Court of Appeals erroneously distinguished overcharging from misrepresentation, finding proximate cause without considering whether plaintiffs presented sufficient evidence of reliance.

We disagree with the Court of Appeals' interpretation of *Sampson-Bladen Oil* and the implication that there is no requirement for plaintiffs to demonstrate that they relied on the alleged misrepresentations. In *Sampson-Bladen Oil* a fuel oil supplier regularly, for a period of several years, overcharged one of its customers by misrepresenting the volume of oil that had been delivered. 86 N.C. App. 173, 177, 356 S.E.2d 805, 808, *disc. rev. denied*, 321 N.C. 121, 361 S.E.2d 597 (1987). The Court of Appeals held that such conduct amounted to a violation of section 75-1.1. *Id.* (stating "it seems plain to us, and we so hold, that systematically overcharging a customer for two years, as the jury found was done here in the amount of $2,795.30, is an unfair trade practice"). Yet, a claim for overcharging is not distinct from one based on misrepresentation. In *Sampson-Bladen Oil* the customer complained that the fuel oil supplier misrepresented in its bills how much oil was delivered and that the customer was damaged by making payments in reliance on those bills. *See id*. at 173-75, 356 S.E.2d at 806-07.

Reliance, in turn, demands evidence "show[ing] that the plaintiff suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation." *Pearce*, 316 N.C. at 471, 343 S.E.2d at 180. We previously likened such burden of proof to that of the "detrimental reliance requirement under a fraud claim." *Id*. In making this inquiry we examine the mental state of the plaintiff. Two key elements specific to the plaintiff combine to determine detrimental reliance: (1) actual reliance and (2) reasonable reliance. *See id*. at

472, 343 S.E.2d at 181 (weighing the testimony of the plaintiff widow to decide if evidence supported claim of actual reliance by her husband); *see also Forbis v. Neal*, 361 N.C. 519, 527, 649 S.E.2d 382, 387 (2007) ("[A]ny reliance on the allegedly false representations must be reasonable." (citation omitted)).

In the context of a misrepresentation claim brought under section 75-1.1, actual reliance requires that the plaintiff have affirmatively incorporated the alleged misrepresentation into his or her decision-making process: if it were not for the misrepresentation, the plaintiff would likely have avoided the injury altogether. *See Hageman v. Twin City Chrysler-Plymouth Inc.*, 681 F. Supp. 303, 308 (M.D.N.C. 1988) ("[A] plaintiff must prove that he or she detrimentally relied on the defendant's . . . misrepresentation." (interpreting *Pearce*, 316 N.C. at 471, 343 S.E.2d at 180)); *see also Tucker*, 150 N.C. App. at 154, 564 S.E.2d at 251 ("[T]he plaintiff must show 'actual reliance' on the alleged misrepresentation in order to establish that the alleged misrepresentation 'proximately caused' the injury of which plaintiff complains." (citation omitted)). The second element, reasonableness, is most succinctly defined in the negative: "Reliance is not reasonable where the plaintiff could have discovered the truth of the matter through reasonable diligence, but failed to investigate." *Sullivan v. Mebane Packaging Grp., Inc.*, 158 N.C. App. 19, 26, 581 S.E.2d 452, 458 (citations omitted), *disc. rev. denied*, 357 N.C. 511, 588 S.E.2d 473 (2003). Additionally, in cases concerning the existence of actual and reasonable reliance, "when there are genuine issues of material fact that are legitimately called into question, summary judgment should be denied and the issue preserved for the jury." *Howerton*, 358 N.C. at 471, 597 S.E.2d at 694 (applying N.C.G.S. § 75-1.1 and finding a genuine issue of material fact regarding the plaintiff's reliance on the defendant's advertisements). Consequently, the Court of Appeals erred by not considering whether plaintiffs presented conclusive evidence of their actual and reasonable reliance on defendant's alleged misrepresentations.

Further, Community Bank's evidence raises another genuine issue about an entirely different material fact: whether plaintiffs actually received discounted loans. Because plaintiffs' claims assert that they were injured when they paid for discounted loans they did not receive, the determination of whether they did, in fact, receive discounted loans is critical. This is a point on which there is conflicting evidence, giving rise to an issue of material fact.

Plaintiffs successfully argued to the trial court in support of their motion for partial summary judgment that Community Bank's loan

transmittal documents, which had "no" checked under the heading "Buydown" and did not list a "Bought Down Rate," established that they did not actually receive discounted loans. In response, former Community Bank Mortgage Operations Officer, John Grace, explained that the sections of the loan transmittal documents plaintiffs sought to use to establish they did not receive discounted loans do not actually stand for that proposition. While, as plaintiffs suggest, the loan transmittal documents do appear to indicate plaintiffs did not receive discounted loans, Mr. Grace's statement draws that inference into question, creating a genuine issue of material fact. Thus, summary judgment on these loan discount claims was inappropriate.

[2] Community Bank also contends that the Court of Appeals erred by holding that section 75-1.1 recognizes a claim for excessive pricing that would prohibit the fees plaintiffs paid for closing services. Community Bank asserts that nothing in the general language of section 75-1.1 reflects a legislative intent to place our trial courts in the position of price regulators. Further, Community Bank argues that by enacting a separate statute prohibiting certain businesses from charging "unreasonably excessive" prices during certain, specified events, the General Assembly intends not to regulate prices generally through section 75-1.1.

As we have observed, section 75-1.1 prohibits certain "unfair or deceptive" conduct. N.C.G.S. § 75-1.1. This Court has previously explained these terms. *E.g.*, *Walker v. Fleetwood Homes of N.C., Inc.*, 362 N.C. 63, 72, 653 S.E.2d 393, 399 (2007). "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers," and a "practice is deceptive if it has the capacity or tendency to deceive." *Id.* (citation and quotation marks omitted). Plaintiffs contend that charging closing fees roughly three times as high as the upper end of a range they find to be reasonable satisfies the "unfair or deceptive" requirement of a claim under section 75-1.1.

In most cases, there is nothing unfair or deceptive about freely entering a transaction on the open market. Indeed, in condemnation proceedings our legislature actually deems the "fair market value" of real property to be a just measurement of its value when compensating a property owner for its taking. N.C.G.S. § 136-112(2) (2011). The term market value has been defined as the actual sale price "by a seller willing but not obliged to sell, to a buyer willing but not obligated to buy." *N.C. State Highway Comm'n v. Helderman*, 285 N.C. 645, 654, 207 S.E.2d 720, 727 (1974) (citation and quotation marks

omitted); *see also* 24 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 64:4, at 50 (4th ed. 2002). As a result, when transacting parties willingly and honestly negotiate a transaction, generally the transaction is not said to be unfair or deceptive.

Our legislature has created an exception to this prevailing rule in section 75-38 of our General Statutes. In that section the General Assembly made it illegal and a violation of section 75-1.1 to engage in price gouging during an emergency or during an abnormal market disruption. N.C.G.S. § 75-38 (2011). When such an event occurs individuals may not "sell or rent or offer to sell or rent any goods or services which are consumed or used as a direct result of an emergency or which are consumed or used to preserve, protect, or sustain life, health, safety, or economic well-being of persons or their property with the knowledge and intent to charge a price that is unreasonably excessive under the circumstances." *Id.* § 75-38(a). The legislature listed several factors that must be considered in determining "whether a price is unreasonably excessive," including whether the "price charged by the seller is attributable to additional costs imposed by the seller's supplier or other costs of providing the good or service during the triggering event." *Id.* § 75-38(a)(1). This section's prohibition on "unreasonably excessive" prices expires at the end of the "triggering event." *Id.* § 75-38(c), (d). As a result, it seems our General Assembly has determined that when a buyer is under an extraordinary need on account of health, safety, or similar circumstances following an abnormal event, prices may become unlawfully excessive.

While there may be circumstances other than those described in section 75-38 when an unreasonably excessive price would constitute a violation of section 75-1.1, such circumstances are not present in this case. Plaintiffs entered into their loan transactions freely and without any compulsion. Bumpers obtained his loan to improve his financial condition, using its proceeds to retire existing debt with a higher interest rate and presumably to increase the value of another asset. Bumpers was informed and was aware that other closing agents existed and that those other agents might charge lower fees to close his loan from Community Bank. Nonetheless, Bumpers elected to close the transaction using Title America, LLC. Elliott was similarly aware of other lending and closing options and declined to use them. More to the point, while the record does indicate that the closing fees plaintiffs paid were higher than those charged by attorneys performing similar services at the time, the fees paid are not so high as to run afoul of section 75-1.1. Accordingly, it was error for the Court of Appeals to recognize these claims for excessive pricing.

The Superior Court, Wake County, improperly entered summary judgment for plaintiffs on their loan discount claims and their excessive pricing claims. The Court of Appeals erroneously affirmed the entry of summary judgment on plaintiffs' loan discount claims and, as a result, incorrectly remanded plaintiffs' excessive pricing claims after finding an issue of material fact. Because genuine issues of material fact exist in regards to plaintiffs' loan discount claims, and plaintiffs' excessive pricing claims are not recognized by section 75-1.1, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the trial court for additional proceedings consistent with this opinion.

REVERSED AND REMANDED.

Justice HUDSON dissenting.

Because my review of the record persuades me that the trial court properly granted plaintiffs' motion for summary judgment on their claims regarding the loan discount fee, and because I conclude plaintiffs have sufficiently pleaded a claim for excessive pricing under N.C.G.S. § 75-1.1, I respectfully dissent.

The Court of Appeals held that summary judgment for plaintiffs was appropriate on their claims that they were wrongly charged a loan discount fee. Although the majority here concludes that genuine issues of material fact remain, I disagree. On this issue the record reveals that plaintiffs did not receive a discounted interest rate despite being charged a loan discount fee. On the Form 1008, a standard form created by Fannie Mae, the "no" block is checked in the "bought-down rate" box. In addition, the interest rate for which plaintiffs qualified was the interest rate they received; no further rate reduction is noted on the Form 1008 or elsewhere; the "qualifying rate" stated is the rate they ultimately received; and in addition to the "no" block being checked for the "bought-down rate," the space to show a "bought-down rate" was left blank. No evidence to the contrary has been produced.

Defendant and the majority cite to evidence they contend shows otherwise. For example, defendant offers the affidavit of John Grace in an attempt to contradict plaintiffs' interpretation of the Form 1008; however, the affidavit does not actually contradict the form. At no point does Mr. Grace say that plaintiffs actually received a discounted rate; instead, he attempts to explain that the "bought-down rate" space on the form refers to a temporary rate reduction, not a perma-

nent one. Further, in deposition testimony in a different but similar case, Mr. Grace testified that a "loan discount fee" is the same thing as a "loan origination fee." Despite this testimony and defendant's claims that the two terms are "often related loan terms," HUD has clearly defined the two terms as having very different meanings. U.S. Dep't of Hous. & Urban Dev., Office of Hous.—Fed. Hous. Admin., *Buying Your Home: Settlement Costs and Helpful Information* (June 1997). According to HUD, a "loan origination fee" is a fee that "covers the lender's administrative costs in processing the loan." *Id.* § III.A. ("Specific Settlement Costs"). A "loan discount fee" is a "one-time charge imposed by the lender or broker to lower the rate at which the lender or broker would otherwise offer the loan to you." *Id.* Moreover, as the majority points out in footnotes 1 and 3, plaintiffs each paid two separate amounts, $2,062.63 and $1,280.25, respectively, by plaintiff Bumpers, and $2,800.00 and $1,400.00, respectively, by plaintiff Elliot. Neither of these attempts to contradict plaintiffs' evidence creates a genuine issue of material fact regarding whether plaintiffs were charged for a discount rate they did not receive. I disagree that the statements by defendant's employee "draw [the] inference into question" about the rate plaintiffs actually paid because Mr. Grace's testimony and affidavit do not appear to address that point at all. I would therefore hold that the trial court was correct in granting summary judgment for plaintiffs on their claim regarding the loan discount fee.

Further, I would not hold that actual reliance is a necessary element of plaintiffs' Section 75-1.1 claims that are based on systematic overcharging rather than misrepresentation.[1] First, the plain language of the statute does not require reliance. Section 75-1.1(a) simply states: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C.G.S. § 75-1.1(a) (2011). Section 75-16, which gives force to Section 75-1.1, also contains no actual reliance language; it provides a right of action to anyone who is "injured." *Id.* § 75-16 (2011).

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1. Plaintiffs' Second Claim for Relief states in pertinent part:

> 23. The various fees charged to the named plaintiffs, and to members of the plaintiff class, are duplicative in that (among other things) the origination fee, the application fee, the underwriting fee, the processing fee, the closing fee and the document review fee are separate fees charged for overlapping functions and/or for the same function. Such fees are neither necessary nor reasonable charges, and violate applicable law limiting fees, G.S. 53-238 and G.S. 75-1.1.

Second, I agree with the Court of Appeals that this case is factually similar to *Sampson-Bladen Oil Co. v. Walters*, 86 N.C. App. 173, 356 S.E.2d 805 (1987). There the Court of Appeals held that it was an unfair trade practice for an oil company to charge its customers for oil they were not receiving. *Id.* at 177, 356 S.E.2d at 808-09. Here, contrary to what the majority asserts, the same thing has happened: defendant charged for a product that plaintiffs did not receive.

I also disagree with the majority that summary judgment was appropriate for defendant on plaintiffs' N.C.G.S. § 75-1.1 claim based on excessive pricing. I would hold that plaintiffs have articulated such a claim and would remand to the trial court for further proceedings because genuine questions of material fact remain.

Section 75-1.1(a) states: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." As this Court has previously noted, the legislature's statement of purpose when it enacted the statute was

> "to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business and between persons engaged in business and the consuming public within this State to the end that good faith and fair dealings between buyers and sellers at all level[s] of commerce be had in this State."

Bhatti v. Buckland, 328 N.C. 240, 245, 400 S.E.2d 440, 443 (1991) (alteration in original) (quoting *Threatt v. Hiers*, 76 N.C. App. 521, 522, 333 S.E.2d 772, 773 (1985), *disc. rev. denied*, 315 N.C. 397, 338 S.E.2d 887 (1986)). Further, section 75-16, which establishes a civil cause of action for violations of section 75-1.1, was enacted "to create a new, private cause of action for aggrieved consumers since traditional common law remedies were often deficient." *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 95, 331 S.E.2d 677, 680 (1985) (citations omitted). These are broad statutes meant to protect consumers from a wide range of unfair trade practices. There is nothing in these provisions to suggest that excessive pricing cannot give rise to a cause of action under the statute.

While the majority ultimately holds that excessive pricing could constitute a violation of section 75-1.1, I write to highlight that the language of N.C.G.S. § 75-38 does not prohibit a claim for excessive pricing in circumstances other than those articulated in that portion of N.C.G.S. Chapter 75. Defendant argues that by enacting a statute

that allows claims for excessive pricing in limited circumstances, such as a state of emergency, the legislature clearly did not intend to allow claims for excessive pricing in circumstances not named by the statute. However, I do not find this reasoning persuasive. Section 75-38 indicates a desire to tightly regulate emergency market situations but there is nothing in the statute to suggest that other market situations cannot be similarly regulated in addition. The mortgage industry is one such "other" market, and our legislature has already enacted several statutes to regulate it. For example, N.C.G.S. § 24-8(d) prohibits "unreasonable compensation" when setting the amount of mortgage brokers' fees.[2] Buying a home is a traditionally important transaction and, given the recent mortgage lending crisis, it is not unreasonable for state legislatures to want to ensure fair practices among lenders.

I am also not convinced that allowing claims for excessive pricing would force trial courts to set price ceilings or lead to the creation of judicially unmanageable standards, as argued by defendant. As stated above, section 75-38 allows claims for excessive pricing under certain circumstances, and while that statute does give some guidance on how pricing is determined to be excessive, it leaves the ultimate decision to the discretion of the trial court. If the legislature placed that decision in the hands of a trial court in some circumstances, I see no reason the trial court could not make a similar determination in other circumstances.

I would also note that this Court need not hold that excessive pricing can support a claim under Section 75-1.1 for all types of consumer transactions. Each market is different and practices vary across markets. Recognizing this, this Court has observed that "[w]hether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981) (citation omitted). In this case we must simply consider whether the actual fees charged by defendant constitute an unfair or deceptive trade practice. Here, given the broad language of section 75-1.1 and the legislature's existing regulation of the mortgage lending industry, I would hold that plaintiffs' claims for excessive pricing should be allowed to proceed.

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2. While plaintiffs have relinquished any claims under section 24-8, I do not believe we are barred from considering how that statute informs our reading of section 75-1.1 claims.

However, as a result of Nancy Guyton's affidavit and testimony, genuine issues of material fact remain regarding whether defendant's fees were excessive. While Ms. Guyton's affidavit states that the fees charged to plaintiffs (amounts of $1,180.00 and $1,145.00) were "substantially in excess of a reasonable fee and were substantially in excess of what would have been charged for closing services for such loans by North Carolina attorneys" and placed the maximum customary cost for the services provided here at not exceeding four hundred dollars, Ms. Guyton stated in her deposition that given the hours spent on a closing and the normal rate for attorney time, a typical residential closing cost would have been between eight hundred and fifty dollars to fifteen hundred dollars. She did not discuss reasonable fees for closings performed by non-attorneys. Given this omission, I would hold that genuine issues of material fact remain regarding whether defendant overcharged for its closing fee and would remand accordingly.

For the reasons stated above, I respectfully dissent.

Justice BEASLEY dissenting.

When the undisputed facts demonstrate that defendant bank charged plaintiffs for a service not actually provided, plaintiffs are entitled to summary judgment on their unfair and deceptive practice claim. Because the majority mischaracterizes the basis for plaintiffs' claim to be a misrepresentation and concludes that summary judgment was improperly granted for plaintiffs, I respectfully dissent.

This case involves several issues: (1) whether proof of actual reliance is required to recover; (2) whether there is a genuine issue of material fact regarding whether plaintiffs received discounted loans; (3) whether summary judgment was properly granted to plaintiffs on their unfair and deceptive practice claim as to the loan fees; and (4) whether summary judgment was properly granted to plaintiffs on their unfair and deceptive practice claim as to the closing fees. Each will be discussed in turn.

The standard of review for an order granting summary judgment is de novo. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004) (citation omitted). "Summary judgment is appropriate where 'there is no genuine issue as to any material fact' and 'any party is entitled to a judgment as a matter of law.' " *Id.* (quoting N.C. R. Civ. P. 56(c)).

Section 75-1.1 of the North Carolina General Statutes declares "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce" to be "unlawful." N.C.G.S. § 75-1.1(a) (2011). The General Assembly has defined "commerce" to mean "all business activities, however denominated, but . . . not include[ing] professional services rendered by a member of a learned profession." *Id.* § 75-1.1(b) (2011). This Court has established three elements that compose an unfair and deceptive practices claim:

> In order to establish a *prima facie* claim for unfair trade[1] practices, a plaintiff must show: (1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff. A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive.

Dalton v. Camp, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001) (citations omitted).

The majority incorrectly characterizes plaintiffs' unfair and deceptive practice claim as one based on misrepresentation and thus incorrectly requires proof of actual reliance to recover under section 75-1.1. The Court of Appeals correctly concluded that plaintiffs' unfair and deceptive practice claim was based on overcharging and that plaintiffs need not prove actual reliance.

Because the majority's error begins with its characterization of the basis for plaintiffs' claim, I begin my analysis there. A claim for overcharging is actionable under section 75-1.1.

This is a claim for overcharging rather than excessive pricing. The majority does not definitively bar future plaintiffs from arguing that excessive pricing constitutes an unfair and deceptive practice, and correctly so. Claims for excessive pricing can prevail under certain circumstances. *See, e.g.*, N.C.G.S. § 14-344 (2011) (prohibiting the sale of admission tickets for more than face value, plus tax and a reasonable service fee); *Id.* § 75-38 (2011) (prohibiting price gouging in times of emergency); *Rite Color Chem. Co. v. Velvet Textile Co.*, 105 N.C. App. 14, 22, 411 S.E.2d 645, 650 (1992) (assuming without deciding that an unconscionable contract may provide a basis for an unfair and deceptive practice claim (citations omitted)). We have previously

1. Although references to the acts proscribed by this statute as "trade practices" persist in our caselaw, the word "trade" was removed from the statute in 1977. *See* 1977 N.C. Sess. Laws ch. 747, § 1.

found that the purpose of section 75-1.1 is to "protect the consuming public." *Skinner v. E.F. Hutton & Co., Inc.*, 314 N.C. 267, 275, 333 S.E.2d 236, 241 (1985) (citation and quotation marks omitted). The legislature may have found price gouging during times of emergency to be particularly distasteful, but nothing appears in section 75-1.1 to indicate that consumers should not be protected from excessive pricing.

Regardless of whether a party asserting excessive pricing, standing alone, can state a claim for an unfair and deceptive practice, charging for a good or service never received is an unfair and deceptive practice that is distinct from excessive pricing. *See Sampson-Bladen Oil Co. v. Walters*, 86 N.C. App. 173, 177, 356 S.E.2d 805, 808 ("[I]t seems plain to us, and we so hold, that systematically overcharging a customer . . . is an unfair trade practice squarely within the purview of G.S. 75-1.1 . . . ."), *disc. rev. denied*, 321 N.C. 121, 361 S.E.2d 597 (1987). In *Sampson-Bladen Oil*, the plaintiff charged the defendant over a two-year period for thousands of gallons of oil that the defendant did not actually receive. *Id.* at 174, 356 S.E.2d at 806-07. The court in *Sampson-Bladen Oil* stated its conclusion briefly; however, the Court of Appeals has since interpreted *Sampson-Bladen Oil* as concluding that false invoices showing the amount of goods used and amount of money owed have a tendency to deceive and therefore constitutes an unfair and deceptive practice. *Noble v. Hooters of Greenville (NC), LLC*, 199 N.C. App. 163, 169, 681 S.E.2d 448, 453 (2009), *disc. rev. dismissed*, 363 N.C. 806, 690 S.E.2d 706 (2010).

The rationale of *Sampson-Bladen Oil* is persuasive and its facts are similar to those in this case. Essentially, defendant bank falsified an invoice regarding the amount of money plaintiffs owed in that it charged plaintiffs a discounted loan fee when defendant bank did not provide discounted loans to plaintiffs. The plaintiffs' claim is not that the cost of their loans was too high in the aggregate, which would be a case of excessive pricing, or that they were told they would receive a discounted loan, which would be a case of misrepresentation; their claim is that they were charged a fee that they should not have been charged at all. There is no difference between charging a customer for oil he did not receive and charging a customer a fee for a service not rendered.

The majority's analysis rewrites the fact statement in *Sampson-Bladen Oil* to say that these plaintiffs, like the customer in *Sampson-Bladen*, base their claims on a misrepresentation. The customer in *Sampson-Bladen* sought recovery on the basis of overcharging, not on the basis of a misrepresentation. The word "overcharge," or a vari-

ation thereof, is used eight times in the Court of Appeals' fact statement. *See Sampson-Bladen*, 86 N.C. App. at 173-75, 356 S.E.2d at 806-07. The term "misrepresentation" appears nowhere in the Court of Appeals' opinion.

Based on the majority's opinion and defendant's and plaintiffs' briefs, it appears that the terms "actual deception" and "actual reliance" are unclear. The majority incorrectly concludes that reliance is required to recover under section 75-1.1. An overview of the history of the three elements required for an unfair and deceptive practice claim should clarify the distinction between actual deception and actual reliance.

We did not precisely define an unfair and deceptive practice claim as having three elements until 2000, after our decision in *Pearce v. American Defender Life Insurance Co.*, 316 N.C. 461, 343 S.E.2d 174 (1986). *See Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000) (citing *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998), for the three-part test). Nonetheless, our language in *Pearce* clearly described the elements to which we were referring in discussing actual deception and actual reliance. We stated, "Under the facts of this case, Mrs. Pearce must first demonstrate that Ms. Wynne's letter had the capacity or tendency to deceive. Unlike a claim based upon fraud, proof of actual deception is not necessary." *Pearce*, 316 N.C. at 470-71, 343 S.E.2d at 180 (citation omitted). With this context, it is apparent that we were referring to the first element of whether the defendant committed a deceptive act or practice. We further declared, "But the second requisite to making out a claim under this statute is similar to the detrimental reliance requirement under a fraud claim. It must be shown that the plaintiff suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation." *Id.* at 471, 343 S.E.2d at 180. We referred to proximate cause as the "second requisite"; however, proximate cause is now considered the third element. *See Gray*, 352 N.C. at 68, 529 S.E.2d at 681. Importantly, we did not say that actual reliance was required; we merely stated that actual reliance—an element of a fraud claim—was *similar* to the proximate cause element of an unfair and deceptive practice claim. Thus, actual deception and actual reliance refer to different elements of an unfair and deceptive practice claim.[2]

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2. The Court of Appeals has held that actual deception is the equivalent of actual reliance and therefore has held that actual reliance is not required. *See, e.g.*, *Cullen v. Valley Forge Life Ins. Co.*, 161 N.C. App. 570, 580, 589 S.E.2d 423, 431 (2003)

Our case law demonstrates that neither actual reliance nor actual deception is required for proximate cause. Generally, the crux of proximate cause is the foreseeability of an injury. *E.g.*, *Hart v. Curry*, 238 N.C. 448, 449, 78 S.E.2d 170, 170 (1953). The three-part test from *Dalton*, outlined above, does not include a requirement of detrimental reliance. While it appears that *Howerton* supports defendant's position that actual reliance is required, a closer reading of *Howerton* reveals that the plaintiff there based his unfair and deceptive practice claim on fraud. 358 N.C. at 443, 469-70, 597 S.E.2d at 678, 693. Fraud is merely one way to prove an unfair and deceptive practice, but *Pearce* does not require actual reliance unless the plaintiff relies on fraud as part of his claim. *Pearce*, 316 N.C. at 470-71, 343 S.E.2d at 180.

The majority depends heavily on *Pearce*. In that case we looked at whether the plaintiff's husband actually relied on the insurance company's statements. *Id.* at 472, 343 S.E.2d at 181. The majority fails to note, however, that *Pearce*, like *Howerton*, involved a fraud claim and an unfair and deceptive practice claim based upon a misrepresentation, unlike the present case. *Id.* at 467, 472, 343 S.E.2d at 178, 181 (stating that the plaintiff asserted, *inter alia*, claims for fraud and unfair and deceptive practices and that the unfair and deceptive practice claim was based upon a misrepresentation).

The majority again misuses *Sampson-Bladen Oil* in requiring reliance. As stated before, the claim in *Sampson-Bladen Oil* was based on systematic overcharging rather than a misrepresentation. The Court of Appeals did not require reliance because the claim was not based on a misrepresentation, and we should not require reliance on these analogous facts when plaintiffs argue that defendants overcharged them and thus committed an unfair and deceptive practice.

Recognizing a claim for overcharging and not requiring reliance in this case does not expand North Carolina law. The statutory law is clear and this Court's precedent is well established. The majority's conclusion flouts the General Assembly's intent to "establish an effective private cause of action for aggrieved consumers in this State. . . . because common law remedies had proved often ineffective." *Marshall v. Miller*, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981).

("Moreover, our Courts have clearly held that *actual* deception is not an element necessary under N.C. Gen. Stat. § 75-1.1 to support an unfair or deceptive practices claim. Accordingly, actual reliance is not a factor." (internal citations omitted)), *disc. rev. denied sub nom. Santomassimo v. Valley Forge Life Ins. Co.*, 358 N.C. 377, 598 S.E.2d 138 (2004). The Court of Appeals ultimately reached the correct result in *Cullen*, but did so under flawed logic that the terms refer to the same element of an unfair and deceptive practice claim, which they do not, as explained herein.

This Court has been consistent in condemning a practice as unfair and deceptive when it "offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Id.* at 548, 276 S.E.2d at 403; *see also Dalton*, 353 N.C. at 656, 548 S.E.2d at 711; *Gray*, 352 N.C. at 68, 529 S.E.2d at 681; *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980), *disavowed in part on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 569, 374 S.E.2d 385, 391-92 (1988). As the Court of Appeals has aptly asserted, "[T]he fair or unfair nature of particular conduct is to be judged by viewing it against the background of actual human experience . . . ." *Harrington Mfg. Co. v. Powell Mfg. Co.*, 38 N.C. App. 393, 400, 248 S.E.2d 739, 744 (1978), *disc. rev. denied and cert. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979). Against the background of human experience and ordinary common sense, charging a consumer a fee for a service not rendered is "immoral, unethical, oppressive, unscrupulous, [and] substantially injurious to consumers." *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. The majority's unfounded narrowing of section 75-1.1 creates precisely the situation the General Assembly sought to avoid: leaving aggrieved consumers with ineffective common law remedies to combat unfair and deceptive practices.

The majority's conclusion that reliance is required and that a plaintiff must "have affirmatively incorporated the alleged misrepresentation into his or her decision-making process" and demonstrate that he would "have avoided the injury all together," opens the door to an array of new fees intended to pad a company's bottom line rather than to reflect the fair cost of a good or service provided to the consumer. For example, under the majority's reasoning, a bank may charge a "paper statement fee" to a customer who has selected electronic monthly statements offered by the bank, a "safety deposit box rental fee" to a customer who has not rented a safety deposit box, and a "teller transaction fee" on a transaction for which the customer only used the ATM. As long as the customer had some other reason that he might have chosen to do business with the bank, such as being an existing account holder, he can never show that, but for the misrepresentation, he would not have conducted business with the bank. The customer would have to show that he or she would have avoided the transaction entirely. The customer has no recourse because the fee was not a part of his decision-making process, despite the existence of an unethical and unfair practice that charges the consumer a fee for a good or service he did not receive. It is fundamentally unfair to pay a fee for a good or service and receive nothing corresponding to that fee in return.

Further, the majority's holding blurs the line between fraud and an unfair and deceptive practice claim. Presumably, the General Assembly is aware of the elements of fraud, though not codified by statute, and has chosen not to include the element of actual reliance as part of the proximate cause requirement for an unfair and deceptive practice. Furthermore, this Court has recognized that the General Assembly "intended to establish an effective private cause of action for aggrieved consumers in this State. . . . because common law remedies had proved often ineffective." *Marshall*, 302 N.C. at 543, 276 S.E.2d at 400. Fraud is one example of the common law remedies that were ineffective in eradicating unfair and deceptive practices. Thus, proximate cause for an unfair and deceptive practice claim requires that a plaintiff prove that the defendant's deceptive act could foreseeably cause injury, and in fact caused injury, if the plaintiff is not relying on fraud to prove an unfair and deceptive practice. *See Dalton*, 353 N.C. at 656, 548 S.E.2d at 711.

Plaintiffs' claim is not based on fraud, unlike *Pearce* and *Howerton*. Defendant bank did not represent that it would provide a discounted loan and then fail to do so. Instead, plaintiffs' claim is based on the contention that defendant bank charged a discount loan fee and did not provide a discounted loan. Because plaintiffs' case is not based on fraud, plaintiffs need not prove actual reliance, consistent with *Sampson-Bladen Oil*. Plaintiffs need only prove that: "(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to . . . plaintiff[s]." *Id.*

Plaintiffs demonstrated the following in support of their summary judgment motion: Defendant bank charged a loan discount fee for a service that was not provided, an act that has a tendency to deceive and is unethical, satisfying the first element. The second element has not been challenged, and loan services are included within the definition of "commerce." *See Johnson*, 300 N.C. at 261-62, 266 S.E.2d at 620. Plaintiffs can also show that defendant bank's fee proximately caused their injuries: defendant bank's deceptive act of charging a discount fee on an undiscounted loan could foreseeably cause a monetary loss and in fact caused a monetary loss.

The majority further incorrectly concludes that there is an issue of material fact regarding whether plaintiffs received discounted loans. Summary judgment for the party with the burden of proof, in this case plaintiffs, is appropriate "when the opposing party has failed

to introduce any materials supporting his opposition" to the motion. *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976).

Defendant failed to support its opposition to plaintiffs' motion. Plaintiffs asserted that they did not receive a discounted loan of any kind. Mr. Grace's affidavit in support of defendant establishes that plaintiffs did not receive a *temporary* loan discount, but it fails to demonstrate that plaintiffs received a *long-term* loan discount. Mr. Grace's affidavit fails to support defendant's opposition to the motion for summary judgment; therefore, summary judgment for plaintiffs was appropriate.

Finally, I disagree with the majority's reasoning regarding the closing fees. I fail to see how "enter[ing] into their loan transactions freely and without any compulsion" exempts these kinds of transactions from the scope of the statutes intended to protect the consumer from predatory, unfair, and deceptive practices. Most consumers likely enter into transactions that later turn out to be unfair and deceptive "freely and without any compulsion." *Id.* If entering a transaction freely is now a defense to an unfair and deceptive practice claim, then the entire purpose of Chapter 75 and its corollaries elsewhere in the General Statutes is void.

HCW RETIREMENT AND FINANCIAL SERVICES, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY; HCWRFS, LLC, FORMERLY HILL, CHESSON & WOODY RETIREMENT & 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

No. 384PA12

(Filed 28 August 2013)

Arbitration and Mediation—waiver—use of discovery

The trial court erred by concluding that defendants impliedly waived any right to arbitration based on their utilization of discovery. Although waiver can occur through the use of procedures not available in arbitration, plaintiffs presented no evidence that the opportunity to question defendants about the relevant claims for relief would not have been available at arbitration, whether in a formal deposition or some equivalent interview or examination.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 731 S.E.2d 181 (2012), affirming an order denying a motion to compel arbitration entered on 9 September 2011 by Judge Charles C. Lamm, Jr. in Superior Court, Orange County. Heard in the Supreme Court on 8 May 2013 by special session in the Old Chowan County Courthouse (1767) in the Town of Edenton pursuant to N.C.G.S. § 7A-10(a).

Northen Blue, LLP, by J. William Blue, Jr., for plaintiff-appellees.

Coats & Bennett, PLLC, by Anthony J. Biller and Emily M. Haas; and Morris, Manning & Martin, LLP, by Keith D. Burns, for defendant-appellants Frank S. Woody, III and Todd T. Yates.

HUDSON, Justice.

Here we address whether the individual defendants waived their contractual right to demand arbitration through actions inconsistent with arbitration rights and prejudicial to plaintiffs. We conclude that plaintiffs have failed to prove such prejudicial actions. Therefore, we reverse the decision of the Court of Appeals and remand for further proceedings.

Frank Woody and Todd Yates (defendants), along with plaintiff Wilton Drake, are financial planners and advisers who each own and operate financial services businesses. On 12 August 2003, defendants and plaintiff Drake formed a limited liability company, Prescott Office Management. Defendants and plaintiff Drake each owned a one-third interest in Prescott, and the Operating Agreement provided that "[a]ll decisions and commitments regarding LLC matters shall be carried out by the Managers subsequent to the approval of 100% of the Members in order to be binding on the Company." Notwithstanding that provision, the Operating Agreement also specified certain actions that could be taken without approval of 100% of the Members, including amending the Operating Agreement itself, which could be accomplished "by Members holding 51% of the aggregate Company Ownership Interests." The Operating Agreement also contained an arbitration provision, which read in pertinent part:

> 14.10 Arbitration. Any dispute, controversy or claim arising out of or in connection with, or relating to, this Operating Agreement or any breach or alleged breach hereof shall, upon the request of any party involved, be submitted to, and settled by,

> arbitration in the State of North Carolina, pursuant to the commercial arbitration rules then in effect of the American Arbitration Association (or at any time or at any other place or under any other form of arbitration mutually acceptable to the parties so involved). Any award rendered shall be final and conclusive upon the parties and a judgment theron [sic] may be entered in the highest court of the forum, state or federal, having jurisdiction.

Around the same time the parties formed Prescott Office Management, LLC, Prescott itself entered into an Operating Agreement with two other entities to form Prestwick Six, LLC. Prescott owned a 50% interest in Prestwick. As a result, Prestwick could not make most business decisions without the approval of Prescott, which at the time could not make most business decisions without the approval of all three Members (plaintiff Drake and defendants). On or about 1 September 2004, Prestwick purchased an office condominium. Subsequently, Prestwick leased space in its office condominium to plaintiff Drake's company, HCW Retirement & Financial Services, LLC ("RFS"), and to defendants' company, HCW Employee Benefit Services, LLC ("EBS").

No material changes in the corporate or office-sharing arrangements occurred from 2004 until 2010. But in September 2010 defendants Yates and Woody, in their capacities as Members of Prescott, held a meeting without informing Drake and amended the Prescott Operating Agreement. The amendments to the Operating Agreement allowed business decisions to be made with approval of 66% of the Members, rather than the previously required 100%. These amendments effectively cut plaintiff Drake out of the decision-making process for Prescott.

Plaintiff Drake alleges, and defendants admit, that defendants used their control over Prescott—which therefore gave them 50% control over Prestwick—to decline to renew the lease between Prestwick and plaintiff Drake's company, RFS, when the lease terminated on 31 December 2010. Drake, along with his LLCs, filed suit against defendants EBS, Prestwick, Yates and Woody individually, and another corporation run in part by Yates and Woody. Although the suit contains numerous claims against the various defendants; this appeal addresses only the twelfth and thirteenth claims for relief, which relate to plaintiff Drake and defendants Yates and Woody individually.

Relevant here are plaintiff Drake's claims alleging breach of good faith by defendants as Members of Prescott and defendants' breach of

fiduciary duty to a minority Member. In response, defendants filed a motion to compel arbitration on those two issues under section 14.10 of the Operating Agreement. During the pendency of the motion to compel arbitration but before it was heard, plaintiffs sought discovery from defendants on those and other issues but defendants objected on the basis that the claims were subject to arbitration. Also during that period, defendants deposed plaintiff Drake. During the course of the ten-to-eleven-hour deposition, plaintiff Drake was asked some questions regarding the twelfth and thirteenth claims for relief, despite defendants' refusal to respond to plaintiffs' discovery requests on those issues pending a ruling on the motion to compel arbitration. In their briefs the parties appear to agree that the questions related to the arbitrable claims consumed approximately one hour of the ten-to-eleven-hour deposition and occupied exactly forty-eight pages of the lengthy transcript of the deposition.

The trial court denied the motion to compel arbitration on 8 September 2011. In its order the court found that the two claims in question "do not arise out of the Operating Agreement or any alleged breach or violation of the Operating Agreement." The court concluded that the claims "fall outside the substantive scope of the arbitration provisions of the Prescott Operating Agreement" and thus "the dispute is not subject to arbitration." In the alternative, the court also found that defendants, by deposing plaintiff Drake about the arbitrable claims after refusing to respond to Drake's discovery requests on the same issues, had utilized discovery procedures that were available in litigation under the Rules of Civil Procedure but "could occur in arbitration only with permission of the arbitrator." The court concluded that plaintiffs were prejudiced by these actions and that "by their acts and conduct with regard to discovery, Defendants Yates and Woody have impliedly waived any right that they might have to arbitration."

Defendants appealed. The Court of Appeals unanimously held that the trial court had erred in concluding that the claims were not arbitrable, but affirmed on the basis of waiver. *HCW Ret. & Fin. Servs., LLC v. HCW Emp. Benefit Servs., LLC*, ___ N.C. App. ___, ___, 731 S.E.2d 181, 193 (2012). In its opinion the Court of Appeals panel cited to the rule that a party opposing a motion to compel arbitration based on waiver has the burden of proving prejudice and to this Court's prior holdings explaining what may constitute prejudice. *Id.* at ___, 731 S.E.2d at 189. The court concluded "that the trial court's determination that Defendants waived their right to have the relevant claims submitted to arbitration by engaging in discovery that

would not have been available as a matter of right during the arbitration process" was supported by the record and therefore affirmed the trial court's order. *Id.* at ___, 731 S.E.2d at 190. Defendants sought discretionary review on the waiver issue, which this Court allowed. Because we conclude that plaintiff has failed to establish prejudicial actions, inconsistent with arbitration, we now reverse.

In *Cyclone Roofing Co. v. David M. LaFave Co.* this Court discussed waiver of contractual arbitration rights. 312 N.C. 224, 229-30, 321 S.E.2d 872, 876-77 (1984). After noting the strong public policy in favor of arbitration, this Court held that "a party has impliedly waived its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration." *Id.* at 229, 321 S.E.2d at 876 (footnote and citations omitted). The Court then described some examples of what would constitute such prejudice. *Id.* at 229-30, 321 S.E.2d at 876-77. Two years later this Court restated those examples concisely in *Servomation Corp. v. Hickory Construction Co.*:

> A party may be prejudiced by his adversary's delay in seeking arbitration if (1) it is forced to bear the expense of a long trial, (2) it loses helpful evidence, (3) it takes steps in litigation to its detriment or expends significant amounts of money on the litigation, or (4) its opponent makes use of judicial discovery procedures not available in arbitration.

316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986). In *Cyclone Roofing* this Court determined that the filing of pleadings and a month's delay before moving to compel arbitration did not constitute waiver when no discovery was conducted during the delay and no evidence was lost. 312 N.C. at 233, 321 S.E.2d at 878-79. In *Servomation* this Court decided that a party did not waive arbitration despite serving its opponent with "numerous interrogatories" that, as argued by opposing counsel, necessitated lengthy responses before moving to compel arbitration. 316 N.C. at 545, 342 S.E.2d at 854-55. The Court noted that no evidence presented by the party opposing arbitration showed that there had been a long trial, that any helpful evidence was lost, or that any steps in litigation were taken to the detriment of that party. *Id.* at 545, 342 S.E.2d at 854. Most importantly for the purposes of the current appeal, the Court in *Servomation* emphasized that "plaintiff has failed to demonstrate that the judicial discovery procedures used by defendant, or their equivalent, *would be unavailable in arbitration*." *Id.* (emphasis added).

In reviewing *Cyclone Roofing* and *Servomation*, we have identified several important points. First, this Court has held that a party implicitly waives its right to compel arbitration when it takes actions inconsistent with arbitration that result in prejudice to the opposing side. Second, the party opposing arbitration bears the burden of proving prejudice. Third, the use of judicial discovery procedures per se does not constitute prejudicial action; rather, the judicial discovery procedures employed must be unavailable in arbitration. *Cyclone Roofing*, 312 N.C. at 230, 321 S.E.2d at 877 (noting potential prejudice when "a party's opponent takes advantage of judicial discovery procedures not available in arbitration"); *see also Servomation*, 316 N.C. at 545, 342 S.E.2d at 854 (requiring for a finding of prejudice that "judicial discovery procedures used by defendant, or their equivalent, would be unavailable in arbitration").

Here, none of the first three examples of prejudicial action described in *Cyclone Roofing* and *Servomation* are at issue. There has been no lengthy trial, no allegation of helpful evidence lost, and no allegation of detrimental steps taken in litigation or significant expense incurred.[1] Plaintiffs rely solely on the alleged prejudicial effect of defendants' use of judicial discovery procedures in a manner inconsistent with arbitration rights.

Plaintiffs attempt to broaden the inquiry by arguing that the totality of the circumstances here—in which defendants refused to respond to plaintiffs' discovery requests, then took plaintiff Drake's deposition, then sought to terminate discovery by calendaring the motion to compel arbitration—constitute prejudicial actions. We are not persuaded. Plaintiffs must show prejudice from actions "inconsistent with arbitration." *Cyclone Roofing*, 312 N.C. at 229, 321 S.E.2d at 876. Defendants' refusal to respond to discovery while the motion to compel was pending is an action consistent with arbitration. Only their taking of plaintiff Drake's deposition was possibly inconsistent with arbitration rights, and plaintiffs must show prejudice therefrom.

Here plaintiff Drake argues that by spending an hour on the arbitrable claims during his deposition, defendants "engag[ed] in discovery that could occur in arbitration only at the discretion of the arbitrator." The trial court found that "Defendants have utilized and

1. Like the Court of Appeals, we recognize that plaintiffs must have incurred some expense in having counsel present for the single hour of deposition questions at issue in this appeal. We do not believe, and plaintiffs do not appear to argue, that this constitutes the type of significant expense contemplated by the Court in *Cyclone Roofing* and *Servomation*.

benefited from discovery . . . that would be available in arbitration only if permitted by the arbitrator." The Court of Appeals affirmed the conclusion that "Defendants waived their right to have the relevant claims submitted to arbitration by engaging in discovery that would not have been available as a matter of right." *HCW Ret. & Fin. Servs.*, ___ N.C. App. at ___, 731 S.E.2d at 190. Each of the passages quoted above contains a subtle but important shift from the original *Cyclone Roofing* standard that the discovery employed be "unavailable in arbitration" to a standard requiring that the discovery employed be "available only at the discretion of the arbitrator" or "unavailable as a matter of right." This varies from the standard this Court has previously endorsed for prejudice under these circumstances: prior case law requires that the discovery procedures employed be unavailable in arbitration, not just unavailable as a matter of right. If the arbitrator has discretion over the discovery procedures at issue, then they are not per se unavailable. Moreover, the opinion in *Servomation* suggests that discovery need not be exactly reciprocal. *See* 316 N.C. at 545, 342 S.E.2d at 854 (requiring for a finding of prejudice that "judicial discovery procedures used by defendant, *or their equivalent*, would be unavailable in arbitration" (emphasis added)). Plaintiffs here presented no evidence that the opportunity to question defendants about the twelfth and thirteenth claims for relief, whether in a formal deposition or some equivalent interview or examination, would be unavailable at arbitration.

Plaintiffs here have attempted to prove prejudice specifically because of defendants' use of discovery procedures not available in arbitration, but have offered no evidence that something equivalent to the one hour of deposition questions would not be available at arbitration. We conclude that plaintiffs have failed to prove prejudicial actions and therefore, that the trial court and Court of Appeals erred in finding waiver of contractual arbitration rights. The remaining issues addressed by the COA are not before this Court and its decision as to those issues remains undisturbed. We reverse the decision of the Court of Appeals affirming the trial court's order finding waiver and remand this case to that court for further remand to the trial court for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. FRANCISCO JAVIER PIZANO-TREJO

No. 203PA12

(Filed 4 October 2013)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 723 S.E.2d 583 (2012), affirming in part, vacating in part, and remanding in part a judgment and order entered on 23 March 2011 by Judge Robert F. Floyd Jr. in Superior Court, Cumberland County. Heard in the Supreme Court on 15 April 2013.

Roy Cooper, *Attorney General*, *by Sherri Horner Lawrence*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Katherine Jane Allen*, *Assistant Appellate Defender*, *for defendant-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).

AFFIRMED.

STATE OF NORTH CAROLINA v. BOBBY LEE MCKENZIE

No. 52A13

(Filed 4 October 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. ___, 736 S.E.2d 591 (2013), reversing an order entered on 13 March 2012 by Judge Phyllis M. Gorham in Superior Court, Duplin County. Heard in the Supreme Court on 4 September 2013.

Roy Cooper, Attorney General, by Christopher W. Brooks, Assistant Attorney General, for the State-appellant.

Hunter & Price, P.A., by Justin B. Hunter and G. Braxton Price, for defendant-appellee.

Tin Fulton Walker & Owen, PLLC, by Noell P. Tin, Jacob H. Sussman, and Matthew G. Pruden, for North Carolina Advocates for Justice, amicus curiae.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed. This case is remanded to the Court of Appeals for further remand to the Superior Court, Duplin County, for additional proceedings consistent with this opinion.

REVERSED AND REMANDED.

GREEN v. KEARNEY

[367 N.C. 113 (2013)]

LARRY DONNELL GREEN, BY AND THROUGH HIS GUARDIAN AD LITEM, SHARON CRUDUP; LARRY ALSTON, INDIVIDUALLY; AND RUBY KELLY, INDIVIDUALLY v. WADE R. KEARNEY, II; PAUL KILMER; KATHERINE ELIZABETH LAMELL; PAMELA BALL HAYES; RONNIE WOOD; PHILLIP GRISSOM, JR.; DR. J.B. PERDUE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS MEDICAL EXAMINER OF FRANKLIN COUNTY; LOUISBURG RESCUE AND EMERGENCY MEDICAL SERVICES, INC.; FRANKLIN COUNTY EMERGENCY MEDICAL SERVICES; EPSOM FIRE AND RESCUE ASSOCIATION, INC.; AND FRANKLIN COUNTY, NORTH CAROLINA, A BODY POLITIC

No. 123A13

(Filed 4 October 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. ___, 739 S.E.2d 156 (2013), affirming an order entered on 8 February 2012 by Judge Henry W. Hight, Jr. in Superior Court, Franklin County. Heard in the Supreme Court on 5 September 2013.

Bell & Vincent-Pope, P.A., by Judith M. Vincent-Pope, for plaintiff-appellants Larry Alston and Ruby Kelly.

Troutman Sanders LLP, by Gary S. Parsons and Whitney S. Waldenberg, for Pamela Ball Hayes, Ronnie Wood, and Louisburg Rescue and Emergency Medical Services, Inc.; and Young Moore and Henderson, P.A., by David M. Duke, for Wade R. Kearney, II, defendant-appellees.

Glenn, Mills, Fisher & Mahoney, P.A., by Carlos E. Mahoney, and Whitley Law Firm, by Ann C. Ochsner, for North Carolina Advocates for Justice, amicus curiae.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. DEMARIO JAQUINTA ROLLINS

No. 8A13

(Filed 4 October 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. ___, 734 S.E.2d 634 (2012), finding no error in an order denying defendant's motion for appropriate relief entered on 12 July 2010 by Judge Richard D. Boner in Superior Court, Mecklenburg County. Heard in the Supreme Court on 3 September 2013.

Roy Cooper, *Attorney General*, *by Laura E. Parker*, *Assistant Attorney General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Daniel R. Pollitt and Anne M. Gomez*, *Assistant Appellate Defenders*, *for defendant-appellant.*

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. MICHAEL DAVID McDARIS

No. 26A13

(Filed 4 October 2013)

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. ___, ___ S.E.2d ___ (Dec. 18, 2012) (No. COA12-476), finding no prejudicial error in judgments entered on 26 October 2011 by Judge Robert C. Ervin in Superior Court, Mecklenburg County. Heard in the Supreme Court on 3 September 2013.

Roy Cooper, Attorney General, by Angenette Stephenson, Assistant Attorney General, for the State.

John Keating Wiles for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. TIMOTHY CHARLES WILKES

No. 80A13

(Filed 4 October 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. ___, 736 S.E.2d 582 (2013), finding no error at a trial that resulted in judgments entered on 16 June 2011 by Judge V. Bradford Long in Superior Court, Moore County, but remanding for resentencing. Heard in the Supreme Court on 5 September 2013.

Roy Cooper, *Attorney General*, *by Creecy C. Johnson*, *Assistant Attorney General*, *for the State.*

Duncan B. McCormick for defendant-appellant.

PER CURIAM.

AFFIRMED.

PAUL E. WALTERS v. ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NORTH CAROLINA

No. 156A13

(Filed 4 October 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. ___, 739 S.E.2d 185 (2013), reversing and remanding an order granting summary judgment for defendant entered on 23 July 2012 by Judge Quentin T. Sumner in Superior Court, Nash County. Heard in the Supreme Court on 5 September 2013.

Etheridge, Hamlett & Murray, L.L.P., by J. Richard Hamlett, II, for plaintiff-appellee.

Roy Cooper, Attorney General, by William P. Hart, Jr. and Lauren Tally Earnhardt, Assistant Attorneys General, for defendant-appellant.

PER CURIAM.

AFFIRMED.

RAMEY KEMP & ASSOCIATES, INC., PLAINTIFF v. RICHMOND HILLS RESIDENTIAL PARTNERS, LLC; FIRST BANK AND FIRST TROY SPE, LLC, DEFENDANT AND THIRD-PARTY PLAINTIFFS v. STEVE SAIEED, THIRD-PARTY DEFENDANT

No. 122A13

(Filed 4 October 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. ___, 737 S.E.2d 420 (2013), affirming an order granting summary judgment entered on 3 October 2011 by Judge R. Allen Baddour, Jr. in Superior Court, Wake County. Heard in the Supreme Court on 5 September 2013.

Manning Fulton & Skinner, P.A., by William C. Smith, Jr. and Natalie M. Rice, for plaintiff-appellee.

Boxley, Bolton, Garber & Haywood, L.L.P., by Ronald H. Garber, for defendant-appellants First Bank and First Troy SPE, LLC.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. DARRYL HESTER

No. 31A13

(Filed 4 October 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. ___, 736 S.E.2d 571 (2012), dismissing defendant's appeal from a judgment entered on 14 October 2011 by Judge Richard D. Boner in Superior Court, Mecklenburg County. Heard in the Supreme Court on 3 September 2013.

Roy Cooper, Attorney General, by Kathleen N. Bolton, Assistant Attorney General, for the State.

Franklin E. Wells, Jr. for defendant-appellant.

PER CURIAM.

AFFIRMED.

DEWEY D. MEHAFFEY, EMPLOYEE v. BURGER KING, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 24PA12

(Filed 8 November 2013)

Workers' Compensation—attendant care services—family member—prior approval

The Industrial Commission exceeded its authority in workers' compensation case by promulgating the Medical Fee Schedule that prevented the award of retroactive compensation for the attendant care services provided before Commission approval was obtained. While good policy reasons may exist for the prerequisites created in the Schedule, this matter is a legislative determination, not one to be made by the Commission without statutory authorization. However, the matter was remanded for necessary findings and conclusions on the issue of reasonableness of the timing of plaintiff's request for reimbursement.

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

Justice NEWBY dissenting in part and concurring 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. ___, 718 S.E.2d 720 (2011), affirming in part and reversing in part an opinion and award filed on 18 August 2010 by the North Carolina Industrial Commission. Heard in the Supreme Court on 14 November 2012.

Sumwalt Law Firm, by Mark T. Sumwalt and Vernon Sumwalt; and Grimes Teich Anderson LLP, by Henry E. Teich, for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones and Jeremy T. Canipe, for defendant-appellees.

HUDSON, Justice.

This case presents the question whether the Medical Fee Schedule promulgated by the North Carolina Industrial Commission (Commission) may bar certain individuals from receiving compensation for attendant care services they provided before obtaining approval for those services from the Commission. We hold that the

Commission may not do so since such action would exceed the power granted to the Commission by the General Assembly. Because the Court of Appeals enforced that provision of the Commission's Medical Fee Schedule, which we conclude was adopted in excess of the Commission's authority, we reverse in part the decision of the Court of Appeals. But because defendants here have challenged the reasonableness of the timing of plaintiff's request for approval of attendant care and the Commission's findings do not address this issue, we remand for the Commission to do so.

On 13 August 2007, plaintiff suffered a compensable injury to his left knee while working as a restaurant manager for defendant Burger King, where he had been employed for approximately eighteen years. As a result of his injury, plaintiff underwent a "left knee arthroscopy with a partial medial meniscectomy" at Transylvania Community Hospital. Plaintiff's condition failed to improve after surgery, and he ultimately developed "reflex sympathetic dystrophy" ("RSD"). Despite undergoing a number of additional procedures, plaintiff continued to suffer pain. Plaintiff eventually was diagnosed with depression related to the injury and resulting RSD, and his psychiatrist concluded that it was unlikely plaintiff's "mood w[ould] much improve until his pain is under better control."

Likely due to pain, plaintiff increasingly attempted to limit his movements following his diagnosis of RSD. By 8 April 2008, plaintiff was using "an assistive device" to move or walk around. On 21 April 2008, John Stringfield, M.D., plaintiff's family physician, prescribed a mobility scooter for plaintiff, and medical records show that by 20 June 2008, plaintiff was using a walker. On 18 December 2008, plaintiff requested a prescription for a hospital bed from Eugene Mironer, M.D., a pain management specialist with Carolina Center for Advanced Management of Pain, to whom plaintiff had been referred as a result of his diagnosis with RSD. Dr. Mironer's office declined to recommend a hospital bed, instructing plaintiff to see his family physician instead. That same day plaintiff visited his family physician, Dr. Stringfield, who prescribed both a hospital bed and a motorized wheelchair.

Since plaintiff's injury, his wife has assisted him with his daily activities in the home. Until 14 August 2008, plaintiff's wife attended to his needs approximately four hours per day. On 15 August 2008, Mrs. Mehaffey discontinued her outside employment, and since then she has attended to plaintiff's needs approximately sixteen hours per day. In her caregiver role, Mrs. Mehaffey helps "plaintiff out of bed in

the morning, gives him a sponge bath, and assists [him] in dressing." She also helps "get [him] onto the scooter and transfers [him] from the scooter to a recliner, where plaintiff sits most of the day." She prepares plaintiff's meals and attends to his bodily needs. At the end of each day, Mrs. Mehaffey helps "plaintiff dress for bed and helps him into bed."

Despite plaintiff's efforts to limit his activity and movement, the medical providers plaintiff saw for pain management indicated that he would derive greater benefit if he attempted to move under his own strength, which would force him to rehabilitate his injury. James North, M.D., the codirector of pain management at Wake Forest Baptist Hospital and plaintiff's preferred treating physician, "opined that providing plaintiff with a power wheelchair was counterproductive to his recovery" because "people using wheelchairs tend to gain weight and avoid using the extremity that causes their pain, both of which impede[ ] the recovery process." Dr. North reasoned that "the less an injured extremity is used, the worse the condition will become." Likewise, Dr. North concluded "that there was no scientific or medical basis for requiring a hospital bed for patients with RSD." Dr. North's medical opinion was echoed by Dr. Mironer. Nonetheless, plaintiff used these mobility aids and comfort devices, procuring for himself the hospital bed and motorized scooter.

Plaintiff's family physician and other individuals began to recommend that plaintiff receive attendant care services. On 9 March 2009, Judy Clouse, a nurse consultant employed by the Commission, recommended that plaintiff receive eight hours of attendant care daily, Monday through Friday, from a Certified Nursing Assistant. On 5 June 2009, Dr. Stringfield recommended that plaintiff have sixteen hours a day of attendant care services, retroactive to the day plaintiff was diagnosed with RSD, thereby including the almost two years of attendant care plaintiff's wife had already provided. Bruce Holt, a certified life care planner, also opined that plaintiff "needs attendant care for at least 16 hours per day, seven days a week."

In light of these recommendations regarding his needs, plaintiff sought a hearing before the Commission to clarify the extent of medical compensation owed to him. Defendants denied any failure to pay for necessary medical treatment. Relevant for our purposes, plaintiff and defendants disagree whether plaintiff's wife should be compensated for the attendant care she provided plaintiff before the Commission approved her rendering that service. Defendants contend that the Commission's Medical Fee Schedule prevents such an

award of retroactive compensation to Mrs. Mehaffey. Plaintiff, on the other hand, views Mrs. Mehaffey's attendant care services as simply another component of medical compensation within the meaning of N.C.G.S. § 97-2(19) (2007), for which defendants are responsible under N.C.G.S. § 97-25 (2007).

The Commission agreed with plaintiff on this issue, choosing not to follow its own fee schedule, perhaps in recognition that it was not authorized to deny reimbursement for these services. First, in an opinion and award filed on 29 January 2010, a deputy commissioner directed defendants to compensate Mrs. Mehaffey for the "attendant care services rendered to plaintiff at the rate of $12.50 per hour, 16 hours per day and seven days per week, from 15 August 2008, through the present and continuing until further order of the Commission." On appeal the Full Commission affirmed in pertinent part the deputy commissioner's opinion and award, concluding that Mrs. Mehaffey's attendant care services were medical compensation for which defendants were responsible under sections 97-2(19) and 97-25 of our General Statutes. In addition, the Full Commission further compensated Mrs. Mehaffey for the attendant care services previously provided from 15 November 2007 through 14 August 2008, while she was still employed outside the home. For those attendant care services the Full Commission awarded compensation for four hours daily, seven days a week, also at a rate of $12.50 per hour.

The Court of Appeals, relying on our decision in *Hatchett v. Hitchcock Corp.*, 240 N.C. 591, 83 S.E.2d 539 (1954), reversed the Commission's decision to provide compensation for Mrs. Mehaffey's past attendant care services. *Mehaffey v. Burger King*, ___ N.C. App ___, ___, 718 S.E.2d 720, 723-24 (2011). In *Hatchett* we were presented with a situation in which the Commission had awarded financial compensation to an injured worker's mother under sections 97-25 and 97-26 of our General Statutes for practical nursing services that she provided to her son without prior approval from the Commission. 240 N.C. at 592-93, 83 S.E.2d at 540-41. Ultimately, this Court determined that the Commission's fee schedule, promulgated pursuant to the Commission's rulemaking authority under the Workers' Compensation Act (the Act), prohibited such an award of compensation for practical nursing services unless that conduct had been first approved by the Commission. *Id.* at 593-94, 83 S.E.2d at 541-42. As a result, we reversed the Commission's award.

The Court of Appeals reasoned that the outcome in the present case is controlled by our decision in *Hatchett*. First, that court

observed that the claim for payment in this case was brought under sections 97-25 and 97-26 of our General Statutes, the same provisions that were at issue in *Hatchett*. *Mehaffey*, ___ N.C. App. at ___, 718 S.E.2d at 724. Additionally, the Court of Appeals explained that the language of the rule at issue in *Hatchett*, which said, "Fees for practical nursing service by a member of claimant's family or anyone else will not be honored unless written authority has been obtained in advance," is nearly identical to the language now found in the Commission's Medical Fee Schedule. *Id*. at ___, 718 S.E.2d at 723-24 (citations and quotation marks omitted). As a result, the Court of Appeals concluded that the Commission should have followed the holding of *Hatchett* and thus declined to award compensation for Mrs. Mehaffey's past provision of attendant care services. *Id*. at ___, 718 S.E.2d at 724.

We allowed plaintiff's petition for discretionary review to consider the Court of Appeals' decision regarding the Commission's award of compensation for past attendant care services provided before approval was obtained from the Commission. *Mehaffey v. Burger King*, ___ N.C. ___, 726 S.E.2d 177 (2012). Plaintiff contends that the Court of Appeals erred by following the holding of *Hatchett*. Instead, plaintiff asserts that the Commission does not have statutory authority under section 97-26(a) to prohibit compensation of an immediate family member for the provision of attendant care services unless prior authorization was obtained. Defendants, on the other hand, contend that the Court of Appeals properly followed our decision in *Hatchett*. Moreover, defendants argue that allowing members of an injured employee's immediate family to be compensated for providing attendant care without the Commission's having first approved that service would contravene one of the underlying purposes of the Act, which is to control medical expenses. To resolve this dispute we turn first to the provisions of the Act.

Generally speaking, the Act provides for the compensation of employees who sustain workplace injuries. N.C.G.S. §§ 97-1 to -101.1 (2011). The Act places upon an employer the responsibility to furnish "medical compensation" to an injured employee. *Id*. § 97-25. At the time of plaintiff's injury, the Act defined "medical compensation" as:

> Medical Compensation.—The term "medical compensation" means medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to

> effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

Id. § 97-2(19) (2007). The Act's catch-all provision for "other treatment" has been understood to include attendant care services. *See, e.g.*, *Ruiz v. Belk Masonry Co.*, 148 N.C. App. 675, 681, 559 S.E.2d 249, 253-54 (upholding an award of attendant care benefits), *appeal dismissed and disc. rev. denied*, 356 N.C. 166, 568 S.E.2d 610 (2002). Moreover, the parties do not dispute that attendant care services fall under the version of section 97-2(19) in effect when plaintiff was injured and that the current version of that statute expressly includes "attendant care services," N.C.G.S. § 97-2(19) (2011).

The Act is designed also to control medical costs. Indeed, as we said in *Charlotte-Mecklenburg Hospital Authority v. North Carolina Industrial Commission*, "The General Assembly enacted the Act in 1929 to both provide swift and sure compensation to injured workers without the necessity of protracted litigation, and to insure a limited and determinate liability for employers." 336 N.C. 200, 203, 443 S.E.2d 716, 718-19 (1994) (citation, alteration, and internal quotation marks omitted)), *superseded by statute*, The Workers' Compensation Reform Act of 1994, ch. 679, sec. 2.3, 1993 N.C. Sess. Laws (Reg. Sess. 1994) 394, 398 (amending N.C.G.S. § 97-26(b) effective 1 October 1994). The latter is essentially a trade-off for the former.

In keeping with its desire to control medical costs, in 1994 the legislature directed the Commission to "adopt a schedule of maximum fees for medical compensation," which would enable employers more accurately to predict their potential financial exposure following an employee's injury. The Workers' Compensation Reform Act of 1994, ch. 679, sec. 2.3, 1993 N.C. Sess. Laws (Reg. Sess. 1994) 394, 397 (codified at N.C.G.S. § 97-26(a)). Before that time an employer's pecuniary liability was tethered to the costs that prevailed "in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person." *Id.* Departing from its previous standard, the General Assembly instructed that this new Medical Fee Schedule "shall be adequate to ensure that (i) injured workers are provided the standard of services and care intended by this Chapter, (ii) providers are reimbursed reasonable fees for providing these services, and (iii) medical costs are

adequately contained." *Id.* The adoption of a Medical Fee Schedule aids in fulfilling a purpose of the Act by indicating to employers the amount of their potential financial exposure.

The central issue in the case *sub judice* is whether the Commission exceeded its authority in promulgating a provision of its Medical Fee Schedule to create a prerequisite to reimbursement for certain care. To answer this question, like all similar questions, we must ascertain whether the General Assembly authorized the administrative body—here the Industrial Commission—to undertake the challenged conduct. *E.g.*, *High Rock Lake Partners, LLC v. N.C. DOT*, ___ N.C. ___, ___, 735 S.E.2d 300, 303-04 (2012). Administrative agencies, as creatures of statute, may act only as authorized by the legislature. *In re Broad & Gales Creek Cmty. Ass'n*, 300 N.C. 267, 280, 266 S.E.2d 645, 654-55 (1980) (citations omitted). As an administrative agency, the Commission must act consistently with the intent of the General Assembly. *See, e.g.*, *Gregory v. W.A. Brown & Sons*, 363 N.C. 750, 763-64, 688 S.E.2d 431, 440 (2010). A provision of the Commission's Medical Fee Schedule that is contrary to our General Statutes is, as a result, without effect. *Forrest v. Pitt Cnty. Bd. of Educ.*, 100 N.C. App. 119, 125-28, 394 S.E.2d 659, 662-64 (1990), *aff'd per curiam*, 328 N.C. 327, 401 S.E.2d 366 (1991).

We understand the difficulty in monitoring home health care, especially when furnished by a family member. In an apparent effort to address this issue, the Commission adopted Section 14 of the Medical Fee Schedule, which states in pertinent part:

> Except in unusual cases where the treating physician certifies it is required, fees for practical nursing services by members of the immediate family of the injured will not be approved unless written authority for the rendition of such services for pay is first obtained from the Industrial Commission.

While good policy reasons may exist for the prerequisites created here in the Schedule, this matter is a legislative determination, not one to be made by the Commission without statutory authorization. Neither section 97-26(a) nor any other provision in our General Statutes grants the Commission the power to create such a requirement. *See* N.C.G.S. § 97-26(a). In fact, the legislature explicitly stated that the Commission's Medical Fee Schedule "shall . . . ensure that . . . providers are reimbursed reasonable fees for" their services. *Id.* And as the enabling legislation indicates, the fee schedule is designed to facilitate uniformity and predictability in the medical costs employers

are required to pay under the Act. *See* Ch. 679, sec. 2.3, 1993 N.C. Sess. Laws (Reg. Sess. 1994) at 397. Section 97-26(a) of our General Statutes does not give the Commission the authority to mandate that certain attendant care service providers may not be compensated unless they first obtain approval from the Commission before rendering their assistance. N.C.G.S. § 97-26(a). As a result, we are unable to permit Section 14 of the Commission's Medical Fee Schedule to prevent the award of retroactive compensation for the attendant care services Mrs. Mehaffey provided her husband. *See Forrest*, 100 N.C. App. at 125, 394 S.E.2d at 662 (noting that the Commission's Medical Fee Schedule is "superseded by" our General Statutes).

We are mindful that this result may appear on its face to be inconsistent with our decision in *Hatchett*. When, however, a change occurs in the law upon which a prior decision rests, this Court must look afresh at the questioned provision. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 173, 109 S. Ct. 2363, 2370, 105 L. Ed. 2d 132, 148 (1989) ("In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress."), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (enacting 42 U.S.C. § 1981(b)), *as recognized in Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 124 S. Ct. 1836, 158 L. Ed. 2d 645 (2004). Our decision in *Hatchett* was based on the fee schedule (which has remained largely unchanged) *and* the statutory language of former section 97-26. Under the statutory language at that time, an employer was liable for medical treatment "when ordered by the Commission." N.C.G.S. § 97-26 (1950). Our decision in *Hatchett* emphasized that statutory language: "G.S. 97-26 provides for the pecuniary liability of the employer for medical, surgical, hospital service or other treatment required, *when ordered by the Commission.*" *Hatchett*, 240 N.C. at 594, 83 S.E.2d at 542. We reasoned that these "plain and explicit words" meant that the plaintiff's mother should not be compensated for her attendant care services because the Commission had not approved the care nor had the plaintiff asked for such an approval. *Id.* at 594, 83 S.E.2d at 542. It appears that we relied heavily on the statutory language to determine that the Commission must be bound by its fee schedule. *Id.* However, in 1994 section 97-26 was completely rewritten, removing the "when ordered by the Commission" language and replacing it with language requiring the Commission to adopt fee schedules and outlining the procedures and standards for doing so. Ch. 679, sec 2.3, 1993 N.C. Sess. Laws at 397.

Therefore, the statutory basis for the decision in *Hatchett* no longer exists, and, as stated above, no statutory basis exists for the current fee schedule.[1]

Nonetheless, we are unable to affirm the Commission's award of compensation for Mrs. Mehaffey's past attendant care services. As plaintiff concedes, to receive compensation for medical services, an injured worker is required to obtain approval from the Commission within a reasonable time after he selects a medical provider. *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 593, 264 S.E.2d 56, 63 (1980). If plaintiff did not seek approval within a reasonable time, he is not entitled to reimbursement. Here, defendants have challenged the reasonableness of the timing of plaintiff's request, and the opinion and award filed by the Full Commission does not contain the required findings and conclusions on this issue. Accordingly, we remand to the Court of Appeals for further remand to the Commission to make the necessary findings of fact and conclusions of law on this issue.

The Court of Appeals reversed in pertinent part the opinion and award entered by the Full Commission, which provided retroactive compensation for Mrs. Mehaffey's attendant care services to her husband. Because that court relied on a provision of the Commission's Medical Fee Schedule that is not authorized by our legislature, we reverse the decision of the Court of Appeals on that issue. We remand this matter to the Court of Appeals for further remand to the Commission for additional proceedings consistent with this opinion.

REVERSED IN PART AND REMANDED.

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

Justice NEWBY dissenting in part and concurring in part.

"It is not debatable that the Workmen's Compensation Act is to be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation. The rule of liberal construction cannot be used to read into the Act a meaning

1. Going forward, under the 2011 revisions to the Workers' Compensation Act, section 97-2(19) defines "Medical Compensation" to include "attendant care services prescribed by a health care provider authorized by the employer *or subsequently by the Commission.*" N.C.G.S. § 97-2(19) (2011) (emphasis added).

alien to its plain and unmistakable words. We should not overstep the bounds of legislative intent, and make by judicial legislation our Workmen's Compensation Act an Accident and Health Insurance Act." *Hatchett v. Hitchcock Corp.*, 240 N.C. 591, 593, 83 S.E.2d 539, 541 (1954) (citations and internal quotation marks omitted). Through "judicial legislation" the majority has done just that, expanding the potential liability owed by employers across our state. In so doing, the majority strikes down a reasonable attempt by the Industrial Commission to regulate costs that has existed for almost eighty years. The majority opinion circumvents the doctrine of stare decisis by "overstep[ping] the bounds of legislative intent," effectively overruling *Hatchett v. Hitchcock Corporation*. *Id*. Consequently, I must respectfully dissent in part.

According to the majority, an injured employee is entitled to compensation for unauthorized health care furnished by a family member despite a provision of the Industrial Commission's Medical Fee Schedule that explicitly requires preapproval. *Mehaffey v. Burger King*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2013). The preapproval requirement is a long-established regulation designed to ensure predictability and to control medical costs while balancing employee access to care. Even so, the majority concludes that by the 1994 revisions to the Workers' Compensation Act, the General Assembly intended to remove the Commission's power to promulgate this historic prerequisite. *Id*. at ___, ___ S.E.2d at ___. Specifically, the majority relies on the elimination of the phrase "when ordered by the Commission" from section 97-26. That statute now states that the Medical Fee Schedule "shall be adequate to ensure that (i) injured workers are provided the standard of services and care intended by this Chapter, (ii) providers are reimbursed reasonable fees for providing these services, and (iii) medical costs are adequately contained." N.C.G.S. § 97-26(a) (2011). The 1994 revisions further instructed the Commission to adopt "rules and guidelines" for the provision of "attendant care." *Id*. § 97-25.4(a) (2011). Those "rules and guidelines shall ensure that injured employees are provided the services and care intended by this Article and that medical costs are adequately contained." *Id*. Notwithstanding this explicit mandate to control costs, the majority holds that the 1994 revisions evidence a clear legislative intent to strip the authority of the Industrial Commission to require preapproval for familial care. *Mehaffey*, ___ N.C. at ___, ___ S.E.2d ___. I disagree.

As an administrative agency, the Commission "possesses only those powers expressly granted to it by our legislature or those which

exist by necessary implication in a statutory grant of authority." *High Rock Lake Partners, LLC v. N.C. DOT*, 366 N.C. 315, 319, 735 S.E.2d 300, 303 (2012) (citation and quotation marks omitted). To determine the extent of an agency's power, "we apply the enabling legislation practically so that the agency's powers include all those the General Assembly intended the agency to exercise," and "[w]e give great weight to an agency's interpretation of a statute it is charged with administering." *Id.* (citations omitted). When reading such statutes, we also must consider legislative acquiescence; in other words, "[t]he 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." *Young v. Woodall*, 343 N.C. 459, 462-63, 471 S.E.2d 357, 359 (1996); *see also State v. Ellison*, ___ N.C. ___, ___, 738 S.E.2d 161, 164 (2013) (approving of legislative acquiescence (citations omitted)).

To ascertain the bounds of the Commission's authority, it is imperative to look at both the agency's enabling legislation as well as the long-standing interpretation it has given to those statutes. The Workers' Compensation Act generally provides health care for employees who sustain workplace injuries. N.C.G.S. §§ 97-1 to -101.1 (2011). Ratified in 1929, the Act sought to respond to the "ordinary hazards" implicit in "the substitution of the factory for the home as a place of labor and the introduction of power driven machinery with its vast complex of dangerous operations." N.C. Indus. Comm'n, *The North Carolina Workmen's Compensation Act*, Bull., May 1929, at 5-6 [hereinafter *Bulletin*]. Under the Act, an employee's right to compensation and an employer's resulting liability are predicated on "mutual concessions," in which "each surrenders rights and waives remedies" otherwise available under the law. *Lee v. Am. Enka Corp.*, 212 N.C. 455, 462, 193 S.E. 809, 812 (1937). The Act ensures that employees receive "prompt, reasonable compensation," but guarantees "limited and determinate liability for employers." *Radzisz v. Harley Davidson of Metrolina, Inc.*, 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997) (citations omitted).

When an employee seeks treatment from a professional health care provider, the Workers' Compensation Act applies in its simplest form. The care furnished comes at a cost, and the provider expects payment for the services rendered. A much more challenging situation occurs when the care is provided by an injured employee's immediate family. Unlike a professional health care provider, a family member does not create a bill or medical records as part of an ongoing busi-

ness and is usually expected to furnish a degree of uncompensated care. At some point, however, that care reaches a threshold, surpassing that which is expected of normal familial duties. But by its very nature, health care furnished by family members is difficult, if not impossible, to monitor and always invites the questions: When do the services cross the line from being merely part of the duties of a family to becoming compensable medical care? And who decides? This intersection tests the delicate balance between access to care and predictable medical costs, the foundation of the Workers' Compensation Act.

Early in its existence, the Industrial Commission, the state agency charged with administering the Workers' Compensation Act, enacted a series of safeguards designed to protect the financial well-being of those who must care for their loved ones following a workplace accident. These safeguards likewise ensured that employers are not wrongfully burdened with paying for care that is implicitly part of the responsibilities of a family or, worse, fraudulent. As the majority concedes, these procedural protections have "remained largely unchanged," *Mehaffey*, ___ N.C. at ___, ___ S.E.2d at ___, and consistent over the better part of the last century.

In the Act's infancy, the Fee Schedule was quite vague on this issue. For example, in 1931 the Fee Schedule made no distinction for familial care, merely stating that "[c]harges for special nursing will be approved in those cases only where, and for such time as, the patient's condition actually requires such attention." *Bulletin*, Sept. 1931, at 9 (Medical and Hospital Fee Schedule). Shortly thereafter, the Commission began including language that reflected the difficulty in managing care furnished by an employee's immediate family. The first iterations of the preapproval requirement were not limited to family members alone, but included "any one" who acted as a practical nurse. In 1936, for instance, the Fee Schedule provided that "[f]ees for practical nursing service by a member of claimant's family or any one else will not be honored unless written authority has been obtained in advance." N.C. Indus. Comm'n, *Medical and Hospital Fee Schedule* 10 (1936).

The language of the 1945 Fee Schedule, at issue in *Hatchett*, was nearly identical, stating that "[f]ees for practical nursing service by a member of claimant's family or any one else will not be honored unless written authority has been obtained in advance." N.C. Indus. Comm'n, *Medical, Dental, Nursing and Hospital Fees* 15 (1945). Nonetheless, in *Hatchett* the Commission chose to ignore its own Fee

Schedule and awarded financial compensation to an injured worker's mother for attendant care services that she provided to her son without prior approval from the Commission. 240 N.C. at 592-93, 83 S.E.2d at 540-41. On appeal, the defendants argued that the Fee Schedule controlled, prohibiting retroactive payments for the plaintiff's care. We agreed, striking down the award for lack of preapproval. *Id.* at 594-95, 83 S.E.2d at 542-43. This Court determined that the Fee Schedule, promulgated pursuant to the Commission's authority under the Workers' Compensation Act, prohibited such an award of compensation for a family member providing attendant care services unless that conduct had been first approved by the Commission. *Id.* at 593-94, 83 S.E.2d at 541-42.

As the Fee Schedule was tested by different and unique fact patterns related to familial care, the Commission continued to fine-tune the provision's language. By 1958 the Commission omitted "any one" and introduced a degree of flexibility by adding the word "ordinarily." At that time the Fee Schedule required that "[f]ees for practical nursing service by a member of the immediate family of the injured person will not ordinarily be approved unless written authority for the rendition of such services for pay is first obtained from the Industrial Commission." N.C. Indus. Comm'n, *Medical*, *Dental*, *Nursing*, *and Hospital Fees* 28 (1958).

Following the legislature's 1994 revision of the Workers' Compensation Act that directed the Commission to adopt a Medical Fee Schedule that balances costs with access to care, the Commission again turned to the existing preapproval requirement, now section 14 of the Medical Fee Schedule. As it has for almost eighty years, that rule seeks to foster predictability and reduce the costs associated with home health care, stating that:

> When deemed urgent and necessary by the attending physician, special duty nurses may be employed. Such necessity must be stated in writing when more than seven days of nursing services are required.
>
> . . . .
>
> Except in unusual cases where the treating physician certifies it is required, fees for practical nursing services by members of the immediate family of the injured will not be approved unless written authority for the rendition of such services for pay is first obtained from the Industrial Commission.

N.C. Indus. Comm'n, *Medical Fee Schedule: Section 14* (2012). Therefore, according to the Commission's own terms, for a family member to receive payment for providing attendant care, the services generally must be preapproved in writing by the Commission. Yet, in keeping with the Workers' Compensation Act's mandate to ensure reasonable access to care, an injured employee may bypass Commission preapproval in unusual cases by first obtaining certification from the treating physician that the care provided by family members is required and then procuring the Commission's approval within a reasonable time, *see Mehaffey*, ___ N.C. at ___, ___ S.E.2d at ___ ("As plaintiff concedes, to receive compensation for medical services, an injured worker is required to obtain approval from the Commission within a reasonable time after he selects a medical provider." (citation omitted)). In either situation, however, the Fee Schedule fulfills the statutory directive of controlling costs and promoting predictability while leaving employees reasonable access to necessary care.

Like the Fee Schedule itself, the statutes undergirding the preapproval requirement have seen little change in the years since we decided *Hatchett*. For example, N.C.G.S. § 97-25, the statute upon which both the claims in this case and those in *Hatchett* are founded, generally reads the same, stating that compensation "shall be provided by the employer." *Compare* N.C.G.S. § 97-25 (1950), *with id.* § 97-25 (2007). Further, when we decided *Hatchett* the relevant subsection of N.C.G.S. § 97-90 was nearly identical to its current version, reading that "no physician shall be entitled to collect fees from an employer or insurance carrier until he has made the reports required by the Industrial Commission in connection with the case." *Id.* § 97-90(a) (1950). That same statute now provides in part that "no physician or hospital or other medical facilities shall be entitled to collect fees from an employer or insurance carrier until he has made the reports required by the Commission in connection with the case." *Id.* § 97-90(a) (2011). Moreover, the Commission's rule making authority under N.C.G.S. § 97-80 has likewise withstood the test of time, requiring the agency to adopt rules consistent with the Workers' Compensation Act. *Compare id.* § 97-80(a) (2011) ("The Commission shall adopt rules, in accordance with Article 2A of Chapter 150B of the General Statutes and not inconsistent with this Article, for carrying out the provisions of this Article."), *with id.* § 97-80 (1950) ("The Commis-sion may make rules, not inconsistent with this article, for carrying out the provisions of this article."). Consequently, the doctrine of stare decisis directs that our reasoning in *Hatchett* and our application of the Commission's Fee Schedule in that case control here.

Yet, attempting to distinguish *Hatchett* from the case at hand, the majority seizes upon the revision to N.C.G.S. § 97-26 to nullify the preapproval requirement. This result apparently relies solely on the General Assembly's later "removing" of the phrase "when ordered by the Commission," which was part of the statute when we decided *Hatchett*. *Mehaffey*, ___ N.C. at ___, ___ S.E.2d at ___. Perhaps the majority's analysis would be reasonable if we were faced with a surgical extraction of these five words only, but in reality the entire statute, along with many other provisions of the Workers' Compensation Act, was revised in 1994. Though the language changed, the majority agrees that the statute's purpose remained intact: to "control medical costs" and to "enable employers more accurately to predict their potential financial exposure following an employee's injury." *Id.* at ___, ___ S.E.2d at ___. After further emphasizing that "[t]he adoption of a Medical Fee Schedule aids in fulfilling a purpose of the Act by indicating to employers the amount of their potential financial exposure," *id.* at ___, ___ S.E.2d at ___, why would the majority then strike down a specific provision that unequivocally was enacted with that purpose in mind?

The majority's mischaracterization of this revision to N.C.G.S. § 97-26 as evidence of legislative intent unreasonably parses a statute that previously interposed a sensible balance between access to care and cost containment. Now, the majority has effectively removed the cost containment provision. Striking the preapproval requirement, a proven method of ensuring "uniformity and predictability," *Mehaffey*, ___ N.C. at ___, ___ S.E.2d at ___, and guaranteeing that "medical costs are adequately contained," N.C.G.S. § 97-26(a), did not result from actions by our General Assembly. And, this Court should not pass judgment on policy. *See Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 285, 177 S.E.2d 291, 298 (1970) (concluding that "questions as to public policy are for legislative determination" (citation omitted)); *State v. Barksdale*, 181 N.C. 621, 626, 107 S.E. 505, 508 (1921) ("It is [the Court's role] to construe the laws and not to make them.").

Since first recognizing the challenge of managing home health care furnished by immediate family members, the Commission has interpreted the Workers' Compensation Act to allow the agency to require preapproval for such services. Nevertheless, the majority affords no weight to the Commission's interpretation—the Fee Schedule—which we approved in *Hatchett* and the General Assembly accepted for decades. If anything, the 1994 revisions to the Workers' Compensation Act actually bolstered the Commission's authority. An

examination of the current version of section 97-26 makes clear that the power to require preapproval of these services is well within a practical reading of the legislature's mandate to adopt a Fee Schedule that ensures "(i) injured workers are provided the standard of services and care intended by this Chapter, (ii) providers are reimbursed reasonable fees for providing these services, and (iii) medical costs are adequately contained." N.C.G.S. § 97-26(a). Moreover, the extent of the Commission's authority is even more evident when considered in light of the long history of the preapproval requirement in conjunction with the plain and unambiguous language of section 97-25.4(a) instructing the Commission to adopt "rules and guidelines" for the provision of "attendant care" that "shall ensure that injured employees are provided the services and care intended by this Article and that medical costs are adequately contained." *Id.* § 97-25.4(a).

As a result, I would hold that Section 14 of the Medical Fee Schedule is consistent with the current statutory scheme and that the Commission was thereby bound to apply it. Accordingly, for an employee to receive compensation for attendant care when provided by immediate family members, that employee must obtain either approval from the Commission before receiving treatment or, in unusual cases only, certification from the employee's treating physician that the care provided is required.

In this instance, the parties agree that plaintiff failed to obtain preapproval from the Commission before receiving attendant care from his wife. Thus, under its own Fee Schedule, the Commission should have denied plaintiff's reimbursement request unless this case presents an "unusual" situation and plaintiff's treating physician certified that the care furnished was required. Based on my review of the record, however, I am unable to make such a determination. I cannot determine, for example, why the Commission chose to depart from its own general requirements, whether the Commission believed this to be an "unusual" case, if plaintiff's treating physician certified plaintiff's wife's care was required, when such certification occurred, or if plaintiff sought Commission approval within a reasonable time. Most striking, the Commission's opinion and award ignores Section 14 of the Fee Schedule altogether, neither mentioning it nor alluding to its application to this case. Therefore, I would remand this matter to the Commission for further proceedings to consider application of the Fee Schedule and the preapproval requirement.

The majority claims to "understand the difficulty in monitoring home health care, especially when furnished by a family member," yet

removes the authority from the Commission to address this very real challenge. *Mehaffey*, ___ N.C. at ___, ___ S.E.2d at ___. In the name of construing a statute designed "to control medical costs," *id.* at ___, ___ S.E.2d at ___, the majority instead has increased significantly employers' exposure to potential liability. Because the majority's analysis runs afoul of one of the core aspirations of the Workers' Compensation Act—predictability—and because I believe our reasoning in *Hatchett* remains controlling, I respectfully dissent in part.

I concur with the majority's conclusion that "to receive compensation for medical services, an injured worker is required to obtain approval from the Commission within a reasonable time after he selects a medical provider." *Mehaffey*, ___ N.C. at ___, ___ S.E.2d at ___ (citation omitted).

MICHAEL A. GREEN AND DANIEL J. GREEN, PLAINTIFFS V. JACK L. FREEMAN, JR., CORINNA W. FREEMAN, PIEDMONT CAPITAL HOLDING OF NC, INC., PIEDMONT EXPRESS AIRWAYS, INC., PIEDMONT SOUTHERN AIR FREIGHT, INC., AND NAT GROUP, INC., DEFENDANTS V. LAWRENCE J. D'AMELIO, III, THIRD-PARTY DEFENDANT

No. 424A12

(Filed 8 November 2013)

Corporations—breach of fiduciary duty—insufficient evidence—agency—piercing the corporate veil

The trial court erred in an action resulting from a failed business venture by denying defendant Corinna Freeman's (Corinna) motions for directed verdict and judgment notwithstanding the verdict on plaintiff's breach of fiduciary duty claim. Plaintiffs never became shareholders, plaintiffs did not establish that Corinna owed them a special duty as creditors, and plaintiffs' injury was the same as the injury suffered by the company. The decision of the Court of Appeals affirming the trial court's denial was reversed and the matter was remanded to that Court for application of the piercing the corporate veil doctrine to plaintiffs' agency claims.

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 542 (2012), affirming a judgment entered on 2 June 2010 and an order entered on 8 July 2010, both by Judge Edwin G. Wilson, Jr., and an

order entered on 6 October 2008 by Judge Ronald Spivey, all in Superior Court, Guilford County. Heard in the Supreme Court on 12 March 2013.

Thomas B. Kobrin for plaintiff-appellees.

Rossabi Black Slaughter, P.A., by Gavin J. Reardon and T. Keith Black, for defendant-appellant Corinna W. Freeman.

MARTIN, Justice.

In this case we are presented with a failed corporate venture and asked what remedy, if any, is available to plaintiffs. We hold that plaintiffs did not present evidence sufficient to establish a breach of fiduciary duty claim and reverse the decision of the Court of Appeals on that issue. We reverse and remand to the Court of Appeals for application of the piercing the corporate veil doctrine to plaintiffs' agency claims.

Defendant Corinna Freeman and her now-deceased husband founded Piedmont Southern Air Freight (Piedmont Southern), a shipping company, and ran it together until he became sick in 2001. That same year, Corinna signed a letter "delegating responsibility and authority for making all corporate, financial, operational and administrative decisions for [Piedmont Southern]" to her son Jack Freeman, another defendant in this case who is not a party to this appeal. Corinna remained owner of the company on the corporate paperwork filed with the Secretary of State. In 2005 Corinna applied to the Secretary of State to have Piedmont Southern reinstated after an administrative dissolution. In that filing, she signed as the owner of Piedmont Southern. Also in 2005, Jack partnered with Larry D'Amelio to create a new shipping company, Piedmont Express Airways (Piedmont Express). Jack and Larry intended to structure Piedmont Express and Piedmont Southern as subsidiaries of a new entity called Piedmont Capital Holding of North Carolina (Piedmont Capital). Jack and Larry met with plaintiff Michael Green to discuss investing in this new venture. Afterward, Michael and his brother Daniel, also a plaintiff here, each gave the venture $200,000, which they believed would serve as both a loan and an investment. Larry signed promissory notes to Michael and Daniel on behalf of Piedmont Southern, Piedmont Express, and Piedmont Capital (collectively, the Piedmont companies), promising to repay the funds within the earlier of one year or when the cumulative billings of the companies equaled two million dollars. Corinna was not involved in any of the conversa-

tions leading up to the transfers of plaintiffs' capital, and plaintiffs did not rely on her when making their decision to invest. Additionally, Corinna's signature was not on any of the loan documents.

Although Jack and Larry apparently intended that Piedmont Capital own Piedmont Southern and Piedmont Express, the articles of incorporation for Piedmont Capital and Piedmont Express did not establish a hierarchy among the three companies. The operating agreement for the three companies similarly grouped the three entities together. Moreover, the corporate names were used interchangeably in corporate communications and discussions between the parties. According to the operating agreement, Jack was CEO and Larry was President of the three companies. The agreement further provided that "[t]he initial Chairperson shall be Corinna W[.] Freeman and Jack L. Freeman Jr." In addition, the agreement identified Corinna as holding thirty-three shares of the combined companies, with a later amendment indicating she held eighty-eight shares. No stockholders or directors meetings were ever held, and stock was never issued. Corinna did not sign the operating agreement, but Jack signed "by Jack Freeman" on a line designated for Corinna on the later amendment. Jack testified that he never told her about identifying stock in her name or about naming her Chairperson. When plaintiffs asked to meet with Corinna or to learn about her involvement in the companies, Jack told them he had authority to act on her behalf and sign all documents in her name. Jack and Larry both testified that Corinna was not involved in the management of the companies. Corinna did come to the Piedmont offices on several occasions to train the staff and received compensation for her services.

The record contains evidence of several bank accounts operated for the various Piedmont companies. In 2005 a Wachovia business checking account was opened by Corinna as the "CEO/OWNER" of Piedmont Express. A First Citizens checking account and a First Citizens money market savings account were in the name of Piedmont Capital; these two accounts each received one of the Green brothers' $200,000 checks. Funds from these accounts were deposited into a First Citizens checking account for Piedmont Express. An American Express business credit card was issued to "C Freeman, PSA Airline" and was actively used at least between December 2005 and July 2006.

Between February 2006 and June 2006, payments were made on a Wachovia credit card issued to "C Freeman" by eight checks written from the Piedmont Express checking account with First Citizens

Bank and signed by "signatory for C. Freeman." In June 2006 three checks from the Piedmont Express Wachovia checking account were signed by Corinna to repay loans. In 2007 Corinna wrote checks from a BB&T account in her name, totaling over $19,000, to Jack and Piedmont Southern for company expenses. Mortgage and utility payments on a house belonging to Corinna were paid from the Piedmont Express Wachovia checking account.

By June 2006, plaintiffs' $400,000 had all been spent. In December 2006, plaintiffs sued Jack, Larry, Corinna, and the Piedmont companies to recover the funds. Plaintiffs originally claimed that they should be able to pierce the corporate veil and that Corinna, along with Jack and, in some cases, the Piedmont companies, had committed fraud, breach of contract, conversion, and breach of fiduciary duty, engaged in unfair and deceptive practices, and received unjust enrichment. Plaintiffs subsequently amended their complaint to include Larry as a third-party defendant. The trial court granted summary judgment for Corinna on plaintiffs' claims based on fraud, breach of contract, and unfair and deceptive practices, but denied summary judgment for Corinna on plaintiffs' claims based on conversion, unjust enrichment, breach of fiduciary duty, and piercing the corporate veil. Upon plaintiffs' subsequent motion, the trial court allowed plaintiffs to amend the complaint to include claims under the theory that Jack was acting as Corinna's agent.

Thus, when this case went to trial, the claims against Corinna were as follows: agency claims, based on Jack's actions, for fraud, breach of fiduciary duty, and unfair and deceptive practices; personal liability claims for conversion, unjust enrichment, and breach of fiduciary duty; and personal liability "for the debts and obligations of the Piedmont Companies" through the piercing the corporate veil doctrine. At the end of plaintiffs' presentation of evidence, the trial court dismissed the conversion claim against Corinna. At the close of all evidence, the trial court granted in part Corinna's motion for directed verdict, dismissing the agency claims and the unjust enrichment claim. Thus, as for Corinna, only the breach of fiduciary duty and piercing the corporate veil issues were submitted to the jury. The jury found that Corinna "control[led] [the Piedmont companies] with regard to the acts or omissions that damaged the plaintiffs" and that "plaintiffs [were] damaged by the failure of [Corinna] to discharge her duty as a corporate director or officer." Corinna's post-trial motions for judgment notwithstanding the verdict (JNOV) or a new trial were denied. Corinna then appealed from the trial court's original judg-

ment and its denial of her motions for JNOV and a new trial. Plaintiffs cross-appealed from the trial court's rulings adverse to them.

The Court of Appeals affirmed the trial court's denial of Corinna's motions. *Green v. Freeman*, ___ N.C. App. ___, 733 S.E.2d 542 (2012). In so doing, the court held there was sufficient evidence for a jury to find Corinna liable for breach of fiduciary duty and liable under "plaintiffs' claim for piercing the corporate veil." *Id.* at ___, 733 S.E.2d at 552-54. The court also affirmed the dismissal of plaintiffs' unfair and deceptive practices claim. *Id.* at ___, 733 S.E.2d at 556. The court did not address the merits of plaintiffs' arguments that the trial court erred by dismissing plaintiffs' agency claims and by not admitting the depositions of defendants, stating, "[A]s we have affirmed the trial court's judgment [regarding plaintiffs' claims based on breach of fiduciary duty and piercing the corporate veil] . . . there is no need to address these additional arguments as we are affirming the judgment for the reasons stated above and consideration of these issues would have no effect upon the outcome." *Id.* at ___, 733 S.E.2d at 556.

The dissenting judge would have held that "plaintiffs failed to adduce evidence of a fiduciary relationship, or evidence that Corinna personally breached any duty to plaintiffs proximately resulting in their harm." *Id.* at ___, 733 S.E.2d at 557 (Calabria, J., dissenting). The dissenting judge also would have held that "since plaintiffs failed to prove Corinna exercised domination and control over Piedmont that would subject her to individual liability, plaintiffs failed to prove her liability for corporate obligations should extend beyond the confines of a corporate separate entity." *Id.* at ___, 733 S.E.2d at 563. Corinna appealed to this Court as of right on the basis of the dissent. We reverse the decision of the Court of Appeals on the breach of fiduciary duty issue, and we remand to that court for consideration of plaintiffs' cross-appeal from the trial court's dismissal of their agency claims against Corinna and the effect of the agency claims on the application of the piercing the corporate veil doctrine. The other issues decided by the Court of Appeals are not before this Court and are not addressed in this opinion.

When considering the denial of a directed verdict or JNOV, the standard of review is the same. *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 323, 411 S.E.2d 133, 138 (1991). "The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Id.* at 322, 411 S.E.2d at 138 (citation omitted). If "there is

evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for [JNOV] should be denied." *Abels v. Renfro Corp.*, 335 N.C. 209, 215, 436 S.E.2d 822, 825 (1993) (citations omitted). Further, "[i]f, at the close of the evidence, a plaintiff's own testimony has unequivocally repudiated the material allegations of his complaint and his testimony has shown no additional grounds for recovery against the defendant, the defendant's motion for a directed verdict should be allowed." *Cogdill v. Scates*, 290 N.C. 31, 44, 224 S.E.2d 604, 611 (1976). Whether Corinna was entitled to a directed verdict or JNOV is a question of law. *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 720, 693 S.E.2d 640, 643 (2009) (citations omitted), *cert. denied*, ___ U.S. ___, 131 S. Ct. 2456 (2011). We review questions of law de novo. *E.g.*, *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc.*, ___ N.C. ___, ___, 742 S.E.2d 781, 786 (2013).

The first issue before us is whether there was sufficient evidence, as a matter of law, that Corinna breached a fiduciary duty owed to plaintiffs, proximately causing injury to them. "For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citations omitted). A fiduciary relationship may arise when " 'there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.' " *Id.* (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)).

In North Carolina, directors of a corporation are required to act in good faith, with due care, and in a manner they reasonably believe to be in the best interests of the corporation. N.C.G.S. § 55-8-30 (2011). When these fiduciary duties are breached, a shareholder may sue the offending director in a derivative action. *Id.* § 55-7-40 (2011). The shareholder must "[f]airly and adequately represent[ ] the interests of the corporation in enforcing the right of the corporation." *Id.* § 55-7-41 (2011). The General Assembly has expressly indicated its intent "to avoid an interpretation [of N.C.G.S. § 55-8-30] . . . that would give shareholders a direct right of action on claims that should be asserted derivatively" and to avoid giving creditors a generalized fiduciary claim. N.C.G.S. § 55-8-30 N.C. cmt. (2011); *see* Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 14.01[2], at 14-4 (7th ed. 2012) [hereinafter *Robinson on Corporation Law*].

The general rule is that "[s]hareholders, creditors or guarantors of corporations generally may not bring individual actions to recover what they consider their share of the damages suffered by the corporation." *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 660, 488 S.E.2d 215, 220-21 (1997) (citations and quotation marks omitted). Shareholders may, however, bring a derivative lawsuit against corporate officers and directors, in which case any damages flow back to the corporation, not to the individual shareholders bringing the action. *Rivers v. Wachovia Corp.*, 665 F.3d 610, 614-15 (4th Cir. 2011) (citations omitted); *see* 2 James D. Cox & Thomas Lee Hazen, *Cox & Hazen on Corporations* § 15.02 (2d ed. 2003) [hereinafter *Cox & Hazen on Corporations*]. Plaintiffs did not bring a derivative suit. Therefore, we examine two exceptions to the general rule: shareholders, creditors and guarantors may bring an individual action against a third party for breach of fiduciary duty when (1) "the wrongdoer owed [them] a special duty" or (2) they suffered a personal injury "distinct from the injury sustained by . . . the corporation itself." *Barger*, 346 N.C. at 659, 661, 488 S.E.2d at 219, 221. Plaintiffs alleged they were both shareholders and creditors. We analyze each alleged position separately.

We begin by determining whether plaintiffs ever became shareholders of the Piedmont companies. "[T]he holder of the shares acquires the status of a shareholder[ ] when they are issued, which is a fact to be determined upon the intent of the parties as indicated by the pertinent corporate resolutions, subscription or like agreement, or other relevant circumstances." *Robinson on North Carolina Corporation Law* § 20.01, at 20-2; *see* N.C.G.S. § 55-6-03(a) (2011). Shares are authorized in the articles of incorporation filed with the Secretary of State, N.C.G.S. § 55-6-01 (2011), but then may be issued by the corporation's board of directors, *id.* § 55-6-21 (2011); *Cox & Hazen on Corporations* § 16.13, at 1058; *Robinson on North Carolina Corporation Law*, at 20-2 (noting it is "important to fix the issue date of shares precisely by directors' resolutions or in some other definitive manner").

At trial Michael Green testified that he never received any stock and that he did not know whether any stock was put in his name in the company books. The only document in the record mentioning the issuance of stock is the operating agreement, signed by plaintiffs, Larry, and Jack on 22 November 2005, which states, "It is further agreed that Michael Alan Green and Danny Jay Green must remain Shareholders in the Company for a period of 5 years before said

shares will be vested." The 2006 amendment to the operating agreement includes the same requirement. Plaintiffs' complaint was filed on 6 December 2006. Plaintiffs presented no evidence or alternative interpretation of the vesting schedule. Accordingly, either because the authorized stock was never issued by a decision of the board of directors or because the stock did not vest in plaintiffs, we conclude that plaintiffs never became shareholders.

When "plaintiff[s'] own testimony has unequivocally repudiated the material allegations of [their] complaint . . . the defendant's motion for a directed verdict should be allowed." *Cogdill*, 290 N.C. at 44, 224 S.E.2d at 611. Because plaintiffs never became shareholders, Corinna could not have owed them, as shareholders, fiduciary duties under either the special duty or the personal injury exception. Plaintiffs therefore lack standing to bring a claim as shareholders for breach of fiduciary duty.

In addition to alleging they were shareholders, plaintiffs alleged the $400,000 given to the Piedmont companies was a loan. Thus, we next consider whether plaintiffs can recover under the special duty or unique personal injury exception based on the theory of liability that Corinna, as a director or officer, breached a fiduciary duty owed to them as creditors. To recover under the special duty exception, there must be a special duty "that defendant[ ] owed . . . to plaintiffs that was personal to plaintiffs as [creditors] and was separate and distinct from the duty defendant[ ] owed the corporation." *Barger*, 346 N.C. at 661, 488 S.E.2d at 221. When considering claims by shareholders, we have recognized the creation of a special duty "when the wrongful actions of a party induced an individual to become a shareholder; . . . when the party performed individualized services directly for the shareholder; and when a party undertook to advise shareholders independently of the corporation." *Id.* at 659, 488 S.E.2d at 220 (citations omitted). "This list is illustrative; it is not an exclusive list of all factual situations in which a special duty may be found." *Id.* "We apply the same rules for establishing a special duty when plaintiffs are [creditors] as we apply when plaintiffs are shareholders." 346 N.C. at 661, 488 S.E.2d at 221.

Plaintiffs' testimony, standing alone, establishes that none of the scenarios discussed in *Barger* apply. Plaintiffs testified that Corinna was not involved in the meetings leading up to their $400,000 alleged investment, that they did not rely on any representations made by her when choosing to invest, and that there was almost no personal interaction between Corinna and plaintiffs. In fact, the most contact plain-

tiffs had with Corinna was seeing her a handful of times and saying nothing more than "hello." Even viewed in the light most favorable to plaintiffs, the evidence of plaintiffs' contact with Corinna does not allow a reasonable inference that they relied on or trusted in her when they chose to invest in the Piedmont companies. While the *Barger* scenarios are not exclusive, the facts of this case do not present an analogous situation meriting the recognition of a fiduciary duty under the special duty exception.

To establish a breach of fiduciary duty under the second exception, plaintiffs had to present evidence that they suffered an injury peculiar or personal to themselves. *Id.* There must be evidence "that the injury suffered by the [creditor] is personal to him and distinct from the injury suffered by the corporation itself." *Id.* The loss of an investment "is identical to the injury suffered by" the corporate entity as a whole. *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 336, 525 S.E.2d 441, 444 (2000); *see also Cox & Hazen on Corporations* § 15.02, at 890. Even when one person contributes a disproportionate amount of the investment and thus bears a correspondingly greater loss, such an occurrence "hardly makes for an 'individual injury.' " *Energy Investors*, 351 N.C. at 336, 525 S.E.2d at 444. Here, plaintiffs' injury is the loss of $400,000. Because plaintiffs' injury is the same as the injury suffered by the company itself, the evidence was insufficient to support plaintiffs' claim under the personal injury exception.

Plaintiffs have failed to produce evidence showing either that Corinna owed them, as shareholders or creditors, a special duty or that they suffered a personal injury distinct from the injury suffered by the Piedmont companies as a whole. Therefore, as a matter of law, plaintiffs could not assert individual claims that belonged to the company. *Energy Investors*, 351 N.C. at 336, 525 S.E.2d at 444. Accordingly, there was insufficient evidence to support plaintiffs' claim, and Corinna's motions for directed verdict and JNOV should have been granted. *See Abels*, 335 N.C. at 215, 436 S.E.2d at 825. We reverse the decision of the Court of Appeals on this issue.

The second issue Corinna raises on appeal is whether the Court of Appeals erred in holding "the trial court did not err in denying defendant Corinna's motions for a directed verdict and JNOV as to plaintiffs' claims for piercing the corporate veil." *Green*, ___ N.C. App. at ___, 733 S.E.2d at 555 (majority). "The general rule is that in the ordinary course of business, a corporation is treated as distinct

from its shareholders." *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 438, 666 S.E.2d 107, 112 (2008) (citation omitted). Piercing the corporate veil sets aside that general rule and allows a plaintiff to impose legal liability for a corporation's obligations, or for torts committed by the corporation, upon some other company or individual that controls and dominates a corporation. *See Henderson v. Sec. Mortg. & Fin. Co.*, 273 N.C. 253, 160 S.E.2d 39 (1968). The doctrine allows injured parties to bring claims against individuals who otherwise would have been shielded by the corporate form. Courts will pierce the corporate veil "when applying the corporate fiction would accomplish some fraudulent purpose, operate as a constructive fraud, or defeat some strong equitable claim." *Ridgeway Brands*, 362 N.C. at 439, 666 S.E.2d at 112-13 (citations and internal quotation marks omitted). Disregarding the corporate form is not to be done lightly. *Id.* at 438-39, 666 S.E.2d at 112.

The aggrieved party must show that "the corporation is so operated that it is a mere instrumentality or *alter ego* of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State." *Henderson*, 273 N.C. at 260, 160 S.E.2d at 44 (citations omitted). Evidence upon which we have relied to justify piercing the corporate veil includes inadequate capitalization, noncompliance with corporate formalities, lack of a separate corporate identity, excessive fragmentation, siphoning of funds by the dominant shareholder, nonfunctioning officers and directors, and absence of corporate records. *Glenn v. Wagner*, 313 N.C. 450, 455-58, 329 S.E.2d 326, 330-32 (1985) (citations omitted). Many of those elements are facially present here. The record contains evidence that the names of the Piedmont companies were used interchangeably; no shareholders or directors meetings were ever held; and funds from corporate accounts were used to pay personal expenses, such as a home mortgage and utility bills.

After the fact finder determines that the corporate veil should be pierced—in other words, that the corporate identity should be disregarded—the next inquiry is whether a noncorporate defendant may be held liable for her personal actions as an officer or director. To succeed in this inquiry, plaintiffs must present evidence of three elements:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and

> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of [a] plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id. at 455, 329 S.E.2d at 330 (citation and quotation marks omitted).

In this case there was evidence, when taken in the light most favorable to plaintiffs, from which a jury could conclude that Corinna exercised domination and control over the Piedmont companies. Despite Corinna's designation as Chairperson, no shareholders or directors meetings were ever held. Her name was on a corporate credit card account and on at least one of the corporate checking accounts. She is the undisputed owner of Piedmont Southern and is designated in corporate documents as majority shareholder of the Piedmont companies. Corinna wrote checks totaling over $19,000 from a BB&T account in her name to Jack and Piedmont Southern for company expenses. Finally, mortgage and utility payments on a house belonging to Corinna were paid from a Piedmont Express checking account.

But sufficient evidence of domination and control establishes only the first element for liability. There must also be an underlying legal claim to which liability may attach. *Id.*; *see Whitehurst v. FCX Fruit & Vegetable Serv., Inc.*, 224 N.C. 628, 637, 32 S.E.2d 34, 40 (1944). The only legal claim against Corinna considered by the jury was breach of fiduciary duty, which we have held was erroneously submitted to the jury. Plaintiffs' complaint stated other claims against Corinna, but they were dismissed by the trial court. Plaintiffs appealed the dismissal of their agency claims against Corinna to the Court of Appeals, but the court did not address the merits of that portion of the appeal because the court affirmed the trial court's judgment regarding plaintiffs' claims for breach of fiduciary duty and piercing the corporate veil. *Green*, ___ N.C. App. at ___, 733 S.E.2d at 556. Without these agency claims, however, there was no legal claim still providing a basis for liability.

The doctrine of piercing the corporate veil is not a theory of liability. Rather, it provides an avenue to pursue legal claims against corporate officers or directors who would otherwise be shielded by the corporate form. Without the agency claims serving as the underlying wrongs that proximately caused plaintiffs' harm, evidence of domination and control is insufficient to establish liability. In other

words, if the trial court properly dismissed plaintiffs' agency claims, it is irrelevant whether Corinna exercised domination and control over the Piedmont companies. On the other hand, if the trial court erred in dismissing the agency claims, the question remains whether plaintiffs may recover against Corinna on those claims through the piercing the corporate veil doctrine. Therefore, we reverse and remand to the Court of Appeals for a determination of whether the trial court erred in granting Corinna's motion for a directed verdict on plaintiffs' agency claims for fraud and breach of fiduciary duty.

In summary, plaintiffs' evidence on their breach of fiduciary duty claim was insufficient as a matter of law. Additionally, plaintiffs' agency claims are the only remaining claims to which personal liability may attach under the piercing the corporate veil doctrine. Accordingly, the decision of the Court of Appeals is reversed and this case is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. RONALD PRINCEGERALD COX

No. 57PA12-2

(Filed 8 November 2013)

Firearms and Other Weapons—possession of firearm by felon—motion to dismiss—sufficiency of evidence—confession—corpus delicti rule

The trial court did not err by denying defendant's motion to dismiss the charge of possession of a firearm by a felon for a weapon recovered by police officers ten to twelve feet from a car in which defendant was a passenger. The *corpus delicti* rule was satisfied because defendant's confession was supported by substantial independent evidence tending to establish its trustworthiness. Further, defendant made no claim that his confession was obtained by deception or coercion, or was a result of physical or mental infirmity.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 731 S.E.2d 438 (2012), reversing in part and finding no error in part in a judgment entered on 15 September 2010 by Judge Charles H. Henry in Superior

Court, Wayne County, and remanding for resentencing. Heard in the Supreme Court on 3 September 2013.

Roy Cooper, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellant.

Irving Joyner for defendant-appellee.

MARTIN, Justice.

Defendant, a convicted felon, confessed to possession of a firearm recovered by Goldsboro police officers ten to twelve feet from a car in which he was a passenger. Because defendant's confession is supported by substantial independent evidence tending to establish its trustworthiness, the *corpus delicti* rule is satisfied. We reverse the decision of the Court of Appeals.

The Goldsboro Police Department conducted a DWI checkpoint from 11:00 p.m. on 30 October until 3:00 a.m. on 31 October 2009 at the intersection of Central Heights Road and Highway 13 North. The Department posted notice signs and illuminated the area with mobile lighting units. Officer William VanLenten was assigned to watch for vehicles attempting to avoid the checkpoint. At approximately 1:35 a.m., Officer VanLenten observed a Chevrolet Impala sedan traveling north toward the checkpoint. The Impala abruptly slowed down and appeared to Officer VanLenten "like it was going to turn west" onto another road. Instead, the Impala continued its path north and turned into the driveway of a residence. Officer VanLenten was familiar with this residence and had never seen the Impala there. As he followed in his patrol vehicle to investigate, he observed the driver jump from the Impala and flee to the back of the property. Three other men remained in the car: defendant in the front passenger seat, James Darden in the rear seat behind defendant, and Deangelo Cox in the rear seat behind the driver's seat. The driver's door was open and all the windows were down. Officer VanLenten ordered the passengers to show their hands. The backseat passengers, Darden and Deangelo Cox, complied, but defendant ignored the command, rolling a marijuana cigarette instead.

As Officer Tyler McNeill arrived to provide backup, the driver of the Impala, Brian White, returned to the scene with his hands up. Officer McNeill removed James Darden from the car and found a firearm on the car's floor at the foot of his seat. Deangelo Cox and defendant were then removed from the car. In White's flight path through the yard, the officers found a firearm loaded with five rounds

of ammunition and a clear plastic bag containing several smaller plastic bags of marijuana. The firearm was located within ten to twelve feet of the driver's side of the car. The night was cool and the grass was wet with condensation, but the firearm was dry and warm. Within three feet of the firearm the officers also found a small bag of individually wrapped marijuana. Darden claimed ownership of the firearm found at the foot of his seat, and Officer NcNeill took him into custody. No one claimed ownership of the firearm and marijuana that were found outside the car. Officer VanLenten checked the serial number of the unclaimed firearm and learned it had been reported stolen from Sumter, Georgia. He arrested White, Deangelo Cox, and defendant.

After the Impala's four occupants had been transported to the Wayne County Magistrate's Office, they discussed among themselves their desire that Deangelo Cox, who was defendant's younger brother, not be charged. Officer VanLenten reiterated that if none of them took ownership of the marijuana and stolen firearm, then all of them would be charged. The group asked Officer VanLenten whether Deangelo Cox would be released "if they said who the items belonged to." After Officer VanLenten gave them their *Miranda* warnings, White stated the marijuana belonged to him and defendant stated the firearm belonged to him. The men refused to make written statements. Deangelo Cox was released from police custody and was not charged. Defendant was indicted for possession of a stolen firearm, possession of a controlled substance, and possession of a firearm by a felon.

Before defendant's case was called for trial, the State dismissed the charge of possession of a stolen firearm. At trial, Officers VanLenten and McNeill testified for the State. The trial court admitted a certified copy of defendant's prior felony conviction. At the conclusion of the State's case in chief, defense counsel moved to dismiss the two remaining charges. The trial court denied these motions. Brian White, the Impala's driver, was the sole witness for the defense. He testified that he was present with defendant the entire time they were held at the magistrate's office and never heard defendant admit the stolen firearm belonged to him. He also denied claiming ownership of the marijuana found in the grass. At the close of the evidence, the trial court again denied the defense's motions to dismiss the charges. The jury found defendant guilty of possession of a controlled substance and possession of a firearm by a felon. The trial court consolidated the offenses for judgment and sentenced defendant to a term of twelve to fifteen months of imprisonment.

On appeal, the Court of Appeals held the trial court erred by denying defendant's motion to dismiss the charge of possession of a firearm by a felon. *State v. Cox*, ___ N.C. App. ___, ___, 721 S.E.2d 346, 348 (2012). The court stated: "[T]he entirety of the confession, as conveyed by Officer VanLenten, was that defendant owned the gun. Thus, any corroborative evidence under either [the traditional or *Parker* articulation of the *corpus delicti*] test would have to tend to establish that defendant owned or possessed the gun." *Id.* at ___, 721 S.E.2d at 350. Concluding that "[t]he State did not present such evidence" and "the only evidence that defendant possessed the gun was the extrajudicial confession," the Court of Appeals reversed the trial court's denial of defendant's motion to dismiss that charge. *Id.* at ___, 721 S.E.2d at 350. As for the second issue raised on appeal, the court found no error in defendant's conviction for possession of marijuana. *Id.* at ___, 721 S.E.2d at 350.

On 13 June 2012, we allowed the State's petition for discretionary review for the limited purpose of remanding to the Court of Appeals for reconsideration in light of our decision in *State v. Sweat*, 366 N.C. 79, 727 S.E.2d 691 (2012). *State v. Cox*, 366 N.C. 211, 742 S.E.2d 189 (2012). Upon reconsideration, the Court of Appeals upheld its original decision. *State v. Cox*, ___ N.C. App. ___, ___, 731 S.E.2d 438, 443 (2012). The State again petitioned this Court for discretionary review. We allowed the State's petition on 24 January 2013.

The sole issue before us is whether the Court of Appeals erred by reversing the trial court's denial of defendant's motion to dismiss the charge of possession of a firearm by a felon. "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." *Sweat*, 366 N.C. at 84, 727 S.E.2d at 695 (alteration in original) (citations and internal quotation marks omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citations and internal quotation marks omitted). "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." *Sweat*, 366 N.C. at 84, 727 S.E.2d at 695 (alteration in original) (citations and internal quotation marks omitted). "Whether the State presented substantial evidence of each essential element is a question of law." *State v. Phillips*, 365 N.C. 103, 133-34, 711 S.E.2d

122, 144 (2011) (citation omitted), *cert. denied*, ___ U.S. ___, 132 S. Ct. 1541 (2012). "We review questions of law de novo." *State v. Khan*, ___ N.C. ___, ___, 738 S.E.2d 167, 171 (2013) (citation omitted). Accordingly, we conduct a de novo review to determine whether there was substantial evidence that defendant was previously convicted of a felony and subsequently possessed a firearm. *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 347-48 (2012) (citing N.C.G.S. § 14-415.1(a) (2011)).

A confession can be powerful evidence against the accused. *See, e.g.*, *Premo v. Moore*, ___ U.S. ___, ___, 131 S. Ct. 733, 744 (2011). But we have long held that "an extrajudicial confession, standing alone, is not sufficient to sustain a conviction of a crime." *State v. Parker*, 315 N.C. 222, 229, 337 S.E.2d 487, 491 (1985). When the State relies upon a defendant's extrajudicial confession, we apply the *corpus delicti* rule "to guard against the possibility that a defendant will be convicted of a crime that has not been committed." *Id.* at 235, 337 S.E.2d at 494. This inquiry is preliminary to consideration of whether the State presented sufficient evidence to survive the motion to dismiss.

The *corpus delicti* rule is historically grounded in three policy justifications: (1) to "protect[ ] against those shocking situations in which alleged murder victims turn up alive after their accused killer has been convicted and perhaps executed"; (2) to "ensure[ ] that confessions that are erroneously reported or construed, involuntarily made, mistaken as to law or fact, or falsely volunteered by an insane or mentally disturbed individual cannot be used to falsely convict a defendant"; and (3) "to promote good law enforcement practices [by] requir[ing] thorough investigations of alleged crimes to ensure that justice is achieved and the innocent are vindicated." *State v. Smith*, 362 N.C. 583, 591-92, 669 S.E.2d 299, 305 (2008) (citations and internal quotation marks omitted).

Traditionally, our *corpus delicti* rule has required the State to present corroborative evidence, independent of the defendant's confession, tending to show that "(a) the injury or harm constituting the crime occurred [and] (b) this injury or harm was done in a criminal manner." *Id.* at 589, 669 S.E.2d at 304 (citation omitted); *see also Parker*, 315 N.C. at 231, 337 S.E.2d at 492. This traditional approach requires that the independent evidence " 'touch[ ] or concern[ ] the *corpus delicti*' "—literally, the body of the crime, such as the dead body in a murder case. *Parker*, 315 N.C. at 229, 337 S.E.2d at 491 (citation omitted).

When applying the *corpus delicti* rule, it is fundamental that the corroborative evidence "need not . . . in any manner tend to show that the defendant was the guilty party." 1 Kenneth S. Broun et al., *McCormick on Evidence* § 146, at 810 (7th ed. 2013) [hereinafter 1 *McCormick on Evidence*]. Instead, the rule requires the State to present evidence tending to show that the crime in question occurred. The rule does not require the State to logically exclude every possibility that the defendant did not commit the crime. Thus, if the State presents evidence tending to establish that the injury or harm constituting the crime occurred and was caused by criminal activity, then the *corpus delicti* rule is satisfied and the State may use the defend-ant's confession to prove his identity as the perpetrator. *See*, *e.g.*, *State v. Trexler*, 316 N.C. 528, 533, 342 S.E.2d 878, 881 (1986).

In *State v. Parker*, acknowledging shortcomings and criticisms of the traditional *corpus delicti* rule, 315 N.C. at 231-35, 337 S.E.2d at 492-95, we adopted a rule for non-capital cases "expand[ing] the type of corroboration which may be sufficient to establish the trustworthiness of the confession," *Trexler*, 316 N.C. at 532, 342 S.E.2d at 880.

> [W]hen the State relies upon the defendant's confession to obtain a conviction, it is no longer necessary that there be independent proof tending to establish the *corpus delicti* of the crime charged if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime.
>
> We wish to emphasize, however, that when independent proof of loss or injury is lacking, there must be *strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession. Corroboration of insignificant facts or those unrelated to the commission of the crime will not suffice. We emphasize this point because although we have relaxed our corroboration rule somewhat, we remain advertent to the reason for its existence, that is, to protect against convictions for crimes that have not in fact occurred.

Parker, 315 N.C. at 236, 337 S.E.2d at 495; *see also Sweat*, 366 N.C. at 82, 727 S.E.2d at 694; *Trexler*, 316 N.C. at 532, 342 S.E.2d at 880. This rule, known as the *Parker* rule, applies when independent proof of the commission of the crime—that is, the *corpus delicti*—is lacking but there is substantial independent evidence tending to establish the trustworthiness of the defendant's extrajudicial confession. *Trexler*,

316 N.C. at 532, 342 S.E.2d at 880. As we later clarified, we did not abandon the traditional rule when we adopted the rule in *Parker*. *Id.* Rather, the State may now satisfy the *corpus delicti* rule under the traditional formulation or under the *Parker* formulation. *Id.*; *see also State v. Sloan*, 316 N.C. 714, 725, 343 S.E.2d 527, 534 (1986).

The Court in *Parker* noted that application of the traditional *corpus delicti* rule "is nearly impossible in those instances where the defendant has been charged with a crime that does not involve a tangible *corpus delicti* such as is present in homicide (the dead body), arson (the burned building) and robbery (missing property)." 315 N.C. at 232, 337 S.E.2d at 493. For many statutory offenses, "[s]imply identifying the elements of the *corpus delicti* . . . provides fertile ground for dispute." 1 *McCormick on Evidence* § 147, at 815. These difficulties provided, in part, the Court's motivation for adopting the more flexible *Parker* rule. Although the gun recovered by the officers may have provided independent evidence of the tangible *corpus delicti* under the traditional rule, in light of the above considerations, we apply the *Parker* rule. Accordingly, we must determine whether defendant's "confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show [he] had the opportunity to commit the crime." *Parker*, 315 N.C. at 236, 337 S.E.2d at 495.

The State's evidence tended to show that the Chevrolet Impala attempted to avoid a DWI checkpoint by pulling into a residential driveway. The driver fled on foot as Officer VanLenten's patrol car approached. Officer VanLenten observed that defendant was one of three remaining passengers in the car. Officers thereafter found the firearm in question within ten to twelve feet of the driver's open door. Even though the night was cool and the grass was wet with condensation, the firearm was dry and warm, indicating that it came from inside the car. Near the firearm officers found marijuana packaged in a manner consistent with packaging for sale. The officers also found a firearm at the feet of one of the other passengers. These are not "insignificant facts" or facts "unrelated to the commission of the crime." *Id.* Rather, these facts strongly corroborate "*essential* facts and circumstances embraced in [ ] defendant's confession." *Id.* They link defendant temporally and spatially to the firearm. Thus, the circumstances preceding defendant's confession—circumstances that were observed by law enforcement officers—establish the trustworthiness of the confession.

Furthermore, defendant makes no claim that his confession was obtained by deception or coercion, or was a result of physical or mental infirmity. In fact, before confessing, defendant was advised of his *Miranda* rights and signed a Waiver of Rights form that stated:

> I have read the statement of my [*Miranda*] rights above. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer present during questioning. I understand and know what I am doing. No promises or threats have been made against me and no pressure of any kind has been used against me by any officer or any other person.

The evidence presented at trial is consistent with these statements. As Officer McNeill testified, while the officers were completing their paperwork, the four men discussed among themselves how they might prevent defendant's younger brother from being charged. Officer VanLenten also testified that he observed the four men's conversation and noted their concern that defendant's younger brother might be charged. Defendant confessed only after Officer VanLenten informed him of his *Miranda* rights. The trustworthiness of defendant's confession is thus further bolstered by the evidence that defendant made a voluntary decision to confess. For the foregoing reasons, defendant's confession is "supported by substantial independent evidence tending to establish its trustworthiness." *Id.* The State has therefore met its burden under the *Parker* articulation of the *corpus delicti* rule.

The Court of Appeals erred when it reasoned: "[T]he entirety of the confession, as conveyed by Officer VanLenten, was that defendant owned the gun. Thus, any corroborative evidence under either [*corpus delicti*] test would have to tend to establish that defendant owned or possessed the gun." *Cox*, ___ N.C. App. at ___, 731 S.E.2d at 443. Even though defendant admitted the gun belonged to him, the Court of Appeals conducted a sufficiency analysis that effectively disregarded his confession—evaluating whether the State's other evidence excluded the possibility that the gun belonged to any of the other three occupants of the Impala. This analysis is inconsistent with the *corpus delicti* doctrine, which does not require that the corroborative evidence "in any manner tend to show that the defendant was the guilty party." 1 *McCormick on Evidence* § 146, at 810. Rather, defendant's confession provides the proof that he committed the crime.

We apply the *corpus delicti* rule in light of the standard of review for motions to dismiss for insufficient evidence, which requires the

reviewing court to construe the evidence "in the light most favorable to the State." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). Under that standard, evidentiary "contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Id.* If a reasonable inference of the defendant's guilt may be drawn from the evidence, dismissal is improper, "even if the evidence likewise permits a reasonable inference of the defendant's innocence." *State v. Butler*, 356 N.C. 141, 567 S.E.2d 137 (2002). Our opinion in *State v. Butler* is illustrative of these axiomatic principles. In that case, controlled substances were discovered in a taxicab in which the defendant had been a passenger. *Id.* at 144, 567 S.E.2d at 139. Unlike defendant in the present case, the defendant in *Butler* made no confession. Applying the "light most favorable to the State" standard of review, we held there was sufficient evidence that the defendant constructively possessed the controlled substances even though two other individuals had the opportunity to place the drugs there. *See id.* at 144-45, 567 S.E.2d at 139. We did not require the State to exclude the possibility that the controlled substances belonged to the two other individuals. In that case, the defendant did not confess. In the case before us, however, defendant did confess to possession of the firearm, presenting the jury with evidence of his guilt. Armed with defendant's confession, the State was not required to submit alternative evidence proving defendant's identity as the perpetrator.

Because the *corpus delicti* rule is satisfied, defendant's confession provides substantial evidence that he possessed the firearm. Taken with the undisputed evidence of defendant's prior felony conviction, the evidence was sufficient for the State to survive defendant's motion to dismiss the charge of possession of a firearm by a felon. *See Bradshaw*, 366 N.C. at 93, 728 S.E.2d at 347-48 (citing N.C.G.S. § 14-415.1(a) (2011)). Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

HOKE COUNTY BOARD OF EDUCATION; HALIFAX COUNTY BOARD OF EDUCATION; ROBESON COUNTY BOARD OF EDUCATION; CUMBERLAND COUNTY BOARD OF EDUCATION; VANCE COUNTY BOARD OF EDUCATION; RANDY L. HASTY, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF RANDELL B. HASTY; STEVEN R. SUNKEL, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF ANDREW J. SUNKEL; LIONEL WHIDBEE, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF JEREMY L. WHIDBEE; TYRONE T. WILLIAMS, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF TREVELYN L. WILLIAMS; D.E. LOCKLEAR, JR., INDIVIDUALLY AND AS GUARDIAN AD LITEM OF JASON E. LOCKLEAR; ANGUS B. THOMPSON II, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF VANDALIAH J. THOMPSON; MARY ELIZABETH LOWERY, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF LANNIE RAE LOWERY; JENNIE G. PEARSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF SHARESE D. PEARSON; BENITA B. TIPTON, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF WHITNEY B. TIPTON; DANA HOLTON JENKINS, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF RACHEL M. JENKINS; AND LEON R. ROBINSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF JUSTIN A. ROBINSON, PLAINTIFFS, AND CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,[1] PLAINTIFF-INTERVENOR, AND RAFAEL PENN; CLIFTON JONES, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF CLIFTON MATTHEW JONES; AND DONNA JENKINS DAWSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF NEISHA SHEMAY DAWSON AND TYLER ANTHONY HOUGH-JENKINS, PLAINTIFF-INTERVENORS, V. STATE OF NORTH CAROLINA AND STATE BOARD OF EDUCATION, DEFENDANTS, AND CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, REALIGNED DEFENDANT

No. 5PA12-2

(Filed 8 November 2013)

Appeal and Error—appealability—mootness—subsequent legislation

Plaintiffs' appeal challenging changes made by the General Assembly in 2011 to the prekindergarten program (formerly "More at Four") for at-risk four-year-old children was dismissed as moot ex mero motu. Subsequent legislation enacted in 2012 rendered this controversy dismissed *ex mero motu* as moot. The case was remanded to the Court of Appeals with instructions to vacate the 18 July 2011 order of the Wake County Superior Court.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 731 S.E.2d 691 (2012), affirming an order entered by Judge Howard E. Manning, Jr. on 18 July 2011 in Superior Court, Wake County. Heard in the Supreme Court on 15 October 2013.

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1. The trial court's order and Court of Appeals opinion refer instead to the Asheville City Board of Education, which was voluntarily dismissed from this action in May 2006.

Parker Poe Adams & Bernstein LLP, by Robert W. Spearman, Melanie Black Dubis, and Scott E. Bayzle, for plaintiff-appellees.

Tharrington Smith, L.L.P., by Deborah R. Stagner and Neal A. Ramee, for plaintiff-intervenor-appellee Charlotte-Mecklenburg Board of Education.

UNC Center for Civil Rights, by Mark Dorosin, for plaintiff-intervenor-appellees Penn, Jones, and Dawson.

Roy Cooper, Attorney General, by John F. Maddrey, Solicitor General, for defendant-appellant State of North Carolina.

Smith Moore Leatherwood LLP, by James G. Exum, Jr. and Matthew Nis Leerberg, for defendant-appellee State Board of Education.

Michael F. Easley, Governor of North Carolina, 2001-2009, amicus curiae.

Ann McColl, General Counsel, and Carrie B. Bumgardner and Jessica N. Holmes, Staff Attorneys, for North Carolina Association of Educators, amicus curiae.

Christine Bischoff and Carlene McNulty for North Carolina Justice Center; Lewis Pitts and Jason Langberg for Advocates for Children's Services of Legal Aid of North Carolina; Christopher Brook for American Civil Liberties Union of North Carolina Legal Foundation; Iris A. Sunshine for Children's Law Center of Central North Carolina; Jane Wettach for Children's Law Clinic at Duke Law School; Robert McCarter and Laurie Gallagher for Council for Children's Rights; John Rittelmeyer and Susan Pollitt for Disability Rights North Carolina; Scott Holmes for North Carolina Central University School of Law Civil Litigation Clinic; Gregory C. Malhoit for North Carolina Rural Education Working Group; Anita S. Earls and Clare Barnett for Southern Coalition for Social Justice; and Mary Irvine for UNC Center on Poverty, Work and Opportunity, amici curiae.

Poyner Spruill LLP, by Robert F. Orr, Edwin M. Speas, Jr., and John W. O'Hale, for North Carolina School Boards Association and National School Boards Association; and Allison B. Schafer, General Counsel, for North Carolina School Boards Association, amici curiae.

PER CURIAM.

In *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997) and *Hoke County Board of Education v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004),[2] this Court first found and then reaffirmed that the Constitution of North Carolina guarantees "every child of this state an opportunity to receive a sound basic education in our public schools." 346 N.C. at 347, 488 S.E.2d at 255; *accord* 358 N.C. at 649, 599 S.E.2d at 397. Following our opinion in *Leandro*, the State created a prekindergarten program (formerly "More at Four") for at-risk four-year-old children. Plaintiffs brought the instant proceeding to challenge changes to this program made by the General Assembly in 2011. We conclude that subsequent legislation enacted in 2012 rendered this controversy moot.

The instant proceeding arose after the General Assembly instituted changes to North Carolina's prekindergarten program in the 2011 biennial budget law. *See* Current Operations and Capital Improvements Appropriations Act of 2011, ch. 145, sec. 10.7, 2011 N.C. Sess. Laws 253, 354-56. Plaintiffs filed a "Motion for Hearing on Curtailment of Pre-Kindergarten Services for At-Risk Children, Elimination of EOC Testing, and Defendants' Compliance with North Carolina's Constitutional Requirements," in essence seeking a judicial determination that the 2011 legislative changes failed to comply with the State's constitutional obligations recognized in *Leandro* and *Hoke County*. After a hearing, the trial court on 18 July 2011 entered a "Memorandum of Decision and Order re: Pre-Kindergarten Services for At-Risk Four Year Olds" (the "order"), finding that some of the changes violated the Constitution of North Carolina and mandating that the State "not deny any eligible at-risk four year old admission to the North Carolina Pre-Kindergarten Program."

In its order, the trial court faulted two of the changes made by the General Assembly to the prekindergarten program, finding that subsection 10.7(f), which purportedly capped the percentage of "at-risk" children permitted in the prekindergarten program, and subsection 10.7(h), which instituted a co-payment requirement for certain students enrolled in the program, were unconstitutional. The State appealed the trial court's order to the Court of Appeals. However, approximately one year after the trial court issued its order and while the appeal was pending, the General Assembly amended the chal-

2. We note that the media and public frequently refer to *Hoke County Board of Education v. State* as "*Leandro II*."

lenged statutory provisions. *See* Act of June 5, 2012, ch. 13, sec. 2, 2011 N.C. Sess. Laws 65, 65-66 (Reg. Sess. 2012). These amendments substantially altered the language of subsection 10.7(f) and repealed subsection 10.7(h). *Id.* Thereafter, the Court of Appeals affirmed the trial court in part and dismissed the appeal in part. *Hoke Cnty. Bd. of Educ. v. State*, ___ N.C. App. ___, 731 S.E.2d 691 (2012). This Court allowed the State's Petition for Discretionary Review.

We now consider whether this appeal is moot as a result of these most recent amendments. "Whenever, during the course of litigation it develops that . . . the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978) (citations omitted), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297, 99 S. Ct. 2859 (1979). This Court consistently has "refused to consider an appeal raising grave questions of constitutional law where, pending the appeal to it, the cause of action had been destroyed so that the questions had become moot." *Benvenue PTA v. Nash Cnty. Bd. of Educ.*, 275 N.C. 675, 680, 170 S.E.2d 473, 477 (1969) (citing *Wikel v. Bd. of Comm'rs of Jackson Cnty.*, 120 N.C. 311, 120 N.C. 451, 27 S.E. 117 (1897)). When, as here, the General Assembly revises a statute in a "material and substantial" manner, with the intent "to get rid of a law of dubious constitutionality," the question of the act's constitutionality becomes moot. *State v. McCluney*, 280 N.C. 404, 405-07, 185 S.E.2d 870, 871-72 (1972) (action challenging state obscenity statute under United States Supreme Court precedent held moot after General Assembly repealed and replaced statute). "The court takes judicial notice [of intervening legislation] without formal supplemental plea . . . ." *Wikel*, 120 N.C. at 312, 120 N.C. at 452, 27 S.E. at 117. Once the issues on appeal become moot, the appropriate disposition is to dismiss the appeal *ex mero motu* and to vacate the decision of the Court of Appeals. *See, e.g.*, *Messer v. Town of Chapel Hill*, 346 N.C. 259, 261, 485 S.E.2d 269, 270 (1997) (per curiam) (citing *State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.*, 289 N.C. 286, 290, 221 S.E.2d 322, 324-25 (1976)).

The 2012 amendments enacted by the General Assembly in the wake of the trial court's order are readily comparable to the intervening legislation in *McCluney*. The repeal of subsection 10.7(h) and the alteration of subsection 10.7(f) constitute "material and substantial" changes to the provisions that the trial court found unconstitutional. *See McCluney*, 280 N.C. at 405, 185 S.E.2d at 871. Accordingly, we

conclude that the questions originally in controversy between the parties are no longer at issue and that this appeal is moot. We express no opinion on the legislation now in effect because questions of its constitutionality are not before us. *Id.* at 407, 185 S.E.2d at 872. Our mandates in *Leandro* and *Hoke County* remain in full force and effect.

We dismiss this appeal as moot *ex mero motu* and vacate the opinion of the Court of Appeals. This case is remanded to the Court of Appeals with instructions to vacate the 18 July 2011 order of Superior Court, Wake County.

APPEAL DISMISSED AS MOOT; COURT OF APPEALS OPINION VACATED; AND REMANDED.

CONNIE CHANDLER, EMPLOYEE, BY HER GUARDIAN AD LITEM, CELESTE M. HARRIS v. ATLANTIC SCRAP & PROCESSING, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 35PA12

(Filed 8 November 2013)

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 745 (2011), affirming in part, reversing in part, and remanding an opinion and award filed on 25 February 2010 by the North Carolina Industrial Commission, as amended by an order filed by the Commission on 7 February 2011. Heard in the Supreme Court on 14 November 2012.

Walden & Walden, by Daniel S. Walden and Margaret D. Walden, for plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones, for defendant-appellants.

PER CURIAM.

For the reasons stated in *Mehaffey v. Burger King*, ___ N.C. ___, ___ S.E.2d ___ (2013) (No. 24PA12), the decision of the Court of Appeals is affirmed as to the matter on appeal to this Court, and this case is remanded to that court for further remand to the Industrial Commission for further proceedings not inconsistent with *Mehaffey*.

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

AFFIRMED AND REMANDED.

Justice NEWBY dissents for the reasons stated in his opinion in *Mehaffey v. Burger King*, ___ N.C. ___, ___ S.E.2d ___ (2013).

AMOS TYNDALL, AS GUARDIAN AD LITEM FOR CHE-VAL BATTS v. FORD MOTOR COMPANY AND ALEJANDRO ORTIZ RIOS

No. 415PA12

(Filed 8 November 2013)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review orders entered by the Court of Appeals on 28 August 2012 dismissing defendant Ford Motor Company's appeal from and denying defendant Ford Motor Company's petition for writ of certiorari to review an order denying this defendant's motion to dismiss entered by Judge Thomas H. Lock on 25 January 2012 in Superior Court, Nash County. Heard in the Supreme Court on 15 October 2013.

Martin & Jones, PLLC, by Hoyt G. Tessener; Langdon & Emison, by J. Kent Emison, pro hac vice, and Jessica M. Agnelly, pro hac vice; and Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr. and Pressly M. Millen, for plaintiff-appellee.

Kilpatrick Townsend & Stockton LLP, by Adam H. Charnes and Richard D. Dietz; Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan L.L.P., by Kirk G. Warner and Christopher R. Kiger; and Bowman and Brooke LLP, by Robert L. Wise, pro hac vice, for defendant-appellant Ford Motor Company.

Pinto Coates Kyre & Brown, PLLC, by Kenneth Kyre, Jr., for North Carolina Association of Defense Attorneys and North Carolina Chamber, amici curiae.

Carlton Fields, P.A., by Wendy F. Lumish, pro hac vice, and Alina Alonso Rodriguez, pro hac vice; and Smith Moore Leatherwood LLP, by Jon Berkelhammer, for Product Liability Advisory Council, 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 orders of the Court of Appeals. Accordingly, the orders of the Court of Appeals are left undisturbed.

AFFIRMED.

STATE OF NORTH CAROLINA v. WAYNE ANTHONY HUSS

No. 499PA12

(Filed 8 November 2013)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 734 S.E.2d 612 (2012), reversing judgments entered on 1 July 2011 by Judge Beverly T. Beal in Superior Court, Lincoln County. Heard in the Supreme Court on 14 October 2013.

Roy Cooper, *Attorney General*, *by Sherri Horner Lawrence*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Daniel Shatz*, *Assistant Appellate Defender*, *for defendant-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.*, *Amward Homes*, *Inc. v. Town of Cary*, 365 N.C. 305, 716 S.E.2d 849 (2011); *State v. Pastuer*, 367 N.C. 287, 715 S.E.2d 850 (2011).

AFFIRMED.

STATE OF NORTH CAROLINA v. NICHOLAS BRADY HEIEN

No. 380A11-2

(Filed 8 November 2013)

On 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 1 (2013), affirming an order signed on 25 March 2010 by Judge Vance Bradford Long and judgments entered on 26 May 2010 by Judge A. Moses Massey, all in Superior Court, Surry County, after the Supreme Court of North Carolina remanded the Court of Appeals' prior decision of this case, *State v. Heien*, ___ N.C. App. ___, 714 S.E.2d 827 (2011). Heard in the Supreme Court on 14 October 2013.

Roy Cooper, *Attorney General*, *by Derrick C. Mertz*, *Assistant Attorney General*, *for the State.*

Michele Goldman for defendant-appellant.

PER CURIAM.

AFFIRMED.

RICHARD M. JOHNSTON v. STATE OF NORTH CAROLINA

No. 29A13

(Filed 8 November 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 859 (2012), reversing and remanding a judgment entered on 24 October 2011 by Judge Abraham P. Jones in Superior Court, Caswell County. Heard in the Supreme Court on 15 October 2013.

Dan L. Hardway for plaintiff-appellee.

Roy Cooper, Attorney General, by Hal F. Askins, Special Deputy Attorney General, and Catherine F. Jordan, Assistant Attorney General, for defendant-appellant.

PER CURIAM.

AFFIRMED.

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

IN RE L.M.T.

[367 N.C. 165 (2013)]

IN THE MATTER OF: L.M.T., A.M.T.

No. 40PA13

(Filed 20 December 2013)

Termination of Parental Rights—findings—permanency planning order—termination order—reviewed together

A trial court must make written findings in a permanency planning order that consider the factors of N.C.G.S. § 7B-507, but need not recite the statutory language verbatim. Even if the permanency planning order is deficient, the appellate court should review the order in conjunction with the trial court's termination of parental rights order to determine whether statutory requirements have been met. A deficiency in one may be cured by the other. In this case, the trial court's orders ceasing reunification efforts and terminating respondent's parental rights were each sufficient standing alone and should have been affirmed by the Court of Appeals.

Justice BEASLEY concurring.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, ___ S.E.2d ___ (2012), reversing orders entered on 19 October 2010 and 5 March 2012, both by Judge Edward A. Pone in District Court, Cumberland County, and remanding for additional findings of fact. Heard in the Supreme Court on 4 September 2013.

Christopher L. Carr and Elizabeth Kennedy-Gurnee for Cumberland County Department of Social Services, and Beth A. Hall, Attorney Advocate for the Guardian ad Litem, petitioner-appellants.

J. Thomas Diepenbrock for respondent-appellee-mother.

Annick Lenoir-Peek, Assistant Appellate Defender, for Office of Parent Representation, amicus curiae.

NEWBY, Justice.

In this case we consider the statutory requirement that a trial court make certain findings of fact in matters involving the legal separation of a parent and child. Though a trial court is required to make written findings of fact in a permanency planning order that consider the factors in section 7B-507 of our General Statutes, these findings

need not recite the statutory language verbatim. When reviewing the sufficiency of such orders, an appellate court should consider whether the trial court's findings of fact address the substance of the statutory requirements. Further, even if the permanency planning order is deficient standing alone, the appellate court should review that order in conjunction with the trial court's termination of parental rights order to determine whether the statutory requirements are met. In some instances, a deficiency in one may be cured by the other. In this case, because both the permanency planning order and the termination of parental rights order comply with the statutory mandate, we reverse the decision of the Court of Appeals.

Respondent Mother appealed after the trial court entered two orders that (1) ceased reunification efforts between respondent and her children, L.M.T. and A.M.T., ("cease reunification order") and (2) terminated respondent's parental rights ("termination order"). At the Court of Appeals respondent argued that the trial court's cease reunification order failed to satisfy section 7B-507, which requires trial courts to "make[ ] written findings of fact that" further reunification efforts would be "futile" or "inconsistent with the juvenile's health, safety, and need for a safe, permanent home." N.C.G.S. § 7B-507(b)(1) (2011). The Court of Appeals acknowledged that in the cease reunification order the trial court "made numerous and detailed findings addressing respondent's troubled case history." *In re L.M.T.*, ___ N.C. App. ___, ___ S.E.2d ___, No. COA12-743, 2012 WL 6595388, at *2 (Dec. 18, 2012) (unpublished). Moreover, the Court of Appeals found "sufficient evidence in the record to support the required findings." *Id.* at *3. Nonetheless, the Court of Appeals determined that the cease reunification order contained "no finding explicitly linking those facts with any of the factors listed in N.C. Gen. Stat. § 7B-507, including the futility of further reunification efforts or that further efforts would be inconsistent with the juveniles' health, safety, and need for a safe, permanent home." *Id.* at *2. Based on these perceived deficiencies in the cease reunification order, and without considering the termination of parental rights order, the Court of Appeals reversed both orders and remanded for additional findings. *Id.* at *3.

We allowed discretionary review to consider the requirement that a trial court make certain findings of fact under subsection 7B-507(b) of our Juvenile Code. *In re L.M.T.*, ___ N.C. ___, 738 S.E.2d 359 (2013). The purpose of the Juvenile Code is, in part, to "provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with pre-

venting the unnecessary or inappropriate separation of juveniles from their parents" and to ensure "that the best interests of the juvenile are of paramount consideration by the court." N.C.G.S. § 7B-100(4), (5) (2011). The General Assembly further stated that "when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a safe, permanent home within a reasonable amount of time." *Id.* § 7B-100(5). The Juvenile Code strikes a balance between the constitutional rights of a parent and the best interests of a child, *id.* § 7B-100(3) (2011) (stating that a purpose of the Juvenile Code is "[t]o provide for services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence"), and provides a protective framework when a juvenile is "alleged to be abused, neglected, or dependent," *id.* § 7B-300 (2011). *See In re R.T.W.*, 359 N.C. 539, 553, 614 S.E.2d 489, 498 (2005) ("Parents' fundamental right to control their children at some point gives way to the state's interest in the welfare of the child. In Subchapter I of our Juvenile Code, the General Assembly has established procedures to safeguard parental rights while simultaneously providing for the removal of children and even the termination of parental rights.").

To advance the Juvenile Code's dual purpose of protecting parental rights and promoting the best interests of the child, subsection 7B-507(b) requires that trial courts make written findings of fact in orders that place "a juvenile in the custody or placement responsibility of a county department of social services." N.C.G.S. § 7B-507(b) (2011). Relevant to the case at hand, that statute mandates:

> [T]he court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:
>
> (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]

Id. Strict adherence to this statute ensures that the trial court fulfills the aspirations of the Juvenile Code by allowing our appellate courts to conduct a thorough review of the order. While trial courts are advised that use of the actual statutory language would be the best practice, the statute does not demand a verbatim recitation of its language as was required by the Court of Appeals in this case. Put differently, the order must make clear that the trial court considered the evidence in light of whether reunification "would be futile or would

be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." The trial court's written findings must address the statute's concerns, but need not quote its exact language. On the other hand, use of the precise statutory language will not remedy a lack of supporting evidence for the trial court's order.

Our review of the cease reunification order in this case "is limited to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law." *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (citing *In re Eckard*, 148 N.C. App. 541, 544, 559 S.E.2d 233, 235, *disc. rev. denied*, 356 N.C. 163, 568 S.E.2d 192 (2002)). The trial court's findings of fact are conclusive on appeal if supported by any competent evidence. *Id.* (citing *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003)).

At the permanency planning review hearing, the trial court considered extensive evidence from multiple witnesses, including respondent, about respondent's continued drug abuse, which she admitted occurred in the presence of her children; her lack of employment, attempted suicide, and confessed deception of the court; her involvement in domestic violence with her husband; and other repeated instances of behavior inconsistent with the best interests of the juveniles. That evidence supported the following findings of fact contained in the cease reunification order:

> The Respondent Mother has now disclosed that she has a substance abuse problem, primarily related to prescription drugs.
>
> [Respondent Mother's drug use became] increasingly worse . . . while she was in the process of seeking reunification with the juveniles.
>
> There have been instances of domestic violence between the Respondent Mother and her now husband . . . . At least one of those incidents involved [respondent's] use of a knife. . . .
>
> The environment of the Respondent Mother's home is not conducive to raising children. In fact, the environment that the Respondent Mother and her husband have created is injurious.
>
> That while the Court, the Department, the Guardian ad Litem and everyone else involved was working toward the reunification process, the Respondent Mother was sinking deeper and deeper into an abyss of domestic violence and drug abuse all the while

> covering it up and refusing to acknowledge the fact of its existence in order that the Court, the Department, the Guardian ad Litem and others surrounding her could assist her and help the juveniles. The deception of the Court during this process is bad enough, but the Respondent Mother has completely let her children down.
>
> The Respondent Mother and her husband are facing eviction and have received a notice to vacate their housing . . . .
>
> [The juveniles] are in need of permanence and deserve a fresh start.
>
> The Court determines that in the best interest of the juveniles, the permanent plan should now be changed to that of placement with other Court approved caretakers with a concurrent plan of adoption.
>
> Return of the juveniles to the custody of the Respondents would be contrary to the welfare and best interest of the juveniles.

While these findings of fact do not quote the precise language of subsection 7B-507(b), the order embraces the substance of the statutory provisions requiring findings of fact that further reunification efforts "would be futile" or "would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." N.C.G.S. § 7B-507(b)(1). As an example, the trial court's finding that "the environment that the Respondent Mother and her husband have created is injurious" indicates that further reunification efforts would be "inconsistent" with the juveniles' "health" and "safety." *Id.* Likewise, the trial court's findings of fact related to respondent's drug abuse, participation in domestic violence, deception of the court, and repeated failures at creating an acceptable and safe living environment certainly suggest that reunification efforts "would be futile." *Id.* Moreover, these findings clearly support the trial court's conclusions that "[r]eturn of the juveniles . . . is contrary to the welfare and best interest of the juveniles," "[t]hat in the best interest of the juveniles, legal and physical custody should remain with the Cumberland County Department of Social Services," and "[t]hat the Cumberland County Department of Social Services should be relieved of reunification and visitation efforts with the Respondents."

Even if the cease reunification order standing alone had been insufficient, that would not end the appellate court's inquiry. Parents

may seek appellate review of cease reunification orders only in limited circumstances. In this case, respondent appealed under subsection 7B-1001(a)(5)(a), which provides that

> a. The Court of Appeals shall review [an] order [entered under section 7B-507] to cease reunification together with an appeal of the termination of parental rights order if all of the following apply:
>
> 1. A motion or petition to terminate the parent's rights is heard and granted.
>
> 2. The order terminating parental rights is appealed in a proper and timely manner.
>
> 3. The order to cease reunification is identified as an issue in the record on appeal of the termination of parental rights.

Id. § 7B-1001(a)(5) (2011). In other words, if a termination of parental rights order is entered, the appeal of the cease reunification order is combined with the appeal of the termination order.

Despite the General Assembly's plain language that we are to "review the order to cease reunification *together* with an appeal of the termination of parental rights order," *id.* (emphasis added), respondent urges the Court to consider each order by itself. Had the General Assembly intended to so limit our scope of review, it could have clearly drawn such a distinction. Rather, the legislature unambiguously instructed our appellate courts to review both orders "together." The word "together" is defined to include "at one time," "with each other," and "considered as a whole." *Webster's Third New International Dictionary* 2404 (1967). Accordingly, we read this statute to mean that we are to look to both orders "with each other," *id.*, to determine whether the trial court has made sufficient findings of fact. Because we consider both orders "together," incomplete findings of fact in the cease reunification order may be cured by findings of fact in the termination order. This application of the statute is consistent with the "paramount" aim of the Juvenile Code to provide for "the best interests of the juvenile" within a "reasonable amount of time." N.C.G.S. § 7B-100(5); *see also* Act of Aug. 23, 2005, ch. 398, 2005 N.C. Sess. Laws 1455 (captioned "An Act to Amend the Juvenile Code to Expedite Outcomes for Children and Families Involved in Welfare Cases and Appeals and to Limit the Appointment of Guardians ad Litem for Parents in Abuse, Neglect, and Dependency Proceedings.");

cf. In re M.I.W., 365 N.C. 374, 381, 722 S.E.2d 469, 474 (2012) ("Our holding [ensures that the best interest of the juvenile are of paramount consideration] by minimizing procedural delay that interferes with addressing the needs of the child when that delay is unnecessary to protect the rights of parents.").

Though the issue was not addressed by the Court of Appeals, to provide finality in this case we now shift our attention to the sufficiency of the termination of parental rights order. In regards to this order, at the Court of Appeals respondent challenged only the trial court's conclusion of law that terminating her parental rights would be in the best interests of her children.

"Once the trial court has found a ground for termination, the court then considers the best interests of the child in making its decision on whether to terminate parental rights." *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009). When making a decision on a child's best interests, section 7B-1110 requires the trial court to consider:

(1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

(3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

N.C.G.S. § 7B-1110 (2011). "We review this decision on an abuse of discretion standard, and will reverse a court's decision only where it is 'manifestly unsupported by reason.' " *In re S.N.*, 194 N.C. App. at 146, 669 S.E.2d at 59 (citation omitted); *see also In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984) ("[T]he court's decision to terminate parental rights is discretionary.").

At the termination of parental rights hearing, the trial court again took extensive evidence regarding domestic violence, lack of necessary medical care for the juveniles, respondent's admitted drug abuse and related criminal activity, her neglect of the juveniles while they were visiting her, specifically that they were not "fed" or "bathed," her

failure to obtain a job and pay child support, and her struggles with mental illness. The court heard further testimony that respondent had made little progress toward changing the circumstances that initially led to the removal of her children and that another family was interested in permanently adopting them. The trial court made the following findings of fact:

> That the Respondent Mother and [her husband] have demonstrated a pattern of failing to provide appropriate care for the juveniles and the Court finds that it is probable that this neglect would be repeated if custody of the juveniles was returned to the Respondent Mother.
>
> That the Respondent Mother's situation has not improved, and based on the evidence presented on this date, the juveniles would be subjected to irreparable harm if the juveniles were returned to the home of the Respondents.
>
> Since [the Department of Social Services was relieved of reunification and visitation efforts], the Respondent Mother has not made efforts to communicate with the juveniles by sending any cards, gifts, or letters to the juveniles.
>
> The Respondent Mother has willfully failed to pay any amount towards the costs of care for the juveniles. The Respondent Mother is physically and financially able to do so.
>
> The Respondents have demonstrated a pattern of failing to provide appropriate care for the juveniles. It is highly probable that neglect would be repeated if custody of the juveniles was returned to either of the Respondents. The Respondents have neglected the welfare of the juveniles for several years. This behavior is likely to continue into the foreseeable future.

Additionally, the court concluded that "based on the tender age of the juveniles, the likelihood of adoption for each of the juveniles is great," that there is a "minimal bond" between respondent and her children, and that the juveniles "have begun to adjust" to their "potential adoptive home." Given the totality of the evidence and the trial court's extensive order, the court clearly considered the factors in section 7B-1110. Viewing the trial court's decision through the lens of the abuse of discretion standard, we cannot say that its determination was manifestly unsupported by reason, and we must thus defer to the trial court's judgment "that it is in the best interest of these juveniles for the purpose of obtaining safety, permanence, and stability that the parental rights of the Respondents . . . be terminated."

Accordingly, we conclude that the trial court's orders ceasing reunification and terminating respondent's parental rights were each sufficient standing alone and should have been affirmed. The Court of Appeals erred both in its analysis of the cease reunification order and in its determination that the cease reunification order was deficient without considering that order in light of the findings of fact in the termination order. Ending a parent-child relationship is a decision the court must weigh carefully, mindful of constitutional protections and statutory safeguards. Those safeguards, however, are to be applied practically so that the best interests of the child—the polar star in controversies over child neglect and custody—are the paramount concern. The decision of the Court of Appeals is therefore reversed thereby reinstating the trial court's orders.

REVERSED.

Justice BEASLEY concurring.

I concur in the majority's holding that the trial court's findings of fact are sufficient under N.C.G.S. § 7B-507(b)(1) to support its conclusion that reunification efforts should cease in respondent's case. I disagree, however, with the majority's further statement that any hypothetical deficiencies in the permanency planning order's findings could be "cured" by examining that order in conjunction with the order terminating respondent's parental rights.[1] Accordingly, I write separately to express my concerns.

The majority correctly observes that this case asks us to "consider the statutory requirement that a trial court make certain findings of fact in matters involving the legal separation of a parent and child." This inquiry is controlled by N.C.G.S. § 7B-507(b), which specifies that orders relieving county departments of social services of further reunification efforts must include findings of fact addressing, among other considerations, whether "[s]uch efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." N.C.G.S. § 7B-507(b)(1) (2013). The majority concludes—and I agree—that the trial court's findings in this case, while not couched in the "precise language" of N.C.G.S. § 7B-507(b)(1), are sufficient to "embrace the substance of the statute."

1. The majority refers to the trial court's 19 October 2010 order as a "cease reunification order." Because reunification efforts are only one aspect of the review that district courts undertake in conducting permanency planning hearings, I refer to the order as a "permanency planning order."

In its order, the trial court found as fact:

> 3. The Court readopts the findings from the previous orders entered in this matter, and the Court further finds that those were the findings that existed at the time that those particular orders were entered.
>
> 4. The juveniles were adjudicated dependent on January 5, 2010. They have remained in the continual care of the Cumberland County Department of Social Services since on or about August 31, 2009, as a result of a Non Secure Custody Order filed subsequent to the filing of the Petition. The Petition was filed on July 29, 2009.
>
> 5. It is not possible for the juveniles to return to the custody of the Respondents in as much as the conditions which led to the removal of the juveniles from the home as well as the accruing conditions have not been alleviated.
>
> 6. Since the previous hearing, it has been determined that the Respondent Mother has been very much less than candid with the Court, the Cumberland County Department of Social Services as well as all others involved in this case.
>
> 7. The Respondent Mother has now disclosed that she has a substance abuse problem, primarily related to prescription drugs. Her testimony today indicates that she began abusing the drugs in November, 2009. The abuse has become increasingly worse. The Court notes that this occurred while she was in the process of seeking reunification with the juveniles. She failed to disclose this to the Court or the Cumberland County Department of Social Services. In fact, at a previous hearing where the Cumberland County Department of Social Services had significant concerns about missing prescription medication, the Respondent Mother came into court and, in fact, lied under oath. She attributed the missing medication into [sic] a mix-up at the pharmacy. She indicated that the pills were not actually missing but that she had taken the pills back to the pharmacy and there was some problem with the pharmacy records. She admitted today that that statement was not true and that she and a friend had abused the prescription drugs. In fact, she did this while the juveniles were within her care.
>
> . . . .

9. There have been incidents of domestic violence between the Respondent Mother and her now husband Mr. Dickerson. At least one of those incidents involved the use of a knife by the Respondent Mother directed toward her husband. Additionally, the Respondent Mother's husband has a problem with illegal drugs and prescription drugs. Each of them are facing serious felony charges. The Respondent Mother is currently facing charges of Felony Trafficking Opium or Heroin and Felony Obtaining a Controlled Substance by Fraud or Forgery. This incident surrounds allegations of forgery of a prescription. They could both face a significant period of incarceration. Additionally, the Respondent Mother is facing charges of Driving While Impaired. The offense date for that is August 20, 2010. She took a significant number of Zanex, and her testimony today is that she has little or no recollection after taking the pills.

10. The Respondent Mother's husband's chain of command has had significant difficulties with the substance abuse and domestic violence between the Respondent Mother and the Respondent Mother's husband. They have had to respond to several different incidents. Witnesses present in court today have responded to several of the domestic violence incidents as well as other incidents involving illegal drugs and controlled substances. The Respondent Mother's husband has been placed on buddy-watch on at least four (4) different occasions within the past couple of months. Buddy-watch is placed in effect when an individual has suicidal or homicidal ideations. Both the Respondent Mother and her husband have had suicidal attempts. Mr. Dickerson has been taken to the 6th floor at Womack Army Hospital which is the unit that deals with behavioral and emotional and mental health issues as well as substance abuse issues. He has gone there on at least one (1) occasion within the past sixty (60) days. The environment of the Respondent Mother's home is not conducive to raising children. In fact, the environment that the Respondent Mother and her husband have created is injurious.

11. Of significant concern to this Court is the fact that these juveniles were formerly placed with relatives and had to be removed following significant incidents and a toxic relationship between the Respondent Mother and her relatives. The Court has previously ruled out relative involvement as a result

of that and has closed that chapter in these juveniles' lives while we made a sincere and significant effort to reunify the Respondent Mother with her children. That while the Court, the Department, the Guardian ad Litem and everyone else involved was working toward the reunification process, the Respondent Mother was sinking deeper and deeper into an abyss of domestic violence and drug abuse all the while covering it up and refusing to acknowledge the fact of its existence in order that the Court, the Department, the Guardian ad Litem and others surrounding her could assist her and help the juveniles. The deception of the Court during this process is bad enough, but the Respondent Mother has completely let her children down.

12. The Respondent Mother and her husband are facing eviction and have received a notice to vacate their housing by October 11, 2010. Mr. Dickerson has obtained a new residence at 709 Wellons Avenue in Spring Lake, North Carolina. The Respondent Mother is not listed as a tenant on the lease, and their relationship at this time is unclear. Mr. Dickerson is in the process of being chaptered out of the military. That is likely to occur within a very short period of time. The Respondent Mother is unemployed.

. . . .

15. The juveniles have been in care since August 31, 2009. They are in need of permanence and deserve a fresh start. The juveniles are doing well in the current foster care placements. There are no suitable relatives, based on the information that has previously been provided to the Court, and relative placement is not appropriate for these juveniles.

. . . .

17. The previous permanent plan was reunification with the Respondent Mother. The Court previously approved of this plan and finds that the Cumberland County Department of Social Services has been making reasonable efforts, as required by N.C. Gen. Stat. §§ 7B-507 and 7B-907, to implement that permanent plan of care. Those efforts include, but are not limited to, conducting Child and Family Team Meetings, developing an appropriate Out-of-Home Family Services Case Plan, making necessary referrals, coordinating with the Respondent

> Mother to complete the psychological evaluation and parenting assessment, and ensuring that the needs of the juveniles were being met. The Court determines that in the best interest of the juveniles, the permanent plan should now be changed to that of placement with other Court approved caretakers with a concurrent plan of adoption. The Court further determines that the Cumberland County Department of Social Services should be relieved of reunification and visitation efforts with the Respondents.
>
> 18. Return of the juveniles to the custody of the Respondents would be contrary to the welfare and best interest of the juveniles.

Based on these findings, the trial court concluded:

> 2. Return of the juveniles to the Respondents is contrary to the welfare and best interest of the juveniles.
>
> 3. That the Cumberland County Department of Social Services should be relieved of reunification and visitation efforts with the Respondents.
>
> . . . .
>
> 5. That in the best interest of the juveniles, legal and physical custody should remain with the Cumberland County Department of Social Services for placement in foster care, with suitable relatives or with other Court approved caretakers, pending further orders of the Court.

The trial court's adoption of the findings contained in its previous orders is critical, I believe, because it shows that the trial court was aware of the developments in this case, from the events leading to the juveniles entering Cumberland County DSS custody in August 2009 to the events precipitating the court's decision to cease reunification efforts in October 2010. The court's finding that the conditions which led to the juveniles' removal from respondent's custody had not been alleviated and, in fact, had worsened implicitly recognizes that continuing reunification efforts would be futile. Such a conclusion is further supported by the trial court's findings regarding respondent's increasing abuse of prescription drugs, her "sinking" into an "abyss of domestic violence," her consistent deception of the trial court, and her inability to obtain and maintain a safe home for the juveniles. The court's findings further recognize that it would be inconsistent with

the juveniles' health and safety to work toward reunifying respondent with the juveniles—indeed, the court found that the living environment created by respondent is "injurious" and "not conducive to raising children." Moreover, in the trial court's finding of fact 17, the court reviews its "previous permanent plan," recites the "reasonable efforts" made by the Cumberland County Department of Social Services, and determines that the Department "should be relieved of reunification . . . efforts with the Respondents," indicating that the trial court properly considered the relevant factors set out in N.C.G.S. § 7B-507(b)(1).

Accordingly, I agree with the majority that the trial court's findings of fact in its permanency planning order "address the substance of the statutory requirements" under N.C.G.S. § 7B-507(b)(1). *See In re T.R.M.*, 208 N.C. App. 160, 164, 702 S.E.2d 108, 111 (2010) (determining that the trial court's findings supported its "conclusion that further reunification efforts were not required" despite none of the findings using N.C.G.S. § 7B-507(b)(1) phraseology); *In re D.J.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 32 (2005) (concluding that the trial court's finding that "return of the children would be contrary to their best interests," coupled with a recitation of "DSS attempts to assist the mother, were sufficient to support cessation of reunification efforts).

Nonetheless, despite having concluded that the trial court's permanency planning order is sufficient "standing alone," the majority then discusses whether the order also might have been sufficient if read together with the trial court's termination order. This discussion is both unnecessary and inappropriate. It is unnecessary because we have already held that the trial court's "written findings of fact in [its] permanency planning order [establish] that [it] consider[ed] the factors in section 7B-507 of our General Statutes." We have thus answered the question before us; we should not engage in any further analysis that is not necessary to dispose of this case.

The majority's discussion is, moreover, inappropriate in light of the well-established principle that "[i]t is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter." *Poore v. Poore*, 201 N.C. 791, 792, 161 S.E. 532, 533 (1931) (citations omitted). Critically, we have held that the permanency planning order in this case adequately stands on its own under N.C.G.S. §§ 7B-507 and 7B-907. Thus any further discussion of whether a hypothetically

deficient order could be salvaged by looking at a subsequent termination order is purely advisory in nature. Because the facts of this case do not compel this Court to answer this question, we should refrain from doing so. *See Boswell v. Boswell*, 241 N.C. 515, 518-19, 85 S.E.2d 899, 902 (1955) ("This Court declares the law as it relates to the facts of the particular case under consideration. A decision may be considered authority only within the framework of such facts. Dissimilarity as to a material fact may call for application of a different principle of law. Hence, the Court will not give advisory opinions or decide abstract questions." (citations omitted)).

Beyond issues of judicial restraint and abstract questions, I further disagree with the majority's merging of permanency planning and termination orders for purposes of appellate review. Underlying my disagreement is the fact that permanency planning hearings are fundamentally different in nature than proceedings to terminate parental rights. We have recognized that

> [t]he permanency planning process in Article 9 [of Chapter 7B] is meant to bring about a definitive placement plan for the abused, neglected, or dependent child. Within twelve months of its initial custody order removing a child from his parent, the court *must* conduct a permanency planning hearing to "develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." [N.C.G.S.] § 7B-907(a). The permanent plan may include, *inter alia*, returning the child to his parent, legal guardianship, or adoption. *See* N.C.G.S. § 7B-907. The court enters a written order memorializing the permanent plan and continuing or modifying custodial arrangements accordingly. *Id.* § 7B-907(c). Even the "permanent plan" is not immutable, however. Follow-up hearings every six months enable the court to review progress and, if necessary, formulate a new permanent plan. N.C.G.S. § 7B-907(a).

In re R.T.W., 359 N.C. 539, 546, 614 S.E.2d 489, 494 (2005), *superseded by statute on other grounds*, Act of Aug. 23, 2005, ch. 398, sec. 12, N.C. Sess. Laws 1455, 1460-61, *as recognized in In re T.R.P.*, 360 N.C. 588, 592, 636 S.E.2d 787, 791 (2006).[2]

2. The General Assembly has recently merged the provisions regarding custody review hearings, N.C.G.S. § 7B-906, and permanency planning hearings, N.C.G.S. § 7B-907, into one provision: N.C.G.S. § 7B-906.1 (2013). *See* Act of June 13, 2013, ch. 129, secs. 25, 26, 2013 Sess. Laws ___, ___ (effective October 1, 2013). As the proceedings in this matter occurred before the amendment's 1 October 2013 effective date, N.C.G.S. § 7B-906.1 does not apply.

"The essential requirement[ ] at . . . the review hearing[ ] is that sufficient evidence be presented to the trial court so that it can determine what is in the best interest of the child." *In re Shue*, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984). In light of this objective, neither the parent nor the county department of social services bears the burden of proof in permanency planning hearings, and the trial court's findings of fact need only be supported by sufficient competent evidence. *Id.* at 597, 319 S.E.2d at 574.

In contrast to the fluidity and reviewability built into Article 9 decisions, "the dissolution of parental rights under Article 11 is decisive. Termination orders 'completely and permanently terminate[ ] all rights and obligations of the parent to the juvenile and the juvenile to the parent arising from the parental relationship.' " *In re R.T.W.*, 359 N.C. at 548, 614 S.E.2d at 494 (alteration in original) (quoting N.C.G.S. § 7B-1112). The petitioner bears the burden of proving that grounds for termination exist and, given the gravity of such decisions, the trial court's findings of fact must be "based on clear, cogent, and convincing evidence." N.C.G.S. § 7B–1109(f) (2013). Given these important differences in the purposes of and procedures involved in the two types of proceedings, I do not believe that a trial court's findings in a termination order may substitute for or supplement the factual determinations necessary to support a decision to cease reunification efforts.

The majority concludes that N.C.G.S. § 7B-1001(a)(5) authorizes our appellate courts to consider both orders "together" so that any "incomplete findings of fact in the cease reunification order may be cured by findings of fact in the termination order." In support of this conclusion, the majority cites the General Assembly's 2005 amendments to the Juvenile Code's framework for appealing juvenile cases, entitled "An Act to Amend the Juvenile Code to Expedite Outcomes for Children and Families Involved in Welfare Cases and Appeals and to Limit the Appointment of Guardians Ad Litem for Parents in Abuse, Neglect, and Dependency Proceedings." *See* Ch. 398, 2005 N.C. Sess. Laws 1455. The majority, however, ignores the fact that the 2005 amendments were enacted by the legislature to supersede our decision in *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489, in which we held that the entry of an order terminating parental rights during the pendency of an appeal from a permanency planning order renders the pending appeal moot. *Id.* at 553, 614 S.E.2d at 498. The majority's holding that a permanency planning order containing insufficient findings may be "cured" by substituting the findings from a subsequent termination order is simply a retooling of the holding in *R.T.W.*, one that was rejected by our General Assembly.

Subsection 7B-1001(a) enumerates the "juvenile matters [that] may be appealed," providing in pertinent part:

> The Court of Appeals shall review the order to cease reunification together with an appeal of the termination of parental rights order if all of the following apply:
>
> 1. A motion or petition to terminate the parent's rights is heard and granted.
>
> 2. The order terminating parental rights is appealed in a proper and timely manner.
>
> 3. The order to cease reunification is identified as an issue in the record on appeal of the termination of parental rights.

N.C.G.S. § 7B-1001(a)(5)(a) (2013). The majority reads this provision as establishing that "the legislature unambiguously instructed our appellate courts to review both orders " 'together[.]' " But this is not what the statute says. Rather, the statute authorizes our appellate courts to "review the order to cease reunification *together with an appeal* of the termination of parental rights order." *Id.* (emphasis added). Contrary to the majority's interpretation, the statute merely dictates the *timing* of when an underlying permanency planning order may be reviewed, which is "with an appeal of the termination of parental rights order."[3]

Had the legislature intended to authorize the rehabilitation of a defective permanency planning order by borrowing from a subsequent termination order, it "clearly" would have done so. Rather than saying that an order ceasing reunification efforts may be "review[ed] . . . *together with an appeal* of the termination of parental rights order," *id.* (emphasis added), the General Assembly would have said that such an order may be "review[ed] . . . *together with the order* terminating parental rights."

Reflecting on the practical results of the majority's holding further suggests that the majority has misconstrued the statute. Under the majority's rationale, despite the legislature's mandate that we "review the order to cease reunification together with an appeal of the termination of parental rights order," *id.*, we need not actually conduct a review of such an order because even the most deficient or defective order ceasing reunification efforts can be ignored so long as

3. N.C.G.S. § 7B-1001 also permits a parent "to appeal the order [ceasing reunification efforts] if no termination of parental rights petition or motion is filed within 180 days of the order." N.C.G.S. § 7B-1001(a)(5)(b) (2013).

we conclude that the termination order contains findings that, when considered *post hoc*, justify the cessation of reunification efforts. But this outcome is effectively what we held in *R.T.W.* and what the General Assembly overrode in enacting the 2005 amendments to the Juvenile Code. The majority simply reads out of the statute the deliberately imposed requirement that orders ceasing reunification efforts "shall" be subject to review and reinstates the holding from *R.T.W.* *But see Town of Pine Knoll Shores v. Evans*, 331 N.C. 361, 366, 416 S.E.2d 4, 7 (1992) ("[W]ords of a statute are not to be deemed useless or redundant and amendments are presumed not to be without purpose." (citations omitted)). This decision is for the General Assembly to make, not this Court.

Simply put, I believe that the General Assembly intended our appellate courts to review permanency planning orders separately and independently from termination orders. I find nothing in N.C.G.S. § 7B-1001(a)(5) suggesting that a termination order may effectively render a flawed permanency planning order moot. Indeed, there is no point to explicitly providing parents with a right to review decisions to cease reunification efforts only to have that review obviated by allowing courts to leapfrog the permanency planning order and review the termination order in its place.

This conclusion is further supported by examining the provisions in the Juvenile Code detailing the process required to "preserve" such decisions for review. Subsection 7B-507(c) provides, in pertinent part, that "[a]t any hearing at which the court orders that reunification efforts shall cease, the affected parent, guardian, or custodian may give notice to preserve the right to appeal that order in accordance with G.S. 7B-1001." N.C.G.S. § 7B-507(c) (2013). This notice of preservation is required to be "given in writing by a proper party as defined in G.S. 7B-1002 and shall be made within 30 days after entry and service of the order in accordance with G.S. 1A-1, Rule 58." *Id.* § 7B-1001(b) (2013). Section 7B-1001(a)(5) further provides that review is proper only if the parents' "rights to appeal [were] properly preserved" under N.C.G.S. § 7B-507(c). *Id.* § 7B-1001(a)(5).

The majority's holding frustrates parents' efforts to preserve their challenges to decisions ceasing reunification efforts. If parents fail to comply with any step of the preservation process, they have waived appellate review. *See In re S.C.R.*, 198 N.C. App. 525, 531, 679 S.E.2d 905, 908-09 (concluding that a father waived appellate review of an order ceasing reunification efforts by failing to give notice within statutory time frame), *appeal dismissed*, 363 N.C. 654, 686 S.E.2d 676

(2009). Even if parents do preserve their right to appeal, under the majority's reasoning, a reviewing court is nonetheless not required to address any deficiencies in the permanency planning order's findings of fact and conclusions of law so long as the ultimate order terminating the parents' rights can be read as justifying the trial court's earlier decision. The General Assembly, I believe, did not set out a specific process for preserving the right to challenge decisions ceasing reunification efforts, only to have that right frustrated by a mode of review that does not require independent scrutiny of that very order.

The majority concludes that the trial court's findings of fact support its conclusion of law that reunification efforts should cease in this case. This holding is all that is necessary to dispose of this case.

STATE OF NORTH CAROLINA v. MALIK SHAHEEM FRANKLIN

No. 36A13

(Filed 20 December 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. ___, 736 S.E.2d 218 (2012), affirming an order denying defendant's motion to suppress which resulted in a judgment entered on 8 November 2011 by Judge Hugh B. Lewis in Superior Court, Mecklenburg County. Heard in the Supreme Court on 4 September 2013.

Roy Cooper, *Attorney General*, *by Joseph L. Hyde*, *Assistant Attorney General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Andrew J. DeSimone*, *Assistant Appellate Defender*, *for defendant-appellant.*

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.

DAVID B. WIND v. THE CITY OF GASTONIA, NORTH CAROLINA, A MUNICIPAL CORPORATION

No. 172A13

(20 December 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. ___, 738 S.E.2d 780 (2013), affirming an order granting summary judgment for plaintiff and denying summary judgment for defendant entered on 1 November 2011 by Judge Forrest Donald Bridges in Superior Court, Gaston County, and remanding for further proceedings. Heard in the Supreme Court on 18 November 2013.

The McGuinness Law Firm, by J. Michael McGuinness, for plaintiff-appellee.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch, Patrick H. Flanagan, and Bradley P. Kline, for defendant-appellant.

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, amici curiae.

Richard Hattendorf, General Counsel; and Bailey & Dixon, LLP, by Jeffrey P. Gray, for North Carolina State Lodge of the Fraternal Order of Police, amicus curiae.

Edelstein and Payne, by M. Travis Payne, for Professional Fire Fighters and Paramedics of North Carolina, amicus curiae.

PER CURIAM.

AFFIRMED.

ALBERT H. SAMOST AND TIMOTHY E. SHAUGHNESSY v. DUKE UNIVERSITY

No. 218A13

(Filed 20 December 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. ___, 742 S.E.2d 257 (2013), affirming an order granting judgment on the pleadings for defendant entered on 12 January 2012 by Judge Orlando F. Hudson, Jr. in Superior Court, Durham County. Heard in the Supreme Court on 19 November 2013.

Ekstrand & Ekstrand LLP, by Robert Ekstrand, for plaintiff-appellants.

Ellis & Winters LLP, by Paul K. Sun, Jr., Nora F. Warren, and Kelly Margolis Dagger, for defendant-appellee.

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*, 367 N.C. 287, 715 S.E.2d 850 (2011).

AFFIRMED.

STATE OF NORTH CAROLINA v. GLENN EDWARD WHITTINGTON

No. 291PA12

(24 January 2014)

1. Constitutional Law—right to confront witnesses—lab report—State's notice of intent

Melendez-Diaz v. Massachusetts, 557 U.S. 305, had no impact on the continuing vitality of N.C.G.S. § 90-95(g) (notice of intent to introduce a lab report without calling the chemist). A valid waiver of defendant's constitutional right to confront the chemical analyst occurs when the State satisfies the requirements of N.C.G.S. § 90-95(g)(1) and defendant fails to file a timely written objection.

2. Appeal and Error—preservation of issues—introduction of lab report—failure to object at trial on specific grounds

Defendant waived appellate review of the State's notice of intent to introduce a lab report without testimony from the chemist where defendant's objection at trial was based only on his mistaken belief that N.C.G.S. § 90-95(g)(1) had been invalidated by *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, and not the State's failure to provide a copy of the lab report. Defendant adequately advised the trial court that the basis for his objection was the Confrontation Clause, but defendant did not set out specific grounds concerning pretrial delivery of the lab report.

Justice HUDSON dissenting.

Justice BEASLEY joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 728 S.E.2d 385 (2012), vacating two convictions and ordering a new trial for a third conviction, all of which resulted in judgments entered on 7 April 2011 by Judge Quentin T. Sumner in Superior Court, Nash County. Heard in the Supreme Court on 18 November 2013.

Roy Cooper, Attorney General, by Kimberly N. Callahan, Assistant Attorney General, for the State-appellant.

George B. Currin for defendant-appellee.

EDMUNDS, Justice.

Before defendant's trial for narcotics offenses, the State notified defendant that, pursuant to North Carolina General Statutes subsection 90-95(g), it intended to introduce a laboratory report of the results of a chemical analysis of the contraband without calling the testing chemist as a witness. At defendant's trial, the report was admitted over defendant's objection. The Court of Appeals reversed defendant's conviction for trafficking in opium by possession, holding that the State failed to establish that defendant waived his constitutional right to confront the witnesses against him because the record did not demonstrate that the State had provided a pretrial copy of the lab report to defendant. We conclude that defendant neither raised nor preserved this issue at trial. Accordingly, we reverse the Court of Appeals on that issue.

Defendant Glenn Edward Whittington (defendant) was involved in a drug sting on 2 July 2008. Joey Sullivan (Sullivan), a cooperating witness, identified defendant to the Nash County Sheriff's Office as his supplier of illicit prescription medicine. In response, Sergeant Phillip Lewis (Lewis), an investigator in the narcotics division of the sheriff's office, set up a controlled transaction. Lewis wired Sullivan for video and sound, then provided him with cash and gave him instructions for the purchase. Sullivan drove to defendant's house, bought "16 green colored pills" from defendant, and returned to Lewis with the pills.

On 11 May 2009, a three-count indictment was returned charging defendant with trafficking in controlled substances by sale (Count I), delivery (Count II), and possession (Count III) of between four and fourteen grams of opium, in violation of N.C.G.S. § 90-95(h)(4). On 16 November 2009, the State delivered the pills to the State Bureau of Investigation laboratory for chemical analysis. The SBI lab's report, issued on 8 December 2009, identified the "sixteen green circular tablets" as "Oxycodone—Schedule II Opium Derivative" with a weight of "4.3 grams."

Prior to trial, the State notified defendant that it was invoking North Carolina's notice and demand statute, N.C.G.S. § 90-95(g). The statute allows the State to inform a defendant of its intent to enter into evidence the results of chemical analysis identifying whether submitted "matter is or contains a controlled substance" without testimony from the analyst who performed the test, so long as the notice is timely and the defendant is provided a copy of the report. N.C.G.S. § 90-95(g) (2012). The statute further provides a defendant the oppor-

tunity to object in writing before trial to introduction of the report without the analyst's testimony. *Id.* In a document dated 15 February 2010 titled "Notice of Intention to Introduce Evidence at Trial" that was served on defendant and filed with the clerk of court, the State advised defendant that it intended to introduce as evidence pursuant to N.C.G.S. § 90-95(g), "any and all reports prepared by the N.C. State Bureau of Investigation concerning the analysis of substances seized in the above-captioned case. A copy of report(s) will be delivered upon request." The record does not indicate that, before trial, defendant either requested a copy of the report or raised any objection.

Defendant's trial began on 6 April 2011. The State called Jason Bryant (Bryant), an investigator with the Nash County Sheriff's Office, who testified that he delivered the pills to the SBI lab for chemical analysis, then later retrieved the pills from that lab, along with "a lab sheet of their analysis." When the prosecutor asked Bryant "what the lab report states," defendant objected, citing two grounds. The first grounds challenged the sufficiency of the foundation laid by the State as to the chain of custody. The trial court sustained this portion of the objection and that issue is not before us. Defendant then characterized the second part of his objection as constitutional:

> [DEFENSE COUNSEL]: . . . [T]he second part of my foundation is a constitutional basis, Your Honor. That this officer is not allowed—not a physician, he's not allowed to testify about the examination of a substance that was done by another officer who has not been on the witness stand, who has not testified and cannot testify about the results of any examination that another person did based upon purely and simply from reading of the report into evidence.

In response to defendant's constitutional objection, the prosecutor informed the court that the State had notified defendant of its intent to introduce the results of the analysis through the lab report. The court expressed its understanding that, once given such notice, defendant had the burden of raising a Confrontation Clause objection in sufficient time to allow the State to subpoena the analyst for trial:

> [THE STATE]: . . . As far as Investigator Bryant reading the reports of the lab, the State did file a notice of our intent to use the lab [report] to introduce those results. Investigator Bryant is not asked to—to analyze the pills, we're only asking him to read what the State is proposing to admit into evidence.

> THE COURT: I believe once you gave [defendant] notice of what you're intending to do [it] is incumbent upon him at that time to indicate the objection—
>
> [THE STATE]: Yes, sir.
>
> THE COURT:—and you would subpoena the SBI agent here.
>
> [THE STATE]: Yes, sir. Yes, sir.
>
> THE COURT: All right.

Defendant immediately disagreed with the court's interpretation, contending that "my position is that was the law at one time," then added that "the *Melendez-Diaz* case that was decided [by] the United States Supreme Court firmly established the point that I'm trying to make to the Court at this point in this case," citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). Although the court asked defendant if he had anything further, defend- ant provided no additional analysis or argument as the basis for his constitutional objection. The trial court overruled defendant's constitutional objection and allowed Bryant to testify that the SBI lab report identified the "sixteen green circular tablets" as "Oxycodone, Schedule II opium derivative, weight of tablets 4.3 grams."

Later that same morning, after the jury had been excused for its lunch break, the State requested that its "Notice of Intention to Introduce Evidence at Trial," which it had filed and delivered to defense counsel before trial, be entered into the court file. Defense counsel responded that he had no objection to the State's request, but added that "I still rely upon my continuing objections." The trial court admitted the document. On 7 April 2011, the jury found defendant guilty as charged.

Defendant appealed his convictions to the Court of Appeals, challenging, *inter alia*, the introduction of the lab report into evidence over his objection. That court vacated defendant's convictions on Counts I and II because of a fatal defect in the indictments, a result the State does not contest, and ordered a new trial as to Count III, finding that defendant's constitutional objection should have been sustained and that admission of the lab report constituted prejudicial error. *State v. Whittington*, ___ N.C. App. ___, ___, 728 S.E.2d 385, 388-90 (2012).

Noting the presumption against a waiver of constitutional rights, the Court of Appeals observed that " '[t]he State bears the burden of proving that a defendant made a knowing and intelligent waiver of his rights[.]' " *Id.* at ___, 728 S.E.2d at 389 (second alteration in original) (quoting *State v. Bunnell*, 340 N.C. 74, 80, 455 S.E.2d 426, 429 (1995) (citation omitted)). The court reviewed N.C.G.S. § 90-95(g)(1), which, when invoked by the State, in part requires the State to provide a copy of the lab report to a defendant prior to trial, *id.* at ___, 728 S.E.2d at 388-89, then reasoned that

> [i]t is the State's burden to show that it has complied with the requirements of N.C.G.S. § 90-95(g)(1), and that a defendant has waived his constitutional right to confront a witness against him. This burden includes insuring the record on appeal contains sufficient evidence demonstrating full compliance with N.C.G.S. § 90-95(g)(1).

Id. at ___, 728 S.E.2d at 390.

Observing that "[t]he State concedes that there is no definitive record evidence that [d]efendant ever received a copy of the lab report as required by N.C.G.S. § 90-95(g)," *id.* at 728 S.E.2d at 389, the Court of Appeals determined that "[b]ecause the record does not show that the State sent [d]efendant a copy of the lab report by the required time before trial, . . . [d]efendant did not waive his constitutional right to confront the chemical analyst who prepared the lab report." *Id.* at ___, 728 S.E.2d at 389. Concluding that "it was error for the trial court to admit the lab report into evidence" and that the error was not harmless beyond a reasonable doubt, the Court of Appeals vacated defendant's convictions in part and granted defendant a new trial in part. *Id.* at ___, 728 S.E.2d at 390. We allowed the State's Petition for Discretionary Review.

[1] We review constitutional issues *de novo*. *State v. Ortiz-Zape*, ___ N.C. ___, ___, 743 S.E.2d 156, 162 (2013). We first consider the argument that defendant made at trial in support of his constitutional objection. This argument, quoted virtually in its entirety above, is based solely upon defendant's view that subsection 90-95(g) is no longer good law as a result of the Supreme Court's 2009 decision in *Melendez-Diaz*. Subsection 90-95(g), originally included in the statute in 1973, read as follows at the time of defendant's trial:

> (g) Whenever matter is submitted to the North Carolina State Crime Laboratory, the Charlotte, North Carolina, Police Department Laboratory or to the Toxicology Laboratory,

> Reynolds Health Center, Winston-Salem for chemical analysis to determine if the matter is or contains a controlled substance, the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication and without the testimony of the analyst in all proceedings in the district court and superior court divisions of the General Court of Justice as evidence of the identity, nature, and quantity of the matter analyzed. Provided, however, the provisions of this subsection may be utilized by the State only if:
>
> (1) The State notifies the defendant at least 15 business days before the proceeding at which the report would be used of its intention to introduce the report into evidence under this subsection and provides a copy of the report to the defendant, and
>
> (2) The defendant fails to file a written objection with the court, with a copy to the State, at least five business days before the proceeding that the defendant objects to the introduction of the report into evidence.
>
> If the defendant's attorney of record, or the defendant if that person has no attorney, fails to file a written objection as provided in this subsection, then the report may[1] be admitted into evidence without the testimony of the analyst. Upon filing a timely objection, the admissibility of the report shall be determined and governed by the appropriate rules of evidence.
>
> Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the report.

N.C.G.S. § 90-95(g).

Thus, subsection 90-95(g) is a typical "notice and demand statute," as described by the Supreme Court of the United States:

> [N]otice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a

1. In 2013, after defendant's trial, the General Assembly amended subsection 90-95(g) by changing the term "may" to "shall." Act of June 13, 2013, ch. 171, sec. 7, 2013, 2 N.C. Adv. Legis. Serv. 421, 423 (LexisNexis) (captioned "An Act to Amend the Laws Regarding Disposition of Blood Evidence, Admissibility of Reports after Notice and Demand, and Expunction of DNA Samples Taken Upon Arrest.").

> period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial.

Melendez-Diaz, 557 U.S. at 326, 129 S. Ct. at 2541, 174 L. Ed. 2d at 331. In response to arguments that such statutes shift to a defendant the burden of giving notice of his or her intent to confront the analyst, the Supreme Court found that "these statutes shift no burden whatever." *Id.* at 327, 129 S. Ct. at 2541, 174 L. Ed. 2d at 331. Instead, the Court explained that a

> defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so. States are free to adopt procedural rules governing objections. It is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial, announcing his intent to present certain witnesses. There is no conceivable reason why he cannot similarly be compelled to exercise his Confrontation Clause rights before trial.

Id. (citations omitted). Accordingly, we conclude that *Melendez-Diaz* had no impact on the continuing vitality of subsection 90-95(g). When the State satisfies the requirements of subdivision 90-95(g)(1) and the defendant fails to file a timely written objection, a valid waiver of the defendant's constitutional right to confront the analyst occurs.

[2] We next consider whether defendant preserved the notice and waiver issue that the Court of Appeals found dispositive. Although the statute requires that the State provide a copy of the lab report to a defendant "before the proceeding at which the report would be used," N.C.G.S. § 90-95(g)(1), the State's notice stated only that "[a] copy of report(s) will be delivered upon request." As a result, the State's notice was deficient in that, while it establishes that defendant was timely advised of the State's intent, it leaves the record devoid of proof that defendant was also provided a copy of the lab report prior to trial.

Nevertheless, defendant never advised the trial court that the basis of his constitutional objection was either the State's notice or the State's failure to provide a pretrial copy of the lab report. Instead, the transcript indicates that the constitutional objection, first made orally at trial, was based entirely on defendant's mistaken belief that the procedure set out in subsection 90-95(g) had been invalidated by the Supreme Court's opinion in *Melendez-Diaz*. Although the trial court gave defendant ample opportunity to raise questions regarding

the State's compliance with subsection 90-95(g) or any other basis for his objection to admission of the lab report, defendant gave none. Thus, while defendant adequately advised the trial court that the basis for his objection was the Confrontation Clause, the "specific grounds" that North Carolina Rule of Appellate Procedure 10(a)(1) required defendant set out for the trial court did not include any complaint about pretrial delivery of the lab report. N.C. R. App. P. 10(a)(1). Only in defendant's brief to the Court of Appeals did he "swap horses" to raise for the first time the issue of the adequacy of the State's notice to him. *See Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("[T]he law does not permit parties to swap horses between courts in order to get a better mount . . . ."). Consequently, the objection that defendant raised in the trial court was properly overruled because subsection 90-95(g) is still good law, while no objection relating to the State's compliance *vel non* with subsection 90-95(g) was ever brought to the trial court's attention. Because defendant did not raise or preserve at trial any constitutional theory relating to the State's failure to comply with the provisions of subdivision 90-95(g)(1), he waived appellate review based upon inadequate notice. N.C. R. App. P. 10(a)(1); *State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005) ("[C]onstitutional error will not be considered for the first time on appeal); *see also State v. King*, 343 N.C. 29, 45-48, 468 S.E.2d 232, 242-44 (1996) (stating that when the defendant raised at trial a constitutional objection relating to the rights of the testifying witness, he failed to preserve a constitutional issue based on his own rights); *State v Benson*, 323 N.C. 318-19, 321, 372 S.E.2d 517, 519 (1988) (concluding that when the defendant moved to suppress his confession on several grounds and the trial judge denied the motion solely "upon the voluntariness theory," the defendant could not argue for the first time on appeal the new basis that his arrest had been unlawful); *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) ("The theory upon which a case is tried in the lower court must control in construing the record and determining the validity of the exceptions.").

Because defendant failed properly to raise or preserve the issue regarding the State's compliance with subsection 90-95(g), we reverse that portion of the opinion of the Court of Appeals that reversed defendant's conviction on Count III of the indictment. The remaining issues addressed by the Court of Appeals are not before this Court and its decision as to these matters remains undisturbed. This case is remanded to the Court of Appeals for consideration of the remaining assignments of error.

REVERSED IN PART AND REMANDED.

Justice HUDSON dissenting.

Because in my view the majority here improperly shifts the burden of proving compliance with N.C.G.S. § 90-95(g) from the State to defendant, I respectfully dissent.

It is true that under *Melendez-Diaz v. Massachusetts* and other Confrontation Clause precedent, "[t]he defendant *always* has the burden of raising his Confrontation Clause objection." 557 U.S. 305, 327, 129 S. Ct. 2527, 2541 (2009). In the context of a trial on drug offenses, this means that if the State attempts to introduce a lab report without calling the testing analyst to the stand, the defendant must object on constitutional Confrontation Clause grounds to protect his right to confront witnesses against him. Here the practical result of the majority opinion is that a defendant who wishes to challenge the State's compliance with our notice and demand statute must also object specifically on those grounds. This is not necessary under the cases as I read them. When a defendant raises a Confrontation Clause objection—whether because the State is attempting to have a lay witness read the lab report into evidence or that the State has called to the stand a substitute analyst who has no truly independent opinion to offer—he has met his constitutional burden. The burden is then on the State to prove waiver, as subsection 90-95(g) can provide. To prove waiver the State must show that it (1) "notifie[d] the defendant at least 15 business days before the proceeding at which the report would be used of its intention to introduce the report into evidence" and (2) "provide[d] a copy of the report to the defendant." N.C.G.S. § 90-95(g)(1) (2013). This statute appears to require the State's showing to include documentation, not mere assertions. Therefore, when the State plans on introducing a lab report into evidence without the testimony of the testing analyst and the State believes it has complied with the requirements of subsection 90-95(g), the State should be prepared to submit that documentation at trial to prove compliance in case of an objection by the defendant. If the defendant further challenges that proof (arguing, for example, that he did not receive either or both of the documents), then the trial court is properly situated to review the evidence and rule on the matter. Once the State has shown compliance with the requirements placed on it under subdivision 90-95(g)(1), the burden shifts to the defendant to prove that he "file[d] a written objection with the court, with a copy to the State, at least five business days before the proceeding." *Id.* § 90-95(g)(2) (2013). However,

the statute appears to shift that burden to a defendant only if the State has proved its compliance, and accordingly, without the State's showing of compliance with the statutory requirements, the defendant need not object.

The State argued, and the majority has agreed, that without a specific objection on subsection 90-95(g) grounds, the State would not be aware that it might later be required to prove its compliance with the statute; this argument serves as the basis for the majority's claim that defendant is attempting to "swap horses between courts in order to get a better mount." *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). In my opinion, this argument fails because an objection on Confrontation Clause grounds necessarily includes failure to comply with N.C.G.S. § 90-95(g). If at trial a defendant objects on any Confrontation Clause basis, the easiest response a prosecutor can make is to show waiver—because if a defendant has waived his right to object, he has already lost on that issue. In that sense, the constitutional Confrontation Clause right is inextricably bound with the notice and demand statute allowing waiver: the constitutional objection can be countered by showing waiver, and conversely, any procedural objection to compliance with the statute could undermine the State's claim that a defendant waived his constitutional Confrontation Clause rights. Moreover, here it is clear that the prosecutor was well aware that the State's compliance with subsection 90-95(g) would be at issue on appeal, despite no specific objection from defendant on those grounds. This conclusion is evidenced by the colloquy in which the State moved the Notice into evidence: "[The State]: . . . I anticipate by the way things are going that there could be a possible appeal and I just want the record on appeal to reflect that [the Notice] was part of the record." Any such Confrontation Clause objection should instantly alert the State that its compliance with the notice and demand statute is being challenged, and the State then has the burden of proving that it complied with the statutory requirements.

The majority also highlights defense counsel's alleged contention that subsection 90-95(g) is no longer good law in light of *Melendez-Diaz* and his failure to challenge the State's assertion that it complied with the statutory requirements. I agree with the majority that "*Melendez-Diaz* had no impact on the continuing vitality of subsection 90-95(g)." Ultimately, though, while the transcript here does appear to show some confusion on the issues, it does not matter what defense counsel said or did not say. Defendant met his initial burden by objecting to admission of the lab report in violation of his

Confrontation Clause rights. The burden then shifted to the State to prove compliance with our notice and demand statute, which it failed to do. Any further commentary from defense counsel was unnecessary. Best practices would dictate that a defendant alert the trial court if the State fails to meet its burden, but such an objection is not required. Protection of constitutional Confrontation Clause rights requires a defendant to object initially. I conclude that here, Defendant met his burden; the State did not meet its own burden to show waiver.

Here, while the State submitted documentary evidence to show compliance with the notice requirement, the State did not submit any evidence to show that it actually sent a copy of the lab report to defendant.[1] The State's bald assertion that "[c]opy of the report was delivered to [defense counsel]" is insufficient. Therefore, I conclude that the State failed to meet its burden under subsection 90-95(g) to prove that defendant waived his constitutional Confrontation Clause rights and the trial court erred in overruling his objection to admission of the lab report into evidence. Defendant did not need to further object or challenge any evidence presented by the State because the State failed to meet its initial burden.

For the reasons stated above, I respectfully dissent.

Justice BEASLEY joins in this dissenting opinion.

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1. As noted by the majority, while the State's "Notice of Intention to Introduce Evidence at Trial" form is sufficient to give notice, the form is also troubling in some aspects in that it may be inconsistent with the statute. Specifically, the form states that "[a] copy of report(s) will be delivered upon request." As is made clear by N.C.G.S. § 90-95(g)(1), the State *must* provide a copy of the lab report, regardless of whether it is requested.

RUTHERFORD PLANTATION, LLC v. THE CHALLENGE GOLF GROUP OF THE CAROLINAS, LLC F/K/A PREMIER BALSAM BUILDERS, LLC

No. 79A13

(Filed 24 January 2014)

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 409 (2013), reversing an order entered on 29 November 2011 denying defendant's motion to amend a partial summary judgment order entered on 4 November 2011, both by Judge Marvin P. Pope, Jr. in Superior Court, Rutherford County, and remanding for further proceedings. Heard in the Supreme Court on 4 September 2013.

David A. Lloyd for plaintiff-appellant.

McGuire, Wood & Bissette, P.A., by Douglas J. Tate, Starling B. Underwood III, and Joseph P. McGuire, for defendant-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., 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.

THE GLENS OF IRONDUFF PROPERTY OWNERS ASSOCIATION, INC. v. JOHN E. DALY AND CONSTANCE V. DALY

No. 21PA13

(Filed 24 January 2014)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 735 S.E.2d 445 (2012), affirming an order granting summary judgment for defendants entered on 28 September 2011 by Judge Gary E. Trawick in Superior Court, Haywood County. Heard in the Supreme Court on 6 January 2014.

Dungan, Kilbourne & Stahl, P.A., by James W. Kilbourne, Jr. and Robert E. Dungan, for plaintiff-appellant.

Cannon Law, P.C., by William E. Cannon, Jr. and Michael W. McConnell, for defendant-appellees.

Whitfield Bryson & Mason LLP, by Scott C. Harris and Matthew E. Lee, for North Carolina Advocates for Justice, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

IN RE BLUE RIDGE HOUS. OF BAKERSVILLE LLC

[367 N.C. 199 (2014)]

IN THE MATTER OF APPEAL OF BLUE RIDGE HOUSING OF BAKERSVILLE LLC FROM THE DECISION OF THE MITCHELL COUNTY BOARD OF EQUALIZATION AND REVIEW DENYING PROPERTY TAX EXEMPTION FOR CERTAIN PROPERTY EFFECTIVE FOR TAX YEAR 2011

No. 173PA13

(Filed 24 January 2014)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 738 S.E.2d 802 (2013), affirming a final decision entered on 28 February 2012 by the North Carolina Property Tax Commission. Heard in the Supreme Court on 7 January 2014.

David A. Gitlin for taxpayer-appellee.

Hal G. Harrison, Attorney, and R. Ben Harrison, Associate Attorney, for respondent-appellant Mitchell County.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Rowan County
	)	
	)	
EDY CHARLES BANKS, JR.		

No. 90P13

ORDER

The Petition for Writ of Supersedeas filed by the State of North Carolina is ALLOWED. The Petition for Discretionary Review filed by the State of North Carolina is ALLOWED. In addition, the parties are directed to address the extent to which the Court of Appeals' opinion in *State v. Ridgeway*, 185 N.C. App. 423, 648 S.E.2d 886 (2007), reflects policies enunciated by the General Assembly.

By order of the Court in Conference, this 27th day of August 2013.

Jackson, J., recused.

s/Beasley, J.
For the Court

STATE v. GERALD

[367 N.C. 201 (2013)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Richmond County
	)	
	)	
JOHNNY RICHARD GERALD, JR.		

No. 230P13

ORDER

The temporary stay issued in this case 24 May 2013 is dissolved. The State's Petition for Writ of Supersedeas is dismissed as moot. Defendant's Motion to Strike Affidavit is denied. The State's Petition for Discretionary Review is allowed for the limited purpose of vacating the opinion of the Court of Appeals. The case is remanded to the Court of Appeals for further remand to the trial court for an evidentiary hearing on defendant's claim of ineffective assistance of counsel.

By order of the Court in conference, this the 27th of August 2013.

s/Beasley, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Cumberland County
	)	
	)	
MARCUS REYMOND ROBINSON		

No. 41A94-5

ORDER

Defendant's 9 August 2013 motion to supplement the record is allowed. Accordingly, the Clerk of Court for Cumberland County is hereby ordered to furnish this Court with copies of the following documents from State v. Marcus Reymond Robinson (91 CRS 23143): Defendant's Exhibit 2 (capital trial voir dire transcripts), Defendant's Exhibit 6 (MSU Jury Selection Study Report), Defendant's Exhibit 8 (MSU Shadow Coding Report), Defendant's Exhibit 45 (State v. Trull Order), and the transcripts from the related hearings on 6-7 November, 2011 and 10 November 2011.

By order of the Court in conference, this the 20th of August 2013.

s/Newby, J.
For the Court

STATE v. HUGGINS

[367 N.C. 203 (2013)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Iredell County
	)	
	)	
WILLIAM M. HUGGINS		

No. 459P00-3

ORDER

Defendant's petition for writ of mandamus is denied. This case is remanded to the trial court for determination of whether defendant has received appointed counsel and, if not, for a determination of whether the Appellate Defender should be appointed as counsel for defendant to determine the merit of filing a Petition for Writ of Certiorari with the Court of Appeals.

By order of the Court in conference, this the 29th of August 2013.

s/ Beasley, J.
For the Court

LASHANDA SHAW	)	
	)	
v.	)	Cumberland County
	)	
	)	
THE GOODYEAR TIRE & RUBBER COMPANY	)	

No. 89P13

ORDER

Upon consideration of the petition filed on the 7th of March 2013 by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

By order of the Court in conference, this the 3rd of October 2013.

Beasley, J. recused.

s/ Jackson, J.
For the Court

JANET MAY and CURTIS HILL, Co-Administrators of the estate of MARK CURTIS HILL v. MELROSE SOUTH PYROTECHNICS, INC., and OCRACOKE CIVIC & BUSINESS ASSOCIATION d/b/a OCRACOKE ISLAND CIVIC AND BUSINESS ASSOCIATION	)	
JUDY B. BRAY, Administrator of the Estate of MELISSA ANNETTE SIMMONS v. EAST COAST PYROTECHNICS, INC., formerly known as MELROSE SOUTH PYROTECHNICS, INC.	)	Wayne County
KEVIN F. MACQUEEN, Administrator of the Estate of CHARLES NATHANIEL KIRKLAND, JR. v. EAST COAST PYROTECHNICS, INC., formerly known as MELROSE SOUTH PYROTECHNICS, INC.	)	
MARTEZ HOLLAND v. EAST COAST PYROTECHNICS, INC., formerly known as MELROSE SOUTH PYROTECHNICS, INC.	)	

No. 375PA13

ORDER

Defendant's Petition for Writ of Certiorari is allowed for the limited purpose of remanding to the Court of Appeals for consideration of the merits:

By order of the Court in conference, this the 3rd of October 2013.

s/ Beasley, J.
For the Court

LOIS EDMONDSON BYNUM, Individually, and LOIS EDMONDSON BYNUM, Administratrix of the Estate of James Earl Bynum and Lois Marie Bynum	)	Wilson County
v.	)	
WILSON COUNTY and SLEEPY HOLLOW DEVELOPMENT COMPANY	)	

No. 380P13

ORDER

Upon consideration of the petition filed on 30 August 2013 by defendants Wilson County and Sleepy Hollow Development Company in this matter for discretionary review of the decision of the Court of Appeals, the petition is ALLOWED on the following issues:

1. Whether the distinction between activities that are governmental or proprietary in nature should be determined based on the nature of the governmental function at issue or the nature of the plaintiff's involvement with the governmental unit and/or the reason for the plaintiff's presence at a governmental facility.

2. Whether Defendant-Appellant Wilson County was entitled to summary judgment.

The petition is DENIED for all other issues.

By order of this Court in Conference, this 3rd day of October, 2013.

s/ Beasley, J.
For the Court

STATE v. SANDERS

[367 N.C. 207 (2013)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Gaston County
	)	
	)	
TRAVIS KENYEL SANDERS		

No. 315P13

ORDER

Defendant's petition for writ of certiorari is allowed for the limited purpose of remanding to the Court of Appeals for further remand to the trial court for resentencing upon a single conviction for sale or delivery of cocaine and upon a single conviction for possession of cocaine.

By order of the Court in Conference, this 7th day of November, 2013.

s/ Beasley, J.
For the Court

STATE v. SMITH

[367 N.C. 208 (2013)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Craven County
	)	
	)	
HAROLD DEAN SMITH, JR.		

No. 198P13

ORDER

The State's Petition for Writ of Certiorari is allowed for the limited purpose of remanding to the Court of Appeals for review of the trial court's order following full briefing by the parties.

By order of the Court in Conference, this 18th day of December, 2013.

s/ Beasley, J.
For the Court

MARGARET DICKSON, ET AL.	)	
	)	
v.	)	
	)	
	)	
ROBERT RUCHO, ET AL.	)	
NORTH CAROLINA STATE	)	
CONFERENCE OF BRANCHES	)	Wake County
OF THE NAACP, ET AL.	)	
	)	
	)	
v.	)	
	)	
	)	
THE STATE OF NORTH	)	
CAROLINA, ET AL.	)	

No. 201PA12-2

ORDER

Upon consideration of Plaintiff-Appellants' Motion For Enlargement Of Time For Oral Argument, the Court orders that each side shall have forty-five minutes for oral argument to be divided among the parties as they see fit.

By order of the Court in Conference, this 4th day of December, 2013.

s/ Beasley, J.
For the Court

BRYAN DEBAUN	)	
	)	
v.	)	Durham County
	)	
	)	
DANIEL J. KUSZAJ, A/K/A D. J. KUSZAJ, A DURHAM POLICE OFFICER IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; AND CITY OF DURHAM, NORTH CAROLINA	)	

No. 386P13

ORDER

Upon consideration of the Petition for Discretionary Review filed by plaintiff on the 6th day of September 2013, the Petition is ALLOWED for the limited purpose of remanding to the Court of Appeals for reconsideration in light of *Craig ex rel. Craig v. New Hanover County Board of Education*, 363 N.C. 334, 678 S.E.2d 351 (2009).

By Order of this Court in Conference, this 18th day of December, 2013.

s/ Beasley, J.
For the Court

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

27 AUGUST 2013

001P13-2	Jane Brawley Jordan v. Judge Frank Lane Williamson	Petitioner's *Pro Se* Motion for Extension of Time to File PWC	Dismissed without Prejudice **07/08/13**
020P13	State v. Abdul Hassan Jamaal Hoff	Def's PDR Under N.C.G.S. § 7A-31 (COA12-771)	Denied **Beasley, J., Recused**
021P13	The Glens of Ironduff Property Owners Association, Inc. v. John E. Daly and Constance V. Daly	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA12-52) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
035P13	In Re: D.N.W.	Respondent Father's PDR Under N.C.G.S. § 7A-31 (COA12-765)	Denied **Beasley, J., Recused**
036A13	State v. Malik Shaheem Franklin	Appellate Defender's Motion to Permit Current Appellate Counsel to Withdraw and to Reappoint the Office of the Appellate Defender	Allowed **08/07/13**
037PA13-2	State v. Tamara McDaniel Bean	Def's PDR Under N.C.G.S. § 7A-31 (COA12-697 and 12-697-2)	Denied **Beasley, J., Recused**
047P13	State v. Raymond Roberts	Def's PDR Under N.C.G.S. § 7A-31 (COA12-360)	Denied
051P13	Jacques A. Dallaire and wife, Fernande Dallaire v. Bank of America, N.A., Homefocus Services, LLC, and Landsafe Services, LLC	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA12-626) 2. N.C. Bankers Association's Motion for Leave to File *Amicus* Brief	1. Allowed 2. Allowed **Beasley, J., Recused**

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

27 AUGUST 2013

054P13	State v. Antwan Maurice Pittman	1. Def's NOA Based Upon a Constitutional Question (COA12-510) 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**
055P02-11	State v. Henry Ford Adkins	Def's *Pro Se* PWC to Review Order of COA (COAP11-263)	Dismissed
059P07-2	State v. Randall Gray Stoneman	Def's *Pro Se* Motion for PDR Under N.C. G.S. § 7A-31 (COAP13-319)	Dismissed
059P12-2	State v. Arthur Junior Cook	Def's PDR Under N.C.G.S. § 7A-31 (COA12-902)	Denied
067P13-2	Robert Allen Sartori v. County of Jackson, et al (JCJ); Doctor Steven P. Deweese; and Nurse Cathy Barnes	Plt's *Pro Se* Motion for Rehearing (COA11-1398)	Denied
075P13	DOCRX, Inc. v. EMI Services of N.C., LLC	1. Def's Petition for *Writ of Supersedeas* (COA12-783) 2. Def's NOA Based Upon a Constitutional Question 3. Def's PDR Under N.C.G.S. § 7A-31 4. Plt's Motion to Dismiss Appeal 5. Def's Motion for Substitution of Counsel 6. Def's Motion for Temporary Stay	1. Allowed 2. - - - 3. Allowed 4. Allowed 5. Allowed 6. Allowed **06/06/13**

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

27 AUGUST 2013

078A12-2	State v. Jonathan Lynn Burrow	1. Def's NOA Based Upon a Constitutional Question (COA11-773-2) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
084P13-2	David Harold Jonson v. N.C. Office of Administrative Hearings and Donald W. Overby	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
088P12-2	State v. Hubert Keith Beeson	Def's *Pro Se* PWC to Review Order of Superior Court of Davidson County	Dismissed
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. See Special Order **08/27/13** 3. See Special Order **08/27/13** **Jackson, J. Recused**
093P13	James Craig Kelly v. Realty World Cape Fear	1. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-822) 2. Plt's *Pro Se* Motion for Leave to Respond to Response to PDR	1. Denied 2. Denied
094PA13-2	State v. George Victor Stokes	1. State's Motion for Temporary Stay (COA12-810-2) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/24/13** 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** Dissolved the Stay **08/27/13** 2. Denied 3. Denied

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

27 AUGUST 2013

104P11-4	State v. Titus Batts	Def's *Pro Se* PWC to Review Decision of COA (COA09-1012)	Denied
115P13	In the Matter of: S.A.C.	Respondent-Father's PDR Under N.C.G.S. § 7A-31(COA12-989)	Denied
118P13	State v. Maahir S. Muhammad	1. Def's NOA Based Upon a Constitutional Question (COA12-963) 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
118P96-4	In Re: Thomas Franklin Cross, Jr.	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
118P96-5	Thomas Franklin Cross, Jr. v. N.C. Administrative Hearings and Donald W. Overby	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
121P13	Patty C. Greene, Administratrix of the Estate of Bill Ray Greene v. The City of Greenville, North Carolina, a Municipal Corporation	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA12-908) 2. N.C. Advocates for Justice's Motion for Leave to File *Amicus* Brief	1. Denied 2. Dismissed as Moot
126P13	State v. William Arthur Brown	1. Def's NOA Based Upon a Constitutional Question (COA12-848) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. - - - 2. Denied 3. Allowed
133P13	Wilford Dixon v. Delight Gifford	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA12-520) 2. Plt's Motion to Strike 3. Plt's Motion in the Alternative for Leave to File Brief	1. Denied 2. Dismissed as Moot 3. Dismissed as Moot

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

27 AUGUST 2013

141P13	Mary L. Stepp v. Awakening Heart, PA, Nancy L. Tarlow, Isle of Sky Chiropractic, PLLC and Jennifer J. Harris	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA12-581) 2. Defs' (Awakening Heart, PA and Nancy L. Tarlow) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
144P13	In the Matter of: A.P.W. A.K.W., N.R.W.	Petitioner (Guilford County DSS) and *Guardian ad Litem's* PDR Under N.C.G.S. § 7A-31 (COA12-807)	Denied
146P13	Richmond County Board of Education v. Janet Cowell, N.C. State Treasurer, in her official capacity only, David T. McCoy, N.C. State Controller, in his official capacity only, Andy Willis, N.C. State Budget Director, in his official capacity only, Reuben F. Young, Secretary of the N.C. Department of Public Safety, in his official capacity only, and Roy Cooper, Attorney General of the State of N.C., in his official capacity only	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1022)	Denied
147P13	Perry R. Warren v. N.C. Office of Administrative Hearings and Donald Overby	Def's *Pro Se* Motion for Petition for Extraordinary *Writ* of Actual Innocence	Dismissed

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

27 AUGUST 2013

150P13	State v. Garnel Wade Franklin	Def's PDR Under N.C.G.S. § 7A-31 (COA12-851)	Denied
158P13	Independent Technologies, Inc. v. Charles Martin Charles Martin, Third Party Plaintiff v. Gary's Independent Technologies, Inc., Third Party Defendant	1. Plaintiff And Third Party Defendant's NOA Based Upon a Constitutional Question (COA12-872) 2. Plaintiff and Third Party Defendant's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied
162P13	State v. David Coston Bradsher	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1010)	Denied
168P13	State v. Charles Bruce Watson	1. Def's *Pro Se* Motion for NOA (COAP12-385) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* PWC to Review the Order of the COA	1. Dismissed *Ex Mero Motu* 2. Dismissed 3. Dismissed
173P13	In the Matter of: The Appeal of: Blue Ridge Housing of Bakersville LLC from the Decision of the Mitchell County Board of Equalization and Review Denying Property Tax Exemption for Certain Property Effective for Tax Year 2011	1. Mitchell County's NOA Based Upon a Constitutional Question (COA12-941) 2. Mitchell County's PDR Under N.C.G.S. § 7A-31 3. Taxpayer's (Blue Ridge Housing of Bakersville, LLC) Motion to Dismiss Appeal	1. - - - 2. Allowed 3. Allowed
183P13	Foreclosure of Real Property Under Deed to Trust from Robert T. Perry, Willoree L. Perry, in the original amount of $92,500.00, and dated August 31, 2005 and recorded on September 6, 2005 in Book 4942 at page 901, Durham County Registry Trustee Services of Carolina, LLC, Substitute Trustee	Respondent's PDR Under N.C.G.S. § 7A-31 (COA12-944)	Denied

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

27 AUGUST 2013

184P13	The North Carolina State Bar v. Robert J. Burford, Attorney	1. Def's *Pro Se* and Attorney NOA Based Upon a Constitutional Question (COA12-909) 2. Def's *Pro Se* and Attorney PDR Under N.C.G.S. § 7A-31 3. Def's *Pro Se* Motion to Amend NOA and PDR	1. Dismissed *Ex Mero Motu* 2. Denied 3. Denied **Martin, J. and Beasley, J., Recused**
185P13	State v. Nathaniel Lamar Avery	Def's PDR Under N.C.G.S. § 7A-31 (COA12-695)	Denied
186P13	State v. Tyrone Lamonte Scriven	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1188)	Denied
187P13	State v. Jonas Thompson	1. Def's *Pro Se* Motion for NOA (COAP12-323) 2. Def's *Pro Se* PWC to Review Order of COA 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed *Ex Mero Motu* 2. Dismissed 3. Dismissed as Moot
190P13	State v. Michael Ray King	Def's *Pro Se* Motion for Notice of Motion to Appeal (COAP13-238)	Dismissed
191P13	Marion L. Sherrod v. North Carolina Department of Correction	1. Plt's *Pro Se* Motion for NOA (COA13-75) 2. Plt's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 3. Plt's *Pro Se* Motion to File an Amended Complaint 4. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed *Ex Mero Motu* 2. Denied 3. Dismissed 4. Allowed
194P13-2	N.C. Dept. of Correction v. Jonas Allen Strickland	1. Def's *Pro Se* Motion for Interrogatories 2. Def's *Pro Se* Motion for NOA	1. Dismissed 2. Dismissed

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196P13	State v. Jennifer Milanese	1. State's Motion for Temporary Stay (COA12-1061) 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 **05/02/13** Dissolved the Stay **08/27/13** 2. Denied 3. Dismissed 4. Dismissed as Moot
198P13	State v. Harold Dean Smith, Jr.	1. State's Motion for Temporary Stay (COAP13-233) 2. State's Petition for *Writ of Supersedeas* 3. State's PWC to Review Order of COA	1. Allowed **05/03/13** 2. 3.
200P07-4	Kenneth E. Robinson v. S. Eagles, Jr., N.C.C.O.A. Chief Judge	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied **07/23/13** 2. Denied **07/23/13** 3. Dismissed as Moot **07/23/13**
200P13	In the Matter of: K.C.	1. State's Motion for Temporary Stay (COA12-1157) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/06/13** Dissolved the Stay **08/27/13** 2. Denied 3. Denied
202P13	State v. Michael Dwayne Jenkins	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1085)	Denied

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204P13	State v. James Lamont Hazel	1. Def's NOA Based Upon a Constitutional Question (COA12-1102) 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 Served	1. - - - 2. Denied 3. Allowed 4. Allowed
205P13	State v. Michael Travis Barnes	Def's PDR Under N.C.G.S. § 7A-31 (COA12-278)	Denied
206P13	State v. Helen B. Renkosiak	Def's PDR Under NC.G.S. § 7A-31 (COA12-975)	Denied
211P13	Ted L. Bissette and wife, Mary Holly Bissette, Individually and as *Cestuis Que* Trust v. Jennifer T. Harrod; Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, a North Carolina Limited Liability Partnership; all Individually and as Trustees; and Scott W. Rich and wife, Laura K. Rich	Plts' PDR Under N.C.G.S. § 7A-31 (COA12-921)	Denied
213P13	Anthony Antelo, Employee v. Wal-Mart Associates, Inc., Employer, American Home Assurance, Carrier (Claims Management, Inc., Third-Party Administrator)	1. Defs' Motion for Temporary Stay (COA12-846) 2. Defs' Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/17/13** Dissolved the Stay **08/27/13** 2. Denied 3. Denied **Beasley, J., Recused**

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216P13	State v. Antonio McKever	1. Def's *Pro Se* Motion for PDR (COA10-1436) 2. Def's *Pro Se* Motion for Appropriate Relief 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Allowed
219P13	Kimberly K. Moore, as Executrix of Duff S. Moore, deceased v. Scott Trent Smith	1. Motion for Temporary Stay (COA12-1118) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR Under N.C.G.S. § 7A-31 4. Plt's Motion for Substitution of Counsel	1. Allowed **05/22/13** Dissolved the Stay **08/27/13** 2. Denied 3. Denied 4. Allowed **06/18/13**
220P13	Lake Toxaway Community Association, Inc., a North Carolina non-profit corporation v. RYF Enterprises, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-422) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
222P13	State v. Sanchez Domonick Wicks	Def's PDR Under N.C.G.S. § 7A-31 (COA12-912)	Denied
224P13	In the Matter of: H.S.G.	Respondent-Father's PDR Under N.C.G.S. § 7A-31 (COA12-1012)	Denied
225P13	State v. Jonte Rouson	Def's PDR Under N.C.G.S. § 7A-31 (COA12-382)	Denied
226P13	State v. Joseph Ragland	Def's PDR Under N.C.G.S. § 7A-31 (COA12-699)	Denied
228P13	State v. James Lafonte Thompson	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1274)	Denied

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229P13	Martha Grist v. Larry Smith	1. Def's *Pro Se* NOA Based Upon a Constitution Question (COA12-488) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied
230P13	State v. Johnny Richard Gerald, Jr.	1. State's Motion for Temporary Stay (COA12-1231) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Strike Affidavit of Chevonne Wallace Appended to the State's PDR	1. Allowed **05/24/13** 2. See Special Order **08/27/13** 3. See Special Order **08/27/13** 4. See Special Order **08/27/13**
232P13	State v. Bruce Tyler Murchison	1. State's Motion for Temporary Stay (COA12-1321) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/28/13** 2. 3.
233P13	State v. Keisha Malarian Vaughn	1. State's Motion for Temporary Stay (COA12-1179) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/28/13** Dissolved the Stay **08/27/13** 2. Denied 3. Denied
234A13	State of N.C. ex rel. Utilities Commission v. Attorney General, et al.	Motion for Admission of Damon Xenopoulos *Pro Hac Vice*	Allowed **07/29/13**
235PA10	State v. John Edward Brewington	Def's Motion to Stay the Mandate	Denied **07/16/13**

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237P13	Daniel Tapper, Employee v. Penske Truck Leasing Co., L.P., Employer and Gallagher Bassett Services, Inc., Third-Party Administrator	1. Plt's PWC to Review Order of COA (COAP13-251) 2. Plt's Motion to Withdraw PWC	1. - - - 2. Allowed
238P13	State v. Kelly Omar Douglas	1. Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA12-261) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Dismissed as Moot
239P13	State v. Willie Smith, Jr.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-1477) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
240P13	State v. Maurquis Wright and Christian Smith	1. State's Motion for Temporary Stay (COA12-938) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/07/13** Dissolved the Stay **08/27/13** 2. Denied 3. Denied
241P13	State v. Anthony Coleman	1. State's Motion for Temporary Stay (COA12-946) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/10/13** 2. 3.
243P13	In the Matter of: Jennifer Nicole Foster	1. State's Motion for Temporary Stay (COA12-865) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/10/13** Dissolved the Stay **08/27/13** 2. Denied 3. Denied
246P13	State v. Orenthial Terrell Smith	Def's PWC (COAP13-171)	Denied
247P03-2	State v. Reginald Terrell Leach	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-962) 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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247P13	State v. Michael Hamilton Threadgill	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-1293) 2. Def's *Pro Se* Motion for PDR	1. Denied 2. Dismissed
249P13	Diana Victoria Arbona v. Hank Larry Williams and Alexander Joseph Perakis	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-1048)	Denied
250P11-2	State v. Larry Dean Lowry	Def's *Pro Se* Motion to Vacate Sentence or to Allow a Time Reduction	Dismissed **Jackson, J., Recused**
251P13	George T. Powell, Jr. v. Prodev X, LLC v. George R. Brown, Penny R. Powers and Robert E. Rousseau, and Shafic Andraos, Intervenors	1. Def's *Pro Se* PWC to Review Order of Superior Court of Forsyth County (COA13-421 and COAP12-106) 2. Plt's *Pro Se* Motion for NOA	1. Denied 2. Dismissed *Ex Mero Motu*
254P13	State v. Michael Antoine McLaurin	Def's PDR Under N.C.G.S. § 7A-31 (COA12-980)	Denied
255P13	State v. James Samuel Hill, Jr.	1. Def's *Pro Se* Motion for Appeal (COA12-1502) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied
256P13	State v. Jeffry Allen Thomas	Def's PDR Under N.C.G.S. § 7A-31 (COA12-979)	Denied
257P13	Kerry Bigelow and Clyde Clark v. Town of Chapel Hill; Roger Stancil, in his official capacity as Manager of the Town of Chapel Hill and in his personal capacity, insofar as he was operating outside of his job description	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA12-1105) 2. Defs' Motion for Temporary Stay 3. Defs' Petition for *Writ of Supersedeas*	1. Denied 2. Allowed **06/26/13** Dissolved the Stay **08/27/13** 3. Denied
258P13	State v. Michael Dennis Long	1. Def's *Pro Se* PWC to Review Order of COA (COAP12-361) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot **Jackson, J., Recused**

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259P13	State v. Anthony R. Belton	1. Def's *Pro Se* PWC to Review Order of COA (COAP13-110) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied **06/19/13** 2. Allowed **06/19/13** 3. Dismissed as Moot **06/19/13**
260P13	State v. Andrew Charles Beck	1. Def's *Pro Se* Motion for NOA (COAP12-13) 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 2. Dismissed 3. Allowed 4. Dismissed as Moot
262P13	State v. Saquan Treay Facyson	1. State's Motion for Temporary Stay (COA12-1300) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/19/13** 2. 3.
263P13	State v. Tornello Pierce	Def's *Pro Se* Motion for NOA	Dismissed *Ex Mero Motu*
264P13	State v. Jonathan Jay Krieger	Def's *Pro Se* Motion for PDR Under N.C.G.S § 7A-31 (COAP12-953)	Dismissed
265P13	State v. Keith Markham	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-1470)	Denied
266P13	Lee Franklin Booth v. State of N.C.	1. State's Motion for Temporary Stay (COA13-2) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **06/24/13** Dissolved the Stay **08/27/13** 2. Denied 3. Denied 4. Dismissed as Moot
269P13	In the Matter of: William Bunch, III	State's PDR Under N.C.G.S. § 7A-31 (COA12-1367)	Denied

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270P13	State v. Andre Devon Weeks	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1388)	Denied
273P13	State v. Shamon Tornell Kinston	Def's *Pro Se* Motion for Appropriate Relief	Dismissed
275P13	State v. Nathaniel Lee Joyner	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-1244) 2. Def's *Pro Se* Motion to Correct a Misleading Statement 3. State's Motion to Amend Response to PDR	1. Denied 2. Dismissed as Moot 3. Allowed
276P13	Joey Duane Scott v. Deborah Rotroff; Officer Pendley; and S. Stevens	Petitioner's *Pro Se* PWC to Review Order of Superior Court of McDowell County	Dismissed
278P09-2	Jonathan Blitz, on behalf of himself and all others similarly situated v. AGEAN, Inc.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA12-1133) 2. Plt's Motion to Amend Plt's PDR Under N.C.G.S. § 7A-31 to Supply Additional Authority	1. Denied 2. Allowed
280P13	State v. Myisha Edwards Brown	1. Def's Motion for Temporary Stay (COA12-708) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/25/13** Dissolved the Stay **08/27/13** 2. Denied 3. Denied
281P13	George King, d/b/a George's Towing and Recovery v. Town of Chapel Hill	1. Plt's Motion for Temporary Stay (COA12-1262) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's NOA Based Upon a Constitutional Question 4. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/25/13** 2. 3. 4.
283P13	State v. Windsor Devone Ingram	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-1327) 2. Def's *Pro Se* Motion to File a *Pro Se* Brief	1. Denied 2. Dismissed

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285P13	State v. William Andrew Floyd	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1123)	Denied
286P13	Erie Insurance Exchange, Erie Indemnity Company, and Terrence P. Duffy Builders, Inc. v. Builders Mutual Insurance Company	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-1104) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
289P13	State v. Ronald Edward McCray	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA12-1309) 2. Def's *Pro Se* Motion to Appoint Counsel 3. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Dismissed as Moot 3. Denied
290P13	State v. Jamero Lavar Caldwell	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-1358)	Denied
291P13	In the Matter of: C.H. & D.H.	Respondent-Father's PDR Under N.C.G.S. § 7A-31 (COA13-127)	Denied
292P13	State v. Jose Ismael-Ruiz Zuniga	1. Def's *Pro Se* PWC to Review Order of Superior Court of Guilford County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
294P13	Maechel S. Patterson v. Reuben F. Young, et al.	1. Petitioner's *Pro Se* PWC to Review Order of COA (COAP13-255) 2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Petitioner's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as Moot
295P13	In the Matter of: A.J.W. and J.E.W., III	Respondent-Father's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-1458)	Denied

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296P13	In the Matter of the Foreclosure of a Deed of Trust Executed by Angela Anita Thomas in the Original Amount of $136,881.00 Dated February 9, 2007, Recorded in Book 00749, Page 0200, Hoke County Registry Substitute Trustee Services, Inc., Substitute Trustee	Appellant's (Angela Anita Thomas) *Pro Se* Motion for NOA (COA13-443)	Dismissed *Ex Mero Motu*
298P13	State v. Paul Dial	1. Def's Motion for Temporary Stay (COA12-1334) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **07/05/13** 2.
300P13	State v. Leon Gerald Martin	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1080)	Denied **Jackson, J., Recused**
301P13	State v. Deborah Gay Rhodes	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1143)	Denied
304P13	Toni Anway, Dr. Ernest Bernsford, Elizabeth Bosarge, Calvin Bosarge, Calvin Bosarge, Jr., Alonzo Edwards, Terry Fleming, Regina C. Fleming, Iris J. Fleming, Jerry V. Fleming, Hector Garcia, Elizabeth Langdon, Paul Mees, and Gladys Mees v. Silver Creek Community Property Owners Association, Inc.	1. Plts' Motion for Temporary Stay (COA12-1460) 2. Plts' Petition for *Writ of Supersedeas* 3. Plts' PDR Under N.C.G.S § 7A-31	1. Allowed **07/09/13** 2. 3.

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306P04-4	State v. Dwight Parker, Sr.	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 Compel Response to *Writ of Certiorari* 4. Def's *Pro Se* Motion for Summary Judgment	1. Dismissed 2. Allowed 3. Dismissed as Moot 4. Dismissed
306P13	State v. Demetrius Dallas Hairston	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-1356)	Denied
307P13	State v. Lucas Guthrie Gentry	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1017)	Denied
308P12-2	Adam Troy Kittrell v. N.C. Office of Administrative Hearings and Donald W. Overby	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
309P13	In re: Frederick Noble	Petitioner's Petition for *Writ of Mandamus*	Denied **07/11/13**
309P13-2	Frederick A. Noble v. N.C. Administrative Hearings and Donald W. Overby	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
310P13	Tamera Collins Davis, Kevin S. Davis, Kimesha Spinks, and Marcie Jones v. Chase Home Finance, LLC, J.P. Morgan Chase Bank, N.A., and Brock & Scott, PLLC, Substitute Trustee	Plaintiff-Appellants' PDR Under N.C.G.S. § 7A-31 (COA12-1246)	Denied
311P13	State v. Venisha Chakhan Bajja	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1515)	Denied
312P13	State v. Rodrick Allen Stubbs	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1280)	Denied

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313P13	State v. Brian Keith Benfield	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-1383) 2. Def's PWC to Review Decision of COA	1. Dismissed 2. Denied
316P13	State v. James Earl Perry	1. Def's *Pro Se* PWC to Review Order of COA (COAP13-325) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
318P13	State v. Kingg Eric Markee Hanif	1. State's Motion for Temporary Stay (COA12-1108) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/19/13** Dissolved the Stay **08/27/13** 2. Denied 3. Denied
319P13	State v. Tracy Allen Poole	1. Def's Motion for Temporary Stay (COA12-1150) 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	1. Allowed **07/19/13** 2. 3. 4.
320P11-2	Mary Gray, Widow of David D. Gray, Deceased Employee v. United Parcel Service, Inc., Employer and Liberty Mutual Insurance Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-1029)	Denied
322P13	Angela S. Smith, Individually and as *Guardian Ad Litem* for Zackary A. Smith, Alexis V. Smith, and Johnathan A. Smith, minors; and Matthew A. Smith v. Lake Bay East, LLC; Lake Creek Corporation; Joco, Inc.; and East Bladen Land Co.	1. Defendant-Appellants PDR Under N.C.G.S. § 7A-31 (COA12-1541) 2. Def's Motion for Temporary Stay 3. Def's Petition for *Supersedeas*	1. 2. Allowed **08/19/13** 3.

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329P13	State v. Samuel Antwan Washington	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-1559) 2. Def's PWC to Review Order of Superior Court of Cabarrus County	1. Denied 2. Denied
331P13	Lavern Ray Irwin v. N.C. Parole Commission; Anthony E. Rand, Commissioner; and Bryan Wells, Superintendent of Pender C.I.	1. Petitioner's *Pro Se* Motion for PDR (COAP13-412) 2. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	1. Denied 2. Denied **07/25/13**
332P13	Bobby R. Knox, Jr. v. Davis, et al.	1. Plt's *Pro Se* Motion for Rehearing 2. Plt's *Pro Se* Petition for *Writ of Habeas Corpus* 3. Plt's *Pro Se* Motion for Protective Order 4. Plt's *Pro Se* Motion for Surveillance on Prisoner for Medical Complaints	1. Dismissed **08/05/13** 2. Denied **08/05/13** 3. Denied **08/05/13** 4. Dismissed **08/05/13**
333P13	State v. Gerald Ernest Manning, Jr.	Def's *Pro Se* Motion for PDR (COAP13-333)	Dismissed
336P13	State v. Earl Lee Wilson	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-1233)	Denied
339P13	Theodore J. Williams v. N.C. Office of Administrative Hearings and Donald W. Overby	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **07/31/13**
345P13	State v. Samuel J. Jackson	Def's *Pro Se* Motion for Appeal (COAP13-489)	Dismissed
347P13	State v. Wesley Deland Stevens	1. State's Motion for Temporary Stay (COA12-1394) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/05/13** 2. 3.
350P13	Michael Anthony Dilworth v. Ed McMahon, Sheriff	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **08/14/13**
353P13	State v. Matthew Broome	1. Def's *Pro Se* Motion for Reconsideration an Error for Review 2. Def's *Pro Se* Motion for Appointment of Counselor for Review	1. Denied 2. Dismissed as Moot

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355P13	State v. Willard Alan Smith	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP13-463)	Dismissed
366P13	State v. Lester Gerard Packingham	1. State's Motion for Temporary Stay (COA12-1287) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/26/13** 2.
368P13	State v. Michael Paul Miller	State's Motion for Temporary Stay (COA13-81) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/26/13** 2. 3. **Beasley, J., Recused**
370P04-14	State v. Anthony Leon Hoover	1. Def's *Pro Se* Motion for Appeal 2. Def's *Pro Se* Motion for a Court Order to Retain to Use All State Institutional Copy Machines	1. Dismissed *Ex Mero Motu* 2. Dismissed **Hudson, J., Recused**
370P13	State v. Ralph Eugene Frady	1. State's Motion for Temporary Stay (COA12-1375) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/26/13** 2.
371P11-2	State v. Kim Antonio Griffin	1. Def's *Pro Se* PWC to Review Order of COA (COAP13-314) 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
371P13	State v. William Herbert Pennell, IV	1. State's Motion for Temporary Stay (COA12-1269) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/26/13** 2. 3.
372P13	State v. Adam Collier Derbyshire	1. State's Motion for Temporary Stay (COA12-1382) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/27/13** 2. 3.

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377P11-2	State v. Kenis Ray Johnson	Def's *Pro Se* PWC to Review the Order of the COA (COAP13-252)	Dismissed **Beasley, J., Recused**
379P10-2	State v. Ralph Franklin Frederick	1. Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP13-337) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
393P12-3	Jabar Ballard v. N.C. Office of Administrative Hearings and Donald W. Oberby	Def's *Pro Se* Petition for *Writ of Mandamus* (COA12-159)	Denied
394P12-3	State v. Joseph Brian Tarleton	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-916)	Denied
399P06-4	James Albert Coley, Jr. v. N.C. Office of Administrative Hearings and Donald W. Overby	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
411A94-5	State v. Marcus Reymond Robinson	1. State's Motion to Supplement the Attachments to State's PWC in Support of Brief for the State 2. Motion for Admission of Alex T. Haskell *Pro Hac Vice* 3. Motion for Admission of Gregory B. Craig *Pro Hac Vice* 4. Def's Motion to Supplement the Record	Allowed **06/25/13** 2. Allowed **08/20/13** 3. Allowed **08/20/13** 4. See Special Order **08/20/13**
413P12-2	State v. Darryl Thompson	1. Def's *Pro Se* PWC to Review the Order of the COA (COAP13-295) 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
415PA12	Amos Tyndall, as *Guardian ad Litem* for Che-Val Batts v. Ford Motor Company and Alejandro Ortiz Rio	1. Motion for Admission of Wendy F. Lumish *Pro Hac Vice* 2. Motion for Admission of Alina Alonso Rodriquez *Pro Hac Vice* 3. Products Liability Advisory Council's Motion for Leave to File *Amicus* Brief	1. Allowed **06/24/13** 2. Allowed **06/24/13** 3. Allowed **06/24/13**

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459P00-3	State v. William M. Huggins	Def's *Pro Se* Petition for *Writ of Mandamus* (COAP13-147)	See Special Order **08/27/13**
488P10-3	Juan Carlos Ramirez v. N.C. Office of Administrative Hearings and Donald W. Overby	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
491A93-4	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
538P11-2	State v. Joshua K. Caudill	1. Def's NOA Based Upon a Constitutional Question (COA12-1064) 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**
576P07-3	Moses Leon Faison v. N.C. Office of Administrative Hearings and Donald W. Overby	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
580P05-5	In Re: David Lee Smith	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **07/22/13**
580P05-6	David L. Smith v. N.C. Office of Administrative Hearings and Donald W. Overby	Def's Pro Se Petition for *Writ of Mandamus*	Denied **07/31/13**
580P05-7	David L. Smith v. N.C. Office of Administrative Hearings and Donald W. Overby	Def's *Pro Se* Motion for Leave to File Motion to Amend or Supplement Brief Pursuant to N.C.G.S. to His Application for *Writ of Mandamus*	Dismissed

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003P08-2	Adams Creek Associates, a North Carolina Limited Partnership with Billy Dean Brown, General Partner v. Melvin Davis and Licurtis Reels	Defs' PDR Under N.C.G.S. § 7A-31 (COA12-1200)	Denied
005PA12-2	Hoke County Board of Education, et al. v. State of North Carolina, et al.	Attorney Qureshi's Motion to Withdraw as Counsel	Allowed **09/17/13**
017P13-2	State v. Ca'Sey R. Tyler	1. Def's *Pro Se* Motion for Review En Banc (COAP12-984) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of the Superior Court of Onslow County 3. Def's *Pro Se* Motion for Proof of Jurisdiction 4. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Dismissed 4. Allowed
029A13	Johnston v. State of North Carolina	State's Motion to Substitute Counsel	Allowed **08/26/13** **Beasley, J. Recused**
057P13	Kenneth W. Baker Jr., as administrator of the estate of Keith Allen Baker, v. Carson H. Smith Jr., in his official capacity as Sherriff of Pender County; Glenda Simpson, individually and officially; Fidelity and Deposit Company of Maryland, as surety; New Hanover Regional Medical Center; and Dr. Patrick Martin, M.D., d/b/a Patrick Martin & Associates	Plt's Petition for *Writ of Certiorari* to Review Decision of N.C. Court of Appeals (COA12-560)	Denied **Beasley, J. Recused**

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060P13	Larry Pate Woolard v. Michael D. Robertson, Commissioner N.C. Division of Motor Vehicles	1. State's Petition for *Writ of Supersedeas* (COA12-384) 2. State's Petition for *Writ of Certiorari* to Review the Decision of the COA (COA12-384) 3. Petitioner's Motion for Extension of Time to File Response for Petition for *Writ of Certiorari* 4. Petitioner's Motion for Extension of Time to File A Response to Petition for *Writ of Supersedeas*	1. Denied 2. Denied 3. Allowed **02/12/13** 4. Allowed **02/13/13** **Beasley, J., Recused**
076P13	In the Matter of: A.Y.	1. Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA12-80) 2. Guardian Ad Litem's Motion to Withdraw and Substitute Attorney	1. Denied 2. Allowed
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. Denied 2. See Special Order **03/07/13** **Beasley, J. Recused**
094PA13-2	State v. George Victor Stokes	1. State's Motion for Temporary Stay (COA12-810-2) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 N.C.G.S. § 7A-31	1. Allowed **06/24/13** 2. Allowed 3. Allowed
116P13	Sheila Gregory, Administratrix of the Estate of Travis Bryan Kidd v. Barry Blaine Pearson, in his individual capacity, Sheila Gregory, Administratrix of the Estate of Travis Bryan Kidd v. Cleveland County, Self-McNeilly Solid Waste Management Facility	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA12-742, 12-813) 2. N.C. Association of Self Insurers' Motion for Leave to File Amicus Brief 3. N.C. Association of Staffing Professionals' Motion for Leave to File Amicus Brief 4. N.C. Association of County Commissioners' Motion for Leave to File Amicus Brief	1. Allowed 2. Allowed 3. Allowed 4. Allowed **Beasley, J. Recused**

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131P01-9	State v. Anthony Dove	Def's *Pro Se* Petition for *Writ of Certiorari* to Review the Order of the COA (COAP11-424)	Dismissed
139P13	State v. Quintel Augustine, Tilmon Golphin, and Christina Walters	1. State's Petition for *Writ of Certiorari* to Review Order of Superior Court of Cumberland County 2. Defs' Motion for Extension of Time to Respond to Petition for *Writ of Certiorari* 3. Defs' Motion for Extension of Time to Answer 4. Defs' Motion for Extension of Time to Respond to Petition for *Writ of Certiorari* 5. State's Motion for Leave to File Reply	1. Allowed 2. Allowed **04/1/13** 3. Allowed **06/07/13** 4. Allowed **07/18/13** 5. Allowed **09/06/13** **Beasley, J. Recused**
147P13-2	Perry R. Warren v. NC Office of Administrative Hearings and Donald W. Overby	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
149P13	State v. William Henry Parker	Def's PDR Under N.C.G.S. § 7A-31 (COA12-836)	Denied
159P13	Scott B. Carle and John Simmons v. Wyrick, Robbins, Yates & Ponton, LLP, and Madison E. Bullard, Jr.	Plts' PDR Under N.C.G.S. § 7A-31 (COA12-1093)	Denied
170P13	Hillsboro Partners, LLC v. The City of Fayetteville	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-987)	Denied
191P13-2	Marion L. Sherrod v. N.C. Department of Correction (N.C. Department of Public Safety)	Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP13-575)	Denied

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193P10-2	State v. Rajohn Almann Cruz	1. Def's *Pro Se* Motion for NOA (COAP13-514) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review the Order of COA	1. Dismissed *Ex Mero Motu* 2. Dismissed **Beasley, J. Recused**
207P13	Donald L. Haynesworth v. American Express Travel Related Services Company, Inc., and Ann E. Dodd	1. Plt's NOA Based Upon a Constitutional Question (COA12-472) 2. Plt's Petition in the Alternative for *Writ of Certiorari* to Review the Order of COA 3. Defs' Motion to Dismissed Appeal	1. - - - 2. Denied 3. Allowed
212P13-2	State v. Lionel A. Telfort	Def's *Pro Se* Petition for Re-hearing of Denial of Petition for *Writ of Certiorari*	Dismissed
232P13	State v. Bruce Tyler Murchison	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* (COA12-1321) 3. State's PDR Under N.C.G.S. § 7A-31 (COA12-1321) 4. Def's Conditional PDR Under N.C.G.S. § 7A-31 (COA12-1321)	1. Allowed **05/28/13** 2. Allowed 3. Allowed 4. Allowed
234A13	State of N.C. ex rel. Utilities Commission v. Attorney General, et. al.	1. Motion for Admission of Joseph K. Reid, III *Pro Hac Vice* 2. Motion for Leave to File Brief Under Seal	1. Allowed **09/25/13** 2. Allowed **09/25/13**
235P13	State v. Anthony Dwayne Hairston	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-985)	Denied

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236A12-2	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	1. Def's NOA Based Upon A Constitutional Question (COA11-1263-2) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismiss *Ex Mero Motu* 2. Denied **Beasley, J. Recused**
242P13	Sadie Howard v. County of Durham	Plt's Petition for PDR Under N.C.G.S. § 7A-31 (COA12-1484)	Denied
244P13	State v. Madisa Benea Macon	Def's PDR Under N.C.G.S. § 7A-31 (COA12-812)	Denied
245P13	State v. Orenthial Terrell Smith	Def's Petition for *Writ of Certiorari* to Review the Order of the COA (COAP13-170)	Dismissed
247P03-3	State v. Reginald Terrell Leach	Def's *Pro Se* Motion for Request for Appointment of Counsel	Dismissed

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262P13	State v. Saquan Treay Facyson	1. State's Motion for Temporary Stay (COA12-1300) 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 (COA12-1300)	1. Allowed **06/17/13** 2. Allowed 3. Allowed 4. Denied
271P13	State v. Yasmar Decarlos Washington	1. Def's NOA Based Upon a Constitutional Question (COA12-1294) 2. Def's PDR Under N.C.G.S. § 7A-31 (COA12-1294)	1. Dismissed *Ex Mero Motu* 2. Denied
274P13	Reo Property Corporation, Grady I. Ingles and Elizabeth B. Ellis, Solely in their capacities as substitute trustees under certain deed of trust recorded in book 1370 at page 1522 of the Davidson County Register of Deeds v. Rondal Ralph Smith, wife, Robyn M. Smith A/K/A Robin R. Smith; High Point Regional Health System F/K/A High Point Regional Hospital, Def's; and Alan C. Burton and wife, Julie Berrier Burton, Intervening Defendants	Intervening Defs' PDR Under N.C.G.S. § 7A-31 (COA12-860)	Denied

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288P13	State v. Stevie Lynn Wilson	Def's PDR Under N.C.G.S. § 7A-31 (COA12-772)	Denied
293P13	State v. James Otis Womack, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1006)	Denied
298P13	State v. Paul Dial	1. Def's Motion for Temporary Stay (COA12-1334) 2. Def's Petition for *Writ of Supersedeas* 3. Def's NOA Based Upon a Constitutional Question (COA12-1334) 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismissed Appeal (COA12-1334)	1. Allowed **07/05/13** Dissolved **10/03/13** 2. Denied 3. --- 4. Denied 5. Allowed
302P13	In the Matter of: E.H. and N.H.	1. Juveniles' PDR Under N.C.G.S. § 7A-31 (COA13-273) 2. Juveniles' Motion to Redact Appendices to PDR	1. Allowed 2. Allowed
303P13	In the Matter of: A.A.J and S.D.D.	Respondent-Father's PDR Under N.C.G.S. § 7A-31 (COA12-1555)	Denied
305P13	Albert C. Burgess, Jr. v. The State of North Carolina and the United States Attorney	Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review the Order of the COA (COAP13-427)	Dismissed **08/30/13**
313P10-2	Cheyenne Saleena Stark, a Minor, Cody Brandon Stark, a Minor, by their Guardian ad Litem, Nicole Jacobsen v. Ford Motor Company	1. Plaintiff-Appellant's PDR Under N.C.G.S. § 7A-31 (COA09-286-2) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31 (COA09-286-2)	1. Denied 2. Dismissed As Moot

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314P13	In the Matter of the Foreclosure of a Deed of Trust Executed by Victor Radisi and Elizabeth Anne Radisi in the Original Amount of $395,200.00 Dated April 21, 2006, Recorded in Book 1745, Page 365, Iredell County Registry Substitute Trustee Services, Inc., Substitute Trustee	Petitioners Radisi's *Pro Se* PDR (COA13-74)	Denied
317P13	State v. Robert Gene Bailey	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-1516)	Denied
323P13	State v. Tyler James Storm	Def's PDR Under N.C.G.S. §7A-31 (COA12-1498)	Denied
324P13	State v. Jamie Ray Spake	Defendant-Appellant's PDR Under N.C.G.S. § 7A-31 (COA12-1451)	Denied
326P13	State v. Clifton Earl Williams	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1337)	Denied
328P13	State v. Robert Hines	Def's PDR Under N.C.G.S. § 7A-31 (COA13-50)	Denied
337P13	Catherine Mack, Individually, and Jacatherine McLaughlin, a minor child, by and through her Guardian ad Litem, Catherine Mack v. The Board of Education of the Public Schools of Robeson County	1. Plts' NOA Based Upon a Constitutional Question (COA13-51) 2. Plts' PDR Under N.C.G.S. § 7A-31 (COA13-51)	1. Dismissed *Ex Mero Motu* 2. Denied

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338P13	Mark Tate, Employee v. Richard Loftus and Lori Loftus D/B/A West Point Farms, Employer, Noninsured, and Richard Loftus and Lori, Loftus, Individually	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1468)	Denied
340P13	State v. Matthew Kevin Yow	Def's PDR Under N.C.G.S. § 7A-31 (CO12-1473)	Denied
342P13	State v. Loy Wright	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Mecklenburg County (COAP13-493) 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 Amend and Answer State's Response and Resubmit to Supreme Court	1. Dismissed 2. Allowed 3. Dismissed as Moot 4. Dismissed as Moot
343P13	State v. Paul R. Walton, Jr.	1. Def's *Pro Se* Motion for Writ of Supervisory Control for Review Only (COAP13-336) 2. Def's *Pro Se* Motion for Appointment of Counselor to Review Error	1. Dismissed 2. Dismissed as Moot
344P13	State v. Keith Lamont Carolina	1. Defendant's *Pro Se* Motion for Appropriate Relief 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
346P13	State v. Jamal Nemay Williams	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-1227)	Denied

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348P13	In Re: S.D.W.	1. Petitioner's NOA Based Upon A Constitutional Question (COA12-1362) 2. Petitioner's PDR Under N.C.G.S. § 7A-31 3. Respondent's Motion to Dismissed Appeal 4. Respondent's Motion to Dismissed PDR	1. - - - 2. Allowed 3. Allowed 4. Dismissed as Moot
351A13	Michele P. Parks v. Petsmart, Inc.	Plt's *Pro Se* NOA Based Upon A Constitutional Question (COA12-1511)	Dismissed *Ex Mero Motu*
352P13	State v. Jane B. Jordan	1.Def's PDR Under N.C.G.S. § 7A-31 (COA12-1264) 2. Motion to Withdraw PDR 3. Motion to Withdraw As Counsel 4. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-1264)	1. - - - 2. Allowed 3. Allowed 4. Denied
357P13	State v. Doniesha Elouise Core	Def's PDR Under N.C.G.S. § 7A-31 (COA13-49)	Denied
361P13	State v. Michael Ray Jones	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA13-4)	Dismissed
364P13	Mast, Mast, Johnson, Wells & Trimyer, P.A. v. Keith Lane	Def's Petition for *Writ of Certiorari* to Review the Decision of the COA (COA12-1378)	Denied
365P13	State v. Adrian Shawn Battle	Def's *Pro Se* PDR Under N.C.G.S. § 71-31 (COA13-534)	Dismissed
371P13	State v. William Herbert Pennell, IV	1. State's Motion for Temporary Stay (COA12-1269) 2. State's Petition for *Writ of Supersedeas* (COA12-1269) 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/26/13** 2. Allowed 3. Allowed

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373P13	State v. Sandy Sturdivant-Bey	1. Def's *Pro Se* Motion for PDR (COAP13-528) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
375P13	Janet May and Curtis Hill, co-Administrators of the Estate of Mark Curtis Hill, et al. v. Melrose South Pyrotechnics, Inc., and Ocracoke Civic & Business Association d/b/a Ocracoke Island Civic and Business Association, et al.	Def's Petition for *Writ of Certiorari* to Review Order of COA (COA13-620)	Allowed by Special Order **10/03/13**
376P13	State v. Anthony J. Fennell	1. Def's *Pro Se* Motion for NOA (COAP13-585) 2. Def's *Pro Se* Motion for PDR of a Motion	1. Dismissed 2.Dismissed **Beasley, J., Recused**
378P13	State v. Edward Jay Harwood	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1301)	Dismissed
380P13	Lois Edmondson Bynum, Individually, and Lois Edmondson Bynum, Administratrix of the Estate of James Earl Bynum and Lois Marie Bynum v. Wilson County and Sleepy Hollow Development Company	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA12-779) 2. Defs' Petition in the Alternative for *Writ of Certiorari* to Review Order of COA 3. Brunswick County's Motion for Leave to File Amicus Brief 4. N.C. Association of County Commissioners' Motion for Leave to File Amicus Brief 5. Catawba County's Motion for Leave to File Amicus Brief 6. New Hanover County's Motion for Leave to File Amicus Brief 7. Wake County's Motion for Leave to File Amicus Brief 8. Person County's Motion for Leave to File Amicus Brief	1. Allowed by Special Order 2. Dismissed as Moot 3. Allowed 4. Allowed 5. Allowed 6. Allowed 7. Allowed 8. Allowed

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383P13	State v. Ca'Sey Rafeal Tyler	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review the Order of the COA (COAP13-573) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
390P13	Tiffany N. Tobe-Williams v. New Hanover County Board of Education; a/k/a New Hanover County Schools	1. Motion for Temporary Stay (COA13-679) 2. Respondent's Petition for *Writ of Supersedeas*	1. Denied **09/10/13** 2. Denied
400P13	State v. Baswell Leon Francis	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-1464)	Dismissed
407P13	State v. Shawn Germaine Fraley	1. Def's NOA Upon Constitutional Question (COA13-69) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismissed Appeal	1. - - - 2. Denied 3. Allowed
409P13	State v. Nicholas Jeffries	1. Def's *Pro Se* Motion for Violation of Court Orders 2. Def's *Pro Se* Motion for Immediate Dismissed and Release	1. Denied 2. Dismissed
412P13	Henry Clifford Byrd, Sr. v. Sheriff of Forsyth County and Warden of Forsyth County Detention Center	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **09/13/13**
415PA12	Tyndall v. Ford Motor Company, et al	1. Motion for Admission of Jessica M. Agnelly *Pro Hac Vice* 2. Motion for Admission of J. Kent Emison *Pro Hac Vice*	1. Allowed 2. Allowed **Beasley, J., Recused**

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416P13	Jonathan Francis v. Judge John Doe	1. Plt's *Pro Se* Motion for *Writ of Procedendo* 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
455A05-2	State v. Abdul Francisco Hernandez	1. Def's *Pro Se* Petition for *Writ of Certiorari* 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. Dismissed 2. Allowed 3. Dismissed as Moot
465P12-2	Christopher M. Headen v. NC Office of Administrative Hearings and Donald W. Overby	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
472P08-2	Brenda Livesay, Trustee of Ronald Livesay and Brenda Livesay Family Trust dated March 26, 1998, Brenda Livesay, Guardian ad Litem for Candice Livesay and Ron Livesay, Jr., and Brenda Livesay, Individually v. Carolina First Bank, Safeco Corporation, First National Insurance Company of America, and E.K. Morley, Administrator C.T.A. of the Estate of Ronald B. Livesay, Deceased	1. Plaintiff-Appellants' PDR Under N.C.G.S. § 7A-31 (COA12-1177) 2. L. Cooper Harrell's Motion to Withdraw As Counsel of Record	1. Denied 2. Allowed **Jackson, J. Recused**
500P12-2	State v. William Adam Payseur	Def's *Pro Se* Motion for PDR (COA11-692)	Denied
526P07-3	Mary E. Fulmore, Administrator of the Estate of Priscilla Ann Maultsby v. Gregory Howell and PFS Distribution Company, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-1384)	Denied

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542P11-2	Jeffrey Harliss Freeman v. N.C. Department of Public Safety's Secretary of Corrections and Richard L. Neely, Administrator of Piedmont Correctional Institution	1. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review the Order of the COA (COAP13-500)	1. Denied **10/01/13** 2. Dismissed **10/01/13**

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021PA13	The Glens of Ironduff Property Owners Association, Inc. v. John E. Daly and Constance V. Daly	Motion to Withdraw as Counsel	Denied **10/14/2013**
024PA12	Dewey D. Mehaffey, Employee v. Burger King, Employer and Liberty Mutual Group, Carrier	Plt's Motion to Amend New Brief	Allowed **Beasley, J., recused**
050P12-2	Ovarias Verdad Criego-El v. Director Mr. John W. Smith, Sr., Resident Judge Mr. W. Allen Cobb, Jr., District Attorney Connie Jordan, Clerk(s) for New Hanover County Superior Court District No. 5	1. Plt's *Pro Se* Motion for Judicial Notice 2. Plt's *Pro Se* Motion for Notice of Default	1. Dismissed 2. Dismissed
096P13	State v. Kendall Carpenter	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Guilford 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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099P11-2	State v. Billy J.W. Ross, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP13-141)	1. Dismissed
		2. Def's *Pro Se* Motion of Reconsideration (COAP13-141)	2. Dismissed
		3. Def's *Pro Se* Motion to Amend (COAP13-141)	3. Dismissed
		4. Def's *Pro Se* Motion to Amend Prior Conviction/ Points Levels	4. Dismissed
		5. Def's *Pro Se* Motion to Amend Authentication/Self-Authentication: Public Records/Reports	5. Dismissed
		6. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	6. Allowed
		7. Def's *Pro Se* Motion to Appoint Counsel	7. Dismissed as Moot
		8. Def's *Pro Se* Motion to Amend Detainer *Pre-Opus Con*	8. Dismissed
		9. Def's *Pro Se* Motion Challenging Habitual Felon	9. Dismissed
		10. Def's *Pro Se* Motion to Amend Ineffective Assistance of Counsel	10. Dismissed
		11. Def's *Pro Se* Motion to Amend	11. Dismissed
		12. Def's *Pro Se* Motion to Amend (Double Jeopardy Act)	12. Dismissed **Jackson, J., recused**
103P03-3	State v. Derrick Harrell	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Denied **10/30/2013**
		2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	2. Allowed **10/30/2013**
		3. Def's *Pro Se* Motion to Appoint Counsel	3. Dismissed as Moot **10/30/2013**

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109P13	State v. Ronald Jonathan Ward	Def's PDR Under N.C.G.S. § 7A-31 (COA12-295)	Denied
117P13	Cindy L. Hoyle and Rex Hoyle, Jr. v. KB Toys Retail, Inc., CBL & Associates Management, Inc. d/b/a Hanes Mall, and Frances Ramos	Plts' PDR Under N.C.G.S. § 7A-31 (COA12-473)	Denied
186P11-2	State v. Todd Wayne Worsham	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-1228)	Denied
191P13-4	Marion L. Sherrod v. N.C. Department of Correction (N.C. Department of Public Safety)	Plt's *Pro Se* Motion for Leave to File Amended Complaint	Dismissed as Moot
198P13	State v. Harold Dean Smith, Jr.	1. State's Motion for Temporary Stay (COAP13-233) 2. State's Petition for *Writ of Supersedeas* 3. State's Petition for *Writ of Certiorari* to Review the Order of the COA	1. Allowed **05/03/2013** 2. 3.

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201PA12-2	Margaret Dickson, et al. v. Robert Rucho, et al.	1. Plts' Motion for Recusal of Justice Paul Newby	1. Dismissed
		2. N.C. Law Professors' Motion for Leave to File Amicus Brief	2. Allowed
		3. N.C. Legislative Black Caucus' Motion for Leave to File Amicus Brief	3. Allowed
		4. Motion for Admission of Terry Smith *Pro Hac Vice*	4. Dismissed as Moot
		5. Motion for Admission of Kareem U. Crayton *Pro Hac Vice*	5. Allowed
		6. David Lambeth's Motion for Leave to File Amicus Brief	6. Denied
		7. Election Law Professors' Motion for Leave to File Amicus Brief	7. Allowed
		8. Motion for Admission of Michelle R. Singer *Pro Hac Vice*	8. Allowed
		9. Motion for Admission of Leah J. Tulin *Pro Hac Vice*	9. Allowed
		10. Motion for Admission of Paul M. Smith *Pro Hac Vice*	10. Allowed
		11. Motion for Admission of Jessica Ring Amunson *Pro Hac Vice*	11. Allowed
		12. Corrected Motion for Admission of Terry Smith *Pro Hac Vice*	12. Allowed
221P13	Jeffrey Higginbotham v. Thomas A. D'Amico, M.D. and Duke University Health System, Inc.	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA12-1099)	1. Denied
		2. Plt's PDR Under N.C.G.S. § 7A-31	2. Denied
227P13	State v. Julie Ann Noble	Def's PDR Under N.C.G.S. § 7A-31 (COA12-734)	Denied

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232PA13	State v. Bruce Tyler Murchison	Def's Motion for Clarification	Denied **10/14/2013**
241P13	State v. Anthony Coleman	1. State's Motion for Temporary Stay (COA12-946) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/10/2013** 2. 3.
252A95-2	State v. Carl Lorice Brewton	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Buncombe County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion for Judicial Notice and Proclamation	1. Denied 2. Allowed 3. Dismissed
252P13	In the Matter of: Suttles Surveying, P.A. License No. C-0648 (North Carolina Board of Examiners for Engineers and Surveyors Case No. V2009-027) In the Matter of: Kenneth D. Suttles, PLS License No. L-2678 (North Carolina Board of Examiners for Engineers and Surveyors Case No. V2009-064)	1. Petitioners' NOA Based Upon a Constitutional Question (COA12-1350) 2. Petitioners' PDR Under N.C.G.S. § 7A-31 3. Respondent's Motion to Dismiss Appeal	1. - - - 2. Allowed 3. Allowed
253P13	State v. Latius Tirrell Brown	Def's PDR Under N.C.G.S. § 7A-31 (COA12-952)	Denied
261P13	State v. Gene Allen Hodges, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA12-915)	Denied
267P13	State v. Mario Bell	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1514)	Denied
268P13	State v. Edward Joseph Gardner, IV	Def's PDR Under N.C.G.S. § 7A-31 (COA12-969)	Denied

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272P13	Laurence Sasso, as Representative and Willing Administrator of the Estate of Josephine Sasso Tims (Deceased), and as the Representative Guardian of Cecile Sasso Lutman, Laurence Sasso and Glynn Davis, as Co-Administrators and Representatives of the Estate of Garry Wayne Lutman (Deceased) v. Statesville Flying Services, Inc., a North Carolina Corporation and the City of Statesville, North Carolina, a North Carolina Municipal Corporation	Plts' PDR Under N.C.G.S. § 7A-31 (COA12-935)	Denied
279P13	John C. Russell and wife, Dawn Russell v. N.C. Department of Health and Human Services (Defendant formerly N.C. Department of Environment and Natural Resources)	Def's PDR Under N.C.G.S. § 7A-31 (COA12-801)	**Denied**
281P13	George King, d/b/a George's Towing and Recovery v. Town of Chapel Hill	1. Plt's Motion for Temporary Stay (COA12-1262) 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 (COA12-1262) 5. Def's Motion to Dismiss Appeal	1. Allowed **06/25/2013** 2. Allowed 3. - - - 4. Allowed 5. Allowed
287P13	Brenda Hanes Redd v. Wilcohess, L.L.C., and A.T. Williams Oil Company	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-639-2)	Denied

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302PA13	In the Matter of: E.H. and N.H.	1. Juveniles' PDR Under N.C.G.S. § 7A-31 (COA13-273) 2. Juveniles' Motion to Redact Appendices to PDR 3. Respondent-Mother's Motion to Join Appellant-Petitioner-Guardian *ad Litem* for the Children's PDR 4. Respondent-Mother's Motion to Participate in Briefing and Oral Argument	1Allowed **10/03/2013** 2. Allowed **10/03/2013** 3. Allowed **10/15/2013** 4. Allowed **10/15/2013**
304P13	Toni Anway, Dr. Ernest Berrisford, Elizabeth Bosarge, Calvin Bosarge, Jr., Alonzo Edwards, Terry Fleming, Regina C. Fleming, Iris J. Fleming, Jerry V. Fleming, Hector Garcia, Elizabeth Langdon, Paul Mees, and Gladys Mees v. Silver Creek Community Property Owners Association, Inc.	1. Plts' Motion for Temporary Stay (COA12-1460) 2. Plts' Petition for *Writ of Supersedeas* (COA12-1460) 3. Plts' PDR Under N.C.G.S. § 7A-31 (COA12-1460) 4. Def's Motion to Dismiss Motion for Temporary Stay (COA12-1460)	1. Allowed **07/09/2013;** Dissolved the Stay **11/07/2013** 2. Denied 3. Denied 4. Dismissed as Moot
311P10-4	State v. Gregory Scott Grosholz	1. Def's *Pro Se* Motion to Reverse Conviction and Sentence Today if Not Sooner 2. Def's *Pro Se* Motion to Prove Denial of Justice 3. Def's *Pro Se* Motion for Request for Discretionary Review 4. Def's *Pro Se* Motion for Dismissal of Conviction, Sentence and Charge with Prejudice 5. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed as Moot **Beasley, J., recused**
315P13	State v. Travis Kenyel Sanders	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA11-88)	Allow by Special Order

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319P13	State v. Tracy Allen Poole	1. Def's Motion for Temporary Stay (COA12-1150) 2. Def's Petition for *Writ of Supersedeas* 3. Def's NOA Based on a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Appeal	1. Allowed **07/19/2013**; Dissolved the Stay **11/07/2013** 2. Denied 3. - - - 4. Denied 5. Allowed
330P13	State v. William Curtis Lowery	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-1129) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
335P13	State v. Carlos Jerome Gordon	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-1318)	Denied
337P13	Mack, et al. v. The Board of Education of the Public Schools of Robeson County	Def's Motion to Substitute Counsel	Dismissed as Moot **10/16/2013**
339P08-2	State v. Tommie Park	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review the Order of the COA (COAP11-279) 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
341P13	Tammy and Lester Watts v. Clarence Woodrow Bell, Jr., Individually and in His Capacity as General Manager of American General Financial Services, Inc., and American General Financial Services, Inc., d/b/a American General Finance	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-1553)	Denied

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347P13	State v. Wesley Deland Stevens	1. State's Motion for Temporary Stay (COA12-1394) 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 **08/05/2013**; Dissolved the Stay **1/07/2013** 2. Denied 3. Denied 4. Dismissed as Moot
354P13	State v. Ramirez	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA13-213)	Denied
356P13	State v. Nathaniel Gillespie, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Mecklenburg 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
358P13	Thomas A. Rider and Linda R. Rider v. Ron Aderhold, RAD Construction Management, Inc., Boston/South Investment, Inc., and First Citizens Bank and Trust Company	Plt's PDR Under N.C.G.S. § 7A-31 (COA13-57)	Denied
363P13	State v. Osman Gamez	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1488)	Denied
366P13	State v. Lester Gerard Packingham	1. State's Motion for Temporary Stay (COA12-1287) 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 **08/26/2013** 2. Allowed 3. - - - 4. Allowed 5. Allowed

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367P13	Tracy C. Barrett v. SSC Charlotte Operating Company, LLC, and SavaSenior Care d/b/a Brian Center Health and Rehabilitation/Charlotte, Caryn Whitley, and Helen McDougald	1. Defs' (SSC Charlotte Operating Company, LLC, Caryn Whitley, and Helen McDougald) PDR Under N.C.G.S. § 7A-31 2. Defs' (SSC Charlotte Operating Company, LLC, Caryn Whitley, and Helen McDougald) Motion for Temporary Stay 3. Defs' (SSC Charlotte Operating Company, LLC, Caryn Whitley, and Helen McDougald) Petition for *Writ of Supersedeas*	1. Denied 2. Allowed **09/10/2013;** Dissolved the Stay **11/07/2013** 3. Denied
368P13	State v. Michael Paul Miller	1. State's Motion for Temporary Stay (COA13-81) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/26/2013** 2. 3. **Beasley, J., Recused**
370P13	State v. Ralph Eugene Frady	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 (COA12-1375) 4. Def's Conditional PDR Under N.C.G.S. § 7A-31 (COA12-1375)	1. Allowed **08/26/13** 2. 3. 4.
372P13	State v. Adam Collier Derbyshire	1. State's Motion for Temporary Stay (COA12-1382) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/27/2013** 2. 3. **Beasley, J., Recused**
374P13	State v. Marvin Wade Millsaps	1. Def's *Pro Se* Motion for Leave to Unseal Discovery Materials 2. Def's *Pro Se* Motion for Order Setting Aside Habitual Judgment and Imposing Judgment on Substantive Offense	1. Dismissed 2. Dismissed

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377A13	Kylie Lynn Coleman v. Daniel Wayne Orr	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA13-8) 2. Def's *Pro Se* Amended NOA Based Upon a Constitutional Question (COA13-8)	1. Dismissed as Moot 2. Dismissed *Ex Mero Motu*
379P10-3	State v. Ralph Franklin Fredrick	1. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied **10/16/2013** 2. Allowed **10/16/2013**
379P13	State v. Eric Lars Knudsen	State's PDR Under N.C.G.S. § 7A-31 (COA12-1475)	Denied
380PA13	Lois Edmondson Bynum, Individually, and Lois Edmondson Bynum, Administratrix of the Estate of James earl Bynum and Lois Marie Bynum v. Wilson County and Sleepy Hollow Development Company	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA12-779) 2. Defs' Petition in the Alternative for *Writ of Certiorari* to Review Order of COA 3. Brunswick County's Motion for Leave to File Amicus Brief 4. N.C. Association of County Commissioners' Motion for Leave to File Amicus Brief 5. Catawba County's Motion for Leave to File Amicus Brief 6. New Hanover County's Motion for Leave to File Amicus Brief 7. Wake County's Motion for Leave to File Amicus Brief 8. Person County's Motion for Leave to File Amicus Brief 9. N.C. League of Municipalities' Motion for Leave to File Amicus Brief 10. Town of Cornelius' Motion for Leave to File Amicus Brief 11. Town of Cramerton's Motion for Leave to File Amicus Brief	1. Allowed by Special Order 2. Dismissed as Moot 3. Allowed 4. Allowed 5. Allowed 6. Allowed 7. Allowed 8. Allowed 9. Allowed **10/09/2013** 10. Allowed **10/09/2013** 11. Allowed **10/09/2013**

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381P13	State v. Jeffrey Scott Reese	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review the Order of Guilford County Superior Court 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Defendant's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as Moot **Jackson, J., recused**
382P13	State v. Vincent Cox	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-505) 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
384P13	Melissa S. Washburn (now Shaver) v. Edward Nollie Washburn, IV	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1535)	Denied
385P13	Douglas Kirk Lunsford v. Thomas E. Mills, James W. Crowder, III, and Shawn T. Buchanan	1. Unnamed Def's (Farm Bureau) Motion for Temporary Stay (COA13-167) 2. Unnamed Def's (Farm Bureau) Petition for *Writ of Supersedeas* 3. Unnamed Def's (Farm Bureau) PDR Under N.C.G.S. § 7A-31	1. Allowed **09/06/2013** 2. Allowed 3. Allowed
387P13	State v. James Gregory Armistead	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1315)	Denied
388P13	State v. DeMaris Lamar Grice	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1448)	Denied
390P13	Tiffany N. Tobe-Williams v. New Hanover County Board of Education; A/K/A New Hanover County Schools	Motion to Withdraw as Counsel	Allowed
391P13	State v. Mark Allan Biddix	Def's *Pro Se* Petition for *Writ of Mandamas*	Dismissed

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392P13	State v. Robert T. Walston, Sr.	1. State's Motion for Temporary Stay (COA12-1377) 2. State's Petition for *Writ of Supersedeas* (COA12-1377) 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/09/13** 2. 3.
393P13	Stave v. Barry Butler	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP13-359) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
394P06-2	State v. Roy Charles Thompson	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP13-694)	Dismissed
397P13	State v. Kenneth Shawn Lunsford	Def's PDR Under N.C.G.S. § 7A-31 (COA13-94)	Denied
399P13	Ted B. Lockerman, Administrator D/B/N of the Estates of Ellen Dudley Spell, Deceased, and Sulie Daniels Spell, Deceased, on Behalf of the Estates and on Behalf of All Others Similarly Situated v. South River Electric Membership Corporation, a North Carolina Electric Membership Cooperative	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-1450)	Denied
401A13	Riggings Homeowners, Inc. v. Coastal Resources Commission of the State of North Carolina	1. Respondent's NOA Based Upon a Dissent 2. Respondent's Motion for Temporary Stay 3. Respondent's Petition for *Writ of Supersedeas* 4. Respondent's PDR as to Additional Issues	1. - - - 2. Allowed **09/11/2013** 3. Allowed **09/11/2013** 4.

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402P11-5	State v. Sylvester Eugene Harding III	1. Def's *Pro Se* Motion for Appeal as a Right (COAP13-682) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review the Order of the COA 3. Def's *Pro Se* Petition for *Writ of Habeas Corpus*	1. Dismissed 2. Dismissed 3. Denied **10/30/2013**
403P13	State v. James David Corrothers	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1569)	Denied
404P13	Robert A. Izydore v. City of Durham (Durham Board of Adjustment) and Sun River Builders Signature Homes, Inc., Stacy A. Crabtree, Necessary Parties	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA12-1284)	Denied
410P13	State v. David Clayton Harper	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-614) 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
412P13-2	Henry Clifford Byrd, Sr. v. State of N.C. and Sheriff of Forsyth County	1. Petitioner's *Pro Se* Petiton for *Writ of Habeas Corpus* 2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied **10/10/2013** 2. Allowed **10/10/2013**
413P13	State v. Travis Christopher Lemmond	Def's Petition for *Writ of Certiorari* to Review Order of COA (COAP12-1011)	Denied
415P13	State v. Kelvin W. Sellars-El	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA12-199)	Dismissed

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417P13	State v. Jerry Windom	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP13-535)	Dismissed
418P13	State v. Charles Wharton A/K/A Hillery Boyce	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Beaufort County	Dismissed
419P13	State v. Johnathan Blake Perry	Def's PDR Under N.C.G.S. § 7A-31 (COA13-30)	Denied
420P13	Jason Lee Smith and Stacie Ann Smith, Hershel E. Smith (Deceased) v. Rhoda B. Smith	Def's PDR Under N.C.G.S. § 7A-31 (COA13-151)	Denied
421A13	State v. Dorothy Hoogland Verkerk	1. State's Motion for Temporary Stay (COA12-1579) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 (COA12-1579) 4. Def-Appellant's Motion for Temporary Stay 5. Def-Appellant's Petition for *Writ of Supersedeas* 6. Def-Appellant's NOA Based on a Dissent 7. Def-Appellant's NOA Based on a Constitutional Question 8. Def-Appellant's PDR 9. State's Motion to Dismiss NOA	1. Allowed **09/20/2013** 2. Allowed 3. Allowed 4. Allowed **10/01/2013** 5. Allowed 6. - - - 7. - - - 8. Denied 9. Allowed
422P13	State v. Bradley Graham Cooper	1. State's Motion for Temporary Stay (COA12-926) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/20/2013** 2. 3.

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423P13	State v. Jory Joseph Marino	1. Def's Motion for Temporary Stay (COA12-1422) 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	1. Allowed **09/25/2013;** Dissolved the Stay **11/07/2013** 2. Denied 3. Dismissed *Ex Mero Motu* 4. Denied
431P13	State v. Arnulfo Agustin	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1065)	Denied
432P13	State v. Frankie Lee McClain	Def's *Pro Se* Motion to Dismiss the Offense/Charges	Dismissed
433P13	State v. Johnny Ray Gordon	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-602)	Dismissed
434P13	State v. Darwin Vernell Christian	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-162)	Denied
435A96-5	State v. Walic Christopher Thomas	1. Def's Motion to Stay Petition for *Writ of Certiorari* 2. Def's Petition for *Writ of Certiorari* to Review the Decision of the Superior Court of Guilford County 3. Def's *Pro Se* Motion to Withdraw All Appeals 4. State's Motion for Leave to Substitute Counsel of Record	1. 2. 3. Dismissed **12/15/2010** 4. Allowed
437P13	State v. Mickey Laverne Locklear	1. Def's *Pro Se* Motion for NOA (COAP13-570) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP13-570)	1. Dismissed *Ex Mero Motu* 2. Dismissed

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439P13	Calvin and Sandra Latimer v. Internal Revenue Service	1. Plt's *Pro Se* Motion for Complaint of Unauthorized Collection 2. Plt's *Pro Se* Motion to Revisit Mandate and Evidence 3. Plt's *Pro Se* Motion for Sanctions on I.R.S. Collection While in Review	1. Dismissed 2. Dismissed 3. Dismissed
440P13	State v. Bobby Lee Fisk, Jr.	1. State's Motion for Temporary Stay (COA13-11) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/30/13** 2. 3.
441P13	State v. Jeroen M. Eve	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **10/08/2013**
443P13	State v. Anthony M. King	1. Def's *Pro Se* Motion for NOA 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed *Ex Mero Motu* 2. Dismissed 3. Dismissed as Moot
449P13	State v. Gilbert Floyd Brown	1. Def's PDR Under N.C.G.S. § 7A-31 (COA13-77) 2. Def's Motion for Temporary Stay 3. Def's Petition for *Writ of Supersedeas* 4. State's Motion to Substitute Counsel	1. Denied 2. Allowed **10/08/2013**; Dissolved the Stay **11/07/2013** 3. Denied 4. Allowed **10/17/2013**

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450A08-2	Harriett Hurst Turner and John Henry Hurst v. The Hammocks Beach Corporation Inc., Nancy Sharpe Caird, Seth Dickman Sharpe, Susan Spear Sharpe, William August Sharpe, North Carolina State Board of Education, Roy A. Cooper, III, In His Capacity as Attorney General for the State of North Carolina	1. Def's (Hammocks Beach Corporation, Inc.) PDR Under N.C.G.S. § 7A-31 (COA11-1420) 2. Def's (North Carolina State Board of Education) PDR Under N.C.G.S. § 7A-31 (COA11-1420) 3. Plts' Conditional PDR Under N.C.G.S. § 7A-31 (COA11-1420) 4. Plts' Conditional Petition for *Writ of Certiorari* to Review Order of Superior Court of Wake County	1. Allowed 2. Allowed 3. Allowed 4. Allowed
455P13	State v. Marty Tarrell Gaston	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1)	Denied
457P13	State v. Richard Ula Helms, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1436)	Denied
460P13	Christopher Bullard v. N.C. Dept. of Public Safety, Div. of Adult Corrections, et. al.	1. Plt's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP13-487) 2. Plt's *Pro Se* Petition for *Writ of Mandamus*	1. Denied **10/18/2013** 2. Denied **10/18/2013**
461A13	State v. Christopher L. Barnes	Motion of Anna S. Lucas to Withdraw as Appointed Counsel	Allowed **10/15/2013**
465P13	State v. Donald Oliver Ray Jones	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-602)	Denied

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469P13	State v. Shannon Devon Ashe	1. State's Motion for Temporary Stay (COA13-298) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/18/2013** 2. 3.
471P13	John Walter Lawson and Margaret (Meg) Elizabeth Lawson Darling v. Heidi Cavanagh Lawson, Jacqueline Cavanagh Hughes, Mark Caprise, Deputy Sheriff PJ Mullen, Deputy Sheriff Michael Brannon, Corporal Claybourn Harper, Sheriff William Schatzman, Hartford Insurance, Lieutenant Max Creason, and Chief Kenneth Gamble	Plts' PDR Prior to a Decision of the COA	Denied
472P13	In the Matter of: N.J.	1. State's Motion for Temporary Stay (COA13-53) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **10/21/2013** 2.
481P13	State v. Danny Lamont Thomas	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/24/2013** 2. 3. **Beasley, J., recused**
482P13	Carl Lynn Williams v. Governor, Pat McCrory	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **10/28/2013**
483P13	Robert Andrew Bartlett, Sr. v. Kieren J. Shanahan, Secretary, N.C. Department of Public Safety	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **10/28/2013**

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493P13	State v. Jasmine Antoinette Lewis	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **10/04/2013** 2.
494P13	State v. Lance Adam Goldman	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 (COA12-1509)	1. Allowed **11/04/2013** 2. 3.
500P12-3	State v. William Adam Payseur	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA11-692) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Dismissed as Moot
504P13	Lewis K. Archie v. Brad Perritt Inst.	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied
514PA08-3	State v. Bobby E. Bowden	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's Petition for *Writ of Certiorari* to Review Decision of COA (COA12-1072)	1. Allowed **09/09/2013** 2. Allowed 3. Allowed
531P02-3	State v. Vincent Brady Allen	1. Def's *Pro Se* Motion for NOA for Discretionary Review (COAP13-652) 2. Def's *Pro Se* Motion for PDR (COAP13-652)	1. Dismissed 2. Dismissed
539P03-6	State v. Harris Emanuel Ford	Def's *Pro Se* Petition for *Writ of Certiorari* to Review the Order of the COA (COAP13-502)	Dismissed **Hudson, J., recused**

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559P11-2	Bruce Lee Griffin v. Mike Ball, Administrator, Alm. Corre. Inst. #4680	1. State's Motion for Temporary Stay (COAP13-596) 2. State's Petition for *Writ of Supersedeas* 3. State's Petition for *Writ of Certiorari* to Review Order of COA 4. Petitioner's Motion to Appoint Counsel	1. Allowed **08/28/2013** 2. Allowed 3. Allowed 4. Allowed **Beasley, J., recused**
568P02-2	State v. Albert Thomas Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review the Order of the COA (COAP13-504) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed

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026P10-2	Jorge Galeas, Jr. v. FNU Muro, FNU McKnight, FNU Condrey, FNU Gatling, A Cordy, FNU Graham, Colbert L. Respass, Felix C. Taylor, Randy Cartwright, George T. Soloman, FNU Madry, FNU Gray, and FNU Akbar	Plt's *Pro Se* Motion for Complaint	Dismissed
047P02-16	State v. George W. Baldwin	1. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied **12/04/2013** 2. Allowed **12/04/2013**
051PA13	Jacques A. Dallaire and wife, Fernande Dallaire v. Bank of America N.A., Homefocus Services, LLC, and Landsafe Services, LLC	Def's (Bank of America N.A.) Motion for Extension of Time to File Reply Brief	Allowed **11/26/2013** **Beasley, J., recused**
089P13	Lashanda Shaw v. The Goodyear Tire & Rubber Company	Plt's Motion for Reconsideration	Dismissed **Beasley, J., Recused**
104P11-5	State v. Titus Batts	Def's *Pro Se* Motion to Dismiss	Dismissed
112P13	In the Matter of: A.N.C., Jr.	Juvenile's PDR Under N.C.G.S. § 7A-31 (COA12-482)	Denied
116PA13	Sheila Gregory, Administratrix of the Estate of Travis Bryan Kidd v. Barry Blaine Pearson, in his Individual Capacity Sheila Gregory, Administratrix of the Estate of Travis Bryan Kidd v. Cleveland County, Self-McNeilly Solid Waste Management Facility	N.C. Advocates for Justice's Motion for Leave to File Amicus Brief	Allowed **Beasley, J., recused**

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148P10-8	Lance Adam Goldman v. State of North Carolina; Department of Public Safety; Tabor Correctional Institution	1. Plt's *Pro Se* Motion for Civil Complaint 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
168P09-11	Clyde Kirby Whitley v. State of N.C., Delbert Saucers, Warden	1. Petitioner's *Pro Se* Motion to Enforce Judgment 2. Petitioner's *Pro Se* Motion to Enforce Plea Agreement 3. Petitioner's *Pro Se* Motion for Clarification 4. Petitioner's *Pro Se* Motion for Appointment of Counsel	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed as Moot
173PA13	In the Matter of: Blue Ridge Housing of Bakersville, LLC	Mitchell County's Motion to Amend its New Reply Brief	Allowed **11/22/2013**
191P13-5	Marion Sherrod v. N.C. Department of Public Safety	1. Plt's *Pro Se* Motion for Leave to File Amended Complaint 2. Plt's *Pro Se* Motion for Objection to the Clerk of Supreme Court of North Carolina	1. Dismissed 2. Dismissed
198P13	State v. Harold Dean Smith	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* (COAP13-233) 3. State's Petition for *Writ of Certiorari* to Review the Order of the COA	1. Allowed **05/03/2013** 2. Allowed 3. Allowed by Special Order
201PA12-2	Dickson, et al. v. Rucho, et al.	Plaintiff-Appellants' Motion for Enlargement of Time for Oral Argument	Allowed by Special Order **12/04/2013**
201PA12-2	Dickson, et al. v. Rucho, et al.	Motion to Withdraw Motion for Admission *Pro Hac Vice*	Allowed **12/06/2013**
210P13	Pamela Lynn Brinn O'Neal v. Adam Wayne O'Neal	Appellant's (Cynthia A. Mills) PDR Under N.C.G.S. § 7A-31 (COA12-715)	Denied

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241P13	State v. Anthony Coleman	1. State's Motion for Temporary Stay (COA12-946) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/10/2013** Dissolved **12/18/2013** 2. Denied 3. Denied
248P13	The Estate of Donna S. Ray, by Thomas D. Ray and Robert A. Wilson, IV, Administrators of the Estate of Donna S. Ray, and Thomas D. Ray, Individually v. B. Keith Forgy, M.D., PA, Individually and as Agent/Apparent Agent of Grace Hospital, Inc., and/or Grace Healthcare System, Inc., and/or Blue Ridge Healthcare System Inc., and/or Carolinas Healthcare System, Inc., and as an Agent/Apparent Agent, Employee and Shareholder of Mountain View Surgical Associates and Grace Hospital, Inc., and/or Grace Healthcare System, Inc., and/or Blue Ridge Healthcare System, Inc., and/or Carolinas Healthcare System, Inc.	1. Def's (Grace Hospital, Inc., Blue Ridge Healthcare Systems, Inc., Grace Healthcare System, Inc., and Carolinas Healthcare Systems, Inc.) PDR Under N.C.G.S. § 7A-31 (COA12-1071) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot **Jackson, J. and Beasley, J., recused**
250P13	Carolina Builders, Inc. v. Bible Way Community Development Corporation	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1416)	Denied

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278P13	Nancy L.C. Williams v. David H. Humphreys, MD; Plastic Surgery Center, LLC; James Brown, MD; and Asheville Anesthesia Associates, PA	Defs' PDR Under N.C.G.S. § 7A-31 (COA12-814)	Denied
297P13	State v. Nathan Tyrone Black	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-1510) 2. State's Motion to Dismiss PDR	1. Denied 2. Dismissed as Moot
299P13	Randy Lynn Edwards v. Barry Roy Hackney	Plt's Petition for *Writ of Certiorari* to Review the Decision of COA (COA12-1146)	Denied
311P10-5	State v. Gregory Scott Grosholz	1. Def's *Pro Se* Motion Exposing Miscarriage of Justice System 2. Def's *Pro Se* Motion for Motion, Writ, Petition for Justice Denied Defendant	1. Dismissed 2. Dismissed **Beasley, J., recused**
324P11-3	State v. Mark Daniel Stephens	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP13-766)	Dismissed **Jackson, J., recused**
330P13-2	State v. William Curtis Lowery	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA12-1129) 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
332P13-2	Bobby R. Knox, Jr. v. Davis, et al.	1. Plt's *Pro Se* Motion for NOA 2. Plt's *Pro Se* Motion of Order of Protection Against (DPS) Officials 3. Plt's *Pro Se* Motion for Reconsider Protective Order 4. Plt's *Pro Se* Motion for Preliminary Injunction and Temporary Restraining Order and Protective Order	1. Dismissed *Ex Mero Motu* 2. Dismissed 3. Dismissed 4. Dismissed

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349P13	State v. Shawn Antonio Horskins	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-1489) 2. State's Motion to Deem Response Timely Filed	1. Denied 2. Allowed
359A13	George Christie and Deborah Christie v. Hartley Construction, Inc.; Grailcoat Worldwide, LLC; and Grailco, Inc.	1. Plt's NOA Based Upon a Dissent (COA12-1385) 2. Plt's PDR as to Additional Issues	1. --- 2. Allowed
370P13	State v. Ralph Eugene Frady	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 (COA12-1375) 4. Def's Conditional PDR Under N.C.G.S. § 7A-31 (COA12-1375)	1. Allowed **08/26/2013** Dissolve the Stay **12/18/2013** 2. Denied 3. Denied 4. Dismissed as Moot
378P13-2	State v. Edward Jay Harwood	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA12-1301)	Dismissed
379P10-4	State v. Ralph Franklin Fredrick	1. Def's *Pro Se* Motion for NOA (COAP13-397) 2. Def's *Pro Se* Motion for Petition Appealing Dismissal of *Habeas* Petition for Cause	1. Dismissed 2. Dismissed
386P13	Bryan Debaun v. Daniel J. Kuszaj, A Durham Police Officer in his Individual and Official Capacity; and City of Durham, North Carolina	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-1520)	Allowed by Special Order

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396P13	State v. Scott Allen Fisher	Def's PDR Under to N.C.G.S. § 7A-31 (COA12-1404)	Denied
402P13	State v. Adrian Jomel Williams	Def's PDR Under N.C.G.S. § 7A-31 (COA13-89)	Denied
406P13	State v. Nathaniel H. Smith	1. Def's NOA Based Upon a Constitutional Question (COA12-1527) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
414A13	In the Matter of the Foreclosure of a Lien by Parkway Unit Owners Association, Inc., Against Kamelia K. Shaw, Trustee Under the Kamelia K. Shaw Living Trust Dated April 10, 2003	Respondent's *Pro Se* NOA Based Upon a Constitutional Question (COA12-1380)	Dismissed *Ex Mero Motu*
430P13	State v. James Eric Presson	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1518)	Denied

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436P13	I. Beverly Lake, John B. Lewis, Jr., Everette M. Latta, Porter L. McAteer, Elizabeth S. McAteer, Robert C. Hanes, Blair J. Carpenter, Marilyn L. Futrelle, Franklin E. Davis, James D. Wilson, Benjamin E. Fountain, Jr., Faye Iris Y. Fisher, Steve Fred Blanton, Herbert W. Cooper, Robert C. Hayes, Jr., Stephen B. Jones, Marcellus Buchanan, David B. Barnes, Barbara J. Currie, Connie Savell, Robert B. Kaiser, Joan Atwell, Alice P. Nobles, Bruce B. Jarvis, Roxanna J. Evans, Jean C. Narron, and All Others Similarly Situated v. State Health Plan for Teachers and State Employees, a Corporation, Formerly Known as the North Carolina Teachers and State Employees' Comprehensive Major Medical Plan, Teachers and State Employees' Retirement System of North Carolina, a Corporation, Board of Trustees of the Teachers and State Employees' Retirement System of North Carolina, a Body Politic and Corporate, Janet Cowell, in Her Official Capacity as Treasurer of the State of North Carolina, and the State of North Carolina	1. Defs' PDR Prior to a Determination of the COA (COA13-1006) 2. Plts' Motion to Dismiss PDR	1. Denied 2. Dismissed as Moot

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438P13	State v. Derrick Thomas Bailey	1. Def's *Pro Se* Motion for NOA (COAP 13-553) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed *Ex Mero Motu* 2. Dismissed 3. Allowed
442P13	State v. Louise Middleton Bivens	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-1462)	Denied
445P13	State v. Michael Lamar Shorter	Def's *Pro Se* Motion to Dismiss	Dismissed
449P11-6	State v. Charles Everette Hinton	Def's *Pro Se* Motion for Notice of Judicial Review for *Habeas Corpus*	Denied **11/19/2013**
449P11-7	State v. Charles Everette Hinton	Def's *Pro Se* Motion for Notice of *Writ of Mandamus*	Denied
450P13	State v. Sergio Montez Sorrell	Def's *Pro Se* Petition for *Writ of Certiorari* to Review the Decision of the COA (COA12-572)	Denied
451P13	State v. Anthony Parks Weiss	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1566)	Denied

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453P13	In the Matter of: A.H.L., E.C.L., and L.R.L., Juveniles	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA13-172)	Denied
456P13	In the Matter of: Lawrence Bullock, III	Respondent's PDR Under N.C.G.S. § 7A-31 (COA13-149)	Denied
459P13	State v. John Edward Kuplen	1. Def's *Pro Se* Motion to Suspend or Vary Rules of Procedure to File PDR and Associate Documents (COAP13-577) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Motion for NOA of Right 4. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 5. Def's *Pro Se* Motion for Suspension of Rules	1. Dismissed as Moot 2. Dismissed 3. Dismissed *Ex Mero Motu* 4. Allowed 5. Dismiss as Moot
464P13	State v. Lawan Shante McGill El	1. Def's *Pro Se* Motion for NOA (COAP13-695) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed *Ex Mero Motu* 2. Allowed
466A13	State v. Alphonso Ellis Kirkwood, Larell McDaniel	1. Def's (McDaniel) NOA Based Upon a Constitutional Question (COA12-1359) 2. State's Motion to Dismiss Appeal	1. --- 2. Allowed
467P13	Charles Alonzo Tunstall-Bey v. Doctor Paula Smith, et al.; State of North Carolina	Petitioner's *Pro Se* Motion for NOA (COAP13-702)	Dismissed *Ex Mero Motu*
468P13	State v. Donald Jay Young	Def's *Pro Se* Motion for PDR (COAP13-693)	Dismissed

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470P13	State v. Michael Anthony Peacock	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA13-187) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex o Motu* 2. Denied
473P13	Jonathan White, Jeffrey White, and Barbara White v. Burton Farm Development Company LLC and Boddie-Noell Enterprises, Inc. d/b/a Kitty Hawk Land Company John Dettra and wife, Frances Dettra v. Burton Farm Development Company LLC and Boddie-Noell Enterprises, Inc. d/b/a Kitty Hawk Land Company James Lefevre, Rosalinda Lefevre, Individually and as Trustees of their Respective Living Trust, Alex Lefevre, Diego Dayan, Patrick Dayan, and Inner Banks Partnership, LLC v. Burton Farm Development Company LLC and Boddie-Noell Enterprises, Inc. d/b/a Kitty Hawk Land Company	Plts' PDR Under N.C.G.S. § 7A-31 (COA12-1407)	Denied
474P13	State v. Tyquon Devoeta Meggett	Def's PDR Under N.C.G.S. § 7A-31 (COA13-107)	Denied

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475P13	Bernard Mancuso Jr. and wife, Frances W. Mancuso, Christopher L. Burris and wife, Linda Burris, and Mancuso Development, Inc. v. Burton Farm Development Company LLC and Boddie-Noell Enterprises, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA13-38)	Denied
476P13	State v. Derran Maurice McClain	Def's PDR Under N.C.G.S. § 7A-31 (COA13-371)	Denied
477P13	Muse Moore James, Individually, as Executrix of the Estate of Walton Burton James, Sr., and as Co-trustee of the Trust of Walton Burton James, Sr.; and Walton Burton James, Jr., Individually and on Behalf of Unknown and Unborn Issue of Muse Moore James v. Sue Ann Schoonderwoerd; Patrick James Henderson, Individually and as Co-trustee of Walton Burton James, Jr.; and Michael Hampton Henderson	Plts' PDR Under N.C.G.S. § 7A-31 (COA12-1457)	Denied
478A13	State v. Benjamin Scott Marlow	1. Def's NOA Based Upon a Constitutional Question (COA13-18) 2. State's Motion to Dismiss Appeal	1. --- 2. Allowed
479P13	State v. Tyrone Alsbrooks	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-414) 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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480P13	State v. William Leon Chestnut	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA13-32) 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
481P13	State v. Danny Lamont Thomas	1. State's Motion for Temporary Stay (COA13-175) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/24/2013** Dissolved **12/18/2013** 2. Denied 3. Denied **Beasley, J., recused**
485P13	State v. Charles Byrd	1. Def's *Pro Se* Motion for Notice of Appeal (COAP12-1032) 2. Def's *Pro Se* Motion for Arrest of Judgment	1. Dismissed *Ex Mero Motu* 2. Dismissed
486P13	Thomas T. Dillard, Jr. v. Cynthia Vester and Michael Deans Vester	1. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP13-288) 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Plt's *Pro Se* Motion to Procure Original Records	1. Denied 2. Allowed 3. Dismissed as Moot
487P13	State v. Kevin E. Hedgepeth	Def's *Pro Se* Motion for Notice: Appellate Division	Dismissed
488P13	State v. Michael E. Hernandez	Def's *Pro Se* Motion for PDR (COAP13-685)	Dismissed

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489P13	Nicholas Burnham v. S & L Sawmill, Inc., Randy D. Miller Lumber Company, Inc., and Randy D. Miller, Janet B. Miller and Ryan Miller, Individually and as Officers and Sole Owners of the Corporation	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-1581)	Denied
491P13	State v. Jonathan Conlanges Boykin	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-487)	Denied
493P13	State v. Jasmine Antoinette Lewis	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/04/2013** Dissolved **12/18/2013** 2. Denied 3. Denied
495P13	State v. Terry L. Long	Def's *Pro Se* Petition for *Writ of Mandamus* (COAP13-738)	Denied
496P13	State v. Sheila Ann Carter	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-1550)	Denied
497P13	State v. Parnell Monroe, III	Def's PDR Under N.C.G.S. § 7A-31 (COA13-232)	Denied
499P13	State v. Thomas Howard Grooms, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1183)	Denied

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500P13	Federal National Mortgage Association v. Russell McLean, IV	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-364)	Denied
506P13	Terrance L. James-Bey, Ex Rel., Terrance James v. State of North Carolina	1. Petitioner's *Pro Se* Motion for NOA (COAP13-788) 2. Petitioner's *Pro Se* Motion for Application for *Writ of Supersedeas*	1. Dismissed *Ex Mero Motu* 2. Dismissed as Moot
507P13	State v. Raul Retana Ramos	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-255)	Denied
508P13	State v. Norbert Glen Richardson	1. Def's *Pro Se* Motion for PDR Review (COAP13-515) 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
509P13	State v. Robert Lee Golden	1. Def's *Pro Se* Motion for PDR (COAP13-776) 2. Def's *Pro Se* Motion to Proceed As Indigent	1. Dismissed 2. Allowed
511P13	State v. Willie Graham Downey, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP12-867) 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
512P13	State v. Billy M. Parrish	Def's *Pro Se* Motion for NOA (COAP13-853)	Dismissed *Ex Mero Motu*

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513P13	State v. Edward J. Watson	Def's *Pro Se* Motion for North Carolina Supreme Court to Review for State *Habeas* Relief from a Final Decision from COA (COAP13-759)	Denied
515P13	State v. Malcom L. Kinley Jr.	1. Def's *Pro Se* Motion for NOA 2. Def's *Pro Se* Motion for PDR	1. Dismissed *Ex Mero Motu* 2. Dismissed
519P13	State v. Morris S. McDonald	Def's PDR Under N.C.G.S. § 7A-31 (COA13-210)	Denied
524P13	Arnold Floyd Johnson v. Crossroads Ford, Inc.	Def's PDR Under N.C.G.S. § 7A-31 (COA13-173)	Denied
525P13	State v. Dennis O'Keith Blackwell	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-296)	Denied
526P13	State v. Timothy Glen Mills	Def's PDR Under N.C.G.S. § 7A-31 (COA13-497)	Denied
529P13	State v. Nicholas Shay Plemmons	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **11/22/2013**
530P13	State v. John Kwame Malunda, III	1. State's Motion for Temporary Stay (COA13-372) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/22/2013** Dissolved the Stay **12/18/2013** 2. Denied 3. Denied
534P13	State v. Daniel Fred Larson	Def's PDR Under N.C.G.S. § 7A-31 (COA13-163)	Denied

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535P13	Jennifer Tyll and David Tyll v. Joey Berry	Def's *Pro Se* Motion to Review (COA13-1137)	Denied
536P00-6	State v. Terrance L. James	1. Def's *Pro Se* Motion for NOA (COAP13-598) 2. Def's *Pro Se* Motion for Averment of Jurisdiction	1. Dismissed *Ex Mero Motu* 2. Dismissed
539P13	State v. Jamara Washington	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-108)	Denied
541P13	Mohammed Reza Taheri Azar v. State	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/03/2013**
542P13	State v. Roosevelt Erick Lincoln	Def's *Pro Se* Motion for PDR (COA03-288)	Dismissed
547A06-2	State v. Michael Iver Peterson	1. State's PDR Under N.C.G.S. § 7A-31 (COA12-1047) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
547P13	State v. Andre Amon Thompson aka Andre Amon Bey	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/10/2013**

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004P14	State v. Raymond Dakim Harris Joiner	1. Def's *Pro Se* Motion for Appropriate Relief 2. Def's *Pro Se* Motion for Preparation of Stenographic Transcript 3. Def's *Pro Se* Motion to Set Aside Judgment 4. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Dismissed 4. Allowed
005A14	State v. Glenn Edward Benters	1. State's Motion for Temporary Stay (COA13-305) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/07/2014** 2. Allowed 01/07/2014 3. ---
016P14	State v. Richard Stephen Burcham	1. Def's *Pro Se* Motion for Appropriate Relief 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
017P14	State v. Michael Wayne Burton	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA12-354) 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
020P14	State v. Richard L. Elliot	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **01/17/2014**
085P13	Jemm, Inc. v. Charles C. Crawford, III, Robert A. Wolcott, and Jason A. Desiato	Def's (Crawford) PDR Under N.C.G.S. § 7A-31 (COA12-683)	Denied

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099P11-3	State v. Billy J.W. Ross, Jr.	Def's *Pro Se* Motion to Amend Challenging Habitual Felon Act (COAP13-141)	Dismissed **Jackson, J., recused**
139PA13	State v. Quintel Augustine, Tilmon Golphin, and Christina Walters	1. Def's Petition for *Writ of Mandamus* 2. Def's Motion to Withdraw Petition for *Writ of Mandamus* to the Clerk of Superior Court of Cumberland County 3. Def's Motion to Strike 4. Def's Motion to Supplement the Record	1. Withdrawn **01/02/2014** 2. Allowed **01/02/2014** 3. 4. Allowed **Beasley, J., recused**
174P09-2	State v. Anthony Tyrone Burroughs	1. Def's NOA Based Upon a Constitutional Question (COA12-955) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied
189P09-4	Frank L. Perry, Secretary of N.C.D.P.S. v. William T. Henderson	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **01/09/2014**
201PA12-2	Dickson, et al. v. Rucho, et al.	Plts' Motion for Temporary Injunction	Denied **01/23/2014**
201PA12-2	Dickson, et al. v. Rucho, et al.	Motion to Allow the Withdrawal of Clare Barnett as Counsel for NAACP Plaintiff's-Appellant	Allowed **12/23/2013**
237P12-2	State v. Kenneth Wayne Vaughn	Def's PDR Under N.C.G.S. § 7A-31 (COA11-751-2)	Denied

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241A93-3	State v. George Douglas Larrimore	1. Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP13-270) 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 Request to Add Information or Amend	1. Dismissed 2. Allowed 3. Dismissed as Moot 4. Allowed
263P13-2	State v. Tornello Pierce	Def's *Pro Se* Motion for *Writ of Error Corum Nobis*	Dismissed **Beasley, J., recused**
282P13	State v. Anacin William Phillips	1. Def' PDR Under N.C.G.S. § 7A-31 (COA12-852) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
284P13	State v. Ever Alexander Rivas-Batres	1. Def's NOA Based Upon a Constitutional Question (COA12-645) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Allowed as to Issue #3 3. Allowed
291PA12	State v. Glenn Edward Whittington	State's Motion to Amend Record on Appeal (COA11-1197)	Denied
302PA13	In the Matter of: E.H. and N.H.	1. N.C. Guardian ad *Litem* Program's Motion to Leave to File Amicus Brief 2. N.C. Guardian *ad Litem* Program's Motion for Participation in Oral Argument	1. Allowed **11/04/2013** 2. Allowed **01/13/2014**
308P13	State v. Dennis Dwayne Tucker	Defendant-Appellant's PDR Under N.C.G.S. § 7A-31 (COA12-1068)	Denied

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321P13	D. Keith Teague and wife, Penny Teague; Danny Glover, Jr. and wife, Meredith Glover v. Vonda F. Forbes, Executrix of the Estate of James Walter Forbes, Sr., Vonda Dee Forbes, Individually	1. Defendant-Appellants' PDR Under N.C.G.S. § 7A-31 (COA12-1421) 2. Plts' Conditional PDR	1. Denied 2. Dismissed as Moot **Beasley, J., recused**
322P13	Angela S. Smith, Individually and as Guardian *ad Litem* for Zachary A. Smith, Alexis V. Smith, and Johnathan A. Smith, minors, and Matthew A. Smith v. Lake Bay East, LLC; Lake Creek Corporation; Joco, Incorporated; and East Bladen Land Company	1. Defendant-Appellants' PDR Under N.C.G.S. § 7A-31 (COA12-1541) 2. Defendant-Appellants' Motion for Temporary Stay 3. Defendant-Appellants' Petition for *Writ of Supersedeas*	1. Allowed 2. Allowed **08/19/2013** 3. Allowed
325P13	Steven G. Gordon v. Deborah J. Gordon (now James)	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-1126)	Denied
334P13	Halifax Regional Medical Center, Inc. v. Darrell James Brown, M.D., Defendant and Third-Party Plaintiff v. Smith Church Obstetrics & Gynecology, P.C. and Richard Minielly, M.D., Third-Party Defendants	Plaintiff's Petition for *Writ of Certiorari* to Review Decision of the COA (COA12-1480)	Denied
360P13	Ginger A. McKinney (Now Ginger L. Sutphin) v. Joe A. McKinney	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-1152) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot **Beasley, J., recused**

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362A13	State v. Frank Gene Seagle	1. Def's NOA Based Upon a Constitutional Question (COA12-1267) 2. State's Motion to Dismiss Appeal	1. --- 2. Allowed
368P13	State v. Michael Paul Miller	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas (COA13-81) 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Deem Response Timely Filed	1. Allowed **08/26/2013** 2. Allowed 3. Allowed 4. Denied **Beasley, J., recused**
372P13	State v. Adam Collier Derbyshire	1. State's Motion for Temporary Stay (COA12-1382) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. N.C. Conference of District Attorneys, N.C. Sheriffs' Association, and N.C. Association of Police Attorneys' Motion for Leave to File Amicus Brief	1. Allowed **08/27/2013** Dissolved **01/23/2014** 2. Denied 3. Denied 4. Dismissed as Moot **Beasley, J., recused**
380PA13	Bynum v. Wilson County, et al.	Def's (Wilson County) Motion for Extension of Time to File Reply Brief	Allowed **12/27/2013**
389P13	State v. Joshua K. Oliphant and Derrick L. Hamilton	1. Def's (Hamilton) PDR Under N.C.G.S. § 7A-31 (COA12-1219) 2. Def's (Oliphant) *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12-1219) 3. Def's (Hamilton) *Pro Se* Motion for Appropriate Relief	1. Denied 2. Denied 3. Dismissed

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392P13	State v. Robert T. Walston, Sr.	1. State's Motion for Temporary Stay (COA12-1377) 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 **09/09/2013** 2. Allowed 3. Allowed 4. Denied
398P13	State v. Darrell Wayne Summey	1. Def's NOA Based Upon a Constitutional Question (COA12-1405) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
401A13	Riggings Homeowners, Inc. v. Coastal Resources Commission of the State of North Carolina	1. Respondent's NOA Based Upon a Dissent (COA12-1299) 2. Respondent's Motion for Temporary Stay 3. Respondent's Petition for *Writ of Supersedeas* 4. Respondent's PDR as to Additional Issues 5. Petitioner's Motion to Dismiss Appeal 6. Petitioner's Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. Allowed **09/11/2013** 3. Allowed **09/11/2013** 4. Allowed 5. 6. Allowed
408P13	Anne Kimmel Watkins v. Raymond D. Watkins	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1135)	Denied
422P13	State v. Bradley Graham Cooper	1. State's Motion for Temporary Stay (COA12-926) 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 **09/20/2013** Dissolved **01/23/2014** 2. Denied 3. --- 4. Denied 5. Allowed

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425P13	State v. James Christopher Boshers	1. Def's NOA Based on a Constitutional Question (COA12-1344) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
427P13	RL Regi North Carolina, LLC v. Lighthouse Cove, LLC, Lighthouse Cove Development Corp., Inc., Glen C. Stygar, John R. Lancaster, Leticia S. Lancaster, Lionel L. Yow, and Connie S. Yow	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA12-1279) 2. Def's (Connie S. Yow) Conditional PDR Under N.C.G.S. § 7A-31 3. Plt's Motion for Leave to Amend PDR 4. Plt's Petition for *Writ of Certiorari* to Review Decision of COA	1. Allowed 2. Denied 3. Allowed 4. Allowed
435P13	State v. Elder G. Cortez and International Fidelity Insurance Company, Surety and Richard L. Lowery, Surety and Larry D. Atkinson, Surety and Tony L. Barnes Surety International Fidelity Insurance Company v. Elder Giovani Cortez, Johnston County Board of Education; State of N.C.; and Will R. Crocker, in his Official Capacity as Clerk of Superior Court of Johnston County	1. Plt's (International Fidelity Insurance Company) NOA Based Upon a Constitutional Question (COA12-1399) 2. Plt's (International Fidelity Insurance Company) PDR Under N.C.G.S. § 7A-31 3. Def's (Johnston County Board of Education) Motion to Dismiss Appeal 4. Def's (State of N.C. and Will R. Crocker) Motion to Dismiss Appeal 5. Joint Motion to Withdraw NOA and Petition for PDR	1. --- 2. --- 3. --- 4. --- 5. Allowed **Beasley, J., recused**
439P13-2	Calvin and Sandra Latimer v. Internal Revenue Service	Plt's *Pro Se* Motion for Default Go To Judgment	Dismissed

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440P13	State v. Bobby Lee Fish, Jr.	1. State's Motion for Temporary Stay (COA13-11) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/30/2013** Dissolved **01/23/2014** 2. Denied 3. Denied
454P13	Bost Construction Company v. Mary Lynn Baumunk Blondy Willis Coating & Finishes, Inc. v. Bost Construction Company d/b/a Bost Custom Homes f/k/a Bost Builders, Inc. [sic] f/k/a Bost, Inc., Mary Lynn Baumunk Blondy, and Steven M. Blondy Bost Construction Company, Third-Party Plaintiff v. Summerhour and Associates Architects Inc., Flue Sentinel, LLC, Flue Sentinel Inc., et al., Third-Party Defendants	Third Party Defs' (Flue Sentinel, LLC and Flue Sentinel, Inc.) PDR Under N.C.G.S. § 7A-31 (COA12-1454)	Denied **Beasley, J., recused**
455P01-4	State v. Thomas Covington, Jr.	Def's *Pro Se* Petition for *Writ of Certiorari* to Review the Order of the COA (COAP12-958)	Dismissed
458P13	Town of Midland v. Darryl Keith Wayne, Trustee or any Successors in Trust, Under the Darryl Keith Wayne Revocable Trust Agreement, and any Amendments Thereto, Dated February 23, 2007	1. Def's NOA Based Upon a Constitutional Question (COA12-1163) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Allowed

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459P00-4	State v. William M. Huggins	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
463P11-2	State v. Jordan Glenn Peterson	Def's *Pro Se* Motion for a New Trial	Dismissed
472P13	In the Matter of: N.J.	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 (COA13-53) 4. Juvenile's PDR Under N.C.G.S. § 7A-31 (COA13-53)	1. Allowed **10/21/2013** 2. Allowed 3. Allowed 4. Denied
484P13	State v. Jonathan Lee Autery	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-348)	Denied
487P13-2	State v. Kevin Hedgepeth	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed **1/22/2014**
491P12-2	In the Matter of: Tracey E. Cline	Petitioner's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA12964)	Denied
498P13	State v. Willie Lee Holmes	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1580)	Denied
503P13	Charlotte Motor Speedway, LLC and Speedway Motorsports, Inc. v. County of Cabarrus	Plts' PDR Under N.C.G.S. § 7A-31 (COA12-1361)	Allowed
510P13	State v. Floyd Edward May, Sr.	1. State's Motion for Temporary Stay (COA13-37) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/15/2013** 2. Allowed 3. Allowed

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514P13	State v. Raymond Dakim Harris Joiner	Def's *Pro Se* Motion to Set Aside Judgment	Dismissed
522P13	State v. Tunita Shenette Coleman	Def's PDR Under N.C.G.S. § 7A-31 (COA13-373)	Denied
527P13	State v. Rondell Supreme Childress	1. State's Motion for Temporary Stay (COA13-470) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/21/2013** 2. Allowed 3. Allowed 4. Denied
533P13	State v. Anthony Dean Best	Def's PDR Under N.C.G.S. § 7A-31 (COA13-498)	Denied
536P13	State v. Moori El	Def's *Pro Se* Motion to Dismiss for Improper Pleading (COA13-295)	Dismissed
538P13	State v. Ronald Wayne Spann	Def's *Pro Se* Motion for Appropriate Relief	Dismissed

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540P13	Antonio Ford, in her Individual Capacity and on behalf of the Heirs of Lizzie Ward v. City of Wilson; City Council of the City of Wilson; Grant Goings, City Manager of the City of Wilson in his Official Capacity; C. Bruce Rose, Mayor of the City of Wilson in his Official Capacity; Noble G. Blackman, IV, Gwen C. Burton, Avant P. Coleman, Donald I. Evans, James M. Johnson, III, and Willie J. Pitt, City Council Members in their Official Capacities; Charles E. Taylor, Senior Code Enforcement Officer in his Official Capacity	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA13-376) 2. Plt's Petition for *Writ of Certiorari* to Review Decision of COA	1. Dismissed 2. Denied
543P13	State v. Harold Dean Kanupp	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP11-80)	Dismissed
546P13	State v. Melsar Duarte-Gomez	Def's *Pro Se* Motion for PDR (COAP13-845)	Dismissed
548P13	Denise Mathis v. Patsy Dowling, Individually and in her Representative Capacity as Executive Director of Mountain Projects, Inc., et al.	Plt's PDR Under N.C.G.S. § 7A-31 (COA13-380)	Denied

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549P13	Bryan Thompson, as Public Administrator of the Estate of Chelsey Powers v. James Gutierrez, Gerardo Garcia, and Fransisco Ramos	1. Def's (James Gutierrez) PDR Under N.C.G.S. § 7A-31 (COA13-59) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
551P13	In the Matter of: B.G.A.S., J.J.J.Z.Z.W., K.J.G.W., & J.M.E., minor children	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA13-583)	Denied
555P13	State v. Tahashi Matthews	1. Def's NOA Based Upon a Constitutional Question (COA13-277) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied **Hudson, J., recused**
556P13	State v. Timothy John Long	1. Def's NOA Based Upon a Constitutional Question (COA13-347) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Allowed 3. Allowed
558P13	In the Matter of: Application by Town of Smithfield for Approval of Agreement between Electric Suppliers with Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc.	1. Applicant's (Town of Smithfield) PDR Under N.C.G.S. § 7A-31 (COA13-435) 2. N.C. Association of Electric Cooperatives Conditional Motion for Leave to File Amicus Brief 3. Electricities of North Carolina, Inc.'s Conditional Motion for Leave to File Amicus Brief 4. Applicant's (Town of Smithfield) Motion for Withdrawal of Petition for Discretionary Review	1. 2. 3. 4. Allowed **01/16/2014**
559P13	State v. Kevin Terod Holland	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1447)	Dismissed

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563P13	State v. Isaam Mattaay Chaplin	1. Def's NOA Based Upon a Constitutional Question (COA13-393) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
564P13	State v. Delasio Tiyez Wiggins	Def's PDR Under N.C.G.S. § 7A-31 (COA13-233)	Denied
565P13	Sherry Strickland v. Michael Goetz, Sr.	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA13-605) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed *Ex Mero Motu* 2. Denied 3. Allowed
567P13	State v. Manuel Castaneda Moreno	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA12-1402)	Denied
568P13	Lloyd Steven Lane v. North Carolina Department of Public Safety, Division of Prisons; Theodis Bek; Boyd Bennett; Alvin W. Keller; Reuben Young; Robert Lewis; Hattie Pimpong; Patricia Alston; Butch Jackson; Cleo Jenkins; and Kirnan Shanahan	1. Plt's *Pro Se* Motion for NOA (COAP13-670) 2. Plt's *Pro Se* Motion for PDR, Appealing a Petition for Rehearing Denial Pursuant to N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied
572P13	Orlando Hudson and State of North Carolina v. Ernest James Nichols	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Mecklenburg County 2. Def's *Pro Se* Motion to Amend 3. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed 2. Allowed 3. Denied
573P13	State v. Donald Edward Johnson and Jessica Williams	Def's (Williams) PDR Under N.C.G.S. § 7A-31 (COA13-368)	Denied

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

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574P13	State v. Jonathan Ray Williams	Def's PDR Under N.C.G.S. § 7A-31 (COA13-246)	Denied
576P07-4	Moses Leon Faison v. N.C. Parole Commission and Paul G. Butler, Jr.	1. Plt's *Pro Se* Motion for Amended Complaint 2. Plt's *Pro Se* Motion for Discrimination	1. Dismissed 2. Dismissed
578P13	In the Matter of: M.S.M.K.R. and M.S.K.K.R.	Respondent-Mother's *Pro Se* NOA Based Upon a Constitutional Question (COA13-737)	Dismissed *Ex Mero Motu*
581P13	State v. Marshall Lee Brown, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Iredell County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as Moot
582P13	State v. James Samuel Hill, Jr.	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-106)	Denied
583P13	State v. Joseph David Bowden	1. Def's Motion for Temporary Stay (COA13-290) 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 **12/27/2013** Dissolved **01/23/2014** 2. Denied 3. --- 4. Denied 5. Allowed
585P13	State v. Jamar Antonio Martin	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-374)	Denied

STATE OF NORTH CAROLINA v. ERIC STEVEN JONES AND JERRY ALVIN WHITE

No. 527A12

(Filed 7 March 2014)

1. Identity Theft—sufficient evidence of intent

The trial court did not err by denying defendant Jones's motion to dismiss the charge of identity theft where Jones argued that the State failed to prove that he possessed the specific intent necessary for identity theft. Based upon evidence that Jones had fraudulently used other individuals' credit card numbers, a reasonable juror could have inferred that Jones possessed Rini's, Payton's, Daly's, and Batchelor's credit card numbers with the intent to fraudulently represent that he was those individuals for the purpose of making financial transactions in their names. Although Jones contended that the State was required to prove that he intended to represent that he was Rini, Payton, Daly, and Batchelor and not some other individual or an authorized user, it cannot be concluded that the Legislature intended for individuals to escape criminal liability simply by stating or signing a name that differs from the cardholder's name.

2. False Pretenses—indictments—not sufficiently specific—property obtained—"services"

Indictments were insufficient to allege the crime of obtaining property by false pretenses and the trial court property dismissed those charges where the indictments alleged that defendant Jones obtained "services" from Tire Kingdom and Maaco. Like the terms "money" or "goods and things of value," the term "services" does not describe with reasonable certainty the property obtained by false pretenses.

3. Identity Theft—indictments—insufficient—name of recipient

The State must allege the name of the recipient or that the recipient's name is unknown in charging the crime of trafficking in stolen identities. Because the State failed to do so here, the indictments were insufficient to support defendant White's convictions for trafficking in stolen identities and the trial court properly dismissed those charges.

Justice MARTIN concurring part and dissenting in part.

Justice HUDSON 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. ___, 734 S.E.2d 617 (2012), finding no error in a judgment and orders entered on 7 September 2011 by Judge Robert C. Ervin in Superior Court, Mecklenburg County. On 24 January 2013, the Supreme Court allowed petitions by the State and defendant Jones for discretionary review of additional issues. Heard in the Supreme Court on 8 May 2013 by special session in the Old Chowan County Courthouse (1767) in the Town of Edenton pursuant to N.C.G.S. § 7A-10(a).

Roy Cooper, Attorney General, by Kimberly N. Callahan and Joseph L. Hyde, Assistant Attorneys General, for the State-appellant/appellee.

Staples S. Hughes, Appellate Defender, by Andrew DeSimone, Assistant Appellate Defender, for defendant-appellee/appellant Eric Steven Jones.

C. Scott Holmes for defendant-appellee Jerry Alvin White.

JACKSON, Justice.

In this appeal we consider whether the trial court properly denied defendant Eric Steven Jones's motion to dismiss the charge of identity theft, and whether the trial court properly dismissed indictments charging Jones with obtaining property by false pretenses and defendant Jerry Alvin White with trafficking in stolen identities. We conclude that the State presented sufficient evidence to support the jury's determination that Jones possessed the specific intent to commit identity theft. We further conclude that the indictments against Jones and White were insufficient to support the resulting convictions against Jones for obtaining property by false pretenses and against White for trafficking in stolen identities. Accordingly, the decision of the Court of Appeals is affirmed.

In the early morning hours of 2 June 2010, Officer Steven Maloney of the Charlotte-Mecklenburg Police Department initiated a traffic stop of a silver Hyundai Accent that was a suspect vehicle in a financial transaction card theft case. Jones, the driver, was unable to produce a driver's license or vehicle registration card. During a consensual search of the vehicle, Officer Maloney found a Maaco work

order listing James Coleman as the customer and two bags of marijuana. Officer Maloney placed Jones under arrest and conducted a search incident to the arrest. In Jones's wallet, Officer Maloney found, *inter alia*, pieces of paper with the names, addresses, and credit card information of John Rini, James Payton, Sean Daly, and Charles Batchelor.

Subsequent police investigation revealed that each of these individuals had stayed at The Blake Hotel in Charlotte in May 2010. Each man had been checked into the hotel by White and had provided a credit card to him for payment. White confessed that he had written down the names, addresses, and credit card numbers of Payton, Daly, and Batchelor, and had provided this information to another individual; however, White denied recording Rini's information. On various dates in May 2010, unauthorized charges were made on Rini's, Payton's, and Batchelor's credit cards.

Further investigation revealed that on 18 May 2010, an unauthorized purchase was made with Melanie Wright's credit card for the installation of four new tires and rims, an alignment, wiper blades, and brake services for a Hyundai Accent with the same vehicle identification number as the car Jones was driving when arrested. The work order was made under the name "Payton James" or "James Payton," and the credit card receipt was signed with the name "James Payton." On 28 May 2010, Jones paid for paint materials and service, body supplies and labor, and "sublet/towing" of the Hyundai Accent by Maaco with Mary Berry's credit card. This work order was made under the name "James Coleman" and Jones signed the credit card receipt as "Coleman J."

On 7 September 2010, the grand jury returned true bills of indictment charging Jones with four counts of trafficking in stolen identities, two counts of obtaining property by false pretenses, and one count of identity theft. The grand jury indicted White for four counts of trafficking in stolen identities. Jones and White were tried jointly during the 29 August 2011 criminal session of Superior Court in Mecklenburg County. At the close of the State's evidence, defendants moved to dismiss all charges on two grounds: (1) that the indictments were fatally flawed; and (2) that the State's evidence was insufficient. The trial court denied defendants' motions as to insufficiency of the evidence, but deferred ruling on the motions based upon the indictments. Defendants did not present any evidence, and both renewed their motions to dismiss at the close of the evidence.

The jury found Jones not guilty of trafficking in stolen identities but guilty of two counts of obtaining property by false pretenses and one count of identity theft. The jury found White guilty of all four counts of trafficking in stolen identities. The trial court denied Jones's motion to dismiss the charge of identity theft. The trial court then dismissed the charges against Jones for obtaining property by false pretenses and all charges against White for trafficking in stolen identities on the basis that the indictments were "insufficient as a matter of law."

Jones appealed his conviction for identity theft to the Court of Appeals, arguing, *inter alia*, that the State failed to prove that he possessed the specific intent necessary to be convicted of identity theft. *State v. Jones*, ___ N.C. App. ___, ___, 734 S.E.2d 617, 621 (2012). The State appealed the dismissals of the charges against Jones for obtaining property by false pretenses and against White for trafficking in stolen identities. *Id.* at ___, 734 S.E.2d at 621.

The Court of Appeals found no error in the trial court's denial of Jones's motion to dismiss the charge of identity theft. *Id.* at ___, 734 S.E.2d at 622. The court noted that identity theft occurs when a person " 'knowingly obtains, possesses, or uses identifying information of another person, living or dead, *with the intent to fraudulently represent that the person is the other person* for the purposes of making financial or credit transactions in the other person's name.' " *Id.* at ___, 734 S.E.2d at 621 (quoting N.C.G.S. § 14-113.20(a) (2011) (emphasis added)). The court further observed that fraudulent intent may be established "based upon a defendant's conduct or actions." *Id.* at ___, 734 S.E.2d at 621. The court determined that evidence that Jones used the credit card numbers to make purchases and payments on his own behalf when he was not the cardholder or an authorized user was sufficient to raise a reasonable inference of misrepresentation. *Id.* at ___, 734 S.E.2d at 622. The court stated, "[W]hen one presents a credit card or credit card number as payment, he is representing himself to be the cardholder or an authorized user thereof. . . . No verbal statement of one's identity is required, nor can the mere stating of a name different from that of the cardholder negate the inference of misrepresentation." *Id.* at ___, 734 S.E.2d at 622. Therefore, the Court of Appeals concluded that there was sufficient evidence of Jones's intent to commit identity theft and that the trial court properly denied Jones's motion to dismiss the identity theft charge. *Id.* at ___, 734 S.E.2d at 622.

The Court of Appeals also found no error in the trial court's dismissal of the charges against Jones for obtaining property by false pretenses. *Id.* at ___, 734 S.E.2d at 626. The court stated that in charging the crime of obtaining property by false pretenses, " 'it is the general rule that the thing obtained . . . must be described with reasonable certainty, and by the name or term usually employed to describe it.' " *Id.* at ___, 734 S.E.2d at 627 (quoting *State v. Ledwell*, 171 N.C. App. 314, 317, 614 S.E.2d 562, 565 (2005) (alteration in original)). Citing examples of insufficient descriptions, the court concluded that alleging that Jones obtained "services" from Tire Kingdom and Maaco, "without even the most general description of the services or their monetary value," was "plainly insufficient" to sustain the charges. *Id.* at ___, 734 S.E.2d at 627.

The Court of Appeals was divided on the dismissal of the charges against White for trafficking in stolen identities. Relying upon a long line of cases involving illegal trafficking in various substances, the majority below stated that " 'it is necessary . . . to allege in the bill of indictment the name of the person to whom the [transfer] was made or that his name is unknown, unless some statute eliminates that requirement.' " *Id.* at ___, 734 S.E.2d at 627 (second alteration in original) (quoting *State v. Bissette*, 250 N.C. 514, 517, 108 S.E.2d 858, 861 (1959)). Finding no language in either section 14-113.20 or section 14-113.20A of the North Carolina General Statutes eliminating the common law requirement, the majority concluded that the trial court properly dismissed the indictments for failure to name the recipient of the identifying information or to state that the recipient's name was unknown. *Id.* at ___, 734 S.E.2d at 628. The majority stated that naming the recipient was "particularly crucial to avoid the risk of double jeopardy" in cases involving trafficking in stolen identities because identifying information theoretically "can be trafficked an infinite number of times to an infinite number of recipients." *Id.* at ___, 734 S.E.2d at 628. Therefore, in order to give a defendant sufficient notice of the incidence of trafficking for which he must present a defense, the majority held that an indictment for trafficking in stolen identities "must specify the identity of the recipient." *Id.* at ___, 734 S.E.2d at 628.

The dissent below agreed with the majority that the common law requires naming the recipient or stating that the recipient is unknown in an indictment for trafficking in illicit substances. *Id.* at ___, 734 S.E.2d at 628 (Elmore, J., concurring in part and dissenting in part). Nonetheless, the dissenting judge would have held that the common

law rule is inapplicable to the distinct crime of trafficking in stolen identities. *Id.* at ___, 734 S.E.2d at 629. The dissenting judge noted that, unlike illicit substances, the items listed as "identifying information" in section 14-113.20(b) have "independent identifying characteristics which can be specifically described in an indictment so as to put the accused on notice regarding the identifying information he allegedly sold or transferred." *Id.* at ___, 734 S.E.2d at 629. The dissenting judge further noted that identifying information often is stored on-line and can be easily accessed without authorization and transferred to another in an "anonymous vacuum," which would result in most indictments stating that the transferee's identity is "unknown." *Id.* at ___, 734 S.E.2d at 629. Given the "unique nature" of trafficking in stolen identities, the dissenting judge reasoned that imposing the common law rule is short-sighted and unnecessary. *Id.* at ___, 734 S.E.2d at 629. Turning to the instant case, the dissenting judge would have held that the indictment sufficiently apprised White of the conduct that was the subject of the accusation, and therefore, was not fatally defective. *Id.* at ___, 734 S.E.2d at 629.

The State filed its appeal of right based upon the dissenting opinion. We allowed the State's petition for discretionary review on the issue of the indictments against Jones for obtaining property by false pretenses and Jones's petition for discretionary review on the issue of his motion to dismiss the charge of identity theft.

[1] Jones argues that the State failed to prove that he possessed the specific intent necessary to be convicted of identity theft, and therefore, the trial court should have granted his motion to dismiss. We disagree. The standard of review regarding motions to dismiss is well settled:

> "When reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines whether the State presented substantial evidence in support of each element of the charged offense. Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. . . . [I]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied."

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012) (quoting *State v. Abshire*, 363 N.C. 322, 327-28, 677 S.E.2d 444, 449 (2009) (citations and quotation marks omitted)). Here the indictment charged that Jones "did knowingly obtain or possess the identifying information pertaining to three or more separate persons with [fraudulent intent] . . . , to wit: [Jones] possessed the credit card number[s] of . . . Rini, . . . Batchelor, . . . Payton, . . . and . . . Daly." It is undisputed that Jones possessed Rini's, Batchelor's, Payton's, and Daly's credit card numbers. At issue is whether the evidence was sufficient to support an inference that he did so with the intent to "fraudulently represent that [he] [wa]s [Rini, Batchelor, Payton, or Daly] for the purposes of making financial or credit transactions in [those individuals'] name[s]." N.C.G.S. § 14-113.20(a) (2013).

"[I]ntent is seldom provable by direct evidence and ordinarily must be proved by circumstances from which it may be inferred." *State v. Hardy*, 299 N.C. 445, 449, 263 S.E.2d 711, 714 (1980) (citing *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974)). Moreover, when "a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused." *State v. McClain*, 240 N.C. 171, 175, 81 S.E.2d 364, 366 (1954) (citations omitted). Here the evidence showed that using the name James Coleman, Jones used Mary Berry's credit card number to obtain various services at Maaco. Additionally, the evidence tended to show that Jones, using the name James Payton, used Melanie Wright's credit card number to obtain various items and services at Tire Kingdom. Although these actions are not the basis of the identity theft charge, this evidence tends to establish Jones's mental intent in possessing Rini's, Payton's, Daly's, and Batchelor's credit card numbers. Based upon the evidence that Jones had fraudulently used other individuals' credit card numbers, a reasonable juror could infer that Jones possessed Rini's, Payton's, Daly's, and Batchelor's credit card numbers with the intent to fraudulently represent that he was those individuals for the purpose of making financial transactions in their names. It was then " 'for the [jurors] to decide whether the facts, taken singly or in combination, satisf[ied] them beyond a reasonable doubt that . . . defendant [wa]s actually guilty [of identity theft].' " *State v. Trull*, 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998) (first alteration in original) (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965)), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999).

Jones argues that the Maaco and Tire Kingdom purchases actually negate an intent to commit identity theft because he used names that were different from the names of the credit card owners. Specifically, Jones contends that the words "with the intent to fraudulently represent that the person is the other person" require the State to prove that he intended to represent that he was Rini, Payton, Daly, and Batchelor, and not some other individual or an authorized user. N.C.G.S. § 14-113.20(a).

"We generally construe criminal statutes against the State. However, this does not require that words be given their narrowest or most strained possible meaning. A criminal statute is still construed utilizing 'common sense' and legislative intent." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citations omitted). "[W]here a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, . . . the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Id.* (citations and quotation marks omitted). We cannot conclude that the Legislature intended for individuals to escape criminal liability simply by stating or signing a name that differs from the cardholder's name. Such a result would be absurd and contravene the manifest purpose of the Legislature to criminalize fraudulent use of identifying information. Because the State's evidence was sufficient to raise an inference of Jones's fraudulent intent in possessing Rini's, Payton's, Daly's, and Batchelor's credit card numbers, the trial court did not err by denying Jones's motion to dismiss the charge of identity theft.

[2] In its appeal the State first argues that the trial court erred by dismissing the indictments against Jones for obtaining property by false pretenses. An indictment must contain

> "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation."

State v. Cronin, 299 N.C. 229, 234, 262 S.E.2d 277, 281 (1980) (quoting N.C.G.S. § 15A-924(a)(5) (1978)).[1] The purpose of this requirement is:

1. The language of the statute has remained unchanged as of the date of this opinion.

> "(1) [to provide] such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case."

Id. at 235, 262 S.E.2d at 281 (quoting *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953)). "[A]n indictment couched in the language of the statute is generally sufficient to charge the statutory offense." *State v. Palmer*, 293 N.C. 633, 638, 239 S.E.2d 406, 410 (1977). But

> "[i]f the statutory words fail to [charge the essential elements of the offense in a plain, intelligible, and explicit manner,] they must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged."

State v. Cook, 272 N.C. 728, 730, 158 S.E.2d 820, 822 (1968) (citations and internal quotation marks omitted).

Section 14-100(a) of the North Carolina General Statutes defines the elements of obtaining property by false pretenses as (1) "knowingly and designedly by means of any kind of false pretense"; (2) "obtain[ing] or attempt[ing] to obtain from any person . . . any money, goods, property, services, chose in action, or other thing of value"; (3) "with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value." N.C.G.S. § 14-100(a) (2013). Additionally, "[i]t is the general rule that the thing obtained by the false pretense . . . must be described with reasonable certainty, and by the name or term usually employed to describe it." *State v. Gibson*, 169 N.C. 380, 383, 169 N.C. 318, 320, 85 S.E. 7, 8 (1915) (citations omitted). This Court has not had occasion to address this issue recently, but consistently has held that simply describing the property obtained as "money," *State v. Reese*, 83 N.C. 637, 640 (1880), or "goods and things of value," *State v. Smith*, 219 N.C. 400, 401, 14 S.E.2d 36, 36 (1941), is insufficient to allege the crime of obtaining property by false pretenses.

Here the indictments alleged that Jones obtained "services" from Tire Kingdom and Maaco. Like the terms "money" or "goods and things of value," the term "services" does not describe with reason-

able certainty the property obtained by false pretenses. Moreover, "services" is not the name or term usually employed to adequately describe the tires, rims, wiper blades, tire and rim installation, wheel alignment, and brake services Jones allegedly obtained from Tire Kingdom, or the paint materials and service, body supplies and labor, and "sublet/towing" services Jones obtained from Maaco. *Cf. State v. Perkins*, 181 N.C. App. 209, 215, 638 S.E.2d 591, 595 (2007) (holding that an indictment that alleged, *inter alia*, the defendant had "attempted to obtain BEER AND CIGARETTES from FOOD LION . . . BY MEANS OF USING THE CREDIT CARD AND C[H]ECK CARD" of a named individual was sufficient). Accordingly, we hold that the indictments were insufficient to allege the crime of obtaining property by false pretenses and that the trial court property dismissed those charges.

[3] The State also argues that the trial court erred by dismissing the indictments against White for trafficking in stolen identities. In *Bissette*, we stated that "[w]here a sale is prohibited, it is necessary, for a conviction, to allege in the bill of indictment the name of the person to whom the sale was made or that his name is unknown, unless some statute eliminates that requirement." 250 N.C. at 517, 108 S.E.2d at 861. We have extended the *Bissette* rule to apply to a statute prohibiting the possession or sale of narcotics. *State v. Bennett*, 280 N.C. 167, 169, 185 S.E.2d 147, 149 (1971). Therefore, it is a logical extension to also apply the *Bissette* rule to the crime of trafficking in stolen identities. Section 14-113.20A(a) of the North Carolina General Statutes states that "[i]t is unlawful for a person to sell, transfer, or purchase the identifying information of another person with the intent to commit identity theft, or to assist another person in committing identity theft, as set forth in [N.C.]G.S. 14-113.20." N.C.G.S. § 14-113.20A(a) (2013). Nothing in section 14-113.20A eliminates the common law requirement that the indictment state either the name of the recipient or that the recipient's name is unknown. Accordingly, the State was required to allege in the indictments the name of the recipient of the identifying information or that the recipient's name was unknown.

In addition, we note that "[t]he reason for setting forth the name of the [recipient] is because each sale [or transfer] constitutes a distinct offense for which the offender may be punished." *State v. Tisdale*, 145 N.C. 305, 307, 145 N.C. 422, 425, 58 S.E.2d 998, 999 (1907). Naming the recipient notifies the accused of "the particular transaction on which the indictment is founded" and gives the

accused "the benefit of the first acquittal or conviction if accused a second time of the same offense." *Id.* at 425, 58 S.E.2d at 999-1000. This reasoning is even more persuasive in the context of trafficking in stolen identities because a single item of identifying information can be transferred to countless recipients. The State argues that the independent identifying characteristics of identifying information are sufficient to put a defendant on notice of the particular transaction on which the indictment is founded.[2] However even if a defendant is put on notice of the particular identifying information he is alleged to have transferred, he will not know the particular *transaction* with which he is being charged. We hold that the State must allege the name of the recipient or that the recipient's name is unknown in charging the crime of trafficking in stolen identities. Because the State failed to do so here, the indictments were insufficient to support White's convictions for trafficking in stolen identities and the trial court properly dismissed those charges.

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

AFFIRMED.

Justice MARTIN concurring in part and dissenting in part.

A jury found defendant Jerry White guilty of four counts of trafficking in stolen identities. The majority today affirms the dismissal of all four charges by extending a common law rule that has never before been applied to this statutory offense. This extension of the common law rule runs counter to our long-standing requirements for indictments and furthers neither the interests of defendants nor the administration of justice. Accordingly, I respectfully dissent to that portion of the majority's opinion.

The majority's decision fails to properly consider the standards for legally sufficient indictments. Indictments must contain "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with

2. Although social security numbers and digital signatures may contain "unique identifiers," *State v. Jones*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2014) (527A12) (Martin, J., dissenting in part), section 14-113.20(b) lists other examples of "identifying information" that do not share the same type of independent identifying characteristics, such as passwords and "[a]ny other numbers or information that can be used to access a person's financial resources." N.C.G.S. § 14-113.20(b)(10), (13).

sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." N.C.G.S. § 15A-924(a)(5)(2013). The statutory requirements of N.C.G.S. § 15A-924(a)(5) fulfill a long-standing dual purpose: "to give the defendant notice of the charge against him to the end that he may prepare his defense and to be in a position to plead [double jeopardy] in the event he is again brought to trial for the same offense . . . [and] to enable the court to know what judgment to pronounce in case of conviction." *State v. Burton*, 243 N.C. 277, 278, 90 S.E.2d 390, 391 (1955).

In *State v. Worsley*, 336 N.C. 268, 443 S.E.2d 68 (1994), this Court considered an issue nearly identical to the one now before us, involving an indictment for burglary. While the common law had required burglary indictments to specify which felony the defendant intended to commit, we held, "Such cases were decided prior to the enactment of N.C.G.S. § 15A-924(a)(5) . . . and are no longer controlling on this issue." *Id.* at 279, 443 S.E.2d at 73. The former rule was "drawn from the ancient strict pleading requirements of the common law while the pleading requirements of the Criminal Procedure Act are more liberal." *Id.* at 280, 443 S.E.2d at 74 (citation and internal quotation marks omitted). The indictment statute, N.C.G.S. § 15A-924, therefore "supplanted prior [common] law." *Id.* at 279, 443 S.E.2d at 73. The new statutory paradigm—the same that is in place today—requires indictments to " 'charge[ ] the offense . . . in a plain, intelligible, and explicit manner and contain[ ] sufficient allegations to enable the trial court to proceed to judgment and to bar a subsequent prosecution for the same offense.' " *Id.* at 281, 443 S.E.2d at 74 (second alteration in original) (citation omitted). The Court accordingly held that "[t]he indictment for first-degree burglary in the present case therefore satisfie[d] the requirements of N.C.G.S. § 15A-924(a)(5), notwithstanding the fact that it [did] not" comply with the prior common law requirement of specifying the felony the defendant intended to commit. *Id.* The same reasoning applies to the case before us.

"[A]n indictment couched in the language of the statute is generally sufficient to charge the statutory offense." *State v. Palmer*, 293 N.C. 633, 638, 239 S.E.2d 406, 410 (1977). As long as the indictment "express[es] the charge against the defendant in a plain, intelligible, and explicit manner . . . [it] shall not be quashed." N.C.G.S. § 15-153 (2013). Pursuant to N.C.G.S. § 15A-925, when a defendant believes he needs more information to mount his preferred defense, he "may request a bill of particulars to obtain information to supplement the facts contained in the indictment." *State v. Randolph*, 312 N.C. 198,

210, 321 S.E.2d 864, 872 (1984). "If any or all of the items of information requested are necessary to enable the defendant adequately to prepare or conduct his defense, the court must order the State to file and serve a bill of particulars." N.C.G.S. § 15A-925(c) (2013). Indictments receive a liberal construction and quashing indictments is not favored. *State v. Russell*, 282 N.C. 240, 245, 192 S.E.2d 294, 297 (1972) (citations omitted). Moreover, "it is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime." *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981) (citation omitted).

In this case, White's indictment for trafficking in stolen identities mirrored the language of the controlling statute. The indictment not only alleged the precise statutory language but also included the names of White's victims, the dates of the sales, the county in which the sales occurred, and the type of identifying information being trafficked. Yet the majority has seen fit to void that indictment based on a common law rule that has never been—and should not be—extended to trafficking in stolen identities.

The rule applied by the majority because of its "logical extension" to this case was formally announced in *State v. Bissette*, 250 N.C. 514, 108 S.E.2d 858 (1959), but it originated much earlier. The Court's earliest application of the rule requiring the State to allege the name of the recipient of an illicit sale was in the unlawful sale of alcohol, and its purpose was "to identify the particular fact or transaction on which the indictment is founded." *State v. Stamey*, 71 N.C. 202, 203 (1874); *see also State v. Pickens*, 79 N.C. 652 (1878); *State v. Blythe*, 18 N.C. (1 Dev. & Bat. Eq.) 199 (1835). *Bissette* extended that rule to the unlawful sale of agricultural seeds. 250 N.C. at 517-18, 108 S.E.2d at 861. Later, the Court again extended the rule to the unlawful sale of narcotics. *State v. Bennett*, 280 N.C. 167, 169, 185 S.E.2d 147, 149 (1971).

The commonality among all these cases is the inherent fungibility of the substances being unlawfully sold. Differentiating between two jugs of malt liquor, two sacks of tobacco seed, or two baggies of cocaine is nearly impossible. It was this lack of differentiation that raised the concern of multiple prosecutions for the same transaction. Because the goods themselves could not be used to specify which

unlawful transaction was the basis for prosecution, this Court substituted a different identifying element, concluding, "When the name of the vendee of the liquor is given, the particular transaction on which the indictment is founded is identified." *State v. Tisdale*, 145 N.C. 422, 425, 58 S.E. 998, 999-1000 (1907).

Stolen identities, however, are not fungible goods. The inherent nature of the information regulated by N.C.G.S. §§ 14-113.20 and 14-113.20A—social security numbers, drivers license numbers, bank account numbers, debit and credit card numbers, digital signatures, biometric data, etc.—is that they are unique identifiers. The uniqueness and non-fungibility of these data are what make them valuable. When the State alleges trafficking in stolen identities, it must allege specific information sufficient to put defendant on notice when it "asserts facts supporting every element of [the] criminal offense and the defendant's commission thereof." N.C.G.S. § 15A-924(a)(5). Alleging the specific credit card or passport number that has been sold necessarily limits the possible transactions for prosecution. Therefore, logic does not require the extension of the *Bissette* rule to the offense of trafficking in stolen identities.

While the majority uses the potential for repetitious and anonymous sales as a reason to enforce the extra-statutory *Bissette* rule, in reality it shows the harmful consequences of extending the rule. As noted by the majority, stolen identifying information can be sold many times over to anonymous purchasers, creating a situation (not at issue here) in which a defendant has sold someone else's identifying information so many times that he does not know to which sale the indictment is referring. While alleging the recipient may provide additional notice to the defendant, compliance with the *Bissette* rule may be accomplished either by alleging "the name of the person to whom the sale was made" or that "the purchaser was in fact unknown." *Bissette*, 250 N.C. at 517-18, 108 S.E.2d at 861 (citations omitted). The State can thus comply with this extra-statutory common law rule without providing any useful information to the defendant. Yet under the majority's rule, failure to include this statement is grounds for quashing the indictment and finding a jurisdictional defect. This result furthers neither defendant's desire for notice of his alleged crimes nor the State's interest in pursuing violations of our criminal code. The *Bissette* rule simply is poorly tailored to this uniquely twenty-first century criminal offense.

As in *Worsley*, the passage of N.C.G.S. § 15A-924 supplanted the prior common law requirement. The indictment here charged the offense "in a plain, intelligible, and explicit manner" that "inform[ed] the defendant of the charge against him with sufficient certainty to enable him to prepare his defense." *Worsley*, 336 N.C. at 281, 443 S.E.2d at 74 (citations and quotation marks omitted).

The decision to extend or limit common law rules is rooted in the courts' duty "to reflect the spirit of their times and discard legal rules when they serve to impede society rather than to advance it." *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 893 (1998) (citation and quotation marks omitted). The State suffers a harsh penalty for flawed indictments—complete dismissal of its case. The Criminal Procedure Act was "designed to remove from our law unnecessary technicalities which tend to obstruct justice." *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985). Accordingly, when determining whether indictments are fatally flawed, we apply N.C.G.S. § 15A-924 and decline to "engraft additional unnecessary burdens upon the due administration of justice." *Id.* The common law "is not inflexible, and therefore we will not hesitate to abandon a rule which has resulted in injustices, whether it be criminal or civil." *Nelson*, 349 N.C. at 632, 507 S.E.2d at 893 (citation omitted). The indictment in this case reasonably put White on notice of the transactions for which he was being prosecuted. It contained "plain and concise factual statement[s] supporting every element of [the] criminal offense[s] with sufficient precision to clearly apprise the defendant of the conduct which [was] the subject of the accusation." *Freeman*, 314 N.C. at 436, 333 S.E.2d at 746. I would not quash this indictment based on a technical pleading requirement that this Court now imposes for the first time. Accordingly, I respectfully concur in part and dissent in part.

Justice NEWBY joins in this opinion.

Justice HUDSON concurring in part and dissenting in part.

While I agree with the majority that the trial court properly dismissed the obtaining property by false pretenses charges against defendant Jones and the trafficking in stolen identities charges against defendant White, I believe the trial court erred in denying Jones's motion to dismiss the charge of identity theft. Accordingly, I respectfully dissent from that portion of the majority opinion.

The crime of identity theft requires that a defendant "knowingly obtain[ ], possess[ ], or use[ ] identifying information of another per-

son, living or dead, with the *intent to fraudulently represent that the person is the other person* for the purposes of making financial or credit transactions in the other person's name, to obtain anything of value, benefit, or advantage, or for the purpose of avoiding legal consequences." N.C.G.S. § 14-113.20(a) (2013) (emphasis added). Here defendant Jones argued that the State had not presented any evidence that he had acted with the intent of representing that he was the person named on the credit cards; in fact, as noted by the majority, defendant Jones pointed out that he specifically did not sign the transactions at either Maaco or Tire Kingdom with the names on the credit cards. In rebutting this argument, the majority states that it "cannot conclude that the Legislature intended for individuals to escape criminal liability simply by stating or signing a name that differs from the cardholder's name. Such a result would be absurd and contravene the manifest purpose of the Legislature to criminalize fraudulent use of identifying information."

The majority here seems to overlook the other statutes besides the identity theft statute that "criminalize fraudulent use of identifying information"; an offender could be charged with one of these, which would easily avoid the result the majority fears. Most relevant here, N.C.G.S. § 14-113.13 provides in part:

> (a) A person is guilty of financial transaction card fraud when, with intent to defraud the issuer, a person or organization providing money, goods, services or anything else of value, or any other person, he
>
> . . . .
>
> (2) Obtains money, goods, services, or anything else of value by:
>
> a. Representing without the consent of the cardholder that he is the holder of a specified card; or
>
> b. Presenting the financial transaction card without the authorization or permission of the cardholder . . . .

Id. § 14-113.13 (2013). Unlike the crime of identity theft addressed in section 14-113.20, financial transaction card fraud does not require that the defendant represent that he is the other person, it is instead enough that he represents that he is an authorized user of the card. *Id.* § 14-113.13(a)(2)(b). If we read out of the identity theft statute the requirement that the defendant act "with the intent to fraudulently represent that the person is the other person," there is little to no dif-

ference between identity theft and financial transaction card fraud. Because I do not see our task as rewriting this statute, and because our doing so cannot be what the legislature intended, I respectfully dissent.

Given the above, I would hold that the State failed to present sufficient evidence that defendant committed identity theft and that the trial court erred in denying defendant Jones's motion to dismiss. Therefore, I concur in part and dissent in part.

Justice BEASLEY joins in this opinion.

SHEILA GREGORY, ADMINISTRATRIX OF THE ESTATE OF TRAVIS BRYAN KIDD v. BARRY BLAINE PEARSON, IN HIS INDIVIDUAL CAPACITY

SHEILA GREGORY, ADMINISTRATRIX OF THE ESTATE OF TRAVIS BRYAN KIDD v. CLEVELAND COUNTY, SELF-MCNEILLY SOLID WASTE MANAGEMENT FACILITY

No. 116PA13

(Filed 7 March 2014)

On discretionary review pursuant to N.C.G.S. § 7A-31 from the decision of a unanimous panel of the Court of Appeals, ___ N.C. App. ___, 736 S.E.2d 577 (2012), reversing an order entered on 23 March 2012 by Judge Richard Doughton in Superior Court, Cleveland County. Heard in the Supreme Court on 18 February 2014.

James M. Roane III for plaintiff-appellee.

Teague Campbell Dennis & Gorham, L.L.P., by William A. Bulfer and Rebecca Rausch; and Womble Carlyle Sandridge & Rice, LLP, by Sean F. Perrin and Jackson Price, for defendant-appellants.

Patterson Harkavy LLP, by Narendra K. Ghosh; and Sumwalt Law Firm, by Vernon Sumwalt, for North Carolina Advocates for Justice, amicus curiae.

Amy Bason, General Counsel, for North Carolina Association of County Commissioners; and Paul Cranfill for North Carolina Association of Self Insurers, amici curiae.

Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones, for North Carolina Association of Defense Attorneys, amicus curiae.

Womble Carlyle Sandridge & Rice, LLP, by Jillian M. Benson, for North Carolina Association of Staffing Professionals, amicus curiae.

K&L Gates LLP, by A. Lee Hogewood, III, for North Carolina Chamber, 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., Goldston v. State*, 364 N.C. 416, 700 S.E.2d 223 (2010).

AFFIRMED.

STATE v. JOE

[367 N.C. 317 (2014)]

STATE OF NORTH CAROLINA v. ROBERT LEE EARL JOE

No. 333PA11-2

(Filed 7 March 2014)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 730 S.E.2d 779 (2012), affirming in part and vacating in part an order dismissing all charges against defendant entered on 19 May 2010 by Judge Patrice A. Hinnant in Superior Court, Forsyth County, and remanding for further proceedings, after the Supreme Court of North Carolina remanded the Court of Appeals' prior decision of this case, *State v. Joe*, 213 N.C. App. 148, 711 S.E.2d 842 (2011). Heard in the Supreme Court on 8 May 2013 by special session in the Old Chowan County Courthouse (1767) in the Town of Edenton pursuant to N.C.G.S. § 7A-10(a).

Roy Cooper, Attorney General, by Derrick C. Mertz, Assistant Attorney General, for the State-appellant.

Ann B. Petersen for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

IN RE E.H.

[367 N.C. 318 (2014)]

IN THE MATTER OF: E.H., N.H.

No. 302PA13

(Filed 7 March 2014)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 742 S.E.2d 844 (2013), affirming an order entered on 7 December 2012 by Judge Ward D. Scott in District Court, Buncombe County. Heard in the Supreme Court on 17 February 2014.

Hanna Frost Honeycutt for petitioner-appellee Buncombe County Department of Social Services.

Michael N. Tousey for appellant Guardian ad Litem, and Richard Croutharmel for respondent-appellee mother.

Tobias S. Hampson for respondent-appellee father.

Christopher L. Carr and Elizabeth Kennedy-Gurnee for North Carolina Association of Social Services Attorneys, amicus curiae.

Deana K. Fleming and Tawanda N. Foster for North Carolina Guardian ad Litem Program, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

IN RE SUTTLES SURVEYING, P.A.

[367 N.C. 319 (2014)]

IN THE MATTER OF: SUTTLES SURVEYING, P.A., LICENSE NO. C-0648 (NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS CASE NO. V2009-027)

IN THE MATTER OF: KENNETH D. SUTTLES, PLS, LICENSE NO. L-2678 (NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS CASE NO. V2009-064)

No. 252PA13

(Filed 7 March 2014)

On discretionary review pursuant to N.C.G.S. § 7A-31 from a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 742 S.E.2d 574 (2013), affirming an order entered on 21 August 2012 by Judge Nathaniel J. Poovey in Superior Court, Burke County. Heard in the Supreme Court on 19 February 2014.

Allen, Moore & Rogers, L.L.P., by John C. Rogers, III, for petitioner-appellants.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Patricia P. Shields and Joshua D. Neighbors, for respondent-appellee North Carolina Board of Examiners for Engineers and Surveyors.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. MASON JAMEL HOWARD

No. 320A13

(Filed 7 March 2014)

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. ___, 742 S.E.2d 858 (2013), dismissing defendant's appeal from judgments entered on 8 February 2012 by Judge W. Erwin Spainhour in Superior Court, Cabarrus County. Heard in the Supreme Court on 19 February 2014.

Roy Cooper, Attorney General, by Teresa M. Postell, Assistant Attorney General, for the State.

Bryan Gates for defendant-appellant.

PER CURIAM.

AFFIRMED.

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

6 MARCH 2014

001P13-3	Elizabeth Townes Homeowners Association, Inc. and the Elizabeth Townes Board of Directors v. Jane Brawley Jordan, Betty M. Brawley, and Bobby P. Brawley	Def's (Jane Brawley Jordan) *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA	Denied
002P14	In the Matter of: P.B.B.	1. Petitioners' (Bonds) Petition for Discretionary Review Prior to Determination by the Court of Appeals 2. Petitioners' (Bonds) Motion to Amend Petition for Discretionary Review	1. Denied **01/27/2014** 2. Allowed **01/08/2014**
007P14	State v. James Christopher Gatewood	1. State's Motion for Temporary Stay (COA13-669) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/07/2014** Dissolved **03/06/2014** 2. Denied 3. Dismissed
008P14	High Point Bank and Trust Company v. Highmark Properties, LLC, Mitchell Blevins, Cynthia Blevins, Charles Williams, and Janice Williams	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA13-331) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
013P14	State v. Etheridge Everett Grubb, III	Def's PDR Under N.C.G.S. § 7A-31 (COA13-625)	Denied
014P14	In Re: A.D.N., a Minor Child	1. Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA13-709) 2. Respondent-Mother's Motion for Leave to Amend PDR	1. Denied 2. Denied

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

6 MARCH 2014

016P07-4	State v. Joey Duane Scott	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **03/03/2014**
018P14	State v. Paris Jujuan Todd	Def's *Pro Se* Motion for PDR (COA13-67)	Denied
020P14-2	State v. Richard L. Elliott	1. Def's *Pro Se* Motion for NOA (COAP14-14) 2. Def's *Pro Se* Petition for *Writ of Habeas Corpus*	1. Dismissed *Ex Mero Motu* **02/04/2014** 2. Denied **02/04/2014**
023P14	State v. Jimmy I. Jones	Def's PDR Under N.C.G.S. § 7A-31 (COA13-215)	Denied
025P14	State v. Cornelius Jevon Clark	Def's PDR Under N.C.G.S. § 7A-31 (COA13-561)	Denied
027P14	State v. Daniel Charles Lewis	Def's PDR Under N.C.G.S. § 7A-31 (COA13-254)	Denied
029P14	State v. James Howard Rowland	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **02/05/2014**
030P14	State v. Zonta Tavaras Ellison	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Mecklenburg County	Dismissed

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

6 MARCH 2014

031P14	State v. Rodney E. Jones	Def's *Pro Se* Motion for MAR Petition (COAP12-26)	Dismissed
033P14	North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Wade H. Paschal, Jr., Guardian *ad Litem* for Harley Jessup; Reggie Jessup; Randall Collins Jessup; and Thurman Jessup	Plt's PDR Under N.C.G.S. § 7A-31 (COA13-615)	Allowed
037P14	State v. Audra Lindsey Smathers	Def's PDR Under N.C.G.S. § 7A-31 (COA13-496)	Denied
038A14	State v. Joshua Andrew Stepp	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon A Dissent	1. Allowed **02/06/2014** 2. Allowed **02/26/2014** 3. ---
039P14	State v. Robert S. Chamberlain	Def's *Pro Se* Motion for NOA (COAP14-51)	Dismissed
040P14	Michael Antrantrino Lee v. State	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Cumberland County	Dismissed
041A14	State v. Gregory Elder	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **02/07/2014** 2. Allowed

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

6 MARCH 2014

052P14	State v. Rodney E. Jones	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Johnston County	Denied
056P14	Eugene & Martha Kirby; Harris Triad Homes, Inc.; Michael Hendrix; Darren Engelkemier; Ian Hutagalung; Sylvia Maendl; Stephen Stept; James & Phyliss Nelson; and Republic Properties, LLC v. N.C. Department of Transportation	Plts' PDR Prior to a Decision of the COA Under N.C.G.S. § 7A-31(b)	Denied
057P14	State v. Dennis Edward Byers	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP14-7) 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
060A14	State v. Rondell Luvell Sanders	1. State's Motion for Temporary Stay (COA13-750) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **02/26/2014** 2. Allowed **02/26/2014**
062P14	State v. Michael Rankins	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **02/24/2014**
063P14	State v. Rashawn Lorenza Parsons	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **02/26/2014**
138PA08-2	State v. Mickey Vonrice Rollins	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-552) 2. State's Motion to Deny PDR 3. State's Motion to Dismiss Appeal	1. Denied 2. Dismissed as Moot 3. Dismissed

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

6 MARCH 2014

201PA12-2	Dickson, et al. v. Rucho, et al.	Motion for Leah J. Tulin to Withdraw as Counsel for Amici Curiae Election Law Professors	Allowed **02/04/2014**
201PA12-2	Dickson, et al. v. Rucho, et al.	Plt's Motion to Amend the Record	Allowed
211P09-2	Security Credit Corporation, Inc. v. Michael S. Barefoot, Frankie W. Barefoot, Eddie W. Snead, Security Auto Sales, GWS Incorporated, and MB-0001, Inc.	1. Defs' (Michael S. Barefoot, Frankie W. Barefoot, and Security Auto Sales) Petition for *Writ of Certiorari* to Review Order of COA (COA11-908) 2. Defs' (Michael S. Barefoot, Frankie W. Barefoot, and Security Auto Sales) Motion to Amend Petition for *Writ of Certiorari*	1. Denied 2. Allowed **Beasley, J., recused**
249P11-4	State v. Bobby R. Grady	Def's *Pro Se* Motion for Rehearing	Dismissed
251P13-2	George T. Powell, Jr. v. Prodev X, LLC v. George R. Brown, Penny R. Powers and Robert E. Rousseau, and Shafic Andraos, Intervernors	1. Plt's *Pro Se* Motion for Emergency Petition for *Writ of Certiorari* 2. Plt's *Pro Se* Motion for Suspension of Rules	1. Denied 2. Dismissed
260P09-3	Mack Eugene Polk, Jr. v. Herb Jackson, Superintendent of Brown Creek Correctional Institution	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **02/11/2014** **Jackson, J., recused**
281PA13	George King, d/b/a George's Towing and Recovery v. Town of Chapel Hill	1. Plt's Motion to File Reply Brief 2. Def's Motion to Deny Motion to File Reply Brief 3. Def's Motion in the Alternative to Strike Reply Brief 4. Plt's Motion to Allow Reply Brief to be Filed	1. Allowed **03/03/2014** 2. Dismissed as Moot **03/03/2014** 3. Dismissed as Moot **03/03/2014** 4. Dismissed as Moot **03/03/2014**

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

6 MARCH 2014

302PA13	In the Matter of: E.H., N.H.	Respondent-Father's Motion for this Court to Take Judicial Notice of Related Civil Child Custody Proceedings	Dismissed as Moot
327P13	State v. Victor A. Cruz Garcia	Def's PDR Under N.C.G.S. § 7A-31 (COA12-972)	Denied
332P13-3	Bobby R. Knox, Jr. v. N.C. Department of Public Safety of Prisons	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **02/10/2014**
359A13	George Christie and Deborah Christie v. Hartley Construction, Inc., Grailcoat Worldwide, LLC, and Grailco, Inc.	Plts' Motion for Extension of Time to File Reply Brief	Allowed **03/03/2014**
361P13-2	State v. Michael Ray Jones	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Lenoir County	Dismissed
369P13	Edith R. Salmony, Guardian of the Estate of Mary Elizabeth Edwards, Incompetent, Geraldine E. Edwards and Marcus A. Edwards, Sr., Parents and Guardian of the Person of Mary Elizabeth Edwards, Incompetent v. BANK OF AMERICA CORPORATION, a/k/a Bank of America, N.A., formerly known as NationsBank Corporation, also formerly known as BankAmerica Corporation, also formerly known as Nations Bank of North Carolina, N.A., and also formerly known as NCNB Corporation	1. Plts' *Pro Se* & Attorney PDR Under N.C.G.S. § 7A-31 (COA12-1414) 2. Plts' *Pro Se* & Attorney Motion to Deem PDR Timely Filed 3. Plts' *Pro Se* & Attorney Motion in the Alternative for Court to Consider the PDR as a Petition for *Writ of Certiorari* 4. Plts' *Pro Se* & Attorney Petition for *Writ of Certiorari* to Review Order of Superior Court of Wake County	1. Denied 2. Denied 3. Allowed 4. Denied

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

6 MARCH 2014

395P13	State v. John Lewis Wray, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1406)	Denied **Beasley, J., recused**
405P13	State v. Ernie Lee Warrick	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1424)	Denied
424A13	State of North Carolina *ex rel.* Utilities Commission; Duke Energy Progress, Inc., Applicant; Public Staff – North Carolina Utilities Commission, Intervenor v. Attorney General Roy Cooper, Intervenor, The North Carolina Waste Awareness And Reduction Network, Intervenor	1. Duke Energy Progress, Inc. and Public Staff—N.C. Utilities Commission's Motion to Consolidate Appeal with Related Cases 2. Duke Energy Progress, Inc. and Public Staff—N.C. Utilities Commission's Motion in the Alternative to Schedule Oral Argument and Decisions in Related Appeals in a Sequence that Promotes Judicial Economy	1. Denied 2. Denied
428P13	State v. David Clinton Divinie	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1311)	Denied
444P13	Gregory W. Tincher, Employee v. Adecco (Formerly Known as Olsten Staffing), Employer, Broadspire, Third-Party Administrator/ Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-1153)	Denied
444P13-2	Gregory W. Tincher, Employee v. Adecco (Formerly Known as Olsten Staffing), Employer, Broadspire, Third-Party Administrator/ Carrier	Plt's Petition for *Writ of Certiorari* to Review Decision of COA	Denied
447P13	State v. Alvin Gibert	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1087)	Denied

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448P13	State v. Tremona Dremell Williams	Def's PDR Under Under N.C.G.S. § 7A-31 (COA13-193)	Denied
452P13	Thomas Culbreth, Employee v. Ironmen of Fayetteville, Inc., Employer Stonewood Insurance Company, Carrier	1. Defs' NOA Based Upon a Constitutional Question (COA13-14) 2. Defs' PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Hold NOA and PDR In Abeyance Pending Settlement of Claim	1. — 2. — 3. Allowed
462P13	Linda M. Robinson and Frank Robinson v. Duke University Health Systems, Inc., d/b/a Duke University Medical Center, Duke University Affiliated Physicians, Inc., Christopher Mantyh, M.D., Erich S. Huang, M.D., Mayur B. Patel, M.D., Lewis Hodgins, M.D., and Jane and John Doe	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA12-1239) 2. Motion for Admission of Reynolds Williams *Pro Hac Vice*	1. Denied 2. Allowed
465A06-2	State v. Ryan Gabriel Garcell	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Rutherford County	Dismissed
490P13	State v. Alfutir Kareem-Id Mayweather	Def's PDR Under N.C.G.S. § 7A-31 (COA13-316)	Denied
492P13	Judy Hammond v. Saira Saini, M.D., Carolina Plastic Surgery of Fayetteville, P.C., Victor Kubit, M.D., Cumberland Anesthesia Associates, P.A., Wanda Untch, James Bax, and Cumberland County Hospital System, Inc.	Defs' (Bax, Untch, and CCHS) PDR Under N.C.G.S. § 7A-31 (COA12-1493)	Allowed

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494P13	State v. Lance Adam Goldman	1. State's Motion for Temporary Stay (COA12-1509) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/04/2013** Dissolved **03/06/2014** 2. Denied 3. Denied
501A13	State v. Bobby Gene Jolly	1. Def's NOA Based Upon a Constitutional Question (COA12-1389) 2. State's Motion to Dismiss Appeal	1. — 2. Allowed
514PA08-3	State v. Bobby E. Bowden	1. Def's Motion to Take Judicial Notice of the Files of This Court in the Case of Brown v. N.C. Department of Correction 2. Def's Motion to Take Judicial Notice of the Files of this Court in the Case of Jones v. Keller	1. Allowed 2. Allowed
516P13	State v. Keith Tyrone Troxler	Def's PDR Under N.C.G.S. § 7A-31 (COA13-79)	Denied
518P13	Sheena Moody Ward, Plaintiff v. Luis Enrique Carmon, Defendant v. Justin Michael Ward, Third-Party Defendant	Plaintiff and Third-Party Def's PDR Under N.C.G.S. § 7A-31 (COA13-258)	Allowed
528P13	Walter Stevens, Employee v. United States Cold Storage, Inc., Employer, N.C. Insurance Guaranty Association, Carrier	Defs' PDR Under N.C.G.S. § 7A-31 (COA13-150)	Denied
531P13	State v. James A. Phillips, Jr.	1. State's Motion for Temporary Stay (COA13-449) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/22/2013** 2. Allowed 3. Allowed

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532P13	State v. Steven Glenn Bryan	1. State's PDR Under N.C.G.S. § 7A-31 (COA13-520) 2. State's Alternative Petition for *Writ of Certiorari* to Review Order of COA (COA13-520)	1. Denied 2. Denied
535P13-2	Jennifer Tyll and David Tyll v. Joey Berry	1. Def's *Pro Se* Motion for NOA (COA13-1137) 2. Def's *Pro Se* Motion for Discretionary Review 3. Def's *Pro Se* Motion to Accept Brief	1. Dismissed *Ex Mero Motu* 2. Denied 3. Denied
550P13	Avinash Thakorlal Bhathela v. Shawn Currie	Plt's PDR Under N.C.G.S. § 7A-31 (COA13-319)	Denied
552P13	In Re: Twin County Motorsports, Inc.	1. State's Motion for Temporary Stay (COA13-21) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/11/2013** 2. Allowed 3. Allowed
553P13	In re: Jerry's Shell, LLC NCDMV Action No. 27867	1. State's Motion for Temporary Stay (COA13-223) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/11/2013** 2. Allowed 3. Allowed
560P13	State v. Zachary Russell Bowman	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-1565) 2. State's Motion to Deny Def's PDR	1. Denied 2. Dismissed as Moot
561P13	In the Matter of: J.N.M. and A.M.M., Minor Children	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA13-567)	Denied

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570P13	State v. Christopher Wayne Salter	State's PDR Under N.C.G.S. § 7A-31 (COA13-386)	Denied
571P13	State v. Floyd Lynbird Norris, Jr.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA13-282) 2. Def's Petition for *Writ of Certiorari* to Review Decision of COA	1. Dismissed 2. Denied
573P13-2	State v. Donald Edward Johnson and Jessica Williams	1. Def's (Johnson) *Pro Se* Petition of *Writ of Certiorari* to Review Decision of COA 2. Def's (Johnson) *Pro Se* Motion in the Alternative for Petition For *Writ of Error Coram Nobis*	1. Denied 2. Denied
575P13	State v. Ebony Angel Nicholas	1. Def's NOA Based Upon a Constitutional Question (COA13-613) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied
576A13	State v. Vincent Edward Northington	1. Def's NOA Based Upon a Constitutional Question (COA13-475) 2. State's Motion to Dismiss Appeal 3. State's Motion for Response to Def's NOA to be Deemed Timely Filed	1. — 2. Allowed 3. Allowed
577P13	State v. Kevin James Dahlquist	1. Def's Motion for Temporary Stay (COA13-276) 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 **12/20/2013** Dissolved **03/06/2014** 2. Denied 3. — 4. Denied 5. Allowed

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579P13	State v. Melissa Moody Goodwin	Def's PDR Under N.C.G.S. § 7A-31 (COA13-569)	Denied
580P13	In the Matter of: A.N.V. and O.N.V.	Respondent Mother's PDR Under N.C.G.S. § 7A-31 (COA13-572)	Denied
584P13	Department of Transportation v. Ray F. Webster and wife, Dorothy Walton Webster	Defs' PDR Under Under N.C.G.S. § 7A-31 (COA12-1546)	Denied
586P13	Jason McNeill Raynor v. N.C. Department of Crime Control and Public Safety	Plt's Petition for *Writ of Certiorari* to Review Decision of COA (COA13-197)	Denied
587P13	The Estate of Gary Vaughn, Tammy Vaughn, Administratrix v. Pike Electric, LLC, Pike Electric, Inc., and Kenneth Shalako Penland	Def's (Penland) PDR Under N.C.G.S. § 7A-31 (COA13-448)	Denied
588P13	In the Matter of: L.G., R.G.	Respondent-Father's PDR Under N.C.G.S. § 7A-31 (COA13-875)	Denied
589P13	State v. Jeremiah Royster	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of the COA (COAP13-957)	Dismissed
607P06-2	State v. Javier Morales Gonzalez	Def's *Pro Se* Motion for PDR (COA06-4)	Denied

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

No. 390PA11-2

(Filed 11 April 2014)

Class Actions—motion for class certification—individual issues predominate—substantive merits erroneously analyzed

The Court of Appeals correctly concluded that the trial court did not abuse its discretion in denying plaintiffs' motion for class certification because individual issues predominated over common issues. However, the Court of Appeals erred by analyzing the substantive merits of plaintiffs' inverse condemnation claim at the class certification stage and that portion of the opinion was vacated.

Justice NEWBY dissenting in part and concurring 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 651 (2012), affirming an order denying plaintiffs' motion for class certification entered on 20 May 2011 by Judge Lindsay R. Davis, Jr. in Superior Court, Forsyth County. Heard in the Supreme Court on 3 September 2013.

Hendrick Bryant Nerhood & Otis, LLP, by Matthew H. Bryant, Timothy Nerhood, T. Paul Hendrick, and Kenneth C. Otis III, for plaintiff-appellants.

Roy Cooper, Attorney General, by Dahr Joseph Tanoury, Special Deputy Attorney General, and John F. Oates, Jr., Assistant Attorney General, for defendant-appellee North Carolina Department of Transportation.

JACKSON, Justice.

In this appeal we consider whether the Court of Appeals erred by affirming the trial court's order denying plaintiffs' motion for class certification. We hold that analyzing the substantive merits of plaintiffs' inverse condemnation claim is improper at the class certification stage and therefore, the trial court and the Court of Appeals erred in doing so. We also conclude that because of the unique nature of property, coupled with the large number of diverse tracts involved in this litigation, individual issues would predominate over common

issues of law and fact in a trial on the merits. Accordingly, we affirm in part, vacate in part, and reverse in part the opinion of the Court of Appeals for the reasons stated below.

Pursuant to the Transportation Corridor Official Map Act ("the Map Act"), the North Carolina Department of Transportation ("NCDOT") recorded corridor maps with the Forsyth County Register of Deeds on 6 October 1997 and 26 November 2008 identifying transportation corridors for the construction of a highway project known as the Northern Beltway. *See* N.C.G.S. §§ 136-44.50 to -44.54 (2011). Approximately 2,387 parcels of land are listed as located within the Northern Beltway. Plaintiffs are owners of some of these properties. After the filing of a corridor map, the Map Act prohibits issuance of a building permit or approval of any subdivision plat for any property located within the transportation corridor. *Id.* § 136-44.51(a). However, owners of affected properties are not without recourse because these restrictions can be lifted three years after the submission of an application for a building permit or subdivision plat approval if, *inter alia*, efforts to acquire the property have not been initiated. *Id.* § 136-44.51(b). The Map Act also allows the granting of a variance exempting a landowner from these restrictions upon a showing that "no reasonable return may be earned from the land" and the restrictions "result in practical difficulties or unnecessary hardships." *Id.* § 136-44.52. Finally—through what is referred to as the "Hardship Program"—the Map Act allows for "advanced acquisition of specific parcels of property when that acquisition is determined . . . to be in the best public interest to protect the transportation corridor from development or when the [corridor map] creates an undue hardship on the affected property owner." *Id.* § 136-44.53(a).

Plaintiffs' brief states that as of 22 March 2013, NCDOT had purchased over 454 properties in the Northern Beltway. Apparently, a large number of these properties were acquired even before the corridor maps were filed. Earlier, on 18 February 1999, a group of affected property owners filed a lawsuit in the United States District Court for the Middle District of North Carolina, which resulted in a court order issued in June 1999 barring "any irrevocable actions relating to construction, right-of-way acquisitions, or negotiations for right-of-way acquisitions, in furtherance of the [Northern Beltway]." *N.C. Alliance for Transp. Reform, Inc. v. USDOT*, 713 F. Supp. 2d 491, 499 (M.D.N.C. 2010). For the next eleven years, this federal order prevented NCDOT from taking any action as to any of the affected

properties.[1] On 19 May 2010, the injunctive provisions in the court's order were lifted, *id.* at 513, and NCDOT resumed making advanced acquisitions. NCDOT has purchased at least six properties since then.

On 16 September 2010, plaintiffs filed a complaint and declaratory judgment action in Superior Court, Forsyth County, asserting five "claim[s] for relief": (1) inverse condemnation pursuant to N.C.G.S. § 136-111; (2) an unlawful taking in violation of the Fifth Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983; (3) denial of equal protection in violation of the Fourteenth Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983; (4) a wrongful taking in violation of Article I, Section 19 of the North Carolina Constitution; and (5) a request for declaratory relief seeking a declaration of taking and the date of the taking, or, in the alternative, a declaration that the Hardship Program and the Map Act are unconstitutional in that "they [e]ffect a taking by the NCDOT without just compensation and are unequal in their application to property owners." Plaintiffs alleged that in the thirteen years since the department filed the corridor maps, NCDOT has not commenced any condemnation or eminent domain actions against them, but has acquired other property within the Northern Beltway through the Hardship Program. Plaintiffs alleged that NCDOT does not maintain its Northern Beltway property to the standards of other property owners and that it leases its property for less than fair market value, resulting in "condemnation blight" in the Northern Beltway. Plaintiffs further alleged that NCDOT intends to purchase plaintiffs' properties at some future date but no schedule for acquisition of property has been announced, and NCDOT has stated that no funds are available to begin acquisitions for the next ten years. Plaintiffs alleged that NCDOT's actions have placed a "cloud" upon all real property in the Northern Beltway by "destroying and nullifying [the] properties' value," "substantially interfering with [all property owners'] elemental and constitutional rights growing out of the ownership of the properties," and "restricting [their] capacity to freely sell their properties," and that NCDOT's conduct constitutes a taking of their properties without just compensation.

Plaintiffs also sought class certification for themselves "and all others similarly situated who own property in the Northern Beltway in Forsyth County and are subject to [the Map Act]." Plaintiffs alleged

1. While the court order was in effect, NCDOT was allowed to engage in limited acquisitions with the consent of the federal plaintiffs. *See N.C. Alliance for Transp. Reform*, 713 F. Supp. 2d at 503.

that "[t]here are over 500 potential class members" who "have been deprived of their property rights" and whose property NCDOT "is obligated to purchase." Plaintiffs proposed a bifurcated trial in which the first phase would determine whether NCDOT is liable to the class, and the second phase would consist of individual trials to determine each property owner's individual damages. Plaintiffs filed a separate motion for class certification on 18 March 2011, alleging that "[t]here are no less tha[n] 800 class members" who "have had their property adversely impacted by the NCDOT's [m]aps, the [Map Act,] and the actions of the NCDOT" and who therefore "have an interest in the same issues of fact and law, and these issues predominate over issues affecting only individual class members."

NCDOT filed an answer and motion to dismiss plaintiffs' claims pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure, and raised the defense of sovereign immunity. The trial court granted NCDOT's motion to dismiss as to plaintiffs' second, third, and fourth claims, as well as the portion of plaintiffs' fifth claim seeking a declaration of taking and date of taking. The trial court denied NCDOT's motion to dismiss plaintiffs' first claim of inverse condemnation, and their fifth claim seeking a declaration of the Map Act as unconstitutional. Neither party has appealed from this order. The trial court heard plaintiffs' motion for class certification on 25 April 2011 and entered an order on 20 May 2011 denying class certification. Plaintiffs appealed, and the Court of Appeals affirmed the ruling of the trial court. *Beroth Oil Co. v. NCDOT*, ___ N.C. App. ___, 725 S.E.2d 651 (2012). We allowed plaintiffs' petition for discretionary review.

Rule 23 of the North Carolina Rules of Civil Procedure governs class actions. It states in pertinent part: "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued." N.C.G.S. § 1A-1, Rule 23(a) (2011). "First, parties seeking to employ the class action procedure [pursuant to] our Rule 23 must establish the existence of a class." *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 282, 354 S.E.2d 459, 465 (1987). A "class" exists "when each of the members has an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Id.* at 277, 354 S.E.2d at 462. The party seeking to bring a class action also bears the burden of demonstrating the existence of other prerequisites:

> (1) the named representatives must establish that they will fairly and adequately represent the interests of all members of the class; (2) there must be no conflict of interest between the named representatives and members of the class; (3) the named representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case; (4) class representatives within this jurisdiction will adequately represent members outside the state; (5) class members are so numerous that it is impractical to bring them all before the court; and (6) adequate notice must be given to all members of the class.

Faulkenbury v. Teachers' & State Emps.' Ret. Sys. of N.C., 345 N.C. 683, 697, 483 S.E.2d 422, 431 (1997) (citing *Crow*, 319 N.C. at 282-84, 354 S.E.2d at 465-66). When all the prerequisites are met, it is left to the trial court's discretion "whether a class action is superior to other available methods for the adjudication of th[e] controversy." *Crow*, 319 N.C. at 284, 354 S.E.2d at 466.

> "Class actions should be permitted where they are likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results. The usefulness of the class action device must be balanced, however, against inefficiency or other drawbacks. . . . [T]he trial court has broad discretion in this regard and is not limited to consideration of matters expressly set forth in Rule 23 or in [*Crow*].

Id. "[T]he touchstone for appellate review of a Rule 23 order . . . is to honor the 'broad discretion' allowed the trial court in all matters pertaining to class certification." *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 198, 540 S.E.2d 324, 331 (2000). Accordingly, we review the trial court's order denying class certification for abuse of discretion.[2] *See Faulkenbury*, 345 N.C. at 699, 483 S.E.2d at 432 (citing *Crow*, 319

2. In *Crow* we stated, "Whether a proper 'class' under Rule 23(a) *has been alleged* is a question of law." 319 N.C. at 280, 354 S.E.2d at 464 (emphasis added). There we reviewed the trial court's judgment on the pleadings, not a class certification order. *Id.* at 280-81, 354 S.E.2d at 464. Accordingly, the issue before the Court was "whether the allegations of the complaint, taken as true and viewed in the light most favorable to the plaintiffs, support[ed] the conclusion that the named and unnamed plaintiffs comprise[d] a 'class' within the meaning of Rule 23(a)." *Id.* at 281, 354 S.E.2d at 464. After holding as a matter of law that the plaintiffs had properly *alleged* the existence of a class, we remanded the case to the trial court to determine whether the plaintiffs "established *to the satisfaction of the trial court* the *actual existence* of a class." *Id.* at 282, 354 S.E.2d at 465 (emphases added). Therefore, we review the trial court's determination of whether plaintiffs established the actual existence of a class for abuse of discretion.

N.C. at 284, 354 S.E.2d at 466). "[T]he test for abuse of discretion is whether a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Frost*, 353 N.C. at 199, 540 S.E.2d at 331 (citations and quotation marks omitted).

This Court has not previously set forth the standard of review that we employ to review findings of fact and conclusions of law in a class certification order. The Court of Appeals' reasoning in a recent case is persuasive. *See Blitz v. Agean, Inc.*, 197 N.C. App. 296, 677 S.E.2d 1 (2009), *disc. rev. denied and cert. denied*, 363 N.C. 800, 690 S.E.2d 530 (2010). *Blitz* dealt with an alleged violation of 47 U.S.C. § 227 of the Telephone Consumer Protection Act. *Id.* at 298, 677 S.E.2d at 3. There the Court of Appeals relied upon precedent from this Court, precedent from the United States Court of Appeals for the Second Circuit, and its own cases in developing the appropriate standard of review. *Id.* at 299-301, 677 S.E.2d at 4-5. As the court in *Blitz* noted, reviewing de novo the trial court's conclusions of law is "in accord with North Carolina precedent involving matters of law decided in cases where the general standard of review is abuse of discretion." *Id.* at 300, 677 S.E.2d at 4 (citing *Edwards v. Wall*, 142 N.C. App. 111, 114-15, 542 S.E.2d 258, 262 (2001) (expert qualification); *Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000) (motion for new trial)); *see also LendingTree, LLC v. Anderson*, ___ N.C. App. ___, ___, 747 S.E.2d 292, 296 (2013) (venue selection). With regard to factual matters, the Court of Appeals in *Blitz* relied upon its own precedent, stating that an " 'appellate court is bound by the [trial] court's findings of fact if they are supported by competent evidence.' " 197 N.C. App. at 300-01, 677 S.E.2d at 4 (alteration in original) (quoting *Nobles v. First Carolina Commc'ns, Inc.*, 108 N.C. App. 127, 132, 423 S.E.2d 312, 315 (1992), *disc. rev. denied*, 333 N.C. 463, 427 S.E.2d 623 (1993)); *see also Peverall v. Cnty. of Alamance*, 184 N.C. App. 88, 92, 645 S.E.2d 416, 419 (2007) (same).[3] In sum, findings of fact are binding if supported by competent evidence, and conclusions of law are reviewed de novo.

3. We note that some federal courts review the trial court's factual findings for clear error, a standard of review that is more deferential to the trial court. *See, e.g.*, *In re Countrywide Fin. Corp.*, 708 F.3d 704, 707 (6th Cir. 2013); *Meyer v. Portfolio Recovery Assocs.*, 707 F.3d 1036, 1040 (9th Cir. 2012), *cert. denied*, ___ U.S. ___, 185 L. Ed. 2d 1068 (2013); *In re New Motor Vehicles*, 522 F.3d 6, 17 (1st Cir. 2008); *In re Initial Pub. Offerings*, 471 F.3d 24, 40-41 (2d Cir. 2006); *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1337 (11th Cir. 2006); *Wilkins v. Univ. of Houston*, 695 F.2d 134, 135 (5th Cir. 1983); *Kelley v. Norfolk & W. Ry. Co.*, 584 F.2d 34, 36 (4th Cir. 1978) (per curiam). The different standard of review for federal cases applies

Here the trial court found that although plaintiffs satisfied the other prerequisites, plaintiffs failed to establish the existence of a class. The trial court engaged in an analysis of plaintiffs' takings claim, noting that "[w]hen no seizure is involved, whether a taking has occurred depends on whether the mechanism alleged has caused substantial impairment in value of the subject property." The trial court explained that this Court has applied the "substantial impairment" test to hold that a taking has occurred in various circumstances, such as a "continuous and blinding glare" caused by a silver water tower; frequent overflights near an airport; odors from a trash dump; and odors, smoke, ashes, rats, and mosquitoes from a sewage disposal plant. The trial court determined, however, that those cases "represent physical invasions, by sound waves in the case of overflights, and by the particles carried in the air which result in odor and smoke, and the invasion of winged and four-legged vermin, in the case of sewage plants." Therefore, the trial court reasoned that those cases were "distinguishable from cases of 'regulatory takings,' in which some law or ordinance affects the use to which property can be put without entry of any nature."

The trial court explained that "when in the exercise of the police power, a legislative act imposes restrictions on the use of property alleged to constitute a taking," a two-part inquiry called the "ends-means" test is required. First, the court must determine "whether the exercise of police power is legitimate, that is, whether 'the ends sought . . . [are] within the scope of the power, and . . . whether the means chosen to regulate are reasonable.' " Second, the court must determine "whether the interference with the owner's rights amounts to a taking." Acknowledging that the Map Act "contains no expression of its purpose," the trial court noted that at least one purpose is to protect the public purse by limiting the development of properties so that NCDOT would not have to pay as much for future acquisitions. The trial court concluded that protecting the public purse is a "valid reason for exercising police power," but stated that "[i]t is another question, however, whether such restrictions are 'reasonable.' " Assuming that they are reasonable restrictions, the trial court explained that "the second inquiry, whether the interference with the owner's rights amounts to a taking, depends on whether the interfer-

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because Rule 52(a) of the Federal Rules of Civil Procedure specifically states that the appellate court will not set aside a trial court's findings of fact unless the higher court determines that the findings are "clearly erroneous." *See* Fed. R. Civ. P. 52(a)(6). Because our own Rule 52 does not include a similar requirement, *see* N.C.G.S. § 1A-1, Rule 52 (2013), we decline to adopt this more deferential standard of review.

ence renders the use of the property impractical and the property itself of no reasonable value." The trial court noted that this determination would have to be made with respect to each individual property "because each property is different." Therefore, the court concluded that "[c]ommon issues of fact and law would not predominate" and that therefore plaintiffs "have not defined a 'class.' " Further, even assuming that plaintiffs did define a class, the trial court determined that a class action was not a superior procedure because "whether a taking has occurred must be determined on a property-by-property basis" and therefore, "[n]one of the savings and expediencies that a class action offers would be realized."

Plaintiffs argue that the trial court erred by applying an ends-means analysis to their takings claim and assert that the court instead should have applied the traditional eminent domain analysis as to whether NCDOT's actions constituted a "substantial interference" with plaintiffs' property rights. Plaintiffs contend that "once there has been a determination of liability and date of taking for the class, [plaintiffs] foresee only the most difficult valuation cases possibly going to trial on damages." Plaintiffs' argument oversimplifies the issue of liability. Section 136-111 of our General Statutes provides:

> Any person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of [NCDOT] and no complaint and declaration of taking has been filed by [NCDOT] may . . . file a complaint in the superior court . . . alleg[ing] with particularity the facts which constitute said taking together with the dates that they allegedly occurred; said complaint shall describe the property allegedly owned by said parties and shall describe the area and interests allegedly taken.

N.C.G.S. § 136-111 (2011). To prevail on their inverse condemnation claim, plaintiffs must show that their "land or compensable interest therein has been taken." *Id.* In *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E.2d 101 (1982), we stated:

> While North Carolina does not have an express constitutional provision against the "taking" or "damaging" of private property for public use without payment of just compensation, this Court has allowed recovery for a taking on constitutional as well as common law principles. We recognize the fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of this State, and imposes upon a governmental agency taking private property for public use a

> correlative duty to make just compensation to the owner of the property taken. This principle is considered in North Carolina as an integral part of "the law of the land" within the meaning of Article I, Section 19 of our State Constitution.

Id. at 195-96, 293 S.E.2d at 107-08 (footnote omitted). The term "property" not only refers to "the thing possessed," but also includes "every aspect of right and interest capable of being enjoyed as such upon which it is practicable to place a money value." *Id.* at 201, 293 S.E.2d at 110. It is clear that the goal of inverse condemnation here is relatively straightforward: to compensate at fair market value those property owners whose property interests have been taken by the development of the Northern Beltway. This goal is in keeping both with this Court's legal precedents and the statutory mandates of the Legislature. *See Long*, 306 N.C. at 201, 293 S.E.2d at 111 (stating that when a person's property has been taken, "he is entitled to recover to the extent of the diminution in his property's value"); *see also* N.C.G.S. § 136-111 (stating that if NCDOT admits to a taking of property, the department shall "deposit with the court the estimated amount of compensation for said taking"). Determining whether there has been a taking in the first place, however, is much more complicated.

The United States Supreme Court has recognized that a "nearly infinite variety of ways [exist] in which government actions or regulations can affect property interests." *Ark. Game & Fish Comm'n v. United States*, ___ U.S. ___, ___, 184 L. Ed. 2d 417, 426 (2012). In its simplest form, a taking always has been found in cases involving "a permanent physical occupation." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428, 73 L. Ed. 2d 868, 877 (1982). Short of a permanent physical intrusion, however, "no 'set formula' exist[s] to determine, in all cases, whether compensation is constitutionally due for a government restriction of property." *Id.* at 426, 73 L. Ed. 2d at 876 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 648 (1978)). As one commentator has noted, "the law of inverse condemnation is an untidy compilation of legal theories." Charles Szypszak, *Eminent Domain and Local Government in North Carolina: Law and Procedure* 127 (2008). Professor Szypszak quotes another commentator who observes that the case law in this area regarding "government liability for property damage is a 'shifting, puzzling pattern,' in which courts 'have interwoven the law of inverse condemnation with property and tort law concepts and with artificial interpretations of the eminent domain provisions.' " *Id.* (quoting Daniel R. Mandelker, *Inverse Condemnation: The*

Constitutional Limits of Public Responsibility, 1966 Wis. L. Rev. 3, 3, 16). Identifying which legal principles apply will depend upon the facts of each particular inverse condemnation case. *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224, 106, 89 L. Ed. 2d 166, 178-79 (1986) (noting that identifying a taking requires "ad hoc, factual inquiries into the circumstances of each particular case"); *Penn Cent.*, 438 U.S. at 124, 57 L. Ed. 2d at 648 (stating that deciding whether a taking has occurred involves "essentially ad hoc, factual inquiries"); *Barnes v. N.C. State Highway Comm'n*, 257 N.C. 507, 518-19, 126 S.E.2d 732, 740-41 (1962) (distinguishing cases cited by a party because "they involve different factual situations and different legal principles are applicable").

We agree with plaintiffs that there is a "distinction between the police power and the power of eminent domain." *See DOT v. Harkey*, 308 N.C. 148, 152, 301 S.E.2d 64, 67 (1983) (citing *Barnes*, 257 N.C. at 514-17, 126 S.E.2d at 737-39). In *Barnes* we explained:

> The question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or of the power of eminent domain. If the act is a proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable. The state must compensate for property rights taken by eminent domain; damages resulting from the exercise of police power are noncompensable.

257 N.C. at 514, 126 S.E.2d at 737-38 (citations and quotation marks omitted). But we do not reach these questions in determining whether a class action is proper for this proceeding. "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 40 L. Ed. 2d 732, 749 (1974).[4] Here both the trial court and the Court of Appeals improperly engaged in a substantive analysis of plaintiffs' arguments with regard to the nature of NCDOT's actions and the impairment of their properties.[5] *See Beroth Oil*, ___ N.C. App. at ___, 725 S.E.2d at 659-63. We

4. Although North Carolina's Rule 23 differs from Federal Rule 23, this Court has relied upon federal cases interpreting the federal rule for guidance. *See Crow*, 319 N.C. at 282-84, 354 S.E.2d at 465-66.

5. This does not mean that the trial court is precluded from *any* consideration of the merits at the class certification stage. The United States Supreme Court has acknowledged that generally a class determination "involves considerations that are

expressly disavow that portion of the Court of Appeals opinion stating that "[t]he trial court correctly relied upon the ends means test in the instant case, as the alleged taking is regulatory in nature and as [the court] ha[s] specifically held this analysis applicable outside the context of zoning-based regulatory takings." *Id.* at ___, 725 S.E.2d at 663. As explained below, the unique nature of land combined with the diversity of the proposed class preclude any analysis of the merits of plaintiffs' takings claim when determining the issue of class certification in the case *sub judice*.

Here plaintiffs' proposed class includes over 800 property owners within the Northern Beltway. Not all of these 800 property owners have the same property interests and expectations. As the trial court correctly noted, the properties within the Northern Beltway are diverse: "Some . . . are improved and some are not. Some are residential and others are commercial." We acknowledge that some property owners have suffered significant adverse effects as a result of the filing of the corridor maps and the long delay in any subsequent action by NCDOT. Nevertheless, plaintiffs have not shown that all 800 owners within the corridor are affected in the same way and to the same extent. *See Crow*, 319 N.C. at 282, 354 S.E.2d at 465 ("The party seeking to bring a class action under Rule 23(a) has the burden of showing that the prerequisites to utilizing the class action procedure are present." (footnote omitted)). While NCDOT's generalized actions may be common to all, the Court of Appeals correctly determined that "liability can be established only after extensive examination of the circumstances surrounding each of the affected properties." *Beroth Oil*, ___ N.C. App. at ___, 725 S.E.2d at 664. This discrete fact-specific inquiry is required because each individual parcel is uniquely affected by NCDOT's actions. The appraisal process contemplated in condemnation actions recognizes this uniqueness and allows the parties to present to the fact finder a comprehensive analysis of the value of the land subject to the condemnation. *See* N.C.G.S. § 136-112 (2011) (setting forth the measure of damages); *DOT v. M.M. Fowler, Inc.*, 361 N.C. 1, 13 n.5, 637 S.E.2d 885, 894 n.5 (2006) ("Methods of appraisal acceptable in determining fair market value include: (1) comparable sales, (2) capitalization of income, and (3) cost. While the

enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469, 57 L. Ed. 2d 351, 358 (1978) (citation and internal quotation marks omitted). Inquiry into the merits of the cause of action, however, should be made only to the extent necessary to determine whether the requirements of Rule 23 have been met. *See Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004).

comparable sales method is the preferred approach, the next best method is capitalization of income when no comparable sales data are available." (citations omitted)); *Templeton v. State Highway Comm'n*, 254 N.C. 337, 339, 118 S.E.2d 918, 920 (1961) (allowing the admission of "[a]ny evidence which aids . . . in fixing a fair market value of the land and its diminution by the burden put upon it").

We generally agree with the separate opinion that differences in the amount of damages "will not preclude class certification so long as the takings issue predominates." *See Beroth Oil Co. v. NCDOT*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2014) (390PA11-2) (Newby, J., dissenting in part and concurring in part). Here, however, the takings issue is inextricably tied to the amount of damages; the extent of damages is not merely a collateral issue, but is determinative of the takings issue itself. *See Mattoon v. City of Norman, Okla.*, 1981 OK 92, ¶ 23, 633 P.2d 735, 740 (1981) (observing that "the individual questions and the common questions become so intertwined and interconnected as to make them impossible of separation and impossible to weigh for assessment of predominance").

As we have noted at some length, we believe that one of the trial court's fundamental errors was choosing to employ *any* test to determine the extent of damages suffered by all 800 landowners and whether a taking has occurred at this stage of the proceedings. The separate opinion misconstrues our reasoning, opining that the potential for utilization of different tests is an endorsement from this Court that threatens to result in disparate treatment for the landowners. *See Beroth*, ___ N.C. at ___, ___ S.E.2d at ___ (Newby, J., dissenting in part and concurring in part). This is patently incorrect. Although the need *may* arise to use a *different* test in order to determine whether a taking has occurred, it also *may* be most appropriate to utilize the *same* test to determine the takings issue, depending upon the facts and circumstances of the subject property. While the separate opinion seeks to resolve this question today, we believe that reaching this question would be premature at this juncture. Accordingly, it is improper to remand this case to the trial court for such a determination.

Notwithstanding the assertion made by the separate opinion that "the majority's approach focuses exclusively on the unique nature of property, arguably promulgating a per se rule that will bar class actions for claims of inverse condemnation," *Id.* at ___, ___ S.E.2d at ___, we do not hold that class certification is never proper for an

inverse condemnation claim. Both plaintiffs and the separate opinion cite inverse condemnation cases in which class certification has been allowed; however, in each of these cases the existence of a class was substantiated by narrowing the legal and factual issues involved. *See*, *e.g.*, *Loretto*, 458 U.S. at 432, 436-38, 73 L. Ed. 2d at 883-84 (noting the avoidance of "difficult line-drawing problems" and "relatively few problems of proof" in determining "whether there [has been] a taking in the first instance" where installation of cables was a permanent physical occupation); *Amen v. City of Dearborn*, 532 F.2d 554, 556 (6th Cir. 1976) (in which the trial court divided the plaintiffs into six subclasses), *cert. denied*, 465 U.S. 1101, 80 L. Ed. 2d 127 (1984); *Foster v. City of Detroit, Mich.*, 405 F.2d 138, 146 (6th Cir. 1968) (in which the plaintiffs, whose properties had been subject to condemnation proceedings that were later discontinued, claimed they were entitled to additional compensation resulting from the City's earlier actions that accelerated the decline in value of the properties before the second condemnation proceedings); *Moore v. United States*, 41 Fed. Cl. 394, 399 (1998) (noting that state law "appears to minimize most factual differences between the [property interests conveyed], creating essentially the same interest in the [defined geographic area at issue]"); *Meighan v. U.S. Sprint Commc'ns Co.*, 924 S.W.2d 632, 635 (Tenn. 1996) (in which the alleged taking was installation of fiber optic cable and the trial court "granted class certification only as to affected owners in [the county over which that court had jurisdiction]"). In an attempt to substantiate a class, the separate opinion improperly narrows plaintiffs' allegations to a taking of "some portion of [their] fundamental property rights." *Beroth*, ___ N.C. at ___, ___ S.E.2d at ___ (Newby, J., dissenting in part and concurring in part). In addition to the rights to improve and sell property, plaintiffs allege that NCDOT's actions have "abridged and destroyed" their "right to [the] use and enjoyment of the properties." Plaintiffs further allege that their properties' values have been "destroyed and nullified" and therefore "NCDOT is obligated to purchase all of the properties." The separate opinion also improperly narrows the scope of NCDOT's offending actions to "the recordation of the corridor maps and accompanying restrictions." *Id.* at ___, ___ S.E.2d at ___. As plaintiffs assert in their brief, plaintiffs complain of "a myriad of NCDOT actions and impacts not involving the restrictions of the Map Act" that have resulted in "a *de facto* taking of their property." We find it imprudent for this Court to narrow plaintiffs' allegations to conform to the requisites of a proper class. Here plaintiffs' proposed

class is of such breadth that, despite some overlapping issues, a trial on the merits would require far too many individualized, fact-intensive determinations for class certification to be proper.[6]

Plaintiffs argue that "[c]lass certification is superior to Forsyth County dealing with possibly hundreds of identical lawsuits, and certainly prevents inconsistent results on the application of the proper legal standard." In response, NCDOT argues that "[e]fficient means of litigating multiple claims and parties involving the Northern Beltway already exist." Indeed, the Chief Justice has designated fifty-two individual cases brought by Northern Beltway property owners against NCDOT consisting of very similar claims[7] as "exceptional" pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts. In a joint motion for designation of the cases as exceptional, the parties asserted that adjudication of the cases will "involve substantial judicial expertise, requiring the [trial c]ourt to engage in a study and examination of various issues relating to the Winston-Salem Northern Beltway and apply the applicable principles of law." Given the "complex legal issues and numerous parties" involved, the parties requested a designation of the cases as "exceptional" so that all cases will be heard by the assigned Superior Court judge. The parties further argued that having the same judge preside over each case will promote judicial efficiency and prevent inconsistent results. Accordingly, the Chief Justice designated the cases as exceptional and assigned the cases to Superior Court Judge John O. Craig, III.

Although "[c]lass actions should be permitted where they are likely to serve useful purposes," "[t]he usefulness of the class action

6. Our disagreement with the separate opinion arises from a fundamental "divergence of opinion" on the question of whether a correct takings test can be applied to the alleged class at this stage of the proceedings. *See Greensboro-High Point Airport Auth. v. Johnson*, 226 N.C. 1, 16, 36 S.E.2d 803, 814 (1946) (Barnhill, J., dissenting in part and concurring in part) (noting a divergence of opinion between the majority and the separate opinion on a particular question of law). We do not assume that the takings inquiry is "reserved for the damages phase of trial." *See Beroth*, ___ N.C. at ___, ___ S.E.2d at ___ (Newby, J., dissenting in part and concurring in part). We merely hold that plaintiffs' alleged class encompasses such differing issues that a takings test cannot be determined at this stage. As we have carefully set forth, case law supports our findings.

7. These individual plaintiffs are represented by the same counsel as plaintiff-appellants in the case *sub judice*. In one motion for Rule 2.1 designation, plaintiffs' counsel even lists the case *sub judice* as a case "that involve[s] the same legal issues and [is] very similarly pleaded." It appears to us that a claim that some cases are exceptional is inconsistent with a claim by the same party that all these cases can be handled by means of a class action.

device must be balanced . . . against inefficiency or other drawbacks." *Crow*, 319 N.C. at 284, 354 S.E.2d at 466. Here plaintiffs' proposed bifurcated trial is unmanageable because the individual factual issues tied to each unique parcel of land far outnumber the common issues amongst all 800 property owners. Despite its premature determination of what takings test applies, the trial court correctly found that common issues of fact or of law would not predominate and therefore, plaintiffs have failed to establish the existence of a class.[8] *See id.* at 277, 354 S.E.2d at 462. Because this prerequisite has not been met, the trial court did not abuse its discretion by denying class certification. *See id.* at 284, 354 S.E.2d at 466.

For the foregoing reasons, we vacate the Court of Appeals' discussion on the merits of plaintiffs' inverse condemnation claim; however, we affirm the Court of Appeals' conclusion that the trial court did not abuse its discretion in denying plaintiffs' motion for class certification because individual issues predominate over common issues. This case is remanded to the Court of Appeals for further remand to the trial court with instructions to vacate the portion of its order analyzing the merits of plaintiffs' claim.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Justice NEWBY dissenting in part and concurring in part.

The issue in this case is whether the trial court applied the correct legal analysis under North Carolina Rule of Civil Procedure 23 in denying plaintiffs' motion for class certification. A class exists when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members. Plaintiffs allege the recordation of the corridor maps and accompanying restrictions resulted in a

8. At least four other courts have determined that class actions are inappropriate for inverse condemnation claims for similar reasons. *See City of San Jose v. Super. Ct.*, 12 Cal. 3d 447, 461, 115 Cal. Rptr. 797, 807, 525 P.2d 701, 711 (Cal. 1974) ("[T]he [class action] is incompatible with the fundamental maxim that each parcel of land is unique."); *Ario v. Metro. Airports Comm'n*, 367 N.W.2d 509, 516 (Minn. 1985) (en banc) ("It is the unique nature of [a particular] property interest and its proof requirements that makes use of a class action inappropriate."); *Mattoon*, 1981 OK 92 at ¶ 23, 633 P.2d at 740 (holding that common questions do not predominate because "[h]ow much each individual landowner is impaired and how extensive is the interference with his rights to use and enjoy the property are the very questions which must be answered to determine the existence of taking without compensation"); *Palm Beach Cnty. v. Wright*, 641 So. 2d 50, 54 (Fla. 1994) ("[W]e are convinced that the taking issue may only be determined upon an individualized basis because the various property owners' interests will be different and will be affected by the thoroughfare map in a differing manner.").

taking of certain fundamental property rights of all the proposed class members. Because the government action was not for the safety and welfare of the public, the correct takings analysis is whether the corridor maps' restrictions substantially interfere with the rights of the owners of the affected properties. Thus, for purposes of Rule 23, the trial court should have decided whether the issue of substantial impairment of the property rights of all the owners subject to the corridor maps predominates over issues affecting only individuals. Because the trial court's order failed to apply this approach, the matter should be remanded to the trial court for reconsideration in light of the correct legal standard. If the trial court finds that a class exists, it should then exercise its discretion to consider whether class action is a superior method of adjudicating these claims.

The majority refuses to articulate the correct legal analysis to be applied, yet summarily declares that this group of landowners, all similarly affected by the corridor maps' blanket restrictions, do not share common issues of law or fact. A class exists when individuals have a common interest in law, yet the majority's approach prohibits the trial court from identifying the applicable law. The majority wrongly equates specifying the correct legal standard in a takings claim to a premature analysis of the substantive merits. But, how can a trial court know whether a common issue of law exists if prohibited from considering the applicable law? As done by both the trial court and the Court of Appeals and as our precedent requires, recognizing the law to be applied is a fundamental step in determining the existence of a class. The majority incorrectly assumes the takings inquiry is not a consideration for class certification, but is reserved for the damages phase of trial. Moreover, the majority's approach focuses exclusively on the unique nature of real property, arguably promulgating a per se rule that will bar class actions for claims of inverse condemnation. Most troubling, despite these uniform restrictions affecting the same fundamental property rights, the majority emphasizes that the trial court may employ differing tests to determine whether each owner has suffered a taking, thereby endorsing disparate treatment of the same fundamental property rights. *See Beroth Oil Co. v. NCDOT*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2014) (stating that for each individual property owner the trial court may "use a *different* test in order to determine whether a taking has occurred").

Over sixteen years ago, the North Carolina Department of Transportation recorded corridor maps identifying property in the path of the Northern Beltway in Forsyth County. Though some of the

project's past delays stem from a federal court order, *N.C. Alliance for Transp. Reform, Inc. v. USDOT*, 713 F. Supp. 2d 491, 499 (M.D.N.C. 2010), the restrictions imposed by state law never expire, and the majority acknowledges that "NCDOT has stated that no funds are available to begin acquisitions for the next ten years." Under subsection 136-44.51(a) of our General Statutes, "[a]fter a transportation corridor official map is filed with the register of deeds, no building permit shall be issued for any building or structure or part thereof located within the transportation corridor, nor shall approval of a subdivision . . . be granted with respect to property within the transportation corridor." N.C.G.S. § 136-44.51(a) (2013). By recording a corridor map, DOT is able to foreshadow which properties will eventually be taken for roadway projects and in turn, decrease the future price the State must pay to obtain those affected parcels. According to plaintiffs, these blanket restrictions have rendered all the property within the area undevelopable and unmarketable and have substantially impeded all the owners' rights to the use and enjoyment of their properties. Specifically, plaintiffs claim this cloud over the Northern Beltway properties prevents *all* owners from selling or improving their land—fundamental rights of property ownership—thereby drastically decreasing the market value of all affected properties. 1 James A. Webster, Jr., Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* §§ 1.02, 1.04 (6th ed. Nov. 2012) [hereinafter *Webster's*].

As a result, plaintiffs sought a declaratory judgment, alleging the recordation of the maps resulted in an unlawful "taking by inverse condemnation" and violated their rights under the federal and state constitutions. Plaintiffs moved for class certification under North Carolina Rule of Civil Procedure 23 on behalf of all similarly situated owners of property subject to the recorded corridor maps. The trial court, however, saw the recordation of the maps as an exercise of the State's police power and applied an ends-means analysis generally reserved for regulatory takings. The trial court concluded that a regulatory taking would only occur when the "interference renders the use of the property impractical and the property itself of no reasonable value." According to the trial court, common issues of law or fact therefore would not predominate because the ends-means test would have to be applied on a property-by-property basis to determine whether a taking had occurred. Thus, the trial court concluded that "plaintiffs have not defined a 'class.' " Then, assuming *arguendo* that plaintiffs did define a class, the trial court found that a class action is

not a superior method of adjudication because "whether a taking has occurred must be determined on a property-by-property basis." The Court of Appeals applied the same approach, first identifying a legal standard then applying that standard under the framework of Rule 23. *Beroth Oil Co. v. NCDOT*, ___ N.C. App. ___, ___, 725 S.E.2d 651, 659-67 (2012).

While a court's decision whether to allow a case to proceed as a class action involves a multi-part inquiry, the pivotal issue raised in this case is whether plaintiffs allegations are sufficient to constitute a class. Under Rule 23, a class exists "when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Faulkenbury v. Teachers' & State Emps.' Ret. Sys. of N.C.*, 345 N.C. 683, 697, 483 S.E.2d 422, 431 (1997) (citing *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 280, 354 S.E.2d 459, 464 (1987)). When determining whether members have a predominantly common interest, the trial court is to construe Rule 23 liberally and "[t]ak[e] the allegations of the complaint as true." *Crow*, 319 N.C. at 280, 281, 354 S.E.2d at 464, 465. "Whether a proper 'class' under Rule 23(a) has been alleged is a question of law." *Id.* at 280, 354 S.E.2d at 464. Then, "[i]f the prerequisites for a class action are established, it is within the discretion of the trial court as to whether the matter may proceed as a class action." *Faulkenbury*, 345 N.C. at 697, 483 S.E.2d at 431; *see also Blitz v. Agean, Inc.*, 197 N.C. App. 296, 300, 677 S.E.2d 1, 5 (2009) ("With these principles in mind, the standard of review applicable to class certification decisions can be succinctly summarized as follows: We review class certification rulings for abuse of discretion. We review *de novo* the [trial] court's conclusions of law that informed its decision to deny class certification." (citations and internal quotation marks omitted)), *disc. rev. denied and cert. denied*, 363 N.C. 800, 690 S.E.2d 530 (2010). "Class actions should be permitted where they are likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results." *Crow*, 319 N.C. at 284, 354 S.E.2d at 466.

The alleged class here contends the predominant issue of law or fact is whether the recordation of the corridor maps and accompanying blanket restrictions resulted in taking some portion of the owners' fundamental property rights. To make this determination, unlike the majority, I believe the trial court must apply the correct takings analysis. Only after the correct takings test is established can the trial court determine if common issues of law and fact predominate.

To determine which takings test is appropriate in a given case, we must first ascertain whether the government is acting under its police power or under its power of eminent domain. *See Barnes v. N.C. State Highway Comm'n*, 257 N.C. 507, 514, 126 S.E.2d 732, 737-38 (1962) ("The question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or of the power of eminent domain." (citation and quotation marks omitted)). When the government exercises the police power, it acts to protect the "public health, safety, morals and general welfare." *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 213, 258 S.E.2d 444, 448 (1979) (citations omitted). Under this power of *protection*, the "unrestricted use or enjoyment" of an owner's property "is taken from him because his use or enjoyment of such property is injurious to the public welfare." 1 Julius L. Sackman, *Nichols on Eminent Domain* § 1.42[2], at 1-203 (rev. 3d ed. 2013) [hereinafter *Nichols*]; *see also* Ernst Freund, *The Police Power* § 511, at 546 (1904) [hereinafter *Freund*] ("Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests . . . ."). We apply an "ends-means" analysis in cases involving land use restrictions enacted under the State's police power, meaning we first determine "whether the ends sought, *i.e.*, the object of the legislation, is within the scope of the power," then consider "whether the means chosen to regulate are reasonable." *Responsible Citizens in Opposition to the Flood Plain Ordinance v. City of Asheville*, 308 N.C. 255, 261, 302 S.E.2d 204, 208 (1983).

Under eminent domain, on the other hand, property "is taken from the owner and applied to public use because the use or enjoyment of such property or easement therein is beneficial to the public." *Nichols* § 1.42[2], at 1-203; *see also Freund* § 511, at 546-47 ("[I]t may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful, or as Justice Bradley put it, because 'the property itself is the cause of the public detriment.' " (quoting *Davidson v. New Orleans*, 96 U.S. 97, 107, 24 L. Ed 616, 620 (1877) (Bradley, J., concurring)). A taking by eminent domain for the *benefit* or *advantage* of the public occurs when government action causes a "substantial interference with elemental rights growing out of the ownership of the property." *Long v. City of Charlotte*, 306 N.C. 187, 199, 293 S.E.2d 101, 109 (1982) (citations omitted). A substantial interference with a single fundamental right inherent with property ownership may be

sufficient to sustain a takings action; wholesale deprivation of all rights is not required. To recover for such an interference, "the owner must establish not merely an occasional trespass or nuisance, but an interference substantial enough to reduce the market value of his property." *Id.* at 200, 293 S.E.2d at 110. A "physical touching of the land is not necessary." *Id.* at 199, 293 S.E.2d at 109. When, as here, the State fails to file a complaint declaring its intent to act under the power of eminent domain, an affected property owner "may initiate an action to seek compensation for the taking" in a claim for inverse condemnation. N.C.G.S. § 40A-51 (2013); *see also* 2 *Webster's* § 19.02[1], at 19-10 (" 'Inverse condemnation' is a device which forces a governmental body to exercise its power of condemnation even though it may have no desire to do so.").

While reducing the cost for the future acquisition of property may be a laudable public policy, that purpose falls under the category of public benefit or advantage rather than public protection. Thus, the trial court erred by applying a test reserved for the preservation of "public health, safety, morals and general welfare." *A-S-P Assocs.*, 298 N.C. at 213, 258 S.E.2d at 448; *see also Freund* § 511, at 546-47; *Nichols* § 1.42[2], at 1-203. Accordingly, the proper takings test in this case is the less stringent substantial interference test. In other words, to determine whether a class exists, the trial court should have weighed whether plaintiffs collectively alleged a common substantial interference with certain property rights of all owners in the Northern Beltway corridor and whether that issue predominates. For purposes of Rule 23, this is a common issue of law or of fact, one which the trial court failed to consider.

We should remand this case to the trial court for it to apply the correct legal standard and then exercise its discretion over the superiority of class action adjudication. *See Crow*, 319 N.C. at 284, 354 S.E.2d at 466 ("If the prerequisites to a class action are established on remand, the decision whether a class action is superior to other available methods for the adjudication of this controversy continues to be a matter left to the trial court's discretion."). Significantly, all seven members of this Court agree that the trial court acted under a misapprehension of existing law by relying on an ends-means analysis at this stage of its Rule 23 inquiry. *Beroth*, ___ N.C. at ___, ___ S.E.2d at ___ ("[W]e believe that one of the trial court's fundamental errors was choosing to employ *any* test to determine the extent of damages suffered by all 800 landowners and whether a taking has occurred at this stage of the proceedings."). Accordingly, we should no longer review

the trial court's order with the same deference the abuse of discretion standard demands. *See Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 463, 469, 597 S.E.2d 674, 689, 693 (2004) (noting that the admissibility of expert testimony "is within the sound discretion of the trial court and will only be reversed on appeal for abuse of discretion," but vacating the judgment of the trial court because the " 'judgment appealed from was entered under a misapprehension of the applicable law' " (citations omitted)). "Because the trial judge 'did not have the legal standard [articulated] today to guide him in his consideration of the case, . . . it is not reasonable to expect him to have applied it without the benefit of this opinion,' " and this Court should therefore remand this case so the trial court may reconsider plaintiffs' motion for class certification under the appropriate legal standard. *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 38, 591 S.E.2d 870, 894 (2004) (second alteration in original) (citation omitted); *see also Howerton*, 358 N.C. at 469, 597 S.E.2d at 693 (" 'When the order or judgment appealed from was entered under a misapprehension of the applicable law, the judgment, including the findings of fact and conclusions of law on which the judgment was based, will be vacated and the case remanded for further proceedings.' " (citation omitted)); *Blitz*, 197 N.C. App. at 312, 677 S.E.2d at 11 ("[W]e hold that the trial court's ruling denying class certification was based upon a misapprehension of law, and thus constituted an abuse of discretion. [W]here a ruling is based upon a misapprehension of the applicable law, the cause will be remanded in order that the matter may be considered in its true legal light." (second alteration in original) (citations and internal quotation marks omitted)).

The uniqueness and extent of each owner's damages are of no consequence to the takings issue here. Regardless of the past, present, or planned use of each parcel, certain rights to improve and sell associated with each allegedly have been impaired in the same manner by the same uniform restrictions. The monetary values eventually placed on the rights to improve and sell property do not affect the core question of whether the owners may still exercise those rights. Even the majority concedes that "NCDOT's generalized actions may be common to all" owners of property subject to the Northern Beltway corridor maps. Thus, if one owner suffered a taking of certain fundamental property rights based upon the corridor maps' blanket restrictions, all owners suffered a taking.

Admittedly, the extent of damages owed to each owner will vary. But the fact that the owners will "receive recoveries in different

amounts," *Faulkenbury*, 345 N.C. at 698, 483 S.E.2d at 431-32, will not preclude class certification so long as the takings issue predominates. *E.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868 (1982) (holding that the physical intrusion of a cable wire constitutes a taking in a suit brought as a class action); *Amen v. City of Dearborn*, 718 F.2d 789, 798 (6th Cir. 1983) (holding in a class action "that the City's deliberate course of conduct caused such substantial damage to plaintiffs' properties that the properties in effect were actually taken within the meaning of the fifth and fourteenth amendments for which just compensation is due"), *cert. denied*, 465 U.S. 1101, 80 L. Ed. 2d 127 (1984); *Foster v. City of Detroit, Mich.*, 405 F.2d 138, 146 (6th Cir. 1968) (affirming a lower court's ruling in a class action takings suit that "there are important common questions of law and fact affecting all members of the class which override the factual differences regarding the damages suffered by each individual," making "a class action under Rule 23(a)(3) . . . proper in this situation" (citation omitted)); *Meighan v. U.S. Sprint Commc'ns Co.*, 924 S.W.2d 632, 638 (Tenn. 1996) ("It is likewise irrelevant that the case involves property damage. Though often characterized as 'unique,' this quality does not foreclose cases involving property damages from Rule 23 procedures. Literally dozens of class actions involving property damages have proceeded in our state and federal courts." (citations omitted)).

The majority's contention that plaintiffs' proposal for a bifurcated trial is "unmanageable" ignores the effect of denying class certification. Under the majority's reasoning, not only will each owner have to proceed individually on damages, but each will also have to prove that a taking occurred under differing, unarticulated tests. Inevitably this approach will result in disparate treatment of the same fundamental property rights. *See High Rock Lake Partners v. NCDOT*, 366 N.C. 315, 321, 735 S.E.2d 300, 304 (2012) (noting that this Court has a duty to protect fundamental property rights and that "governmental restrictions on the use of land are construed strictly in favor of the free use of real property" (citation and quotation marks omitted)). Our State now potentially bears the burden of over eight hundred identical takings claims when that issue could easily be resolved for all plaintiffs at one time. This outcome is inconsistent with the objectives of Rule 23 to facilitate " 'the efficient resolution of the claims or liabilities of many individuals in a single action' " and eliminate " 'repetitious litigation and possible inconsistent adjudications.' " *Crow*,

319 N.C. at 280, 354 S.E.2d at 464 (citation omitted). Consequently, I dissent in part and concur in part.

Justice MARTIN joins in this opinion.

LOIS EDMONDSON BYNUM, INDIVIDUALLY, AND LOIS EDMONDSON BYNUM, ADMINISTRATRIX OF THE ESTATE OF JAMES EARL BYNUM AND LOIS MARIE BYNUM v. WILSON COUNTY AND SLEEPY HOLLOW DEVELOPMENT COMPANY

No. 380PA13

(Filed 12 June 2014)

Immunity—governmental—operation of building—governmental in nature—premises liability

The trial court erred in a negligence and wrongful death case by denying defendant Wilson County's motion for summary judgment based on governmental immunity. Because the County's operation of the building where plaintiff's decedent fell and was injured was governmental in nature, plaintiffs' claims against the County were barred by governmental immunity.

Justice MARTIN concurring.

Justices EDMUNDS and BEASLEY join 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. ___, 746 S.E.2d 296 (2013), affirming in part an order denying summary judgment entered on 19 March 2012 by Judge Milton F. Fitch, Jr. in Superior Court, Wilson County, and dismissing defendants' appeals in part. Heard in the Supreme Court on 19 February 2014.

Thomas & Farris, P.A., by Albert S. Thomas, Jr., Allen G. Thomas, and Kurt D. Schmidt; and Narron & Holdford, P.A., by Ben L. Eagles, for plaintiff-appellees.

Womble Carlyle Sandridge & Rice, LLP, by Burley B. Mitchell, Jr. and Robert T. Numbers, II; and Teague Campbell Dennis & Gorham, LLP, by Henry W. Gorham, Carrie E. Meigs, and Leslie P. Lasher, for defendant-appellants.

Amy Bason, General Counsel, for North Carolina Association of County Commissioners, amicus curiae.

Kimberly S. Hibbard, General Counsel, and Gregory F. Schwitzgebel, III, Senior Assistant General Counsel, North Carolina League of Municipalities; and Dorothy K. Leapley, Deputy City Attorney, City of Raleigh, for North Carolina League of Municipalities, amicus curiae.

Angela I. Carmon, Attorney for the City of Winston-Salem; and William L. Brown, Town Attorney for the Towns of Cramerton and Cornelius, amici curiae.

Roger A. Askew, Deputy County Attorney, and Scott W. Warren, County Attorney, for Wake County; John L. Roberts, Orange County Attorney's Office, for Orange County; Huey Marshall, Attorney for Brunswick County; Debra Bechtel, Attorney for Catawba County; Wanda Copley, Attorney for New Hanover County; R. Michael Cox, Attorney for Pasquotank County, and C. Ronald Aycock, Attorney for Person County, amici curiae.

JACKSON, Justice.

In this appeal we consider whether governmental immunity bars plaintiffs' claims alleging that defendant Wilson County ("the County") negligently failed to inspect and maintain a county office building. Because the County's operation of the building is governmental in nature, we hold that plaintiffs' claims against the County are barred by governmental immunity. Accordingly, we reverse the decision of the Court of Appeals.

On 1 November 2006, the County entered into an agreement with Sleepy Hollow Development Company ("Sleepy Hollow") to lease an office building on Miller Road. The County housed a number of its departments and divisions in the Miller Road building, including the county commissioners meeting room, the planning department, the inspections department, the water department, the finance department, the human resources department, and the office of the county manager. The building was open to the public. On 15 April 2008, James Earl Bynum visited the Miller Road building to pay his water bill. Mr. Bynum walked up the front exterior steps to the building, went to the second floor, and paid his bill. As he was leaving, he fell while walking down the front steps. As a result of his injuries, Mr. Bynum's legs and right arm were paralyzed.

On 9 December 2008, Mr. Bynum filed a complaint against the County alleging that he had been injured as a result of the County's negligence. Subsequently, Mr. Bynum amended the complaint to add his wife as a plaintiff and Sleepy Hollow as a defendant. Plaintiffs alleged, *inter alia*, that defendants negligently failed to inspect, maintain, and repair the Miller Road building steps, failed to meet the requirements of the North Carolina Building Code, failed to install a required handrail, failed to be aware of and warn of a hidden danger, and failed to ensure that the Miller Road building was accessible to the public in a safe condition. Plaintiffs further alleged that Mr. Bynum had been permanently injured and paralyzed as a result of defendants' negligence.

On 4 June 2010, defendants filed a motion for summary judgment asserting a number of defenses, including governmental immunity. The trial court denied defendants' motion, and defendants appealed to the Court of Appeals. On 6 September 2011, the Court of Appeals issued an unpublished decision dismissing the appeal as interlocutory as to all issues except the County's assertion of governmental immunity. *Bynum v. Wilson Cnty.*, 215 N.C. App. 389, 716 S.E.2d 90, 2011 WL 3891361, at *5 (2011) (unpublished). The Court of Appeals allowed the County's motion to withdraw its appeal of the remaining issue because of an inaccuracy in the record. *Id.*

After Mr. Bynum's death, Ms. Bynum continued the action both in her individual capacity and as administratrix of his estate. On 23 December 2011, plaintiffs filed a motion for leave to amend the complaint to assert a wrongful death claim. The record does not contain an order allowing the amendment; however, plaintiffs' brief states that the amendment was allowed on 9 January 2012. On 16 February 2012, defendants again filed a motion for summary judgment, which the trial court also denied. Defendants appealed. On 18 June 2013, the Court of Appeals issued a unanimous opinion dismissing Sleepy Hollow's appeal as interlocutory and dismissing the County's "non-immunity-related challenges" for the same reason, but concluding that the trial court correctly denied the County's motion for summary judgment on the basis of governmental immunity. *Bynum v. Wilson Cnty.*, ___ N.C. App. ___, ___, 746 S.E.2d 296, 307 (2013) ("*Bynum II*"). The court's governmental immunity analysis focused primarily on Mr. Bynum's subjective purpose for being on the premises. *Id.* at ___, 746 S.E.2d at 304-05. On 3 October 2013, we allowed defendants' petition for discretionary review.

A motion for 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." N.C.G.S. § 1A-1, Rule 56(c) (2013). We review de novo the trial court's order denying a motion for summary judgment. *Estate of Williams v. Pasquotank Cnty. Parks & Recreation Dep't*, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012) (citations omitted). "When applying de novo review, we 'consider[ ] the case anew and may freely substitute' our own ruling for the lower court's decision." *Lanvale Props., LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 149, 731 S.E.2d 800, 806-07 (2012) (alteration in original) (quoting *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)).

Plaintiffs argue that, because Mr. Bynum visited the Miller Road building to pay his water bill, the complaint alleges negligence in connection with the County's operation of a water system, a proprietary function to which immunity does not apply. We disagree.

Governmental immunity "turns on whether the alleged tortious conduct of the county or municipality arose from an activity that was governmental or proprietary in nature." *Estate of Williams*, 366 N.C. at 199, 732 S.E.2d at 141. Immunity applies to acts committed pursuant to governmental functions but not proprietary functions. *Id.* (citing, *inter alia*, *Evans ex rel. Horton v. Hous. Auth.*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004)). Although the distinction may be difficult to distinguish at times, we have explained:

> Any activity of [a] municipality which is discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary.

Britt v. City of Wilmington, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952) (citation omitted).

In *Estate of Williams* we set forth a three-step inquiry for determining whether an activity is governmental or proprietary in nature. First, a court must consider whether the legislature has designated the activity as governmental or proprietary. *Estate of Williams*, 366 N.C. at 200-01, 732 S.E.2d at 141-42. Second, "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." *Id.* at 202, 732 S.E.2d at 142. Finally,

> 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, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider.

Id. at 202-03, 732 S.E.2d at 143 (footnotes omitted).

The approach advanced by plaintiffs and adopted by the Court of Appeals would base the availability of immunity upon "the nature of the plaintiff's involvement with the governmental unit and the reason for the plaintiff's presence at a governmental facility"—here Mr. Bynum's payment of a water bill. *Bynum II*, ___ N.C. App. at ___, 746 S.E.2d at 303. This approach is contrary to the test recently set forth in *Estate of Williams*, which mandates that the analysis should center upon the governmental act or service that was allegedly done in a negligent manner. 366 N.C. at 199, 732 S.E.2d at 141. Moreover, we have emphasized repeatedly the importance of the character of the municipality's acts, rather than the nature of the plaintiff's involvement. *E.g.*, *Moffitt v. City of Asheville*, 103 N.C. 191, 203, 103 N.C. 237, 254, 9 S.E. 695, 697 (1889) ("When such municipal corporations are acting . . . in their ministerial or corporate character in the management of property for their own benefit, or in the exercise of powers assumed voluntarily for their own advantage, they are impliedly liable for damage . . . ."); *see also Evans*, 359 N.C. at 53, 602 S.E.2d at 670 ("[G]overnmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions."). As a result, the Court of Appeals erred by shifting the focus of the test and inappropriately injecting Mr. Bynum's actions and subjective intentions into its analysis.

Here Mr. Bynum was injured while walking down the front steps of the Miller Road building, which houses numerous county departments, including the county commissioners meeting room, the planning department, the inspections department, the water department, the finance department, the human resources department, and the office of the county manager. Thus, the Miller Road building serves

the County's discretionary, legislative, and public functions, several of which only may be performed by the Wilson County government. *Cf. Seibold v. Kinston-Lenoir Cnty. Pub. Library*, 264 N.C. 360, 361, 141 S.E.2d 519, 520 (1965) (per curiam) (noting the importance of the building's underlying function as a public library in a case involving injuries sustained in a fall). Notably, the legislature has specifically assigned to the county government the responsibilities of locating, supervising, and maintaining the county buildings that provide these functions. N.C.G.S. § 153A-169 (2013) ("The board of commissioners shall supervise the maintenance, repair, and use of all county property."); *see also id.* at §§ 153A-351 & 153A-352 (requiring counties to perform duties and responsibilities associated with enforcing State and local laws and ordinances relating to, *inter alia*, construction and maintenance of buildings). According to the analysis set forth in *Estate of Williams*, the fact that the legislature has designated these responsibilities as governmental is dispositive.

The rule set out by the Court of Appeals, subjecting different plaintiffs injured by the same act or omission to different immunity analyses on the basis of their reasons for visiting the same county property, is inconsistent with our precedent on governmental immunity. Accordingly, we reverse the decision of the Court of Appeals denying summary judgment for the County on governmental immunity grounds and hold that the County is entitled to summary judgment on the basis of governmental immunity. This case is remanded to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED IN PART AND REMANDED.

Justice MARTIN concurring.

Despite efforts over many years to bring clarity and predictability to the law of governmental immunity, this goal has remained somewhat elusive. *See, e.g.*, *Evans ex rel. Horton v. Hous. Auth. of City of Raleigh, N.C.*, 359 N.C. 50, 54, 602 S.E.2d 668, 671 (2004) ("We have provided various tests for determining into which category [governmental or proprietary] a particular activity falls, but have consistently recognized one guiding principle . . . ."). While I agree with the majority that plaintiffs' claims are barred by governmental immunity, I write separately to voice my concern that the reasoning employed in the majority opinion may categorically bar claims for harms occurring on county or municipal property.

The majority opinion relies upon the guidance provided in *Estate of Williams v. Pasquotank County Parks & Recreation Department*, which states: "[T]he threshold inquiry in determining whether a function is proprietary or governmental is whether, and to what degree, the legislature has addressed the issue." 366 N.C. 195, 200, 732 S.E.2d 137, 141-42 (2012). The majority found it dispositive that "the legislature has specifically assigned to the county government the responsibilities of locating, supervising, and maintaining the county buildings" and "has designated these responsibilities as governmental." ___ N.C. ___, ___, ___ S.E.2d ___, ___ (June 12, 2014) (380PA13) (citing N.C.G.S. § 153A-169 (2013) ("The board of commissioners shall supervise the maintenance, repair, and use of all county property."); *id.* §§ 153A-351, -352 (2013) (requiring counties to perform certain duties related to building inspections)). In other words, because the legislature has made counties responsible for supervising, maintaining, and repairing all county property, plaintiffs' claims against Wilson County are barred by governmental immunity.

This reasoning would seem to create a categorical rule barring *any* premises liability claims against counties or municipalities for harms that occur on government property. Thus, a municipality that owns and operates a sports arena to produce revenue would be immune from claims arising from its failure to properly maintain its facility. This result is inconsistent with our long-standing precedent. For example, in *Aaser v. City of Charlotte* we stated,

> The Coliseum is an arena for the holding of exhibitions and athletic events owned by the city of Charlotte and administered for it by the Authority to produce revenue and for the private advantage of the compact community. . . . Consequently, the liability of the city and of the Authority to the plaintiff for injury, due to an unsafe condition of the premises, is the same as that of a private person or corporation.

265 N.C. 494, 497, 144 S.E.2d 610, 613 (1965) (citations omitted). In contrast, under the majority's reasoning, it would have been irrelevant in *Estate of Williams* that the County charged rental fees for use of the "Swimming Hole" in which the decedent drowned—because the property was owned by the County, 366 N.C. at 196, 732 S.E.2d at 139, and therefore the County had the statutory responsibility to maintain and repair the property, making the County immune to the tort claim. Rather than issuing such a holding in *Estate of Williams*, we remanded to the Court of Appeals, explaining, "[E]ven if the oper-

ation 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 [the county-owned public park], in this case and under these circumstances, is a governmental function." *Id.* at 201, 732 S.E.2d at 142 (citation omitted). As in *Estate of Williams*, the County's statutory responsibility to maintain and repair the property did not categorically render the County immune from plaintiffs' tort claims.

Instead of applying categorical rules, we have performed case-by-case inquiries in our previous governmental immunity cases. I would apply the following analysis here. The determinative question is "whether the alleged tortious conduct of the county or municipality arose from an activity that was governmental or proprietary in nature." *Estate of Williams*, 366 N.C. at 199, 732 S.E.2d at 141. Here, Mr. Bynum was injured when he fell down the steps of Wilson County's main office building. The complaint alleges Mr. Bynum's fall resulted from the County's failure to inspect, maintain, and repair the steps to this building. So, the resulting question is whether the County's administration of these functions was governmental or proprietary. This multi-use building, which is open to the public, houses the county commissioner's meeting room, the county manager's office, and several county departments, including water, finance, planning, inspections, human resources, and geographic information systems. This building provides a convenient location for Wilson County residents to access numerous government offices and services. As the majority opinion aptly observes, this building "serves the County's discretionary, legislative, and public functions, several of which only may be performed by the Wilson County government." Based on these facts, this multi-use governmental office building undoubtedly serves a governmental function, not a proprietary function. Accordingly, plaintiffs' claims are barred by governmental immunity because the alleged tort arose out of the operation and maintenance of this government office building, which is a governmental function.

By adopting what seems to be a categorical rule, the majority opinion may inadvertently broaden the scope of governmental immunity. Because this common-law doctrine requires case-by-case resolution, I concur in the result only.

Justices EDMUNDS and BEASLEY join in this concurring opinion.

JACQUES A. DALLAIRE AND WIFE, FERNANDE DALLAIRE v. BANK OF AMERICA, N.A.; HOMEFOCUS SERVICES, LLC; AND LANDSAFE SERVICES, LLC

No. 51PA13

(Filed 12 June 2014)

1. Fiduciary Relationship—home mortgage refinancing—evidence of fiduciary relationship—not sufficient

The trial court did not err in an action arising from a home mortgage refinancing by granting summary judgment for Bank of America on the Dallaires' breach of fiduciary duty claim. Ordinary borrower-lender transactions are considered arm's length and do not typically give rise to fiduciary duties. When taken in the light most favorable to the Dallaires, the record provided no basis for concluding that the Dallaires reposed in the Bank of America loan officer the special confidence required for a fiduciary relationship.

2. Fraud—negligent misrepresentation—home mortgage refinancing—failure to make reasonable inquiry

The Court of Appeals erred by overturning a trial court's order granting summary judgment on claims for negligent misrepresentation arising from a home mortgage refinancing. A party cannot establish justified reliance on an alleged misrepresentation if the party fails to make reasonable inquiry regarding the alleged statement.

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. ___, 738 S.E.2d 731 (2012), affirming in part and reversing and remanding in part an order of summary judgment entered on 14 February 2012 by Judge W. David Lee in Superior Court, Cabarrus County. Heard in the Supreme Court on 17 February 2014.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.A., by John F. Scarbrough and James E. Scarbrough, for plaintiff-appellees.

McGuireWoods, LLP, by Robert A. Muckenfuss, for defendant-appellant Bank of America, N.A.

J.L. Pottenger, Jr. for Jerome N. Frank Legal Services Organization Mortgage Foreclosure Clinic, amicus curiae.

Poyner Spruill LLP, by Edwin M. Speas, Jr., Andrew H. Erteschik, and Lynn C. Percival IV, for North Carolina Bankers Association, amicus curiae.

Laura E. Collins for University of North Carolina School of Law Consumer Financial Transactions Clinic, amicus curiae.

NEWBY, Justice.

In this case we consider whether a loan officer's statements about lien priority in a home mortgage transaction support a borrower's claims for breach of fiduciary duty and negligent misrepresentation against the lender. Generally, the home loan process is regarded as an arm's length transaction between parties of equal bargaining power and, absent exceptional circumstances, will not give rise to a fiduciary duty. Because a loan officer's initial discussion of lien priority in the context of an ordinary home mortgage transaction is not an exceptional circumstance, it does not create a fiduciary duty. In addition, a borrower cannot establish a claim for negligent misrepresentation based on a loan officer's statements about lien priority if the borrower fails to make reasonable inquiry into the validity of those statements. Because no fiduciary duty existed and plaintiffs did not forecast evidence that they made reasonable inquiry, the trial court correctly granted summary judgment for the lender on both claims. Accordingly, we reverse the decision of the Court of Appeals.

Jacques and Fernande Dallaire purchased a home as their primary residence in 1998 for $173,660. Seven years later the Dallaires filed Chapter 7 bankruptcy stemming from unrelated business debts. At that time the Dallaires' home was encumbered by three liens. Bank of America held a first priority deed of trust on a mortgage note for $138,900 and a second priority home equity line deed of trust for $25,000. Branch Banking & Trust (BB&T) held a third priority lien securing a business loan in the amount of $241,449.37. The bankruptcy court's order discharged the Dallaires' personal liability on all three liens, but the liens remained attached to their home. *In re Dallaire*, Ch. 7 Case No. 05-53774 (M.D.N.C. Jan. 25, 2006).

A year after their bankruptcy discharge, the Dallaires received an advertisement in the mail from Bank of America offering home mortgage refinancing services. In response, the Dallaires submitted a loan

application, each checking the box indicating "No" when asked if they had declared bankruptcy within the past ten years. According to Mr. Dallaire, however, at the time of the loan application, he disclosed the bankruptcy to a Bank of America loan officer who repeatedly assured Mr. Dallaire "the bankruptcy and BB&T mortgage would not be a problem" and that "the new [Bank of America] loan would be secured by a first lien mortgage against our home."

In accordance with its routine procedures, Bank of America engaged HomeFocus Services, LLC (HomeFocus)[1] to prepare a title report for Bank of America's use. HomeFocus discovered the BB&T lien, prompting Bank of America to contract with LSI Title Agency (LSI) to perform curative title work. As part of that work, an LSI representative spoke with Mr. Dallaire and obtained from him copies of the couple's bankruptcy petition and discharge order. LSI advised Bank of America that the loan was cleared to close, apparently based on the mistaken belief that the BB&T lien on the Dallaires' home had been extinguished completely in bankruptcy.

Bank of America loaned the Dallaires $166,000 in exchange for a deed of trust on their home. Under the terms of the loan agreement, the Dallaires were required to "promptly discharge" any liens which Bank of America determined to have priority over the loan at issue, provided that Bank of America, in its discretion, notified the Dallaires of any such lien. The Dallaires used the loan proceeds to pay off the home's first and second priority liens held by Bank of America, as well as two car loans, all the while reducing their overall monthly payments. Bank of America did not inform the Dallaires of the BB&T lien, and that lien was neither paid off nor subject to a subordination agreement. Consequently, the refinancing resulted in the BB&T lien attaining first priority status on the house, while the new Bank of America loan, which now carried with it personal liability for the Dallaires, took a second lien position. This was not the outcome desired by the Dallaires or Bank of America, as both parties anticipated the new lien would have first priority. Three years after the refinancing, a family friend of the Dallaires expressed interest in purchasing the Dallaires' home. This prompted the Dallaires to contact their bankruptcy attorney who, after conducting a title search, discovered that the BB&T lien was senior to the Bank of America lien.

1. HomeFocus Services, LLC is now known as LandSafe Services, LLC. For consistency, we will use the name of the LLC at the time of the events at issue here.

Upon learning of the status of the Bank of America lien, the Dallaires filed a complaint in Superior Court, Cabarrus County, against Bank of America and Homefocus. According to the Dallaires, the junior status of Bank of America's lien substantially decreased the marketability and value of their home and exposed them to increased personal liability. The Dallaires' complaint alleged, in relevant part, negligent title search, negligent misrepresentation, breach of contract, and breach of fiduciary duty. Defendants moved for summary judgment on all claims. Regarding the Dallaires' fiduciary duty claim, defendants argued that no fiduciary relationship existed and that the transaction never rose to anything more than a routine encounter between creditor and debtor. As to the Dallaires' negligent misrepresentation claim, defendants insisted the Dallaires failed to demonstrate they had made reasonable inquiry into Bank of America's lien priority statements. The trial court granted defendants' motion for summary judgment on all claims, and the Dallaires appealed.

At the Court of Appeals the Dallaires argued, *inter alia*, that the traditional arm's length view of borrower-lender relationships does not comport with the modern loan origination and securitization process in which lenders exercise total control over the process and borrowers put complete trust in the lenders. According to the Dallaires, this "new reality" requires a corresponding evolution in the law whereby lenders should be considered fiduciaries. As for their negligent misrepresentation claim, the Dallaires contended that Bank of America did not use reasonable care in determining the lien's priority.

Concerning the Dallaires' breach of fiduciary duty claim, the Court of Appeals found that "there is a question of fact as to whether or not the circumstances of the parties' interaction prior to signing the loan give rise to a fiduciary relationship and consequently created a fiduciary duty for Defendant." *Dallaire v. Bank of Am.*, ___ N.C. App. ___, ___, 738 S.E.2d 731, 735 (2012). The Court of Appeals reasoned that Bank of America's alleged assurance of a first priority lien on the Dallaires' new mortgage loan was an act beyond the scope of a normal debtor-creditor relationship. *Id.* at ___ n.5, 738 S.E.2d at 735 n.5. When taken in the light most favorable to the Dallaires, the Court of Appeals concluded such actions constituted circumstances sufficient to establish a fiduciary relationship and thus, summary judgment was inappropriate. Consistent with its fiduciary duty holding, the Court of Appeals also remanded the Dallaires' negligent misrepresentation claim "to determine, if a duty existed, whether Defendant negligently misrepresented the priority the loan would

receive." *Id.* at ___, 738 S.E.2d at 736. The Court of Appeals found no merit in the Dallaires' arguments regarding their other claims.

Bank of America sought discretionary review, which we allowed. *Dallaire v. Bank of Am.*, ___ N.C. ___, 747 S.E.2d 535 (2013). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2013). We review de novo an order granting summary judgment. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004) (citation omitted).

[1] Though difficult to define in precise terms, a fiduciary relationship is generally described as arising when "there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 268 (2013) (quoting *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001)) (quotation marks omitted); *see also Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (describing fiduciaries as being held to a standard "stricter than the morals of the market place" and adding that "[n]ot honesty alone, but the punctilio of an honor the most sensitive, is the standard of behavior"). Fiduciary relationships are characterized by "confidence reposed on one side, and resulting domination and influence on the other." *Dalton*, 353 N.C. at 651, 548 S.E.2d at 708 (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)) (emphasis and quotation marks omitted). These characteristics of a fiduciary relationship are readily apparent, for example, in the relationship of spouses, *Eubanks v. Eubanks*, 273 N.C. 189, 195, 159 S.E.2d 562, 567 (1968) ("The relationship between husband and wife is the most confidential of all relationships . . . ." (citation omitted)), attorney and client, *Fox v. Wilson*, 85 N.C. App. 292, 299, 354 S.E.2d 737, 742 (1987) (emphasizing the trust and confidence inherent in the attorney-client relationship), and trustee and beneficiary, *Wachovia Bank & Trust Co. v. Johnston*, 269 N.C. 701, 711, 153 S.E.2d 449, 457 (1967) (recognizing the fundamental duty of a trustee "to maintain complete loyalty to the interests of" his beneficiary), and between partners to a partnership, *Casey v. Grantham*, 239 N.C. 121, 124-25, 79 S.E.2d 735, 738 (1954) (acknowledging partners' duty to act in "utmost good faith" in their dealings with one another). Common to all these relationships is a heightened level of trust and the duty of the fiduciary to act in the best interests of the other party.

Ordinary borrower-lender transactions, by contrast, are considered arm's length and do not typically give rise to fiduciary duties. *Sec. Nat'l Bank of Greensboro v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 95, 143 S.E.2d 270, 276 (1965) ("There was no fiduciary relationship; the relation was that of debtor and creditor."); *see also Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 61, 418 S.E.2d 694, 699 (The " 'mere existence of a debtor-creditor relationship between [the parties does] not create a fiduciary relationship.' " (alteration in original) (citations omitted)), *disc. rev. denied*, 332 N.C. 482, 421 S.E.2d 350 (1992). In other words, the law does not typically impose upon lenders a duty to put borrowers' interests ahead of their own. Rather, borrowers and lenders are generally bound only by the terms of their contract and the Uniform Commercial Code. *Thompson*, 107 N.C. App. at 61, 418 S.E.2d at 699; *see also Camp v. Leonard*, 133 N.C. App. 554, 560, 515 S.E.2d 909, 913 (1999) (citing and applying previous Court of Appeals cases holding that "a lender is only obligated to perform those duties expressly provided for in the loan agreement to which it is a party"). Nonetheless, because a fiduciary relationship may exist "under a variety of circumstances," *Abbitt*, 201 N.C. at 598, 160 S.E. at 906, it is possible, at least theoretically, for a particular bank-customer transaction to "give rise to a fiduciary relation given the proper circumstances." *Thompson*, 107 N.C. App. at 61, 418 S.E.2d at 699 (citation omitted).

Those circumstances are not present in the case at hand. A loan officer's mere assertion that the Dallaires "could obtain a first priority lien mortgage loan," *Dallaire*, ___ N.C. App. at ___, 738 S.E.2d at 735, is insufficient to take the parties' relationship out of the borrower-lender context or transform it from arm's length to fiduciary. When taken in the light most favorable to the Dallaires, the record provides no basis for concluding that they reposed in the Bank of America loan officer the special confidence required for a fiduciary relationship. *See Green*, 367 N.C. at 141, 749 S.E.2d at 268; *see also Thompson*, 107 N.C. App. at 61, 418 S.E.2d at 699 ("[A]n ordinary debtor-creditor relationship generally does not give rise to such a 'special confidence' . . . ."). Thus, the trial court did not err in granting summary judgment for Bank of America on the Dallaires' breach of fiduciary duty claim.

[2] The Dallaires next contend that there was sufficient evidence to create an issue of material fact regarding their claim for negligent misrepresentation. They assert that at the time of their application the Bank of America loan officer repeatedly assured them the new

loan would be secured by a first lien mortgage. The Dallaires stress that determining the effect of a bankruptcy on primary residence liens is a complex task, and that Bank of America was negligent in "relying on non-lawyers" to answer "this quintessentially legal question." According to the Dallaires, they reasonably relied on this negligently prepared information, resulting in substantial harm to their net worth.

"The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988) (citations omitted). A party cannot establish justified reliance on an alleged misrepresentation if the party fails to make reasonable inquiry regarding the alleged statement. *Pinney v. State Farm Mut. Ins. Co.*, 146 N.C. App. 248, 256, 552 S.E.2d 186, 192 (2001) ("It has also been held that when a party relying on a 'misleading representation could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence.' " (citation omitted)), *disc. rev. denied*, 356 N.C. 438, 572 S.E.2d 788 (2002). Whether a party's reliance is justified is generally a question for the jury, except in instances in which " 'the facts are so clear as to permit only one conclusion.' " *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 225, 513 S.E.2d 320, 327 (1999) (quoting Restatement (Second) of Torts § 552 cmt. e (1977)) (emphasis omitted).

Assuming *arguendo* that Bank of America owed a duty to the Dallaires beyond the terms of the loan agreement, the Dallaires have produced no evidence suggesting they made reasonable inquiry regarding the loan officer's alleged misstatements of lien priority. *See, e.g., State Props., LLC v. Ray*, 155 N.C. App. 65, 73, 574 S.E.2d 180, 186 (2002) ("Reliance is not reasonable if a plaintiff fails to make any independent investigation . . . ." (citing *Calloway v. Wyatt*, 246 N.C. 129, 97 S.E.2d 881 (1957))), *disc. rev. denied*, 356 N.C. 694, 577 S.E.2d 889 (2003); *Simms v. Prudential Life Ins. Co. of Am.*, 140 N.C. App. 529, 533, 537 S.E.2d 237, 240 (2000) (When "the purchaser has full opportunity to make pertinent inquiries but fails to do so through no artifice or inducement of the seller, an action in [negligent misrepresentation] will not lie." (alteration in original) (citations and quotation marks omitted)), *disc. rev. denied*, 353 N.C. 381, 547 S.E.2d 18 (2001). As the Dallaires themselves have acknowledged, determining

the effects of a previous bankruptcy on a home's liens is complicated. Yet, there is no indication the couple made pertinent inquiries or sought outside advice about the liens in 2007 as, for example, they did in 2010 when preparing to sell their home. The Dallaires have also failed to offer evidence that Bank of America denied them the opportunity to investigate the loan officer's initial assertions. *See*, *e.g.*, *Oberlin Capital*, *L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 846-47 (2001) (affirming the trial court's dismissal of a party's negligent misrepresentation claim because the plaintiff failed to allege it was denied the opportunity to investigate). Because the Dallaires have put forth no evidence that they made inquiry or were prevented from doing so, they have failed to demonstrate the justified reliance necessary to support their negligent misrepresentation claim. Thus, the trial court did not err in granting summary judgment for Bank of America on the Dallaires' negligent misrepresentation claim.

Under the facts of this case, the Dallaires' home loan refinancing with Bank of America was an arm's length transaction and did not give rise to a claim for breach of fiduciary duty. In addition, the Dallaires failed to demonstrate justified reliance on Bank of America's alleged misstatements in support of their negligent misrepresentation claim. The Court of Appeals erred in overturning the trial court's order granting summary judgment on both claims. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

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

DOCRX, INC. v. EMI SERVICES OF NORTH CAROLINA, LLC

No. 75PA13

(Filed 12 June 2014)

Constitutional Law—Full Faith and Credit Clause—Uniform Enforcement of Foreign Judgment Act

The Court of Appeals did not err in a breach of contract case by holding that the Full Faith and Credit Clause precluded the use of intrinsic fraud to defeat a foreign monetary judgment pursuant to North Carolina's Uniform Enforcement of Foreign Judgment Act (UEFJA). The defenses to a foreign judgment under the UEFJA are limited by the Full Faith and Credit Clause to those defenses that are directed to the enforcement of the foreign judgment, and N.C.G.S. § 1A-1, Rule 60(b) of the North Carolina Rules of Civil Procedure has no applicability.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 738 S.E.2d 199 (2013), vacating an order entered on 6 February 2012 by Judge W. David Lee in Superior Court, Stanly County, and remanding for further proceedings. Heard in the Supreme Court on 7 January 2014.

Henson & Talley, LLP, by Karen Strom Talley and Perry C. Henson, Jr., for plaintiff-appellee.

Chapman Law Group, PLC, by Avery S. Chapman, pro hac vice; and Tin, Fulton, Walker & Owen, PLLC, by Sam McGee, for defendant-appellant.

PARKER, Chief Justice.

The issue in this case is whether the Court of Appeals erred by holding that the Full Faith and Credit Clause precludes the use of intrinsic fraud to defeat a foreign monetary judgment pursuant to North Carolina's Uniform Enforcement of Foreign Judgment Act and N.C.G.S. § 1A-1, Rule 60(b)(3). For the reasons stated herein, we modify and affirm the decision of the Court of Appeals.

DocRx, Inc. (plaintiff), an Alabama corporation, filed a breach of contract action against EMI Services of North Carolina, LLC (defendant) in Mobile County, Alabama on 6 August 2010. The complaint alleged that defendant failed to pay plaintiff the agreed upon commission from defendant's pharmaceutical sales under a contract the

parties entered on 28 June 2010. Specifically, the complaint alleged that defendant failed to pay plaintiff "25% of all net profits of [defendant's] sales made of products supplied . . . by [an intermediate company]" located by plaintiff. The complaint sought, *inter alia*, "compensatory damages, plus interest and costs" but did not allege a specific monetary amount of damages. Defendant did not respond to the complaint, and an initial default judgment was entered on 24 September 2010.

During the default proceedings in Alabama, Brian Ward (Ward), the President and CEO of plaintiff corporation, filed an affidavit with the court in which he stated that defendant sold 3,504 units "for $500 per unit, for a total profit of $475 per unit." Plaintiff's counsel filed a Motion To Enter Default Judgment Amount adopting Ward's statement. Plaintiff's counsel calculated that defendant's total net profits for the sale of the units was $1,664,400 and that plaintiff was entitled to a commission payment of $416,100, which represented 25% of defendant's total net profits. Plaintiff's counsel also alleged that plaintiff was entitled to recover reasonable attorneys' fees in the amount of $12,587.14 and interest on the breach of contract claim in the amount of $24,996. On 1 April 2011, the Circuit Court of Mobile County, Alabama entered a second default judgment against defendant for $453,683.14 (the Alabama judgment).

On 2 August 2011, plaintiff filed a Request To File Foreign Judgment in the Superior Court in Stanly County, North Carolina. Plaintiff presented a certified copy of the Alabama judgment. On 25 August 2011, defendant filed a Motion For Relief From And Notice Of Defense To Foreign Judgment. Defendant argued, *inter alia*, that the Alabama judgment was obtained by extrinsic fraud. On 2 December 2011, plaintiff filed a Motion To Dismiss Defendant's Defense Of Extrinsic Fraud Pursuant To Rule 12(b)(6) Of The North Carolina Rules Of Civil Procedure and a Motion To Enforce Foreign Judgment As A North Carolina Judgment.

Defendant filed an Amended Motion For Relief From And Notice Of Defense To Foreign Judgment on 17 January 2012 in which it added defense based on fraud, pursuant to N.C.G.S. § 1A-1, Rule 60(b). Defendant argued that Ward and plaintiff's counsel falsely inflated the amount of damages owed plaintiff in their respective filings in Alabama. In support of its motion, defendant submitted an affidavit of Douglas R. Smith, Jr. (Smith), a representative of defendant. In his affidavit Smith stated that Ward and plaintiff's counsel knew their

statements regarding the amount of damages were false because of emails Ward sent defendant. Smith alleged that on 18 June 2010, Ward sent two emails to defendant wherein he acknowledged that the selling price per unit was $67, not $500 as alleged by Ward and plaintiff's counsel. Smith further alleged that Ward and plaintiff's counsel knew that their statements were false because on 12 July 2010, Ward sent an email to defendant wherein he acknowledged the selling price per unit to pharmacies and wholesalers was $45. Ward's emails were attached as exhibits to Smith's affidavit.

On 30 January 2012, Ward and plaintiff's counsel both filed affidavits in opposition to defendant's Amended Motion For Relief From And Notice Of Defense To Foreign Judgment. In his affidavit Ward stated that the emails dated 18 June 2010 predated the contract between plaintiff and defendant and referred to pharmaceutical sales that took place prior to the execution of the Agreement. Ward further alleged that the email dated 12 July 2010 referred to a rate that was established for plaintiff's clients during the initial business relationship between the parties.

The trial court heard the matter on 30 January 2012 and entered an order denying plaintiff's motion to enforce the Alabama judgment as a judgment of the State of North Carolina on 6 February 2012. In its order the trial court first determined that the affidavits and exhibits submitted by defendant supported defendant's argument that plaintiff obtained the Alabama judgment as a result of fraud. The trial court then stated that under N.C.G.S. § 1C-1703(c), a provision of North Carolina's Uniform Enforcement of Foreign Judgments Act (UEFJA), the Alabama judgment was " 'subject to the same defenses as a judgment of this State.' " The trial court explained that under Rule 60(b)(3) of the North Carolina Rules of Civil Procedure, relief from enforcement of a judgment was available if the trial court determined "that there was 'fraud (whether heretofore denominated *intrinsic* or *extrinsic)*, misrepresentation, or other misconduct of an adverse party.' " Finally, the trial court concluded that "in accordance with NCRCP 60(b)(3) the intrinsic fraud, misrepresentation and misconduct of the plaintiff in obtaining the underlying Alabama judgment precludes enforcement of the Alabama judgment as a judgment of this State." Plaintiff gave timely notice of appeal to the Court of Appeals.

On appeal plaintiff argued that the trial court erred in denying its motion to enforce the Alabama judgment as a judgment of the State of North Carolina, contending that under the Full Faith and Credit

Clause of the United States Constitution a state may only deny enforcement of a sister state's judgment for extrinsic fraud, not intrinsic fraud.

The Court of Appeals vacated the trial court's order denying enforcement of the Alabama judgment and remanded for further proceedings. *DocRx, Inc. v. EMI Servs. of N.C., LLC*, ___ N.C. App. ___, ___, 738 S.E.2d 199, 204 (2013). The court below recognized that the interplay among the Full Faith and Credit Clause, N.C.G.S. § 1A-1, Rule 60(b), and our UEFJA is an issue of first impression in this State. *Id.* at ___, 738 S.E.2d at 201-02. The Court of Appeals noted that "[t]raditionally, foreign judgments have been subject to attacks on limited grounds," requiring a showing "that the court lacked jurisdiction, or that the judgment was procured through fraud." *Id.* at ___, 738 S.E.2d at 201 (emphasis and quotation marks omitted) (citing *Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523, 146 S.E.2d 397 (1966)). The court also recognized that the UEFJA, enacted in 1989, states, in pertinent part, that a foreign judgment " 'has the same effect and is subject to the same defenses as a judgment of this State and shall be enforced or satisfied in like manner[.]' " *Id.* at ___, 738 S.E.2d at 202 (brackets in original) (quoting N.C.G.S. § 1C-1703(c) (2011)). The Court of Appeals acknowledged that the plain language of the UEFJA would seem to allow a foreign judgment debtor to utilize any defense applicable to a domestic judgment, such as Rule 60(b). *Id.* at ___, 738 S.E.2d at 202.

However, relying on cases from Utah, Montana, and Colorado that have interpreted similar statutes, the court below held that in North Carolina " 'the remedies available under Rule . . . 60 are limited by the Full Faith and Credit Clause of the United States Constitution when a foreign judgment is at issue.' " *Id.* at ___, 738 S.E.2d at 202-03 (quoting *Bankler v. Bankler*, 963 P.2d 797, 799-800 (Utah Ct. App. 1998)). The court adopted the rule articulated by the Colorado Court of Appeals in *Craven v. Southern Farm Bureau Casualty Insurance Co.*, 117 P.3d 11, 14 (Colo. App. 2004), and then concluded that "intrinsic fraud, misrepresentation and misconduct" were not sufficient grounds under the Full Faith and Credit Clause to deny plaintiff's motion to enforce the Alabama judgment. *Id.* at ___, 738 S.E.2d at 203. This Court allowed defendant's petition for discretionary review.

Before this Court defendant argues that the Full Faith and Credit Clause does not limit attack on fraudulent foreign judgments to those obtained by extrinsic fraud. Defendant contends that the decision of the Court of Appeals improperly gives foreign judgments more defer-

ence than domestic judgments because a foreign judgment cannot be attacked for intrinsic fraud under Rule 60(b) and the UEFJA, but a domestic judgment can be attacked on such grounds. We disagree.

The central issue in this case is whether the Full Faith and Credit Clause requires North Carolina courts to enforce the Alabama monetary judgment. This issue involves a question of law, which we review de novo. *State v. Cox*, 367 N.C. 147, 151, 749 S.E.2d 271, 275 (2013).

To determine this issue, we look first to the language of the Full Faith and Credit Clause and the United States Supreme Court's jurisprudence interpreting this constitutional provision. The Full Faith and Credit Clause of the United States Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. IV, § 1. Pursuant to that clause Congress has prescribed:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738 (2012). The purpose of the full faith and credit command

> "was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin."

Baker v. Gen. Motors Corp., 522 U.S. 222, 232, 139 L. Ed. 2d 580, 591 (1998) (quoting *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 277, 80 L. Ed. 220, 228 (1935)).

Under United States Supreme Court decisions, the test for determining when the Full Faith and Credit Clause requires enforcement of a foreign judgment focuses on the validity and finality of the judgment in the rendering state. *See New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 91 L. Ed. 1133 (1947); *Morris v. Jones*, 329 U.S. 545, 91 L. Ed. 488 (1947). In *Morris v. Jones*, Morris brought suit in Missouri

against Chicago Lloyds, an Illinois insurance company authorized to do business in Missouri, for malicious prosecution and false arrest. 329 U.S. at 546-47, 91 L. Ed. at 493. Before a judgment was obtained in Missouri, Chicago Lloyds was ordered into liquidation in Illinois, and a liquidator was appointed. *Id.* at 547, 91 L. Ed. at 493. The Illinois court set "a time for the filing of claims against Chicago Lloyds and issued an order staying suits against it." *Id.* Morris had notice of the stay order but continued to prosecute his suit in Missouri. *Id.* Chicago Lloyds's counsel withdrew from the Missouri suit, "stating to the Missouri court that the Illinois liquidation proceedings had vested all the property of Chicago Lloyds in the liquidator." *Id.* Thereafter, Morris obtained a judgment against Chicago Lloyds in Missouri and filed a proof of claim in the Illinois proceedings, attaching a copy of his Missouri judgment. *Id.* The Illinois Supreme Court upheld an order disallowing the claim, notwithstanding Morris's argument that allowance of the claim was mandated by the Full Faith and Credit Clause. *Id.* The United States Supreme Court allowed Morris's petition for certiorari.

Before the United States Supreme Court, Jones, the statutory liquidator appointed by the Illinois court, contended that the Illinois Supreme Court correctly concluded that title to all property of Chicago Lloyds was vested in the liquidator and was not subject to the process of any other court. *Id.* at 548, 91 L. Ed. at 494. The Illinois court further concluded "that if a liquidator had been appointed in Missouri, [Morris] could not have obtained his judgment or if he had obtained it, he could not have enforced it against the property in the hands of the Missouri liquidator." *Id.* (citation omitted). Accordingly, the Illinois court determined that disallowance of the Missouri judgment in the Illinois proceedings gave the Missouri judgment "the same effect that it would have had under the same circumstances in Missouri." *Id.*

The Supreme Court initially made clear that Morris was "not seeking . . . anything other than the right to prove his claim in judgment form." *Id.* The Supreme Court then reasoned as follows:

> "A judgment of a court having jurisdiction of the parties and of the subject matter operates as *res judicata*, in the absence of fraud or collusion, even if obtained upon a default." Such a judgment obtained in a sister State is . . . entitled to full faith and credit in another State, though the underlying claim would not be enforced in the State of the forum. It is no more important that

> the suit on this underlying claim could not have been maintained in Illinois after the liquidator had been appointed than the fact that a statute of limitations of the State of the forum might have barred it. . . . The full faith and credit to which a judgment is entitled is the credit which it has in the State from which it is taken, not the credit that under other circumstances and conditions it might have had.
>
> Under Missouri law petitioner's judgment was a final determination of the nature and amount of his claim. That determination is final and conclusive in all courts.
>
> . . . .
>
> . . . The command [of the federal statute implementing the Full Faith and Credit Clause] is to give full faith and credit to every judgment of a sister State. And where there is no jurisdictional infirmity, exceptions have rarely, if ever, been read into the constitutional provision or the Act of Congress in cases involving money judgments rendered in civil suits.

Id. at 550-53, 91 L. Ed. at 495-97 (citations omitted). The Court in *Morris* concluded "that the nature and amount of petitioner's claim has been conclusively determined by the Missouri judgment and may not be relitigated in the Illinois proceedings, it not appearing that the Missouri court lacked jurisdiction over either the parties or the subject matter." *Id.* at 554, 91 L. Ed. at 497-98.

New York ex rel. Halvey v. Halvey involved a New York court's modification of a child custody decree rendered in Florida. 330 U.S. at 611-12, 91 L. Ed. at 1134-35. The United States Supreme Court determined that since a Florida court could modify the custody decree, it was not res judicata and the modification by the New York Court did not violate the Full Faith and Credit Clause. *Id.* at 613-14, 91 L. Ed. at 1135-36. In reaching this decision, the Court stated:

> The general rule is that [the Full Faith and Credit Clause] requires the judgment of a sister State to be given full, not partial, credit in the State of the forum. But a judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered. If the court of the State which rendered the judgment had no jurisdiction over the person or the subject matter, the jurisdictional infirmity is not saved by the Full Faith and Credit Clause. . . . Whatever may be the authority of a State to undermine a judgment of a sister State on

> grounds not cognizable in the State where the judgment was rendered, it is clear that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered.

Id. at 614-15, 91 L. Ed. at 1136 (citations omitted). The Court then concluded that "[i]t is not shown that the New York court in modifying the Florida decree exceeded the limits permitted under Florida law. There is therefore a failure of proof that the Florida decree received less credit in New York than it had in Florida." *Id.* at 615, 91 L. Ed. at 1136.

Thus, if the foreign judgment is valid and final in the rendering state, it is conclusive in the forum state and is entitled to receive full faith and credit. *See Morris*, 329 U.S. at 554, 91 L. Ed. at 497-98. If the foreign judgment can be modified in the rendering state, it is not conclusive and can be modified by the forum state. *Halvey*, 330 U.S. at 614-15, 91 L. Ed. at 1136.

The UEFJA enacted in North Carolina sets out the procedure for filing a foreign judgment. N.C.G.S. §§ 1C-1701 to -1708 (2013). Section 1C-1703(c) states that "[a] judgment so filed has the same effect and is subject to the same defenses as a judgment of this State and shall be enforced or satisfied in like manner." N.C.G.S. § 1C-1703(c). A foreign judgment debtor may seek relief from the foreign judgment on the grounds that it "has been appealed from" or "stayed by" the rendering court "or on any other ground for which relief from a judgment of this State would be allowed." N.C.G.S. § 1C-1705(a).

Defendant contends that the phrase "is subject to the same defenses as a judgment of this State," N.C.G.S. § 1C-1703(c), entitles it to challenge the Alabama judgment under Rule 60(b) of the North Carolina Rules of Civil Procedure and that the trial court was, therefore, correct in denying plaintiff's motion to enforce the Alabama judgment on the ground that it was obtained by "intrinsic fraud, misrepresentation and misconduct of the plaintiff," namely, false testimony as to the amount of defendant's indebtedness to plaintiff. Defendant asserts that because Rule 60(b)(3) of the Alabama Rules of Civil Procedure, like Rule 60(b)(3) of the North Carolina Rules of Civil Procedure, provides for relief from a judgment for "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party," Ala. R. Civ. P. 60(b)(3), both the Full Faith and Credit Clause and the UEFJA are satisfied. *See* N.C.G.S. § 1A-1, Rule 60(b)(3) (2013).

This Court has not previously addressed the interplay among the Full Faith and Credit Clause, North Carolina's UEFJA, and Rule 60(b) of the North Carolina Rules of Civil Procedure. However, other state supreme courts that have considered the interplay between the Full Faith and Credit Clause and the UEFJA have rejected the argument that the judgment of the rendering state can be reopened in the forum state under Rule 60 of the Rules of Civil Procedure. For example, in *Matson v. Matson*, the Minnesota UEFJA provided that *"[a] judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a district court or the supreme court of this state, and may be enforced or satisfied in like manner."* 333 N.W.2d 862, 867 (Minn. 1983) (en banc) (quoting Minn. Stat. § 548.27 (1982) (emphasis added)). Interpreting this provision, the Supreme Court of Minnesota stated:

> Appellant is under the misconception that the above-emphasized language allows the courts of this state to apply Minn.R.Civ.P. 60.02 to foreign judgments in the same manner it is applied to judgments of the courts of this state. It has been settled by the United States Supreme Court and courts of other states that the power of a state to reopen or vacate a foreign judgment is more limited than under the rules of civil procedure and that a foreign judgment cannot be collaterally attacked on the merits. After a foreign judgment has been duly filed, the grounds for reopening or vacating it are limited to lack of personal or subject matter jurisdiction of the rendering court, fraud in procurement (extrinsic), satisfaction, lack of due process, or other grounds that make a judgment invalid or unenforceable. The nature and amount or other aspects of the merits (i.e., defenses) of a foreign judgment cannot be relitigated in the state in which enforcement is sought. *See Morris v. Jones*, 329 U.S. 545, 67 S.Ct. 451, 91 L.Ed. 488 (1946).

Id. at 867-68 (citations omitted).

Similarly, the Supreme Court of Nevada stated that "the defenses preserved by Nevada's Uniform Enforcement of Foreign Judgments Act and available under NRCP 60(b) are limited to those defenses that a judgment debtor may constitutionally raise under the full faith and credit clause and which are directed to the validity of the foreign judgment." *Rosenstein v. Steele*, 103 Nev. 571, 573, 747 P.2d. 230, 232 (1987) (per curiam) (citations omitted); *see also Marworth, Inc. v.*

McGuire, 810 P.2d 653, 657 (Colo. 1991) (en banc) (stating that under the Colorado UEFJA "[o]ur courts may consider C.R.C.P. 60(b) motions for relief from a foreign judgment only to the extent permitted by the full faith and credit clause"); *Carr v. Bett*, 1998 MT 266, ¶42, 291 Mont. 326, 338-39, 970 P.2d 1017, 1024 (1998) (holding that a foreign judgment filed under the Montana UEFJA may not "be subjected to the same defenses and proceedings for reopening or vacating as a domestic judgment, and remain consistent with full faith and credit. . . . [T]he only defenses that may be raised to destroy the full faith and credit obligation owed to a final judgment are those defenses directed at the validity of the foreign judgment"); *Wooster v. Wooster*, 399 N.W.2d 330, 333 (S.D. 1987) (stating that "the *grounds* mentioned in Rule 60(b) which allow relief from a judgment are not available to vacate a foreign judgment" under the South Dakota UEFJA); *Salmeri v. Salmeri*, 554 P.2d 1244, 1248 (Wyo. 1976) (holding that a foreign judgment for alimony and child support arrearages was "not subject to attack in [Wyoming] except on grounds that would permit attack upon any other money judgment, such as want of jurisdiction in the court entering the judgment or lack of service so as to vest jurisdiction over the defendant").

This interpretation of the UEFJA also finds support in the Prefatory Note to the 1964 Revised Uniform Enforcement of Foreign Judgments Act, stating that the UEFJA as revised

> adopts the practice which, in substance, is used in Federal courts. It provides the enacting state with a speedy and economical method of doing that which it is required to do by the Constitution of the United States. It also relieves creditors and debtors of the additional cost and harassment of further litigation which would otherwise be incident to the enforcement of the foreign judgment. This act offers the states a chance to achieve uniformity in a field where uniformity is highly desirable. Its enactment by the states should forestall Federal legislation in this field.

Rev. Unif. Enforcement of Foreign Judgments Act prefatory note (1964), 13 U.L.A. 156-57 (2002) [hereinafter Rev. UEFJA prefatory note]. The federal statute, after providing for the registration of a judgment in any other district, mentions only one defense, satisfaction, but does allow that "[t]he procedure prescribed under this section is in addition to other procedures provided by law for the enforcement of judgments." 28 U.S.C. § 1963 (2012).

Defendant relies primarily on two intermediate court of appeals cases, one from Ohio and one from Minnesota. Both cases can be distinguished from the present case. In *Schwartz v. Schwartz* the defendant's second wife sought an annulment in Ohio on the ground that their marriage was null and void because the defendant's previous divorce in New York had been obtained by fraud. 113 Ohio App. 275, 276, 173 N.E.2d 393, 393-94 (1960). An Ohio Court of Appeals granted the annulment after determining that the New York divorce decree was not entitled to full faith and credit when there was evidence of a prearranged, staged act of adultery in order to obtain the divorce. *Id.* at 276, 279-80, 173 N.E.2d at 393, 395-96. The court reasoned that the New York court could set aside the divorce on its own motion for fraud on the court. *Id.* at 279, 173 N.E.2d at 395. Adultery was the only ground for divorce in New York, and without an act of adultery, the court had no authority to enter the divorce. *Id.* at 276, 279, 173 N.E.2d at 393, 395. Thus, since the rendering New York court could have set aside the divorce, the divorce was not entitled to full faith and credit in Ohio under *Halvey v. Halvey*. In the present case, the Alabama court had the authority to enter a judgment on plaintiff's breach of contract claim. Ala. Code § 12-11-30 (2013).

In *Blume Law Firm PC v. Pierce*, the Minnesota Court of Appeals considered whether an Arizona judgment should be entitled to full faith and credit when it was alleged that the judgment was obtained through an attorney's fraudulent misrepresentations in his affidavit in support of the judgment. 741 N.W.2d 921, 926-27 (Minn. Ct. App. 2007). The law firm sued a client and his parents for unpaid legal fees. *Id.* at 924. In the affidavit, the attorney alleged that a valid promissory note and security agreement were entered into by the client and his father. *Id.* at 926. The Arizona court held the parents liable for their son's attorneys' fees. *Id.* at 924, 926. The promissory note and security agreement referenced in the attorney's affidavit were contained in the record in Minnesota, but those documents were signed only by the son. *Id.* at 927. At oral argument before the Court of Appeals of Minnesota, the plaintiff law firm was unable to provide a basis for holding either parent liable. *Id.* The Court of Appeals stated that the allegations sounded in fraud and remanded the case to the trial court to give the law firm the opportunity to demonstrate the basis for suing the parents. *Id.* The court did not distinguish between extrinsic and intrinsic fraud, but instructed that if the law firm was "unable to substantiate its claim," the trial court "should then determine whether the law firm's conduct amounts to

fraud that would justify disregarding the judgment." *Id*. In the present case, defendant's evidence of the amount owed, consisting of emails from which inferences can be drawn, differs markedly from a signed promissory note and security agreement. The emails do not demonstrate on their face that plaintiff's representations were false, and the record contains no document disclosing to whom and for how much defendant sold the pills as required by the terms of the fee agreement at issue in this case. Moreover, the Minnesota Court of Appeals did not hold that the allegations constituted fraud; the court merely stated the allegations sounded in fraud and remanded the case to the trial court.

We hold that the defenses preserved under North Carolina's UEFJA are limited by the Full Faith and Credit Clause to those defenses which are directed to the validity and enforcement of a foreign judgment. The language of the UEFJA that a foreign judgment "has the same effect and is subject to the same defenses as a judgment of this State and shall be enforced or satisfied in like manner," N.C.G.S. § 1C-1703(c), does not refer to defenses on the merits but rather refers to defenses directed at the enforcement of a foreign judgment, such as, that the judgment creditor committed extrinsic fraud, that the rendering state lacked personal or subject matter jurisdiction, that the judgment has been paid, that the parties have entered into an accord and satisfaction, that the judgment debtor's property is exempt from execution, that the judgment is subject to continued modification, or that the judgment debtor's due process rights have been violated. *See Halvey*, 330 U.S. at 614-15, 91 L. Ed. at 1136; *Morris*, 329 U.S. at 554, 91 L. Ed. at 497-98; *White Co*., 296 U.S. at 275-76, 80 L. Ed. at 227; *Matson*, 333 N.W.2d at 867; *Thomas*, 266 N.C. at 526, 146 S.E.2d at 400. To permit a party to relitigate matters that could have and should have been litigated in the rendering court is inconsistent with decisions of the United States Supreme Court holding that judgments that are valid and final in the rendering state are entitled to enforcement in the forum state under the Full Faith and Credit Clause. *See Halvey*, 330 U.S. 610, 91 L. Ed. 1133; *Morris*, 329 U.S. 545, 91 L. Ed. 488. Further, to permit a party to collaterally attack a foreign judgment on the merits would be contrary to the rationale underlying the UEFJA, which is to streamline the procedure for enforcing a foreign judgment and eliminate the need for additional litigation. Rev. UEFJA prefatory note.

Moreover, even if the UEFJA and Rule 60(b) permit a foreign judgment debtor to raise intrinsic fraud as a defense to the foreign

judgment, on the record before this Court, defendant would be barred from asserting that defense. Alabama's Rule 60(b) requires a judgment debtor to raise fraud within four months of entry of the judgment. Ala. R. Civ. P. 60(b).

In the present case a default judgment against defendant in the amount of $453,683.14 was entered on 1 April 2011 in Alabama, and the Request To File Foreign Judgment was filed in Stanly County on 2 August 2011. Defendant's initial Motion For Relief From And Notice Of Defense To Foreign Judgment was filed on 25 August 2011. In that filing defendant asserted, *inter alia*: "**Extrinsic Fraud**. The Alabama foreign judgment is void and unenforceable because the underlying judgment was obtained by fraud—EMI's execution of the contract upon which the Alabama Complaint was based was fraudulently induced and DocRx engaged in fraudulent acts in its own alleged performance of that contract." On 17 January 2012, defendant filed an Amended Motion For Relief From And Notice Of Defense To Foreign Judgment. In that filing defendant raised a defense under Rule 60(b)(3) of the North Carolina Rules of Civil Procedure, alleging that plaintiff's representations as to the amount owed constituted fraud, whether intrinsic or extrinsic.

By the time the Alabama judgment was filed in Stanly County, the four-month period for raising a challenge to the judgment under Alabama Rule of Civil Procedure 60(b)(3) had passed, and the judgment was a final judgment under Alabama law. Irrespective of whether the alleged fraud was intrinsic or extrinsic, the Alabama judgment was final and enforceable in Alabama when it was filed in North Carolina. Thus, plaintiff's claim had been conclusively determined in Alabama.

Therefore, we hold that the Alabama judgment is a final judgment, and under *Morris v. Jones* it is entitled to the same credit in North Carolina that it would be accorded in Alabama. The defenses to a foreign judgment under the UEFJA are limited by the Full Faith and Credit Clause to those defenses that are directed to the enforcement of the foreign judgment, and Rule 60(b) of the North Carolina Rules of Civil Procedure has no applicability.

Defendant's argument that the Court of Appeals decision should be reversed because a foreign judgment creditor would get better treatment than a North Carolina judgment creditor is misplaced and does not comport with the United States Supreme Court's language in *Morris v. Jones* and *Halvey v. Halvey* emphasizing that the validity

and finality of the judgment in the rendering state control whether that judgment is entitled to full faith and credit in the forum state. The UEFJA is not on a parity with the Full Faith and Credit Clause. U.S. Const. art. VI, cl. 2. In the present case the Alabama monetary judgment was valid and final in Alabama, and North Carolina cannot give the Alabama judgment less credit than it would be given in Alabama.

For the reasons stated herein, the decision of the Court of Appeals is affirmed, as modified. This case is remanded to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this opinion.

MODIFIED AND AFFIRMED; REMANDED.

GRIFFIN v. BALL

[367 N.C. 385 (2014)]

BRUCE LEE GRIFFIN, PETITIONER v. MIKE BALL, ADMINISTRATOR, A/M CORRE. INST. #4680, RESPONDENT

No. 559PA11-2

(Filed 12 June 2014)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order of the Court of Appeals, ___ N.C. App. ___, ___ S.E.2d ___ (2013), allowing petitioner's petition for writ of habeas corpus and vacating a judgment entered by Judge Laura J. Bridges on 11 February 2010 in Superior Court, Buncombe County. Heard in the Supreme Court on 15 April 2014.

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

Roy Cooper, *Attorney General*, *by Joseph L. Hyde*, *Assistant Attorney General*, *for the State respondent-appellant.*

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 order of the Court of Appeals. Accordingly, the order of the Court of Appeals is left undisturbed. *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.

IN RE ADOPTION OF S.D.W.

No. 348PA13

(Filed 12 June 2014)

Adoption—consent of biological father—unaware of pregnancy or birth—sufficient opportunity to obtain notice and acknowledge paternity

The trial court did not err by allowing an adoption to proceed without the consent of the biological father, who was unaware that he had fathered the child. Obtaining notice of the pregnancy and birth was not beyond the father's control and he had sufficient opportunity to acknowledge paternity and establish himself as a responsible parent within the time set by statute. Because he failed to do so, he fell outside the class of responsible biological fathers who enjoy a constitutionally protected opportunity to develop a relationship with their natural children and his due process claim failed.

Justice JACKSON dissenting.

Justice HUDSON and Justice BEASLEY join in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 745 S.E.2d 38 (2013), reversing orders entered on 10 November 2011 and 17 February 2012 by Judge Elizabeth T. Trosch in District Court, Mecklenburg County, and remanding for an evidentiary hearing and entry of a revised order. Heard in the Supreme Court on 18 February 2014.

Thurman, Wilson, Boutwell & Galvin, P.A., by W. David Thurman, John D. Boutwell, and Alexander W. Warner, for petitioner-appellants adoptive parents and appellant Christian Adoption Services, Inc.

Jonathan McGirt for respondent-appellee father Gregory Johns.

Claiborne & Fox, PLLC, by Amy Wallas Fox; and Herring & Mills, PLLC, by Bobby Mills, for American Academy of Adoption Attorneys, amicus curiae.

EDMUNDS, Justice.

The issue presented in this case concerns the legal ability of a biological father who is unaware that he has fathered a child to object to the mother's decision to place the child for adoption. Appellee Gregory Johns ("Johns") contends that his state and federal due process rights were violated because the adoption deprived him of his rights as a father. We conclude that obtaining notice of the pregnancy and birth was not beyond Johns's control and that he had sufficient opportunity to acknowledge paternity and establish himself as a responsible parent within the time set by statute. Because he failed to do so, he falls outside the class of responsible biological fathers who enjoy a constitutionally protected relationship with their natural children. As a result, Johns's due process claim fails. We reverse the decision of the Court of Appeals remanding the matter for additional evidence.

Laura Marshburn Welker ("Welker") and Johns acknowledge that they are the biological parents of the minor child "S.D.W." Although they neither married nor cohabited, Johns and Welker were involved in an intimate relationship from approximately May 2009 to February or March 2010. Johns described their involvement as "mostly physical," adding that the couple "had sex[ ] 10 to 20 times a week."

During this time, Johns was aware that Welker had given birth about three years previously to a son who was then living with Welker's mother. Understanding that Welker used a form of birth control that he characterized as an "IUD band," Johns did not wear condoms during intercourse with Welker. In the summer of 2009, Welker became pregnant and she and Johns decided that she would have an abortion. After that pregnancy was terminated, Welker told Johns that she was using another form of birth control. According to Johns: "It's either a shot or a patch. I know she wasn't taking pills every day, that I do know. I don't remember seeing a patch, but I remember we were talking about it, but I'm—I would say it was a shot, a birth control shot." Johns continued his practice of not wearing a condom.

At some time around the end of January 2010, Johns broke up with Welker. Even so, until early March 2010, they engaged in additional acts of sexual intercourse during three to five visits Welker made to Johns's home. Thereafter, Welker cut off all contact with Johns, and except for Johns's birthday on 26 November 2010 when Welker stopped by his home to mark the occasion with another act of sexual intercourse, there was no further communication between them until late April 2011.

In the interim, Welker gave birth to S.D.W. on 10 October 2010. The next day, 11 October, she executed an "Affidavit of Parentage" incorrectly naming "Gregory Thomas James" as the father and leaving blank the line for the father's last known address. At the same time, she executed a Department of Social Services form relinquishing custody of S.D.W. to adoption agency Christian Adoption Services, Inc. ("the agency") through its director, James M. Woodward. The agency identified Benjamin Allen Jones and Heather Pitts Jones ("the Joneses" or "petitioners") as prospective adoptive parents for S.D.W., and on 12 October, the infant was placed in their custody, where he has remained. On 27 October, Welker signed a form provided by the agency titled "Birth Father Information," in which she again misidentified the father as "Gregory Thomas James."

The Joneses filed a petition to adopt S.D.W. on 2 November 2010. The agency, relying on the false name provided by Welker, attempted to locate the biological father. On 16 November 2010, after failing to find "Gregory Thomas James," the agency filed a petition to terminate the parental rights of the absent father, an action that resulted in a stay in the adoption proceedings. N.C.G.S. § 48-2-402 (2013).

In late April 2011, Johns first heard that Welker had given birth. After calling Welker on 25 April 2011 and confirming with her both that the child was his and that she had placed the child for adoption, Johns took steps to assert his intention to obtain custodial rights of S.D.W. and to prevent the adoption from proceeding. Welker also contacted the agency in late April to disclose Johns's correct identity, leading counsel for the agency on 2 May 2011 to voluntarily dismiss without prejudice the action to terminate parental rights.

As a result of the dismissal, the temporary stay was removed on 5 May 2011 and petitioners gave notice of their intention to proceed with the adoption. On 17 May 2011, a Notice of Pendency of Adoption Proceedings was served on Johns's brother. On 24 May 2011, acting *pro se*, Johns sent letters to the Clerk of Court of Mecklenburg County and to counsel for the agency, introducing himself, requesting DNA testing, asking that the adoption be terminated, and advising that he would not surrender his parental rights over S.D.W. On 15 August 2011, Johns, now represented by counsel, filed verified motions in the District Court, Mecklenburg County, seeking to intervene in the adoption proceeding, to dismiss the adoption petition, to secure child custody, and to obtain related relief.

On 19 September 2011, petitioners filed their Response to Respondent's Motions and Motion for Summary Judgment. In this response, petitioners acknowledged that "[a]n issue of fact and law exists as to whether [Johns's] [c]onsent is required" but opposed Johns's Motion to Intervene, arguing that Johns was not a party and that he lacked standing because "he has not seen the minor child nor has he acted in a way that is consistent with the interests, rights, and duties of a parent." Petitioners moved for summary judgment, contending that Johns had failed to carry his burden of showing his consent was required under N.C.G.S. §§ 48-3-601 and 48-3-603. The former statute provides, in pertinent part regarding an agency placement:

> Unless consent is not required under G.S. 48-3-603, a petition to adopt a minor may be granted only if consent to the adoption has been executed by . . . [a]ny man who may or may not be the biological father of the minor but who . . . [b]efore the earlier of the filing of the petition or the date of a hearing under G.S. 48-2-206, has acknowledged his paternity of the minor and . . . [h]as provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support, and has regularly visited or communicated, or attempted to visit or communicate with the biological mother during or after the term of pregnancy, or with the minor, or with both.

N.C.G.S. § 48-3-601 (2013). The latter statute lists persons whose consent is not required. *Id.* § 48-3-603 (2013). The case was transferred from the Assistant Clerk of Court to the district court because of the existence of an issue of fact regarding Johns's consent.

On 19 October 2011, Johns filed his reply to petitioners' response to his motion to intervene and motion to dismiss petitioners' motion for summary judgment. Johns's filing highlighted petitioners' admission that "[a]n issue of fact and law exists as to whether [Johns's] [c]onsent is required" and argued that summary judgment here "is premature and would severely prejudice [his] Constitutionally protected status as the biological parent of the minor child."

On 10 November 2011, Judge Elizabeth T. Trosch entered an order in the District Court, Mecklenburg County, denying Johns's motion to intervene and setting for hearing the Joneses' motion for summary judgment. Johns filed a motion for relief on 21 November 2011, citing

North Carolina Rules of Civil Procedure 52, 59, and 60. In this motion, Johns asserted that the trial court should reopen the matter because the court's findings were insufficient and inadequate, and that the court also should set aside its 10 November 2011 order and relieve him of its directives because he had "obtained newly discovered evidence" proving that the agency and Welker knew his true identity before both the action to terminate his parental rights and the adoption petition were filed. Johns asked the court to set a new trial to determine the merits of his motion to intervene. Later, on 21 December 2011, Johns filed a Motion to Dismiss Petition for Adoption.

A hearing was held on 6 January 2012, at which Judge Trosch heard the Joneses' motion for summary judgment, as well as Johns's motion pursuant to Rules 52, 59, and 60 and his motion to dismiss the petition for adoption. At the conclusion of the hearing, Judge Trosch in open court entered an order allowing the adoption to proceed without Johns's consent and denying all motions made by him. The order was reduced to writing and filed on 17 February 2012.

In its written order, the trial court made numerous findings of fact summarizing the events stated above. It also found that "[t]he Agency made a due and diligent search for 'Gregory Thomas James' after October 11, 2010, but the search was unsuccessful," and that Johns's motion pursuant to Rules 52, 59, and 60 was not verified and was unsupported by any showing of newly discovered evidence. The court determined that "Johns did not rely upon any misrepresentation made by any party . . . . [He] simply did not inquire regarding the existence or identity of the Minor Child." Therefore, the trial court found Johns failed to comply with any provision of "N.C.G.S. [§] 48-3-601 to make his consent necessary in this adoption, nor does any genuine issue of material fact exist with regard to that fact."

In its conclusions of law, the trial court stated that:

> A putative Father who engages in a sexual relationship with a woman multiple times without benefit of contraception is on notice that a child may result from the sexual relationship and must make diligent inquiry to discover the existence of his child in order to establish a Constitutional Parental Right regarding that Minor Child.

The trial court determined that no genuine issue of material fact existed regarding Johns's failure to meet the relevant criteria listed in

section 48-3-601 and that, as a result, his consent "is not necessary for this adoption to proceed pursuant to N.C.G.S. [§§] 48-3-601 and 48-3-603, and Summary Judgment on this issue on behalf of Petitioners should be granted as a matter of law."

Johns appealed to the Court of Appeals, which reversed the trial court's orders granting petitioners' motion for summary judgment and denying Johns's motion to intervene. *In re S.D.W.*, ___ N.C. App. ___, ___, ___, 745 S.E.2d 38, 40, 51 (2013). The Court of Appeals noted that the appeal is interlocutory but concluded that the trial court's order affects a substantial right and that deprivation of this right could cause Johns irreparable damage. *Id.* at ___, 745 S.E.2d at 41-42. The Court of Appeals determined that the issues on appeal boiled down to "whether the trial court properly concluded that [Johns's] consent was not required under the adoption statutes and under the state or federal constitutions and whether the trial court properly interpreted the statutes at issue." *Id.* at ___, 745 S.E.2d at 42. Although the Court of Appeals found that "the trial court correctly concluded that [Johns's] consent is not required" under N.C.G.S. § 48-3-601, *id.* at ___, 745 S.E.2d at 44, the Court of Appeals went on to consider the constitutional implications of Johns's claim, holding that when

> a biological father, who prior to the filing of the petition was unaware that the mother was pregnant and had no reason to know [of the pregnancy], promptly takes steps to assume parental responsibility upon discovering the existence of the child has developed a constitutionally protected interest sufficient to require his consent where the adoption proceeding is still pending.

Id. at ___, 745 S.E.2d at 51. Concluding that insufficient facts existed in the record to determine whether applying N.C.G.S. § 48-3-601 to Johns would violate his due process rights, *id.* at ___, 745 S.E.2d at 44, the Court of Appeals reversed the trial court's orders on the motions and remanded the case with instructions to the trial court to conduct an evidentiary hearing and enter revised findings of fact and conclusions of law, *id.* at ___, 745 S.E.2d at 50-51. This Court allowed discretionary review.

When constitutional rights are implicated, the appropriate standard of review is de novo. *Libertarian Party of N.C. v. State*, 365 N.C. 41, 46, 707 S.E.2d 199, 202-03 (2011) (citing *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001)). The initial question we must consider is "the extent

to which a natural father's biological relationship with his child receives protection under the Due Process Clause." *Lehr v. Robertson*, 463 U.S. 248, 258, 103 S. Ct. 2985, 2992, 77 L. Ed. 2d 614, 624 (1983). Because Johns has not argued that the Law of the Land Clause of the Constitution of North Carolina and the Due Process Clause of the Constitution of the United States are to be interpreted differently here, we will not distinguish between them in our analysis.

While the facts and applicable statutes in *Lehr*, cited above, are not identical to those at bar, the Supreme Court's analysis in that case provides useful guidance. Lehr had lived with the mother of the child in question, though they never married. *Id.* at 251-52, 103 S. Ct. at 2988, 77 L. Ed. 2d at 620-21. Apparently Lehr knew the child was his, for he visited the mother in the hospital when the baby was born. *Id.* at 252, 103 S. Ct. at 2988, 77 L. Ed. 2d at 620. After the birth, Lehr did not live with the mother, provide financial support, enter his name in New York's putative father registry, or offer to marry the mother, who married another man about eight months after the birth. *Id.* at 250-52, 103 S. Ct. at 2987-88, 77 L. Ed. 2d at 619-21. Approximately two years after the child was born, the mother and her husband filed an adoption petition in New York. *Id.* at 250, 103 S. Ct. at 2987, 77 L. Ed. 2d at 619. One month later, Lehr, who was unaware that an adoption proceeding had been filed and was still pending, filed a "visitation and paternity petition" in which he sought a determination of paternity, an order of support, and reasonable visitation privileges with the child. *Id.* at 252, 103 S. Ct. at 2988-89, 77 L. Ed. 2d at 621. After making his filing, Lehr first learned on 3 March 1979 of the pending adoption proceeding. *Id.* at 253, 103 S. Ct. at 2989, 77 L. Ed. 2d at 621.

The trial court conducted a hearing and, after receiving a favorable report from the county Department of Social Services, entered an order of adoption on 7 March 1979. *Id.* at 250, 103 S. Ct. at 2987, 77 L. Ed. 2d at 619. Later that same day, the trial judge advised Lehr's counsel that, while he was aware of Lehr's pending paternity petition, he had already signed the adoption order and did not believe he was required to give notice to Lehr before entering the order. *Id.* at 253, 103 S. Ct. at 2989, 77 L. Ed. 2d at 621. The trial judge denied Lehr's motion to vacate the order of adoption, and the New York Court of Appeals affirmed. *Id.*

The Supreme Court of the United States also affirmed. 463 U.S. at 268, 103 S. Ct. at 2997, 77 L. Ed. 2d at 631. The Court observed that Lehr was subject to New York's adoption scheme, under which sev-

eral classes of putative fathers are entitled to be given notice of any adoption proceedings. *Id.* at 250-51, 103 S. Ct. at 2985, 2988, 77 L. Ed. 2d at 619-20. Lehr, like Johns, admitted he was not a member of any of the classes defined by his state's statute but contended that nevertheless, he had a right to notice and a hearing under the Constitution of the United States. *Id.* at 251-52, 103 S. Ct. at 2988, 77 L. Ed. 2d at 620-21. Lehr argued that "a putative father's actual or potential relationship with a child born out of wedlock is an interest in liberty which may not be destroyed without due process of law; . . . therefore . . . he had a constitutional right to prior notice and an opportunity to be heard before he was deprived of that interest." *Id.* at 255, 103 S. Ct. at 2990, 77 L. Ed. 2d at 622.

The Supreme Court began its analysis by observing that:

> The Fourteenth Amendment provides that no State shall deprive any person of life, liberty, or property without due process of law. When that Clause is invoked in a novel context, it is our practice to begin the inquiry with a determination of the precise nature of the private interest that is threatened by the State. Only after that interest has been identified, can we properly evaluate the adequacy of the State's process.

Id. at 256, 103 S. Ct. at 2990, 77 L. Ed. 2d at 623 (citations omitted). Accordingly, the Court considered the nature of a biological father's liberty interest in developing a relationship with his illegitimate child. *See id.* After acknowledging that "[t]he intangible fibers that connect parent and child . . . . are sufficiently vital to merit constitutional protection in appropriate cases," *id.*, the Court limited the reach of such protection because " 'it by no means follows that each unwed parent has any such right. *Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring*,' " 463 U.S. at 260, 103 S. Ct. at 2992, 77 L. Ed. 2d at 626 (quoting *Caban v. Mohammed*, 441 U.S. 380, 397, 99 S. Ct. 1760, 1770, 60 L. Ed. 2d 297, 310 (1979) (Stewart, J., dissenting) (emphasis added)). The Court then considered how a biological father could nurture a relationship meriting constitutional protection:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's develop-

> ment. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

Id. at 262, 103 S. Ct. at 2993-94, 77 L. Ed. 2d at 627 (footnote omitted).

The Supreme Court then went on to consider whether New York's statute adequately protected Lehr's opportunity to form a relationship with his child. *Id.* at 263-65, 103 S. Ct. at 2994-95, 77 L. Ed. 2d at 627-29. The Court concluded that the statute provides adequate protections, *id.* at 265, 103 S. Ct. at 2995, 77 L. Ed. 2d at 629, and that, because he never formed a "substantial" relationship with his child, the statute did not deny Lehr equal protection, *id.* at 267, 103 S. Ct. at 2996, 77 L. Ed. 2d at 630.

Against this backdrop, we now turn to Johns's case. Recognizing the concern for a biological father's interest identified in *Lehr*, which exists only in those men who have "grasp[ed] that opportunity [to develop a relationship with their offspring] and accept[ed] some measure of responsibility for the child's future," *id.* at 262, 103 S. Ct. at 2993, 77 L. Ed. 2d at 627, North Carolina has adopted a statutory framework designed to protect "both the interests of biological fathers in their children and the children's interest in prompt and certain adoption procedures," *id.* at 263, 103 S. Ct. at 2994, 77 L. Ed. 2d at 628. Like the New York statute, the North Carolina statute designates classes of biological fathers entitled to notice. N.C.G.S. § 48-2-401 (2013); *see also id.* § 48-3-601 (2013).

However, as the Supreme Court noted in *Lehr*, statutes that establish classes of biological fathers entitled to notice nevertheless may fail constitutional scrutiny (1) if they omit too many responsible fathers, or (2) if the qualifications for notice are beyond the control of an interested putative father. *Lehr*, 463 U.S. at 263-64, 103 S. Ct. at 2994, 77 L. Ed. 2d at 628. Even though the question of Johns's rights as a biological father are raised in the context of consent under N.C.G.S. § 48-3-601, while Lehr's rights were considered under a New York statute dealing with notice, that difference is insignificant because notice and consent are intertwined. A father who has not received notice cannot give or withhold consent. As to the first question, whether the statute is "likely to omit many responsible fathers," *id.* at 264, 103 S. Ct. at 2994, 77 L. Ed. 2d at 628, Johns does not challenge the statute's definitions of those responsible men whose consent to an adoption is necessary. Nor does he claim that he falls into any statutorily defined category by virtue of an acknowledge-

ment of paternity before the 2 November 2010 filing of the petition for adoption. Accordingly, he is not asserting that the categories set out in the statute omit too many responsible fathers, *id.*, and we will assume for the purposes of this case that the categories of fathers statutorily entitled to notice are adequate.

Instead, Johns's challenge arises under the second *Lehr* inquiry, whether the qualification for notice was beyond his control. *Id.* Specifically, he argues that he was deprived of knowledge of S.D.W.'s birth and denied the opportunity to demonstrate his commitment as a parent within the time provided by the statute. As we consider this contention, we observe that Johns's case can be distinguished from *Lehr* on the grounds that Welker took steps to disguise Johns's identity and failed to advise Johns of the child's birth when given the opportunity. In contrast, the Supreme Court's recitation of the facts in *Lehr* noted that "[t]here is no suggestion in the record that [the mother] engaged in fraudulent practices that led [Lehr] not to protect his rights." 463 U.S. at 265 n.23, 103 S. Ct. at 2995 n.23, 77 L. Ed. 2d at 629 n.23. Accordingly, we must consider whether, under the facts presented here, obtaining notice of S.D.W.'s birth was beyond Johns's control.

Johns contends that petitioners urge us to adopt a rule that an act of sex is by itself notice of a possible resulting pregnancy. We instead decide this case on the basis of the facts as applied to the statutes. Both parents demonstrated troubling behavior. Welker provided a false name for the father, both when S.D.W. was born and again later when she signed the adoption service's "Birth Father Information" form, obstructing official efforts to locate the father. When she visited Johns to celebrate his birthday less than two months after S.D.W. was born, she kept the news of the birth to herself.

Johns, on the other hand, demonstrated only incuriosity and disinterest. He knew that Welker was fertile because she already had a child when they met. He knew that, despite Welker's purported use of birth control, he had impregnated her once, leading to an abortion. He assumed that her subsequent birth control methods would be effective without making detailed inquiry. He and Welker continued an active sex life, even after they broke up. From Johns's perspective, the sex was unprotected and contraception was wholly Welker's responsibility. The burden on him to find out whether he had sired a child was minimal, for he knew how to contact Welker. All he had to do was ask, for when he finally did call her, she told him. All the while, S.D.W. continued to live and bond with his adoptive parents.

From this dreary record we conclude that, despite our concern over Welker's behavior, nothing she did or failed to do placed Johns in a position in which "qualification for notice" of the existence of S.D.W. was "beyond [his] control" during the relevant statutory time frame. *See Lehr*, 463 U.S. at 264, 103 S. Ct. at 2994, 77 L. Ed. 2d at 628. Accordingly, we conclude both that Johns had the opportunity to be on notice of the pregnancy and that he failed to grasp that opportunity by taking any of the steps that would establish him as a responsible father. Because of his passivity in the face of ample evidence that Welker may have become pregnant with his child and given birth, Johns does not fall into the class of protected fathers who may claim a liberty interest in developing a relationship with a child, and thus he was not deprived of due process. We reverse the decision of the Court of Appeals.

REVERSED.

Justice JACKSON dissenting.

In the instant case, this Court is asked to determine "the legal ability of a biological father who is unaware that he has fathered a child to object to the mother's decision to place the child for adoption." *In re S.D.W.*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (June 12, 2014) (348PA13). Because I believe that the trial court's findings are insufficient to support the majority's determination "that obtaining notice of the pregnancy and birth was not beyond Johns's control and that he had sufficient opportunity to acknowledge paternity and establish himself as a responsible parent within the time set by statute,"[1] *id.* at ___, ___ S.E.2d at ___, I respectfully dissent. *See Lehr v. Robertson*, 463 U.S. 248, 262, 103 S.Ct. 2985, 2993, 77 L.Ed.2d 614, 627 (1983).

Central to the majority's analysis is the conclusion that Johns does not have a claim based upon federal or state substantive due process because, "under the facts presented here, obtaining notice of S.D.W.'s birth was [not] beyond Johns's control." *In re S.D.W.*, ___ N.C. at ___, ___ S.E.2d at ___. As the majority notes, the key prece-

1. I note, as did the Court of Appeals, that Johns sought to establish a relationship with his biological child after the adoption petition had been filed, but before completion of the adoption. *In re S.D.W.*, ___ N.C. App. ___, ___, 745 S.E.2d 38, 49-50 (2013). I express no opinion about whether, had the adoption been finalized, the interests of the State, S.D.W., and the adoptive parents in finality would outweigh Johns's interests as a biological parent.

dent in this case is the United States Supreme Court's opinion in *Lehr v. Robertson*. The majority has correctly recounted the facts and procedural history in that case, with one significant exception. As described in the majority opinion, the key holding in that case was that a mere biological connection is insufficient to create a full-fledged constitutional right, based upon substantive due process, to the care and custody of one's biological children. *See Lehr*, 463 U.S. at 260, 103 S. Ct. at 2992, 77 L. Ed. 2d at 626 ("Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." (citation, emphasis, and quotation marks omitted)). What the majority discounts from its analysis, however, is that *Lehr* established that biological fathers possess at least an "inchoate" interest in their offspring, which is constitutionally entitled to at least some measure of protection. *See id.* at 249-50, 103 S. Ct. at 2987, 77 L. Ed. 2d at 619 ("The question presented is whether New York has sufficiently protected an unmarried father's inchoate relationship with a child whom he has never supported and rarely seen in the two years since her birth."). The Supreme Court noted that the issue in *Lehr* was "not . . . the constitutional adequacy of New York's procedures for terminating a *developed* relationship." *Id.* at 262, 103 S. Ct. at 2994, 77 L. Ed. 2d at 627 (emphasis added). Such a "developed parent-child relationship" merits "substantial protection under the Due Process Clause." *Id.* at 261, 103 S. Ct. at 2993, 77 L. Ed. 2d at 626. The biological father in *Lehr*, however, did not have a "developed" relationship with his child because he "never had any significant custodial, personal, or financial relationship with [the child], and he did not seek to establish a legal tie until after [the child] was two years old." *Id.* at 262, 103 S. Ct. at 2994, 77 L. Ed. 2d at 627. Nevertheless, the Supreme Court noted that a biological connection "offers the natural father an *opportunity* that no other male possesses *to develop a relationship* with his offspring." *Id.* at 262, 103 S. Ct. at 2993, 77 L. Ed. 2d at 627 (emphases added). Accordingly, the Supreme Court examined "whether New York has adequately protected [a putative father's] *opportunity to form* such a relationship."[2]

2. The Supreme Court then determined in *Lehr* that the father's "right to receive notice was completely within [his] control." 463 U.S. at 264, 103 S. Ct. at 2995, 77 L. Ed. 2d at 628. Specifically, he "could have guaranteed that he would receive notice of any proceedings to adopt [the child]" by "mailing a postcard to the putative father registry." *Id.* The Court stated that if New York's statutory adoption scheme "were likely to omit many responsible fathers, and if qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate." 463 U.S. at 264, 103 S. Ct. at 2994, 77 L. Ed. 2d at 628. I note that our Legislature has not enacted a statutory adoption scheme that provides for a putative father registry. *See* N.C.G.S. §§ 48-1-100 to -10-105 (2013).

Id. at 262-63, 103 S. Ct. at 2994, 77 L. Ed. 2d at 627 (emphasis added). Therefore, pursuant to *Lehr*, any statutory framework, on its face and as applied, must respect that inchoate interest by allowing biological fathers to "grasp[ ] th[e] opportunity" to develop that interest into a relationship more substantial and more enduring. *Id.* at 262, 103 S. Ct. at 2993, 77 L. Ed. 2d at 627. The issue here, then, is whether the opportunities afforded to Johns in this case were adequate to protect that interest.

I conclude that they were not. While the majority also has accurately recounted the facts and circumstances that preceded S.D.W.'s birth and the filing of the petition for adoption, I think several of these facts do not support the majority's conclusion, and some likely undermine it. First, the majority notes that Welker told defendant that she was using birth control, specifically an intrauterine device, a hormonal patch, or a hormonal shot. *See In re S.D.W.*, ___ N.C. at ___, ___ S.E.2d at ___. However, despite this, the majority concludes that Johns should have been on notice, in part because he did not use condoms *in addition* to one of these other methods of birth control. *Id.* at ___, ___ S.E.2d at ___. In my view, it is unrealistic to require potential biological fathers to use multiple, redundant forms of contraception or risk losing any rights they might have to raise and care for any children that result from this (protected) sexual activity.

Second, the majority opines that defendant should have been aware of Welker's continued fertility because he previously had impregnated her, and they had decided together that she would get an abortion. *Id.* at ___, ___ S.E.2d at ___. My reading of the majority opinion suggests that this history should have urged Johns to remain in contact with Welker and affirmatively inquire whether she was pregnant with his child, even after their romantic relationship ended; however, in my view, this prior incident argues to the contrary. Because Welker previously informed Johns when she became pregnant, it was reasonable for him to believe that she would tell him if she became pregnant again.[3]

Third, Welker declined to tell Johns about her pregnancy or the birth of S.D.W., despite having every opportunity to do so. Welker knew during the entire duration of the pregnancy that Johns was the biological father. She knew his address: Johns lived at the same apartment for several years, including at the time of S.D.W's birth and

3. It is worth noting that Welker visited Johns on 26 November 2010 to celebrate his birthday. This was over one month after S.D.W. was born on 10 October 2010.

adoption, and Welker visited him there over one hundred times during the course of their relationship. She knew his home telephone number and his cell phone number, both of which remained unchanged for several years (though she changed her own). In short, if Welker had wanted to contact Johns, she easily could have done so.

Fourth, and perhaps most important, Welker actively concealed her pregnancy from Johns. Welker listed no father on the birth certificate, despite knowing that Johns is the biological father. Later, when asked by the adoption agency to provide the biological father's name on the "Affidavit of Parentage," she falsely put "Gregory Thomas James," rather than "Gregory Joseph Johns." She repeated that falsehood two weeks later when filling out the adoption agency's "Birth Father Information" form. Then, when Johns learned through rumor that Welker had been pregnant, she initially denied it to him as well. Only when he pressed her did she finally admit that he is, in fact, the biological father of S.D.W. In light of these facts, it is reasonable to doubt whether Welker would have told Johns about the pregnancy, even if he had questioned her about this subject following their breakup.

In sum, I cannot agree with the majority's characterization of "ample evidence." *In re S.D.W.*, ___ N.C. at ___, ___ S.E.2d at ___. I do not see how—when Welker told Johns she was using birth control, when she told him about a prior pregnancy, when she knew of this pregnancy but said nothing, and when she acted affirmatively to conceal S.D.W.'s existence from him–Johns had any meaningful opportunity to acquire notice of the fact that Welker was pregnant or had borne a child. Accordingly, I do not think the majority's opinion comports with the Supreme Court's holding in *Lehr* that biological fathers possess at least an inchoate interest in their biological offspring and must be afforded an opportunity to develop a relationship more substantial and enduring. *See Lehr*, 463 U.S. at 262, 103 S. Ct. at 2993, 77 L. Ed. 2d at 627.

For these reasons I conclude that the majority's opinion allowing the adoption to proceed without Johns's consent is not in harmony with the Supreme Court's opinion in *Lehr v. Robertson* and imposes unrealistic requirements on potential biological fathers. I would affirm the decision of the Court of Appeals remanding this matter to the trial court to obtain further information regarding the steps Johns actually took to "grasp[ ] th[e] opportunity" presented by the birth of S.D.W. *Id.* Accordingly, I respectfully dissent.

Justice HUDSON and Justice BEASLEY join in this dissenting opinion.

GEORGE KING D/B/A GEORGE'S TOWING AND RECOVERY v. TOWN OF CHAPEL HILL

No. 281PA13

(Filed 12 June 2014)

1. Cities and Towns—municipal power—nonconsensual towing

The general authority to regulate nonconsensual towing from private lots flows from municipal power to protect citizen health, safety, or welfare.

2. Cities and Towns—nonconsensual towing provisions—notice and signage requirements

Chapel Hill's authority to regulate towing was expansive enough to sustain notice and signage requirements. Given the tension between vehicle owners' personal property rights and the right to remove vehicles illegally parked on private property, Chapel Hill's nonconsensual towing provisions appeared to be a rational attempt at addressing some of the inherent issues in towing affecting citizen health, safety, or welfare.

3. Cities and Towns—nonconsensual towing provisions—fee schedule

Chapel Hill exceeded its authority by imposing a fee schedule for nonconsensual towing from private lots. Unlike the signage and notice towing provisions, there is no rational relationship between regulating fees and protecting health, safety, or welfare, while a fee schedule provision implicates the fundamental right to "earn a livelihood." Chapel Hill had the general authority to regulate towing by capping fees, but the town inappropriately placed the burden of increased costs incident to the regulation solely on towing companies.

4. Cities and Towns—nonconsensual towing—credit cards—fees

Requiring towing companies to accept credit and debit cards bears a rational relation to a broad interpretation of citizen safety or welfare by enabling vehicle owners to quickly and easily regain access to their vehicles. The same cannot be said for preventing tow truck operators from passing the cost of accepting credit cards on to those illegally parked.

5. Cities and Towns—towing ordinance—stricken provisions—severability

The remainder of a towing ordinance was left intact after fee schedule and credit card fee provisions were stricken because their loss would not hinder the overall purpose of the ordinance and it was apparent that the town council would have enacted the ordinance even without the offending provisions.

6. Cities and Towns—mobile phone ordinance—towing—challenge without violation—actionable claim

Plaintiff had an actionable claim challenging the Chapel Hill mobile phone ordinance, even though he had not been cited for a violation, because the ordinance's alleged substantial encumbrance on economic activity (towing) constituted a manifest threat of irreparable harm.

7. Cities and Towns—mobile phone ordinance—towing—preemption by State

The legislature's comprehensive scheme regulating mobile telephone usage on the streets and highways precluded Chapel Hill from intruding into that sphere.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 743 S.E.2d 666 (2013), reversing an order and judgment entered on 9 August 2012 by Judge Orlando F. Hudson, Jr. in Superior Court, Orange County. Heard in the Supreme Court on 17 March 2014.

Stark Law Group, PLLC, by Thomas H. Stark and Seth A. Neyhart, for plaintiff-appellant.

Ralph D. Karpinos, Attorney for the Town of Chapel Hill; Matthew J. Sullivan, Staff Legal Advisor, Town of Chapel Hill; and Frederick P. Johnson, for defendant-appellee.

Kimberly S. Hibbard, General Counsel, and Gregory F. Schwitzgebel III Senior Assistant General Counsel, for North Carolina League of Municipalities, amicus curiae.

NEWBY, Justice.

In this case we examine the scope of a municipality's power to regulate both the business of towing vehicles parked in private lots and the use of mobile telephones while driving. Municipalities are

vested with general police power to regulate or prohibit acts detrimental to their citizens' health, safety, or welfare. N.C.G.S. § 160A-174 (2013). Even so, that authority is limited in scope, constrained by State and federal laws, as well as by inherent fundamental rights. Because the Town of Chapel Hill exceeded its power to regulate vehicle towing by creating a fee schedule and by prohibiting towing companies from charging credit card fees, and because municipalities are preempted by State law from regulating a driver's use of a mobile phone, we reverse in part the decision of the Court of Appeals.

Following a public hearing that received testimony on "the dangers and difficulties faced by citizens whose vehicles had been towed from private parking lots in Chapel Hill," the Chapel Hill Town Council sought to minimize any adverse effects related to nonconsensual towing and amended its ordinances accordingly. Chapel Hill, N.C., Code ch. 11, art. XIX, [hereinafter Towing Ordinance] §§ 11-300, -301 (2012). The amendments augmented notice and telephone response requirements, changed vehicle release requirements, and added storage and payment requirements. *Id.* §§ 11-301 to -308. Additionally, Chapel Hill enacted provisions authorizing the Town Council to adopt maximum fees for towing vehicles and prohibiting charges for certain services. *Id.* § 11-304. Chapel Hill based these amendments on the power granted to it under N.C.G.S. § 20-219.2 (defining and penalizing wrongful towing from private lots) and N.C.G.S. § 160A-174 (granting a city general ordinance-making power to "prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens"). *Id.* § 11-300.

Meanwhile, the Town Council considered the use of mobile telephones while driving and sought guidance from the Attorney General on the extent of its authority to regulate mobile phone usage. Noting that the General Assembly had already enacted three statutes policing mobile phone usage while driving, the Office of the Attorney General advised that "the regulation of traffic and motor vehicles is primarily a State function." The Attorney General's advisory letter opined that "an ordinance by the Town of Chapel Hill regulating motorists' use of cell phones, is preempted by State law and, therefore, unenforceable." Nonetheless, the Town Council passed an ordinance that prohibited anyone "18 years of age and older" from using a mobile telephone "while operating a motor vehicle in motion on a public street or highway or public vehicular area." Chapel Hill, N.C., Code ch. 21, art. VII, §§ 21-63, -64 (2012) [hereinafter Mobile Phone Ordinance]. The ordinance provided that "[n]o citation for a vio-

lation . . . shall be issued unless the officer issuing such citation has cause to stop or arrest the driver [for some other violation]." *Id.* § 21-64(e).

Plaintiff operates a towing business within the town limits of Chapel Hill. Plaintiff contracts with property owners and lessees to remove illegally parked vehicles from private lots used by persons who patronize businesses or live on the premises. The nature of the towing industry requires that plaintiff constantly drive around town to monitor the parking lots from which he has agreed to remove vehicles. The Towing Ordinance requires that plaintiff notify the police department before he tows a vehicle and that he respond within fifteen minutes to messages left by owners of towed vehicles, causing plaintiff to violate the Mobile Phone Ordinance. While the requirements of the Towing Ordinance substantially increase plaintiff's operating costs, the fee cap limits plaintiff's ability to allocate those costs to those illegally parked. Consequently, plaintiff sought a declaratory judgment to invalidate both ordinances.

Plaintiff claimed that Chapel Hill lacks the authority to enact either the Towing Ordinance or the Mobile Phone Ordinance. According to plaintiff, N.C.G.S. § 20-219.2, one of the statutes undergirding the Towing Ordinance, violates Article II, Section 24(1)(j) of the North Carolina Constitution, which prohibits the General Assembly from enacting any local laws regulating, *inter alia*, labor or trade. Because N.C.G.S. § 20-219.2 states that it only applies to thirteen counties and their municipalities and to four named cities, plaintiff asserted that the statute is an unconstitutional local act. Plaintiff contended that, lacking sufficient enabling legislation, Chapel Hill is without any authority whatsoever to regulate towing. As for the Mobile Phone Ordinance, plaintiff adopted the position of the Attorney General's Office that State law preempts municipal restrictions on mobile phone usage while driving. Plaintiff insisted that several additions to the laws governing motor vehicles evidence the General Assembly's intent to create a statewide, comprehensive regulatory scheme, and thus the Mobile Phone Ordinance is void.

After both parties moved for judgment on the pleadings, the trial court determined that Chapel Hill lacked the authority to enact either ordinance. The trial court found that N.C.G.S. § 20-219.2 is a local law regulating trade in violation of Article II, Section 24(1)(j). Without addressing the Town's general ordinance-making power, the trial court found the Towing Ordinance void for lack of sufficient enabling legislation. Likewise, the trial court determined that the General

Assembly had enacted a comprehensive scheme of mobile phone regulation that preempts the Mobile Phone Ordinance, voiding it as well. As a result, the trial court entered a permanent injunction barring enforcement of both the Towing Ordinance and the Mobile Phone Ordinance. The Town appealed.

At the Court of Appeals, Chapel Hill argued, and the Court of Appeals agreed, that the Towing Ordinance fell within the Town's general powers under N.C.G.S. § 160A-174. *King v. Town of Chapel Hill*, ___ N.C. App. ___, ___, 743 S.E.2d 666, 675 (2013). The Court of Appeals specifically chose not to address the constitutionality of N.C.G.S. § 20-219.2. *Id.* at ___, 743 S.E.2d at 675. Under a broad construction of N.C.G.S. § 160A-174, the Court of Appeals determined that "the Towing Ordinance was enacted to protect the citizens of the Town of Chapel Hill and provides a number of beneficial services to those citizens." *Id.* at ___, 743 S.E.2d at 675. In reversing the trial court's order, the Court of Appeals held "that the Towing Ordinance covers a proper subject for regulation under the Town's police power," *id.* at ___, 743 S.E.2d at 675, and therefore "falls within the purview of section 174(a)," *id.* at ___, 743 S.E.2d at 674.

As for the Mobile Phone Ordinance, the Court of Appeals determined that plaintiff was not entitled to challenge the ordinance because he had not been cited for a violation and because he failed to demonstrate that its enforcement would result in a "manifest threat of irreparable harm." *Id.* at ___, 743 S.E.2d at 676. According to the Court of Appeals, if plaintiff wishes to challenge the validity of the Mobile Phone Ordinance, he must do so as a defense for his violation of the ordinance. *Id.* at ___, 743 S.E.2d at 676-77 (citation omitted).

We allowed plaintiff's petition for discretionary review to consider the scope of Chapel Hill's authority to regulate the towing industry and mobile phone usage. As a mere creation of the legislature, the Town of Chapel Hill has no inherent powers. *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 654, 142 S.E.2d 697, 701 (1965). Accordingly, municipalities are limited to exercising those powers "expressly conferred" or "necessarily implied" from enabling legislation passed by the General Assembly. *Id.*; *see also* N.C. Const. art. VII, § 1 ("The General Assembly . . . may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable."). To ascertain the extent of a legislative grant of power, "we first must look to the plain language of the statutes themselves." *Smith Chapel Baptist Church v. City of Durham*, 350

N.C. 805, 811, 517 S.E.2d 874, 878 (1999) (citation omitted). When the enabling legislation " 'is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning.' " *Id.* (quoting *Lemons v. Old Hickory Council, BSA, Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988)). But when a statute granting power to a municipality is ambiguous, the enabling legislation "shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect." N.C.G.S. § 160A-4 (2013); *accord Lanvale Props., LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 157, 731 S.E.2d 800, 811 (2012) (stating that N.C.G.S. § 160A-4 does not apply when the enabling legislation is "clear and unambiguous").

Chapel Hill claims that the authority to enact the Towing Ordinance derives from N.C.G.S. § 20-219.2 as well as the general municipal powers imparted by N.C.G.S. § 160A-174. Towing Ordinance § 11-300(b), (c). In designated counties and cities across North Carolina, section 20-219.2 empowers private parking lot owners to remove wrongfully parked vehicles, enacts parking lot signage and notice requirements, and establishes storage lot standards. N.C.G.S. § 20-219.2(a), (a1) (2013). Violation of the statute constitutes an infraction and carries a monetary penalty. *Id.* § 20-219.2(b) (2013). Though N.C.G.S. § 20-219.2 applies only to certain counties and cities, *id.* § 20-219.2(c) (2013), the statute states expressly that it does not preempt local regulation "authorized by general law," *id.* § 20-219.2(d) (2013). According to plaintiff and the trial court, limiting N.C.G.S. § 20-219.2 to certain counties and cities runs afoul of our constitutional prohibition against local acts regulating labor or trade, N.C. Const. art. II, § 24(1)(j), leaving the Towing Ordinance without sufficient enabling legislation.

It is true that N.C.G.S. § 20-219.2 contains no language generally regarded as enabling legislation. *Compare* N.C.G.S. § 20-219.2, *with id.* § 160A-190 (2013) ("*A city may by ordinance* regulate, restrict, or prohibit the sale, possession or use within the city of pellet guns . . . ." (emphasis added)), *and id.* § 160A-302.1 (2013) ("*The governing body of any city is hereby authorized* to enact an ordinance prohibiting or regulating fishing from any bridge . . . ." (emphasis added)). Rather than being a municipal enabling statute, N.C.G.S. § 20-219.2 regulates conduct by, *inter alia*, permitting the State "to prosecute private citizens who trespass in private parking lots" and regulating the removal of unauthorized vehicles from private lots. *Kirschbaum v. McLaurin*

Parking Co., 188 N.C. App. 782, 787, 656 S.E.2d 683, 686-87 (2008). Because N.C.G.S. § 20-219.2 does not authorize municipal action, we must look elsewhere to determine whether Chapel Hill possesses the power to regulate nonconsensual towing from private lots. Furthermore, because N.C.G.S. § 20-219.2 has no bearing on this analysis, we decline to address the statute's constitutionality. *See High Rock Lake Partners v. N.C. DOT*, 366 N.C. 315, 323, 735 S.E.2d 300, 305 (2012) (noting that we will decline to address constitutional claims when we base our holding on statutory grounds).

"This Court has long recognized that the police power of the State may be exercised to enact laws, within constitutional limits, 'to protect or promote the health, morals, order, safety, and general welfare of society.' " *Standley v. Town of Woodfin*, 362 N.C. 328, 333, 661 S.E.2d 728, 731 (2008) (quoting *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949)). The General Assembly has delegated a portion of this power to municipalities through N.C.G.S. § 160A-174. *Id.* Section 160A-174(a) provides that "[a] city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances." Like the State's police power, N.C.G.S. § 160A-174 is by its very nature ambiguous, and its reach cannot be fully defined in clear and definite terms. *See City of Winston-Salem v. S. Ry. Co.*, 248 N.C. 637, 642-43, 105 S.E.2d 37, 41 (1958) ("Since the police power of the State has not been, and by its nature cannot be, placed within fixed definitive limits, it may be extended or restricted to meet changing conditions, economic as well as social."); Ernst Freund, *The Police Power* § 3, at 3 (1904) ("[An examination of police power] will reveal the police power not as a fixed quantity, but as the expression of social, economic and political conditions. As long as these conditions vary, the police power must continue to be elastic, i.e., capable of development."). Therefore, we are bound to construe N.C.G.S. § 160A-174 "to include any additional and supplementary powers that are reasonably necessary or expedient to carry [the grant of power] into execution and effect." N.C.G.S. § 160A-4; *see also Lanvale*, 366 N.C. at 157, 731 S.E.2d at 811.

Yet, we are also mindful that "[a]n exertion of the police power inevitably results in a limitation of personal liberty, and legislation in this field 'is justified only on the theory that the social interest is paramount.' " *Ballance*, 229 N.C. at 769, 51 S.E.2d at 734-35 (quoting *State v. Mitchell*, 217 N.C. 244, 250, 7 S.E.2d 567, 571 (1940)). Even a broad

construction of N.C.G.S. § 160A-174 does not endow municipalities with omnipotence. Section 160A-174 is limited by individual rights and by the laws and constitutions of the state and federal governments. N.C.G.S. § 160A-174(b). To be sustained as a legitimate exercise of the police power, an ordinance that regulates trades or businesses "must be rationally related to a substantial government purpose." *Treants Ents., Inc., v. Onslow County*, 320 N.C. 776, 778-79, 360 S.E.2d 783, 785 (1987); *see also Ballance*, 229 N.C. at 769, 51 S.E.2d at 735 (noting the uses of the police power "must have a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare").

[1] Before turning to the specific provisions of the Towing Ordinance at issue here, we first address whether N.C.G.S. § 160A-174, when construed in accordance with N.C.G.S. § 160A-4, bestows any authority at all on municipalities to regulate towing from private lots located within their borders. Protection of the real property rights and business interests of those who own or lease parking lots depends on having the ability to remove vehicles parked without permission. On the other hand, the right to remove vehicles collides with the personal property rights of vehicle owners. Towing can leave unknowing drivers without means of transportation and can lead to altercations between vehicle owners and towing personnel. In an urban setting the general power to regulate towing ameliorates these dangers in addition to protecting lot owners' and lessees' property rights by ensuring that parking is available to those lawfully present on the property. Reading N.C.G.S. § 160A-174 broadly, this general authority to regulate nonconsensual towing from private lots flows from municipal power to protect citizen health, safety, or welfare.

Plaintiff's remaining objections to the Towing Ordinance relate to Chapel Hill's notice requirements, fee schedule, and required payment options. We consider each of the challenged portions in turn to determine which, if any of them, constitute a valid exercise of Chapel Hill's general ordinance-making authority.

[2] Plaintiff first argues that the notice and signage requirements exceed the scope of Chapel Hill's power to protect citizen health, safety, or welfare. The Towing Ordinance mandates, *inter alia*, that signs be posted in certain locations around private parking lots, making it clear that the area is a "tow-away zone." Towing Ordinance § 11-301. Lettering must be at least a certain size on a contrasting background, and the sign itself must be a minimum of twenty-four inches by twenty-four inches. *Id.* § 11-301(a). Chapel Hill asserts that these

requirements are intended to ensure that drivers are on notice, to inform car owners of the location of their vehicles, and to prevent conflicts between citizens and tow truck operators. Given the tension between vehicle owners' personal property rights and the right to remove vehicles illegally parked on private property, these provisions appear to be a rational attempt at addressing some of the inherent issues affecting citizen health, safety, or welfare that arise when one's car is involuntarily towed. Construing N.C.G.S. § 160A-174 broadly, we agree that the Town's authority to regulate towing is expansive enough to sustain the notice and signage requirements.

[3] Plaintiff next challenges the fee schedule provision of the Towing Ordinance. According to plaintiff, the fee limit is lower than his actual operating costs and contends this limit on his ability to make a profit exceeds the power granted by N.C.G.S. § 160A-174. Section 11-304 of the Towing Ordinance states, in part, that

> [a]ny towing or storage firm which tows or removes a vehicle pursuant to this article shall not charge the owner or operator of the vehicle in excess of the fees established in the fee schedule adopted annually by the town council. No storage fees shall be charged for the first twenty-four-hour time period from the time the vehicle is initially removed from the private property. The fees referred to herein shall be all inclusive; no additional fees may be charged for the use of particular equipment or services.
>
> . . . .
>
> . . . The fees established by the town council shall be all inclusive. . . . No additional fees may be charged for using dollies, trailers, lifts, slim jims or any other equipment or service.

Towing Ordinance § 11-304.

Unlike the signage and notice provisions, there is no rational relationship between regulating fees and protecting health, safety, or welfare. Further, the fee schedule provision implicates the fundamental right to "earn a livelihood." *Roller v. Allen*, 245 N.C. 516, 518-19, 96 S.E.2d 851, 854 (1957); *see also State v. Harris*, 216 N.C. 746, 759, 6 S.E.2d 854, 863 (1940) ("While many of the rights of man, as declared in the Constitution, contemplate adjustment to social necessities, some of them are not so yielding. Among them the right to earn a living must be regarded as inalienable."). This Court's duty to protect fundamental rights includes preventing arbitrary government actions that interfere with the right to the fruits of one's own labor. N.C.

Const. art. I, § 1; *Roller*, 245 N.C. at 525, 96 S.E.2d at 859 ("A state cannot under the guise of protecting the public arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions on them." (citations omitted)).

Despite our expansive reading of N.C.G.S. § 160A-174, we do not believe that statute permits a city or town to create the fee schedule at issue here. The prices that citizens pay for towing are wholly unrelated to the protection of citizen health or safety, leaving only the question of whether the fee schedule provision falls under the protection of citizen welfare. Allowing Chapel Hill to engage in price setting under the general and undefined rubric of "welfare" could subject other enterprises not only to price setting but also to officious and inappropriate regulation of other aspects of their businesses. Where any relationship between "welfare" and the specific activity sought to be regulated is as attenuated as here, we believe that the more prudent course is for the General Assembly to grant such authority expressly, as it has done in regard to rates that may be charged in other contexts such as, for instance, taxi cabs. N.C.G.S. § 160A-304 (2013).

While Chapel Hill has the general authority to regulate towing, by capping fees, the town inappropriately places the burden of increased costs incident to the regulation solely on towing companies. Accordingly, we hold that Chapel Hill exceeded its authority by imposing a fee schedule for nonconsensual towing from private lots.

[4] Plaintiff further argues that Chapel Hill exceeded its general ordinance-making authority by requiring fees "be payable by cash, debit card and at least two (2) major national credit cards at no extra cost." Towing Ordinance § 11-304(d). "Failure to accept credit or debit cards for payment is a violation of [the Towing Ordinance] and is punishable as a misdemeanor." *Id.* Requiring towing companies to accept credit and debit cards bears a rational relation to a broad interpretation of citizen safety or welfare by enabling vehicle owners to quickly and easily regain access to their vehicles. N.C.G.S. § 160A-174. The same cannot be said for preventing tow truck operators from passing the cost of accepting credit cards on to those illegally parked. This provision is tantamount to creating a fee cap, which we have already said exceeds Chapel Hill's general authority to regulate nonconsensual towing from private lots.

[5] Having held that the fee schedule and the prohibition on charging credit card fees exceed the power granted by N.C.G.S. § 160A-174, we

must now determine whether the remainder of the Towing Ordinance is valid. We will sever a provision of an otherwise valid ordinance when the enacting body would have passed the ordinance absent the offending portion. *Jackson v. Guilford Cnty. Bd. of Adjust.*, 275 N.C. 155, 168, 166 S.E.2d 78, 87 (1969) (" 'The invalidity of one part of a statute [or ordinance] does not nullify the remainder when the parts are separable and the invalid part was not the consideration or inducement for the Legislature [or board of county commissioners] to enact the part that is valid.' When the statute, or ordinance, could be given effect had the invalid portion never been included, it will be given such effect if it is apparent that the legislative body, had it known of the invalidity of the one portion, would have enacted the remainder alone." (alterations in original) (citations omitted)). At oral argument counsel for Chapel Hill acknowledged that certain provisions of the Towing Ordinance are indeed severable. Striking only the fee schedule and credit card fee provisions would not hinder the overall purpose of the ordinance to "minimize and control the harmful and adverse effects that occur during the non-consensual towing of motor vehicles," Towing Ordinance § 11-300(f), and it is apparent that the Town Council would have enacted the Towing Ordinance even absent the offending provisions. In sum, we strike the fee schedule and credit card fee provisions of the Towing Ordinance, but leave the remainder of the ordinance intact.[1]

[6] We now turn to the Mobile Phone Ordinance and, as an initial matter, consider the Court of Appeals' holding that plaintiff did not have an actionable claim. *King*, ___ N.C. App. at ___, 743 S.E.2d at 676-77. According to the Court of Appeals, because plaintiff had not been cited for violating the ordinance and because plaintiff failed to demonstrate that enforcement of the ordinance would result in "a manifest threat of irreparable harm," he could not challenge the validity of the ordinance. *Id.* at ___, 743 S.E.2d at 676. We disagree and conclude that the ordinance's alleged substantial encumbrance on economic activity constitutes a manifest threat of irreparable harm sufficient to invoke the equity jurisdiction of the Court. *High Point*

1. We find unpersuasive the parties' remaining arguments pertaining to N.C.G.S. § 160A-177 (2013) ("The enumeration in this Article or other portions of this Chapter of specific powers to regulate, restrict or prohibit acts, omissions, and conditions shall not be deemed to be exclusive or a limiting factor upon the general authority to adopt ordinances conferred on cities by G.S. 160A-174.") and N.C.G.S. § 160A-194 (2013) ("A city may by ordinance, subject to the general law of the State, regulate and license occupations, businesses, trades, professions, and forms of amusement or entertainment and prohibit those that may be inimical to the public health, welfare, safety, order, or convenience.").

Surplus Co., 264 N.C. at 651-53, 142 S.E.2d at 699-700 (allowing a merchant to challenge a local ordinance that prohibited Sunday sales of certain goods that constituted "a substantial 'dollar-volume of business' ").

[7] Thus, we now consider whether Chapel Hill exceeded its power by prohibiting all adults from "us[ing] a mobile telephone or any additional technology associated with a mobile telephone while operating a motor vehicle in motion on a public street or highway or public vehicular area." Mobile Phone Ordinance § 21-64(b). Consistent with the Attorney General's advisory letter, plaintiff contends that statewide mobile phone legislation precludes local regulation.

As discussed above, N.C.G.S. § 160A-174 grants cities general ordinance-making power. Local ordinances must, however, be in harmony with State law; whenever the two come into conflict, the former must bow to the latter. *Town of Washington v. Hammond*, 76 N.C. 33, 36 (1877) ("The true principle is that municipal by-laws and ordinances must be in harmony with the general laws of the State, and whenever they come in conflict with the general laws, the by-laws and ordinances must give way."). Cities may not "regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation." N.C.G.S. § 160A-174(b)(5). This "need to avoid dual regulation" is generally referred to as preemption. *Craig v. Cnty. of Chatham*, 356 N.C. 40, 44, 565 S.E.2d 172, 175 (2002) (citation omitted) (concluding that state swine farm regulations preempt local ordinances).

When weighing whether State legislation preempts a particular field, our precedent dictates that we consider whether the General Assembly has expressed "a clear legislative intent to provide such a 'complete and integrated regulatory scheme.' " *Id.* at 45, 565 S.E.2d at 176. As part of this analysis, we initially examine "the spirit of the act[ ] and what the act seeks to accomplish. Where legislative intent is not readily apparent from the act, it is appropriate to look at various related statutes *in pari materia* so as to determine and effectuate the legislative intent." *Id.* at 46, 565 S.E.2d at 176-77 (alteration in original) (citations and internal quotation marks omitted).

At the outset, we note that regulation of highways and roads has generally been the prerogative of the State, not counties and cities. *See Suddreth v. City of Charlotte*, 223 N.C. 630, 631-32, 27 S.E.2d 650, 652 (1943) (noting that "the power to regulate the use of public roads and streets" is "peculiarly and exclusively a legislative prerogative").

Indeed, the General Assembly "has enacted numerous statutes regulating almost every aspect of transportation and travel on the highways," as evidenced by the over 1100 pages devoted to motor vehicle laws in the 2013 edition of the North Carolina General Statutes. *Coman v. Thomas Mfg. Co., Inc.*, 325 N.C. 172, 176, 381 S.E.2d 445, 447 (1989). Within these sweeping, statewide provisions, the legislature has, in numerous instances, ceded regulatory power over roadways to municipalities. *E.g.*, N.C.G.S. § 20-115.1(f) (2013) (allowing local regulation of certain tractor trailers); *id.* § 20-169(2)-(4) (2013) (allowing local authorities to, *inter alia*, prohibit "other than one-way traffic upon certain highways," regulate "the use of the highways by processions or assemblages," and regulate "the speed of vehicles on highways in public parks"); *id.* § 20-368 (2013) (stating that "moves [of houses] on streets on the municipal system of streets shall comply with local regulations"). Yet our General Statutes lack any enabling legislation permitting local regulation of mobile phone use while driving.

In contrast, the General Assembly has, on a statewide scale, repeatedly amended our Motor Vehicle Act to reduce the dangers associated with mobile phone usage on roads and highways. Section 20-137.3 states that "no person under the age of 18 years shall operate a motor vehicle on a public street or highway or public vehicular area while using a mobile telephone or any additional technology associated with a mobile telephone while the vehicle is in motion." *Id.* § 20-137.3(b) (2013). Section 20-137.4, titled "Unlawful use of a mobile phone," prohibits using a mobile telephone while operating a school bus. *Id.* § 20-137.4(b) (2013). The most recent amendments, codified at N.C.G.S. § 20-137.4A, broadly prohibit text messaging while driving and operating a commercial vehicle while using a mobile phone or other electronic device. That section prohibits manually entering letters or text on a mobile phone or reading electronic messages stored in or transmitted to the device while driving. *Id.* § 20-137.4A(a), (a1) (2013).

Interpreted *in pari materia*, these statutes evidence the General Assembly's "intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation." *Id.* § 160A-174(b)(5). Moreover, when the meaning or purpose of a statute is in doubt, we have "previously ruled that the title of a statute may be used as an aid in determining legislative intent." *Spruill v. Lake Phelps Vol. Fire Dep't, Inc.*, 351 N.C. 318, 323, 523 S.E.2d 672, 676 (2000) (citing *Equip. Fin. Corp. v. Scheidt*, 249 N.C. 334, 340, 106 S.E.2d 555, 560

(1959)). While not entirely dispositive, the broadly worded title of N.C.G.S. § 20-137.4—"Unlawful use of a mobile phone"—tends to indicate an expansive intent to regulate, thus precluding municipalities from doing so.

In conclusion, we recognize municipalities' need to protect their citizens, but we are unwilling to construe our General Statutes to give municipalities unfettered power to regulate in the name of health, safety, or welfare, as "[t]here is nothing in government more dangerous to the liberty and rights of the individual than a too ready resort to the police power." *Harris*, 216 N.C. at 763, 6 S.E.2d at 865; *see also Mitchell*, 217 N.C. at 250, 7 S.E.2d at 571 ("Whenever the police power is invoked there is a resulting delimitation of personal liberty."). Under a broad reading of Chapel Hill's ordinance-making power, we hold that the Town is generally permitted to regulate vehicle towing and that it acted within its authority by enacting signage, notice, and payment requirements for towing from private lots. Even construing Chapel Hill's powers broadly, however, we hold that the Town exceeded those powers by imposing a fee schedule and prohibiting towing companies from charging credit card fees. Additionally, we hold that the legislature's comprehensive scheme regulating mobile telephone usage on our streets and highways precludes municipalities from intruding into this sphere wholly occupied by the State. Accordingly, the decision of the Court of Appeals reversing the trial court's issuance of a permanent injunction barring enforcement of both ordinances is reversed in part and affirmed in part. This matter is remanded to the Court of Appeals for further remand to the Superior Court, Orange County, for proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

CLAUDE V. MEDLIN, EMPLOYEE v. WEAVER COOKE CONSTRUCTION, LLC, EMPLOYER, KEY RISK INSURANCE COMPANY, CARRIER

No. 411A13

(Filed 12 June 2014)

Workers' Compensation—termination of temporary disability payments—inability to earn same wages as before injury—failure to show work-related injury

The Industrial Commission did not err in a workers' compensation case by terminating plaintiff's temporary disability payments and awarding defendants a credit for all disability payments made to plaintiff after 22 December 2010. Plaintiff did not show that his inability to earn the same wages as before his injury resulted from his work-related injury.

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. ___, 748 S.E.2d 343 (2013), affirming an opinion and award filed on 19 October 2012 by the North Carolina Industrial Commission. Heard in the Supreme Court on 18 February 2014.

Oxner, Thomas + Permar, by Michael G. Soto, for plaintiff-appellant.

Brewer Law Firm, P.A., by Joy H. Brewer and Ginny P. Lanier, for defendant-appellees.

Sumwalt Law Firm, by Vernon Sumwalt, for North Carolina Advocates for Justice, amicus curiae.

Young Moore and Henderson P.A., by Angela Farag Craddock, for North Carolina Association of Defense Attorneys, North Carolina Association of Self-Insurers, and North Carolina Chamber, amici curiae.

HUDSON, Justice.

Plaintiff Claude Medlin appealed the opinion and award of the North Carolina Industrial Commission terminating his temporary disability payments and awarding defendants Weaver Cooke Construction, LLC ("Weaver") and Key Risk Insurance Company a credit for all disability payments made to Medlin after 22 December 2010. ___ N.C. App. ___, ___, 748 S.E.2d 343, 344 (2013). On appeal, the Court of Appeals affirmed the Commission in a divided opinion. The

majority held that the Commission's binding findings of fact show that plaintiff's inability to find work was not due to his injury, but rather to large-scale economic factors. *Id.* at ___, 748 S.E.2d at 347. Because we agree that plaintiff has not shown that his inability to earn the same wages as before his injury resulted from his work-related injury, we affirm.

Background

Plaintiff graduated from North Carolina State University in 1974 with a degree in civil engineering. Since then he has worked in the commercial construction industry in several different capacities, including as a project engineer, supervisor, project manager, and estimator. In April of 2006, defendant Weaver hired plaintiff and he worked for the company as both a project manager and an estimator. *Id.* at ___, 748 S.E.2d at 344. As an estimator, plaintiff helped Weaver obtain construction jobs by pricing the estimate to ensure that those jobs could be completed under budget; this job was sedentary, but required that plaintiff be able to lift and carry up to ten pounds occasionally. As a project manager, plaintiff actually managed the construction projects; this job was at least slightly more physically demanding than the estimator position.

Plaintiff injured his right shoulder in May 2008 while helping to move a large credenza, then exacerbated the injury later that day when moving a fifty pound box of files. *See id.* at ___, 748 S.E.2d at 344. After this injury, he continued to work for Weaver until 21 November 2008, when he was terminated as part of widespread layoffs both within the company, and within the construction industry as a whole. *See id.* at ___, 748 S.E.2d at 344. The reason given for plaintiff's layoff was "reduction of staff due to lack of work." *Id.* at ___, 748 S.E.2d at 344. On 22 December 2008, after plaintiff was laid off, Weaver accepted his injury as compensable and submitted Industrial Commission Form 60. *Id.* at ___, 748 S.E.2d at 344. In January 2009, plaintiff began to receive unemployment benefits from defendants; the next month, he began to receive temporary total disability payments as well. *Id.* at ___, 748 S.E.2d at 344-45. These overlapping benefits continued until late March 2011. *Id.* at ___, 748 S.E.2d at 345.

Starting in late 2008, plaintiff began medical treatment for his shoulder, primarily at the hands of Raymond Carroll, M.D., and Kevin Speer, M.D. *See id.* at ___, 748 S.E.2d at 345. Dr. Carroll performed surgery on plaintiff's shoulder on 10 February 2009, and plaintiff began physical therapy. *Id.* at ___, 748 S.E.2d at 345. However, plain-

tiff's shoulder pain worsened until he was discharged from therapy in April 2009. *Id.* at ___, 748 S.E.2d at 345. An MRI conducted late in 2009 showed that plaintiff may have suffered a superior labral tear to his shoulder; but because this tear was not present at the time of the surgery performed earlier that year, Dr. Carroll concluded that it had not been caused by the May 2008 work injury. Both Dr. Carroll and Dr. Speer eventually placed plaintiff at maximum medical improvement, though plaintiff was assigned permanent work restrictions preventing him from lifting weights greater than ten pounds, climbing ladders, or performing repetitive overhead activities. *Id.* at ___, 748 S.E.2d at 345.

During the period following his layoff, plaintiff sought employment within the construction industry. Although he estimated that he made hundreds of job inquiries, plaintiff was unable to find equivalent work in that industry. *Id.* at ___, 748 S.E.2d at 345. Eventually, on 22 December 2010, defendants filed an "Application to Terminate Payment of Compensation," alleging that plaintiff could no longer show that he was disabled. *Id.* at ___, 748 S.E.2d at 345. More specifically, defendants argued that plaintiff could not show that he was legally disabled because his inability to find another position as an estimator was due to the economic downturn, rather than to any physical limitations. *Id.* at ___, 748 S.E.2d at 345.

Deputy Commissioner Philip A. Baddour, III heard this matter on 17 May 2011, and subsequently received the depositions of Dr. Speer, Dr. Carroll, Sandy J. Kimmel, D.O., and vocational case manager Gregory Henderson. The Deputy Commissioner denied plaintiff's claim for disability compensation after 22 December 2010, and awarded defendants a credit for all unemployment benefits plaintiff received during the time he also received disability compensation. Plaintiff appealed to the Full Commission.

The Full Commission heard the case on 4 September 2012. The Commission considered the parties' stipulations, several exhibits, and the testimony of several witnesses, including plaintiff, Dr. Carroll, Dr. Speer, Dr. Kimmel, and Mr. Henderson. Based on that evidence, the Commission made the following relevant findings of fact:

> 1. Plaintiff holds a Bachelor[ ] of Science degree in civil engineering. Since graduating in 1974, he has worked for several general contractors in the commercial construction context. Specifically, he has worked as a Project Engineer, Supervisor, Senior Estimator, and ultimately as a Project Manager on con-

struction projects involving hospitals, prisons, and schools, among other things.

. . . .

5. Plaintiff was laid off by Defendant-Employer on 21 November 2008 due to a reduction in Defendant-Employer's staff secondary to a lack of available work. This lack of available work experienced by Defendant-Employer is part of a larger economic downturn which has adversely affected the construction industry as a whole. In the parties' Pre-Trial Agreement, the parties stipulated that "Plaintiff continued working following the injury and was laid off due to lack of work on November 21, 2008."

. . . .

10. On 20 May 2009, Dr. Carroll discharged Plaintiff from his care and released him to return to work without restrictions.

11. Plaintiff's medical care was subsequently transferred to Dr. Kevin Speer, an orthopaedic surgeon . . . . On 23 July 2009, Dr. Speer restricted Plaintiff from lifting over ten (10) pounds or engaging in repetitive overhead activities.

12. In late 2009, an MRI arthrogram of Plaintiff's right shoulder showed evidence of a possible superior labral tear which was not present at the time of the February 2009 surgery. Because the potential tear was not present in February 2009, Dr. Carroll opined to a reasonable degree of medical certainty that the tear was unrelated to the May 2008 work injury. Dr. Carroll further opined that it may be related to the weightlifting engaged in by Plaintiff following the February 2009 surgery.

. . . .

22. Following his layoff, Plaintiff sought subsequent employment within the construction industry.

23. The position of Estimator is classified as a sedentary duty job by the *Dictionary of Occupational Titles*.

24. On 21 June 2010, VocMed conducted a job analysis for Plaintiff's pre-injury Estimator position. The analysis indicated that the job required lifting and carrying up to ten (10) pounds on an occasional basis.

25. On 18 November 2010, Gregory B. Henderson, a vocational case manager and President of VocMed, conducted a targeted labor market survey in which two employers in the commercial construction industry of similar size and geographic location confirmed that someone with Plaintiff's restrictions was physically capable of performing the job duties required by the Estimator position.

26. In an updated labor market survey conducted by Mr. Henderson on 18 July 2011, an additional three employers confirmed that someone with Plaintiff's restrictions was physically capable of performing the job duties required by the Estimator position.

27. Mr. Henderson offered testimony as an expert in the field of vocational rehabilitation. Mr. Henderson opined that Plaintiff has the vocational skills and physical capabilities needed to perform work as an Estimator. He further opined that Plaintiff would be able to return to work as an Estimator, but for the current economic downturn.

28. Eddie Carroll, Defendant-Employer's Senior Vice President of Pre-Construction, testified that Plaintiff could perform each of the regular duties of the Estimator position within his current restrictions.

Based on these findings of fact, the Commission concluded that plaintiff was not entitled to any disability payments made after 22 December 2010 (the date defendants filed the application to terminate payments), and that defendants were entitled to a credit for any payments they had made after that date. More specifically, the Full Commission made the following relevant conclusions of law:

2. In order to meet the burden of proving disability, Plaintiff must prove that he was incapable of earning pre-injury wages in either the same or in any other employment and that the incapacity to earn pre-injury wages was caused by Plaintiff's injury. A Plaintiff is unable to meet their burden of proving disability where, but for economic factors, the employee is capable of returning to his pre-injury position.

3. Plaintiff would be capable of returning to work as an Estimator with either Defendant-Employer or a competitor company, but for the current economic downturn affecting both Defendant-Employer as well as the construction industry as a

> whole. As such, any lost wages Plaintiff experienced from 22 December 2010 to the present are attributable to large-scale economic factors and are unrelated to Plaintiff's May 2008 work injury. Accordingly, Plaintiff cannot establish disability secondary to his work-related injury at any time from 22 December 2010 to the present, and therefore Defendants are entitled to terminate disability compensation.
>
> 4. Defendants are entitled to a credit for temporary total disability compensation paid to Plaintiff after 22 December 2010 (the date of Defendants' . . . Application to Terminate Compensation) through the date of termination.

(citations omitted). From this opinion and award, plaintiff appealed.

In a divided opinion, the Court of Appeals affirmed the Full Commission. *Id.* at ___, 748 S.E.2d at 347. The majority did not apply its own precedent, *Russell v. Lowe's Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). Instead, it emphasized that, under this Court's opinion in *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982), a plaintiff seeking to establish disability must show that his inability to earn the same wages as before the injury was a result of his work-related injury. As such, the majority reasoned, the Commission's finding that "the only reason plaintiff is unable to find employment was based on the economic downturn and was not related to his injury" was sufficient to defeat plaintiff's disability claim. ___ N.C. App. at ___, 748 S.E.2d at 347. The dissenting opinion, in contrast, pointed to *Russell* and would have held that proving disability by one of the *Russell* methods also necessarily proves the causation requirement described in *Hilliard. Id.* at ___, 748 S.E.2d at 348 (Geer, J., dissenting). The dissent also concluded that plaintiff had proved disability through the second *Russell* method by providing evidence showing that he was capable of some work, but was unable, after reasonable efforts, to obtain employment. *Id.* at ___, 748 S.E.2d at 349. We now turn to the substance of this disagreement.

The Applicable Law

We note and reaffirm that in *Hilliard* this Court held that under the Workers' Compensation Act, a claimant seeking disability must establish that his inability to find work was "because of" his work-related injury. N.C.G.S. § 97-2(9) (2013). On the record before us, plaintiff failed to do so, and so we affirm the decision of the Court of Appeals.

Since the Workers' Compensation Act was first enacted in 1929, the General Assembly has defined the term "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." *Id.* §§ 97-2(9) (2013), -2(i) (1930). This definition, we have long and consistently held, specifically relates to the incapacity to earn wages, rather than only to physical infirmity. *See*, *e.g.*, *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 378-79 (1986); *Fleming v. K-Mart Corp.*, 312 N.C. 538, 541, 324 S.E.2d 214, 216 (1985). In *Hilliard*, we articulated again the three factual elements that a plaintiff must prove to support the legal conclusion of disability:

> We are of the opinion that in order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

305 N.C. at 595, 290 S.E.2d at 683 (citation omitted). The burden of proving the existence and extent of a disability is generally carried by the claimant. *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 493 (2005) (citing *Hendrix*, 317 N.C. at 185, 345 S.E.2d at 378).

In *Russell v. Lowe's Product Distribution*, the Court of Appeals applied *Hilliard* to a worker's compensation claim that arose when the claimant fell from the top of a row of boxes while unloading a truck. *See* 108 N.C. App. at 762, 425 S.E.2d at 455. The Court of Appeals cited *Hilliard* for the proposition that the claimant must prove the existence and extent of his disability. *See id.* at 765, 425 S.E.2d at 457. It then went on to describe four methods by which a claimant could meet that burden:

> The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be

> futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Id. (citations omitted).

Subsequently, the Court of Appeals has not applied *Russell* consistently. In one line of cases, the Court of Appeals has held that satisfying one of the *Russell* prongs satisfies two of the *Hilliard* elements, but not necessarily the causation element. *See*, *e.g.*, *Helfrich v. Coca-Cola Bottling Co. Consol.*, ___, N.C. App. ___, ___, 741 S.E.2d 408, 413 (2013) ("A plaintiff may satisfy the first two prongs of the *Hilliard* test through [proving one of the *Russell* prongs.]"); *Heatherly v. Hollingsworth Co.*, 211 N.C. App. 282, 292, 712 S.E.2d 345, 352-53 ("A plaintiff may establish the first two elements through any one of four methods of proof [from *Russell*.]"), *disc. rev. denied*, ___, N.C. ___, 717 S.E.2d 367 (2011); *Graham v. Masonry Reinforcing Corp. of Am.*, 188 N.C. App. 755, 759, 656 S.E.2d 676, 679 (2008) ("This Court has stated a claimant may prove the first two prongs of *Hilliard* through [proving one of the *Russell* prongs.]"). In a second line of cases, however, the Court of Appeals has held that satisfying one of the *Russell* prongs proves all three *Hilliard* elements. *See*, *e.g.*, *Campos-Brizuela v. Rocha Masonry, L.L.C.*, 216 N.C. App. 208, 223, 716 S.E.2d 427, 438 (2011) ("[W]e now hold that proof of disability under any one of the four prongs of the *Russell* test is sufficient to permit an award of disability benefits."), *appeal dismissed and disc. rev. denied*, 366 N.C. 398, 732 S.E.2d 579 (2012); *Nobles v. Coastal Power & Elec., Inc.*, 207 N.C. App. 683, 692, 701 S.E.2d 316, 323 (2010) ("The employee must prove that he is unable to earn the same wages that he had earned before his injury, either in the same or other employment, and that the diminished earning capacity is a result of the compensable injury, a burden which he may meet in one of four ways [as stated in *Russell*]." (citing *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683)); *Barrett v. All Payment Servs., Inc.*, 201 N.C. App. 522, 524-25, 686 S.E.2d 920, 923 (2009) ("An employee may satisfy his burden under *Hilliard* in one of four ways . . . ."), *disc. rev. denied*, 363 N.C. 853, 693 S.E.2d 915 (2010); *Boylan v. Verizon Wireless*, 201 N.C. App. 81, 91, 685 S.E.2d 155, 161 (2009) ("In workers' compensation cases, a claimant ordinarily has the burden of proving both the existence of his disability and its degree. The employee may meet this burden in one of four ways [as described in *Russell*]." (citation and internal quotation marks omitted)), *disc. rev.*

denied, 363 N.C. 853, 693 S.E.2d 918 (2010). Given these divergent lines of cases, there was support for both the majority and dissenting opinions here.

Hilliard was grounded explicitly in the statutory definition of disability in section 97-2; *Russell* expanded upon, and perhaps diverged from, that grounding. We reaffirm that a claimant seeking to establish that he is legally disabled must prove all three statutory elements as explained in *Hilliard*. He may prove the first two elements through any of the four methods articulated in *Russell*, but these methods are neither statutory nor exhaustive. In addition, a claimant must also satisfy the third element, as articulated in *Hilliard*, by proving that his inability to obtain equally well-paying work is because of his work-related injury. This conclusion accords with the statutory definition of disability as the "incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C.G.S. § 97-2 (emphasis added). Our determination here also squares with the long line of precedent from this Court holding that the claimant must prove causation. *See, e.g.*, *Clark*, 360 N.C. at 43-44, 619 S.E.2d at 492-93; *Saums v. Raleigh Cmty. Hosp.*, 346 N.C. 760, 763, 487 S.E.2d, 746, 749 (1997); *Hendrix*, 317 N.C. at 185, 345 S.E.2d at 378.[1]

We now turn to the statutory "causation" element, as described in *Hilliard*. As we noted earlier, this Court has frequently stated that the legal definition of disability refers not solely to physical infirmity, but also to earning capacity. *See*, *e.g.*, *Hendrix*, 317 N.C. at 186, 345 S.E.2d at 378-79; *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434-35, 342 S.E.2d 798, 804 (1986) (" 'Under the Workmen's Compensation Act disability refers not to physical infirmity but to a diminished capacity to earn money.' " (quoting *Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 84 155 S.E.2d 755, 761 (1967) (citations omitted))). Because the focus is on earning capacity, broad economic conditions, as well

1. The only case from this Court holding to the contrary is *Demery v. Perdue Farms, Inc.* In that case, the Court of Appeals held that proving one of the *Russell* prongs sufficed to prove all three *Hilliard* elements. *See Demery*, 143 N.C. App. 259, 264-66 & n.1, 545 S.E.2d 485, 489-90 & n.1, *aff'd per curiam* 354 N.C. 355, 554 S.E.2d 337 (2001). *Demery*, however, is readily distinguishable from this case. There, the disputed and dispositive issue was whether the claimant had satisfied the first *Russell* method by producing competent evidence showing that she was incapable of work in any employment. *See id.* at 264-67, 545 S.E.2d at 489-91. Whether her inability to find equally well-paying work was caused by her work-related injury, versus some other factor or combination of factors, was simply not in dispute. Accordingly, the implication in *Demery* that satisfying *Russell* satisfies all three elements of *Hilliard* was dicta, and our holding today does not disturb the ultimate result in that case.

as the circumstances of particular markets and occupations, are undoubtedly relevant to whether a claimant's inability to find equally lucrative work was because of a work-related injury. Whether in a boom or bust economy, a claimant's inability to find equally lucrative work is a function of both economic conditions and his specific limitations. Both factors necessarily determine whether a specific claimant is able to obtain employment that pays as well as his previous position; the Commission makes this determination based on the evidence in the individual case.

Application Here

We now turn to the case at hand. We review an order of the Full Commission only to determine "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000); *see also* N.C.G.S. § 97-86 (2013); *Clark*, 360 N.C. at 43, 619 S.E.2d at 492; *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). Because the Industrial Commission is the "sole judge of the credibility of the witnesses and the weight of the evidence[,] [w]e have repeatedly held that the Commission's findings of fact 'are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary.' " *Davis v. Harrah's Cherokee Casino*, 362 N.C. 133, 137, 655 S.E.2d 392, 394-95 (2008) (citations omitted) (quoting *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965) (per curiam)). In addition, where findings of fact are not challenged and do not concern jurisdiction, they are binding on appeal. *See* N.C.G.S. § 97-86 ("The award of the Industrial Commission . . . shall be conclusive and binding as to all questions of fact . . . ."); *see also McLean v. Roadway Express, Inc.*, 307 N.C. 99, 102, 296 S.E.2d 456, 458 (1982) ("Except as to questions of jurisdiction, the rule is that the findings of fact made by the Commission are conclusive on appeal when supported by competent evidence."). "The Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted).

Plaintiff has challenged only Finding of Fact Number 24. Again, that finding states:

> 24. On 21 June 2010, VocMed conducted a job analysis for Plaintiff's pre-injury Estimator position. The analysis indicated

> that the job required lifting and carrying up to ten (10) pounds on an occasional basis.

Plaintiff contends that this finding was not supported by competent evidence because "[t]he undisputed evidence shows that Plaintiff's primary job with Defendant-Employer was Project Manager, not Estimator. Although he performed some Estimator duties, Plaintiff was hired as a Project Manager and remained in that role until he was laid off." Nonetheless, even if plaintiff were correct about his primary duties, this contention does not undercut the finding of fact, which refers to a vocational analysis of estimator positions. Moreover, based on our review of the record submitted to the Full Commission, we hold that this finding was supported by competent evidence. Because plaintiff has challenged only this specific finding, all the Commission's findings are binding on appeal. *See McLean*, 307 N.C. at 102, 296 S.E.2d at 458.

We also hold that these findings support the legal conclusion that plaintiff has not met his burden of showing that he is entitled to disability compensation. The findings of fact quoted above establish, among other things, that any limitations because of a superior labral tear were likely not caused by plaintiff's work-related injury. The Commission properly concluded, based on the evidence presented, that plaintiff has not proved that his inability to find equally lucrative work is *because* of his work-related injury. *See* N.C.G.S. § 97-2. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

RL REGI NORTH CAROLINA, LLC v. LIGHTHOUSE COVE, LLC; LIGHTHOUSE COVE DEVELOPMENT CORP., INC.; GLEN C. STYGAR; JOHN R. LANCASTER; LETICIA S. LANCASTER; LIONEL L. YOW; AND CONNIE S. YOW

No. 427PA13

(Filed 20 August 2014)

Guaranty—guaranty agreement—spousal guarantee—loan secured by real estate—restructuring—waiver of claim

In an action that arose from the restructuring of a loan securing the purchase and development of real estate, the trial court improperly allowed defendant to assert an Equal Credit Opportunity Act claim she had waived, thus depriving plaintiff of its rights under the forbearance agreement. The waiver was part of the contractual forbearance agreement, which plaintiff entered into in exchange for leniency in repaying the debt. Although the Court of Appeals held that the original loan relationship violated public policy and that the waiver was unenforceable, the cases cited to support that position involved conduct illegal on its face. There was nothing facially illegal about this loan.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 748 S.E.2d 723 (2013), affirming a judgment entered on 1 June 2012 by Judge Jay D. Hockenbury in Superior Court, New Hanover County. Heard in the Supreme Court on 5 May 2014.

Nelson Mullins Riley & Scarborough, LLP, by Christopher J. Blake and Joseph S. Dowdy, for plaintiff-appellant.

Stubbs & Perdue, P.A., by Matthew W. Buckmiller, for defendant-appellee Connie S. Yow.

Ward and Smith, P.A., by Jason T. Strickland and Matthew A. Cordell, for North Carolina Bankers Association, Inc., amicus curiae.

NEWBY, Justice.

In this case we consider the effect of a waiver on claims arising from a guarantor-lender relationship, including claims under the federal Equal Credit Opportunity Act ("ECOA"). In exchange for a lender's willingness to restructure loans after default, a guarantor

may waive prospective claims against the lender. Because we hold that defendant waived any potential claims, including those under the ECOA, we reverse the decision of the Court of Appeals.

In 2006 Regions Bank provided $4,208,000 in financing for the acquisition and partial development of approximately fifty-seven acres of land in Brunswick County to Lighthouse Cove, LLC and Lighthouse Cove Development Corp., Inc. ("the LC Entities"). The loan was secured by the real estate and guaranteed by the individual business partners and their spouses, including Lionel L. Yow and his wife, defendant Connie S. Yow. By 2009 the LC Entities had defaulted on the obligations. As part of a restructuring agreement, on 7 December 2009, defendant executed a forbearance agreement that:

> recognize[d] and agree[d] that each Borrower [wa]s in default of its obligations under its respective Loan Documents as a result of the Payment Defaults and that the Lender has the present and immediate right to payment in full of all of the Obligations and the right to exercise any or all of its respective remedies contained in the Loan Documents.

According to the parties' arrangement, Regions Bank "agree[d] to not exercise any of the Collection Remedies under the Loan Documents" and to forego payments on the principal debt during the agreed upon forbearance period. In exchange, defendant waived "any and all claims, defenses and causes of action."

> Waiver of Claims. Each Obligor acknowledges that the Lender has acted in good faith and has conducted itself in a commercially reasonable manner in its relationships with each of the Obligors in connection with this Agreement and in connection with the Obligations, the [Letter of Credit] Obligations and the Loan Documents, each of the Obligors hereby waiving and releasing any claims to the contrary. Each Obligor . . . releases and discharges the Lender . . . from any and all claims, defenses and causes of action, whether known or unknown and whether now existing or hereafter arising, including without limitation, any usury claims, that have at any time been owned, or that are hereafter owned, in tort or in contract by any Obligor or any affiliate of an Obligor and that arise out of any one or more circumstances or events that occurred prior to the date of this Agreement.

Defendant further acknowledged that she freely and voluntarily entered into the agreement "after an adequate opportunity and suffi-

cient period of time to review, analyze, and discuss . . . all terms and conditions of this Agreement." Eventually, the LC Entities defaulted on their obligations under the forbearance agreement.

In September 2010, plaintiff RL REGI North Carolina, LLC purchased Regions Bank's interest in the LC Entities' loans. Three months later, plaintiff filed an action seeking recovery of the indebtedness from the business partners and their spouses. Defendant asserted as an affirmative defense that plaintiff's predecessor in interest obtained her guaranty of the loans in violation of the ECOA, which, *inter alia*, prohibits discrimination in credit transactions based on marital status. On 22 March 2012, the trial court entered an order granting summary judgment in favor of plaintiff on all claims, counterclaims, and affirmative defenses, except those with regard to defendant. The trial court concluded that a genuine issue of material fact existed as to whether plaintiff's predecessor in interest violated the ECOA in obtaining her guaranty.

Following a jury trial, the trial court entered judgment for defendant, concluding that Regions Bank had procured her guaranty in violation of the ECOA and that this violation constituted an affirmative defense. Plaintiff appealed from both the denial of its motion for summary judgment and the post-trial judgment that concluded plaintiff violated the ECOA which voided the guaranty agreement signed by defendant.

On appeal the Court of Appeals unanimously affirmed the trial court. *RL REGI N.C., LLC v. Lighthouse Cove, LLC*, ___ N.C. App. ___, 748 S.E.2d 723 (2013). The Court of Appeals held, *inter alia*, that defendant's execution of the forbearance agreement "waiv[ing] all defenses" could not waive the defense that the guaranty was acquired in violation of the ECOA. *Id.* at ___, 748 S.E.2d at 730. Plaintiff sought discretionary review in this Court, which we allowed, *inter alia*, to decide whether defendant retained any claims under the ECOA when she executed a forbearance agreement that broadly waived potential defenses. *RL REGI N.C., LLC v. Lighthouse Cove, LLC*, ___ N.C. ___, 753 S.E.2d 667 (2014).

The ECOA prohibits lending institutions from discriminating against applicants in credit transactions "on the basis of race, color, religion, national origin, sex or marital status, or age." 15 U.S.C. § 1691(a)(1) (2012). To enforce the prohibition against discrimination based on marital status, federal law authorizes the Board of Governors of the Federal Reserve system to prescribe rules lending

institutions must follow in procuring spousal guarantees. *Id.* § 1691b(a)(1); *see* Equal Credit Opportunity Act (Regulation B), 12 C.F.R. Pt. 202 (2014), Supp. I to Pt. 202—Official Staff Interpretations, para. 7(d)(6), cmt. 2; FDIC, Financial Institution Letter NO. FIL- 6-04, Guidance on Regulation B Spousal Signature Requirements, 2004 WL 61154, at *5 (Jan. 13, 2004). While a creditor may not automatically require that a spouse be a party to a loan, it can do so if it first finds the applicant is not independently creditworthy. FDIC, Financial Institution Letter NO. FIL- 6-04, 2004 WL 61154, at *5.

Some courts have held that, when a lender circumvents the ECOA requirements, a guarantor may assert the lender's violation as an affirmative defense and avoid the contract. *Bank of the West v. Kline*, 782 N.W.2d 453, 461 (Iowa 2010); *see also Integra Bank/Pittsburgh v. Freeman*, 839 F. Supp. 326, 329 (E.D. Pa. 1993); *Still v. Cunningham*, 94 P.3d 1104, 1114 (Alaska 2004); *Eure v. Jefferson Nat'l Bank*, 248 Va. 245, 252, 448 S.E.2d 417, 421 (1994). Other courts have held a violation is not a defense to collection of the debt. *See FDIC v. 32 Edwardsville, Inc.*, 873 F. Supp. 1474, 1480 (D. Kan. 1995); *Riggs Nat'l Bank of Washington, D.C. v. Linch*, 829 F. Supp. 163, 169 (E.D. Va. 1993), *aff'd*, 36 F.3d 370 (4th Cir. 1994); *CMF Va. Land, L.P. v. Brinson*, 806 F. Supp. 90, 95 (E.D. Va. 1992); *Diamond v. Union Bank & Trust of Bartlesville*, 776 F. Supp. 542, 544 (N.D. Okla. 1991).

It is unnecessary, however, for us to determine in this case whether a violation of the ECOA occurred and, if so, whether such a violation creates an affirmative defense to the recovery of the indebtedness. Regardless of whether plaintiff violated the ECOA, defendant waived any possible claims under that statute.

The waiver here is part of the contractual forbearance agreement. Applying contract principles, we determine the intent of the parties by the plain meaning of the written terms. *E.g.*, *Powers v. Travelers Ins. Co.*, 186 N.C. 336, 338, 119 S.E. 481, 482 (1923). "We must decide the case, therefore, . . . by what is written in the contract actually made by them." *Id.* (citation and quotation marks omitted). Parties are free to waive various rights, including those arising under statutes. *See Clement v. Clement*, 230 N.C. 636, 640, 55 S.E.2d 459, 461 (1949); *Cameron v. McDonald*, 216 N.C. 712, 715, 6 S.E.2d 497, 499 (1940); *In re West*, 212 N.C. 189, 192, 193 S.E. 134, 136 (1937); *see also Ballard v. Bank of Am.*, 734 F.3d 308, 313 (4th Cir. 2013). In contracts parties understand that "liability to the burden is a necessary incident to the right to the benefit." *Norfleet v. Cromwell*, 70 N.C. 510, 516, 70

N.C. 633, 641 (1874) (citations omitted).

In executing the forbearance agreement, defendant acknowledged the enforceability of her guaranty and waived a wide array of potential claims. The agreement expressly releases the lender from "any and all claims, defenses and causes of action." The comprehensive language contained in the agreement, *inter alia*, "waive[s] and release[s] any claims" that may challenge the lender's "good faith" or "commercially reasonable" conduct. Defendant argues that the waiver's phrase "in tort or in contract" limits the otherwise broad language in the agreement from covering statutory claims. This argument overlooks the preceding phrase "including without limitation" and the overall expansive language of the waiver. Given the wide-ranging nature of the statement "waiving and releasing any claims," we do not agree that the release should be interpreted to exclude statutory claims.

Defendant argued, and the Court of Appeals agreed, that the waiver was unenforceable because the original loan relationship violated public policy. The cases cited for this view, however, hold that a contract which on its face involves illegal conduct will not be enforced. *See Cansler v. Penland*, 125 N.C. 408, 409, 125 N.C. 578, 579, 34 S.E. 683, 684 (1899) (holding a contract in which a sheriff authorized another to exercise certain duties of the sheriff was inherently illegal and unenforceable); *cf. Martin v. Underhill*, 265 N.C. 669, 673-74, 144 S.E.2d 872, 875-76 (1965) (finding a contract to bid on property for another at a public auction was not illegal in its essence and was thus enforceable). There is nothing facially illegal about this loan relationship in which a lender provided a loan upon certain conditions; moreover, parties routinely forego claims in settlement agreements. Here a waiver of potential defenses to the guaranty, including a potential defense for a violation of the ECOA, was a part of defendant's decision to accept the benefits of the forbearance agreement.

In a recent decision on similar facts, the United States Court of Appeals for the Fourth Circuit enforced a waiver of potential claims under the ECOA. *Ballard*, 734 F.3d at 314. That court analogized a settlement of claims under the ECOA to one under the Equal Employment Opportunity Act. *Id.*; *see, e.g.*, *Alexander v. Gardner–Denver Co.*, 415 U.S. 36, 52, 94 S. Ct. 1011, 1021, 39 L. Ed. 2d 147, 160 (1974) ("[P]resumably an employee may waive his cause of action under [the Equal Employment Opportunity Act] as part of a voluntary settlement."). In either scenario, a waiver does not operate as a pre-

condition to the original contract for credit or employment; instead, it acts as a "negotiated benefit" or compromise of the original contract terms. *Ballard*, 734 F.3d at 314. Defendant's waiver here was not a precondition for the LC Entities to receive the original loan, but rather it was a negotiated settlement.

In executing the forbearance agreement, defendant acknowledged the enforceability of her guaranty and waived her potential claims, including those under the ECOA, in exchange for leniency in repaying the debt. The trial court improperly allowed defendant to assert a claim she waived, thus depriving plaintiff of its rights under the forbearance agreement. The Court of Appeals erroneously affirmed the trial court's judgment. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for consideration of defendant's remaining issues on appeal.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; VIRGINIA ELECTRIC AND POWER COMPANY D/B/A DOMINION NORTH CAROLINA POWER, APPLICANT; AND PUBLIC STAFF – NORTH CAROLINA UTILITIES COMMISSION, INTERVENOR V. ATTORNEY GENERAL ROY COOPER AND NUCOR STEEL-HERTFORD, INTERVENORS

No. 234A13

(Filed 12 June 2014)

1. Utilities—North Carolina Utilities Commission—electric service rate—cost-of-service study—approval of adjustments—authority

The North Carolina Utilities Commission ("Commission") did not err by approving certain adjustments made by Dominion North Carolina Power to a study of the costs of providing retail electric service to a large industrial customer. The Commission's determination that it would be unfair to make further adjustments to the cost-of-service study to account for the customer's interruptible contract was not in excess of its statutory authority or jurisdiction and there was substantial evidence in the record to support the Commission's findings.

2. Utilities—North Carolina Utilities Commission—electric service rate—return on equity—impact on consumers

An order by the North Carolina Utilities Commission ("Commission"), which authorized a 10.2% return on equity ("ROE") for Dominion North Carolina Power, failed to meet the statutory requirement that the Commission make findings of fact regarding the impact of changing economic conditions on customers when determining the proper ROE for a public utility. The portion of the Commission's order in which it authorized the 10.2% ROE was reversed and remanded for additional findings of fact in light of *State ex rel. Utils. Comm'n v. Cooper*, 366 N.C. 484.

On direct appeal as of right pursuant to N.C.G.S. §§ 62-90(d) and 7A-29(b) from a final order of the North Carolina Utilities Commission entered on 21 December 2012 in Docket No. E-22, Sub 479. Heard in the Supreme Court on 19 November 2013.

McGuireWoods, LLP, by James Y. Kerr, II, for applicant-appellee Virginia Electric and Power Company d/b/a Dominion North Carolina Power.

Antoinette R. Wike, Chief Counsel, and William E. Grantmyre and Dianna W. Downey, Staff Attorneys, for intervenor-appellee Public Staff – North Carolina Utilities Commission.

Kevin Anderson, Senior Deputy Attorney General; Phil Woods, Special Deputy Attorney General; Margaret A. Force, Assistant Attorney General; and William V. Conley, Special Deputy Attorney General, for intervenor-appellant Roy Cooper, Attorney General.

Nelson, Mullins, Riley & Scarborough, LLP, by Joseph W. Eason and Phillip A. Harris, Jr.; and Brickfield, Burchette, Ritts & Stone, P.C., by Damon E. Xenopoulos, pro hac vice, for intervenor-appellant Nucor Steel-Hertford.

JACKSON, Justice.

In this case we consider whether the North Carolina Utilities Commission ("the Commission") erred by approving certain adjustments made by Dominion North Carolina Power ("Dominion") to a study of the costs of providing retail electric service to a large industrial customer. In addition, we consider whether the order of the

Commission, which authorized a 10.2% return on equity ("ROE") for Dominion, contained sufficient findings of fact to demonstrate that it was supported by competent, material, and substantial evidence in view of the entire record. We conclude that the Commission did not err by approving Dominion's adjustments to the cost-of-service study; however, we reverse that portion of the Commission's order in which it authorized a 10.2% ROE for Dominion and remand for additional findings of fact in light of *State ex rel. Utilities Commission v. Attorney General Roy Cooper* ("*Cooper*"), 366 N.C. 484, 739 S.E.2d 541 (2013).

On 30 March 2012, Dominion filed an application with the Commission requesting authority to increase its retail electric service rates to produce an additional $63,665,000—an increase of approximately 19.11% in overall base revenues. Subsequently, Dominion reduced its proposed revenue increase to $55,320,000 and requested an ROE of 11.25%. The ROE represents the return that a utility is allowed to earn on its capital investment by charging rates to its customers. As a result, a higher ROE impacts profits for shareholders and costs to consumers. *Id.* at 485 n.1, 739 S.E.2d at 542 n.1. The ROE is one of the components used in determining a company's overall rate of return. *State ex rel. Utils. Comm'n v. Public Staff* ("*Public Staff III*"), 323 N.C. 481, 490, 374 S.E.2d 361, 366 (1988).

In this case the Commission allowed petitions to intervene filed by Nucor Steel-Hertford ("Nucor"), the Carolina Industrial Group for Fair Utility Rates, the North Carolina Sustainable Energy Association, and the North Carolina Waste Awareness and Reduction Network. Nucor is a large industrial customer of Dominion. The Attorney General and the Public Staff of the Commission intervened as allowed by law. *See* N.C.G.S. §§ 62-15, 20 (2013).

On 27 April 2012, the Commission entered an order declaring this proceeding a general rate case and suspending the proposed new rates for up to 270 days. The Commission scheduled four public hearings to receive testimony from public witnesses. The Commission also scheduled an evidentiary hearing for 16 October 2012, at which additional public testimony as well as expert testimony would be received.

During the course of the hearings, the Commission heard testimony from twenty public witnesses and a number of witnesses presented by the parties. The Commission also received evidence addressing the methodology used in Dominion's cost-of-service studies. Cost-of-service studies are used to allocate production and trans-

mission plant costs among multiple jurisdictions and customer classes. Dominion is required to submit such studies annually to the Commission. Dominion used the summer and winter peak and average method ("SWPA"), with a test period ending 31 December 2011, for its original study. The SWPA method models cost of service using two factors: a peak demand component and an average demand component. The peak demand component accounts for the power consumed during the hour when demand for electricity is highest in the summer and winter months. Average demand is calculated using the total power provided during the year, divided by the number of hours in the year. To determine the cost of providing service to a particular customer class, the peak and average demands for that class are weighted using a value called the system load factor, which represents whether the customer class uses more power during peak or off-peak periods. The effect of the system load factor is to allocate base load production costs to customer classes that use power during off-peak hours and peak production costs to customer classes that use power during peak hours.

Nucor operates an electric arc furnace. During the test period, Nucor consumed 21% of all electricity sold by Dominion in North Carolina. Nucor's maximum peak demand was 158 megawatts ("MW"), and its average demand was 104 MW; however, in its original cost-of-service study, Dominion reduced Nucor's peak demand component to 38 MW. This reduction reflected that Dominion has a contractual right to interrupt Nucor's power use for limited periods. The contract between the companies provides for several types of interruption that place conditions on Nucor's use of electricity. During a period of interruption, Nucor may purchase electricity pursuant to special price terms, depending upon the type of interruption Dominion has requested. Also, depending upon the type of interruption, Nucor may or may not be allowed to use this electricity to operate its electric arc furnace.

Nucor offered the testimony of Dr. Dennis Goins, Economic Consultant with Potomac Management Group, who recommended additional adjustments to the treatment of Nucor in the cost-of-service study. Goins's primary recommendation was to treat the entirety of Nucor's demand as interruptible or "non-firm." Goins testified that interruptible service should not cause Dominion to incur any production capacity costs, so no production capacity costs should be allocated to Nucor. In the alternative, Goins recommended

that Dominion should reduce Nucor's average demand in the same manner that it adjusted Nucor's peak demand.

Dominion witness Paul B. Haynes, Manager, Regulation for Dominion, strongly opposed these proposals. Haynes noted that Goins's primary recommendation would assign no responsibility for production plant costs and other costs to Nucor. He testified that this proposal would reduce the revenue requirement assigned to Nucor by $11.5 million, but increase the revenue requirement assigned to the residential class by $900,000. Haynes argued that Goins's secondary proposal was unfair because all other customer classes' average demand factors were calculated using the amount of energy they actually consumed. Haynes testified that the proposal would ignore 63% of the energy Nucor actually consumed, and it would potentially shift costs to other jurisdictions and adversely affect other customer classes.

The Commission heard additional testimony concerning Dominion's ROE. Dominion presented the testimony of Robert Hevert, Managing Partner of Sussex Economic Advisors, LLC, Inc. Hevert testified that in developing his ROE recommendation, he relied primarily on the Constant Growth Discounted Cash Flow ("DCF") model, which estimates the ROE as the sum of expected dividend yield and expected rate of dividend growth. Hevert also considered the Capital Asset Pricing Model ("CAPM"), which estimates cost of equity as the expected return on a risk-free investment plus a risk premium. Hevert further testified that because Dominion is not publicly traded, it was necessary to perform the analysis on a proxy group of publicly-traded companies comparable to Dominion. On direct examination he recommended an ROE range of 10.75% to 11.50%; however, on rebuttal he modified the range to 10.50% to 11.50%, with a specific recommendation of 11.25%. He criticized the ROE recommendations of Public Staff witness Johnson and Nucor witness Woolridge because he believed that their recommendations were excessively low considering the 10.7% ROE authorized for Dominion in its last general rate case order of 13 December 2010.

The Public Staff presented the testimony of Dr. Ben Johnson, Consulting Economist and President of Ben Johnson Associates, Inc. Johnson used a market approach and a comparable earnings approach to estimate Dominion's cost of equity. Johnson's market approach included an analysis of historic market returns earned by investors in publicly traded common stocks, a DCF analysis, and a CAPM analysis. Johnson testified that the average regulated utility

often has a significantly lower cost of equity than an average unregulated, competitive firm because public utilities have substantially less risk. In performing his analysis, Johnson selected a different proxy group from that utilized by Hevert. Johnson argued that Hevert's proxy group improperly selected companies that were enjoying better-than-average financial performance and a lower-than-average risk profile. Johnson also testified that Hevert had relied solely upon data concerning projected earnings per share growth, which he characterized as more subjective and less reliable. Johnson's market approach estimated a cost of equity range of 7.89% to 9.08%, and his comparable earnings approach estimated that Dominion's cost of equity was in the range of 9.75% to 10.75%. He suggested that the Commission could average the upper and lower bounds of each range to create a composite range of 8.82% to 9.91%. He further recommended that the Commission exercise discretion in determining how much weight to put on each of his approaches. Assuming equal weight, he recommended a 9.37% ROE.

Nucor presented the testimony of Dr. J. Randall Woolridge, finance and business administration professor at the University Park Campus of Pennsylvania State University, Director of the Smeal College Trading Room, and President of the Nittany Lion Fund, LLC. Woolridge testified that he, like Hevert, had applied both the DCF and CAPM approaches; however, Woolridge testified that Hevert had included only ten companies in his proxy group, while Woolridge had included thirty-six. Woolridge also criticized Hevert's analysis for relying solely upon projected earnings per share growth rates because he stated that those estimates are overly optimistic and upwardly biased. Woolridge's DCF analysis estimated that the cost of equity was 8.5% for his proxy group and 8.6% for Hevert's proxy group. Woolridge testified that for both proxy groups, his CAPM analysis estimated the cost of equity at 7.5%. He concluded that the appropriate equity cost rate was between 7.5% and 8.6%; however, he gave greater weight to the DCF model and recommended an authorized ROE of 8.5%.

On 21 December 2012, the Commission issued an order that authorized an increase of $21,954,000 in Dominion's gross annual revenues and approved an ROE of 10.2%. The Commission approved Dominion's treatment of Nucor in its cost-of-service study. The Commission determined that it was appropriate to reduce Nucor's peak demand to reflect the value of the interruptible nature of its contract with Dominion. However, the Commission did not accept

the recommendations of Nucor's witness Goins. The Commission found that "[o]utside of the relatively few hours the Company can contractually request Nucor to curtail its arc furnace load, Nucor is free to buy through all other requests at a fixed price arrangement." In addition, the Commission noted that "it is completely up to Nucor during these buy-through time periods to decide how much energy to consume and the resulting demand that it places on the system, and when to consume that energy." The Commission concluded that no additional adjustment should be made to the cost-of-service study to account for Nucor because "[t]o do otherwise would inappropriately shift costs to other customer classes and jurisdictions."

In support of its ROE determination, the Commission summarized the testimony of Hevert, Johnson, and Woolridge. The Commission noted that Hevert had updated his analysis during his rebuttal testimony by adding a company to the proxy group and adjusting the expected growth rates. The Commission found that given the small size of Hevert's proxy group, the update "inordinately influenced" his results. In weighing the testimony of Johnson and Woolridge, the Commission noted that their recommendations were "below any authorized ROE determination for a vertically-integrated electric utility like [Dominion] by any Commission in the last 30 years."

The Commission also acknowledged that it was required to consider whether the order was fair and reasonable to consumers, 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.

(ellipsis in original.) 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 testimony and written statements from numerous public witnesses concerning the impact of current economic conditions on [Dominion's] customers. Therefore, the Commission has ample evidence to consider in determining whether the various ROEs supported by the expert testimony strikes [sic] a fair balance between a reasonable rate of return for shareholders and reasonable rates for the Company's customers.

In addition, the Commission noted that "Hevert and . . . Johnson testified that it is not necessary to consider the impact of changing economic conditions on consumers in the context of an ROE economic analysis, other than in a broader macroeconomic sense, when analyzing changing market conditions for the purpose of making ROE recommendations."

The Commission determined that an ROE of 10.2% "strikes a fair balance between the interests of the Company, its shareholders and ratepayers based on the current financial market and economic conditions." The Commission explained that 10.2% fell within the range of Hevert's DCF and CAPM results and the comparable earnings method used by Johnson. Furthermore, the Commission noted that "interest rates and authorized returns have trended down since the Company's last general rate case order in December of 2010, when [Dominion] was allowed a rate of return on common equity of 10.70%." Nucor and the Attorney General appealed.

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) (2013). When reviewing an order of the Commission, this Court

> 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
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> (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.

Id. § 62-94(b) (2013). Pursuant to subsection 62-94(b), this Court must determine whether the Commission's findings of fact are supported by competent, material, and substantial evidence in view of the entire record. *Id.*; *CUCA I*, 348 N.C. at 460, 500 S.E.2d at 699 (citations omitted). "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." *CUCA I*, 348 N.C. at 460, 500 S.E.2d at 700 (alteration in original) (citations and quotation marks omitted). The Commission must include all necessary findings of fact, and failure to do so constitutes an error of law. *Id.*

[1] In its appeal Nucor argues that the Commission "is prohibited from considering the potential impact of its decision on ratepayers in other jurisdictions when determining the total amount of revenues required from North Carolina's retail ratepayers." As a result, Nucor contends that the Commission erred by finding that further adjustments to the cost-of-service study would "inappropriately shift costs to other . . . jurisdictions." In support of its assertion, Nucor notes that the Commission must consider costs associated with "providing the service rendered to the public within the State," N.C.G.S. § 62-133(b)(1) (2013), and fix a rate of return "in accordance with the reasonable requirements of its customers in the territory covered by its franchise," *id.* § 62-133(b)(4) (2013). In Nucor's view, this language establishing the Commission's role in North Carolina means that the

Commission is prohibited from considering any effect, however harmful, that its order might have beyond North Carolina.

The express legislative mandate of section 62-133 is that the Commission "fix such rates as shall be fair both to the public utilities and to the consumer." N.C.G.S. § 62-133(a) (2013); *see also*, *e.g.*, *id.* § 62-131(a) (2013); *CUCA I*, 348 N.C. at 462, 500 S.E.2d at 701 (noting that the Commission must determine "a rate that is just and reasonable both to the utility company and to the public"). In its order the Commission explained in detail that Goins's recommendations were not fair to investors or other consumers. The Commission noted that the specific terms of Nucor's contract impose minimal service interruption on Nucor and permit use of electricity during a period of curtailment. The Commission noted that Dominion often "has no option other than to provide . . . energy whenever it is demanded." As a result, the Commission found that Nucor's use of energy creates substantial costs for Dominion and concluded that those costs should be included in the cost-of-service study. The Commission's comment that Goins's recommendation "would inappropriately shift costs to other customer classes and jurisdictions" represents the Commission's determination that it would be unfair to make further adjustments to the cost-of-service study to account for Nucor's interruptible contract. We hold that this determination was not "[i]n excess of statutory authority or jurisdiction of the Commission." N.C.G.S. § 62-94(b)(2).

Next, Nucor argues that the Commission's findings rejecting Goins's recommendations regarding the cost-of-service study were not supported by competent, material, and substantial evidence. Nucor contends that the evidence shows that Goins's proposals would not have shifted costs to other customer classes or jurisdictions and would have produced a lower revenue requirement. Nonetheless, it is the role of the Commission, not the reviewing court, to weigh the evidence. *See Public Staff III*, 323 N.C. at 491, 374 S.E.2d at 367 (citation omitted). " 'The rate order of the Commission will be affirmed if . . . the facts found by the Commission are supported by competent, material and substantial evidence.' " *State ex rel. Utils. Comm'n v. Thornburg*, 325 N.C. 463, 476, 385 S.E.2d 451, 458 (1989) (citation omitted). The Commission rejected Goins's recommendations, and there was substantial evidence in the record, including the testimony of three other expert witnesses who strongly opposed Goins's recommendations, to support the Commission's findings. As a result, Nucor's argument is meritless. Accordingly, we affirm that por-

tion of the Commission's order concerning the treatment of Nucor in Dominion's cost-of-service studies.

[2] In the second issue before us, the Attorney General argues that the Commission's order is legally deficient because the Commission failed to make required findings and conclusions regarding changing economic conditions and the resulting impact on consumers. In addition, the Attorney General contends that the Commission's order does not contain sufficient findings and reasoning regarding interest rate trends and the ROE range it referenced in reaching its decision. Furthermore, the Attorney General asserts that the Commission's order inappropriately considered ROEs authorized for other utilities by other commissions and the prior ROE authorized for Dominion, which do not reflect current economic conditions.

The Commission has a statutory obligation to treat both shareholders and consumers fairly. Subdivision 62-133(b)(4) of the North Carolina General Statutes requires the Commission to fix a rate of return that

> will enable the public utility by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors . . . 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). We have explained that this provision advances the Legislature's "twin goals of assuring 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.

Most recently, we stated that "customer interests cannot be measured only indirectly or treated as mere afterthoughts . . . . Instead, it is clear that the Commission must take customer interests into account when making an ROE determination." *Cooper*, 366 N.C. at 495, 739 S.E.2d at 548. In *Cooper* the Commission adopted the ROE stipulation of a nonunanimous settlement proposal. *See id.* at 486, 489, 739 S.E.2d at 542-44. We concluded that the order did not contain sufficient findings to demonstrate that the Commission had exercised its own independent judgment. *Id.* at 493, 739 S.E.2d at 547. In addition, we concluded that the Commission had not made sufficient find-

ings regarding the impact of changing economic conditions on consumers. *Id.* at 494, 739 S.E.2d at 547.

The Commission did not have the benefit of our guidance in *Cooper* when it issued its order in the case *sub judice*. As a result, the findings of fact regarding this issue are virtually identical to the findings we held were deficient in *Cooper*:

The Commission's Order in This Case	The Commission's Order in *Cooper*
[Dominion] witness Hevert and Public Staff witness Johnson testified that it is not necessary to consider the impact of changing economic conditions on consumers in the context of an ROE economic analysis, other than in a broader macroeconomic sense, when analyzing changing market conditions for the purpose of making ROE recommendations. However, the 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	Duke witness Hevert and Public Staff witness Johnson testified that it is not necessary to consider the impact of changing economic conditions on consumers in the context of an ROE economic analysis, other than in a broader macroeconomic sense, when analyzing changing market conditions for the purpose of making ROE recommendations. However, the 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. Public Staff witness Johnson testified in depth concerning the economic downturn, including the unemployment rate. In addition, the Commission received testimony and written statements from numerous public witnesses concerning the impact of current economic conditions on [Dominion's] customers. Therefore, the Commission has ample evidence to consider in determining whether the various ROEs supported by the expert testimony strikes [sic] a fair balance between a reasonable rate of return for shareholders and reasonable rates for the Company's customers. (ellipsis in original) (citation omitted).

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. 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. (ellipsis in original).

We recognize the appeal of using boilerplate findings of fact in cases that frequently may appear so similar, but this type of pro forma fact-finding is insufficient to meet the Commission's obligations pursuant to Chapter 62 of the General Statutes. We reiterate our concern with the Commission treating consumer interests as incidental to its statutory mandate or as a "mere afterthought[ ]." *Cooper*, 366 N.C. at 495, 739 S.E.2d at 548. Although the Commission's order mentions testimony by Johnson and the public witnesses, the order omits the substance of this evidence and, more importantly, the weight which it was given. This ROE determination fails to meet the statutory requirement that "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." *Id.*

In addition, we note that the evidence offered by Johnson and Woolridge suggested that Dominion's cost of equity may have fallen substantially since its last general rate case order in December 2010. These experts recommended ROEs significantly below the 10.7% ROE last authorized by the Commission; however, the Commission gave little weight to their testimony because their recommendations were "below any authorized ROE determination for a vertically-integrated electric utility like [Dominion] by any Commission in the last 30 years." The Commission then made an ROE determination within the higher range of Hevert's DCF and CAPM results, 10.5% to 11.5%, and Johnson's comparable earnings method, 9.75% to 10.75%.

We previously have stated that "[t]he Commission's concern about an 'extreme fluctuation' between the rate of return allowed in [the company's] last general rate case and that allowed here . . . is an improper consideration in determining rate of return. It has nothing to do with the [c]ompany's *existing* cost of equity." *State ex rel. Utils. Comm'n v. Public Staff*, 331 N.C. 215, 225, 415 S.E.2d 354, 361 (1992) (citing N.C.G.S. § 62-133(b)(4) (1989)). There does not appear to be any evidence in the record indicating that the economic conditions facing Dominion, its shareholders, and its consumers today are comparable to the conditions facing other utilities over the last thirty years. Fundamentally, the Commission's reliance on past ROE determinations authorized for other utilities, without evidence tying those determinations to the facts of the case *sub judice*, prevented the Commission from fairly considering current economic conditions.

For the foregoing reasons, we reverse and remand that portion of the order addressing the Commission's ROE determination with instructions to make additional findings of fact concerning the impact of changing economic conditions on consumers. We affirm the remainder of the Commission's order.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; DUKE ENERGY PROGRESS, INC., APPLICANT; AND PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION, INTERVENOR V. ATTORNEY GENERAL ROY COOPER AND THE NORTH CAROLINA WASTE AWARENESS AND REDUCTION NETWORK, INTERVENORS

No. 424A13

(Filed 20 August 2014)

Utilities—rate making—effect of changing economic conditions on customers—findings—sufficient

The North Carolina Utilities Commission (Commission) made sufficient findings in a general rate case regarding the impact of changing economic conditions upon customers, and those findings were supported by the evidence in view of the entire record. Although the Attorney General contended that the Commission failed to make findings of fact showing in "meaningful detail" that it considered the impact of changing economic conditions upon customers, the Commission's order contained several findings of fact that addressed this factor and those findings of fact not only demonstrated that the Commission considered the impact of changing economic conditions upon customers, but also specified how this factor affected the Commission's final order. Contrary to the Attorney General's suggestion, the North Carolina Supreme Court did not state in *State ex rel. Utils. Comm'n v. Cooper*, 366 N.C. 484, that the Commission must "quantify" the influence of this factor upon the final return on equity determination.

On direct appeal as of right pursuant to N.C.G.S. §§ 62-90(d) and 7A-29(b) from a final order of the North Carolina Utilities Commission entered on 30 May 2013 in Docket No. E-2, Sub 1023. Heard in the Supreme Court on 5 May 2014.

K&L Gates LLP, by Kiran H. Mehta; Heather Shirley Smith, Deputy General Counsel, and Charles A. Castle, Associate General Counsel, Duke Energy Progress, Inc.; and Williams Mullen, by Christopher G. Browning, Jr., for applicant-appellee Duke Energy Progress, Inc.

Antoinette R. Wike, Chief Counsel, and William E. Grantmyre and Lucy E. Edmondson, Staff Attorneys, for intervenor-appellee Public Staff—North Carolina Utilities Commission.

Kevin Anderson, Senior Deputy Attorney General; Phillip K.

Woods and William V. Conley, Special Deputy Attorneys General; and Margaret A. Force, Assistant Attorney General, for intervenor-appellant Roy Cooper, Attorney General.

John D. Runkle for North Carolina Waste Awareness and Reduction Network, intervenor-appellant.

JACKSON, Justice.

In this case we consider whether the order of the North Carolina Utilities Commission ("the Commission") authorizing a 10.2% return on equity ("ROE") for Duke Energy Progress ("DEP") contained sufficient findings of fact to demonstrate that it was supported by competent, material, and substantial evidence in view of the entire record. *See* N.C.G.S. § 62-94 (2013). Because we conclude that the Commission made sufficient findings of fact regarding the impact of changing economic conditions upon customers, we affirm. *See id.* § 62-94(b).

On 12 October 2012, DEP filed an application with the Commission requesting authority to increase its North Carolina retail electric service rates to produce an additional $359,000,000, yielding a net increase of 11% in overall base revenues. The application requested that rates be established using an ROE of 11.25%. The ROE represents the return that a utility is allowed to earn on its capital investment by charging rates to its customers. As a result, the ROE approved by the Commission affects profits for shareholders and costs to consumers. *State ex rel. Utils. Comm'n v. Cooper* ("*Cooper II*"), ___ N.C. ___, ___, 758 S.E.2d 635, 636 (2014) (citations omitted). The ROE is one of the components used in determining a company's overall rate of return. *Id.* at ___, 758 S.E.2d at 636 (citation omitted).

On 5 November 2012, the Commission entered an order declaring this proceeding a general rate case and suspending the proposed new rates for up to 270 days. The Commission scheduled five hearings across the State to receive public witness testimony. The Commission also scheduled an evidentiary hearing for 18 March 2013 to receive expert witness testimony. The Attorney General of North Carolina and the Public Staff of the Commission intervened as allowed by law. *See* N.C.G.S. §§ 62-15, 20 (2013).

On 28 February 2013, DEP and the Public Staff filed an Agreement and Stipulation of Settlement with the Commission. The Stipulation provided for a net increase of $178,712,000 in annual rev-

enues and an ROE of 10.2%. Among the parties contesting the Stipulation was the Attorney General.

By the time the evidentiary hearing began on 18 March 2013, the Commission already had heard testimony from 127 public witnesses. Many of these customers opposed the proposed rate increase, testifying about unemployment and poverty in their communities. Other customers expressed their view that DEP should be required to discontinue fossil fuel and nuclear generation in favor of energy efficiency and renewable energy, even if doing so would result in higher costs.

The Commission also heard from expert witnesses, who testified about the appropriate ROE and explained how current economic conditions affect consumers. Specifically, DEP presented the testimony of Robert B. Hevert, Managing Partner of Sussex Economic Advisers, LLC. Hevert recommended an ROE of 11.25%, which was above the midpoint of his recommended range of 10.50% to 11.50%. Hevert primarily used the Constant Growth Discounted Cash Flow model to compute his recommended ROE and considered the Capital Asset Pricing Model as a check on his results. Hevert also considered the effect of current economic conditions upon North Carolina customers. He testified that although North Carolina's unemployment rate was worse than the national average, the State's GDP growth and expected household income growth also were higher than the national average. Hevert noted that North Carolina's average residential electric prices were approximately 12.31% below the national average. He concluded that "the regional economic conditions in North Carolina were substantially similar to the United States, such that there is no direct effect of those conditions on the Company's cost of equity." As a result, Hevert determined that his ROE analysis did not need to be adjusted to account for the impact of changing economic conditions upon utility customers in this State.

The Public Staff presented the testimony of Ben Johnson, Consulting Economist and President of Ben Johnson Associates, Inc. Johnson estimated an ROE range utilizing two approaches: first, a comparable earnings approach, which arrived at a range of 9.75% to 10.75%; and second, a market approach, which arrived at a range of 7.72% to 8.95%. Johnson also addressed the prolonged period of economic weakness that began in 2007. Johnson stated that improvement in the economy has been both weak and slow, with firms still reluctant to either invest or expand. Nevertheless, Johnson concluded that the proposed ROE of 10.2% agreed upon in the Stipulation was reasonable and consistent with the public interest.

Other interested parties also presented evidence to 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 3 Consultants, Inc., who recommended a specific ROE of 9.25%. In addition, 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 did not recommend a specific ROE, but noted that Hevert's recommendation of 11.25% exceeded the range of recently authorized ROEs across the country.

The Attorney General did not present any ROE evidence.

On 30 May 2013, the Commission entered an order granting a $178,712,000 annual retail revenue increase and approving an ROE of 10.2% as agreed to in the Stipulation. In support of its conclusions, the Commission summarized the testimony of Hevert, Johnson, O'Donnell, Chriss, and Rosa. The Commission also recognized that it must 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.

(Second alteration in original.) The Commission concluded that the 10.2% ROE set forth in the Stipulation is "just and reasonable to all parties in light of all the evidence presented." The Attorney General appealed the Commission's order to this Court as of right pursuant to N.C.G.S. §§ 7A-29(b) and 62-90. The North Carolina Waste Awareness and Reduction Network filed a separate appeal supporting the Attorney General's position.

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:
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> (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) (2013). When reviewing an order of the Commission, this Court may, *inter alia*,

> 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
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> (2) In excess of statutory authority or jurisdiction of the Commission, or
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> (3) Made upon unlawful proceedings, or
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> (4) Affected by other errors of law, or
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> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
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> (6) Arbitrary or capricious.

Id. § 62-94(b) (2013). Pursuant to subsection 62-94(b) this Court must determine whether the Commission's findings of fact are supported by competent, material, and substantial evidence in view of the entire record. *Id.*; *CUCA I*, 348 N.C. at 460, 500 S.E.2d at 699 (citation omitted). "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." *CUCA I*, 348 N.C. at 460, 500 S.E.2d at 700 (alteration in original) (citations and quotation marks omitted). The Commission must include all nec-

essary findings of fact, and failure to do so constitutes an error of law. *Id.* (citation omitted).

The Attorney General argues that the Commission's order is legally deficient because it is not supported by competent, material, and substantial evidence and does not include sufficient findings, reasoning, and conclusions. Specifically, the Attorney General contends that the Commission failed to make findings of fact showing in "meaningful detail" that it considered the impact of changing economic conditions upon customers when determining ROE. The Attorney General asserts that the Commission must "quantify" the extent to which it adjusted the final ROE to account for consumer interests. We disagree.

Pursuant to subdivision 62-133(b)(4) of the North Carolina General Statutes, the Commission must fix a rate of return that

> will enable the public utility by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors, . . . 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). Recently, we observed that this provision, along with Chapter 62 as a whole, requires the Commission to treat consumer interests fairly, not indirectly or as "mere afterthoughts." *State ex rel. Utils. Comm'n v. Cooper* ("*Cooper I*"), 366 N.C. 484, 495, 739 S.E.2d 541, 548 (2013). In *Cooper I* the Commission's order stated:

> Duke witness Hevert and Public Staff witness Johnson testified that it is not necessary to consider the impact of changing economic conditions on consumers in the context of an ROE economic analysis, other than in a broader macroeconomic sense, when analyzing changing market conditions for the purpose of making ROE recommendations. However, the 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. 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.

(Ellipsis in original.) We explained that "the Commission must consider *all* evidence presented by interested parties, which necessarily includes customers . . . . [I]n 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." *Id.* We concluded that the order did not contain sufficient findings addressing the impact of changing economic conditions upon customers. 366 N.C.at 494, 739 S.E.2d at 547. But contrary to the Attorney General's suggestion, we did not state in *Cooper I* that the Commission must "quantify" the influence of this factor upon the final ROE determination. *See id.*; *State ex rel. Utils. Comm'n v. Pub. Staff*, 323 N.C. 481, 498, 374 S.E.2d 361, 370 (1988) ("Given th[e] subjectivity ordinarily inherent in the determination of a proper rate of return on common equity, there are inevitably pertinent factors which are properly taken into account but which cannot be quantified with the kind of specificity here demanded by [the appellant].").

Here the Commission's order contains several findings of fact that address this factor:

> 16. Changing economic conditions in North Carolina during the last several years have caused high levels of unemployment, home foreclosures and other economic stress on DEP's customers.
>
> 17. The rate increase approved in this case, which includes the approved ROE and capital structure, will be difficult for some of DEP's customers to pay, in particular DEP's low-income customers.
>
> 18. Continuous safe, adequate and reliable electric service by DEP is essential to the support of businesses, jobs, hospitals, government services, and the maintenance of a healthy environment.

19. The ROE and capital structure approved by the Commission appropriately balances the benefits received by DEP's customers from DEP's provision of safe, adequate and reliable electric service in support of businesses, jobs, hospitals, government services, and the maintenance of a healthy environment with the difficulties that some of DEP's customers will experience in paying DEP's increased rates.

20. The 10.2% ROE and the 53% equity financing approved by the Commission in this case are as low as reasonably possible. They appropriately balance DEP's need to obtain equity financing and maintain a strong credit rating with its customers' need to pay the lowest possible rates.

21. The difficulties that DEP's low-income customers will experience in paying DEP's increased rates will be mitigated to some extent by the $20 million that DEP will contribute to assistance for low-income customers and job training.

The Commission also stated that it gave "great weight" to Hevert's testimony that, although North Carolina's unemployment rate was higher than the national average, the State enjoyed lower average electric rates, higher expected household income growth, and superior GDP growth as compared to the nation as a whole. The Commission noted that Johnson testified that improvement in the economy has been slow and that the state of the economy affects both investors and consumers. The Commission explained that in addition to submitting recommended ROE ranges, Johnson concluded that a 10.2% ROE was reasonable and consistent with the public interest in combination with other provisions in the Stipulation. Furthermore, the Commission found that 58 of the 127 public witnesses who testified at the hearings stated that "the rate increase was not affordable to many customers," including the elderly, the unemployed or underemployed, the poor, and persons with disabilities. Nevertheless, the Commission explained that "[a]nother significant group of customers" wanted DEP to invest more in renewable energy, even if doing so would increase consumer costs.

In addition, the Commission found that specific provisions in the Stipulation serve customer interests. The Commission noted that the Stipulation required DEP to exclude from its rate base for one year the construction work in progress invested in the company's new Sutton power plant, thereby "making it easier for ratepayers to pay their electric bills in the current economic environment." The capital

structure contained in the Stipulation allowed for less equity than DEP's actual capital structure during the test year, and the Commission observed that this adjustment lowered the rate paid by ratepayers, but increased the risk to debt holders and lowered the return for investors. Finally, the Commission noted that the distribution of $20,000,000 for assistance to low-income consumers and for job training benefited those ratepayers with the least ability to pay. These findings of fact not only demonstrate that the Commission considered the impact of changing economic conditions upon customers, but also specify how this factor affected the Commission's final order. Therefore, we hold that the Commission made sufficient findings regarding the impact of changing economic conditions upon customers and that these findings are supported by competent, material, and substantial evidence in view of the entire record.

Accordingly, the order of the Commission is affirmed.

AFFIRMED.

STATE OF NORTH CAROLINA v. CHRISTOPHER L. BARNES

No. 461A13

(Filed 11 April 2014)

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. ___, 747 S.E.2d 912 (2013), finding no error in part and vacating in part a judgment entered on 17 February 2012 by Judge W. Allen Cobb, Jr. in Superior Court, Wayne County, and remanding to the trial court for resentencing. Heard in the Supreme Court on 18 March 2014.

Roy Cooper, *Attorney General*, *by Laura E. Parker*, *Assistant Attorney General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Paul M. Green*, *Assistant Appellate Defender*, *for defendant-appellant.*

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. SAQUAN TREAY FACYSON

No. 262PA13

(Filed 12 June 2014)

Sentencing—aggravating factor—joining with more than one other person—acting in concert

The Court of Appeals in a second-degree murder prosecution erred in concluding that the aggravating factor that defendant joined with more than one other person in committing an offense may not be considered when a defendant is guilty under the theory of acting in concert. Acting in concert requires joinder with *at least one* other person, while the aggravating factor requires joinder with *more than one* other person, as well as not being charged with a conspiracy.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 743 S.E.2d 252 (2013), reversing a judgment entered on 23 March 2013 by Judge Henry W. Hight in Superior Court, Durham County, and remanding for a new sentencing hearing. Heard in the Supreme Court on 17 March 2014.

Roy Cooper, *Attorney General*, *by Teresa M. Postell*, *Assistant Attorney General*, *for the State-appellant.*

Sue Genrich Berry for defendant-appellee.

BEASLEY, Justice.

The sole issue in this case is whether the evidence necessary to prove that a defendant is guilty of a crime under the doctrine of acting in concert is the same evidence necessary to establish the aggravating factor that the defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy. Because the aggravating factor requires additional evidence beyond the evidence that is necessary to prove acting in concert, the trial court properly submitted the aggravating factor to the jury in this case. Accordingly, we reverse the Court of Appeals on this issue.

Facts

The State presented evidence at trial tending to establish the following facts. On 19 April 2010, David Andrews and Brian Rhode were

both employed at a Chili's Restaurant in Durham, North Carolina. That afternoon, Andrews borrowed Rhode's red Ford Fusion to go buy crack cocaine. When Andrews ran out of money, he let other people use Rhode's car in exchange for crack. At some point, Andrews "rent[ed]" the car to a group of men that included defendant, Demetrius Lloyd, and Neiko Malloy. When the car was not returned at the agreed-upon time, Rhodes reported the vehicle as stolen.

At approximately noon on 20 April 2010, Pebbles Kersey walked out of her Durham apartment, located on Dearborn Drive, to go to her mailbox. As she was walking toward her mailbox, Kersey saw a red car pull up to the park across the street. Inside the car were three men, all wearing red bandanas over their faces. Jermaine Jackson, who was standing in the park, yelled at Kersey to "[g]et down," and Kersey saw a man in the backseat of the car fire a gun at Jackson.

Also around midday on 20 April 2010, Dennis Diaz, M.D., was waiting at the stoplight at the intersection of Old Oxford Road and Dearborn Drive when he saw Kersey "duck" to the ground. He immediately heard gunshots and noticed two men leaning out of a car, both holding guns and shooting in Jackson's direction. After firing multiple shots, the men in the car fled the scene.

Jackson suffered a .38 caliber gunshot wound to his left jaw area and subsequently died as a result of the injury. Police recovered twelve bullet casings from the scene of the shooting. Eight casings were from nine-millimeter bullets and the other four were .38 caliber casings.

At approximately 12:30 p.m. on 20 April 2010, Rahjon Baldwin, the manager of an apartment complex on Gray Avenue in Durham, called the police to report a suspicious red Ford Fusion parked in the complex's parking lot. A group of three men were standing around the car and one of them was wiping the passenger side of the car with a T-shirt. When Baldwin approached the men and told them to move the red Ford, the men started walking away from the car toward the entrance of the apartment complex. A gray car then pulled into the parking lot and the three men attempted to get inside. However, the police officers responding to Baldwin's call arrived before the men could get inside the gray car. When the officers ordered the men to the ground, two of them ran away on foot. These two men were eventually apprehended, and all four men—defendant, Lloyd, Malloy, and a fourth man—were taken into custody.

Police searched the area around the red Ford Fusion and found a discarded T-shirt and a set of car keys that unlocked the car. When they searched the vehicle, police found a nine-millimeter casing in the groove where the hood joins the front windshield on the passenger side. All four men were tested for gunshot residue. While no residue was found on defendant's hands, gunshot residue was found on his jeans.

Defendant was charged with first-degree murder and accessory after the fact to first-degree murder. The case was tried noncapitally, and the State gave notice of its intent to submit as an aggravating factor that "[t]he defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy." At the close of the State's evidence and at the close of all the evidence, defendant moved to dismiss the charges for insufficient evidence. The motions were denied. Defendant did not testify or put on any evidence.

Regarding the murder charge, the trial court instructed the jury on both first-degree and second-degree murder. The court instructed the jury that, with respect to either first-degree or second-degree murder, the jury could find defendant guilty if it determined that he acted alone or that he joined with one or more persons to commit the murder. The trial court also submitted an interrogatory on the verdict sheet asking the jury, assuming it found defendant guilty of either murder or accessory after the fact to murder:

> Do you find from the evidence beyond a reasonable doubt that the defendant joined with more than one other person in committing the offense for which you have unanimously found the [d]efendant guilty . . . and that the defendant was not charged with committing a conspiracy as to this offense?

The jury found defendant guilty of second-degree murder and answered the interrogatory affirmatively. The trial court found the existence of two mitigating factors, determined that the aggravating factor outweighed the mitigating factors, and concluded that an aggravated sentence was justified in this case. The trial court accordingly sentenced defendant to an aggravated-range term of 225 to 279 months imprisonment.

Defendant appealed his conviction and sentence to the Court of Appeals, arguing, among other things, that "the trial court erred in sentencing him in the aggravated range of sentences because the evidence supporting the aggravating factor was the same evidence necessary to support an element of the underlying offense." *State v.*

Facyson, ___ N.C. App. ___, ___, 743 S.E.2d 252, 256 (2013). Defendant claimed that the jury necessarily convicted him of second-degree murder based on the theory of acting in concert due to the lack of evidence regarding who fired the bullet that killed Jackson. Defendant further contended that the evidence of his concerted action was the same evidence used to support the aggravating factor that he joined with more than one other person in committing the murder, but was not charged with committing a conspiracy. Thus, according to defendant, the use of this aggravating factor to enhance his sentence violated the prohibition in N.C.G.S. § 15A-1340.16(d) against using evidence necessary to prove an element of the offense to also prove an aggravating factor. *Id.* at ___, 743 S.E.2d at 256-57.

The Court of Appeals held that the State presented evidence sufficient to permit the jury to find either that defendant acted in concert in committing the murder or that "it was defendant's actions alone that resulted in Jackson's death." *Id.* at ___,743 S.E.2d at 257. The court observed, however, that "the verdict sheet did not require the jury to indicate the theory on which it found defendant guilty." *Id.* at ___, 743 S.E.2d at 257. Resolving the ambiguity in the verdict sheet in favor of defendant, the court concluded, consistent with defendant's second premise, that it must "assum[e] that the aggravated sentence imposed was based on the same evidence necessary to establish an element of the underlying offense." *Id.* at ___, 743 S.E.2d at 257 (citation omitted). The court thus "reverse[d] the judgment entered upon [defendant's] conviction for second-degree murder and remand[ed] for a new sentencing hearing without the use of the aggravating factor." *Id.* at ___, 743 S.E.2d at 257. We allowed the State's petition for discretionary review. ___ N.C. ___, 748 S.E.2d 317 (2013).

Discussion

The State argues that the Court of Appeals erred in concluding that "when a defendant is guilty under the theory of acting in concert, the aggravating factor that he joined with more than one other person in committing the offense and was not charged with conspiracy, may not be considered in determining the sentence." We agree.

Our Structured Sentencing Act provides that if the jury finds that one or more aggravating factors exist, and if the trial court determines that the aggravating factors outweigh the mitigating factors, then the court may impose a sentence in the statutorily-prescribed aggravated range. N.C.G.S. § 15A-1340.16(b) (2013). In determining whether an aggravating factor may properly be considered, section

15A-1340.16(d) dictates that "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation." *Id.* § 15A-1340.16(d) (2013). In interpreting this provision, this Court has "emphasize[d] . . . that many of the statutory factors listed under [the predecessor to N.C.G.S. § 15A-1340.16(d)] contemplate a duplication in proof without violating the proscription that 'evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation.' " *State v. Thompson*, 309 N.C. 421, 422 n.1, 307 S.E.2d 156, 158 n.1 (1983) (quoting N.C.G.S. § 15A-1340.4(a)(1), predecessor to N.C.G.S. § 15A-1340.16(d)).

We applied this principle in *State v. Bruton*, 344 N.C. 381, 385, 474 S.E.2d 336, 339-40 (1996), where the defendant (Townsend) was convicted of second-degree murder, under a concerted action theory, based on evidence that he and another man (Bruton) intentionally fired multiple shots at the victim and other individuals, each using a nine-millimeter semiautomatic pistol. The defendant argued that the evidence used to prove the aggravating factor that he "knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person" was the same evidence used "to prove second-degree murder on the basis of acting in concert." *Bruton*, 344 N.C. at 393-94, 474 S.E.2d at 344-45. This Court rejected that argument, observing that, "[i]n meeting its burden of proof with respect to second-degree murder on the basis of acting in concert, the State was *not required to establish* that [the] defendant . . . knowingly created a great risk of death to more than one person or that he did so by using a weapon which in its normal use is hazardous to the lives of more than one person." *Id.* at 394, 474 S.E.2d at 345 (emphasis added). Thus, because the aggravating factor was supported by evidence "[d]iscrete" from the evidence necessary to establish defend-ant's acting in concert, the aggravating factor was properly submitted. *Id.*

In *Thompson*, 309 N.C. at 422, 307 S.E.2d at 158, we addressed the use of the aggravating factor that "[t]he offense involved an attempted or actual taking of property of great monetary value" when the underlying offense was felony larceny, which requires evidence that the value of the property taken exceeds a statutorily defined amount, *see* N.C.G.S. § 14-72(a) (2013). There, we observed that "simply because [the] defendant had been charged with larceny" did not preclude the use of evidence "establish[ing] an attempted taking of property of great monetary value": "The *additional* evidence neces-

sary to prove a taking or attempted taking of property of *great* monetary value is not evidence necessary to prove an element of felonious larceny." *Thompson*, 309 N.C. at 422, 307 S.E.2d at 158.

In *State v. Abee*, 308 N.C. 379, 380, 302 S.E.2d 230, 231 (1983) (per curiam), the defendant pleaded guilty to one count of second-degree sexual offense based on a single act of fellatio. The record, however, "clear[ly]" established that the defendant had committed multiple acts of fellatio, and the trial court considered these "repeated acts of fellatio" as a factor warranting enhancement of the defendant's sentence. *Id.* at 381, 302 S.E.2d at 231. We upheld the trial court's use of the aggravating factor because "[n]o proof of any other act of fellatio" was necessary to support the defendant's guilty plea. *Id.* Thus the remaining acts of fellatio could properly be considered as an aggravating factor because they were not the basis of the defendant's conviction. *Id.*

Finally, in *State v. Ahearn*, 307 N.C. 584, 602-03, 300 S.E.2d 689, 701 (1983), the defendant was convicted of felony child abuse under N.C.G.S. § 14-318.4(a), which required that the victim be "a child less than sixteen years of age." He argued that because the age of the victim is an element of the offense, the trial court was precluded from considering the aggravating factor that the victim was "very young." Id. at 602, 300 S.E.2d at 701. We rejected the defendant's contention, reasoning: "The age of the victim, while an element of the offense, spans sixteen years, from birth to adolescence. . . . The fact that [the victim] was *very young* (24 months) was not an element necessary to prove felonious child abuse, and was therefore properly considered as an aggravating factor." *Id.* at 603, 300 S.E.2d at 701.

Bruton, *Thompson*, *Abee*, and *Ahearn* confirm that when an aggravating factor is established by evidence that is in addition to the evidence necessary to prove an element of the underlying offense, the aggravating factor may properly be considered under section 15A-1340.16(d). *Thompson*, 309 N.C. at 422, 307 S.E.2d at 158 (emphasis omitted). Applying this principle in this case, section 15A-1340.16(d)(2) provides that a defendant's sentence may be enhanced if "[t]he defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy." N.C.G.S. § 15A-1340.16(d)(2). Defendant argued, and the Court of Appeals held, that the evidence establishing this aggravating factor was the same evidence necessary to prove that defendant acted in concert in committing the murder. It is well established that under the doctrine

of acting in concert, " 'when *two or more* persons act together in pursuance of a common plan or purpose, each is guilty of any crime committed by any other in pursuance of the common plan or purpose.' " *State v. Wilkerson*, 363 N.C. 382, 424, 683 S.E.2d 174, 200 (2009) (emphasis added) (quoting *State v. Thomas*, 325 N.C. 583, 595, 386 S.E.2d 555, 561 (1989)), *cert. denied*, 559 U.S. 1074, 130 S. Ct. 2104, 176 L. Ed. 2d 734 (2010).

Section 15A-1340.16(d)(2), in contrast, requires proof that "the defendant . . . joined *with at least two* other individuals in the commission of a crime." *State v. Hurt*, 359 N.C. 840, 843, 616 S.E.2d 910, 912 (2005) (emphasis added) (citation omitted), *vacated in part on other grounds*, 361 N.C. 325, 332, 643 S.E.2d 915, 919 (2007). Thus, by definition, while section 15A-1340.16(d)(2) requires evidence that the defendant joined with *at least two* other individuals to commit the offense, the doctrine of acting in concert only requires proof that the defendant joined with *at least one* other person. Accordingly, to echo our reasoning in *Bruton*, 344 N.C. at 394, 474 S.E.2d at 345, "[i]n meeting its burden of proof with respect to second-degree murder on the basis of acting in concert, the State was not required to establish" in this case that defendant joined with at least two other individuals in committing the murder—the State only needed to establish that defendant joined with one other person.

This, the State accomplished. Andrews testified that he "rented" his co-worker's red Ford Fusion to three men—defendant, Lloyd, and Malloy. That same car was seen by Kersey and Diaz at the scene of the shooting, with both witnesses reporting that multiple shots were fired from the vehicle at Jackson, the victim. Defendant, Lloyd, Malloy, and a fourth man were apprehended shortly after the shooting and one of them was attempting to wipe down the car.

Any evidence that defendant joined with more than one person was "additional evidence" unnecessary to prove that defendant acted in concert in committing the second-degree murder. *Thompson*, 309 N.C. at 422, 307 S.E.2d at 158 (emphasis omitted). Thus the evidence used to prove the aggravating factor in section 15A-1340.16(d)(2) is not the same evidence used to prove that defendant acted in concert. *See Bruton*, 344 N.C. at 394, 474 S.E.2d at 345 (upholding use of aggravating factor when the defendant's acting in concert and the aggravating factor were supported by "[d]iscrete evidence").

Moreover, in addition to evidence that the defendant joined with more than one other person in committing the offense, the plain

language of section 15A-1340.16(d)(2) requires proof that the defendant "was not charged with committing a conspiracy." N.C.G.S. § 15A-1340.16(d)(2). This statutory requirement also is not an element of acting in concert. Defendant does not contend otherwise, arguing instead that "[t]he record [i]s silent on this element" and thus the State failed to meet its burden of proving the aggravating factor. The record establishes, however, that defendant conceded this point in his brief to the Court of Appeals when he acknowledged that "[n]o conspiracy charge was joined for trial in this case."

In sum, criminal culpability under the acting-in-concert doctrine does not require proof that "[t]he defendant joined with more than one other person in committing the offense" or that the defendant "was not charged with committing a conspiracy" with respect to the underlying offense. *Id.* Consequently, the evidence presented by the State to support defendant's conviction for second-degree murder under an acting-in-concert theory is not the same evidence the State used to support the aggravating factor provided in section 15A-1340.16(d)(2). We, therefore, reverse that portion of the Court of Appeals' decision that reversed the trial court's judgment and remanded the case for resentencing. The remaining issues addressed by the Court of Appeals are not before this Court, and its decision as to those matters remains undisturbed.

REVERSED IN PART.

STATE OF NORTH CAROLINA v. BRUCE TYLER MURCHISON

No. 232PA13

(Filed 12 June 2014)

Probation and Parole—revocation proceeding—admission of hearsay evidence—no abuse of discretion

The trial court did not abuse its discretion in a probation revocation proceeding by admitting hearsay evidence. The trial court was not bound by the formal rules of evidence and the hearsay evidence was relevant for determining whether defendant had violated a condition of his probation by committing a criminal offense. Accordingly, the trial court reasonably exercised its discretion in revoking defendant's probation and activating his previously earned sentence.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 741 S.E.2d 927 (2013), reversing judgments entered on 8 August 2012 by Judge James M. Webb in Superior Court, Moore County. Heard in the Supreme Court on 18 February 2014.

Roy Cooper, Attorney General, by Kimberly N. Callahan, Assistant Attorney General, for the State-appellant.

William B. Gibson for defendant-appellee.

MARTIN, Justice.

While on probation, defendant was indicted for first-degree burglary, first-degree kidnapping, and assault with a deadly weapon. At the resulting hearing, the trial court revoked his probation. The Court of Appeals held, and defendant argues, that the trial court abused its discretion by basing the revocation upon hearsay evidence. The trial court was permitted under statute to consider hearsay evidence in the revocation hearing. Because we conclude that the trial court reasonably exercised its discretion in revoking defendant's probation and activating his previously earned sentence, we reverse the decision of the Court of Appeals.

On 26 October 2011, defendant pled guilty to two counts of assault with a deadly weapon with intent to kill (offense date 30 September 2010), assault with a deadly weapon (offense date 13 May 2011), and possession with intent to sell or deliver marijuana (offense date 22 September 2010). Defendant was on probation when he committed these offenses. He received sentences of twenty-four to thirty-eight months of imprisonment for each count of assault with a deadly weapon with intent to kill and six to eight months of imprisonment for the remaining convictions. The trial court suspended these sentences and placed defendant on supervised probation for sixty months.

On 2 February and 13 February 2012, defendant's probation officer, Leslie Tyree, filed reports alleging defendant had violated numerous conditions of his probation by, among other things, committing assault with a deadly weapon on 1 February 2012, missing curfews, and failing to attend counseling for his drug and anger problems. Finding defendant in violation of the conditions of his probation, the trial court modified his probation, imposing an active term of ninety days of imprisonment.

Defendant was released from the ninety-day term of imprisonment on 21 May 2012 to continue his term of probation. On 21 June 2012, Officer Tyree filed violation reports alleging defendant had been charged on 17 June 2012 with first-degree burglary, first-degree kidnapping, and assault with a deadly weapon. The matter was heard in Superior Court, Moore County, on 8 August 2012. Officer Tyree testified over objection that defendant's mother had called her and reported that defendant had "broke[n] into her house and held her and his girlfriend in a closet, and he had knives." Officer Tyree further testified that she believed defendant would kill somebody if allowed to remain on probation. The State also introduced a computer printout from the Administrative Office of the Courts indicating that defendant had been indicted for first-degree burglary in Lee County and that the case was set for the week of 6 August 2012. The trial court found that defendant unlawfully, willfully, and without legal justification had violated conditions of his probation by committing one or more subsequent offenses, as alleged in the violation reports. Accordingly, the trial court revoked defendant's probation and activated his suspended sentences.

Defendant appealed, arguing that the trial court erred in revoking his probation because the State failed to produce any evidence other than hearsay in support of the revocation. The Court of Appeals reversed the trial court, holding that "the evidence presented at the revocation hearing was not competent so 'as to *reasonably* satisfy the judge in the exercise of his sound discretion that the defendant ha[d] willfully violated a valid condition of probation.' " *State v. Murchison*, ___ N.C. App. ___, 741 S.E.2d 927, 2013 WL 1899615, at *4 (2013) (unpublished) (alteration in original) (citation omitted). We allowed the State's petition for discretionary review.

"Probation or suspension of sentence comes as an act of grace to one convicted of, or pleading guilty to, a crime." *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967) (citing *Escoe v. Zerbst*, 295 U.S. 490, 492, 55 S. Ct. 818, 819 (1935)). When a defendant's probation is revoked, "the sentence [the defendant] may be required to serve is the punishment for the crime of which he had previously been found guilty." *State v. Hewett*, 270 N.C. 348, 352, 154 S.E.2d 476, 479 (1967).

The Supreme Court of the United States has observed that revocation of probation " 'deprives an individual . . . only of the conditional liberty' " dependent on the conditions of probation. *Gagnon v. Scarpelli*, 411 U.S. 778, 781, 93 S. Ct. 1756, 1759 (1973) (citation omit-

ted), *superseded by statute*, Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 228 (1976). A probation revocation proceeding is not a formal criminal prosecution, and probationers thus have "more limited due process right[s]." *Id.* at 789, 93 S. Ct. at 1763. Consistent with this reasoning, we have stated that "[a] proceeding to revoke probation is not a criminal prosecution" and is "often regarded as informal or summary." *Hewett*, 270 N.C. at 353, 154 S.E.2d at 479. Thus, "the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt." *Duncan*, 270 N.C. at 245, 154 S.E.2d at 57 (citations omitted). Instead, "[a]ll that is required in a hearing of this character is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation." *Hewett*, 270 N.C. at 353, 154 S.E.2d at 480. Accordingly, the decision of the trial court is reviewed for abuse of discretion. *See State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 ("[Abuse of discretion] occurs when a ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." (citations and internal quotation marks omitted)). The State argues that because the formal rules of evidence do not apply in probation revocation proceedings, the Court of Appeals erred in finding abuse of discretion. We agree.

Both the Criminal Procedure Act and the Evidence Code address the issue before this Court. The Criminal Procedure Act states that "[f]ormal rules of evidence do not apply" in probation revocation hearings. N.C.G.S. § 15A-1345(e) (2013). Similarly, our Rules of Evidence, other than those concerning privileges, do not apply in proceedings for "sentencing, or granting or revoking probation." *Id.* § 8C-1, Rule 1101(b)(3) (2013); *see also id.* Rule 101 (2013).

Our precedent applying Rule of Evidence 1101(b)(3) to sentencing proceedings is instructive. In *State v. Carroll* the defendant argued that the trial court erred by allowing a jury to consider and find an aggravating factor that was based solely on inadmissible hearsay. 356 N.C. 526, 545, 573 S.E.2d 899, 912 (2002), *cert. denied*, 539 U.S. 949, 123 S. Ct. 2624 (2003). The trial court admitted, among other things, testimony that a judgment from Florida showed the defendant had a prior violent felony conviction and that the fingerprints in the Florida file matched the copy of the defendant's fingerprints in a Cumberland County file. *Id.* at 545-46, 573 S.E.2d at 912. Noting that the Rules of Evidence do not apply in capital sentencing proceedings, we concluded that the hearsay evidence was "reliable

evidence relevant to the State's duty to prove its aggravating circumstances" and was properly admitted. *Id.* at 547, 573 S.E.2d at 913.

Similarly, in *State v. Thomas* the defendant argued the trial court erred in his sentencing proceeding by admitting the testimony of a detective who reported the statements of a robbery victim to prove an aggravating factor. 350 N.C. 315, 358-59, 514 S.E.2d 486, 512-13, *cert. denied*, 528 U.S. 1006, 120 S. Ct. 503 (1999). Citing Rule of Evidence 1101(b)(3), we wrote, "We have repeatedly stated that the Rules of Evidence do not apply in capital sentencing proceedings. Therefore, a trial court has great discretion to admit any evidence relevant to sentencing." *Id.* at 359, 514 S.E.2d at 513 (citations omitted).

As in *Carroll* and *Thomas*, the trial court in this case had "great discretion to admit any evidence relevant to" the revocation of defendant's probation. *Id.* The trial court exercised this discretion when it admitted Officer Tyree's testimony reporting the statements of defendant's mother that defendant had broken into her home and threatened defendant's girlfriend and her with a knife. The trial court also exercised its discretion when it admitted the computer printout from the Administrative Office of the Courts showing that defendant had been indicted for first-degree burglary in Lee County, with the case calendared for that very week.

This hearsay evidence was relevant for determining whether defendant had violated a condition of his probation by committing a criminal offense. *See* N.C.G.S. § 15A-1343(b)(1) (2013). Because the proceeding was a probation revocation hearing, the trial court was not bound by the formal rules of evidence and acted within its discretion when it admitted the hearsay evidence. *Id.* §§ 8C-1, Rule 1101(b)(3), 15A-1345(e). Given the statements of defendant's mother, the document indicating defendant had been indicted for first-degree burglary, defendant's demonstrated propensity for violence, and Officer Tyree's concern that defendant would kill somebody if allowed to remain on probation, we cannot say that the trial court abused its discretion in revoking defendant's probation and activating his suspended sentence. *See Hewett*, 270 N.C. at 353, 154 S.E.2d at 480.

Our General Assembly has declared that the primary purposes of criminal sentencing are to punish the offender fairly, to protect the public, to rehabilitate the offender, and to deter criminal behavior. N.C.G.S. § 15A-1340.12 (2013). The discretion afforded to trial courts in probation hearings is a significant means to ensure that these purposes are achieved. The evidence before the trial court allowed the

reasonable conclusion that defendant had continued a course of criminal action and posed a danger to the public. The trial court was therefore justified in activating his suspended sentence. We reverse the decision of the Court of Appeals.

REVERSED.

STATE OF NORTH CAROLINA v. WILLIAM HERBERT PENNELL, IV

No. 371PA13

(Filed 12 June 2014)

Appeal and Error—appealability—jurisdiction—challenge to indictment underlying original conviction—activation of suspended sentence—impermissible collateral attack

The Court of Appeals erred by concluding that a defendant may challenge the jurisdictional validity of the indictment underlying his original conviction on direct appeal from the activation of a suspended sentence. A challenge to the validity of the original judgment constituted an impermissible collateral attack. The proper procedure through which defendant may challenge the facial validity of the original indictment is by filing a motion for appropriate relief under N.C.G.S. § 15A-1415(b) or petitioning for a writ of habeas corpus. The Court of Appeals was instructed to reinstate the judgment of the trial court revoking defendant's probation on the felony larceny count in case number 09 CRS 53255.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 746 S.E.2d 431 (2013), affirming in part, vacating and remanding in part, and arresting in part judgments entered on 5 June 2012 by Judge Christopher W. Bragg in Superior Court, Iredell County. Heard in the Supreme Court on 19 February 2014.

Roy Cooper, Attorney General, by Robert C. Montgomery, Special Deputy Attorney General, and Joseph L. Hyde, Assistant Attorney General, for the State-appellant.

Staples S. Hughes, Appellate Defender, by Jason Christopher Yoder, Assistant Appellate Defender, for defendant-appellee.

BEASLEY, Justice.

We consider whether, on direct appeal from the activation of a suspended sentence, a defendant may challenge the jurisdictional validity of the indictment underlying his original conviction. Because a challenge to the validity of the original judgment constitutes an impermissible collateral attack, we hold that defendant's appeal was not proper. Accordingly, we reverse the decision of the Court of Appeals with respect to this issue.

Defendant William Herbert Pennell pleaded guilty on 2 December 2010 to two counts of felony breaking or entering, two counts of felony larceny after breaking or entering, and one count of possession of cocaine. Defendant received four consecutive sentences of eight to ten months for each of the property offenses and one sentence of six to eight months for the drug possession conviction. Under a plea arrangement, defendant's sentences were suspended and he was placed on thirty-six months of supervised probation.

On 16 June 2011, defendant's probation officer filed five probation violation reports. After a hearing, the trial court modified defendant's sentences by extending the length of his probation by twenty-four months. Defendant's probation officer filed five additional violation reports on 18 August 2011. On 13 October 2011, the trial court revoked defendant's probation and activated his sentence on one count of larceny after breaking or entering in case number 10 CRS 57417. The trial court modified defendant's other sentences to add six months of intensive supervised probation following his release from his activated sentence.

On 3 February 2012, defendant's probation officer filed four additional probation violation reports. After a hearing, the trial court entered judgment on 5 June 2012 revoking defendant's probation and activating his sentences for the remaining offenses for which he was on probation.

Defendant appealed the 5 June 2012 judgments to the Court of Appeals. In his appeal defendant first argued that the trial court erred in activating his sentence for larceny after breaking or entering in case number 10 CRS 57417 because his sentence for this count of larceny had already been activated and served pursuant to the trial court's revocation of defendant's probation on 13 October 2011. The Court of Appeals agreed. *State v. Pennell*, ___ N.C. App. ___, ___, 746 S.E.2d 431, 444 (2013). The Court of Appeals concluded that the trial

court intended to revoke defendant's probation for the count of breaking or entering in case number 10 CRS 57417 rather than the count of larceny after breaking or entering in the case having the same number, and remanded the judgment and commitment to the trial court to correct the clerical mistake in its judgment. *Id.* at ___, 746 S.E.2d at 444.

Defendant's second argument before the Court of Appeals was that the trial court lacked subject matter jurisdiction to revoke his probation on the count of felony larceny in case number 09 CRS 53255 because the original indictment for the offense was fatally defective. Relying predominantly on this Court's holding in *State v. Ray*, 212 N.C. 748, 194 S.E. 472 (1938), the Court of Appeals held that defendant's appeal was proper, determined that the original indictment was defective, and arrested revocation of defendant's probation on that count. *Pennell*, ___ N.C. App. at ___, 746 S.E.2d at 442-44. On 3 October 2013, we allowed the State's petition for discretionary review. *State v. Pennell*, ___ N.C. ___, 748 S.E.2d 534 (2013).

The issue now before this Court is whether a defendant may collaterally challenge the validity of an underlying indictment by means of an appeal from revocation of his probation. The State contends that defendant may not challenge the indictment underlying his conviction in an appeal from a judgment revoking probation because the appeal constitutes an impermissible collateral attack on the initial judgment accepted by defendant under his 2 December 2010 guilty plea. In response, defendant argues that because the original indictment was facially defective, the trial court lacked subject matter jurisdiction to adjudicate one charge of larceny, and therefore, the court's initial judgment is void. Defendant asserts that a challenge to the trial court's jurisdiction "may be raised at any time" and that "a collateral attack is permissible when the underlying judgment is void." Defendant contends that it is therefore appropriate to hear a challenge to the trial court's jurisdiction over the original conviction and sentence in an appeal from the probation revocation activating his suspended sentence.

The Court of Appeals agreed with defendant's arguments and held that defendant's appeal was proper. *Pennell*, ___ N.C. App. at ___, 746 S.E.2d at 442. Central to its conclusion was this Court's holding in *State v. Ray*. *Id.* at ___, 746 S.E.2d at 439. There, the defendant was indicted for embezzlement but pleaded guilty to a charge of trespass. *Ray*, 212 N.C. at 748, 194 S.E. at 472. The defendant's sentence

was suspended on the condition that he pay specific remuneration to the trial court for the benefit of individuals we presume to be the victims of his embezzlement. *Id.* at 748-49, 194 S.E. at 472-73. After the defendant failed to comply with these conditions, the trial court ordered that "the jail sentence imposed by the previous judgment be put into execution." *Id.* at 750, 194 S.E. at 473. In response to the defendant's appeal, this Court concluded that "[t]he defendant's motion in arrest of judgment, on account of defect in the bill of indictment for embezzlement, cannot be sustained, since he was neither tried nor sentenced under that bill nor for that offense." *Id.* at 750, 194 S.E. at 473-74. From this determination the Court of Appeals concluded that, because this Court "addressed a defendant's argument, in an appeal from the revocation of a suspended sentence, that the indictment for the underlying sentence was defective," our precedent demonstrated that such an appeal was properly before the Court and thus may be addressed on its merits. *Pennell*, ___ N.C. App. at ___, 746 S.E.2d at 439.

We take this opportunity to address *Ray* and reemphasize the limitations this Court has since recognized with respect to challenges to jurisdiction on appeal. First, this Court in *Ray* did not squarely address whether a jurisdictional challenge to an original judgment may be raised in an appeal from the activation of a suspended sentence. Rather, this Court observed that the defendant's assertion of error was baseless because the defendant was not convicted under the indictment he was attempting to challenge. This brief conclusion by our Court that the defendant's appeal lacked merit for this reason is altogether insufficient to support the weight placed upon it by the Court of Appeals.

Moreover, since deciding *Ray* this Court has recognized limitations on challenges to jurisdiction on appeal. "While it is true that a defendant may challenge the jurisdiction of a trial court, such challenge may be made in the appellate division only if and when the case is properly pending before the appellate division." *State v. Absher*, 329 N.C. 264, 265 n.1, 404 S.E.2d 848, 849 n.1 (1991) (per curiam). Our inquiry is thus whether defendant's case is properly before our appellate courts.

In *State v. Holmes*, 361 N.C. 410, 646 S.E.2d 353 (2007), this Court addressed "whether a suspended sentence can be challenged when appealing the trial court's order revoking probation and activating the sentence." *Id.* at 411, 646 S.E.2d at 354. There the defendant pleaded guilty to second-degree kidnapping, assault inflicting serious bodily

injury, and accessory after the fact to second-degree rape. *Id.* He was sentenced in the aggravated range for the kidnapping and assault charges, but all his sentences were suspended. 361 N.C. at 411-12, 646 S.E.2d at 354. The defendant did not appeal the sentences. *Id.* at 412, 646 S.E.2d at 354. A year later, defendant violated the conditions of his probation and his three sentences were activated. *Id.* He appealed the activation of his sentences, arguing, *inter alia*, that "his sentences for kidnapping and assault were unconstitutionally aggravated in violation of the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)." *Id.* Recognizing the reasoning of prior cases from the Court of Appeals, we held that "a direct appeal from the original judgment lies only when the sentence is originally entered." 361 N.C. at 411, 646 S.E.2d at 354.

In reaching our holding in *Holmes*, we were persuaded by the reasoning of the Court of Appeals in *State v. Noles*, 12 N.C. App. 676, 184 S.E.2d 409 (1971), and *State v. Rush*, 158 N.C. App. 738, 582 S.E.2d 37 (2003). *Holmes*, 361 N.C. at 412-13, 646 S.E.2d at 355. The Court of Appeals in *Noles* addressed facts similar to those presently before us: in an appeal from the revocation of his probation, the defendant in *Noles* attacked "the validity of the warrant upon which he was originally tried . . . because there was no affirmative showing on the record that the defendant entered a plea of guilty understandingly and voluntarily." *Noles*, 12 N.C. App. at 678, 184 S.E.2d at 410. The Court of Appeals concluded that the defendant's appeal was not proper because "inquiries [when appealing from an order activating a suspended sentence] are permissible only to determine whether there is evidence to support a finding of a breach of the conditions of the suspension, or whether the condition which has been broken is invalid because it is unreasonable or is imposed for an unreasonable length of time." *Id.* (citing *State v. Caudle*, 276 N.C. 550, 173 S.E.2d 778 (1970)). The Court of Appeals thus concluded that "[q]uestioning the validity of the original judgment where sentence was suspended on appeal from an order activating the sentence is, we believe, an impermissible collateral attack." *Id.*

More than thirty years later, the Court of Appeals again addressed similar facts. The defendant in *State v. Rush* entered into a plea agreement with the State in which the defendant "would receive two 24-month suspended sentences." *Rush*, 158 N.C. App. at 739, 582 S.E.2d at 38. But the judgment documents suspending the sentences and signed by the defendant stated that the two sentences being sus-

pended were "for a minimum term of 24 months and a maximum term of 38 months." *Id.* The defendant later violated her probation, and the trial court activated the sentences as stated in the judgment forms. 158 N.C. App. at 740, 582 S.E.2d at 38. On appeal from the revocation of the defendant's probation, the Court of Appeals determined that "by failing to exercise any of her options" to assert that the judgment entered was inconsistent with her plea agreement, the defendant's appeal "amount[ed] to an impermissible collateral attack on the initial judgment." *Id.* at 741, 582 S.E.2d at 39 (citing *Noles*, 12 N.C. App. at 678, 184 S.E.2d at 410) (summarizing the defendant's options to assert error as (1) filing a motion under N.C.G.S. § 15A-1024 to withdraw her guilty plea based on the judgments being inconsistent with the plea agreement, (2) appealing within ten days after entry of the judgments if her grounds of appeal fell under N.C.G.S. § 15A-1444, and (3) filing a petition for writ of certiorari as permitted under section 15A-1444(e)). In *Holmes* this Court summarized the Court of Appeals' determination in *Rush* to be that "by failing to appeal from the original judgment suspending her sentences, the defendant waived any challenge to that judgment and thus could not attack it in the appeal of a subsequent order activating her sentence." *Holmes*, 361 N.C. at 413, 646 S.E.2d at 355 (citing *Rush*, 158 N.C. App. at 741, 582 S.E.2d at 39).

In finding *Noles* and *Rush* to be persuasive, this Court observed that the defendant in *Holmes* could have appealed his initial judgments, but failed to do so. *Id.* The Court thus concluded that the defendant's attempt to subsequently attack the sentences imposed in those original judgments in an appeal from the order revoking his probation and activating his sentence was "an impermissible collateral attack on the original judgments." *Id.*

The reasoning this Court found persuasive in *Holmes* is also persuasive here. As in *Holmes*, defendant failed to appeal from his original judgment. He may not now appeal the matter collaterally via a proceeding contesting the activation of the sentence imposed in the original judgment.[1] As such, defendant's present challenge to the validity of his original conviction is improper. Because a jurisdictional challenge may only be raised when an appeal is otherwise

1. *State v. Neeley*, 307 N.C. 247, 249, 297 S.E.2d 389, 391 (1982), establishes that a defendant may raise a constitutional claim of right to counsel for the first time after a suspended sentence has been activated. *Id.* As we observed in *Neeley*, however, our holding there "only addresses those circumstances in which a defendant seeks to challenge the validity of an original *uncounseled* prison sentence at a later time when the prison sentence is activated." 307 N.C. at 250, 297 S.E.2d at 391 (emphasis added).

proper, *Absher*, 329 N.C. at 265 n.1, 404 S.E.2d at 849 n.1, we hold that a defendant may not challenge the jurisdiction over the original conviction in an appeal from the order revoking his probation and activating his sentence. The proper procedure through which defendant may challenge the facial validity of the original indictment is by filing a motion for appropriate relief under N.C.G.S. § 15A-1415(b) or petitioning for a writ of habeas corpus. Our holding here does not prejudice defendant from pursuing these avenues.

For the reasons stated above, we reverse the decision of the Court of Appeals on the issue of whether defendant's appeal may be based solely upon a challenge to the trial court's original jurisdiction and instruct the Court of Appeals to reinstate the judgment of the trial court revoking defendant's probation on the felony larceny count in case number 09 CRS 53255. The holding by the Court of Appeals addressing the trial court's clerical error in activating a sentence that defendant had already served is not before this Court and remains undisturbed.

REVERSED IN PART.

STATE OF NORTH CAROLINA v. EVER ALEXANDER RIVAS-BATRES

No. 284PA13

(Filed 12 June 2014)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 744 S.E.2d 497 (2013), finding no plain error in defendant's trial that resulted in judgments entered on 15 November 2011 by Judge Christopher W. Bragg in Superior Court, Union County, but remanding the case to the trial court for correction of an order and review of the judgments, all of which relate to defendant's sentencing. Heard in the Supreme Court on 5 May 2014.

Roy Cooper, *Attorney General*, *by Sherri Horner Lawrence*, *Assistant Attorney General*, *for the State.*

Mark Montgomery for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. GEORGE VICTOR STOKES

No. 94PA13-2

(Filed 11 April 2014)

Kidnapping—second-degree—failure to consider lesser-included offense of attempted second-degree kidnapping

The Court of Appeals erred by refusing to consider whether defendant's actions constituted the lesser-included offense of attempted second-degree kidnapping after finding the evidence insufficient to support the jury's verdict of second-degree kidnapping. The State presented sufficient evidence that defendant's actions satisfied each element of attempted second-degree kidnapping. The case was remanded to the Court of Appeals for further remand to the trial court for resentencing upon a verdict of guilty of attempted second-degree kidnapping.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous unpublished decision of the Court of Appeals, ___ N.C. App. ___, 745 S.E.2d 375 (2013), vacating the judgment, entered 9 March 2012 by Judge Richard T. Brown in Superior Court, Hoke County, on defendant's conviction for second-degree kidnapping and remanding for resentencing following remand from the Supreme Court of North Carolina of the Court of Appeals' prior decision in this case, *State v. Stokes*, ___ N.C. App. ___, 738 S.E.2d 208 (2013). Heard in the Supreme Court on 17 February 2014.

Roy Cooper, Attorney General, by Kathleen N. Bolton, Assistant Attorney General, for the State-appellant.

Leslie C. Rawls for defendant-appellee.

NEWBY, Justice.

Today we examine the scope of an appellate court's review after it concludes that a defendant's conviction was not supported by sufficient evidence. When confronted with such a situation, our long-standing practice has been to determine whether the evidence presented was sufficient to support a lesser included offense of the convicted crime. If so, we recognize the jury's verdict as a verdict of guilty to the lesser included offense. The Court of Appeals therefore erred by refusing to consider whether defendant's actions constituted the lesser included offense of attempted second-degree kidnapping

after finding the evidence insufficient to support the jury's verdict of second-degree kidnapping. Because the State presented sufficient evidence that defendant's actions satisfied each element of attempted second-degree kidnapping, we reverse the decision of the Court of Appeals and remand for entry of judgment on the lesser offense.

On 21 April 2008, defendant and another unidentified man entered S&J Grocery in Bowmore, North Carolina, where Terry Parker worked as a clerk. Both men pointed guns at Parker and demanded cash and cigarettes. The man accompanying defendant took between $180 and $200 from the cash register. When Parker reached under the counter for the cigarettes, defendant fired his gun next to Parker's head. After Parker gave the men five or six cartons of cigarettes, defendant ordered Parker, at gunpoint, to "[g]o to the back of the store." Parker refused, believing defendant would kill him if he complied. Defendant then repeatedly demanded that Parker "[g]et in the car," which was parked outside the store and occupied by a third unidentified person. Parker walked from behind the counter toward the entrance, but stopped because he believed defendant would kill him if he got into the car. Defendant and the others then left the store, and Parker notified police. Defendant was eventually apprehended and confessed to being present during the robbery "and that he fired a shot at the clerk."

As a result, defendant was convicted of second-degree kidnapping, possession of a firearm by a felon, assault with a deadly weapon with intent to kill, robbery with a dangerous weapon, and attaining the status of habitual felon. The jury did not consider a charge of attempted second-degree kidnapping. Defendant appealed, arguing, *inter alia*, that the State failed to introduce sufficient evidence of removal, an essential element of second-degree kidnapping. *State v. Stokes*, ___ N.C. App. ___, ___, 738 S.E.2d 208, 211 (2013). The Court of Appeals agreed and reversed defendant's second-degree kidnapping conviction. *Id.* at ___, 738 S.E.2d at 211. The State then petitioned this Court for discretionary review, asserting, *inter alia*, that the Court of Appeals erred by failing to remand the case for entry of judgment and sentencing on attempted second-degree kidnapping. We allowed the State's request by special order, in pertinent part, "for the limited purpose of remanding the matter to the Court of Appeals . . . for consideration of whether defendant's actions satisfy the elements of attempted kidnapping under N.C.G.S. § 15-170." On remand the Court of Appeals concluded:

> [W]e find a discussion of attempted second-degree kidnapping to be inappropriate here for the following reasons: 1) The State did not argue or attempt to prove attempted second-degree kidnapping at trial; 2) Likewise, the jury was not instructed on attempted second-degree kidnapping; 3) The State made no mention or argument of attempted second-degree kidnapping in its appeal to this Court. Simply put, we conclude that this issue was not advanced or preserved by the State for our review.

State v. Stokes, ___ N.C. App. ___, 745 S.E.2d 375, 2013 WL 2431157, at *3 (2013) (unpublished). We then allowed the State's second petition for discretionary review to determine if the Court of Appeals erred by failing to consider whether the State presented sufficient evidence to support a conviction of attempted second-degree kidnapping.

Under our Criminal Procedure Act, "[a] defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered." N.C.G.S. § 15A-1444(a) (2013). Upon a defendant's challenge to the sufficiency of evidence, we review the record " 'in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence.' " *State v. Jones*, ___ N.C. ___, ___, ___ S.E.2d ___, ___, 2014 WL 895626, at *4 (Mar. 7, 2014) (No. 527A12) (citations omitted). "If the appellate court finds that the evidence with regard to a charge is insufficient as a matter of law, the judgment must be reversed and the charge must be dismissed unless there is evidence to support a lesser included offense. In that case the court *may* remand for trial on the lesser offense." N.C.G.S. § 15A-1447(c) (2013) (emphasis added).

Since section 15A-1447 was enacted in 1977, our appellate courts have repeatedly and consistently recognized a jury's verdict of guilty to a greater offense that was founded upon insufficient evidence as a verdict of guilty to a lesser included offense when the evidence warranted such a charge. In *State v. Jolly*, 297 N.C. 121, 254 S.E.2d 1 (1979), for example, the jury convicted the defendant of first-degree burglary, which requires a finding that the dwelling entered was actually occupied at the time of the offense. *Id.* at 127, 254 S.E.2d at 5. Second-degree burglary, on the other hand, does not require a finding that the dwelling was occupied. *Id.* at 130, 254 S.E.2d at 7 ("[T]he sole distinction between the two degrees of burglary is the element of actual occupancy. Otherwise, the elements of the two offenses are identical." (citations omitted)). The evidence at trial showed that the

victim's hotel room was unoccupied at the commencement of the offense, and we therefore found the evidence was insufficient to support a conviction for first-degree burglary. *Id.* at 129-30, 254 S.E.2d at 6-7. But, because the elements of both degrees of burglary are identical with the exception of occupation, we concluded that "in finding defendant guilty of first degree burglary, the jury necessarily had to find facts establishing the offense of burglary in the second degree." *Id.* at 130, 254 S.E.2d at 7. Thus, we determined "the verdict returned by the jury must be considered a verdict of guilty of burglary in the second degree" and remanded the case to the trial court for entry of judgment on that lesser charge. *Id.* ("Hence, leaving the verdict undisturbed but recognizing it for what it is, the judgment upon the verdict of guilty of first degree burglary is vacated and the cause is remanded to the Superior Court of Cumberland County for pronouncement of a judgment as upon a verdict of guilty of burglary in the second degree.").

We applied this same reasoning in *State v. Barnette*, 304 N.C. 447, 284 S.E.2d 298 (1981). In *Barnette* we determined the jury's verdict of first-degree rape was founded upon insufficient evidence "on the alternative elements of deadly weapon and aiding and abetting," but held "that the verdict returned by the jury must be considered as a verdict of guilty of second degree rape." *Id.* at 466, 284 S.E.2d at 309 (citing *Jolly*, 297 *N.C.* at 130, 254 S.E.2d at 7). Consequently, we remanded the case to the trial court "with instructions to enter judgment on the lesser included offense." *Id.* at 470, 284 S.E.2d at 312.

We then cited our reasoning in *Jolly* and *Barnette* favorably again in *State v. Dawkins*, 305 N.C. 289, 287 S.E.2d 885 (1982). In *Dawkins* the jury found the defendant guilty of first-degree burglary on a theory that the defendant intended to commit a felony once inside the victim's home, specifically rape. We determined, however, that the State presented insufficient evidence of the defendant's intent to commit rape. *Id.* at 290, 287 S.E.2d at 887. Nevertheless, we concluded that

> [w]hen the jury found the defendant guilty of burglary, it necessarily found facts which would support a conviction of misdemeanor breaking and entering. . . . Therefore, because there is not sufficient evidence of intent to commit the felony of rape within [the victim's] house, we recognize the jury's verdict as a verdict of guilty of misdemeanor breaking and entering . . . .

Id. at 290-91, 287 S.E.2d at 887 (citing *Barnette*, 304 N.C. 447, 284 S.E.2d 298, and *Jolly*, 297 N.C. 121, 254 S.E.2d 1). As a result, we

vacated the judgment upon the verdict of first-degree burglary and remanded the case for judgment upon a verdict of guilty of misdemeanor breaking and entering. *Id.*

Likewise, in *State v. Robinson*, 310 N.C. 530, 313 S.E.2d 571 (1984), we determined the State failed to present sufficient evidence of vaginal intercourse at the defendant's trial for first-degree rape. *Id.* at 533, 313 S.E.2d at 574. In that case we held "that by its verdict of guilty of rape the jury necessarily found beyond a reasonable doubt all of the elements of the lesser offense of attempt to commit rape," *id.* at 535, 313 S.E.2d at 575, and "recognize[d] it as a verdict of guilty of the lesser included offense of an attempt to commit rape in the first degree," *id.* at 541, 313 S.E.2d at 578. Thus, we ordered that "[t]he judgment imposed upon the verdict of guilty of rape in the first degree [be] vacated, and the cause . . . remanded to the Superior Court, Cumberland County, for resentencing upon the verdict of guilty of an attempt to commit rape in the first degree." *Id.*

Despite this significant precedent, defendant argues our Rules of Appellate Procedure prevented the Court of Appeals, and now this Court, from considering whether defendant's actions satisfied the elements of attempted second-degree kidnapping in this case. Although defendant acknowledges that the State was initially the appellee at the Court of Appeals, defendant points to Rule 28(b)(7), which mandates that an appellant's brief "contain . . . [a] short conclusion stating the precise relief sought." N.C. R. App. P. 28(b)(7). According to defendant, that provision when read with subsection 28(c), allowing appellees to present alternate grounds to affirm, requires the State to request that the Court of Appeals remand for judgment on a lesser included offense upon finding the evidence insufficient to sustain a jury's verdict of the greater offense. *Id.* at R. 28(c) ("Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken."). Because the State did not argue for a conviction of attempted second-degree kidnapping at the end of trial or in its first brief at the Court of Appeals, defendant asserts that the State is precluded from doing so now. In other words, defendant believes for this Court to invoke the reasoning we employed in *Jolly*, *Robinson*, *Barnette*, and *Dawkins*, the State must present an alternative argument that if the Court finds the evidence for a conviction lacking, then we are to consider lesser included offenses.

While we agree it would be better practice for the State to present such an alternative argument, we have not, however, historically imposed this requirement. In both *Robinson* and *Barnette*, and also arguably in *Jolly*, the State as the appellee never requested in the alternative that we consider the evidence of a lesser included offense. The Court did so *ex mero motu*. Similarly to the cases previously mentioned, in *State v. Freeman*, 307 N.C. 445, 298 S.E.2d 376 (1983), we determined that the defendant's conviction for first-degree burglary was based on insufficient evidence of intent to commit rape once inside the victim's home. *Id.* at 449, 298 S.E.2d at 379. We held "that by finding the defendant guilty of burglary, the jury 'necessarily found facts which would support a conviction of misdemeanor breaking and entering' " and remanded the case for entry of judgment on misdemeanor breaking and entering. *Id.* at 451, 298 S.E.2d at 380 (quoting *Dawkins*, 305 N.C. at 291, 287 S.E.2d at 887). In *Freeman*, as in the case before us now, the jury never considered the lesser included offense; the State never raised the issue at trial; and the State, as the appellee, made no alternative argument on appeal.

Our analysis is further aided by cases in which the trial court's charge to the jury lacked an essential element of the convicted offense. When the actual instructions given are sufficient to sustain a conviction on a lesser included offense, we consider the conviction a verdict on the lesser charge and then remand for appropriate sentencing. For instance, in *State v. Gooch*, 307 N.C. 253, 297 S.E.2d 599 (1982), the defendant was found guilty of possession of more than one ounce of marijuana, but the trial court failed to instruct on the essential element of "[p]ossession of *more than one* ounce." *Id.* at 256, 297 S.E.2d at 601. Though the State never argued for a lesser included offense at trial or at the Court of Appeals or before this Court, we determined that "[i]n failing to submit the amount requirement . . . the trial court essentially submitted to the jury the offense of simple possession of marijuana, and the jury convicted defendant of that offense." *Id.* at 257, 297 S.E.2d at 602 (internal citation omitted). We concluded that the "defendant [was] not, however, entitled to a new trial," *id.*, and "the verdict the jury returned must be considered a verdict of guilty of simple possession of marijuana," 307 N.C. at 258, 297 S.E.2d at 602 (citation omitted). Acting *ex mero motu*, we "le[ft] the verdict undisturbed but recognize[d] it as a verdict of guilty of the lesser included offense of simple possession" and remanded "for resentencing as upon a verdict of guilty of simple pos-

session of marijuana." *Id.* (citing *Barnette*, 304 N.C. at 468-70, 284 S.E.2d at 311, and *Jolly*, 297 N.C. at 130, 254 S.E.2d at 7). Similarly, in *State v. Corley*, 310 N.C. 40, 311 S.E.2d 540 (1984), the jury convicted the defendant of, *inter alia*, first-degree kidnapping, but the trial court failed to instruct the jury that an essential element of the charged crime is "that the victim either was not released in a safe place or had been seriously injured or sexually assaulted." *Id.* at 55, 311 S.E.2d at 549 (citations and internal quotation marks omitted). The State never requested in the alternative that the trial court or this Court consider the lesser included offense of second-degree kidnapping. We concluded:

> The defendant is not, however, entitled to a new trial. In failing to submit the essential element of kidnapping in the first degree set forth in subsection (b) of G.S. 14-39, the trial court essentially submitted to the jury the offense of kidnapping in the second degree. In finding the defendant guilty of kidnapping in the first degree, the jury necessarily found facts establishing the offense of kidnapping in the second degree. The jury's verdict will be considered a verdict of guilty of kidnapping in the second degree. We, therefore, leave the verdict undisturbed but recognize it as a verdict of guilty of the lesser included offense of kidnapping in the second degree, vacate the judgment imposed upon the verdict of guilty of kidnapping in the first degree and remand the case to the Superior Court, Buncombe County, for judgment and resentencing as upon a verdict of guilty of kidnapping in the second degree.

Id. (citing *Gooch*, 307 N.C. at 257-58, 297 S.E.2d at 602).

When acting as an appellee, the State should bring alternative arguments to the appellate court's attention, and we strongly encourage the State to do so. Nonetheless, we are bound to follow our longstanding, consistent precedent of acting *ex mero motu* to recognize a verdict of guilty of a crime based upon insufficient evidence as a verdict of guilty of a lesser included offense. Hence, the Court of Appeals incorrectly refused to consider whether defendant's actions constituted attempted second-degree kidnapping.

We address that issue now and first turn to section 15-170 of our General Statutes, which states that a defendant indicted for a crime "may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." N.C.G.S. § 15-170 (2013). An attempt occurs when a defendant forms the

"intent to commit the substantive offense" and performs "an overt act done for that purpose which goes beyond mere preparation," but fails to complete all elements of the substantive offense. *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996) (citations omitted).

Section 14-39 of our General Statutes defines kidnapping and provides in pertinent part:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony . . . .

N.C.G.S. § 14-39 (2013). To avoid constitutional violations related to double jeopardy, the confinement, restraint, or removal element "require[s] a removal separate and apart from that which is an inherent, inevitable part of the commission of another felony." *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981). "If the restraint is an inherent, inevitable element of a joined armed robbery, then no separately punishable offense of kidnapping can exist." *State v. Johnson*, 337 N.C. 212, 221, 446 S.E.2d 92, 98 (1994) (citing, *inter alia*, *Irwin*, 304 N.C. at 102, 282 S.E.2d at 446). When we consider whether kidnapping and armed robbery charges may be sustained simultaneously, we look to whether the victim was " 'exposed to greater danger than that inherent in the' " commission of the underlying felony or whether the victim was " 'subjected to the kind of danger and abuse the kidnapping statute was designed to prevent.' " *State v. Tucker*, 317 N.C. 532, 535-36, 346 S.E.2d 417, 419 (1986) (quoting *Irwin*, 304 N.C. at 103, 292 S.E.2d at 446). Second-degree kidnapping occurs "[i]f the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted"; otherwise, the elements are the same as for first-degree kidnapping. N.C.G.S. § 14-39(b).

Defendant argues the evidence fails to indicate that he attempted to move Parker apart from that movement necessary in the commission of the armed robbery. According to defendant, "both directives for Parker to move were part and parcel of the underlying, ongoing

robbery, not separate kidnapping attempts," and convictions for both offenses would constitute double jeopardy. We disagree.

Defendant ordered Parker at gunpoint to the back of the store and then into an awaiting automobile *outside* the store *after* stealing the cigarettes and money, the only two items defendant demanded during the robbery. At this point defendant was attempting to flee the scene of the crime. The armed robbery was complete, and defendant's attempted removal of Parker therefore cannot be considered inherent to that crime. By ordering Parker into an awaiting automobile after completing the armed robbery, defendant attempted to place Parker in danger greater than that inherent in the underlying felony. *See Johnson*, 337 N.C. at 221, 446 S.E.2d at 98 ("The key question is whether the victim is exposed to greater danger than that inherent in the armed robbery itself or 'subjected to the kind of danger and abuse the kidnapping statute was designed to prevent.' " (quoting *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446)).

Thus, we hold that convictions for both attempted second-degree kidnapping and armed robbery in this case are not inconsistent with our constitutional prohibitions against double jeopardy. *E.g.*, *State v. Boyce*, 361 N.C. 670, 674, 651 S.E.2d 879, 882 (2007) ("This restraint and removal was a distinct criminal transaction that facilitated the accompanying felony offense and was sufficient to constitute the separate crime of kidnapping under North Carolina law." (citation omitted)). When the evidence is viewed in the light most favorable to the State, defendant attempted to move Parker for the purpose of "[f]acilitating the commission of any felony or facilitating flight of any person following the commission of a felony." N.C.G.S. § 14-39(a)(2). Consequently, we conclude that the State presented sufficient evidence of attempted removal to sustain a conviction of attempted second-degree kidnapping.

By finding defendant guilty of second-degree kidnapping, the jury necessarily found beyond a reasonable doubt all the elements of the lesser included offense of attempted second-degree kidnapping. We leave the verdict undisturbed, but recognize it as a verdict of guilty of the lesser included offense. The decision of the Court of Appeals is reversed, and we remand this case to that court for further remand to the trial court for resentencing upon a verdict of guilty of attempted second-degree kidnapping.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. DOROTHY HOOGLAND VERKERK

No. 421A13

(Filed 12 June 2014)

Search and Seizure—traffic stop—driving while impaired—initial stop by fireman—motion to suppress evidence—reasonable suspicion

The Court of Appeals erred in a driving while impaired case by reversing the trial court's denial of defendant's motion to suppress. Because defendant never challenged the actions of the arresting officers but instead focused on whether a firefighter possessed legal authority to stop her car, she presented no legal basis for suppressing the evidence supporting her conviction. The stop by the police was supported by reasonable suspicion independent of any evidence derived from the fireman's initial stop of defendant.

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. ___, 747 S.E.2d 658 (2013), vacating a judgment entered on 7 September 2012 by Judge A. Robinson Hassell in Superior Court, Orange County, and remanding to the trial court for further proceedings. On 7 November 2013, the Supreme Court allowed the State's petition for discretionary review of additional issues. Heard in the Supreme Court on 18 March 2014.

Roy Cooper, Attorney General, by Derrick C. Mertz and Lauren Tally Earnhardt, Assistant Attorneys General, for the State-appellant/appellee.

Law Office of Matthew Charles Suczynski, PLLC, by Matthew C. Suczynski and Michael R. Paduchowski, for defendant-appellant/appellee.

EDMUNDS, Justice.

Defendant Dorothy Verkerk pleaded guilty to the offense of driving while impaired, reserving her right to appeal the trial court's denial of her motion to suppress. The motion focused on whether a firefighter possessed legal authority to stop her car, not on the actions taken by or the evidence presented by the police officers who later stopped her again and charged her. Because she has never challenged the actions of the arresting officers, defendant has presented

no legal basis for suppressing the evidence supporting her conviction. Accordingly, we reverse the holding of the Court of Appeals.

At approximately 10:30 p.m. on 27 May 2011, Fire Engine 32 of the Chapel Hill Fire Department was returning from a call. Fire Department Lieutenant Gordon Shatley, who was commanding the Engine, became concerned about the erratic driving of a vehicle proceeding in the same direction on U.S. Highway 15-501 South in Chapel Hill. Lt. Shatley relayed information about the vehicle's description, actions, and location to the Chapel Hill Police Department. The police were unable to respond promptly, so Lt. Shatley followed the vehicle. When he observed it continue to drift between lanes and then nearly strike a bus, he ordered the driver of Engine 32 to activate its emergency lights and siren. He testified that he did so to keep other motorists from passing both vehicles.

The vehicle then moved into the left lane and sharply back into the far right lane, where it came to an abrupt stop after hitting the curb with force sufficient to send sparks shooting into the air. Engine 32 stopped behind it and Lt. Shatley approached the vehicle to offer assistance to defendant driver. After Lt. Shatley spoke with defendant for at least ten minutes and she appeared to agree that her car could be parked for the evening at a nearby lot, she unexpectedly drove away from the scene and turned onto Environ Way, where parking was available. At approximately the same time, Chapel Hill police officers arrived and Lt. Shatley indicated where the vehicle had gone. The officers drove in that direction while Lt. Shatley and Engine 32 returned to the fire station. Thereafter, Chapel Hill police officers encountered[1] defendant, investigated her condition, and cited her for driving while impaired and driving while license revoked.

Defendant was found guilty of driving while impaired in District Court, Orange County, on 10 January 2012. Defendant appealed to the superior court, where she filed a motion to suppress in which she argued that firefighters do not have legal authority to conduct traffic stops. Following a hearing on 2 August 2012, the trial court filed a written order denying defendant's motion. On 7 September 2012, defendant pleaded guilty to driving while impaired but reserved her

1. Although the record is ambiguous as to whether defendant's vehicle was in motion when the Chapel Hill Police reached her and the parties disagreed on that point at oral argument, defendant has never argued that she was not "operating" her vehicle then. *See* N.C.G.S. §§ 20-4.01(25), -138.1(a) (2013). For convenience, we will refer to defendant's encounters with Lt. Shatley and with the Chapel Hill police as "stops."

right to appeal the court's denial of the suppression motion. The State dismissed the charge of driving while license revoked.

Defendant appealed the denial of her motion to suppress to the Court of Appeals. On 3 September 2013, a divided court issued an opinion finding that Lt. Shatley's actions constituted a seizure for the purposes of the Fourth Amendment. *State v. Verkerk*, ___ N.C. App. ___, ___, 747 S.E.2d 658, 663-64 (2013). The court vacated the trial court's order and remanded the matter for further proceedings. *Id.* at ___, 747 S.E.2d at 673. The dissenting judge generally agreed with the majority regarding the seizure, but argued that a remand was unnecessary because the evidence was sufficient to hold that Lt. Shatley was a State actor and that he had seized defendant without sufficient legal authority. *Id.* at ___, 747 S.E.2d. at 673-74 (Hunter, Robert C., J., concurring in part and dissenting in part). Defendant appeals as of right on the basis of the dissent. N.C.G.S. § 7A-30(2) (2013). We also allowed the State's Petition for Discretionary Review. *Id.* § 7A-31 (2013).

Defendant's motion filed with the trial court is titled "Motion To Suppress Traffic Stop." The motion does not cite a specific statute, but instead states that it is filed

> pursuant to the Fourth Amendment to the Constitution of the United States as . . . applied to the states through the Fourteenth Amendment of the Constitution of the United States and pursuant to the parallel provisions of the Constitution of North Carolina, Chapter 15A of the General Statutes of North Carolina and applicable Federal and North Carolina case law.

Defendant's motion does not specify what evidence she seeks to suppress, instead focusing entirely on defendant's contention that Lt. Shatley had no legal authority to stop her.

The record indicates that defendant was stopped twice. The first stop was in response to Engine 32's lights and siren, while the second was initiated by the Chapel Hill police after defendant drove away from Lt. Shatley. In her appeal to this Court, defendant again contends that evidence from the first stop was improperly obtained. Accordingly, we conclude that defendant seeks to suppress all evidence obtained from the moment when Engine 32's emergency signals were activated until she drove away from Lt. Shatley.

However, we need not consider the extent of Lt. Shatley's authority to conduct a traffic stop or even whether the encounter with Lt. Shatley amounted to a "legal stop." The record demonstrates that suf-

ficient other evidence was presented to establish that the Chapel Hill police had reasonable suspicion to stop defendant based upon Lt. Shatley's observations of defendant's driving that he transmitted to the Chapel Hill police before activating the lights and siren. When Chapel Hill police officers stopped defendant, they made their own assessment of her condition and collected sufficient evidence to support the charges they subsequently filed. At defendant's plea hearing, the prosecutor quoted from the affidavit of the arresting officer, who reported that:

> I spoke with [defendant]. She said she was on her way home from a party where she had at least three glasses of wine. I noticed a strong odor of alcohol coming from her person. I asked her to perform several field sobriety tests which she did poorly on. I tried—I had to stop one test due to safety concerns for [defendant].

Defendant never contradicted or challenged any evidence relating to the stop by Chapel Hill police officers. Moreover, defendant has never argued that any legal error in the first stop would have any effect on the admissibility of evidence gathered before that first stop by Lt. Shatley or during the second stop by Chapel Hill police officers.

Because the stop by the Chapel Hill police was supported by reasonable suspicion independent of any evidence derived from Lt. Shatley's stop of defendant, we conclude that the trial court correctly denied defendant's motion to suppress. We reverse the holding to the contrary by the Court of Appeals.

REVERSED.

MICHAEL A. FALK, As Trustee of the Trust Dated 10-26-1989 Having the Tax ID Number 65-6043718 (AKA The Charlotte Falk Irrevocable Trust)	)	
v.	)	
FANNIE MAE (AKA FEDERAL NATIONAL MORTGAGE ASSOCIATION); GLASSRATNER MANAGEMENT & REALTY ADVISORS, LLC; IDELL FLOURNEY; SONYA PETIT; LIBA MEIERE; SHAWNEQUA DODSON; ADOLFO ZARATE; TISHAUN WHITEHEAD; AND JOHN DOES #1 - #160, BEING THE UNIDENTIFIED LESSEES OF THE APARTMENT UNITS AT THE PROPERTY KNOWN AS RIDGEWOOD APARTMENTS	)	GUILFORD COUNTY
FANNIE MAE (AKA FEDERAL NATIONAL MORTGAGE ASSOCIATION), Third Party Plaintiff	)	
v.	)	
MICHAEL A. FALK, As Trustee of the Trust Dated 10-26-1989 Having the Tax ID Number 65-6043718 (AKA The Charlotte Falk Irrevocable Trust) and QUICKSILVER, LLC, Third Party Defendants	)	

No. 197P13

ORDER

The Notice of Appeal filed by defendant and third-party plaintiff (Fannie Mae) and defendant (GlassRatner Management & Realty Advisors,

LLC) is RETAINED. Their Petition for Discretionary Review is ALLOWED. Plaintiff and third-party defendant's (Michael A. Falk) Motion to Dismiss Appeal is DENIED.

In addition, the parties are directed to address the applicability, if any, of N.C.G.S. § 45-37(b) (1991) and N.C.G.S. § 45-37(b) (2011) to this case.

By order of the Court in Conference, this the 10th day of April 2014.

s/Beasley, J.
For the Court

IN RE D.C.

[367 N.C. 489 (2014)]

IN THE MATTER OF: D.C.	)))	From Chatham County

No. 523P13

ORDER

Petitioner'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 *In re L.M.T.*, No. 40PA13 (20 December 2013).

By order of the Court in Conference, this 11th day of June, 2014.

s/Beasley, J.
For the Court

IN THE MATTER OF: R.R.N.	)))	From Wilson County

No. 186P14

ORDER

Petitioner's petition for discretionary review is allowed as to the following issue: "Whether the Court of Appeals erred in its interpretation of N.C.G.S. § 7B-101(3) regarding the definition of a 'caretaker.' " Respondent's motion to dismiss is denied, petitioner's motion for leave to file verification is allowed, and petitioner's petition for writ of supersedeas is allowed.

By order of the Court in Conference, this 19th day of August, 2014.

s/Beasley, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	WAKE COUNTY
	)	
EUGENE OLIVER DENNING	)	
	)	
	)	

No. 135P14

ORDER

The Petition for Discretionary Review filed by defendant is treated as a Petition for Writ of Certiorari and is DENIED. Defendant's motion to deem his Petition for Discretionary Review timely is DENIED. In addition, defendant's motion in the alternative for this Court to issue its Writ of Certiorari to review his Petition for Discretionary Review in spite of it not being timely filed is DENIED.

By order of the Court in Conference, this the 19th day of August 2014.

Jackson, J., recused.

s/Beasley, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cabarrus County
	)	
YOSHEIKA CHARMAINE SMITH	)	
	)	
	)	

No. 59P14

ORDER

The Motion for Temporary Stay issued 20 February 2014 is dissolved. The State's Petition for Writ of Supersedeas is denied. 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. Pennell*, No. 371PA13-1 (12 June 2014).

By order of the Court in Conference, this 11th day of June, 2014.

s/Beasley, J.
For the Court

MONICA WILSON and WILSON LAW GROUP PLLC	)	
	)	
v	)	WAKE COUNTY
	)	
NORTH CAROLINA DEPARTMENT OF COMMERCE; NC DEPARTMENT OF COMMERCE, DIVISION OF EMPLOYMENT SECURITY; SHARON ALLRED DECKER, in her capacity as Secretary of Commerce; and DALE R. FOLWELL, in his capacity as Assistant Secretary of Employment Security	)	

No. 285P14

ORDER

The Petition for Discretionary Review filed by defendant is treated as a Petition for Writ of Certiorari and is DENIED. Defendant's motion to deem his Petition for Discretionary Review timely is DENIED. In addition, defendant's motion in the alternative for this Court to issue its Writ of Certiorari to review his Petition for Discretionary Review in spite of it not being timely filed is DENIED.

By order of the Court in Conference, this the 19th day of August 2014.

Jackson, J., recused.

s/Beasley, J.
For the Court

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

10 APRIL 2014

010P14	State v. Rodney Jones, Jr.	1. Def's *Pro Se* Motion for Notice and Notification Requesting and Appointing the N.C. Supreme Court as Trustee for Rodney Jones, Jr., the Beneficiary and Petitioner for the PDR 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-676)	1. Dismissed 2. Denied
011P14	State v. Donnie George Morton	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-146)	Denied
026P10-3	Jorge Galeas, Jr. v. FNU Muro, FNU McKnight, FNU Condrey, FNU Gatling, A. Cordy, FNU Graham, Colbert L. Respass, Felix C. Taylor, Randy Cartwright, Gorge T. Solomon, FNU Madry, FNU Gray, and FNU Akbar	Plt's *Pro Se* Motion for Commercial Affidavit	Dismissed
026P14	William Thomas Fox and Scott Everett Sanders v. The City of Greensboro; Mitchell Johnson, in his individual and official capacities; Timothy R. Bellamy, in his individual and official capacities; Gary W. Hastings, in his individual and official capacities; Ernest L. Cuthbertson, in his individual and official capacities; John D. Slone, in his individual and official capacities; Norman O. Rankin, in his individual and official capacities; and Martha T. Kelly, in her individual and official capacities	Defs' (Johnson, Bellamy, Hastings, and Kelly) PDR Under N.C.G.S. § 7A-31 (COA13-171)	Denied **Edmunds, J., recused**

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

10 APRIL 2014

028P14	Capital Bank, N.A. v. Julian E. Cameron and Alfred B. Cooper, Jr.	1. Def's (Alfred B. Cooper, Jr.) PDR Under N.C.G.S. § 7A-31 (COA13-696) 2. Motion to Withdraw PDR	1. --- 2. Allowed **04/08/2014**
032P14	In the Matter of the Foreclosure of a Deed of Trust Executed by Burl Webb, Jr. and Leigh B. Webb Dated January 6, 2006 and Recorded in Book 19879 at Page 177 in the Mecklenburg County Public Registry, North Carolina	1. Respondent's PDR Under N.C.G.S. § 7A-31 (COA13-324) 2. Respondent's Petition for *Writ of Certiorari* to Review Decision of COA 3. Petitioner's Conditional PDR Under N.C.G.S. § 7A-31	1. Dismissed 2. Denied 3. Dismissed as Moot
035P14	State v. Reggie Devon Avent	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-665)	Denied
036P14	State v. Derrick Eddings, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA13-474)	Denied
043P14	State v. Channing Allamar Blackwell	1. Def's NOA Based Upon a Constitutional Question (COA13-196) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
050P14	State v. James Allen Minyard	1. Def's NOA Based Upon a Constitutional Question (COA13-377) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
053P14	State v. Allegra Rose Dahlquist	Def's PDR Under N.C.G.S. § 7A-31 (COA13-437)	Denied

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

10 APRIL 2014

054P14	State v. Travis Melton Sherman	Def's PDR Under N.C.G.S. § 7A-31 (COA13-811)	Denied
061P14	State v. Aaron Wesley McGarva	Def's PDR Under N.C.G.S. § 7A-31 (COA13-336)	Denied
064P14	State v. Namath Philip Beam	Def's PDR Under N.C.G.S. § 7A-31 (COA13-635)	Denied
066P14	Edward Lee Bombria v. Lowe's Home Ctr. Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA13-680)	Denied
067P14	Nationwide Mutual Insurance Company, Inc. v. Integon National Insurance Company and State National Insurance Company	Defs' PDR Under N.C.G.S. § 7A-31 (COA13-640)	Denied
068P14	State v. Joe N. Childers	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP13-868)	Dismissed
070P14	State v. Marcus Xaiver Bridges	State's PDR Under N.C.G.S. § 7A-31 (COA13-493)	Denied
074P14	State v. Jackie Lee Dover, Sr.	*1.* Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 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
075P14	State v. Eric Darnell Rogers	Def's *Pro Se* Motion for Appropriate Relief	Dismissed
076P14	State v. William Lee Hall	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 (COA13-729)	1. Allowed **03/06/2014** 2. 3.

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

10 APRIL 2014

079P14	Ebele Ann Oraefo v. Christina Claressa Pounds	Plt's PDR Under N.C.G.S. § 7A-31 (COA13-101)	Denied
083P14	Hall v. N.C. Services Corporation, et al.	Plt's Motion for Temporary Stay	Allowed **03/11/2014**
085P14	State v. Roy Denning Hudson	Def's PDR Under N.C.G.S. § 7A-31 (COA13-230)	Denied
087P14	State v. Tina Mahoney	Def's PDR Under N.C.G.S. § 7A-31 (COA13-716)	Denied
088P14	State v. John Darren Bullard	Def's PDR Under N.C.G.S. § 7A-31 (COA13-794)	Denied
091P14	State v. Salim Abdu Gould	1. Def's *Pro Se* Motion for Leave to File 2. Def's *Pro Se* Motion for Leave to File *Forma Pauperis* 3. Def's *Pro Se* Motion of Discovery Under Rule 26.2 Production of Witness Statements 4. Def's *Pro Se* Motion of Discovery of Arrest Reports/Statement of Arresting Officer 5. Def's *Pro Se* Motion of Empeachment [sic] of Witness (Government) 6. Def's *Pro Se* Motion to Suppress 7. Def's *Pro Se* Motion of Disclosure of Video and Audio of Recorded Interrogation of Defendant as Evidence (DVD Interview of Defendant) Page #5 of Motion of Discovery Photos-Videos-Sketches 8. Def's *Pro Se* Motion to Suppress and/or Empeachment [sic] of Statements and Expert Witnesses, Officers of Law in Said Case Exhibits 4, 5, 6 of Motion of Discovery 9. Def's *Pro Se* Motion to Suppress Exhibit 14 Constitutional Rights Warning and Consent 10. Def's *Pro Se* Motion to Suppress Victim's Statement Exhibit "Unknown"	1. Dismissed 2. Allowed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed 8. Dismissed 9. Dismissed 10. Dismissed

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092P14	State v. Gregory Austin Griffin	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31	Dismissed
101P14	LexisNexis Risk Data Management Inc., a Florida Corporation, and LexisNexis Risk Solutions Inc., a Georgia Corporation v. N.C. A.O.C.	1. Defs' (N.C. Administrative Office of the Courts and John W. Smith, II) Motion for Temporary Stay (COA13-547) 2. Defs' (N.C. Administrative Office of the Courts and John W. Smith, II) Petition for *Writ of Supersedeas* 3. Defs' (N.C. Administrative Office of the Courts and John W. Smith, II) PDR Under N.C.G.S. § 7A-31	1. Allowed **03/27/2014** 2. 3.
102P14	State v. Hoard McLeod	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied **03/27/2014**
104P11-6	State v. Titus Batts	Def's *Pro Se* Motion to Dismiss for Improper Pleading	Dismissed
106P14	State v. Saquan Devel Hussey	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP13-1014) 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
107P14	State v. Thomas Keith Sutton	1. Def's Motion for Temporary Stay (COA13-841) 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	1. Allowed **03/31/2014** 2. 3. 4.
114P14	State v. Michael Rashawn Crowder	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/07/2014** 2. 3.

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197P13	Michael A. Falk, as Trustee of the Trust Dated 10-26-1989 Having the Tax ID Number 65-6043718 (AKA the Charlotte Falk Irrevocable Trust) v. Fannie Mae (AKA Federal National Mortgage Association); GlassRatner Management & Realty Advisors, LLC; Idell Flourney; Sonya Petit; Liba Meiere; Shawnequa Dobson; Adolfo Zarate; Tishaun Whitehead; and John Does #1 - #160, Being the Unidentified Lessees of the Apartment Units at the Property Known as Ridgewood Apartments Fannie Mae (AKA Federal National Mortgage Association), Third Party Plaintiff v. Michael A. Falk, as Trustee of the Trust Dated 10-26-1989 Having the Tax ID Number 65-6043718 (AKA the Charlotte Falk Irrevocable Trust) and Quicksilver, LLC, Third Party Defendants	1. Def and Third Party Plaintiff (Fannie Mae) and Def's (GlassRatner Management & Realty Advisors, LLC) NOA Based Upon a Constitutional Question (COA12-764) 2. Def and Third Party Plaintiff (Fannie Mae) and Def's (GlassRatner) PDR Under N.C.G.S. § 7A-31 3. Plt and Third Party Def's (Michael A. Falk) Motion to Dismiss Appeal	1. Retained by Special Order 2. Allowed by Special Order 3. Denied by Special Order
199P13-2	State v. Roger Stevenson	1. Def's *Pro Se* Motion for Complaint for Money Owed 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed **Jackson, J., recused**
205PA12-2	State v. Timothy Lee Harris El Shabazz	Def's PDR Under N.C.G.S. § 7A-31 (COA13-212)	Denied

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259P11-2	State v. Emmanuel Ngene	Def's *Pro Se* Motion to Review PDR	Dismissed
284PA13	State v. Ever Alexander Rivas-Batres	Def's Motion to Amend Defendant-Appellant's New Brief	Allowed **03/20/2014**
308P06-3	In Re: Christopher L. Bullock	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed without Prejudice
332P13-4	Bobby R. Knox, Jr. v. N.C. Department of Pub. Safety of Prisons	1. Def's *Pro Se* Motion for PDR 2. Def's *Pro Se* Motion for Order to Show Cause for an Order of Protective Order and Federal Injunction	1. Dismissed 2. Dismissed
332P13-5	Bobby R. Knox, Jr. v. N.C. Department of Pub. Safety of Prisons	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review the Order of Forsyth 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
368PA13	State v. Michael Paul Miller	Motion by the Appellate Defender as Friend of the Court to Discharge Current Appellate Counsel and to Appoint the Office of the Appellate Defender to Represent the Defendant-Appellee Before the Court	Allowed **03/12/2014** **Beasley, J., recused**
385PA13	Douglas Kirk Lunsford v. Thomas E. Mills, James W. Crowder, III, and Shawn T. Buchanon	Plt's Motion for Leave to Supplement Printed Record on Appeal	Denied
423P13-2	State v. Jory Joseph Marino	1. State's Petition for *Writ of Certiorari* to Review Order of Superior Court of Moore County 2. State's Motion to Expedite Petition of *Writ of Certiorari*	1. Denied 2. Dismissed as Moot

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426P13	Duke University Health System, Inc. v. John D. Sparrow, Sr.	Def's PDR Under N.C.G.S. § 7A-31 (COA13-12)	Denied
459P12-2	State v. Dominique V. Gray	1. Def's *Pro Se* Petition for *Writ of Certiorari* 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
469P13	State v. Shannon Devon Ashe	1. State's Motion for Temporary Stay (COA13-298) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/18/2013** Dissolved **04/10/2014** 2. Denied 3. Denied
504P12-2	State v. Tyrone Johnson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review the Order of Mecklenburg 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
505P13	Amy Diamond, Petitioner v. Charlotte-Mecklenburg County Board of Education, Eric Davis, Timothy S. Morgan, Tom Tate, Joyce Davis, & Allen McElrath, in their individual and official capacities, Respondents	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA12-690-2) 2. Petitioner's Motion to Deem Brief Timely Filed	1. Denied 2. Allowed
517P13	City of Asheville, a N.C. Municipality v. Resurgence Development Company, LLC	Def's PDR Under N.C.G.S. § 7A-31 (COA13-341)	Denied

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520P13	State v. Leah Anne Walton	Def's PDR Under N.C.G.S. § 7A-31 (COA13-203)	Denied
537P13	State v. Rufus Lee McGirt	Def's Petition for *Writ of Certiorari* to Review Order of COA (COA13-78)	Denied
562P13	Kevan Busik v. N.C. Coastal Resources Commission; N.C. Department of Environment and Natural Resources; N.C. Division of Coastal Management and 1118 Longwood Avenue Realty Corporation, Intervenor	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA12-1491)	Denied
563A99-5	State v. Ronald Lee Pugh	Def's PDR Under N.C.G.S. § 7A-31 (COA13-536)	Denied
568P13-2	Lloyd Steven Lane v. N.C. Department of Public Safety, Division of Prisons; Theodis Beck; Boyd Bennett; Alvin W. Keller; Reuben Young; Robert Lewis; Hattie Pimpong; Patricia Alston; Butch Jackson; Cleo Jenkins; and Kirnan Shanahan	Plt's *Pro Se* Motion for Petition for Rehearing *en banc* to Denial of PDR Under Rule 31	Dismissed
572P13-2	Orlando Hudson and State of North Carolina v. Ernest James Nichols	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Durham County	Dismissed
580P05-8	In Re: David L. Smith	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied **03/14/2014**
580P05-9	In Re: David L. Smith	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied **03/24/2014**

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001P14	State v. John Omar Lalinde	1. Def's PDR Under N.C.G.S. § 7A-31 (COA13-115) 2. State's Motion to Deem Response to PDR Timely Filed and Served	1. Denied 2. Allowed
002P11-3	State v. Ricky Bartlett	1. Def's *Pro Se* Motion for Petition for *Writ of Certiorari* 2. Def's *Pro Se* Motion for Appropriate Release 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 4. Def's *Pro Se* Motion for Appropriate Release	1. Denied 2. Dismissed 3. Allowed 4. Dismissed **Beasley, J., recused**
016P07-5	State v. Joey Duane Scott	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Guilford County	Dismissed
034P14	State v. George Lee Nobles	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Jackson County 2. State's Motion for Extension of Time to File Response to Petition for *Writ of Certiorari* 3. Eastern Band of Cherokee Indians' Motion for Leave to File Statement of Interest and Position in Def's Petition for *Writ of Certiorari* 4. Adam N. Tabor's Motion to Withdraw as Counsel of Record	1. Denied 2. Allowed **02/11/2014** Dissolved **06/11/2014** 3. Allowed 4. Allowed
041A14	State v. Elder	1. State's Motion for Temporary Stay (COA13-710) 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. Motion of N.C. Advocates for Justice for Leave to File Amicus Curiae Brief if the Court Allows the State's PDR	1. Allowed **02/07/2014** 2. Allowed **03/06/2014** 3. --- 4. Denied 5. Dismissed as Moot

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045P14	Philadelphus Presbyterian Foundation, Inc., Chris Emanuel Baxley, Danny Bullard & Sybil Bullard Harris, Fraser & Harris, LLC, Shelli Brewington, Ricky Lynn Britt, Phil Locklear & Deborah Locklear, & Melanie Strickland Hunt v. Robeson County Board of Adjustment, Robeson County Board of Commissioners, Robeson County	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA13-777)	Denied
049P13-2	State v. Cassius Renay Jones	1. Def's *Pro Se* Motion for Appropriate Relief 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
051P14	State v. Douglas Dalton Rayfield, II	Def's PDR Under N.C.G.S. § 7A-31 (COA13-531)	Denied
059P14	State v. Yosheika Charmaine Smith	1. State's Motion for Temporary Stay (COA13-742) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/20/2014** Dissolved **06/11/2014** 2. Denied 3. Special Order
060A14	State v. Rondell Luvell Sanders	1. State's Motion for Temporary Stay (COA13-750) 2. State's Motion for *Writ of Supersedeas* 3. State's NOA Based Upon a Dissent 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/26/2014** 2. Allowed **02/26/2014** 3. --- 4. Denied

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071P14	State v. Ramil Marque Council	1. Def's NOA Based Upon a Constitutional Question (COA13-607) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
072P14	State v. Charles Anthony McGrady	Def's PDR Under N.C.G.S. § 7A-31 (COA13-330)	Allowed
076P14	State v. William Lee Hall	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 (COA13-729)	1. Allowed **03/06/2014** Dissolved **06/11/2014** 2. Denied 3. Denied
077P14	National Enterprises Incorporated, a California Corporation v. John W. Hughes a/k/a John W. Hughes, III and Kathryn Hughes a/k/a Kathryn H. Hughes	Defs' PDR Under N.C.G.S. § 7A-31 (COA13-820)	Denied
084P14	In the Matter of: C.W.F	State's PDR Under N.C.G.S. § 7A-31 (COA13-444)	Allowed
086P14	James P. Torrence, Sr., and Tonya Burke, on behalf of themselves and all other persons similarly situated v. Nationwide Budget Finance, QC Holdings, Inc., QC Financial Services, Inc., Financial Services of N.C., Inc., and Don Early	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA12-453) 2. Plts' Petition for *Writ of Certiorari* to Review Order of Superior Court of New Hanover County	1. Denied 2. Denied
089P14	In the Matter of: A.P.	Respondent-Father's PDR Under N.C.G.S. § 7A-31 (COA13-674)	Denied

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090P14	State v. Douglas Dalton Rayfield, II	Def's PDR Under N.C.G.S. § 7A-31 (COA13-549)	Denied
092P14-2	State v. Gregory Austin Griffin	Def's *Pro Se* Motion for NOA (COA13-1093)	Dismissed
093P14	State v. Terrance L. Alexander	Def's PDR Under N.C.G.S. § 7A-31 (COA13-580)	Denied
095P14	State v. Derrick Lamont Leath	Def's PDR Under N.C.G.S. § 7A-31 (COA13-967)	Denied
096P14	State v. Daniel Junior Bandy	Def's PDR Under N.C.G.S. § 7A-31 (COA13-711)	Denied
100P14	Terry Wayne Wood v. Jeremy Nunnery, North Carolina Farm Bureau, and Firemen's Insurance Company of Washington, D.C.	1. Def's (Jeremy Nunnery) PDR Under N.C.G.S. § 7A-31 (COA13-713) 2. N.C. Association of Defense Attorney's Motion for Leave to File Amicus Brief 3. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Dismissed 3. Allowed
101P14	LexisNexis Risk Data Management Inc., a Florida Corporation, and LexisNexis Risk Solutions Inc., a Georgia Corporation v. North Carolina Administrative Office of the Courts; John W. Smith, II, in his official capacity as the Director of the North Carolina Administrative Office of the Courts; and Nancy Lorrin Freeman, in her official capacity as the Clerk of the Wake County Superior Court	1. Defs' (N.C. Administrative Office of the Courts and John W. Smith, II) Motion for Temporary Stay (COA13-547) 2. Defs' (N.C. Administrative Office of the Courts and John W. Smith, II) Petition for *Writ of Supersedeas* 3. Defs' (N.C. Administrative Office of the Courts and John W. Smith, II) PDR Under N.C.G.S. § 7A-31	1. Allowed **03/27/2014** 2. Allowed 3. Allowed **Parker, J., recused**
104P14	Anjelika Dechkovskaia v. Alex Dechkovskaia (Male's Name Spelled Deshkovski)	Def's PDR Under N.C.G.S. § 7A-31 (COA13-766)	Denied

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107P14	State v. Thomas Keith Sutton	1. Def's Motion for Temporary Stay (COA13-841)	1. Allowed **03/31/2014** Dissolved **06/11/2014**
		2. Def's Petition for *Writ of Supersedeas*	2. Denied
		3. Def's NOA Based Upon a Constitutional Question	3. ---
		4. Def's PDR Under N.C.G.S. § 7A-31	4. Denied
		5. State's Motion to Dismiss Appeal	5. Allowed
108P06-2	State v. Hezzie Locklear, Jr.	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Robeson County	Dismissed
110P14	State v. Kermit Bernard Wooten	Def's *Pro Se* Motion for PDR (COA11-385)	Denied
111P14	Judy Knox v. University of North Carolina at Charlotte	1. Petitioner's *Pro Se* Motion for Notice of Appeal (COA14-229)	1. Dismissed *Ex Mero Motu*
		2. Petitioner's *Pro Se* Motion for PDR	2. Denied
112P14	State v. Douglas Durant Lipford	Def's PDR Under N.C.G.S. § 7A-31 (COA13-708)	Denied
114P14	State v. Michael Rashawn Crowder	1. State's Motion for Temporary Stay (COA13-824)	1. Allowed **04/07/2014** Dissolved **06/11/2014**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Denied
116P14	Lorie Ann Patterson v. University Ford, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA13-585)	Denied
118P14	Larry Barrow, Louis Brown, and Doris Murphrey v. D.A.N. Joint Venture Properties of North Carolina, LLC, Connie Murphrey, and Donald Stocks	Plts' PDR Under N.C.G.S. § 7A-31 (COA13-975)	Denied

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119P14	State v. Jose Antonio Jaimes Nieto	Def's PDR Under N.C.G.S. § 7A-31 (COA13-430)	Denied
124P14	State v. Jason Lynn Young	State's Motion for Temporary Stay (COA13-586)	Allowed **04/16/2014**
125P14	State v. Steven Clark Kostick	Def's PDR Under N.C.G.S. § 7A-31 (COA13-873)	Denied
126P14	State v. James Anthony May	Def's *Pro Se* Motion for PDR (COA08-146)	Denied
127P14	State v. David Keith Price	1. Def's Motion for Temporary Stay (COA13-904) 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 **04/21/2014** Dissolved **06/11/2014** 2. Denied 3. --- 4. Denied 5. Allowed
128P14	State v. Michael Edward Brooks	Def's *Pro Se* Motion for NOA (COAP13-33)	Dismissed
131A14	Morningstar Marinas/Eaton Ferry, LLC v. Warren County, North Carolina and Ken Krulik, Warren County Planning and Zoning Administrator, in his official capacity	1. Respondents' NOA Based Upon a Dissent (COA13-458) 2. Respondents' PDR as to Additional Issues	1. --- 2. Denied
133P14	State v. Joanna Leigh Beck	1. Def's Motion for Temporary Stay (COA13-764) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/23/2014** Dissolved **06/11/2014** 2. Denied 3. Denied

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134P14	State v. Walter Anthony Arthur	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Durham County	Dismissed
138P14	Theodore Justice v. Joyner's Auto Body & Paint, Kevin Wayne Joyner, and Conrad Boyd Sturges, III, Law Firm of Davis, Sturges & Tomlinson	Plt's *Pro Se* Petition for *Writ of Mandamus*	Denied
140P14	State v. Eradio Velazquez-Perez and Edgar Ampelio-Vallalvazo	1. State's Motion for Temporary Stay (COA13-694) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's (Edgar Ampelio-Villalvazo) Conditional PDR Under N.C.G.S. § 7A-31 5. Def's (Eradio Velazquez-Perez) NOA Based Upon a Constitutional Question 6. Def's (Eradio Velazquez-Perez) PDR Under N.C.G.S. § 7A-31 7. State's Motion to Dismiss Appeal	1. Allowed **05/05/2014** Dissolved **06/11/2014** 2. Denied 3. Denied 4. Dismissed as Moot 5. --- 6. Denied 7. Allowed
146P14	Tracey Cline v. David Hoke, Individually and as Custodian of the Public Records Pursuant to N.C.G.S. § 132-2	Plt's *Pro Se* PDR Prior to a Determination of the COA (COA14-428)	Denied **Parker, J., recused**
147P14	Celestine L. Simmons v. City of Greensboro, Housing Community Development Department (HCD), City Attorney Mujeeb Shah-Khan, and City Manager Denise Turner-Roth	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-1065)	Denied

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152P14	State v. Montreall Lavell Banner	1. Def's NOA Based Upon a Constitutional Question (COA13-563) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
154P14	State v. Cornell Lee Shelton	1. Def's *Pro Se* Motion for PDR (COA13-945) 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
168P14	State v. Kevin Michael King	Def's Motion for Temporary Stay (COA13-1118)	Allowed **05/22/2014**
170P14	State v. Shawn Rondel Bailey	Motion for Temporary Stay	Allowed **06/05/2014**
171P14	State v. Lisa Starnes Morgan	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-1227)	Denied
172P11-2	State v. Kevin Errol Smith	Def's *Pro Se* Motion to Dismiss for Improper Pleading	Dismissed
183A14	State v. Tiyoun Jimek Jackson	1. State's Motion for Temporary Stay (COA13-743) 2. State's Petition for *Writ of Supersedeas* 3. State's NOA Based Upon a Dissent	1. Allowed **06/06/2014** 2. Allowed **06/06/2014** 3. ---
184P14	State v. Richard Shane Davis	1. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied **06/06/2014** 2. Allowed **06/09/2014** 3. Dismissed as Moot **06/09/2014**
186P14	In the Matter of: R.R.N.	Petitioner's Motion for Temporary Stay	Allowed
187P14*	In the Matter of: J.C.B., C.R.R., H.F.R.	Petitioner's Motion for Temporary Stay	Allowed **06/10/2014**

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251P13-3	George T. Powell, Jr. v. ProDev X, LLC v. George R. Brown, Penny R. Powers and Robert E. Rousseau, and Shafic Andraos, Intervenor	Plt's *Pro Se* Motion for Petition for Rehearing	Dismissed
345P13-2	State v. Samuel J. Jackson	Def's *Pro Se* Motion to Object and Appeal the Order of the Court	Dismissed
345P13-3	State v. Samuel J. Jackson	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **05/29/2014**
375PA13-2	Janet May and Curtis Hill, Co-Administrators of the Estate of Mark Curtis Hill v. Melrose South Pyrotechnics, Inc., and Ocracoke Civic Business Association d/b/a Ocracoke Island Civic and Business Association Judy B. Bray, Administrator of the Estate of Melissa Annette Simmons v. East Coast Pyrotechnics, Inc., formerly known as Melrose South Pyrotechnics, Inc. Kevin F. MacQueen, Administrator of the Estate of Charles Nathaniel Kirkland, Jr. v. East Coast Pyrotechnics, Inc., formerly known as Melrose South Pyrotechnics, Inc. Martez Holland v. East Coast Pyrotechnics, Inc., formerly known as Melrose South Pyrotechnics, Inc.	1. Defs' (Melrose South Pyrotechnics, Inc. and East Coast Pyrotechnics, Inc.) Motion for Temporary Stay (COA13-620) 2. Defs' (Melrose South Pyrotechnics, Inc. and East Coast Pyrotechnics, Inc.) Petition for *Writ of Supersedeas* 3. Defs' (Melrose South Pyrotechnics, Inc. and East Coast Pyrotechnics, Inc.) PDR Under N.C.G.S. § 7A-31	1. Allowed **03/05/2014** Dissolved **06/11/2014** 2. Denied 3. Denied

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418P12-2	Mark Elliott, Tor and Michelle Gabrielson, Michihiro and Yoko Kashima, on behalf of themselves and of 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	1. Def's (KB Home Raleigh-Durham, Inc.) NOA Based Upon a Constitutional Question 2. Def's (KB Home Raleigh-Durham Inc.) PDR Under N.C.G.S. § 7A-31 3. Motion to Admit Matthew H. Lembke *Pro Hac Vice* 4. Motion to Admit Kevin C. Newsom *Pro Hac Vice* 5. Motion to Admit Edmund S. Sauer *Pro Hac Vice* 6. Plts' Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed 4. Allowed 5. Allowed 6. Allowed
441P13-2	State v. Jeroen M. Eve	Def's *Pro Se* Motion to Dismiss	Dismissed
449P11-8	State v. Charles Everette Hinton	Petitioner's *Pro Se* Motion for Notice of Joinder of Remedies for Suit at Law and in Civil Action	Dismissed
450A08-2	Harriet Hurst Turner and John Henry Hurst v. Hammocks Beach Corporation, Inc., Nancy Sharpe Caird, Seth Dickman Sharpe, Swan Spear Sharpe, William August Sharpe, North Carolina State Board of Education, Roy A. Cooper, III, in his capacity as Attorney General of the State of North Carolina	Def's (The Hammocks Beach Corporation, Inc.) Motion for Objection to Argument Content	Dismissed as Moot
450A08-2	Harriet Hurst Turner and John Henry Hurst v. Hammocks Beach Corporation, Inc., Nancy Sharpe Caird, Seth Dickman Sharpe, Swan Spear Sharpe, William August Sharpe, North Carolina State Board of Education, Roy A. Cooper, III, in his capacity as Attorney General of the State of North Carolina	Joint Motion to Dismiss Appeal	Allowed **06/11/2014**

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463P13	State v. James Anthony Carr	1. Def's NOA Based Upon a Constitutional Question (COA13-259) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
468P13-2	State v. Donald Jay Young	1. Def's *Pro Se* Motion for PDR 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
483P13-2	Robert Andrew Bartlett, Sr. v. Frank L. Perry, Secretary,. N.C. Department of Public Safety	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **06/10/2014**
508P13-2	State v. Norbert Glen Richardson	Def's *Pro Se* Motion for Memorandum of Support	Dismissed
521P13	Julio Alberto Martinez Zaldana, Employee v. Smith Employer, and/or Auto Owners Insurance Company, Alleged Carrier, and/or Dargan Construction Company (Gallagher Bassett Services, Inc., Third-Party Administrator) Plaintiff's PDR Under N.C.G.S. § 7A-31 (COA13-318)		Denied
523P13	In the Matter of: D.C.	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA13-502)	Special Order
544P13	Bonnier R. Robinson, Administrator of the Estate of Bernice D. Thomas v. Discovery Insurance Company	Def's PDR Under N.C.G.S. § 7A-31 (COA13-226)	Denied

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554P13	Robert Anthony Coats v. N.C. Department of Health and Human Services, O'Berry Neuro-Medical Treatment Center	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA13-275)	Denied
559PA11-3	State v. Bruce Lee Griffin	1. Def's *Pro Se* Motion for Appropriate Relief 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**
568A03-2	State v. Larry Stubbs	1. Def's NOA Based Upon a Dissent (COA13-174) 2. Def's NOA Based Upon a Constitutional Question 3. Def's PDR as to Additional Issues 4. State's Motion to Dismiss Appeal	1. --- 2. --- 3. Denied 4. Allowed

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002P11-4	Ricky Bartlett v. D.P.S. State of N.C.	Petitioner's *Pro Se* Motion for Appropriate Release	Dismissed **Beasley, J., recused**
006P14	State v. Daniel Harrison Brennick	Def's PDR Under N.C.G.S. § 7A-31 (COA13-627)	Denied
008PA14	High Point Bank and Trust Company v. Highmark Properties, LLC, et al.	Plt's Motion for Extension of Time to File Reply Brief	Allowed **07/10/2014**
015P14	N.C. State Board of Education and N.C. School Board Association, et al. v. N.C. Learns, Inc., d/b/a N.C. Virtual Academy	Respondent's PDR Under N.C.G.S. § 7A-31 (COA13-179)	Denied **Jackson, J., recused**
024P14	In the Matter of: Appeals of: Hull Storey Gibson Companies LLC from the decisions of the Cleveland County Board of Equalization and Review concerning the valuation of real property	Taxpayer's (Hull Storey Gibson Companies, LLC) PDR Under N.C.G.S. § 7A-31 (COA13-198)	Denied
031P14-2	State v. Rodney E. Jones	Def's *Pro Se* Motion for *Writ of Supersedeas* (COAP12-26)	Dismissed
050P00-2	State v. Albert Lee Stevenson, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP12-784) 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
055P14	Luis Valladares, Employee v. Tech Electric Corp., Employer, Cincinnati Insurance Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA13-705)	Denied

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058P14	James Hinson v. City of Greensboro, David Wray, Former Police Chief of the City of Greensboro, in his official and individual capacity, and Randall Brady, Former Deputy Police Chief of the City of Greensboro, in his official and individual capacity	1. Defs' (David Wray and Randall Brady) PDR Under N.C.G.S. § 7A-31 (COA13-404) 2. Defs' (David Wray and Randall Brady) Motion to Withdraw PDR	1. --- 2. Allowed **07/09/2014**
072PA14	State v. Charles Anthony McGrady	Def's Motion for Appointment of Counsel	Allowed **06/24/2014**
073P11-2	State v. Norman Ray Roberts, III	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA13-1111)	Dismissed
074P14-2	State v. Jackie Lee Dover, Sr.	Def's *Pro Se* Motion for PDR (COA12-457)	Dismissed
083P14	Thomas Adair Hall v. North Carolina Services Corporation, and Manheim Remarketing, Inc. and Manheim Corporate services, Inc., All a/k/a or d/b/a Manheim Statesville, Manheim Consulting, Total Resource Auctions, and/or Statesville Auto Auction PMA Insurance Group, Carrier and Shelor Chevrolet Corporation, Employer	1. Employer and Carrier's Motion for Temporary Stay (COA13-781) 2. Employer and Carrier's Petition for *Writ of Supersedeas* 3. Employer and Carrier's PDR	1. Allowed **03/11/2014** Dissolved **08/19/2014** 2. Denied 3. Denied
091P11-2	State v. Ron Dale Johnson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Granville County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot

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094P14	State v. Jeremiah Royster	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
097A14	Leslie Webb, Administratrix of the Estate of Robert B. Webb, III v. Wake Forest University Medical Center, University Dental Associations, North Carolina Baptist Hospital, Wake Forest University, Wake Forest University Physicians, Shilpa S. Buss, DDS, and Reena Patel, DDS	1. Def's Motion to Dismiss Appeal 2. Def's Motion to Dismiss Appeal	1. Allowed **06/14/2014** 2. Allowed **06/17/2014**
099P14	State v. William Roscoe Mills, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA13-590)	Denied
108P14	Duke Energy Carolinas, LLC, v. Herbert A. Gray, Third-Party Plaintiff v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., Third Party Defendant and Builder Support Services of the Carolinas, Inc. f/k/a John Wieland Homes and Neighborhoods of the Carolinas, Inc., Fourth-Party Plaintiff v. Yarbrough-Williams & Houle, Inc., Lucus-Forman, Inc., and Carter Land Surveyors & Planners, Inc., Fourth-Party Defendant's	1. Plt's PDR Prior to a Determination of COA 2. Def's (Herbert A. Gray) and Fourth-Party Plt's Conditional PDR Prior to a Determination of COA 3. Plt's Motion to Amend Certificate of Service for PDR 4. N.C. Electric Membership Corporation and N.C. Association of Electric Cooperatives Motion for Leave to File Amicus Brief 5. Public Service Company of N.C. Inc. and Piedmont Natural Gas Company, Inc.'s Motion for Leave to File Amicus Brief	1. Denied **08/15/2014** 2. Dismissed as Moot **08/15/2014** 3. Allowed **08/15/2014** 4. Dismissed as Moot **08/15/2014** 5. Dismissed as Moot **08/15/2014**

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113P14	State v. Jasper Lee Hopper	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Cleveland 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
115P10-2	State v. Donald Sullivan	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP14-398)	Denied **Beasley, J., recused**
118P09-2	State v. Titus Germaine Williams	Def's Petition for *Writ of Certiorari* to Review Order of COA (COAP14-219)	Dismissed
120P14	State v. Lamar Monquee Carpenter	Def's PDR Under N.C.G.S. § 7A-31 (COA13-898)	Denied
122P14	Douglas Scott File, Employee v. Norandal USA, Inc., Employer ACE USA, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA13-977)	Denied
124P14	State v. Jason Lynn Young	1. State's Motion for Temporary Stay (COA13-586) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/16/2014** 2. Allowed 3. Allowed
129P14	In the Matter of: Appeal of: Pace/Dowd Properties Ltd. From the Decisions of the Union County Board of Equalization and Review Regarding the Valuations of Certain Property for Tax Year 2010	1. Union County's PDR Under N.C.G.S. § 7A-31 (COA13-759) 2. Pace/Dowd Properties Ltd.'s Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot

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134P14-3	State v. Walter Anthony Arthur	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Durham County 2. Def's *Pro Se* Petition for *Writ of Habeas Corpus*	1. Dismissed 2. Denied **07/23/2014**
134P14-4	State v. Walter Anthony Arthur	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied
135P14	State v. Eugene Oliver Denning	1. Def's PDR Under N.C.G.S. § 7A-31 (COA13-724) 2. Def's Motion to Deem PDR Timely 3. Def's Motion in the Alternative for Court to Issue Its *Writ of Certiorari* to Review PDR in Spite of It Not Being Timely Filed	1. Special Order 2. Special Order 3. Special Order **Jackson, J., recused**
136A14	Charles D. Brown v. Town of Chapel Hill, Chapel Hill Police Officer D. Funk, in his official and individual capacity, and Other Chapel Hill Police Officers, in their individual and official capacities, to be Named When Their Identities and Level of Participation Becomes Known	1. Defs' Motion to Dismiss Appeal (COA13-323) 2. Plt's Petition in the Alternative for *Writ of Certiorari* to Review Decision of the COA	1. Allowed 2. Denied
139P14	Mark R. Patmore, Mercia Residential Properties, LLC, William T. Gartland, and 318 Brooks LLC v. Town of Chapel Hill, North Carolina	Plts' PDR Under N.C.G.S. § 7A-31 (COA13-1049)	Denied
141P14	State v. Kenneth Eugene Alston	Def's PDR Under N.C.G.S. § 7A-31 (COA13-429)	Denied

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145P14	State v. Jerry Michael Sparks	1. Def's NOA Based Upon a Constitutional Questions (COA13-659) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss	1. --- 2. Denied 3. Allowed
149P14	State v. Tiffany Leigh Marion	Def's PDR Under N.C.G.S. § 7A-31 (COA13-200)	Denied
150P14	Mike Vanek v. Global Supply and Logistics, Inc., Stanford Ron Banks, Greg Kirchner, Robert Malzacher, and Martin Banks	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA13-1135) 2. Defs' (Global Supply and Logistics, Inc. & Stanford Ron Banks) Motion to Dismiss Action	1. Denied 2. Dismissed as Moot
155P14	Christian Murillo Paredones and Gisell Guadalupe Murillo Paredones, Minor Children of Decedent-Employee Felipe Pacheco Flores a/k/a Murillo Arellano Gumercindo v. Wrenn Brothers, Employer and Continental Indemnity Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA13-910)	Denied
156P14	Curtis Ray Holmes v. North Carolina Farm Bureau Insurance Co., Inc.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA13-1096) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
158P08-2	State v. Lenin Javier Flores-Matamoros	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Guilford County (COAP14-316) 2. Def's *Pro Se* NOA 3. Def's *Pro Se* Petition for *Writ of Certiorari to Review* Order of COA	1. Dismissed 2. Dismissed *Ex Mero Motu* 3. Dismissed

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158P14	State v. Donnel Tracy Cousin	Def's PDR Under N.C.G.S. § 7A-31 (COA13-543)	Denied
159P14	Timothy Blakeley v. The Town of Taylortown, North Carolina, a municipal corporation	Def's PDR Under N.C.G.S. § 7A-31 (COA13-853)	Denied
160P14	State v. Javier Herrera Moran	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1046)	Denied
163P14	Duke Energy Carolinas, LLC v. Bruton Cable Services, Inc. Defendant/Third-Party Plaintiff v. Robert Wayne Taylor and wife, Lois K. Taylor; Davis-Martin-Powell and Associates, Inc.; and Jon Eric Davis, Third-Party Defendants	1. Third Party Defs' (Davis-Martin-Powell and Associates, Inc. and Jon Eric Davis) PDR Under N.C.G.S. § 7A-31 (COA13-686) 2. Def/Third-Party Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
164P14	State v. Cleveland Lewis Williams	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP13-717)	Dismissed
165P14	Elizabeth S. McGill Davis v. Gary Edward Davis, Wanda Sue Bennett, Donna Thomas, Brian Graf, Jr., and Chris Graf	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA13-1168) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
166P14	State v. Donald Vernon Edwards	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Orange 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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167P14	State v. Christopher Leon Blakney	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-1088)	Denied
168P14	State v. Kevin Michael King	1. Def's Motion for Temporary Stay (COA13-1118) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/22/2014** Dissolved **08/19/2014** 2. Denied 3. Denied
169P14	State v. Corey Dinan	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1022)	Denied
172P11-3	State v. Kevin Errol Smith	Def's *Pro Se* Motion to Dismiss (COA10-998)	Dismissed
172P14	Robert A. Bell and Joan A. Bell v. City of New Bern and Town of Trent Woods	Def's (Town of Trent Woods) PDR Under N.C.G.S. § 7A-31 (COA13-817)	Denied
173P14	State v. Willie E. McLendon	1. Def's PDR Under N.C.G.S. § 7A-31 (COA13-915) 2. Def's Motion to Deem Timely Filed PDR 3. Def's Motion in the Alternative for Court to Construe the Petition as a Petition for *Writ of Certiorari*	1. Dismissed 2. Denied 3. Denied
174P14	State v. Victor Nnamdi Inyama	Def's PDR Under N.C.G.S. § 7A-31 (COA13-666)	Denied
176P14	State v. Solomon Lee-Warren Graves	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1299)	Denied
177A14	State v. Nicholas Tavares West	1. Def's NOA Based Upon a Constitutional Question (COA13-959) 2. State's Motion to Dismiss Appeal	1. --- 2. Allowed

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178P14	State v. Chauncey Lajarvis Sterling	1. Def's NOA Based Upon a Constitutional Question (COA13-1191) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
179P14	State v. Torrey Dale Grady	1. Def's NOA Based Upon a Constitutional Question (COA13-958) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
181A93-4	State v. Rayford Lewis Burke	Def.-Appellant's Motion for Extension of Time to File Petition for *Writ of Certiorari*	Allowed **07/24/2014**
181P14	Cynthia S. Shackleford v. Anne Lundquist	1. Def's NOA Based Upon a Constitutional Question (COA13-960) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion for Leave to File Supplemental Authority in Support of NOA and PDR	1. Dismissed *Ex Mero Motu* 2. Denied 3. Denied
182P14	Carol Monsour Puryear v. Betty Carlton Puryear (Formerly Beverly Carlton Devin)	1. Def's NOA Based Upon a Constitutional Question (COA13-1014) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal 4. Def's Motion for Leave to File Supplemental Authority In Support of NOA and PDR	1. --- 2. Denied 3. Allowed 4. Denied
185P14	State v. Crecencio Felix Rodelo	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA13-609)	Denied
186P14	In the Matter of: R.R.N.	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA13-947) 2. Petitioner's Motion for Temporary Stay 3. Petitioner's Petition for *Writ of Supersedeas* 4. Petitioner's (Mother) Motion to Dismiss Petition for *Writ of Supersedeas* 5. Petitioner's Motion for Leave to File Verification	1. Special Order 2. Allowed **06/11/2014** 3. Special Order 4. Special Order 5. Special Order

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187P14	In the Matter of: J.C.B., C.R.R., H.F.R.	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA13-1112) 2. Petitioner's Motion for Temporary Stay 3. Petitioner's Petition for *Writ of Supersedeas* 4. Motion to Withdraw and Substitute Attorney	1. Denied 2. Allowed **06/11/2014** Dissolved **08/19/2014** 3. Denied 4. Allowed **07/10/2014**
190P14	State v. Gustavo Gaspar	Def's PDR Under N.C.G.S. § 7A-31 (COA13-970)	Denied
192P14	State v. Michael Randolph Finch	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1212)	Denied
195P14	State v. Michael E. Williams	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Guilford 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
196P14	City of Asheville v. Rogers S. Aly	Plt's Motion for Temporary Stay (COA13-720)	Allowed **06/12/2014**
197P14	April R. Hunt v. Jeffery H. Hunt	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1153)	Denied
199P14	In the Matter of the Foreclosure of a Deed of Trust from Jimmie L. Echols, Gloria G. Echols, Vincent Boyd, and Republique, Inc., Dated July 12, 2002, Recorded in Book 799, Page 1, Bertie County Registry	1. Respondent's *Pro Se* Notice of Appeal Based Upon a Constitution Question (COA13-804) 2. Respondent's *Pro Se* PDR 3. Petitioner's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed

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200P14	State v. Francis Marius Hogan, Jr.	1. Def's Motion for Temporary Stay (COA13-1284) 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	1. Allowed **06/17/2014** Dissolved **08/19/2014** 2. Denied 3. Dismissed *Ex Mero Motu* 4. Denied
201P14	Sheriff of Bertie Along with Office of Sheriff of Bertie, Delegates of Sheriff of Bertie Involved, Sheriff of Bertie as Respondent Superior, Sheriff Mr. John Holley in capacity, Sheriff Mr. John Holley as Individual Surety Bond Insurer(s) Continental National American Group CNA as Surety Bond (Malfactors) v. Defendant Echols (Claimant)	1. Claimant's *Pro Se* Motion for NOA (COA14-343) 2. Claimant's *Pro Se* Motion for PDR	1. Dismissed *Ex Mero Motu* 2. Denied
203A14	State v. Tony Linwood Martin, Jr.	1. State's Motion for Temporary Stay (COA13-956) 2. State's Petition for *Writ of Supersedeas* 3. State's NOA Based Upon a Dissent	1. Allowed **06/19/2014** 2. Allowed **07/17/2014** 3. ---
204A14	State v. Howard Junior Edgerton	1. State's Motion for Temporary Stay (COA13-1235) 2. State's Petition for *Writ of Supersedeas* 3. NOA Based Upon a Dissent	1. Allowed **06/20/2014** 2. Allowed **07/22/2014** 3. ---
205P14	State v. Jermaine Deprie Glover	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1141)	Denied

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206P14	Ra Neter El Mu Urain Bey, Authorized Representative, Natural Person, In Propria Person: Ex Relatione Willie James Dixon, Jr. v. Small Claims Court	Plt's *Pro Se* Petition for *Writ of Mandamus*	Dismissed **06/25/2014**
207P14	State v. Curtis Mario Benton	1. State's Motion for Temporary Stay (COA13-1204) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/23/2014** 2. Allowed 3. Allowed
212P14	State v. Kimberly Dale Adams	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1202)	Denied
215P14	State v. John Burton Edmonds, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1219)	Denied
216P14	N.C. State Bar v. Jeffrey S. Berman, Attorney	1. Def's PDR Under N.C.G.S. § 7A-31 (COA13-1249) 2. Def's Motion for Temporary Stay 3. Def's Petition for *Writ of Supersedeas*	1. Denied 2. Allowed **07/09/2014** Dissolved **08/19/2014** 3. Denied
218P14	State v. Winfred Scott Simpson	Def's PDR Under N.C.G.S. § 7A-31 (COA13-776)	Denied
221P14	State v. Avery L. Williams, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP14-175) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
223P14	State v. Miguel Antoni Meza-Rodriguez	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1190)	Denied

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224P14	State v. William D. Moore	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Davidson 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
226P14	In the Matter of: Gilbert Moore, Jr., Respondent	Respondent's PDR Under N.C.G.S. § 7A-31 (COA13-1397)	Denied
228P14	State v. Robert Leviticus McKoy	State's Motion for Temporary Stay (COA13-1071)	Allowed **07/03/2014**
229P14	Sharon Skoff, Employee v. US Airways, Inc., Employer, and New Hampshire Insurance Co., Carrier, (Chartis Claims, Inc., Third Party Administrator)	Defs' Motion for Temporary Stay (COA13-994)	Allowed **07/07/2014**
232P14	Jakiem Lance Wilson v. State	Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP13-917)	Dismissed
236P14	State v. Albert Grey Gurkin, Sr.	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1220)	Denied
243P14	State v. Terry Wayne Harris	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1217)	Denied
244P14	State v. Brandon Michael Pickens	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **07/16/2014**
246P14	State v. Lamate Sherron Anderson	Def-Appellant's PDR Under N.C.G.S. § 7A-31 (COA13-1281)	Denied
248P14	State v. Thorne Oliver Watlington	State's Motion for Temporary Stay (COA13-825)	Allowed **07/18/2014**
250P14	David Baker-Bey v. Small Claim Court Magistrate	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Dismissed **07/21/2014**

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

19 AUGUST 2014

251P14	State v. Paul Brady Smith	1. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Def's *Pro Se* Motion to Appoint Counsel	1. Denied **07/21/2014** 2. Dismissed as Moot **07/21/2014**
252P14	State v. Thomas Craig Campbell	State's Motion for Temporary Stay (COA13-1404)	Allowed **07/21/2014**
254P14	State v. Sydney Cheryl Sutton	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Wake County	Dismissed
255P14	State v. Samuel Eugene Williams, Jr.	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* (COA13-1221) 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31 5. State's Motion to Correct Error in PDR	1. Allowed **07/23/2014** Dissolved **08/19/2014** 2. Denied 3. Denied 4. Dismissed as Moot 5. Allowed
260P14	State v. Randal Eugene Powell	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1109)	Denied
264P14	State v. Donnell Christopher Lewis	1. Def's *Pro Se* Motion for NOA (COAP14-469) 2. Def's *Pro Se* Petition for *Writ of Certiorari* 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

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

19 AUGUST 2014

266P14	Robert Carpenter and Tammy Carpenter, individually and Tammy Carpenter as Administrator of the Estate of Monique L. Carpenter v. Willie McKinney, individually and jointly and severally with Windham Heating and Air Conditioning, Inc., individually and jointly and severally with Old Republic Home Protection Company, Inc., individually jointly and severally with Paul Edward Windham, individually and d/b/a Windham Heating & Air	Def's (Old Republic Home Protection Company, Inc.) Motion for Extension of Time to File Response	Allowed **08/13/2014**
274P14	State v. Jerrod Stephon Hill	State's Motion for Temporary Stay (COA13-188)	Allowed **08/04/2014**
285P97-2	State v. Darryl Anthony Howard	State's Motion for Temporary Stay	Allowed **07/16/2014**
285P14	Monica Wilson and Wilson Law Group PLLC v. N.C. Dept. of Commerce; N.C. Dept. of Commerce, Division of Employment Security; Sharon Allred Decker, in her capacity as Secretary of Commerce; and Dale R. Folwell, in his capacity as Assistant Secretary of Employment Security	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **08/07/2014** Dissolved **08/19/2014** 2. Special Order **Jackson, J., recused**
295P12-2	State v. Lawrence Donell Flood, Sr.	Def's *Pro Se* Petition for *Writ of Mandamus* (COA11-856)	Dismissed

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19 AUGUST 2014

316P98-2	State v. Billy Ray Artis	Def's *Pro Se* Motion for Request for New Sentencing on Petition	Dismissed
332P13-6	Bobby R. Knox, Jr. v. Arthur Davis, et al.	1. Plt's *Pro Se* Motion for Order to Show Cause for Federal Injunction & Protective Order from (D.P.S) Staff Officials 2. Plt's *Pro Se* Motion for Order to Show Cause for an Order of Protective Order of (D.O.P.) (D.P.S.) Staff Officials at N.C. Marion Correctional	1. Dismissed 2. Dismissed
355A10-2	State v. Neil Matthew Sargent	1. Def's NOA Based Upon a Constitutional Question (COA13-482) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
380PA13	Lois Edmondson Bynum, Administratrix of the Estate of James Earl Bynum and Lois Bynum, Plaintiff-Appellees, v. Wilson County and Sleepy Hollow Development Company, Defendants-Appellants	Plt-Appellee's Petition for Rehearing	Denied **07/18/2014**
388P13-2	State v. Demaris Lamar Grice	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA12-1448)	Denied
394P13	State v. Willie Mack McCoy, Jr.	1. Def's NOA Based Upon a Constitutional Question (COA12-1210) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Have the COA Transmit to this Court the Sealed Internal Affairs Report and the Sealed Brady Argument 4. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed 4. Allowed
411A13	Claude V. Medlin, Employee v. Weaver Cooke Construction, LLC, Employer Key Risk Insurance Company, Carrier	Motion to Withdraw Law Firm	Dismissed as Moot **07/17/2014**

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19 AUGUST 2014

433P13-2	State v. Johnny Ray Gordon	Def's *Pro Se* Motion for PDR (COAP13-602)	Dismissed
434P13-2	State v. Darwin Vernell Christian	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Guilford County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
449P11-9	State v. Charles Everette Hinton	Petitioner's *Pro Se* Motion for Notice and Notification of Petition to Take, Give, and Obtain Oral or Written Depositions Before Action, Independent Action, and Suit	Dismissed
450PA12-2	Barbara R. Duncan v. John H. Duncan	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-399-2) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot **Beasley, J., recused**
452P13	Thomas Culbreth, Employee v. Ironmen of Fayetteville, Inc., Employer; Stonewood Insurance Company, Carrier	1. Defs' NOA Based Upon a Constitutional Question (COA13-14) 2. Defs' PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Hold NOA and PDR In Abeyance Pending Settlement of Claim 4. Joint Motion to Withdraw PDR	1. Dismissed as Moot 2. --- 3. Allowed **03/06/2014** 4. Allowed
457P05-2	State v. Jeremy Antuan Marsh	1. Def's PDR Under N.C.G.S. § 7A-31 (COA13-190) 2. Def's Petition for *Writ of Certiorari* to Review the Decision of the COA	1. Denied 2. Denied
487P13-3	State v. Kevin E. Hedgepeth	Def's *Pro Se* Motion for Notice to the Appellate Division that the State Supreme Court had the Original Jurisdiction	Dismissed

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

19 AUGUST 2014

502P13	State v. Jevon Arvin Davis	Def's PDR Under N.C.G.S. § 7A-31 (COA13-317)	Denied
532P09-4	State v. David Louis Richardson	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Pitt County	Dismissed
535P13-3	Jennifer Tyll and David Tyll v. Joey Berry	1. Def's PDR Under N.C.G.S. § 7A-31 (COA13-512) 2. Def's *Pro Se* NOA Based Upon a Constitutional Question	1. Denied 2. Dismissed *Ex Mero Motu*
545P13	Rockford-Cohen Group, LLC and Lynette Thompson v. N.C. Dept. of Insurance, Commissioner of Insurance Wayne Goodwin, and N.C. Bail Agents Association, a N.C. Non-Profit Corporation	1. Defs' (N.C. Bail Agents Association) NOA Based Upon a Constitutional Question (COA13-124) 2. Defs' PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal 4. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. Denied 3. Allowed 4. Dismissed as Moot
557P13	Tyki Sakwan Irving v. Charlotte Mecklenburg Board of Education	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1496)	Allowed
566P13	State v. Philip Warnew Smith	Def's Petition for *Writ of Certiorari* to Review the Decision of the COA (COA13-463)	Denied
568A03-2	State v. Stubbs	1. Def's Motion for Extension of Time to File Brief 2. Def's Motion to Deem Motion for Extension of Time to File Brief Timely Filed	1. Allowed **07/22/2014** 2. Allowed **07/22/2014**
580P05-10	In re: David L. Smith	1. Petitioner's *Pro Se* Petition for *Writ of Mandamus* 2. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 3. Petitioner's *Pro Se* Petition for *Writ of Certiorari*	1. Denied **08/11/2014** 2. Denied **08/11/2014** 3. Denied **08/11/2014**
580P05-11	In re: David L. Smith	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied **08/19/2014**

CHARLOTTE MOTOR SPEEDWAY, LLC AND SPEEDWAY MOTORSPORTS, INC. v.
COUNTY OF CABARRUS

No. 503PA13

(Filed 19 December 2014)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 748 S.E.2d 171 (2013), affirming an order entered on 21 March 2012 by Judge Robert C. Ervin in Superior Court, Cabarrus County. Heard in the Supreme Court on 9 September 2014.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, William K. Diehl, Jr., and John R. Buric, for plaintiff-appellants.

Erwin, Bishop, Capitano & Moss, PA, by J. Daniel Bishop; and Richard M. Koch, Cabarrus County Attorney, for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

GEORGE CHRISTIE AND DEBORAH CHRISTIE v. HARTLEY CONSTRUCTION, INC.; GRAILCOAT WORLDWIDE, LLC; AND GRAILCO, INC.

No. 359A13

(Filed 19 December 2014)

Statutes of Limitation and Repose—contracting for warranty term exceeding repose period—bound by agreement

The Court of Appeals erred by affirming the trial court's dismissal of plaintiffs' claim for breach of express warranty against defendant GrailCoat. By contracting for a warranty term that exceeded the repose period, GrailCoat waived the protections provided by statute and was bound by its agreement. Discretionary review was improvidently allowed as to the remaining two issues.

Justice HUNTER 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. ___, 745 S.E.2d 60 (2013), affirming an order of summary judgment entered on 13 August 2012 by Judge Gary E. Trawick in Superior Court, Orange County. On 18 December 2013, the Supreme Court allowed plaintiffs' petition for discretionary review of additional issues. Heard in the Supreme Court on 14 April 2014.

Whitfield Bryson & Mason, LLP, by Daniel K. Bryson and Scott C. Harris, for plaintiff-appellants.

Ragsdale Liggett PLLC, by William W. Pollock and Angela M. Allen, for defendant-appellee Hartley Construction, Inc.

Conner Gwyn Schenck PLLC, by Andrew L. Chapin, for defendant-appellees GrailCoat Worldwide, LLC and GrailCo, Inc.

Jonathan McGirt, and Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn, for North Carolina Advocates for Justice, amicus curiae.

EDMUNDS, Justice.

Defendants GrailCoat Worldwide, LLC and GrailCo, Inc. (collectively, "GrailCoat") provided an express twenty-year warranty for its

product SuperFlex,[1] a stucco-like material that plaintiffs purchased to cover the exterior of their new home. When the product later failed and plaintiffs brought suit for damages, GrailCoat claimed that North Carolina's six-year statute of repose barred plaintiffs' attempt to enforce the warranty. We conclude that by contracting for a warranty term that exceeded the repose period, GrailCoat waived the protections provided by that statute and is bound by its agreement. Accordingly, we hold GrailCoat to its promise to plaintiffs and reverse in part the decision of the Court of Appeals affirming the trial court's grant of summary judgment in favor of the GrailCoat defendants.

George and Deborah Christie ("plaintiffs") presented evidence tending to show the following: In 2004, plaintiffs decided to build a custom home in Orange County. Because they lacked experience in both architectural design and residential construction, plaintiffs entered into an agreement with Hartley Construction, Inc., a company that specialized in designing and building such houses. Under the agreement, Hartley would manage all aspects of the project to provide plaintiffs a "turnkey" home ready for occupancy. Hartley constructed the home using structural insulated panels ("SIPs") as the exterior walls of the residence. The SIPs would not only constitute the house's load-bearing structural support, but would also provide insulation and sheathing. SIP construction requires an exterior cladding system to protect the home from the elements and moisture intrusion. During the design process, Hartley suggested that plaintiffs consider SuperFlex, an exterior cladding system marketed by GrailCoat as being "extremely well-suited [for] use over Structural Insulated Panels." Plaintiffs conducted research by accessing GrailCoat's website, which promised that "[p]roperly installed over SIPs, GrailCoat is fully warranted for twenty years to not crack, craze, fatigue or delaminate from the substrate. If maintained properly, GrailCoat could last forty or fifty years, even in salt air, freeze/thaw, or heavy rain or sun exposure." Satisfied with GraiCoat's representations and relying on the warranty provisions stated on its website, plaintiffs elected to use SuperFlex. Hartley purchased the SuperFlex and hired a GrailCoat-certified installer who applied the product to the home in the latter half of 2004. Orange County issued a Certificate of Occupancy for the residence on 22 March 2005.

Several years later, plaintiffs began to notice cracks and blistering in the SuperFlex and moisture intrusion into their home. Further

1. In the record, the product is called both "SuperFlex" and "GrailCoat." We will use the term SuperFlex to avoid confusing the product with the manufacturer.

investigation revealed that the moisture had caused substantial rot and delamination of the SIPs, significantly compromising the structural integrity of the home. After several unsatisfactory meetings with Hartley representatives in late March of 2011, plaintiffs notified GrailCoat of the problems and their intent to make a warranty claim. On 18 April 2011, GrailCoat responded, stating that the problems were a result of improper application and installation rather than any defect in the product. Although GrailCoat offered replacement SuperFlex, it refused to compensate plaintiffs for labor costs for installation of the replacement product or for any damage caused by the moisture intrusion.

On 31 October 2011, plaintiffs filed a complaint in Superior Court, Orange County, alleging breach of contract, breach of implied warranty, negligence and negligence per se, gross or willful and wanton negligence, and unfair and deceptive practices against Hartley Construction, Inc.; and alleging breach of express warranties, breach of implied warranties of merchantability and fitness, negligence, and unfair and deceptive practices against GrailCoat Worldwide and GrailCo, Inc. Hartley filed its answer on 3 January 2012, asserting numerous defenses and asking the court to dismiss the complaint. GrailCoat filed its answer on 6 January 2012, pleading affirmative defenses while also moving to dismiss and for judgment on the pleadings. After the trial court denied all the motions included in both answers, each defendant moved for summary judgment. Hartley's motion stated that, because the Christies had failed to forecast sufficient evidence of fraudulent or willful or wanton conduct, Hartley was entitled to summary judgment under N.C.G.S. § 1-50(a)(5), North Carolina's six-year statute of repose for claims arising out of improvements to real property. GrailCoat argued that it was entitled to summary judgment "as a matter of law, as shown by the pleadings and applicable law." Plaintiffs also moved for summary judgment against GrailCoat on their claim for breach of express warranty. After conducting a hearing, the trial court entered an order on 13 August 2012 granting defendants' motions for summary judgment as to all claims against them, denying plaintiffs' motion for summary judgment on their express warranty claim, and dismissing plaintiffs' complaint with prejudice.

The Court of Appeals affirmed the trial court in a divided opinion. The majority opinion stated that N.C.G.S. § 1-50(a)(5) applies to plaintiffs' claims and noted that whether a statute of repose has run is a question of law. *Christie v. Hartley Constr., Inc.*, ___ N.C. App.

___, ___, 745 S.E.2d 60, 62 (2013). The majority found that, based on Orange County's 22 March 2005 issuance of the Certificate of Occupancy for the structure, the statute of repose had run on 22 March 2011, several months before plaintiffs filed their complaint. *Id.* at ___, 745 S.E.2d at 63. As to the effect of defendant's express warranty on the statute of repose, the majority cited *Roemer v. Preferred Roofing, Inc.*, 190 N.C. App. 813, 660 S.E.2d 920 (2008), where the Court of Appeals held that N.C.G.S. § 1-50(a)(5) precluded a claim for damages under an express lifetime warranty. *Id.* at ___, 745 S.E.2d at 63. The majority compared the lifetime warranty in *Roemer* to the twenty-year warranty at issue here and concluded that the statute of repose barred plaintiffs' claims for damages in this case. The majority added that, under *Roemer*, any remedy for breach of the warranty once the statute of repose had run lay in specific performance, not damages. *Id.* at ___, 745 S.E.2d at 63. Accordingly, the Court of Appeals majority affirmed the trial court. *Id.* at ___, 745 S.E.2d at 63.

Although the dissenting judge agreed with the majority as to the resolution of all of plaintiffs' claims against Hartley and most of plaintiffs' claims against GrailCoat, he dissented from the dismissal of plaintiffs' claim for breach of express warranties. *Id.* at ___, 745 S.E.2d at 63 (Hunter, Jr., Robert N., J., dissenting). The dissenting judge noted that *Roemer* did not describe the terms of the warranty at issue in that case or "provide reasoning for why specific performance would be the sole remedy under those terms," leading him to presume that the warranty in *Roemer* limited the remedy to that particular relief. *Id.* at ___, 745 S.E.2d at 64. In other words, he believed that the result in *Roemer* was more likely driven by the terms of the warranty than by the statute of repose.

The dissenting judge went on to argue that, because the warranty here is a "full warranty," *Roemer* should be limited to its facts and deemed inapplicable to this case. *Id.* at ___, 745 S.E.2d at 64. Observing that the majority's holding unnecessarily impairs the freedom to contract, he would have held that "a full warranty which exceeds the time period for the statute of repose is a waiver of the statute for all claims." *Id.* at ___, 745 S.E.2d at 64. Plaintiffs filed a notice of appeal based on the dissent. We also allowed plaintiffs' petition for discretionary review of additional issues.

We begin our analysis by reviewing the characteristics of statutes of limitations and statutes of repose. Although both are public policy

tools by which the General Assembly has set an expiration date for certain types of civil claims, these statutes exhibit significant differences in both form and function that have not always proved clear in practice. *See Bolick v. Am. Barmag Corp.*, 306 N.C. 364, 366, 293 S.E.2d 415, 417-18 (1982) ("Although the term 'statute of repose' has traditionally been used to encompass statutes of limitation, in recent years it has been used to distinguish ordinary statutes of limitation from those that begin 'to run at a time unrelated to the traditional accrual of the cause of action.' " (footnote omitted)); *see also CTS Corp. v. Waldburger*, 573 U.S. ___, ___, 134 S. Ct. 2175, 2186, 189 L. Ed. 2d 62, 76 (2014) ("[I]t is apparent that general usage of the legal terms [statutes of repose and statutes of limitation] has not always been precise . . . ."); Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U. L. Rev. 579, 582-87 (1981) [hereinafter *Statutes of Repose*] (noting five distinct uses of the term "statute of repose" employed at the time of the article's publication).

Statutes of limitation are intended "to require diligent prosecution of known claims," *Black's Law Dictionary* 1636 (10th ed. 2014), and to prevent the problems inherent in litigating claims in which "evidence has been lost, memories have faded, and witnesses have disappeared," *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 349, 64 S. Ct. 582, 586, 88 L. Ed. 788, 792 (1944). Such statutes achieve this goal by beginning the limitations period when the plaintiff's cause of action accrues, typically when the plaintiff is injured or discovers he or she has been injured. *See, e.g.*, *CTS Corp.*, 573 U.S. at ___, 134 S. Ct. at 2182, 189 L. Ed. 2d at 72; *Trs. of Rowan Technical Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 234 n.3, 328 S.E.2d 274, 276 n.3 (1985). Although statutes of limitation function as affirmative defenses, *see Solon Lodge No. 9 v. Ionic Lodge No. 72*, 247 N.C. 310, 316, 101 S.E.2d 8, 13 (1957), their enforceability is subject to equitable defenses, *see, e.g.*, *Nowell v. Great Atl. & Pac. Tea Co.*, 250 N.C. 575, 579, 108 S.E.2d 889, 891 (1959) ("[E]quity will deny the right to assert [a statute of limitations] defense when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith."). As a result, statutes of limitation are procedural, not substantive, and determine not whether an injury has occurred, but whether a party can obtain a remedy for that injury. *See Bolick*, 306 N.C. at 366-67, 293 S.E.2d at 418.

In contrast, statutes of repose are intended to mitigate the risk of inherently uncertain and potentially limitless legal exposure. *See*, *e.g.*, *CTS Corp.*, 573 U.S. at ___, 134 S. Ct. at 2183, 189 L. Ed. 2d at 73; *Raithaus v. Saab—Scandia of Am., Inc.*, 784 P.2d 1158, 1161 (Utah 1989); *Statutes of Repose* at 587. Accordingly, such a statute's limitation period is initiated by the defendant's "last act or omission" that at some later point gives rise to the plaintiff's cause of action. *See*, *e.g.*, N.C.G.S. § 1-50(a)(5)(a) (2013); *Trs. of Rowan Technical*, 313 N.C. at 234 n.3, 328 S.E.2d at 276 n.3. The time of the occurrence or discovery of the plaintiff's injury is not a factor in the operation of a statute of repose.

Because an applicable repose period begins to run automatically, statutes of repose give potential defendants a degree of certainty and control over their legal exposure that is not possible when such exposure hinges upon the possibility of an injury to a plaintiff that may never manifest. Statutes of repose function as "unyielding and absolute barrier[s]" to litigation, *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985) (citations omitted), are substantive in nature, *see Boudreau v. Baughman*, 322 N.C. 331, 341, 368 S.E.2d 849, 857 (1988) ("If the action is not brought within the specified period, the plaintiff 'literally has *no* cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress.' " (citation omitted)), and are not subject to equitable doctrines, *see*, *e.g.*, *Monson v. Paramount Homes*, *Inc.*, 133 N.C. App. 235, 240, 515 S.E.2d 445, 449 (1999) ("While equitable doctrines may toll statutes of limitation, they do not toll substantive rights created by statutes of repose." (citations omitted)). The plaintiff has the burden of proving that a statute of repose does not defeat the claim. *See Hargett v. Holland*, 337 N.C. 651, 654, 447 S.E.2d 784, 787 (1994) (citing *Bolick*, 306 N.C. 364, 293 S.E.2d 415).

Subdivison 1-50(a)(5), triggered by a defendant's "last act or omission," is a statute of repose that provides that any claim relating to any "improvement to real property" must be brought within six years. N.C.G.S. § 1-50(a)(5)(a). We have held that this statute "applies exclusively to all claims based upon or arising out of the defective or unsafe condition of an improvement to real property." *Forsyth Mem'l Hosp., Inc. v. Armstrong World Indus., Inc.*, 336 N.C. 438, 446, 444 S.E.2d 423, 428 (1994). Accordingly, we consider the effect of the statute of repose and of defendant's twenty-year warranty upon plaintiffs' claims for damages to real property.

North Carolina has long recognized that parties generally are "free to contract as they deem appropriate." *Hlasnick v. Federated Mut. Ins. Co.*, 353 N.C. 240, 244, 539 S.E.2d 274, 277 (2000). This rule also extends to warranties because "[a] warranty, express or implied, is contractual in nature." *Wyatt v. N.C. Equip. Co.*, 253 N.C. 355, 358, 117 S.E.2d 21, 24 (1960). Therefore, we are faced with a conflict between the public policy embodied in the repose period set out in N.C.G.S. § 1-50(a)(5) and the right of parties to contract freely. When encountering such conflicts in the past, this Court has held to "the broad policy of the law which accords to contracting parties freedom to bind themselves as they see fit, subject, however, to the qualification that contractual provisions violative of the law or contrary to some rule of public policy are void and unenforceable." *Hall v. Sinclair Ref. Co.*, 242 N.C. 707, 709-10, 89 S.E.2d 396, 397-98 (1955).

The public policy underlying N.C.G.S. § 1-50(a)(5) appears straightforward. As noted above, statutes of repose provide a bulwark against the possibility of open-ended exposure to suits for damages. Here, where GrailCoat is a business concern furnishing purported improvements to real property, the statute terminates the risk of suit six years after this defendant's last act "giving rise to the cause of action or substantial completion of the improvement." N.C.G.S. § 1-50(a)(5). A company might well rely on such a limitation when making business decisions such as product pricing and insurance coverage. However, we see no public policy reason why the beneficiary of a statute of repose cannot bargain away, or even waive, that benefit. A warranty is a seller's indication of its confidence in, and its willingness to stand behind, its product. A business marketing its products may reasonably conclude that offering a warranty giving customers protection exceeding the limitations period will provide an edge over its competitors. A supplier of improvements to real property who is willing in good faith to provide a warranty that extends beyond six years should not be forced to offer a more limited warranty. The continuing popularity of extended warranties that allow a customer to purchase additional protection indicates both that buyers are mindful of the duration of warranty coverage and that sellers are aware that extended warranties provide value. Therefore, we conclude that the six-year repose period set out in the statute provides valuable protection to those who make improvements to real property, but that the beneficiaries of the statute of repose may choose to forego that protection without violating any rule of public policy.

Here, GrailCoat advertised its product to plaintiffs as being "fully warranted" for twenty years but now claims that this warranty covered only the first six years after its product was applied and that the remaining fourteen of those twenty years were a nullity. A warranty that a seller knows is unenforceable is a sham, useful only to beguile the unsuspecting. Plaintiffs' evidence indicated that they carefully researched SuperFlex and other possible exterior cladding systems for their home and were influenced by GrailCoat's twenty-year warranty when making their final decision. As a result, we conclude that GrailCoat knowingly and freely entered into a contract of sale with plaintiffs in which GrailCoat bargained away the protections of the statute of repose. The contract at issue provided for a warranty of twenty years. That warranty stands in its entirety. Accordingly, we reverse the holding of the Court of Appeals affirming the trial court's dismissal of plaintiffs' claim for breach of express warranty against GrailCoat.

We conclude that discretionary review was improvidently allowed as to the remaining two issues.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

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

DICKSON v. RUCHO

[367 N.C. 542 (2014)]

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, 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. 201PA12-2

(Filed 19 December 2014)

1. Elections—redistricting—race as predominant factor—strict scrutiny—truncated facts—nothing to gain on remand

In an action concerning the setting of new electoral districts after the 2010 census, whether the predominant factor in the formation of the districts could fairly be described as race and whether strict scrutiny was the appropriate standard of review could not be determined because of the trial court's truncated findings of fact. The trial court's error in concluding as a matter of law that the General Assembly was motivated predominantly by race was not fatal because plaintiffs could gain nothing on remand.

2. Elections—redistricting—Voting Rights Act—compelling state interest

Because the Supreme Court of the United States and the United States Congress have indicated without ambiguity that they expect states to comply with the Voting Rights Act, state laws passed for the purpose of complying with the Act must be capable of surviving strict scrutiny, indicating that such compliance is a compelling state interest. Moreover, the General Assembly's desire to comply with the Voting Rights Act is justifiable for other reasons, including that elections are a core state function, that establishing voting districts is an essential component of holding elections, and that a state is subject to federal mandates in addition to those found in the Voting Rights Act and the Fourteenth Amendment.

3. Elections—redistricting—Voting Rights Act—race-based remedial action—narrowly tailored

In an action concerning the setting of new electoral districts after the 2010 census, the trial court's findings supported its conclusion that defendants established a compelling state interest in creating districts that would avoid liability under the Voting Rights Act (VRA). Evidence of a history of discrimination justified the General Assembly's concern about retrogression and compliance with the VRA, and the General Assembly had a strong basis in evidence on which to reach a conclusion that race-based remedial action was necessary for each VRA district. The redistricting was sufficiently narrowly tailored to advance those state interests and plaintiffs failed to demonstrate improper packing or gerrymandering based upon race.

4. Elections—redistricting—proportionality—not a dispositive factor

In an action concerning the setting of new electoral districts after the 2010 census, the General Assembly's consideration of rough proportionality was merely a means of avoiding voter dilution and potential Voting Rights Act liability, not an attempt to trade the rights of some minority voters against the rights of other members of the same minority class. Proportionality was not a dispositive factor, but merely one consideration of many described in the materials and other contributions from numerous organizations, experts, and lay witnesses.

5. Elections—redistricting—non-Voting Rights Act districts—race as dominant factor—not established

Plaintiffs failed to establish that race was the dominant factor in drafting electoral districts that were not drawn as Voting Rights Act (VRA) districts, and the trial court's application of the rational basis test was appropriate where the court's findings of fact supported its conclusions of law. The trial court found both racial and non-racial motivations, with neither category predominant in the establishment of the districts. Although plaintiffs argued that the evidence cited by the trial court was pretextual and implausible and contended that other evidence more favorable to their position was persuasive, plaintiffs did not contend that the evidence credited and cited by the trial court was not competent.

6. Elections—redistricting—N.C. Constitution—Whole County Provision

Plaintiffs did not successfully argue that that the trial court erred when it failed to find that redistricting plans following a census violated the Whole County Provision of the North Carolina Constitution. Plaintiffs contended that the plan violated *Stephenson v. Bartlett*, 355 N.C. 354, (*Stephenson I*) because it divided counties and traversed county lines to an unnecessary extent. Plaintiffs did not produce an alternative plan that better complied with a correct reading of *Stephenson I*'s fifth and sixth factors than the plans enacted by the General Assembly.

7. Elections—redistricting—N.C. Constitution—Good of the Whole clause

Plaintiffs' argument that redistricting plans violated the "Good of the Whole" clause found in Article I, Section 2 of the

Constitution of North Carolina failed because the claim was not based upon a justiciable standard, and because acts of the General Assembly enjoy "a strong presumption of constitutionality."

Justice BEASLEY concurring in part and dissenting in part.

Justice HUDSON joins in this opinion.

Appeal pursuant to N.C.G.S. § 120-2.5 from orders entered on 6 February 2012 and 8 July 2013 by a three-judge panel of the Superior Court, Wake County appointed by the Chief Justice under N.C.G.S. § 1-267.1. Heard in the Supreme Court on 6 January 2014.

Poyner Spruill LLP, by Edwin M. Speas, Jr., John W. O'Hale, and Caroline P. Mackie, for Dickson plaintiff-appellants; and Southern Coalition for Social Justice, by Anita S. Earls and Allison Riggs, and Tin Fulton Walker & Owen, PLLC, by Adam Stein, for NC NAACP plaintiff-appellants.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Thomas A. Farr and Phillip J. Strach, for legislative defendant-appellees; and Roy Cooper, Attorney General, by Alexander McC. Peters, Special Deputy Attorney General, for all defendant-appellees.

Jenner & Block LLP, by Paul M. Smith, pro hac vice, Jessica Ring Amunson, pro hac vice, and Michelle R. Singer, pro hac vice; and Smith Moore Leatherwood LLP, by Mark Anderson Finkelstein and Matthew Nis Leerberg, for Election Law Professors Guy-Uriel Charles, Gilda R. Daniels, Lani Guinier, Samuel Issacharoff, Justin Levitt, Janai S. Nelson, Spencer Overton, Richard H. Pildes, and Franita Tolson, amici curiae.

H. Jefferson Powell for North Carolina Law Professors Michael Curtis, Walter Dellinger, William P. Marshall, and H. Jefferson Powell, amici curiae.

Terry Smith, pro hac vice, and Ferguson, Chambers & Sumter, P.A., by Geraldine Sumter, for North Carolina Legislative Black Caucus, amicus curiae.

EDMUNDS, Justice.

Following the 2010 Decennial Census, the General Assembly of North Carolina enacted redistricting plans for the North Carolina Senate and House of Representatives, and for the North Carolina dis-

tricts for the United States House of Representatives. Plaintiffs challenge the legality of these plans, arguing that they violate the constitutions of the United States and of North Carolina, controlling federal statutes, and applicable decisions of the Supreme Court of the United States and the Supreme Court of North Carolina. The three-judge panel reviewing the plans unanimously concluded that the General Assembly applied traditional and permissible redistricting principles to achieve partisan advantage and that no constitutional violations resulted. After a careful and exhaustive review of the record in this case and the pertinent law, we conclude that, as to the twenty-six districts deliberately drawn to comply with the federal Voting Rights Act of 1965, the trial court erred when it applied strict scrutiny prematurely. However, plaintiffs were not prejudiced because even if strict scrutiny is not appropriate, these districts survive this most demanding level of review. As to the remaining challenged districts, we affirm the ruling of the trial court.

I. Procedural Background

The Constitution of North Carolina requires decennial redistricting of the North Carolina Senate and North Carolina House of Representatives, subject to several specific requirements. The General Assembly is directed to revise the districts and apportion Representatives and Senators among those districts. N.C. Const. art. II, §§ 3, 5. Similarly, consistent with the requirements of the Constitution of the United States, the General Assembly establishes North Carolina's districts for the United States House of Representatives after every decennial census. U.S. Const. art. I, §§ 2, 4; 2 U.S.C. §§ 2a, 2c (2012).

Following the census conducted with a date of 1 April 2010, leaders of the North Carolina House of Representatives and the North Carolina Senate independently appointed redistricting committees. Each committee was responsible for recommending a plan applicable to its own chamber, while the two committees jointly were charged with preparing a redistricting plan for the United States House of Representatives North Carolina districts. These committees sought information and suggestions from numerous sources, including the North Carolina Legislative Black Caucus and the North Carolina delegation to the United States Congress. In addition, these committees solicited input from various constituencies; invited public comment and conducted public hearings in multiple counties, including twenty-four of the forty counties then covered by section 5 of the Voting

Rights Act of 1965 (hereinafter "the Voting Rights Act" or "VRA");[1] heard both lay and expert testimony regarding such matters as racially polarized voting; solicited and received advice from the University of North Carolina School of Government; commissioned reports from independent experts to fill gaps in the evidence; and considered written submissions.

The General Assembly convened on 25 July 2011 to deliberate the redistricting plans drawn by the House and Senate committees. That same day, alternative maps were submitted by leaders of the Democratic Party and by the Legislative Black Caucus. On 27 July, the General Assembly ratified the 2011 North Carolina Senate redistricting plan and the 2011 plan for the federal House of Representatives districts. On 28 July, the General Assembly ratified the 2011 North Carolina House of Representatives redistricting plan. On 2 September 2011, the three plans were submitted to the United States Department of Justice for preclearance under section 5 of the Voting Rights Act, and preclearance was received on 1 November 2011.[2] Also on 2 September, a suit seeking preclearance was filed in the United States District Court for the District of Columbia. That action was dismissed on 8 November 2011.

On 3 November 2011, Margaret Dickson and forty-five other registered voters filed a complaint, seeking to have the three redistricting plans declared invalid on both constitutional and statutory grounds. These plaintiffs filed an amended complaint on 12 December 2011. On 4 November 2011, the North Carolina State Conference of Branches of the NAACP joined by three organizations and forty-six individuals filed a complaint seeking similar relief. These plaintiffs filed an amended complaint on 9 December 2011. Following the filing of the original complaints, the Chief Justice of the Supreme Court of North Carolina appointed a panel of three superior court judges to hear these actions, pursuant to N.C.G.S. § 1-267.1. On 19 December 2011, the three-judge panel ("the trial court") consolidated both cases for all purposes.

On 6 February 2012, the trial court allowed in part and denied in part defendants' motion to dismiss. Plaintiffs filed a motion for par-

1. Effective 1 September 2014, section 5 of the VRA is codified at 52 U.S.C.S. § 10304 (LexisNexis 2014). Section 5 previously was codified at 42 U.S.C.S. § 1973c.

2. Because a software glitch caused the State's initial submission to the Department of Justice to be incomplete, the General Assembly enacted curative statutes on 7 November 2011. These statutes were precleared on 8 December 2011.

tial summary judgment on 5 October 2012, and defendants filed a motion for summary judgment on 10 December 2012. The trial court heard arguments on these motions on 25 and 26 February 2013.

While a ruling on the motions for summary judgment was pending, the trial court issued an order determining that genuine issues of material fact existed as to two issues that could not be resolved by summary judgment. Accordingly, the court ordered a trial on these two issues, which it identified as:

A. Assuming application of a strict scrutiny standard and, in considering whether the Enacted Plans were narrowly tailored, was each challenged Voting Rights Act ("VRA") district drawn in a place where a remedy or potential remedy for racially polarized voting was reasonable for purposes of preclearance or protection of the State from vote dilution claims under the Constitution or under § 2 of the VRA?

B. For six specific districts (Senate Districts 31 and 32, House Districts 51 and 54 and Congressional Districts 4 and 12 – none of which is identified as a VRA district), what was the predominant factor in the drawing of those districts?

The court conducted the trial on 4 and 5 June 2013. On 8 July 2013, the trial court issued its unanimous "Judgment and Memorandum of Decision" denying plaintiffs' motion for partial summary judgment and entering summary judgment for defendants on all remaining claims. Plaintiffs entered timely notice of appeal pursuant to N.C.G.S. § 120-2.5.

II. Plaintiffs' Federal Claims

We begin by considering plaintiffs' claims brought under federal law. If a redistricting plan does not satisfy federal requirements, it fails even if it is consistent with the law of North Carolina. *See* U.S. Const. art. VI, § 2; N.C. Const. art. I, § 3. Plaintiffs argued first to the trial court, and now to us, that the redistricting plans violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States because they impermissibly classify individuals based upon their race. In other words, plaintiffs contend that the redistricting plans constitute impermissible racial gerrymandering that has denied them equal protection under the law.

A. Standards Applicable upon Review

[1] A court considering allegations of racial gerrymandering first must determine the appropriate standard of review. Strict scrutiny, the highest tier of review, applies "when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *White v. Pate*, 308 N.C. 759, 766, 304 S.E.2d 199, 204 (1983) (citations omitted). "Race is unquestionably a 'suspect class,' " *Phelps v. Phelps*, 337 N.C. 344, 353, 446 S.E.2d 17, 23 (1994), and if a court finds that race is the "predominant, overriding factor" behind the General Assembly's plans, the plans must satisfy strict scrutiny to survive, *Miller v. Johnson*, 515 U.S. 900, 920, 115 S. Ct. 2475, 2490, 132 L. Ed. 2d 762, 782 (1995). "Under strict scrutiny [review], a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest." *Stephenson v. Bartlett*, 355 N.C. 354, 377, 562 S.E.2d 377, 393 (2002) (hereinafter "*Stephenson I*") (citation omitted). If, on the other hand, the plans are not predominantly motivated by improper racial considerations, the court defaults to the rational basis test. *See Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 2331, 120 L. Ed. 2d 1, 12 (1992) ("[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification" satisfy rational basis review.). Under rational basis review, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985) (citations omitted).

A party challenging a redistricting plan has the burden of establishing that race was the predominant motive behind the state legislature's action. *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80. In *Miller*, the Supreme Court stated that

> [t]he plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect

> for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can "defeat a claim that a district has been gerrymandered on racial lines."

Id. (quoting *Shaw v. Reno*, 509 U.S. 630, 647, 113 S. Ct. 2816, 2827, 125 L. Ed. 2d 511, 529 (1993) (hereinafter "*Shaw I*")).

As a court considers which standard of review is appropriate, it should be mindful of the Supreme Court's observation that "courts must 'exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race.' " *Easley v. Cromartie*, 532 U.S. 234, 242, 121 S. Ct. 1452, 1458, 149 L. Ed. 2d 430, 443 (2001) (hereinafter "*Cromartie II*") (quoting *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779 (emphasis added)). At least three factors lie behind this admonition. First, in light of the interplay detailed below between the Fourteenth Amendment, which virtually forbids consideration of race, and the VRA, which requires consideration of race, the Supreme Court has acknowledged that the existence of legislative consciousness of race while redistricting does not automatically render redistricting plans unconstitutional. *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779 ("Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process."); *see also Shaw I*, 509 U.S. at 646, 113 S. Ct. at 2826, 125 L. Ed. 2d at 528 ("[T]he legislature always is *aware* of race when it draws district lines . . . . That sort of race consciousness does not lead inevitably to impermissible race discrimination."). Second, the Supreme Court has recognized the importance of States' own traditional districting principles, holding that States can adhere to them without being subject to strict scrutiny so long as those principles are not subordinated to race. *Bush v. Vera*, 517 U.S. 952, 978, 116 S. Ct. 1941, 1961, 135 L. Ed. 2d 248, 269 (1996) (plurality). Finally, the Supreme Court has accepted that some degree of deference is due in light of the difficulties facing state legislatures when reconciling conflicting legal responsibilities. *Id.* at 1038, 116 S. Ct. at 1991, 135 L. Ed. 2d at 308 (Stevens, Ginsburg & Breyer, JJ., dissenting); *see also Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2014 WL 5019686, at *6-7 (E.D. Va. Oct. 7, 2014) (determination by three-judge court in accordance with 52 U.S.C.S. § 10304(2)) (recognizing that redistricting is "possibly 'the most difficult task a legislative body ever undertakes' " (citation omitted)).

A court's determination of the predominant motive underlying a redistricting plan is factual in nature. *Hunt v. Cromartie*, 526 U.S. 541, 549, 119 S. Ct. 1545, 1550, 143 L. Ed. 2d 731, 740 (1999) (hereinafter "*Cromartie I*" (citations omitted)). Factual findings are binding on appeal if not challenged at trial or on appeal, *e.g.*, *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991), or if supported by competent evidence found by the trial judge, *e.g.*, *In re Estate of Trogdon*, 330 N.C. 143, 147-48, 409 S.E.2d 897, 900 (1991). Conclusions of law are reviewed de novo. *E.g.*, *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc.*, 366 N.C. 505, 512, 742 S.E.2d 781, 786 (2013) (citation omitted). Here, of the thirty challenged House, Senate, and Congressional districts, the trial court concluded that twenty-six were predominantly motivated by race and thus subject to strict scrutiny review. The trial court concluded that the remaining four challenged districts were not predominantly motivated by race and thus were subject to rational basis review. We consider each group in turn.

B. The VRA Districts

We turn first to the twenty-six districts that the trial court subjected to strict scrutiny. As to these districts, the trial court reached two significant conclusions. First, the court unanimously found that "it is undisputed that the General Assembly intended to create 26 of the challenged districts to be 'Voting Rights Act districts' " that would include a Total Black Voting Age Population of at least fifty percent. This unchallenged finding of fact is binding on us. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. The trial court then reached a second unanimous conclusion that drawing such districts "necessarily requires the drafters of districts to classify residents by race," that the "shape, location and racial composition of each VRA district was predominantly determined by a racial objective," and that the process of creating such districts resulted in "a racial classification sufficient to trigger the application of strict scrutiny as a matter of law." Although this second determination by the trial court is neither purely factual nor purely legal, we are mindful that federal precedent cited above instructs that the General Assembly's consideration of race to the degree necessary to comply with section 2 does not rise to the level of a "predominant motive" as a matter of course. Accordingly, before reviewing the trial court's application of strict scrutiny, we believe it necessary to review its conclusion as to the General Assembly's predominant motive.

1. Predominant Motive

The challenges faced by the General Assembly while redistricting are easy to express but persistently difficult to resolve. The Fourteenth Amendment, by guaranteeing equal protection for all citizens regardless of race, virtually prohibits consideration of race during redistricting. U.S. Const. amend. XIV, § 1. Yet the Voting Rights Act, passed "to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall 'be denied or abridged . . . on account of race, color, or previous condition of servitude,' " *Voinovich v. Quilter*, 507 U.S. 146, 152, 113 S. Ct. 1149, 1154-55, 122 L. Ed. 2d 500, 510 (1993) (alteration in original) (citations omitted), specifically requires consideration of race. For instance, section 2 "prohibits the imposition of any electoral practice or procedure that 'results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color.' " *Id.* at 152, 113 S. Ct. at 1155, 122 L. Ed. 2d at 510 (quoting 42 U.S.C. § 1973(a) (alteration in original) (effective 1 September 2014, recodified as 52 U.S.C.S. § 10301(a) (LexisNexis 2014)). At the same time, the General Assembly must ensure that each district complies with federal and state "one-person, one-vote" standards, *see* N.C. Const. art. II, §§ 3(1), 5(1); *Reynolds v. Sims*, 377 U.S. 533, 565-66, 84 S. Ct. 1362, 1383-85, 12 L. Ed. 2d 506, 529-30 (1964); *Baker v. Carr*, 369 U.S. 186, 207-08, 82 S. Ct. 691, 705, 7 L. Ed. 2d 663, 680 (1962), and that, to the greatest extent allowed under federal law, the redistricting plans comply with the Whole County Provision of our state constitution, *Stephenson I*, 355 N.C. at 382-84, 562 S.E.2d at 395-97. Moreover, the Supreme Court of the United States has acknowledged other legitimate considerations, such as compactness, contiguity, and respect for political subdivisions, *see Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 780; *Shaw I*, 509 U.S. at 646, 113 S. Ct. 2826, 125 L. Ed. 2d at 528; *Reynolds*, 377 U.S. at 578, 84 S. Ct. at 1390, 12 L. Ed. 2d at 537; political advantage, *see Cromartie I*, 526 U.S. at 551, 119 S. Ct. at 1551, 143 L. Ed. 2d at 741; and accommodation of incumbents, *see Karcher v. Daggett*, 462 U.S. 725, 740, 103 S. Ct. 2653, 2663, 77 L. Ed. 2d 133, 147 (1983). Thus, "[t]he courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Miller*, 515 U.S. at 915-16, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779.

Despite this cat's cradle of factors facing the General Assembly, the trial court found that no factual inquiry was required regarding the General Assembly's predominant motivation in forming the

twenty-six VRA districts beyond the General Assembly's concession that the districts were drafted to be VRA-compliant. In light of the many other considerations potentially in play, we do not believe that this concession established that race *ipso facto* was the predominant motive driving the General Assembly. Because of the trial court's truncated findings of fact on this issue, we do not know which other factors may have influenced the creation and shape of these twenty-six districts and the extent of any such influence. As a result, we do not know whether race fairly can be described as the predominant factor in the formation of these districts and whether, in turn, strict scrutiny was the appropriate standard of review. Moreover, in future cases such an assumption—that deliberate creation of VRA-compliant districts equates to race as the predominant motive in creating the districts—may well shortcut the fact-finding process at which trial courts excel, resulting in scanty records on appeal. Accordingly, we hold that the trial court erred in concluding as a matter of law that, just because the twenty-six districts were created to be VRA-compliant, the General Assembly was motivated predominantly by race.

Nonetheless, this error is not fatal and does not invalidate the trial court's order. A similar scenario played out in *Cromartie I*, in which the courts reviewed the General Assembly's creation of North Carolina's Twelfth Congressional District. 526 U.S. at 543, 119 S. Ct. at 1547, 143 L. Ed. 2d at 736. The plaintiffs filed suit in federal court, arguing that the district was the result of an unconstitutional racial gerrymander. *Id.* at 544-45, 119 S. Ct. at 1548, 143 L. Ed. 2d at 737. The three-judge panel of the United States District Court heard arguments pertaining to pending motions, but did not conduct an evidentiary hearing. *Id.* at 545, 119 S. Ct. at 1548, 143 L. Ed. 2d at 737. The panel majority, finding that the General Assembly used race-driven criteria in drawing the district and that doing so violated the Equal Protection Clause of the Fourteenth Amendment, granted the plaintiffs' motion for summary judgment and entered an injunction. *Id.* On appeal, the Supreme Court reversed, finding that the General Assembly's motivation in drawing district lines is a factual question that, when contested, should not be resolved by summary judgment. 526 U.S. at 549, 553, 119 S. Ct. at 1550, 1552, 143 L. Ed. 2d at 740, 742.

The posture of the litigants here is distinguishable because plaintiffs, unlike their counterparts in *Cromartie I*, lost at summary judgment and are the appealing party. However, even if we were to follow *Cromartie I*'s lead and reverse, plaintiffs could gain nothing on

remand. The basis for our reversal would be that the trial court erred in applying strict scrutiny before making adequate findings of fact. As the trial court noted in its order, if defendants' plans survived strict scrutiny, they would surely survive a less rigorous review. On the other hand, if the trial court on remand found facts and determined once more that strict scrutiny is proper, the panel has already conducted its analysis under that standard. Although the dissent argues that the case should be remanded for additional findings, the record on which it would base those findings—which we have reviewed in detail—would not have changed. As a result, reversing and remanding to the trial court to make findings of fact and conclusions of law would achieve nothing but delay. *See e.g.*, *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6, 89 S. Ct. 1426, 1430 n.6, 22 L. Ed. 2d 709, 715 n.6 (1969) (plurality) (stating that, when reviewing an agency decision that was based upon an incorrect standard, "it would be useless to remand" because "[t]here is not the slightest uncertainty" that the outcome would remain unchanged). Accordingly, as we review the voluminous record and the trial court's exhaustive analysis, we will proceed on the presumption that strict scrutiny is appropriate and apply that standard as we review the trial court's analysis. If these plans survive strict scrutiny, they survive rational basis review.

2. Compelling Governmental Interest

[2] We begin this analysis by considering the factors that defendants contend constitute a "compelling governmental interest." *See Stephenson I*, 355 N.C. at 377, 562 S.E.2d at 393 (citation omitted). Defendants argue that the General Assembly drafted the twenty-six districts both to avoid liability under section 2 of the VRA and to obtain preclearance under section 5 of the VRA by avoiding retrogression, which has been defined as "a change in voting procedures which would place the members of a racial or language minority group in a less favorable position than they had occupied before the change with respect to the opportunity to vote effectively." *Id.* at 363-64, 562 S.E.2d at 385 (citations omitted). Defendants' brief acknowledges that three principles guided the General Assembly: (1) Compliance with the Whole County Provision of the Constitution of North Carolina, as set out in *Stephenson I* and *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (hereinafter "*Stephenson II*"); (2) Where possible, establishment of VRA districts having a Total Black Voting Age Population above fifty percent, in accord with *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007) (hereinafter "*Pender County*"), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1,

129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009) (hereinafter "*Strickland*") (plurality); and (3) Exploration of "the possibility of establishing a sufficient number of VRA legislative districts to provide African American voters with rough proportionality in the number of VRA districts in which they have a reasonable opportunity to elect their candidates of choice."

Although the Supreme Court of the United States has never held outright that compliance with section 2 or section 5 can be a compelling state interest, the Court has issued opinions that expressly assumed as much. To be specific, the Supreme Court in *Shaw v. Hunt* assumed *arguendo* that compliance with section 2 could be a compelling state interest, 517 U.S. 899, 915, 116 S. Ct. 1894, 1905, 135 L. Ed. 2d 207, 225 (1996) (hereinafter "*Shaw II*"), and adopted a similar approach in *Miller*, where the issue was the State's desire to comply with section 5 of the Voting Rights Act, 515 U.S. at 921, 115 S. Ct. at 2490-91, 132 L. Ed. 2d at 783. In addition, the Supreme Court has observed that "deference is due to [States'] reasonable fears of, and to their reasonable efforts to avoid, § 2 liability." *Vera*, 517 U.S. at 978, 116 S. Ct. at 1961, 135 L. Ed. 2d at 269 (plurality). The trial court here, footnoting several federal cases addressing the issue, stated that "[i]n general, compliance with the Voting Rights Act can be a compelling governmental interest." Faced squarely with the issue, we agree with the trial court. The Equal Protection Clause of the Fourteenth Amendment requires equal treatment regardless of race, while the Voting Rights Act requires consideration of race. Because the Constitution of the United States trumps any federal statute, a State's efforts to comply with the Voting Rights Act creates tension with the Fourteenth Amendment. Any violation of the latter triggers strict scrutiny, mandating that the State demonstrate a compelling interest. Because the Supreme Court of the United States and the United States Congress have indicated without ambiguity that they expect States to comply with the Voting Rights Act, state laws passed for the purpose of complying with the Act must be capable of surviving strict scrutiny, indicating that such compliance is a compelling state interest.[3] This analysis applies equally to a State's efforts to comply with sections 2 and 5 of the Voting Rights Act.

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3. "If compliance with § 5 were not a compelling state interest, then a State could be placed in the impossible position of having to choose between compliance with § 5 and compliance with the Equal Protection Clause." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 518, 126 S. Ct. 2594, 2667, 165 L. Ed. 2d 609, 694 (2006) (hereinafter "*LULAC*") (Scalia, J., Thomas, J., Roberts, C.J. & Alito, J., dissenting in part).

Moreover, the General Assembly's desire to comply with the Voting Rights Act is justifiable for other reasons. Holding elections is a core State function, fundamental in a democracy. Establishing voting districts is an essential component of holding elections. In doing so, a State is subject to federal mandates in addition to those found in the Voting Rights Act and the Fourteenth Amendment, such as the "one-person, one-vote" requirement. *Stephenson I*, 355 N.C. at 363-64, 383, 562 S.E.2d at 384-85, 397. A determination that the State does not have a compelling interest in complying with federal mandates would invite litigation by those claiming that the State could never satisfy the requirements of strict scrutiny, undermining the General Assembly's efforts to create stable districts between censuses and citizen expectations that existing election districts are valid. On a level no less practical, we also assume that North Carolina, and all States for that matter, would prefer to avoid the expense and delay resulting from litigation. Accordingly, we hold that compliance with sections 2 and 5 of the Voting Rights Act may be a compelling state interest.

[3] We next consider whether compliance with either section 2 or section 5 constitutes a compelling state interest under the facts presented here. Those goals may reach the level of a compelling state interest if two conditions are satisfied. First, the General Assembly must have identified past or present discrimination with some specificity before it could turn to race-conscious relief. *Shaw II*, 517 U.S. at 909, 116 S. Ct. at 1902, 135 L. Ed. 2d at 221 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504, 109 S. Ct. 706, 727, 102 L. Ed. 2d 854, 889 (1989)). Second, before acting, the General Assembly must also have "had 'a strong basis in evidence' " on which to premise a conclusion that the race-based remedial action was necessary. *Id.* at 910, 116 S. Ct. at 1903, 135 L. Ed. 2d at 222 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277, 106 S. Ct. 1842, 1849, 90 L. Ed. 2d 260, 271 (1986) (plurality)).

a. Compelling Interest Under Section 2 of the Voting Rights Act

Before we turn our attention to consideration of individual districts, we consider the application of section 2 of the VRA in the instant case. "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S. Ct. 2752, 2764, 92 L. Ed. 2d 25, 44 (1986); *see* 52 U.S.C.S. §§ 10301-10702 (LexisNexis 2014). The question of voting discrimination *vel non*, including vote dilution, is deter-

mined by the totality of the circumstances. *Gingles*, 478 U.S. at 43-46, 106 S. Ct. at 2762-64, 92 L. Ed. 2d at 42-44 (discussing section 2(b) of the VRA, now codified at 52 U.S.C.S. § 10301(b)). However, under *Gingles*, a reviewing court does not reach the totality of circumstances test unless the challenging party is able to establish three preconditions. *Id.* at 50-51, 106 S. Ct. at 2766-67, 92 L. Ed. 2d at 46-47. First, a "minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50, 106 S. Ct. at 2766, 92 L. Ed. 2d at 46. Second, the minority group must "show that it is politically cohesive." *Id.* at 51, 106 S. Ct. at 2766, 92 L. Ed. 2d at 47. Finally, the minority group must "be able to demonstrate that the majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 51, 106 S. Ct. at 2766-67, 92 L. Ed. 2d at 47. Although *Gingles* dealt with multi-member districts, the same preconditions must be met when a claim of vote dilution is made regarding a single-member district. *Growe v. Emison*, 507 U.S. 25, 40-41, 113 S. Ct. 1075, 1084, 122 L. Ed. 2d 388, 403-04 (1993); *see also Johnson v. De Grandy*, 512 U.S. 997, 1006-07, 114 S. Ct. 2647, 2654-55, 129 L. Ed. 2d 775, 788 (1994).

Unlike cases such as *Gingles*, in which minority groups use section 2 as a sword to challenge districting legislation, here we are considering the General Assembly's use of section 2 as a shield. Defendants argue that, because the *Gingles* test considers race, the State has a compelling interest in preemptively factoring race into its redistricting process to ensure that its plans would survive a legal challenge brought under section 2. To establish that this state interest is legitimate, defendants must show a strong basis in evidence that the possibility of a section 2 violation existed at the time of the redistricting. *See Shaw II*, 517 U.S. at 910, 916, 116 S. Ct. at 1903, 1905-06, 135 L. Ed. 2d at 222, 225-26. However, because this inquiry addresses only the possibility of a section 2 violation, and because a totality of the circumstances inquiry is by its nature fact-specific, defendants' evidence need only address "the three *Gingles* preconditions" to establish a compelling governmental interest. *See Vera*, 517 U.S. at 978, 116 S. Ct. at 1961, 135 L. Ed. 2d at 269 (citing *Growe*, 507 U.S. at 40, 113 S. Ct. at 1084, 122 L. Ed. 2d at 403-04).

Thus, to establish a compelling interest in complying with section 2 when the redistricting plans were developed, the legislature at that time must have had a strong basis in evidence that the Total Black Voting Age Population in a geographically compact area was fifty per-

cent plus one of the area's voting population. Such evidence would satisfy the first *Gingles* precondition. *Pender Cnty.*, 361 N.C. at 503, 649 S.E.2d at 372. In addition, a strong basis in evidence of racially polarized voting in that same geographical area would satisfy the second and third preconditions set out in *Gingles*. *LULAC*, 548 U.S. at 427, 126 S. Ct. at 2615, 165 L. Ed. 2d at 637 (majority). Against this background, we consider the trial court's application of these standards in discerning whether defendants here could legitimately claim a compelling interest in complying with section 2.

The trial court's order included several extensive appendices. In the body of the order, the trial court described the legislative record that existed when the plans were enacted, then referred to Appendix A, where this information was presented in detail. Appendix A, titled "Findings of Fact Relevant to the Issue of Racial Polarization in Specific Locations where Voting Rights Act Districts were Placed in the Enacted Plans," is incorporated by reference into the trial court's order.

Appendix A is broken into three parts. Part I, titled "General Findings of Fact," opens with a summary of the background of the case, then notes results of recent elections. For instance, the trial court observed that all African-American incumbents elected to the North Carolina General Assembly or the United States Congress in 2010 were elected in districts that were either majority African-American or majority-minority coalition districts. In addition, no African-American candidate elected in 2010 was elected from a majority white crossover district, and two African-American incumbent state senators running in majority white districts were defeated in that election. No African-American candidate for the United States Congress was elected in a majority white district between 1992 and 2010, while from 2004 through 2010, no African-American candidate was elected to office in a statewide partisan election.

In this Part I of Appendix A, the court also considered an academic study of racially polarized voting conducted by Ray Block, Jr., Ph.D. This study, prepared for the Southern Coalition of Social Justice, is titled "Racially Polarized Voting in 2006, 2008, and 2010 in North Carolina State Legislative Contests." Dr. Block employed Justice Brennan's conclusion in *Gingles* that racially polarized voting occurs when there is a consistent relationship between the race of the voter and the way in which that person votes, and found that such a relationship existed in the areas examined. He added that he also found evidence that "majority-minority districts facilitate the election

of African American candidates." The court determined that Dr. Block's study provided "substantial evidence regarding the presence of racially polarized voting in almost all of the counties[4] in which the General Assembly enacted the 2011 VRA districts."

Nevertheless, the trial court observed that the North Carolina General Assembly identified a few limitations in Dr. Block's study. For instance, the study did not pinpoint the percentage of white voters in majority African-American or majority-minority districts who voted for the candidate of choice of African-American voters. In addition, his study could analyze a legislative election only when the African-American candidate had opposition. As a result, the General Assembly commissioned Thomas L. Brunell, Ph.D. to prepare a supplementary report. Dr. Brunell's study, titled "Report on Racially Polarized Voting in North Carolina," examined the forty North Carolina counties covered by section 5 of the Voting Rights Act, plus Columbus, Duplin, Durham, Forsyth, Jones, Mecklenburg, Richmond, Sampson, Tyrrell, Wake, and Warren Counties. Dr. Brunell found "statistically significant racially polarized voting" in fifty of these fifty-one counties.

The trial court made additional findings of fact in Part I of Appendix A that we believe would be pertinent to a *Gingles* totality of circumstances test and that, by extension, indicate a strong basis in evidence that the *Gingles* preconditions existed. At the beginning of the redistricting process, the General Assembly noted that North Carolina had been ordered to create majority African-American districts as a remedy for section 2 violations in Bertie, Chowan, Edgecombe, Forsyth, Gates, Halifax, Martin, Mecklenburg, Nash, Northampton, Wake, Washington, and Wilson Counties. *See Gingles v. Edmisten*, 590 F. Supp. 345, 365-66, 376 (E.D.N.C. 1984), *aff'd in part*, *rev'd in part sub nom.*, *Thornburg v. Gingles*, 478 U.S. at 80, 106 S. Ct. at 2782, 92 L. Ed. 2d at 65. Faculty at the North Carolina School of Government advised the chairs of the General Assembly's redistricting committees that North Carolina is still bound by the holding in *Gingles*. In addition, the United States District Court noted on remand from the decision in *Cromartie I* that the parties there had stipulated that legally significant racially polarized voting was present in North Carolina's First Congressional District. *Cromartie v. Hunt*, 133 F.

4. These counties were Beaufort, Bertie, Chowan, Craven, Cumberland, Durham, Edgecombe, Gates, Guilford, Granville, Greene, Halifax, Hertford, Hoke, Jones, Lenoir, Martin, Mecklenburg, Nash, Northampton, Pasquotank, Perquimans, Pitt, Robeson, Sampson, Scotland, Vance, Wake, Warren, Washington, Wayne, and Wilson.

Supp. 2d 407, 422-23 (E.D.N.C. 2000), *rev'd*, *Cromartie II*, 532 U.S. 234, 121 S. Ct. 1452, 149 L. Ed. 2d 430. The trial court found that consideration of race in the construction of the First District was reasonably necessary to protect the State from liability under the Voting Rights Act. *Id.* at 423. This finding by the trial court was not appealed and thus is not affected by the holding in *Cromartie II* and remains good law.

In addition, the trial court found as fact that the documents submitted by plaintiffs included a law review article prepared by an attorney for the North Carolina NAACP. Anita S. Earls et al., *Voting Rights in North Carolina 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 577 (2008). The court observed that this article "also provided evidence of racially polarized voting as alleged or established in voting rights lawsuits filed in many of the counties[5] in which 2011 VRA districts were enacted." The court added as a finding of fact that no witness testified that racial polarization had disappeared either statewide or in those areas in which the General Assembly previously had created VRA districts.

In Part II of Appendix A, the trial court conducted an individualized analysis of each of the VRA districts created by the General Assembly in 2011. Generally, each finding of fact relates to one district. While four of the findings of fact deal with more than one district, in each such instance those districts are situated within the same county. Each finding of fact in this Part II follows a similar pattern. The finding of fact begins with data that explain how the information in Part I of the Appendix applies to the district under examination. The finding of fact lists the counties included in the district, along with that district's Total Black Voting Age Population. This information is pertinent to the first *Gingles* precondition, that the minority group is able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. *See Pender Cnty.*, 361 N.C. at 503, 649 S.E.2d at 372 (discussing *Gingles*, 478 U.S. at 50, 106 S. Ct. at 2766, 92 L. Ed. 2d at 46). Subsequent sections of each finding of fact set out how racially polarized voting was found in many of the counties contained within the district or districts, under either Dr. Block's analysis or Dr. Brunell's analysis, or both. This information is pertinent to both the second and

5. The article included references to cases involving the following counties: Beaufort, Bladen, Cumberland, Duplin, Forsyth, Franklin, Granville, Halifax, Lenoir, Montgomery, Pasquotank, Person, Pitt, Richmond, Sampson, Scotland, Tyrrell, Vance, Wayne, and Washington.

third *Gingles* preconditions: that the minority group is politically cohesive and that the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *LULAC*, 548 U.S. at 427, 126 S. Ct. at 2615, 165 L. Ed. 2d at 637. Additional information in the finding of fact conveys how many counties within the district or districts are affected by *Gingles* or *Cromartie II*, or both. This information is useful in determining the totality of circumstances.

Plaintiffs have not challenged any of the trial court's findings of fact relating to the twenty-six VRA districts, and thus those findings are binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. The trial court's findings of fact indicate that each of the challenged districts had a Total Black Voting Age Population exceeding fifty percent, thus satisfying the first *Gingles* precondition. *See Pender Cnty.*, 361 N.C. at 503, 649 S.E.2d at 372. The facts found by the trial court also indicate that the maps are sufficient to satisfy the second and third *Gingles* preconditions, as each district demonstrates racially polarized voting according to Dr. Brunell's analysis. *See LULAC*, 548 U.S. at 427, 126 S. Ct. at 2615, 165 L. Ed. 2d at 637. Although Dr. Block's analysis did not cover some of the counties in some of the challenged districts, where the two studies overlapped, they reached the same conclusions.

Moreover, the trial court made additional findings of fact, recited above, that would be relevant to the *Gingles* totality of circumstances test for twenty-two of the challenged VRA districts.[6] Specifically, of the twenty-six VRA districts challenged here, fifteen include counties lying within the area where the *Gingles* court found section 2 violations; nine include counties lying within the area which the parties in the *Cromartie* litigation stipulated to have racially polarized voting; and thirteen included counties that were subject to various section 2 lawsuits filed between 1982 and 2006 in which plaintiffs alleged or established racially polarized voting.[7] While we assume from the Supreme Court's language in *Vera*, 517 U.S. at 978, 116 S. Ct. at 1960-61, 135 L. Ed. 2d at 269, that satisfaction of the *Gingles* preconditions is sufficient to trigger a State's compelling interest in avoiding section 2 liability, we believe that this additional evidence, while pertaining to only some of the covered districts, is consistent with and reinforces the trial court's conclusions of law.

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6. The districts not affected by this evidence are Senate 28, House 29, House 31, and House 57.

7. The only districts not affected by at least one of these three pieces of evidence are Senate 28, House 29, House 31, and House 57.

Based upon the totality of this evidence, we are satisfied that the trial court correctly found that the General Assembly identified past or present discrimination with sufficient specificity to justify the creation of VRA districts in order to avoid section 2 liability. *See Shaw II*, 517 U.S. at 909, 116 S. Ct. at 1902, 135 L. Ed. 2d at 221. In addition, we see that the General Assembly, before making its redistricting decisions, had a strong basis in evidence on which to reach a conclusion that race-based remedial action was necessary for each VRA district. *Id.* at 910, 116 S. Ct. at 1903, 135 L. Ed. 2d at 222. Accordingly, we conclude that the trial court's findings of fact as to these VRA districts support its conclusion of law that defendants established a compelling state interest in creating districts that would avoid liability under section 2 of the Voting Rights Act.

b. Compelling Governmental Interest under Section 5 of the Voting Rights Act

As noted above, forty of North Carolina's one hundred counties were covered by section 5 at the time of redistricting. This section, which prevents retrogression, forbids "[a]ny voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice." 52 U.S.C.S. § 10304(b).[8] Section 5 requires preclearance, either by the United States Department of Justice or by a three-judge panel of the United States District Court for the District of Columbia, of any election procedure that is different from that in force on the relevant coverage date. *See Perry v. Perez*, ___ U.S. ___, ___, 132 S. Ct. 934, 939, 181 L. Ed. 2d 900, 904 (2012) (per curiam) (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S 193, 198, 129 S. Ct. 2504, 2509, 174 L. Ed. 2d 140, 147 (2009)). The Supreme Court has left no doubt, however, that in fashioning its redistricting plans, a State must comply with the substantive requirements of section 5, not merely obtaining preclearance from the Department of Justice. *Miller*, 515 U.S. at 922, 115 S. Ct. at 2491, 132 L. Ed. 2d at 783. As the Supreme Court intimated in *Miller*, the Department of Justice is not infallible, so courts have "an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest." *Id.* Section 5 does

8. This statute no longer applies in North Carolina. *Shelby Cnty. v. Holder*, ___ U.S. ___, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013).

not "give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression. A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw I*, 509 U.S. at 655, 113 S. Ct. at 2831, 125 L. Ed. 2d at 534.

We concluded above that compliance with section 5 is a compelling state interest. Turning then to the facts of this case, we take into account the evidence recited above in our discussion regarding the State's concern about possible section 2 liability. In addition, the appendices to the trial court's order indicate that all of North Carolina Senate Districts 5, 21, and 28, and all of North Carolina House Districts 5, 7, 12, 24, 42, and 57, are in counties covered by section 5. Also, section 5 covers most of the territory contained in United States Congressional District One, Senate Districts 4 and 20, and House Districts 21, 32, and 48. Moreover, all of the twenty-six challenged districts contain areas that previously have been part of majority-minority districts. As a result of their connection with counties covered under section 5, these districts may become subject to nonretrogression analysis. *Georgia v. Ashcroft*, 539 U.S. 461, 479, 123 S. Ct. 2498, 2511, 156 L. Ed. 2d 428, 451 (2003) ("[I]n examining whether the new plan is retrogressive, the inquiry must encompass the entire statewide plan as a whole. Thus, while the diminution of a minority group's effective exercise of the electoral franchise in one or two districts may be sufficient to show a violation of § 5, it is only sufficient if the covered jurisdiction cannot show that the gains in the plan as a whole offset the loss in a particular district." (internal citations omitted)). Accordingly, we conclude from the totality of the evidence that a history of discrimination justified the General Assembly's concern about retrogression and compliance with section 5. We further conclude that the General Assembly had a strong basis in evidence on which to reach a conclusion that race-based remedial action was necessary.

3. Narrow Tailoring

Having determined that defendants had a compelling interest both in avoiding section 2 liability and in avoiding retrogression under section 5, we now consider whether the redistricting was sufficiently narrowly tailored to advance those state interests as to the twenty-six districts created to comply with the Voting Rights Act. *See Stephenson I*, 355 N.C. at 377, 562 S.E.2d at 393. In the context of redistricting,

> the "narrow tailoring" requirement of strict scrutiny allows the States a limited degree of leeway in furthering such interests [as VRA compliance]. If the State has a "strong basis in evidence" for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2, and the districting that is based on race "substantially addresses the § 2 violation," it satisfies strict scrutiny.

Vera, 517 U.S. at 977, 116 S. Ct. at 1960, 135 L. Ed. 2d at 268 (internal citations omitted). Thus, while a State does not have a free hand when crafting districts with the intent of avoiding section 2 liability, the Supreme Court has acknowledged that "[a] § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests.' " *Id.* at 977, 116 S. Ct. at 1960, 135 L. Ed. 2d at 269.

As discussed above, the trial court found that the General Assembly designed each of the challenged districts to consist of a Total Black Voting Age Population exceeding fifty percent of the total voting age population in that district. We have held that doing so is permissible as a method of addressing potential liability under section 2. *Pender Cnty.*, 361 N.C. at 503, 649 S.E.2d at 372. Unlike redistricting plans that have been faulted for setting arbitrary thresholds for Total Black Voting Age Population, *see, e.g.*, *Page*, 2014 WL 5019686, at *6 (citing and quoting *Smith v. Beasley*, 946 F. Supp. 1174, 1207 (D.S.C.) (1996)), the target of fifty percent plus one of the Total Black Voting Age Population chosen by North Carolina's General Assembly is consistent with the requirements of the first *Gingles* precondition. Nevertheless, because section 2 limits the use of race in creating remedial districts by allowing race to be considered only to the extent "reasonably necessary" for compliance, the question arises whether the percentages of Total Black Voting Age Population in each of North Carolina's challenged districts are higher than "reasonably necessary" to avoid the risk of vote dilution. *See Vera*, 517 U.S. at 979, 116 S. Ct. at 1961, 135 L. Ed. 2d at 269.

The Total Black Voting Age Population percentage ranges from a low of 50.45% to a high of 57.33% in the twenty-six districts in question. However, the *average* Total Black Voting Age Population of the challenged districts is only 52.28%. Twenty-one of the twenty-six districts have Total Black Voting Age populations of less than 53%, and only two of these districts, Senate 28 and House 24, exceed 55% Total

Black Voting Age Population. We are mindful that a host of other factors were considered in addition to race, such as the Whole County Provision of the Constitution of North Carolina, protection of incumbents, one-person, one-vote requirements and partisan considerations. As a result, we are satisfied that these districts are sufficiently narrowly tailored. They do not classify individuals based upon race to an extent greater than reasonably necessary to comply with the VRA, while simultaneously taking into account traditional districting principles.

Plaintiffs argue that creating districts with a Total Black Voting Age Population percentage exceeding fifty percent constitutes impermissible racial packing, citing *Vera*, 517 U.S. at 983, 116 S. Ct. at 1963, 135 L. Ed. 2d at 272; *Missouri v. Jenkins*, 515 U.S. 70, 88, 115 S. Ct. 2038, 2049, 132 L. Ed. 2d 63, 80 (1995); and *Shaw I*, 509 U.S. at 655, 113 S. Ct. at 2831, 125 L. Ed. 2d at 534. Plaintiffs also argue that districts with a Total Black Voting Age Population exceeding fifty percent are not automatically necessary because minority voters in crossover and coalition districts have elected candidates of their choice where the Total Black Voting Age Population was between forty and fifty percent. However, this Court previously has considered, but declined to adopt, similar arguments. *Pender Cnty.*, 361 N.C. at 502-04, 649 S.E.2d at 371-73. We concluded in that case that applying a bright line rule—that the presence of more than fifty percent of the Total Black Voting Age Population satisfied the first *Gingles* prong—was logical and gave the General Assembly "a safe harbor for the redistricting process." *Id.* at 505, 649 S.E.2d at 373.

Although the burden is upon the State under strict scrutiny, the parties challenging the redistricting must also make a showing.

> In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.

Cromartie II, 532 U.S. at 258, 121 S. Ct. at 1466, 149 L. Ed. 2d at 453. Here, when the evidence is undisputed that racial identification correlates highly with party affiliation, plaintiffs have failed to meet this obligation. The General Assembly's plans fall within the safe harbor

provisions of *Pender County* while respecting, to the extent possible, the Whole County Provision, as mandated by *Stephenson I*. In contrast, plaintiffs' proposals would effectively invite the type of litigation over section 2 claims envisioned in *Pender County*, *see* 361 N.C. at 505-06, 649 S.E.2d at 373, while failing to provide for the legitimate political goals pursued by the General Assembly in its plans.

We are aware of the Supreme Court's warning that "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Strickland*, 556 U.S. at 24, 129 S. Ct. at 1249, 173 L. Ed. 2d at 190 (plurality) (citations omitted). In addressing this possibility, we note that the average Total Black Voting Age Population in the twenty-six VRA districts is 52.28% of the total voting age population. This figure indicates that minority voters were moved out of crossover districts only to the extent necessary to meet *Pender County*'s safe harbor provision, while simultaneously pursuing other legitimate political goals, including those mentioned above. Where racial identification correlates highly with party affiliation, placing additional Democratic voters in districts that already vote Democratic is not forbidden as long as the motivation for doing so is not primarily racial. *See Cromartie I*, 526 U.S. at 551-52, 119 S. Ct. at 1551, 143 L. Ed. 2d at 741. Accordingly, we conclude that plaintiffs have failed to demonstrate improper packing or gerrymandering based upon race.

4. Proportionality

[4] Finally, because plaintiffs challenge the General Assembly's consideration of proportionality, the trial court analyzed whether the legislature used proportionality in the enacted plans improperly to "link[ ] the number of majority-minority voting districts to minority members' share of the relevant population." *See De Grandy*, 512 U.S. at 1014, 114 S. Ct. at 2658 n.11, 129 L. Ed. 2d at 792 n.11. The trial court found as fact that "the General Assembly acknowledges that it intended to create as many VRA districts as needed to achieve a 'roughly proportionate' number of Senate, House and Congressional districts as compared to the Black population in North Carolina," adding that each VRA district had to be at least fifty percent African-American in voting age population. The trial court specifically found that the General Assembly's enacted plans

> endeavored to create VRA districts in roughly the same proportion as the ratio of Black population to total population in North

> Carolina. In other words, because the 2010 census figures established that 21% of North Carolina's population over 18 years of age was 'any part Black,' the corresponding rough proportion of Senate seats, out of 50 seats, would be 10 seats, and hence 10 VRA Senate districts. Likewise, of the 120 House seats, 21% of those seats would be roughly 25 House seats, and hence 25 VRA districts.

Based on these and other findings, the trial court concluded that "the General Assembly had a strong basis in evidence for concluding that 'rough proportionality' was reasonably necessary to protect the State from anticipated liability under § 2 of the VRA and ensuring preclearance under § 5 of the VRA."

Plaintiffs now argue that this conclusion is erroneous as a matter of law because racial proportionality is neither a compelling governmental interest nor a requirement of the VRA. They contend that, because "[t]he VRA was not designed to guarantee majority-minority voting districts, but to guarantee that the processes, procedures, and protocols would be fair and free of racial discrimination," the legislature's redistricting was based upon an unconstitutional premise. Plaintiffs contend that, by focusing on proportionality at the statewide level, the General Assembly necessarily predetermined how many VRA districts to draw without first considering where potential liability existed for section 2 violations. Plaintiffs maintain that, as a result, the General Assembly's process sought " 'outright racial balancing,' " which is "patently unconstitutional" under such cases as *Fisher v. University of Texas at Austin*, ___ U.S. ___, ___, 133 S. Ct. 2411, 2419, 186 L. Ed. 2d 474, 486 (2013), *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 729-30, 127 S. Ct. 2738, 2757, 168 L. Ed. 2d 508, 529 (2007) (plurality), and *Grutter v. Bollinger*, 539 U.S. 306, 330, 123 S. Ct. 2325, 2339, 156 L. Ed. 2d 304, 333 (2003), and thus can neither be required by section 2 nor constitute a compelling state interest.

The VRA provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C.S. § 10301(b). Consistent with this proviso, the Supreme Court has repeatedly held that proportionality does not provide a safe harbor for States seeking to comply with section 2. *LULAC*, 548 U.S. at 436, 126 S. Ct. at 2620, 165 L. Ed. 2d at 642 (citing *De Grandy*, 512 U.S. at 1017-21, 114 S. Ct. at 2660-62, 129 L. Ed. 2d at 794-97). Such a rule "would be in derogation of the statutory text and its considered purpose . . . and of the ideal that the Voting Rights Act of 1965 attempts to foster," *De Grandy*, 512 U.S.

at 1018, 114 S. Ct. at 2660, 129 L. Ed. 2d at 795, and could allow "the most blatant racial gerrymandering . . . so long as proportionality was the bottom line," *id.* at 1019, 114 S. Ct. at 2661, 129 L. Ed. 2d at 796. Even so, the Court has also held that proportionality can be an element of the "totality of circumstances" test under *Gingles*. *Id.* at 1000, 114 S. Ct. at 2651, 129 L. Ed. 2d at 784. When considered in this manner, the Court has instructed that the "probative value assigned to proportionality may vary with other facts" and "[n]o single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength." *Id.* at 1020-21, 114 S. Ct. at 2661-62, 129 L. Ed. 2d at 797; *see also LULAC*, 548 U.S. at 436, 126 S. Ct. at 2620, 165 L. Ed. 2d at 642.

In light of these standards, the record here demonstrates that the General Assembly did not use proportionality improperly to guarantee the number of majority-minority voting districts based on the minority members' share of the relevant population. We believe that such an effort, seeking to guarantee proportional representation, proportional success, or racial balancing, would run afoul of the Equal Protection Clause. *See De Grandy*, 512 U.S. at 1017-22, 114 S. Ct. at 2658-62, 129 L. Ed. 2d at 794-98. Instead, the General Assembly considered rough proportionality in a manner similar to its prophylactic consideration of the *Gingles* preconditions, as a means of inoculating the redistricting plans against potential legal challenges under section 2's totality of the circumstances test. Proportionality was not a dispositive factor, but merely one consideration of many described in the materials and other contributions from numerous organizations, experts, and lay witnesses. The General Assembly's consideration of rough proportionality was merely a means of avoiding voter dilution and potential section 2 liability, not an attempt to trade "the rights of some minority voters under § 2 . . . off against the rights of other members of the same minority class." *Id.* at 1019, 114 S. Ct. at 2661, 129 L. Ed. 2d at 796. Accordingly, we conclude that this factor does not constitute grounds for a violation of section 2.

Thus, with regard to the VRA districts, we hold that, while the General Assembly considered race, the trial court erred by concluding prematurely that race was the predominant factor motivating the drawing of the districts without first performing adequate fact finding. However, because we held above that the trial court correctly found that each of the twenty-six districts survives strict scrutiny, we need not remand the case for reconsideration under what may be a less demanding standard of review.

C. Non-VRA districts

[5] We now turn to the four districts that the trial court found were not drawn as VRA districts but which were challenged by plaintiffs as being the result of racial gerrymandering. These were the Fourth and Twelfth Congressional Districts, North Carolina Senate District 32, and North Carolina House District 54.

The trial court made numerous specific findings of fact as to whether race was the General Assembly's predominant motive in drafting these districts. For example, the court found that race was not a factor in drawing Congressional District Twelve, Congressional District Four, and House District 54. In fact, the record indicates that the drafters of these three districts did not consider racial data. The trial court found that political goals were a factor in drawing Congressional Districts Twelve and Four, and that protection of incumbents was a factor in drawing Congressional District Twelve and House District 54. The trial court found that the drafting of Senate District 32 was compelled by the need to comply with the population distribution requirements set out in *Stephenson I*. In addition, the drafters were instructed to comply with *Cromartie II* in drawing Congressional District Twelve and Congressional District Four, and with *Gingles* in Senate District 32. The drafters considered the Whole County Provision of the North Carolina Constitution in drawing Senate District 32 and House District 54. Based on these findings, the trial court determined that the "shape, location and composition" of each of these districts was dictated not only by such factors as a desire to avoid liability under section 2 of the Voting Rights Act and attaining preclearance under section 5 of that Act, but also by other "equally dominant legislative motivations," such as complying with the North Carolina Constitution, equalizing population among districts, protecting incumbents in both parties, and fashioning districts "that were more competitive for Republican candidates than the plans used in past decades or any of the alternative plans."

Once the trial court found that race was not a predominant motive in drafting these four districts, it applied the rational basis test. Under this test, a court considers whether the drawing of the districts bears " '*some* rational relationship to a conceivable legitimate governmental interest.' " *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (quoting *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980) (emphasis added)). Concluding that "the General Assembly has articulated a reasonably conceivable state of facts, other than a racial motivation, that provides a rational

basis for creating the non-VRA districts," the trial court found that plaintiffs' challenge to these districts failed.

Plaintiffs argue to us that the trial court erred in its findings of fact and conclusions of law regarding Congressional District Twelve and North Carolina Senate District 32, contending that race manifestly was the predominant factor in the construction of these districts. As detailed above, the trial court found both racial and non-racial motivations, with neither category predominant. When a trial court sits without a jury, "the trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding." *Bailey v. State*, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998) (citation omitted). Although plaintiffs argue that the evidence cited by the trial court was pretextual and implausible and contend that we should consider and be persuaded by other evidence more favorable to their position that was also presented to the trial court, plaintiffs do not contend that the evidence credited and cited by the trial court was not competent.

We conclude that the trial court did not err either in its determination that the rational basis test was appropriate or in its application of that test to the evidence it credited. The Supreme Court of the United States has recognized that compliance with federal law, incumbency protection, and partisan advantage are all legitimate governmental interests. *See Shaw I*, 509 U.S. at 654, 113 S. Ct. at 2830, 125 L. Ed. 2d at 533 (compliance with federal law); *Karcher*, 462 U.S. at 740, 103 S. Ct. at 2663, 77 L. Ed. 2d at 147 (incumbency protection); *Cromartie I*, 526 U.S. at 551, 119 S. Ct. at 1551, 143 L. Ed. 2d at 741 (partisan interests). In light of this authority and the trial court's findings of fact, we agree that plaintiffs failed to establish that race was the dominant factor in drafting these districts and conclude that the trial court's application of the rational basis test was appropriate. The court's findings of fact support its conclusions of law. The General Assembly's actions in creating these districts were rationally related to all its expressed goals. Accordingly, we affirm the trial court as to these non-VRA districts.

III. Plaintiffs' State Claims

[6] We now consider plaintiffs' claims brought under state law. Plaintiffs argue that the trial court erred when it failed to find that the enacted Senate and House plans violate the Whole County Provision of the North Carolina Constitution. Article II, Section 3(3) of the

Constitution of North Carolina provides that "[n]o county shall be divided in the formation of a senate district," while Article II, Section 5(3) contains a similar provision with regard to each representative district. These prohibitions against dividing counties in the creation of General Assembly districts collectively are called the Whole County Provision.

The tension between the Whole County Provision and federal requirements is apparent. In 1983, a three-judge panel of the United States District Court for the Eastern District of North Carolina held that the Whole County Provision was unenforceable anywhere in the State. *Cavanagh v. Brock*, 577 F. Supp. 176, 181-82 (E.D.N.C. 1983). However, this Court subsequently rejected *Cavanagh's* analysis and held that the Whole County Provision remained enforceable to the extent that it could be harmonized with federal law. *Stephenson I*, 355 N.C. at 374, 562 S.E.2d at 391. As a result, the Whole County Provision remains in effect but must accommodate both the one-person, one-vote mandate and the requirements of the VRA. Since the Constitution of North Carolina provides that each senator and each representative shall represent "as nearly as may be" an equal number of inhabitants, N.C. Const. art. II, §§ 3(1), 5(1), the former federal requirement is met by definition. Thus, we consider plaintiffs' contentions that the challenged House and Senate districts violate the Whole County Provision, as harmonized with the VRA.

This Court has set out nine criteria for ensuring that House and Senate districts satisfy both the Whole County Provision and the Voting Rights Act. *Stephenson I*, 355 N.C. at 383-84, 562 S.E.2d at 396-97. These criteria may be summarized as follows: First, "legislative districts required by the VRA shall be formed" before non-VRA districts. *Id.* at 383, 562 S.E.2d at 396-97. Second, "[i]n forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent" to ensure "compliance with federal 'one-person, one-vote' requirements." *Id.* at 383, 562 S.E.2d at 397. Third, "in counties having a . . . population sufficient to support the formation of one non-VRA legislative district," "the physical boundaries" of the non-VRA district shall "not cross or traverse the exterior geographic line of" the county. *Id.* Fourth, "[w]hen two or more non-VRA legislative districts may be created within a single county," "single-member non-VRA districts shall be formed within" the county, "shall be compact," and "shall not traverse" the county's exterior geographic line. *Id.* Fifth, for non-VRA counties that "cannot support at least one legislative dis-

trict," or counties "having a non-VRA population pool" that, "if divided into" legislative "districts, would not comply with" one-person, one-vote requirements, the General Assembly should combine or group "the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard. Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the [one-person, one-vote] standard, whose boundary lines do not cross or traverse the 'exterior' line of the multi-county grouping." 355 N.C. at 383-84, 562 S.E.2d at 397. "[T]he resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard." *Id.* at 384, 562 S.E.2d at 397. Sixth, "only the smallest number of counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard shall be combined." *Id.* Seventh, "communities of interest should be considered in the formation of compact and contiguous [legislative] districts." *Id.* Eighth, "multi-member districts shall not be" created "unless it is established that such districts are necessary to advance a compelling governmental interest." *Id.* Ninth, "any new redistricting plans . . . shall depart from strict compliance with" these criteria "only to the extent necessary to comply with federal law." *Id.*

In their discussion of the Whole County Provision, plaintiffs contend that the test of a plan's compliance with *Stephenson I*'s fifth and sixth criteria is the number of counties left undivided. They argue that the current plan violates *Stephenson I* because it divides counties and traverses county lines to an unnecessary extent. In support of their argument, plaintiffs submit charts indicating that their suggested "House Fair and Legal" plan results in five fewer divided counties and six fewer county line traversals than the enacted House plan, while maintaining the same number of groupings. Similarly, plaintiffs' charts indicate that their suggested "Senate Fair and Legal" plan divides five fewer counties and contains eleven fewer traversals of county lines than the enacted Senate plan.

Defendants respond that plaintiffs have misinterpreted the requirements of *Stephenson I*. According to defendants, *Stephenson I* is satisfied by minimizing the number of counties contained within each multi-county grouping. In other words, a proper plan maximizes the number of possible two-county groupings before going on to create three-county groupings, maximizes the number of possible three-

county groupings before creating four-county groupings, and so on. Defendants argue that plaintiffs have misread *Stephenson I* because, under *Stephenson I*, divisions of counties and traversals of county lines are relevant only if plaintiffs' alternative maps are comparable to the State's maps in terms of the number of counties within each grouping. In support of its argument, the State provides charts showing that the enacted House and Senate plans result in a greater number of groupings that contain fewer counties, as compared with the various proposed alternative plans, all of which create groupings that contain more counties than the enacted plans. To illustrate, the enacted House district plan contains eleven groupings consisting of one county and fifteen groupings consisting of two counties. The closest comparable alternative plan proposed by plaintiffs, House Fair and Legal, also contains eleven groupings consisting of one county but only nine groupings consisting of two counties. Similarly, while both the enacted Senate plan and plaintiffs' proposed Senate Fair and Legal contain one grouping consisting of one county and eleven groupings consisting of two counties, the enacted plan contains four districts consisting of three counties while Senate Fair and Legal contains only three groupings consisting of three counties.

While we are conscious of the efforts of the litigants to interpret *Stevenson I*'s requirements faithfully, after careful review of our opinions in *Stephenson I* and *Pender County*, we are satisfied that defendants' interpretation is correct. *Stephenson I*'s fifth factor states that, when combining two or more counties to comply with the one-person, one-vote standard, "the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary" for compliance. 355 N.C. at 384, 562 S.E.2d at 397. Only after these groupings have been established does *Stephenson I* state that "the resulting interior county lines . . . may be crossed or traversed . . . only to the extent necessary to comply with the . . . 'one-person, one-vote' standard." *Id.* Thus, the process established by this Court in *Stephenson I* and its progeny requires that, in establishing legislative districts, the General Assembly first must create all necessary VRA districts, single-county districts, and single counties containing multiple districts. Thereafter, the General Assembly should make every effort to ensure that the maximum number of groupings containing two whole, contiguous counties are established before resorting to groupings containing three whole, contiguous counties, and so on. As shown by the charts provided by defendants, plaintiffs have not produced an alternative plan that better complies with a correct reading of *Stephenson I*'s fifth and sixth

factors than the plans enacted by the General Assembly. Because the enacted plans result in groupings containing fewer whole, contiguous counties than do any of plaintiffs' plans, we need not discuss the number of counties divided or county lines traversed.

In addition, the maps that plaintiffs employ to support their arguments regarding the Whole County Provision are not helpful because they are premised upon a flawed understanding of our holding in *Pender County*. In that case, we held that the first *Gingles* precondition can be shown only where the minority population is fifty percent plus one of the Total Black Voting Age Population. *Pender Cnty.*, 361 N.C. at 502, 649 S.E.2d at 371 (The "minority group must constitute a numerical majority of the voting population in the area under consideration before Section 2 of the VRA requires the creation of a legislative district to prevent dilution of the votes of that minority group."). Here, as did the plaintiffs in *Pender County*, *see id.* at 502-03, 649 S.E.2d at 371-72, plaintiffs argue that we should adopt a standard that allows VRA requirements to be satisfied by other forms of minority districts, such as coalition and crossover districts. Not only is plaintiffs' argument inconsistent with our holding in *Pender County*, this flawed approach adversely affects the first step of the process required by *Stephenson I*, the formation of VRA districts. As a result, plaintiffs' maps are distorted *ab initio* and the distortion is compounded at each subsequent step. Consequently, even if plaintiffs' proposed alternative plans were comparable to the enacted plans in terms of the number and composition of county groupings, their incompatibility with *Pender County* means that they cannot serve as an adequate basis for comparison with the enacted plans.

Plaintiffs have also compared the General Assembly's enacted plans with earlier redistricting plans approved in North Carolina. However, those plans were tailored to a particular time and were based upon then-existing census numbers and population concentrations. The requirement that the State maintain its one-person, one-vote standard as populations shift makes comparisons between current and previous districting plans of limited value. The utility of prior plans is further diminished by subsequent clarifications of the legal standards in effect when these earlier plans were promulgated. *See*, *e.g.*, *Pender Cnty.*, 361 N.C. at 503-04, 649 S.E.2d at 372 (explaining the requirements of the first *Gingles* precondition). As a result, no meaningful comparisons can be made in this case.

Separately, plaintiffs argue that this Court should consider the purported lack of compactness of the districts created by the General

Assembly and the harm resulting from splitting precincts. While these are valid considerations and may be evidence of other legal infirmities, neither constitutes an independent legal basis for finding a violation, and we are unaware of any justiciable standard by which to measure these factors.

[7] Finally, plaintiffs argue that the enacted plans violate the "Good of the Whole" clause found in Article I, Section 2 of the Constitution of North Carolina. We do not doubt that plaintiffs' proffered maps represent their good faith understanding of a plan that they believe best for our State as a whole. However, the maps enacted by the duly elected General Assembly also represent an equally legitimate understanding of legislative districts that will function for the good of the whole. Because plaintiffs' argument is not based upon a justiciable standard, and because acts of the General Assembly enjoy "a strong presumption of constitutionality," *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam) (citation omitted), plaintiffs' claims fail.

We agree with the unanimous three-judge panel that the General Assembly's enacted plans do not violate plaintiffs' constitutional rights. We hold that the enacted House and Senate plans satisfy state and federal constitutional and statutory requirements. Accordingly, we affirm the trial court.

AFFIRMED.

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

Justice BEASLEY concurring in part and dissenting in part.

I agree with the majority's holding with respect to plaintiffs' challenge under the "Good of the Whole" Clause in Article I, Section 2 of the Constitution of North Carolina. Nonetheless, because the twenty-six VRA districts at issue and two of the four non-VRA districts were created in direct contradiction to federal and state provisions, this Court should vacate the trial court's judgment and remand the matter to the lower court for proper findings of fact and conclusions of law. I therefore respectfully dissent. Furthermore, there are several points of error, any of which would warrant vacating and remanding. With respect to the VRA districts, the record supports the trial court's conclusions that the VRA districts were drawn with race as the predominant motive and that strict scrutiny applies. Contrary to the conclusions reached by the

trial court and the majority, however, these districts fail strict scrutiny. With respect to the non-VRA districts, the trial court's findings do not support its conclusions that race was not the predominant motive for the drafting of Senate District 32 and Congressional District 12. Because the shape and composition of invalid districts necessarily affect other districts, the redistricting plan at issue violates the Whole County Provisions set forth in Article II, Sections 3(3) and 5(3) of the Constitution of North Carolina.

I.

Though this honorable Court wishes to achieve finality in this appeal, the citizens of this state would be better served by this Court if we held our usual course and vacated and remanded the case to the trial court for proper findings of fact and conclusions of law based upon a correct interpretation of the law. I disagree with the majority's assertion that doing so "would achieve nothing but delay" because "the panel has already conducted its analysis under th[e] [strict scrutiny] standard." In its analysis the trial court incorrectly stated and applied the standard. At a minimum, proper findings, once made, would better illuminate defendants' actions in view of the appropriate constitutional tests and would provide a better basis for proper review by this Court, potential consideration by the Supreme Court of the United States, and assessment by the citizens of North Carolina of our General Assembly's actions and this Court's decision.

In reaching its conclusions, the trial court misapplied precedent from this Court and the Supreme Court of the United States. The majority compounds the error by ignoring altogether the trial court's explicit findings of fact and by too generously characterizing the General Assembly's enacted plan. The majority's departure from this Court's usual course of adherence to our settled principles of appellate review could create a stain of suspicion among the citizens of the state regarding the actions of their elected officials and bodies of government—both legislative and judicial. *See, e.g.*, *State v. Carter*, 322 N.C. 709, 722, 370 S.E.2d 553, 560 (1988) ("[W]e regard the crucial matter of the integrity of the judiciary . . . to be [a] paramount consideration[ ].").

II.

Contrary to the majority's opinion, the trial court correctly concluded that strict scrutiny applies; however, the trial court incorrectly articulated the standard and therefore improperly applied its findings of fact to the standard. Of particular concern is the trial court's finding that the General Assembly's use of "rough proportionality" as a

redistricting "benchmark" survives strict scrutiny. This misstep is fatal to the VRA districts and consequently affects the legitimacy of non-VRA districts drawn in view of the Whole County Provisions. Although this Court should vacate and remand for reconsideration in light of correct principles, the majority attempts to cure the trial court's errors and prematurely affirm an incomplete and incorrect judgment. As stated above, it would be impractical to vacate and remand piecemeal because the invalidity of at least one House, Senate, or Congressional district would necessarily compromise the shape and composition of the remaining districts in the affected group or groups.

A.

It is well established that "all laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized." *Hunt v. Cromartie*, 526 U.S. 541, 546, 119 S. Ct. 1545, 1548-49, 143 L. Ed. 2d 731, 737-38 (1999) ("*Cromartie I*") (citations omitted). "This is true whether or not the reason for the racial classification is benign or the purpose remedial." *Shaw v. Hunt*, 517 U.S. 899, 904-05, 116 S. Ct. 1894, 1900, 135 L. Ed. 2d 207, 218 (1996) ("*Shaw II*") (citations omitted). Yet, "[a]pplying traditional equal protection principles in the voting-rights context is 'a most delicate task' . . . because a legislature may be conscious of the voters' races without using race as a basis for assigning voters to districts." *Id.* at 905, 116 S. Ct. at 1900, 135 L. Ed. 2d at 218 (quoting *Miller v. Johnson*, 515 U.S. 900, 905, 115 S. Ct. 2475, 2483, 132 L. Ed. 2d 762, 772 (1995)). Only "when race becomes the 'dominant and controlling' consideration" is the right to equal protection jeopardized. *Id.* (quoting *Miller*, 515 U.S. at 913, 115 S. Ct. at 2486, 132 L. Ed. 2d at 777).

The burden to make this showing falls to the plaintiff:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

Miller, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80.

If the plaintiff satisfies this initial burden of production, the redistricting legislation "cannot be upheld unless it satisfies strict scrutiny, [the] most rigorous and exacting standard of constitutional review."[1] *Id*. at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782. Once strict scrutiny review is triggered, the burden shifts to the State to "show not only that its redistricting plan was in pursuit of a compelling state interest, but also that 'its districting legislation is narrowly tailored to achieve [that] compelling interest.' " *Shaw II*, 517 U.S. at 908, 116 S. Ct. at 1902, 135 L. Ed. 2d at 220-21 (alteration in original) (quoting *Miller*, 515 U.S. at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782).

Here, while acknowledging the fact-intensive nature of the examination into whether race was the predominant factor motivating the legislature's redistricting decision, the trial court believed that it was "able to by-pass this factual inquiry" for the twenty-six VRA districts:

> The Plaintiffs collectively challenge as racial gerrymanders 9 Senate, 18 House and 3 U.S. Congressional districts created by the General Assembly in the Enacted Plans. Of those 30 challenged districts, it is undisputed that the General Assembly intended to create 26 of the challenged districts to be "Voting Rights Act districts" [hereinafter "VRA districts"] and that it set about to draw each of these VRA districts so as to include at least 50% Total Black Voting Age Population [hereinafter "TBVAP"]. Moreover, the General Assembly acknowledges that it intended to create as many VRA districts as needed to achieve a "roughly proportionate" number of Senate, House and Congressional districts as compared to the Black population in North Carolina. To draw districts based upon these criteria necessarily requires the drafters of districts to classify residents by race so as to include a sufficient number of black voters inside such districts, and consequently exclude white voters from the districts, in an effort to achieve a desired racial composition of >50% TBVAP and the desired "rough proportionality." This is a racial classification.

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1. "If, however, [the] plaintiff[ ] cannot show that race was the 'predominant factor' to which traditional districting principles were 'subordinated,' and thus cannot meet the threshold for triggering strict scrutiny, it follows that the facially neutral classification (the electoral district) will be subject, at most, to rational basis review." *Quilter v. Voinovich*, 981 F. Supp. 1032, 1050 (N.D. Ohio 1997) (citing *Miller*, 515 U.S. at 915-16, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80), *aff'd*, 523 U.S. 1043, 118 S. Ct. 1358, 140 L. Ed. 2d 508 (1998).

(footnote call numbers omitted). Accordingly, the trial court "conclude[d] . . . that in drawing [the] VRA districts . . . [,] the shape, location and racial composition of each VRA district was predominantly determined by a racial objective and was the result of a racial classification sufficient to trigger the application of strict scrutiny as a matter of law."

The majority explains that

> [b]ecause of the trial court's truncated findings of fact [as to whether race was "the General Assembly's predominant motivation in forming the twenty-six VRA districts"], we do not know which other factors may have influenced the creation and shape of these twenty-six districts and the extent of any such influence. As a result, we do not know whether race fairly can be described as the predominant factor in the formation of these districts and whether, in turn, strict scrutiny was the appropriate standard of review.

The majority then analyzes the case as if strict scrutiny applies. This Court should remand for the trial court to clarify the full basis for its conclusion that plaintiffs have met their burden to show that race was the predominant factor. The record provides substantial evidence and the Supreme Court of the United States provides clear guidance on this point. Furthermore, as discussed below, the trial court's subsequent findings with regard to proportionality inescapably lead to the conclusion that race was the predominant factor, thereby requiring strict scrutiny.

Plaintiffs and *amici* point to evidence showing that State Senator Robert Rucho and State Representative David Lewis, the respective chairs of the Senate and House Redistricting Committees, instructed Dr. Thomas Hofeller, the "chief architect" of the redistricting plans, to draw the plans to provide "substantial proportional[ity]" between the percentage of the state's population that is Black and the percentage of districts that would be majority Black. Dr. Hofeller was also told to "draw a 50% plus one district wherever in the state there is a sufficiently compact black population" to do so. The public statements released by Senator Rucho and Representative Lewis also reflect these legislative goals, saying that, in order to comply with VRA section 2, the VRA districts are designed to provide Black voters with "substantial proportionality" and "must be established with a BVAP of 50% plus one." As stated particularly well by the *amici* election law professors, this "undisputed, direct evidence" demonstrates the legis-

lature's intent to "creat[e] a certain number of majority-minority districts and then pack[ ] the maximum number of black voters possible into the districts."[2] This evidence and the arguments advanced by plaintiffs and *amici* underscore the trial court's error in "by-pass[ing] [its] factual inquiry."

The Supreme Court of the United States has found similar evidence to be sufficient to trigger strict scrutiny of the redistricting plans. *See*, *e.g.*, *Bush v. Vera*, 517 U.S. 952, 958-59, 116 S. Ct. 1941, 1951-52, 135 L. Ed. 2d 248, 257 (1996) (plurality) (explaining that strict scrutiny applies when race is "the predominant factor" in a legislature's redistricting plan) (citation, emphasis, and quotation marks omitted); *Id.* at 1002, 116 S. Ct. at 1974, 135 L. Ed. 2d at 286 (Thomas & Scalia, JJ., concurring in the judgment) (explaining that Texas's admission that "it intentionally created majority-minority districts" to comply with the VRA was "enough to require application of strict scrutiny in this suit"); *Shaw II*, 517 U.S. at 906, 116 S. Ct. at 1901, 135 L. Ed. 2d at 219 (applying strict scrutiny after "fail[ing] to see how" a court could "reach[ ] any conclusion other than that race was the predominant factor in" the General Assembly's drawing of redistricting lines when the State admitted that its "overriding" purpose was to obtain preclearance from DOJ (citation, emphasis, and quotation marks omitted)); *Miller*, 515 U.S. at 919, 115 S. Ct. at 2490, 132 L. Ed. 2d at 781 (concluding that Georgia's express desire to obtain preclearance was "powerful evidence that the legislature subordinated traditional districting principles to race when it ultimately enacted a plan creating three majority-black districts" and thus strict scrutiny applied). Accordingly, in view of *Vera*, *Shaw II*, and *Miller*, the trial court in this case correctly concluded that strict scrutiny is the appropriate level of review to apply to the enacted plans.

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2. "Packing" is one means of diluting minority voting strength. For example, "[a] minority group . . . might have sufficient numbers to constitute a majority in three districts. So apportioned, the group inevitably will elect three candidates of its choice, assuming the group is sufficiently cohesive. But if the group is packed into two districts in which it constitutes a super-majority, it will be assured only two candidates." *Voinovich v. Quilter*, 507 U.S. 146, 153-54, 113 S. Ct. 1149, 1155, 122 L. Ed. 2d 500, 511 (1993). In contrast to packing, minority voting strength may also be diluted by what is known as "cracking": "A politically cohesive minority group that is large enough to constitute the majority in a single-member district has a good chance of electing its candidate of choice, if the group is placed in a district where it constitutes a majority. Dividing the minority group among various districts so that it is a majority in none may prevent the group from electing its candidate of choice . . . ." *Id.* at 153, 113 S. Ct. at 1155, 122 L. Ed. 2d at 511.

Nonetheless, the trial court improperly applied the standard. In its decision the trial court states that if plaintiffs meet the threshold burden of establishing that "race was the overriding consideration behind a redistricting plan,"

> the state then has the burden of "producing evidence that the plan's use of race is narrowly tailored to further a compelling state interest, and the plaintiffs bear the ultimate burden of persuading the court either that the proffered justification is not compelling or that the plan is not narrowly tailored to further it." *Shaw v. Hunt*, 861 F. Supp. 408, 436 (E.D. N.C. 1994).

In support of this proposition, the trial court quotes the district court's decision in *Shaw II*. In *Shaw II*, however, the Supreme Court of the United States reversed the trial court and, in doing so, held that under strict scrutiny, "*North Carolina . . . must show* not only that its redistricting plan was in pursuit of a compelling state interest, but also that 'its districting legislation is narrowly tailored to achieve [that] compelling interest.' " 517 U.S. at 908, 116 S. Ct. at 1902, 135 L. Ed. 2d at 220-21 (alteration in original) (emphasis added) (quoting *Miller*, 515 U.S. at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782). This language from *Shaw II* clearly places the burden of proof on the State once strict scrutiny is triggered.

This conclusion is bolstered by the Supreme Court's earlier statement in *Miller* that, "[t]o satisfy strict scrutiny, *the State must demonstrate* that its districting legislation is narrowly tailored to achieve a compelling interest." 515 U.S. at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782 (emphasis added) (citations omitted). More recently, in the affirmative action context, the Supreme Court has been more explicit on this point: Under strict scrutiny, "*it remains at all times the [government]'s obligation to demonstrate*, and the Judiciary's obligation to determine" that the challenged action is narrowly tailored to achieve a compelling governmental interest. *Fisher v. Univ. of Tex. at Austin*, ___ U.S. ___, ___, 133 S. Ct. 2411, 2420, 186 L. Ed. 2d 474, 486-87 (2013) (emphasis added).

Here the trial court attempted to distinguish *Fisher* on the ground that the General Assembly is entitled to some degree of deference given that redistricting is "an inherently political process." The Supreme Court, however, has declined to defer to political decision makers and apply something less than strict scrutiny to race-based classifications:

> But we have refused to defer to state officials' judgments on race in . . . areas where those officials traditionally exercise substantial discretion. For example . . . . in the redistricting context, despite the traditional deference given to States when they design their electoral districts, we have subjected redistricting plans to strict scrutiny when States draw district lines based predominantly on race.

Johnson v. California, 543 U.S. 499, 512, 125 S. Ct. 1141, 1150, 160 L. Ed. 2d 949, 962-63 (2005) (citations omitted); *accord Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 744, 127 S. Ct. 2738, 2766, 168 L. Ed. 2d 508, 539 (2007) (plurality) (explaining that "deference is fundamentally at odds with our equal protection jurisprudence" and that courts "put the burden on state actors to demonstrate that their race-based policies are justified" (citations and quotation marks omitted)). Moreover, to whatever extent the legislature may be entitled to deference, that "limited degree of leeway in furthering [its] interests" in complying with the VRA relates to whether the State has met its burden of establishing "the 'narrow tailoring' requirement of strict scrutiny." *Vera*, 517 U.S. at 977, 116 S. Ct. at 1960, 135 L. Ed. 2d at 268 (plurality). Nonetheless, the State is not relieved of "the *burden to prove* 'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate.' " *Fisher*, ___ U.S. at ___, 133 S. Ct. at 2419, 186 L. Ed. 2d at 485 (alterations in original) (emphasis added) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505, 109 S. Ct. 706, 728, 102 L. Ed. 2d 854, 889 (1989)).

Thus, the trial court's misunderstanding and misapplication of the strict scrutiny analytical framework should warrant this Court's vacating the trial court's decision and remanding for reconsideration in light of correct principles. *See id.* at ___, 133 S. Ct. at 2421, 186 L. Ed. 2d at 488 (remanding after determining that the trial court and court of appeals misapplied strict scrutiny standard to enable challenged admissions policy to "be considered and judged under a correct analysis"). Failure to apply properly the operative constitutional test is, in itself, a sufficient basis for overturning the trial court's decision. *See id.*

B.

I turn next to address the invalidity of the twenty-six VRA districts. In view of the appropriate strict scrutiny standard, assuming that the state had a compelling interest in avoiding liability under

VRA section 2 and obtaining preclearance under VRA section 5,[3] and assuming that the factors set forth in *Thornburg v. Gingles* are met, the trial court's findings with respect to proportionality do not support its ultimate conclusion that the redistricting plans pass strict scrutiny. Therefore, this Court should vacate and remand regarding the twenty-six VRA districts.

In *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986), the Supreme Court set forth three "necessary preconditions" for a vote-dilution claim brought under VRA section 2: the minority group must be able to demonstrate that (1) it is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) it is "politically cohesive"; and (3) the majority votes "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 50-51, 106 S. Ct. at 2766-67, 92 L. Ed. 2d at 46-47 (citations omitted). "In a § 2 case, only when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances." *Bartlett v. Strickland*, 556 U.S. 1, 11-12, 129 S. Ct. 1231, 1241, 173 L. Ed. 2d 173, 182 (2009) (plurality) (citations omitted). "While . . . proportionality is not dispositive in a [districting challenge], it is a relevant fact in the totality of circumstances to be analyzed . . . ." *Johnson v. De Grandy*, 512 U.S. 997, 1000, 114 S. Ct. 2647, 2651, 129 L. Ed. 2d 775, 784 (1994).

Here, in considering whether the General Assembly's plan was narrowly tailored, the trial court reviewed, *inter alia*, defendants' Memorandum of Law in Support of their Motion for Summary Judgment. Defendants' Memorandum states:

> [d]efendants freely admit three principles followed by them in drawing the enacted legislative plans:
>
> . . . .
>
> 3. that the General Assembly would explore the possibility of establishing a sufficient number of VRA legislative districts to provide African-American voters with rough proportionality in

3. The United States Supreme Court has repeatedly assumed without deciding that compliance with the VRA can be a compelling state interest in the strict scrutiny context, but the Court has not expressly decided the issue. *See Shaw II*, 517 U.S. at 915, 116 S. Ct. at 1905, 135 L. Ed. 2d at 225 ("We assume, *arguendo*, for the purpose of resolving this suit, that compliance with § 2 could be a compelling interest . . . ."); *Miller*, 515 U.S. at 921, 115 S. Ct. at 2490-91, 132 L. Ed. 2d at 782 (assuming that satisfying "the Justice Department's preclearance demands" can be a compelling interest).

the number of VRA districts in which they have reasonable opportunity to elect their candidates of choice.

Defendants further state that they "increased the number of VRA districts to provide African American voters with rough proportionality in the number of districts in which they can elect candidates of choice."

After reviewing defendants' Memorandum and other materials, the trial court entered its judgment explaining the General Assembly's use of proportionality in redrawing its district plans as follows:

> *The undisputed evidence establishes that the General Assembly, in drafting the Enacted Plans, endeavored to create VRA districts in roughly the same proportion as the ratio of Black population to total population in North Carolina.* In other words, because the 2010 census figures established that 21% of North Carolina's population over 18 years of age was "any part Black," the corresponding rough proportion of Senate seats, out of 50 seats, would be 10 seats, and hence 10 VRA Senate districts. Likewise, of the 120 House seats, 21% of those seats would be roughly 25 House seats, and hence 25 VRA districts.
>
> The General Assembly, in using "rough proportionality" as a *benchmark* for the number of VRA districts it created in the Enacted Plans, relies upon Supreme Court precedent that favorably endorses "rough proportionality" as a means by which a redistricting plan can provide minority voters with an equal opportunity to elect candidates of choice. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 429-30 (2006) [hereinafter LULAC]; *Shaw II*, 517 U.S. at 916 n.8; *De Grandy*, 512 U.S. at 1000. In *De Grandy*, the Supreme Court said that "no violation of § 2 can be found . . . , where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population." 512 U.S. at 1013-1015. Where a State's election districts reflect substantial proportionality between majority and minority populations, the Supreme Court explained, such districts would "thwart the historical tendency to exclude [the minority population], not encourage or perpetuate it." *Id.* at 1014. It is reasonable for the General Assembly to rely upon this unequivocal holding of the Supreme Court in drafting a plan to avoid § 2 liability. When the Supreme Court says "no violation of § 2 can be found" under certain circumstances, prudence dictates that the General

> Assembly should be given the leeway to seek to emulate those circumstances in its Enacted Plans.

(ellipsis in original) (emphases added) (footnote call number omitted). The trial court concluded that achieving rough proportionality was "not inconsistent with the General Assembly's obligation to narrowly tailor the plans under strict scrutiny." Although the trial court correctly cited the holding in *De Grandy*, the case does not support the trial court's conclusion.

In *De Grandy* the Florida legislature drew majority-minority districts roughly proportionate in number to the minorities' share of the total Florida population. While the Supreme Court held that such redistricting did not violate VRA section 2, the Court explicitly rejected the state's proposed rule that "rough proportionality" would always immunize the state from VRA section 2 liability, stating:

> [W]e reject the safe harbor rule because of . . . a tendency to promote and perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity. Because in its simplest form the State's rule would shield from § 2 challenge a districting scheme in which the number of majority-minority districts reflected the minority's share of the relevant population, the conclusiveness of the rule might be an irresistible inducement to create such districts. It bears recalling, however, that for all the virtues of majority-minority districts as remedial devices, they rely on a quintessentially race-conscious calculus aptly described as the "politics of second best."

Id. at 1019-20, 114 S. Ct. at 2661, 129 L. Ed. 2d at 796 (citation omitted); *see also id.* at 1025, 114 S. Ct. at 2664, 129 L. Ed. 2d at 799 (O'Connor, J., concurring) (Proportionality, while "*always* relevant," is "*never* itself dispositive."). Further, "the most blatant racial gerrymandering in half of a county's single-member districts would be irrelevant under § 2 if offset by political gerrymandering in the other half, so long as proportionality was the bottom line." *Id.* at 1019, 114 S. Ct. at 2661, 129 L. Ed. 2d at 796 (majority) (citations omitted). Thus, the Supreme Court admonished that an "inflexible rule" permitting the use of rough proportionality as a safe harbor "would run counter to the textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.' The need for such 'totality' review springs from the demonstrated ingenuity of state and local governments in hobbling minority voting

power . . . ." *Id.* at 1018, 114 S. Ct. at 2660, 129 L. Ed. 2d at 795 (citations omitted).

A state legislature is thus required to determine whether *each* majority-minority district is reasonably necessary to afford minorities equal political and electoral opportunity. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 437, 126 S. Ct. 2594, 2620-21, 165 L. Ed. 2d 609, 643 (2006) (explaining that "proportionality" may not "displace" the "intensely local appraisal" of each challenged district (internal quotation marks omitted) (quoting *Gingles*, 478 U.S. at 79, 106 S. Ct. at 2781, 92 L. Ed. 2d at 65)). Here, however, defendants' public statements undermine their adherence to the applicable standards and demonstrate the central role proportionality played in the 2011 redistricting plan. On 17 June 2011, defendants announced a public hearing on the matter, in which defendants sought redistricting plans with a sufficient number of majority-minority districts to provide substantial proportionality. Defendants recommended "that each plan include a sufficient number of majority African American districts to provide North Carolina's African American citizens with a substantially proportional and equal opportunity to elect their preferred candidate of choice." Defendants explained that "proportionality for the African American citizens in North Carolina means the creation of 24 majority African American House districts and 10 majority Senate districts. . . . Unlike the 2003 benchmark plans, the Chairs' proposed 2011 plans will provide substantial proportionality for North Carolina's African American citizens."

Notwithstanding, based on its misreading of *De Grandy*, the trial court cites approvingly defendants' use of proportionality as the "benchmark" for creating the enacted plan—beginning with proportionality as the goal and then working backwards to achieve that goal. Similarly, the trial court reasoned: "When the Supreme Court says 'no violation of § 2 can be found' under certain circumstances, prudence dictates that the General Assembly should be given the leeway to seek to emulate those circumstances in its Enacted Plans." (quoting *De Grandy*, 512 U.S. at 1000, 114 S. Ct. at 2651, 129 L. Ed. 2d at 784). But this is precisely what the Supreme Court rejected in *De Grandy*: proportionality is relevant as a *means* to an end (compliance with the VRA), but it is not an *end* in itself and it does not—contrary to the trial court's reasoning—provide a safe harbor for redistricting plans premised on race. The trial court's misunderstanding of the applicable law permeates its analysis of the narrow tailoring requirement and leads it incorrectly to conclude that defendants' use of proportionality as an end is constitutionally permissible.

The majority states that "the trial court analyzed whether the legislature used proportionality in the enacted plans improperly to 'link [ ] the number of majority-minority voting districts to minority members' share of the relevant population.' " (alteration in original) (citation omitted). After setting forth various standards and principles, the majority summarily concludes that "the record here demonstrates that the General Assembly did not use proportionality improperly to guarantee the number of majority-minority voting districts based on the minority members' share of the relevant population." The majority is only able to draw this conclusion by ignoring the trial court's determination—based upon "the undisputed evidence"—that the General Assembly used proportionality as a "benchmark." The majority's conclusion becomes more confusing when the majority states, "We believe that such an effort, seeking to guarantee proportional representation, proportional success, or racial balancing, would run afoul of the Equal Protection Clause." (citing *De Grandy*, 512 U.S. at 1017-22, 114 S. Ct. at 2660-62, 129 L. Ed. 2d at 794-98). I agree "that such an effort . . . would run afoul of the Equal Protection Clause," and it does here. In view of defendants' public statements, defendants' Memorandum of Law to the trial court, the undisputed evidence before the trial court, and the trial court's unqualified finding that the legislature used proportionality as a "benchmark" for its redistricting plans, the majority's attempt to explain otherwise is unconvincing and runs afoul of the United States Supreme Court's warnings in *De Grandy*.

By characterizing the General Assembly's consideration of race as a "prophylactic consideration" used "as a means of inoculating the redistricting plans against potential legal challenges under section 2's totality of the circumstances test," the majority compounds the trial court's error and purports to establish the use of race as a legislative safe harbor in derogation of the clear prohibition against such use set forth by the Supreme Court of the United States. *De Grandy*, 512 U.S. at 1018-20, 114 S. Ct. at 2660-61, 129 L. Ed. 2d at 795-97. In light of these errors, this Court should vacate the trial court's order and remand the case for reconsideration under a correct understanding of the law.

C.

With respect to the four non-VRA districts, plaintiffs challenge the trial court's determination that "race was not the predominant motive in the creation of" Senate District 32 and Congressional District 12. "The legislature's motivation is itself a factual question,"

Cromartie I, 526 U.S. at 549, 119 S. Ct. at 1550,143 L. Ed. 2d at 740, and a trial court's findings resolving factual issues in a nonjury trial are binding on appeal "if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding," *Stephenson v. Bartlett*, 357 N.C. 301, 309, 582 S.E.2d 247, 252 (2003) ("*Stephenson II*") (citation and quotation marks omitted).

i.

Looking first at Senate District 32, plaintiffs contend that the trial court's findings actually undermine its conclusion that strict scrutiny does not apply because the districts are not race-based. The trial court found the following relevant facts:

> 204. As was true under the 2000 Census, under the 2010 Census there is insufficient TBVAP in Forsyth County to draw a majority-TBVAP Senate district in Forsyth County. However, because of concerns regarding the State's potential liability under § 2 and § 5, Dr. Hofeller was instructed by the redistricting chairs to base the 2011 Senate District 32 on the 2003 versions of Senate District 32.
>
> . . . .
>
> 207. The first version of Senate District 32 that was released by the General Assembly had a TBVAP of 39.32%. Subsequently, the SCSJ plan was released. Its version of District 32 was located in a three-county and three-district group (Forsyth, Davie, Davidson). The SCSJ District 32 had a TBVAP of 41.95%. The SCSJ District 32 was a majority-minority coalition district with a non-Hispanic white population of 43.18%.
>
> 208. The redistricting chairs were concerned that any failure to match the TBVAP % found in the SCSJ District 32 could potentially subject the state to liability under § 2 or § 5 of the VRA. Therefore, Dr. Hofeller was instructed by the Redistricting Chairs to re-draw the State's version of Senate District 32 so that it would at least equal the SCSJ version in terms of TBVAP.

As discussed above, the Supreme Court of the United States has held that when redistricting plans drawn in an attempt to preempt VRA section 2 litigation or obtain VRA section 5 preclearance are predominantly race-based, such plans attract strict scrutiny. *See Vera*, 517 U.S. at 959, 116 S. Ct. at 1951-52, 135 L. Ed. 2d at 257; *Shaw II*, 517 U.S. at 906-07, 116 S. Ct. at 1901, 135 L. Ed. 2d at 219-20; *Miller*, 515 U.S. at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782.

The trial court acknowledged that compliance with the VRA was a motivating factor behind the enacted plans, but concluded that "comply[ing] with the Whole County Provision, . . . equaliz[ing] population among the districts, . . . protect[ing] incumbents, and . . . satisfy[ing] the General Assembly's desire to enact redistricting plans that were more competitive for Republican candidates" were "equally dominant legislative motivations." Notwithstanding, in the section of its fact-finding order addressing Senate District 32, the trial court made no findings regarding these other considerations. While the evidence might support such a conclusion, the trial court's actual findings do not. Accordingly, this Court should vacate and remand on the issue of whether race was the predominant motivation behind the shape, location, and composition of Senate District 32.

ii.

With respect to Congressional District 12, the trial court's findings belie a fundamental problem with redistricting, particularly in North Carolina, the importance of which cannot be overstated. In *Easley v. Cromartie*, 532 U.S. 234, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001), the Supreme Court of the United States observed that "racial identification correlates highly with political affiliation" in North Carolina. *Id.* at 258, 121 S. Ct. at 1466, 149 L. Ed. 2d at 453. As such, the plaintiffs in that case "ha[d] not successfully shown that race, rather than politics, predominantly account[ed] for" the shape, location, and composition of the 1997 version of Congressional District 12. *Id.* at 257, 121 S. Ct. at 1466, 149 L. Ed. 2d at 453. Because race and politics historically have been and currently remain intertwined in North Carolina, I cannot escape my conviction that politics are a pretext for this excruciatingly contorted race-based district. Therefore, the trial court incorrectly concluded that "the shape, location and composition of [this district] . . . included equally dominant legislative motivations . . . to protect incumbents[ ] and to . . . enact redistricting plans that were more competitive for Republican candidates." To allow this serpentine district, which follows the I-85 corridor between Mecklenburg and Guilford Counties, to be drafted for political advantage is a proxy for racial disenfranchisement and effectively creates a "magic words" threshold. Upholding this district's tortured construction creates an incentive for legislators to stay "on script" and avoid mentioning race on the record, and in this instance, it is disingenuous to suggest that race is not the predominant factor. As such, this Court should vacate and remand as to Congressional District 12.

iii.

With respect to House District 54 and Congressional District 4, the trial court also found that race was not the predominant motivating factor. Plaintiffs do not contest these determinations, and they are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). As stated above, however, because the shapes and compositions of the four non-VRA districts are necessarily affected by the VRA districts, it would be impossible to vacate and remand piecemeal.

D.

With respect to the Whole-County Provisions ("WCP"), plaintiffs contend that the trial court erred in concluding that the enacted house and senate plans do not violate the provisions of the state constitution, which dictate that "[n]o county shall be divided in the formation of a senate district," N.C. Const. art. II, § 3(3), and "[n]o county shall be divided in the formation of a representative district," *id*. art. II, § 5(3). In *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) ("*Stephenson I*"), this Court construed the WCP in light of federal law and "mandated that in creating legislative districts, counties shall not be divided except to the extent necessary to comply with federal law, including the 'one-person, one-vote' principle and the VRA." *Stephenson II*, 357 N.C. at 309, 582 S.E.2d at 251-52 (citing *Stephenson I*, 355 N.C. at 363-64, 562 S.E.2d at 384-85). To ensure complete compliance with federal law and to provide maximum enforcement of the WCP, this Court "outlined in *Stephenson I* the following requirements that must be present in any constitutionally valid redistricting plan:"

> [1.] . . . [T]o ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts. . . . In the formation of VRA districts within the revised redistricting plans on remand, we likewise direct the trial court to ensure that VRA districts are formed consistent with federal law and in a manner having no retrogressive effect upon minority voters. *To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP, as herein established* . . . .
>
> [2.] In forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal "one-person, one-vote" requirements.

[3.] In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district . . . , the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county.

[4.] When two or more non-VRA legislative districts may be created within a single county, . . . single-member non-VRA districts shall be formed within said county. *Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.*

[5.] In counties having a non-VRA population pool which cannot support at least one legislative district . . . or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the . . . "one-person, one-vote" standard, the requirements of the WCP are met by combining or grouping the *minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping;* provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard.

[6.] The intent underlying the WCP must be enforced to the maximum extent possible; thus, *only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined*[.]

[7.] . . . *[C]ommunities of interest should be considered in the formation of compact and contiguous electoral districts.*

[8.] . . . [M]ulti-member districts shall not be used in the formation of legislative districts unless it is established that such districts are necessary to advance a compelling governmental interest.

[9.] Finally, we direct that any new redistricting plans, including any proposed on remand in this case, *shall depart from*

> *strict compliance with the legal requirements set forth herein only* to the extent necessary to comply with federal law.

Stephenson II, 357 N.C. at 305-07, 582 S.E.2d at 250-51 (alterations in original) (quotation marks omitted) (quoting *Stephenson I*, 355 N.C. at 383-84, 562 S.E.2d at 396-97 (emphasis added)).

In view of my analysis concerning plaintiffs' equal protection claim, the WCP issue also warrants remanding the case because the General Assembly, in attempting to comply with *Stephenson I's* Rule 1, drew the VRA districts before applying Rules 2 through 9. Because I conclude that the VRA districts are unconstitutional, this Court should instruct the General Assembly to redraft its redistricting plans. The unconstitutional VRA districts would necessarily affect the result of the General Assembly's application of the rubric set forth in *Stephenson I*. *See Pender Cnty. v. Bartlett*, 361 N.C. 491, 508-09, 649 S.E.2d 364, 375 (2007) (concluding that a house district, created with the intent to comply with VRA section 2, was not required by the VRA and thus "must be drawn in accordance with the WCP and the *Stephenson I* requirements"), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009). As such, I would vacate and remand on this issue.

E.

Having carefully considered the precedent established by the Supreme Court of the United States, the decisions of this Court, and the record on appeal, it is important to recognize that race can be used as a factor fairly, but it equally important to emphasize that race must not be used punitively. To this end, it is important to be cognizant of race, not only in view of the historical record of our state and our nation, but also taking into account modern realities and future possibilities. It is for this reason that I note my concern with the majority's statement that "no meaningful comparisons can be made" with "earlier redistricting plans approved in North Carolina" because "those plans were tailored to a particular time and were based upon then-existing census numbers and population concentrations." Some comparisons may be of limited value, but increasingly sophisticated data processing and modes of visual representation may provide helpful comparisons among past, present, and proposed districts in view of past and present population concentrations. It would be a disservice to North Carolina's citizens and our courts if the majority's statements are read to foreclose without qualification any meaningful comparisons with earlier approved plans.

III.

As discussed above, the trial court erred by making incomplete findings of fact and conclusions of law. Further, even using the findings as made by the trial court, the court's judgment discloses several serious misapplications of law, which led the court to erroneous conclusions of law. There can be no serious debate that strict scrutiny applies in view of the General Assembly's use of race as a benchmark for measuring the redistricting plan. The VRA districts are fatally defective in view of the legislature's use of racial proportionality as a safe harbor, and the invalidity of these districts necessarily renders invalid the entire plan under settled federal constitutional standards announced by the Supreme Court of the United States. Similarly, the trial court's findings regarding the non-VRA districts do not support its conclusions. Furthermore, these impermissibly racially gerrymandered districts fail under the Whole County Provision of the North Carolina Constitution. For any of these errors, this Court would do well to vacate and remand rather than prematurely affirm a defective and ultimately undemocratic districting plan.

Accordingly, I concur in that part of the majority's opinion regarding plaintiffs' remaining state claims related to the "Good of the Whole" Clause in Article I, Section 2 of the Constitution of North Carolina, and respectfully dissent from those parts of the opinion affirming the trial court's erroneous judgment.

Justice HUDSON joins in this opinion.

FALK v. FANNIE MAE

[367 N.C. 594 (2014)]

MICHAEL A. FALK, AS TRUSTEE OF THE TRUST DATED 10-26-1989 HAVING THE TAX ID NUMBER 65-6043718 (A/K/A "THE CHARLOTTE FALK IRREVOCABLE TRUST") V. FANNIE MAE (A/K/A FEDERAL NATIONAL MORTGAGE ASSOCIATION); GLASSRATNER MANAGEMENT & REALTY ADVISORS, LLC; IDELL FLOURNEY; SONYA PETIT; LIBA MEIERE; SHAWNEQUA DODSON; ADOLFO ZARATE; TISHAUN WHITEHEAD; AND JOHN DOES #1 - #160, BEING THE UNIDENTIFIED LESSEES OF THE APARTMENT UNITS AT THE PROPERTY KNOWN AS "RIDGEWOOD APARTMENTS"

FANNIE MAE (A/K/A FEDERAL NATIONAL MORTGAGE ASSOCIATION), THIRD-PARTY PLAINTIFF V. MICHAEL A. FALK, AS TRUSTEE OF THE TRUST DATED 10-26-1989 HAVING THE TAX ID NUMBER 65-6043718 (A/K/A "THE CHARLOTTE FALK IRREVOCABLE TRUST") AND QUICKSILVER, LLC, THIRD-PARTY DEFENDANTS

No. 197PA13

(Filed 19 December 2014)

Mortgages and Deeds of Trust—competing liens—life of lien statute

In an action involving a dispute between two parties that held mortgage liens on the same apartment property, with the issue being the application of N.C.G.S. § 45-37(b) (applicable to liens recorded before 1 October 2011), the note to the trust of which plaintiff was the trustee (the Trust) was payable on demand and therefore matured on the date of its execution, 28 October 1994. For purposes of N.C.G.S. § 45-37(b), the note then expired fifteen years after the date of its execution and the Trust was prevented from asserting its interest in the property against creditors or purchasers for valuable consideration. Although a lienholder may file an affidavit or other instrument to extend its lien on the property, the Trust did not contend that it did so. Defendant-Fannie Mae, as a qualifying creditor who took its interest in the property from the mortgagor, could benefit from N.C.G.S. § 45-37(b)'s conclusive presumption that prior liens expire after fifteen years irrespective of the fact that its interest was recorded and assigned before expiration of the statute's fifteen-year period.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal of right of a constitutional question pursuant to N.C.G.S. § 7A-30(1) to review a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 738 S.E.2d 404 (2013), reversing and remanding an order entered on 9 March 2012 by Judge Lindsay R. Davis, Jr. in Superior Court, Guilford County. Heard in the Supreme Court on 6 October 2014.

Rossabi Black Slaughter, P.A., by Gavin J. Reardon and Amiel J. Rossabi, for plaintiff/third-party defendant-appellee Michael A. Falk and third-party defendant-appellee Quicksilver, LLC.

Horack, Talley, Pharr & Lowndes, P.A., by Zipporah B. Edwards and Robert B. McNeill; and Carruthers & Roth, P.A., by Rachel S. Decker and J. Patrick Haywood, for defendant/third-party plaintiff-appellant Fannie Mae and defendant-appellant GlassRatner Management and Realty Advisors, LLC.

HUNTER, Justice.

The case before us involves a dispute between Michael Falk, Trustee of the Charlotte Falk Irrevocable Trust (Trust), and the Federal National Mortgage Association (Fannie Mae), concerning which party's mortgage lien on the Ridgewood Apartments, located in Guilford County, has priority status. The solution to the dispute involves application of our State's "life of lien" statute, N.C.G.S. § 45-37(b).[1]

Subsection 45-37(b) establishes a conclusive presumption that the conditions of prior liens are satisfied after fifteen years from the later of either of two dates: the date on which the instrument requires performance, or the date of maturity of the last installment of debt (maturity date). Because in *Smith v. Davis*, 228 N.C. 172, 45 S.E.2d 51 (1947), this Court established that the 1923 version of this statute did not apply the presumption to lienholders who acquired and recorded their liens before the expiration of senior mortgage indebtedness, the Court of Appeals applied that interpretation to the current version of the statute. We hold this application was erroneous because the unique legislative language in the 1923 Act was not present in subsequent revisions of the life of lien statute. We conclude therefore that the General Assembly did not intend to continue this limitation and that the limitation did apply to the transactions in this case. N.C.G.S. § 45-37(b) authorizes a senior lienholder to extend the "life of the lien" by filing an affidavit with the register of deeds containing the information required by the statute. We hold that, absent the filing of such an affidavit, N.C.G.S. § 45-37(b) allows a court to conclusively presume that prior liens are satisfied irrespective of whether a subsequent lienholder obtained its interest before or after expiration of

1. N.C.G.S. § 45-37(b) (2013) applies to security instruments recorded and subject to the conclusive presumption provided by that statute before 1 October 2011. Security instruments recorded after that date are subject to the "life of lien" requirements of N.C.G.S. § 45-36.24 (2013).

the fifteen year period from the maturity date. Accordingly, we reverse the decision of the Court of Appeals.

Ridgewood Apartments (the property) consists of a number of tracts containing apartments for rent. In 1992 Michael Falk and his son Harry Falk, as shareholder-directors of Quicksilver Corporation, purchased the property for $5,200,000. The Falks subsequently converted Quicksilver Corporation into Quicksilver, LLC (Quicksilver) and became the sole member-managers. On 27 October 1994, Quicksilver acquired the property by deed and on the following day, 28 October, secured the payment with a promissory note (Trust Note) in the amount of $600,000 and a deed of trust (Trust Deed) "to evidence a debt incurred for the purchase of [the property]" in 1992. The Trust Note established a 14% per annum interest rate in the event of default. The Trust Deed was recorded in Guilford County on 30 December 1994.

In December 1994, Michael Falk issued an oral demand on behalf of the Trust to Quicksilver for partial payments on the loan.[2] The Trust contends that Quicksilver's failure to make payments placed Quicksilver in default, thus triggering the 14% default interest rate as specified in the Trust Note. Despite several partial payments to the Trust in later years, the Trust contends Quicksilver never cured the default, and the Trust Note has accrued interest at the default rate since 1995.

In 1999 Wachovia Bank, N.A. (Wachovia) loaned funds to Quicksilver to make improvements to the property. To fulfill a condition Wachovia imposed on its loan to Quicksilver, Michael Falk and a Co-Trustee signed an agreement subordinating the Trust's interest in the property to Wachovia. This subordination agreement was recorded on 15 March 2000. Wachovia secured its loan through a Deed of Trust, Assignment of Rents, and Security Agreement and Financing Statement (Wachovia Deed) encumbering the property. The Wachovia Deed was recorded in Guilford County on 7 July 1999.

To obtain a better interest rate, Quicksilver refinanced the Wachovia loan with funds from Lend Lease Mortgage Capital, L.P. (Lend Lease). To secure this loan, on 14 May 2001, Quicksilver executed and recorded a Multifamily Note secured by a Multifamily Deed of Trust, Assignment of Rents, and Security Agreement encumbering the property. Although the original deed of trust to the Trust was still

2. Unless otherwise noted, all references to Michael Falk or to the Trust's activities will be to Michael Falk's activities as Trustee of the Trust.

of record, no subordination agreement was signed for this transaction. The Wachovia Note and Deed of Trust were satisfied of record. Subsequently, Lend Lease sold and assigned its Note and Deed of Trust to Fannie Mae (hereinafter the FNMA Note and FNMA Deed).

Quicksilver subsequently defaulted on the FNMA Note and Fannie Mae foreclosed on the property in 2011. Fannie Mae was the highest bidder at the foreclosure sale and received a Trustee's Deed for the property dated 2 August 2011. Following Fannie Mae's foreclosure, Mr. Falk's counsel sent a letter to Fannie Mae stating that the Trust held a superior lien on the property and demanding immediate payment of $3,525,977.05 to cover the principal and interest owing under the Trust Note.

After Fannie Mae refused to pay the amount demanded, the Trust filed a verified complaint in Superior Court, Guilford County, against Fannie Mae and others seeking both a declaratory judgment that the Trust Deed was a "valid and enforceable lien" and an injunction to prevent Fannie Mae from collecting rents from residents of the property. In a separate action, the Trust sought to foreclose upon the property under its Trust Deed. After a foreclosure hearing before an assistant clerk of superior court, the assistant clerk filed findings of fact and an order permitting the Trust to proceed with foreclosure on the property.

Fannie Mae appealed the foreclosure order and findings of fact to the superior court. Fannie Mae also filed an answer to the Trust's verified complaint, a counterclaim and third-party complaint, and motions seeking a temporary restraining order and preliminary injunction to stop the foreclosure action. The superior court granted Fannie Mae's motion for a temporary restraining order and scheduled a hearing on all other matters for January 2012. Before the hearing date, Fannie Mae and Mr. Falk filed cross motions for summary judgment.

The matter was heard during the 17 January 2012 civil session of Superior Court, Guilford County. At the hearing, the Trust argued that the Trust Deed was valid and enforceable and entitled it to foreclose upon the property because of Quicksilver's default under the Trust Note. Fannie Mae argued, *inter alia*, that the Trust's lien had expired by operation of law and, in the alternative, that the FNMA Deed was superior to the Trust Deed "pursuant to subrogation." The trial court granted Fannie Mae's motion for summary judgment, ruling that the version of N.C.G.S. § 45-37(b) in effect when the Trust Note matured on 28 October 1994 operated to terminate the Trust's lien on the property no later than 28 October 2009. *See* N.C.G.S. § 45-37(b) (1991).

This termination of the Trust's lien enabled Fannie Mae to foreclose upon the property in 2011 without having the transaction encumbered by a senior lien. The Trust appealed.

At the Court of Appeals the Trust argued, *inter alia*, that the trial court erred by granting Fannie Mae's motion for summary judgment because N.C.G.S. § 45-37(b)'s conclusive presumption that prior liens expire after fifteen years is only available to a subsequent creditor who acquires an interest in the property *after* that fifteen year period has expired. Fannie Mae's brief before the Court of Appeals conceded this point. The Court of Appeals analyzed the applicability of N.C.G.S. § 45-37(b) (2011) and concluded that Fannie Mae could not avail itself of the statute's conclusive presumption.[3] The court cited this Court's opinion in *Smith v. Davis*, 228 N.C. 172, 45 S.E.2d 51, for the proposition that subsection 45-37(b)'s conclusive presumption is only available to creditors who rely on it when contracting for their interest in the property. *Falk v. Fannie Mae*, ___ N.C. App. ___, ___, 738 S.E.2d 404, 408 (2013) (citing *Smith*, 228 N.C. at 180, 45 S.E.2d at 57). The court then concluded that the trial court erred by giving Fannie Mae the benefit of subsection 45-37(b)'s conclusive presumption when the mortgage giant acquired its interest in the property on 14 May 2001, only six and a half years after the Trust Deed was recorded on 30 December 1994. *Id.* at ___, 738 S.E.2d at 408.

The Court of Appeals then considered two additional grounds on which it could possibly affirm the trial court's order: (1) whether our State's "new" life of lien statute, N.C.G.S. § 45-36.24(b), operates to terminate the Trust's lien to the benefit of Fannie Mae, and (2) whether equitable subrogation entitles Fannie Mae to take the status of senior lienholder.

On the first issue, the court determined that if subsection 45-36.24(b)—which has an effective date of 1 October 2011—were retroactively applied to the Trust Note and Deed, the Trust's lien would terminate on 28 October 2009. The court then concluded that such a retrospective application would be unconstitutional. Specifically, the court determined that retroactive application of subsection 45-36.24(b) to the Trust Deed would impair the Trust's vested rights in the property in violation of one or more of these provisions: Article I, Section 19 of the North Carolina Constitution, Article I, Section 10 of the United States Constitution, and Amendment XIV, Section 1 to the United States Constitution. *Id.* at ___, 738 S.E.2d at 410.

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3. The applicable version of N.C.G.S. 45-37(b) was effective 1 October 2011. N.C.G.S. § 45-37(b) has not been amended since 2011.

The Court of Appeals also rejected Fannie Mae's argument that the doctrine of equitable subrogation entitled it to senior lienholder status. The court concluded that under this Court's precedent in *Peek v. Wachovia Bank & Trust Co.*, 242 N.C. 1, 86 S.E.2d 745 (1955), a creditor could only benefit from equitable subrogation if it was "excusably ignorant" of an intervening lien. *Falk*, ___ N.C. App. at ___, 738 S.E.2d at 411 (citing *Peek*, 242 N.C. at 15, 86 S.E.2d at 755). In this case Fannie Mae had record notice of the Trust's lien on the property and therefore could not claim to be excusably ignorant for purposes of equitable subrogation. *Id.* at ___, 738 S.E. 2d at 411. For this and the foregoing reasons, the Court of Appeals reversed the trial court order and remanded for further proceedings.

Fannie Mae[4] sought discretionary review, which we allowed; we also retained Fannie Mae's notice of appeal based upon a constitutional question. In our order allowing review, we directed the parties to address the applicability of N.C.G.S. § 45-37(b) (1991) and N.C.G.S. § 45-37(b) (2011) because the trial court's order granting summary judgment to Fannie Mae applied section 45-37(b) (1991) to support its ruling.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2013). We review de novo an order granting summary judgment. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004) (citation omitted).

Since 1923 our State has limited the life of security liens in order to reduce the number of unsatisfied deeds of trust and other encumbrances hampering the marketability of property. In their current forms, our "life of lien" statutes—N.C.G.S. §§ 45-37(b) and 45-36.24 (2013)—impose a fifteen year period on the life of any lien on real property that was not extended through the filing of an affidavit or other instrument. After this period, these statutes allow a subsequent creditor of the grantor to transfer the subject property free of the prior lienholder's encumbrances.

4. GlassRatner Management & Realty Advisors, LLC—Fannie Mae's agent for the collection of rents on the property—and various lessees of the apartment units in Ridgewood Apartments are also parties to this action. For simplicity, we will refer only to Fannie Mae.

In the present case the Trust executed and recorded the Trust Deed on 30 December 1994 to secure repayment of an earlier loan. Considered under our state's "race recording" statute alone, the Trust's act of recording its deed established its superior interest in the property relative to the FNMA Deed, which was recorded on 14 May 2001. *Falk*, ___ N.C. App. at ___, 738 S.E.2d at 408; *see* N.C.G.S. §§ 47-18, -20 (2013). The issue before the Court is whether the Trust's failure to file an affidavit extending the life of its lien before Fannie Mae's foreclosure upon the property in 2011 undermined its security interest in the property.

This issue presents two questions: (1) Whether the Trust Note and the Trust Deed, executed in 1994, continued to impose a valid lien on the property in 2011 when Fannie Mae initiated foreclosure; and (2) Whether Fannie Mae, which acquired its interest in the property less than seven years after the Trust Deed was executed and recorded, could benefit from the statutorily imposed expiration of the Trust's lien.

The Court of Appeals considered two statutes under which the Trust Deed could have expired. The court first considered N.C.G.S. § 45-37(b), our State's "old" life of lien statute which, in an earlier version, was in effect at the time the Trust Deed was executed. The court also considered retroactive application of the "new" life of lien statute, N.C.G.S. § 45-36.24, which applies to all security instruments whenever recorded, except, inter alia, those "conclusively presumed to have been fully paid and performed pursuant to . . . [subsection] 45-37(b) [before] October 1, 2011." N.C.G.S. § 45-37(b).

We begin by considering subsection 45-37(b). It is a settled principle of constitutional law that "any law affecting the validity, construction and enforcement of a contract at the time of its making becomes a part of the contract as fully as if incorporated therein." *Adair v. Orrell's Mut. Burial Ass'n, Inc.*, 284 N.C. 534, 538, 201 S.E.2d 905, 908 (citations omitted), *appeal dismissed*, 417 U.S. 927 (1974). As a general matter, therefore, courts must apply the law that is in effect when a contract is formed in any future dispute over the construction of that contract. Consistent with this principle, the trial court applied the then-current version of subsection 45-37(b) (codified at N.C.G.S. § 45-37(b) (1991)) to determine whether the Trust Deed was valid and enforceable after Fannie Mae's foreclosure in 2011. The 1991 version of N.C.G.S. § 45-37(b) was effective from 1 January 1992 until 1 October 2011, and was thus part of the "law of the contract" when the Trust Note and Trust Deed were executed in 1994.

It is also, however, "a generally accepted principle of statutory construction that there is no constitutional limitation upon legislative power to enact retroactive laws which do not impair the obligation of contracts or disturb vested rights." *Piedmont Mem'l Hosp. v. Guilford Cnty.*, 221 N.C. 308, 311, 20 S.E.2d 332, 334 (1942) (citations omitted). When the General Assembly rewrote subsection 45-37(b) in 2011, it made no substantive changes to the 1991 version of the statute. *See* Act of June 18, 2011, ch. 312, sec. 12, 2011 N.C. Sess. Laws 1212, 1229-30. Other than containing minor editorial revisions, N.C.G.S. § 45-37(b) (2011) merely established that the statute would apply "only to security instruments . . . that were conclusively presumed pursuant to this subsection to have been fully paid and performed prior to October 2011" and that a new life of lien statute, N.C.G.S. § 45-36.24 (2011), would apply to security instruments recorded after that date. It also required that creditors file affidavits or a separate instrument postponing the date of lien expiration on or before 1 October 2011.

Subsection 45-37(b) is "retroactive" in the limited sense that it applies to "any security instrument recorded before October 1, 2011." Because the current version of subsection 45-37(b) does not include any changes that would "impair the obligation of contracts or disturb vested rights" in relation to the security instruments at issue in this case, *id.* at 311, 20 S.E.2d at 334, we conclude that the Court of Appeals' application of that statute to the Trust Deed was proper. This is the version of the statute that we apply here.

Subsection 45-37(b) states, in relevant part:

> It shall be conclusively presumed that the conditions of any security instrument recorded before October 1, 2011, securing the payment of money or securing the performance of any other obligation or obligations have been complied with or the debts secured thereby paid or obligations performed, as against creditors or purchasers for valuable consideration from the mortgagor or grantor, from and after the expiration of 15 years from whichever of the following occurs last:
>
> (1) The date when the conditions of the security instrument were required by its terms to have been performed, or
>
> (2) The date of maturity of the last installment of debt or interest secured thereby;

> provided that on or before October 1, 2011, and before the lien has expired pursuant to this subsection, the holder of the indebtedness secured by the security instrument or party secured by any provision thereof may file an affidavit with the register of deeds which affidavit shall specifically state:
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> (1) The amount of debt unpaid, which is secured by the security instrument; or
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> (2) In what respect any other condition thereof shall not have been complied with; or
>
> may record a separate instrument signed by the secured creditor and witnessed by the register of deeds stating:
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> (1) Any payments that have been made on the indebtedness or other obligation secured by the security instrument including the date and amount of payments and
>
> (2) The amount still due or obligations not performed under the security instrument.
>
> The effect of the filing of the affidavit or the recording of a separate instrument made as herein provided shall be to postpone the effective date of the conclusive presumption of satisfaction to a date 15 years from the filing of the affidavit or from the recording of the separate instrument.

In interpreting this statute, we are guided by our obligation to give effect to the plain meaning of its terms. "'When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.'" *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) (citations omitted).

By its plain terms, subsection 45-37(b) establishes a conclusive presumption that, as against subsequent creditors or purchasers for value from the grantor, the terms of a deed of trust have been satisfied from and after the expiration of fifteen years from the latter of "(1) [t]he date when the conditions of the security instrument were required by its terms to have been performed, or (2) [t]he date of maturity of the last installment of debt or interest secured thereby." A lienholder may file an affidavit or record a separate instrument with

the register of deeds containing the required information and thus postpone expiration of its lien beyond the fifteen year period; however, if the lienholder does not file such an additional instrument, this statute directs that a senior lienholder will no longer be able to assert his lien against the interests of a subsequent creditor after fifteen years have expired.

Here the Trust does not contend that it filed an affidavit or other instrument with the Guilford County Register of Deeds to extend its lien on the property. Therefore, the only question we must resolve is the date on which subsection 45-37(b)'s fifteen year expiration period began in relation to the Trust's lien.

Our State has long recognized that "a promissory note, payable on demand, is a present debt . . . and the statute [of limitations] begins to run from the date of it." *Caldwell v. Rodman*, 50 N.C. (5 Jones) 139, 140 (1857) (citation and quotation marks omitted). The trial court noted that this rule "has clear application in determining when a claim for breach of the obligation to pay according to the instrument accrues for statute of limitations purposes, but no reason exists why it should not apply as well where the issue is when a lien expires." We agree.

Here the Trust Note was payable on demand. Accordingly, the Trust Note matured on the date of its execution, 28 October 1994. For the purposes of N.C.G.S. § 45-37(b), therefore, the Trust Note—and the Trust Deed that was executed to secure repayment under the note—expired on 28 October 2009, fifteen years after the date of the Note's execution. This expiration prevented the Trust from being able to assert its interest in the property "against creditors or purchasers for valuable consideration from the mortgagor or grantor" after that date. N.C.G.S. § 45-37(b) (2011).

The remaining question is whether Fannie Mae qualifies as a creditor or purchaser for value who can claim the benefit of subsection 45-37(b)'s conclusive presumption. By its plain terms, subsection 45-37(b) does not limit the creditors or purchasers for value from the mortgagor who may claim the benefit of the conclusive presumption in relation to prior liens. The statute says nothing about when a subsequent creditor must obtain its interest from the grantor. The only time limitation imposed by the statute concerns when the conclusive presumption can be claimed at all: "from and after the expiration of 15 years." *Id.*

Giving effect to the plain terms of this statute, therefore, we hold that the Trust Deed expired on 28 October 2009 because the Trust did not file the required documentation to extend the life of its security interest. We hold further that Fannie Mae, as a qualifying creditor who took its interest in the property from the mortgagor Quicksilver, could benefit from subsection 45-37(b)'s conclusive presumption irrespective of the fact that its interest was recorded and assigned before expiration of the statute's fifteen year period.

The Court of Appeals arrived at a different conclusion. That court cited our opinion in *Smith* to argue that "[i]n light of the primary purpose of the statute," subsection 45-37(b)'s conclusive presumption "arises only in favor of creditors and purchasers for valuable consideration who rely on the presumption when contracting." *Falk*, ___ N.C. App. at ___, 738 S.E. 2d at 408 (citing *Smith*, 228 N.C. at 180, 45 S.E.2d at 57). Because Fannie Mae acquired the FMNA Deed less than seven years after the Trust Deed was recorded, the court reasoned that Fannie Mae could not have relied on the statutory presumption because it had not yet arisen. *Id.* at ___, 738 S.E.2d at 408.

In *Smith* this Court addressed a situation in which a bank acquired a deed of trust on property within fifteen years of an earlier lien. When the junior lienholder foreclosed after the fifteen year period and attempted to transfer the property free of the earlier encumbrance, the lower courts found the prior lien valid and enforceable. The Court interpreted N.C.G.S. § 45-37(5) (1943),[5] the predecessor statute to subsection 45-37(b), and concluded the presumption was only available to creditors who loaned funds to the mortgagor after the fifteen years had expired. *Smith*, 228 N.C. at 178-79, 45 S.E.2d at 56-57.

The Court's interpretation of the statute in *Smith* was not based on the statutory language itself, but rather on the language of the caption appended to the General Assembly's original enactment in 1923: "An Act to Facilitate the Examination of Titles and to Create a Presumption of Payment of Instruments Securing the Payment of Money After Fifteen Years from the Date of the Maturity of the Debts Secured Thereby." *Id.* at 178, 45 S.E.2d at 56 (quoting Act of Mar. 6, 1923, ch. 192, sec. 1, 1923 N.C. Pub. [Sess.] Laws 508, 508 (codified at section 2594 of the Consolidated Statutes of North Carolina (1924) (amended 1935) (recodified at N.C.G.S. § 45-37 (1943))). The Court

5. N.C.G.S. § 45-37(5) was recodified in 1969 to the current numbering format of subsection 45-37(b).

looked to the caption of the original Act because it believed the statute was ambiguous regarding the creditors the General Assembly intended to benefit by creating the conclusive presumption on the life of liens. *Id.* at 179-80, 45 S.E.2d at 57. The Court interpreted the caption's use of the verb "to facilitate" to render the statute's provisions "prospective" in the sense of making future transactions easier by removing the obstacle of "old and unsatisfied mortgages." *Id.* at 180, 45 S.E.2d at 57. The Court in *Smith* held that the General Assembly's intention was to protect only parties "who extend credit or purchase for a valuable consideration 'from and after' the expiration of the fifteen year period." *Id.*

The Court's interpretation of the statute in *Smith* was short-lived. In 1951 the General Assembly rejected that interpretation by enacting an amendment to section 45-37 that permitted subsequent creditors to avail themselves of the conclusive presumption that prior liens expire after fifteen years regardless of when they extended credit. *See* Act of Mar. 20, 1951, ch. 292, sec. 1, 1951 N.C. Sess. Laws 243. When this amendment to the statute was codified, subsection 45-37(5) included the statement that the conclusive presumption would protect subsequent creditors "irrespective of whether the credit was extended or the purchase was made before or after the expiration of said fifteen years." *Id.*; N.C.G.S. § 45-37(5) (Supp. 1965).

The 1951 amendment to the statute explicitly contradicted the *Smith* interpretation of the statute. The change remained in place until 1969, when the General Assembly acted (in the words of the new session law's caption) "to recodify and simplify the law concerning discharge of record of mortgages, deeds of trust and other instruments." Act of Jun. 9, 1969, ch. 746, 1969 N.C. Sess. Laws 762, 762. The 1969 amendment reformatted the statute into its current form (subsection 45-37(b)) and eliminated the clause inserted in 1951 stating "irrespective of whether the credit was extended or the purchase was made before or after the expiration of said fifteen years." *Id.*, sec. 1, at 764-65; *see* N.C.G.S. § 45-37(b) (Supp. 1969). With only very minor changes, the law codified in 1969 remains today, resulting in the statute that we have reproduced above.

We find the language in the version of subsection 45-37(b) that has existed since 1969 unambiguous with respect to which creditors may avail themselves of the conclusive presumption bearing on the expiration of prior liens. The statute makes the presumption effective in relation to "creditors or purchasers for valuable consideration from the mortgagor or grantor." N.C.G.S. § 45-37(b). The presumption

is categorical—it imposes no limitation on when a creditor must obtain its interest in the property to be able to avail itself of the statute's protection after the expiration of the fifteen year period.

In its brief before this Court, the Trust argues that when the 1969 General Assembly eliminated the language inserted in 1951, it effectively reenacted the *Smith* decision's understanding of the statutory language over the objections of an earlier legislature. We reject this argument. The Court in *Smith* found the statute ambiguous regarding which creditors could benefit from the presumption. For this reason, the Court looked outside the statute to supply a meaning that it did not find in the statutory language itself. Accordingly, if the 1969 General Assembly intended to enact the *Smith* decision's interpretation of language the Court found ambiguous, the legislature would have introduced a clear statement of the rule rather than allowing the original, purportedly ambiguous language to stand.

Because the language of the statute is unambiguous, we need not construe the possible legislative intent behind it. *N. C. Med. Bd.*, 363 N.C. at 201, 675 S.E.2d at 649. Even if we look to evidence of legislative intent, however, we find nothing in the history of the statute's evolution since 1951 that suggests the legislature's intent to follow this Court's decision in *Smith* by limiting the benefit of the statute to creditors acquiring their interest after the fifteen year period. When the General Assembly revised the statute in 1969 and eliminated the language explicitly making the presumption applicable to subsequent creditors irrespective of when they acquired their interest, it announced its intention as one of "simplify[ing]" the statute. *See* Ch. 746, sec. 1, 1969 N.C. Sess. Laws at 762. If the General Assembly intended to do more than clarify and streamline the statutory language, it could have inserted new terms. If it intended to enact the *Smith* decision's limitation, it could simply have said the conclusive presumption was available only to creditors who rely on it when contracting for their interest.

We hold that N.C.G.S. § 45-37(b) allows creditors or purchasers for value from a grantor to benefit from the conclusive presumption that prior liens expire after fifteen years irrespective of when those creditors obtain their interest. Accordingly, in this case the statute acted to terminate the Trust Deed and permitted Fannie Mae to foreclose on the property unencumbered. The Court of Appeals erred in overturning the trial court's order granting summary judgment for Fannie Mae on this basis. Because we find a proper interpretation of

subsection 45-37(b) dispositive of the controversy before us, we need not reach the other issues addressed before the Court of Appeals. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

JUDY HAMMOND v. SAIRA SAINI, M.D.; CAROLINA PLASTIC SURGERY OF FAYETTEVILLE, P.C.; VICTOR KUBIT, M.D.; CUMBERLAND ANESTHESIA ASSOCIATES, P.A.; WANDA UNTCH; JAMES BAX; AND CUMBERLAND COUNTY HOSPITAL SYSTEM, INC.

No. 492PA13

(Filed 19 December 2014)

Discovery—medical review privilege—failure to establish medical review committee

The trial court did not err in a medical malpractice case by concluding that the Quality Care Control Reports, notes taken by the Cumberland County Health System, Inc. (CCHS) Risk Manager, and the Root Cause Analysis Report were not protected by N.C.G.S. § 131E-95(b). Defendant CCHS failed to demonstrate the existence of a medical review committee within the meaning of the statute, and thus, the documents were not shielded from discovery.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 748 S.E.2d 585 (2013), affirming in part and vacating and remanding in part orders entered on 18 June 2012 by Judge Mary Ann Tally in Superior Court, Cumberland County. Heard in the Supreme Court on 6 October 2014.

Patterson Harkavy LLP, by Burton Craige and Narendra K. Ghosh; and Beaver Holt Sternlicht & Courie, P.A., by Mark A. Sternlicht, for plaintiff-appellee.

McGuireWoods, LLP, by Patrick M. Meacham, Mark E. Anderson, and Monica E. Webb, for defendant-appellants Wanda Untch, James Bax, and Cumberland County Hospital System, Inc.

The Lawing Firm, P.A., by Sally A. Lawing; and The Whitley Law Firm, by Ann C. Ochsner, for North Carolina Advocates for Justice, amicus curiae.

Linwood Jones, General Counsel, for North Carolina Hospital Association, amicus curiae.

JACKSON, Justice.

In this case we consider whether certain documents in the possession of the Cumberland County Health System, Inc. ("CCHS") are shielded from discovery by section 131E-95 of the North Carolina General Statutes, which protects "[t]he proceedings of a medical review committee, the records and materials it produces and the materials it considers." N.C.G.S. § 131E-95(b) (2013). Because we conclude that CCHS failed to demonstrate the existence of a medical review committee within the meaning of the statute, we hold that the documents are not shielded from discovery on this basis. Accordingly, we affirm the decision of the Court of Appeals.

On 28 September 2011, plaintiff filed a complaint against defendants in Superior Court, Cumberland County. Plaintiff's complaint alleged that on 17 September 2010, she went to Cape Fear Valley Medical Center for surgery to remove a possible basal cell carcinoma from her face. The surgery was performed by Saira Saini, M.D., a physician with Carolina Plastic Surgery of Fayetteville, P.C., and total intravenous anesthesia was administered by Victor Kubit, M.D., an anesthesiologist with Cumberland Anesthesia Associates, P.A. During the surgery, drapes were placed on plaintiff's face, and Dr. Kubit, along with nurse anesthetists Wanda Untch and James Bax, both CCHS employees, administered supplemental oxygen to plaintiff through a face mask. The complaint asserted that the supplemental oxygen was "permitted . . . to build up under the . . . drapes" on plaintiff's face. According to the complaint, the oxygen and the drapes were ignited by an electrocautery device used by Dr. Saini to stop bleeding, and the resulting fire caused first and second degree burns and left plaintiff with permanent injuries and scars. As a result, plaintiff sought damages based upon negligence.

On 2 December 2011, defendants CCHS, Untch, and Bax filed an answer denying the allegations of negligence.[1] Subsequently, plaintiff served interrogatories and requests for production of documents on

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

these defendants. Defendants objected to some of plaintiff's discovery requests and argued, *inter alia*, that N.C.G.S. § 131E-95 shielded from discovery: (1) documents titled "Quality Care Control Reports" ("QCC Reports") prepared by Bax and Stephanie Emanuel; (2) notes taken by CCHS Risk Manager Harold Maynard; and (3) a document titled "Root Cause Analysis Report" ("RCA Report").

Plaintiff filed motions to compel discovery pursuant to Rule 37 of the North Carolina Rules of Civil Procedure. In opposing these motions, defendants submitted an affidavit from Maynard and a copy of an administrative policy titled "Sentinel Events and Root Cause Analysis" ("RCA Policy"). In addition, defendants submitted copies of the documents that they had withheld to the trial court for *in camera* review. On 18 June 2012, the trial court entered orders granting plaintiff's motions to compel discovery. On an interlocutory appeal from these orders, the Court of Appeals affirmed the trial court's conclusion that N.C.G.S. § 131E-95 did not apply because defendants had not shown that the withheld documents were part of a medical review committee's proceedings, were produced by a medical review committee, or were considered by a medical review committee as required by the statute. *Hammond v. Saini*, ____ N.C. App. ____, ____, 748 S.E.2d 585, 590 (2013). We allowed defendants' petition for discretionary review.[2]

Defendants argue that after the operating room fire that injured plaintiff, CCHS established a Root Cause Analysis Team ("RCA Team"), which constitutes a medical review committee pursuant to N.C.G.S. § 131E-76(5). Defendants contend that as a result, the QCC Reports, Maynard's notes, and the RCA Report, which allegedly were considered or produced by the RCA Team, are protected by N.C.G.S. § 131E-95. We disagree.

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) (citation omitted); *see also Bryson v. Haywood Reg'l Med. Ctr.*, 204 N.C. App. 532, 535, 694 S.E.2d 416, 419 (citation omitted), *disc. rev. denied*, 364 N.C. 602, 703 S.E.2d 158 (2010). Pursuant to subsection 131E-95(b), "[t]he proceedings of a medical review committee, the records and materials it produces and the materials it considers" are shielded from discovery and introduction

2. In addition, the Court of Appeals considered other issues raised by defendants. *Hammond*, ___ N.C. App. at ___, ___, 748 S.E.2d at 588, 592-94. These issues were not presented in the petition for discretionary review and are not before this Court. *See* N.C. R. App. P. 16(a).

into evidence in certain civil cases. N.C.G.S. § 131E-95(b). A medical review committee is

> any of the following committees formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing:
>
> a. A committee of a state or local professional society.
>
> b. A committee of a medical staff of a hospital.
>
> c. A committee of a hospital or hospital system, if created by the governing board or medical staff of the hospital or system or operating under written procedures adopted by the governing board or medical staff of the hospital or system.
>
> d. A committee of a peer review corporation or organization.

Id. § 131E-76(5) (2013). The party asserting the privilege has the burden to demonstrate each of its essential elements and cannot meet this burden by mere conclusory assertions. *In re Miller*, 357 N.C. 316, 336, 584 S.E.2d 772, 787 (2003). In the case *sub judice*, defendants rely upon subdivision (c) of this definition in asserting that the RCA Team constitutes a medical review committee. Necessarily, to establish the applicability of the definition in subdivision (c), the evidence must set forth either how the committee was "created" or how the "written procedures" it "operat[es] under" were "adopted." N.C.G.S. § 131E-76(5)(c); *see also Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 84, 347 S.E.2d 824, 829-30 (1986) (considering whether a hospital's board of trustees constituted a medical review committee based upon evaluation of the roles and powers of the board, the bylaws of the hospital and medical staff, and the requirement that a specific officer "be invited to attend" medical staff executive committee meetings).

Here, defendants rely upon Maynard's affidavit, which states in pertinent part:

> 3. The attached CCHS Administrative Policy titled "Sentinel Events and Root Cause Analysis" was in place on September 17, 2010.
>
> 4. Pursuant to this policy, the events related to Ms. Hammond's surgery on September 17, 2010, were considered to be a sentinel event and a root cause analysis was performed that resulted in the production of a root cause analysis report. The

> sentinel event and root cause analysis processes are peer review processes designed to evaluate the quality, cost of, and/or necessity for hospitalization and/or the providing of health care.
>
> 5. In general, the peer review committees established to deal with sentinel events and prepare a root cause analysis are created by the medical staff and governing board of CCHS and operate under the attached written procedures, which have been adopted by the medical staff and governing board of the healthcare system. This was true on September 17, 2010.
>
> 6. Pursuant to the attached CCHS policy, the sentinel event and root cause analysis activities are considered Medical Review Committees as defined by N.C.G.S. §[ ]131E-76(5). The proceedings related to the sentinel event and root cause analysis peer review activities, the records and materials they produce, and the materials they consider are confidential pursuant to N.C.G.S. §[ ]131E-95.

This affidavit is insufficient to demonstrate that the RCA Team meets the criteria for a medical review committee as defined by N.C.G.S. § 131E-76(5)(c). Instead, the affidavit merely recites the language of the statute and offers the conclusory assurance that each requirement has been satisfied. The affidavit does not provide specific evidence that could serve as the basis of findings of fact or conclusions of law. In addition, it explains none of the formal organizational processes that led to the adoption of the RCA Policy and the creation of the RCA Team and identifies none of the departments or personnel involved.

Similarly, defendants rely upon the RCA Policy, which does not contain sufficient evidence to demonstrate the applicability of N.C.G.S. §§ 131E-76(5) and 131E-95(b). Nothing about the policy itself indicates that the RCA Team "operat[ed] under" the policy in this investigation. *See* N.C.G.S. § 131E-76(5)(c). In addition, it does not appear that the RCA Policy was "adopted by the governing board or medical staff of" CCHS. *See id.* The policy states only that it was "approved by MN" and that it originated in the "Performance Improvement/Patient Safety" department. No evidence has identified these entities as the governing board or medical staff of CCHS.

Based upon the evidence in the record, we are unable to conclude that the RCA Team constitutes a medical review committee pursuant to N.C.G.S. § 131E-76(5). As a result, the trial court did not err by con-

cluding that the QCC Reports, Maynard's notes, and the RCA Report are not protected by N.C.G.S. § 131E-95(b). The decision of the Court of Appeals, except as modified herein, is affirmed as to the issue on direct appeal pursuant to the PDR. We remand this case to the COA for further remand to the trial court for additional proceedings not inconsistent with this opinion.

MODIFIED, AFFIRMED, AND REMANDED.

IN RE JERRY'S SHELL, LLC

No. 553PA13

(Filed 19 December 2014)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 753 S.E.2d 399 (2013), reversing an order entered on 26 November 2012 by Judge Richard L. Doughton in Superior Court, Rowan County, and remanding the matter for a new hearing. Heard in the Supreme Court on 7 October 2014.

Roy Cooper, *Attorney General*, *by Christopher W. Brooks*, *Assistant Attorney General*, *for respondent-appellant Michael D. Robertson*, *Commissioner*, *North Carolina Division of Motor Vehicles.*

Jessica C. Williams, *PLLC*, *by Ralph E. Stevenson*, *III*, *for petitioner-appellee Jerry's Shell Service*, *LLC.*

PER CURIAM.

For the reasons stated in *In re Twin County Motorsports*, *Inc.*, 367 N.C. 613 766, S.E.2d 832 (2014), we reverse the decision of the Court of Appeals and remand this case to that court for consideration of petitioner's remaining assignments of error.

REVERSED AND REMANDED.

IN RE TWIN COUNTY MOTORSPORTS, INC.

No. 552PA13

(Filed 19 December 2014)

Administrative Law—administrative agency hearing—pro se representation of corporation by nonattorney—not unauthorized practice of law

The Court of Appeals erred by holding that a nonattorney had engaged in unauthorized practice of law under N.C.G.S. §§ 84-4 and 84-5 when he represented a corporation in a Department of Motor Vehicles hearing. An administrative hearing does not constitute an "action or proceeding" before a judicial body under N.C.G.S. § 84-4. The corporation was not entitled to a new hearing.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 749 S.E.2d 474 (2013), affirming an order entered on 17 October 2012 by Judge Frank Brown in Superior Court, Nash County, and remanding the matter for a new hearing. Heard in the Supreme Court on 7 October 2014.

Roy Cooper, *Attorney General*, *by Christopher W. Brooks*, *Assistant Attorney General*, *for respondant-appellant Michael D. Robertson*, *Commissioner*, *North Carolina Division of Motor Vehicles.*

Jessica C. Williams, *PLLC*, *by Ralph E. Stevenson*, *III*, *for petitioner-appellee Twin County Motorsports*, *Inc.*

BEASLEY, Justice.

In this appeal we consider whether a corporation may appear or proceed at hearings before the Division of Motor Vehicles ("DMV") without being represented by an attorney. Because we have determined that a hearing before an administrative agency is not an "action or proceeding," we hold that a nonattorney may appear or proceed on behalf of a corporation before an administrative hearing officer without engaging in the unauthorized practice of law under N.C.G.S. § 84-4.

Twin County Motorsports, Inc. ("Twin County") is licensed by the DMV to perform vehicle emissions and equipment inspections. On 7 October 2010, the DMV charged Twin County with six violations of N.C.G.S. § 20-183.7B(a)(3) for allowing a person not licensed as a

safety inspection mechanic to perform safety inspections. Lance Cherry, an officer and shareholder of Twin County, requested a hearing before the DMV. On 19 May 2011, Cherry appeared on behalf of Twin County at the DMV hearing. He informed the hearing officer that he did not wish to have an attorney present. In his testimony, he stated that the allegations levied by the DMV were "accurate," but that the violations were "unintentional." The hearing officer concluded that sufficient evidence was presented to sustain that Twin County violated N.C.G.S. § 20–183.7B(a)(3). The hearing officer levied a civil penalty of fifteen hundred dollars and suspended Twin County's inspection license for 1080 days.

Twin County retained legal counsel and sought review of the hearing officer's decision by the Commissioner of the DMV. The Commissioner upheld the hearing officer's order on 5 August 2011. Twin County appealed the Commissioner's decision to the Superior Court of Nash County. In its appeal to the trial court, Twin County asserted that Twin County, as a corporation, should not have been represented by Cherry, a nonattorney, at the DMV hearing. The trial court agreed, concluded that Cherry's *pro se* representation of Twin County as an agent of Twin County constituted the unauthorized practice of law in violation of N.C.G.S. §§ 84-4 and 84-5, and remanded the matter to the DMV hearing officer for a new hearing. The State appealed to the Court of Appeals.

The Court of Appeals affirmed the trial court. *In re Twin Cnty. Motorsports, Inc.*, ___ N.C. App. ___, 749 S.E.2d 474 (2013). The court reasoned that its earlier holding in *Lexis-Nexis, Division of Reed Elsevier, Inc. v. Travishan Corp.* that " 'a corporation must be represented by a duly admitted and licensed attorney-at-law and cannot proceed *pro se*' " controlled here. *Id.* at ___, 749 S.E.2d at 476 (quoting *Lexis-Nexis*, 155 N.C. App. 205, 209, 573 S.E.2d 547, 549 (2002)). The Court of Appeals explained that even though it had determined that a corporation may represent itself pro se in "contested case" proceedings under N.C.G.S. § 150B-23 before the Office of Administrative Hearings ("OAH"), *Allied Envtl. Servs., PLLC v. N.C. Dep't of Envtl. & Natural Res.*, 187 N.C. App. 227, 653 S.E.2d 11 (2007), *disc. rev. denied*, 362 N.C. 354, 661 S.E.2d 238 (2008), this exception to *Lexis-Nexis's* general prohibition against *pro se* representation by corporations did not apply here because DMV proceedings are exempt from the "contested case" provisions of N.C.G.S. Chapter 150B and are thus not governed by section 150B-23. *Twin Cnty. Motorsports*, ___ N.C. App. at ___, 749 S.E.2d at 477. Because

the reasoning employed by the Court of Appeals in announcing the *Allied* "exception" did not apply to administrative appeals *not* governed by N.C.G.S. § 150B-23, the court held that "in hearings before the DMV, corporations must be represented by legal counsel." *Id.* at ___, 749 S.E.2d at 477.

The State sought our discretionary review of the court's decision, which we allowed on 6 March 2014. ___ N.C. ___, 755 S.E.2d 627 (2014). In its appeal to this Court, the State asks that we conclude that N.C.G.S. § 84-4, governing the unauthorized practice of law, does not prohibit an owner of a business licensed by the DMV from appearing on behalf of his entity at a license hearing. The State asserts that "administrative license hearings before [the] DMV are not by law an 'action or proceeding' " under N.C.G.S. § 84-4 and that, under *State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337 (1962), a nonlawyer agent is allowed to perform a legal act on behalf of a corporation without violating section 84-4 if the act is in "the primary interest of the corporation." *See Gardner v. N.C. State Bar*, 316 N.C. 285, 289-90, 341 S.E.2d 517, 520 (1986) ("When a corporation's employees perform legal services for the corporation in the course of their employment, their acts have been held to be the acts of the corporation so that in law, the corporation itself is performing the acts.").

In pertinent part, N.C.G.S. § 84-4 provides that

> it shall be unlawful for any person or association of persons, except active members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys-at-law, to appear as attorney or counselor at law in any action or proceeding before any judicial body, including the North Carolina Industrial Commission, or the Utilities Commission . . . .

N.C.G.S. § 84-4 (2013). A prerequisite for the unauthorized practice of law under N.C.G.S. § 84-4, therefore, is indeed an appearance in an "action or proceeding" before a judicial body.

In *Ocean Hill Joint Venture v. North Carolina Department of Environment, Health & Natural Resources*, 333 N.C. 318, 426 S.E.2d 274 (1993), this Court addressed the definition of "action or proceeding." We addressed whether a one-year statute of limitations, N.C.G.S. § 1-54(2), applied to an administrative agency's assessment of a civil penalty. *Id.* at 320-21, 426 S.E.2d at 276. The provision in question prescribed a one-year statute of limitations of one year for "an action or proceeding . . . [u]pon a statute . . . where the action is given to the State alone." N.C.G.S. § 1-54, -54(2) (1983). We determined that "a pre-

requisite for application of N.C.G.S. § 1-54 is that there must be an 'action or proceeding.' " *Ocean Hill*, 333 N.C. at 321, 426 S.E.2d at 276. We turned to the question of what, then, constitutes an "action or proceeding":

> An "action" as defined in N.C.G.S. § 1-2 "is an ordinary proceeding in a court of justice . . . ." Although "proceeding" itself is not defined in Chapter 1, the terms "ordinary proceeding" and "special proceeding" are both used. The definition of "action" encompasses "ordinary" proceedings while a "special proceeding" includes every other remedy in a court of justice. From these definitions we conclude that, as the term is used in Chapter 1 of the General Statutes, a "proceeding," like an "action," must take place in a court of justice.

Id. (emphasis added by court) (citations omitted). We then contemplated whether an agency, when empowered by the General Assembly with judicial authority, may constitute such a "court of justice":

> We have recognized that "[a]rticle IV, section 3 of the Constitution contemplates that discretionary judicial authority may be granted to an agency when reasonably necessary to accomplish the agency's purposes." *In the Matter of Appeal from the Civil Penalty Assessed for Violations of the SPCA*, 324 N.C. 373, 379, 379 S.E.2d 30, 34 (1989). However, an agency so empowered is not a part of the "general court of justice." N.C. Const. art. IV, § 2. In fact, "[a]ppeals from administrative agencies shall be to the general court of justice." N.C. Const. art. IV, § 3 (emphasis added). Thus, the grant of limited judicial authority to an administrative agency does not transform the agency into a court for purposes of the statute of limitations.

Id. (brackets in original). We concluded that the agency's "issuance . . . of a notice of civil penalty" was "not the institution of an action or proceeding in a court [of justice]" and therefore, was not "within the meaning of N.C.G.S. § 1-54." *Id.*

Our holding in *Ocean Hill* governs the question before us today. As in *Ocean Hill*, a prerequisite for the statute at issue is that there be an "action or proceeding." N.C.G.S. § 84-4. We have determined that an "action or proceeding" requires a "court of justice," and that an administrative agency, though empowered with limited judicial authority, is not a "court of justice." *Ocean Hill*, 333 N.C. at 321, 426 S.E.2d at 276. We must therefore conclude that a nonattorney's appearance on behalf of a corporate entity before an administrative

hearing officer does not constitute the unauthorized practice of law under N.C.G.S. § 84-4 because the appearance is not an "appear[ance] as attorney or counselor at law in any *action or proceeding* before any judicial body." N.C.G.S. § 84-4 (emphasis added). Because an appearance by a nonattorney before an administrative hearing officer does not constitute the unauthorized practice of law under N.C.G.S. § 84-4, we need not address the State's arguments concerning *Pledger*.

We further note that our conclusion that a nonattorney may appear before an administrative hearing officer without violating N.C.G.S. § 84-4 is in line with recent legislative action. The North Carolina General Assembly has recently provided that, in contested cases before the Office of Administrative Hearings (OAH) and in appeals to the Property Tax Commission, "[a] business entity may represent itself using a nonattorney representative." Act of Aug. 15, 2014, ch. 120, secs. 7(a), 7(b), 2014 5 N.C. Adv. Legis. Serv. 26, 31-32 (LexisNexis) (amending N.C.G.S. §§ 150B-23(a) and 105-290). While not directly governing the matter *sub judice* because the legislation applies to contested cases before the OAH and appeals to the Property Tax Commission commencing on or after 18 September 2014, the passage of this legislation is consistent with our conclusion that a nonattorney's appearance before an administrative hearing officer does not constitute the unauthorized practice of law under N.C.G.S. § 84-4.

The trial court erred in reversing the DMV's final agency decision in this case. For the reasons stated above, we reverse the decision of the Court of Appeals affirming the trial court's order and remanding this matter for a new hearing before the DMV.

REVERSED.

DOUGLAS KIRK LUNSFORD v. THOMAS E. MILLS, JAMES W. CROWDER, III, AND SHAWN T. BUCHANAN

No. 385PA13

(Filed 19 December 2014)

1. Motor vehicles—insurance—underinsured motorist coverage—multiple tortfeasors—coverage triggered by exhaustion of single at-fault motorist's liability coverage

In a negligence action for an automobile accident involving multiple tortfeasors, the trial court did not err by granting summary judgment in favor of plaintiff and ordering his insurer to provide his underinsured motorist (UIM) benefits after one of the tortfeasors had tendered the limit of his liability coverage. When a single "underinsured highway vehicle" under N.C.G.S. § 20-279.21(b)(4) has tendered the liability limit of its insurance, a UIM insurer's obligation to provide UIM benefits is triggered

2. Motor vehicles—insurance—underinsured motorist coverage—pre- and post-judgment interest and costs—determined by contract

In a negligence action for an automobile accident, the trial court erred by ordering plaintiff's underinsured motorist (UIM) carrier to pay pre- and post-judgment interest and costs. Because the UIM statute does not speak to the issue of pre- and post-judgment interest and costs, the issue was governed by the terms of the insurance policy. The policy here capped the UIM carrier's liability at the UIM coverage limit.

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

Justice NEWBY dissenting in part and concurring 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. ___, 747 S.E.2d 390 (2013), affirming an order of summary judgment entered on 13 November 2012 by Judge James U. Downs in Superior Court, McDowell County. Heard in the Supreme Court on 15 April 2014.

Abrams & Abrams, P.A., by Noah B. Abrams, Douglas B. Abrams, Margaret S. Abrams, and Melissa N. Abrams, for plaintiff-appellee.

Nelson Levine de Luca & Hamilton, by David L. Brown, Brady A. Yntema, and David G. Harris, II, for unnamed defendant-appellant North Carolina Farm Bureau Mutual Insurance Company.

White & Stradley, PLLC, by J. David Stradley; and Whitley Law Firm, by Ann C. Ochsner, for North Carolina Advocates for Justice, amicus curiae.

Sparkman Larcade, PLLC, by George L. Simpson, IV, for North Carolina Association of Defense Attorneys and Property Casualty Insurers Association of America, amici curiae.

BEASLEY, Justice.

The primary issue in this appeal is whether an insured may, in a situation in which there is more than one at-fault driver responsible for the accident causing the insured's injuries, recover under his or her underinsured motorist (UIM) policy before exhausting the liability insurance policies of all the at-fault drivers. We conclude that the insured is only required to exhaust the liability insurance coverage of a single at-fault motorist in order to trigger the insurer's obligation to provide UIM benefits. Accordingly, we affirm the Court of Appeals' decision on this issue. Because, however, the trial court's award of interest and costs against the insurer in this case exceeds the amount the insurer contractually promised to pay under the terms of its policy with the insured, the Court of Appeals erred in upholding that portion of the award. In this respect, we reverse the Court of Appeals.

Facts

The parties to this appeal have stipulated to the material facts, which tend to establish that on 18 September 2009, defendant Thomas E. Mills was operating a tractor-trailer owned by his employer, defendant James W. Crowder, III. Mills was traveling eastbound on Interstate Highway 40 in McDowell County when he lost control while rounding a curve, causing his vehicle to collide with the concrete median barrier and flip. Plaintiff Douglas Kirk Lunsford, a volunteer firefighter, responded first to the scene and found that Mills was injured and that diesel fuel was leaking from the tractor-trailer. Lunsford, who was standing in the highway median, attempted to lift Mills over the concrete divider so that he could carry Mills to safety and assess his injuries. As Lunsford was doing so, defendant Shawn T. Buchanan was driving westbound on Interstate Highway 40. When the vehicle in front of Buchanan slowed down because of the tractor-

trailer accident, Buchanan swerved to the left to avoid the vehicle and struck Lunsford. Lunsford was dragged underneath Buchanan's car and suffered severe injuries, including multiple broken bones, lacerations, and internal injuries.

At the time of the accidents, Mills and Crowder were insured through Crowder's business motor vehicle policy with United States Fire Insurance Company (U.S. Fire), which provided a liability coverage limit of $1 million. The second driver, Buchanan, was insured under a policy written by Allstate Insurance Company (Allstate), providing liability coverage of $50,000. Lunsford maintained two policies with unnamed defendant North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau): (1) a business policy with UIM coverage of $300,000; and (2) a personal policy with UIM coverage of $100,000.

Lunsford subsequently filed a negligence action against Mills, Crowder, and Buchanan (named defendants), claiming that they were jointly and severally liable for his injuries. All named defendants filed answers, which included crossclaims for indemnification and contribution. Farm Bureau, as an unnamed defendant, also filed an answer in which it claimed that it would be entitled to an offset with respect to Lunsford's UIM policies for any damages he recovered through the insurance policies held by the named defendants.

On 24 May 2011, Allstate tendered to Lunsford the $50,000 liability coverage limit for Buchanan's policy. Lunsford's attorney notified Farm Bureau the next day of Allstate's tender and demanded that Farm Bureau tender payment on Lunsford's UIM claim. In a letter dated 7 June 2011, Farm Bureau indicated that (1) it would not advance the liability policy limits tendered to Lunsford by Allstate; and (2) it would review its legal options regarding Lunsford's UIM claim and respond "at a later date." On 15 November 2011, Lunsford's attorney informed Farm Bureau that Lunsford had tentatively settled his claims against Mills and Crowder for $850,000, which was to be paid through Crowder's policy with U.S. Fire. At the time of these settlements, Farm Bureau had not provided UIM coverage to Lunsford.

On 12 January 2012, the trial court entered an order approving the settlement agreements. On 19 July 2012, Farm Bureau filed a motion for summary judgment on Lunsford's UIM claim, arguing that he was not entitled to UIM coverage because the total amount of his settlements with Buchanan, Mills, and Crowder ($50,000 + $850,000 = $900,000) exceeded the aggregate amount of Lunsford's UIM policies

($300,000 + $100,000 = $400,000). Lunsford also moved for summary judgment, maintaining that his UIM policies stacked and that he was entitled to recover $350,000 from Farm Bureau—the amount of his aggregated UIM coverage limit ($400,000) minus the $50,000 he recovered through his settlement with Buchanan.

After conducting a hearing on the parties' motions, the trial court entered an order on 13 November 2012 granting summary judgment in favor of Lunsford. The trial court accordingly ordered Farm Bureau to pay Lunsford $350,000, plus costs and pre- and post-judgment interest "as provided by law."

Farm Bureau appealed the trial court's order to the Court of Appeals, primarily arguing that the trial court erred in granting summary judgment in favor of Lunsford and ordering Farm Bureau to pay $350,000 in UIM coverage because, under the statute governing UIM coverage, Farm Bureau "was not required to provide coverage until all applicable policies—meaning all policies held by all the named Defendants—had been exhausted." *Lunsford v. Mills*, ___ N.C. App. ___, ___, 747 S.E.2d 390, 393 (2013). The court disagreed based on its reading of the UIM statute: " 'Underinsured motorist coverage is deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of *the underinsured highway vehicle* have been exhausted.' " *Id.* at ___, 747 S.E.2d at 393 (quoting N.C.G.S. § 20-279.21(b)(4) (emphasis added by court)). The court interpreted this language "to mean that UIM coverage is triggered the moment that an insured has recovered under all policies applicable to '*a*'—meaning *one*—'underinsured highway vehicle' involved in a motor vehicle accident resulting in injury to the insured." *Id.* at ___, 747 S.E.2d at 393 (emphasis added).

Noting that the issue of when UIM coverage is triggered in situations involving multiple potential at-fault drivers is one of first impression in North Carolina, the Court of Appeals believed that its interpretation of the UIM statute was consistent with that court's precedent suggesting that "insureds should [not] 'be kept hanging in limbo as they are forced to sue any and all possible persons . . . before they could recover UIM benefits' just because other potential tortfeasors also happen to be covered under automobile policies." *Id.* at ___, 747 S.E.2d at 394 (quoting *Farm Bureau Ins. Co. of N.C. v. Blong*, 159 N.C. App. 365, 373, 583 S.E.2d 307, 312, *disc. rev. denied*, 357 N.C. 578, 589 S.E.2d 125 (2003)). In light of this rationale, the court determined that, in such a situation, UIM carriers are obligated

"to first provide coverage, and later seek an offset through reimbursement or exercise of subrogation rights." *Id.* at ___, 747 S.E.2d at 394. Consequently, the court determined that upon the exhaustion of "all policies applicable to Mr. Buchanan's vehicle," Lunsford's "UIM coverage was triggered," and "Farm Bureau was not at liberty to withhold coverage until [Lunsford] reached settlement agreements with Mr. Mills and Mr. Crowder." *Id.* at ___, 747 S.E.2d at 394.

Farm Bureau alternatively argued that, even it were required to provide UIM coverage, the trial court nevertheless erred in ordering it to pay pre- and post-judgment interest and costs. In support of this contention, Farm Bureau cited our decision in *Sproles v. Greene*, 329 N.C. 603, 613, 407 S.E.2d 497, 503 (1991), in which we concluded that North Carolina's compulsory motor vehicle insurance laws do not impose an obligation on liability insurers to pay interest on a judgment in excess of the insurer's policy limits, but rather, such an obligation "is governed by the terms of the [insurance] policy." The Court of Appeals believed that *Sproles* was distinguishable on the ground that *Sproles* held that a "UIM carrier is not required to pay pre and post-judgment interest *on behalf of the insured* where the judgment has been entered *against the insured*." *Lunsford*, ___ N.C. App. at ___, 747 S.E.2d at 395 (citing *Sproles*, 329 N.C. at 605, 407 S.E.2d at 498). Here, in contrast, "the judgment was entered against Farm Bureau itself, not against its insured (Plaintiff)." *Id.* at ___, 747 S.E.2d at 395. Thus the court concluded that *Sproles* "ha[d] no bearing on the case at hand" and upheld the trial court's award of interest and costs. *Id.* at ___, 747 S.E.2d at 395 (2013).

Farm Bureau petitioned this Court for discretionary review of the Court of Appeals' decision regarding both the UIM coverage and the judgment interest issues. We allowed Farm Bureau's petition with respect to both questions. 367 N.C. 259, 749 S.E.2d 843 (2013).

Standard of Review

Under Rule 56(c) of the North Carolina Rules of Civil Procedure, summary judgment is appropriate when the record establishes that there are no genuine issues of material fact and that any party is entitled to judgment as a matter of law. N.C. R. Civ. P. 56(c); *e.g.*, *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Here the parties have stipulated to the material facts, and therefore, the only question for our consideration is whether either party is entitled to judgment as a matter of law. Answering this question primarily involves interpretation of the Motor Vehicle Safety and Financial

Responsibility Act of 1953 (commonly referred to as the "FRA"), N.C.G.S. §§ 20-279.1 through -279.39 (2013), and examination of the terms of Farm Bureau's motor vehicle insurance policy, each a question of law. *See Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998) ("A question of statutory interpretation is ultimately a question of law for the courts."); *Wachovia Bank & Trust v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970) (observing that the interpretation of "the language used in [a] policy of insurance" is "a question of law"). This Court reviews questions of law de novo, meaning that we consider the matter anew and freely substitute our judgment for the judgment of the lower court. *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted).

Underinsured Motorist Coverage

[1] The parties' principal dispute centers on the proper interpretation of subdivision 20-279.21(b)(4), the FRA's provision governing UIM coverage. The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature. *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990). "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." *Hyler v. GTE Prods. Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993) (citations omitted), *superseded in part by statute*, Workers' Compensation Reform Act of 1994, ch. 679, sec. 2.5, 1993 N.C. Sess. Laws 394, 399-400, *as recognized in N.C. Ins. Guar. Ass'n v. Bd. of Trs.*, 364 N.C. 102, 691 S.E.2d 694 (2010). Thus, in effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used. *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009); *accord In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978) ("[C]ourts must give [a clear and unambiguous] statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.").

The first paragraph of subdivision 20-279.21(b)(4) defines the term "underinsured highway vehicle" as

> a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of

> underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.

N.C.G.S. § 20-279.21(b)(4). The statute further sets out when UIM coverage is triggered:

> Underinsured motorist coverage is deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted.

Id. ("triggering provision").

Farm Bureau reads the reference to "all bodily injury liability bonds and insurance policies *applicable at the time of the accident*" in the definition of an underinsured highway vehicle to mean that, in determining whether UIM coverage is triggered, the insured's UIM coverage limit must be compared to the sum of all of the liability limits of all the at-fault motorists. Thus, according to Farm Bureau, as a prerequisite to receiving UIM benefits, Lunsford was required to exhaust not only Buchanan's liability limits, but also the policy limits of Mills and Crowder to the extent that they are liable as joint tortfeasors. We read subdivision 20-279.21(b)(4) differently.

As an initial matter, the reference to "all bodily injury liability bonds and insurance policies applicable at the time of the accident" is found in the UIM statute's definition of an "underinsured highway vehicle," not in the triggering provision. The location of the clause in a separate and distinct provision of the UIM statute indicates that the clause relates solely to an underinsured highway vehicle and not, as Farm Bureau suggests, to all the vehicles involved in an accident. *See Colonial Penn Ins. Co. v. Salti*, 84 A.D.2d 350, 352, 446 N.Y.S.2d 77, 79 (N.Y. App. Div. 1982) ("[T]he [UIM] endorsement affords coverage for bodily injury arising out of the use of an underinsured highway vehicle and the clause '*the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident*' . . . should be read to relate . . . to [the underinsured] vehicle only, and not, as [the insurer] contends, to the total number of vehicles involved in the accident." (emphasis added)).

An examination of the actual language of the triggering provision further undermines Farm Bureau's reading of the statute to provide that UIM coverage is not triggered until "**all** liability limits applicable 'at the time of the accident' " are exhausted. The plain language of the

triggering provision identifies the liability bonds and insurance policies relevant to determining whether UIM coverage is triggered as those bonds and policies relating to "the ownership, maintenance, or use of *the* underinsured highway vehicle." N.C.G.S. § 20-279.21(b)(4) (emphasis added). A statute's use of the definite article—"the"—indicates that the legislature intended the term modified to have a singular referent. *See Renz v. Grey Adver., Inc.*, 135 F.3d 217, 222 (2d Cir. 1997) ("Placing the article 'the' in front of a word connotes the singularity of the word modified."); *see also Gen. Accident Ins. Co. v. Wheeler*, 221 Conn. 206, 211, 603 A.2d 385, 387 (1992) (concluding, under an insurance regulation providing that "the 'insurer shall undertake to pay on behalf of the insured all sums which the insured shall be legally entitled to recover as damages from *the* owner or operator of *an* uninsured [or underinsured] motor vehicle because of bodily injury sustained by the insured caused by an accident involving the uninsured [or underinsured] motor vehicle,' " that an insured is required to exhaust "the insurance coverage of only one tortfeasor" in order to recover UIM benefits (brackets in original)).

Farm Bureau's interpretation effectively rewrites the triggering provision to provide that UIM coverage applies only once *all* liability bonds or insurance policies providing coverage for *any* party potentially liable for the insured's bodily injuries have been exhausted. But that is not what the statute says. The plain language of the triggering provision establishes that when an insured suffers bodily injury caused by the ownership, maintenance, or use of *an* underinsured highway vehicle, and when the liability bonds or insurance policies providing coverage for *that vehicle* have been exhausted, UIM coverage is triggered. Accordingly, a UIM carrier's statutory obligation to provide UIM benefits is triggered when the insurer of a single vehicle meeting the definition of an underinsured highway vehicle tenders its liability limits to the UIM claimant through an offer of settlement or in satisfaction of a judgment. *See Register v. White*, 358 N.C. 691, 698, 599 S.E.2d 549, 555 (2004) ("Exhaustion occurs when the liability carrier has tendered the limits of its policy in a settlement offer or in satisfaction of a judgment.").

Farm Bureau contends, however, that this interpretation of subdivision 20-279.21(b)(4) has been "expressly rejected by the legislature." In support of this argument, Farm Bureau points to the General Assembly's consideration and ultimate rejection of a bill proposed in the 1983 legislative session that was designed "to clarify the law concerning UIM coverage." The proposed bill would have completely

repealed subdivision 20-279.21(b)(4), the FRA's provision governing UIM coverage, and amended subdivision 20-279.21(b)(3), the provision governing uninsured motorist coverage, so that an underinsured motor vehicle would have constituted an "uninsured motor vehicle" to the extent of "the difference between the limits of the bodily injury liability insurance and property damage liability insurance coverages on *such motor vehicle* and the limits of the uninsured motorist coverage provided under the insured's motor vehicle liability insurance policy." H. 60, 135th Gen. Assemb., Reg. Sess. (N.C. 1983) (emphasis added).

The fact that this proposed bill was not enacted is unavailing. When, as here, "the language of a statute expresses the legislative intent in clear and unambiguous terms, the words employed must be taken as the final expression of the meaning intended unaffected by its legislative history." *Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 161, 123 S.E.2d 582, 586 (1962) (citations omitted); *accord Wake Cares, Inc. v. Wake Cnty Bd. of Educ.*, 190 N.C. App. 1, 25, 660 S.E.2d 217, 232 (2008) (explaining that "[l]egislative history cannot . . . be relied upon to force a construction on [a] statute inconsistent with the plain language"), *aff'd*, 363 N.C. 165, 675 S.E.2d 345 (2009).

Farm Bureau's construction of the UIM statute also undermines the statute's purpose. Section 20-279.21 "was passed to address circumstances where ' "the tortfeasor has insurance, but his [or her] coverage is in an amount insufficient to compensate the injured party for his [or her] full damages." ' " *Progressive Am. Ins. Co. v. Vasquez*, 350 N.C. 386, 390, 515 S.E.2d 8, 10-11 (1999) (first alteration in original) (quoting *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 189, 420 S.E.2d 124, 127 (1992), *superseded by statute*, Act of July 12, 1991, ch. 646, secs. 1, 2, 1991 N.C. Sess. Laws 1550, 1559). We have recognized the remedial nature of subdivision 20-279.21(b)(4) and explained that the statute should be "liberally construed" in order to accomplish its purpose of "protect[ing] . . . innocent victims who may be injured by financially irresponsible motorists." *Proctor v. N.C. Farm Bureau Mut. Ins. Co.*, 324 N.C. 221, 224-25, 376 S.E.2d 761, 763 (1989). To that end, subdivision 20-279.21(b)(4)—as well as the FRA as a whole—should be "interpreted to provide the innocent victim with the fullest possible protection." *Id.* at 225, 376 S.E.2d at 764.

If Farm Bureau's interpretation were adopted, insureds would be required to pursue all claims, including weak, tenuous ones, against all potentially liable parties, no matter how impractical, before being eligible to collect their contracted-for UIM benefits. Placing this bur-

den on insureds—who, like Lunsford, commonly suffer serious injuries and need prompt payment of benefits to pay medical expenses and other costs—would substantially delay the recovery of UIM benefits and promote litigation expenses that reduce insureds' overall recovery. *See Wheeler*, 221 Conn. at 213, 603 A.2d at 388 (observing that if the insured is not permitted to recover UIM benefits until exhausting all liability limits of all joint tortfeasors, "the insured could be required to pursue claims of weak liability against third parties, thereby fostering marginal and costly litigation in our courts"). Because Farm Bureau's interpretation of subdivision 20-279.21(b)(4) would fail to provide innocent victims "the fullest possible protection," we reject Farm Bureau's proposed construction. *See Proctor*, 324 N.C. at 225-26, 376 S.E.2d at 764 (rejecting insurer's construction of subdivision 20-279.21(b)(4) that "result[ed] in the least possible protection for the innocent victim of an underinsured tortfeasor" and thus "undermine[d] the intent and purpose of the statute").

Our conclusion that an insured may recover UIM benefits upon exhausting the liability limits of a single at-fault motorist is further buttressed by examining the subrogation provision of section 20-279.21. *See Faizan v. Grain Dealers Mut. Ins. Co.*, 254 N.C. 47, 53, 118 S.E.2d 303, 307 (1961) (construing provisions of the FRA *in pari materia*). The third paragraph of subdivision 20-279.21(b)(4) states in pertinent part:

> An underinsured motorist insurer may at its option, upon a claim pursuant to underinsured motorist coverage, pay moneys without there having first been an exhaustion of the liability insurance policy covering the ownership, use, and maintenance of the underinsured highway vehicle. In the event of payment, the underinsured motorist insurer shall be either: (a) entitled to receive by assignment from the claimant any right or (b) subrogated to the claimant's right regarding any claim the claimant has or had against the owner, operator, or maintainer of the underinsured highway vehicle, provided that the amount of the insurer's right by subrogation or assignment shall not exceed payments made to the claimant by the insurer.

N.C.G.S. § 20-279.21(b)(4); *see also id.* § 20-279.21(b)(3) (providing an insurer a right to reimbursement from settlement proceeds to the extent the insurer has made a "payment to any person under the coverage required by this section and subject to the terms and conditions of coverage").

If, as Farm Bureau argues, insureds were required to exhaust the liability policies of all at-fault motorists as a prerequisite to recovering UIM coverage, there would be no need to provide UIM carriers subrogation or reimbursement rights, and consequently, these provisions would be rendered meaningless. *See Leslie v. W.H. Transp. Co.*, 338 F. Supp. 2d 684, 689 (S.D. W. Va. 2004) ("The reservation of a subrogation right indicates that [the insurer] foresees situations in which an insured receives UIM benefits and [the insurer] then pursues a claim against a tortfeasor who is legally liable for the damages suffered by the insured. If the insured were required to exhaust every tortfeasor's policy limit before receiving UIM benefits, it is hard to imagine a UIM scenario in which subrogation rights would arise."). Yet it is a fundamental principle of statutory interpretation that courts should "evaluate [a] statute as a whole and . . . not construe an individual section in a manner that renders another provision of the same statute meaningless." *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998) (citation omitted), *cert. denied*, 526 U.S. 1098, 119 S. Ct. 1576, 143 L. Ed. 2d 671 (1999), *abrogated on other grounds by Lenox, Inc. v. Tolson*, 353 N.C. 659, 548 S.E.2d 513 (2001).

Moreover, given the General Assembly's provision of subrogation and reimbursement rights for the financial protection of insurers, we cannot agree with Farm Bureau's argument that the trial court's order resulted in a "windfall" for Lunsford. Farm Bureau could have preserved its subrogation rights by advancing its UIM policy limits. *See State Farm Mut. Auto. Ins. Co. v. Blackwelder*, 332 N.C. 135, 138-39, 418 S.E.2d 229, 231 (1992) (concluding that the insurer of the injured party's vehicle had "preserved its subrogation rights" against the estate of the deceased tortfeasor by advancing the deceased tortfeasor's liability limits to its insured and by advancing an additional amount to settle its insured's UIM claim). Had Farm Bureau elected to do so, it would have been entitled to recoup the advanced funds from the proceeds of the settlements with Mills and Crowder.[1] N.C.G.S.

1. Farm Bureau further contends that Lunsford's recovery of an amount greater than his contracted-for UIM coverage limit is inconsistent with the purpose of the UIM statute, as articulated by the Court of Appeals in *Nationwide Mutual Insurance Co. v. Haight*, 152 N.C. App. 137, 566 S.E.2d 835 (2002), *disc. rev. denied*, 356 N.C. 675, 577 S.E.2d 627 (2003), in which the court stated: "UIM coverage is intended to place a policy holder in the same position that the policy holder would have been in if the tortfeasor had had liability coverage equal to the amount of the . . . UIM coverage." *Id.* at 142, 566 S.E.2d at 838 (citations, emphasis, and quotation marks omitted). We perceive no inherent conflict between *Haight*'s articulation of the intended purpose of the UIM statute and the principle we reaffirmed in *Proctor* that subdivision 20-279.21(b)(4), as a remedial statute, must be "interpreted to provide the innocent victim with the fullest

§ 20-279.21(b)(3). But by not advancing its policy limits, Farm Bureau waived its subrogation rights. *See* N.C.G.S. § 20-279.21(b)(4) (prohibiting insurers from exercising any right of subrogation when "the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days" of receiving written notice of the proposed settlement).

In sum, we believe that the structure and plain language of subdivision 20-279.21(b)(4), the purpose behind the UIM statute, and the legislature's inclusion of subrogation rights for insurers, compel the conclusion that UIM coverage is triggered upon the exhaustion of the policy limits of a single at-fault motorist. Accordingly, upon Allstate's tender of its policy limit of $50,000 on behalf of Buchanan, UIM coverage was triggered under subdivision 20-279.21(b)(4), and Lunsford was entitled to recover UIM benefits according to the terms of his policy with Farm Bureau. We therefore affirm the Court of Appeals' decision on this issue.

Judgment Interest and Costs

[2] Farm Bureau also challenges the Court of Appeals' determination that Lunsford is entitled to pre- and post-judgment interest and costs. Farm Bureau contends that the award of these damages, taxed in excess of Lunsford's UIM coverage limits, conflicts with our decision in *Baxley v. Nationwide Mutual Insurance Co.*, 334 N.C. 1, 430 S.E.2d 895 (1993). We agree.

We have established that "when a statute is applicable to the terms of a policy of insurance, the provisions of that statute become terms of the policy to the same extent as if they were written in it, and if the terms of the policy conflict with the statute, the provisions of the statute prevail." *Id.* at 6, 430 S.E.2d at 898 (citing *Sutton v. Aetna Cas. & Surety Co.*, 325 N.C. 259, 263, 382 S.E.2d 759, 762 (1989)). Section 20-279.21 is silent with respect to pre- and post-judgment interest, and thus subsection 24-5(b), the statute governing judgment interest, "is not a part of the Financial Responsibility Act so as to be written into every liability policy." *Id.* (citing *Sproles*, 329 N.C. at 613, 407 S.E.2d at 503). When, as here, no statutory provision dictates a liability insurer's obligation to pay interest in excess of its policy

possible protection." *Proctor*, 324 N.C. at 225, 376 S.E.2d at 764. Even if, as we have held, a UIM carrier is required to provide UIM coverage upon exhaustion of the liability limits of a single tortfeasor, the carrier may still seek recovery of any overpayment through the exercise of its rights to subrogation or reimbursement. Through these mechanisms, insurers are able to recoup any overpayment and insureds are divested of any so-called "windfall."

limits, such an obligation "is governed by the language of the policy." *Id.* (citing *Sproles*, 329 N.C. at 612-13, 407 S.E.2d at 502-03) (emphasis omitted).

The pertinent language in Lunsford's business and personal policies states that Farm Bureau promises to pay, up to its UIM policy limit,

> all sums the "insured" is *legally entitled to recover as compensatory damages* from the owner or driver of:
>
> a. An "uninsured motor vehicle" because of "bodily injury" sustained by the "insured" and caused by an "accident"; and
>
> b. An "uninsured motor vehicle" as defined in Paragraphs a. and c. of the definition of "uninsured motor vehicle", because of "property damage" caused by an "accident".
>
> The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the "uninsured motor vehicle".

(Emphasis added.) The policies' definition of an "uninsured motor vehicle" includes an "underinsured motor vehicle."

In *Baxley*, 334 N.C. at 6-7, 430 S.E.2d at 899, we examined substantially similar policy language:

> The contractual language [at issue] is [the UIM carrier]'s promise to pay, up to its UIM policy limit,
>
> damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of:
>
> 1. Bodily injury sustained by a covered person and caused by an accident; and
>
> 2. Property damage caused by an accident.

Holding that interest is an element of "damages," *id.* at 11, 430 S.E.2d at 901, we held that, based on the pertinent policy language, the UIM carrier in *Baxley* was "obligated to pay pre-judgment interest up to its policy limits." *Id.* at 6, 430 S.E.2d at 898 (emphasis omitted). Our reasoning in *Baxley* regarding judgment interest has similarly been applied to costs. *See Wiggins v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 26, 35-36, 434 S.E.2d 642, 648 (1993) (rejecting, based on *Baxley*, the insurer's contention "that 'damages' does not include costs or interest").

The relevant language in Farm Bureau's policy is, we believe, materially indistinguishable from the policy language at issue in *Baxley*. Accordingly, the Court of Appeals erred in concluding that Farm Bureau was required to pay pre- and post-judgment interest and costs in excess of its remaining UIM policy limit of $350,000. Because Farm Bureau contractually capped its obligation to pay "compensatory damages" at its UIM coverage limit, Farm Bureau is not required to pay interest and costs over and above the $350,000 coverage amount. *See Baxley*, 334 N.C. at 11, 430 S.E.2d at 901 ("Since [the UIM carrier] promised to pay [the insured]'s resulting damages, it must now do so, up to, but not in excess of, its UIM policy limits.").

Lunsford nonetheless claims that Farm Bureau should be required to pay pre- and post-judgment interest because the judgment "was entered directly against Farm Bureau" due to Farm Bureau's "breach of its obligations under its insurance contract." This argument is misplaced. There is no underlying breach of contract claim against Farm Bureau in this case, and thus, such a claim could not have been the basis for the trial court's award of interest and costs. Rather, the basis for the award is Farm Bureau's promise to pay, up to its UIM coverage limit, the "compensatory damages" resulting from the named defendants' negligence. In such circumstances, our precedent "clearly establish[es]" that the extent to which a UIM carrier is required to pay judgment interest is controlled by "the specific terms of [the] policy." *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 491, 467 S.E.2d 34, 40 (1996). Farm Bureau was permitted to, and did in fact, cap its liability for damages, including interest, at the amount of its UIM coverage limit. We accordingly reverse the Court of Appeals' decision with respect to interest and costs.

Conclusion

We affirm that part of the decision of the Court of Appeals holding than an insured is only required to exhaust the liability insurance coverage of a single at-fault motorist in order to trigger the insurer's obligation to provide UIM benefits. We reverse the decision of the Court of Appeals awarding interest and costs against the insurer in an amount that exceeds the amount the insurer contractually promised to pay under the terms of its policy with the insured. This case is remanded to the Court of Appeals for further remand to the Superior Court, McDowell County, for proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART, AND REMANDED.

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

Justice NEWBY dissenting in part and concurring in part.

The purpose of underinsured motorist (UIM) coverage in our state is to serve as a safeguard when tortfeasors' liability policies do not provide sufficient recovery—that is, when the tortfeasors are "under insured." This is simply not the case here. Plaintiff incurred damages amounting to $900,000. He brought suit jointly and severally against responsible tortfeasors whose total liability limits were $1,050,000. Those combined liability limits were more than sufficient to satisfy plaintiff's damages and were more than twice as high as plaintiff's $400,000 UIM limits. Not only does the majority incorrectly hold that UIM coverage was necessary in this instance, but the majority's outcome also leaves plaintiff with $350,000 in excess of his agreed-to damages. By contrast, I would hold that UIM coverage was not activated in this case. Rather, under the UIM statute, coverage only applies when the policyholder's UIM limits are more than the combined limits of the insurance coverage of all jointly and severally liable tortfeasors against whom the plaintiff files suit. Consequently, I respectfully dissent.

At the time of the accident, the jointly and severally liable tortfeasors, Mills, his employer Crowder, and Buchanan, carried liability policies totaling $1,050,000 while plaintiff was covered by two UIM policies with North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) with combined limits of $400,000. After plaintiff filed suit against Mills, Crowder, and Buchanan, Buchanan's provider, Allstate, tendered to plaintiff the $50,000 limits of Buchanan's policy. Six months later, plaintiff settled his claim with defendants Mills' and Crowder's coverage provider for $850,000. After the trial court approved plaintiff's settlement with the named defendants, Farm Bureau, as an unnamed defendant, moved for summary judgment, contending that plaintiff was not entitled to UIM coverage because the combined policy limits of the defendants exceeded plaintiff's UIM limits. Plaintiff also moved for summary judgment, insisting that Buchanan was an underinsured driver and that plaintiff was thus entitled to Farm Bureau's UIM policy limits of $400,000 less an offset of $50,000 for Buchanan's Allstate insurance payment. The trial court entered judgment in plaintiff's favor for $350,000, plus costs and pre-

and post-judgment interest. As a result, plaintiff received $50,000 from Buchanan's insurer, $850,000 from the settlement with Mills and Crowder, and $350,000 from his own UIM policy with Farm Bureau for a total of $1,250,000 while settling his damages claims with the actual tortfeasors for only $900,000, which left untapped $150,000 of tortfeasor insurance.

The majority's holding is based on a fundamental misunderstanding of UIM coverage and the implementing statute, as well as a misunderstanding of Farm Bureau's argument. UIM insurance in North Carolina developed out of uninsured motorist (UM) insurance. James E. Snyder, Jr., *North Carolina Automobile Insurance Law* § 30-1 (3d ed. 1999). UM insurance provides recovery for a policyholder injured in an auto accident by the motor vehicle of a tortfeasor who has no liability insurance. *Id.* By comparison, UIM coverage provides a secondary source of recovery for an insured when the tortfeasor has insurance, but the tortfeasor's liability limits are insufficient to compensate the injured party. *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 263, 382 S.E.2d 759, 762 (1989), *superseded on other grounds by statute*, Act of July 12, 1991, ch. 646, 1991 N.C. Sess. Laws 1550 (captioned "An Act to Prohibit the Stacking of Uninsured and Underinsured Motorist Coverage"). The UM and UIM statute is part of North Carolina's Motor Vehicle Safety and Financial Responsibility Act of 1953 (Act). N.C.G.S. §§ 20-279.1 to 279.39 (2013). The Act's purpose is

> to compensate the innocent victims of financially irresponsible motorists. The Act is remedial in nature and is to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished. The purpose of the Act, we have said, is best served when [every provision of the Act] is interpreted to provide the innocent victim with the fullest possible protection.

Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 573-74, 573 S.E.2d 118, 120 (2002) (alteration in original) (citations and internal quotation marks omitted). Even though the Act is intended to provide "the fullest possible protection," *id.* at 574, 573 S.E.2d at 120, it is only activated when a plaintiff is "under insured." A plaintiff cannot, under the statute, obtain UIM proceeds if the tortfeasors' insurance is greater than the UIM coverage or is sufficient to compensate his damages. N.C.G.S. § 20-279.21(b)(4). The recovery provided by UIM coverage is only meant to augment inadequate recoveries obtained from underinsured tortfeasors. *Id.* (reducing UIM amounts by amounts

received by the plaintiff from a tortfeasor's exhausted policy or policies). In other words, UIM coverage puts the insured claimant back in the position he would have occupied had the tortfeasor been insured at limits equal to the claimant's UIM limits. *See Nationwide Mut. Ins. Co. v. Haight*, 152 N.C. App. 137, 142, 566 S.E.2d 835, 838 (2002) (noting the statute's goal of putting a policy holder "in the same position that the policy holder would have been in if the tortfeasor had had liability coverage equal to the amount of the UM/UIM coverage" (citations and emphasis omitted)), *disc. rev. denied*, 356 N.C. 675, 577 S.E.2d 627 (2003).

Two provisions in the UIM statute in particular demonstrate this intent by the legislature to make UIM coverage a source of compensation secondary to tortfeasors' liability policies. *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (observing that, *inter alia*, "we are guided by the structure of the statute" in determining legislative intent (citations omitted)). The first is the reduction provision, which states:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident.

N.C.G.S. § 20-279.21(b)(4) ("reduction provision"). Under the reduction provision, a UIM carrier reduces its applicable policy limits by amounts paid to the claimant from tortfeasors' exhausted policies.

The second supporting provision is the offset or recovery provision found in N.C.G.S. § 20-279.21(b)(3), which is incorporated by reference into subdivision 20-279.21(b)(4):

> In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of coverage, the insurer making payment shall, to the extent thereof, be entitled to the proceeds of any settlement for judgment resulting from the exercise of any limits of recovery of that person against any person or organization legally responsible for the bodily injury for which the payment is made, including the proceeds recoverable from the assets of the insolvent insurer.

Id. at § 20-279.21(b)(3). This provision entitles a UIM carrier to use a claimant's judgment proceeds to recoup the UIM carrier's payments to the claimant. The presence of the reduction and offset provisions in the statute evinces a legislative intent for UIM coverage to be applicable only to the extent that other sources of recovery fail to compensate for the injury up to the UIM limits.[1] *Elec. Supply Co.*, 328 N.C. at 656, 403 S.E.2d at 294 ("An analysis utilizing the plain language of the statute and the canons of construction must be done in a manner which harmonizes with the underlying reason and purpose of the statute." (citation omitted)); *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 295 (1975) ("A construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language." (citation omitted)). The insured's UIM limits, not the insured's total damages, provide the ceiling for recovery. *See Fasulo v. State Farm Mut. Auto. Ins. Co.*, 108 N.M. 807, 810-11, 780 P.2d 633, 636-37 (1989) (discussing a UIM statute similar to subsection 20-279.21(b)(4)). Thus, an insured plaintiff's UIM recovery "is controlled contractually by the amount of the UIM policy limits purchased and available to her, not fortuitously by the number of tortfeasors involved in the accident." *Nikiper v. Motor Club of Am. Cos.*, 232 N.J. Super. 393, 398-99, 557 A.2d 332, 335, *certification denied*, 117 N.J. 139, 564 A.2d 863 (1989). The majority's holding runs contrary to the nature and purpose of UIM coverage.

With this understanding of the UIM statute's purpose in mind, it is necessary to consider closely the statute's controlling provision in this case—the activation provision. As an initial matter, the majority misreads Farm Bureau's argument. Farm Bureau is not insisting that the statute requires plaintiff "to exhaust not only Buchanan's liability limits, but also the policy limits of Mills and Crowder to the extent that they are liable as joint tortfeasors" in order for plaintiff to receive UIM benefits. Rather, Farm Bureau is asserting that UIM coverage is not applicable at all because plaintiff implicated $1,050,000 in liability coverage when he sued the three tortfeasors. As a result of this mischaracterization, the majority errs in its approach to the statute by focusing on the UIM's triggering (exhaustion) provision without first fully considering subdivision (b)(4)'s activation provi-

1. By contrast, some states apply an "excess coverage" approach whereby UIM coverage is activated when a tortfeasor's liability limits are exceeded by the insured's damages. 3 Irvin E. Schermer & William J. Schermer, *Automobile Liability Insurance* § 38:9, at 38-31 (4th ed. Dec. 2004).

sion.[2] The distinction between the activation and triggering provisions is critical because if no vehicle meets the definition of an underinsured vehicle under the activation provision, then consideration of the subsequent triggering provision is unnecessary.

The activation provision is found in subdivision (b)(4), which is the portion of the statute governing UIM coverage. N.C.G.S. § 20-279.21(b)(4). A UIM carrier pays on its policy to an injured claimant when (1) the auto accident involves a tortfeasor who meets the statute's definition of an underinsured highway vehicle (the activation provision); and (2) the underinsured highway vehicle's liability coverage has been exhausted (triggering provision). *Id.*[3] The UIM statute's activation provision defines an underinsured highway vehicle as:

> [A] highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.

Id. The activation provision applies a comparison of limits approach—UIM coverage is activated when the insured's UIM policy limits are greater than the liability limits of policies connected with the tortfeasor's ownership, maintenance, or use of a highway vehicle. 3 Irvin E. Schermer & William J. Schermer, *Automobile Liability Insurance* § 38:7 (4th ed. Dec. 2004) [hereinafter *Automobile Liability Insurance*]. In a scenario involving a single insured claimant and a single tortfeasor, application of the statute's activation provision is straightforward. If the insured's UIM limits are greater than the tortfeasor's liability limits, the insured's UIM coverage is activated. N.C.G.S. § 20-279.21(b)(4). Only then does subdivision (b)(4)'s triggering provision become relevant.

Under the triggering provision, once the tortfeasor's liability limits have been paid out to the insured, if the injuries have not been

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2. The majority's analysis and interpretation of the activation provision is relegated to one paragraph with a citation to a case from New York interpreting, against the insurer, a provision in a claimant's insurance policy. That case did not interpret a statute and offers no support for an interpretation of North Carolina's statute.

3. The relevant portions of the current version of this statute are identical to the 2009 version of the statute, which is the version applicable to this case. *White v. Mote*, 270 N.C. 544, 555, 155 S.E.2d 75, 82 (1967) ("Laws in effect at the time of issuance of a policy of insurance become a part of the contract . . . .").

adequately compensated, the insured can collect from the UIM carrier up to the maximum amount of the UIM coverage limits minus the amount paid to the claimant under the tortfeasor's exhausted policy. *Id.* The net effect is that UIM coverage puts the insured claimant back in the position he would have occupied had the tortfeasor been insured at limits equal to the claimant's UIM limits. *See Haight*, 152 N.C. App. at 142, 566 S.E.2d at 838.

Though the activation provision's application is clear when only one tortfeasor is involved, we have not previously addressed whether, in a multiple tortfeasor scenario, the insured's UIM policy limits should be compared individually to each tortfeasor's liability limits or compared to the sum of the liability limits of all tortfeasors. When read in the broader context of the statute, the UIM's activation provision instructs comparing the insured's policy limits to the sum of the liability of all jointly and severally liable tortfeasors. More specifically, a vehicle is underinsured when "the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident" with respect to the use of the vehicle is less than an insured's UIM limits. N.C.G.S. § 20-279.21(b)(4).

This interpretation of the activation provision is in consonance with the surrounding provisions of the statute and in keeping with the overall legislative intent of requiring UIM coverage to provide a limited source of compensation when a claimant is injured by tortfeasors who are collectively underinsured.[4] *Automobile Liability Insurance* § 41.3 at 41-42 (noting that under "comparison of limits" statutes like North Carolina's, "an underinsured motorist carrier may defeat underinsured motorist coverage by pointing to other liability coverages available to the tortfeasor which, when aggregated, produce a totality of limits in excess of the underinsured motorist insured's limits, or *by aggregating the liability coverages of joint tortfeasors.*" (emphasis added) (footnote call number omitted)); *see Nikiper*, 232 N.J. Super. at 397, 557 A.2d at 334 ("We conclude that where the amount paid by the insurors for the multiple tortfeasors equals or exceeds the amount of the UIM coverage, plaintiff has no UIM claim."); *see also Sutton*, 325 N.C. at 265, 382 S.E.2d at 763 (observing that "[l]egislative intent can be ascertained not only from the phraseology of the statute but also from the nature and purpose of the act

4. The legislative history of the statute asserted by Farm Bureau and addressed by the majority provides additional support for this interpretation. Because the activation provision is susceptible to multiple interpretations, the majority's dismissive "plain meaning" response to Farm Bureau's argument is unavailing.

and the consequences which would follow its construction one way or the other"). In the case at hand it is contrary to the purpose of the statute to conclude that Buchanan's vehicle alone activates UIM coverage when the combined liability limits of the jointly and severally liable tortfeasors is $1,050,000 and plaintiff's UIM coverage is $400,000. Likewise, it is nonsensical to say a party is "underinsured" when the injured party settles with the tortfeasors for $150,000 less than their policies' coverage. *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) ("[W]here a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." (citations and internal quotation marks omitted)).

Interpreting the first portion of the activation provision to require comparing UIM limits to the combined limits of jointly and severally liable tortfeasors is in harmony with the immediately succeeding portion of the activation provision, which addresses UIM coverage in the context of multiple victims. *State ex rel. Comm'r of Ins. v. N. C. Auto. Rate Admin. Office*, 287 N.C. 192, 202, 214 S.E.2d 98, 104 (1975) ("We are further guided by rules of construction that statutes *in pari materia*, and all parts thereof, should be construed together and compared with each other." (citation omitted)). The succeeding portion of the provision states:

> For purposes of an underinsured motorist claim asserted by a person injured in an accident where more than one person is injured, a highway vehicle will also be an "underinsured highway vehicle" if the total amount actually paid to that person *under all bodily injury liability bonds and insurance policies applicable at the time of the accident* is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.

N.C.G.S. § 20-279.21(b)(4) (emphasis added). This provision unambiguously contemplates comparing an insured plaintiff's UIM limits broadly to payments the plaintiff has received under all liability policies applicable at the time of the accident. It does not restrict the comparison of limits test to a single tortfeasor. Because this second portion of the activation provision requires aggregation of liability limits for the purposes of comparison in a multiple *victim* scenario, under the first portion of the activation provision, in a multiple tortfeasor scenario, the same aggregation of liability limits must apply. Otherwise, in a multiple victim, multiple *tortfeasor* scenario, the acti-

vation provision would produce conflicting determinations as to the existence of an underinsured highway vehicle, with the first portion requiring a one-to-one comparison and the second portion requiring a one-to-all comparison. An interpretation of the activation provision that limits policy comparisons to a single tortfeasor violates a basic rule of statutory interpretation by creating this conflict. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 440, 238 S.E.2d 597, 603 (1977) ("Obviously, the Court will, whenever possible, interpret a statute so as to avoid absurd consequences." (citations omitted)).

The majority contends that under Farm Bureau's approach, "insureds would be required to pursue all claims, including weak, tenuous ones, against all potentially liable parties, no matter how impractical, before being eligible to collect their contracted-for UIM benefits." As noted above, this conclusion arises from mischaracterizing Farm Bureau's argument as stating that UIM benefits should only be paid after plaintiff exhausts all applicable policies. The majority's policy concern disappears, however, when Farm Bureau's position is correctly understood to be that UIM coverage is not activated when the sum of the jointly and severally liable tortfeasors' policy limits is higher than plaintiff's UIM limits. In the instant case plaintiff chose to bring suit against the three defendants jointly and severally; no one was being "forced to sue any and all possible persons," *Lunsford v. Mills*, ____ N.C. App. ____, ____, 747 S.E.2d 390, 394 (2013), or "required to pursue all claims," as the majority insists. An attempt by a UIM carrier to demand that plaintiff pursue the other tortfeasors before being eligible for UIM benefits "would be in the realm of bad faith." *Farm Bureau Ins. Co. of N.C. v. Blong*, 159 N.C. App. 365, 373, 583 S.E.2d 307, 312, *disc. rev. denied*, 357 N.C. 578, 589 S.E.2d 125 (2003). Our General Statutes already prohibit such actions. N.C.G.S. § 58-63-15(11)(f) (2013) ("Unfair Claim Settlement Practices"); *see also Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61,71, 529 S.E.2d 676, 683 (2000) (concluding that "the act or practice of '[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear,' also engages in conduct that embodies the broader standards of N.C.G.S. § 75-1.1" (alteration in original) (quoting N.C.G.S. § 58-63-15(11)(f))). The decision whether to pursue further litigation is within the control of the plaintiff unless he subrogates his claims to the insurer; a UIM carrier "cannot require an insured to pursue [other alleged tortfeasors] before exhaustion can occur." *Blong*, 159 N.C. App. at 373, 583 S.E.2d at 312. If plaintiff in this case had preferred to

sue Buchanan alone and collect on his $50,000 policy limits, plaintiff's UIM coverage would have been activated and triggered. Having chosen, however, to pursue simultaneously claims against multiple tortfeasors whose combined liability limits far exceeded plaintiff's own UIM coverage, plaintiff was no longer able to access his UIM policy limits.

The majority further asserts, again under a misunderstanding of Farm Bureau's position, that requiring exhaustion before the receipt of UIM benefits would render "meaningless" the provisions granting UIM carriers subrogation and reimbursement rights. Under a proper consideration of Farm Bureau's position and based on a proper reading of the activation provision, the provisions in question would not be surplusage. The subrogation provision noted by the majority is applicable when (a) underinsured motorist coverage is activated, and (b) a UIM carrier voluntarily pays out to the insured before the triggering provision has been satisfied. N.C.G.S. § 20-279.21(b)(4). This subrogation right is a necessary assurance to a UIM carrier who voluntarily, *id.* ("at its option"), chooses to pay its insured before exhaustion of a tortfeasor's policy limits. Granted, this scenario is not likely to occur. George L. Simpson, III, *North Carolina Uninsured and Underinsured Motorist Insurance* § 4:2, at 351 (2013-2014 ed.) (noting that these occasions are likely to be few). Nevertheless, this does not make the provision superfluous.

Lastly, the majority misapprehends subdivision (b)(4)'s thirty-day advancement-of-payment provision. The majority is incorrect in concluding that Farm Bureau has forfeited its rights to recovery from the proceeds of the Mills and Crowder settlement, N.C.G.S. § 20-279.21(b)(3) (incorporated into subdivision (b)(4) and entitling the UIM carrier to "the proceeds of any settlement for judgment" related to the plaintiff's injuries), because it failed to "preserve its subrogation rights" by not advancing its policy limits to plaintiff in a timely manner. When a UIM carrier fails to advance payment within thirty days of notice of a settlement with an underinsured motorist, it only forfeits its subrogation rights as to the underinsured motorist under N.C.G.S. § 20-279.21(b)(4) ("No insurer shall exercise any right of subrogation or any right to approve settlement *with the original owner*, *operator*, *or maintainer of the underinsured highway vehicle* under a policy providing coverage against an underinsured motorist where the insurer has been provided with written notice before a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following

receipt of that notice." (emphasis added)). That thirty-day deadline does not affect the UIM carrier's recovery rights against remaining tortfeasors. Furthermore, the offset provision in N.C.G.S. § 20-279.21(b)(3) contains no requirement that a UIM carrier first pay out its limits before being entitled to a recovery against the proceeds paid by tortfeasors. Nothing in the statute dictates that a UIM carrier forfeits its rights to offset against judgment recoveries from other parties by not paying out benefits in a timely manner.

The case relied on by the majority in support of its forfeiture conclusion, *State Farm Mutual Automobile Insurance Co. v. Blackwelder*, determined that the insurer preserved subrogation rights against the underinsured tortfeasor; it does not address a UIM carrier's right to recover proceeds paid by other tortfeasors. 332 N.C. 135, 418 S.E.2d 229 (1992). In *Blong*, upon which the Court of Appeals relied in arriving at a conclusion similar to that of the majority, a UIM carrier paid out its policy limits to an insured and then argued it was entitled to an offset against any amounts received by the insured in subsequent actions against additional parties. 159 N.C. App. at 367-68, 583 S.E.2d at 308-09. Noting the UM/UIM statute's remedial nature, *Blong* nonetheless concluded that "the Act appears to allow for the type of subrogation that plaintiff claims." *Id.* at 373, 583 S.E.2d at 312. *Blong* answered the question whether the UIM carrier was entitled to an offset after having already paid out its UIM limits and gave a sequence of "how the procedure *may* play out." *Id.* (emphasis added). The holding in *Blong* does not "clearly obligate[ ] the UIM carrier to first provide coverage, and later seek [recovery]". *Lunsford*, ____ N.C. App. at ____, 747 S.E.2d at 394. Neither the UIM statute nor case law provides the necessary support for the majority's timing and forfeiture determination regarding Farm Bureau's entitlement to recovery. Furthermore, reading the UIM statute as requiring Farm Bureau to pay out its UIM limits promptly in order to protect the UIM policyholder is unnecessary; a UIM claimant is already protected by the Unfair Claim Settlement Practices statute from delayed payment, as noted above. Regardless whether UIM coverage was activated in this case, Farm Bureau should nevertheless be entitled to recovery.

The majority's insistence on reading the activation provision as limited only to a comparison of the UIM policy limits and an individual tortfeasor's policy limits in this case allows plaintiff to collect from his $400,000 UIM policy even though he has already settled damages claims for $900,000 with the tortfeasors, which is $150,000 less

than the maximum primary insurance coverage available. The legislature never intended for UIM coverage to serve this role, providing plaintiff an excess recovery of $350,000. Rather the legislature intended for plaintiff's UIM policy to serve as a safeguard to protect plaintiff in the event the tortfeasors' liability policies failed to compensate plaintiff for injuries up to $400,000. This legislative intent is best carried out by first comparing plaintiff's UIM limits to the combined limits of all the auto policies implicated in the lawsuit. Even though the majority's holding provides "the fullest possible protection," *Pennington*, 356 N.C. at 574, 573 S.E.2d at 120, it contravenes the activation provision's requirements and the legislature's intent to reduce UIM payouts by amounts recovered from all liable parties. Accordingly, the trial court erred in requiring Farm Bureau to make the $350,000 payment. Nevertheless, were UIM coverage properly implicated, I agree with the majority that the awarding of costs and interests against the insurer is limited contractually by the terms of the insured's policy. Thus, I respectfully concur in part and dissent in part.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC. v. WADE H. PASCHAL, JR., GUARDIAN AD LITEM FOR HARLEY JESSUP; REGGIE JESSUP; RANDALL COLLINS JESSUP; AND THURMAN JESSUP

No. 33PA14)

(Filed 19 December 2014

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ____ N.C. App. ____, 752 S.E.2d 775 (2014), affirming an order entered on 30 November 2012 and reversing and remanding an order of summary judgment entered on 6 December 2012, both by Judge G. Wayne Abernathy in Superior Court, Wake County. Heard in the Supreme Court on 18 November 2014.

Haywood, Denny & Miller, L.L.P., by Robert E. Levin, for plaintiff-appellant.

Moody, Williams, Roper & Lee, LLP, by C. Todd Roper, for defendant-appellees Harley, Thurman, and Reggie Jessup.

Kluttz, Reamer, Hayes, Randolph, & Adkins, L.L.P., by Michael S. Adkins; and Maginnis Law, PLLC, by T. Shawn Howard, for North Carolina Advocates for Justice, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

RIGGINGS HOMEOWNERS, INC., PETITIONER v. COASTAL RESOURCES COMMISSION OF THE STATE OF NORTH CAROLINA, RESPONDENT

No. 401A13

(Filed 19 December 2014)

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. ___, 747 S.E.2d 301 (2013), affirming an order entered on 1 June 2012 by Judge Jay D. Hockenbury in Superior Court, New Hanover County. On 23 January 2014, the Supreme Court allowed respondent's petition for discretionary review of additional issues and petitioner's conditional petition for discretionary review. Heard in the Supreme Court on 6 October 2014.

Shipman & Wright, L.L.P., by William G. Wright and Gary K. Shipman, for petitioner-appellant/appellee.

Roy Cooper, Attorney General, by Christine A. Goebel, Assistant Attorney General, and Mary L. Lucasse and Marc Bernstein, Special Deputy Attorneys General, for respondent-appellant/appellee.

PER CURIAM.

Justice HUNTER 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).

AFFIRMED.

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, N.C. WASTE AWARENESS AND REDUCTION NETWORK, N.C. JUSTICE CENTER, AND N.C. HOUSING COALITION, INTERVENORS

No. 268A12-2

(Filed 19 December 2014)

1. Utilities—North Carolina Utilities Commission—electric service rate—return on equity—sufficiency of findings of fact

In a utilities rate case, the Utilities Commission's order authorizing a return on equity of 10.5% for Duke Energy Carolinas contained sufficient findings of fact. The findings reviewed the testimony of the witnesses, described the weight given to the evidence, and demonstrated that the Commission reached an independent conclusion in adopting the return on equity in the stipulation.

2. Utilities—North Carolina Utilities Commission—electric service rate—return on equity—impact on consumers—sufficiency of findings of fact

In a utilities rate case, the Utilities Commission's order authorizing a return on equity of 10.5% for Duke Energy Carolinas contained sufficient findings of fact regarding the impact of changing economic conditions on utilities customers. The order considered the need for safe, adequate, and reliable electric service and the difficult economic climate for consumers, concluding that a 10.5% return on equity struck the appropriate balance. The order also found that the stipulation for the return on equity would mitigate the impact of the rate increase in several ways, including provision of assistance programs for low-income consumers.

On direct appeal as of right pursuant to N.C.G.S. §§ 7A-29(b) and 62-90(d) from a final order of the North Carolina Utilities Commission on remand from this Court entered on 23 October 2013 in Docket No. E-7, Sub 989. Heard in the Supreme Court on 8 September 2014.

K&L Gates LLP, by Kiran H. Mehta; Heather Shirley Smith, Deputy General Counsel, and Charles A. Castle, Associate General Counsel, Duke Energy Carolinas, LLC; and Williams Mullen, by Christopher G. Browning, Jr., for applicant-appellee Duke Energy Carolinas, LLC.

Antoinette R. Wike, Chief Counsel, and William E. Grantmyre and David T. Drooz, Staff Attorneys, for intervenor-appellee Public Staff—North Carolina Utilities Commission.

Kevin Anderson, Senior Deputy Attorney General; Phillip K. Woods, Special Deputy Attorney General; Michael T. Henry, Assistant Attorney General; and John F. Maddrey, Solicitor General; for intervenor-appellant Roy Cooper, Attorney General.

Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn, for NC WARN; and John D. Runkle for NC WARN, N.C. Justice Center, and N.C. Housing Coalition, intervenor-appellants.

JACKSON, Justice.

In this case we consider whether the order of the North Carolina Utilities Commission ("the Commission") authorizing a 10.5% return on equity ("ROE") for Duke Energy Carolinas ("Duke") contained sufficient findings of fact to demonstrate that the order was supported by competent, material, and substantial evidence in view of the entire record. *See* N.C.G.S. § 62-94 (2013). Because we conclude that the Commission made sufficient findings of fact regarding the impact of changing economic conditions upon customers, we affirm. *See id.* § 62-94(b).

On 1 July 2011, Duke filed an application with the Commission requesting authority to increase its North Carolina retail electric service rates to produce an additional $646,057,000, yielding a net increase of 15.2% in overall base revenues. The application requested that rates be established using an ROE of 11.5%. The ROE represents the return that a utility is allowed to earn on the equity-financed portion of its capital investment by charging rates to its customers. As a result, the ROE approved by the Commission affects profits for shareholders and costs to consumers. *State ex rel. Utils. Comm'n v. Cooper* ("*Cooper II*"), 367 N.C. 430, 432, 758 S.E.2d 635, 636 (2014) (citations omitted). "The ROE is one of the components used in determining a company's overall rate of return." *Id.* (citation omitted).

The proceedings before the Commission are set forth in our opinion in *State ex rel. Utilities Commission v. Cooper* ("*Cooper I*"), 366 N.C. 484, 739 S.E.2d 541 (2013). In pertinent part, we explained that

> [t]he 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 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.

Id. at 486, 739 S.E.2d at 542-43. Subsequently, the Commission conducted six hearings to receive testimony from public witnesses and an evidentiary hearing for receiving expert testimony. *Id.* On 27 January 2012, the Commission entered an order (the "Rate Order") approving the revenue increase and ROE contained in the Stipulation. 366 N.C. at 488, 739 S.E.2d at 544. The Attorney General appealed.

Upon review, we concluded that the Rate Order was not supported by sufficient findings of fact demonstrating that the Commission exercised independent judgment in approving the Stipulation's provisions. *Id.* at 493, 739 S.E.2d at 547. We explained that

> 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.

Id. We further noted that the Rate Order did not include sufficient findings of fact regarding the impact of changing economic conditions upon customers. 366 N.C. at 494, 739 S.E.2d at 547. As a result, we reversed the Rate Order and remanded the case "with instructions to make an independent [ROE] determination . . . based upon . . . findings of fact that weigh all the available evidence." *Id.* at 496, 739 S.E.2d at 548.

On 23 October 2013, the Commission entered an order (the "Remand Order") making supplemental findings of fact, summarizing public witness testimony, reviewing expert testimony, explaining the weight given to the evidence, and "reaffirm[ing]" the Rate Order. The Commission concluded that the ROE authorized in the Rate Order

was "justified and supported" by the evidence and was reasonable in light of the Stipulation as a whole. The Attorney General appealed the Remand Order to this Court as of right pursuant to N.C.G.S. §§ 7A-29(b) and 62-90.

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) (2013). When reviewing an order of the Commission, this Court may, *inter alia*,

> 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.

Id. § 62-94(b) (2013). Pursuant to subsection 62-94(b) this Court must determine whether the Commission's findings of fact are supported by competent, material, and substantial evidence in light of the entire record. *Id.*; *CUCA I*, 348 N.C. at 460, 500 S.E.2d at 699 (citation omit-

ted). "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." *CUCA I*, 348 N.C. at 460, 500 S.E.2d at 700 (alteration in original) (citations and quotation marks omitted). The Commission must include all necessary findings of fact, and failure to do so constitutes an error of law. *Id.* (citation omitted).

[1] In his appeal,[1] the Attorney General argues that the Commission did not reach its own independent conclusions because the Remand Order "once again analyzes and critiques the expert testimony . . . in just such a way so as to reach—to the exact *tenth of a percent*—the precise compromise ROE contained in the Stipulation." The Attorney General asserts that the Commission supported the Remand Order by "cherry picking" through the available evidence, evidence from other cases, and orders entered in other jurisdictions. We disagree.

In *CUCA I* we explained that the Commission is required to reach an independent conclusion on a fair ROE. 348 N.C. at 461-62, 500 S.E.2d at 700-01. The Commission must consider all the evidence before it along with any stipulation entered into by some of the parties and any other relevant facts. *Id.* at 466, 500 S.E.2d at 703. But the requirement that the Commission reach an independent conclusion does not preclude the Commission from adopting an ROE recommended by a particular party or witness. As we explained in *CUCA I*,

> [t]he 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.

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1. We note that NC WARN, the North Carolina Justice Center, and the North Carolina Housing Coalition did not file a notice of appeal with the Commission, although they filed a brief with this Court. Pursuant to section 62-90 of the North Carolina General Statutes, a party may appeal a final order of the Commission "if the party . . . shall file with the Commission notice of appeal and exceptions which shall set forth specifically the ground or grounds on which the aggrieved party considers said decisions or order to be unlawful, unjust, unreasonable or unwarranted." N.C.G.S. § 62-90(a) (2013). Because NC WARN, the North Carolina Justice Center, and the North Carolina Housing Coalition did not file a notice of appeal with the Commission, we are without jurisdiction to consider their arguments.

In *Cooper I* we reversed the Rate Order because we were unable to conclude from the record that the Commission had considered all the evidence in addition to the Stipulation. *See* 366 N.C. at 493, 739 S.E.2d at 547. Specifically, we noted that the Rate Order did not weigh the evidence, but "merely recited the witnesses' testimony before reaching an ROE conclusion." *Id.* But in the Remand Order, the Commission revisited the evidence related to ROE and explained the weight given to each witness's testimony.

The Commission first reviewed the discounted cash flow ("DCF") analysis presented by Duke witness Robert Hevert. *See* 366 N.C. at 486-87, 739 S.E.2d at 543. The Commission explained that Hevert performed this analysis using several proxy groups and arrived at estimated ROE ranges of: (1) 10.42% to 10.84% for a proxy group he had selected; (2) 10.24% to 10.74% for a proxy group selected by Public Staff witness Johnson; (3) 10.31% to 10.57% for one proxy group selected by CUCA witness O'Donnell; and (4) 10.27% to 10.58% for a second proxy group selected by O'Donnell. The Commission observed that the average midpoint of these ranges was exactly the stipulated 10.5%. Ultimately, the Commission "credit[ed]" Hevert's DCF analysis and found "that the resulting value provides substantial support for its determination that 10.5% is the appropriate [ROE]."

The Commission noted that Public Staff witness Ben Johnson had examined ROE through a comparable earnings method and a market approach. The Commission gave "substantial weight" to Johnson's comparable earnings method, which resulted in an ROE range of 9.75% to 10.75%, and determined that Johnson's analysis provided "ample support" for the Commission's conclusion that 10.5% was an appropriate ROE. Nevertheless, the Commission explained that Johnson had acknowledged that his market approach "does not focus on short-term securities markets at all; so the recent drop in interest rates and the drop in the opportunity to reach capital that is being signaled by security markets is simply not a part of that analysis." The Commission further explained that Hevert testified that Johnson's market analysis resulted in an "unreasonably low" ROE. The Commission determined that Johnson's market analysis was unpersuasive.

The Commission gave "minimal weight" to CUCA witness Kevin O'Donnell's testimony recommending an ROE of 9.5%. The Commission concluded that O'Donnell inappropriately relied upon the assumed rate of return for Duke's pension expense, "ignor[ing] the crucial distinction between expected returns, which underlie pen-

sion expense, and required returns, which underlie the appropriate rate of return on equity."

In conducting its analysis, the Commission was required to consider the Stipulation together with all the other evidence and was permitted to adopt the ROE contained therein. *CUCA I*, 348 N.C. at 466, 500 S.E.2d at 703. We hold that the Remand Order contains sufficient findings of fact explaining the weight given to the evidence and demonstrating that the Commission reached its own independent conclusion on ROE.

[2] Next, the Attorney General argues that the Commission determined that it "need not follow" this Court's decision in *Cooper I*. Specifically, the Attorney General contends that the Commission did not make sufficient findings of fact regarding the impact of changing economic conditions upon customers. We disagree.

Pursuant to subdivision 62-133(b)(4) of the North Carolina General Statutes, the Commission must fix a rate of return that

> will enable the public utility by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors, . . . 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) (2013). In *Cooper I* we observed that this provision, along with Chapter 62 as a whole, requires the Commission to treat consumer interests fairly, not indirectly or as "mere afterthoughts." 366 N.C. at 495, 739 S.E.2d at 548. But although the Commission must make findings of fact regarding the impact of changing economic conditions upon consumers, "we did not state in *Cooper I* that the Commission must 'quantify' the influence of this factor upon the final ROE determination." *State ex rel. Utils. Comm'n v. Cooper* ("*Cooper III*"), 367 N.C. 444, 450, 761 S.E.2d 640, 644 (2014) (citations omitted).

Here the Commission's order contains several findings of fact that address this factor:

> 53. Economic conditions in North Carolina during the last several years have caused high levels of unemployment and other economic stress on [Duke's] customers.

54. The rate increase approved in this case, which includes, among the many authorized adjustments, the approved return on equity and capital structure, will be difficult for some of [Duke's] customers to pay, in particular [Duke's] low-income customers. . . .

55. Continuous safe, adequate, and reliable electric service by [Duke] is essential to the well-being of the people, businesses, institutions, and economy of North Carolina.

56. The return on equity approved by the Commission appropriately balances the benefits received by all of [Duke's] customers from [Duke's] provision of safe, adequate, and reliable electric service in support of the well-being of the people, businesses, institutions, and economy of North Carolina with the difficulties that a portion of [Duke's] customers experience in paying their bills in the current economic environment.

Furthermore, the Commission found that the Stipulation was "designed to mitigate the impact of the rate increase in several ways." First, the Commission explained that pursuant to the Stipulation, Duke's rates would increase by 7.21% across-the-board for all customer classes, which amounted to less than half the revenue increase that Duke originally sought. The Commission determined that an across-the-board increase, as provided in the Stipulation, resulted in a smaller increase for residential customers than an alternative rate design considered by the Commission. The Commission concluded that this approach was responsive to the concerns of public witnesses regarding the ability of residential customers to pay for a rate increase.

Second, the Commission noted that the Stipulation required Duke to defer recovery of costs associated with construction work in progress at Duke's Cliffside Unit 6. The Commission found that this requirement "provid[es] $51 million of relief in present rates to respond to the present economic straits." (Emphasis omitted.)

Finally, the Commission explained that the Stipulation required Duke to pay $11 million for energy assistance for low-income customers. As stated in the Stipulation, this contribution would come from Duke's shareholders and would be used exclusively to provide energy assistance to Duke's North Carolina retail customers.

These findings of fact not only demonstrate that the Commission considered the impact of changing economic conditions upon customers, but also specify how this factor influenced the Commission's decision to authorize a 10.5% ROE as agreed to in the Stipulation.

These findings are supported by the evidence before the Commission, including public witness testimony, expert testimony, and the Stipulation itself. Therefore, we hold that the Commission made sufficient findings regarding the impact of changing economic conditions upon customers and that these findings are supported by competent, material, and substantial evidence in view of the entire record.

Accordingly, the order of the Commission is affirmed.

AFFIRMED.

STATE OF NORTH CAROLINA v. EDY CHARLES BANKS, JR.

No. 90PA13

(Filed 19 December 2014)

Constitutional Law—effective assistance of counsel—counsel's argument—statutory rape—second-degree rape

The Court of Appeals erred by holding that defendant received ineffective assistance of counsel based on trial counsel's failure to argue that defendant could not, consistent with double jeopardy principles, be sentenced for both statutory rape and second-degree rape when the convictions stemmed from a single act of sexual intercourse with the same victim. Any such argument would have been unsuccessful because it is the General Assembly's intent for defendants to be separately punished for a violation of both statutes arising from a single act of sexual intercourse when the elements of each offense are satisfied.

Justices JACKSON and HUNTER 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. ___, 736 S.E.2d 843 (2013), reversing and remanding an order denying defendant's motion for appropriate relief entered on 5 December 2011 by Judge Anna Mills Wagoner in Superior Court, Rowan County. Heard in the Supreme Court on 17 February 2014.

Roy Cooper, *Attorney General*, *by Amy Kunstling Irene*, *Assistant Attorney General*, *for the State-appellant.*

Allison Standard for defendant-appellee.

BEASLEY, Justice.

Petitioner Edy Charles Banks, Jr., in his motion for appropriate relief (MAR), claims that he received ineffective assistance of counsel (IAC) when his trial counsel failed to object on double jeopardy grounds to his being sentenced by the trial court for both statutory rape and second-degree rape when the convictions were predicated on a single act of sexual intercourse with the victim. We conclude that defendant was properly convicted of both statutory rape and second-degree rape committed during a single act of sexual intercourse and that separate punishments for each offense are appropriate. Consequently, defendant could not have been prejudiced by ineffective assistance of counsel when a double jeopardy argument would have been unsuccessful at trial. We, therefore, reverse the decision of the Court of Appeals.

In 2007 Banks was convicted of statutory rape of a fifteen-year-old child, second-degree rape of a mentally disabled person, and taking indecent liberties with a child. The evidence presented in support of these convictions tended to show that on 4 May 2005, Banks engaged in a single act of vaginal intercourse with J.L., a juvenile who suffers from various mental disorders and is mildly to moderately mentally disabled. At the time of the incident, Banks was twenty-nine years old and J.L. was fifteen years old. The trial court sentenced Banks to a presumptive-range term of 240 to 297 months of imprisonment for the statutory rape conviction. The trial court consolidated the second-degree rape and indecent liberties convictions into one judgment and sentenced Banks to a consecutive, presumptive-range term of 73 to 97 months of imprisonment. Banks's convictions were subsequently upheld on direct appeal. *See State v. Banks*, 201 N.C. App. 591, 689 S.E.2d 245, 2009 WL 4931757 (unpublished).

On 2 September 2011, Banks filed an MAR in Superior Court, Rowan County, asserting that his

> convictions of statutory rape and second degree rape for the same act violate the protection against double jeopardy in the Fifth Amendment to the United States Constitution and the North Carolina Constitution's law of the land provision in Article 1,

> Section 19. Trial counsel's failure to raise this claim at trial constitutes ineffective assistance of counsel in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the North Carolina Constitution, Article 1, Sections 19 and 23.

The trial court, without conducting an evidentiary hearing on Banks's IAC claim, entered an order on 5 December 2011 denying Banks's MAR. The court applied the test established in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932). The test, established as a means to identify " 'congressional intent to impose separate sanctions for . . . offenses arising in the course of a single act or transaction,' " *Albernaz v. United States*, 450 U.S. 333, 337, 101 S. Ct. 1137, 1141, 67 L. Ed. 2d 275, 281 (1981) (citations omitted), requires the trial court to consider "whether each provision requires proof of a fact which the other does not," *Blockburger*, 284 U.S. at 304, 52 S. Ct. at 182, 76 L. Ed. at 309 (citations omitted). Applying this test, the trial court determined that statutory rape and second-degree rape "constitute separate and distinct crimes" and that "there is no clear legislative intent to prohibit multiple convictions for the same conduct in the [applicable criminal] statutes." Accordingly, the trial court found that "[Banks]'s rights against double jeopardy were not violated" and thus, "trial counsel was not ineffective in failing to raise the claim."

Banks petitioned the Court of Appeals for a writ of certiorari to review the trial court's denial of his MAR. The Court of Appeals allowed Banks's petition, reversed the trial court's order, and remanded for further proceedings consistent with its opinion. *State v. Banks*, ___ N.C. App. ___, ___, ___, 736 S.E.2d 843, 845, 847 (2013). In its opinion the Court of Appeals held that the General Assembly did not intend for Banks to be punished separately for both statutory rape and second-degree rape based upon a single act of sexual intercourse, and thus Banks had been improperly sentenced. *Id.* at ___, 736 S.E.2d at 847. The Court of Appeals based its holding exclusively upon its prior decision in *State v. Ridgeway*, 185 N.C. App. 423, 648 S.E.2d 886 (2007), in which the court concluded that the General Assembly did not intend cumulative punishment for statutory rape and sexual offense when the convictions were based on a single act. *Id.* at 434-35, 648 S.E.2d at 894-95.

The State petitioned this Court for discretionary review, which we allowed on 27 August 2013. The State contends that the Court of Appeals erred in holding that Banks received ineffective assistance of

counsel because of trial counsel's failure to argue that Banks could not, consistent with double jeopardy principles, be sentenced for both statutory rape and second-degree rape when the convictions stemmed from a single act of sexual intercourse with the same victim. To prevail on an IAC claim, the defendant must satisfy a two-part test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. The United States Supreme Court has explained, however, that a reviewing court need not "address both components of the inquiry if the defendant makes an insufficient showing on one. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699. Because we conclude that Banks was not prejudiced by trial counsel's failure to raise the double jeopardy argument, we need not determine whether counsel's performance was deficient.

The State argues that Banks was not prejudiced by counsel's failure to raise the argument that defendant could not be punished for both second-degree rape and statutory rape because any such argument would have been unsuccessful. We agree.

> Where multiple punishment [in a single prosecution] is involved, the Double Jeopardy Clause acts as a restraint on the prosecutor and the courts, not the legislature. The Double Jeopardy Clauses of both the United States and North Carolina Constitutions prohibit a court from imposing more punishment than that intended by the legislature. "[T]he question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized."

State v. Gardner, 315 N.C. 444, 452-53, 340 S.E.2d 701, 707-08 (1986) (second alteration in original) (citations omitted). Therefore, the

issue here is whether the General Assembly intended a single act of sexual intercourse to support punishments for both statutory rape and second-degree rape when the elements of both offenses are satisfied.

We first note that the reasoning underlying *Ridgeway*, the case on which the Court of Appeals largely relied, is inapplicable. In *Ridgeway* the issue was whether the trial court properly allowed the jury to consider both first-degree rape and statutory sexual offense as grounds for convicting the defendant. 185 N.C. App. at 433-35, 648 S.E.2d at 894-95. The Court of Appeals concluded that while submitting both charges to the jury was proper, "judgment must be arrested on one count of first degree rape and on one count of first degree sexual offense," *id.* at 434, 648 S.E.2d at 894, because "the legislative intent was to provide alternate methods by which the State can prove the crimes of rape or sexual offense," *id.* at 435, 648 S.E.2d at 894. The court noted that the 1995 statute criminalizing statutory rape or statutory sexual offenses involving a thirteen-, fourteen-, or fifteen-year-old extended the age requirement in "the original statutes for rape and sexual offense" that criminalized sexual intercourse with a child under thirteen years of age. *Id.* at 435, 648 S.E.2d at 894-95. Here, by contrast, we do not have any legislative history indicating an intent by the legislature that the two offenses in question were to be "alternate methods" by which the State could prove the offenses. As such, *Ridgeway* does not inform our present inquiry.

To begin our analysis, we first examine whether double jeopardy principles have been violated by determining whether the "two crimes are considered identical." *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987). This Court has used the test set out in *Blockburger* to determine whether two crimes should be considered identical. *See generally State v. Sparks*, 362 N.C. 181, 657 S.E.2d 655 (2008); *State v. Fernandez*, 346 N.C. 1, 484 S.E.2d 350 (1997); *State v. Pipkins*, 337 N.C. 431, 446 S.E.2d 360 (1994). This test provides that " '[a] single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' " *Blockburger*, 284 U.S. at 304, 52 S. Ct. at 182, 76 L. Ed. at 309 (citations omitted). We have held that "the fact that each crime for which a defendant is convicted in one trial requires proof of an element the other does not demonstrates the legislature's intent that the defendant may be punished for both crimes." *State v. Swann*, 322 N.C. 666, 677, 370 S.E.2d 533, 539 (1988) (citing *Etheridge*, 319 N.C. 34, 352

S.E.2d 673). Thus, legislative intent determines whether multiple punishments may be supported by one act [of sexual intercourse]. *Gardner*, 315 N.C. at 455, 340 S.E.2d at 709 (explaining that the presumption raised by the *Blockburger* test "may be rebutted by a clear indication of legislative intent").

The legislative intent of the statutes defining the offenses in question can be extrapolated from the provisions of each statute. *State v. Davis*, 364 N.C. 297, 302, 698 S.E.2d 65, 68 (2010) ("When a statute is unambiguous, this Court will give effect to the plain meaning of the words without resorting to judicial construction. [C]ourts must give [an unambiguous] statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." (alterations in original) (internal quotation marks omitted) (quoting *State v. Byrd*, 363 N.C. 214, 219, 675 S.E.2d 323, 325 (2009); *State v. Green*, 348 N.C. 588, 596, 502 S.E.2d 819, 824 (1998), *cert. denied*, 525 U.S. 1111, 119 S. Ct. 883, 142 L. Ed. 2d 783 (1999))).

The second-degree rape statute provides in pertinent part that

> (a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.
>
> (b) Any person who commits the offense defined in this section is guilty of a Class C felony.

N.C.G.S. § 14-27.3(a)(1)-(2) (2013).

The General Assembly has defined statutory rape as follows:

> (a) A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.

Id. § 14-27.7A (2013).

As the language of N.C.G.S. § 14-27.7A indicates, an element of the offense of statutory rape is the age of the minor victim, " 'under which it should be presumed . . . that consent [cannot] be given.' " *State v. Anthony*, 351 N.C. 611, 615, 528 S.E.2d 321, 323 (2000) (citation and emphasis omitted). Moreover, the age of the defendant, "or more specifically the difference in age between the defendant and the victim, [is] an essential element" of statutory rape. *Id.* at 617, 538 S.E.2d at 324. Second-degree rape, however, involves the act of intercourse with a victim who is mentally disabled or incapacitated. N.C.G.S. § 14-27.3. The terms "mentally disabled" and "mentally incapacitated" have been defined by statute as:

> (1) "Mentally disabled" means (i) a victim who suffers from mental retardation, or (ii) a victim who suffers from a mental disorder, either of which temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act.
>
> (2) "Mentally incapacitated" means a victim who due to any act committed upon the victim is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act.

Id. § 27.1(1), (2) (2013).

Here Banks was convicted and sentenced for both (1) statutory rape of a person who is thirteen, fourteen, or fifteen years old by a defendant who is at least six years older than the victim and (2) second-degree rape. Although based on the same act of sexual intercourse, the two offenses committed by Banks are separate and distinct under the *Blockburger* test, each requiring proof of an element where the other offense does not. Statutory rape involves an age component under which consent legally cannot be given absent marriage. N.C.G.S. § 14-27.7A; *Anthony*, 351 N.C. at 616, 528 S.E.2d at 323 (explaining that "[t]he purpose of the statutory rape law is to protect children under a certain age from sexual acts." (citation omitted)). This age component is an essential element of the crime. *Id.* at 617, 528 S.E.2d at 324. In contrast, second-degree rape involves the act of intercourse with a victim who suffers from a mental disability or mental incapacity. N.C.G.S. § 14-27.3. Based on the separate and distinct elements that must be proved, neither of these two criminal offenses

is a lesser included offense of the other. Thus, double jeopardy principles have not been violated. *See generally Gardner*, 315 N.C. at 463, 340 S.E.2d at 714 (holding "that a defendant may be tried for, convicted of, and punished separately for the crime of breaking or entering and the crime of felony larceny" arising from one act or occurrence).

Given the elements of second-degree rape and statutory rape, it is clear that the legislature intended to separately punish the act of intercourse with a victim who, because of her age, is unable to consent to the act, and the act of intercourse with a victim who, because of a mental disability or mental incapacity, is unable to consent to the act. *See Albernaz*, 450 U.S. at 339, 343, 101 S. Ct. at 1142, 1144, 67 L. Ed. 2d at 281-82, 284 (explaining that Congress intended to impose multiple punishments for two statutes directed at separate evils and thus punishment for both offenses does not exceed legislative authority).

Because it is the General Assembly's intent for defendants to be separately punished for a violation of the second-degree rape and statutory rape statutes arising from a single act of sexual intercourse when the elements of each offense are satisfied, defendant's argument that he was prejudiced by counsel's failure to raise the argument of double jeopardy would fail. We therefore conclude that defendant was not prejudiced.

For the reasons stated above, the decision of the Court of Appeals is reversed.

REVERSED.

Justices JACKSON and HUNTER did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. GLENN EDWARD BENTERS

No. 5A14

(Filed 19 December 2014)

1. Search and Seizure—motion to suppress—drugs—totality of circumstances—no probable cause for search warrant

The trial court did not err in a drugs case by granting defendant's motion to suppress items seized under a search warrant. The totality of circumstances revealed that the affidavit failed to provide a substantial basis for the magistrate to conclude that probable cause existed. The information available to law enforcement officers from an anonymous tip and from the officers' corroborative investigation was deficient, and the affidavit's material allegations were conclusory.

2. Appeal and Error—additional evidence—conditional argument

Although the Court of Appeals made glancing references to additional evidence beyond the four corners of a search warrant in a drugs case, it was error to consider this evidence. The State's conditional argument regarding inevitable discovery was not considered in light of the Supreme Court's holding and analysis based solely upon the affidavit supporting the warrant.

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 750 S.E.2d 584 (2013), affirming an order granting defendant's motion to suppress entered on 24 September 2012 by Judge Carl R. Fox in Superior Court, Vance County. Heard in the Supreme Court on 8 September 2014.

Roy Cooper, *Attorney General*, *by Derrick C. Mertz*, *Assistant Attorney General*, *for the State-appellant.*

Brock & Meece, *P.A.*, *by C. Scott Holmes*, *for defendant-appellee.*

BEASLEY, Justice.

In this appeal we consider the sufficiency of an affidavit in support of an application for a search warrant. We hold that under the

totality of the circumstances, the affidavit failed to provide a substantial basis for the magistrate to conclude that probable cause existed. The information available to law enforcement officers from an anonymous tip and from the officers' corroborative investigation was qualitatively and quantitatively deficient, and the affidavit's material allegations were uniformly conclusory. Accordingly, we affirm the Court of Appeals.

The affidavit at issue provides in relevant part as follows:

> I, Deputy Joseph R. Ferguson, am a certified North Carolina law enforcement officer, sworn and employed by the Vance County Sheriff's Office. I have been a sworn law enforcement officer since 1998. While employed by the Sheriff's Office I have been assigned to the patrol division, the Community Policing Program, and am currently a Detective Lieutenant in the Criminal Investigations and Narcotics Division. I have attended and successfully completed Basic Law Enforcement Training and obtained an Associates Degree in Applied Science in Criminal Justice Technology at Vance Granville Community College. I have received the following training related to the enforcement of North Carolina State Laws: Constitutional Law, Arrest, Search, and, Seizure, Search and Seizure in North Carolina, Criminal Investigations, Search Warrant Preparation, Interview and Interrogation, Advance Death Investigations, and Crime Scene Processing as part of the in service training courses provided by the North Carolina Community College system[.] I have also completed the Drug Law Enforcement Training Program through the Federal Law Enforcement Training Center and attended the Discovery for Law Enforcement Agents Seminar sponsored by the Eastern District of North Carolina's U.S. Attorney's Office. During my career in law enforcement I have investigated over one thousand criminal cases and have made over five hundred arrests many resulting in conviction by trail [sic] or plea bargain in Vance County District and Superior Courts.
>
> On September 29, 2011 Lt. Ferguson, hereby known as your affiant, received information from Detective J. Hastings of the Franklin County Sheriff's Office Narcotics Division about a residence in Vance County that is currently being used as an indoor marijuana growing operation. Detective Hastings has extensive training and experience with indoor marijuana growing investigations on the state and federal level. Within

the past week Hastings met with a confidential and reliable source of information that told him an indoor marijuana growing operation was located at 527 Currin Road in Henderson, North Carolina. The informant said that the growing operation was housed in the main house and other buildings on the property. The informant also knew that the owner of the property was a white male by the name of Glenn Benters. Benters is not currently living at the residence, however [he] is using it to house an indoor marijuana growing operation. Benters and the Currin Road property [are] also known by your affiant from a criminal case involving a stolen flatbed trailer with a load of wood that was taken from Burlington North Carolina. Detective Hastings obtained a subpoena for current subscriber information. Kilowatt usage, account notes, and billing information for the past twenty-four months in association with the 527 Currin Road Henderson NC property from Progress Energy Legal Department. Information provided in said subpoena indicated that Glenn Benters is the current subscriber and the kilowatt usage hours are indicative of a marijuana grow operation based on the extreme high and low kilowatt usage.

Also on 9-29-2011 Detective Hastings and your affiant along with narcotics detectives from the Vance and Franklin County Sheriffs' Office as well as special agents with the North Carolina S.B.I. traveled to the residence at 527 Currin Road Henderson NC[ ]and observed from outside of the curtilage multiple items in plain view that were indicative of an indoor marijuana growing operation. The items mentioned above are as followed [sic]; potting soil, starting fertilizer, seed starting trays, plastic cups, metal storage racks, and portable pump type sprayers. Detectives did not observe any gardens or potted plants located around the residence. Detectives observed a red Dodge full size pickup truck parked by a building located on the curtilage of the residence and heard music coming from the area of the residence.

After observing the above listed circumstances, detectives attempted to conduct a knock and talk interview with anyone present at the residence. After knocking on the back door, which your affiant knows Benters commonly uses based on previous encounters, your affiant waited a few minutes for someone to come to the door. When no one came to the door,

your affiant walked to a building behind the residence that music was coming from in an attempt to find someone. Upon reaching the rear door of the building, your affiant instantly noticed the strong odor of marijuana emanating from the building. Your affiant walked over to a set of double doors on the other side of the building and observed two locked double doors that had been covered from the inside of the building with thick mil black plastic commonly used in marijuana grows to hide light emanated by halogen light typically used in indoor marijuana growing operations. Thick mil plastic was also present on windows inside the residence as well.

Based on these facts your affiant respectfully request[s] a search warrant in order to obtain evidence from the property located at 527 Currin Road Henderson NC . . . .

. . . .

s/ J. Ferguson	s/ [Magistrate]
Affiant	Judge
9-29-11/ 9/29/11	9/29/11
Date	Date

That same day, a magistrate issued a warrant based upon this affidavit authorizing a search of defendant's home and outbuildings on his property. Law enforcement officers immediately executed the warrant and seized fifty-five marijuana plants; various indoor growing supplies, including lights, timers, chemicals, water pumps, flexible tubing, humidifiers, and several boxes of Ziploc plastic bags; numerous firearms and ammunition; and $1540 in cash.

A grand jury indicted defendant for maintaining a dwelling to keep a controlled substance (two counts), manufacture of a Schedule VI controlled substance, possession of drug paraphernalia, trafficking in marijuana by manufacture, trafficking in marijuana by possession, and possession with intent to sell or deliver a Schedule VI controlled substance. On 20 February 2012, defendant moved to suppress the items seized under the search warrant, arguing that the search and seizure violated the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution. On 24 September 2012, the trial court entered an order allowing defendant's motion. The State timely appealed to the Court of Appeals.

A majority of the panel of the Court of Appeals concluded that the affidavit at issue was not supported by probable cause and affirmed the trial court's order allowing defendant's motion to suppress. *State v. Benters*, ___ N.C. App. ___, ___, 750 S.E.2d 584, 591 (2013). The dissent agreed with the majority "that the affidavit did not contain a sufficient factual basis to establish probable cause under the confidential informant standard" because "L[ieutenant] Ferguson's description of the source's reliability was merely conclusory." *Id.* at ___, 750 S.E.2d at 591-92 (Hunter, Robert C., J., dissenting). The dissent, however, would have concluded that the affidavit was supported by probable cause under an anonymous tip standard because "the affidavit contained detailed information provided by the source which was independently corroborated by experienced officers." *Id.* at ___, 750 S.E.2d at 591. The State appeals to this Court based on the dissent. N.C.G.S. § 7A-30(2) (2013). We now affirm.

[1] The issue before this Court is whether the facts and circumstances set forth in the affidavit establish probable cause. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The "common-sense, practical question" of whether probable cause exists must be determined by applying a "totality of the circumstances" test. *Illinois v. Gates*, 462 U.S. 213, 230, 103 S. Ct. 2317, 2328, 76 L. Ed. 2d 527, 543 (1983); *State v. Arrington*, 311 N.C. 633, 637, 641, 319 S.E.2d 254, 257 (1984). Thus,

> "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed.

Arrington, 311 N.C. at 638, 319 S.E.2d at 257-58 (quoting *Gates*, 462 U.S. at 238-39, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548 (third and fourth alterations in original)). " '[P]robable cause requires only a probabil-

ity or substantial chance of criminal activity, not an actual showing of such activity.' " *State v. Riggs*, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991) (emphasis omitted) (quoting *Gates*, 462 U.S. at 244 n.13, 103 S. Ct. at 2335 n.13, 76 L. Ed. 2d at 552 n.13). This commonsense, practical inquiry is to be based upon " 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Id.* (quoting *Gates*, 462 U.S. at 231, 103 S. Ct. at 2328, 76 L. Ed. 2d at 544).

Further, "a magistrate is entitled to draw reasonable inferences from the material supplied to him by an applicant for a warrant." *State v. Sinapi*, 359 N.C. 394, 399, 610 S.E.2d 362, 365 (2005) (citing *Riggs*, 328 N.C. at 221, 400 S.E.2d at 434). And we acknowledge that " 'great deference should be paid a magistrate's determination of probable cause and that after-the-fact scrutiny should not take the form of a *de novo* review.' " *Id.* at 398, 610 S.E.2d at 365 (quoting *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258). This deference, however, is not without limitation. A reviewing court has the duty to ensure that a magistrate does not abdicate his or her duty by "mere[ly] ratif[ying] . . . the bare conclusions of [affiants]." *Gates*, 462 U.S. at 239, 103 S. Ct. at 2333, 76 L. Ed. 2d at 549; *see State v. Campbell*, 282 N.C. 125, 130-31, 191 S.E.2d 752, 756 (1972) ("Probable cause cannot be shown by affidavits which are purely conclusory . . . ." (citation and internal quotation marks omitted)); *see also United States v. Leon*, 468 U.S. 897, 914, 104 S. Ct. 3405, 3416, 82 L. Ed. 2d 677, 693 (1984) ("[C]ourts must . . . insist that the magistrate purport to perform his neutral and detached function and not serve merely as a rubber stamp for the police.") (citations and internal quotation marks omitted), *superseded in part by* Fed. R. Crim. P. 41(e).

Because the affidavit is based in part upon information received by Detective Hastings from a source unknown to Lieutenant Ferguson, we must determine the reliability of the information by assessing whether the information came from an informant who was merely anonymous or one who could be classified as confidential and reliable. *State v. Hughes*, 353 N.C. 200, 203, 539 S.E.2d 625, 628 (2000). This Court has explained that statements against an informant's penal interests and statements given by an informant with a history of providing reliable information to law enforcement carry greater weight for purposes of establishing reliability. *Id.* at 204, 539 S.E.2d at 628-29; *Riggs*, 328 N.C. at 219, 400 S.E.2d at 433 (discussing informant reliability based on an informant's "track record"); *State v. Beam*, 325 N.C. 217, 221, 381 S.E.2d 327, 330 (1989) (acknowledging

the credibility of statements against penal interest (citation omitted)); *Arrington*, 311 N.C. at 641, 319 S.E.2d at 259 (discussing the credibility of statements against penal interest); *see Hughes*, 353 N.C. at 204, 539 S.E.2d at 628 (suggesting that "other indication[s] of reliability" may suffice even in the absence of statements against penal interest or an informant's history of giving reliable information).

When sufficient indicia of reliability are wanting, however, we evaluate the information based on the anonymous tip standard. *Hughes*, 353 N.C. at 205, 539 S.E.2d at 629. An anonymous tip, standing alone, is rarely sufficient, but "the tip combined with corroboration by the police could show indicia of reliability that would be sufficient to [pass constitutional muster]." *Id.* (citing *Alabama v. White*, 496 U.S. 325, 329, 110 S. Ct. 2412, 2416, 110 L. Ed. 2d 301, 308 (1990)). Thus, "a tip that is somewhat lacking in reliability may still provide a basis for [probable cause] if it is buttressed by sufficient police corroboration." 353 N.C. at 207, 539 S.E.2d at 630 (citation omitted). Under this flexible inquiry, when a tip is less reliable, law enforcement officers carry a greater burden to corroborate the information. *Id.* at 205, 539 S.E.2d at 629. As compared with the less demanding reasonable suspicion standard, probable cause requires both a greater quantity and higher quality of information. *White*, 496 U.S. at 329-30, 110 S. Ct. at 2416, 110 L. Ed. 2d at 308-09.

As a preliminary matter, the State argues that it did not concede the illegality of the law enforcement officers' entry onto defendant's property to conduct a "knock and talk interview" at the back door of defendant's residence or at an outbuilding from which officers heard music playing. *See Benters*, ___ N.C. App. at ___, 750 S.E.2d at 588 (majority) ("The State concedes that the 'knock and talk' entry onto defendant's property was an illegal search . . . ."); *see also id.* at ___, 750 S.E.2d at 590 ("As previously acknowledged by the State, this entry was illegal and thus the marijuana smell and plastic coverings could not be properly considered in seeking a search warrant."). Having reviewed the opinion below and record on appeal, including the State's briefs to the Court of Appeals, we observe that the State did not expressly concede the point, but rather "[a]ssum[ed], without deciding, that the trial court correctly determined that the officers' entry onto defendant's property to conduct a 'knock and talk'—and further entry onto the property to locate or engage any person near the building from which the music was emanating—was illegal, and omitting this information from the warrant, the warrant was nevertheless valid." Nonetheless, by failing to preserve the issue for appeal

or to present any argument whatever, the State limits its arguments and our scope of review to the first three paragraphs of the affidavit. N.C. Rs. App. P. 10(b), 16(b), 28(b)(6).

In its principal argument on appeal, the State argues that the majority of the panel of the Court of Appeals erred by concluding that the first three paragraphs of the affidavit failed to establish probable cause upon which a search warrant could issue. In support of this argument, the State contends that the tip given to Detective Hastings and relayed to Lieutenant Ferguson had sufficient indicia of reliability to provide probable cause. Even if the tip is considered wholly anonymous, the State suggests that law enforcement officers independently corroborated the tip through Lieutenant Ferguson's prior personal knowledge of defendant and the property, the subpoenaed Progress Energy utility reports, and the officers' personal observations of defendant's gardening supplies. The State further argues that the officers' reliance upon the tip and their interpretation of the investigation must "be viewed through the eyes of a narcotics officer with the appropriate training and experience that both Lieutenant Ferguson and Detective Hastings appeared to have."

With respect to whether the source of the information at issue should be treated as a reliable, confidential informant or an anonymous informant, the affidavit states the following relevant information: (1) the affiant's name; (2) the name of the detective from whom the affiant received the tip; (3) that the detective "met with a confidential and reliable source"; and (4) that the source informed the detective about an indoor marijuana growing operation at a house and other buildings on property owned by defendant.

It is clear from the affidavit that the information provided does not contain a statement against the source's penal interest. Nor does the affidavit indicate that the source previously provided reliable information so as to have an established "track record." Thus, the source cannot be treated as a confidential and reliable informant on these two bases. *Hughes*, 353 N.C. at 204, 539 S.E.2d at 628; *Riggs*, 328 N.C. at 219, 400 S.E.2d at 433; *Beam*, 325 N.C. at 221, 381 S.E.2d at 329-30; *Arrington*, 311 N.C. at 641-42, 319 S.E.2d at 259-60. Nonetheless, the State argues that because Detective Hastings met "face-to-face" with the source, the source should be considered more reliable, and we acknowledge that Lieutenant Ferguson is entitled to rely upon information reported to him by Detective Hastings. *See State v. Vestal*, 278 N.C. 561, 576, 180 S.E.2d 755, 765 (1971) (citation omitted), *cert. denied*, 414 U.S. 874, 94 S. Ct. 157, 38 L. Ed. 2d 114 (1973).

We already have addressed this issue on similar facts presented in *Hughes*. There we explained that the law enforcement officer who filed the affidavit "had never spoken with the informant and knew nothing about the informant other than [his captain's] claim that he was a confidential and reliable informant." *Hughes*, 353 N.C. at 204, 539 S.E.2d at 628. Although the captain in *Hughes* received the tip from a phone call rather than a face-to-face meeting, the captain told the affiant that the confidential source was reliable. *Id.* at 201, 539 S.E.2d at 627. We concluded that the source must be analyzed under the anonymous tip standard because the affiant had nothing more than the captain's "conclusory statement that the informant was confidential and reliable," *id.* at 204, 539 S.E.2d at 629. We see no reason to reach a different result here. The affidavit does not suggest Lieutenant Ferguson was acquainted with or knew anything about Detective Hastings's source or could rely on anything other than Detective Hastings's statement that the source was confidential and reliable. *Id.*

Authorities cited by the State bolster our decision. *See United States v. Perkins*, 363 F.3d 317, 320-23 (4th Cir. 2004) (explaining that an informant's tip was reliable when the informant (1) was known to the investigating officer, (2) had provided reliable information on six to ten prior occasions, and (3) lived directly across the street from the defendant, and when material aspects of the tip were corroborated), *cert. denied*, 543 U.S. 1056, 125 S. Ct. 867, 160 L. Ed. 2d 781 (2005); *United States v. Christmas*, 222 F.3d 141, 144 (4th Cir. 2000) (explaining that a face-to-face tip gave the officer an opportunity to assess the informant's credibility and demeanor, and the informant's close proximity to the drug sales and her "expos[ure] . . . to the risk of reprisal" by talking with uniformed officers in public bolstered the informant's credibility), *cert. denied*, 531 U.S. 1098, 121 S. Ct. 830, 148 L. Ed. 2d 712 (2001); *State v. Allison*, 148 N.C. App. 702, 705, 559 S.E.2d 828, 830 (2002) (finding that a face-to-face tip allowed the officer to assess the informant's demeanor and "significantly increased the likelihood that [the informant] would be held accountable if her tip proved to be false" (citation omitted)).

In contrast, the affidavit here fails to establish the basis for Detective Hastings's appraisal of his source's reliability, including the source's demeanor or degree of potential accountability. The affidavit does not disclose whether Detective Hastings met his source privately, or publicly and in uniform such that the source could risk

reprisal. Moreover, nothing in the affidavit suggests the basis of the source's knowledge. We previously have explained that

> [i]n the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

State v. Edwards, 286 N.C. 162, 168, 209 S.E.2d 758, 762 (1974) (citation and quotation marks omitted).

Accordingly, we hold that Detective Hastings's source of information is an anonymous informant. The tip, as averred, amounts to little more than a conclusory rumor, and the State is not entitled to any great reliance on it. Therefore, the officers' corroborative investigation must carry more of the State's burden to demonstrate probable cause. *See White*, 496 U.S. at 330, 110 S. Ct. at 2416, 110 L. Ed. 2d at 309 ("[I]f a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable."); *Hughes*, 353 N.C. at 205, 539 S.E.2d at 629.

The State directs our attention to several factors which it believes sufficiently corroborate the anonymous tip. These factors include: (1) Lieutenant Ferguson's knowledge of defendant and his property resulting "from a criminal case involving a stolen flatbed trailer"; (2) utility records for the preceding twenty-four months subpoenaed by Detective Hastings that "indicated that Glenn Benters is the current subscriber and the kilowatt usage hours are indicative of a marijuana grow operation based on the extreme high and low kilowatt usage"; and (3) the law enforcement officers' observations of "multiple items in plain view that were indicative of an indoor marijuana growing operation," including "potting soil, starting fertilizer, seed starting trays, plastic cups, metal storage racks, and portable pump type sprayers," in the absence of "any gardens or potted plants located around the residence." The State argues that all of these corroborative factors must be "viewed through the eyes of" the officers in light of their training and experience.

The State suggests that law enforcement officers' "corroboration of mundane matters" conveyed by the informant, such as defendant's name and address, increases the reliability of the tip. We agree, but the State's proposition has limited effect. On the fluid balance pre-

scribed by the Supreme Court, a less specific or less reliable tip requires greater corroboration to establish probable cause. *White*, 496 U.S. at 329-30, 110 S. Ct. at 2416, 110 L. Ed. 2d at 308-09 (citations omitted). Thus, some measure of reliability flows from law enforcement officers' corroboration of mundane matters, but such corroboration supports a finding of probable cause only to a coterminous extent. Here, the officers corroborated defendant's name and address through subpoenaed Progress Energy records showing defendant as the current subscriber and through Lieutenant Ferguson's knowledge of defendant and his address from a prior, unrelated criminal charge. The officers' corroboration tends to show they know defendant's identity and address, although it is not clear that defendant ever resides at this address. Thus, the officers' corroboration adds a small measure of reliability to the anonymous tip, but does little toward establishing probable cause.

With respect to the subpoenaed Progress Energy utility records, we note that this Court has not yet addressed law enforcement officers' use of electricity usage records in an affidavit for a search warrant related to an alleged indoor marijuana growing operation. We are cognizant that we must view the records as part of the totality of the circumstances. As we consider this novel issue before our Court, however, we momentarily consider in isolation the rules regarding this source of information. Having reviewed numerous state and federal authorities that have assessed an affiant's use of utility records, we acknowledge that these records can provide powerful support for probable cause in applications for search warrants, and we adopt the following principles.

In a totality of the circumstances inquiry, the value to be accorded to energy records is, of course, flexible. The weight given to power records increases when meaningful comparisons are made between a suspect's current electricity consumption and prior consumption, or between a suspect's consumption and that of nearby, similar properties. *See, e.g.*, *United States v. Kattaria*, 553 F.3d 1171, 1174 (8th Cir.) (en banc) (per curiam) (Probable cause existed when the affidavit showed, *inter alia*, that "between November 2003 and April 2004, the [defendant's] residence . . . consumed between 1890 and 2213 kilowatt hours of electricity per month, while neighboring residences of comparable size consumed between 63 and 811 kilowatt hours in the same time period."), *cert. denied*, 558 U.S. 1061, 130 S. Ct. 771, 175 L. Ed. 2d 537 (2009); *United States v. Miller*, No. 1:12CR269–1, 2012 WL 4061771, at *1-2 (M.D.N.C. Sept. 14, 2012)

(probable cause found when the affidavit showed, *inter alia*, the defendant's electricity consumption to be nearly three times higher than nine similarly sized houses on his street); *State v. Hook*, 255 Mont. 2, 5, 839 P.2d 1274, 1276 (1992) (finding probable cause when the affidavit, *inter alia*, "recited in detail the power usage, the times of residence by the defendant, previous usage by former occupants, normal residential usage, and comparisons as to these facts"); *State v. Lemonds*, 160 N.C. App. 172, 179, 584 S.E.2d 841, 845-46 (2003) (probable cause found when, *inter alia*, electric bills for the defendant's first home "revealed a dramatic increase in electricity usage during the period of [the] defendant's residency," and electric bills for the defendant's second home, into which he moved during the course of the investigation, revealed a dramatic increase after his occupancy "when compared with the previous occupant's bills for the same time of year").

By contrast, little to no value should be accorded to wholly conclusory, non-comparative allegations regarding energy usage records. *See*, *e.g.*, *State v. Kaluza*, 272 Mont. 404, 409, 901 P.2d 107, 110 (1995) (concluding probable cause was not established because, *inter alia*, "no basis [wa]s provided for the affiant's conclusory statement concerning his training and experience in investigating marijuana grow operations" and utility records were insufficient without "detailed comparisons with average and previous resident's usage"); *State v. McManis*, 2010 VT 63, ¶ 18, 188 Vt. 187, 196, 5 A.3d 890, 896 ("Without any information to put the power records into context, the bare recitation of an increase in power usage cannot corroborate the [confidential informant]'s claim of a marijuana growing operation."); *see also Campbell*, 282 N.C. at 130-31, 191 S.E.2d at 756 (requiring affidavits to set forth underlying circumstances rather than merely conclusory allegations (citation omitted)).

Here Lieutenant Ferguson averred that "Detective Hastings has extensive training and experience with indoor marijuana growing investigations on the state and federal level," and that Detective Hastings had subpoenaed defendant's Progress Energy power records. Lieutenant Ferguson then summarily concluded that "the kilowatt usage hours are indicative of a marijuana grow operation based on the extreme high and low kilowatt usage." As explained above, the absence of any comparative analysis severely limits the potentially significant value of defendant's utility records. *Kaluza*, 272 Mont. at 409, 901 P.2d at 110; *McManis*, 2010 VT 63, ¶¶ 16-19, 188 Vt. at 195-97, 5 A.3d at 896. Therefore, these unsupported allega-

tions do little to establish probable cause independently or by corroborating the anonymous tip. *Campbell*, 282 N.C. at 130-31, 191 S.E.2d at 756.

We acknowledge that investigating officers or a reviewing magistrate may have some degree of suspicion regarding defendant's "extreme high and low kilowatt usage" given that defendant "is not currently living at the residence." These unspecified extremes also may be explained, however, by wholly innocent behavior such as defendant's intermittently visiting his property. Thus, these circumstances may justify additional investigation, but they do not establish probable cause.

We turn next to the officers' observations of multiple gardening items on defendant's property in the absence of exterior gardens or potted plants. In relevant part, the affidavit provides that law enforcement officers

> observed from outside of the curtilage multiple items in plain view that were indicative of an indoor marijuana growing operation. The items mentioned above are as followed [sic]; potting soil, starting fertilizer, seed starting trays, plastic cups, metal storage racks, and portable pump type sprayers. Detectives did not observe any gardens or potted plants located around the residence.

Nothing here indicates "a 'fair probability that contraband or evidence of a crime will be found in a particular place' " beyond Lieutenant Ferguson's wholly conclusory allegations. *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258 (quoting *Gates*, 462 U.S. at 238, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548); *see Riggs*, 328 N.C. at 219-21, 400 S.E.2d at 433-34. The affidavit does not state whether or when the gardening supplies were, or appeared to have been, used, or whether the supplies appeared to be new, or old and in disrepair. Thus, amid a field of speculative possibilities, the affidavit impermissibly requires the magistrate to make what otherwise might be reasonable inferences based on conclusory allegations rather than sufficient underlying circumstances. This we cannot abide. *Campbell*, 282 N.C. at 130-31, 191 S.E.2d at 756.

With respect to the officers' training and experience, we must "give due weight to inferences drawn from . . . facts by . . . local law enforcement officers." *Ornelas v. United States*, 517 U.S. 690, 699, 116 S. Ct. 1657, 1663, 134 L. Ed. 2d 911, 920-21 (1996) (observing that "a police officer views the facts through the lens of his police experience and expertise"). The affidavit here sets forth Lieutenant

Ferguson's training and experience, including his having been a sworn law enforcement officer since 1998, his employment with the Vance County Sheriff's Office, his current employment as a Detective Lieutenant in the Criminal Investigations and Narcotics Division, his training in "Search[ ] and Seizure, Search and Seizure in North Carolina, Criminal Investigations, [and] Search Warrant Preparation," and his completion of the "Drug Law Enforcement Training Program through the Federal Law Enforcement Training Center." The affidavit also states that "Detective Hastings has extensive training and experience with indoor marijuana growing investigations on the state and federal level." We are not convinced that these officers' training and experience are sufficient to balance the quantitative and qualitative deficit left by an anonymous tip amounting to little more than a rumor, limited corroboration of facts, non-comparative utility records, observations of innocuous gardening supplies, and a compilation of conclusory allegations. *See White*, 496 U.S. at 329-30, 110 S. Ct. at 2416, 110 L. Ed. 2d at 308-09. Furthermore, we are unaware of any precedent that would permit, much less require, such a heavy reliance upon officers' training and experience as the State calls for here.

Taking the relevant factors together in view of the totality of the circumstances, we conclude that the officers' verification of mundane information, Detective Hastings's statements regarding defendant's utility records, and the officers' observations of defendant's gardening supplies are not sufficiently corroborative of the anonymous tip or otherwise sufficient to establish probable cause, notwithstanding the officers' professional training and experience. Furthermore, the material allegations set forth in the affidavit are uniformly conclusory and fail to provide a substantial basis from which the magistrate could determine that probable cause existed. *Gates*, 462 U.S. at 238-39, 103 S. Ct. at 2332-33, 76 L. Ed. 2d at 548-49; *Arrington*, 311 N.C. at 638, 319 S.E.2d at 257-58; *Campbell*, 282 N.C. at 130-31, 191 S.E.2d at 756. Accordingly, although "great deference should be paid a magistrate's determination of probable cause," *Sinapi*, 359 N.C. at 399, 610 S.E.2d at 365 (citation and quotation marks omitted), we hold the affidavit at issue is insufficient to establish probable cause.

[2] In its remaining arguments on appeal, the State notes that the trial court took additional evidence once defendant challenged the search. The State contends that the Court of Appeals erred by relying upon facts elicited at the hearing that went beyond "the four corners of [the] warrant." The State argues that if additional evidence is con-

sidered, the record demonstrates that the officers had probable cause to support a search warrant independent of any information gathered during the allegedly illegal entry onto defendant's property. The State argues, moreover, that had the entry not occurred, "the police unquestionably would have pursued the investigation until it reached a successful conclusion," making it "inevitable" that the marijuana and other items would have been discovered pursuant to a search warrant supported by probable cause.

We acknowledge that the Court of Appeals majority and dissenting opinions made glancing references to additional evidence found during defendant's suppression hearing and it was error to consider this evidence, but in light of our holding and analysis based solely upon the affidavit, we do not believe these errors warrant reversal. Therefore, we need not consider the State's conditional argument regarding inevitable discovery. *See*, *e.g.*, *Poore v. Poore*, 201 N.C. 791, 792 161 S.E. 532, 533 (1931) ("It is no part of the function of the courts . . . to give advisory opinions . . . .").

For the reasons set forth above, we affirm the opinion of the Court of Appeals.

AFFIRMED

Justice NEWBY dissenting.

In this case we address the level of corroboration required to substantiate an informant's tip such that probable cause exists to obtain a search warrant for a defendant's property. The majority concludes that, under the anonymous tip standard, "the State is not entitled to any great reliance" on a tip from a known informant. In doing so, the majority ignores the fact that the informant clearly was not anonymous and incorrectly affords his tip the same weight as if he were completely unknown to police. Because a tip provided to police by an identified informant is inherently more reliable than a completely anonymous tip, it should require less independent corroboration. Although purportedly applying a "common sense" approach, the majority's rigid, formalistic dissection of the evidence corroborating the tip undermines the purpose of the required totality of the circumstances test. Here, the information provided in the tip, most of which was corroborated by other evidence, under a common sense application of the totality of the circumstances, establishes probable cause to believe that defendant was growing marijuana on his property.

Therefore, the warrant was valid, and the search did not violate the Fourth Amendment. Accordingly, I respectfully dissent.

The Fourth Amendment to the Constitution of the United States contains a guarantee against unreasonable searches and seizures and provides that "no Warrants shall issue, but upon probable cause." In *State v. Arrington* our Court adopted the Supreme Court of the United States' "totality of the circumstances" test for determining when probable cause exists:

> "The task of the issuing magistrate is simply to make a *practical, common-sense decision* whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a *fair probability* that contraband or evidence of a crime will be found in a particular place."

311 N.C. 633, 638, 319 S.E.2d 254, 257-58 (1984) (emphasis added) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)). A reviewing court should grant "great deference" to the magistrate's determination of probable cause, *id.* at 638, 319 S.E.2d at 258, keeping in mind that " '[t]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants,' " *State v. Sinapi*, 359 N.C. 394, 398, 610 S.E.2d 362, 365 (2005) (quoting *State v. Riggs*, 328 N.C. 213, 222, 400 S.E.2d 429, 435 (1991)).

Tips from informants can establish probable cause if they are reliable. *See Gates*, 462 U.S. at 227, 233-34, 103 S. Ct. at 2326, 2329-30, 76 L. Ed. 2d at 541, 545. Tips from informants with a proven track record with police are considered trustworthy and can establish probable cause standing alone when the affidavit states that the informant is reliable and provides factual grounds to support that belief. *See State v. Isleib*, 319 N.C. 634, 635, 639, 356 S.E.2d 573, 574-75, 577 (1987) (concluding that an informant's tip alone established probable cause because the informant had provided information to police on three prior occasions that had led to arrests and convictions). On the other hand, anonymous tips are generally insufficient standing alone to establish probable cause. *Alabama v. White*, 496 U.S. 325, 329, 110 S. Ct. 2412, 2415-16, 110 L. Ed. 2d 301, 308 (1990).

Not all anonymous tips, however, are created equal. Some bear more indicia of reliability than others, and in evaluating the totality of the circumstances, "the indicia of the tip's reliability are certainly

among the circumstances that must be considered." *State v. Maready*, 362 N.C. 614, 619, 669 S.E.2d 564, 567 (2008) (citing *White*, 496 U.S. at 330, 110 S. Ct. at 2416, 110 L. Ed. 2d at 309). "[The] view that tips fall into two stark categories that are wholly anonymous or wholly non-anonymous is inconsistent both with reality and with Fourth Amendment law. For in reality, tips fall somewhere on a spectrum of reliability . . . ." *United States v. Perkins*, 363 F.3d 317, 324 (4th Cir. 2004), *cert. denied*, 543 U.S. 1056, 125 S. Ct. 867, 160 L. Ed. 2d 781 (2005); *see also Gates*, 462 U.S. at 232, 103 S. Ct. at 2329, 76 L. Ed. 2d at 544 ("[T]ips doubtless come in many shapes and sizes" and " 'may vary greatly in their value and reliability.' Rigid legal rules are ill-suited to an area of such diversity." (quoting *Adams v. Williams*, 407 U.S. 143, 147, 92 S. Ct. 1921, 1924, 32 L. Ed. 2d 612, 617 (1972))). In a recent decision, the United States Supreme Court observed that even a wholly anonymous tip, without more, "can demonstrate sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop." *Navarette v. California*, ___ U.S. ___, ___, 134 S. Ct. 1683, 1688, 188 L. Ed. 2d 680, 687 (2014) (alteration in original) (quotation marks omitted) (concluding that a tip from an anonymous 911 caller that another vehicle ran her off the road "bore adequate indicia of reliability for the officer to credit the caller's account" because the caller witnessed the dangerous driving and reported it immediately and because a 911 caller may later be identified (quoting *id.* at ___, 134 S. Ct. at 1688-90, 188 L. Ed. 2d at 687-89)).

When, however, the anonymous tip alone is insufficient, "the tip combined with corroboration by the police could show indicia of reliability that would be sufficient to [pass constitutional muster]." *State v. Hughes*, 353 N.C. 200, 205, 539 S.E.2d 625, 629 (2000). Thus, even when analyzing tips under the anonymous tip standard, there is a sliding scale, and the extent of independent corroboration required to render a tip reliable becomes a factual determination, "tak[ing] into account all the facts surrounding [the] tip." *Perkins*, 363 F.3d at 324; *see Hughes*, 353 N.C. at 206, 539 S.E.2d at 630 (" '[I]f a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable.' " (quoting *White*, 496 U.S. at 330, 110 S. Ct. at 2416, 110 L. Ed. 2d at 309)).

As illustrated by *Navarette*, a tipster is not treated as wholly unreliable simply because the affidavit does not disclose the tipster's prior experience with law enforcement. It follows that less independent

verification is needed to substantiate a tip from an informant who is readily identifiable by police than one who is completely anonymous. *See Maready*, 362 N.C. at 619-20, 669 S.E.2d at 567-68 (giving significant weight to a tip when the tipster provided information to police in a face-to-face encounter and was, therefore, not completely anonymous); *see also Perkins*, 363 F.3d at 323 ("Where the informant is known . . . , an officer can judge the credibility of the tipster firsthand and thus confirm whether the tip is sufficiently reliable . . . ."). Moreover, because affidavits are practical documents and the existence of probable cause is a commonsense determination, the summary nature of the affidavit becomes less important when a tip shows some indicia of reliability and is corroborated by independent investigation.

Here the majority's analysis recognizes that the informant was known and identified to police, yet it ignores that crucial fact to conclude instead that he "is an anonymous informant" whose tip "amounts to little more than a conclusory rumor." However, the affidavit states that "within the past week [an officer] *met* with a *confidential and reliable source of information* that told him an indoor marijuana growing operation was located at [defendant's property]." (Emphasis added.) Because the police knew the informant's identity, the informant's tip had some degree of reliability at the outset. Though the tip, at face value, may not be enough on its own to establish probable cause, the tip is more reliable than if the informant were completely anonymous. *See Maready*, 362 N.C. at 619-20, 669 S.E.2d at 567-68. Therefore, even without specific details on why the informant was a reliable source of information, the tipster should be afforded greater weight in the totality of the circumstances than if he were unknown and unidentified. *See id.* at 619, 669 S.E.2d at 567 ("The potential indicia of reliability include all 'the facts known to the officers from personal observation' including those that do not necessarily corroborate or refute the informant's statements." (internal citation omitted)).

The detectives' subsequent investigation into the informant's allegations sufficiently corroborated the tip that defendant was conducting a marijuana growing operation, and when taken together and viewed through the lens of common sense, the tip and corroborating evidence detailed in the first three paragraphs of the affidavit established " 'a fair probability that contraband or evidence of a crime [would] be found' " on defendant's property. *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258 (quoting *Gates*, 462 U.S. at 238, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548). In the tip, the informant did not simply say

that there was a marijuana growing operation. He identified defendant by name and appearance, provided defendant's address, specified that defendant was not currently living at the residence, and described the buildings that defendant was using to house the marijuana growing operation. The affiant was also familiar with defendant and his property from a prior, unrelated criminal case. Based on the tip, which already bore some indicia of reliability, detectives obtained utility records for the address and learned that defendant was the current subscriber, confirming a detail provided by the informant. Furthermore, according to a law enforcement officer with "extensive training and experience with indoor marijuana growing investigations on the state and federal level," the two year history of "extreme high and low kilowatt usage" was "indicative of a marijuana grow operation," just as the informant said.

The majority concludes for the first time that the opinion of a trained and experienced detective who analyzed the power usage is not sufficient, absent a comparative analysis, despite the fact that the detective reviewed power records for the preceding two years. In doing so, the majority ignores the expertise of trained and experienced law enforcement officers. Under the majority's reasoning, detectives should have invaded the privacy of innocent, neighboring landowners by obtaining their power records in order to conduct a comparative analysis. Even so, detectives here did not rely solely on the utility bills to establish probable cause; rather, the unusual power usage was just another piece of evidence that helped bolster the informant's reliability and corroborate his tip that defendant was housing an indoor marijuana growing operation.

Detectives further confirmed the information in the tip by conducting surveillance of defendant's property. Despite the noticeable absence of gardens or potted plants around the property, officers observed multiple horticultural items in plain view, including "potting soil, starting fertilizer, seed starting trays, plastic cups, metal storage racks, and portable pump type sprayers." Based on their training and experience, detectives determined that these objects were consistent with a marijuana growing operation. This observation is yet another circumstance establishing the informant's reliability and lending support to the tip that defendant was operating an indoor marijuana growing operation.

Moreover, the fact that any of the corroborating evidence can be explained by innocent behavior does not mean it cannot also be used to establish probable cause, as the majority suggests. The possibility

of innocent behavior does not rule out probable cause. *Gates*, 462 U.S. at 243 n.13, 103 S. Ct. at 2335 n.13, 76 L. Ed. 2d at 552 n.13 ("[I]nnocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens' demands. . . . In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." (internal citation omitted)).

Applying the required commonsense approach to the totality of the circumstances, the information contained in the affidavit established a "fair probability" that defendant was conducting an indoor marijuana growing operation. Detectives received a tip from an identified informant who provided details about defendant, his property, and his indoor marijuana growing operation. In a subsequent investigation, a trained and experienced detective concluded that defendant's power usage was indicative of a marijuana growing operation. Furthermore, surveillance of defendant's property produced evidence consistent with a marijuana growing operation. This circumstantial evidence unequivocally supported the initial, detailed tip. Even under an anonymous tip standard, a known informant's tip must be afforded more weight than if he were wholly anonymous. Each piece of independent, corroborating evidence thereafter substantiated the informant's reliability, and the tip, combined with the corroborating evidence, provided a sufficient basis for the warrant. Therefore, the search was lawful. Accordingly, I respectfully dissent.

STATE OF NORTH CAROLINA v. BOBBY E. BOWDEN

No. 514PA08-3

(Filed 19 December 2014)

Sentencing—life imprisonment—credits—never applied for calculation of unconditional release date

The trial court erred by concluding that the various credits defendant had accumulated during his incarceration must be applied to reduce his sentence of life imprisonment, thereby entitling him to immediate and unconditional release. Although the Department of Corrections (DOC) has applied these credits towards privileges like obtaining a lower custody grade or earlier parole eligibility, DOC has never applied these credits towards the calculation of an unconditional release date for a *Bowden*-class inmate.

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

Justice HUDSON dissenting.

Justice BEASLEY joins in the dissenting opinion.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 747 S.E.2d 617 (2013), affirming an order entered on 8 May 2012 by Judge Gregory A. Weeks in Superior Court, Cumberland County. Heard in the Supreme Court on 15 April 2014.

Roy Cooper, *Attorney General*, *by Joseph Finarelli*, *Special Deputy Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Katherine Jane Allen*, *Assistant Appellate Defender*, *for defendant-appellee.*

NEWBY, Justice.

In this case we determine whether the various credits defendant Bobby E. Bowden has accumulated during his incarceration must be applied to reduce his sentence of life imprisonment, thereby entitling him to immediate and unconditional release. Our previous holdings regarding the particular class of inmates that includes defendant

mandate the conclusion that defendant remains lawfully incarcerated. Accordingly, we reverse the decision of the Court of Appeals.

On 20 December 1975, defendant was convicted of two counts of first-degree murder and one count of armed robbery in Superior Court, Cumberland County, and was later sentenced to death. On direct appeal in 1976, this Court vacated defendant's death sentence and remanded the case with directives to impose life sentences for the two counts of first-degree murder, in accord with *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976). *State v. Bowden*, 290 N.C. 702, 717, 228 S.E.2d 414, 424 (1976) ("*Bowden I* "). Upon remand of this case to the trial court, defendant received two life sentences to run concurrently.

Notably, defendant is one of a limited group of prisoners, referred to herein as the *Bowden*-class inmates, who committed offenses between 8 April 1974 and 30 June 1978 and received death sentences that were later reduced to life imprisonment. The version of section 14-2 of the North Carolina General Statutes in effect during that time period stated that "[a] sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison." N.C.G.S. § 14-2 (Supp. 1974). Defendant has accrued various credits while incarcerated, including good time, gain time, and merit time. For *Bowden*-class inmates serving a life sentence, the Department of Correction ("DOC")[1] has applied these credits towards privileges like obtaining a lower custody grade or earlier parole eligibility, but not towards the calculation of an unconditional release date. *Lovette v. N.C. Dep't of Corr.*, 366 N.C. 471, 737 S.E.2d 737 (per curiam), *cert. denied*, ___ U.S. ___, 134 S. Ct. 394, 187 L. Ed. 2d 168 (2013); *Jones v. Keller*, 364 N.C. 249, 254, 698 S.E.2d 49, 54 (2010), *cert. denied*, ___ U.S. ___, 131 S. Ct. 2150, 179 L. Ed. 2d 935 (2011). The DOC applied some of defendant's credits towards earlier parole eligibility. The Parole Commission has periodically reviewed defendant's parole eligibility according to law since 1987 and denied defendant parole after each review. In December 2005 defendant filed a petition for writ of habeas corpus *ad subjiciendum*, claiming he was entitled to immediate release from prison because, after applying all his various credits, he had completed his eighty-year life sentence. The trial court denied defendant's petition by an order dated 25 January 2006.

1. Effective January 2012, the DOC was renamed the Department of Public Safety. Act of June 4, 2011, ch. 145, sec. 19.1.(a), 2011 N.C. Sess. Laws 253, 535 ("Current Operations and Capital Improvements Appropriations Act of 2011").

Defendant petitioned the Court of Appeals for review. Treating defendant's petition for writ of certiorari as a motion for appropriate relief, the Court of Appeals vacated the 25 January 2006 order and remanded the matter for an evidentiary hearing under N.C.G.S. § 15A-1420. Following that hearing, the trial court entered an order on 27 August 2007 once again denying defendant's claim for relief.

Defendant appealed the denial of his motion for appropriate relief. The Court of Appeals held that N.C.G.S. § 14-2 (1974) regards defendant's life sentence as an eighty-year sentence "for all purposes" "without any limitation or restriction." *State v. Bowden*, 193 N.C. App. 597, 600-01, 668 S.E.2d 107, 109-10 (2008) ("*Bowden II*"), *disc. rev. improvidently allowed per curiam*, 363 N.C. 621, 683 S.E.2d 208 (2009). The Court of Appeals reversed the trial court's order and remanded "for a hearing to determine how many sentence reduction credits defendant is eligible to receive and how those credits are to be applied." *Id.* at 601, 668 S.E.2d at 110.

In response to this decision, the DOC calculated projected release dates for Bowden and all other affected inmates and informed those inmates accordingly. Nonetheless, in subsequent litigation involving other *Bowden*-class inmates, the DOC maintained and successfully defended its position that credits had not been and should not be applied towards the unconditional release of *Bowden*-class inmates. *Lovette*, 366 N.C. at 472, 737 S.E.2d at 737; *Jones*, 364 N.C. at 260, 698 S.E.2d at 58; *accord Brown v. N.C. Dep't of Corr.*, 364 N.C. 319, 320, 697 S.E.2d 327 (2010) (per curiam).

In this case, upon remand from the Court of Appeals, the trial court held a hearing and entered an order on 8 May 2012, concluding that defendant had a liberty interest in good time, gain time, and merit time credits that he earned between 1975 and October 2009. The trial court ruled that all of defendant's credits should be applied to his sentence for all purposes, including calculating an unconditional release date. Further, the trial court concluded that the DOC's refusal to apply defendant's credits in this way violated his rights under both the Due Process Clause and the Ex Post Facto Clause of the United States Constitution. Upon applying all of defendant's credits to his eighty-year life sentence, the trial court determined that defendant had served his entire sentence, that his unconditional release date was 13 October 2009, and that he should have been released on 29 October 2009. The trial court ordered the DOC to release defendant unconditionally by 11 May 2012, but stayed its order the following day pending final appellate review.

On appeal the Court of Appeals affirmed the trial court. *State v. Bowden*, ___ N.C. App. ___, ___, 747 S.E.2d 617, 630 (2013). The Court of Appeals noted, *inter alia*, that the DOC applied credits towards the calculation of defendant's unconditional release date following its decision in *Bowden II* in 2008 and this Court's silence on the merits of that case in 2009. *Id.* at ___, 747 S.E.2d at 619. To support its determination, the Court of Appeals pointed to the presence of the word "applied" in defendant's computerized credit records and informal internal discussions among DOC employees following *Bowden II*. *Id.* at ___, 747 S.E.2d at 621-22. The trial court and the Court of Appeals contended this evidence rendered our previous decision in *Jones*, regarding an otherwise indistinguishable defendant, inapplicable. *Id.* at ___, 747 S.E.2d at 621.

The State sought review in this Court via a petition for writ of certiorari, which we allowed to decide whether our decision in *Jones* controls the outcome of this case. *State v. Bowden*, 367 N.C. 267, 267, 749 S.E.2d 847, 848 (2013). Defendant argues, as did the defendant in *Jones*, that when his various credits are applied to his statutorily defined eighty-year life sentence, he is entitled to immediate and unconditional release. *See Jones*, 364 N.C. at 252, 698 S.E.2d at 52-53. Again like the defendant in *Jones*, defendant contends the DOC's refusal to apply his credits in this way infringes on his due process protected liberty interests and subjects him to an unconstitutional ex post facto law. *Id.* at 256, 698 S.E.2d at 55.

In all significant ways, the issues presented by this case are indistinguishable from those resolved by our decision in *Jones*. In *Jones* the trial court ruled that Alford Jones, a *Bowden*-class defendant who was convicted of first-degree murder and whose death sentence was subsequently reduced to life imprisonment, was entitled to receive credits for all purposes and to have those credits applied towards his unconditional release. *Id.* at 251, 698 S.E.2d at 52. Jones also argued that after *Bowden II*, the DOC applied his credits in calculating an unconditional release date of which he was informed. This Court rejected that reasoning and concluded that the DOC possessed "statutorily and constitutionally permissible authority" to apply Jones's credits "for limited purposes that did not include calculating an unconditional release date." *Id.* at 252, 698 S.E.2d at 53.

Though we noted that the DOC does not have unfettered discretion, we recognized that the General Assembly has delegated certain authority to the DOC to govern prisoners and administer criminal

sentences. *Id.* at 252-53, 698 S.E.2d at 53; *see* N.C.G.S. § 148-11 (1974) ("The Commissioner [of Correction] shall propose rules and regulations for the government of the State prison system, which shall become effective when approved by the Commission of Correction."); *id.* § 148-11 (2013) ("The Secretary shall adopt rules for the government of the State prison system."); *see also id.* § 148-4 (1974) ("The Commissioner of Correction shall have control and custody of all prisoners serving sentence in the State prison system, and such prisoners shall be subject to all the rules and regulations legally adopted for the government thereof."); *id.* § 148-4 (2013) (same with exception of substituting the Secretary of Public Safety for the Commissioner of Correction); *id.* § 148-13 (1974) (stating that the Department's regulations include provisions governing "rewards and privileges applicable to the several classifications of prisoners as an inducement to good conduct [and] allowances of time for good behavior."); *id.* § 148-13 (2013) (authorizing the Secretary of Public Safety to "issue regulations regarding . . . the privileges and restrictions applicable to each custody grade"). The application of credits earned during incarceration falls under the "strictly administrative" discretion allotted to the DOC and remains "outside the purview of the courts." *Jones*, 364 N.C. at 255, 698 S.E.2d at 55 (citation and quotation marks omitted). Recognizing this statutory delegation of administrative discretion, this Court in *Jones* deferred to the DOC's policies for governing prisoners so long as those policies remained within constitutional bounds. *Id.* at 256-57, 698 S.E.2d at 55-56. We noted that the DOC had never applied these credits towards the calculation of an unconditional release date for a *Bowden*-class inmate. *Id.* at 254-55, 698 S.E.2d at 54-55.

The DOC's exercise of authority in *Jones* did not exceed constitutional limits despite the defendant's claims that, *inter alia*, the DOC's actions violated his due process rights and subjected him to an unconstitutional ex post facto law. *Id.* at 256, 698 S.E.2d at 55. This Court concluded that a prisoner's *de minimis* liberty interest in having his various credits applied towards his desired purpose of unconditional release must be balanced against the State's corresponding and compelling interest in public safety. *Id.* at 256-58, 698 S.E.2d at 55-56. As such, the DOC may apply those credits for limited purposes, such as earlier parole eligibility, but decline to reduce the remaining sentence. *Id.* at 254-55, 257, 698 S.E.2d at 54, 56. Ultimately, we determined that because he had "no State-created right to have his time credits used to calculate his eligibility for unconditional release[,]

Jones's due process rights ha[d] not been violated." *Id.* at 257, 698 S.E.2d at 56. Likewise, the DOC's policy to refuse to apply these credits towards calculating an unconditional release date for a *Bowden*-class inmate serving a life sentence did not constitute an ex post facto violation. *Id.* at 259, 698 S.E.2d at 57.

In *Jones* we thoroughly reviewed and rejected the same arguments advanced by defendant here—that a *Bowden*-class inmate serving a life sentence is entitled to have his credits applied for all purposes, including immediate and unconditional release. We have since extended our holding in *Jones* to other *Bowden*-class defendants to deny them the application of credits towards an unconditional release date. *Lovette*, 366 N.C. at 472, 737 S.E.2d at 737 (holding that *Bowden*-class inmates convicted of second-degree murder and second-degree burglary were not entitled to have their credits applied towards calculating an unconditional release date); *Brown*, 364 N.C. at 320, 697 S.E.2d at 327 (holding that a *Bowden*-class inmate convicted of first-degree felony murder was not entitled to have her credits applied towards calculating an unconditional release date). In erroneously distinguishing *Jones* from the case at hand, the trial court and the Court of Appeals placed great emphasis on the DOC's attempt to interpret and implement the Court of Appeals' ruling in *Bowden II* by calculating a proposed release date. But defendant has no State-created right to his unconditional release based on an agency's good faith interpretation of, and actions taken to comply with, a ruling that is later found to be contrary to law. The DOC is charged with ensuring public safety and facilitating the orderly release and supervision of criminal defendants, some of whom have been convicted of the most heinous crimes. We must not force the DOC to reverse its long-standing policies in response to lower court directives that prove inconsistent with those ultimately determined by this Court. To decide otherwise would undermine the State's ability to react to court decisions while still seeking further judicial review.

Defendant here, like Jones, is a member of the *Bowden* class of inmates who are all serving life sentences. The nature and severity of the offenses warranting a life sentence remains the same, and the DOC retains the same implicit discretion in governing these inmates. Moreover, the DOC bears the same significant responsibility to ensure the release and subsequent supervision of only those prisoners who are prepared to return safely to society. Because defendant's status is indistinguishable from that of the defendant in *Jones*, he must be treated equally under the law. The DOC has never applied

these credits towards the calculation of an unconditional release date for a *Bowden*-class inmate. Therefore, we hold that defendant, like Jones, remains lawfully incarcerated and is not entitled to release. The decision of the Court of Appeals affirming the trial court's order to the contrary is reversed.

REVERSED.

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

Justice HUDSON dissenting.

The majority holds that Bobby Bowden must remain incarcerated, despite the unchallenged fact that he has accumulated good time, gain time, and merit time credits which, if applied, would have entitled him to release in October 2009. Here I conclude that, unlike in *Jones v. Keller*, 364 N.C. 249, 698 S.E.2d 49 (2010), *cert. denied*, ___ U.S. ___, 179 L. Ed. 2d 935 (2011), the North Carolina Department of Correction ("DOC") actually applied the prison credits to defendant Bowden's record, and it may not now take those credits away without violating his constitutional rights. Accordingly, I respectfully dissent.

The majority bases its decision primarily on this Court's opinion in *Jones v. Keller*, 364 N.C. 249, 698 S.E.2d 49. However, in my view, *Jones* does not control the outcome of this case. Central to the outcome in *Jones* was the trial court's factual finding, based on competent evidence, that the DOC had not actually applied credits to the defendant's account for purposes of calculating his unconditional release date. If it had done so, clear and binding precedent from the Supreme Court of the United States would have required his release on the date as calculated there. Here, however, the trial court found as fact that credits *had* been applied for this purpose—a factual finding of paramount importance which the majority has largely ignored. Because we are bound on appeal by that finding, just as we are bound by the Supreme Court's interpretations of federal constitutional law, I conclude that defendant Bowden was entitled to release in October 2009 and that his continued detention violates the United States Constitution.

To begin with, the majority opinion conflicts with binding precedent from the Supreme Court of the United States. As it did in *Jones*,

the majority characterizes the liberty interest at stake here as "*de minimis.*" *State v. Bowden* ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2014) ("This Court concluded that a prisoner's *de minimis* liberty interest in having his various credits applied towards his desired purpose of unconditional release must be balanced against the State's corresponding and compelling interest in public safety."); *Jones*, 364 N.C. at 257, 698 S.E.2d at 56 ("Thus, [the defendant's] liberty interest, if any, in having these credits used for the purpose of calculating his date of unconditional release is de minimis, particularly when contrasted with the State's compelling interest in keeping inmates incarcerated until they can be released with safety to themselves and to the public."). From this premise, it would seem naturally to follow that such credits are entitled to little, if any, constitutional protection.

But this is not what the Supreme Court of the United States has said. In *Wolff v. McDonnell*, 418 U.S. 539, 41 L. Ed. 2d 935 (1974), the Court addressed whether good time credits authorized by state statute were protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 553-58, 41 L. Ed. 2d at 949-52. The Court opined:

> We also reject the assertion of the State that whatever may be true of the Due Process Clause [of the Fourteenth Amendment] in general or of other rights protected by that Clause against state infringement, the interest of prisoners in disciplinary procedures is not included in that "liberty" protected by the Fourteenth Amendment. It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison. . . . But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.

Id. at 556-57, 41 L. Ed. 2d at 951 (internal citation omitted);[1] *see also Weaver v. Graham*, 450 U.S. 24, 30-31, 67 L. Ed. 2d 17, 24 (1981) ("Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the [Ex Post Facto] Clause if it

1. *Wolff* may have been abrogated in some respects, but not on this point. In fact, the Supreme Court has recently cited *Wolff* for just this proposition. *See Wilkinson v. Austin*, 545 U.S. 209, 221, 162 L. Ed. 2d 174, 189 (2005) (citing *Wolff*, 418 U.S. at 556-558, 41 L. Ed. 2d at 951-52, for the proposition that there is a "liberty interest in avoiding withdrawal of state-created system of good-time credits")). Accordingly, there is

is both retrospective and more onerous than the law in effect on the date of the offense."). So despite the determination of the Supreme Court of the United States that the liberty interest in prison credits "has real substance" protected by the Fourteenth Amendment, the majority here holds that this interest is "*de minimis*." Failing even to mention *Wolff*, the majority concludes that the State can continue to imprison Bobby Bowden, regardless of the number of credits he has earned to reduce his sentence, without violating the constitutional promise of due process.

The majority here can only justify characterizing defendant Bowden's liberty interest in prison credits as *de minimis*—despite the Supreme Court's explicit holding to the contrary—by inaccurately characterizing the facts found by the trial court regarding what is at stake. As noted, the majority in *Jones* described the defendant's liberty interest as his interest "in having these credits used for the purpose of calculating his date of unconditional release." 364 N.C. at 257, 698 S.E.2d at 56. Today's majority writes similarly. Here, however, the trial court found that the credits *had already* been applied to defendant Bowden's account—and the difference between applying the earned credits, and not applying them, is the difference between freedom and incarceration. Certainly to defendant and others behind bars, this interest is anything but "*de minimis*."

But my disagreement does not end with the Due Process Clause of the Fourteenth Amendment. Today's majority also ignores the opinion of the Supreme Court of the United States in *Lynce v. Mathis*, 519 U.S. 433, 137 L. Ed. 2d 63 (1997). There, the Court addressed the strikingly comparable question of whether the State of Florida violated the Ex Post Facto Clause of Article I, Section 10 of the United States Constitution when it awarded early release credits to state inmates, then took those credits away. *See id.* at 435, 440, 137 L. Ed. 2d at 68, 72. The Court summarized the relevant facts as follows:

> In 1986 petitioner pleaded *nolo contendere* to a charge of attempted murder and received a sentence of 22 years (8,030 days) in prison. In 1992 the Florida Department of Corrections released him from prison based on its determination that he had accumulated five different types of early release credits totaling 5,668 days. Of that total, 1,860 days were "provisional credits" awarded as a result of prison overcrowding. Shortly after

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no credible argument that the passage of time, or other doctrinal developments, have lessened our obligation to comply with *Wolff*.

> petitioner's release, the state attorney general issued an opinion interpreting a 1992 statute as having retroactively canceled all provisional credits awarded to inmates convicted of murder or attempted murder. Petitioner was therefore rearrested and returned to custody. His new release date was set for May 19, 1998.

Id. at 435-36, 137 L. Ed. 2d at 68-69 (footnote call number omitted). Presented with these facts, the Court concluded unanimously that awarding such credits, and then revoking them, cannot comport with the constitutional protection against ex post facto punishment. In an opinion written by Justice Stevens, and joined in full by six other justices, the Court opined that the guarantee against increasing punishment after the fact "is only one aspect of the broader constitutional protection against arbitrary changes in the law." *Id.* at 440, 137 L. Ed. 2d at 71. The Court noted further that this protection also "places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects." *Id.*

Turning to the specific issue at hand, the Court went on to hold that these dual protections against arbitrariness and compact-breaking apply to sentence reduction credits created and awarded by the State. It noted that "the operation of the 1992 statute to effect the cancellation of overcrowding credits . . . was clearly retrospective" and reasoned that this retroactivity narrowed the relevant question to "whether those consequences disadvantaged petitioner by increasing his punishment." *Id.* at 441, 137 L. Ed. 2d at 72. The Court then concluded that the petitioner was disadvantaged, and central to this conclusion was the fact that the credits had already been awarded:

> The 1992 statute has unquestionably disadvantaged petitioner because it resulted in his rearrest and prolonged his imprisonment. Unlike [actions taken in a previous case], the 1992 Florida statute did more than simply remove a mechanism that created an *opportunity* for early release for a class of prisoners whose release was unlikely; rather, it made ineligible for early release a class of prisoners who were previously eligible—including some, like petitioner, who had actually been released.

Id. at 446-47, 137 L. Ed. 2d at 75-76 (emphasis in original). Importantly, it is undisputed that here, like the defendant in *Lynce*, the application of the credits Bobby Bowden has already earned would provide him with no mere "opportunity," but would entitle him to immediate release.

As noted, this majority opinion of the United States Supreme Court was fully endorsed by seven justices. Justice Thomas also wrote a brief opinion, joined by Justice Scalia, concurring in part and concurring in the judgment. Critically, that opinion also confirms the central relevance of the fact that the sentence reduction credits had already been awarded:

> Unlike in [a previous case], the increase in petitioner's punishment here was neither "speculative" nor "attenuated." Petitioner pleaded *nolo contendere* to a charge of attempted murder and was duly sentenced. During the period of his confinement, petitioner accumulated release credits under a state statute adopted in response to prison overcrowding. Those credits enabled petitioner to be freed from prison before his sentence (as originally imposed) had run. . . .
>
> Under these narrow circumstances, I agree with the Court that the State's retroactive nullification of petitioner's previously accrued, and then used, release credits violates the Constitution's ban on *ex post facto* lawmaking. . . . The present case involves not merely an effect on the availability of *future* release credits, but the retroactive elimination of credits already earned and used. Accordingly, I concur in part and concur in the judgment.

Id. at 450-51, 137 L. Ed. 2d at 77-78 (Thomas & Scalia, JJ., concurring in part and concurring in the judgment) (emphasis in original). In light of this concurring opinion, it is clear that the Court was unanimous on this point. Today's majority thus ignores a recent legal holding that commanded nine votes at the Supreme Court of the United States.

The import of these cases, then, is also clear: The State is under no obligation to create or to award credits that reduce a prisoner's sentence for a crime for which he was lawfully convicted. But once it does so, it cannot then arbitrarily and with no process take those credits back. I would hold that if the State does so, it violates both the Due Process Clause of the Fourteenth Amendment and the Ex Post Facto Clause of Article I, Section 10 of the United States Constitution. These principles continue to bind this Court and we are not free to disregard them.

In my view, these cases compel this conclusion so clearly that a different outcome would be possible only if the relevant facts were different. In *Jones*, the facts were different. That case, like this one, involved a defendant who was a member of what has been called the *Bowden*-class of inmates. *See*, *e.g.*, *Jones*, 364 N.C. at 262, 698 S.E.2d

at 59 (Newby, J., concurring in the result). And as here, the defendant argued that the State's failure to apply the credits he had earned to calculate his unconditional release date was unconstitutional and violated both his right to due process and his right to be free from ex post facto punishment. *See id.* at 256, 698 S.E.2d at 55 (majority). In *Jones*, the majority rejected both arguments, based in large part on the trial court's finding of fact that "the Department of Correction has never used good time, gain time, or merit time credits in the calculation of unconditional release dates for inmates who received sentences of life imprisonment." *Id.* at 254, 698 S.E.2d at 54 (brackets and quotation marks omitted). With that finding, the defendant in *Jones* missed landing squarely within the holdings of the Supreme Court in *Wolff* and *Lynce*. He was held not to be entitled to release.

Here, the findings of fact are different: Judge Weeks found as fact what Judge Rand did not. For example, Judge Weeks' order granting defendant's Motion for Appropriate Relief included a heading titled "The Department of Correction's historic application of Mr. Bowden's sentence reduction credits shows: (1) Mr. Bowden received enough credits to unconditionally discharge his sentence on October 13, 2009; and (2) those credits were applied to reduce his unconditional release date." A finding within that subsection of the order states:

> Upon learning that Mr. Bowden was serving a term of years sentence, the Department of Correction applied and awarded all good, gain, and merit time sentence reduction credits previously earned by Mr. Bowden to reduce Mr. Bowden's unconditional release date, resulting in a determination that Mr. Bowden's sentence would expire on October 13, 2009.

A later portion of the order addresses the subsequent retraction of those awarded and applied credits. A heading in the order is explicitly titled "The Department of Correction revoked Mr. Bowden's sentence reduction credits." A finding of fact within that section then provides:

> This Court finds that pursuant to [a memorandum issued by the Secretary of Correction], the Department of Correction revoked Mr. Bowden's sentence reduction credits [including good, gain, and merit time credits], which had previously been awarded to him and applied to reduce his unconditional release date, and recalculated his unconditional release date such that it was reduced only by jail credits. As of the date of the entry of this Order, Mr. Bowden's unconditional release date as posted on the "Offender Public Information" portion of the North Carolina Department of Correction website is July 23, 2055.

(Footnote call number omitted.) These findings are fully supported by competent evidence in the record, as detailed in the trial court's order and noted by the Court of Appeals. In essence, the State argues that defendant Bowden's credits should not be treated as "applied" because credits accumulated by other inmates were not treated as "applied." In my view, there is no plausible claim of ambiguity regarding what Judge Weeks determined based on the evidence presented in this case. The facts as found by the trial court are straightforward, and those quoted are joined by many others in the trial court's forty-six page order.

Having carefully reviewed the trial court's findings, I cannot avoid the conclusion that these binding facts distinguish this case from *Jones* and place it squarely within the purviews of *Wolff* and *Lynce*. The majority's assertion that "[t]he DOC has never applied these credits toward the calculation of the unconditional release date of a *Bowden*-class inmate" is simply inconsistent with the record here. *Bowden*, ___ N.C. at ___, ___ S.E.2d at ___. Instead of recognizing the long-standing principle that we are bound on appeal by a trial court's findings of fact when those findings are either unchallenged or supported by competent evidence, the majority has in essence grounded its discussion in facts that it wishes the trial court had found, but did not. The majority has, at a minimum, departed significantly from our well-established approach to review of a trial court's factual findings.

Because the binding findings here establish that sentence reduction credits were actually applied to calculate an unconditional release date for defendant, and when that finding was absent in *Jones*, our opinion in *Jones* does not compel the outcome here. And because I conclude that controlling Supreme Court precedents, applied to those findings of fact, require the release of Bobby Bowden, I would affirm the Court of Appeals and the trial court. I respectfully dissent.

Justice BEASLEY joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. RONDELL SUPREME CHILDRESS

No. 527PA13

(Filed 19 December 2014)

Homicide—attempted murder—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of attempted murder. The evidence supported an inference that defendant deliberately and with premeditation set out to kill the victim by shooting her on her front porch.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 753 S.E.2d 399 (2013), finding no error in part and reversing in part judgments entered on 17 July 2012 by Judge Jerry R. Tillett in Superior Court, Pasquotank County. Heard in the Supreme Court on 10 September 2014.

Roy Cooper, *Attorney General*, *by Mary Carla Babb*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Charlesena Elliott Walker and Constance E. Widenhouse*, *Assistant Appellate Defenders*, *for defendant-appellee.*

MARTIN, Chief Justice.

From the safety of a car, defendant drove by Patrice Harney's home, shouted a phrase used by gang members, and then returned to shoot at her and repeatedly fire bullets into her home when she retreated from his attack. We hold defendant's actions provided sufficient evidence of premeditation and deliberation to survive a motion to dismiss an attempted murder charge.

Around two in the morning on 12 August 2010, Patrice Harney was sitting on her front porch talking with her cousin and brother while her three children slept inside. While Patrice and her companions were on the porch, a silver car and a green car drove by. The road was no more than sixty feet from the house in a well-lit area, and Patrice recognized defendant as the driver of the silver car. Someone in the silver car yelled out, "[W]hat's popping." Patrice testified the phrase was used by gang members, but she "didn't take offense to it"

because she was not part of a gang. The cars did not stop at this point. A few minutes later, the silver car returned and came to "a dead stop" in front of Patrice's house, and defendant rolled down his window and "just started shooting."

After Patrice and her cousin saw the gun pointed in their direction, they ran inside the house. Patrice sprinted to her children's room to pull them onto the floor and shield them from the bullets that were then coming through the walls of the house. Once the shooting stopped, Patrice ran to the front of her home, where police had already arrived. Bullets had pierced the window in front of which Patrice had been sitting and the exterior of the residence. Bullet holes were also found in the children's room. Between six and twelve shots were fired overall. Before the shooting, Patrice did not have any problem with defendant, and later said she was surprised at what he had done.

Defendant was apprehended several weeks later. He was subsequently indicted for one count of attempted murder and six counts of discharging a firearm into occupied property. At the close of the State's evidence, the trial court dismissed one count of discharging a firearm into occupied property. At the close of all evidence, after not having put on any evidence in his defense, defendant moved to dismiss all charges. Specifically, defendant claimed that the State had failed to produce evidence of intent for the attempted murder charge. The trial court denied his motion. The jury found defendant guilty of the remaining five counts of discharging a firearm into occupied property and of attempted first-degree murder. The trial court sentenced defendant to consecutive terms of 36 to 53 months for each of the five firearms convictions followed by 185 to 231 months of imprisonment for the attempted murder conviction.

Defendant appealed to the Court of Appeals. In a unanimous, unpublished opinion, the court concluded that the State had failed to produce sufficient evidence of defendant's premeditation and deliberation. *State v. Childress*, ___ N.C. App. ___, 753 S.E.2d 399, 2013 WL 5947787, at *5 (2013) (unpublished). Accordingly, the court held that the trial court's denial of defendant's motion to dismiss was error and reversed the attempted murder conviction. *Id.* We allowed the State's petition for discretionary review of that issue and now reverse.

When considering a motion to dismiss for insufficiency of the evidence, we consider whether, in the light most favorable to the State and with all reasonable inferences drawn in the State's favor, there is enough evidence of each essential element of the crime charged to

persuade a rational juror that the defendant was the perpetrator. *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002) (citations omitted). In this case we consider only whether there was sufficient evidence of premeditation and deliberation to support defendant's conviction for attempted murder.

"We have recognized that it is difficult to prove premeditation and deliberation and that these factors are usually proven by circumstantial evidence because they are mental processes that are not readily susceptible to proof by direct evidence." *State v. Sierra*, 335 N.C. 753, 758, 440 S.E.2d 791, 794 (1994) (citation omitted); *see also State v. Hutchins*, 303 N.C. 321, 344, 279 S.E.2d 788, 802 (1981) ("Premeditation and deliberation are seldom susceptible of direct proof, but they may be inferred from circumstantial evidence." (citations omitted)). In the context of a first-degree murder charge, this Court has identified several examples of circumstantial evidence, any one of which may support a finding of the existence of these elusive qualities:

> (1) absence of provocation on the part of the deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

State v. Olson, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992) (citation omitted); *see also State v. Leazer*, 353 N.C. 234, 238, 539 S.E.2d 922, 925 (2000) (same). When evaluating the presence of premeditation and deliberation, this Court has additionally considered whether a defendant arrived at the scene of the crime with a weapon and whether a defendant fired multiple shots. *State v. Taylor*, 362 N.C. 514, 531, 669 S.E.2d 239, 256 (2008). These examples are merely illustrative and are not to be treated as an exhaustive list of factors a jury may use to infer premeditation and deliberation.

At least five of the above circumstances are implicated in this case. Considered in the light most favorable to the State, the evidence presented at trial showed that: (1) Patrice did not provoke defendant in any way and was unarmed; (2) defendant drove by Patrice's home before returning and shooting at her; (3) during this initial drive-by, defendant or a companion in his car yelled out "[W]hat's popping," a phrase associated with gang activity that a jury may interpret as a

threat; (4) defendant had a firearm with him; and (5) defendant fired multiple shots toward Patrice and her home. A reasonable juror could easily infer from this evidence that defendant drove by Patrice's home, threatened her, and returned shortly to carry out that threat without any intervening provocation by Patrice. Based on defendant's actions, a reasonable juror could conclude that defendant shot repeatedly at Patrice and that those shots tracked her movement through her home and into her children's bedroom. While alternative theories may be possible, "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *Mann*, 355 N.C. at 301, 560 S.E.2d at 781 (alteration in original) (citations and quotation marks omitted).

The evidence presented supported an inference that defendant deliberately and with premeditation set out to kill Patrice by shooting her on her front porch. Accordingly, the decision of the Court of Appeals is reversed.

REVERSED.

STATE OF NORTH CAROLINA v. BRANDI LEA GRAINGER

No. 30PA13

(Filed 19 December 2014)

Homicide—first-degree murder—jury instruction—accessory before the fact—no error

The trial court did not err by declining to instruct the jury on accessory before the fact under N.C.G.S. §14-5.2 in defendant's prosecution for first-degree murder. The State presented evidence of defendant's statements to the police that she had asked two men to attack the victim, knowing they were armed. Defendant's statements provided support for the jury's verdict finding defendant guilty under the first-degree felony murder rule. For this reason, the accessory before the fact instruction under N.C.G.S. § 14-5.2 did not apply, and the Court of Appeals erred by ordering a new trial.

Justices BEASLEY and HUNTER 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. ___, 741 S.E.2d 364 (2012), vacating a judgment entered on 4 October 2011 by Judge Edgar B. Gregory in Superior Court, Randolph County, and remanding for a new trial. Heard in the Supreme Court on 6 January 2014.

Roy Cooper, Attorney General, by Mary Carla Hollis, Assistant Attorney General, for the State-appellant.

Duncan B. McCormick for defendant-appellee.

HUDSON, Justice.

The State seeks review of the opinion of the Court of Appeals granting defendant a new trial on her conviction of first-degree murder. The Court of Appeals held that a new trial was merited because the trial court erred in failing to instruct the jury on accessory before the fact under N.C.G.S. § 14-5.2 and that the error was prejudicial. *State v. Grainger*, ___ N.C. App. ___, ___, 741 S.E.2d 364, 370 (2012). Because defendant was convicted of first-degree murder under theories of both premeditation and deliberation and the felony murder rule, and defendant's conviction for first-degree murder under the theory of felony murder is supported by the evidence, we hold that no new trial is required, and we reverse the opinion of the Court of Appeals.

After pleading not guilty, defendant was tried noncapitally at the 26 September and 3 October 2011 criminal sessions of Superior Court, Randolph County. The State's evidence at trial tended to show the following: In 2008 defendant, her mother, Mr. Phillip Mabe, and Mr. Dylan Boston conspired to kill defendant's father. Boston testified that Mabe and he discussed with defendant their plan to murder the victim and make it look like a robbery. In exchange for killing her father, defendant promised Mabe and Boston money from the victim's life insurance policy. On 6 September 2008, defendant picked up Mabe and Boston in her car, drove them by her house to show them where her father would be, and then dropped them off nearby. At that point, defendant knew that Boston was carrying a gun in his pant leg. Mabe and Boston went to the Grainger residence, shot the victim in the head, took some items from a lock box, and left the house in the

victim's car. Defendant did not accompany Mabe and Boston to the residence; she was shopping with her mother and cousin at Kmart. After Boston and Mabe left defendant's house, they called defendant to pick them up at a Food Lion parking lot. She did so, dropped them off at Mabe's house, and then went back to Kmart. Defendant and her mother "discovered" the victim's body later that night and called the police.

Defendant told a different story. Although she did not testify at trial, she did give several statements to the police over the course of their investigation. After initially denying any involvement, defendant eventually told the police that she had planned an attack on her father, but that the plan was just for Mabe and Boston "to go in the front door, trash the place and to freak my dad, Paul Grainger, freak him out a little bit, scare him." She did not admit that there was any plan to kill her father, or even to rob him.

During the jury charge conference, defendant requested an instruction on accessory before the fact under N.C.G.S. § 14-5.2. Section 14-5.2 states in relevant part:

> [i]f a person who heretofore would have been guilty and punishable as an accessory before the fact is convicted of a capital felony, and the jury finds that his conviction was based solely on the uncorroborated testimony of one or more principals, coconspirators, or accessories to the crime, he shall be guilty of a Class B2 felony.

N.C.G.S. § 14-5.2 (2013). The trial court declined to give the instruction. The jury returned a verdict finding defendant guilty of first-degree murder: "A. On the basis of malice, premeditation and deliberation" and "B. Under the first degree felony murder rule." She was sentenced to life imprisonment without parole. Defendant appealed. The Court of Appeals ordered a new trial, reasoning that it was error for the trial court not to have given the accessory before the fact instruction and that the error was prejudicial. *Grainger*, ___ N.C. App. at ___, 741 S.E.2d at 370. The State filed a petition for discretionary review, which we allowed.

Defendant argues that she was entitled to the instruction on accessory before the fact because of a conflict in the evidence regarding her intent towards her father. She denied planning to kill her father, admitting only that she wanted Boston and Mabe to rough him up and "scare him," while Boston testified that the plan was to murder

the father. Defendant argues that this conflict shows that Boston's testimony was uncorroborated and that the "uncorroborated testimony of one . . . principal[ ]" entitled her to the instruction. N.C.G.S. § 14-5.2

Defendant argues extensively that section 14-5.2 applies to her because any first-degree murder trial involves a "capital felony" within the purview of N.C.G.S. § 15A-2004, regardless of whether she was tried capitally or not. The State responds otherwise, contending that section 14-5.2 does not apply to defendant or others like her who are not tried capitally and thus are not subject to the death penalty as a possible punishment. The Court of Appeals resolved this issue in favor of defendant, holding that first-degree murder is statutorily a capital felony, even if she was not tried capitally, relying on our decision in *State v. Cummings*, 352 N.C. 600, 631-32, 536 S.E.2d 36, 58-59 (2000), *cert. denied*, 532 U.S. 997 (2001). *Grainger*, ___ N.C. App. at ___, 741 S.E.2d at 369.

The Court of Appeals did not discuss that defendant was also convicted of first-degree murder under the theory of felony murder; however, we conclude that because the evidence supporting her conviction on this theory does not rely solely on the uncorroborated testimony of a principal, section 14-5.2 does not apply to her conviction on this theory. The record reveals that defendant's own statements to the police provide support for her conviction for first-degree felony murder. "[T]o support convictions for a felony offense and related felony murder, all that is required is that the elements of the underlying offense and the murder occur in a time frame that can be perceived as a single transaction." *State v. Thomas*, 329 N.C. 423, 434-35, 407 S.E.2d 141, 149 (1991). Here defendant herself admitted that she asked Mabe and Boston to "freak out" her father; whether she intended her father to be murdered is superfluous under this theory. "A felony comes within the purview of the felony murder rule if its commission or attempted commission creates a substantial foreseeable risk to human life and actually results in the loss of life." *State v. Hutchins*, 303 N.C. 321, 345, 279 S.E.2d 788, 803 (1981) (citation omitted). Certainly, sending Mabe and Boston to attack her father, knowing they were armed, "create[d] a substantial foreseeable risk to human life." *Id.* In our review of defendant's conviction under the felony murder rule, we need not consider the testimony of coconspirator Boston regarding her intent, as we would if reviewing a conviction solely under the theory of premeditation and deliberation. Therefore, because her conviction for first-degree murder under a

theory of felony murder is supported by ample evidence, defendant's conviction must stand. *Cf. State v. McLemore*, 343 N.C. 240, 249, 470 S.E.2d 2, 7 (1996) (concluding that "[a]lthough the defendant should not have been convicted of felony murder, the verdict cannot be disturbed if the evidence supports a conviction based on premeditation and deliberation"). Accordingly, the decision of the Court of Appeals is reversed.

REVERSED.

Justices BEASLEY and HUNTER did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. SAMUEL KRIS HUNT

No. 195PA11-2

(Filed 19 December 2014)

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 409 (2012), on remand from this Court, 365 N.C. 432, 722 S.E.2d 484 (2012), finding no error in part and vacating in part a judgment entered on 8 October 2009 by Judge Edwin G. Wilson, Jr. in Superior Court, Randolph County, and remanding for resentencing. On 7 March 2013, the Supreme Court allowed the State's petition for discretionary review of an additional issue. Heard in the Supreme Court on 18 November 2013. Following oral argument, the Court on 9 December 2013 ordered supplemental briefing on one issue. Determined on the supplemental briefs without further oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Roy Cooper, Attorney General, by Elizabeth J. Weese and Anne M. Middleton, Assistant Attorneys General, for the State-appellee/appellant.

M. Alexander Charns for defendant-appellant/appellee.

PER CURIAM.

On defendant's appeal arising from the dissenting opinion, the decision of the Court of Appeals is affirmed. The State's petition for discretionary review as to an additional issue was improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Justice HUNTER took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. TIMOTHY JOHN LONG

No. 556PA13

(Filed 19 December 2014)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 753 S.E.2d 398 (2013), finding no prejudicial error in a judgment entered on 19 September 2012 by Judge R. Allen Baddour in Superior Court, Mecklenburg County. Heard in the Supreme Court on 10 September 2014.

Roy Cooper, Attorney General, by Angenette Stephenson, Assistant Attorney General, for the State.

Office of the Public Defender, by Julie Ramseur Lewis, Assistant Public Defender, for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. MICHAEL PAUL MILLER

No. 368PA13

(Filed 19 December 2014)

1. Search and Seizure—police dog—search for intruders—instrumentality of police

In a prosecution for offenses involving the sale or delivery of marijuana, it was noted that a police dog assisting officers in the search of a home for intruders is clearly acting as an instrumentality of the police.

2. Search and Seizure—police dog—nuzzling bag open—instinctive or directed—remanded for determination

A police dog's instinctive action, unguided and undirected by the police, that brings evidence into plain view is not a search within the meaning of the Fourth Amendment or Article I, Section 20 of the North Carolina Constitution. When a dog is simply being a dog, if it acts without assistance, facilitation, or other intentional action by its handler, it cannot be said that a State or governmental actor intends to do anything. If, however, police misconduct is present, or if the dog is acting at the direction or guidance of its handler, then it can be readily inferred from the dog's action that there is an intent to find something or to obtain information. This case was remanded to the trial court to resolve whether the dog's nuzzling which opened the bags in which contraband was found was instinctive, undirected, and unguided by the officers.

Justice BEASLEY did not participate in the consideration or decision in 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. ___, 746 S.E.2d 421 (2013), reversing judgments entered on 23 May 2011 by Judge Joseph N. Crosswhite in Superior Court, Rowan County, and remanding the case to the trial court to resolve a conflict in the evidence relating to defendant's motion to suppress and for additional proceedings. Heard in the Supreme Court on 8 September 2014.

Roy Cooper, *Attorney General*, *by Martin T. McCracken and Teresa Postell*, *Assistant Attorneys General*, *for the State appellant.*

Staples S. Hughes, *Appellate Defender*, *by Kathleen M. Joyce*, *Assistant Appellate Defender*, *for defendant appellee.*

HUNTER, Justice.

A police dog's instinctive action, unguided and undirected by the police, that brings evidence not otherwise in plain view into plain view is not a search within the meaning of the Fourth Amendment to the United States Constitution or Article I, Section 20 of the North Carolina Constitution.

I

In May 2009, the Spencer Police Department received a burglar alarm report indicating a possible break in at defendant Michael Paul Miller's residence. Officer Brian Hill was the first officer to arrive at the scene. Officer Hill surveyed the exterior of the home and noticed a broken window on the back side of the house having an opening large enough for a person to gain entry into the residence. The doors of the residence were locked. Concerned that an intruder was in the house, Officer Hill called for backup and the assistance of a canine officer to perform a protective sweep.

Shortly thereafter, additional backup arrived, including Officer Jason Fox and his police dog, "Jack." Officer Hill explained the situation to Officer Fox and the two began discussing how to proceed next. As the officers were preparing to search the home, defendant's mother, Ms. Gwen Weant, arrived at the scene with a key to the house. She gave Officer Hill and Officer Fox the key, as well as permission to search the premises for intruders.

Officer Fox began the search by deploying Jack inside the house. At Officer Fox's command, Jack began methodically working his way through the house searching for intruders. Jack went from room to room until he reached a side bedroom, where he remained. Officer Fox, fearing for Jack's safety, entered the house and went to the bedroom to investigate. Jack was sitting on the bedroom floor staring at a dresser drawer, thereby alerting Officer Fox to the presence of narcotics. Officer Fox opened the drawer and discovered a brick of marijuana. He then called for Officer Hill, who also observed the drugs. Leaving the brick of marijuana undisturbed, Officer Fox, Officer Hill, and Jack continued their protective sweep of the house.

As Jack neared the back of the house, he stopped in front of a closet at the end of the main hallway and began barking at the closet door, this time alerting Officer Fox to the presence of a human suspect behind the closet door. Unlike the passive sit and stare alert that Jack used to signal for the presence of narcotics, Jack was trained to bark to signal the presence of human suspects. Officer Fox and Officer Hill drew their firearms and opened the closet door, revealing two large black trash bags on the closet floor. No intruder was found in the closet.

Each officer characterized the ensuing events somewhat differently at a later hearing held on defendant's motion to suppress. Officer Hill testified that as soon as they opened the closet door, he could see marijuana in the opening of the trash bags and that the marijuana was plainly visible. Officer Fox initially testified that he could see what appeared to be marijuana inside a partially opened bag and that he did not manipulate the bag in any way at that time. But later, on cross examination he testified that as soon as they opened the closet door, Jack "immediately" stuck his nose inside one of the trash bags and nuzzled the bag open; Officer Fox then indicated that the marijuana was visible to him only after Jack nuzzled the bag open.

The officers did not immediately seize the marijuana. Instead, they finished their protective sweep of the house, still finding no intruders, and locked and secured the residence. Defendant arrived at the scene shortly thereafter, and, after questioning from Officer Hill, disclosed that a gun was in his vehicle. The handgun was immediately seized. Based on the information gathered by Officers Hill and Fox during their initial sweep, Sergeant Eric Ennis, an investigator for the Spencer Police Department, applied for a search warrant to recover the drugs observed in defendant's residence. When the search warrant arrived, the officers reentered defendant's home and seized the drugs.

Defendant was subsequently indicted on charges of possession with the intent to sell or deliver marijuana, maintaining a dwelling house for keeping, storing, using or selling marijuana, and carrying a handgun concealed in his vehicle. At a preliminary hearing, defendant moved to suppress all evidence seized during the search of his house, arguing that the search and seizure violated his rights under the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution.

After considering the testimonies of Officer Hill, Officer Fox, and Sergeant Ennis, as well as other documentary exhibits offered into evidence, the trial court entered an order granting defendant's motion

in part and denying the motion in part. With respect to the brick of marijuana seized from defendant's dresser drawer, the trial court found that "the officers deviated from the . . . search [for intruders] when they opened" the drawer. Consequently, the trial court found that defendant's constitutional rights were violated by that action and ordered that this evidence be suppressed; however, with respect to the marijuana seized from the trash bags in the hall closet, the trial court denied defendant's motion. The trial court recognized the conflict between the testimonies of Officers Hill and Fox regarding whether the marijuana was in plain view before Jack nuzzled into the trash bag, but, rather than resolving the conflict, summarily found that the discovery of the marijuana in the closet did not violate defendant's constitutional rights. Defendant entered an *Alford* plea of guilty to all charges while reserving the right to appeal the trial court's decision allowing the marijuana seized from the closet into evidence. Defendant then appealed the order and subsequent judgments to the Court of Appeals.

The Court of Appeals reversed the judgments and remanded the case to the trial court for further proceedings. *State v. Miller*, ___ N.C. App. ___, 746 S.E.2d 421 (2013). Citing *Arizona v. Hicks*, 480 U.S. 321, 324 25 (1987), the Court of Appeals concluded that "Jack was an instrumentality of the police, and his actions, regardless of whether they are instinctive or not, are no different than those undertaken by an officer. If he opened the bags and exposed the otherwise hidden marijuana, it would not be admissible under the plain view doctrine." *Miller*, ___ N.C. App. at ___, 746 S.E.2d at 427. In reaching its holding, the Court of Appeals rejected persuasive precedent from two federal circuit courts of appeal that had rejected Fourth Amendment challenges by defendants under analogous factual circumstances. *Id.* at ___, 746 S.E.2d at 426; *see United States v. Reed*, 141 F.3d 644, 650 (6th Cir. 1998); *United States v. Lyons*, 957 F.2d 615, 617 (8th Cir. 1992). But, because the trial court failed to resolve in its order whether the marijuana was in plain view without Jack's nuzzling of the bags, the Court of Appeals remanded the question to the trial court with instructions to suppress the evidence if the trial court found that Jack brought the marijuana into plain view. *Miller*, ___ N.C. App. at ___, 746 S.E.2d at 427.

On a petition for discretionary review to this Court, we ordered briefing and argument on the following question submitted by the State: "Did the Court of Appeals err by holding that the canine was an

instrumentality of the police and his actions, whether instinctive or not, are no different than those undertaken by an officer?"

As formulated, the question presented focuses on two discrete inquiries: (1) whether Jack was an instrumentality of the police, and (2) whether Jack's actions are analytically different under the Fourth Amendment or Article I, Section 20 from similar actions performed by the police. With respect to the first inquiry, the "instrumentality" question implies that a material issue in this case is whether Jack was a State actor for the purpose of invoking the Fourth Amendment. We note that a police dog assisting officers in the search of a home for intruders is clearly acting as an instrumentality of the police. *See Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971) (concluding that instruments and agents of the State are State actors for Fourth Amendment purposes), *abrogated in part on other grounds by Horton v. California*, 496 U.S. 128 (1990). Therefore, whether Jack was a State actor is not the issue here. Rather, the dispositive issue in this case is whether Jack's actions are analytically different under the Fourth Amendment or Article I, Section 20 from similar actions performed by the police. Stated precisely, we must decide whether a police dog's instinctive action, unguided and undirected by the police, that brings evidence not otherwise in plain view into plain view is a search within the meaning of the Fourth Amendment or Article I, Section 20 of the North Carolina Constitution.

II

[1] The Fourth Amendment states in pertinent part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Our State's analogous constitutional provision, Article I, Section 20, declares that "[g]eneral warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted." N.C. Const. art. I, § 20. In construing these analogous provisions together, we have held that nothing in the text of Article I, Section 20 calls for broader protection than that of the Fourth Amendment. *State v. Garner*, 331 N.C. 491, 506 07, 417 S.E.2d 502, 510 (1992). Accordingly, our Article I, Section 20 jurisprudence generally comports with the Supreme Court of the United States' interpretation of the Fourth Amendment.

A

Man's best friend is no stranger to Fourth Amendment jurisprudence. The Supreme Court of the United States has decided several cases involving police dog sniffs that indicate the extent to which police may use these four legged crime fighters without running afoul of constitutional safeguards. In *United States v. Place*, 462 U.S. 696, 707 (1983), the Court concluded that a dog sniff of a person's luggage in a public place (an airport) is not a "search" within the meaning of the Fourth Amendment. In reaching its decision, the Court acknowledged that "a person possesses a privacy interest in the contents of personal luggage," but supported its conclusion by noting that a dog sniff for the purpose of identifying the presence of narcotics is "*sui generis*," that is, unique in the sense that "the sniff discloses only the presence or absence of narcotics, a contraband item." *Id.* Focusing on the intrusiveness of the dog's action, the Court stated that a dog sniff for narcotics conducted in a public place

> does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. . . . Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

Id. By drawing a contrast between a "canine sniff" and other conduct that may "expose noncontraband items that otherwise would remain hidden from public view," the Court in *Place* limited its permissive holding to sniffs that can reveal no more than the presence of contraband.

The applicability of the holding in *Place* in other factual contexts has since been confirmed in *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000), and *Illinois v. Caballes*, 543 U.S. 405, 408 10 (2005). In *Edmond* the Court stated that a dog sniff of the exterior of a vehicle stopped at a highway checkpoint "does not transform the seizure into a search." 531 U.S. at 40 (citing *Place*, 462 U.S. at 707). The Court explained, "Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics." *Id.* In *Caballes* the Court observed that "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to

possess does not violate the Fourth Amendment." 543 U.S. at 410. The Court reasoned that "any interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.' " *Id.* at 408 (citation omitted). Taken together, these cases stand for a generally permissive view of public dog sniffs under the Fourth Amendment.

Nonetheless, insofar as *Place*, *Edmond*, and *Caballes* encourage police to utilize dog sniffs in the public sphere, the Court's recent decision in *Florida v. Jardines*, 133 S. Ct. 1409 (2013), places police on a much shorter leash when employing dog sniffs in and around the home. In *Jardines* police brought a drug sniffing dog onto the defendant's front porch, where the dog alerted to the presence of narcotics at the defendant's front door. *Id.* at 1413. Police used the dog's positive alert to obtain a warrant to search the residence for narcotics. *Id.* Delivering the opinion of the Court, Justice Scalia emphasized that "the officers learned what they learned only by physically intruding on Jardines' property to gather evidence," which "is enough to establish that a search occurred." *Id.* at 1417. Noting that the home is "first among equals" when it comes to the Fourth Amendment, *id.* at 1414, the Court stated that "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment," *id.* at 1417-18.

While each of these cases is instructive on the question presented here, each falls short of being determinative. First, unlike the abovementioned cases, Jack's action here is not properly classified as a dog "sniff," but rather a dog "nuzzle." While Jack likely sniffed the marijuana in defendant's closet, it is his nuzzling of the trash bags that has triggered the Fourth Amendment inquiry at issue here. Second, although Jack was in the privacy of defendant's home when he nuzzled the bags, the exigency of the situation meant that the officers and Jack were lawfully in the house and in front of the open closet searching for intruders.

Although the case did not involve a dog, the Court of Appeals believed that *Arizona v. Hicks* was determinative of the question presented by defendant's Fourth Amendment challenge. In *Hicks* a bullet was fired through the floor of the defendant's apartment, injuring a man in the apartment below. 480 U.S. at 323. Police entered the defend-ant's apartment to search for the shooter, for other victims, and for weapons. *Id.* During the search, one of the officers noticed

expensive stereo equipment that "seemed out of place in the squalid and otherwise ill appointed four room apartment." *Id.* The officer read and recorded the serial numbers of the items, moving some of the equipment to do so. *Id.* Upon confirmation that the items were stolen, the equipment was seized. *Id.* In analyzing whether the officer's movement of the equipment to read the serial numbers constituted a Fourth Amendment search, the Court stated that

> taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of [the defendant's] privacy unjustified by the exigent circumstance that validated the entry. . . . It matters not that the search uncovered nothing of any great personal value to [the defendant]—serial numbers rather than (what might conceivably have been hidden behind or under the equipment) letters or photographs. A search is a search, even if it happens to disclose nothing but the bottom of a turntable.

Id. at 325.

Analogizing the officer's actions in *Hicks* to Jack's actions here, the Court of Appeals determined that Jack's nuzzling of the bags was an action " 'unrelated to the objectives of the authorized intrusion' " that created " 'a new invasion of [defendant's] privacy unjustified by the exigent circumstance that validated the entry.' " *Miller*, ___ N.C. App. at ___, 746 S.E.2d at 427 (quoting *Hicks*, 480 U.S. at 325). To bridge the gap between an officer's action in *Hicks* and a dog's action here, the Court of Appeals stated, without authority, that "Jack was an instrumentality of the police, and his actions, regardless of whether they are instinctive or not, are no different than those undertaken by an officer." *Id.* at ___, 746 S.E.2d at 427. The problem with this analogy, however, is that Jack's actions *are* different from the actions of an officer, particularly if the dog's actions were instinctive, undirected, and unguided by the police.

B

Several federal circuit courts of appeal have recognized the distinction between an officer's actions and the instinctive actions of a police dog, albeit in imprecise terms. *See*, *e.g.*, *United States v. Sharp*, 689 F.3d 616, 618 20 (6th Cir.), *cert. denied*, 133 S. Ct. 777 (2012); *United States v. Pierce*, 622 F.3d 209, 212 15 (3d Cir. 2010); *United States v. Vazquez*, 555 F.3d 923, 930 (10th Cir.), *cert. denied*, 558 U.S. 903 (2009); *Lyons*, 957 F.2d at 616 17. The most common factual scenario encountered in the federal circuits has occurred when a

lawful traffic stop takes place; a police dog is used to perform a sniff around the exterior of the vehicle; and the dog, without prompting, jumps into an open window or door and alerts to the presence of narcotics *inside* the suspect's car. For example, in one of the first cases to address this type of situation, *United States v. Stone*, 866 F.2d 359 (10th Cir. 1989), a police dog jumped into a vehicle's hatchback that had been opened by the defendant during a traffic stop. *Id.* at 361. The court stated that "[e]ven though the police could use a trained dog to sniff the exterior of Stone's automobile, the dog created a troubling issue under the Fourth Amendment when it entered the hatchback." *Id.* at 363. The court acknowledged that people have an expectation of privacy in the interiors of their automobiles, *id.*, but concluded that "the dog's instinctive actions did not violate the Fourth Amendment," *id.* at 364. The Court reasoned that

> [t]here is no evidence, nor does Stone contend, that the police asked Stone to open the hatchback so the dog could jump in. Nor is there any evidence the police handler encouraged the dog to jump in the car. . . . In these circumstances, we think the police remained within the range of activities they may permissibly engage in when they have reasonable suspicion to believe an automobile contains narcotics.

Id. The rule of the case has since been articulated clearly by the Sixth Circuit in *Sharp*: "[A] dog's instinctive jump into a car does not violate the Fourth Amendment as long as the canine enters the vehicle on its own initiative and is neither encouraged nor placed into the vehicle by law enforcement." 689 F.3d at 619 (citations omitted). In defining what an "instinctive" act is, *Sharp* noted that " 'instinctive implies the dog enters the car without assistance, facilitation, or other intentional action by its handler.' " *Id.* (quoting *Pierce*, 622 F.3d at 214). When there is, however, a desire by law enforcement to facilitate a dog sniff in the interior of the vehicle, the Fourth Amendment is implicated. *See*, *e.g.*, *United States v. Winningham*, 140 F.3d 1328, 1330 31 (10th Cir. 1998) (affirming the lower court's decision invalidating a search when "the officers themselves opened the door, allowing the van to sit on the side of the highway with the sliding door wide open for a period of at least six minutes until the drug dog could arrive . . . [and] then unleashed the dog as the dog neared the open door").

The federal circuit court cases that are close to being on all fours with respect to the instant case are *United States v. Reed* and *United States v. Lyons*. In *Reed*, a Sixth Circuit decision, police responded to

a possible break in at the defendant's flat and called in a canine unit to perform a protective sweep for intruders. 141 F.3d at 646. "Cheddy," the police dog tasked with performing the search, was trained to alert for narcotics and intruders upon command. *Id.* at 647. After being commanded to search for intruders (not for drugs),

> Cheddy entered the master bedroom, and alerted on a dresser by scratching at the right hand dresser drawers. [The officer], upon hearing the commotion, entered the master bedroom. Although it is unknown whether the dresser drawers were open before Cheddy entered the room, apparently the dog had knocked the top drawer off its runners and into the second drawer, which was also open. . . . [The officer] pulled the dog away, and noticed a bag of cocaine plainly visible in his bright mag light beam.

Id. Citing, *inter alia*, *Stone*, the court determined that "there was no illegal search in this instance, even assuming that Cheddy moved the drawers . . . because the movement of the drawers, if any, would have been occasioned by Cheddy's instinctive reactions to the nature of the contraband." *Id.* at 650.

In *Lyons* police were called to the airport to investigate a suspicious package addressed to the defendant. 957 F.2d at 615 16. "Grady," the trained police dog tasked with sniffing the package, suddenly and without prompting, "became agitated and tore the package in two, spewing the contents on the floor. The contents were white chunks which the police then field tested and determined to be cocaine." *Id.* at 616. Also citing *Stone*, the Eighth Circuit Court of Appeals concluded that "[w]ithout misconduct by the police, the mere fact that the dog tore the package does not constitute a 'search.' " *Id.* at 617.

Lyons is a model of precision insofar as it clearly asserts the doctrinal foundation for its holding—that the dog's instinctive actions did not constitute a Fourth Amendment search. *Id.*; *see also Pierce*, 622 F.3d at 214 15 ("[W]e apply the considerable body of jurisprudence examined above to conclude that [the dog's] interior sniffs, as a natural migration from his initial exterior sniffs, did not constitute a search requiring a warrant or probable cause."). Yet, *Lyons* and similar cases that purport to be decided on search grounds do not engage in a prototypical search analysis (by referring to the Supreme Court's search cases and doctrine) and fail to fully articulate *why* a dog's instinctive, undirected, and unguided action does not constitute a Fourth Amendment search.

C

The determinative question in the instant case is therefore: Whether a police dog's instinctive action, unguided and undirected by the police, that brings evidence not otherwise in plain view into plain view is a search within the meaning of the Fourth Amendment. Nipping at the heels of near uniformity in the federal circuit courts that have addressed the issue in strictly "search" terms, we hold that such action is not a search.

We reach this holding fully aware that what constitutes a "search" within the meaning of the Fourth Amendment has expanded in recent years, beginning with the Supreme Court's decision in *United States v. Jones*, 132 S. Ct. 945 (2012). Before *Jones*, the Court's decision in *Katz v. United States*, 389 U.S. 347 (1967), and its progeny defined a Fourth Amendment search in terms of one's "reasonable" or "legitimate" expectation of privacy. *See generally* 1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.1 (5th ed. 2012). The test articulated by the Court for determining whether a Fourth Amendment search occurred under the *Katz* line of cases is (1) whether "the individual manifested a subjective expectation of privacy in the object of the challenged search," and (2) whether "society is willing to recognize that expectation as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (brackets, citation, and internal quotation marks omitted). If the answer to both inquiries is in the affirmative, then a search has occurred. *Id.*

In *Jones*, however, the Court stated that "Fourth Amendment rights do not rise or fall with the *Katz* formulation." 132 S. Ct. at 950. Harkening back to traditional property based concepts foundational to the Fourth Amendment, the Court reintroduced the common law "trespass" theory into the Court's Fourth Amendment jurisprudence.[1] *Id.* at 951. The Court indicated that when the government engages in a "physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment." *Id.* (citation and quotation marks omitted). In discussing reintroduction of the trespass theory into the Court's Fourth Amendment jurisprudence, the Court stated that "the *Katz*

1. *Jardines* reaffirmed application of common law trespass theory just last year. 133 S. Ct. at 1414 17.

reasonable expectation of privacy test has been *added to*, not *substituted for*, the common law trespassory test."[2] *Id.* at 952.

Important, however, in the Court's search doctrine is the prerequisite that the State or government actor have as his or her purpose a desire to find something or obtain information. "A trespass on 'houses' or 'effects,' or a *Katz* invasion of privacy, is not alone a search unless it is done to obtain information; and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy." *Id.* at 951 n.5; *see also Kyllo*, 533 U.S. at 32 n.1 ("When the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief.' N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed. 1989)."). This point is dispositive in this case, and is a point that inherently supports the holdings in those federal circuit court cases that have determined that a dog's instinctive, unguided, and undirected action that leads to the discovery of evidence is not a Fourth Amendment search.

If a police dog is acting without assistance, facilitation, or other intentional action by its handler (in the words of *Sharp*, acting "instinctively"), it cannot be said that a State or governmental actor intends to do anything. In such a case, the dog is simply being a dog. If, however, police misconduct is present, or if the dog is acting at the direction or guidance of its handler, then it can be readily inferred from the dog's action that there is an intent to find something or to obtain information. *See Winningham*, 140 F.3d at 1330 31 (invalidating a search on such grounds). In short, we hold that a police dog's instinctive action, unguided and undirected by the police, that brings evidence not otherwise in plain view into plain view is not a search within the meaning of the Fourth Amendment or Article I, Section 20 of the North Carolina Constitution. Therefore, the decision of the Court of Appeals that Jack was an instrumentality of the police, regardless of whether his actions were instinctive, is reversed.

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2. In *Jones*, government agents attached a GPS tracking device to the undercarriage of the defendant's car while it was parked in a public place and then subsequently monitored the defendant's movements for 28 days, collecting evidence eventually supporting a criminal indictment on drug charges. 132 S. Ct. at 948. The Court held that such action constituted a search under the common law trespass analysis. *Id.* at 949.

III

[2] As defendant indicates in his brief to this Court, the trial court has not made a finding of fact with respect to the instinctive, unguided, and undirected nature of Jack's nuzzling of the bags in this case. Defendant's brief does concede, however, that Officer Fox leashed Jack before opening the closet door and that "there is no evidence to contradict [Officer Fox's] testimony" that "he did not order Jack to sniff the bag to nudge it open." Nevertheless, our review of the trial court's suppression order is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Accordingly, because we have reversed the Court of Appeals' determination that Jack was an instrumentality of the police, regardless of the instinctive nature of his actions, we remand this matter to the Court of Appeals for further remand to the trial court to resolve whether Jack's nuzzling of the bags was instinctive, undirected, and unguided by the officers, and to enter new findings of fact and conclusions of law consistent with this opinion.

REVERSED AND REMANDED.

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

STATE v. PHILLIPS

[367 N.C. 715 (2014)]

STATE OF NORTH CAROLINA v. JAMES A. PHILLIPS, JR.

No. 531PA13

(Filed 19 December 2014)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 750 S.E.2d 43 (2013), reversing an order entered on 5 December 2012 by Judge Theodore S. Royster, Jr. in Superior Court, Stanly County. Heard in the Supreme Court on 9 September 2014.

Roy Cooper, *Attorney General*, *by Kathleen N. Bolton*, *Assistant Attorney General*, *for the State-appellant.*

Arnold & Smith, *PLLC*, *by Matthew R. Arnold and J. Bradley Smith*, *for defendant-appellee.*

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. RONDELL LUVELL SANDERS

No. 60A14

(Filed 19 December 2014)

1. Sentencing—parallel offense in another state—burden of proof—producing statutes

It was error for the trial court to determine that the Tennessee offense of domestic assault was substantially similar to the North Carolina offense of assault on a female without fully examining the Tennessee statutes. Section 39-13-111 of the Tennessee Code Annotated provides that a person commits domestic assault who commits an assault as defined in § 39-13-101 against a domestic abuse victim. The State provided the trial court with a photocopy of the 2009 version of Tenn. Code Ann. § 39-13-111 but not Tenn. Code Ann. § 39-13-101. The party seeking the determination of substantial similarity must provide evidence of the applicable law.

2. Sentencing—prior Tennessee offense—domestic assault—no substantial similarity to N.C. assault on a female

The offenses of domestic assault in Tennessee and assault on a female in North Carolina were not substantially similar for sentencing purposes.

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. ___, 753 S.E.2d 713 (2014), affirming in part and remanding for resentencing in part a judgment entered on 15 February 2013 by Judge Wayland J. Sermons, Jr. in Superior Court, Beaufort County. Heard in the Supreme Court on 18 November 2014.

Roy Cooper, *Attorney General*, *by Laura E. Parker*, *Assistant Attorney General*, *for the State-appellant.*

W. Michael Spivey for defendant-appellee.

BEASLEY, Justice.

On 19 November 2009, a jury found Rondell Luvell Sanders ("defendant") guilty of robbery with a dangerous weapon. At sentencing, the trial court awarded sentencing points for defendant's two prior Tennessee misdemeanor convictions, finding the Tennessee offenses of "theft of property" and "domestic assault" to be substan-

tially similar to North Carolina offenses. On appeal, the Court of Appeals remanded the case and instructed the trial court to consider the elements of the offenses, rather than their punishments, when determining substantial similarity. *State v. Sanders*, ___ N.C. App. ___, 736 S.E.2d 238 (2013). On remand, the trial court considered the elements and determined the Tennessee offenses to be substantially similar to the North Carolina offenses of "larceny" and "assault on a female." It is from the trial court's order on remand that defendant presently appeals.

In its opinion, the Court of Appeals affirmed in part and remanded in part the trial court's judgment. *State v. Sanders*, ___ N.C. App. ___, ___, 753 S.E.2d 713, 717 (2014). The court unanimously affirmed the trial court's determination that the Tennessee offense of "theft of property" is substantially similar to the North Carolina offense of "larceny."[1] *Id.* at ___, 753 S.E.2d at 716. The Court of Appeals majority held that the trial court erred in finding the Tennessee offense of "domestic assault" to be substantially similar to the North Carolina offense of "assault on a female." *Id.* at ___, 753 S.E.2d at 717. The majority concluded that the elements of the Tennessee offense differed from the North Carolina offense to such an extent that the two offenses were not substantially similar. *Id.* at ___, 743 S.E.2d at 717. The dissent disagreed, and would have held that, because the purposes of the two states' offenses are similar and because additional evidence in the record would demonstrate that defendant's conduct would satisfy the elements of the North Carolina offense, the State met its burden of establishing the two offenses' substantial similarity by a preponderance of the evidence. *Id.* at ____, 753 S.E.2d at 719-20 (Bryant, J., dissenting). The State appeals the holding of the Court of Appeals on the basis of the dissent pursuant to N.C.G.S. § 7A-30(2).

Subsection 15A-1340.14(e) governs the assignment of sentencing points for prior convictions in other jurisdictions and states, in pertinent part, that

> [i]f the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

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1. This Court denied defendant's petition for discretionary review of this unanimous holding on 11 June 2014. ___ N.C. ___, 758 S.E.2d 861 (2014).

N.C.G.S. § 15A-1340.14(e) (2013). This Court has not addressed the comparison of out-of-state offenses with North Carolina offenses for purposes of determining substantial similarity under N.C.G.S. § 15A-1340.14(e).

[1] First, the State argues that the trial court did not err in determining the Tennessee offense of "domestic assault" and the North Carolina offense of "assault on a female" to be substantially similar without reviewing the Tennessee statute defining the offense of "assault."

The Court of Appeals has held that, for purposes of determining "substantial similarity" under N.C.G.S. § 15A-1340.14(e), a party may establish the elements of an out-of-state offense by providing "evidence of the statute law of such state." *State v. Rich*, 130 N.C. App. 113, 117, 502 S.E.2d 49, 52 (citing N.C.G.S. § 8-3), *disc. rev. denied*, 349 N.C. 237, 516 S.E.2d 605 (1998). Further, the Court of Appeals has consistently held that when evidence of the applicable law is not presented to the trial court, the party seeking a determination of substantial similarity has failed to meet its burden of establishing substantial similarity by a preponderance of the evidence. *See*, *e.g.*, *State v. Burgess*, 216 N.C. App. 54, 57-58, 715 S.E.2d 867, 870 (2011) (holding that the State failed to present sufficient evidence of out-of-state convictions' similarity to North Carolina offenses when, *inter alia*, the State provided copies of the 2008 version of the applicable out-of-state statutes, but did not present evidence that the statutes were unchanged from the 1993 and 1994 versions under which the defendant had been convicted); *State v. Wright*, 210 N.C. App. 52, 70-72, 708 S.E.2d 112, 125-26 (holding that when the State did not provide evidence of the New York and Connecticut statutes under which the defendant had been convicted, did not submit copies of the applicable out-of-state statutes, and did not furnish a comparison of the statutes' provisions with the laws of North Carolina, the State failed to demonstrate the substantial similarity of the out-of-state convictions to North Carolina crimes), *disc. rev. denied*, 365 N.C. 200, 710 S.E.2d 9 (2011); *State v. Morgan*, 164 N.C. App. 298, 309, 595 S.E.2d 804, 812 (2004) (holding that the State failed to meet its burden of showing that the defendant's prior conviction was substantially similar to a North Carolina offense when it offered the 2002 version of the applicable New Jersey statute governing the defendant's 1987 New Jersey conviction, but failed to present any evidence that the statute was unchanged from 1987 to 2002).

Section 39-13-111 of the Tennessee Code Annotated provides that "[a] person commits domestic assault who commits an assault as

defined in § 39-13-101 against a domestic abuse victim." Tenn. Code Ann. § 39-13-111(b) (2009). Section 39-13-101 of the Tennessee Code Annotated, in turn, establishes that someone commits an "assault" when he or she: "(1) Intentionally, knowingly or recklessly causes bodily injury to another; (2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or (3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative." *Id.* § 39-13-101(a)(1)-(3) (2009). Here the State provided the trial court with a photocopy of the 2009 version[2] of Tenn. Code Ann. § 39-13-111, but did not give the trial court a photocopy of Tenn. Code Ann. § 39-13-101.

We agree with the Court of Appeals that for a party to meet its burden of establishing substantial similarity of an out-of-state offense to a North Carolina offense by the preponderance of the evidence, the party seeking the determination of substantial similarity must provide evidence of the applicable law. We therefore hold that it was error for the trial court to determine that Tenn. Code Ann. § 39-13-111 was substantially similar to a North Carolina offense without reviewing Tenn. Code Ann. § 39-13-101, which is explicitly referenced by Tenn. Code Ann. § 39-13-111 and defines Tennessee's statutory elements of assault.

[2] Second, the State argues the trial court did not err in its determination that the Tennessee offense of "domestic assault" and the North Carolina offense of "assault on a female" were substantially similar. The State urges this Court to look beyond the elements of the offenses and consider (1) the underlying facts of defendant's out-of-state conviction, and (2) whether, considering the legislative purpose of the respective statutes defining the offenses, the North Carolina offense is "suitably equivalent" to the out-of-state offense.

In North Carolina, "any person who commits [an] assault" is guilty of a class A1 misdemeanor "if, in the course of the assault, . . . he or she . . . [a]ssaults a female, he being a male person at least 18 years of age." N.C.G.S. § 14-33(c), (c)(2) (2013). The offense "assault on a female" thus requires that (1) the assailant be male, (2) the assailant be at least eighteen years old, and (3) the vic-

2. We note that the 2009 version was not, in fact, the version of the statute actually in force at the time of defendant's Tennessee conviction. After defendant was convicted on 6 January 2009, the statute was amended to add subsection (c)(3). Tenn. Code Ann. § 39-13-111 (2009) (showing the effective date of the 2009 amendment to Tenn. Code Ann. § 39-13-111 as 1 July 2009).

tim of the assault be female. *Id.*, § 14-33(c)(2). The offense does not require that any type of relationship exist between the assailant and the victim.

In comparison, a person in Tennessee is guilty of the offense of domestic assault if that person "commits an assault as defined in § 39-13-101 against a domestic abuse victim." Tenn. Code Ann. § 39-13-111(b) (2009). Subsection 39-13-111(a) of the Tennessee statutes specifically defines a "domestic abuse victim" as "any person who falls within the following categories:"

> (1) Adults or minors who are current or former spouses;
>
> (2) Adults or minors who live together or who have lived together;
>
> (3) Adults or minors who are dating or who have dated or who have or had a sexual relationship, but does not include fraternization between two (2) individuals in a business or social context;
>
> (4) Adults or minors related by blood or adoption;
>
> (5) Adults or minors who are related or were formerly related by marriage; or
>
> (6) Adult or minor children of a person in a relationship that is described in subdivisions (a)(1)-(5).

Tenn. Code Ann. § 39-13-111(a) (2009). The offense thus requires that the person being assaulted fall within at least one of these six enumerated categories of domestic relationships. The offense does not require the victim to be female or the assailant to be male and of a certain age.

The Court of Appeals has stated, and we agree, that "[d]etermination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." *State v. Fortney*, 201 N.C. App. 662, 671, 687 S.E.2d 518, 525 (2010) (citing *State v. Hanton*, 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006)). The Court of Appeals has appropriately determined certain offenses to be insufficiently similar by comparing the elements of out-of-state and North Carolina offenses. *See, e.g.*, *State v. Hogan*, ___ N.C. App. ___, ___, 758 S.E.2d 465, 474 (concluding that the New Jersey offense of third-degree theft is not substantially simi-

lar to the North Carolina offense of misdemeanor larceny "[g]iven the disparity in elements" between the definitions of the two offenses), *appeal dismissed and disc. rev. denied*, ___ N.C. ___, 762 S.E.2d 465 (2014); *Hanton*, 175 N.C. App. at 258-59, 623 S.E.2d at 606 (determining that the New York offense of second-degree assault is not substantially similar to the North Carolina offense of assault inflicting serious injury because, unlike the North Carolina offense, the New York offense does not require that the defendant cause "serious" physical injury). After comparing the elements of the Tennessee offense of "domestic assault" and the North Carolina offense of "assault on a female," we must conclude that the offenses are not substantially similar. Indeed, a woman assaulting her child or her husband could be convicted of "domestic assault" in Tennessee, but could not be convicted of "assault on a female" in North Carolina. A male stranger who assaults a woman on the street could be convicted of "assault on a female" in North Carolina, but could not be convicted of "domestic assault" in Tennessee.

We therefore hold that the trial court erred in determining the two offenses to be substantially similar. Accordingly, we affirm the holding of the Court of Appeals on this issue and remand this case to the Court of Appeals for further remand to the trial court for resentencing consistent with this opinion.

AFFIRMED AND REMANDED.

STATE OF NORTH CAROLINA v. ROBERT TIMOTHY WALSTON, SR.

No. 392PA13

(Filed 19 December 2014)

1. Evidence—good character—respectful towards children—not sufficiently tailored to charges—child sexual abuse

The trial court did not err in a first-degree sexual offense, multiple first-degree rape, and multiple taking indecent liberties with a minor case by denying defendant's request to introduce evidence of his being respectful towards children under N.C.G.S. § 8C-1, Rule 404(a)(1). Defendant's proffered evidence was not sufficiently tailored to the State's charges of child sexual abuse.

2. Jury—jury charge—use of word "victim"—not impermissible commentary

The trial court did not err in a first-degree sexual offense, multiple first-degree rape, and multiple taking indecent liberties with a minor case by denying defendant's request to use the words "alleged victim" instead of "victim" in its charge to the jury to describe the complaining witnesses. The trial court's use of the term "victim" was not impermissible commentary on a disputed issue of fact.

Justice HUNTER 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. ___, 747 S.E.2d 720 (2013), finding prejudicial error in defendant's trial resulting in judgments entered on 17 February 2012 by Judge Cy A. Grant in Superior Court, Dare County, and ordering that defendant receive a new trial. Heard in the Supreme Court on 9 September 2014.

Roy Cooper, *Attorney General*, *by Sherri Horner Lawrence*, *Assistant Attorney General*, *for the State-appellant.*

Mark Montgomery for defendant-appellee.

NEWBY, Justice.

In this case we consider the admissibility of evidence of a pertinent character trait of a criminal defendant under North Carolina Rule of Evidence 404(a)(1). For character evidence to be admissible at trial under Rule 404(a)(1), an accused must "tailor the evidence to a particular trait that is relevant to an issue in the case." *State v. Squire*, 321 N.C. 541, 546, 364 S.E.2d 354, 357 (1988). Defendant's proffered evidence of being respectful towards children was not sufficiently tailored to the State's charges of child sexual abuse and was thus inadmissible. Separately, we consider the extent to which, if at all, use of the word "victim" in a trial court's jury charge amounts to prejudicial error. Based on long-standing precedent, the trial court's use of the term "victim" was not impermissible commentary on a disputed issue of fact. Thus, the trial court did not err in denying defendant's request to use the words "alleged victim" instead of "victim" in its charge to the jury. Accordingly, on both issues we reverse the decision of the Court of Appeals.

This case arose from incidents that occurred in 1988 and 1989 between defendant and the prosecuting witnesses, E.C. and J.C., sisters who at the time of the incidents were about seven and four years old, respectively. During the relevant period, defendant's wife operated an at-home day care where she watched E.C., J.C., and their younger brother in addition to her own three children. According to the State's evidence, on several occasions defendant sexually abused the prosecuting witnesses individually, with each child being unaware that the other had been abused. Apparently, at some point several years later, J.C. and E.C.'s mother became concerned that her daughters had been abused. As a result, in 1994 E.C. and J.C. were interviewed by a social services worker and two sheriff's deputies. In those interviews both girls denied having been abused. No physical exams were conducted at that time, and the sheriff's office concluded that nothing in the interviews indicated any type of sexual assault.

In 2001, for the first time, E.C. and J.C. confided in each other and their parents that defendant had abused them. Seven years later, J.C. contacted law enforcement to report the incidents; officers subsequently reached E.C., who detailed similar incidents of her own. In January 2009 defendant was indicted on two counts of first-degree sex offense with a child, five counts of first-degree rape of a child, and seven counts of taking indecent liberties with a child. Superseding indictments were filed on 14 November 2011.

The State's evidence at trial relied almost exclusively on the testimony of E.C. and J.C. The State also called witness K.B., who testified under North Carolina Rule of Evidence 404(b) regarding alleged incidents of sexual abuse involving defendant when she was approximately ten and defendant was eighteen. Defendant took the stand in his own defense and also sought to introduce witness testimony regarding his good character. Defense counsel summarized the character witnesses' proposed testimony in a voir dire proffer, stating that each witness would testify to defendant's traits of (1) being law-abiding, (2) having good character, and (3) being respectful towards children. The trial court ruled that the testimony regarding defendant's law-abiding character trait would be admissible, but that testimony about the other two traits was prohibited as a matter of law.

At another point in the trial, defendant proffered Dr. Moira Artigues's voir dire expert testimony on repressed and suggested memories, which the trial court prohibited in all respects. During the jury instruction conference, defendant unsuccessfully sought to have

the word "victim" changed to "alleged victim" in the pattern jury instructions used by the trial court. The jury found defendant guilty of one count of first-degree sexual offense, three counts of first-degree rape, and five counts of taking indecent liberties with a minor. Defendant appealed.

Defendant raised, *inter alia*, three issues on appeal. Defendant first argued that the trial court erred in prohibiting witness testimony about his character under Rule of Evidence 404(a)(1). *State v. Walston*, ___ N.C. App. ___, ___, 747 S.E.2d 720, 724 (2013). The Court of Appeals agreed, concluding that the trait of being respectful towards children was relevant and admissible under the rule. *Id.* at ___, 747 S.E.2d at 725-26. As to defendant's second issue on appeal, the Court of Appeals agreed with defendant that the trial court erred in not substituting "alleged victim" for the word "victim" in the pattern jury instructions. *Id.* at ___, 747 S.E.2d at 726. According to the Court of Appeals, the use of the word "victim" "intimate[d] the trial court's belief that E.C. and J.C. were sexually assaulted," which was "a disputed issue of fact for the jury to resolve." *Id.* at ___, 747 S.E.2d at 727. Given that the State's and defendant's evidence "were in equipoise," *id.* at ___, 747 S.E.2d at 728, the Court of Appeals ordered a new trial because "the jury reasonably might have reached a different verdict" had either of the trial court's errors not occurred, *id.* at ___, 747 S.E.2d at 726, 728; *see* N.C.G.S. § 15A-1443(a) (2013). Lastly, defendant contended that the trial court erroneously excluded his proposed expert testimony on repressed and suggested memory under North Carolina Rule of Evidence 702. *Id.* at ___, 747 S.E.2d at 728. The Court of Appeals determined that the trial court incorrectly relied on an earlier version of Rule 702 in arriving at its conclusion. *Id.* at ___, 747 S.E.2d at 728. Rule 702 was amended in 2011. *See* Act of June 17, 2011, ch. 283, sec. 1.3, 2011 N.C. Sess. Laws 1048, 1049. The amended version applies to actions "commenced on or after" 1 October 2011. *Id.* at sec. 4.2, at 1051. Concluding that the "trigger date" for applying the new statute predated 14 November 2011, the date of the superseding indictments, the Court of Appeals instructed the trial court, on retrial, to apply the newly-amended rule. *Walston*, ___ N.C. App. at ___, 747 S.E.2d at 728.

In response to the Court of Appeals' holdings regarding the Rule 404(a)(1) character evidence and the use of the word "victim" in the jury instructions, the State petitioned this Court for discretionary review, which we allowed.

[1] We first consider the State's contention that the Court of Appeals erred in holding that defendant should have been allowed to introduce evidence of his being respectful towards children under Rule 404(a)(1). We agree with the State that such character evidence was not sufficiently tailored to a relevant issue at trial to satisfy the specific requirements of Rule 404(a)(1).

A jury's perception of a defendant's character can have a strong impact on its determination of the defendant's innocence or guilt. As a result, our legislature has crafted specific rules to control the admission of character evidence at trial. *See* N.C.G.S. § 8C-1, Rules 404, 405 (2013). Effective 1 July 1984, Rule 404 governs the content of admissible character evidence and the contexts in which it may be admitted. Rule 404(a) is a general rule of exclusion, stating that "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion." *Id.* § 8C-1, Rule 404(a). The rule's federal counterpart uses substantially the same language. Fed. R. Evid. 404(a)(1). The rule is of "fundamental importance in American law," implementing "the philosophy that a defendant should not be convicted because he is an unsavory person, nor because of past misdeeds, but only because of his guilt of the particular crime charged." 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:21 at 677 (4th ed. 2013). As the United States Supreme Court stated in *Michelson v. United States*:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience

> that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

335 U.S. 469, 475-76, 69 S. Ct. 213, 218-19, 93 L. Ed. 168, 173-74 (1948) (internal citations and footnotes omitted).

Defendants in criminal cases, however, may utilize an exception under Rule 404(a) that "permits the accused to offer evidence of a 'pertinent trait of his character' as circumstantial proof of his innocence." *State v. Bogle*, 324 N.C. 190, 201, 376 S.E.2d 745, 751 (1989) (quoting N.C.G.S. § 8C-1, Rule 404(a)(1) (1988)). This exception should be "restrictively construed" though because "Rule 404(a), as a general rule, excludes character evidence." *State v. Sexton*, 336 N.C. 321, 360, 444 S.E.2d 879, 901 (citation and quotation marks omitted), *cert. denied*, 513 U.S. 1006, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994). Thus, even though the term "pertinent" is synonymous with the word "relevant," *State v. Squire*, 321 N.C. at 547, 364 S.E.2d at 358, for a trait to be pertinent under Rule 404(a)(1), it "must bear a special relationship to or be involved in the crime charged," *State v. Laws*, 345 N.C. 585, 596, 481 S.E.2d 641, 647 (1997) (citation, emphases, and quotation marks omitted). In other words, to have evidence of his good character admitted at trial under Rule 404(a)(1), the accused must "tailor the evidence to a particular trait that is relevant to an issue in the case." *Squire*, 321 N.C. at 546, 364 S.E.2d at 357.

Our past application of Rule 404(a)(1) has not been so narrow as to preclude evidence of a more generalized character trait such as being law-abiding. *See id.* at 546, 364 S.E.2d at 357. We have, however, consistently required the accused to conform the character evidence to relevant traits, such as honesty for a defendant charged with embezzlement, or peacefulness for a defendant charged with a crime of violence. *See*, *e.g.*, *State v. Collins*, 345 N.C. 170, 174, 478 S.E.2d 191, 194 (1996) (ruling that character evidence inadmissible under Rule 404(a)(1) "focused on factual information about defendant's behavior and appearance rather than pertinent traits of his character"); *Bogle*, 324 N.C. at 202, 376 S.E.2d at 752 (holding that "the traits of truthfulness and honesty are not 'pertinent' . . . to the crime of trafficking in marijuana"); *Squire*, 321 N.C. at 548, 364 S.E.2d at 358 (noting that generally the trait of being law-abiding is a relevant character trait); *see also State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12 (noting, in defendant's trial for first-degree murder, that testimony about the defendant's reputation for "nonviolence or peacefulness" was admitted as "a pertinent trait of his character"),

cert. denied, 531 U.S. 1019, 121 S. Ct. 582, 148 L. Ed. 2d 498 (2000) ; *State v. Syriani*, 333 N.C. 350, 384, 428 S.E.2d 118, 136 (same), *cert. denied*, 510 U.S. 948, 114 S. Ct. 392, 126 L. Ed. 2d 341 (1993); *State v. Cummings*, 332 N.C. 487, 507, 422 S.E.2d 692, 703 (1992) (same); *State v. Garner*, 330 N.C. 273, 289-90, 410 S.E.2d 861, 870 (1991) (same); *State v. Gappins*, 320 N.C. 64, 70, 357 S.E.2d 654, 658 (1987) (same); *State v. Clapp*, ___ N.C. App. ___, ___,761 S.E.2d 710, 718-19 (2014) (concluding, in defendant's trial for sexual offenses against a 13, 14, or 15 year old child, that evidence defendant worked well with children and did not have an unnatural lust to have sexual relations with children was not pertinent and was "nothing more than an attestation to Defendant's normalcy"); *State v. Wagoner*, 131 N.C. App. 285, 293, 506 S.E.2d 738, 743 (1998) ("[E]vidence of defendant's general psychological make-up is not pertinent to the commission of a sexual assault.") (internal quotation marks omitted), *disc. rev. denied*, 350 N.C. 105, 533 S.E.2d 476 (1999); *State v. Mustafa*, 113 N.C. App. 240, 246, 437 S.E.2d 906, 909 (determining that evidence of the defendant's good military record was not pertinent to a charge of rape), *cert. denied*, 336 N.C. 613, 447 S.E.2d 409 (1994). Applying the aforementioned principles, we now determine if defendant's evidence in the present case satisfied the requirements of Rule 404(a)(1).

In his proffer of character witness testimony to the court, defendant's counsel asserted three potentially pertinent traits to which the witnesses would attest: (1) defendant's good character; (2) defendant's law-abiding nature; and (3) defendant's respect towards children. We conclude, and defendant does not dispute, that the trial court correctly prohibited testimony of defendant's general character under Rule 404(a). We also conclude that testimony about defendant's law-abiding character trait was properly allowed under Rule 404(a)(1). *See Squire*, 321 N.C. at 548, 364 S.E.2d at 358. As to the last trait, we hold that the trial court did not err in prohibiting evidence of defendant's respectful attitude towards children. Being respectful towards children does not bear a special relationship to the charges of child sexual abuse, *Laws*, 345 N.C. at 596, 481 S.E.2d at 647, nor is the proposed trait sufficiently tailored to those charges, *Squire*, 321 N.C. at 546, 364 S.E.2d at 357. Having a respectful or thoughtful attitude towards children does not preclude a defendant from sexually abusing them. *Sexton*, 336 N.C. at 360, 444 S.E.2d at 901 (requiring that Rule 404(a)(1) be restrictively construed). Such evidence would only be relevant if defendant were accused in some way of being disrespectful towards children or if defendant had demonstrated further

in his proffer that a person who is respectful is less likely to be a sexual predator. Defendant provided no evidence that there was a correlation between the two or that the trait of respectfulness has any bearing on a person's tendency to sexually abuse children. As detailed above, our case law has repeatedly held that peacefulness is a pertinent trait with regards to alleged acts of violence (under which defendant's charges would fall) and that truthfulness is admissible as a pertinent trait when defendant is charged with crimes involving dishonesty. Defendant cites no case law from our appellate courts in which we found traits similar to respectfulness towards children to be pertinent. To the contrary, the Court of Appeals recently determined in *State v. Clapp* that the defendant's trait of "working well with children" was not pertinent under Rule 404(a)(1) when the defendant was charged with child sexual offenses. ___ N.C. App. at ___, 761 S.E.2d at 718-19. Accordingly, the Court of Appeals erred in the present case in overturning the trial court's ruling on this issue.

[2] The State also contends that there was no error in the trial court's use of the pattern jury instructions that include the term "victim." At trial, counsel for defendant objected to the trial court's use of the pattern jury instructions and requested that the court substitute the phrase "alleged victim" for "victim" when giving the jury charge. The trial court did not modify the pattern instructions and instructed the jury, in relevant part, as follows, in accordance with North Carolina Pattern Jury Instructions, Criminal, 207.15.1 and 207.45.1:

> First degree sexual offense. The defendant has been charged with two counts, two charges of first degree sexual offense. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt.
>
> First, that the defendant engaged in a sexual act with the *victim*. A sexual act means fellatio, which is any touching by the lips or tongue of one person and the male sex organ of another, or any penetration, however slight, by an object into the genital opening of a person's body.
>
> Second, that at the time of the acts alleged the *victim* was a child under the age of 13.
>
> And third, that at the time of the alleged offense the defendant was at least 12 years old and was at least four years older than the *victim*.

Now if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant engaged in a sexual act with the *victim*, E.C., in the living room area of the defendant's house by inserting his finger into her vagina and that at that time the *victim* was a child under the age of 13 years, and that the defendant was at least 12 years old, and was at least four years older than the *victim*, it would be your duty to return a verdict of guilty. If you do not so find or if you have a reasonable doubt as to one or more of these things, it will be your duty to return a verdict of not guilty.

Also, if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant engaged in a sexual act with the *victim*, J.C., in the defendant's bedroom by having the *victim* place his penis in her mouth, and that at the time the *victim* was a child under the age of 13 years, and that the defendant was at least 12 years old and was at least four years older than the *victim*, it would be your duty to return a verdict of guilty.

If you do not so find or if you have a reasonable doubt as to one or more of these things, it will be your duty to return a verdict of not guilty.

First degree rape. The defendant has been charged with three counts of first degree rape. For you to find the defendant guilty of this offense the State must prove three things beyond a reasonable doubt.

First, that the defendant engaged in vaginal intercourse with the *victim*. Vaginal intercourse is penetration, however slight, of the female sex organ by the male sex organ. The actual emission of semen is not necessary. It is not necessary that the vagina be entered or that the hymen be ruptured. The entering of the labia is sufficient to establish this element.

Second, at the time of the acts alleged the *victim* was a child under the age of 13 years.

And third, that at the time of the acts alleged the defendant was at least 12 years old and was at least four years older than the *victim*.

So if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant engaged in vaginal intercourse with the *victim*, J.C., in the defendant's car and that

at the time the victim was a child under the age of 13 years, and that the defendant was at least 12 years old and was at least four years older than the *victim*, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant engaged in vaginal intercourse with the *victim*, J.C., in the bathroom of the defendant's home and that at that time the *victim* was a child under the age of 13 years and that the defendant was at least 12 years old and was at least four years older than the *victim*, it would be your duty to return a verdict of guilty. If you do not so find or if you have a reasonable doubt as to one or more of these things, it will be your duty to return a verdict of not guilty.

Now if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant engaged in vaginal intercourse with the *victim*, J.C., in the second bedroom of the defendant's home and that at that time the *victim* was a child under the age of 13 years, and that the defendant was at least 12 years old, and was at least four years older than the *victim*, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it will be your duty to return a verdict of not guilty.

See 1 N.C.P.I.–Crim. 207.15.1, 207.45.1 (Jan. 2002) (emphases added).

The Court of Appeals determined that the trial court erred in using the word "victim" instead of "alleged victim" in the jury instructions because whether the prosecuting witnesses were victimized "was a disputed issue of fact for the jury to resolve," given the lack of physical evidence. *Walston*, ___ N.C. App. at ___, 747 S.E.2d at 727. The State insists that the Court of Appeals' conclusion is contrary to our long-standing precedent. We agree.

The jury charge is one of the most critical parts of a criminal trial. "Pattern" jury instructions have existed for years, compiled as trial court judges individually developed effective, appeals-tested instructions and informally shared them with each other. 1 N.C.P.I.–Crim. Intro. 3-4 (2014). That process was formalized in North Carolina in the 1960s when the North Carolina Conference of Superior Court Judges appointed a committee of trial court judges to systematically

draft pattern jury instructions to be used across the state. *Id.* at 4. The first edition of the North Carolina Pattern Jury Instructions was published for public use in 1973. *Id.* at 5. Since then, subsequent committees have continued the meticulous work of refining and revising the pattern instructions to reflect changes in both the general statutes and case law. *Id.*

Though the pattern instructions have "neither the force nor the effect of law," *State v. Warren*, 348 N.C. 80, 119, 499 S.E.2d 431, 453, *cert. denied*, 525 U.S. 915, 119 S. Ct. 263, 142 L. Ed. 2d 216 (1998), we have often approved of jury instructions that are consistent with the pattern instructions, *see, e.g.*, *State v. Steen*, 352 N.C. 227, 275, 536 S.E.2d 1, 29 (2000) (approving of jury instructions that followed the pattern instructions "almost verbatim"), *cert. denied*, 531 U.S. 1167, 121 S. Ct. 1131, 148 L. Ed. 2d 997 (2001); *State v. DeCastro*, 342 N.C. 667, 693, 467 S.E.2d 653, 666 (holding that instructions "virtually identical" to the pattern jury instructions were a correct statement of the law), *cert. denied*, 519 U.S. 896, 117 S. Ct. 241, 136 L. Ed. 2d 170 (1996). Those holdings reflect the continual efforts of the pattern jury instructions committees to draft instructions consistent with "the long-standing, published understanding" of our case law and statutes. *Stark v. Ford Motor Co.*, 365 N.C. 468, 478, 723 S.E.2d 753, 760 (2012). That being said, in giving jury instructions, "the court is not required to follow any particular form," as long as the instruction adequately explains "each essential element of the offense." *State v. Avery*, 315 N.C. 1, 31, 337 S.E.2d 786, 803 (1985) (citation and quotation marks omitted).

The term "victim" appears frequently in our state's pattern jury instructions. Unsurprisingly, this is not the first time we have addressed whether use of the term in jury instructions is error. In *State v. Hill*, we concluded that use of the term "victim" was not improper and was not "intimating that the defendant committed the crime." 331 N.C. 387, 411, 417 S.E.2d 765, 777 (1992), *cert. denied*, 507 U.S. 924, 113 S. Ct. 1293, 122 L. Ed. 2d 684 (1993). We made the same observation in *State v. Gaines*. 345 N.C. 647, 675, 483 S.E.2d 396, 413, *cert. denied*, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997). In *State v. McCarroll*, in which a defendant was charged with several child sexual abuse counts, we considered the defendant's argument that the trial court's use of the term "victim" in the jury charge was prejudicial when referring to the thirteen-year-old prosecuting witness. 336 N.C. 559, 565-66, 445 S.E.2d 18, 22 (1994). Observing that "[t]he judge properly placed the burden of proof on the State" in his

instructions, we determined the trial court did not commit plain error in its use of the word "victim" in that case. *Id.* at 566, 445 S.E.2d at 22.

Accordingly, we hold in this case that the trial court did not err in using the word "victim" in the pattern jury instructions to describe the complaining witnesses. We stress, however, when the State offers no physical evidence of injury to the complaining witnesses and no corroborating eyewitness testimony, the best practice would be for the trial court to modify the pattern jury instructions at defendant's request to use the phrase "alleged victim" or "prosecuting witness" instead of "victim." As the pattern jury instructions themselves note, "all pattern instructions should be carefully read and adaptations made, if necessary, before any instruction is given to the jury." 1 N.C.P.I.–Crim. at xix ("Guide to the Use of this Book") (2014).

The trial court was correct in concluding that defendant's character evidence of his respectful attitude towards children was inadmissible under Rule of Evidence 404(a)(1). Such testimony was not tailored to a pertinent trait of defendant's character. So too, the trial court's use of the word "victim" in the jury instructions was not error. It was improper for the Court of Appeals to order a new trial based on these two issues. On remand the Court of Appeals should address fully whether the trial court's application of the former expert witness standard was prejudicial error. The decision of the Court of Appeals is reversed and the matter is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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

IN RE BRANCH

[367 N.C. 733 (2015)]

IN RE: INQUIRY CONCERNING A JUDGE, NO. 13-127
BRENDA G. BRANCH, RESPONDENT

No. 220A14

(Filed 23 January 2015)

Judges—malpractice—public reprimand—insufficient inquiry—improper reliance on legal arguments

Respondent Judge Brenda G. Branch was publicly reprimanded for conduct prejudicial to the administration of justice that brought the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b) and which violated Canons 1, 2A, 3A(1), and 3A(4) of the Code of Judicial Conduct. Respondent's misconduct resulted from insufficient inquiry into her obligations under the Servicemember's Civil Relief Act of 2003, her insufficiently based conclusion that defendant serviceman husband had legal representation in a divorce case while he was commissioned overseas, and an inappropriate reliance on legal arguments advanced by one party that respondent did not sufficiently research for herself.

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

This matter is before the Court pursuant to N.C.G.S. §§ 7A-376 and -377 upon a recommendation by the Judicial Standards Commission entered 6 June 2014 that respondent Brenda G. Branch, a Judge of the General Court of Justice, District Court Division 6A, State of North Carolina, be publicly reprimanded for conduct in violation of Canons 1, 2A, 3A(1), and 3A(4) of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b). Calendared for argument in the Supreme Court on 6 October 2014, but determined on the record without briefs or oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure and Rule 2(c) of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission.

No counsel for Judicial Standards Commission or respondent.

ORDER

By the recommendation of the North Carolina Judicial Standards Commission (Commission), the issue before this Court is whether

Brenda G. Branch (respondent), a judge of the General Court of Justice, District Court Division, Judicial District 6A, should be publicly reprimanded for conduct in violation of Canons 1, 2A, 3A(1), and 3A(4) of the North Carolina Code of Judicial Conduct and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b). Respondent waived her right to a formal hearing, and she does not contest the facts or oppose the Commission's recommendation that she be publicly reprimanded.

On 13 January 2014, the Commission's counsel filed a statement of charges alleging that respondent had engaged in inappropriate conduct while presiding over divorce proceedings in which Sergeant First Class Jason Foster (Foster) was the defendant. Foster was deployed overseas at the time of the proceedings. The statement of charges asserted that respondent denied Foster a fair trial in clear violation of the Servicemember's Civil Relief Act of 2003. Respondent filed an answer on 18 February 2014, which was timely received by the Commission. On 9 May 2014, the Commission held a formal hearing of the matter at the North Carolina Court of Appeals. Counsel for the Commission and counsel for respondent presented evidence at the hearing by stipulation. After reviewing all the evidence and hearing oral arguments from counsel, on 6 June 2014, the Commission made its recommendation, which stated the following findings of fact:

1. The investigative panel of the Commission alleged that, in the matter of Halifax County File No. 12-CVD-733, Foster v. Foster, the Respondent engaged in conduct inappropriate to her judicial office by:

    a. making inadequate inquiry into the rights afforded to Defendant Jason Foster, a litigant protected under the Servicemember's Civil Relief Act of 2003, 50 U.S.C. App. §§ 501-597b (hereafter "the SCRA"), and failing to maintain adequate professional competence in this area of the law;

    b. imprudently relying upon the counsel for the opposing party in the matter for a determination of the rights afforded to Defendant Jason Foster under the SCRA, without sufficiently performing her own independent inquiry and research into the law, and allowing opposing counsel to present such advice and opinion on the law to the Court outside of the presence of Defendant or anyone appointed as legal representation for Defendant; and,

c. inappropriately denying Defendant Jason Foster the appointment of legal representation guaranteed under the SCRA, thereby denying him his full right to be heard according to the law.

2. In the matter of Halifax County File No. 12-CVD-733, Foster v. Foster, Defendant Jason W. Foster was, at the time of the service of a civil complaint for child custody, child support, alimony, equitable distribution, post-separation support, and attorney fees, serving as an Active Duty Soldier of the rank of Sergeant First Class in the United States Army, stationed in Daegu, South Korea.

3. In a letter to the Court dated 16 July 2012 and filed 26 July 2012, Defendant Jason Foster, in response to the service of the complaint, wrote Respondent to request a stay of proceedings pursuant to the SCRA and claiming that his military service precluded him from participating in court proceedings until at least 30 April 2013. Defendant, in his letter, wrote that "legal counsel informs me that federal law requires a stay of proceedings for a minimum of 90 days for service members on active duty" and cited the SCRA. Defendant received this advice from a Judge Adjutant General officer stationed in Daegu, Korea.

4. In a separate letter also dated 16 July 2012 and filed 26 July 2012, Defendant's commanding officer also wrote the court to verify that Defendant's military service would preclude his participation in court proceedings until at least 30 April 2013 and to also request a stay of proceedings until that time, personally ensuring that Defendant would be able to participate in the next scheduled proceeding after 30 April 2013. The commanding officer, in his letter, wrote that he was "advised by legal counsel that federal law allows a stay of proceedings for service members on active duty when their ability to defend themselves is materially affected by their material service" and cited the SCRA. The commanding officer's letter explained "Until this date [30 April 2013], SFC Jason Foster is needed by this unit because he is essential to the mission" and further explained "In this instance, SFC's critical role in the national security mission of this command precludes his participation in court proceedings until April 30th, 2013. He will be unable to present any defense at all due to his duties."

5. The stay proposed in the letters from Defendant and Defendant's commanding officer was for approximately nine months.

6. The SCRA states in plain language that, if it appears that Defendant is in military service, the court may not enter a default judgment against the absent member until after the court appoints an attorney to represent Defendant.

7. Sometime between the 6 August 2012 and 8 August 2012 term of Halifax County Family Court, counsel for Plaintiff in this matter requested an order from Respondent seeking further information from Defendant concerning his status under the SCRA and his future availability before ruling on his request to stay the proceedings.

8. In a hearing on Plaintiff's attorney's request, Respondent asked Plaintiff's attorney to provide supporting documents for her request that Defendant's stay be denied. Plaintiff's attorney was allowed to present arguments and evidence challenging the validity of Defendant's claim for a stay. Defendant was not present and was not represented at this proceeding. Respondent did not appoint counsel for Defendant and cites the letters from Defendant and his Commanding officer referring to "the advice of counsel" as evidence.

9. Plaintiff's attorney provided Respondent with an undated, uncited publication, entitled "CROSSING THE MILITARY MINEFIELD: A JUDGE'S GUIDE TO MILITARY DIVORCE IN NORTH CAROLINA" by Mark E. Sullivan, discussing the SCRA and ways to challenge the claims of servicemen under the SCRA, specifically detailing ways that a judge could deny a serviceman a stay, when so requested, by finding that the serviceman did not show "good faith and diligence" when responding to a court action. Here, Defendant was not properly served with any motion or objection from Plaintiff's counsel, had no notice of her objections to his request for a stay, and was not provided with the documents Plaintiff's counsel presented to Respondent, which Respondent used in consideration of the Plaintiff's counsel's objections.

10. The same article presented to Respondent by Plaintiff's attorney also says in plain language that counsel should be appointed on behalf of an absent serviceman before the entry of a default judgment.

11. Respondent, relying upon the information presented by Plaintiff's attorney, consented to the order requested by Plaintiff's attorney and tasked Plaintiff's attorney with drafting the order requesting

more information from Defendant. Respondent entered the order on 4 September 2012 declaring that the information provided by Defendant and his commanding officer was insufficient to justify a request for a stay, and gave Defendant a deadline of 1 October 2012 to provide further justification for his request for a stay. Tracking information reveals that order was not received by Defendant until 24 September 2012, less than one week before the deadline presented in the order.

12. In response to the 4 September 2012 order, neither Defendant, nor anyone representing Defendant, replied to Plaintiff's attorney's inquiries for more information concerning his claim that he would be unable to participate in the scheduled court proceedings. Defendant claims that information about his military mission was confidential and that he could not provide that information to the Court.

13. On 5 November 2012, Respondent denied Defendant's request for a stay, citing "a lack of good faith and due diligence" by Defendant in failing to respond to the Court's efforts to get more information. Respondent decided that the failure of Defendant to respond to the order for more information was "a willful and direct intention to maneuver and prolong the case at the Defendant's will for as long as the Defendant saw fit without regard to the Plaintiff."

14. In subsequent legal proceedings on 3 December 2012 and 4 March 2013 Respondent entered default judgments against Defendant. Defendant was not present and was not represented at any of these proceedings.

15. Nowhere in the case file for Halifax County File No. 12-CVD-733, prior to or concurrent with the entry of the aforementioned default judgments, is there any notice of representation, appointment of counsel, or any other filings, correspondence, or similar documentary evidence to suggest that Defendant was represented in this matter by counsel. Defendant retained Mr. William T. Skinner IV as counsel on 6 May 2013, within a month of his return to North Carolina.

16. Despite the absence of any legal filing or notice or representation on behalf of Defendant, Respondent claims that she determined that Defendant was represented by counsel based on the following statement in his letter requesting the stay: "Legal counsel informs me that federal law requires a stay of proceedings for a

minimum of 90 days for service members on active duty (50 U.S.C. App. 522(a) (1))." Nowhere in Defendant's is [sic] letter, or the letter from his commanding officer, is any legal counsel named nor is any contact information provided for any legal counsel. Nothing in the [sic] either letter suggests that any counsel referred to is or was licensed to practice in the state of North Carolina.

17. The actions identified by the Commission as misconduct by Respondent, while in violation of the North Carolina Code of Judicial Conduct, do not appear to be the result of any willful or intentional misconduct by Respondent who believed at all times that she was acting within the scope of her discretion and that she was acting to preserve the integrity of the Court. Rather Respondent's misconduct appears to have resulted from insufficient inquiry into her obligations under the SCRA, her insufficiently-based conclusion that Defendant had legal representation, and from an inappropriate reliance on legal arguments advanced by one party that Respondent did not sufficiently research for herself.

18. Respondent has a good reputation in her community. The actions identified by the Commission as misconduct by Respondent appear to be isolated and do not form any sort of recurring pattern of misconduct, and Respondent has been fully cooperative with the Commission's investigation, voluntarily providing information about the underlying legal matter and fully and openly admitting error.

19. Respondent agreed to enter into a Stipulation to bring closure to the matter and because of her concern for protecting the integrity of the court system. With the benefit of hindsight, Respondent now admits and understands her error and that in fact her actions, even if unintentional and not motivated by malice or ill-intent, did constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Respondent acknowledged that she has learned a valuable lesson from this incident and will be particularly vigilant to changes to the laws that affect the growing number of servicemen and servicewomen in North Carolina, and will make every effort to ensure that every person legally interested in a proceeding receives their opportunity to be heard according to the law in the [sic] all future dealings.

20. Respondent agreed to accept a recommendation of public reprimand from the Commission and acknowledged that the conduct set out in the stipulations establishes by clear and convincing evidence that this conduct is in violation of the North Carolina Code of Judicial Conduct and is prejudicial to the administration of justice that brings the judicial office into disrepute in violation of G.S. § 7A-376(b).

In addition to these findings of fact, the Commission made the following conclusions of law based on clear and convincing evidence:

1. Respondent's conduct, as set forth in Paragraphs One through Twenty of the findings of fact, constitutes conduct in violation of Canons 1, 2A, 3A(1) and 3A(4) of the North Carolina Code of Judicial Conduct.

2. Respondent's conduct, as set forth in Paragraphs One through Twenty of the Findings of Fact, constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. §7A- 376(b).

When reviewing a recommendation from the Commission, the Supreme Court "acts as a court of original jurisdiction, rather than in its typical capacity as an appellate court." *In re Hartsfield*, 365 N.C. 418, 428, 722 S.E.2d 496, 503 (2012) (order) (citation and quotation marks omitted). We have discretion to "adopt the Commission's findings of fact if they are supported by clear and convincing evidence, or [we] may make [our] own findings." *Id.* (alterations in original) (citations and quotation marks omitted). The scope of our review is to "first determine if the Commission's findings of fact are adequately supported by clear and convincing evidence, and in turn, whether those findings support its conclusions of law." 365 N.C. at 429, 722 S.E.2d at 503 (citation and quotation marks omitted).

After careful review, this Court concludes that the Commission's findings of fact are supported by clear, cogent, and convincing evidence in the record. In addition, we conclude that the Commission's findings of fact support its conclusions of law. We therefore accept the Commission's findings and adopt them as our own. Based upon those findings and conclusions and the recommendation of the Commission, we conclude and adjudge that respondent be publicly reprimanded.

Therefore, pursuant to N.C.G.S. §§ 7A-376(b) and -377(a5), it is ordered that respondent Brenda G. Branch be PUBLICLY REPRIMANDED for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S.

§ 7A-376(b) and which violates Canons 1, 2A, 3A(1), and 3A(4) of the Code of Judicial Conduct.

By order of the Court in Conference, this the 22nd day of January, 2015.

s/Beasley, J.
For the Court

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

IN THE MATTER OF C.W.F.

No. 84PA14

(Filed 23 January 2015)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 753 S.E.2d 736 (2014), vacating and remanding an order entered on 22 August 2012 by Judge Don W. Creed, Jr. in District Court, Moore County. Heard in the Supreme Court on 13 January 2015.

Roy Cooper, *Attorney General*, *by Josephine Tetteh*, *Assistant Attorney General*, *for petitioner-appellant State of North Carolina.*

Staples S. Hughes, *Appellate Defender*, *by David W. Andrews*, *Assistant Appellate Defender*, *for respondent-appellee C.W.F.*

Miranda R. McCoy for Jackson Springs Treatment Facility, *amicus curiae.*

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION, AND DUKE ENERGY CAROLINAS, LLC v. ATTORNEY GENERAL ROY COOPER AND NORTH CAROLINA WASTE AWARENESS AND REDUCTION NETWORK

No. 12A14

(Filed 23 January 2015)

1. Utilities—general rate case—changing economic conditions—impact on customers—findings

The Utilities Commission made sufficient findings regarding the impact of changing economic conditions upon customers in a general rate case and those findings were supported by competent, material, and substantial evidence in view of the entire record. The Commission's findings not only demonstrated that the Commission considered the impact of changing economic conditions upon customers, but also specified about how that factor influenced the Commission's decision to authorize a 10.2% return on equity. These findings were supported by the evidence before the Commission, including public witness testimony, expert testimony, and a Stipulation of Agreement between Duke Energy and the Public Staff.

2. Utilities—general rate case—single coincident peak cost-of-service methodology—just and reasonable—substantial evidence supporting finding

Although an intervenor in a general rate case argued that the Utilities Commission's order authorized preferential treatment of the industrial class to the detriment of the residential class, there was substantial evidence in the record to support the Commission's finding that the use of single coincident peak (1CP) cost-of-service methodology allocated costs equitably. The Commission considered all the evidence presented by the parties, explained the weight given to the evidence, and concluded that the use of 1CP methodology was "just and reasonable" in light of the specific characteristics of Duke's system. It is not the function of the Supreme Court to determine whether there is evidence to support a position the Commission did not adopt.

3. Utilities—general rate case—errors—improper costs submitted—corrective steps taken

The Utilities Commission's findings in a general rate case were supported by substantial evidence in the record, including

the testimony of witnesses for both Duke and the Public Staff acknowledging that errors occurred and that corrective steps were taken to resolve the errors. An intervenor did not show that the Commission allowed Duke to recover any improper costs from ratepayers.

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

On direct appeal as of right pursuant to N.C.G.S. §§ 7A-29(b) and 62-90(d) from a final order of the North Carolina Utilities Commission entered on 24 September 2013 in Docket No. E-7, Sub 1026. Heard in the Supreme Court on 8 September 2014.

Troutman Sanders LLP, by Kiran H. Mehta; Heather Shirley Smith, Deputy General Counsel, and Charles A. Castle, Associate General Counsel, Duke Energy Carolinas, LLC; and Williams Mullen, by Christopher G. Browning, Jr., for applicant-appellee Duke Energy Carolinas, LLC.

Antoinette R. Wike, Chief Counsel, and William E. Grantmyre, David T. Drooz, and Robert S. Gillam, Staff Attorneys, for intervenor-appellee Public Staff – North Carolina Utilities Commission.

Kevin Anderson, Senior Deputy Attorney General; Phillip K. Woods, Special Deputy Attorney General; Michael T. Henry, Assistant Attorney General; and John F. Maddrey, Solicitor General, for intervenor-appellant Roy Cooper, Attorney General.

Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn; and John D. Runkle for NC WARN, intervenor-appellant.

JACKSON, Justice.

In this case we consider whether the order of the North Carolina Utilities Commission ("the Commission") authorizing a 10.2% return on equity ("ROE") for Duke Energy Carolinas ("Duke") contained sufficient findings of fact to demonstrate that the order was supported by competent, material, and substantial evidence in view of the entire record. *See* N.C.G.S. § 62-94 (2013). In addition, we consider whether the Commission's use of the single coincident peak ("1CP") cost-of-service methodology unreasonably discriminated against residential

customers and whether the Commission inappropriately shifted certain expenses to ratepayers. Because we conclude that the Commission made sufficient findings of fact regarding the impact of changing economic conditions upon customers, that the use of 1CP was supported by substantial evidence, and that no improper costs were included in the Commission's order, we affirm.

On 4 February 2013, Duke filed an application with the Commission requesting authority to adjust and increase its North Carolina retail electric service rates to produce an additional $446,000,000, yielding a net increase of 9.7% in overall base revenues. The application requested that rates be established using an ROE of 11.25%. The ROE represents the return that a utility is allowed to earn on the equity-financed portion of its capital investment by charging rates to its customers. As a result, the ROE approved by the Commission affects profits for shareholders and costs to consumers. *State ex rel. Utils. Comm'n v. Cooper*, 367 N.C. 430, 432, 758 S.E.2d 635, 636 (2014) (citations omitted). "The ROE is one of the components used in determining a company's overall rate of return." *Id.* (citation omitted).

On 4 March 2013, the Commission entered an order declaring this proceeding a general rate case and suspending the proposed new rates for up to 270 days. The Commission scheduled five hearings across the state to receive public witness testimony. The Commission also scheduled an evidentiary hearing for 8 July 2013 to receive expert witness testimony. The Attorney General of North Carolina and the Public Staff of the Commission intervened as allowed by law. *See* N.C.G.S. §§ 62-15, -20 (2013). In addition, several parties filed petitions to intervene, including the North Carolina Waste Awareness and Reduction Network ("NC WARN").

On 17 June 2013, Duke and the Public Staff filed an Agreement and Stipulation of Settlement with the Commission. The Stipulation produced a net increase of $234,480,000 in annual revenues and an ROE of 10.2%. The Stipulation provided for the use of the 1CP cost-of-service methodology. Among the parties contesting the Stipulation were the Attorney General and NC WARN.

During the hearings, the Commission received testimony from 131 public witnesses, and the parties presented both expert testimony and documentary evidence. The evidence presented before the Commission will be discussed in greater detail as necessary throughout this opinion.

On 24 September 2013, the Commission entered an order granting a $234,480,000 annual retail revenue increase, approving an ROE of 10.2%, and authorizing the use of the 1CP cost-of-service methodology as agreed to in the Stipulation. The Commission reviewed the evidence before it and stated that it must consider whether the ROE is reasonable and fair to customers. *See State ex rel. Utils. Comm'n v. Cooper* ("*Cooper I*"), 366 N.C. 484, 493, 739 S.E.2d 541, 547 (2013). The Commission concluded that the rate increase, ROE, and cost-of-service methodology set forth in the Stipulation were "just and reasonable to the Company's customers and to all parties of record in light of all the evidence presented." The Attorney General and NC WARN appealed the Commission's order to this Court as of right pursuant to N.C.G.S. §§ 7A-29(b) and 62-90.

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) (2013). When reviewing an order of the Commission, this Court may, *inter alia*,

> 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
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> (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.

Id. § 62-94(b). Pursuant to subsection 62-94(b) this Court must determine whether the Commission's findings of fact are supported by competent, material, and substantial evidence in view of the entire record. *Id.*; *CUCA I*, 348 N.C. at 460, 500 S.E.2d at 699 (citation omitted). "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." *CUCA I*, 348 N.C. at 460, 500 S.E.2d at 700 (alteration in original) (citations and quotation marks omitted). The Commission must include all necessary findings of fact, and failure to do so constitutes an error of law. *Id.* (citation omitted).

[1] The Attorney General argues that the Commission's order is legally deficient because it is not supported by competent, material, and substantial evidence and does not include sufficient findings, reasoning, and conclusions. Specifically, the Attorney General contends that the Commission failed to make findings of fact showing in "meaningful detail" how it "quantified" the impact of changing economic conditions upon customers when determining the proper ROE. We disagree.

Pursuant to subdivision 62-133(b)(4) of the North Carolina General Statutes, the Commission must fix a rate of return that

> will enable the public utility by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors, . . . 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) (2013). In *Cooper I* we observed that this provision, along with Chapter 62 as a whole, requires the Commission to treat consumer interests fairly—not indirectly or as "mere afterthoughts." 366 N.C. at 495, 739 S.E.2d at 548. But although the Commission must make findings of fact with respect to the impact of changing economic conditions upon consumers, "we did not state in

Cooper I that the Commission must 'quantify' the influence of this factor upon the final ROE determination." *State ex rel. Utils. Comm'n v. Cooper*, 367 N.C. 444, 450, 761 S.E.2d 640, 644 (2014) (citations omitted).

The evidence before the Commission included expert testimony and documentary evidence concerning ROE. Duke presented the testimony of Robert B. Hevert, Managing Partner of Sussex Economic Advisers, LLC. Hevert testified in support of the 10.2% ROE agreed to in the Stipulation. Although Hevert originally had recommended an ROE of 11.25%, he testified that he respected Duke's determination that an ROE of 10.2% would be sufficient to raise necessary capital. Hevert also discussed the effect of capital market conditions upon Duke's North Carolina customers. He testified that although North Carolina's unemployment rate was higher than the national average, the State's GDP growth and expected household income growth exceeded the national average. Hevert noted that North Carolina's average residential electric rates were approximately 12.46% below the national average. Hevert testified that his ROE analysis reflected changing economic conditions.

The Public Staff presented the testimony of Ben Johnson, Consulting Economist and President of Ben Johnson Associates, Inc. Johnson also supported the 10.2% ROE agreed to in the Stipulation. He explained that he had computed an ROE range of 9.75% to 10.75% using the comparable earnings method and that an ROE of 10.2% would fall just below the midpoint of that range. Johnson testified that he took into consideration changing economic conditions and determined that the Stipulation is "responsive" to those "difficult economic conditions."

The Commercial Group—representing some 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 did not recommend a specific ROE, but noted that Hevert's original recommendation of 11.25% exceeded the range of recently authorized ROEs across the country. They testified that the 10.2% ROE contained in the Stipulation "provides for significant movement on the Commercial Group's concerns regarding rate of return on equity."

Finally, the Attorney General introduced documentary evidence intended to show that setting a lower ROE results in lower rates and

a report comparing average utility bills and average disposable income on a state-by-state basis.

The Commission stated that it gave "substantial weight" to Hevert's testimony that, although North Carolina's unemployment rate was higher than the national average, the State enjoyed lower average electric rates, higher expected household income growth, and superior GDP growth as compared with the nation as a whole. Similarly, the Commission stated that it gave "substantial weight" to Johnson's testimony that the recent financial crisis had resulted in a period of "prolonged weakness." The Commission noted that both Hevert and Johnson testified that economic conditions facing customers have improved since the financial crisis. Furthermore, the Commission found that sixty-eight of the public witnesses who testified at the hearings stated that "the rate increase was not affordable to many customers," including the elderly, the unemployed and underemployed, the poor, and persons with disabilities. Nevertheless, the Commission explained that

> nine public witnesses testified that they understood [Duke's] need to increase rates in an effort to retire older coal plants and replace them with natural gas generation. In addition, 22 public witnesses expressed the view that the Company should be required to discontinue its fossil fuel and nuclear generation in favor of energy efficiency and renewable resources.

The Commission found that the Stipulation "result[ed] in lower rates to consumers in the existing economic environment and provides consumers with greater rate stability." The Commission noted that the Stipulation provided for a phase-in of the rate increase in which $30 million of the total annual revenue increase would be deferred for two years. The Commission acknowledged that this provision only mitigated the rate increase temporarily, but found that it would "help ratepayers at a time when the impact of economic conditions is relatively severe." In addition, the Commission noted that in the Stipulation, Duke agreed not to seek another increase in base rates for two years. The Commission found that this provision has "particular value to customers" because it would provide rate stability during a period in which Duke is planning to make large capital investments. Finally, the Commission explained that the Stipulation requires Duke to contribute $10 million for energy assistance for low-income customers.

Ultimately, the Commission found:

16. Changing economic conditions in North Carolina during the last several years have caused high levels of unemployment, home foreclosures and other economic stress on [Duke's] customers.

17. The rate increase approved in this case, which includes the approved return on equity and capital structure, will be difficult for some of [Duke's] customers to pay, in particular [Duke's] low-income customers.

18. Continuous safe, adequate and reliable electric service by [Duke] is essential to the support of businesses, jobs, hospitals, government services, and the maintenance of a healthy environment.

19. The return on equity and capital structure approved by the Commission appropriately balances the benefits received by [Duke's] customers from [Duke's] provision of safe, adequate and reliable electric service in support of businesses, jobs, hospitals, government services, and the maintenance of a healthy environment with the difficulties that some of [Duke's] customers will experience in paying [Duke's] increased rates.

20. The 10.2% return on equity and the 53% equity financing approved by the Commission in this case result in a cost of capital that is as low as reasonably possible. They appropriately balance [Duke's] need to obtain equity financing and maintain a strong credit rating with its customers' need to pay the lowest possible rates.

21. The difficulties that [Duke's] low-income customers will experience in paying [Duke's] increased rates will be mitigated to some extent by the $10 million of shareholder funds that [Duke] will contribute to assist low-income customers.

These findings of fact not only demonstrate that the Commission considered the impact of changing economic conditions upon customers, but also specify how this factor influenced the Commission's decision to authorize a 10.2% ROE as agreed to in the Stipulation. These findings are supported by the evidence before the Commission, including public witness testimony, expert testimony, and the Stipulation itself. Therefore, we hold that the Commission made sufficient findings regarding the impact of changing economic conditions upon customers and that these findings are supported by competent, material, and substantial evidence in view of the entire record.

[2] In the second issue before us, NC WARN argues that the Commission's order authorized preferential treatment of the industrial class to the detriment of the residential class. NC WARN observes that the Commission approved use of the 1CP cost-of-service methodology for allocating costs and contends that this methodology results in a greater rate increase for the residential class. NC WARN asserts that this use of 1CP is unjustified and constitutes unreasonable discrimination. We disagree.

Section 62-140 prohibits unreasonable or unjust discrimination among customer classes. *CUCA I*, 348 N.C. at 467, 500 S.E.2d at 704 (citation omitted). The statute states in pertinent part:

> No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service.

N.C.G.S. § 62-140(a) (2013). "The charging of different rates for services rendered does not *per se* violate this statute." *CUCA I*, 348 N.C. at 468, 500 S.E.2d at 704 (citation omitted). But any differences in rates between customer classes "must be based on reasonable differences in conditions," including such factors as quantity of use, time of use, manner of service, and costs of rendering the various services. *Id.* (citation omitted).

The witnesses who testified before the Commission disagreed whether 1CP is a fair cost-of-service methodology. Phillip O. Stillman, Director of Regulatory Strategy and Research for Duke Energy Business Services, LLC, supported the use of 1CP. Stillman explained that 1CP allocates costs based upon how much demand each customer class placed upon the system during the single hour in the test year when total demand peaked. Stillman testified that Duke's historical load profile reflects a predominant summer peak and that using 1CP would allocate costs correctly in light of the actual load characteristics of Duke's system. Similarly, Kroger presented the testimony of Kevin C. Higgins, Principal of Energy Strategies, LLC, who explained that a utility's resource planning is driven by its need to meet its summer peak. In addition, Nicholas Phillips, Jr., Managing Principal of Brubaker & Associates, Inc., testified that use of the 1CP methodology would allocate cost responsibility to customer classes properly and would minimize Duke's need for new generating capacity.

In contrast, NC WARN presented the testimony of William B. Marcus, Principal Economist for JBS Energy, Inc., who opposed the use of 1CP in this case. Marcus testified that costs arise not only from Duke's need to meet its peak demand, but from factors that are related to the amount of energy produced over the entire year, such as expenses for fuel handling, ash disposal, fuel transport, and water and consumable chemicals. Based upon these other costs, Marcus stated that 1CP may allocate costs unfairly and allow industrial customers to pay less than other customer classes. Michael R. Johnson, Senior Analyst in Greenpeace's Climate and Energy Campaign, also opposed using 1CP and asserted that this methodology contributes to environmental harm by encouraging the use of high emissions energy sources. Both witnesses recommended including a component in the cost-of-service methodology that accounts for the total energy consumed by each customer class.

The Commission stated that it gave "substantial weight" to Stillman's "undisputed testimony" that having sufficient generation and transmission resources to meet its summer peak load requirements "is an essential planning criterion of [Duke's] system." The Commission found that the use of 1CP would allow all customer classes to share equitably in fixed costs relative to the demands they place on the system during the summer peak. But the Commission explained that the alternative methodologies recommended by NC WARN and Greenpeace were not supported by substantial evidence and had not been "adequately applied and analyzed with regard to the operating characteristics of the Company's system." As a result, the Commission concluded that their experts' testimony was entitled to "little weight."

Ultimately, the record contained conflicting evidence regarding whether the use of 1CP was reasonable and fair to Duke's different customers. The Commission considered all the evidence presented by the parties, explained the weight given to the evidence, and concluded that the use of 1CP methodology here was "just and reasonable" in light of the specific characteristics of Duke's system. We are mindful that "[i]t is not the function of this Court to determine whether there is evidence to support a position the Commission did not adopt. . . . The credibility of the testimony and the weight to be accorded it are for the Commission," rather than the reviewing court, "to decide." *State ex rel. Utils. Comm'n v. Piedmont Natural Gas Co.*, 346 N.C. 558, 569, 488 S.E.2d 591, 598 (1997) (citations omitted). We hold that there is substantial evidence in the record to support the

Commission's finding that the use of 1CP allocates costs "equitably." NC WARN has not shown that the use of 1CP here results in unreasonable or unjust discrimination.

[3] Finally, NC WARN argues that certain costs included in the Stipulation are not reasonable operating expenses and should not be recovered from ratepayers. We disagree.

In fixing rates the Commission must ascertain a utility's reasonable operating expenses. N.C.G.S. § 62-133(b)(3), (5) (2013). The Commission must fix rates that will allow the utility to recover its reasonable operating expenses and receive a fair rate of return on the cost of the property used and useful in providing the service rendered to the public. *Id.* § 62-133(b)(5); *see also State ex rel. Utils. Comm'n v. Thornburg*, 325 N.C. 463, 467 n.2, 385 S.E.2d 451, 453 n.2 (1989). "The findings of the Commission, when supported by competent evidence, are conclusive." *State ex rel. Utils. Comm'n v. N.C. Power*, 338 N.C. 412, 422, 450 S.E.2d 896, 901-02 (1994) (citation omitted), *cert. denied*, 516 U.S. 1092, 116 S. Ct. 813, 133 L. Ed. 2d 758 (1996).

Before the Commission Marcus testified that Duke should not be allowed to recover costs associated with stock-based compensation, advertising, dues, donations, political contributions, sponsorships, survey research, and liability insurance for directors and officers. In response to his concerns, Duke presented witnesses Carol E. Shrum, Director of Rates and Regulatory Strategy for Duke; Paul R. Newton, State President for Duke; and J. Danny Wiles, Director for Regulated Accounting for Duke Energy Corporation. Shrum disagreed with Marcus about advertising, some of the disputed dues, survey research, and liability insurance for directors and officers, and testified that these costs constitute reasonable operating expenses. Similarly, Newton testified that stock-based compensation is a proper and reasonable expense that is allowable in setting rates.

Nevertheless, Shrum testified that the sponsorships, political contributions, donations, and some additional dues challenged by Marcus had been removed from Duke's cost of service in the Stipulation and would not be recovered from Duke's North Carolina customers. Both Newton and Wiles acknowledged that some of these expenses were not reasonable operating expenses and had been included because of errors by Duke. Wiles explained that "over 95%" of these errors already had been identified by the Public Staff and removed from the Stipulation. With respect to the remaining errors, Newton testified that they subsequently were corrected. Similarly,

Katherine A. Fernald, Assistant Director in the Accounting Division of the Public Staff, testified that no unlawful expenses remained in the Stipulation.

In its order the Commission summarized the evidence concerning each expense that Marcus alleged was improper. The Commission concluded that some of these expenses were reasonable and could be recovered from ratepayers. But the Commission was "quite disturbed" to find that political contributions, which may not be recovered from ratepayers, were included in Duke's original application. The Commission ordered Duke "to conduct an internal root cause analysis" of this error and to file a report by 31 December 2013. Nevertheless, based upon the evidence in the record, the Commission concluded that "all inappropriately coded charges" had been removed from the cost of service during the course of the proceeding. The Commission found that "any charges remaining outside of those reconciled in the Stipulation were subsequently addressed by the Company through additional adjustments, or appropriately accounted for by the Company's accounting system." We conclude that the Commission's findings are supported by substantial evidence in the record, including the testimony of witnesses for both Duke and the Public Staff acknowledging that errors occurred and explaining that corrective steps were taken to resolve the errors. NC WARN has not shown that the Commission allowed Duke to recover any improper costs from ratepayers.

Accordingly, the order of the Commission is affirmed.

AFFIRMED.

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

STATE v. GRICE

[367 N.C. 753 (2015)]

STATE OF NORTH CAROLINA v. JERRY WADE GRICE, JR.

No. 501PA12

(Filed 23 January 2015)

1. Search and Seizure—motion to suppress—plain view doctrine—officers' access to contraband

It was not error for the trial court to deny defendant's motion to suppress evidence of marijuana plants seized without a warrant from an area outside of his home in view of his driveway. The investigating officers had a lawful right of access from the driveway to the marijuana plants, which were approximately fifteen yards away in an unfenced area bordering a wood line. Even assuming the plants were in the home's curtilage, the officers did not violate the Fourth Amendment by traveling from one portion of the curtilage to another to seize the plants that were in plain view. The seizure was a minimal intrusion on defendant's property rights when balanced against the State's interest in seizing contraband.

2. Search and Seizure—motion to suppress—exigent circumstances

It was not error for the trial court to deny defendant's motion to suppress evidence of marijuana plants seized without a warrant from an area outside of defendant's home. Exigent circumstances justified the seizure of the plants to prevent their destruction. The plants were outside of defendant's home in small, transportable pots; there was a vehicle in the driveway, indicating someone may have been in the home; and it may have been dangerous to leave an officer behind while the other applied for a warrant.

3. Search and Seizure—motion to suppress—plain error review

Admission of evidence of marijuana plants seized without a warrant from an area outside of defendant's home did not amount to plain error. Even assuming the admission was erroneous, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings because defendant acknowledged that the marijuana was his.

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

Justice HUDSON dissenting.

Justice BEASLEY joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 735 S.E.2d 354 (2012), vacating a judgment entered on 14 December 2011 by Judge James G. Bell in Superior Court, Johnston County, and remanding for a new trial. Heard in the Supreme Court on 19 November 2013.

Roy Cooper, *Attorney General*, *by Derrick C. Mertz*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *and Jon H. Hunt and Benjamin Dowling-Sendor*, *Assistant Appellate Defenders*, *for defendant-appellee.*

MARTIN, Chief Justice.

Defendant grew marijuana in view of his driveway, leaving three potted plants exposed to any visitor who might approach his residence. Two detectives did just that, and when they saw the plants, they seized them before returning the following day with a warrant to search defendant's home. At trial, the court denied defendant's motion to suppress the evidence of the seized plants. On appeal, the Court of Appeals reversed the trial court. We now reverse the decision of the Court of Appeals.

On 5 May 2011, the Johnston County Sheriff's Office received an anonymous tip that Jerry Grice, Jr. was growing marijuana at a particular residence on Old School Road. In response, the Sheriff's Office dispatched two detectives, Guseman and Allen, to conduct a knock and talk investigation at the address. Both detectives had extensive training in narcotic investigations, including training in identifying marijuana. The property was located in a rural area, and the house was situated along with several outbuildings approximately one-tenth of a mile down a dirt path. After driving up the driveway, the detectives parked behind a white vehicle on the right side of the house.

The front door of the house was inaccessible, covered with plastic, and obscured by furniture. However, the officers noticed that the driveway led to a side door, which appeared to be used as the main entrance. Once the detectives had parked, two dogs ran up to their car and started barking. Detective Allen remained in the driveway to

calm the dogs while Detective Guseman knocked on the side door. No one answered his knocks. From the driveway, Detective Allen noticed several buckets at a distance of approximately fifteen yards. Due to his training, Detective Allen recognized the plants growing in three of the buckets as marijuana. Detective Allen called Detective Guseman over to the driveway to observe the plants. Also based on his training, Detective Guseman identified the plants as marijuana without approaching the buckets.

After identifying the plants from the driveway, the officers walked to the plants and telephoned Captain Fish to determine how best to proceed. The Captain instructed Detectives Guseman and Allen to seize the plants and return to the Sheriff's Office to obtain a search warrant. A search warrant for the residence was executed the next morning. Detectives from the Sheriff's Office returned to the residence and arrested defendant, who admitted that the plants seized the previous day were his.

Defendant was subsequently indicted for manufacturing a controlled substance. A second charge was brought but later dropped by the State and is not relevant to our discussion here. Defendant filed a motion to suppress evidence of the seized marijuana plants, claiming discovery of the plants was the product of an illegal search and seizure. The motion was denied. At trial, defendant failed to object to the introduction of the plants on this constitutional basis. The jury unanimously found defendant guilty, and the court sentenced him to a suspended term of six to eight months with supervised probation. Defendant appealed.

The Court of Appeals reversed, holding that "the trial court erred in its conclusion that no Fourth Amendment violation resulted from the seizure [of the plants]." *State v. Grice*, ___ N.C. App. ___, ___, 735 S.E.2d 354, 358 (2012). The court reasoned that admitting the State's evidence in this case would make it "difficult to articulate a limiting principle such that 'knock and talk' investigations would not become a pretense to seize any property within the home's curtilage." *Id.* at ___, 735 S.E.2d at 358. The court further reasoned that "the trial court's finding '[t]hat this seizure was to prevent [the plants'] destruction' is not supported by competent evidence in the record." *Id.* at ___, 735 S.E.2d at 359. The court thus held that " 'exigent circumstances' cannot be a justification for this warrantless seizure." *Id.* at ___, 735 S.E.2d at 359. The court concluded its opinion by reasoning that if the evidence of the plants had properly been sup-

pressed, "the jury probably would have reached a different result" and thus, plain error occurred. *Id.* at ___, 735 S.E.2d at 359. We reverse.

[1] The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250, 111 S. Ct. 1801, 1803 (1991) (citation omitted). The protections against unreasonable searches and unreasonable seizures are distinct from one another—"[a] search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." *Horton v. California*, 496 U.S. 128, 133, 110 S. Ct. 2301, 2306 (1990) (citation omitted).

When considering whether a warrantless *search* was unreasonable, the inquiry focuses on whether an individual has " 'manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable.' " *Kyllo v. United States*, 533 U.S. 27, 33, 121 S. Ct. 2038, 2042-43 (2001) (alteration in original) (quoting *California v. Ciraolo*, 476 U.S. 207, 211, 106 S. Ct. 1809, 1811 (1986)). Privacy expectations are highest in one's home. *See Florida v. Jardines*, ___ U.S. ___, ___, 133 S. Ct. 1409, 1414 (2013).

When law enforcement observes contraband in plain view, no reasonable expectation of privacy exists, and thus, the Fourth Amendment's prohibition against unreasonable warrantless searches is not violated. *Ciraolo*, 476 U.S. at 213-15, 106 S. Ct. at 1812-14. Instead, the Fourth Amendment analysis must consider whether a subsequent warrantless seizure of the items left in plain view was reasonable. That is the case with which we are presented. Here, defendant had no privacy interest in the marijuana plants left in plain view of his driveway, where any member of the public coming to his door might have seen them. When there is no privacy interest, there can be no search under the Fourth Amendment. *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S. Ct. 2130, 2137 (1993).

We are left then to examine whether the seizure of the plants violated defendant's possessory interest in them, thereby running afoul of the Fourth Amendment. While the general rule is that warrantless seizures are unconstitutional, a warrantless seizure of an item may be justified as reasonable under the plain view doctrine, so long as three elements are met: First, "that the officer did not violate the Fourth

Amendment in arriving at the place from which the evidence could be plainly viewed"; second, that the evidence's "incriminating character . . . [was] 'immediately apparent' "; and third, that the officer had "a lawful right of access to the object itself." *Horton*, 496 U.S. at 136-37, 110 S. Ct. at 2308 (internal citations omitted); *accord State v. Virgil*, 276 N.C. 217, 227, 172 S.E.2d 28, 34 (1970). The North Carolina General Assembly has additionally required that the discovery of evidence in plain view be inadvertent. *State v. Mickey*, 347 N.C. 508, 516, 495 S.E.2d 669, 674 (citing N.C.G.S. § 15A-253 (1988)), *cert. denied*, 525 U.S. 853, 119 S. Ct. 131 (1998). The plain view doctrine represents the principle that "[t]he warrantless seizure of contraband that presents itself in this manner is deemed justified by the realization that resort to a neutral magistrate under such circumstances would often be impracticable and would do little to promote the objectives of the Fourth Amendment." *Dickerson*, 508 U.S. at 375, 113 S. Ct. at 2137 (citations omitted); *see also Texas v. Brown*, 460 U.S. 730, 739, 103 S. Ct. 1535, 1541 (1983) (plurality) ("[R]equiring police to obtain a warrant once they have obtained a first-hand perception of contraband, stolen property, or incriminating evidence generally would be a needless inconvenience.") (citation and internal quotation marks omitted).

Regarding the first element, the officers in this case were present in defendant's driveway to perform a knock and talk investigation. This matters because "[i]t is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Horton*, 496 U.S. at 136, 110 S. Ct. at 2308. Notably, defendant does not contest that this procedure was lawful, for there is an "implicit license [that] typically permits the visitor to approach the home by the front path." *Jardines*, ___ U.S. at ___, 133 S. Ct. at 1415. Secondly, testimony from both officers establishes that, based on their training and experience, they instantly recognized the plants as marijuana. Defendant does not contest the validity of that testimony. Thirdly, discovery of the marijuana was inadvertent—defendant does not allege the officers wandered the property looking for the marijuana before seeing it.

The sole point of contention is whether the officers had a lawful right of access from the driveway fifteen yards across defendant's property to the plants' location. Defendant claims that, while the officers had a lawful right to be present at the door of defendant's home, they did not have a lawful right to enter the curtilage fifteen yards

away. When describing this element, the United States Supreme Court says that the plain view doctrine " 'serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure.' " *Horton*, 496 U.S. at 135-36, 110 S. Ct. at 2307 (citation omitted); *see Illinois v. Andreas*, 463 U.S. 765, 771, 103 S. Ct. 3319, 3324 (1983) ("The plain-view doctrine authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity."). Similarly, the Court in *Horton* observed that "[w]here the *initial* intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate." 496 U.S. at 135, 110 S. Ct. at 2307 (emphasis added).

Here, the knock and talk investigation constituted the initial entry onto defendant's property which brought the officers within plain view of the marijuana plants. The presence of the clearly identifiable contraband justified walking further into the curtilage. This understanding of the "lawful right of access" element is consistent with the background precedent that informed the Court's introduction of this language in *Horton*. 496 U.S. at 137 & n.7, 110 S. Ct. at 2308 & n.7 (citing *Chapman v. United States*, 365 U.S. 610, 81 S. Ct. 776 (1961) (holding that officers who had climbed through a window of a home to perform a warrantless search violated the Fourth Amendment, and the subsequent seizure of distilling materials from inside the home was unconstitutional); *Jones v. United States*, 357 U.S. 493, 78 S. Ct. 1253 (1958) (holding that the nighttime seizure of distilling materials from a home was unconstitutional because law enforcement did not have a search warrant justifying entry into the home); *McDonald v. United States*, 335 U.S. 451, 69 S. Ct. 191 (1948) (holding that officers who had been watching the defendant for two months committed an unconstitutional search when they climbed through a window and peered through a transom to see if he was running an illegal gambling operation); *Trupiano v. United States*, 334 U.S. 699, 68 S. Ct. 1229 (1948) (holding that a warrantless planned raid on a distillery was unconstitutional), *overruled in part by United States v. Rabinowitz*, 339 U.S. 56, 66, 70 S. Ct. 430, 435 (1950); *Johnson v. United States*, 333 U.S. 10, 68 S. Ct. 367 (1948) (holding

that officers who entered a hotel room without a search warrant based on the perceived smell of opium could not justify the arrest of the occupant); *Taylor v. United States*, 286 U.S. 1, 52 S. Ct. 466 (1932) (holding that law enforcement officers who used a flashlight to peer into a garage, then broke into the garage to open cardboard boxes suspected of containing whisky, effectuated an unconstitutional search, and the subsequent seizure was also unconstitutional)). Our precedent similarly takes this point of view. *State v. Bone*, 354 N.C. 1, 8, 550 S.E.2d 482, 487 (2001) ("In North Carolina, a seizure is lawful under [the plain view] doctrine when the officer was in a place he or she had a right to be at the time the evidence was discovered, it is immediately obvious that the items observed are evidence of a crime, and the discovery is inadvertent."), *cert. denied*, 535 U.S. 940, 122 S. Ct. 1323 (2002); *State v. Hoffman*, 281 N.C. 727, 736-37, 190 S.E.2d 842, 849 (1972) ("Being lawfully in defendant's residence, the officers could examine and, without a warrant, seize 'suspicious objects in plain sight' . . . . If the officers' presence was lawful, the observation and seizure of what was then and there apparent could not in itself be unlawful.") (alteration in original) (citations and internal quotation marks omitted).

Defendant places special emphasis on the fact that the plants were on the "curtilage" of the property. The curtilage is the area " 'immediately surrounding and associated with the home.' " *Jardines*, ___ U.S. at ___, 133 S. Ct. at 1414 (quoting *Oliver v. United States*, 466 U.S. 170, 180, 104 S. Ct. 1735, 1742 (1984)). In a non-Fourth Amendment case, we have said "the curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings." *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955) (citations omitted). The curtilage does enjoy some measure of Fourth Amendment protection, *Jardines*, ___ U.S. at ___, 133 S. Ct. at 1414, because it is "intimately linked to the home, both physically and psychologically," *Ciraolo*, 476 U.S. at 213, 106 S. Ct. at 1812. As such, it serves as the buffer between the intimate activities of the home and the prying eyes of the outside world. But, law enforcement is not required to turn a blind eye to contraband or otherwise incriminating materials left out in the open on the curtilage. *Ciraolo*, 476 U.S. at 213, 106 S. Ct. at 1812. Neither is law enforcement absolutely prohibited from crossing the curtilage and approaching the home, based on our society's recognition that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers . . . ."

Jardines, ___ U.S. at ___, 133 S. Ct. at 1416 (citation and internal quotation marks omitted).

As a buffer, the curtilage protects privacy interests and prevents unreasonable searches on the curtilage. *See generally Jardines*, ___ U.S. ___, 133 S. Ct. 1409; *United States v. Dunn*, 480 U.S. 294, 107 S. Ct. 1134 (1987). Whether the curtilage enjoys coextensive protection against unreasonable seizures is less clear. We do know, however, that constitutionally protected property interests exist on a spectrum. On one end of the spectrum, we have the home, which is protected by the highest constitutional threshold and thus may only be breached in specific, narrow circumstances. On the other end, we have open fields, which even though they may be private property may be reasonably traversed by law enforcement under the Fourth Amendment. *Oliver*, 466 U.S. at 176-77, 104 S. Ct. at 1740. Curtilage falls somewhere in between. The protection afforded the curtilage, at least in the context of violations of privacy, is determined by looking at several factors: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Dunn*, 480 U.S. at 301, 107 S. Ct. at 1139 (citations omitted). These considerations are important not because they will "yield[ ] a 'correct' answer to all extent-of-curtilage questions. . . . [but because] they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.* at 301, 107 S. Ct. at 1139-40.

Borrowing these considerations for our analysis today, we conclude that the unfenced portion of the property fifteen yards from the home and bordering a wood line is closer in kind to an open field than it is to the paradigmatic curtilage which protects "the privacies of life" inside the home. *Oliver*, 466 U.S. at 180, 104 S. Ct. at 1742 (citation and internal quotation marks omitted). However, even if the property at issue can be considered the curtilage of the home for Fourth Amendment purposes, we disagree with defendant's claim that a justified presence in one portion of the curtilage (the driveway and front porch) does not extend to justify recovery of contraband in plain view located in another portion of the curtilage (the side yard). By analogy, it is difficult to imagine what formulation of the Fourth Amendment would prohibit the officers from seizing the contraband if the plants had been growing on the porch—the paradigmatic cur-

tilage—rather than at a distance, particularly when the officers' initial presence on the curtilage was justified. The plants in question were situated on the periphery of the curtilage, and the protections cannot be greater than if the plants were growing on the porch itself. The officers in this case were, by the custom and tradition of our society, implicitly invited into the curtilage to approach the home. Traveling within the curtilage to seize contraband in plain view within the curtilage did not violate the Fourth Amendment.[1]

Our decision in *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972), is illustrative of this principle. In that case, a deputy arrived at the defendant's home to arrest the defendant. The officer saw the defendant standing in the doorway of the utility room, so the officer approached that doorway. From the doorway, the officer saw marijuana seeds on the top of a deep freezer inside the room. The defendant met the officer at the doorway and was arrested. The officer proceeded to enter the room and seize the marijuana seeds. This Court held the officer "was legally on the premises, and no search was required to discover the contraband material." *Id.* at 12, 187 S.E.2d at 713. We allowed the plain view observance of contraband from the doorway of a home to justify entry into the home. The intrusion in this case is far less invasive than entry into the home.

Whatever special protection the curtilage enjoys against warrantless seizures, that protection does not support the creation of a rule that law enforcement is automatically prohibited from crossing from one lawfully arrived at portion of the curtilage to another portion of the curtilage to retrieve inadvertently discovered contraband in plain view. This is particularly true when, as here, the contraband nature of the seized items was immediately apparent, because "any interest in possessing contraband cannot be deemed legitimate." *Illinois v. Caballes*, 543 U.S. 405, 408, 125 S. Ct. 834, 837 (2005) (citation and internal quotation marks omitted).

Because the fact that the plants were on the curtilage alone is insufficient to hold that the officers violated the Fourth Amendment

1. We decline the dissent's invitation to adopt the "pre-intrusion" framework invoked by the Florida Supreme Court over thirty years ago. *See* post at 767 (citing *Ensor v. State*, 403 So. 2d 349 (Fla. 1981), *superseded on other grounds by statute*, Fla. Stat. § 790.25(5) (Supp. 1982)). To the extent the dissent finds that case persuasive, we think these facts are the quintessential example of a " 'prior valid intrusion,' " when "an officer is legally inside, by warrant or warrant exception, a constitutionally protected area and inadvertently observes contraband also in the protected area." *Ensor*, 403 So. 2d at 352. Here, the detectives were legally inside the curtilage, a constitutionally protected area, performing a knock and talk investigation when they inadvertently observed contraband also in the protected area.

in seizing the plants, we perform the Fourth Amendment's reasonableness inquiry to conclude our evaluation of the constitutionality of the officers' actions in this case. *United States v. Jacobsen*, 466 U.S. 109, 124, 104 S. Ct. 1652, 1662 (1984). In this inquiry, " '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' " *Id.* at 125, 104 S. Ct. at 1662 (alteration in original) (citation omitted). "This rule merely reflects an application of the Fourth Amendment's central requirement of *reasonableness* to the law governing seizures of property." *Brown*, 460 U.S. at 739, 103 S. Ct. at 1542 (emphasis added). The State has a legitimate interest in seizing contraband, and the nature of the intrusion in this case was minimal. The officers were at the home in daylight; the contraband nature of the plants was readily apparent; the officers took only the plants, leaving behind the buckets and caretaking implements surrounding them; and the officers left immediately after seizing the plants. The officers did not cross or open any fence or barrier, nor did they use the sighting of the plants as an excuse to conduct a general search of the rest of the property. In other words, they did not travel outside the category of property covered by the initial invitation to enter the curtilage. Under these circumstances, the warrantless seizure of clearly identifiable contraband left in plain view of defendant's driveway was not unreasonable and the motion to suppress was properly denied.

Moreover, contrary to the concern raised by the Court of Appeals, this holding does not mean that knock and talk investigations may be used as a pretense to seize contraband in a home's curtilage. The limiting principle is what it has always been: law enforcement must have " 'some other legitimate reason for being present unconnected with a search directed against the accused.' " *Horton*, 496 U.S. at 136, 110 S. Ct. at 2307 (citation omitted). The implicit license enjoyed by law enforcement and citizens alike to approach the front doors of homes may be limited or rescinded by clear demonstrations by the homeowners and is already limited by our social customs. *See Jardines*, ___ U.S. at ___, 133 S. Ct. at 1415-16. If law enforcement officers attempt to use an unreasonable warrantless search to justify a subsequent seizure, their argument will fail. *Horton*, 496 U.S. at 136, 110 S. Ct. at 2307-08. But as the officers here did not perform an unconstitutional search and had a legitimate reason to be in the driveway, from which they saw the marijuana plants left in plain view, they lawfully seized those plants.

[2] Furthermore, the seizure was also justified by exigent circumstances. Defendant points to the fact that the officers' testimony at trial did not cite any exigencies that steered their decision to seize the marijuana before obtaining a warrant. They seized the plants because their captain told them to. But the Supreme Court "has long taken the view that 'evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.' " *Kentucky v. King*, ___ U.S. ___, ___, 131 S. Ct. 1849, 1859 (2011) (citation omitted); *accord State v. Barnard*, 362 N.C. 244, 248, 658 S.E.2d 643, 645-46 (Constitutionality "depends on the objective facts, not the officer's subjective motivation.") (citations omitted), *cert. denied*, 555 U.S. 914, 129 S. Ct. 264 (2008). Accordingly, we look at the whole record to determine if there were factors reasonably supporting the immediate seizure of the plants.

Factors long used to justify warrantless seizures have included the belief that contraband will be removed or destroyed, the possible danger to police guarding the site, and the ready destructibility of the contraband. *United States v. Turner*, 650 F.2d 526, 528 (4th Cir. 1981) (citing *United States v. Rubin*, 474 F.2d 262, 268-69 (3d Cir.) (cataloguing various exigent circumstances recognized by other circuit courts), *cert. denied*, 414 U.S. 833, 94 S. Ct. 173 (1973)); *see generally Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022 (1971), *abrogated in part by Horton*, 496 U.S. 128, 110 S. Ct. 2301. The Supreme Court has stressed the importance of "balanc[ing] the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable." *Illinois v. McArthur*, 531 U.S. 326, 331, 121 S. Ct. 946, 950 (2001) (citations omitted). This analysis led the Supreme Court to approve a warrantless seizure that was tailored to the immediate governmental need because the search was "limited in time and scope and avoid[ed] significant intrusion into the home itself." *Id.* (citations omitted). Similarly, there was no physical intrusion into the home in this case. The officers removed the three plants and the three plants alone, leaving behind the buckets in which they had been planted and the various caretaking implements surrounding them. The plants were small and easily transportable, and there was a passenger vehicle in the driveway. The fact that no one came to the door does not establish that no one was at home, but simply that no one was willing to answer the door. A reasonable officer might believe that the presence of the vehicle and the two dogs roaming the unfenced yard indicated that someone was at home and simply

remaining inside. Leaving an officer behind to secure the yard while the other officer went to get a warrant, as suggested by defendant, could have exposed that remaining officer to unknown danger. Moreover, "[f]aulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution." *King*, ___ U.S. at ___, 131 S. Ct. at 1861. Reviewing the record, it is objectively reasonable to conclude that someone may have been home, that the individual would have been aware of the officers' presence, and that the individual could easily have moved or destroyed the plants if they were left on the property. Under these facts, we find no reason to disturb the trial court's finding that "this seizure was to prevent [the plants'] destruction," and conclude that exigent circumstances justified the seizure.

[3] Finally, as acknowledged in his brief, defendant failed to object to the introduction of the challenged evidence at trial. Therefore, we review the trial court's evidentiary determination for plain error. *See* N.C. R. App. P. 10(a)(4); *see also State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012). Under the plain error standard, defendant cannot show that admission of the challenged evidence amounted to plain error.

Plain error requires that "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.' " *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (internal citations omitted). We also stated, "plain error is to be 'applied cautiously and only in the exceptional case.' " *Id.* at 518, 723 S.E.2d at 334 (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). In order to ensure plain error is reserved for the exceptional case, we stressed that plain error requires a defendant to show that the prejudicial error was one that "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 519, 723 S.E.2d at 335. When plain error analysis fails to adequately account for this element, plain error may become indistinguishable from the less stringent harmless error standard.

Even if it was error to deny the motion to suppress, it was not an error that seriously affected the fairness, integrity, or public reputation of judicial proceedings. Here, the trial court allowed evidence that defendant left three marijuana plants outside in his yard for any member of the public to see. Defendant acknowledges that the plants

were his. The inclusion of this evidence is not the "exceptional case" that justifies finding plain error. *Id.* at 518, 723 S.E.2d at 334. Accordingly, we reverse the decision of the Court of Appeals.

Defendant chose to grow marijuana in his yard, plainly visible to any visitors to his home. The law enforcement officers who visited defendant's home carefully limited the scope of their intrusion and their seizure was justified under the plain view doctrine and supported by exigent circumstances. Because defendant failed to specifically object at trial to the introduction of the plants, the plain error doctrine provides yet another reason for our decision. Therefore, we reverse the decision of the Court of Appeals.

REVERSED.

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

Justice HUDSON dissenting.

The State argues, and the majority agrees, that because the marijuana plants in defendant's backyard were in "plain view," their seizure was justified under the "plain view" doctrine. Because I conclude that this determination is based upon a mistaken assumption about how the doctrine applies when the view and seizure occur from outside a constitutionally protected area, a "pre-intrusion" scenario, I respectfully dissent.

As the Maryland intermediate appellate court has observed, "[n]eedless confusion" has arisen out of the failure by courts to distinguish "visually similar but legally distinct situations" involving the observation of contraband:

> The "plain view doctrine," as described in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 [(1971)], refers exclusively to the legal justification—the reasonableness—for the seizure of evidence which has not been particularly described in a warrant and which is inadvertently spotted in the course of a constitutional search already in progress or in the course of an otherwise justifiable intrusion into a constitutionally protected area. It has no applicability when the vantage point from which the "plain view" is made is not within a constitutionally protected area.

Scales v. State, 13 Md. App. 474, 478 n.1, 284 A.2d 45, 47 n.1 (Md. Ct. Spec. App. 1971). After *Coolidge* it was not entirely clear whether the discovery of contraband had to be "inadvertent" to justify its warrantless seizure under the "plain view" doctrine. In *Horton v. California*, 496 U.S. 128, 130, 110 S. Ct. 2301, 2304 (1990), the Supreme Court of the United States clarified that "even though inadvertence is a characteristic of most legitimate 'plain-view' seizures, it is not a necessary condition." However, as noted by the majority, our State statutes require that the discovery be inadvertent. N.C.G.S. § 15A-253 (2013) (stating that when a search is conducted via a warrant, an officer may also take possession of contraband that is "inadvertently discovered" although not specified in the warrant).

In 1971 the Supreme Court further explained the contours of what has come to be known as the "plain view" doctrine:

> [P]lain view *alone* is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.' *Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.*

Coolidge v. New Hampshire, 403 U.S. 443, 468, 91 S. Ct. 2022, 2039 (1971) (second emphasis added) (citations omitted), *abrogated in part by Horton*, 496 U.S. 128, 1105 S. Ct. 2301. In other words,

> "plain view" provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment. "Plain view" is perhaps better understood, therefore, not as an independent "exception" to the Warrant Clause, but simply as an extension of whatever the prior justification for an officer's "access to an object" may be.

Texas v. Brown, 460 U.S. 730, 738-39, 103 S. Ct. 1535, 1541 (1983) (plurality) (footnote omitted).

As the Florida Supreme Court explains in *Ensor v. State*, these visually similar situations fall into one of three categories for purposes of Fourth Amendment analysis:

> The term "plain view" has been misunderstood and misapplied because courts have made it applicable to three distinct factual situations. This has resulted in confusion of the elements of the "plain view doctrine." To eliminate this confusion, we believe it appropriate to distinguish the true "plain view doctrine" as established in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), from other situations where officers observe contraband.
>
> The first factual situation we identify as a "prior valid intrusion." In this situation, an officer is legally inside, by warrant or warrant exception, a constitutionally protected area and inadvertently observes contraband also in the protected area. It is this situation for which the United States Supreme Court created the "plain view doctrine" in *Coolidge* and held that an officer could constitutionally seize the contraband in "plain view" from within this protected area. We emphasize that it is critical under this doctrine for the officer to be already within the constitutionally protected area when he inadvertently discovers the contraband.
>
> We identify the second factual situation as a "non-intrusion." This situation occurs when both the officer and the contraband are in a non-constitutionally protected area. Because no protected area is involved, the resulting seizure has no fourth amendment ramifications, and, while the contraband could be defined as in "plain view," it should not be so labeled to prevent any confusion with the *Coolidge* "plain view doctrine."
>
> The third situation concerns a "pre-intrusion." Here, the officer is located outside of a constitutionally protected area and is looking inside that area. If the officer observes contraband in this situation, it only furnishes him probable cause to seize the item. He must either obtain a warrant or have some exception to the warrant requirement before he may enter the protected area and seize the contraband. As with the non-intrusion situation, the term "plain view" should not be employed here to prevent confusion. For clarity, we label an observation in the latter two non-*Coolidge* situations as a legally permissive "open view."

403 So. 2d 349, 352 (Fla. 1981), *superseded on other grounds by statute*, Fla. Stat. § 790.25(5) (Supp. 1982). These distinctions come from the limits to the plain view doctrine, as explained by the Supreme Court in *Texas v. Brown*. While the majority believes that this case falls within the first category of cases described in *Ensor*, I

believe it falls within the third. Consequently, the majority analyzes the constitutionality of the seizure of the contraband in this case under the "plain view" doctrine, while I analyze it as a "pre-intrusion" case.

Essentially, I do not agree with the majority that simply because the officers were lawfully on the front porch, they could move to what the State has identified as defendant's "backyard" and "behind the residence." I do not dispute that the officers here had every right to be on the front (or, in this case, side) porch to conduct a "knock and talk" investigation. *See State v. Lupek*, 214 N.C. App. 146, 151, 712 S.E.2d 915, 919 (2011) ("In North Carolina, however, no search of the curtilage occurs when an officer is in a place where the public is allowed to be, such as at the front door of a house. It is well established that '[e]ntrance [by law enforcement officers] onto private property for the purpose of a general inquiry or interview is proper.' " (alterations in original) (quoting *State v. Prevette*, 43 N.C. App. 450, 455, 259 S.E.2d 595, 599-600 (1979), *appeal dismissed and disc. rev. denied*, 299 N.C. 124, 261 S.E.2d 925, *cert. denied*, 447 U.S. 906, 100 S. Ct. 2988 (1980))). The front porch, however, is very different from the backyard and the rest of the curtilage. The Supreme Court has repeatedly emphasized the high privacy interest individuals hold in the curtilage. *See*, *e.g.*, *United States v. Dunn*, 480 U.S. 294, 300, 107 S. Ct. 1134, 1139 (1987) (recognizing "that the Fourth Amendment protects the curtilage of a house"); *United States v. Martinez–Fuerte*, 428 U.S. 543, 561, 96 S. Ct. 3074, 3084 (1976) (noting that the "sanctity of private dwellings" is "afforded the most stringent Fourth Amendment protection"). Further, as noted by the majority, this Court has specifically defined the curtilage to include areas identical to where the contraband was observed in this case: "[T]he curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings." *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955) (citations omitted). Therefore, although the officers here were lawfully on the porch that served as the main entrance to the house, they had no right to enter other portions of defendant's curtilage. Defendant's "backyard," located "behind the residence," is still "afforded the most stringent Fourth Amendment protection." *Martinez-Fuerte*, 428 U.S. at 561, 96 S. Ct. at 3084.

Because the officers were outside the protected area, I conclude that the Fourth Amendment requires either (1) a warrant or (2) probable cause and exigent circumstances to allow the officers to cross into the protected area and seize the contraband. Here there was no

warrant. On the other hand, there was probable cause given the immediately apparent contraband nature of the plants, so exigent circumstances, if they existed, could have justified a seizure of the contraband. However, I do not agree that such circumstances existed. The majority relies on the following facts to establish exigent circumstances: "[t]he plants were small and easily transportable, [ ] there was a passenger vehicle in the driveway," and two dogs were roaming around the yard. From these facts, the inference is drawn that someone was at home and could destroy the plants after the officers left the scene. Even if the officers assumed someone was at the residence, these facts do not create a typical "exigent circumstances" fact pattern. Usually, the suspect and the contraband are in one location, and the officers are in a different location—as in, the officers are outside the house and the suspect is inside with the contraband, contemplating potential destruction of it. *See*, *e.g.*, *State v. Rojas*, ___ N.C. App. ___, 745 S.E.2d 374, 2013 WL 2407224, at *5 (2013) (unpublished) (explaining that "marijuana is often times disposed of by flushing it down the toilet or putting it in the garbage disposal"). Here, on the other hand, it is the officers and the contraband that are together, and the suspect is nowhere to be seen. If these circumstances support a finding of exigent circumstances, it is difficult to imagine when a simple sighting of portable contraband would not. *See State v. Yananokwiak*, 65 N.C. App. 513, 517, 309 S.E.2d 560, 563 (1983) ("The state's argument that exigency is shown simply because drugs are easily destroyed would permit the exigency exception to swallow the entire warrant requirement."). Finally, the burden is on the State to prove the exigent circumstances. *State v. Allison*, 298 N.C. 135, 141, 257 S.E.2d 417, 421 (1979) (citation omitted). Here the State did not present any evidence to the trial court regarding exigent circumstances, but argued for it and the trial court found as fact: "That this seizure was to prevent [what appeared to marijuana plants'] destruction." The basis for this finding is not apparent, and the trial court made no conclusions of law on that issue. Therefore, exigent circumstances cannot properly justify the officers' intrusion into defendant's protected curtilage.

For these reasons, I conclude that the officers were not justified in seizing the plants here. In my view, defendant's Fourth Amendment rights were violated and the evidence should have been suppressed.

Having determined that the challenged evidence was obtained in violation of defendant's Fourth Amendment rights, and thus should have been suppressed, the issue to me becomes whether erroneous

admission of the evidence constitutes plain error. In *State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012), we recently "reaffirm[ed]" the principles forming "the plain error standard of review" on appeal:

> 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 affects the fairness, integrity or public reputation of judicial proceedings.

Id. at 518, 723 S.E.2d at 334 (brackets, citations, and internal quotation marks omitted). I disagree with the assertion that the consideration of inadmissible evidence does not affect the "fairness, integrity, or public reputation of judicial proceedings." *Id.* In my view, it does exactly that. The majority appears to suggest that because defendant actually possessed the contraband, his conviction does not offend our justice system. I cannot agree with that premise. In my view, a conviction obtained with evidence which should not have been admitted is as offensive to our justice system as a wrongful conviction.

For the above reasons, I respectfully dissent.

Justice BEASLEY joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. ANTONIO ALONZO MONROE

No. 153A14

(Filed 23 January 2015)

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. ___, 756 S.E.2d 376 (2014), finding no error after appeal of a judgment entered on 11 April 2013 by Judge Yvonne Mims Evans in Superior Court, Gaston County. Heard in the Supreme Court on 13 January 2015.

Roy Cooper, Attorney General, by LaShawn S. Piquant, Assistant Attorney General, and Daniel Snipes Johnson, Special Deputy Attorney General, for the State.

Mark Hayes for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. JOSHUA ANDREW STEPP

No. 38A14

(Filed 23 January 2015)

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. ___, 753 S.E.2d 485 (2014), reversing a judgment entered on 13 September 2011 by Judge W. Osmond Smith, III in Superior Court, Wake County and ordering that defendant receive a new trial. Heard in the Supreme Court on 12 January 2015.

Roy Cooper, *Attorney General*, *by Anne M. Middleton and Sherri Horner Lawrence*, *Assistant Attorneys General*, *for the State-appellant.*

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

PER CURIAM.

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

REVERSED.

LEXISNEXIS RISK DATA MANAGEMENT, INC., a Florida Corporation; and LEXISNEXIS RISK SOLUTIONS, INC., a Georgia Corporation	)	
v.	)	From Wake County
NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS; JOHN W. SMITH, II, in his official capacity as the Director of the North Carolina Administrative Office of the Courts; and NANCY LORRIN FREEMAN, in her official capacity as the Clerk of the Wake County Superior Court	)	

No. 101PA14

ORDER

The motion by The News and Observer Publishing Co.; Capitol Broadcasting Company, Inc.; Time-Warner Entertainment-Advance Newhouse Partnership; DTH Media Corp.; and the North Carolina Press Foundation, Inc. to file a brief supporting plaintiff-appellants is allowed.

The motion by The News and Observer Publishing Co.; Capitol Broadcasting Company, Inc.; Time-Warner Entertainment-Advance Newhouse Partnership; DTH Media Corp.; and the North Carolina Press Foundation, Inc. to participate in oral argument is allowed as follows:

Pursuant to Rule 30 of the North Carolina Rules of Appellate Procedure, petitioner-appellants have a total of thirty minutes in which to present their oral argument. Petitioner-appellants may, but are not compelled to and are under no duty to, cede a portion of those thirty minutes to The News and Observer Publishing Co.; Capitol Broadcasting Company, Inc.; Time-Warner Entertainment-Advance Newhouse Partnership; DTH Media Corp.; and the North Carolina Press Foundation, Inc. However, if petitioner-appellants and amici reach an agreement to share time, they together will have a total of thirty minutes of oral argument.

By order of the Court in Conference, this 15th day of October, 2014.

s/Edmunds, J.
For the Court

ALICE HART, RODNEY ELLIS, JUDY CHAMBERS, JOHN HARDING LUCAS, MARGARET ARBUCKLE, LINDA MOZELL, YAMILE NAZAR, ARNETTA BEVERLY, JULIE PEEPLES, W.T. BROWN, SARA PILAND, DONNA MANSFIELD, GEORGE LOUCKS, WANDA KINDELL, VALERIE JOHNSON, MICHAEL WARD, T. ANTHONY SPEARMAN, BRITTANY WILLIAMS, RAEANN RIVERA, ALLEN THOMAS, JIM EDMONDS, SASHA VRTUNSKI, PRISCILLA NDIAYE, DON LOCKE, and SANDRA BYRD, Plaintiff-Appellees	)	
v.	)	From Wake County
STATE OF NORTH CAROLINA and NORTH CAROLINA STATE EDUCATIONAL ASSISTANCE AUTHORITY, Defendants, CYNTHIA PERRY, GENNELL CURRY, THOM TILLIS and PHIL BERGER, Intervenor-Defendant-Appellants	)	

No. 372A14

ORDER

Pending before the Court is Defendant-Intervenors' Petition for Writ of Supersedeas and Motion to Expedite. On 22 September 2014, the North Carolina Court of Appeals issued a writ of supersedeas staying in part the order entered 28 August 2014 by Judge Robert Hobgood. Pursuant to that writ of supersedeas, the disbursement of funds to the 1,878 applicants who accepted Opportunity Scholarships through the Opportunity Scholarship Program as of 21 August 2014 was permitted, pending the outcome of Defendant-Intervenors' appeal of Judge Hobgood's order declaring the Program unconstitutional. That portion of the 22 September 2014 writ of supersedeas issued by the Court of Appeals remains undisturbed. The instant petition for writ of supersedeas is allowed to the extent that the State Education Assistance Authority may proceed with all preliminary administrative steps necessary to prepare for the 2015-16 academic year. However, funds scheduled to be disbursed to scholarship recipients, tentatively scheduled to begin on 15 August 2015, may not be released or distributed without further order of this Court.

The motion to expedite is allowed.

By order of the Court in Conference, this 12th day of December, 2014.

s/Beasley, J.
For the Court

CUBBAGE, et al.	)	
	)	
	)	
v.	)	From Wake County
	)	
	)	
THE BOARD OF TRUSTEES OF THE ENDOWMENT FUND OF NC STATE UNIVERSITY, et al.	)	

No. 380A14

ORDER

The motion by Plaintiffs-Appellants to stay the closing of the sale of the subject property is denied.

The motion by Plaintiffs-Appellants for expedited consideration of the appeal is allowed. The case shall be calendared for oral argument on 17 November 2014.

By order of the Court, this 24th day of October, 2014.

s/Hunter, J.
For the Court

CUBBAGE, et al.	)	
	)	
	)	
v.	)	From Wake County
	)	
	)	
THE BOARD OF TRUSTEES OF THE ENDOWMENT FUND OF NC STATE UNIVERSITY, et al.	)	

No. 380A14

ORDER

Upon consideration of the appeal certified by this Court on 10 October 2014 prior to a determination by the Court of Appeals and heard by this Court on 17 November 2014, the following order was entered:

Dismissed as Moot *ex mero motu* by order of the Court in conference, this 18th day of December, 2014.

s/Hunter, J.
For the Court

REVEREND ROBERT RICHARDSON, III, REVEREND MICHAEL and DELORES GALLOWAY, STEVEN W. SIZEMORE, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, ALAMANCE-BURLINGTON BOARD OF EDUCATION, ASHEBORO CITY BOARD OF EDUCATION, CATAWBA COUNTY BOARD OF EDUCATION, CHAPEL HILL-CARRBORO CITY BOARD OF EDUCATION, CHATHAM COUNTY BOARD OF EDUCATION, CLEVELAND COUNTY BOARD OF EDUCATION, COLUMBUS COUNTY BOARD OF EDUCATION, CRAVEN COUNTY BOARD OF EDUCATION, CURRITUCK COUNTY BOARD OF EDUCATION, DAVIDSON COUNTY BOARD OF EDUCATION, DURHAM PUBLIC SCHOOLS BOARD OF EDUCATION, EDENTON-CHOWAN BOARD OF EDUCATION, GATES COUNTY BOARD OF EDUCATION, GRAHAM COUNTY BOARD OF EDUCATION, HALIFAX COUNTY BOARD OF EDUCATION, HARNETT COUNTY BOARD OF EDUCATION, HYDE COUNTY BOARD OF EDUCATION, LEE COUNTY BOARD OF EDUCATION, LENOIR COUNTY BOARD OF EDUCATION, LEXINGTON CITY BOARD OF EDUCATION, MACON COUNTY BOARD OF EDUCATION, MARTIN COUNTY BOARD OF EDUCATION, MOUNT AIRY CITY BOARD OF EDUCATION, NEWTON-CONOVER CITY BOARD OF EDUCATION, ONSLOW COUNTY BOARD OF EDUCATION, ORANGE COUNTY BOARD OF EDUCATION, PAMLICO COUNTY BOARD OF EDUCATION, PERSON COUNTY BOARD OF EDUCATION, PITT COUNTY BOARD OF EDUCATION, POLK COUNTY BOARD OF EDUCATION, ROCKINGHAM COUNTY BOARD OF EDUCATION, RUTHERFORD COUNTY BOARD OF EDUCATION, SCOTLAND COUNTY BOARD OF EDUCATION, STANLEY COUNTY BOARD OF EDUCATION, SURRY COUNTY BOARD OF EDUCATION, VANCE COUNTY BOARD OF EDUCATION, WARREN COUNTY BOARD OF EDUCATION, WASHINGTON COUNTY BOARD OF EDUCATION, WHITEVILLE CITY BOARD OF EDUCATION,

YANCEY COUNTY BOARD OF EDUCATION, and ALEXANDER COUNTY BOARD OF EDUCATION, ASHEVILLE CITY BOARD OF EDUCATION, AVERY COUNTY BOARD OF EDUCATION, BERTIE COUNTY BOARD OF EDUCATION, BLADEN COUNTY BOARD OF EDUCATION, CAMDEN COUNTY BOARD OF EDUCATION, CASWELL COUNTY BOARD OF EDUCATION, CHEROKEE COUNTY BOARD OF EDUCATION, CLINTON CITY BOARD OF EDUCATION, CUMBERLAND COUNTY BOARD OF EDUCATION, EDGECOMBE COUNTY BOARD OF EDUCATION, ELIZABETH CITY-PASQUOTANK BOARD OF EDUCATION, GUILFORD COUNTY BOARD OF EDUCATION, HERTFORD COUNTY BOARD OF EDUCATION, HICKORY CITY BOARD OF EDUCATION, HOKE COUNTY BOARD OF EDUCATION, JACKSON COUNTY BOARD OF EDUCATION, KANNAPOLIS CITY BOARD OF EDUCATION, MONTGOMERY COUNTY BOARD OF EDUCATION, MOORE COUNTY BOARD OF EDUCATION, MOORESVILLE BOARD OF EDUCATION, NORTHAMPTON COUNTY BOARD OF EDUCATION, SAMPSON COUNTY BOARD OF EDUCATION, THOMASVILLE CITY BOARD OF EDUCATION, and TRANSYLVANIA COUNTY BOARD OF EDUCATION, Plaintiff-Appellees	)	
v.	)	From Wake County
THE STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF EDUCATION, and THE NORTH CAROLINA STATE EDUCATION ASSISTANCE AUTHORITY, Defendants, CYNTHIA PERRY, GENNELL CURRY, THOM TILLIS and PHIL BERGER, Intervenor-Defendant-Appellants	)	

RICHARDSON v. N.C.

[367 N.C. 779 (2014)]

No. 384A14

ORDER

Pending before the Court is Defendant-Intervenors' Petition for Writ of Supersedeas and Motion to Expedite. On 22 September 2014, the North Carolina Court of Appeals issued a writ of supersedeas staying in part the order entered 28 August 2014 by Judge Robert Hobgood. Pursuant to that writ of supersedeas, the disbursement of funds to the 1,878 applicants who accepted Opportunity Scholarships through the Opportunity Scholarship Program as of 21 August 2014 was permitted, pending the outcome of Defendant-Intervenors' appeal of Judge Hobgood's order declaring the Program unconstitutional. That portion of the 22 September 2014 writ of supersedeas issued by the Court of Appeals remains undisturbed. The instant petition for writ of supersedeas is allowed to the extent that the State Education Assistance Authority may proceed with all preliminary administrative steps necessary to prepare for the 2015-16 academic year. However, funds scheduled to be disbursed to scholarship recipients, tentatively scheduled to begin on 15 August 2015, may not be released or distributed without further order of this Court.

The motion to expedite is allowed.

By order of the Court in Conference, this 12th day of December, 2014.

s/Beasley, J.
For the Court

THE TIMES NEWS PUBLISHING COMPANY, d/b/a Times-News	)	
v.	)	From Alamance County
THE ALAMANCE-BURLINGTON BOARD OF EDUCATION, d/b/a Alamance-Burlington Schools or The Alamance-Burlington School System; and DR. WILLIAM HARRISON, in his capacity as Interim Superintendent of Alamance-Burlington School System	)	

No. 477P14

ORDER

The record presented to the Court does not indicate the extent, if any, to which the Court of Appeals considered N.C.G.S. § 132-9(a) in ruling on Plaintiff-Appellant's petition. Plaintiff-Appellant's Petition for Expedited Review and Writ of Certiorari is allowed for the limited purpose of remanding the matter to the Court of Appeals with instructions to reconsider Plaintiff-Appellant's filing in light of N.C.G.S. § 132-9(a) to the extent necessary to ensure compliance with that statutory provision.

By order of the Court in Conference, this 22nd day of January, 2015.

s/Ervin, J.
For the Court

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

18 DECEMBER 2014

008PA14	High Point Bank and Trust Company v. Highmark Properties, LLC, Mitchell Blevins, Cynthia Blevins, Charles Williams, and Janice Williams	Plt's Motion to Amend the Record on Appeal	Allowed **11/12/2014**
009A14	Jorge Tovar-Mauricio, Edemias Deleon Morales, Mario M. Tovar, Ranulfo Deleon Vasquez, Bernabe Francisco Calixto, Tomas Martinez Guerrero, and Gabriel Dominguez-Contrera, Employees v. T.R. Driscoll, Inc., Employer and General Casualty Insurance Company; Carolinas Roofing and Sheet Metal Contractors Self-Insured Fund, Carrier	1. Def's (Carolinas Roofing and Sheet Metal Contractors Self-Insured Fund) Notice of Appeal Based Upon a Dissent (COA13-517) 2. Def's (Carolinas Roofing and Sheet Metal Contractors Self-Insured Fund) PDR as to Additional Issues 3. Def's (Casualty Insurance Company) PDR Under N.C.G.S. § 7A-31	1. --- 2. Allowed 3. Allowed
016P14-2	State v. Richard Stephen Burcham	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Forsyth County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
019P14	State v. Randy Benjamin Bartlett	State's PDR Under N.C.G.S. § 7A-31 (COA13-471)	Allowed
021A14	David M. Morgan, Employee v. Morgan Motor Company of Albemarle, Employer and Brentwood Services, Inc., Servicing Agent for the North Carolina Auto Dealers Association Self-Insurer's Fund, Carrier	1. Plt's Notice of Appeal Based on Dissent (COA12-1485) 2. Plt's PDR as to Additional Issues	1. --- 2. Denied

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022P14	Thomas C. Wetherington v. N.C. Dept. of Crime Control & Public Safety; N.C. Highway Patrol	1. Respondent's PDR Under N.C.G.S. § 7A-31 (COA13-405) 2. Petitioner's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
023P13-2	Eric L. Martinez v. State of North Carolina; Frank Perry	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Yadkin County (COAP14-321)	Denied
046PA12-3	State v. Marva Denyse Gillis	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1203)	Denied **Hunter, J., recused**
046P14-2	State v. Demetrius Watson	**1.** Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP14-59) 2. Def's *Pro Se* Petition for *Writ of Mandamus* 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied **11/12/2014** 2. Denied **11/12/2014** 3. Allowed **11/12/2014**
048P14	State v. Thaddeus Stephen MacMoran	Def's PDR Under N.C.G.S. § 7A-31 (COA13-758)	Denied **Hunter, J., recused**
049PA14	State v. James Kevin Moir	Def's Motion to Dismiss Appeal	Denied **11/10/2014**
055P02-12	State v. Henry Ford Adkins	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Rockingham County	Denied
065P14	State v. Jason Russell Williams	1. Def's NOA Based Upon a Constitutional Question (COA12-1128) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss the Appeal	1. --- 2. Denied 3. Allowed

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069P14	State v. Garry White	1. State's Motion for Temporary Stay (COA13-494)	1. Allowed **02/26/2014** Dissolved **12/18/2014**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Denied
		4. Def's Motion to Dissolve Temporary Stay	4. Dismissed as Moot
		5. Def's Motion to Dismiss State's PDR (Mootness)	5. Dismissed as Moot
		6. State's Petition for *Writ of Certiorari* to Review Order of Superior Court of Anson County	6. Denied
073P14	State v. Travis Ricks	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1476)	Denied
078P14	Erwin Church of God, a North Carolina Non-Profit Corporation; and Church of God, a Tennessee Non-Profit Corporation v. Alton R. Childers	Def's Petition for *Writ of Certiorari* to Review Order of COA (COA14-32)	Denied
098P14	Anne Blanchard, Executrix of the Estate of Mary Lou Barthazon, deceased v. Britthaven, Inc. and Hillco, Ltd.	Def's PDR Under N.C.G.S. § 7A-31 (COA12-1286)	Denied

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101PA14	LexisNexis Risk Data Management, Inc., a Florida Corporation, and LexisNexis Risk Solutions, Inc., a Georgia Corporation v. North Carolina Administrative Office of the Courts; John W. Smith, II, in his official capacity as the Director of the North Carolina Administrative Office of the Courts; and Nancy Lorrin Freeman, in her official capacity as the Clerk of the Wake County Superior Court	1. The News and Observer Publishing Co.; Capitol Broadcasting Company, Inc.; Time-Warner Entertainment-Advance Newhouse Partnership; DTH Media Corp.; and the North Carolina Press Foundation, Inc.'s Motion for Leave to File Amicus Brief 2. The News and Observer Publishing Co.; Capitol Broadcasting Company, Inc.; Time-Warner Entertainment-Advance Newhouse Partnership; DTH Media Corp.; and the North Carolina Press Foundation, Inc.'s Motion for Leave to Participate in Oral Argument 3. Motion of Associate Professor Ryan Thornburg for Leave to File Brief Amicus Curiae	1. Special Order **11/02/2014** 2. Special Order **10/02/2014** 3.
102P10-2	State v. Brian Michael Blakeman	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP14-225) 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**
104P11-7	State v. Titus Batts	1. Def's *Pro Se* Motion to Dismiss for Improper Pleading (COAP11-171) 2. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 3. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Dismissed 2. Denied **11/12/2014** 3. Denied
111P10-2	GE Betz, Inc. v. R.C. Conrad, Robert Dodd, Benjamin Lukowski, Barry Ownings, and Zee Company, Inc.	1. Defs' Motion for Temporary Stay (COA13-239) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **12/30/2013** Dissolved **12/18/2014** 2. Denied 3. Denied

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115P14	Millie E. Hershner v. N.C. Department of Administration and the N.C. Human Relations Commission	Respondent's PDR Under N.C.G.S. § 7A-31 (COA13-790)	Allowed
117P14	In the Matter of: Application of Duke Energy Corporation and Progress Energy, Inc., to Engage in a Business Combination Transaction and to Address Regulatory Conditions and Codes of Conduct	Intervenor's (N.C. Waste Awareness and Reduction Network) PDR Under N.C.G.S. § 7A-31 (COA13-566)	Denied
131P01-10	State v. Anthony Dove	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed as Moot
132P14	State v. Melvin Bibian Warner	Def's PDR Under N.C.G.S. § 7A-31 (COA13-699)	Denied
134P14-5	State v. Walter Anthony Arthur	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Durham County	Dismissed
139A04-2	State v. Jerry Wayne Sharpe	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **11/21/2014**
139PA13	State v. Quintel Augustine, Tilmon Golphin, and Christina Walters	1. Defs' Petition for *Writ of Mandamus* 2. Defs' Motion to Withdraw Petition for *Writ of Mandamus* to the Clerk of Superior Court of Cumberland County 3. Defs' Motion to Strike 4. Defs' Motion to Supplement the Record 5. Def's Motion to Supplement Record	1. Withdrawn **01/02/2014** 2. Allowed **01/02/2014** 3. 4. Allowed 5. **Beasley, J., recused**

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143P14	PBK Holdings, LLC v. County of Rockingham	1. Plt's NOA Based Upon a Constitutional Question (COA13-865) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
144P14	State v. Scott Jay Stough	Def's PDR Under N.C.G.S. § 7A-31 (COA13-762)	Denied
148P14	Frankie Delano Washington and Frankie Delano Washington, Jr. v. Tracey Cline, Anthony Smith, William Bell, John Peter, Andre T. Caldwell, Moses Irving, Anthony Marsh, Edward Sarvis, Beverly Council, Steven Chalmers, Patrick Baker, the City of Durham, NC, and the State of North Carolina	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA13-224-2) 2. Plts' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
158P06-5	State v. Derrick D. Boger	Def's *Pro Se* Motion to Alter or Amend the Judgment	Dismissed
161P14	State v. Buddy Ray Russell	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1308)	Denied
162P14	Mary B. Bentley, Employee v. Revlon, Inc., Employer and CNA Insurance Company, Carrier Mary B. Bentley, Employee v. Revlon, Inc., Employer and ESIS Insurance Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA13-932)	Denied **Hunter, J., recused**

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166P11-3	State v. Haiber Montehermoso	1. Def's *Pro Se* Motion for NOA (COAP14-723) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
170P14	State v. Shawn Rondel Bailey	1. State's Motion for Temporary Stay (COA13-1320) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/05/2014** Dissolved **12/18/2014** 2. Denied 3. Denied
175P14	State v. Dexter Eugene Rucker	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA09-1389)	Denied
180P14	In Re: Petition of Joseph Jemsek, Jemsek, M.D., License No: 23386, Petitioner, Before the North Carolina Medical Board	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA13-801)	Denied
186PA14	In the Matter of: R.R.N.	1. Guardian *ad Litem's* Motion for Extension of Time to File Brief 2. Respondent Mother's Motion to Have Guardian *ad Litem* Declared an Appellant	1. Allowed **10/10/2014** 2. Denied **10/10/2014**
186PA14	In the Matter of: R.R.N.	1. Guardian *ad Litem's* Motion to Deem Brief Timely Filed 2. Respondent-Mother's Motion to File Brief in Response to Guardian *ad Litem's* Brief 3. Respondent-Mother's Motion to Have Guardian *ad Litem* Declared an Appellant for Purposes of Oral Argument and to Confirm that Respondent Mother, as the only Party Seeking Affirmance, is Entitled to a Full Thirty Minutes of Oral Argument	1. Allowed 2. Denied 3. Denied
191P14	State v. Jonathan Donald Thompson	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1198)	Denied

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193P14	State v. Jose Santos Lopez-Pesina	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1047)	Denied
201PA12-2	Dickson, et al. v. Rucho, et al.	1. Def's Motion to Strike Compilations in the Appendix to Plaintiff's Brief Not Presented to the Three-Judge Panel 2. Plt's Motion for Temporary Injunction	1. Denied 2. Dismissed as Moot **Hunter, J., recused**
211P14	State v. Dorsey Alphonzo Lemon, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1144)	Denied
213P14	The Estate of Betty Ann W. Amos, by and through Barbara A. Williams and Judy A. James, in their capacities as Co-Executors of the Estate of Betty Ann W. Amos v. W. Scott Moore, M.D.; Nephrology Associates, P.L.L.C.; Novant Health, Inc.; and Forsyth Memorial Hospital, Inc., both D/B/A Forsyth Medical Center	1. Defs' (W. Scott Moore, M.D. and Nephrology Associates, P.L.L.C.) PDR Under N.C.G.S. § 7A-31 (COA 13-963) 2. Plts' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
214P14	State v. Woodrow Josh Craddock, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA13-997)	Denied
219P14	State v. Alexander Scott Talbot	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1077)	Denied
220P12-2	State v. David Roland Conley	Def's *Pro Se* Petition for *Writ of Mandamus* (COA11-1251)	Denied
226P06-2	State v. De'Norris Levelle Sanders	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA12-1243)	Dismissed

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227P14	State v. Max Tracy Earls	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1128)	Denied
234P12-4	State v. Titus Lamont Batts	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied
234P14	Templeton Properties LP v. Town of Boone	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA13-1274) 2. Respondent's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Denied **Hunter, J., and Jackson, J., recused**
235P14	State v. Michael Kevin McGee	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1161)	Denied
236P13-2	The N.C. State Bar v. Geoffrey H. Simmons, Attorney	1. Def's PDR Under N.C.G.S. § 7A-31 (COA13-1140) 2. Attorney Totman's Motion for Leave to Withdraw	1. Denied 2. Allowed **Hunter, J., recused**
237P14	State v. Antonio Neal Gray	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1081)	Allowed
241P14	State v. Pierce McCoy	Def's PDR Under N.C.G.S. § 7A-31 (COA 13-933)	Denied **Hunter, J., recused**
242P14	Can Am South, LLC v. The State of North Carolina, the North Carolina Department of Health and Human Services, and the North Carolina Department of Administration	Defs' PDR Under N.C.G.S. § 7A-31 (COA 13-1240)	Denied
248P14	State v. Thorne Oliver Watlington	1. State's Motion for Temporary Stay (COA13-925) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/18/2014** Dissolved **12/18/2014** 2. Denied 3. Denied

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252P14	State v. Thomas Craig Campbell	1. State's Motion for Temporary Stay (COA13-1404) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/21/2014** 2. Allowed 3. Allowed
253P14	State v. Lonnie Bernard Davis	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
256P14	State v. Kenneth Myles Lewis, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA13-905)	Denied
259P14	State v. Marlon Curtis McKenzie	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1366)	Denied **Hunter, J., recused**
262P14	State v. Kyle Wesley Wood	Def's PDR Under N.C.G.S. § 7A-31 (COA14-154)	Denied
263P14	State v. Shawn Carlos Godley	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1337)	Denied
265P14	Weaver Investment Company and Travel Camps, Inc., on their own behalf and on behalf of Fourth Creek Landing Housing Limited Partnership and Fourth Creek Landing Associates v. Pressly Development Associates, Pressly Development Company, Inc., David L. Pressly, and Edwin A. Pressly	Def's PDR Under N.C.G.S. § 7A-31 (COA13-624)	Denied

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272A14	State v. Jonathan Douglas Richardson	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 2.
274P14	State v. Jerrod Stephon Hill	1. State's Motion for Temporary Stay (COA13-1188) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/04/2014** Dissolved **12/18/2014** 2. Denied 3. Denied
275P14	Clifford Roberts Wheeless, III, MD v. Maria Parham Medical Center, Inc.	1. Plt's Motion to Stay (COA13-1475) 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. Plt's Motion to Consolidate Appeals	1. Allowed **08/05/2014** Dissolved **12/18/2014** 2. Denied 3. Dismissed *ex mero motu* 4. Denied 5. Dismissed as Moot
276P14	State v. Jerry William McNeill	1. Def's PDR Under N.C.G.S. § 7A-31 (COA14-64) 2. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Cumberland County	1. Dismissed 2. Dismissed
279P14	Karlette D. Brewster v. Claude A. Verbal, II, Margie H. Verbal	Def's (Margie H. Verbal) PDR Under N.C.G.S. § 7A-31 (COA13-1344)	Denied
281P14	Lakisha Wiggins and G. Elvin Small, as *Guardian ad Litem* for Roy Lee Brothers, a Minor v. East Carolina Health-Chowan, Inc. d/b/a Chowan Hospital and Michael David Gavigan, M.D.	Def's (East Carolina Health-Chowan, Inc. d/b/a Chowan Hospital) PDR Under N.C.G.S. § 7A-31 (COA13-1428)	Denied

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283P14	Clifford Roberts Wheeless, III, MD v. Maria Parham Medical Center, Inc.	1. Plt's NOA Based Upon a Constitutional Question 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Amend NOA and PDR	1. Dismissed *ex mero motu* 2. Denied 3. Allowed
284P14	State v. Terry Lynn Hall	Def's PDR Under N.C.G.S. § 7A-31 (COA14-40)	Denied
286P09-2	State v. Johnny M. McCullough	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Beaufort 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
289P14	In the Matter of: K.G.A.W. and G.W.W.	Respondent-Father's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-137)	Denied **Hunter, J., recused**
292P14	State v. Christopher Columbus Rogers, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP14-212) 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
294P14	Robert E. King and wife, Jo Ann O'Neal v. Michael S. Bryant, M.D., and Village Surgical Associates, P.A.	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1003)	Allowed **Hunter, J., recused**
298P14	State v. Tyrone Devon Sloan	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1469)	Denied
299P10-3	State v. Michael Wayne Mabe	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA09-1648)	Dismissed **Jackson, J., and Beasley, J., recused**

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299P14	State v. Tremayne Wendell Carroll	Def's PDR Under N.C.G.S. § 7A-31 (COA14-14)	Denied
305P14	James B. Taylor Family Limited Partnership, James B. Taylor, and Mary Ann Taylor v. Bank of Granite	1. Plt's PDR Under N.C.G.S. § 7A-31(COA13-550) 2. Def's Motion to File Amended Certificate of Service	1. Denied 2. Allowed
305P97-5	State v. Egbert Francis, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Wake 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
307P14	State v. Donald G. Barnette, Jr.	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
310A14	State v. Joe Fornecker Smith	1. Def's NOA Based Upon a Constitutional Question (COA14-34) 2. State's Motion to Dismiss Appeal	1. --- 2. Allowed
312P14	State v. Charles Benzing	Def's Petition for *Writ of Certiorari* to Review Order of the Superior Court of Wake County	Dismissed
313P14	Laura H. Roberts (now Huckabee) v. John B. Roberts	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1210)	Denied
314P14	State v. Helvin Contero Vasquez	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of the COA (COAP14-604) 2. Def's *Pro Se* Motion to Amend	1. Dismissed 2. Dismissed as Moot

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317P13-2	State v. Robert Gene Bailey	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP13-985) 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
318P14	Ron D. Meyer v. Race City Classics, LLC	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1371)	Denied
320P14	GRE Properties Thomasville, LLC v. Libertywood Nursing Center, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA13-1180) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
321P14	State v. Derrick Jervon Lindsay El Bey	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Stanly County	Dismissed
326A14	State v. Quinton O'Brian Surratt	1. Def's NOA Based Upon a Constitutional Question (COA 13-1413) 2. State's Motion to Dismiss Appeal	1. --- 2. Allowed
327P14	State v. Robert Alfonzo Clapp	Def's PDR Under N.C.G.S. § 7A-31 (COA13-785)	Denied
328P14-2	State v. Ramiro Saucedo-Solis	Def's *Pro Se* Motion to Appeal	Dismissed
329P14	State v. Dwayne Demont Haizlip	1. Def's PDR Under N.C.G.S. § 7A-31 (COA13-1286) 2. Def's Petition for *Writ of Certiorari* to Review Order of COA (COA13-1286)	1. Denied 2. Denied
331P14	Bonaventure Okafor and Uzomaka Okafor v. Donatus Okafor, Nordica L. Jeffers, Rudolph P. Jeffers, Jr., Embrace Home Loans, Inc. and Mortgage Electronic Registration Systems, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA13-1441)	Denied **Hunter, J., recused**

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332P13-7	Bobby R. Knox, Jr. v. Frank L. Perry	1. Def's *Pro Se* Motion for Order to Show Cause for an Order of Protective Order Marion C.I. 3730 Staff Officials and Preliminary Federal Injunction [13 July 2014]	1. Dismissed
		2. Def's *Pro Se* Motion for Order to Show Cause for an Order of Protective Order and Preliminary Federal Injunction [28 July 2014]	2. Dismissed
		3. Def's *Pro Se* Motion for Order to Show Cause for an Order of Protective Order and Preliminary Federal Injunction [31 July 2014]	3. Dismissed
		4. Def's *Pro Se* Motion for Order to Show Cause for an Order of Protective Order and Preliminary Federal Injunction [11 September 2014]	4. Dismissed
		5. Def's *Pro Se* Motion for Order to Show Cause for an Order of Protective Order and Preliminary Federal Injunction [22 September 2104]	5. Dismissed
		6. Def's *Pro Se* Motion for Order to Show Cause for an Order of Protective Order and Preliminary Federal Injunction [29 September 2014]	6. Dismissed
		7. Def's *Pro Se* Motion for Order to Show Cause for an Order of Protective Order and Preliminary Federal Injunction [31 September 2014]	7. Dismissed
		8. Def's *Pro Se* Motion for Order to Show Cause for an Order of Protective Order and Preliminary Federal Injunction [6 October 2014]	8. Dismissed
		9. Def's *Pro Se* Motion for Order to Show Cause for an Order of Protective Order and Preliminary Federal Injunction [7 October 2014]	9. Dismissed
334P14	Charles E. Townsend and Wife, Mary J. Townsend v. Celestine L. Simmons, City of Greensboro, and CitiMortgage, Inc.	Respondent's (Celestine L. Simmons) PDR Under N.C.G.S. § 7A-31 (COA13-1320)	Denied **Hunter, J., recused**

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335P14	State v. Wyman C. Lowery	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP14-620)	Dismissed
336P14	State v. Miguel Garcia Tapia	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP14-607)	Dismissed
337P14	State v. Daniel Darnell Davis	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-1313)	Denied **Jackson, J., recused**
338P14	Waddell Bynum J. v. Progressive Ins. Group Inc., Mark A. Valentine, Agent	Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Mecklenburg County	Dismissed
339P14	State v. Veletta Wilkins Edwards	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA13-1290)	Denied
340P14	Samuel and Doris Fort, Julia Katherine Faircloth, Raeford B. Lockamy, II, OK Farms of Cedar Creek, LLC, and Arnold Drew Smith v. County of Cumberland, North Carolina, and Tigerswan, Inc.	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA14-93)	Denied
343P14	State v. James Douglas Triplett	1. State's Motion for Temporary Stay (COA13-1289) 2. State's Petition for *Writ of Supersedeas* (COA13-1289) 3. State's PDR Under N.C.G.S. § 7A-31 (COA13-1289)	1. Allowed **09/19/2014** 2. Allowed 3. Allowed
345P14	State v. Jonathan A. Thompson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Mecklenburg 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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347A14	State ex rel. Utils. Comm'n v. Cooper, Att'y Gen. (Aqua)	Intervenor's Motion to File Amended Brief	Allowed **12/01/2014**
348P14	State v. Megael Jermaine Matthews	Def's PDR Under N.C.G.S. § 7A-31 (COA14-109)	Denied
350P14	Wake County v. Hotels.com, L.P., et al., Buncombe County v. Hotels.com, L.P., et al., Dare County v. Hotels.com, L.P., et al., Mecklenburg County v. Hotels.com, L.P., et al.	1. Plt's Motion to File PDR Under Seal 2. Plt's PDR Under N.C.G.S. § 7A-31 (COA13-594)	1. Allowed **09/24/2014** 2. Denied
351P14	Hometrust Bank v. George N. Tsiros and Tammy Tsiros	1. Def's PDR Under N.C.G.S. § 7A-31 (COA14-267) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
352P14	State v. Marlon Devon Harris	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1332)	Denied
355P14	Terri Young v. Daniel Bailey, in his individual and official capacity as Sheriff of Mecklenburg County, and Ohio Casualty Insurance Company	Plt's PDR Prior to a Determination of the COA (COA14-966)	Denied
357P14	In the Matter of: Appeal of: Grandfather Mountain Stewardship Foundation, Inc., from the decision of the Avery County Board of Equalization and Review denying property tax exemption for certain real property for tax year 2011	1. Appeallant-Foundation's NOA Based Upon a Constitutional Question (COA13-1447) 2. Appeallant-Foundation's PDR Under N.C.G.S. § 7A-31 3. Appellee-Avery County's Conditional PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as Moot

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359P14	Harold Bright Harris, Jr. v. Dr. Lawrence McClure-Caldwell, et al., and Al Jean Bogle: Clerk of Superior Court Catawba County, et al.	Plt's *Pro Se* Petition for *Writ of Mandamus*	Denied
361P14	State v. Samuel Gideon	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-38)	Denied **Hunter, J., recused**
362P14	State v. George Anthony Graham	Def's PDR Under N.C.G.S. § 7A-31 (COA 14-157)	Denied
365P14	Jerome Brewer, Sabrina Brewer, and Matthew J. Brewer, by and through his *Guardian ad Litem*, Timothy T. Leach v. William P. Hunter, MD, Neuroscience & Spine Center of the Carolinas, PA, and Neuroscience & Spine Center of the Carolinas, LLP	1. Def's Motion for Temporary Stay (COA14-7) 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	1. Allowed **10/07/2014** Dissolved **12/18/2014** 2. Denied 3. Denied 4. Dismissed as Moot **Hunter, J., recused**
368P14	State v. Kirk James Keller	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion to Appoint Counsel	1. Denied **11/13/2014** 2. Dismissed as Moot **11/13/2014**
369P14	State v. Donte Macon	Def's PDR Under N.C.G.S. § 7A-31 (COA14-122)	Denied
371P14	State v. Bartholomew Torain	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
372A14	Hart, et al. v. State	1. Def-Intervenors' Petition for Writ of Supersedeas 2. Def-Intervenors' Motion to Expedite	1. See Special Order **12/12/2014** 2. Allowed, See Special Order **12/12/2014**

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373A14	Cape Fear River Watch, et al. v. N.C. Environmental Management Commission, et al.	1. Intervenor's Motion for Judicial Notice 2. Petitioner's Motion for Judicial Notice 3. Respondent's Motion for Extension of Time to File Response to Petitioner's Motion for Judicial Notice	1. 2. 3. Allowed **12/02/2014** **Edmunds, J., recused**
374A14	Fisher, et al. v. Flue-Cured Tobacco Cooperative Stabilization Corporation	1. Def's Conditional Petition for *Writ of Certiorari* to Review Order of Wake County Superior Court 2. Plt's Motion to Dismiss Appeal	1. Dismissed as Moot 2. Denied
380A14	Cubbage, et al. v. The Board of Trustees of the Endowment Fund of NC State University, et al.	1. Plt's Motion for Temporary Stay 2. Plt's Motion for Expedited Consideration of Appeal	1. Special Order **10/24/2014** 2. Special Order **10/24/2014**
381P14	State v. Coleco Tayloe Best	Def's PDR Under N.C.G.S. § 7A-31 (COA14-198)	Denied **Hunter, J., recused**
382P14	Frizell Legett Jr.-Bey v. State	Def's *Pro Se* Motion for Avernment of Jurisdiction	Dismissed
384A14	Richardson, et al. v. The State of North Carolina, et al.	1. Motion for Leave to Withdraw 2. Def-Intervenors' Petition for Writ of Supersedeas 3. Def-Intervenors' Motion to Expedite	1. Allowed **12/10/2014** 2. See Special Order **12/12/2014** 3. Allowed, See Special Order **12/12/2014**
385P14	State v. Joseph Edward Tucker	1. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied **10/20/2014** 2. Allowed **10/20/2014** 3. Dismissed as Moot **10/20/2014**

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387P14	Stella Anderson, Pam Williamson, Marianne Clawson, Alaina Doyle, Lauren Larve Joyner, Ian O'Keefe, and David Sabbagh v. The North Carolina State Board of Elections	1. Respondent's Motion for Temporary Stay 2. Respondent's Petition for *Writ of Supersedeas* 3. Respondent's Motion for Expedited Response	1. Allowed **10/22/2014** 2. Allowed **10/22/2014** 3. Dismissed as Moot **10/23/2014**
392PA13	State v. Robert T. Walston, Sr.	Def's Petition for *Writ of Certiorari* to Review Order of COA	Dismissed **Hunter, J., recused**
392P14	State v. Joseph Overocker	1. State's Motion for Temporary Stay (COA14-270) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/21/2014** Dissolved **12/18/2014** 2. Denied 3. Denied **Hunter, J., recused**
393P14	State v. Billy Ray Davis	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1092)	Denied
394P14	State v. Franklin Lawrence Dowdy	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Moore County	Dismissed
397P14	State v. Shaun Smith	Def's PDR Under N.C.G.S. § 7A-31 (COA14-193)	Denied
398P05-3	State v. Robert Lee Hood	Def's *Pro Se* Motion to Reconcile Court Order	Dismissed
398P14	State v. Stilloan Devoray Robinson	Def's PDR Under N.C.G.S. § 7A-31 (COA14-224)	Allowed
399P14	State v. Jeremiah Lamont Luke	1. Def's NOA Based Upon a Constitutional Question (COA13-1261) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied

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400P14	State v. Dennis Moore	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **10/24/2014**
401A13	Riggings Homeowners, Inc. v. Coastal Resources Commission of the State of North Carolina	1. Respondent's NOA Based Upon a Dissent (COA12-1299) 2. Respondent's Motion for Temporary Stay 3. Respondent's Petition for *Writ of Supersedeas* 4. Respondent's PDR as to Additional Issues 5. Petitioner's Motion to Dismiss Appeal 6. Petitioner's Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. Allowed **09/11/2013** 3. Allowed **09/11/2013** 4. Allowed 5. Dismissed as Moot 6. Allowed **Hunter, J., recused**
401P14	State v. Matthew Keith Hutcheson	Def's Petition for *Writ of Certiorari* to Review Order of the COA (COA13-842)	Denied
402P14	State v. Bobby Lee Rawlings	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-242)	Denied **Hunter, J., recused**
403P14	State v. Anthony Lashone Green	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Sampson County	Dismissed
405P14	State v. Dwayne Anthony Ellis	1. State's Motion for Temporary Stay (COA14-77) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/27/2014** 2. Allowed 3. Allowed
407P14	State v. Dwain Cornelius Ferrell	1. Def's *Pro Se* Motion for NOA (COAP14-742) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Dismi*ssed ex mero motu* 2. Dismissed

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408P14	State v. Marcelino Garcia Castillo	1. Def's *Pro Se* Motion for NOA (COAP14-760) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 3. Def's *Pro Se* Motion to Amend 4. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Dismissed *ex mero motu* 2. Dismissed as Moot 3. Allowed 4. Denied
409P14	State v. George William Gantt-El	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP14-663)	Denied
411P14	State v. Brandon Tremayne Holman	Def's *Pro Se* Petition for *Writ of Mandamus* (COAP14-721)	Denied
412P14	State v. Steven Lynn Barbour	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Wayne County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
414P14	State v. Jerry D. Rembert	1. State's Motion for Temporary Stay (COA14-522) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/07/2014** Dissolved **12/18/2014** 2. Denied 3. Denied
417P00-3	State v. Frank Moore	Def's *Pro Se* Motion for Notice of Appeal	Dismissed
417P14	State v. Melvin Lee Luckey	Def's PDR Under N.C.G.S. § 7A-31 (COA14-12)	Denied
421P14	Susan Hyatt Call v. Brandon T. Hyatt and Jessica Metcalf Hyatt	Appellant's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA14-751)	Denied
424P14	Stritzinger v. Bank of America, et al.	Plt's *Pro Se* Motion for Petition for Extraordinary Relief and Certified Questions	Dismissed

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429P13	Robert Paul Morris v. Scenera Research, LLC and Ryan C. Fry	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA12-1481)	1. Allowed
		2. N.C. Chamber and N.C. Association of Defense Attorneys' Motion for Leave to File Amicus Brief	2. Allowed
		3. Plt's Conditional PDR Under N.C.G.S. § 7A-31	3. Allowed
		4. Plt's Motion to Strike Motion by the N.C. Chamber and the N.C. Association of Defense Attorneys Denominated Motion for Leave to File Amicus Curiae Brief	4. Denied
		5. Qualcomm Incorporated, Qualcomm Technologies, Incorporated, Cisco Systems, Inc., Microsoft Corp., and Cree, Inc.'s Motion for Leave to File Amicus Brief	5. Allowed
		6. N.C. State University's Motion for Leave to File Amicus Brief	6. Allowed
		7. Plt's Motion to Strike Motion by Qualcomm Incorporated, Qualcomm Technologies, Incorporated, Cisco Systems, Inc., Microsoft Corp., and Cree, Inc. Denominated Motion for Leave to File Amicus Curiae Brief	7. Denied
		8. Plt's Motion to Strike Motion by N.C. State University Denominated Motion for Leave to File Amicus Curiae Brief	8. Denied
434P13-3	State v. Darwin Vernell Christian	1. Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP14-796)	1.Dismissed
		2. Def's *Pro Se* Motion to Appoint Counsel	2. Dismissed as Moot
435A96-5	State v. Walic Christopher Thomas	1. Def's Motion to Stay Petition for *Writ of Certiorari*	1.
		2. Def's Petition for *Writ of Certiorari* to Review the Decision of the Superior Court of Guilford County	2.
		3. Def's *Pro Se* Motion to Withdraw All Appeals	3. Dismissed **12/15/2010**
		4. State's Motion for Leave to Substitute Counsel of Record	4. Allowed **07/12/2013**
		5. Def's Pro Se Motion for Ineffective Assistance of Post Conviction Counsel	5. Dismissed

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436P13-2	I. Beverly Lake, John B. Lewis, Jr., Everette M. Latta, Porter L. McAteer, Elizabeth S. McAteer, Robert C. Hanes, Blair J. Carpenter, Marilyn L. Futrelle, Franklin E. Davis, James D. Wilson, Benjamin E. Fountain, Jr., Faye Iris Y. Fisher, Steve Fred Blanton, Herbert W. Cooper, Robert C. Hayes, Jr., Stephen B. Jones, Marcellus Buchanan, David B. Barnes, Barbara J. Currie, Connie Savell, Robert B. Kaiser, Joan Atwell, Alice P. Nobles, Bruce B. Jarvis, Roxanna J. Evans, Jean C. Narron, and all others similarly situated v. State Health Plan for Teachers and State Employees, a Corporation formerly known as the North Carolina Teachers and State Employees' Comprehensive Major Medical Plan, Teachers and State Employees' Retirement System of North Carolina, a Corporation, Board of Trustees of the Teachers and State Employees' Retirement System of North Carolina, a Body Politic and Corporate, Janet Cowell, in her official capacity as Treasurer of the State of North Carolina, and the State of North Carolina	1. Def-Appellants' PDR Under N.C.G.S. § 7A-31 (COA13-1006) 2. Defs' Motion to Deem PDR to be Timely Filed 3. Defs' Conditional Petition for *Writ of Certiorari* to Review Decision of the COA 4. Plt's Motion to Dismiss Petition	1. --- 2. Denied 3. Denied 4. Allowed

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437P14	State v. Timothy Anquan Saunders	Def's PDR Under N.C.G.S. § 7A-31 (COA14-400)	Denied
444P09-4	State v. Charles Gene Rogers	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Wayne County 2. Def's *Pro Se* Motion for First Amendment to Petition for *Writ of Certiorari* 3. Def's *Pro Se* Motion for Second Amendment to Petition for *Writ of Certiorari* 4. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 5. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 6. Def's *Pro Se* Motion to Compel	1. Denied **10/28/2014** 2. Allowed **10/28/2014** 3. Allowed **10/28/2014** 4. Denied **10/28/2014** 5. Denied **10/28/2014** 6. Dismissed **10/28/2014**
484P99-3	State v. Michael Ray Williams	1. Def's *Pro Se* Motion to Compel the COA to Forward a Copy of the MAR (COAP14-258) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Dismissed 2. Dismissed
491P02-6	Dontez Simuel v. John H. Connell, Clerk of the North Carolina Court of Appeals	Plt's *Pro Se* Motion for Writ of Prohibition	Denied
505PA10-2	State v. David Franklin Hurt	Def's PDR Under N.C.G.S. § 7A-31 (COA09-442-2)	Denied **Beasley, J., and Hunter, J., recused**
514P13-2	State v. Raymond Dakim Harris Joiner	1. Def's *Pro Se* Motion to Dismiss 2. Def's *Pro Se* Motion for Notice of Formal Request for Relinquishment of Bonds that are being Held by Unknown Entity by Private Company and or Corporation	1. Dismissed 2. Dismissed

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534P07-2	State v. Clifton Erwin Teachey	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP14-272) 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
555P13-2	State v. Tahashi T. Matthews	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Mecklenburg County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
557PA13	Irving v. Charlotte Mecklenburg Board of Education	Def's Motion for Extension of Time to File Reply Brief	Allowed **12/01/2014**
569P13	State v. Sabur Rashid Allah	1. State's Motion for Temporary Stay (COA13-667) 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 **12/18/2013** Dissolved **12/18/2014** 2. Denied 3. Denied 4. Dismissed as Moot **Beasley, J., recused**
579P01-2	State v. Antorio Maurice Smarr	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Gaston County	Dismissed
580P05-12	In Re: David L. Smith	1. Def's *Pro Se* Motion for Notice of Appeal (COAP14-529) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 3. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed *ex mero motu* 2. Denied 3. Denied

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012A14	State *ex rel.* Utilities Commission, et al. v. Att'y Gen., et al.	1. Appellees' Motion to Consolidate Related Appeals 2. Appellees' Motion in the Alternative for Suggested Order of Appeals	1. Dismissed as moot 2. Dismissed as moot **Ervin, Jr., recused**
012A14	State *ex rel.* Utilities Commission, et al. v. Att'y Gen., et al.	N.C. Warn's Motion to Allow Factual Correction to Oral Argument	Dismissed as moot **Ervin, J., recused**
038A14	State v. Joshua Andrew Stepp	1. Def's Motion to Strike Part B of the State's Brief as Outside the Scope of an Appeal of Right (COA13-46) 2. State's Petition in the Alternative for *Writ of Certiorari* to Review Decisions of COA	1. Dismissed as moot 2. Dismissed as moot
046P14-4	State v. Demetrius Watson	1. Def's *Pro Se* Motion for Petition for Reconsideration and/or Petition for Rehearing "*Ex-Parte*" 2. Def's *Pro Se* Motion for Petition for Reconsideration and/or Petition for Rehearing "*Ex-Parte*"	1. Dismissed 2. Dismissed
074P98-5	State v. William T. Barnes	1. Def's *Pro Se* PWC to Review Order of Superior Court of Rockingham County 2. Def"s *Pro S*e Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
084PA14	In the Matter of: C.W.F.	1. Respondent's Motion to Dismiss Appeal (Mootness) 2. State's Motion for Extension of Time to File Response	1. Dismissed as moot 2. Allowed **08/19/2014**
124PA14	State v. Young	Def's Motion to Supplement the Record on Appeal	Allowed
147P13-3	In Re: Perry R. Warren	Def's *Pro Se* PWC to Review Order of COA (COAP14-646)	Denied

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151P14-2	Kimberly Shreve v. N.C. Department of Justice, Kristen Fetter, Colon Willoughby, Wake County Sheriff Donnie Harrison, and Deputy Tina Byrd	Plaintiff's *Pro Se* Motion for Appellant's Opening Brief	Dismissed
229P14	Sharon Skoff, Employee v. US Airways, Inc., Employer, and New Hampshire Insurance Co., Carrier, (Chartis Claims, Inc., Third Party Administrator)	1. Defs' Motion for Temporary Stay (COA13-994) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **07/07/2014** Dissolved **01/22/2015** 2. Denied 3. Denied
238P14	State v. Roberto Torres-Robles	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1023)	Denied
268A12-2	State *Ex Rel.* Utils. Comm'n v. Cooper, Att'y Gen.	1. Appellees' Motion to Consolidate Related Appeals 2. Appellees' Motion in the Alternative for Suggested Order of Appeals	1. Dismissed as moot 2. Dismissed as moot **Ervin, J., recused**
319P14	Kirk Alan Turner v. Special Agent Gerald R. Thomas, in his individual capacity and, in the alternative, in his official capacity; Special Agent Duane Deaver, in his individual capacity and, in the alternative, in his official capacity; Robin Pendergraft, in her individual capacity and, in the alternative, in her official capacity; and John and Jane Doe SBI Supervisors, in their individual capacities and, in the alternative, in their official capacities	1. Defs' (Thomas and Deaver) Motion for Temporary Stay (COA13-1131) 2. Defs' (Thomas and Deaver) Petition for *Writ of Supersedeas* 3. Defs' (Thomas and Deaver) PDR Under N.C.G.S. § 7A-31	1. Allowed **09/10/2014** 2. Allowed 3. Allowed

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323P10-6	State v. Lacy Lee Williams, Jr.	Def's *Pro Se* Motion for Reconsideration to the Full Supreme Court for Def's PDR	Dismissed
341P14	State v. Robert McPhail	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1182)	Denied **Ervin, J., recused**
360P14	In the Matter of: James Spencer	Respondent's PDR (COA14-143)	Denied **Ervin, J., recused**
367P14	Rose Glynne, M.D. v. Wilson Medical Center, a North Carolina Corporation	1. Plt's Notice of Appeal Based on a Constitutional Question (COA14-53) 2. Plt's PDR Under G.S. 7A-31 3. Def's Motion to Dismiss Appeal 4. Consent Motion for Dismissal of Notice of Appeal and Incorporated PDR	1. --- 2. --- 3. Dismissed as moot 4. Allowed **Ervin, J., recused**
388P14	In Re: Foreclosure of Real Property Under Deed of Trust from Gregory Thomas Aldridge, in the original amount of $129,50.00, dated April 2, 2007 and recorded in Book 4515, Page 789, Union County Registry	1. Respondent's PDR Under N.C.G.S. § 7A-31 (COA14-275) 2. Motion by Benjamin A. Lipman for Admission *Pro Hac Vice*	1. Denied 2. Allowed
389P14	State v. Marcus McLaughlin	Def's *Pro Se* Motion for PDR	Dismissed
400P14-2	State v. Dennis Moore	Def's *Pro Se* Motion for Petition for Reconsideration and/or Petition for Rehearing	Dismissed
401P10-2	State v. Tyrone Raynard Gladden	Def's *Pro Se* Motion for PDR (COAP14-976)	Dismissed

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415A14	Kimberly T. Spence v. Carl J. Willis, II	Plaintiff's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA14-399)	Dismissed *ex mero motu* **Ervin, J., recused**
425P14	In Re: Lloyd Steven Lane	Petitioner's *Pro Se* PWC to Review Order of COA (COAP14-681)	Denied
429P14	Maurice Quema Wilson v. Erwin Carmichael, Roy Cooper, and State of North Carolina	Petitioner's *Pro Se* Motion for Notice and Joinder of Claims Seeking Inquiry into Restraints on Liberty	Dismissed
431P14	Deon Quintin McDonald v. Chipp Bailey, Roy Cooper, and State of North Carolina	Plaintiff's *Pro Se* Motion for Notice and Joinder of Claims Seeking Inquiry into Restraints on Liberty	Dismissed
435P14	Branch Banking and Trust Company v. Brian Keith Keesee and Brian Keith Keesee Construction, Inc.	Def's' PDR Under G.S. 7A-31 (COA14-328)	Denied
440P11-2	K2 Asia Ventures, Ben C. Broocks, and James G.J. Crow v. Robert Trota, Vericona Trota, Joselito Saludo, Carolyn T. Salud, Roland V. Garcia, Cristina T. Garcia, Jim Fuentebella, Sharon Fuentebella, Max's Baclaran, Inc., Chickens R Us, Inc., Max's Makati, Inc., Max's Ermita, Inc., Max's of Manila, Inc., The Real American Doughnut Company, Inc., Trofi Ventures, Inc., Ruby Investment Company Holdings, Inc., Krispy Kreme Doughnut Corporation, and Krispy Kreme Doughnuts, Inc.	Plts' PDR Under N.C.G.S. § 7A-31 (COA13-1376)	Denied

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22 JANUARY 2015

443P14	State v. Jamel LaPointe Allen	Def's *Pro Se* Motion for NOA (COA14-290)	Dismissed *ex mero motu*
447P14	State v. Rocky Lee Dewalt	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-372) 2. Def's PDR Under G.S. 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
451P14	State v. Kevin Kennedy Gilchrist	Def's *Pro Se* Motion for Petition to Dismiss All Charges	Dismissed
452P14	Clorey Eugene France v. Glover & Petersen, P.A., Ann B. Petersen	1. Plaintiff's *Pro Se* Motion for Notice of Appeal (COA14-852) 2. Plaintiff's *Pro Se* Motion for Supplemental Amendment to Notice of Appeal	1. Dismissed *ex mero motu* 2. Allowed **Ervin, J., recused**
456P14	Raymond Earl Dickerson, d/b/a Perkinson Wrecker Service v. Emma Victoria Johnson Howard	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA14-509) 2. Def's *Pro Se* PWC to Review Decision of COA 3. Def' *Pro Se* PWC to Review Decision of COA 4. Def's *Pro Se* Motion for PDR 5. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed *ex mero motu* 2. Denied 3. Denied 4. Denied 5. Allowed
466P14	In the Matter of: J.R.W.	Respondent-Mother's PDR Under N.C.G.S. 7A-31 (COA14-443)	Denied
472P14	State v. Ajanaku Edward Murdock	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA14-534) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied

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

22 JANUARY 2015

475P14	State v. Reginald U. Fullard	1. Def's *Pro Se* PWC to Review Order of Superior Court of Forsyth 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
477P14	The Times News Publishing Company, d/b/a Times-News v. The Alamance-Burlington Board of Education, d/b/a Alamance-Burlington Schools or The Alamance-Burlington School System; and Dr. William Harrison, in his capacity as Interim Superintendent of Alamance-Burlington School System	1. Plaintiff's Motion for Petition for Expedited Review 2. Plaintiff's PWC to Review Order of COA (COAP14-1011)	1. Special Order 2. Special Order
501PA12	State v. Grice	Def's Motion to Strike Portions of State's New Brief	Dismissed as moot **Ervin, J., recused**
514P13-3	State v. Raymond Dakim Harris Joiner	1. Def's *Pro Se* Motion for First Amendment Redress *Ex Parte* Show Cause Reply (COA14-645) 2. Def's *Pro Se* Motion for Emergency Petition for Declaratory Judgment	1. Dismissed 2. Dismissed
532P09-5	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 for Clerk to File Exhibits with Supreme Court 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 4. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot 3. Allowed 4. Dismissed as moot

TOWN OF BOONE	)	
	)	
v.	)	From Wake County
	)	
THE STATE OF NORTH CAROLINA and COUNTY OF WATAUGA	)	
	)	

No. 93P15

ORDER

On 10 March 2015, defendant State of North Carolina filed a Motion for Temporary Stay Pending Appeal and Petition for Writ of Supersedeas seeking the entry of an order granting a temporary stay and issuance of a writ of supersedeas with respect to a preliminary injunction entered by a three judge panel on 29 December 2014 restraining the operation of N.C. Sess. L. 2014-33, entitled "AN ACT PROVIDING THAT THE TOWN OF BOONE SHALL NOT EXERCISE THE POWERS OF EXTRATERRITORIAL JURISDICTION." Defendant further seeks entry of a temporary stay of any further trial court proceedings pending the disposition of the State's appeal in this case. The State's motion and petition are denied without prejudice to the State's right to renew its motion and petition should the extent to which or manner in which the Town exercises its extraterritorial jurisdiction as of 31 December 2014 materially change.

By order of the court, this the 19th day of March 2015.

s/Sam J. Ervin
For the Court

STATE OF NORTH CAROLINA,	)	
	)	
Upon the relation of,	)	
Patrick L. McCrory, individually	)	
and in his official capacity as	)	
GOVERNOR OF THE STATE OF	)	
NORTH CAROLINA; James B.	)	
Hunt, Jr.; and James G. Martin,	)	
Plaintiff-Appellees	)	
	)	
v.	)	
	)	
From Wake County	)	
Philip E. Berger, in his official	)	From Wake County
capacity as PRESIDENT PRO	)	
TEMPORE OF THE NORTH	)	
CAROLINA SENATE; Timothy K.	)	
Moore, in his official capacity as	)	
SPEAKER OF THE NORTH	)	
CAROLINA HOUSE OF	)	
REPRESENTATIVES; and, in	)	
their official capacities as members	)	
of the Coal Ash Management	)	
Commission, Harrell Jamison Auten III;	)	
Tim L. Bennett; Allen Hayes; Scott	)	
Flanagan; Rajaram Janardhanam;	)	
and Lisa D. Riegel,	)	
Defendant-Appellants	)	

No. 113A15

ORDER

Motion of Cherie Berry, North Carolina Commissioner of Labor; Wayne Goodwin, North Carolina Commissioner of Insurance; Steve Troxler, North Carolina Commissioner of Agriculture; and Beth A. Wood, C.P.A., State Auditor of North Carolina for Leave to File Brief as *Amici Curiae* is allowed. The due date for filing plaintiff-appellees' brief is extended to 8 June 2015. The due date for filing any reply brief is extended to 22 June 2015. Oral argument will be heard at 9:30 a.m. on 30 June 2015.

By order of the Court in Conference, this 28th day of May, 2015.

s/Sam J. Ervin IV
For the Court

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, LBERT KIRBY, TERRENCE WILLIAMS, NORMAN C. CAMP, MARY F. POOLE, STEPHEN T. SMITH, PHILIP A. BADDOUR, and DOUGLAS A. WILSON	)	
v.	)	From Wake County
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, 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 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. 201PA12-3

ORDER

On 20 April 2015, the United States Supreme Court Order List of 20 April 2015, posted on that Court's website, indicated that in the instant case, the Supreme Court granted certiorari, vacated the judgment of this Court, and remanded the matter for further consideration in light of *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. ___, 135 S. Ct. 1257 (2015). *See* http://www.supremecourt.gov/orders/ordersofthecourt/14.

On 20 April 2015, plaintiffs filed in this Court their "Motion for Expedited Schedule on Remand."

On 27 April 2015, defendants filed in this Court their "Response to Plaintiffs' Motion for Expedited Schedule on Remand."

On 28 April 2015, plaintiffs filed in this Court their "Reply to Defendants' Response to Plaintiffs' Motion for Expedited Schedule on Remand."

On 5 May 2015, the Supreme Court of the United States e-mailed to this Court a certified copy of the mandate and a certified copy of the judgment in the instant case.

Pursuant to the mandate of the Supreme Court of the United States, Plaintiffs' Motion for Expedited Schedule on Remand is allowed as follows:

Further briefing and argument shall be limited to the applicability of *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. ___, 135 S. Ct. 1257 (2015), to the case at bar.

Any supplemental material to be added to the Record on Appeal shall be due on or before 1 June 2015.

Plaintiffs' brief shall be due on or before 11 June 2015. Any motions to file amicus curiae briefs aligned with plaintiffs, along with the attached proposed briefs, shall be filed on or before that same date.

Defendants' brief shall be due on or before 13 July 2015. Any motions to file amicus curiae briefs aligned with defendants, along with the attached proposed briefs, shall be filed on or before that same date.

Plaintiffs' reply brief, if any, shall be due on or before 27 July 2015.

Oral argument will be held on 31 August 2015.

This the 7th day of May, 2015.

s/Sam J. Ervin

For the Court

STATE v. GRADY

[367 N.C. 821 (2015)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From New Hanover County
	)	
TORREY DALE GRADY	)	

No. 179A14-2

ORDER

On remand by the United States Supreme Court, 575 U.S. ___, 135 S. Ct. 1368, 191 L. Ed. 2d 459 (2015) (per curiam), the following order was entered and is hereby certified to the North Carolina Court of Appeals:

Remanded to the Court of Appeals for reconsideration in light of *Grady v. North Carolina*, 575 U.S. ___, 135 S. Ct. 1368, 191 L. Ed. 2d 459 (2015) (per curiam).

By order of the Court in Conference, this 10th day of June, 2015.

s/Sam J. Ervin
For the Court

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

9 OCTOBER 2014

003P14	Jorge A. Espinosa v. Tradesource, Inc., Employer, Arch Insurance Company, Carrier (Gallagher Bassett Services Inc., Third-Party Administrator)	1. Plt-Appellant's Motion for Temporary Stay (COA13-220 and 13-466) 2. Plt-Appellant's PDR Under N.C.G.S. § 7A-31 3. Def's Conditional PDR Under N.C.G.S. § 7A-31 4. Plt's Motion to Amend PDR	1. Allowed **01/03/2014** Dissolved **10/09/2014** 2. Denied 3. Dismissed as Moot 4. Dismissed as Moot
012A14	State ex rel. Utilities Commission, et al. v. Attorney General, et al.	Duke Energy Carolinas, LLC's Motion to Correct Appellee Brief	Allowed **08/28/2014**
042P14	Taralyn Shalandra Simpson v. Sears, Roebuck and Co. and Amy Edwards	Defs' PDR Under N.C.G.S. § 7A-31 (COA13-329)	Denied
047P14	State v. Walter Eric McKinney	1. State's Motion for Temporary Stay (COA13-384) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/11/2014** 2. Allowed 3. Allowed
103P14	State v. Harold Goins, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA 13-998)	Denied
109P14	State v. Joshua Lee Watson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Halifax 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
131P04-2	State v. Shan Edward Carter	1. Def's *Pro Se* Motion for NOA (COAP14-463) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of New Hanover County	1. Dismissed *ex mero motu* 2. Dismissed

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

9 OCTOBER 2014

137P14	Christopher Benjamin v. City of Durham and North Carolina Department of Transportation – Division of Motor Vehicles	Plt's PDR Under N.C.G.S. § 7A-31 (COA13-909)	Denied
138A94-4	State v. Marlow Tyrone Williams	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Forsyth County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied **08/21/2014** 2. Allowed **08/21/2014** 3. Dismissed as Moot **08/21/2014**
142P14	State v. Norman Trevor Williams	1. Def's PDR Under N.C.G.S. § 7A-31 (COA13-871) 2. Motion for Withdrawal and Substitution of Counsel	1. Denied 2. Allowed
151P14	Kimberly Shreve v. Kristen Fetter and Tina Hoagland Byrd	1. Plt's *Pro Se* Motion to Change for Improper Venue 2. Plt's *Pro Se* Motion for Appeal	1. Dismissed 2. Dismissed
157P14	In re Adoption of: "Baby Boy" born April 10, 2012	Respondent's PDR Under N.C.G.S. § 7A-31 (COA13-912)	Denied
188A14	State v. Laurence Alvin Lovette, Jr.	1. Def's NOA Based Upon a Constitutional Question (COA 13-991) 2. State's Motion to Dismiss Appeal	1. --- 2. Allowed
194P14	Roanoke Country Club, Inc., T&J Properties, LLC, Robert R. Martin and wife, Theresa W. Martin, and Reginald W. Ross, Jr. and wife, Delores Ross v. Town of Williamston	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA13-756)	Denied

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

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196P14	City of Asheville v. Roger S. Aly	1. Plt's Motion for Temporary Stay (COA13-720) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/12/2014** Dissolved **10/09/2014** 2. Denied 3. Denied
203P10-2	State v. Carl Steve Owens	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Cherokee County	Dismissed **Jackson, J., recused**
210P14	State v. Donald Ray Cline, Jr.	Def's Petition for *Writ of Certiorari* to Review Order of the COA (COAP13-316)	Dismissed
217P14	Ehab Abdelaziz v. Mohammed Asmar, Khalid Ayoub Alnabulsi, and Suma, Inc., d/b/a XPRESS 13, a dissolved NC Corporation	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA13-1424) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
228P14	State v. Robert Leviticus McKoy	1. State's Motion for Temporary Stay (COA13-1071) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/03/2014** Dissolved **10/09/2014** 2. Denied 3. Denied
230P14	State v. Severn Lee Williams	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1250)	Denied **Jackson, J., recused**
231P14	Ray Horton Hunt v. Lindsay Nicole Durfee (now Collinsworth)	Plt's PDR Under N.C.G.S. § 7A-31 (COA13-1443)	Denied

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

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233P14	State v. Domenico Alexander Lockhart	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1460)	Denied **Hunter, J., recused**
234P12-3	State v. Titus Lamont Batts	Def's *Pro Se* Motion to Dismiss for Improper Filing	Dismissed
239P14	State v. Winston Harvey Stephens, Jr.	1. Def's NOA Based Upon a Constitutional Question (COA14-8) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss the Appeal	1. --- 2. Denied 3. Allowed
240P14	Alisa G. Henderson v. Jason Jordan Henderson	Def's PDR Under N.C.G.S. § 7A-31 (COA 13-843)	Denied
245P14	Reinaldo Olavarria v. Wake County Human Services: Mary Morris, Warren Ludwig, Marilyn Fletcher, Ramon Rojano, Kathy Sutehall, Linda Clements Wendell Police Department: Roy D. Holloway, James E. Gill, Vance Johnson	1. Plt's *Pro Se* NOA Based Upon a Constitutional Question (COA13-1215) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Defs' (Wendell Police Department, Roy D. Holloway, James E. Gill, and Vance Johnson) Motion to Dismiss Appeal 4. Defs' (Wake County Human Services, Mary Morris, Warren Ludwig, Marilyn Fletcher, Ramon Rojano, Kathy Sutehall, and Linda Clements) Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed 4. Allowed **Hunter, J., recused**
247P14	State v. Marco Santaine Davis	Def-Appellant's PDR Under N.C.G.S. § 7A-31 (COA13-952)	Denied

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

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249P14	State v. Jose Gustavo Galaviz-Torres	1. State's Motion for Temporary Stay (COA13-1318) 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 (COA13-1318)	1. Allowed **07/18/2014** 2. Allowed 3. Allowed 4. Dismissed as Moot **Hunter, J., recused**
257P14	State v. Antonio Edward West	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1399)	Denied
261P14	State v. Jeffrey Scott Hughes	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-1400)	Denied
267P14	In the Matter of: N.T.U., minor child	Respondent Mother's PDR Under N.C.G.S. § 7A-31 (COA14-89)	Denied
268A12-2	State ex rel. Utilities Commission v. Attorney General	Duke Energy Carolinas, LLC's Motion to Correct Appellee Brief	Allowed **08/28/2014**
268P14	State v. David Lee Mizelle	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of the COA (COA12-351)	Denied
271P14	State v. Rodney Moucell Jones	Def's *Pro Se* Motion for PDR (COAP13-459)	Dismissed
273P14	State v. Corey Lamont McClamb	Def's PDR Under N.C.G.S. § 7A-31 (COA13-996)	Denied
277P14	State v. Luis Gustavo Licona Rosales	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1373)	Denied
278P14	State v. Michael Wayne Mabe	Def's *Pro Se* Motion for Discretionary Review (COAP14-516)	Dismissed **Beasley, J. and Jackson, J., recused**

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

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280A14	In the Matter of: J.C. and J.C.	*Guardian ad Litem's* Motion to Withdraw and Substitute Attorney	Allowed **08/9/2014** **Hunter, J., recused**
282A14	State v. Douglas Eugene Veal	1. Def's NOA Based Upon a Constitutional Question (COA13-1407) 2. State's Motion to Dismiss Appeal	1. --- 2. Allowed
286P14	State v. Shawn Dewayne Parks	Def's *Pro Se* Motion for PDR (COAP14-332)	Dismissed
287P14	State v. Louis Gene Davis	Def's *Pro Se* Motion for PDR (COAP12-831)	Dismissed
288P14	State v. Jerry Dan Surratt II	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Randolph County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed Without Prejudice 2. Allowed 3. Dismissed as Moot
289P06-5	State v. Steve Morrison	1. Def's *Pro Se* Motion for NOA (COAP14-414) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Mecklenburg County	1. Dismissed *ex mero motu* 2. Dismissed **Hunter, J., recused**
291P14	State v. Carmen B. Brown	1. Def's *Pro Se* Motion for Appropriate Relief 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Guilford County 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 4. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Allowed 4. Dismissed as Moot
292P12-2	State v. Alonzo Greene	1. Def's *Pro Se* Motion for NOA (COA14-565) 2. Def's *Pro Se* Motion for PDR	1. Dismissed *ex mero motu* 2. Dismissed

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

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293P14	State v. Danny Ray Anderson	Def's PDR Under N.C.G.S. § 7A-31 (COA14-25)	Denied **Hunter, J., recused**
295P14	State v. Leonardo Arreola	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP14-564) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
297P14	State v. Christopher Leevett Robinson	Def's PDR Under N.C.G.S. § 7A-31 (COA 13-1436)	Denied
301P14	State v. Zannie Jay Lotharp-Bey	Petitioner's *Pro Se* Motion for Appeal as of Right (COAP14-581)	Dismissed
303P14	State v. Michael David Morrow	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-1282)	Denied
304P14	Hart, et al. v. State of North Carolina, et al., Cynthia Perry, Gennell Curry, Thom Tillis, and Phil Berger, Intervenors Richardson, et al. v. State of North Carolina, et al., Cynthia Perry, Gennell Curry, Thom Tillis, and Phil Berger, Invervenors	1. Intervenors' Emergency Motion for Temporary Stay (COAP14-659) 2. Intervenors' Petition for *Writ of Supersedeas* 3. Intervenors' Motion for Suspension of the Rules	1. Dismissed without Prejudice **09/02/2014** 2. Dismissed as Moot **09/02/2014** 3. Dismissed as Moot **09/02/2014**
306P14	State v. Gerald Michael Delaney	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP14-571)	Dismissed **Jackson, J., recused**
322P14	State v. Alphonza Leonard Thomas	1. Def's *Pro Se* Petition for *Writ of Certiorari* 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

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

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323P10-5	State v. Lacy Lee Williams, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP14-628) 2. Def's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed
323P14	State v. Charles Marshall	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP14-473)	Dismissed
324P14	State v. Anthony Pressley	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-1248)	Denied
325P14	State v. Doran Arthur Atkins	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA13-1242)	Denied
328P14	State v. Ramiro Saucedo-Solis	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **09/26/2014**
333P14	State v. Ryan Matthew Williams	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1309)	Allowed
337P03-2	Adrian Devon Murray v. Mark E. Klass, Theodore S. Royster, Jr.	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied
372A14	Hart, et al. v. State of North Carolina	Special Order (COAP14-659)	Special Order
373A14	Cape Fear River Watch v. NC Environmental Management Commission, et al.	Special Order (COA14-708)	Special Order
373P13-2	State v. Sandy Alexander Sturdivant	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP13-528) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
374A14	Fisher, et al. v. Flue-Cured Tobacco Cooperative Stabilization Corp.	Special Order (COA14-609)	Special Order

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

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375A14	Arnesen, et al. v. Rivers Edge Golf Club and Plantation, Inc.	Special Order (COA14-870)	Special Order
376A14	Anderson, et al. v. Coastal Communities at Ocean Ridge Plantation, Inc., et al.	Special Order (COA14-871)	Special Order
377A14	Barton, et al. v. Coastal Communities at Ocean Ridge Plantation, Inc., et al.	Special Order (COA14-872)	Special Order
378A14	Barry, et al. v. Ocean Isle Palms, Inc., et al.	Special Order (COA14-873)	Special Order
379A14	Beadnell, et al. v. Coastal Communities at Ocean Ridge Plantation, Inc., et al.	Special Order (COA14-874)	Special Order
380A14	Cubbage, et al. v. Board of Trustees of N.C. State University Endowment Fund, et al.	Special Order (COA14-311)	Special Order
407P13-2	State v. Shawn Germaine Fraley	Def's *Pro Se* Motion for NOA (COAP14-509)	Dismissed *ex mero motu*

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

9 OCTOBER 2014

449P11-10	State v. Charles Everette Hinton	1. Def's *Pro Se* Motion for Notice of Objection 2. Def's *Pro Se* Motion for Relief from Order of the Court	1. Dismissed 2. Dismissed
455A05-3	State v. Abdul Fransisco Hernandez	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Cumberland 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
472PA13	In the Matter of: N.J.	1. Juvenile-Appellee's Motion to Dismiss State's Appeal (Mootness) 2. State's Motion to Reconsider 3. State's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA (COA13-53) 4. Juvenile-Appellee's Motion to Dissolve Stay of the Execution of Judgment of the COA (COA13-13-53) 5. Juvenile-Appellee's Amended Motion to Dissolve Stay of the Execution of Judgment of the COA	Allowed 09/09/2014 2. Denied 3. Denied 4. --- 5. Dismissed as Moot **Hunter, J., recused**

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

9 OCTOBER 2014

2521P11-2	Michael I Cinoman, M.D. and Medical Mutual Insurance Company of North Carolina v. The University of North Carolina; the University of North Carolina Healthcare System d/b/a the University of North Carolina Hospitals at Chapel Hill; the University of North Carolina d/b/a the School of Medicine of the University of North Carolina at Chapel Hill; the University of North Carolina d/b/a the University of North Carolina Liability Insurance Trust Fund; William L. Roper in his capacity as Dean of the School of Medicine of the University of North Carolina Chapel Hill; Brian Goldstein in his capacity as Chairman of the University of North Carolina Liability Insurance Trust Council; and Thomas M. Stern, as Guardian ad Litem for Armani Wakefall; and WakeMed	Def's PDR Under N.C.G.S. § 7A-31 (COA13-902-2)	Denied
629P01-2	State v. John Edward Butler	Def's *Pro Se* Motion to Appoint Counsel	Denied

APPENDIXES

INVESTITURE CEREMONIES OF
CHIEF JUSTICE MARTIN

INVESTITURE CEREMONY OF
JUSTICE BEASLEY

INVESTITURE CEREMONY OF
JUSTICE ERVIN

INVESTITURE CEREMONY OF
JUSTICE HUDSON

INVESTITURE CEREMONY OF
JUSTICE HUNTER

PORTRAIT CEREMONY OF
CHIEF JUSTICE LAKE

PORTRAIT CEREMONY OF
JUSTICE BROCK

PORTRAIT CEREMONY OF
JUSTICE WHICHARD

AMENDMENTS TO THE RULES OF THE JUDICIAL STANDARDS COMMISSION

AMENDMENT TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE EFFECTIVE 10 APRIL 2015

FORMAL ADVISORY OPINION OF THE JUDICIAL STANDARDS COMMISSION, 2015-01

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING REINSTATEMENT FROM INACTIVE STATUS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING STANDARDS FOR CERTIFICATION AS A SPECIALIST

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PLAN OF LEGAL SPECIALIZATION

AMENDMENT TO THE ORDER ESTABLISHING THE EQUAL ACCESS TO JUSTICE COMMISSION

REVISED RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

REVISED STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

REVISED RULES OF THE NORTH CAROLINA SUPREME COURT FOR THE DISPUTE RESOLUTION COMMISSION

REVISED RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING THE PRELITIGATION FARM NUISANCE MEDIATION PROGRAM

RULES IMPLEMENTING MEDIATION IN MATTERS BEFORE THE CLERK OF SUPERIOR COURT

RULES IMPLEMENTING MEDIATION IN MATTERS PENDING IN DISTRICT CRIMINAL COURT

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING JUDICIAL DISTRICT BARS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING TRANSFER TO INACTIVE STATUS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING SUSPENSION

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 THE CONTINUING LEGAL EDUCATION PROGRAM

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 REGISTRATION OF INTERSTATE AND INTERNATIONAL LAW FIRMS

Investiture

of

Mark D. Martin

Chief Justice

Supreme Court of North Carolina

Law and Justice Building
Raleigh, North Carolina

September 3, 2014
10:00 a.m.

PROGRAM

Supreme Court Courtroom
10:00 a.m., September 3, 2014

Sounding of the Gavel	Christie Cameron Roeder Clerk Supreme Court of North Carolina
Welcoming Remarks	Robert H. Edmunds, Jr. Associate Justice Supreme Court of North Carolina
Recognition of the Governor	Justice Robert Edmunds
Remarks	The Honorable Pat McCrory Governor, State of North Carolina
Administration of Oath	Justice Robert Edmunds
Remarks	Chief Justice Mark D. Martin
Adjournment	Christie Cameron Roeder

Remarks by Chief Justice Martin

It is an honor to be installed as the 28th Chief Justice of the Supreme Court of North Carolina. I thank Governor McCrory for the confidence he has shown in me and for trusting me to lead the Judicial Branch of government.

During my tenure on this Court, beginning in 1999, I have had the distinct honor and privilege of serving under four chief justices: Burley B. Mitchell, Jr., Henry Frye, I. Beverly Lake, Jr., and Sarah Parker. I'll never forget the day when I was appointed to the bench and the kindness that Justice Jim Exum showed me on my first day of work, on December 30th, 1992. These leaders of our Court and judicial system fully devoted themselves to the fair and impartial administration of justice. They set a very high bar for future chief justices to follow.

I especially want to recognize Chief Justice Parker, under whom I served as Senior Associate Justice since 2006. Chief Justice Parker cares deeply about North Carolina's courts. I hope to carry on her strong work ethic in the pursuit of justice.

Our founders clearly understood the importance of our courts, and that is why they made the courts a co-equal branch of government—a co-equal branch which has a critical function to perform on behalf of the people of North Carolina. That function requires adequate resources, and I plan to ensure that the courts are adequately funded.

As part of the twenty-first century, we know the courts will need to look at innovation and efficiency. We know that concepts of virtual courthouses and e-filing that are being pursued in other states must be diligently planned out, carried out, and implemented here. The public demands no less, and twenty-first century public expectations must be met. We must focus on our core functions as courts: upholding the rule of law and ensuring justice in our day. We need to have the resources to get it right the first time, and yet also have the accountability and integrity to admit when we have made an error. We will begin this process here, right at the Supreme Court, by taking steps to hear more fully briefed and argued appeals.

And how can our way of life, our constitutional rights and responsibilities move forward into the future unless our young people understand the importance of our Constitution, the rule of law. Civics education should not be a recommended subject. It should

be part of every schoolhouse across the land. Equal access to justice—if we do not ensure that each and every person has access to our courts then we have failed as a people. It is our compact as citizens, for our common bonds as Americans and North Carolinians far outweigh anything that would potentially divide us. Finally, institutional transparency and accountability. The courts exist for the people of North Carolina, and they are our accountability.

I plan to follow my predecessors' devotion to service of the public as I lead the Supreme Court and supervise the administration of justice during this appointive term of office. Earlier this year, I issued an administration of justice plan designed to strengthen our courts. I will not be able to complete this work alone. Instead, I look forward to working with other justice system stakeholders, the public, and the leadership of the two other branches of government to implement this plan for the benefit of the people of this great state.

Thank you so much for being a part of this ceremony today. I so appreciate your presence. As the ceremony concludes, I would ask you to stay in your seats so that the Justices and the Governor can leave this room. After greeting the Governor and my fellow Justices briefly in the Conference Room, I will go the History Room on the first floor and look forward to greeting each of you there.

Madam Clerk, please adjourn this ceremonial session.

Investiture

of

Mark D. Martin

Chief Justice

Supreme Court of North Carolina

Law and Justice Building
Raleigh, North Carolina

January 5, 2015
11:00 a.m.

Mark D. Martin is the Chief Justice of the Supreme Court of North Carolina. With twenty-two years of judicial service, Chief Justice Martin is the only active member of the North Carolina state judiciary with experience on the Supreme Court, Court of Appeals, and Superior Court.

Martin learned the value of public service from his parents, Colonel M. Dean Martin and Ann Martin. His father served in the United States Air Force and his mother worked as a school teacher. After Colonel Martin retired from the military, he served as a business professor at Western Carolina University until his death in 1990. Martin followed his parents to Western, graduating *summa cum laude*. He received his *Juris Doctor*, with honors, from the University of North Carolina School of Law. Martin later earned a Master of Laws (LL.M.) in Judicial Process from the University of Virginia.

In November 1998, Martin was elected to fill an open seat on the Supreme Court. At the time of his installation, at age 35, he was the youngest Supreme Court justice in North Carolina history. Martin served on the Court of Appeals from 1994 to 1998, and as Resident Superior Court Judge in Greenville, Judicial District 3A, from 1992 to 1994. Prior to his judicial service, Martin served as legal counselto Governor James G. Martin (no relation), practiced law at the McNair Law Firm in Raleigh, and clerked for United States Judge Clyde H. Hamilton.

Martin has served in a number of leadership roles within the North Carolina Bar Association, including as its Vice-President and as a member of its Litigation Section Council, Judicial Independence Committee, and Strategic Planning and Emerging Trends Committee. He has taught law courses at the University of North Carolina, Duke University, and North Carolina Central University. In 2003, Martin chaired the Commission on the Future of the North Carolina Business Court. He has also served on the Board of Directors for the Carolina Law Alumni Association and the Wake County Bar Association.

Martin is dedicated to strengthening and advancing the rule of law. He has served as Chair of the ABA Judicial Division and as Chair of the Appellate Judges Conference. As a member and as Chair of the Appellate Judges Education Institute (AJEI) Board of Directors, Martin has worked on a national level to support continuing education for appellate judges, appellate lawyers, and appellate court staff attorneys. He chaired the 2008 AJEI Summit in Phoenix, Arizona. He co-chaired the 2009 National Summit on Fair and Impartial State Courts, in which representatives from thirty-eight jurisdictions participated and Justice Sandra Day O'Connor (Ret.) served as Honorary Host. Martin is a recipient of the Order of the Long Leaf Pine, the highest civilian award in North Carolina. In November 2011, Martin was inducted into the Warren E. Burger Society of the National Center for State Courts.

Martin is married to Kym Lake Martin and is the proud father of five children: Lauren, Anna, Sarah, Nathaniel, and Susanna. He and his family reside in Apex.

PROGRAM

Sounding of the Gavel	Clerk Christie Cameron Roeder
Invocation	Reverend Ronald A. Lewis
Welcome	Justice Robert H. Edmunds, Jr.
Special Remarks	Wm. T. (Bill) Robinson III Judge James A. Wynn, Jr.
Recognition of Chief Deputy Attorney General	Justice Edmunds
Presentation of Commission	Chief Deputy Attorney General Grayson Kelley
Introduction	Governor Pat McCrory
Administration of Oath	Justice Edmunds
Remarks	Chief Justice Mark D. Martin
Benediction	Lynette Troyer Lewis
Adjournment	Christie Cameron Roeder

Reception following ceremony at
the Governor's Mansion, Raleigh, N.C.

Remarks by Chief Justice Martin

It is such an honor to have so many friends gathered, and it is an honor to be installed for a full term as the twenty-eighth Chief Justice of the Supreme Court of North Carolina. I wish to thank the people of North Carolina for entrusting me with the responsibility of leading the judicial branch of government.

At the outset, I apologize that guests of the Court are located in three locations. A chief justice should be installed in the Supreme Court, but our courtroom only holds about one hundred people. I am advised that over six hundred people are in attendance and therefore are seated in three locations. Thank you for understanding our predicament, and I look forward to seeing you in person at the reception.

I wish to thank Governor McCrory, Judge Wynn, and Bill Robinson for their gracious remarks. I also want to thank my wife, Kym; my children; and my family for supporting me during the two-year election cycle and for allowing me to pursue my passion of public service.

During my tenure on the Supreme Court, which began in January 1999, I have had the distinct honor and privilege of serving with four different chief justices: Burley B. Mitchell, Jr.; Henry Frye; I. Beverly Lake, Jr.; and Sarah Parker. These leaders of our Supreme Court and court system fully devoted themselves to the fair and impartial administration of justice. They set a very high bar for future chief justices to follow. And Chief Justice Jean Toal, my good friend from South Carolina, what an honor for us to have you here with us today.

Our founders clearly understood the importance of our courts, and that is why they made the courts a separate and co-equal branch of government—a co-equal branch which has a critical function to perform on behalf of the people of North Carolina. That function requires adequate resources, and my top goal as Chief Justice will be working to strengthen our courts through adequate funding and efficient administration.

As part of the twenty-first century judiciary, court systems—both in North Carolina and around the country—will need to stress innovation and efficiency without losing focus of the paramount objectives of any court system: fairness, impartiality, commitment to

the Constitution, uniform application of law, administrative accountability, decisional independence, and equal justice under the law.

To begin the dialogue about how best to achieve these objectives, I issued a comprehensive administration of justice plan in February of 2014. Over the past several months, I received invaluable feedback on that seven-point plan and those proposals to strengthen the administration of justice in North Carolina. And they remain my administrative blueprint as I begin my term of office. I would like to use this opportunity to speak to you briefly about each of these points.

First, we must apply innovation to strengthen our courts. In order to ensure that we innovate in a deliberate and logical way, we will establish a multidisciplinary study commission similar to the Bell Commission of the 1960s and the Medlin Commission of the 1990s. This panel will evaluate the operation of our court system and issue a report and recommendation.

This commission will bring together stakeholders not only from within the judiciary, but will also include members of the General Assembly, leaders from the private sector, attorneys who practice in our courts, and members of the public. If we are to achieve meaningful reforms that enable our courts to meet twenty-first century expectations, this multidisciplinary commission must include a broad spectrum of people who are committed to the administration of justice at all levels.

There are also proposals that we can move forward with in the near future. For instance, we are committed to successfully implementing the Business Court Modernization Act, and there is no reason why we cannot be a national leader on this front. Additionally, I am committed to calendaring more appeals for full briefing and argument at the Supreme Court, a process my colleagues and I have already initiated. Finally, I desire to establish an office of central staff at the Supreme Court, similar to offices already being used by many other states and the Court of Appeals. This new office will enable justices to consider more appeals, to issue more opinions, and to provide appropriate guidance to legal system stakeholders and the public at large.

We must also incorporate the improving use of technology within the judicial branch. The primary objective here is the implementa-

tion of electronic filing systems in all North Carolina courts. Thirty-five states and the federal judiciary have already moved forward with e-filing. When we implemented electronic filing here at the Supreme Court in 1996, we were a national leader. The focal point of our justice system is the county courthouse. By expanding the use of e-filing in the trial courts, we will seek to eliminate paper filing requirements and make justice system filings available online whenever possible, thereby enhancing the openness and transparency of court operations.

To fulfill our obligation to promote the fair and impartial administration of justice, we must also promote civics education and strengthen the rule of law. These related goals are critical to ensure that the public understands the vital role of courts in promoting the rule of law and supporting our democracy. This discourse should start in our schools, as it is critical that young people understand the important role of courts and their status as a co-equal branch of government.

And we will work to strengthen the rule of law by adopting best practices to ensure equal access to justice for all persons. We must promote a thorough understanding of the rule of law and its importance to the preservation of our constitutional rights and responsibilities. Our state is great because her people are great; and our people deserve a judiciary that is second to none and that is open and accessible to all.

Another important part of the plan is improving justice system mental health resources for individuals and families. Our state, like so many others, has experienced success with the adoption of so-called "specialty" or "problem-solving" courts that are specifically tailored to address issues like family court or dependency and drug treatment. We also have two relatively new Veterans Courts that address issues specific to those who have served our country. Rather than merely meting out punishment, these courts seek to rehabilitate offenders in an effort to lower recidivism rates and reduce costs. I am committed to evaluating the establishment of mental health courts within the General Court of Justice that will address and empower individual families to proactively address mental health issues. And I have talked to the Governor about this initiative. In order to assure the long-term success of these mental health courts, we will also encourage public-private partnerships to cultivate justice system mental health resources.

None of the proposals that I have just described will be feasible or even possible without adequate funding. Each of these projects promises significant return on investment in the long-run—not only economically but for the better administration of justice. I look forward to working with legislative leaders and the Governor in order to promote consensus on critical funding needs.

Funding shortfalls impact our citizens in a very real way. For instance, courts struggle to pay juror fees to those who are called for jury duty. In some cases, sessions of court have even been cancelled even though the judge and parties were present and ready to proceed, because there was no court reporter or interpreter available. These delays result in inconvenience and increased costs to our citizens who rely on the court system.

Another critical shortcoming is the severe delay in obtaining forensic evidence. I am advised that delays of a year or more for blood-alcohol analysis in driving while impaired cases, or DNA testing in felony cases, have become the norm rather than the exception. These delays erode confidence in our justice system.

It is a fundamental principle that justice delayed is justice denied. North Carolinians who are endangered by impaired drivers, abused by family members, or victims seeking confidence that their perpetrator has been caught and fairly tried—all deserve better. We must provide access to our courts and timely justice to our citizens, and that can only be accomplished by adequately funding our courts.

The employees of the judicial branch are a tribute to the people of this great state. During the recession, we tightened our belts, and we worked diligently to ensure that courthouses remained open to serve you. Our people are the most important part of the court system, and they need adequate resources to effectively serve you. At a time when district attorneys wait a year or more for blood-alcohol tests in DWI cases; at a time when our courts' operating budget has made it difficult to pay jurors and conduct trials; and at a time when many of our assistant clerks work multiple jobs to make ends meet, it is time to adequately support our courts so that we may better serve you, the people of North Carolina.

Finally, in accordance with good government principles and in conjunction with increased funding to adequately and sustainably carry on the business of the courts, we must promote institutional

transparency and accountability. We can start by improving judicial branch websites in order to facilitate better access to public record materials. We will also increase the information available to the public by issuing an improved annual report on the judiciary.

As you can see, we are embarking on a challenging set of goals to strengthen our justice system. These goals are tangible and achievable, but I will need your help to succeed. Fully-functioning courts are vital to any healthy society. A government's legitimacy depends on the impartial administration of justice, which requires adequate staffing and funding for the courts. I will devote my term as your Chief Justice to ensuring that our judicial branch has the resources and the character to be worthy of the public's trust.

I want to conclude by thanking each of you for being a part of this ceremony. I so appreciate your presence.

As the ceremony concludes, I would ask you to stay seated when the ceremony is adjourned so that the Justices and the Governor can leave the courtroom. At that point, I hope you will join me for a reception at the Governor's Mansion. And Governor, we so appreciate you opening your house to us in just a few minutes. There will not be a formal receiving line of the members of the Court at the reception, but I will look forward to greeting each of you throughout the event. And again, thank you for being here today.

At this point, I am pleased to call upon Lynette Troyer Lewis to pronounce the Benediction. Following the Benediction, Madam Clerk, please adjourn this ceremonial session.

Remarks by Wm. T. "Bill" Robinson III 2011-2012 President of the American Bar Association

May it please the Court. Chief Justice Martin, Mrs. Martin, and honored guests: For many years, beginning long before I was privileged to be President of the American Bar Association, and long before he was Chair of the ABA Appellate Judges Conference and then Chair of the entire ABA Judicial Division, it has been my personal and professional privilege to know and work closely with Chief Justice Mark Martin and to witness up close his exceptional dedication to our profession and especially to the judiciary of North Carolina and throughout the United States.

Throughout his career, Chief Justice Martin has consistently worked to improve our system of justice for his fellow citizens. When then-ABA President Bill Neukom focused his ABA leadership on starting the World Justice Project to develop multidisciplinary support for our legal system and the rule of law, he wisely selected a young justice of the North Carolina Supreme Court to help him organize rule of law conferences all across the United States. When another ABA President, Tommy Wells, focused his initiative on supporting state court systems across the country, he asked Justice Martin and Philadelphia attorney Ned Madeira to organize a national summit to highlight the need for adequate court funding. Thirty-eight states participated in the summit, and Justice Sandra Day O'Connor served as honorary host. About the same time, in 2008, Justice Martin chaired the annual summit organized by the Appellate Judges Education Institute, or AJEI, to provide continuing education programming for America's appellate judges and justices, appellate court staff attorneys, and appellate lawyers, which was held in Phoenix, Arizona.

Justice Martin's collaboration with Tommy Wells and Ned Madeira developed the theme of "justice" as the "business of government." It was Justice Martin who, along with my colleague and former ABA President Steve Zack, and Mary McQueen of the National Center for State Courts, put together the regional conferences which brought together national, regional, and state leaders, to explore and identify what was working well in the administration of justice and what needed improvement. These conferences cultivated and identified promising innovations that could be shared and implemented at the state level.

In 2008, as our country sunk financially into the Great Recession, state and local tax revenues dramatically declined. They shrank so severely and so quickly that major, across-the-board budget cuts were implemented in many states. Included were financial cuts to the judicial system that were quite severe in too many states—for example, causing the suspension of civil jury trials, the closing of courtrooms and even courthouses, many vacant judgeships, and the laying off of court staff due to lack of funds. The ability of courts to provide and administer justice became increasingly challenged.

The ABA responded to this national crisis with the ABA Task Force on the Preservation of the Justice System. This task force began with Steve Zack as ABA President and continued the next year as the focus of my year as the ABA President. In tackling this national challenge, we at the ABA relied heavily on our friend and valued counselor, Justice Martin, for his wise and unwavering encouragement—especially on matters of importance to the judiciary nationally, regionally, and at the state level. Meeting the challenge of court underfunding is not for sprinters but requires the long-term commitment and determination of marathoners like Chief Justice Martin.

The work of the ABA Task Force has continued, and Justice Martin made it the focus of his year as Chair of the ABA Judicial Division. Before becoming Chief Justice, he worked closely with Steve Zack and me as Co-Chairs of the ABA Task Force last year, to meet with chief justices of state judiciaries, with appellate judges and with trial judges, and academic scholars and bar leaders, in a series of regional meetings again organized with the expertise and support of the National Center's Mary McQueen. In these regional conferences we shared innovative ideas and developed strategic plans to keep our judicial systems in the states strong and vibrant. Many of these plans are now being implemented by state courts throughout the country and will result in more efficient and effective court systems with a sustained, more adequate funding system for our courts.

Of course, court funding is not the only issue of concern for our judicial system. It is also important that our courts continue to be fair and impartial. As Chair of the ABA Judicial Division, Justice Martin also focused on the perceptions of justice, developing techniques and training for judges and court administrators to assure that bias and implicit bias do not in any way compromise or affect the

decisions of our courts. This work continues at the ABA today. The ABA is funding the creation of training materials and programs for judges and courts to use in addressing these issues. While Chief Justice Martin is always the first to give others the credit for such efforts and progress for our courts, the truth is that these national accomplishments for the administration of justice and our courts are in large part a direct result of his dynamic and effective leadership.

Because of his dedication and leadership, it did not surprise any of us who have been privileged to work with Chief Justice Martin at the ABA, that soon after announcing that he would run for chief justice, Justice Martin offered the citizens of North Carolina his proposed blueprint for improving the administration of justice here in North Carolina. This plan, as you know, was not a collection of mere platitudes or a vague set of unachievable goals but rather a clear, written proposal with specific objectives for incorporating judicial innovation, improving the use of technology, improving mental health resources, and promoting transparency and accountability—to name but a few of the issues and opportunities addressed in this historic proposal. I am told by a veteran staffer here at the Court that Chief Justice Martin is the first to offer such a comprehensive proposal for the courts of North Carolina. His leadership on this is but another indication, really another confirmation, of his courage and commitment to achieve needed change. But, as all of you know probably better that I, this Chief Justice has never been about the status quo when potential improvement to the justice system can be attained.

Chief Justice Martin has always stood up for the cause of justice and the courts with unwavering dedication, tireless hard work, exceptional expertise, and effective leadership. His service as Chief Justice of North Carolina will surely and successfully combine his extensive judicial experience at every level of the courts, his exceptional legal knowledge, and his superb interpersonal skills, to the collective benefit of the people of North Carolina and of the United States. We can be confident that history will recognize and confirm the wisdom of the voters of North Carolina in their choice of Mark Martin to serve as their Chief Justice. In conclusion, let me say with confidence: Upward and onward for North Carolina courts under the leadership of Chief Justice Martin.

Remarks by Judge James A. Wynn, Jr.
Fourth Circuit Court of Appeals

Mr. Chief Justice and Associate Justices of the Supreme Court of North Carolina, and if you'll permit me, the Governor of the State of North Carolina, Governor Pat McCrory: May it please the Court.

As I was walking up here, it came to my attention that perhaps there were those in this audience who are saying to themselves, "How is it that someone from the tobacco fields of Eastern North Carolina gets to speak at the investiture of the Chief Justice?" And I say to myself as I say those words and hear those words within my mind, I think about the fact that it is the person who is being invested as the Chief Justice of this Court. He has that degree of humbleness—the degree of humbleness that recognizes ordinary citizens like myself and can touch bases with those from the highest posts in this country to the lowest posts.

And I think this is particularly important in this the 800th anniversary of the Magna Carta, brought about in 1215. As you well know, this was the great document that set forth the rule of law. Chief Justice Martin has been so instrumental in adhering to the rule of law and ensuring across this country—and, indeed, across the world, through the World Justice Commission and his work there—that the rule of law is adhered to, equally and fairly by all.

But I speak too, to say also there is this other document—this other amendment—that is in its 150th anniversary. It is the Thirteenth Amendment to the Constitution, that you all know abolished slavery in this country. And the degree of race relations in the state of North Carolina is indeed indicated by the conduct of Chief Justice Martin. You know, some years ago—I've served with nearly every one of you on this Court, except for my good friend Justice Newby, who had the occasion to run against me and win—but Justice Newby, I will say, along with my good friend Judge Duncan, I think the three of us turned out all right—but in this year of the 150th anniversary of the Thirteenth Amendment, the importance of race relations is ever so important. Some years ago, when Justice Martin, around 1994, became a member of the North Carolina Court of Appeals, having served as a Superior Court judge, having served as Counsel to Governor Martin, came to the Court of Appeals, and in his choice as to who it would be that would swear him in, he didn't choose the Chief Judge, he didn't choose someone outside—he

chose lowly me to swear him in onto the court. How ironic that would be—he being Republican, me being Democrat; he being non-African American, me being African American. But again, it showed the humbleness; it showed the connectivity that he and I had developed then and have developed since.

We've worked together on the American Bar Association as you all know. We've had important meetings and opportunities to know people across this country and across the state of North Carolina. Let me just say in closing, you could not have someone who is a greater ambassador for the state of North Carolina, nor a greater representative as the one who seeks to adhere to the rule of law, nor one who recognizes that all people should be treated equally, and that the law should be applied fairly to everyone regardless of their station in life. So I commend to you my good friend, my colleague, Chief Justice Mark Martin.

Remarks by Patrick L. "Pat" McCrory
Governor of North Carolina

May it please the Court. First, to my staff, never have me follow Justice Jim Wynn again. Justice Ervin, welcome to the Court.

On behalf of the people of North Carolina, I wish to congratulate Chief Justice Mark Martin on this tremendous achievement. When I appointed Chief Justice Martin to the position in September, I spoke of his experience, high values, and integrity—that I was confidently making him extremely qualified to serve the people of our state as Chief Justice.

Justice Martin was first elected to the Supreme Court in 1998, at the age of thirty-five, to become the youngest justice ever to serve on the state's highest court. In 2006, Martin became the Senior Associate Justice, and he has nearly twenty-two years of judicial experience, authoring over four hundred appellate decisions during his twenty-year tenure on the Supreme Court and Court of Appeals. He is the only sitting judge in North Carolina who has served on the Supreme Court, the Court of Appeals, and the Superior Court. He is a graduate of the University of North Carolina School of Law and received his undergraduate degree from Western Carolina University. He also has a Master of Laws degree in Judicial Process from the University of Virginia. But most importantly, and something that is very important to me as Governor, and is also very important to me as a former mayor, he is an ethical and honest person with the highest integrity.

Since his appointment last fall, Chief Justice Martin has already demonstrated his ability to lead this Court. He has appointed chief district court judges; he has held his first judicial council meeting; he has met with trial court judges, members of the Court of Appeals, and other judicial branch members; and he has also demonstrated a commitment to efficiency. On behalf of the Supreme Court, he agreed to review one of the largest number of cases from the Court of Appeals ever at one time to move important issues through the judicial process at a faster rate. And just last month, the Supreme Court had the largest volume of opinions filed in years. Usually, the general number is four to six opinions filed once a month. In December, the Supreme Court filed twenty-two opinions, indicating an even more responsive and efficient Court. Congratulations to each of you.

Additionally, Chief Justice Martin has established himself as a passionate advocate for the needs of the Judicial Branch. I'm glad the people of our state recognized Chief Justice Martin's ability to serve this Court in a professional and ethical manner, and I congratulate Chief Justice Martin; his wife, Kym; and their beautiful family on this achievement. Chief Justice Martin's experience, integrity, humility, and high standards will continue a long tradition of distinguished chief justices North Carolina has had for nearly two hundred years, and I know that this Court under his leadership will continue to uphold, protect, defend, and honor our state's Constitution. I look forward to having all of you come to the Executive Mansion later on today to celebrate and continue to honor this great public servant. Thank you, and may God continue to bless the great state of North Carolina.

Investiture

of

Cheri Beasley

Associate Justice

Supreme Court of North Carolina

Law and Justice Building
Raleigh, North Carolina

January 8, 2015
2:00 p.m.

Judge Cheri Beasley graduated from Douglass College of Rutgers University with a double major in Economics and Political Science in 1988. In December 1991 she received her J.D. from The University of Tennessee College of Law in Knoxville after completing a summer of law studies at Oxford University in England. From 1994 to 1999, Judge Beasley served as an Assistant Public Defender in the Twelfth Judicial District. In 1999 she was appointed as Judge of the District Court, Twelfth District, by Governor James B. Hunt, Jr. and then was elected and reelected as district court judge serving nearly ten years in this position. In November 2008 Judge Beasley was elected to the North Carolina Court of Appeals. She is the only African-American woman elected to any statewide office in North Carolina without having first been appointed to the office. Judge Beasley was appointed by Governor Beverly Perdue to serve as an Associate Justice of the Supreme Court of North Carolina.

Judge Beasley has lectured at The North Carolina Judicial College, UNC School of Law and NCCU School of Law. She was on the faculty of the National Institute for Trial Advocacy and has given lectures to law enforcement officers and court personnel. Judge Beasley is a member of the American Bar Association, Appellate Judicial Division, NC Bar Association (serving on several committees), Cumberland County Bar Association, Wake County Bar Association, and Junior League of Fayetteville (former director). Judge Beasley is a 2012 Henry Toll Fellow of the Council on State Governments.

Judge Beasley is married to Curtis Owens, a clinical research scientist. They are the proud parents of twelve-year-old twin sons, Thomas and Matthew, who are seventh graders. The family are members of First Baptist Church, South Wilmington Street, Raleigh. Their home church is First Baptist Church, Moore Street, Fayetteville. Judge Beasley is the only child of the late Dr. Lou Beasley and the late William James Beasley.

PROGRAM

Sounding of the Gavel	Christie Cameron Roeder Clerk Supreme Court of North Carolina
Invocation	Rev. Cureton L. Johnson Senior Pastor First Baptist Church Fayetteville, North Carolina
Welcoming Remarks	Mark D. Martin Chief Justice Supreme Court of North Carolina
Recognition of Attorney General	Chief Justice Martin
Presentation of Commission	The Honorable Roy Cooper Attorney General
Administration of Oath	Chief Justice Martin
Remarks	Cheri Lynn Beasley Associate Justice Supreme Court of North Carolina
Benediction	Rev. Dr. Dumas A. Harshaw, Jr. Pastor First Baptist Church Raleigh, North Carolina
Adjournment	Christie Cameron Roeder

Reception following ceremony

Investiture

of

Sam J. Ervin, IV

Associate Justice

Supreme Court of North Carolina

Law and Justice Building
Raleigh, North Carolina

January 7, 2015
2:00 p.m.

Sam J. Ervin, IV, was born in Morganton, North Carolina, on November 18, 1955. He attended the public schools in Burke County, North Carolina, graduating from Freedom High School in 1974. In 1978, Justice Ervin was awarded an A.B., magna cum laude, from Davidson College. After graduating from Davidson, he attended Harvard Law School, from which he received a J.D., cum laude, in 1981.

From 1981 until 1999, Justice Ervin practiced law with the Morganton, North Carolina, firm of Byrd, Byrd, Ervin, Whisnant, McMahon, P.A. While in private practice, Justice Ervin handled a variety of civil, criminal, and administrative matters, including many appeals to the North Carolina Court of Appeals and the Supreme Court of North Carolina.

In 1999, Justice Ervin was nominated for a seat on the North Carolina Utilities Commission by Governor James B. Hunt, Jr. He was nominated for a second term on the Utilities Commission by Governor Michael F. Easley in 2007. Both appointments were confirmed by the General Assembly. During his service as a member of the Utilities Commission, Judge Ervin was involved in deciding many important regulatory proceedings. In addition, Justice Ervin was extensively involved in the activities of the National Association of Regulatory Utility Commissioners, having served as Chairman of that organization's Subcommittee on Nuclear Issues and Waste Disposal from 2002 until 2005; as Chairman of that organization's Committee on Electricity from 2004 until 2007; and as a member of its Task Force on Climate Policy from 2007 through 2008. While a member of the Utilities Commission, Justice Ervin testified on two different occasions before the Subcommittee on Energy and Air Quality of the Committee on Commerce of the United States House of Representatives.

Justice Ervin was elected to the North Carolina Court of Appeals on November 4, 2008, and to the Supreme Court of North Carolina on November 4, 2014.

Justice Ervin has also been, at various times, involved in a wide variety of church-related, bar-related, and charitable activities. Justice Ervin is a member of the First Presbyterian Church of Morganton, North Carolina, where he has served as a deacon, elder, and member of the Administrative Committee. He is married to Mary Temple Ervin and has two children and two step-children.

PROGRAM

Sounding of the Gavel	Christie Cameron Roeder Clerk Supreme Court of North Carolina
Invocation	Reverend Michael R. Bailey Pastor First Presbyterian Church Morganton, North Carolina
Welcoming Remarks	Mark D. Martin Chief Justice Supreme Court of North Carolina
Recognition of Attorney General	Chief Justice Mark D. Martin
Presentation of Commission	Roy Cooper Attorney General State of North Carolina
Administration of Oath	Chief Justice Mark D. Martin
Remarks	Sam J. Ervin IV Associate Justice Supreme Court of North Carolina
Benediction	Reverend Michael R. Bailey
Adjournment	Christie Cameron Roeder

Reception following ceremony at
The Capitol Rotunda, Raleigh, N.C.

Remarks by Justice Ervin

Mr. Chief Justice, fellow members of the Court, distinguished guests, and friends:

I want to begin by expressing my thanks to each of you for coming and being with us this afternoon. I am overwhelmed by the fact that so many of you have taken time out of your busy schedules and have traveled such distances to join us on this occasion.

It is always risky for someone in my position to start down the road of expressing gratitude to specific individuals, since anyone who does that will inevitably leave someone out who should be included. However, I believe that I would be remiss if I failed to mention certain people who have played particularly significant roles in my life on this occasion. As a result, with apologies to everyone else, I am going to start down the dangerous road of thanking specific people for all that they have done for me.

I want to begin with my colleagues on the Supreme Court, each of whom has gone out of his or her way to welcome me to the Court. I appreciate their warmth, hospitality, and friendship and look forward to learning from and serving with them.

In addition, I want to express my gratitude to my long-time friend Christie Roeder, who had to put up with me when I was in private practice and who must have looked forward to my return to her life with considerable trepidation, and the other members of the Court staff, all of whom have been extremely hospitable since my election to the Court in November. I value their service and look forward to working with them as well.

Thirdly, I want to express my gratitude to my former colleagues at the Court of Appeals, with whom I served for the last six years. I immensely enjoyed the experience of serving on that body, appreciate their presence here today, and will miss having the opportunity to work with them in handling the significant case load that that Court is required to address. I particularly want to acknowledge the presence of former Chief Judge John Martin and current Chief Judge Linda McGee, both of whom have provided an example of exemplary public service that all of us would be well-advised to emulate.

Similarly, I want to thank the members of the Utilities Commission, on which, as the Chief Justice noted, I served for nearly a

decade, for their help, friendship, and example. Although many of my former colleagues on the Utilities Commission are here today, I particularly want to acknowledge the presence of current Chair Ed Finley, who served as Chair during the latter portion of my service on the Utilities Commission, and former Chair Jo Anne Sanford, who served as Chair during the majority of my tenure on that body.

In addition, I want to thank former Chief Justices Mitchell, Frye, and Parker and former Justices Whichard, Wynn, and Timmons-Goodson for their presence here today. I believe that I appeared in front of each of these former members of the Court except for Justices Wynn and Timmons-Goodson during my time in private practice and am grateful to have had the benefit of their friendship and the opportunity to learn from their example. I can only hope that my service on this Court will be as successful as their service was.

I also want to thank former Governor Jim Hunt and former Governor Mike Easley, neither of whom could be here today. Governor Hunt allowed me to begin my career in public service by appointing me to serve on the Utilities Commission, a decision for which I will be forever grateful. I am also grateful to Governor Easley, who gave me a chance to continue my career in public service when he appointed me to a second term on that body.

Next, I want to thank the members of my campaign staff, including Mike Davis, who is represented here today by his wife and my long-time friend, Alice Garland; Tim McKay; Tammy Brunner; Meghan Quick; Ben Julen; and Jenny Summer. Somehow, these folks managed to take this ugly duckling of a candidate and turn him into, if not a swan, at least someone who became sufficiently presentable to have been given the opportunity to sit here this afternoon.

I should also mention my opponent and friend, former Justice Robert N. Hunter, Jr., who, as the Chief Justice has indicated, is not present today in accordance with long-standing Court tradition. I appreciate the energetic and civil manner in which he ran his campaign and hope that we have set a precedent for how judicial campaigns should be conducted. I am glad that Governor McCrory has given former Justice Hunter a chance to continue his career in public service by appointing him to serve on the Court of Appeals.

As I suspect is the case with everyone on the bench and with many of you here in the courtroom, I owe a great deal to the legal mentors who took me under their wings over the years. I particularly

want to mention my former partners, Joe and Bob Byrd; John McMurray, a fine general practitioner from Morganton; and Tom Eller, who helped teach me to be a utility lawyer of sorts. Unfortunately, none of these folks are with us any longer. I miss them all and wish that I could share this moment with them.

I am, however, grateful, that two of my other legal mentors, United States Bankruptcy Judge George Hodges, under whom I worked when I interned in the law firm in which he practiced, and my good friend Don Cowan, with whom I handled a number of cases during my time in private practice, are here with us today. I appreciate the example that each of these men has set for me and want to acknowledge the influence that they have had on my life.

Finally, I want to thank the members of my family, including my mother, my siblings, my children and step-children, and, most importantly, my wife, a very private person who made the risky decision of taking me on almost 29 years ago despite my obvious interest in a career in public service and who has been the light of my life ever since. I appreciate more than she can ever know the opportunities that she has given me to further a career in public service even though that process has been hard on our family on occasion. I would not be here without the love and support that I have received from each of you and am grateful that you are here.

I did not mention in my list of legal mentors the two that are probably the most important, neither of whom is here today. They are my father and my grandfather.

Dad, as many of you know, served on the Superior Court and as a member of the United States Court of Appeals for the Fourth Circuit. I appreciate the presence of my friend and his successor, Judge Allyson Duncan, who was also my predecessor on the Utilities Commission, and her colleagues, Judge Wynn and Judge Al Diaz.

Granddad, in addition to his service in the United States Senate, served as a Superior Court Judge and a member of this Court. In fact, his portrait hangs just around the corner.

I was raised in a family in which we helped to decide Dad's cases around the dinner table and engaged in legal and policy discussions in which Granddad played the devil's advocate, took the opposite side of whatever position any of us took, and tried to argue us into changing our minds. Aside from the usual lessons that one learns

from the members of one's family about the importance of hard work, integrity, faith, remembering the less fortunate among us, and being what my father called "a dues paying member of society," I learned what I think of as my judicial philosophy from Dad and Granddad.

They taught me the importance of remembering that behind every case that comes before any Court are real people with real problems whose lives will be substantially affected by what the members of the Court do and that I need to keep this fact in mind in order to ensure that I view the role that I undertake with sufficient seriousness.

They taught me the importance of recognizing that each person, regardless of his or her age, gender, race, economic status, or any other personal characteristic, is entitled to be treated equally under the law and to have the law applied to his or her case without fear or favor.

They taught me that judges should strive to the best of their ability to make decisions based solely on the facts in and the law applicable to the case under consideration without attempting to effectuate any political or personal agenda.

And they taught me that judges, particularly at the appellate level, should clearly and fully explain the decisions that they make so that the litigants that come before the Court and the members of the public can fully understand why the Court made the decision that was made.

As a life-long Presbyterian, which makes me a Calvinist, I recognize that all of us are limited human beings who are, at some level, unable to do the things that we want to do and who are likely to fail on occasion. I do, however, hope that my service on this Court will reflect my adherence to these basic principles.

I am grateful that the citizens of North Carolina have seen fit to afford me the opportunity to serve on this Court and look forward to working with my colleagues in service to the citizens of this State in the years to come. Again, I want to thank each of you for coming and being here with us today. I am very grateful to you for your friendship and your help.

Investiture

of

Robin E. Hudson

Associate Justice

Supreme Court of North Carolina

Law and Justice Building
Raleigh, North Carolina

January 6, 2015
2:00 p.m.

Robin Hudson was born in Atlanta, Georgia, to Thomas Warner Hudson, Jr., and Barbara Conroy Hudson. She grew up with her three brothers there and in Greensboro, North Carolina, where the family moved in 1966. In 1969, she graduated from Page Senior High School in Greensboro.

In 1973, Justice Hudson earned a B.A. in Philosophy and Psychology from Yale University, graduating with the first class at that university that included women as freshmen. She was granted her J.D. in 1976, from the University of North Carolina and was admitted to the bar that same year.

Justice Hudson served as a legal services staff attorney in Boston and Durham, North Carolina, until April of 1977, when she opened her solo law office in Raleigh. She practiced law until she joined the North Carolina Court of Appeals, following her election in 2000, as the first woman elected to that Court without having been first appointed.

Justice Hudson has served as Vice-President of the North Carolina Bar Association, Board Member of the North Carolina Academy of Trial Lawyers, and President, Secretary and Board Member of the Women's Forum of North Carolina. She was a founding member of the North Carolina Association of Women Attorneys (NCAWA) in 1978 and remains active in that organization, having recently chaired its Judicial Division.

She has also received many awards, including the 2009 Gwyneth B. Davis Award for Public Service presented by the NCAWA, the 2006 Woman of Distinction Award presented by the General Federation of Women's Clubs, and the 2004 Outstanding Appellate Justice Award presented by the Academy of Trial Lawyers.

Justice Hudson is married to Victor Farah, an attorney in Raleigh. She is especially proud of her two adult children, Charles and Emily, both of whom teach second grade in public schools. Charles and his wife, Carolyn, are the proud parents of Justice Hudson's granddaughter, Doris, and her expected baby sister, due in May.

PROGRAM

Sounding of the Gavel	Christie Cameron Roeder Clerk Supreme Court of North Carolina
Invocation	Rev. Dr. Dumas Harshaw Senior Pastor First Baptist Church Raleigh, North Carolina
Welcoming Remarks	Mark D. Martin Chief Justice Supreme Court of North Carolina
Recognition of Attorney General	Chief Justice Martin
Presentation of Commission	Roy Cooper Attorney General State of North Carolina
Administration of Oath	Chief Justice Martin
Remarks	Robin E. Hudson Associate Justice Supreme Court of North Carolina
Benediction	Ms. Celia Hartnett Eucharistic Minister St. Paul's Episcopal Church
Adjournment	Christie Cameron Roeder

Reception following the Ceremony

Investiture

of

Robert N. Hunter, Jr.

Associate Justice

Supreme Court of North Carolina

Law and Justice Building
Raleigh, North Carolina

September 26, 2014
2:00 p.m.

Justice Robert N. ("Bob") Hunter, Jr. was born in Greensboro, North Carolina, on March 30, 1947, to Robert and Flora Hunter. His father was a building contractor and his mother was a teacher. He went to Greensboro Public Schools and graduated from Page High School in 1965. He then entered UNC-Chapel Hill and graduated with a B.A. Degree in History in 1969. In 1973 he obtained his Juris Doctor Degree from the UNC School of Law. After law school, Justice Hunter worked for the Holshouser Administration in the Department of Natural and Economic Resources. In 1974 he was appointed a Deputy Attorney General by Attorney General James H. Carson. After this service, he began private practice, first in Raleigh and later in Greensboro, until 2008 when he was elected to the North Carolina Court of Appeals. In 2014 he was awarded an LLM Degree in Judicial Studies from Duke University School of Law.

Justice Hunter's contributions to the community include serving as Guilford County Public Administrator, Chairman of the N.C. State Board of Elections, and President of N.C. BarCares, Inc. Justice Hunter has also been a member of the N.C. Criminal Justice Training and Standards Council and has taught as an adjunct professor at the UNC-G School of Business Administration, Wake Forest University Law School, Elon University Law School, and North Carolina Central University School of Law. Justice Hunter has earned recognition from his professional colleagues by receiving the McNeill Smith Award in Constitutional Law from the N.C. Bar Association and being named the 2011 Outstanding Appellate Judge by the N.C. Advocates for Justice.

For over sixteen years Justice Hunter has been married to Susan Awbrey Hunter, an elementary school teacher and licensed professional counselor. Together they have three children: Robert Neal Hunter, III; Chris Awbrey Steele, who is married to Jennifer Steele; and Alan Baret Steele, who is married to Laurie Steele. Justice Hunter's family includes five grandchildren, Asher Bennett Steele, Tristan Awbrey Steele, Allie Edwards, Zach Hodges, and MaKayla Hall, all of whom refer to him as "Grandbear," and Justice Hunter's brother, John McKinnon Hunter.

Justice Hunter is a member of First Presbyterian Church in Greensboro, North Carolina. When residing in Raleigh Justice Hunter and Susan attend Christ Episcopal Church, and when residing in Morehead City they attend St. Andrews Episcopal Church.

PROGRAM

Sounding of the Gavel	Christie Cameron Roeder Clerk Supreme Court of North Carolina
Invocation	Rev. Dr. Winston Breeden Charles Former Rector of Christ Church Raleigh
Welcoming Remarks	The Honorable Mark D. Martin Chief Justice Supreme Court of North Carolina
Remarks	The Honorable Pat McCrory Governor State of North Carolina
Recognition of Attorney General	Chief Justice Mark Martin
Presentation of Commission	The Honorable Roy Cooper Attorney General State of North Carolina
Administration of Oath	Chief Justice Mark Martin
Remarks	Justice Robert N. Hunter Associate Justice Supreme Court of North Carolina
Adjournment	Christie Cameron Roeder

Reception following ceremony at
the North Carolina Bar Center at
217 East Edenton Street, Raleigh, N.C.

Remarks by Justice Hunter

I want to thank all of you for coming today. It is very moving to me that all of you have taken time out of your day to be here with me. I want to thank Governor McCrory for his generosity in appointing me and in signing and sealing my commission as Justice. His kind words mean more to me and my family than I can say. I appreciate Attorney General Roy Cooper for delivering the title to my office to the Court; now it's been signed, sealed, and delivered. Susan and I appreciate that my friends and former colleagues from the Court of Appeals are here. They have made me a better judge through working with them and getting to know them in the process of adjudication at the Court of Appeals. Finally, I want to give a word of thanks to all my new colleagues at the Supreme Court who have been so gracious in welcoming me in this new post.

I am blessed. The people of North Carolina have been very generous to me and my family. I have been educated by them; they have provided me with interesting work all of my life; and I am very blessed that, in late life, I am able to give back in some small measure for the wonderful opportunities that they provided for me and my family. We live in the goodliest land.

In 2008, I began a second career in a new and exploding city, Raleigh, North Carolina. I love my job.

Earlier this week I asked some friends and colleagues what I should talk about today. Some suggested I speak about our present troubles. But Chief Justice Mark Martin proposed an aggressive program for dealing with those problems when he was sworn in earlier this month. I do not have any additional wisdom to add to what he had to say because he has my unqualified support in this endeavor. Some have suggested I talk about judicial independence. But over the last six years I have gotten to know all of the appellate judges and they are pretty independent people. I do not think that I have anything to add to that subject either. Finally, some have suggested I talk about judicial elections. But I am writing an article about that for the *North Carolina Law Review*, so I do not think that such heavy fare would be appropriate for this occasion.

Today I want to talk about something that I have noticed over the years. It is an intangible force that gives buoyancy to the legal system. This force is like the unseen hand that moves juries to do the right thing and reach the right result. It is elusive and changes over

time. Judges have pondered over this force since before Solomon. Children are born with an innate sense of what it is. I briefly want to discuss the sense of justice.

Like other senses, a sense of justice has to be educated.

I was the first lawyer in my family. My family was given to Presbyterian ministers and building contractors. I was fortunate in my education because I was given Bible stories to read as a child. Stories of Adam and Eve, Cain and Able, Esau and Jacob, Joseph and his brothers. The trial and crucifixion of an innocent man.

After I graduated from Bible stories and went to school, I studied history. There I learned about the great martyrs and heroes in the cause of justice: Sir Thomas Moore, John Adams, John Marshall, the great trial lawyer Abraham Lincoln and the fictional lawyer Atticus Finch.

My father, like his father before him, was a builder. For several hot summers he employed me as a common laborer. This job entailed bringing wheelbarrows of cement up rickety planks on a construction site and then catching bricks thrown up two stories on rickety scaffolding. My job was to deliver the bricks to the masons so they could do their work. From this experience, I deduced there was a better way to make a living. But it was an important lesson.

I went to the University at Chapel Hill. As a student, I encountered many of the dilemmas presented by the professors there for the study of the human condition. Among the aphorisms I remember clearly from that time in my life—and I don't remember everything very clearly from that time in my life—is a phrase that stands on a statue in Polk Place: "Duty is the sublimest word in the English Language." What is duty; what does it require? How do you know what is required for duty?

Later, I went to the Law School in Chapel Hill. The legal masters there provided more conundrums to bedevil me. I remember Professor Frank Strong, a person who seemed to be an old man at the time he taught me. He was from Ohio and he had been very active with the Tafts. No one could understand what he said in class. I had to go to the law review citations that he would give us to figure out what he was talking about. His theme was separation of powers and constitutional judicial review.

The Chinese have an expression that confusion comes before great wisdom. All the young people who have been taking the bar exam can understand that experience. Even though I have been practicing for 35 years, I am still waiting for great wisdom. I am still a little confused about some of the concepts and ideas that I learned in law school.

After graduating from law school in 1974, and after a brief stint in state government work, I hung out my shingle on Martin Street in Raleigh a couple of blocks away from where we sit. My last government job was on the second floor of this building as deputy attorney general. My current office is a couple of doors down from that, so I will begin and end my legal career—I hope—in the same building.

When I was practicing law, one day my father was dying, and he came to me and he said, "Son, I put you through law school and I put you through college, but I have never seen you try a case. I would like to see you try a case." I said, "Well, OK Dad." I had a little fender bender to try for my father to see what it was like to be a lawyer. Joe John was a district court judge then and he was the trial judge. The case involved an automobile controversy between an Asian lady—who was my client – whose mother would not pay a deductible and a young man who had collided with my client while driving a convertible with the radio blasting and his girlfriend beside him.

My father came down and sat with me while we were picking the jury. He leaned over to me after the jury had been picked and said, "You know, son, I wouldn't have picked those people." Then, later on, after I finished examining the witnesses, he said, "You know, son, I don't think I would've asked those questions." And then the matter was closing argument, and he had a similar criticism. When the jury finally came back, they announced that it was 11 to 1; one lady wouldn't agree with the other folks. Judge John asked us if we would accept the verdict—an 11 to 1 verdict. My father looked at me and said, "Son, you better retry this case."

When the jury then came back and gave me everything I wanted, my father was stunned. I think the real reason he wanted to come and see me try that case was because he was worried that I would not be able to support myself after he was gone and he could no longer send me money. He did not understand what had just gone on. (But he never mentioned it again either.)

I think a lot of the public is like my father. They do not understand what goes on in court. They do not understand the value of lawyers and the solidity which we bring to a society as a way of giving people a right to be heard and a process they understand that is fair. It never ceases to amaze me that two people come to court, tell a judge their problems, and that judge says a few words and the people walk away doing what he said.

Were it not for the sense of justice that I spoke about earlier, I am not sure that would happen.

Some philosopher once said, "When the student is ready, the teacher will appear." Over the 35 years I have been practicing law, I came to learn that my clients were my teachers. Across my law office desk, I heard more stories. O' Henry in his wildest imagination could not have come up with the stories that these people have told me. Practicing law is really the study of the human condition. Some would say it is the human comedy. I loved my clients and I was passionate for them when I was a lawyer and an advocate because I knew that my clients wanted a specific kind of justice. Gradually I learned how to practice law through the help of patient clerks and judges. I learned what justice looks like. Yet another kind of education was given to me, as it is given to all lawyers, who practice for any length of time.

The great skills of the trial lawyer are not the great skills of the judge. The greatest skill that a trial lawyer can have is to characterize a problem. He can format a problem. He forms the question that needs to be answered by the judge and the jury. Now his opponent, of course, tries to un-form the problem he has created.

In the vast majority of cases, legal questions are resolved by the routine application of settled law. We all know this at the Court of Appeals and on the bench because human problems have a repetition to them and it seems it is endless. But sometimes, in a rare case, when the stars are aligned just so and you have facts that are clear and do not require debate, a question has presented itself to a judge and an appellate court which can do great justice.

The judges in *Bayard vs. Singleton*, for example, a foundational case for the jurisprudence of this state, did great justice when they recognized constitutional judicial review. I know this because Frank Strong told me that at Chapel Hill law school. *Bayard* is a foundation-

al decision supporting two notions: the separation of powers and that courts are independent and have a constitutional duty to do justice under a written constitution. Prior to *Bayard*, judges were the King's men, placing their thumb on the scales of justice to secure royal prerogative. Justices Ashe, Spenser, and William voided a statute passed by the legislature which prohibited former British loyalists from obtaining a jury trial to recover their property seized during the American revolution.

From this seed, constitutional judicial review—as a way to secure justice—became firmly planted in American jurisprudence. Other great justices and judges have employed Bayard to secure a just society. John Marshall, for example, used the concept in *Marbury vs. Madison*. Earl Warren employed the concept in the great Warren era decisions: *Brown*, *Gideon*, *Reynolds v. Simms*. Our own justices at this bench and those sitting before us—Parker, Frye, Mitchell, Richard, Orr, Wainwright—have employed the same principles as *Bayard*, as have Judges Howdy Manning and Knox Jenkins. The judges on the Court of Appeals who are with us today know this law as well.

The job of being an appellate judge is very different from being a lawyer. We read stories—so many stories—that are painted with dark hues of aggrievement and human weakness and failure in which the consequences are dire. Alexander Solzhenitsyn in *The Gulag Archipelago* (which I recommend to anyone who has insomnia) takes the Russian justice system and describes it case by case. And it is a Hell of a justice system, because there is no justice in the system. It is a system to do away with problematic people.

But the artist makes each case a point of paint on the canvas to tell his narrative. Gradually you read the 4000 page treatise and you come to understand that no artist could have made up all of those names and all of those cases. The story was not fiction, but nonfiction.

So an appellate judge gets a view of society that is a little different from that which appears on the television every night. Eventually you have enough points of paint to see that a picture has emerged. From the point of view of an appellate judge, or at least this appellate judge, the picture is not always pretty.

Our attempts at justice are so often imperfect. Human beings, like the institutions they inhabit, are imperfect. Courts are imperfect.

However, these imperfections really just show that justice is a human endeavor.

When I go to church, we pray for the success of our Governor and our Legislature. I pray that they succeed beyond their wildest dreams. I want the schools to educate. I want there to be mental health workers for those in need and for everyone to have a job and be secure in that job and be successful financially beyond their wildest dreams. I pray for North Carolina to succeed, so that judges like me will not have to look at this picture much longer. In short, I pray for a just society.

Lawyers and judges are in the job of building a just society. Now I am no longer hauling cement or bricks for the masons, but we are doing a different kind of building here.

Take a moment, while you are in this temple to justice, and look around the space we are in today. On the walls of this courtroom are portraits, the portraits of past builders of our just society. They no longer say anything—and yet they have said so much. What they have said stands before us on these bookshelves. It is a narrative; it is a painting in words of the tapestry of North Carolina's experiment in ordered liberty and democracy. They are cases that are so familiar to us as practitioners and judges. These justices' opinions speak long after they cannot speak. The chief justices on this wall and the justices in the halls here knew something that we also know. One cannot build a just society by wishing it were so. Likewise, we cannot, like the Israelites in Egypt under Pharaoh, build a just society with bricks made without straw.

The judicial branch is co-equal. We respect the constitution and separation of powers and the powers and decisions the constitution gives to other branches of government. I hope these other branches will give equal respect to our judgments as well and are equally committed to building a just society. As Dr. King once said, without justice there is no peace.

I want to close with a quotation from *Isaiah* 1:18: "*Come now, and let us reason together.*"

Portrait Ceremony

of

Chief Justice Lake

OPENING REMARKS
and
RECOGNITION OF EUGENE BOYCE
by
CHIEF JUSTICE MARK MARTIN

The Chief Justice welcomed the guests with the following remarks:

Good afternoon, Ladies and Gentlemen. I am pleased to welcome each of you to your Supreme Court on this very special occasion in which we honor the service on this Court of Chief Justice I. Beverly Lake, Jr.

The presentation of portraits has a long tradition at the Court, beginning 127 years ago. The first portrait to be presented was that of Chief Justice Thomas Ruffin on March 5, 1888. Today the Court takes great pride in continuing this tradition into the 21st century. For those of you who are not familiar with the Court, the portraits in the courtroom are those of former Chief Justices, and those in the hall here on the third floor are of former Associate Justices.

The presentation of Chief Justice Lake's portrait today will make a significant contribution to our portrait collection. This addition allows us not only to appropriately remember an important part of our history but also to honor the service of a valued member of our Court family.

I would like to share from a personal and Court perspective how very special and admired Chief Justice Lake has been both as a "brother" on the Court and as our leader. When I first arrived as a new member of this Court, Chief Justice Lake was an Associate Justice. My chambers were located next door to his, and he took the time to assist me in learning the work flow of the Court. His advice was invaluable.

Upon Justice Lake becoming Chief Justice two years later, I saw a determined leader with a gentle hand bring continued progress to our Court system. As a former trial judge, Chief Justice Lake connected well with the trial judges across the state, and they felt they had his ear.

From his bouncing a Wake Forest basketball down the halls of this building while wearing a Wake Forest jersey after a VERY RARE Wake Forest win over UNC, to his steady hand at the helm of our Judicial Branch, he was loved for his effective leadership and his fun-loving nature. We were and continue to be fortunate to have had him serve our Court system.

At this time, it is my pleasure to recognize Chief Justice Lake's long-time friend and Senior Counsel at Nexsen Pruet, Eugene Boyce, and invite him to the podium for remarks.

Remarks by Eugene Boyce

Mr. Chief Justice, and Distinguished Members of the Supreme Court of North Carolina:

Thank you for this opportunity today, at this most important time in this greatly significant year of 2015. We are just weeks from the date of the signing of the Magna Carta in Runneymede, England - June 15th of the year 1215. I was also reminded as I entered this building and read above the entrance of those important words: "LAW AND JUSTICE."

This event honors one of our own - a person born in a home to a family, who grew up in a small town, educated in schools and college and a law school and in the service of our country and who became and remains dedicated to "the rule of law" - a believer in "Law and Justice." Justice Lake, as many of our ancestors, brought forward those words, and thereafter in deeds, into our State and Federal governing processes for 800 years.

The first Chief Justice of this Court was born in London, England - only 22 miles from Runnymede - from the birthplace of liberty and freedom of people. He served 11 years on that three-person court. He is the only foreign-born Justice in this Court's history. That was 197 years ago – 1818, to be precise.

Today, we honor a Chief Justice who was born here in Raleigh, only a few blocks from here, and a lot less than 197 years ago. He is Chief Justice number 26. He is one of only 87 Justices who have served "Law & Justice."

Beverly Lake, Jr. grew up in his early years only 17 miles from here, just up US 1 when US 1 was North Main Street in the Town of Wake Forest.

We honor one who has spent a lifetime of dedication to his family, to many friends, to our profession, to the State of North Carolina and to the United States of America and today, foremost, to this the third branch, the Judicial Branch of our Government. He has given many decades of his time and devotion to the "Rule of Law" as it first came about in 1215 and which has persevered for 800 years.

Just during his 12 years on this Court while a Justice and Chief Justice, he created the "Commission on Professionalism" in 1998.

In 2002, he created the "North Carolina Actual Innocence Commission."

In 2004, he was involved in creation of the "Commission on Permissible Political Conduct by Judges and Candidates for Judicial Office."

On the eve of his retirement in late 2005, Chief Justice Lake created a "State Commission to Improve Access to Civil Courts" as well as a "Commission to Improve Rural Court Services."

Having served two terms as State Senator and later Legislative Representative for the Governor - the Executive Branch - as well as a Deputy Attorney General, he has fought as much as anyone for improvement of the budget of the third (and still underfunded) branch of State Government.

This was all in addition to the work to which he, as you ladies and gentlemen today know, has devoted hours, days, weeks, months and years in dealing with lawyers and listening to them, in reading our briefs, in doing even more research on his own, engaging other justices about the right and final decision, and finally applying "the Rules of Law" that guide and control and bring resolution and peace and satisfaction to the multitude of our people.

I have known our Honoree from time long past, still memorable, even though memory is now "barely."

We were together in the Town of Wake Forest for six years in the middle of the last century. We were students in what I still call the "real" College of Wake Forest. We served our country - thankfully in peacetime - in the United States Army with the 18th Airborne Corps Headquarters at Ft. Bragg. I was in the JAG Corps, prosecuting and defending soldiers in military court. He was across the base in the Military Intelligence Division, ready to return and finish law school.

A few years later, a couple years apart, we each were given our first job as a practicing lawyer by two fine gentlemen - one, Mr. A.J. Fletcher (later the founder of WRAL-TV) and the other, then, Dr. I. Beverly Lake. I will always remember Mr. Fletcher's advice to us budding trial lawyers. He said, "You'll always remember the cases you lose."

Both Mr. Fletcher and Dr. Lake gave us advance notice, "You'll never be a real lawyer until three things happen: You have been employed in a controversy between two guys fighting over where the land boundary line is, (2) a bunch of children arguing over who gets their parents' property and thirdly, (3) a dispute in a church congregation split.

Our first case was in this Court. It was the third one - a church case. We came here twice. The Edgemont Free Will Baptist Church lawsuit was when the minority of the Congregation wanted to oust the Preacher who was supported by the much larger majority.

My recollection is not as much about the lawsuit as it is about the Preacher who, in his sermon one Sunday, said, "They are accusing me of rubbing the fur on the cat the wrong way. Well, I tell them - TURN THE CAT AROUND."

That was not "humor." That was "advice." We took it seriously.

As to humor, I cannot help but share a little of the lighter side of the life of our Honoree. Back in old Wake Forest, you may not know that Highway US 1 from NY to Florida was, in fact, North Main Street of the Town. Even then US 1/N. Main Street was considerably, heavily filled with 18 wheeler trucks plus many cars full of Yankees going south to escape the Northern weather. One day, two teenagers built a sign that blocked US 1 and directed all southbound vehicles to turn right down a town street. Trouble was, the little right turn street was only three blocks long and came to a dead end. These two guys avoided arrest and later got college diplomas.

The next true tale that came to mind last night was about a strange noise that occurred in this very stately and serious building. The unusual noise was a continuous bumping on the hallway floor. A certain Justice was, of all things, dressed, not in his robe but, in a Wake Forest College jersey, dribbling a basketball and singing the school fight song. Wake Forest the night before had won the 1995 ACC Basketball Championship. Several Justices then were UNC undergrads. One of the few bragging chances ever presented to "little ole Wake Forest."

I have this to go along with the Lake portrait, if he desires. You can see it - a tee shirt showing that the next year, in 1996, Wake Forest beat Georgia Tech for its second title in a row. I don't know if

he "dribbled" down these halls twice, but the Court had no Georgia Tech grads, so I guess not.

Believe it or not, in fact read it in today's program. A lot more has been accomplished by Justice Lake than what I have mentioned.

Chris Mumma, the co-heart and the co-soul of the Innocence Commission, will tell us of Justice Lake's and her amazing accomplishments that are carrying forward the unbelievable work and victories of the Commission as created 13 years ago and which will continue even better to -

ENFORCE "THE RULE OF LAW," AND SECURE TO ALL "LAW AND JUSTICE."

Thank you for this opportunity.

RECOGNITION OF CHRISTINE MUMMA by CHIEF JUSTICE MARK MARTIN

We also are fortunate to have Christine Mumma, Executive Director of the North Carolina Center on Actual Innocence in Durham, North Carolina, and former research assistant to Chief Justice Lake, to make some remarks.

Thank you Ms. Mumma for your remarks and for your service as Executive Director of the Center on Actual Innocence.

Remarks by Christine Mumma

May it please the court. Chief Justice Martin and Associate Justices, my name is Christine Mumma and I'm delighted to be here today on this special occasion to honor former Chief Justice I. Beverly Lake, Jr.

In 1998, I had the distinct honor of having my life path collide with that the future Chief Justice I. Beverly Lake, Jr. What I knew when I first met him was that he was a justice on the Supreme Court, his father had been a justice on the court, he was Republican, and he needed a new law clerk, which was the most important thing to me. We were introduced by our mutual friend who passed away last year, Judge Donald Smith, and I would say we established an immediate bond. I like to think that was because of the planned path that lay ahead for both of us.

What I learned after I started clerking for Chief Justice Lake was that he is intelligent, well-versed in the law, kind, quick-witted, a flirt, and, most importantly, a fearless leader. A man of principal and belief in justice for all. As Chief Justice, one of his areas of focus was confidence in the justice system – in the judiciary, the State, and the defense. This of course, cannot be achieved without principals and a commitment to justice for all.

The year I started law school, North Carolina exonerated its first citizen through the use of DNA testing. Ronald Cotton was freed after ten years in prison for crimes he did not commit and had no part in. With that same evidence, Bobby Poole was identified as the true perpetrator of those horrible rapes. There have been over 300 DNA exonerations nationally since that time. Eleven more in North Carolina.

Chief Justice Lake recognized that nothing can or should negatively impact confidence in our justice system more than an innocent person spending decades in prison for a crime they did not commit. With that, Chief Justice took what I and many others believe to be the largest and strongest step of leadership ever taken by a member of the judiciary in this State, and possibly the country. He established a stakeholder's study commission that included members from the judiciary, prosecution, defense, law enforcement, academia, and victim advocates. That Commission, designed to ensure continuous improvement in our justice system, was the first such study commission in the country, and a dozen States have followed Chief Justice Lake's example.

From the work of that study group, North Carolina became the first state in the county to establish statutory law providing for eyewitness identification procedures. Based on scientific study, those procedures were designed to increase the reliability of eyewitness identification, the leading causation issue of wrongful conviction. North Carolina also became the first state in the country to statutorially require recording of interrogations in homicide investigations, and later in all serious felonies and juvenile interrogations. The study commission also contributed to the establishment of model statutory guidelines for the preservation of biological evidence, compensation for the exonerated, and most notably, the first state sponsored Innocence Inquiry Commission in the country.

Last week, the I. Beverly Lake Fair Trial Act, H700, unanimously passed committee. The bill addresses one of the last issues left on the original 2002 agenda for the Actual Innocence study Commission – the inherent unreliability of jailhouse informant testimony and the need for cautionary protections when that type of evidence is used. I hope it will become law and that the words "I. Beverly Lake" and "Fair Trial Act" will forever be on the books in the same sentence, for that is what he believes in and has fought for.

Chief Justice Lake once told me that he considers his contributions to criminal justice reform relating to issues of innocence his legacy. From what I have heard from North Carolina citizens and criminal justice stakeholders around the county, everyone agrees. Chief Justice Lake, thank you for your courage, your leadership, your so many years of public service, and, most importantly to me, your treasured friendship. Congratulations your honor.

RECOGNITION OF
CHIEF JUSTICE I. BEVERLY LAKE, JR.
by
CHIEF JUSTICE MARK MARTIN

Next, Chief Justice Lake has asked for time for rebuttal, and we are very pleased to welcome the Chief to the podium for remarks.

Thank you, Chief Justice Lake.

Remarks by Chief Justice I. Beverly Lake, Jr.

May It Please the Court. I fear this may be about the last time I'm able to address this wonderful Court from this podium and say, "May It Please the Court." I hope the presentation of the portrait will, indeed, please the Court. And I want to especially thank you, each and every member, for this special ceremonial session. It cuts considerably into your heavy workload, and I appreciate that. I appreciate the opportunity to be here with you. It has been a real privilege and honor for me to know and serve with all of you through the years, and I thank you for that.

I would like to thank some special people who have contributed, I think, greatly to this ceremony today, including our wonderful clerk, Christie Cameron Roeder. Also, my good right arm, Terry Murray. So many of my research assistants are here, and I appreciate the fact that they made a special effort to be here with us today. I appreciate the good work they did to help me, especially, and all of us with our work. They did, without exception, wonderful jobs, and I deeply appreciate each and every one of them.

I want to say a word about a special guest here today – the wonderful man who painted my portrait. I have not seen the portrait, but I am told that it is indeed worthy of this court and, knowing him, I'm sure it is. He was born in England, has a wonderful British accent, but now lives in Edenton and has for some time. He does exceptional work, and I'd like to recognize John Becker. John, will you stand? Thank you, sir. He has indeed done commendable work for a number of people. I am told I am included in that group, and I greatly appreciate it and his friendship through the years.

I appreciate so many of the opportunities that I've had appearing before this Court. I hope this is not the last time that I appear at this podium and say "May It Please the Court." I hope that everyone tries to make a special effort to do that. They owe that to the jurisprudence of this State and to you and your work. And I do appreciate so much the work that you do. Having been a part of it for many years, I know. I know what you do and I thank you. I thank you for it.

Lastly, I would like to recognize and thank Nexsen Pruet, who has prepared and is responsible for the reception that I hope all of us will enjoy at the conclusion of this special session. So I look forward to seeing each and every one of you there and all of our mutual friends here in the courtroom today with us. Thank you.

ACCEPTANCE OF CHIEF JUSTICE LAKE'S PORTRAIT
by
CHIEF JUSTICE MARK MARTIN

Now, I am delighted to ask two of Chief Justice Lake's grandchildren, Isaac Beverly Lake, V and Mollie Smith to unveil the portrait of their grandfather.

On behalf of the Supreme Court, we accept this portrait of Chief Justice Lake as a part of our collection. Mr. Becker, we appreciate Chief Justice Lake's remarks concerning you, and from the looks of the faces in the audience (we can't see it yet), your work has been very well-received. We are pleased to have this fine work of art, and we sincerely appreciate the efforts of all who helped to make this presentation possible.

Chief Justice Lake's portrait will be hung in this Courtroom and will be a continuous reminder to us and our successors of the great history and traditions of this Court. Additionally, these proceedings will be printed in the North Carolina Reports.

Your participation today makes this ceremony special, and we are honored that all of you could be with us. At the close of this ceremony, Chief Justice Lake and his family will move to the History Center on the first floor of this building, and the Court will follow.

On behalf of the Lake family, and with appreciation to the law firm of Nexsen Pruet, who is graciously providing the reception in Chief Justice Lake's honor, I invite all of you to a reception in the History Center. Please allow Chief Justice Lake and his family, as well as the Court, a few moments to get to the History Center prior to your leaving the Courtroom. The Clerk will help guide you. Again, thank you for being with us today.

Portrait Ceremony

of

Justice Brock

OPENING REMARKS
and
RECOGNITION OF WALTER E. BROCK, JR.
and
THE HONORABLE GERALD ARNOLD
by
CHIEF JUSTICE MARK MARTIN

The Chief Justice welcomed the guests with the following remarks:

Good afternoon, Ladies and Gentlemen. I am pleased to welcome each of you to your Supreme Court on this very special occasion in which we honor the service on this Court of Associate Justice Walter Edgar Brock.

The presentation of portraits has a long tradition at the Court, beginning 127 years ago. The first portrait to be presented was that of Chief Justice Thomas Ruffin on March 5, 1888. Today the Court takes great pride in continuing this tradition into the 21st century. For those of you who are not familiar with the Court, the portraits in the courtroom are those of former Chief Justices, and those in the hall here on the third floor are of former Associate Justices.

The presentation of Justice Brock's portrait today will make a significant contribution to our portrait collection. This addition allows us not only to appropriately remember an important part of our history but also to honor the service of a valued member of our Court family.

We have all benefitted from Justice Brock's service to the Judiciary and to this Court. Justice Brock was a pioneer for the Courts during the transition to our Unified Court System in the late 1960's and early 1970's. Besides being one of the original members of the Court of Appeals and helping to establish the working relationship between the two appellate courts, he also was a member of the Appellate Rules Commission that wrote the Rules of Appellate Procedure, a publication appellate attorneys and the appellate bench refer to daily. Finally, Justice Brock served as the original – a word that keeps being said for this important figure in our Judicial History – chair of the Judicial Standards Commission. As such, Justice Brock was responsible for setting up a system of review that has served the state well for many years.

At this time, it is my pleasure to recognize Justice Brock's son, Walter E. Brock, Jr., and invite him to the podium for remarks, following which Mr. Brock will then introduce former Court of Appeals Chief Judge Gerald Arnold, who will present Justice Brock's portrait to the Court.

Remarks by Walter E. Brock, Jr.

Chief Justice Martin, Associate Justices, Distinguished and Honored Guests, Family, Colleagues and Friends:

May it please the Court, my name is Walter E. Brock, Jr. of the Wake County Bar. On behalf of my family, I thank this Court and the persistent Danny Moody of the Supreme Court Historical Society for this opportunity to honor our father, uncle, grandfather, and great grandfather - the late Justice Walter E. Brock. The family is deeply honored by the presence of distinguished former chief justices and associate justices of this Court, current and past judges of the Court of Appeals, and former law clerks of my father, many of whom have traveled a significant distance to be here.

Today is a unique opportunity to celebrate our father's judicial career, and his passion for the process of justice in our trial and appellate courts. The timing of this occasion is not by accident. The Court was kind enough to schedule this event on the first court business day to follow March 21, 2015, which would have been our father's 99th birthday had he survived.

We ask that you accept from our family the gift of a portrait that our mother and we have all admired for its authentic portrayal of our father as we remember him. The portrait was painted by Aileen Hord of Hord Studios in Charlotte. The legend in our family (that my father probably initiated, and certainly never bothered to dispel) is that Hord Studios was seeking to promote its portrait services. The studio was located at that time in the original Charlotte Town Mall. Dad frequently held court in Charlotte as a Special Superior Court Judge in the mid 1960's. The studio approached him and offered to do his portrait for free if they could display it in the showcase at the studio as a promotion. I am told by Aileen Hord's daughter Timmy who recalls it well that the portrait remained on display at Hord Studio until at least 1983.

Before the presentation of the portrait, however, and with the permission of the Court, the family would ask the Court to allow the record to reflect some of the story of our father's career and life. We could think of no better judicial historian and raconteur than my father's friend and youthful colleague on the Court of Appeals, The Honorable S. Gerald Arnold, to tell his story. Judge Arnold has been extraordinarily kind and generous with his time and talent in

researching and preparing his remarks. Our family will forever be in his debt.

Before Judge Arnold was an accomplished jurist, he was born and raised in Harnett County where he practiced law and still maintains the old family home. He earned his undergraduate degree from East Carolina University and law degree from the University of North Carolina. He served in the Legislature from 1970 to 1974, and was elected to the Court of Appeals in 1974, where he served as an Associate Judge and then as Chief Judge until 1998. He served as Chairman of the Judicial Standards Commission from 1983 to 1990. After his judicial retirement, Judge Arnold served as President of Lawyers Mutual Liability Insurance Company of North Carolina until 2010, where I am proud to say he was a client.

With the Court's permission, I will ask that Judge Arnold take the podium.

Remarks by Hon. Gerald Arnold

Chief Justice Martin, Justices of the Supreme Court, Members of the Brock family, honored guests, distinguished and much admired ladies and gentlemen:

May it please the Court, it is my great pleasure to participate today in the presentation of the portrait of the Honorable Walter Edgar Brock, who served with distinction on this Court, and to say a few words about his life.

He was a colleague, and a cherished friend. As Chief Justice Martin has said, he was a pioneer who left his mark on North Carolina's expanded judicial system in the 1960's and 70's, a founding father and a chief architect of the COA, the JSC and our Appellate Rules.

I will refer to him as Judge Brock, rather than Justice, because that was the title of his time, and the title that he liked. I may also refer to him simply as Brock, as he was familiarly called by his friends, and more importantly, by his wife, Sarah.

The portrait is a gift from the surviving members of Judge Brock's family, and with the Court's permission I wish to recognize them at this time. 1) Frances Brock Moore and her husband, Daniel K. Moore, Lexington, 2) Elizabeth Brock Lovette and her husband., James F. Lovette, Winston Salem, 3) Walter E. Brock, Jr. and his wife, Lynn Beazlie Brock, Raleigh, 4) Family of predeceased daughter, Elaine Brock Rogers.

If it please the Court, my admiration and gratitude for Judge Walter Brock began forty one years ago when I became a Judge on the North Carolina Court of Appeals. He was Chief Judge of that Court at the time.

I learned very quickly how fortunate I was to have Walter Brock as Chief Judge, and as teacher. It is hard to imagine anyone who could have better exemplified the qualities we so admire in an appellate judge.

He placed a premium on thorough research, cogent reasoning and clear writing. He disposed of motions and petitions in a timely manner, and expected as much from colleagues. Brock always filed his opinions on time. He was an exemplar of learning and integrity.

I remember how everything about Brock was always just so—every detail in order—his clothes impeccable—his walk purposeful

his voice resonant—his looks striking: stocky, well-built, square faced, graying hair, piercing eyes, and a smile that could disguise his assertive questions.

But what I remember most, more than how he looked, or the sound of his voice, or how he carried himself, were the high standards he set. It had to be right.

My fear today is that if I do not get this right, his ghost will haunt me for the rest of my days, then in the hereafter, it will not be St. Peter I dread so much as Walter Brock.

His story began down in the central section of North Carolina in Wadesboro, on March 21, 1916. He was one of five children of Walter E. Brock, Sr., and Elizabeth Brock. His life was not without adversity, when he was twelve years old his mother died. His father at the time was Judge of Superior Court. Young Walter went to live with a loving aunt, Mrs. Mary B. McDowell and her husband, in Scotland Neck, NC. He attended public school there, where he was called "Buster." In 1933, he graduated from high school in Scotland Neck.

He came of age during the hard economic times of the Great Depression. Following high school he worked for four years in a clothing store before borrowing $50.00 in 1937 to enter the University of North Carolina at Chapel Hill. As a self-help student he worked at various jobs, the best of which was clerk and manager of the Carolina Inn. It was there that he met the love of his life, Sarah Cahoon, from Plymouth, North Carolina, a secretary for the University. They were married on December 23, 1939. For the rest of his life, Sarah Brock would be by his side.

Before leaving Scotland Neck, Brock became interested in flying and he learned to fly. When World War II came along it was too big an event for him to miss. He enlisted in the United States Army Air Corps in 1941, and served as an advanced fighter pilot instructor until 1945, earning the rank of Major. He thereafter served in the Air Force Reserve for several years and retired as a Lt. Colonel.

One of Brock's more interesting experiences must have been teaching Chaing Kai-shek's pilots to fly. This obviously presented somewhat of a challenge. He spoke no Chinese, and they spoke no English.

With the end of WWII, fortune improved for Judge Brock and Sarah, due in part to the greatest investment any society ever made in higher education, the G.I. Bill. He entered the UNC Law School in

1945. Based on his academic record he became Associate Editor of the North Carolina Law Review. In 1947, he received his law degree.

He was admitted to the N.C. State Bar the same year, and returned to Anson County to practice law in Wadesboro, the County seat, and the place of his birth. He became a successful lawyer and practiced law there until 1963.

Judge Brock was active in public service, serving as Chairman of the Anson County Red Cross, as a long-time member of the Civitan Club, as a member of the Chamber of Commerce, the Piedmont Area Development Association and the Recreation Commission. He was involved in politics, serving as Chair of the County Democratic Executive Committee and as a member of the State Democratic Executive Committee.

He was active in his church, Calvary Episcopal Church, where he served as a Member of the Vestry, Junior Warden, Senior Warden, and Lay Reader. Later, he was to become a member of the Vestry, Church of the Good Shepherd, in Raleigh.

Judge Brock stayed loyal to his Alma Mater. He was Chairman of the Anson County Morehead Scholarship Committee from 1952 to 1967, and served on the District Selection Committee from 1968 to 1971.

He was Chairman of that Committee from 1972 until 1982. Judge Brock further assisted the UNC Law School in moot court and trial advocacy programs.

Brock served Anson County as Judge of Criminal Court from 1952 to 1954. He was President of the 20th Judicial District Bar, as well as serving a term as State Bar Councilor.

In 1963, Governor Terry Sanford appointed him a Special Superior Court Judge. He served until 1967, when Governor Dan Moore appointed him to become one of the six original judges of the North Carolina Court of Appeals.

When Chief Judge Raymond Mallard retired in December 1973, Chief Justice Bobbitt designated Judge Brock to serve as Chief Judge of the COA, and Judge Brock remained Chief Judge of that Court until he took office as Associate Justice of the North Supreme Court, having been elected to the Supreme Court in November 1978.

While on the COA, Judge Brock composed 799 opinions. His opinions were clear and concise, and recognized for their craftsman-

ship and scholarship. He advocated judicial restraint, seeking to adapt accepted legal principles, rather than discard them, in order to meet new problems. His goal always was to provide objective standards for the guidance of the bench, the bar and the public.

Walter Brock was an individual who made a difference: not only in the success of the COA, due in large measure to his leadership, but also in the study commission charged with writing what we then called the "new" Appellate Rules, which were adopted by the Supreme Court. He understood the reason for the rules, and realized that fairness dictated that they should be enforced.

He was the first Chairman of the NC Judicial Standards Commission, serving from 1973 through 1978. He prepared the rules of that Commission and directed its day to day operations in an effort to uphold the highest standards for the State's judiciary.

Judge Brock was an effective Chief Judge and a good administrator. He managed an ever increasing caseload. He was a hands-on supervisor of the Clerk's office, and when necessary, not above prodding a judge who might be dilatory in getting an opinion filed.

On January 2, 1979, Judge Brock took his oath as Associate Justice of the N.C. Supreme Court. His opinions are contained in volumes 296 through 299 of the Supreme Court Reports. He was author of 31 opinions, including the well-known case of Stanback v. Stanback, 297 NC 181, one of the most cited cases in North Carolina, having been cited in over 300 reported cases.

Sadly, Judge Brock's career on the Supreme Court was cut short in April of 1980 when he suffered a severe heart attack. He had to retire in December of that same year. North Carolina thus lost the experience and dedication of one of its foremost jurists, and a distinguished public servant.

If it please the Court, no judge ever becomes perfect, and we know that there is no objective assessment even for what makes a good judge. It depends on personal notions of what is desirable. Judge Brock's legacy was not ideology, it was intelligence and integrity. His extensive record speaks for itself. All who served with him would agree that he was one hundred percent reliable.

As we knew him, however, Brock was more than an outstanding Judge. He was an incredibly interesting individual, always full of energy, and hugely entertaining person with whom to have lunch. Like Brock or not, he was never dull.

He was one of finest story tellers to come out of Anson County. Many of his notorious tall tales involved his home county, as well as the Pee Dee River. He exaggerated about Anson County being one of the original counties, as well as the largest, its western boundary extending all the way to the South Seas. He told of seeing whales and sharks in the Great Pee Dee, and great schools of fish.

Any attempt to correct him on such matters was useless. Brock was unmatched in wit and delighted in repartee, but Judge Ed Clark liked to challenge Brock on his disregard for facts, correctly pointing out that Anson County was formed from Clark's home county of Bladen. And as for the Pee Dee, Judge Clark did not think it much of a river, he being more accustomed to the Cape Fear, which ran through Bladen County. Clark said that he could jump the Mighty Pee Dee, even at flood stage.

In exasperation and obvious condescension, Brock simply indicated that Judge Clark apparently had no better knowledge of history and geography than he had of the law. He then proceeded to recall an elegant evening he had spent aboard the H.M.S. Queen Elizabeth when it docked at Wadesboro. I tried to explain to Clark that it was senseless to argue with anyone from Anson. Since my wife was also born in Anson, I knew this firsthand.

Few of his friends escaped his good natured joking. Brock was generally unmatched in his wit and repartee.

He especially enjoyed Supreme Court Justice Frank Huskins. The two had formed a close friendship back in their days on the Superior Court.

One morning Brock noticed out the window that Judge Huskins was crossing Capital Square on the way to his office, about ten a.m. Brock seized the moment and quickly telephoned and asked to speak to Judge Huskins. When the secretary replied that Judge Huskins was not available, Brock told her that he was a concerned taxpayer, that Judge Huskins was a shame and disgrace to the judiciary, and that it seemed the least he could do was get to work at some reasonable hour before lunch.

The secretary reportedly told Judge Huskins about the irate taxpayer's call a few minutes later when he arrived. Judge Huskins told her to forget it, that the call obviously was from Judge Brock, whom everyone knew was a moron.

Brock and Huskins lived by the sword in their verbal combat, neither asked for quarter and neither gave any quarter.

Brock was a master of hyperbole. Perhaps the best example was at home when he gave stern advice to his young son, Walter Jr.: "Now son, I'm not saying that I'm perfect, . . . but I am working down to it." Judge Brock had a passion for wood working. He built a shop in his backyard. Well, a one-car garage, to comply with city zoning. He constructed the building almost completely from rejected mahogany. It was his getaway while he was on the court. He made beautiful cherry cabinets, tables and desks that are now family heirlooms.

Working in his wood shop, in a sense, explained a lot about Brock's special nature. He had the calling of a craftsman, the desire for creativity, the need for the personal satisfaction of a job done well. It had to be right. Everything "just so, everything in order."

He approached his work with this sense of craftsmanship, of getting it right, whether he was writing an opinion, drafting appellate rules or setting up the Judicial Standards Commission.

He was a golfer and carried this same spirit on the golf course. In fact, at one time he was so serious about his single-digit handicap that Sarah gave him a choice: golf or family. The next day Brock came home with a ski boat, and the entire family, we are told, became accomplished water skiers. After that his golf game might have suffered, but he still talked a big game.

Brock doted on his grandchildren. He and his grandson and namesake, Walter IV, known as Eddie, had the same birthday. Eddie took full advantage of this, and for seven years they delighted in sharing birthday parties. It was a toss-up as to which kid enjoyed it more.

On the bench Brock was tough as nails, but he was a man whose heart was as tender as love itself. This was readily apparent in his relationship with Charlie Wall. Charlie Wall was a beagle, but he was no ordinary dog, not to hear Brock tell it. He was much the same as a person, so Brock treated him like one. His quarters behind the family home had wall-to-wall carpet, a doorbell and a telephone. Charlie Wall was brought to the COA, dressed in a robe and bifocals, and photographed in the Courtroom, sitting in the presiding judge's chair.

This photograph occupied a prominent place in the Judge's office. Brock also claimed that he sought, and got, the dog's advice

on tough legal issues, which was almost believable when you saw Charlie Wall sitting in front of Judge Brock, barking and wagging his tail in response to the judge's questions. Clark once wanted to know why Brock did not let Charlie Wall write some of his opinions. Brock replied that would not be right; a judge had to write his own opinions.

When he died, Charlie Wall was buried in the back yard with a beautiful mahogany grave marker.

Shortly after he retired in 1980, Brock purchased a Harker's Island styled trawler, hand-made in Marshallburgh, N.C. It was christened "The Tuppence," a 30 ft., diesel. (I have not spoken about his penchant for pinching pennies, but "Tuppence" was an appropriate name.) There was no question as to who was the captain. Any crew either shaped up or shipped out. Detailed ship's log are preserved to this day.

Following his retirement, Judge Brock and Sarah spent most of their remaining years at the coast, at or near Morehead City. These were peaceful and happy times. He became an accomplished skipper under Sarah's watchful eye. She served as nurse, dietitian, and first mate, and her loving care enriched and prolonged his life.

Nobody could have said it as well as his good friend Ed Clark: Could any man ask for a better retirement than to be with his "loving wife and children, caring friends, and a good boat."

Judge Brock died on June 13, 1987. Sarah Brock continued to live in Raleigh for another 25 years. She died February 28, 2012.

In his book, THE GREATEST GENERATION, Tom Brokaw apologized to the men and women whose stories he could not get to. He asked that we, friends and family, of other members of that generation, tell their stories.

May it please the Court, One way of telling the story of one who was a member of that greatest generation, and who became a Justice of this esteemed Court, is by the presentation of this portrait.

The portrait will be unveiled by two of Judge Brock's great grandsons, Hudgins Brock, and Harrison Bell.

ACCEPTANCE OF JUSTICE BROCK'S PORTRAIT
by
CHIEF JUSTICE MARK MARTIN

Thank you, Chief Judge Arnold and Mr. Brock for those excellent remarks. They were a fitting tribute to our former colleague.

Now, I am delighted to ask two of Justice Brock's great-grandchildren, Harrison Fisher Bell and Robert Hudgins Brock, Jr. to unveil the portrait of their great-grandfather.

On behalf of the Supreme Court, we accept this portrait of Justice Brock as a part of our collection. We are pleased to have this fine work of art, and we sincerely appreciate the efforts of all who helped to make this presentation possible.

Justice Brock's portrait will be hung in an appropriate place in this building and will be a continuous reminder to us and our successors of the great history and traditions of this Court. Additionally, these proceedings will be printed in the North Carolina Reports.

Your participation today makes this ceremony special, and we are honored that all of you could be with us. At the close of this ceremony, Justice Brock's children will head a receiving line with this Court at the front of the Courtroom, and the research assistants will assist you in forming a line to greet Justice Brock's family and the members of the Court. On behalf of the Brock family, and with appreciation to the law firm of Young Moore and Henderson, who are graciously providing the reception in Justice Brock's and his son Walter's honor, I invite all of you to a reception in the History Center on the first floor of this building. Again, thank you for being with us today.

Portrait Ceremony

of

Justice Whichard

OPENING REMARKS and RECOGNITION OF JAMES R. SILKENAT by CHIEF JUSTICE SARAH PARKER

The Chief Justice welcomed the guests with the following remarks:

Good morning, Ladies and Gentlemen. I am pleased to welcome each of you to your Supreme Court on this very special occasion in which we honor the service on this Court of Associate Justice Willis P. Whichard.

The presentation of portraits has a long tradition at the Court, beginning 126 years ago. The first portrait to be presented was that of Chief Justice Thomas Ruffin on March 5, 1888. Today the Court takes great pride in continuing this tradition into the 21st century. For those of you who are not familiar with the Court, the portraits in the courtroom are those of former Chief Justices, and those in the hall here on the third floor are of former Associate Justices.

The presentation of Justice Whichard's portrait today will make a significant contribution to our portrait collection. This addition allows us not only to appropriately remember an important part of our history but also to honor the service of a valued member of our Court family.

We are pleased to welcome Justice Whichard and his wife Leona, daughter Jennifer and her husband Steve Ritz, and daughter Ida and her husband David Silkenat. We also are pleased to welcome grandchildren Georgia, Evelyn, and Cordia Ritz; Chamberlain, Dawson, and Thessaly Silkenat; and Ida's in-laws Elizabeth and James Silkenat.

Today we honor a man who has distinguished himself not only as a jurist on this Court and the Court of Appeals, but also as a lawyer legislator serving in both Chambers of the General Assembly, as Dean of the Campbell Law School, and as a scholar. Through his outstanding record of public service, Justice Whichard has enhanced the jurisprudence and the legal profession.

In addition to being Justice Whichard's daughter Ida's father-in-law, Mr. James R. Silkenat is also the current President of the American Bar Association, who introduced himself to me at an ABA meeting by saying that he and Justice Whichard share grandchildren. Mr. Silkenat is a partner in the New York office of Sullivan and Worcester. He is a graduate of the University of Chicago School of Law, is the author of numerous books and articles, and is the recipient of multiple high honors and awards in recognition of his distinguished legal career. At this time, it is my distinct pleasure to recognize Mr. Silkenat and invite him to the podium for remarks.

REMARKS
by
JAMES R. SILKENAT
PRESIDENT, AMERICAN BAR ASSOCIATION

May it please the Court:

I am Jim Silkenat, President of the American Bar Association, and I am pleased to be here to honor Justice Whichard. Many of you know him as "Willis"; some learned to call him "Bill," which is how I know him.

I first heard of Justice Whichard when my son stared dating Bill and Leona's daughter, Ida, in prep school. A former ABA President from North Carolina, AP Carlton, somehow heard about that and told me "Justice Whichard ought to be Governor of North Carolina." At that point it was obvious that my son was dating way above his station.

Well, dating above his station or not, David and Ida got married and now Bill and Leona and I share 3 grandchildren. You will get to meet them later. The respective roles that Bill and I play in this extended family are quite clear: Bill is known as "Grandpa" and I am officially known as the "Other Grandpa."

Over the past 20 years of so, I have gotten to know Bill quite well: scholar, legislator, judge, Dean, practicing lawyer, and Grandpa. I cannot think of anyone, lawyer or not, whom I admire more.

When we travel together around the Raleigh/Durham area, Bill is recognized and revered by people in every place we visit. It is quite remarkable to see. And, in the ABA, I finally persuaded Bill to serve on our most prestigious committee, the ABA Standing Committee on the Federal Judiciary, which reviews potential Presidential appointments to the Federal bench, including to the U.S. Supreme Court.

So, on behalf of all 400,000 ABA members, I would like to thank my son David for marrying above himself. As a result, I got to meet Bill and we got to have him as an active ABA leader. I am very pleased to be here to honor him today.

RECOGNITION OF MARTIN BRINKLEY by CHIEF JUSTICE SARAH PARKER

I am now pleased to call to the podium Mr. Martin Brinkley, a distinguished member of the Raleigh bar, to present the portrait. Mr. Brinkley received his undergraduate degree from Harvard and his law degree from the University of North Carolina School of Law. He is a former President of the North Carolina Bar Association and a former President of the North Carolina Supreme Court Historical Society.

REMARKS
by
MARTIN H. BRINKLEY

MADAM CHIEF JUSTICE, AND MAY IT PLEASE THE COURT:

For twelve years Willis Padgett Whichard served this Court as an Associate Justice with diligence, distinction, a keen sense of duty, a thoroughgoing love for the sacred office of appellate judge, a measured devotion to the principled application of the rule of law, a deep knowledge of and reverence for history, an unfailing collegiality, and a robust sense of humor. On behalf of Justice Whichard's family and my own dear friend and mentor, I have the honor to present to the Court his portrait, to be unveiled momentarily, together with the following account of his exemplary life and career.

The portrait was painted from life by Dean Paules of York, Pennsylvania, a recipient of the National Portrait Seminar's grand prize who also painted the portrait of Chief Justice Burley B. Mitchell, Jr. and that of Justice and former Governor Dan K. Moore. Justice Whichard sat for the portrait in 1998, shortly before leaving the Court to become Dean of the Norman Adrian Wiggins School of Law at Campbell University. Mr. Paules's other North Carolina subjects include the late Nobel laureate Dr. George Herbert Hitchings of Research Triangle Park, the late State Treasurer Harlan Boyles, and University of North Carolina at Chapel Hill Chancellor emeritus Paul Hardin. The roster of his commissions is national in scope and ranges across present and former ranking members of the United States House of Representatives and United States Senate, judges of federal and state appellate courts, distinguished chief executives of America's most prominent business corporations, and several former Major League Baseball Commissioners.

Anyone seeking to traverse, in the span this morning's proceedings will allow, the life of a man who, uniquely among North Carolinians, has seen service in both houses of the North Carolina General Assembly and on both of North Carolina's appellate courts; has served as dean of an important law school and enjoyed a successful career in the private practice of law; has chaired or served on literally scores of committees and commissions in service to his hometown, his university, his state and his country; has received two dozen awards recognizing the consistent excellence of that service; has presided over several statewide cultural institutions and organizations; has authored the definitive biography of one of the only two

North Carolinians ever to sit on the Supreme Court of the United States, along with nearly forty other literary works; and who is still rendering service to the commonwealth in his eighth decade, is certain to fail – or at a minimum, to sport unduly with his listeners' patience and dull their sensibilities. For notwithstanding the presence on the roll of former justices of this Court of the names of former governors, congressmen and legislators, distinguished legal scholars, trial judges and eminent practitioners of the law, I believe it can be said with some accuracy that in the nearly two centuries the Supreme Court of North Carolina has existed in it's present form-done more, in more capacities or with greater distinction, for the Old North State than the man whose portrait we dedicate today.

I have reason to know that Willis Whichard was once, in far off halcyon days in Chapel Hill, a student of the Latin language and literature. In the classrooms of Murphey Hall he surely encountered, from time to time, the rhetorical techniques employed by Marcus Tullius Cicero in his public orations. Among those techniques is a figure of speech known as *praeteritio* – the strategy of drawing attention to a subject by seeming to disregard it. I confess at the outset my intention to ally myself liberally with Cicero this morning by eschewing bland recitation of the scores of organizations and causes Justice Whichard has served and led throughout more than half a century of dedication to hometown, alma mater, state and country. These are none the less important for the omission. Yet we are here to dedicate his portrait to the institution in whose service he gave the very best he had to give, and which drew from him the noblest qualities of mind and spirit his character could offer. His service to this Court and the years of childhood, education, professional experience and public service that prepared him for that service are, therefore, the gravamen of these remarks.

Willis Padgett Whichard's taproot is sunk deep in the soil of Durham, where he was born the son of teachers on May 24, 1940 and where he spent a happy childhood. The Durham of that day was a very different place than the hub of education, medicine, and high technology we now know. As North Carolina's leading journalist put it just one year after Willis's birth, Durham was a blend of Coastal Plain and rolling Piedmont; a place of "squat tobacco warehouses and tobacco factories combine[d] with the erect reaching of new Gothic in a university."[1] Like his hometown, Willis Whichard is, from the standpoint of ancestry, a thoroughly blended North Carolinian.

1. Jonathan Daniels, *Tar Heels* 106 (1941).

The blood of Pitt County runs through his veins on his father's side; on his mother's, that of far western Clay.

His father, Willis Guilford Whichard, a 1930 graduate of the University of North Carolina, taught high school American history in Red Springs and Pinehurst before being called in the mid-1930s to Durham, first as a teacher at Carr Junior High and Durham High School, and later as principal of North Durham and E. K. Powe Elementary Schools, dedicating a total of 36 years to public education. His mother, Beulah Padgett Whichard, taught elementary grades at Southside and Watts St. Schools in Durham for more than twenty years. Conversations around the family dinner table ran to religion and current events. The radio in the dining room was always tuned to the 6 o'clock news on WPTF, followed at 6:15 by Carl Goerch's "Doings of the Legislature" program and, every Sunday evening, Goerch's "Carolina Chats" – a midcentury precursor to WUNC's *North Carolina People with William Friday*. Beulah taught her son to read before he started first grade; the family frequented the Durham Public Library from the time he could walk. From an early age his reading tastes ran to biographies of statesmen, foreshadowing lifelong interest in a genre to which Whichard would himself make important contributions. He never forgot the importance of that library to a book-hungry little boy when, decades after he had become one of Durham's most distinguished citizens, he agreed to become the Founding President of the Durham Library Foundation.

The Whichards were a family in which hard work was an expected pathway to greater opportunities. At age 10 Willis began an eight-year career as a newspaper carrier for the local afternoon daily, *The Durham Sun*, delivering papers on foot and by bicycle to more than 130 homes, earning a dime a week from each customer. He sold soft drinks and peanuts at Duke home football games on Saturday afternoons. During summer breaks from high school and college, he worked for the book and supply department of the Durham City Schools, repairing books and preparing school buildings for the return of students in the fall.

That Willis Whichard would go to college was never in doubt, but it was the offer of a $150 per semester scholarship to the University of North Carolina, coupled with the money he had saved from his newspaper route, that determined a great deal of the direction of his life. He traveled the eight miles from Durham to Chapel Hill in the fall of 1958, finding there a university of some 8,000 undergraduate and graduate students. It was a shame, his father said as they unpacked,

that the place had gotten so big his son wouldn't be able to get to know anybody. One of Whichard's lasting memories was of a Sunday afternoon walk during his first week on that magical campus, when he passed William and Ida Friday moving at a "fairly rapid clip" towards Franklin Street from Cameron Avenue and the South Building. At that time Friday had just celebrated his 38th birthday and been President of the University for two years. Later that same week, Whichard encountered the chancellor of one year's standing, William Brantley Aycock, who told the awed freshman class that they were there "to draw interest on the intellectual, moral, and spiritual capital provided by the work, effort and sacrifice of many generations" of North Carolinians.[2] Friday and Aycock pushed out the horizons of young Whichard's hopes, planting seeds that bore fruit in his life for decades.

As could be said of so many Tar Heels both before him and since, it is probably impossible to gauge or fathom the influence of the University of North Carolina on Willis Whichard's life. He arrived in Chapel Hill in the latter part of a golden age that began under Presidents Edward Kidder Graham and Harry Woodburn Chase in the early years of the century, flowered through years of economic depression and war under the legendary Frank Porter Graham, and reached final maturity under Gordon Gray and his successor, the late William Friday. The University at Chapel Hill was, during this period, the most prestigious and progressive academic institution in the New South, a beacon of light exercising a kind of lifting power over state, region and country. By the late 1950s, the "Greatest Generation," educated on the GI bill and finished with doctoral dissertations, medical and law degrees, had taken over the leadership of North Carolina's chief public treasure. Under the influence of these civic-minded men who had made the world safe for democracy, Whichard plunged into the life of the campus, becoming active in student government and being elected to half a dozen leadership organizations, among them the Order of the Grail, the Order of the Old Well, and preeminently, the Order of the Golden Fleece, the University's oldest and highest honorary society, whose members include juniors, seniors and graduate and professional students who have made significant, lasting contributions to the University.

Although President Friday headed a university system then consisting of three institutions, he was very much a presence on the

2. Willis P. Whichard, *How Chancellor Aycock and President Friday Shaped the Course for Today's University*, Remarks for Reunion Weekend, May 9, 2014, Chapel Hill, N.C.

campus at Chapel Hill in young Whichard's years there. Undergraduate student leaders were known to Friday, and he sought out opportunities to interact with them. Whichard later recounted how, on a Sunday night every spring, the Fridays would host the members of the Order of the Golden Fleece at the President's house on Franklin Street to consider, with other future leaders of the state, the problems and possibilities of the University and the state as a whole. As Whichard later recalled:

> These occasions had a steady refrain. A small but influential corps of people really ran the state, [Friday] would say. They were a mix from the business, professional and academic communities. They might not always determine who would be the Governor, but they did determine who could be the Governor. They solicited responsible candidates for lesser positions as well, and saw to it that they had the funding to make their candidacies viable.
>
> It was implicit, if not explicit, that your turn might come to serve the state in some way, and if it did, the ancient concept of civic virtue demanded that you do it. You were getting a world-class education in Chapel Hill, at considerable expense to the taxpayers, and for that you owed something back.[3]

With the privilege of hindsight, we can conjure the kind of inspiration the future Supreme Court justice must have drawn from contact of this immediacy and power with the great men of his youth. Those who know him well cannot imagine any subject other than history for his principal course of study at UNC. Justice Whichard did indeed major in history, earning an A.B. degree in that subject with Phi Beta Kappa honors in 1962. Among his faculty mentors were Raymond H. Dawson, who had joined the political science faculty in the fall of Willis's freshman year immediately after completing the University's doctoral program and went on to be dean of the College of Arts and Sciences and Vice President for Academic Affairs of the UNC system under President Friday; the historian of American religion Robert Moats Miller; Samuel S. Hill, Jr., who would become a leading historian and sociologist of religion in America; and J. Carlyle Sitterson, who taught 20th century American history and served as Chancellor of the Chapel Hill campus from 1966 to 1972.

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3. *Id.*

Having married his sweetheart, Leona Paschal of Chatham County, at the end of his junior year, Justice Whichard resolved to go to law school immediately after receiving his bachelor's degree. He thus remained in Chapel Hill, moving the focus of his academic endeavors to Manning Hall in the fall of 1962. He excelled in the study of law, achieving election to the Board of Editors of the *North Carolina Law Review* in his second year and to the Order of the Coif, the highest scholastic honorary society for law students, in his third. The expectation that he and his fellow law school classmates would serve North Carolina was as clear in the Law School's Socratic dialogues as it had been in undergraduate history lectures. Legendary law professors announced which North Carolina cases needed overruling, and which statutes needed amending, if ever a student could find his way to the bench of the Supreme Court or the chambers of the legislature. While Whichard says he never imagined at the time that Albert Coates, Henry Brandis and others were talking to him, he also never forgot what they said.

In addition to his commitments to student organizations and his dedication to academic labors, Justice Whichard's years in Chapel Hill sowed the seeds of his career in electoral politics. Having joined the Democratic Party in 1959, during his sophomore year he worked actively for Terry Sanford in the gubernatorial campaign of 1960, drawn into that effort in part by the importunings of a 1959 N.C. State University graduate from Wilson County who had introduced himself as Jimmy Hunt. Whichard served as President of the University of North Carolina Young Democratic Clubs. He took a leave of absence from the Law School during the second semester of his second year in order to devote his full time to Judge L. Richardson Preyer's gubernatorial campaign. These experiences taught him the basics of electoral politics, a knowledge he put to good use in nine campaigns for local and statewide office over a quarter century.

My remarks have deliberately dwelt on the future Supreme Court justice's time at Chapel Hill. For one who knows him well, it is clear that no institution ever has exercised a more formative influence over the life of this gifted man from Durham. Indeed, with the possible exception of this Court, none has been more the beneficiary of his consistent and devoted service. During his years in the legislature he served on the Board of Directors and ultimately as President of the UNC Law Alumni Association. While an Associate Justice of this Court, he served on the Board of Directors and as President of the UNC General Alumni Association. He has been, at various times, a member of the Board of Visitors of the University as a whole, as well

as the Boards of Advisors of the UNC School of Public Health, the UNC School of Social Work, and UNC's Center for the Study of the American South. He served on three search committees for deans of the Law School and on a Law School selfstudy committee in the mid-1980s. His labors on behalf of the University and its constituent parts have, quite literally, spanned the whole of his professional life. In view of the sheer volume of this service, Justice Whichard's receipt of the Distinguished Alumnus Award from the Law School in 1993, the Distinguished Alumnus Award from the University in 2000, and the Distinguished Service Medal from the General Alumni Association in 2004 seem almost afterthoughts. It is enough to say that he has been "Tar Heel born and Tar Heel bred," and that when he shuffles off this mortal coil and joins the choir invisible, he will surely have earned that plainest, proudest sobriquet that a son of Carolina can deserve: He will be a "Tar Heel dead."

Following his graduation from law school in 1965, Justice Whichard passed the North Carolina bar examination and walked through the doors of this building. His mission: a coveted clerkship with Associate Justice William H. Bobbitt, then a twenty-six year veteran of the Superior and Supreme Court benches and one of the state's most respected and beloved lawyers. Of those present here today, Justice Whichard's own former law clerks will perhaps have the keenest understanding of what his relationship to Justice Bobbitt meant to him, as it was mirrored in their own clerkships. Justice Bobbitt possessed, according to the headline of the *News & Observer* editorial that followed his death, "a great mind and a merry twinkle," as well as the habit of "treat[ing] all who crossed his path with fairness, whether they lived modestly or in mansions." He had, according to one of his former law clerks, all the leading qualities of a great judge: "intelligence, perceptiveness of legal issues, common sense, even temperament, hard working, impeccable character, honesty (as a person and intellectually), a love of the law, a desire to excel as a judge and a desire to see a just and sensible result reached in every case."[4]

Justice Whichard relished every moment of his year clerking for Justice Bobbitt, remaining close to the elder judge until his death in 1992. From the thrill Chief Justice Susie Sharp reported that Justice Bobbitt felt on Whichard's appointment to the Court of Appeals fourteen years later ("Judge nearly burst his buttons," she said), there seems little doubt that Bobbitt considered him his most outstanding

4. Willis P. Whichard, *Presentation Address Upon Presentation of the Portrait of Chief Justice William H. Bobbit to the Supreme Court of North Carolina*, 333 N.C. 799, 806 (1993) (quoting Pender H. McElroy, former law clerk to Justice Bobbitt).

law clerk. When he left the clerkship in August 1966 to begin law practice in his hometown of Durham, the fleeting thought may just have crossed Justice Whichard's mind that perhaps, someday, he himself might sit on the Supreme Court. He could not have known that while serving as an associate justice, he would have the privilege of standing at this lectern to deliver the presentation address for the portrait of his mentor late in the winter of 1993.

The law firm of Powe, Porter, Alphin & Whichard, P.A., was perhaps the leading firm in Durham when Justice Whichard joined it after his clerkship. Edward Knox Powe, III, better known as "E.K.," who had founded the firm in 1950 after his graduation from Chapel Hill and the UNC School of Law, was the grandson of the first general manager of the Erwin Cotton Mills, an educational philanthropist after whom the elementary school Justice Whichard's father served as principal had been named. Powe's undergraduate career had been interrupted by service in the U.S. Army in World War II, when he was wounded in France and received the Purple Heart and Bronze Star for bravery. He had been involved in the organization and development of the Research Triangle Park and was renowned for his surety and insurance practice. Active in Durham civic affairs and later President of the North Carolina State Bar, kindly and endowed with a keen sense of humor, E.K. Powe ably modeled the role of Durham's leading lawyer for Justice Whichard in his early years of practice. Another name partner, W. Travis Porter, III, a Korean War veteran who had graduated from UNC and its Law School in 1960, provided a further dedicated example of public service, leading a variety of Durham organizations and later serving as a member and Chairman of the Board of Trustees of the University at Chapel Hill and as Chairman of the Board of Governors of the UNC System in the 1990s.

The culture of civic service that characterized the Powe, Porter firm, combined with the decision to return to the hometown he knew well, made for a happy transition to private practice for Justice Whichard. Commitments that resonated throughout his life – in particular, unswerving dedication to the welfare of the City of Durham and fierce loyalty to the University at Chapel Hill – were shared by the firm's established partners and encouraged in their new colleague. In his fourteen years of law practice, Justice Whichard dealt with a variety of matters, acquiring the bedrock skills of clear communication and persuasion that are the successful lawyer's stock in trade. He handled minor criminal cases and appeared in a number of civil trials, either with one of his partners or alone. Shortly after starting private practice, he threw himself head-

long into the community life of Durham, joining the Durham Jaycees, leading March of Dimes campaigns, and serving on the Red Cross board. Two years after joining the law firm, Willis and Leona Whichard welcomed their first child, Jennifer. Life in Durham was very full.

Yet somewhere deep in his soul, like the distant horn calls in a Richard Strauss tone poem, the clarion voices of President Friday and Chancellor Aycock sounded the leitmotiv of service in a wider sphere. An appointment to the North Carolina General Statutes Commission in 1969 led the young Durham lawyer, just three years into his private practice and with every prospect of financial success and a comfortable career, to offer himself as a candidate for the North Carolina House of Representatives. With the support of his law firm (for E.K. Powe had himself served two terms in the legislature in the 1950s), in 1970, at the age of 30, Whichard ran successfully for the House. Four years later, a seat in the State Senate for a larger Durham-based district became available, and Whichard was elected to three successive terms in the upper house.

That Willis Whichard was a superb legislator does not seem to be in any doubt. A later colleague on the Supreme Court, then an Assistant Attorney General, recalled how draft bills were sent from the legislature to the Department of Justice for vetting in days before the General Assembly had its own bill drafting staff. Representative and Senator Whichard's bills never required any change whatsoever; they were perfect from the moment they arrived from Jones Street. He chaired or served on numerous legislative committees and commissions, including the Senate Committee on Courts of Judicial Districts and the Judicial Planning Committee of the Governor's Crime Commission. Among his proudest legislative accomplishments was the passage of the Coastal Area Management Act of 1974, which provided for the protection, preservation, orderly development and management of North Carolina's coastal resources, covering the 20 coastal counties, adjacent ocean waters, the Outer Banks and other barrier islands, and all the state's inlets, sounds and estuarine waters. The act gave policymaking authority to a fifteen-member Coastal Resources Commission, made up primarily of coastal residents nominated by local governments and appointed by the governor.

Senator Whichard's legislative service was graced by the addition to his family of a second daughter, Ida, in 1976.

Towards the end of his third term in the upper house, in September 1980, Senator Whichard was appointed to the North Carolina

Court of Appeals by Governor James B. Hunt, Jr. – the same young man who, twenty years before, had been his companion in arms in Terry Sanford's 1960 gubernatorial campaign. The reaction of bench, bar and the public to the appointment was swift and approving. Justice J. Frank Huskins of the Supreme Court wrote this in a letter to Governor Hunt on the day the appointment was announced:

> I was delighted with your appointment of Willis Whichard to succeed Frank Parker on the Court of Appeals. It is most fitting that quality be succeeded by quality. This really is a quality appointment. [Senator Whichard's] foundation in the law is excellent. He has an unassuming disposition which is most becoming to those who occupy the bench. I am confident he will acquit himself with distinction . . . .

Chief Judge Naomi Morris of the Court of Appeals, never one to be easily impressed, told members of the bar in a *State Bar Quarterly* column: "We have welcomed Judge Willis Whichard who, I do not hesitate to predict, will very quickly earn your respect and admiration, both for the quality of the man and the quality of his work."[5]

Because his appointment had been to the seat of retiring Judge Frank M. Parker, Judge Whichard was immediately confronted with the necessity of running in the November 1980 election to remain on the Court of Appeals for the balance of Judge Parker's unexpired term. He was successfully elected that fall, receiving the endorsements of all of the state's major newspapers. The following, from the *Asheville Citizen* of October 23, 1980, is typical: "There is probably no abler candidate on the state ballot this year than Judge Willis Whichard . . . . [He] possesses intellectual depth, sensitivity and a keen sense of fairness, qualities he demonstrated again and again during five terms in the North Carolina [General Assembly]." Two years later, Judge Whichard won a full eight-year term from the voters. His opinions on the Court of Appeals may be found in volumes 49 through 82 of the *North Carolina Court of Appeals Reports*, and were able contributions to the jurisprudence of that court.

During his tenure on the Court of Appeals, Judge Whichard enrolled in the Master of Laws program at the University of Virginia,

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5. Column of Chief Judge Naomi Morris, North Carolina Court of Appeals, 27 N.C. State Bar Q. vol. 4, p. 28 (1980).

writing his thesis under the distinguished scholar G. Edward White. White's *The American Judicial Tradition*,[6] a series of essays analyzing profiles of various leading American judges from John Marshall to the middle of the 20th century, is a masterpiece of its kind, and Judge Whichard employed White's approach when writing his master's thesis, *A Place for Walter Clark in the American Judicial Tradition*. The thesis was published in the *North Carolina Law Review* in 1985[7] near the end of Judge Whichard's tenure on the Court of Appeals, and remains the leading modern portrait of one of this Court's most important chief justices. It was the prelude to a more extensive scholarly contribution to the field of judicial biography that Judge Whichard would make fifteen years in the future.

After six years on the Court of Appeals, Judge Whichard was prevailed upon in 1986 to run for the seat on the Supreme Court to which Governor Martin had determined to appoint Justice Robert R. Browning of Greenville. Associate Justice James G. Exum, Jr., first elected to the Court in 1974, had retired from his seat earlier in 1986 in order to run for the chief justiceship. Judge Whichard's colleague on the Court of Appeals, Judge John Webb of Wilson, likewise filed to run for the associate justiceship to which Governor Martin had recently appointed Justice Francis I. Parker of Charlotte. Exum, Whichard and Webb were all elected to the Supreme Court on the same day and sworn in together on November 26, 1986. Justice Whichard was re-elected to a full eight-year term in 1990, and served until his retirement on December 31, 1998.

The day Willis Padgett Whichard joined the Supreme Court of North Carolina was the beginning of nearly eight years of relative stability in the court's membership, following on more than a half dozen years of frequent changes in personnel that began with the retirement of Chief Justice Susie Sharp in the late 1970s. The court Justices Whichard and Webb joined consisted of Chief Justice Exum and Associate Justices Louis B. Meyer, Burley B. Mitchell, Jr., Harry C. Martin and Henry E. Frye. With the exception of Chief Justice Exum, none of the justices had served on the Supreme Court for more than six years, although four of the seven had previously sat on the Court of Appeals and three on the Superior Court.

The Exum Court quickly proved itself a worthy heir to the Supreme Court's greatest traditions. As Chief Justice Exum himself

6. *See* G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (Oxford 1988).

7. 65 N.C. L. Rev. 287 (1985).

has told me, "All of us enjoyed what we were doing. We got along as people and professionals, and we cared deeply about reaching a principled resolution to every case." There was a palpable sense that here, in this courtroom and on these halls, the sacred duty of appellate judging was being honored to the fullest, with pleasure and joy. Justice Louis Meyer personified this joy when he went down the halls humming and singing, often stopping by other chambers to ask justices, secretaries and law clerks alike: "Are you happy in your work?"

It would be unwise for us to attempt to say which of the opinions Justice Whichard authored while he was a member of the Supreme Court were pathbreaking or important. It will suffice to say that he authored a number of opinions which, at the time, were of great importance to the public and to the jurisprudence of the state, and that some of them are likely to be influential for years to come. He filed the first of these opinions just forty-four days after taking the oath of office;[8] the balance may be found in Volumes 318 through 349 of the *North Carolina Reports*. They reflect the author's knowledge of law, his ability to write lucidly and straightforwardly, and his soundness of judgment. The opinions of the other justices with whom he served also bear the stamp of his influence, for he concerned himself with the products of the whole Court, not just his own.

The importance of Justice Whichard's life as a member of the Supreme Court, and his place in its history, rest largely on his approach to the task of judging and on his perception of the judicial role in American government. It may not be inappropriate to attempt to characterize, in a general way, the contours of his jurisprudence, with the support of a few examples. If Justice Whichard can be identified with a particular "school" of judicial philosophy, it is with what may loosely be called the "restrained" model of judging rather than the "activist" one, which values judicial decisions largely in terms of the substantive results they achieve. Justice Whichard's more modest approach, associated with figures such as Learned Hand, Felix Frankfurter and Lewis F. Powell, Jr., looks to the quality of the process by which decisions are made. It values impartiality, thorough analysis, and sound reasoning, and is slow to embrace politically controversial judicial initiatives. An example of Justice Whichard's reluctance to interfere with the decisions of elected legislators is his opinion for a five-justice majority of the Court in *Maready v. City of Winston-Salem*, 342 N.C. 708 (1996), in which he held that a statute authorizing local governments to expend public money for

8. *State v. Hooper*, 318 N.C. 680 (6 January 1987).

economic development incentive grants to private corporations does not violate the public purpose clause of the North Carolina Constitution.[9] Reasoning closely from Supreme Court precedents and explicit legislative declarations indicating that the statute in question was "part of a comprehensive scheme of legislation dealing with economic development whereby the General Assembly is attempting to authorize exercise of the power of taxation for the perceived public purpose of promoting the general economic welfare of the citizens of North Carolina," Justice Whichard's opinion cites twenty-two facilities and activities accomplished with public expenditure that this Court had previously deemed to be public purposes, and concludes that the statute in question clearly served a public purpose while providing only incidental private benefit.

In the long run, Justice Whichard's opinions will be noted for superior craftsmanship and creativity within the confines set by the other branches of government, rather than for dramatic overturning of majoritarian preferences. In *Bhatti v. Buckland*, 328 N.C. 240 (1991), for example, he wrote for a unanimous Court that the sale at auction of two lots in a tract of land containing a home was a commercial land transaction affecting commerce in the broadest sense, not merely a residential real estate sale, and was therefore within the scope of the cause of action created by North Carolina's Unfair Trade Practices Act.[10] While deferential to the legislature in matters of statutory interpretation, where the common law was concerned he was innovative in areas he thought legitimately open to judicial determination. For example, in *Roper v. Edwards*, 323 N.C. 461 (1988), he extended the doctrine of constructive trust to reach an equitable result where defendants refused to convey real estate in accordance with the terms of a settlement agreement, despite having promised to do so, on the ground that the settlement agreement contained a prohibited restraint on alienation. The trial court and Court of Appeals had both held that the plaintiff had no remedy at law, and that the constructive trust doctrine was not applicable because the plaintiff had not proved that the defendants committed fraud or breached a duty owed to the plaintiff. Justice Whichard's opinion held that "[i]nequitable conduct short of actual fraud will give rise to a constructive trust where retention of the property by the holder of the legal title would result in his unjust enrichment. . . . To permit defendants to retain the extensive benefits they received in the

9. *See* N.C. Const. art. V, § 2(1) (providing that "[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only").

10. N.C. Gen. Stat. § 75-1.1.

bargained-for settlement, while refusing to perform the apparently meager concession they made in the process, would unjustly enrich defendants."

Justice Whichard placed a high value on openness to all points of view, including those with which he was inclined to disagree, and a correspondingly low value on his own infallibility. Professor Gerald Gunther, in the preface to his brilliant biography of Judge Learned Hand, described traits of his subject that could equally be applied to Justice Whichard:

> Reflectiveness, intolerance of absolutes, and relentless searching for answers, despite an abiding conviction that there were no permanent ones, were well ingrained traits by the time [Hand] became a judge. Intellectually engaged and always ready to examine his own assumptions, he was a philosopher and a humanist. . . . The doubting judge – always convinced that he had not found Truth and, indeed, that Truth was not findable – nevertheless pressed on in the search with all the talents and energies he could muster.[11]

Whichard's personal traits shaped his style of modest judging. To his Supreme Court colleagues, he was a gregarious, joyful companion, one whose calm demeanor and lack of ideology brought together divergent opinions. His superb sense of the Court's history and encyclopaedic knowledge of its precedents added a dimension of institutional memory and perspective that helped the other justices function better. Former Chief Justice Mitchell has commented that Justice Whichard was "as legally brilliant as anybody we've ever had, and probably the closest thing to a true Renaissance man as we've ever had on the Court." Mitchell's law clerks were never allowed to circulate an opinion until Justice Whichard, the acknowledged scholar of the Court, had given it his customary thorough proofreading. His strong desire, moderately and deliberately expressed, was to achieve a principled, articulable resolution for every case. His theme – "Reason is God's crowning gift to man," as Sophocles put it – was always uttered in a calm voice, layered over the unspoken chords of mutual respect, never taking oneself too seriously, and the belief that disagreements were never personal.

His relationship with his law clerks was a special part of Justice Whichard's life. More than twenty served him during his Court of Appeals and Supreme Court tenure. While I did not have the privilege

11. Gerald Gunther, *Learned Hand: The Man and the Judge* xvi-xvii (1994).

of clerking for Justice Whichard, I know a few of his law clerks well, and believe I am not far from the mark in guessing that each would say he or she gained far more from the experience than he or she provided in the way of assistance to the Justice. The clerks found that the benefits of clerking for him continued long after the formal relationship ended, as he kept up with them and inspired their legal careers. As one clerk remarked to me: "The impact of clerking for Justice Whichard has reverberated through my whole career. I learned respect for the law, but even more, I learned humanity from him. After my clerkship, the law really had a face. He humanized everything I have dedicated my life to in the years since."

During his Supreme Court service, Justice Whichard continued his graduate studies at the University of Virginia, enrolling in a course of study that led to the conferral on him in 1994 of the degree of Doctor of Juridical Science – the highest academic distinction available to an American lawyer. Justice Whichard had become aware that neither of the two North Carolinians to serve on the Supreme Court of the United States had been the subject of any extensive biographical treatment, and asked Professor G. Edward White to supervise a dissertation on the first, James Iredell, a Federalist largely responsible for North Carolina's ratification of the United States Constitution and one of President Washington's first appointees to the new nation's highest court. The result, a 381-page biography published by Carolina Academic Press in 2000, will likely remain the definitive treatment of its subject for decades to come.

One day in 1997, I was having lunch with Justice Whichard when he asked me to be prepared to manage his campaign for re-election to the Supreme Court that fall. Within a few weeks, however, he informed me that he had decided not to run, that the labors of the-Court no longer held his interest in the way they once had, and that other avenues ofservice beckoned.

His subsequent career has revealed again his unswerving commitment to our profession and the welfare of the public. For the seven years after his retirement from the Supreme Court, he was the highly successful Dean of the Norman Adrian Wiggins School of Law at Campbell University. In 2006 he re-entered private practice in Research Triangle Park with his former colleagues at Powe, Porter, Alphin & Whichard, by then part of the Charlotte-based law firm of Moore & Van Allen, PLLC. The following year, he accepted his hometown's call for leadership once again, chairing the City of Durham's

committee to investigate the Durham Police Department's handling of the Duke lacrosse case. In 2009- 11, he chaired the Governor's Scientific Advisory Panel on Offshore Energy. He chaired the North Carolina Humanities Council and continued his twenty-year presidency of the North Caroliniana Society, an organization of 200 North Carolinians dedicated to the preservation of the state's literary, historical and cultural heritage. He served on the Board of Trustees of the North Carolina Center for the Advancement of Teaching and remains active on its Foundation Board. He is presently serving as the Fourth Circuit member of the American Bar Association's Standing Committee on the Federal Judiciary, from which post he evaluates presidential nominees to Article III judgeships throughout the United States.

Justice Whichard practiced law with Moore & Van Allen until less than a year ago, when he joined his former law clerk Beth Tillman and her partner Christina Hinkle in their private practice in Chapel Hill. The law firm's offices are located not far from the Southern Historical Collection in Wilson Library on the University campus, where Justice Whichard is hard at work on a biography of another unique North Carolinian: David Lowry Swain, governor in the early 1830s and the greatest President of the University before Reconstruction. The book will be published as part of the Coates University History Leadership Series, sponsored by the University of North Carolina at Chapel Hill Library.

I have reflected long and thoroughly on what character from literature or history Justice Whichard most resembles. My choice, an obscure one by most lights, would surprise many of you, if you have even heard of him. Plantagenet Palliser, the hero of a series of six mid-nineteenth century novels by the grossly underrated Anthony Trollope, is a highly principled, utterly scrupulous Liberal prime minister who manages to hold together a successful coalition government in the middle of Victoria's reign. Modeled loosely on the character of William Gladstone, Palliser expresses his philosophy to a cabinet colleague in the following passage from Trollope's 1876 novel, *The Prime Minister*, fifth in the Palliser series:

> Equality would be a heaven, if we could attain it. How can we to whom so much has been given dare to think otherwise? How can you look at the bowed back and bent legs and abject face of that poor ploughman, who winter and

> summer has to drag his rheumatic limbs to his work, while you go a-hunting or sit in pride of place among the foremost few of your country, and say that it all is as it ought to be? You are a Liberal because you know that it is not all as it ought to be, and because you would still march on to some nearer approach to equality . . . .[12]

That passage expresses, I believe, the unblemished, unextinguishable, inexhaustible virtue and love of state and country that distinguish the statesman from the merely political character. And it describes the attitude towards his fellow toil-bound human beings exhibited by Justice Whichard. To appreciate this good man, ask yourself how much better off our country would be if more of us were like him. When the framers of our Constitution finished their work in Philadelphia in September 1787, someone asked Ben Franklin just what the Constitutional Convention had produced. He answered: "A Republic – if you can keep it." Franklin meant that the whole American constitutional experiment depended on every generation producing people of fortitude, kindness and temperance. In our time, Willis Whichard has been a member of that cloud of witnesses in whom our Forefathers' hopes for recurrence of those virtues havebeen fulfilled.

I close, asking your indulgence for a brief personal observation. My friendship with Willis Whichard began in the spring of 1991, when I was a student in his seminar on the Judicial Process at the Law School in Chapel Hill. That course was far and away one of the most intellectually enriching academic experiences of my time in law school. Years later, my wife told Justice Whichard that if he had announced that the seminar would meet at 7:00 a.m. on Sunday mornings, I would have shown up fifteen minutes early. He has remained, for more than twenty years, a kind of polar star in the firmament of my life. I confess, unfeignedly and with thankful heart, to Your Honors and to all here in this courtroom, that I have been blessed – truly blessed – to know Willis Whichard. And I pray that for decades to come, as the shadows lengthen and the evening comes, as the fevers of life burn and subside, until the work of my earthly pilgrimage is done, I may have theprivilege of his wisdom and counsel, and of enjoying in them the kind and patient twinkle of an everlasting friend.

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12. Anthony Trollope, *The Prime Minister* vol. II, at 265 (Oxford 1982).

ACCEPTANCE OF JUSTICE WHICHARD'S PORTRAIT
by
CHIEF JUSTICE SARAH PARKER

Thank you, Mr. Brinkley for that eloquent and fitting tribute to our former colleague. At this time, I am delighted to ask Justice Whichard's grandchildren to unveil the portrait of their grandfather.

On behalf of the Supreme Court, I thank Mr. Brinkley for his insightful remarks on the remarkable contributions of Justice Whichard to the State of North Carolina, and on behalf of the Court, I accept this portrait of Justice Whichard as a part of our collection. We are pleased to have this fine work of art, and we sincerely appreciate the efforts of all who helped to make this presentation possible.

Justice Whichard's portrait will be hung in an appropriate place in this building and will be a continuous reminder to us and our successors of his friendship and of the tradition of excellence and public service which Justice Whichard's life and work have exemplified. Additionally, these proceedings will be printed in the North Carolina reports.

RULES OF THE JUDICIAL STANDARDS COMMISSION

The Rules of the Judicial Standards Commission are hereby amended to read as follows:

RULE 1. AUTHORITY

These rules are promulgated pursuant to the authority contained in N.C. Gen. Stat. § 7A-375(g), and § 97-78.1, and are effective September 1, 2014. The term "judge" shall at all times refer to any member of the General Court of Justice of North Carolina or any commissioner or deputy commissioner of the North Carolina Industrial Commission.

RULE 2. ORGANIZATION

(a) The Commission shall have a Chairperson, who is the Court of Appeals member and two Vice-Chairpersons, each of whom shall be a superior court judge. A Vice-Chairperson shall preside in the absence of the Chairperson during Commission recommendation hearings. The Executive Director shall serve as the secretary to the full Commission and to each panel, and shall perform such duties as the full Commission or a panel may assign.

(b) The Chairperson shall divide the Commission into two six (6) member panels, one to be designated Panel A and the other Panel B. Each panel shall include one (1) superior court judge, one (1) district court judge, two (2) members appointed by the North Carolina State Bar, one (1) citizen appointed by the Governor, and one (1) citizen appointed by the General Assembly. Membership on the panels may rotate in a manner determined by the Chairperson of the Commission, provided that no member, other than the Chairperson, shall sit on both the hearing and investigative panel for the same proceeding. The Chairperson of the Commission shall preside over all panel meetings. The two Vice-Chairpersons shall be assigned to different panels and each shall preside over their respective panel meetings in the absence of the Chairperson. No member, other than the Commission Chairperson who shall preside over all disciplinary recommendation hearings, who has served on an investigative panel for a particular inquiry shall serve upon the hearing panel for the same matter. Should both panels of the Commission meet jointly, and the Chairperson not be present, then the Vice-Chairperson with the longest tenure of service on the Commission shall preside.

(c) The full Commission shall meet on the call of the Chairperson or upon the written request of any five (5) members. Each

panel of the Commission shall meet every other month, unless prevented by exigent circumstances, such as inclement weather, emergency, or unresolvable conflict with court calendars, alternating such meetings with the other panel, or upon the call of the Chairperson. Hearing panels shall also meet as needed to conduct disciplinary recommendation hearings upon the call of the Chairperson. Each member of the Commission, including the Chairperson, Vice-Chairpersons, or other presiding member shall be a voting member.

(d) A quorum for the conduct of business of the full Commission shall consist of any nine (9) members. A quorum for the conduct of the business of a panel shall consist of five (5) members. A quorum for the conduct of any disciplinary recommendation proceeding instituted pursuant to Rule 12 shall consist of five (5) members of the panel assigned to hear the proceeding. The affirmative vote of five (5) members of a hearing panel is required to make a recommendation to the Supreme Court that a judge be issued a public reprimand, censured, suspended, or removed from office.

(e) The Commission shall ordinarily meet in Raleigh, but may meet anywhere in the State. The Commission's address is P.O. Box 1122, Raleigh, N.C. 27602.

RULE 3. EXECUTIVE DIRECTOR

The Executive Director shall have duties and responsibilities prescribed by the Commission including but not limited to:

(1) Receive and screen complaints and allegations as to misconduct or disability, and make preliminary evaluations with respect thereto;

(2) Maintain the Commission's records;

(3) Maintain statistics concerning the operation of the Commission and make them available to the Commission and to the Supreme Court;

(4) Administer the funds for the Commission's budget, as prepared by the Administrative Office of the Courts;

(5) Employ and supervise other members of the Commission's staff;

(6) Prepare an annual report of the Commission's activities for presentation to the Commission, to the Supreme Court and to the public;

(7) Employ, with the approval of the Chairperson, a special counsel, and an investigator as necessary to investigate and process matters before the Commission and before the Supreme Court.

RULE 4. COUNSEL

Commission counsel shall have duties and responsibilities prescribed by the Commission including but not limited to:

(1) Advise the Commission during its investigations and draft decisions, orders, reports and other documents;

(2) Direct investigations involving alleged misconduct or disability;

(3) Direct letters of notice to respondents when directed to do so by the Commission;

(4) Prosecute disciplinary recommendation proceedings before the Commission;

(5) Appear on behalf of the Commission in the Supreme Court in connection with any recommendation made by the Commission;

(6) Perform other duties at the direction of the Executive Director or Commission Chairperson.

RULE 5. INVESTIGATOR

The Investigator shall have duties and responsibilities prescribed by the Commission including, but not limited to:

(1) Conduct preliminary investigations;

(2) Conduct formal investigations, upon authorization of the Commission;

(3) Assist Counsel in the preparation and coordination of disciplinary recommendation proceedings initiated pursuant to Rule 12;

(4) Maintain records of the investigations and subsequent proceedings as set forth above;

(5) Perform other duties at the direction of the Executive Director or Commission Chairperson.

RULE 6. CONFIDENTIALITY

(a) During Investigative and Initial Disciplinary Recommendation Proceedings.

(1) Except as otherwise provided herein, or unless a written waiver is provided by the subject judge, at all times unless and until the Supreme Court orders any disciplinary action taken, all Commission proceedings including Commission deliberations, investigative files, records, papers and matters submitted to the Commission, shall be held confidential by the Commission, its Executive Director, Counsel, Investigator and staff except as follows:

(A) With the approval of the Commission, the investigative officer may notify respondent that a complaint has been received and may disclose to respondent the name of the person making the complaint.

(B) The Commission may inform a complainant or potential witness of the date when respondent is first notified that a complaint alleging misconduct or incapacity has been filed with the Commission.

(C) When the Commission has determined that there is a need to notify another person or agency in order to protect the public or the administration of justice.

(D) In any case in which a complaint filed with the Commission is made public by the complainant, the judge involved, independent sources, or by rule of law, the Commission may issue such statements of clarification and correction as it deems appropriate in the interest of maintaining confidence in the justice system. Such statements may address the status and procedural aspects of the proceeding, the judge' s right to a fair hearing in accordance with due process requirements, and any official

action of disposition by the Commission, including release of its written notice to the complainant or the judge of such action or disposition.

(E) In any case in which the Commission initiates a formal investigation that would create a reasonable conflict of interest for the respondent judge if he or she were to proceed in adjudicating a matter involving the complainant, the identity of the complainant may be made known to the respondent judge to facilitate recusal.

(2) The fact that a complaint has been made, or that a statement has been given to the Commission, shall be confidential during the investigation and initial proceeding except as provided in this Rule.

(3) No person providing information to the Commission shall disclose information they have obtained from the Commission concerning the investigation, including the fact that an investigation is being conducted, unless and until the Supreme Court orders any disciplinary action taken against the respondent.

(4) The work product of the Commission members, its Executive Director, Commission Counsel and investigator shall be confidential and shall not be disclosed.

(5) Where a complaint has been made to the State Ethics Commission and the Ethics Commission has forwarded the complaint to the Judicial Standards Commission and, as required by statute, notified the respondent judge of the complaint, the Judicial Standards Commission may, at its discretion, confirm the receipt and disposition of the complaint upon inquiry of the judge so notified.

(b) Commission Deliberations. All deliberations of the Commission in reaching a decision on the statement of charges or a recommendation to the Supreme Court shall be confidential and shall not be disclosed.

(c) General Applicability.

(1) No person shall disclose information obtained from Commission proceedings or papers filed only with the Com-

mission, except information obtained from documents disclosed to the public by the Commission pursuant to this Rule.

(2) Any person violating the confidentiality requirements of this Rule 6 may be subject to punishment for contempt.

(3) A judge shall not intimidate, coerce, or otherwise attempt to induce any person to disclose, conceal or alter records, papers, or information made confidential by the Rule. A violation of this subsection may be charged as a separate violation of the Code of Judicial Conduct.

(4) All written communications from the Commission or its employees to a judge or his or her counsel which are deemed confidential pursuant to these rules shall be enclosed in a securely sealed inner envelope which is clearly marked "Confidential".

(d) After Investigation by the Commission and Findings of Misconduct by the Supreme Court.

(1) If, after an investigation is completed, the Commission concludes that disciplinary proceedings should be instituted, the notice and statement of charges filed by the Commission, along with the answer and all other pleadings, remain confidential. Disciplinary hearings ordered by the Commission are confidential, and recommendations of the Commission to the Supreme Court, along with the record filed in support of such recommendations are confidential. Testimony and other evidence presented to the Commission is privileged in any action for defamation.

(2) Upon issuance of a public reprimand, censure, suspension, or removal by the Supreme Court, the notice and statement of charges filed by the Commission along with the answer and all other pleadings, and recommendations of the Commission to the Supreme Court along with the record filed in support of such recommendations, are no longer confidential.

RULE 7. DISQUALIFICATION

A judge who is a member of the Commission is disqualified from acting in any case in which he or she is a respondent, except in his or her own defense.

RULE 8. ADVISORY OPINIONS

(a) A judge may seek an informal advisory opinion as to whether conduct, actual or contemplated, conforms to the requirements of the Code of Judicial Conduct. Such informal advisory opinion may be requested verbally or in writing. The Chairperson, Executive Director, or Counsel may grant or deny a request for an informal advisory opinion. Information contained in a request for an informal advisory opinion shall be confidential, however, when a request for an informal advisory opinion discloses actual conduct which may be actionable as a violation of the Code of Judicial Conduct, the Chairperson, Executive Director, or Counsel shall refer the matter to an investigative panel of the Commission for consideration. The Chairperson, Executive Director, or Counsel may issue an informal advisory opinion to guide the inquiring judge's own prospective conduct if the inquiry is routine, the responsive advice if readily available from the Code of Judicial Conduct and formal Commission opinions, or the inquiry requires immediate response to protect the inquiring judge's right or interest. An informal advisory opinion may be issued verbally, but shall be confirmed in writing and shall approve or disapprove only the matter in issue and shall not otherwise serve as precedent and shall not be published. An inquiry requesting an opinion concerning past conduct or that presents a matter of first impression shall be referred to the Commission for formal opinion. Such informal advisory opinions shall be reviewed periodically by the Commission and, if upon such review, a majority of the Commission present and voting decided that such informal advisory opinion should be withdrawn or modified, the inquiring judge shall be notified in writing by the Executive Director. Until such notification, the judge shall be deemed to have acted in good faith if he or she acts in conformity with the informal advisory opinion which is later withdrawn or modified. If an inquiring judge disagrees with the informal advisory opinion issued by the Chairperson, Executive Director, or Counsel, such judge may submit a written request, in accordance with subsection (b), for consideration of the inquiry by the Commission at its next regularly scheduled meeting.

(b) Any person may request that the Commission issue a formal opinion as to whether actual or contemplated conduct on the part of a judge conforms to the requirements of the Code of Judicial Conduct. Such requests for formal opinions shall be submitted to the Executive Director. Information contained in a request for a formal opinion shall not be confidential. The Commission shall determine whether to issue a formal opinion in response to such request; if the

Commission determines to issue a formal opinion, it shall prepare a formal written opinion which shall state its conclusion with respect to the question asked and the reason therefor. Such formal opinions shall be provided to interested parties in the manner deemed appropriate by the Chairperson and a copy shall be provided the Appellate Reporter for publication and such Reporter shall, from time to time as directed by the Commission, publish an index of advisory opinions. Formal advisory opinions shall have precedential value in determining whether similar conduct conforms to the Code of Judicial Conduct, but shall not constitute controlling legal authority for the purposes of review of a disciplinary recommendation by a reviewing court. A formal opinion may be reconsidered or withdrawn by the Commission in the same manner in which it was issued. Until a formal advisory opinion is modified or withdrawn by the Commission or overturned by a reviewing court, a judge shall be deemed to have acted in good faith if he or she acts in conformity therewith.

(c) All inquiries, whether requesting a formal opinion or an informal advisory opinion, shall present in detail all operative facts upon which the inquiry is based, but should not disclose privileged or sensitive information which is not necessary to the resolution of the question presented.

RULE 9. PROCEDURE UPON RECEIPT OF COMPLAINT OR INFORMATION

(a) The Executive Director and Commission Counsel shall review each complaint or information received by the Commission to determine whether the complaint or information, if true, discloses facts indicating that a judge has engaged in conduct which is in violation of the Code of Judicial Conduct, has engaged in willful misconduct in office, has willfully and persistently failed to perform the duties of his or her judicial office, has engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or is habitually intemperate, or alleging that a judge is suffering from a mental or physical incapacity interfering with the performance of his duties, which incapacity is, or is likely to become, permanent.

(1) If such initial review discloses no such facts so that the complaint is obviously unfounded or frivolous, the Executive Director shall notify the Chairperson who, if he or she agrees, may dismiss the complaint. The Chairperson shall inform the investigative panel of any such dismissal at the panel's next meeting and, upon the request of any member,

such determination may be reconsidered; otherwise the dismissal of the complaint shall be final and the complainant shall be notified.

(2) If such initial review discloses no such facts so that the complaint is obviously unfounded and frivolous, and the complaint substantially conforms to an abuse of the complaint process, the Executive Director shall notify the Chairperson, who, if he or she agrees, may dismiss the complaint and recommend that the complainant be barred from further complaints to the Commission. The Chairperson shall inform the investigative panel of any such dismissal and recommended bar at the panel's next meeting and, upon the request of any member, such dismissal may be reconsidered. Provided, a recommended bar of further complaints by the complainant shall be ordered only upon the affirmative finding of the panel, by clear and convincing evidence, that the complainant has abused the complaint process by one or more of the following:

(A) Abusive or threatening language directed toward the staff, Commission, or judiciary;

(B) Knowingly filing false information with the Commission;

(C) Repeated demands to rehear a complaint already reviewed and dismissed with no new or significantly different allegations or evidence, or repeated demands to rehear a complaint already determined to be outside of the time period allowed for review of alleged misconduct by the Commission;

(D) Complaints which maintain that the complainant is not subject to the authority of the State of North Carolina, its laws, rules, or procedures and refuse to recognize the authority of the General Statutes of North Carolina over the Commission's operations and procedures;

(b) If a complaint or information is not dismissed as frivolous or unfounded, the Executive Director and Investigator shall conduct such preliminary review as may be necessary to apprise the investigative panel of the nature thereof, and such panel shall review the

complaint or information at the next meeting occurring after the complaint or information is received.

(c) If the investigative panel, by the affirmative vote of not less than five (5) members, determines that the complaint alleges, or information discloses, facts indicating that a judge has engaged in conduct which is in violation of the Code of Judicial Conduct, has engaged in willful misconduct in office, has willfully and persistently failed to perform the duties of his or her judicial office, has engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or is habitually intemperate, or alleging that a judge is suffering from a mental or physical incapacity interfering with the performance of his duties, which incapacity is, or is likely to become, permanent, such panel shall order a formal investigation to determine whether disciplinary proceedings or health-related retirement should be recommended.

(d) The judge shall be notified of the formal investigation, the nature of the allegations which the Commission is investigating, and whether the formal investigation is on the Commission's own motion or upon written complaint. The notice shall afford the judge a reasonable opportunity to present such relevant information as he or she may deem advisable. Such notice shall be in writing and may be personally delivered by the Chairperson, Executive Director, Commission Counsel, or Investigator, or it may be delivered by certified mail, return receipt requested.

(e) If, upon ordering a formal investigation in accordance with subparagraph (d) above, the investigative panel determines that immediate suspension of the judge is required for the proper administration of justice, it may recommend to the Chief Justice that such judge be temporarily suspended from the performance of his or her judicial duties pending final disposition of the inquiry. A copy of such recommendation shall be provided the judge by certified mail, return receipt requested.

RULE 10. RECORD OF PROCEEDINGS

The Commission shall keep a record of all formal investigations and disciplinary recommendation proceedings concerning a judge. In disciplinary recommendation hearings, testimony shall be recorded verbatim by a court reporter and by video recording and, if the Commission recommends to the Supreme Court that the judge be disciplined, a transcript of the evidence and all proceedings therein shall

be prepared, including a video recording of the testimony of all witnesses who testify at the disciplinary recommendation hearing, and made a part of the record.

RULE 11. LETTER OF CAUTION

If the inquiry discloses conduct by a judge which requires attention but is not of such a nature as to warrant a recommendation by Commission that the judge be disciplined by the Supreme Court, the investigative panel may issue a letter of caution to the judge. No letter of caution may be issued after a disciplinary recommendation proceeding has been initiated pursuant to Rule 12.

RULE 12. INITIATION OF DISCIPLINARY RECOMMENDATION PROCEEDINGS

If, after completion of the formal investigation, the investigative panel determines, by the affirmative vote of not less than five (5) members, that probable cause exists that a judge has:

(a) violated the Code of Judicial Conduct and engaged in conduct prejudicial to the administration of justice and that such conduct, if proven, would warrant a recommendation by the Commission that the judge receive a public reprimand by the Supreme Court, that may require that the judge follow a corrective course of action or, be disciplined by the Supreme Court; or

(b) that a judge is temporarily incapacitated or is suffering from an incapacity which is, or is likely to become, permanent; then,

the Commission shall initiate disciplinary recommendation proceedings by the filing, at the Commission offices, a Statement of Charges alleging the charge or charges. The Statement of Charges shall identify the complainant and state the charge or charges in plain and concise language and in sufficient detail to give fair and adequate notice of the nature of the alleged conduct or incapacity. The Statement of Charges shall be entitled "BEFORE THE JUDICIAL STANDARDS COMMISSION, Inquiry Concerning a Judge No. ___." A copy of the Statement of Charges shall be personally served upon the respondent judge by the Chairperson, the Executive Director, the Commission's Investigator, or by some person

of suitable age and discretion designated by the Commission. If, after reasonable efforts to do so, personal service upon the respondent judge cannot be effected, service may be made by registered or certified mail with a delivery receipt, and proof of service in accordance with N.C. Gen. Stat. § 1-75.10(4) shall be filed with the Commission. Service of a copy of the Statement of Charges shall constitute notice to the respondent judge of the initiation of disciplinary recommendation proceedings.

RULE 13. ANSWER

Unless the time is extended by order of the Commission, the respondent judge shall file at the Commission offices, within twenty (20) days after service of the Statement of Charges, a written original and 10 copies of an Answer, which shall be verified. The Statement of Charges and Answer shall constitute the pleadings. No further pleadings may be filed, and no motions may be filed against any of the pleadings. The assertion of a mental or physical condition as a defense by the respondent judge shall constitute a waiver of medical privilege for the purpose of the Commission proceeding.

Failure to answer the Statement of Charges shall constitute an admission of the factual allegations contained in the Statement of Charges.

RULE 14. EX PARTE CONTACTS

After the filing of a Statement of Charges and disciplinary recommendation proceedings by the Commission, members of the Commission shall not engage in ex parte communications regarding the matter with the respondent judge, counsel for the respondent judge, Commission counsel, or any witness, except that Commission members may communicate with Commission staff and others with respect to procedural and administrative matters as may be required to perform their duties in accordance with these rules.

RULE 15. DISCOVERY

(a) Upon written demand after the time for filing an Answer has expired, Commission Counsel and respondent judge will each disclose to the other, within 20 days after such demand, the following:

(1) the name and address of each witness the party expects to offer at the disciplinary recommendation hearing;

(2) a brief summary of the expected testimony of each witness;

(3) copies of any written statement and a transcript of any electronically recorded statement made by any person the party anticipates calling as a witness;

(4) copies of documentary evidence which may be offered;

(b) Failure to disclose the name of any witness, or to provide any material required to be disclosed by section (a) may result in the exclusion of the testimony of such witness or the documentary evidence which was not provided.

(c) Commission Counsel shall provide the respondent judge with any exculpatory evidence of which he or she is aware and which is relevant to the allegations of the complaint.

(d) Both Commission Counsel and respondent judge shall have a continuing duty to supplement information required to be exchanged under this rule.

(e) The taking of depositions, serving of requests for admission, and other discovery procedures authorized by the Rules of Civil Procedure, shall be permitted only by stipulation of the parties or by order of the Commission Chairperson for good cause shown, and in such manner and upon such conditions as the Chairperson may prescribe.

(f) Disputes concerning discovery shall be determined by the Chairperson, whose decision may not be appealed prior to the conclusion of the disciplinary recommendation hearing and the entry of a recommendation for discipline or other final order by the Commission.

(g) Unless the time is extended by order of the Commission, all discovery shall be completed within 60 days of the filing of the answer.

RULE 16. AMENDMENTS TO NOTICE OR ANSWER

At any time prior to the conclusion of the disciplinary recommendation hearing, the hearing panel may allow or require amendments to the Statement of Charges or to the Answer. The Statement of Charges may be amended to conform to the proof or to set forth additional facts, whether occurring before or after the commencement of the disciplinary recommendation hearing. In the event of an amendment setting forth additional facts, the respondent judge shall be given a reasonable time to answer the amendment and to prepare and present his or her defense to the matters charged thereby.

RULE 17. DISCIPLINARY RECOMMENDATION HEARING

Upon the filing of an Answer, or upon the expiration of the time allowed for its filing, the hearing panel shall order a disciplinary recommendation hearing before it upon the charges contained in the Statement of Charges. The disciplinary recommendation hearing shall be held no sooner than 60 days after filing of the Answer or, if no Answer is filed, 60 days after the expiration of time allowed for its filing, unless the judge consents to an earlier disciplinary recommendation hearing. The Commission shall serve a notice of the disciplinary recommendation hearing upon the respondent judge in the same manner as service of the Statement of Charges under Rule 12.

Upon the date set for the disciplinary recommendation hearing, such disciplinary recommendation hearing shall proceed whether or not the respondent judge has filed an Answer, and whether or not he or she appears in person or through counsel. At least six members, or alternates, shall be present continually during the presentation of evidence at the disciplinary recommendation hearing.

Commission Counsel, or other counsel appointed by the Commission for that purpose, shall present evidence in support of the charges alleged in the Statement of Charges. Commission counsel may call the respondent judge as a witness.

The disciplinary recommendation hearing shall be recorded verbatim in accordance with the provisions of Rule 10.

RULE 18. RIGHTS OF RESPONDENT; BURDEN OF PROOF

The respondent judge shall have the right to representation by counsel and the opportunity to defend against the charges by the

introduction of evidence, examination and cross-examination of witnesses and to address the hearing panel in argument at the conclusion of the disciplinary recommendation hearing. The respondent judge shall also have the right to the issuance of subpoenas to compel the attendance of witnesses or the production of documents and other evidentiary material.

Upon the entry of an appearance by counsel for the respondent judge, a copy of any notices, pleadings, or other written communications sent to the respondent judge shall be furnished to such counsel by the Executive Director.

Commission Counsel shall have the burden of proving the existence of grounds for a recommendation of discipline by clear, cogent and convincing evidence, as that term is defined by the Supreme Court.

RULE 19. WITNESSES; OATHS; SUBPOENAS

The respondent judge and the Commission shall have the right to call witnesses to testify to the character of the respondent and any genuine dispute of material facts between the parties in the disciplinary recommendation hearing. Neither the respondent judge nor the Commission shall call more than four character witnesses in such a proceeding. Additional character witnesses may submit affidavits or be identified and tendered for the record. Neither the respondent judge nor the Commission shall be limited in the number of witnesses called to testify to material facts in a disciplinary recommendation hearing.

Every witness who testifies before the hearing panel at a disciplinary recommendation hearing shall be required to declare, by oath or affirmation, to testify truthfully. The oath or affirmation may be administered by any member of the Commission. A subpoena to compel the attendance of a witness at a disciplinary recommendation hearing before the Commission, or a subpoena for the production of documentary evidence, shall be issued in the name of the State upon request of any party, and shall be signed by a member of the Commission, by the Executive Director, or by Commission Counsel. A subpoena shall be served, without fee, by any officer authorized to serve a subpoena pursuant to the provisions of N.C. Gen. Stat. § 1A-1, Rule 45(b).

Witnesses shall be reimbursed in the manner provided in civil cases in the General Court of Justice, and their expenses shall be

borne by the party calling them unless, when mental or physical disability of the judge is in issue, in which case the Commission shall bear the reasonable expenses of the witnesses whose testimony is related to the disability. Vouchers authorizing disbursements by the Commission for witnesses shall be signed by the Chairperson or Executive Director.

RULE 20. RULES OF EVIDENCE

Except as otherwise provided in these rules, the Rules of Evidence as set forth in Chapter 8C of the North Carolina General Statutes shall apply in all disciplinary recommendation hearings under these rules. Rulings on evidentiary matters shall be made by the Chairperson, or by member presiding in the absence of the Chairperson.

RULE 21. MEDICAL EXAMINATION

When the mental or physical condition or health of the respondent judge is in issue, a denial of the alleged condition shall constitute a waiver of medical privilege for the purpose of the Commission proceeding, and the respondent judge shall be required to produce, upon request of Commission Counsel, his or her medical records relating to such condition. The respondent judge shall also be deemed to have consented to a physical or mental examination by a qualified licensed physician or physicians designated by the Commission. A copy of the report of such examination shall be provided to the respondent judge and to the Commission. The examining physician or physicians shall receive the fee of an expert witness, to be set by the Commission.

RULE 22. STIPULATIONS

At any time prior to the conclusion of a disciplinary recommendation hearing, the respondent judge may stipulate to any or all of the allegations of the Statement of Charges in exchange for a stated disposition, which may include a stated recommendation to the Supreme Court for discipline. The stipulation shall be in writing and shall set forth all material facts relating to the proceeding and the conduct of respondent. The stipulation shall be signed by the respondent judge, his or her counsel, and by Commission Counsel. The stipulation shall be submitted to the hearing panel, which shall either approve the stipulation or reject it. If the stipulation provides for a stated recommendation for discipline, it must be approved by the affirmative vote of not less than five members of the hearing panel. If the stipulation is rejected by the hearing panel, it shall be deemed

withdrawn and will not be considered in any proceedings before, or deliberations of, the hearing panel. If the hearing panel approves the stipulation, it shall prepare a written recommendation to the Supreme Court consistent therewith and transmit such recommendation in accordance with the provisions of Rules 24 and 25.

RULE 23. CONTEMPT POWERS

The Commission has the same power as a trial court of the General Court of Justice to punish for contempt, or for refusal to obey lawful orders or process of the Commission. See N.C. Gen. Stat. § 7A-377(d).

RULE 24. PROCEDURE FOLLOWING DISCIPLINARY RECOMMENDATION HEARING

At the conclusion of the disciplinary recommendation hearing, the hearing panel shall deliberate and determine whether to dismiss the proceeding or to file a recommendation with the Supreme Court. In all cases, the Executive Director shall notify the respondent judge in writing of the decision of the hearing panel within 60 days after the conclusion of the disciplinary recommendation hearing, unless the time is extended by order of the Chairperson.

At least five members of the Commission must concur in any recommendation to issue a public reprimand, censure, suspend, or remove any judge. If the hearing panel reaches a decision to recommend the public reprimand, censure, suspension or removal of a judge, the Executive Director shall prepare a proposed record of the proceedings and a written decision setting forth the hearing panel's findings of fact, conclusions of law, and recommendation. The proposed record of the proceeding shall include a verbatim transcript of the disciplinary recommendation hearing as well as a copy of the video recording of such disciplinary recommendation hearing. Such proposed record and decision shall be served upon the respondent judge and his or her counsel, if any, in the same manner as service of the complaint under Rule 12.

RULE 25. TRANSMITTAL OF RECORD TO THE SUPREME COURT

A respondent who is recommended for public reprimand, censure, suspension, or removal is entitled to a copy of the proposed record to be filed with the Supreme Court, and if the respondent has objections to it, to have the record settled by the Commission's chair.

Unless the respondent judge files objections to the proposed record, or a proposed alternative record, within 10 days after the proposed record and the recommendation of the hearing panel have been served upon him or her, the proposed record shall constitute the official record. If the respondent judge files objections or a proposed alternative record, the Commission Chairperson shall send written notice to Commission Counsel and to the respondent judge and his or her counsel, setting a time and place for a hearing to settle the record, and the record as settled by the Commission Chairperson shall be the official record.

Within 10 days after the official record has been settled, the Executive Director shall certify the record and decision of the Commission and file it with the Clerk of the Supreme Court. The Executive Director shall concurrently serve upon the respondent judge, in the same manner as service of the complaint under Rule 12, a notice of the filing of such record and decision, specifying the date upon which it was filed in the Supreme Court. The Executive Director shall also transmit to the respondent judge copies of any changes to the official record occurring as a result of the settlement of the record.

RULE 26. PROCEEDINGS IN THE SUPREME COURT

The respondent is entitled to present a brief and to argue the respondent's case, in person and through counsel, to the Supreme Court. Proceedings in the Supreme Court shall be as prescribed by Supreme Court Rule. See N.C. Gen. Stat. § 7A-33 and The Rules for Review of Recommendations of the Judicial Standards Commission.

Adopted unanimously by the Judicial Standards Commission during its regular business meeting on this the 8th day of August, 2014.

s/WANDA G. BRYANT
Wanda G. Bryant
Wanda G. Bryant, Chairperson
Judicial Standards Commission

Witness my hand and the Seal of the Judicial Standards Commission, this the 8th day of August, 2014 .

s/J. CHRISTOPHER HEAGARTY
Christopher Heagarty
J. Christopher Heagarty, Executive Director
Judicial Standards Commission

IN THE SUPREME COURT OF NORTH CAROLINA

****

ORDER ADOPTING AMENDMENT TO THE
NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure is hereby amended as described below:

Rule 21(a)(1) is amended to read as follows:

(a) Scope of the Writ.

(1) Review of the Judgments and Orders of Trial Tribunals. The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

This amendment to the North Carolina Rules of Appellate Procedure shall be effective on 10 April, 2015.

This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments also shall be published as quickly as practicable on the North Carolina Judicial Branch Government Home Page (http://www.nccourts.org/).

By order of this Court in Conference, this 10th day of April, 2015.

s/Sam J. Ervin
For the Court

JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2015 - 01

QUESTION:

Are there any ethical issues under the Code of Judicial Conduct that should be considered by a judge during the process of adopting or fostering a child? If a judge adopts or fosters a child from within his or her judicial district, does the judge have any obligation to recuse from cases involving the Department of Social Services (DSS) in his or her county of residence?

COMMISSION CONCLUSION:

During the application process to foster or adopt a child, a judge will be required to disclose information about his or her employment, and it is appropriate to disclose and discuss his or her judicial office in that context. However, a judge should be cautious to avoid statements or remarks which could be viewed as an attempt to use his or her judicial office to gain favorable treatment in the adoption process.

During the application process to foster or adopt a child, if a Department of Social Services is involved in that process, a judge should disqualify himself or herself from any case or proceeding involving that specific Department of Social Services for as long as the application is pending.

After the conclusion of the application process, if an application to foster or adopt a child is denied, then the attempt to adopt or foster no longer forms a basis for disqualification and the judge may resume hearing any cases or proceedings involving that specific Department of Social Services.

If, after the conclusion of the application process, an application to adopt a child is successful and the adoption is complete, no further disclosure or disqualification of the matter is required when hearing any cases or proceedings involving that specific Department of Social Services.

If, after the conclusion of the application process, an application to foster a child is successful and the fostering has commenced, a judge has an obligation to disqualify himself or herself from any cases or pro-

ceedings involving any specific Department of Social Services with jurisdiction or influence over the continued foster-care arrangement for the duration of the fostering of that child, unless all counsel and parties waive the potential disqualification pursuant to the remittal of disqualification procedures set out in Canon 3D of the Code of Judicial Conduct.

DISCUSSION:

The frequency with which the Commission has received questions about judges involved in fostering or adopting children through a local Department of Social Services has increased in recent years. This formal opinion represents a more involved examination of the issues underlying adoption and foster care by a judge and supersedes any previous informal advice provided by the Commission.

The Commission first considered the influence a judge might have over a local Department of Social Services. Canons 1, 2A and 2B of the Code of Judicial Conduct provide that a judge's conduct should ensure the preservation of the integrity, independence and impartiality of the judiciary and prohibit conduct which misuses the prestige of the judicial office. Further, Canon 2B specifically advises that "[a] judge should not allow the judge's family, social, or other relationships to influence the judge's judicial conduct or judgment." Particularly at the District Court level, where a judge may have frequent interactions with representatives of a local Department of Social Services, it is important that a judge not make statements or take actions that could be viewed as an attempt to use his or her judicial office to gain favorable treatment in the adoption or foster care process. The adoption or fostering process will require a judge to disclose and perhaps discuss his or her employment as part of the evaluation of the judge as a candidate for adoption or foster-parenting. Such disclosure and discussion is proper. However, other conduct that would reasonably suggest that a judge's judicial actions in unrelated cases involving the Department of Social Services might be influenced by the actions of the Department in the judge's adoption or fostering case is not proper.

The Commission next considered the influence a local Department of Social Services might have over a judge. Here, the Commission was further guided by Canon 2B which also holds that ". . . nor shall the judge convey or permit others to convey the impression that they are in a special position to influence the judge." Upon examination of the adoption and fostering process, the Commission identified certain

situations where the leverage exercised by the Department of Social Services over extremely personal aspects of a judge's life could create a reasonable and substantial conflict of interest for the judge.

Canon 3D advises that a judge should disqualify himself or herself in any proceeding in which the judge's impartiality may reasonably be questioned. Canon 3C describes situations where the judge's spouse, child or family member might have a substantial interest in a party to, or in an outcome of, a specific proceeding. While the issue of an adoption or foster care is not specifically addressed within the Code, the Commission concluded that the potential impact to a judge by the actions or recommendations of a Department of Social Services in regards to the approval of an adoption or foster care application is substantial. Once an application had concluded and a matter permanently resolved, however, that potential impact is diminished. Only where that potential impact remains, such as in an on-going foster-care arrangement that continues under the review and approval of the Department of Social Services, should a judge continue to disqualify himself or herself from a Department of Social Services case.

Canon 3D provides that "nothing in this Canon shall preclude a judge from disqualifying himself/herself from participating in any proceeding upon the judge's own initiative." A judge should always disqualify when the judge questions his or her own ability to remain impartial. However, where a judge believes that his or her judgment will not be influenced by a potential conflict with the Department of Social Services, and where circumstances such as necessity or emergency challenge the reasonableness of disqualification, disqualification may potentially be waived. Such situations may include, for example, when an otherwise disqualified judge is the only judge available for hearing Department of Social Services matters; when emergency situations require immediate judicial action such as on an emergency ex parte order or temporary restraining order; or when certain administrative or ministerial actions that do not require any independent discretion by a judge warrant immediate action, then an otherwise disqualified judge may disclose the basis for his or her disqualification from Department of Social Services cases and, if all counsel and parties provide a written waiver for the potential disqualification, remit the disqualification pursuant to the procedures set out in Canon 3D of the Code of Judicial Conduct.

As this formal opinion supersedes any informal opinion produced by the Commission on this subject, any judge who has acted in conformity with a previous informal opinion inconsistent with this formal opinion

will be deemed to have acted in good faith and any conduct by a judge undertaken in reliance upon any previous informal advice by the Commission on this subject shall not be held to be misconduct.

References:

North Carolina Code of Judicial Conduct
Canon 1
Canon 2A
Canon 2B
Canon 3C
Canon 3D
Rules of the North Carolina Judicial Standards Commission, Rule 8 (2014)

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING REINSTATEMENT FROM INACTIVE STATUS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 25, 2014.

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 inactive status, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined in bold type, deletions are interlined):

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

.0902 Reinstatement from Inactive Status

(a) Eligibility to Apply for Reinstatement

...

(c) Requirements for Reinstatement

(1) Completion of Petition.

...

(2) CLE Requirements for Calendar Year Before Inactive.

Unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph (c)**(5)**~~(6)~~ of this rule, the member must satisfy the minimum continuing legal education requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the calendar year in which the member was transferred to inactive status, (the "subject year"), including any deficit from a prior calendar year that was carried forward and recorded in the member's CLE record for the subject year.

(3) Character and Fitness to Practice.

...

~~(4) CLE Requirements For Members Granted Inactive Status Prior to March 10, 2011. [Effective for all members who are transferred to inactive status on or after January 1, 1996, through March 9, 2011.] If more than 2 years have elapsed between the date of the entry of the order transferring the member to inactive status and the date the petition is filed, the member must complete 15 hours of continuing legal education (CLE) approved by the Board of Continuing Legal Education pursuant to Rule .1519 of this subchapter. Of the required 15 CLE hours, 3 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism. The CLE hours must be completed within one year prior to the filing of the petition.~~

(4)~~(5)~~ **Additional** CLE Requirements ~~If Inactive Less Than 7 Years.~~

~~[Effective for all members who are transferred to inactive status on or after March 10, 2011.]~~ If more than ~~1 but less than 7 years have~~ **year has** elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must complete 12 hours of approved CLE for each year that the member was inactive **up to a maximum of 7 years**. The CLE hours must be completed within 2 years prior to filing the petition. For each 12-hour increment, ~~4~~ **6** hours may be taken online; 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism; and 5 hours must be earned by attending courses determined to be practical skills courses by the Board of Continuing Legal Education or its designee. If during the period of inactivity the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision without regard to whether they were taken during the 2 years prior to filing the petition.

(5)~~(6)~~ Bar Exam Requirement If Inactive 7 or More Years.

[Effective for all members who are transferred to inactive status on or after March 10, 2011.] If 7 years or more have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must obtain a passing grade on a regularly scheduled North Carolina bar examination. **A member sub-**

ject to this requirement does not have to satisfy the CLE requirements in paragraphs (c)(2) and (c)(4).

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of inactive status shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)~~(5)~~**(4)**for each year that the member was inactive up to a maximum of 7 years.

(B) Military Service. Each calendar year in which an inactive member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate the requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)~~(5)~~**(4)** for each year that the member was inactive up to a maximum of 7 years.

(6)~~(7)~~ Payment of Fees, Assessments and Costs

...

.0904 Reinstatement from Suspension

(a) Compliance Within 30 Days of Service of Suspension Order.

...

(d) Requirements for Reinstatement

(1) Completion of Petition

...

(2) CLE Requirements for Calendar Years Before Suspended Unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph (d)(4) of this rule, the member must satisfy the minimum continuing legal education (CLE) requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the year in which the member was suspended (the “subject year”), including any deficit from a prior

year that was carried forward and recorded in the member's CLE record for the subject year. The member shall also sign and file any delinquent CLE annual report form.

(3) **Additional** CLE Requirement**s** ~~If Suspended Less Than 7 Years~~ If more than 1 ~~but less than 7 years have~~ **year has** elapsed between the effective date of the suspension order and the date upon which the reinstatement petition is filed, the member must complete 12 hours of approved CLE for each year that the member was suspended **up to a maximum of 7 years**. The CLE must be completed within 2 years prior to filing the petition. For each 12-hour increment, ~~4~~ **6** hours may be taken online; 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism; and 5 hours must be earned by attending courses determined to be practical skills courses by the Board of Continuing Legal Education or its designee. If during the period of suspension the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision without regard to whether they were taken during the 2 years prior to filing the petition.

(4) Bar Exam Requirement If Suspended 7 or More Years **[Effective for all members who are administratively suspended on or after March 10, 2011.]** If 7 years or more have elapsed between the effective date of the suspension order and the date that the petition is filed, the member must obtain a passing grade on a regularly scheduled North Carolina bar examination. **A member subject to this requirement does not have to satisfy the CLE requirements in paragraphs (d)(2) and (d)(3).**

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of suspension shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended up to a maximum of 7 years.

(B) Military Service. Each calendar year in which a suspended member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate the requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended up to a maximum of 7 years.

(5) Character and Fitness to Practice

...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 25, 2014.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of September, 2014.

s/L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 2nd day of October, 2014.

s/Mark Martin
Mark D. Martin, 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 2nd day of October, 2014.

s/Robert N. Hunter, Jr.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING REINSTATEMENT FROM INACTIVE STATUS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 24, 2014.

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 inactive status, as particularly set forth in 27 N.C.A.C. 1D Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

.0902 Reinstatement from Inactive Status

(a) Eligibility to Apply for Reinstatement

…

(b) Definition of "Year"

…

(c) Requirements for Reinstatement

(1) Completion of Petition.

…

(7) Payment of Fees, Assessments and Costs.

The member must pay all of the following:

(A) a $125.00 reinstatement fee;

(B) the membership fee~~,~~ and the Client Security Fund assessment~~, and the judicial surcharge~~ for the year in which the application is filed;

…

(i) Denial of Petition

When a petition for reinstatement is denied by the council in a given calendar year, the member may not petition again until the following calendar year. The reinstatement fee, costs, and any fees paid pursuant to paragraph (c)(7) shall be retained. However, the State Bar membership fee, Client Security Fund assessment, ~~judicial surcharge~~ and district bar membership fee assessed for the year in which the application is filed shall be refunded.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 2014.

Given over my hand and the Seal of the North Carolina State Bar, this the 20th day of February, 2014.

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 6th day of March, 2014.

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 6th day of March, 2014.

s/Beasley, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING STANDARDS FOR CERTIFICATION AS A SPECIALIST

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 25, 2014.

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 standards for certification as a specialist in criminal law, as particularly set forth in 27 N.C.A.C. 1D Section .2500, be amended as follows (additions are underlined in bold type, deletions are interlined):

27 N.C.A.C. 1D, Section .2500, Certification Standards for the Criminal Law Specialty

.2505 Standards for Certification as a Specialist

Each applicant for certification as a specialist in criminal law or the subspecialty of state criminal law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification:

(a) Licensure and Practice
...

(d) Peer Review

(1) ...

(4) Each applicant must provide for reference and independent inquiry the names and addresses of the following: (i) ten lawyers and judges who practice in the field of criminal law and who are familiar with the applicant's practice, and (ii) opposing counsel and the judge in last ~~ten~~ **eight** serious (Class G or higher) felony cases tried by the applicant.

(5) ...

(e) Examination ...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 25, 2014.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of September, 2014.

s/L. Thomas Lunsford
L. Thomas Lunsford II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 2nd day of October, 2014.

s/Mark Martin
Mark D. Martin, 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 2nd day of October, 2014.

s/Robert N. Hunter, Jr.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 25, 2014.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the continuing legal education program, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additional language is underlined in bold type):

27 N.C.A.C. 1D, Section .1500 Rules Governing the Administration of the Continuing Legal Education Program

.1517 Exemptions

(a) Notification of Board.
...

(d) Nonresidents. Any active member residing outside of North Carolina who does not practice in North Carolina for at least six (6) **consecutive** months and does not represent North Carolina clients on matters governed by North Carolina law shall be exempt from the requirements of these rules.

(e) Law Teachers.
...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 25, 2014.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of September, 2014.

s/L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 2nd day of October, 2014.

s/Mark Martin
Mark D. Martin, 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 Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 2nd day of October, 2014.

s/Robert N. Hunter, Jr
For the Court

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 25, 2014.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 2, be amended as follows (additions are underlined in bold type, deletions are interlined):

27 N.C.A.C. 2, North Carolina Rules of Professional Conduct

Rule 1.0 Terminology

(a) ...

(o) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, **and any data embedded therein (commonly referred to as metadata),** including handwriting, typewriting, printing, photostating, photography, audio or video recording, and ~~e-mail~~ **electronic communications**. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

[1] ...

Screened

[8] ...

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not commu-

nicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce, and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other ~~materials~~ **information, including information in electronic form**, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other ~~materials~~ **information, including information in electronic form**, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] ...

Rule 1.1 Competence

A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

[1] ...

Retaining or Contracting with Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. *See also* Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee division), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the

decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience, and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

~~[6]~~**[8]** To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with the technology relevant to the lawyer's practice,** engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

[Re-numbering remaining paragraphs]

Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules;

(2) ...

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] ...

Communicating with Client

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. ~~Client telephone calls should be promptly returned or acknowledged.~~ **A lawyer should address with the client how the lawyer and the client will communicate, and should respond to or acknowledge client communications in a reasonable and timely manner.**

Explaining Matters

[5] ....

Rule 1.6 Confidentiality

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

(1) …

(6) ...;~~ or~~

(7) ...; **or**

(8) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

~~(c)~~ **(d)** ...

Comment

[1] ...

Detection of Conflicts of Interest

[17] Paragraph (b)(8) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. *See* Rule 1.17, Comment [8]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[18] Any information disclosed pursuant to paragraph (b)(8) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(8) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(8). Paragraph (b)(8) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation. *See* Comment [5].

Acting Competently to Preserve Confidentiality

~~[17]~~**[19] Paragraph (c) requires a** ~~A~~ lawyer ~~must~~ **to** act competently to safeguard information acquired during the representation of a client against **unauthorized access by third parties and against** inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. *See* Rules 1.1, 5.1, and 5.3. **The unauthorized access to, or the inadvertent or unauthorized disclosure of, information acquired during the professional relationship with a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information to comply with other law—such as state and federal laws that govern data privacy, or that impose notification requirements upon the loss of, or unauthorized access to, electronic information—is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the**

lawyer's own firm, see Rule 5.3, Comments [3]-[4].

~~[18]~~**[20]** When transmitting a communication that includes information acquired during the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the client's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. **Whether a lawyer may be required to take additional steps to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.**

[Re-numbering remaining paragraphs]

Rule 1.17 Sale of a Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, from an office that is within a one-hundred (100) mile radius of the purchased law practice, except the seller may ~~work for~~ **continue to practice law with** the purchaser ~~as an independent contractor~~ and may provide legal representation at no charge to indigent persons or to members of the seller's family;

(b) ....

Comment

[1] ...
Termination of Practice by the Seller

[2] ….

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as an independent contract lawyer **or an employee** for the ~~purchaser~~ **practice**. Permitting the seller to continue to work for the practice will assist in the smooth transition of cases and will provide mentoring to new lawyers. The requirement that the seller cease private practice also does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business. Similarly, the Rule allows the seller to provide *pro bono* representation to indigent persons on his own initiative and to provide legal representation to family members without charge. ***See also* 98 Formal Ethics Opinion 6 (1998) (requirements in rule relative to sale of law practice to lawyer who is stranger to the firm do not apply to the sale of law practice to lawyer who is a current employee of firm).**

[4] ….

Client Confidences, Consent and Notice

[6] ….

[8] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. ***See* Rule 1.6(b)(8).** Providing the purchaser access to ~~client-specific~~ **detailed** information relating to the representation, ~~and to the~~ **such as the client's** file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 30 days. If nothing is heard from the client within that time, consent to the sale is presumed.

...

Other Applicable Ethical Standards

[11] ....

[13] After purchase, the law practice may retain the same name subject to the requirements of Rule 7.5. The seller's retirement or discontinuation of affiliation with the law practice must be indicated on letterhead and other communications as necessary to avoid misleading the public as to the seller's relationship to the law practice. If the seller becomes an independent contract lawyer or employee of the practice, the letterhead and other communications must indicate that the seller is no longer the owner of the firm; an "of counsel" designation would be sufficient to do so.

Applicability of the Rule

~~[13]~~ [14] ....

[Re-numbering remaining paragraphs.]

Rule 1.18 Duties to Prospective Client

(a) A person who ~~discusses~~ **consults** with a lawyer **about** the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions with~~ **learned information from** a prospective client shall not use or reveal **that** information ~~learned in the consultation~~, except as Rule 1.9 would permit with respect to information of a former client.

(c) ...

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's ~~discussions~~ **consultations** with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] ~~Not all persons who communicate information to a lawyer are entitled to protection under this Rule~~. **A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In such a situation, to avoid the creation of a duty to the person under this Rule, a lawyer has an affirmative obligation to warn the person that a communication with the lawyer will not create a client-lawyer relationship and information conveyed to the lawyer will not be confidential or privileged. *See also* Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest.** ~~A person who communicates~~ **Such a person is communicating** information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, **and** is **thus** not a "prospective client" ~~within the meaning of paragraph (a)~~. **Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."**

[3] ...

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial ~~interview~~ **consultation** to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition ~~conversations~~ **a consultation** with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. *See* Rule 1.0(f) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] ...

Rule 4.4 Respect for Rights of Third Persons

(a) ....

(b) A lawyer who receives a writing relating to the representation of the lawyer's client and knows or reasonably should know that the writing was inadvertently sent shall promptly notify the sender.

Comment

[1] ...
[2] Paragraph (b) recognizes that lawyers sometimes receive writings that were mistakenly sent or produced by opposing parties or their lawyers. ***See* Rule 1.0(o) for the definition of "writing," which includes electronic communications and metadata. A writing is inadvertently sent when it is accidentally transmitted, such as when an electronic communication or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted.** If a lawyer knows or reasonably should know that such a writing was sent inadvertently, then this rule requires the lawyer promptly to notify the sender in order to permit that person to take protective measures. This duty is imputed to all lawyers in a firm. Whether the lawyer who receives the writing is required to take additional steps, such as returning the original writing, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a writing has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a writing that the lawyer knows or reasonably should know may have been ~~wrongfully~~ **inappropriately** obtained by the sending person. ~~*See* Rule 1.0(o) for the definition of "writing."~~ **Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the**

metadata was inadvertently sent to the receiving lawyer. A lawyer who receives an electronic communication from the opposing party or the opposing party's lawyer must refrain from searching for or using confidential information found in the metadata embedded in the communication. *See* 2009 FEO 1.

[3] Some lawyers may choose to return a writing **or delete electronically stored information** unread, for example, when the lawyer learns before receiving the writing that it was inadvertently sent ~~to the wrong address~~. Whether the lawyer is required to do so is a matter of law. When return of the writing is not required by law, the decision voluntarily to return such a writing **or delete electronically stored information** is a matter of professional judgment ordinarily reserved to the lawyer. *See* Rules 1.2 and 1.4.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or organization shall make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) ...

Comment

~~[2]~~**[1]** Paragraph (a) requires lawyers with managerial authority within a law firm or organization to make reasonable efforts ~~to establish internal policies and procedures designed to provide~~ **to ensure that the firm has in effect measures giving** reasonable assurance that nonlawyers in the firm **and nonlawyers outside the firm who work on firm matters** ~~will~~ act in a way compatible with the **professional obligations of the lawyer** ~~Rules of Professional Conduct.~~ *See* **Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and** Comment [1] to Rule 5.1 **(responsibilities with respect to lawyers within a firm)**. Paragraph (b) applies to lawyers who have supervisory authority over ~~the work of a nonlawyer~~ **such nonlawyers within or outside the firm**. Paragraph (c) specifies the

circumstances in which a lawyer is responsible for **the** conduct of ~~a nonlawyer~~ **such nonlawyers within or outside the firm** that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

~~[1]~~**[2]** ...

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations and, depending upon the risk of unauthorized disclosure of confidential client information, should consider whether client consent is required. *See* Rule 1.1, cmt. [7]. The extent of this obligation will depend upon the circumstances, including the education, experience, and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. *See also* Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. *See* Rule 1.2. When making such an allocation in a mat-

ter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

~~[3]~~**[5]** ...

Rule 5.5 Unauthorized Practice of Law

(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted to practice in another **United States** jurisdiction, ~~but not in this jurisdiction~~, **and not disbarred or suspended from practice in any jurisdiction,** does not engage in the unauthorized practice of law in this jurisdiction if the lawyer's conduct is in accordance with these Rules and:

(1) the lawyer is authorized by law or order to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or

~~(2) other than engaging in conduct governed by paragraph (1): (A) the lawyer provides legal services to the lawyer's employer or its organizational affiliates and the services are not services for which pro hac vice admission is required; a lawyer acting pursuant to this paragraph is not subject to the prohibition in Paragraph (b)(1);~~

~~(B)~~**(2)** the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice **and the lawyer's services are not services for which pro hac vice admission is required;**

~~(C)~~**(3)** the lawyer acts with respect to a matter that is in or is reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the **lawyer's** services arise out of or are reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission is required; **or**

~~(D)~~**(4)** the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation **and the lawyer is admitted pro hac vice or the lawyer's services are not services for which pro hac vice admission is required**~~; or~~**.**

(d) A lawyer admitted to practice in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, does not engage in the unauthorized practice of law in this jurisdiction and may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law if the lawyer's conduct is in accordance with these Rules and:

~~(2)(A)~~**(1)** the lawyer provides legal services to the lawyer's employer or its organizational affiliates**;** ~~and~~ the services are not services for which pro hac vice admission is required; **and, when the services are performed by a foreign lawyer and require advice on the law of this or another US jurisdiction or of the United States, such advice is based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice;** ~~a lawyer acting pursuant to this paragraph is not subject to the prohibition in Paragraph (b)(1);~~ **or**

~~(E)~~**(2)** the lawyer is providing services limited to federal law, international law, the law of a foreign jurisdiction or the law of the jurisdiction in which the lawyer is admitted to practice**, or the lawyer is providing services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.**

(e) A lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in

any jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction and may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law if the lawyer's conduct is in accordance with these Rules, ~~(F)~~ the lawyer is the subject of a pending application for admission to the North Carolina State Bar by comity, having never previously been denied admission to the North Carolina State Bar for any reason, and **the lawyer satisfies the following conditions:**

~~(i)~~**(1)** is licensed to practice law in a state with which North Carolina has comity in regard to admission to practice law;

~~(ii)~~**(2)** is a member in good standing in every jurisdiction in which the lawyer is licensed to practice law;

~~(iii)~~**(3)** has satisfied the educational and experiential requirements prerequisite to comity admission to the North Carolina State Bar;

~~(iv)~~**(4)** is domiciled in North Carolina;

~~(v)~~**(5)** has established a professional relationship with a North Carolina law firm and is actively supervised by at least one licensed North Carolina attorney affiliated with that law firm; and

~~(vi)~~**(6)** gives written notice to the secretary of the North Carolina State Bar that the lawyer intends to begin the practice of law pursuant to this provision, provides the secretary with a copy of the lawyer's application for admission to the State Bar, and agrees that the lawyer is subject to these rules and the disciplinary jurisdiction of the North Carolina State Bar. A lawyer acting pursuant to this provision ~~is not subject to the prohibition in Paragraph (b)(1),~~ may not provide services for which pro hac vice admission is required, and shall be ineligible to practice law in this jurisdiction immediately upon being advised that the lawyer's application for comity admission has been denied.

~~(d)~~**(f)** A lawyer shall not assist another person in the unauthorized practice of law.

~~(e)~~**(g)** ....

~~(f)~~**(h)** ....

(i) For the purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

Comment

[1] A lawyer may ~~regularly~~ practice law only in a jurisdiction in which the lawyer is ~~admitted~~ **authorized** to practice. The practice of law in violation of lawyer-licensing standards of another jurisdiction constitutes a violation of these Rules. This Rule does not restrict the ability of lawyers authorized by federal statute or other federal law to represent the interests of the United States or other persons in any jurisdiction.

[2] There are occasions in which lawyers admitted to practice in another **United States** jurisdiction, but not in ~~this jurisdiction~~ **North Carolina, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis** ~~will engage in conduct~~ in ~~this jurisdiction~~ **North Carolina** under circumstances that do not create ~~significant~~ **an unreasonable** risk to the interests of their clients, the courts, or the public. ~~Paragraph~~ **Paragraphs** (c)**, (d), and (e) identify** ~~identifies six~~ **seven** situations in which the lawyer may engage in such conduct without fear of violating this Rule. All such conduct is subject to the duty of competent representation. *See* Rule 1.1. Rule 5.5 does not address the question of whether other conduct constitutes the unauthorized practice of law. The fact that conduct is not included or described in this Rule is not intended to imply that such conduct is the unauthorized practice of law. With the exception of ~~paragraph~~ **paragraphs** ~~(c)(2)(A)~~**(d)** and ~~(F)(c)~~ **(e)**, **this Rule does not authorize a US or foreign** ~~nothing in this Rule is intended to authorize a~~ lawyer to establish an office or other systematic and continuous presence in ~~this jurisdiction~~ **North Carolina** without being admitted to practice here. Presence may be systematic and continuous even if the lawyer is not physically present in this jurisdiction. ~~Such a~~ **A** lawyer **not admitted to practice in North Carolina** must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in ~~this jurisdiction~~ **North Carolina**. *See also* Rules 7.1(a) and 7.5(b). However, a lawyer admitted to practice in another jurisdic-

tion who is partner, shareholder, or employee of an interstate or international law firm that is registered with the North Carolina State Bar pursuant to 27 N.C.A.C. 1E, Section .0200, may practice, subject to the limitations of this Rule, in the North Carolina offices of such law firm.

[3] Paragraphs (c), (d), and (e) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory, or commonwealth of the United States and, where noted, any foreign jurisdiction. The word "admitted" in paragraphs (c), (d)(2), and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice because, for example, the lawyer is on inactive status.

[4] Paragraphs (c), (d), and (e) do not authorize communications advertising legal services in North Carolina by lawyers who are admitted to practice in other jurisdictions. Nothing in these paragraphs authorizes a lawyer not licensed in this jurisdiction to solicit clients in North Carolina. Whether and how lawyers may communicate the availability of their services in this jurisdiction are governed by Rules 7.1-7.5.

~~[3]~~**[5]** Lawyers not admitted to practice generally in ~~the jurisdiction~~ **North Carolina** may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. Such authority may be granted pursuant to formal rules **or law** governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph ~~(b)(1)~~**(c)(1),** a lawyer does not violate this Rule when the lawyer appears before such a tribunal or agency. Nor does a lawyer violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing, such as factual investigations and discovery conducted in connection with a litigation or administrative proceeding, in which an out-of-state lawyer has been admitted or in which the lawyer reasonably expects to be admitted. ~~Nothing in paragraph (c)(1) is intended toauthorize a lawyer not licensed in this jurisdiction to solicit clients in this jurisdiction.~~

~~[4] When lawyers appear or anticipate appearing before a tribunal or administrative agency with authority to admit the lawyer to practice pro hac vice, their conduct is governed by paragraphs (a) and (c)(1) and not by (c)(2). Paragraph (c)(2) authorizes a lawyer to engage in certain conduct other than making or preparing for appearances before such a tribunal. For example, paragraph (c)(2)(A) recognizes that some clients hire a lawyer as an employee in circumstances that may make it impractical for the lawyer to become admitted to practice in this jurisdiction. Given that these clients are unlikely to be deceived about the training and expertise of these lawyers, lawyers may act on behalf of such a client without violating this Rule. The lawyer may also act on behalf of the client's commonly owned organizational affiliates but only in connection with the client's matters~~.

~~[5]~~**[6]** Paragraph (c)**(2)**~~(2)(B)~~ recognizes that the complexity of many matters requires that a lawyer whose representation of a client consists primarily of conduct in a jurisdiction in which the lawyer is admitted to practice, also be permitted to act on the client's behalf in other jurisdictions in matters arising out of or otherwise reasonably related to the lawyer's representation of the client. This conduct may involve negotiations with private parties, as well as negotiations with government officers or employees, and participation in alternative dispute-resolution procedures. This provision also applies when a lawyer is conducting witness interviews or other activities in this jurisdiction in preparation for a litigation or other proceeding that will occur in another jurisdiction where the lawyer is either admitted generally or expects to be admitted pro hac vice.

~~[6]~~**[7]** Paragraph (c)**(3)**~~(2)(C)~~ permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in ~~this jurisdiction~~ **North Carolina** if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, **and** if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

~~[7]~~**[8]** Paragraph (c)**(4)**~~(2)(D)~~ recognizes that association with a lawyer licensed to practice in ~~this jurisdiction~~ **North Carolina** is likely to protect the interests of both clients and the public. The lawyer admitted to practice in ~~this jurisdiction~~ **North Carolina**,

however, may not serve merely as a conduit for an out-of-state lawyer but must actively participate in and share actual responsibility for the representation of the client. If the admitted lawyer's involvement is merely pro forma, then both lawyers are subject to discipline under this Rule.

[9] Paragraphs (d) and (e) identify three circumstances in which a lawyer who is admitted to practice in another jurisdiction, or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may establish an office or other systematic and continuous presence in North Carolina for the practice of law. Except as provided in these paragraphs, a lawyer who is admitted to practice law in another jurisdiction and who desires to establish an office or other systematic or continuous presence in North Carolina must be admitted to practice law generally in North Carolina.

[10] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers, and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[11] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation, or judicial precedent.

~~[8]~~**[12]** Paragraph **(e)**~~(e)(2)(F)~~ permits a lawyer who is awaiting admission by comity to practice on a provisional and limited basis if certain requirements are met. As used in this paragraph, the term "professional relationship" refers to an employment or partnership arrangement.

~~[9]~~**[13]** …

~~[10]~~**[14]** Lawyers may also provide professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se.* **However, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.**

~~[11]~~**[15] Paragraphs (g) and (h) clarify the limitations on employment of a disbarred or suspended lawyer.** In the absence of statutory prohibitions or specific conditions placed on a disbarred or suspended ~~attorney~~ **lawyer** in the order revoking or suspending the license, such individual may be hired to perform the services of a law clerk or legal assistant by a law firm with which he or she was not affiliated at the time of or after the acts resulting in discipline. Such employment is, however, subject to certain restrictions. A licensed ~~attorney~~ **lawyer** in the firm must take full responsibility for, and employ independent judgment in, adopting any research, investigative results, briefs, pleadings, or other documents or instruments drafted by such individual. The individual may not directly advise clients or communicate in person or in writing in such a way as to imply that he or she is acting as ~~an attorney~~ **a lawyer** or in any way in which he or she seems to assume responsibility for a client's legal matters. The disbarred or suspended ~~attorney~~ **lawyer** should have no communications or dealings with, or on behalf of, clients represented by such disbarred or suspended ~~attorneys~~ **lawyer** or by any individual or group of individuals with whom he or she practiced during the period on or after the date of the acts which resulted in discipline through and including the effective date of the discipline. Further, the employing ~~attorney~~ **lawyer** or law firm should perform no services for clients represented by the disbarred or suspended attorney lawyer during such period. Care should be taken to ensure that clients fully understand that the disbarred or suspended attorney lawyer is not acting as ~~an attorney~~ **a lawyer**, but merely as a law clerk or lay employee. Under some circumstances, as where the individual may be known to clients or in the community, it may be necessary to make an affirmative statement or disclosure concerning the disbarred or suspended ~~attorney's~~ **lawyer's** status with the law firm. Additionally, a disbarred or suspended ~~attorney~~ **lawyer** should be paid on some fixed basis, such as a straight salary or hourly rate,

rather than on the basis of fees generated or received in connection with particular matters on which he or she works. Under these circumstances, a law firm employing a disbarred or suspended ~~attorney~~ **lawyer** would not be acting unethically and would not be assisting a nonlawyer in the unauthorized practice of law.

~~[12]~~**[16]** ~~An attorney~~ **A lawyer** or law firm should not employ a disbarred or suspended ~~attorney~~ **lawyer** who was associated with such ~~attorney~~ **lawyer** or firm at any time on or after the date of the acts which resulted in the disbarment or suspension through and including the time of the disbarment or suspension. Such employment would show disrespect for the court or body which disbarred or suspended the ~~attorney~~ **lawyer**. Such employment would also be likely to be prejudicial to the administration of justice and would create an appearance of impropriety. It would also be practically impossible for the disciplined lawyer to confine himself or herself to activities not involving the actual practice of law if he or she were employed in his or her former office setting and obliged to deal with the same staff and clientele.

Rule 7.1 Communications Concerning a Lawyer's Services

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services....

(b) ...

Comment

[1] ...

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead ~~a prospective client~~ **the public**.

[4] ...

Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service that complies with Rule 7.2(d), or a prepaid or group legal services plan that complies with Rule 7.3(d); and

(3) pay for a law practice in accordance with Rule 1.17.

(c) …

Comment

[1] To assist the public in **learning about and** obtaining legal services, lawyers are permitted to make known their services not only through reputation, but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers may entail the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, **email address, website,** and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their

consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Television**, the Internet, and other forms of electronic communication are** ~~is~~ now ~~one of~~ **among** the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television**, Internet, and other forms of electronic** advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.1(b) for the disclaimer required in any advertisement that contains a dramatization~~. Electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule.~~ ~~But~~ **and** see Rule 7.3(a) for the prohibition against ~~the~~ **a** solicitation ~~of a prospective client~~ through a real-time electronic exchange **initiated by the lawyer** ~~that is not initiated by the prospective client.~~

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] **Except as permitted under paragraphs (b)(1)-(b)(3), lawyers** ~~Lawyers~~ are not permitted to pay others for **recommending the lawyer's services or for** channeling professional work **in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities.** Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, ~~banner ads~~ **Internet-based advertisements,** and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, and website designers. **Moreover, a lawyer**

may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rule 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's service). To comply with Rule 7.1, a lawyer must not pay a lead generator if the lead generator states, implies, or creates an impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. *See* **also** Rule 5.3 for the (duties of lawyers and law firms with respect to the conduct of nonlawyers**); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another)** ~~who prepare marketing materials for them~~.

[6] A lawyer may pay the usual charges of a prepaid or group legal services plan or a not-for-profit lawyer referral service. A legal services plan is defined in Rule 7.3(d). Such a plan assists ~~prospective clients~~ **people who seek** to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by ~~laypersons~~ **the public** to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit lawyer referral service.

[7] A lawyer who accepts assignments or referrals from a prepaid or group legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations….Legal service plans and lawyer referral services may communicate with ~~prospective clients~~ **the public**, but such communication must be in conformity with these Rules….

Rule 7.3 Direct Contact with Potential Clients

(a) A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment ~~from a potential client~~ when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a potential client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the ~~potential client~~ **target of the solicitation** has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, harassment, compulsion, intimidation, or threats.

(c) Targeted Communications. Unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), every written, recorded, or electronic communication from a lawyer soliciting professional employment from ~~a potential client~~ **anyone** known to be in need of legal services in a particular matter shall include the statement, in capital letters, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES" (the advertising notice)**, which shall be conspicuous and** subject to the following requirements:

(1) Written Communications. Written communications shall be mailed in an envelope. The advertising notice shall be printed on the front of the envelope, in a font that is as large as any other printing on the **front or the back of the** envelope. **If more than one color or type of font is used on the front or the back of the envelope, the font used for the advertising notice shall match in color, type, and size the largest and widest of the fonts.** The front of the envelope shall contain no printing other than the name of the lawyer or law firm and return address, the name and address of the recipient, and the advertising notice. The advertising notice shall also be printed at the beginning of the body of the **enclosed** ~~letter~~ **written communication** in a font as large as or larger than any other printing contained in the ~~letter~~ **enclosed written communication**. **If more than one color or type of font is used on the enclosed written communication, then the font of the advertising notice shall match in color, type, and size the largest and widest of the fonts. Nothing on the envelope or the enclosed writ-**

ten communication shall be more conspicuous than the advertising notice.

(2) Electronic Communications. The advertising notice shall appear in the "in reference" **or subject box** ~~block~~ of the address **or header** section of the communication. No other statement shall appear in this block. The advertising notice shall also appear, at the beginning and ending of the electronic communication, in a font as large as or larger than any other printing in the body of the communication or in any masthead on the communication. **If more than one color or type of font is used in the electronic communication, then the font of the advertising notice shall match in color, type, and size the largest and widest of the fonts. Nothing in the electronic communication shall be more conspicuous than the advertising notice.**

(3) Recorded Communications. The advertising notice shall be clearly articulated at the beginning and ending of the recorded communication.

(d) ….

~~(e) For purposes of this rule, a potential client is a person with whom a lawyer would like to form a client-lawyer relationship.~~

Comment

[1] A solicitation is a communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

~~[1]~~**[2]** There is a potential for abuse **when a solicitation involves** ~~inherent in~~ direct in-person, live telephone, or real-time electronic contact by a lawyer with **someone** ~~a prospective client~~ known to need legal services. These forms of contact ~~between a lawyer and a prospective client~~ subject ~~the layperson~~ **a person** to the private

importuning of the trained advocate in a direct interpersonal encounter. The ~~prospective client~~ **person**, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

~~[2]~~**[3]** This potential for abuse inherent in direct in-person, live telephone, or real-time electronic solicitation ~~of potential clients~~ justifies its prohibition, particularly ~~since~~ ~~lawyer~~ **because lawyers have** ~~advertising and written and recorded communication permitted under Rule 7.2 offer~~ alternative means of conveying necessary information to those who may be in need of legal services. ~~Advertising and written and recorded~~ **In particular,** communications ~~which may~~ **can** be mailed ~~or autodialed~~ **or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations** make it possible for ~~a potential client~~ **the public** to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting ~~the potential client~~ **the public** to direct in-person, telephone or real-time electronic persuasion that may overwhelm ~~the client's~~ **a person's** judgment.

~~[3]~~**[4]** The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to ~~potential client~~ **the public**, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone, or real-time electronic ~~conversations between a lawyer and a potential client~~ **contact** can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

~~[4]~~**[5]** There is far less likelihood that a lawyer would engage in abusive practices against ~~an individual who is~~ a former client, or **a person** with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

~~[5]~~**[6]** But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress, harassment, compulsion, intimidation, or threats within the meaning of Rule 7.3(b)(2), or which involves contact with ~~a potential client~~ **someone** who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication ~~to a client~~ as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the ~~potential client~~ **recipient of the communication** may violate the provisions of Rule 7.3(b).

~~[6]~~**[7]** This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to ~~a potential client~~ **people who are seeking legal services for themselves**. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become potential clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

~~[7]~~ **[8]** Paragraph (c) of this rule requires that all targeted mail solicitations of potential clients must be mailed in an envelope on which the statement, "This is an advertisement for legal services," appears in capital letters **in a font at least as large as any other printing on the front or the back of the envelope**. The statement must appear on the front of the envelope with no other distracting extraneous written statements other than the name and address of the recipient and the name and return address of the lawyer or firm. Postcards may not be used for targeted mail solicitations. No embarrassing personal information about the recipient may appear on the back of the envelope. The advertising notice must also appear **in the "in reference" or subject box of an electronic communication (email) and** at the beginning of ~~an enclosed letter~~ **any paper** or electronic communication in a font that is at least as large as the font used for any other printing in the ~~letter~~ **paper** or electronic communication. **On any paper or electronic communication required by this rule to contain the advertising notice, the notice must be conspicuous and should not be obscured by other objects or printing or by manipulating fonts. For example, inclusion of a large photograph or graphic image on the communication may diminish the prominence of the advertising notice. Similarly, a font that is narrow or faint may render the advertising notice inconspicuous if the fonts used elsewhere in the communication are chubby or flamboyant.** The font size requirement does not apply to a brochure enclosed with the ~~letter~~ **written communication** if the ~~letter~~ **written communication** contains the required notice. As explained in 2007 Formal Ethics Opinion 15, the font size requirement does not apply to an insignia or border used in connection with a law firm's name if the insignia or border is used consistently by the firm in official communications on behalf of the firm. **Nevertheless, any such insignia or border cannot be so large that it detracts from the conspicuousness of the advertising notice.** ~~The advertising notice must also appear in the "in reference to" section of an email communication.~~ The requirement that certain communications be marked, "This is an advertisement for legal services," does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[Re-numbering remaining paragraphs]

Rule 8.5 Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. ...

(b) Choice of Law. In any exercise of the disciplinary authority of North Carolina, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer is not subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment

[1] ....

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer is not subject to discipline under this Rule. **With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.** ....

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 25, 2014.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of September, 2014.

s/L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 2nd day of October, 2014.

s/Mark Martin
Mark D. Martin, 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 2nd day of October, 2014.

Robert N. Hunter Jr.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PLAN OF LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 25, 2014.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning standards for certification in immigration law, as particularly set forth in 27 N.C.A.C. 1D, Section .2600, be amended as follows (additions are underlined in bold type, deletions are interlined):

27 N.C.A.C. 1D, Section .2600 Certification Standards for the Immigration Law Specialty

.2605 Standards for Certification as a Specialist in Immigration Law

Each applicant for certification as a specialist in immigration law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in immigration law:

(a) Licensure and Practice ...

(b) ...

(c) Continuing Legal Education - An applicant must earn no less than 48 hours of accredited continuing legal education (CLE) credits in **topics relating to** immigration law during the four years preceding application. At least 20 of the 48 CLE credit hours must be earned during the first and second year preceding application and at least 20 of the CLE hours must be earned during the third and fourth years preceding application. Of the 48 hours, at least 42 must be in immigration law; the balance may be in the related areas of federal administrative procedure, trial advocacy, evidence, taxation, family law, employment law, and criminal law and procedure.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the com-

petence and qualification of the applicant in the specialty field….All references must be licensed and in good standing to practice in North Carolina. At least ~~two~~ **four** of the completed peer reference forms received by the board must be from lawyers or judges who have substantial practice or judicial experience in immigration law….

(e) ...

.2606 Standards for Continued Certification as a Specialist

The period of certification is five years... [E]ach applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement ...

(b) Continuing Legal Education - The specialist must have earned no less than 60 hours of accredited continuing legal education credits **in topics relating to** immigration law as accredited by the board. At least 30 of the 60 CLE credit hours must be earned during the first three years after certification or recertification, as applicable. Of the 60 hours, at least 52 must be in immigration law; the balance may be in the related areas of federal administrative procedure, trial advocacy, evidence, taxation, family law, employment law, and criminal law and procedure.

(c) Peer Review ...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 25, 2014.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of September, 2014.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 2nd day of October, 2014.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 2nd day of October, 2014.

s/Robert N. Hunter Jr
For the Court

EQUAL ACCESS TO JUSTICE COMMISSION

The Order establishing the Equal Access to Justice Commission is hereby amended to read as follows:

IN THE SUPREME COURT OF NORTH CAROLINA
BY ORDER OF THE COURT

In recognition of the need to expand access to civil legal representation for people of low income and modest means in North Carolina, the Court hereby creates the **EQUAL ACCESS TO JUSTICE COMMISSION.**

BY THIS ORDER, the Court charges this Commission with the following goals, purposes, and responsibilities:

(1) Identify and assess current and future needs of low-income North Carolinians for access to justice in civil matters by conducting a study to determine the full range and volume of such unmet legal needs. The study shall: (a) determine and document how unrepresented people with legal disputes are attempting to meet these needs without attorneys, the extent to which these efforts are successful, and the consequences of the lack of attorney representation; (b) recognize the enormous efforts currently being made by attorneys to serve low-income North Carolinians; (c) analyze the need for funding and other resources to close the gap; and (d) address any other matters related to the delivery of equal access to justice in civil matters to all North Carolinians.

(2) Develop and publish a strategic plan for delivery of civil legal services to low-income North Carolinians throughout the state that will (in part) educate the public about the large gap between the ideal of equal access to the legal system and the reality of lack of representation.

(3) Foster coordination within the civil legal services delivery system and between legal aid organizations and other legal and non-legal organizations.

(4) Increase resources and funding for access to justice in civil matters and ensure both are applied to the greatest need so that all possibilities for additional state, local, and other non-Legal Services Corp. funding are examined, the most feasible options analyzed, and a strategy for pursuing such funding implemented.

(5) Ensure wise and efficient use of available resources through collaboration among legal aid and other organizations (such as other legal advocacy groups, non-legal advocacy groups, providers of social services, law schools, the court system,

corporate and government law departments, and other state and local agencies) and through the use of local, regional, and statewide coordination systems.

(6) Develop and implement other initiatives designed to expand civil access to justice, such as increasing community education, enhancing technology, developing assisted *pro se* programs, and encouraging greater voluntary participation of the private bar in *pro bono* legal assistance to low-income people in North Carolina.

(7) Monitor the effectiveness of the statewide system and services provided, as well as periodically evaluate the progress made by the Commission in fulfilling the civil legal needs of low-income North Carolinians.

(8) Consider the legal needs and access to the civil justice system of persons whose income and means are such that they do not qualify under existing assistance programs and whose access to civil justice is limited either by the actual or perceived cost of legal services; and develop and implement initiatives designed to meet these needs, such as limited representation and limited appearances by attorneys and identification of types of services that could be provided by non-lawyers.

The Equal Access to Justice Commission shall consist of up to thirty members who reflect the diversity of ethnic, gender, legal, and geographic communities of North Carolina and who are residents of North Carolina. The Chief Justice or his or her designee shall serve as Chair of the Commission. The day-to-day management and operation of the organizations shall be conducted by an Executive Director who works with and reports regularly to the Commission. Members are eligible for reappointment at the discretion of the Chief Justice, with a term limit of two three-year terms. These three-year terms will be staggered. The appointments of governmental representatives will expire at the expiration or resignation of the appointing office's term or the member's term, whichever comes first. Prospective Commission members may be recommended by a Commission Development Committee for consideration and appointed by the Chief Justice as follows:

(1) Judiciary:

The Chief Justice will appoint up to five representatives of the judiciary which may include:

(a) An Associate Justice from the Supreme Court of North Carolina;

(b) A Judge from the North Carolina Court of Appeals;

(c) A Judge from the Superior Court;

(d) A Judge from the District Court;

(e) A representative of the North Carolina Administrative Office of the Courts (AOC);

(f) A representative from the North Carolina Clerks of Superior Court;

(g) A North Carolina Judge from the federal courts may also be invited to serve.

(2) Practicing Lawyers:

In consultation with the leadership of the below bar organizations, the Chief Justice will appoint up to eight practicing lawyers:

(a) North Carolina State Bar;

(b) North Carolina Bar Association/Foundation (NCBA);

(c) The North Carolina IOLTA Board of Trustees;

(d) NC Advocates for Justice;

(e) North Carolina Association of Defense Attorneys;

(f) Other bar associations.

(3) Legal Aid Programs:

In consultation with the North Carolina Equal Justice Alliance, the Chief Justice will appoint up to six members from legal aid programs.

(4) Law Schools:

In consultation with the deans, the Chief Justice will appoint one or more representatives from the accredited law schools in North Carolina.

(5) Public Members:

(a) Governmental Representatives: The Chief Justice will invite the Governor, the President Tempore of the Senate, and the Speaker of the House to serve on the Commission or to recommend a member of their respective body to serve in his or her stead.

(b) North Carolina Philanthropy Community Representative: In consultation with the North Carolina Network of Grantmakers, the Chief Justice will appoint one member to the Commission.

(c) North Carolina Business Community Representatives: The Chief Justice will appoint two members to the Commission from the business community in North Carolina.

(6) The Chief Justice may also appoint at-large members to the Commission. These members will not represent any particular group, but rather will serve because of their demonstrated commitment to increasing access to justice in North Carolina.

The Commission will meet quarterly and will file an annual written report on the status and progress of its activities. The Commission will send a copy of the report to this Court, the North Carolina State Bar, and the North Carolina Bar Association. The Commission will provide oral progress reports to North Carolina Bar Association board meetings and to North Carolina State Bar Council meetings.

Adopted by the Court in Conference this the 19th day of August, 2014.

s/Sarah Parker
SARAH PARKER
Chief Justice
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of August, 2014.

s/Christie Speir Cameron Roeder
CHRISTIE SPEIR CAMERON ROEDER
Clerk of the Supreme Court

In the Supreme Court of North Carolina

Order Adopting Amendments To The Rules Implementing Statewide Mediated Settlement Conferences And Other Settlement Procedures In Superior Court Civil Actions

WHEREAS, section 7A-38.1 of the North Carolina General Statutes codifies a statewide system of court-ordered mediated settlement conferences to be implemented in superior court judicial districts in order to facilitate the resolution of civil actions within the jurisdiction of those districts, and

WHEREAS, N.C.G.S. § 7A-38.1(c) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said mediated settlement conferences,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.1(c), the Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of April, 2014.

Adopted by the Court in conference the 23rd day of January, 2014. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civi Actions amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

Hudson, J., Recused.

s/Beasley, J.
For the Court

REVISED RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

TABLE OF CONTENTS

RULE 1. INITIATING SETTLEMENT EVENTS

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES. Pursuant to N.C.G.S. § 7A-38.1, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the court pursuant to these Rules.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES. In furtherance of this purpose, counsel, upon being retained to represent any party to a superior court case, shall advise his or her client(s) regarding the settlement procedures approved by these Rules and shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. INITIATING THE MEDIATED SETTLEMENT CONFERENCE IN EACH ACTION BY COURT ORDER.

(1) Order by Senior Resident Superior Court Judge. The senior resident superior court judge of any judicial district shall, by written order, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in all civil actions except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his/her order upon motion of a party pursuant to Rule 1.C(6) only for good cause shown.

(2) Motion to Authorize the Use of Other Settlement Procedures. The parties may move the senior resident superior court judge to authorize the use of some other settlement procedure allowed by these rules or by local rule in lieu of a mediated settlement conference, as provided in N.C.G.S. § 7A-38.1(i). Such motion shall be filed within 21 days of the order requiring a mediated settlement conference on a North Carolina Administrative Office of the Courts (NCAOC) form, and shall include:

(a) the type of other settlement procedure requested;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral;

(d) that the neutral and opposing counsel have agreed upon the selection and compensation of the neutral selected; and

(e) that all parties consent to the motion.

If the parties are unable to agree to each of the above, then the senior resident superior court judge shall deny the motion and the parties shall attend the mediated settlement confer-ence as originally ordered by the court. Otherwise, the court may order the use of any agreed upon settlement procedures authorized by Rules 10 13 herein or by local rules of the superior court in the county or district where the action is pending.

(3) Timing of the Order. The senior resident superior court judge shall issue the order requiring a mediated

settlement conference as soon as practicable after the time for the filing of answers has expired. Rules 1.C(4) and 3.B herein shall govern the content of the order and the date of completion of the conference.

(4) Content of Order. The court's order shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on a NCAOC form.

(5) Motion for Court Ordered Mediated Settlement Conference. In cases not ordered to mediated settlement conference, any party may file a written motion with the senior resident superior court judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing with the senior resident superior court judge within 10 days after the date of the service of the motion. Thereafter, the judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(5) Motion to Dispense with Mediated Settlement Conference. A party may move the senior resident superior court judge to dispense with the mediated settlement conference ordered by the judge. Such motion shall state the reasons the relief is sought. For good cause shown, the senior resident superior court judge may grant the motion.

Such good cause may include, but not be limited to, the fact that the parties have participated in a settlement procedure such as non-binding arbitration or early neutral evaluation prior to the court's order to participate in a mediated settlement conference or have elected to resolve their case through arbitration.

D. INITIATING THE MEDIATED SETTLEMENT CONFERENCE BY LOCAL RULE.

(1) Order by Local Rule. In judicial districts in which a system of scheduling orders or scheduling conferences is utilized to aid in the administration of civil cases, the senior resident superior court judge of said districts shall, by local rule, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in all civil actions except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his/her order upon motion of a party pursuant to Rule 1.D(6) only for good cause shown.

(2) Scheduling Orders or Notices. In judicial districts in which scheduling orders or notices are utilized to manage civil cases and for all cases ordered to mediated settlement conference by local rule, said order or notice shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to designate their own mediator and the deadline by which that designation should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to designate a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(3) Scheduling Conferences. In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to mediated settlement conferences by local rule, the notice for said scheduling conference shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to designate their own mediator and the deadline by which that designation should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to designate a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the

(4) Application of Rule 1.C. The provisions of Rules 1.C(2), (5) and (6) shall apply to Rule 1.D except for the time limitations set out therein.

(5) Deadline for Completion. The provisions of Rule 3.B determining the deadline for completion of the mediated settlement conference shall not apply to mediated settlement conferences conducted pursuant to Rule 1.D. The deadline for completion shall be set by the senior resident superior court judge or designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline shall be well in advance of the trial date.

(6) Selection of Mediator. The parties may designate or the senior resident superior court judge may appoint, mediators pursuant to the provisions of Rule 2, except that the time limits for designation and appointment shall be set by local rule. All other provisions of Rule 2 shall apply to mediated settlement conferences conducted pursuant to Rule 1.D.

(7) Use of Other Settlement Procedures. The parties may utilize other settlement procedures pursuant to the provisions of Rule 1.C (2) and Rule 10. However, the time limits and method of moving the court for approval to utilize another settlement procedure set out in those rules shall not apply and shall be governed by local rule.

COMMENT TO RULE 1

Comment to Rule 1.C(6).

If a party is unable to pay the costs of the conference or lives a great distance from the conference site, the court may want to consider Rules 4 or 7 prior to dispensing with mediation for good cause. Rule 4 provides a way for a party to attend electronically and Rule 7 provides a way for parties to attend and obtain relief from the obligation to pay the mediator's fee.

RULE 2. DESIGNATION OF MEDIATOR

A. DESIGNATION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES. The parties may designate a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Designation of Mediator by Agreement within 21 days of the court's order, however, any party may file the designa-

tion. The party filing the designation shall serve a copy on all parties and the mediator designated to conduct the settlement conference. Such designation shall state the name, address and telephone number of the mediator designated; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the designation and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on a NCAOC form.

B. APPROVAL OF PARTY NOMINEE ELIMINATED. As of January 1, 2006, the former Rule 2.B rule allowing the approval of a non-certified mediator is rescinded. Beginning on that date, the court shall appoint mediators certified by the Dispute Resolution Commission (Commission), pursuant to Rule 2.C which follows.

C. APPOINTMENT OF MEDIATOR BY THE COURT. If the parties cannot agree upon the designation of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the senior resident superior court judge appoint a mediator. The motion must be filed within 21days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the designation of a mediator and have been unable to agree.The motion shall be on a form approved by the NCAOC.

Upon receipt of a motion to appoint a mediator, or failure of the parties to file a Designation of Mediator by Agreement with the court within 21 days of the court's order, the senior resident superior court judge shall appoint a mediator, certified pursuant to these Rules, who has expressed a willingness to mediate actions within the judge's district.

In making such appointments, the senior resident superior court judge shall rotate through the list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. The senior resident superior court judge shall retain discretion to depart in a specific case from a strict rotation when, in the judge's discretion, there is good cause to do so.

As part of the application or annual certification renewal process, all mediators shall designate those judicial districts for which they are willing to accept court appointments. Each

designation shall be deemed to be a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated district and will not charge for travel time and expenses incurred in carrying out his/her duties associated with those appointments. A refusal to accept an appointment in a judicial district designated by the mediator may be grounds for removal from said district's court appointment list by the Commission or the senior resident superior court judge.

The Commission shall furnish to the senior resident superior court judge of each judicial district a list of those certified superior court mediators requesting appointments in that district. Said list shall contain the mediators' names, addresses and telephone numbers and shall be provided electronically through the Commission's website at www.ncdrc.org. The Commission shall promptly notify the senior resident superior court judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

D. MEDIATOR INFORMATION DIRECTORY. To assist the parties in designating a mediator, the Commission shall assemble, maintain and post on its website a list of certified superior court mediators. The list shall supply contact information for mediators and identify court districts that they are available to serve. Where a mediator has supplied it to the Commission, the list shall also provide biographical information, including information about an individual mediator's education, professional experience and mediation training and experience.

E. DISQUALIFICATION OF MEDIATOR. Any party may move thesenior resident superior court judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be designated or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. WHERE CONFERENCE IS TO BE HELD. The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree on a location, the mediator shall be responsible for reserving a neutral place in the county where the action is pending and making arrangements for the conference and for giving timely

notice of the time and location of the conference to all attorneys, *pro se* parties, and other parties required to attend.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The court's order issued pursuant to Rule 1.C(1) shall state a deadline for completion for the conference which shall be not less than 120 days nor more than 180 days after issuance of the court's order. The mediator shall set a date and time for the conference pursuant to Rule 6.B(5).

C. EXTENDING DEADLINE FOR COMPLETION. The senior resident superior court judge may extend the deadline for completion of the mediated settlement conference upon the judge's own motion, upon stipulation of the parties or upon suggestion of the mediator.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions or the trial of the case, except by order of the senior resident superior court judge.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(i) All individual parties;

(ii) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on

behalf of such party whether and on what terms to settle the action or who has been authorized to negotiate on behalf of such party and can promptly communicate during the conference with persons who have decision-making authority to settle the action; provided, however, if a specific procedure is required by law (*e.g.*, a statutory pre-audit certificate) or the party's governing documents (*e.g.*, articles of incorporation, bylaws, partnership agreement, articles of organization or operating agreement) to approve the terms of the settlement, then the representative shall have the authority to negotiate and make recommendations to the applicable approval authority in accordance with that procedure;

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(b) Insurance Company Representatives. A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each such carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(c) Attorneys. At least one counsel of record for each party or other participant, whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C. or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(a) By agreement of all parties and persons required to attend and the mediator, or

(b) By order of the senior resident superior court judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

(3) Scheduling. Participants required to attend shall promptly notify the mediator after designation or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator, and a scheduling conflict with another court proceeding thereafter arises, participants shall promptly attempt to resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina June 20, 1985.

B. NOTIFYING LIEN HOLDERS. Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request said lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

C. FINALIZING AGREEMENT.

(1) If an agreement is reached at the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically recorded. If an agreement is upon all issues, a consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

(2) If the agreement is upon all issues at the conference, the parties shall give a copy of their signed agreement, consent judgment or voluntary dismissal(s) to the mediator and all parties at the conference and shall file a consent judgment or voluntary dismissal(s) with the court within 30 days or within 90 days if the state or a political subdivision thereof is a party to the action, or before expiration of the mediation deadline, whichever is longer. In all cases, consent judgments or voluntary dismissals shall be filed prior to the scheduled trial.

(3) If an agreement is reached upon all issues prior to the conference or finalized while the conference is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the court within 30 days or within 90 days if the state or a political subdivision thereof is a party to the action or before expiration of the mediation deadline, whichever is longer.

(4) When a case is settled upon all issues, all attorneys of record must notify the senior resident judge within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal(s).

D. PAYMENT OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule 7.

E. RELATED CASES. Upon application by any party or person, the senior resident superior court judge may order that an attorney of record or a party in a pending superior court case or a representative of an insurance carrier that may be liable for all or any part of a claim pending in superior court shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered pursuant to this rule. Any such attorney, party, or carrier representative that properly attends a mediation conference pursuant to this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issues concerning an order entered pursuant to this rule shall be determined by the senior resident superior court judge who entered the order.

F. NO RECORDING. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition precludes recording either surreptitiously or with the agreement of the parties.

COMMISSION COMMENTS TO RULE 4

Commission Comment to Rule 4.C.

N.C.G.S. § 7A-38.1(1) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which agreement upon all issues has been reached should be disposed of as expeditiously as possible. This rule is intended to assure that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep confidential the terms of their settlement, they may timely file with the court closing documents which do not contain confidential terms, *i.e.*, voluntary dismissal(s) or a consent judgment resolving all claims. Mediators will not be required by local rules to submit agreements to the court.

Commission Comment to Rule 4.E.

Rule 4.E was adopted to clarify a senior resident superior court judge's authority in those situations where there may be a case related to a superior court case pending in a different forum. For example, it is common for there to be claims asserted against a third-party tortfeasor in a superior court case at the same time that there are related workers' compensation claims being asserted in an Industrial Commission case. Because of the related nature of such claims, the parties in the Industrial Commission case may need an attorney of record, party or insurance carrier representative in the superior court case to attend the Industrial Commission mediation conference in order to resolve the pending claims in that case. Rule 4.E specifically authorizes a senior resident superior court judge to order such attendance provided that all parties in the related Industrial Commission case consent and the persons ordered to attend receive reasonable notice. The Industrial Commission's Rules for Mediated Settlement and Neutral Evaluation Conferences contain a similar provision that provides that persons involved in an Industrial Commission case may be ordered to attend a mediation conference in a related superior court case.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCE OR PAY MEDIATOR'S FEE

Any person required to attend a mediated settlement conference or to pay a portion of the mediator's fee in compliance with N.C.G.S. § 7A-38.1 and the rules promulgated by the Supreme Court of North Carolina (Supreme Court) to implement that section who fails to attend or to pay without good cause, shall be subject to the contempt powers of the court and monetary sanctions imposed by a resident or presiding superior court judge. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order.

If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence.

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be followed. The mediator's conduct shall be governed by Standards of Professional Conduct for Mediators (Standards) promulgated by the Supreme Court.

(2) Private Consultation. The mediator may communicate privately with any participant prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1;

(h) The duties and responsibilities of the mediator and the participants; and

(i) That any agreement reached will be reached by mutual consent.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) Declaring impasse. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) Reporting Results of Mediation.

(a) The mediator shall report to the court the results of the mediated settlement conference and any settlement reached by the parties prior to or during a recess of the conference. Mediators shall also report the results of mediations held in other superior court civil cases in which a mediated settlement conference was not ordered by the court. Said report shall be filed on a NCAOC form within 10 days of the conclusion of the conference or of being notified of the settlement and shall include the

names of those persons attending the mediated settlement conference if a conference was held. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

(b) If an agreement upon all issues is reached at, prior to or during a recess of the conference, the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal(s) and the name, address and telephone number of the person(s) designated by the parties to file such consent judgment or dismissal(s) with the court. The mediator shall advise the parties that Rule 4.C requires them to file their consent judgment or voluntary dismissal with the court within 30 days or within 90 days if the state or a political subdivision thereof is a party to the action, or before expiration of the mediation deadline, whichever is longer. The mediator shall indicate on the report that the parties have been so advised.

(c) The Commission or the NCAOC may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.

(d) Mediators who fail to report as required by this rule shall be subject to sanctions by the senior resident superior court judge. Such sanctions shall include, but not be limited to, fines or other monetary penalties, decertification as a mediator and any other sanction available through the power of contempt. The senior resident superior court judge shall notify the Commission of any action taken against a mediator pursuant to this section.

(5) Scheduling and Holding the Conference. It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the senior resident superior court judge.

A mediator selected by agreement of the parties shall not delay scheduling or holding a conference because one of more of the parties has not paid an advance fee deposit required by that agreement.

RULE 7. COMPENSATION OF THE MEDIATOR AND SANCTIONS

A. BY AGREEMENT. When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator. The terms of the parties' agreement with the mediator notwithstanding, Section D below shall apply to issues involving the compensation of the mediator. Sections E and F below shall apply unless the parties' agreement provides otherwise.

B. BY COURT ORDER. When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay to the mediator a one time, per case administrative-fee of $150 that is due upon appointment.

C. CHANGE OF APPOINTED MEDIATOR. Pursuant to Rule 2.A, the parties may select a certified mediator to conduct their mediated settlement conference. Parties who fail to select a certified mediator and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. The court may approve the substitution only upon proof of payment to the court's original appointee the $150 one time, per case administrative fee, any other amount due and owing for mediation services pursuant to Rule 7.B and any postponement fee due and owing pursuant to Rule 7.E.

D. INDIGENT CASES. No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subsequent to the trial of the action. In ruling upon such motions, the judge shall apply the criteria enumerated in N.C.G.S. § 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's

favor. The court shall enter an order granting or denying the party's request.

E. POSTPONEMENTS AND FEES.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for a session of the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A conference session may be postponed by the mediator for good cause only after notice by the movant to all parties of the reasons for the postponement and a finding of good cause by the mediator. Good cause shall mean that the reason for the postponement involves a situation over which the party seeking the postponement has no control, including but not limited to, a party or attorney's illness, a death in a party or attorney's family, a sudden and unexpected demand by a judge that a party or attorney for a party appear in court for a purpose not inconsistent with the Guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts or inclement weather such that travel is prohibitive. Where good cause is found, a mediator shall not assess a postponement fee.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause provided that the mediator was notified of the settlement immediately after it was reached and the mediator received notice of the settlement at least 14 calendar days prior to the date scheduled for mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of $150 shall be paid to the mediator if the postponement is allowed, except that if the request for postponement is made within seven calendar days of the scheduled date for mediation, the fee shall be $300. The postponement fee shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

(5) If all parties select the certified mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

F. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the named parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the conference.

COMMENTS TO RULE 7

Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage or any other out-of-pocket expenses associated with a court ordered mediation.

It is not unusual for two or more related cases to be mediated collectively. A mediator shall use his or her business judgment in assessing the one time, per case administrative fee when two or more cases are mediated together and set his/her fee according to the amount of time s/he spent in an effort to schedule the matter for mediation. The mediator may charge a flat fee of $150 if scheduling was relatively easy or multiples of that amount if more effort was required.

Comment to Rule 7.E.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

Comment to Rule 7.F.

If a party is found by a senior resident superior court judge to have failed to attend a mediated settlement conference without good cause, then the court may require that party to pay the mediator's fee and related expenses.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Commission may receive and approve applications for certification of persons to be appointed as superior court mediators. For certification, a person shall:

A. Have completed a minimum of 40 hours in a trial court mediation training program certified by the Commission, or have completed a 16-hour supplemental trial court mediation training certified by the Commission after having been certified by the Commission as a family financial mediator;

B. Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she:

(a) is either:

(i) a member in good standing of the North Carolina State Bar; or

(ii) a member similarly in good standing of the bar of another state and a graduate of a law school recognized as accredited by the North Carolina Board of Law Examiners; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney; and

(b) has at least five years of experience after date of licensure as a judge, practicing attorney, law professor and/or mediator or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8.B(1) or Rule 8.B(2).

(2) A non-attorney may be certified if he or she has:

(a) completed a six-hour training on North Carolina court organization, legal terminology, civil court procedure, the attorney-client privilege, the unauthorized practice of law and common legal issues arising in superior court cases, provided by a trainer certified by the Commission;

(b) provided to the Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience claimed in Rule 8.B(2)(c);

(c) completed either:

(i) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Commission; and after completing the 20-hour training, mediating at least 30 disputes, over the course of at least three years, or equivalent experience, and possess a four-year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to January 1, 2005, and have four years of professional, management or administrative experience in a professional, business or governmental entity; or

(ii) ten years of professional, management or administrative experience in a professional, business or governmental entity and possess a four-year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to January 1, 2005.

C. Have Completed the Following Observations:

(1) All applicants. All applicants for certification shall observe two mediated settlement conferences, at least one of which shall be of a superior court case.

(2) Non-attorney applicants. Non-attorney applicants for certification shall observe three mediated settlement conferences in addition to those required by (1) above and which are conducted by at least two different mediators. At least one of these additional observations shall be of a superior court case.

(3) Conferences eligible for observation. Conferences eligible for observation under (1) and (2) above shall be those in cases pending before the North Carolina Superior Court, the North Carolina Court of Appeals, the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, or the United States

District Courts for North Carolina that are ordered to mediation or conducted by agreement of the parties which incorporates the rules of mediation of one of those entities.

Conferences eligible for observation shall also include those conducted in disputes prior to litigation which are mediated by agreement of the parties incorporating the rules for mediation of one of the entities named above.

All such conferences shall be conducted by certified superior court mediators pursuant to rules adopted by one of the above entities and shall be observed from their beginning to settlement or impasse. Observations shall be reported on an NCAOC form.

(4) All observers shall conform their conduct to the Commission's Requirements for Observer Conduct.

D. Demonstrate familiarity with the statute, rules and practice governing mediated settlement conferences in North Carolina;

E. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. An applicant for certification shall disclose on his/her application(s) any of the following: any pending criminal matters; any criminal convictions; and any disbarments or other revocations or suspensions of any professional license or certification, including suspension or revocation of any license, certification, registration or qualification to serve as a mediator in another state or country for any reason other than to pay a renewal fee. In addition, an applicant for certification shall disclose on his/her application(s) any of the following which occurred within ten years of the date the application(s) is filed with the Commission: any pending disciplinary complaint(s) filed with, or any private or public sanctions(s) imposed by, a professional licensing or regulatory body, including any body regulating mediator conduct; any judicial sanction(s); any civil judgment(s); any tax lien(s); or any bankruptcy filing(s). Once certified, a mediator shall report to the Commission within (30) days of receiving notice any subsequent criminal convic tion(s); any disbarment(s) or revocation(s) of a professional license(s), other disciplinary complaint(s) filed with or actions taken by, a professional licensing or regulatory body; any judicial sanction(s); any tax lien(s); any civil judgment(s) or any filing(s) for bankruptcy.

F. Submit proof of qualifications set out in this section on a form provided by the Commission;

G. Pay all administrative fees established by the NCAOC upon the recommendation of the Commission;

H. Agree to accept as payment in full of a party's share of the mediator's fee, the fee ordered by the court pursuant to Rule 7;

I. Comply with the requirements of the Commission for continuing mediator education or training. (These requirements may include completion of training or self-study designed to improve a mediator's communication, negotiation, facilitation or mediation skills; completion of observations; service as a mentor to a less experienced mediator; being mentored by a more experienced mediator; or serving as a trainer. Mediators shall report on a Commission approved form.);

J. Once certified, agree to make reasonable efforts to assist mediator certification applicants in completing their observation requirements.

K. No mediator who held a professional license and relied upon that license to quality for certification under subsections B(1) or B(2) above shall be decertified or denied recertification because that mediator's license lapses, is relinquished or becomes inactive; provided, however, that this subsection shall not apply to any mediator whose professional license is revoked, suspended, lapsed, relinquished or becomes inactive due to disciplinary action or the threat of same from his/her licensing authority. Any mediator whose professional license is revoked, suspended, lapsed, or relinquished, or who becomes inactive, shall report such matter tothe Commission.

If a mediator's professional license lapses, is relinquished or becomes inactive, s/he shall be required to complete all otherwise voluntary continuing mediator education requirements adopted by the Commission as part of its annual certification renewal process and to report completion of those hours to the Commission's office annually.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators seeking only certification as superior court mediators shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of trial court mediation;

(3) Communication and information gathering skills;

(4) Standards of conduct for mediators including, but not limited to the Standards adopted by the Supreme Court;

(5) Statutes, rules and practice governing mediated settlement conferences in North Carolina;

(6) Demonstrations of mediated settlement conferences;

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed, and evaluated by program faculty; and

(8) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules, and practice governing mediated settlement conferences in North Carolina.

B. Certified training programs for mediators who are already certified as family financial mediators shall consist of a minimum of sixteen hours. The curriculum of such programs shall include the subjects in Rule 9.A and discussion of the mediation and culture of insured claims. There shall be at least two simulations as specified in subsection (7).

C. A training program must be certified by the Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these Rules or attended in other states may be approved by the Commission if they are in substantial compliance with the standards set forth in this Rule.

D. To complete certification, a training program shall pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES. Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the senior resident superior court judge may order the use of the procedure requested under these rules or under local rules unless the court finds that the parties did not agree upon all of the relevant details of the procedure, (including items a-e in Rule 1.C(2)); or that for good cause, the selected procedure is not appropriate for the case or the parties.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES. In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) Neutral Evaluation (Rule 11). Neutral evaluation in which a neutral offers an advisory evaluation of the case following summary presentations by each party;

(2) Arbitration (Rule 12). Non binding arbitration, in which a neutral renders an advisory decision following summary presentations of the case by the parties and binding arbitration, in which a neutral renders a binding decision following presentations by the parties; and

(3) Summary Trials (Jury or Non-Jury) (Rule 13). Non-binding summary trials, in which a privately procured jury or presiding officer renders an advisory verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer; and binding summary trials, in which a privately procured jury or presiding officer renders a binding verdict following summary pre-sentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer.

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) When Proceeding is Conducted. Other settlement procedures ordered by the court pursuant to these rules shall be conducted no later than the date of completion set out in the court's original mediated settlement conference order unless extended by the senior resident superior court judge.

(2) Authority and Duties of Neutrals.

(a) Authority of neutrals.

(i) Control of proceeding. The neutral evaluator, arbitrator or presiding officer shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the proceeding. The neutral evaluator, arbitrator or presiding officer shall attempt to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral(s). In the absence of agreement, such neutral shall select the date for the proceeding.

(b) Duties of neutrals.

(i) The neutral evaluator, arbitrator or presiding officer shall define and describe the following at the beginning of the proceeding.

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by N.C.G.S. § 7A 38.1(l) and Rule 10.C(6) herein; and

(e) The duties and responsibilities of the neutral(s) and the participants.

(ii) Disclosure. Each neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice, or partiality.

(iii) Reporting results of the proceeding. The neutral evaluator, arbitrator or presiding officer shall report the result of the proceeding to the court on a NCAOC form. The NCAOC may require the neutral to provide statistical data for evaluation of other settlement procedures on forms provided by it.

(iv) Scheduling and holding the proceeding. It is the duty of the neutral evaluator, arbitrator or presiding officer to schedule the proceeding and conduct it prior to the completion deadline set out in the court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral evaluator, arbitrator, or presiding officer unless said time limit is changed by a written order of the senior resi dent superior court judge.

(3) Extensions of Time. A party or a neutral may request the senior resident superior court judge to extend the deadline for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. If the court grants the motion for an extension, this order shall set a new deadline for the completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(4) Where Procedure is Conducted. The neutral evaluator, arbitrator or presiding officer shall be responsible for reserving a place agreed to by the parties, setting a time, and making other arrangements for the proceeding and for giving timely notice to all attorneys and unrepresented parties in writing of the time and location of the proceeding.

(5) No Delay of Other Proceedings. Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions or the trial of the case, except by order of the senior resident superior court judge.

(6) Inadmissibility of Settlement Proceedings. Evidence of statements made and conduct occurring in a mediated

settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

(a) In proceedings for sanctions under this section;

(b) In proceedings to enforce or rescind a settlement of the action;

(c) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or

(d) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this section, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediated settlement conference or other settlement proceeding. No mediator, other neutral or neutral observer present at a settlement proceeding shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during or as a follow-up to a mediated settlement con-ference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals and proceedings to enforce laws concerning juvenile or elder abuse.

(7) No Record Made. There shall be no record made of any proceedings under these Rules unless the parties have stipulated to binding arbitration or binding summary trial in which case any party after giving adequate notice to opposing parties may record the proceeding.

(8) Ex Parte Communication Prohibited. Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(9) Duties of the Parties.

(a) Attendance. All persons required to attend a mediated settlement conference pursuant to Rule 4 shall attend any other settlement procedure which is non binding in nature, authorized by these rules and ordered by the court except those persons to whom the parties agree and the senior resident superior court judge excuses. Those persons required to attend other settlement procedures which are binding in nature, authorized by these rules and ordered by the court shall be those persons to whom the parties agree. Notice of such agreement shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the order requiring a mediated settlement conference. The notice shall be on a NCAOC form.

(b) Finalizing agreement.

(i) If an agreement is reached on all issues at the neutral evaluation, arbitration or summary trial, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate within 14 days of the conclusion of the proceeding or before the expiration of the deadline for its completion, whichever is longer. The person(s) responsible for filing closing documents with the court shall also sign the report to the court. The parties shall

give a copy of their signed agreement, consent judgment or voluntary dismissal(s) to the neutral evaluator, arbitrator, or presiding officer, and all parties at the proceeding.

(ii) If an agreement is reached upon all issues prior to the evaluation, arbitration or summary trial or while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the court within 14 days or before the expiration of the deadline for completion of the proceeding whichever is longer.

(iii) When a case is settled upon all issues, all attorneys of record must notify the senior resident judge within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s).

(c) Payment of neutral's fee. The parties shall pay the neutral's fee as provided by Rule 10.C(12).

(10) Selection of Neutrals in Other Settlement Procedures. The parties may select any individual to serve as a neutral in any settlement procedure authorized by these rules. For arbitration, the parties may select either a single arbitrator or a panel of arbitrators. Notice of such selection shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the order requiring a mediated settlement conference.

The notice shall be on a NCAOC form. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

(11) Disqualification. Any party may move a resident or presiding superior court judge of the district in which an action is pending for an order disqualifying the neutral and, for good cause, such order shall be entered. Cause shall exist if the selected neutral has violated any stand-

ard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) Compensation of the Neutral. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparing for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time.

Unless otherwise ordered by the court or agreed to by the parties, the neutral's fees shall be paid in equal shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented by the same counsel. The presiding officer and jurors in a summary jury trial are neutrals within the meaning of these Rules and shall be compensated by the parties.

(13) Sanctions for Failure to Attend Other Settlement Procedure or Pay Neutral's Fee. Any person required to attend a settlement procedure or to pay a neutral's fee in compliance with N.C.G.S. § 7A-38.1 and the rules promulgated by the Supreme Court to implement that section, who fails to attend or to pay the fee without good cause, shall be subject to the contempt powers of the court and monetary sanctions imposed by a resident or presiding superior court judge. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, neutral fees, expenses, and loss of earnings incurred by persons attending the procedure. A party seeking sanctions against a person or a resident or presiding judge upon his/her own motion shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. NATURE OF NEUTRAL EVALUATION. Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The

neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing candid assessment of liability, settlement value and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. PRE-CONFERENCE SUBMISSIONS. No later than 20 days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, shall not be more than five pages in length and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than 10 days prior to the date established for the neutral evaluation conference to begin any party may, but is not required to, send additional written information not exceeding three pages in length to the evaluator, responding to the submission of an opposing party. The response shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) Evaluator's Opening Statement. At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

(2) Oral Report to Parties by Evaluator. In addition to the written report to the court required under these rules at the conclusion of the neutral evaluation conference, the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of liability, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefore. The evaluator shall not reduce his or her oral report to writing and shall not inform the court thereof.

(3) Report of Evaluator to Court. Within 10 days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the court using a NCAOC form. The evaluator's report shall inform the court when and where the evaluation was held, the names of those who attended and the names of any party, attorney or insurance company representative known to the evaluator to have been absent from the neutral evaluation without permission. The report shall also inform the court whether or not an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the evaluator to send a copy of any agreement reached by the parties to the court.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties to the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions.

RULE 12. RULES FOR ARBITRATION

In this form of settlement procedure the parties select an arbitrator who shall hear the case and enter an advisory decision. The arbitrator's decision is made to facilitate the parties' negotiation of a settlement and is non-binding, unless neither party timely requests a trial *de novo*, in which case the decision is entered by the senior resident superior court judge as a judgment, or the parties agree that the decision shall be binding.

A. ARBITRATORS.

Arbitrator's Canon of Ethics. Arbitrators shall comply with the Canons of Ethics for Arbitrators promulgated by the Supreme Court of North Carolina (Canons). Arbitrators shall be disqualified and must recuse themselves in accordance with the Canons.

B. EXCHANGE OF INFORMATION.

(1) Pre-hearing Exchange of Information. At least 10 days before the date set for the arbitration hearing the parties shall exchange in writing:

(a) Lists of witnesses they expect to testify;

(b) Copies of documents or exhibits they expect to offer into evidence; and

(c) A brief statement of the issues and contentions of the parties.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing. Each party shall bring to the hearing and provide to the arbitrator a copy of these materials. These materials shall not be filed with the court or included in the case file.

(2) Exchanged Documents Considered Authenticated. Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian, or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(3) Copies of Exhibits Admissible. Copies of exchanged documents or exhibits are admissible in arbitration hearings in lieu of the originals.

C. ARBITRATION HEARINGS.

(1) Witnesses. Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(2) Subpoenas. Rule 45 of the North Carolina Rules of Civil Procedure (N.C.R.Civ.P.) shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these Rules.

(3) Motions. Designation of an action for arbitration does not affect a party's right to file any motion with the court.

(a) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions referred to the arbitrator in the exchange of information required by Rule 12.B(1).

(b) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.

(4) Law of Evidence Used as Guide. The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(5) Authority of Arbitrator to Govern Hearings. Arbitrators shall have the authority of a trial judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all matters involving contempt to the senior resident superior court judge.

(6) Conduct of Hearing. The arbitrator and the parties shall review the list of witnesses, exhibits and written

statements concerning issues previously exchanged by the parties pursuant to Rule 12.B(1), above. The order of the hearing shall generally follow the order at trial with regard to opening statements and closing arguments of counsel, direct and cross-examination of witnesses and presentation of exhibits. However, in the arbitrator's discretion the order may be varied.

(7) No Record of Hearing Made. No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(8) Parties must be Present at Hearings; Representation. Subject to the provisions of Rule 10.C(9), all parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator. All parties may be represented by counsel. Parties may appear *pro se* as permitted by law.

(9) Hearing Concluded. The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing has been concluded.

D. THE AWARD.

(1) Filing the Award. The arbitrator shall file a written award signed by the arbitrator and filed with the clerk of superior court in the county where the action is pending, with a copy to the senior resident superior court judge within 20 days after the hearing is concluded or the receipt of post-hearing briefs whichever is later. The award shall inform the court of the absence of any party, attorney, or insurance company representative known to the arbitrator to have been absent from the arbitration without permission. An award form, which shall be a NCAOC form, shall be used by the arbitrator as the report to the court and may be used to record its award. The report shall also inform the court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the arbitrator to

send a copy of any agreement reached by the parties to the court.

(2) Findings; Conclusions; Opinions. No findings of fact and conclusions of law or opinions supporting an award are required.

(3) Scope of Award. The award must resolve all issues raised by the pleadings, may be in any amount supported by the evidence, shall include interest as provided by law, and may include attorney's fees as allowed by law.

(4) Costs. The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.

(5) Copies of Award to Parties. The arbitrator shall deliver a copy of the award to all of the parties or their counsel at the conclusion of the hearing or the arbitrator shall serve the award after filing. A record shall be made by the arbitrator of the date and manner of service.

E. TRIAL DE NOVO.

(1) Trial *De Novo* as of Right. Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial *de novo* as of right upon filing a written demand for trial *de novo* with the court, and service of the demand on all parties, on a NCAOC form within 30 days after the arbitrator's award has been served. Demand for jury trial pursuant to N.C.R.Civ.P. 38(b) does not preserve the right to a trial *de novo*. A demand by any party for a trial *de novo* in accordance with this section is sufficient to preserve the right of all other parties to a trial *de novo*. Any trial *de novo* pursuant to this section shall include all claims in the action.

(2) No Reference to Arbitration in Presence of Jury. A trial *de novo* shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the court's approval.

F. JUDGMENT ON THE ARBITRATION DECISION.

(1) Termination of Action Before Judgment. Dismissals or a consent judgment may be filed at any time before entry of judgment on an award.

(2) Judgment Entered on Award. If the case is not terminated by dismissal or consent judgment and no party files a demand for trial *de novo* within 30 days after the award is served, the senior resident superior court judge shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be served on all parties or their counsel.

G. AGREEMENT FOR BINDING ARBITRATION.

(1) Written Agreement. The arbitrator's decision may be binding upon the parties if all parties agree in writing. Such agreement may be made at any time after the order for arbitration and prior to the filing of the arbitrator's decision. The written agreement shall be executed by the parties and their counsel and shall be filed with the clerk of superior court and the senior resident superior court judge prior to the filing of the arbitrator's decision.

(2) Entry of Judgment on a Binding Decision. The arbi trator shall file the decision with the clerk of superior court and it shall become a judgment in the same manner as set out in N.C.G.S. §1-569.1ff.

H. MODIFICATION PROCEDURE.

Subject to approval of the arbitrator, the parties may agree to modify the procedures required by these rules for court ordered arbitration.

RULE 13. RULES FOR SUMMARY TRIALS

In a summary bench trial, evidence is presented in a summary fashion to a presiding officer, who shall render a verdict. In a summary jury trial, evidence is presented in summary fashion to a privately procured jury, which shall render a verdict. The goal of summary trials is to obtain an accurate prediction of the ultimate verdict of a full civil trial as an aid to the parties and their settlement efforts.

Rule 23 of the General Rules of Practice also provide for summary jury trials. While parties may request of the court permission to utilize

that process, it may not be substituted in lieu of mediated settlement conferences or other procedures outlined in these rules.

A. PRE-SUMMARY TRIAL CONFERENCE.

Prior to the summary trial, counsel for the parties shall attend a conference with the presiding officer selected by the parties pursuant to Rule 10.C(10). That presiding officer shall issue an order which shall:

(1) Confirm the completion of discovery or set a date for the completion;

(2) Order that all statements made by counsel in the summary trial shall be founded on admissible evidence, either documented by deposition or other discovery previously filed and served, or by affidavits of the witnesses;

(3) Schedule all outstanding motions for hearing;

(4) Set dates by which the parties exchange:

(a) A list of parties' respective issues and contentions for trial;

(b) A preview of the party's presentation, including notations as to the document (*e.g.* deposition, affidavit, letter, contract) which supports that evidentiary statement;

(c) All documents or other evidence upon which each party will rely in making its presentation; and

(d) All exhibits to be presented at the summary trial.

(5) Set the date by which the parties shall enter a stipulation, subject to the presiding officer's approval, detailing the time allowable for jury selection, opening statements, the presentation of evidence and closing arguments (total time is usually limited to one day);

(6) Establish a procedure by which private, paid jurors will be located and assembled by the parties if a summary jury trial is to be held and set the date by which the parties shall submit agreed upon jury instructions, jury selection questionnaire, and the number of potential jurors to be questioned and seated;

(7) Set a date for the summary jury trial; and

(8) Address such other matters as are necessary to place the matter in a posture for summary trial.

B. PRESIDING OFFICER TO ISSUE ORDER IF PARTIES UNABLE TO AGREE. If the parties are unable to agree upon the dates and procedures set out in Section A of this Rule, the presiding officer shall issue an order which addresses all matters necessary to place the case in a posture for summary trial.

C. STIPULATION TO A BINDING SUMMARY TRIAL. At any time prior to the rendering of the verdict, the parties may stipulate that the summary trial be binding and the verdict become a final judgment. The parties may also make a binding high/low agreement, wherein a verdict below a stipulated floor or above a stipulated ceiling would be rejected in favor of the floor or ceiling.

D. EVIDENTIARY MOTIONS. Counsel shall exchange and file motions *in limine* and other evidentiary matters which shall be heard prior to the trial. Counsel shall agree prior to the hearing of said motions as to whether the presiding officer's rulings will be binding in all subsequent hearings or non-binding and limited to the summary trial.

E. JURY SELECTION. In the case of a summary jury trial, potential jurors shall be selected in accordance with the procedure set out in the pre-summary trial order. These jurors shall complete a questionnaire previously stipulated to by the parties. Eighteen jurors or such lesser number as the parties agree shall submit to questioning by the presiding officer and each party for such time as is allowed pursuant to the Summary Trial Pre-trial Order. Each party shall then have three peremptory challenges, to be taken alternately, beginning with the plaintiff. Following the exercise of all peremptory challenges, the first 12 seated jurors, or such lesser number as the parties may agree, shall constitute the panel.

After the jury is seated, the presiding officer in his/her discretion, may describe the issues and procedures to be used in presenting the summary jury trial. The jury shall not be informed of the non-binding nature of the proceeding, so as not to diminish the seriousness with which they consider the matter and in the event the parties later stipulate to a binding proceeding.

F. PRESENTATION OF EVIDENCE AND ARGUMENTS OF COUNSEL.

Each party may make a brief opening statement, following which each side shall present its case within the time limits set in the Summary Trial Pre-trial Order. Each party may reserve a portion of its time for rebuttal or surrebuttal evidence. Although closing arguments are generally omitted, subject to the presiding officer's discretion and the parties' agreement, each party may be allowed to make closing arguments within the time limits previously established.

Evidence shall be presented in summary fashion by the attorneys for each party without live testimony. Where the credibility of a witness is important, the witness may testify in person or by video deposition. All statements of counsel shall be founded on evidence that would be admissible at trial and documented by prior discovery.

Affidavits offered into evidence shall be served upon opposing parties far enough in advance of the proceeding to allow time for affiants to be deposed. Counsel may read portions of the deposition to the jury. Photographs, exhibits, documentary evidence and accurate summaries of evidence through charts, diagrams, evidence notebooks or other visual means are encouraged, but shall be stipulated by both parties or approved by the presiding officer.

G. JURY CHARGE. In a summary jury trial, following the presentation of evidence by both parties, the presiding officer shall give a brief charge to the jury, relying on predetermined jury instructions and such additional instructions as the presiding officer deems appropriate.

H. DELIBERATION AND VERDICT. In a summary jury trial, the presiding officer shall inform the jurors that they should attempt to return a unanimous verdict. The jury shall be given a verdict form stipulated to by the parties or approved by the presiding officer. The form may include specific interrogatories, a general liability inquiry, and/or an inquiry as to damages. If, after diligent efforts and a reasonable time, the jury is unable to reach a unanimous verdict, the presiding officer may recall the jurors and encourage them to reach a verdict quickly and/or inform them that they may return separate verdicts, for which purpose the presiding officer may distribute separate forms.

In a summary bench trial, at the close of the presentation of evidence and arguments of counsel and after allowing time for settlement discussions and consideration of the evidence by the presiding officer, the presiding officer shall render a decision. Upon a party's request, the presiding officer may allow three business days for the filing of post-hearing briefs. If the presiding officer takes the matter under advisement or allows post-hearing briefs, the decision shall be rendered no later than 10 days after the close of the hearing or filing of briefs whichever is longer.

I. JURY QUESTIONING. In a summary jury trial the presiding officer may allow a brief conference with the jurors in open court after a verdict has been returned, in order to determine the basis of the jury's verdict. However, if such a conference is used, it should be limited to general impressions. The presiding officer should not allow counsel to ask detailed questions of jurors to prevent altering the summary trial from a settlement technique to a form of pre-trial rehearsal. Jurors shall not be required to submit to counsels' questioning and shall be informed of the option to depart.

J. SETTLEMENT DISCUSSIONS. Upon the retirement of the jury in summary jury trials or the presiding officer in summary bench trials, the parties and/or their counsel shall meet for settlement discussions. Following the verdict or decision, the parties and/or their counsel shall meet to explore further settlement possibilities. The parties may request that the presiding officer remain available to provide such input or guidance as the presiding officer deems appropriate.

K. MODIFICATION OF PROCEDURE. Subject to approval of the presiding officer, the parties may agree to modify the procedures set forth in these Rules for summary trial.

L. REPORT OF PRESIDING OFFICER. The presiding officer shall file a written report no later than 10 days after the verdict. The report shall be signed by the presiding officer and filed with the clerk of the superior court in the county where the action is pending, with a copy to the senior resident court judge. The presiding officer's report shall inform the court of the absence of any party, attorney or insurance company representative known to the presiding officer to have been absent from the summary jury or summary bench trial with out permission. The report may be used to record the verdict.

The report shall also inform the court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the presiding officer to send a copy of any agreement reached by the parties.

RULE 14. LOCAL RULE MAKING

The senior resident superior court judge of any district conducting mediated settlement conferences under these Rules is authorized to publish local rules, not inconsistent with these Rules and N.C.G.S. § 7A-38.1, implementing mediated settlement conferences in that district.

RULE 15. DEFINITIONS

A. The term, senior resident superior court judge, as used throughout these rules, shall refer both to said judge or said judge's designee.

B. The phrase, NCAOC forms, shall refer to forms prepared by, printed and distributed by the NCAOC to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the NCAOC. Proposals for the creation or modification of such forms may be initiated by the Commission.

RULE 16. TIME LIMITS.

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the N.C.R.Civ.P.

In the Supreme Court of North Carolina

Order Adopting Amendments to the Standards of Professional Conduct for Mediators

WHEREAS, Sec. 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission under the Judicial Department and charges it with the administration of mediator certification and regulation of mediator conduct and decertification, and

WHEREAS, N.C.G.S. § 7A-38.2(a) provides for this Court to adopt standards for the conduct of meditators and of mediator training programs participating in the proceedings conducted pursuant to N.C.G.S.Sect.7A-38.1, 7A-38.3, 7A-38.4A, 7A-38.3B, and 7A-38.3C.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(a), the Standards of Professional Conduct for Mediators are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of April, 2014.

Adopted by the Court in conference the 23rd day of January, 2014. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Standards of Professional Conduct for Mediators amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

Hudson, J., Recused.

s/Beasley, J.
For the Court

REVISED STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

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PREAMBLE

These Standards of Professional Conduct for Mediators (Standards) shall apply to all mediators who are certified by the North Carolina Dispute Resolution Commission (Commission) or who are not certified, but are conducting court-ordered mediations in the context of a program or process that is governed by statutes, as amended from time to time, which provide for the Commission to regulate the conduct of mediators participating in the program or process. Provided, however, that if there is a specific statutory provision that conflicts with these Standards, then the statute shall control.

These Standards are intended to instill and promote public confidence in the mediation process and to provide minimum standards for mediator conduct. As with other forms of dispute resolution, mediation must be built upon public understanding and confidence. Persons serving as mediators are responsible to the parties, the public and the courts to conduct themselves in a manner that will merit that confidence. (See Rule VII of the Rules of the North Carolina Supreme Court for the Dispute Resolution Commission.)

It is the mediator's role to facilitate communication and understanding among the parties and to assist them in reaching an agreement. The mediator should aid the parties in identifying and discussing issues and in exploring options for settlement. The mediator should not, however, render a decision on the issues in dispute. In mediation, the ultimate decision whether and on what terms to resolve the dispute belongs to the parties and the parties alone.

I. Competency: A mediator shall maintain professional competency in mediation skills and, where the mediator lacks the skills necessary for a particular case, shall decline to serve or withdraw from serving.

A. A mediator's most important qualification is the mediator's competence in procedural aspects of facilitating the resolution of disputes rather than the mediator's familiarity with technical knowledge relating to the subject of the dispute. Therefore a mediator shall obtain necessary skills and substantive training appropriate to the mediator's areas of practice and upgrade those skills on an ongoing basis.

B. If a mediator determines that a lack of technical knowledge impairs or is likely to impair the mediator's effectiveness, the mediator shall notify the parties and withdraw if requested by any party.

C. Beyond disclosure under the preceding paragraph, a mediator is obligated to exercise his/her judgment as to whether his/her skills or expertise are sufficient to the demands of the case and, if they are not, to decline from serving or to withdraw.

II. Impartiality: A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute.

A. Impartiality means absence of prejudice or bias in word and action. In addition, it means a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.

B. As early as practical and no later than the beginning of the first session, the mediator shall make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's impartiality.

C. The mediator shall decline to serve or shall withdraw from serving if:

(1) a party objects to his/her serving on grounds of lack of impartiality, and after discussion, the party continues to object; or

(2) the mediator determines he/she cannot serve impartially.

III. Confidentiality: A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

A. A mediator shall not disclose, directly or indirectly, to any non-participant, any information communicated to the mediator by a participant within the mediation process, whether the information is obtained before, during or after the mediated settlement conference. A mediator's filing with the appropriate court a copy of an agreement reached in mediation pursuant to a statute that mandates such filing shall not be considered to be a violation of this paragraph.

B. A mediator shall not disclose, directly or indirectly, to any participant, information communicated to the mediator in confidence by any other participant in the mediation process, whether the information is obtained before, during or after the mediated settlement conference, unless that other participant gives the mediator permission to do so. A mediator may encourage a participant to permit disclosure, but absent such permission, the mediator shall not disclose.

C. A mediator shall not disclose to court officials or staff any information communicated to the mediator by any participant within the mediation process, whether before, during or after the mediated settlement conference, including correspondence or communications regarding scheduling or attendance, except as required to complete a report of mediator for the court; provided, however, when seeking to collect a fee for services, the mediator may share correspondence or communications from a participant relating to the fees of the mediator. The confidentiality provisions above notwithstanding, if a mediator believes that communicating certain procedural matters to court personnel will aid the mediation, then with the consent of the parties to the mediation, the mediator may do so. In making any permitted disclosure, a mediator shall refrain from expressing personal opinions about a participant or any aspect of the case with court officials or staff.

D. The confidentiality provisions set forth in A, B, and C above notwithstanding, a mediator may report otherwise confidential conduct or statements made in preparation for, during or as a follow-up to mediation in the circumstances set forth in sections (1) and (2) below:

(1) A statute requires or permits a mediator to testify or to give an affidavit or to tender a copy of any agreement reached in mediation to the official designated by the statute.

If, pursuant to Family Financial Settlement (FFS) and Mediated Settlement Conference (MSC) Rule 5, a media-

tor has been subpoenaed by a party to testify about who attended or failed to attend a mediated settlement conference/mediation, the mediator shall limit his/her testimony to providing the names of those who were physically present or who attended by electronic means.

If, pursuant to FFS and MSC Rule 5, a mediator has been subpoenaed by a party to testify about a party's failure to pay the mediator's fee, the mediator's testimony shall be limited to information about the amount of the fee and who had or had not paid it and shall not include statements made by any participant about the merits of the case.

(2) To a participant, non-participant, law enforcement personnel or other persons affected by the harm intended where public safety is an issue, in the following circumstances:

(i) a party or other participant in the mediation has communicated to the mediator a threat of serious bodily harm or death to be inflicted on any person, and the mediator has reason to believe the party has the intent and ability to act on the threat; or

(ii) a party or other participant in the mediation has communicated to the mediator a threat of significant damage to real or personal property and the mediator has reason to believe the party has the intent and ability to act on the threat; or

(iii) a party's or other participant's conduct during the mediation results in direct bodily injury or death to a person.

If the mediator is a North Carolina lawyer and a lawyer made the statements or committed the conduct reportable under subsection D(2) above, then the mediator shall report the statements or conduct to the North Carolina State Bar (State Bar) or the court having jurisdiction over the matter in accordance with North Carolina State Bar Rule of Professional Conduct 8.3(e).

E. Nothing in this Standard prohibits the use of information obtained in a mediation for instructional purposes or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization or dispute resolution program, so long as

the parties or the specific circumstances of the parties' controversy are not identified or identifiable.

F. Nothing in this Standard shall prohibit a mediator from revealing communications or conduct occurring prior to, during or after a mediation in the event that a party to or a participant in a mediation has filed a complaint regarding the mediator's professional conduct, moral character or fitness to practice as a mediator and the mediator reveals the communication or conduct for the purpose of defending him/herself against the complaint. In making any such disclosures, the mediator should make every effort to protect the confidentiality of non-complaining parties to or par ticipants in the mediation and avoid disclosing the specific circumstances of the parties' controversy. The mediator may consult with non-complaining parties or witnesses to consider their input regarding disclosures.

IV. Consent: A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator and the party's options within the process.

A. A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require.

B. A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator shall encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

C. If a party appears to have difficulty comprehending the process, issues or settlement options or difficulty participating in a mediation, the mediator shall explore the circumstances and potential accommodations, modifications or adjustments that would facilitate the party's capacity to comprehend, participate and exercise self-determination.If the mediator then determines that the party cannot meaningfully participate in the mediation, the mediator shall recess or discontinue the mediation. Before discontinuing the mediation, the mediator shall consider the context and circumstance of the mediation, including subject matter of the dispute, availability of support persons for the party and whether the party is represented by counsel.

D. In appropriate circumstances, a mediator shall inform the partie of the importance of seeking legal, financial, tax or other professional advice before, during or after the mediation process.

V. Self Determination: A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.

A. A mediator is obligated to leave to the parties full responsibility for deciding whether and on what terms to resolve their dispute. He/She may assist them in making informed and thoughtful decisions, but shall not impose his/her judgment or opinions for those of the parties concerning any aspect of the mediation.

B. A mediator may raise questions for the participants to consider regarding their perceptions of the dispute as well as the acceptability of proposed options for settlement and their impact on third parties. Furthermore, a mediator may suggest for consider ation options for settlement in addition to those conceived of by the parties themselves.

C. A mediator shall not impose his/her opinion about the merits of the dispute or about the acceptability of any proposed option for settlement. A mediator should resist giving his/her opinions about the dispute and options for settlement even when he/she is requested to do so by a party or attorney. Instead, a mediator should help that party utilize his/her own resources to evaluate the dispute and the options for settlement.

This section prohibits imposing one's opinions, advice and/or counsel upon a party or attorney. It does not prohibit the mediator's expression of an opinion as a last resort to a party or attorney who requests it and the mediator has already helped that party utilize his/her own resources to evaluate the dispute and options.

D. Subject to Standard IV.D above, if a party to a mediation declines to consult an independent counsel or expert after the mediator has raised this option, the mediator shall permit the mediation to go forward according to the parties' wishes.

E. If, in the mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, inequality of bargaining power or ability, unfairness resulting from non-disclosure or fraud by a participant or other circumstance likely to lead to a grossly unjust result, the mediator shall inform the parties of the mediator's concern. Consistent with the confidentiality required in Standard III, the mediator may discuss with the parties the source of the concern. The mediator may choose to discontinue

the mediation in such circumstances but shall not violate the obligation of confidentiality.

VI. Separation of Mediation from Legal and Other Professional Advice: A mediator shall limit himself or herself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.

A mediator may provide information that the mediator is qualified by training or experience to provide only if the mediator can do so consistent with these Standards. Mediators may respond to a party's request for an opinion on the merits of the case or suitability of settlement proposals only in accordance with Section V.C above.

COMMISSION OFFICIAL COMMENT

Although mediators shall not provide legal or other professional advice, mediators may respond to a party's request for an opinion on the merits of the case or the suitability of settlement proposals only in accordance with Section V.C above, and mediators may provide information that they are qualified by training or experience to provide only if it can be done consistent with these Standards.

VII. Conflicts of Interest: A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.

A. The mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.

B. Where a party is represented or advised by a professional advocate or counselor, the mediator shall place the interests of the party over his/her own interest in maintaining cordial relations with the professional, if such interests are in conflict.

C. A mediator who is a lawyer, therapist or other professional and the mediator's professional partners or co-shareholders shall not advise, counsel or represent any of the parties in future matters concerning the subject of the dispute, an action closely related to the dispute or an out growth of the dispute when the mediator or his/her staff has engaged in substantive conversations with any party to the dispute. Substantive conversations are those that go beyond discussion of the general issues in dispute, the identity of parties or participants and scheduling or administrative issues. Any disclosure that a party might expect the mediator to hold confidential pursuant to Standard III is a substantive conversation.

A mediator who is a lawyer, therapist or other professional may not mediate the dispute when the mediator or the mediator's professional partners or co-shareholders has advised, counseled or represented any of the parties in any matter concerning the subject of the dispute, an action closely related to the dispute, a preceding issue in the dispute or an out growth of the dispute.

D. A mediator shall not charge a contingent fee or a fee based on the outcome of the mediation.

E. A mediator shall not use information obtained or relationships formed during a mediation for personal gain or advantage.

F. A mediator shall not knowingly contract for mediation services which cannot be delivered or completed as directed by a court or in a timely manner.

G. A mediator shall not prolong a mediation for the purpose of charging a higher fee.

H. A mediator shall not give or receive any commission, rebate or other monetary or non-monetary form of consideration from a party or representative of a party in return for referral or expectation of referral of clients for mediation services, except that a mediator may give or receive de minimis offerings such as sodas, cookies, snacks or lunches served to those attending mediations conducted by the mediator and intended to further those mediations or intended to show respect for cultural norms.

A mediator should neither give nor accept any gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

VIII. Protecting the Integrity of the Mediation Process. A mediator shall encourage mutual respect between the parties and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

A. A mediator shall make reasonable efforts to ensure a balanced discussion and to prevent manipulation or intimidation by either party and to ensure that each party understands and respects the concerns and position of the other even if they cannot agree.

B. If a mediator believes that the statements or actions of any participant, including those of a lawyer who the mediator believes is engaging in or has engaged in professional misconduct, jeopardize or will jeopardize the integrity of the mediation process, the mediator shall attempt to persuade the participant to cease

his/her behavior and take remedial action. If the mediator is unsuccessful in this effort, s/he shall take appropriate steps including, but not limited to, postponing, withdrawing from or terminating the mediation. If a lawyer's statements or conduct are reportable under Standard III.C(2), the mediator shall report the lawyer to the State Bar or the court having jurisdiction over the matter in accordance with North Carolina State Bar Rule of Professional Conduct 8.3.

In the Supreme Court of North Carolina

Order Adopting Amendments to the Rules of the North Carolina Supreme Court for the Dispute Resolution Commission

WHEREAS, Section 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission to provide for the certification and qualification of mediators, other neutrals, and mediation and other neutral training programs, the regulation of mediators, other neutrals, trainers, and managers affiliated with certified or qualified programs, and

WHEREAS, N.C.G.S. § 7A-38.2(b) provides for this Court to implement section 7A-38.2 by adopting rules,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(b), the Supreme Court's Rules for the Dispute Resolution Commission are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of April, 2014.

Adopted by the Court in conference the 23rd day of January, 2014. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Supreme Court's Rules for the Dispute Resolution Commission amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

Hudson, J., Recused.

s/Beasley, J.
For the Court

REVISED RULES OF THE NORTH CAROLINA SUPREME COURT FOR THE DISPUTE RESOLUTION COMMISSION

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I. OFFICERS OF THE COMMISSION

A. Officers. The North Carolina Dispute Resolution Commission (Commission) shall establish the offices of chair and vice chair.

B. Appointment; Elections.

(1) The chair shall be appointed for a two-year term and shall serve at the pleasure of the Chief Justice of the Supreme Court of North Carolina. (Supreme Court).

(2) The vice chair shall be elected by vote of the full Commission for a two-year term and shall serve in the absence of the chair.

C. Committees.

(1) The chair may appoint such standing and *ad hoc* committees as are needed and designate Commission members to serve as committee chairs.

(2) The chair may appoint ex-officio members to serve on either standing or *ad hoc* committees. Ex-officio members shall have particular expertise in dispute resolution or be representatives of dispute resolution programs or organizations. Ex officio members may not vote upon issues before committees or before the Commission.

II. COMMISSION OFFICE; STAFF

A. Office. The chair, in consultation with the director of the North Carolina Administrative Office of the Courts (NCAOC), is authorized to establish and maintain an office for the conduct of Commission business.

B. Staff. The chair, in consultation with the director of the NCAOC, is authorized to appoint an executive secretary and to: (1) fix his or her terms of employment, salary, and benefits; (2) determine the scope of his or her authority and duties; and (3) delegate to the executive secretary the authority to employ necessary secretarial and staff assistants, with the approval of the director of the NCAOC.

III. COMMISSION MEMBERSHIP

A. Vacancies. Upon the death, resignation, or permanent incapacitation of a member of the Commission, the chair shall notify the appointing authority and request that the vacancy created by the death, resignation, or permanent incapacitation be filled. The appointment of a successor shall be for the former member's unexpired term.

B. Disqualifications. If, for any reason, a Commission member becomes disqualified to serve, that member's appointing authority shall be notified and requested to take appropriate action. If a member resigns or is removed, the appointment of a successor shall be for the former member's unexpired term.

C. Conflicts of Interest and Recusals. All Commission members must:

(1) Disclose any present or prior interest or involvement in any matter pending before the Commission or its committees for decision upon which the member is entitled to vote;

(2) Recuse himself or herself from voting on any such matter if his or her impartiality might reasonably be questioned; and

(3) Continue to inform themselves and to make disclosures of subsequent facts and circumstances requiring recusal.

An ex-officio member who has a conflict of interest with regard to a matter before a committee or the Commission shall disclose his/her conflict before engaging in any dicussion related to the matter.

D. Compensation. Pursuant to N.C.G.S. § 138-5, ex officio members of the Commission shall receive no compensation for their services but may be reimbursed for their out of pocket expenses necessarily incurred on behalf of the Commission and for their mileage, subsistence, and other travel expenses at the per diem rate established by statutes and regulations applicable to state boards and commissions.

IV. MEETINGS OF THE COMMISSION

A. Meeting Schedule. The Commission shall meet at least twice each year pursuant to a schedule set by the Commission and in special sessions at the call of the chair or other officer acting for the chair.

B. Quorum. A majority of Commission members shall constitute a quorum. Decisions shall be made by a majority of the members present and voting except that decisions to dismiss complaints or impose sanctions pursuant to Rule IX of these Rules or to deny certification or certification renewal or to revoke certification pursuant to Rule X of these Rules shall require an affirmative vote consistent with those Rules.

C. Public Meetings. All meetings of the Commission for the general conduct of business and minutes of such meetings shall be open and available to the public except that meetings, portions of meetings, or hearings conducted pursuant to Rules IX and X of these Rules may be closed to the public in accordance with those Rules.

D. Matters Requiring Immediate Action. If, in the opinion of the chair, any matter requires a decision or other action before the next regular meeting of the Commission and does not warrant the call of a special meeting, it may be considered and a vote or other action taken by correspondence, telephone, facsimile, or other practicable method; provided, all formal Commission decisions taken are reported to the executive secretary and included in the minutes of Commission proceedings.

E. Committee Meetings. Committees shall meet as needed. A majority of committee members eligible to vote shall constitute a quorum for purposes of standing and *ad hoc* committee meetings. Decisions shall be made by a majority of the members eligible to vote who are present and voting except that decisions to dismiss complaints or impose sanctions pursuant to Rule IX of these Rules or to deny certification or certification renewal or to revoke certification pursuant to Rule X of

these Rules shall require an affirmative vote consistent with those Rules.

V. COMMISSION'S BUDGET

The Commission, in consultation with the director of the NCAOC, shall prepare an annual budget. The budget and supporting financial information shall be public records.

VI. POWERS AND DUTIES OF THE COMMISSION

The Commission shall have the authority to undertake activities to expand public awareness of dispute resolution procedures, to foster growth of dispute resolution services in this state, and to ensure the availability of high quality mediation training programs and the competence of mediators. Specifically, the Commission is authorized and directed to do the following:

A. Review and approve or disapprove applications of (1) persons seeking to have training programs certified; (2) persons seeking certification as qualified to provide mediation training; (3) attorneys and non attorneys seeking certification as qualified to conduct mediated settlement conferences and mediations; and (4) persons or organizations seeking reinstatement following a prior suspension or decertification.

B. Review applications as against criteria for certification set forth in rules adopted by the Supreme Court for mediated settlement conference/mediation programs operating under the Commission's jurisdiction and as against such other requirements of the Commission which amplify and clarify those rules. The Commission may adopt application forms and require their completion for approval.

C. Compile and maintain lists of certified trainers and training programs along with the names of contact persons, addresses, and telephone numbers and make those lists available on-line or upon request.

D. Institute periodic review of training programs and trainer qualifications and re certify trainers and training programs that continue to meet criteria for certification. Trainers and training programs that are not re certified shall be removed from the lists of certified trainers and certified training programs.

E. Compile, keep current, and make available on-line lists of certified mediators which specify the judicial districts in which each mediator wishes to practice.

F. Prepare, keep current, and make available on-line biographical information submitted to the Commission by certified mediators in order to make such information accessible to court staff, lawyers, and the wider public.

G. Make reasonable efforts on a continuing basis to ensure that the judiciary, clerks of court, court administration personnel, attorneys, and to the extent feasible, parties to mediation, are aware of the Commission and its office and the Commission's duty to receive and hear complaints against mediators and mediation trainers and training programs.

VII. MEDIATOR CONDUCT

The conduct of all mediators, mediation trainers, and managers of mediation training programs must conform to the Standards of Professional Conduct for Mediators (Standards) adopted by the Supreme Court and enforceable by the Commission and the standards of any professional organization of which such person is a member that are not in conflict nor inconsistent with the Standards. A certified mediator shall inform the Commission of any criminal convictions, disbarments or other revocations or suspensions of a professional license, complaints filed against the mediator or disciplinary actions imposed upon the mediator by any professional organization, judicial sanctions, civil judgments, tax liens or filings for bankruptcy. Failure to do so is a violation of these Rules. Violations of the Standards or other professional standards or any conduct otherwise discovered reflecting a lack of moral character or fitness to conduct mediations or which discredits the Commission, the courts or the mediation process may subject a mediator to disciplinary proceedings by the Commission.

VIII. STANDARDS AND ADVISORY OPINIONS COMMITTEE

A. The Standards and Advisory Opinions Committee. The Commission's chair shall appoint a standing committee on Standards and Advisory Opinions to address the matters listed below in Rule VIII.B. Members of the Standards and Advisory Opinions Committee shall recuse themselves from discussing or deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest. Pursuant to Rule I.C(2) only Commission members may vote on matters before the Standards and Advisory Opinions Committee.

B. Matters to Be Considered by the Standards and Advisory Opinions Committee. The Standards and Advisory Opinions Committee shall review and consider the following:

(1) Matters relating to the Standards, including making recommendations for revisions to the Standards.

(2) Commission staff requests for assistance in responding to inquiries from mediators and the public regarding matters of ethics and Standards interpretation and the drafting of advisory opinions pursuant to the Commission's Advisory Opinion Policy.

(3) Matters relating to mediator advertising, including advertising or related materials, asserting that the individual or training program featured in the advertisement is certified or eligible to be certified.

(4) Matters that interface with the N.C. State Bar or other professional regulatory agencies regarding inconsistencies and/or conflicts between DRC Rules and the rules of those entities.

C. Initial Staff Review.

(1) Commission staff may respond in writing to requests for advice under VIII.B and may respond orally when time is of the essence. Written requests for formal advisory opinions shall be referred to the Chair of the Standards and Advisory Opinions Committee in compliance with procedures established by the committee. The referral procedure shall ensure that the case file number, names of parties, and other identifying information are deleted so that any decision cannot be influenced by this information.

(2) All requests for informal advice shall be logged by Commission staff and the requesting party's confidentiality shall be maintained unless otherwise requested by the requesting party.

D. Review by Standards and Advisory Opinions Committee.

(1) If the Standards and Advisory Opinions Committee Chair determines that a formal Commission advisory opinion is not warranted under VIII.B, the requesting party shall be so advised in writing and provided with informal advice if requested.

(2) If the Standards and Advisory Opinions Committee Chair determines that a Commission advisory opinion is warranted under VIII.B, the matter shall be considered by the Standards and Advisory Opinions Committee, and if the

Standards and Advisory Opinions Committee concurs, a proposed advisory opinion shall be prepared and submitted to the Commission for its consideration. If the Standards and Advisory Opinions Committee determines that a formal Commission advisory opinion is not warranted under VIII.B, the requesting person shall be so advised in writing and provided with informal advice if requested.

IX. GRIEVANCE AND DISCIPLINARY COMMITTEE

A. Grievance and Disciplinary Committee. The Commission's chair shall appoint a standing committee entitled the Grievance and Disciplinary Committee to address the matters listed below in Paragraph B. Members of the Committee shall shall recuse themselves from discussing or deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest. Pursuant to Rule I.C(2) only Commission members may vote on matters before the Grievance and Disciplinary Committee.

B. Matters to Be Considered by the Grievance and Disciplinary Committee. The Grievance and Disciplinary Committee shall review and consider the following:

(1) Matters relating to the moral character, conduct, or fitness to practice of an applicant for mediator certification or certification renewal or of a certified mediator and appeals of staff decisions to deny an application for mediator certification or certification renewal on the basis of the applicant's moral character, conduct, or fitness to practice.

(2) Matters relating to the moral character, conduct, or fitness to practice of any trainer or manager affiliated with a certified mediator training program or a training program that is an applicant for certification or certification renewal and appeals of staff decisions to deny an application for mediator training program certification or certification renewal on the basis of the moral character, conduct, or fitness to practice of any trainer or manager affiliated with the program.

(3) Complaints by a member of the Commission, its staff, a judge, court staff, or any member of the public regarding the moral character, conduct, or fitness to practice of a mediator under the Commission's jurisdiction or a trainer

or manager affiliated with a certified mediator training program.

C. Initial Staff Review and Determination.

(1) Review and Referral of Matters Relating to Moral Character, Conduct, or Fitness to Practice. Commission staff shall review information relating to the moral character, conduct, or fitness to practice of applicants seeking mediator certification or certification renewal, including matters which applicants are required to report under program rules, and information relating to the moral character, conduct, or fitness to practice of trainers and managers affiliated with mediator training programs seeking certification or certification renewal (applicants).

Commission staff may contact applicants to discuss matters reported and may conduct background checks on applicants. Any third party with knowledge of any information relating to the moral character, conduct, or fitness to practice of an applicant may notify the Commission. Commission staff shall seek to verify any such third party reports and may disregard those that cannot be verified. Commission staff may contact any agency where complaints about an applicant have been filed or any agency or judge that has imposed discipline on an applicant.

All such reported matters or any other information gathered by Commission staff and bearing on moral character, conduct, or fitness to practice shall be forwarded directly to the Grievance and Disciplinary Committee for its review, except those matters expressly exempted from review by the Guidelines for Reviewing Pending Grievances/Complaints, Disciplinary Actions Taken, Convictions, Civil Judgments, Tax Liens, Bankruptcies, and Other Matters Relevant to Good Moral Character (Guidelines). Matters that are exempted by the Guidelines may be processed by Commission staff and will not act as a bar to certification or certification renewal.

Commission staff or the Grievance and Disciplinary Committee may elect to take any matter relating to an applicant's moral character, conduct, or fitness to practice, including matters reported by third parties or revealed by background check, and process it as a complaint pursuant to Rule IX.C(3) below. Commission staff may consult with the Grievance and Disciplinary Committee's chair prior to making such election.

(2) Commission Staff Review of Oral or Written Complaints. Commission staff shall review oral and written complaints made to the Commission regarding the moral character, conduct, or fitness to practice of a mediator under the jurisdiction of the Commission or a trainer or manager affiliated with a certified mediator training program (respondents), except that Commission staff shall not act on anonymous complaints unless staff can independently verify the allegations made.

(a) Oral complaints. If after reviewing an oral complaint, Commission staff determines it is necessary to contact any third parties including any witnesses identified by the complaining party or other third parties identified by staff during its review of the complaint, or to refer the matter to the Grievance and Disciplinary Committee, the Commission staff shall first make a summary of the complaint and forward it to the complaining party who shall be asked to sign the summary along with a release and to return it to the Commission's office, except that when complaints are initiated by a member of the Commission, the Grievance and Disciplinary Committee, the Standards and Advisory Opinions Committee or by Commission staff, judges, other court officials, or court staff, they need not be in writing and may be filed anonymously.

(b) Written complaints. Commission staff shall acknowledge all written complaints within 30 days of receipt. Written complaints may be made by letter, email or filed on the Commission's approved complaint form. If a complaint is not made on the approved form, Commission staff shall require the complaining party to sign a release before contacting any third parties in the course of an investigation.

(c) If a complaining party refuses to sign a complaint summary prepared by Commission staff or to sign a release or otherwise seeks to withdraw a complaint after filing it with the Commission, Commission staff or a Grievance and Disciplinary Committee member may pursue the complaint. In determining whether to pursue a complaint independently, Commission staff or a Grievance and Disciplinary Committee member shall consider why the complaining party is

unwilling to pursue the matter further, whether the complaining party is willing to testify if a hearing is necessary, whether the complaining party has specifically asked to withdraw the complaint, the seriousness of the allegations made in the complaint, whether the circumstances complained of may be independently verified without the complaining party's participation, and whether there have been previous complaints filed regarding the respondent's conduct.

(d) If Commission staff asks a respondent to respond in writing to an oral or written complaint, the respondent shall be provided with a summary of or a copy of the complaint and any supporting evidence provided by the complaining party. The respondent shall have 30 days from the date of the letter transmitting the complaint to respond. Upon request, the respondent may be afforded 10 additional days to respond to the complaint.

(e) Any complaint made pursuant to Rule IX.C above regarding the conduct of a certified mediator during a mediation, from appointment or selection through conclusion by settlement or impasse, not filed within one (1) year of the conclusion of such mediation shall be deemed untimely and shall be subject to summary dismissal.

(3) Initial Determination on Oral and Written Complaints. After reviewing a Rule IX.B(3) complaint and any additional information gathered, including information supplied by the respondent and any witnesses or other third parties contacted, Commission staff shall determine whether to:

(a) Recommend dismissal. Commission staff shall make a recommendation to dismiss a complaint upon concluding that the complaint does not allege facts sufficient to constitute a violation of a rule, standard, or guideline enforceable under the jurisdiction of the Commission. Such recommendation shall be made to the chair of the Grievance and Disciplinary Committee. If after giving the complaint due consideration, the Grievance and Disciplinary Committee chair disagrees with the recommendation to dismiss, s/he may direct staff to refer the matter for

conciliation or to the full Grievance and Disciplinary Committee for review. If the chair agrees with the recommendation, the complaint shall be dismissed with notification to the complaining party, the respondent, and any witnesses or others contacted. The complaining party and respondent shall be notified of the dismissal by certified US mail, return receipt requested and such service shall be deemed sufficient for purposes of these Rules Commission staff shall note for the file why a determination was made to dismiss the complaint and shall report on such dismissals to the Grievance and Disciplinary Committee. Dismissed complaints shall remain on file with the Commission for at least five years and the Grievance and Disciplinary Committee may take such complaints into consideration if additional complaints are later made against the same respondent.

The complaining party shall have 30 days from the date of the letter notifying him or her of the dismissal to appeal the determination in writing to the full Grievance and Disciplinary Committee.

(b) Refer to conciliation. If Commission staff determines that the complaint appears to be largely the result of a misunderstanding between the respondent and complainant or raises a best practices concern(s) or involves technical or relatively minor rule violation(s) resulting in minimal harm to the complainant, the matter may be referred for conciliation if the parties are willing to discuss the basis of the complaint. Once a matter is referred for conciliation, Commission staff may serve as a resource to the parties, but shall not act as their mediator. Prior to or at the time a matter is referred for conciliation, Commission staff shall provide written information to the complainant explaining the conciliation process and advising him/her that the complaint will be deemed to be resolved and the file closed if the complainant does not notify the Commission within 90 days of the referral that conciliation either failed to occur or did not resolve the matter. If either the complaining party or the respondent refuses conciliation or the complaining party notifies Commission staff that conciliation

failed, Commission staff may refer the matter to the Grievance and Disciplinary Committee for review or to the Grievance and Disciplinary Committee chair with a recommendation for dismissal.

(c) Refer to the Grievance and Disciplinary Committee. Following initial investigation, including contacting the respondent, any witnesses, or other third parties as necessary, Commission staff shall refer all Rule IX.B(3) matters to the full Grievance and Disciplinary Committee when such matters raise concerns about possible significant program rule or Standards violations or raise a significant question about a respondent's moral character, conduct, or fitness to practice. No matter shall be referred to the Grievance and Disciplinary Commit tee until the respondent has been forwarded a copy of the complaint or a summary and a copy of these Rules and allowed a 30 day period in which to respond.

The respondent's response to the complaint and the responses of any witnesses or others contacted during the investigation shall not be forwarded to the complainant, except as provided for in N.C.G.S. § 7A-38.2(h) and there shall be no opportunity for rebuttal. The response shall be included in the materials forwarded to the Grievance and Disciplinary Committee. If any witnesses or others were contacted, any written responses or summaries of responses shall also be included in the materials forwarded to the Grievance and Disciplinary Committee.

(4) Confidentiality. Commission staff will create and maintain files for all matters considered pursuant to Rule IX.B. All information in those files pertaining to applicants for certification or certification renewal shall remain confidential in accordance with N.C.G.S. § 7A-38.2(h). Information pertaining to complaints regarding the character, conduct, or fitness to practice of mediators or trainers or managers affiliated with certified training programs shall remain confidential until such time as the Grievance and Disciplinary Committee completes its preliminary investigation and finds probable cause pursuant to Rule IX.D(2) and N.C.G.S. § 7A-38.2(h).

Commission staff shall reveal the names of applicants and respondents to the Grievance and Disciplinary Committee and the Grievance and Disciplinary Committee shall keep the names of applicants and respondents and other identifying information confidential except as provided for in N.C.G.S. § 7A-38.2(h).

D. Grievance and Disciplinary Committee Review and Determination on Matters Referred by Staff.

(1) Grievance and Disciplinary Committee Review of Applicant Moral Character Issues and Complaints.

The Grievance and Disciplinary Committee shall review matters brought before it by Commission staff pursuant to the provisions of Rule IX.B above and may contact any other persons or entities with knowledge of the matter for additional information. The chair may in his/her discretion appoint members of the Grievance and Disciplinary Committee to serve on a subcommittee to investigate a particular matter brought to the Grievance and Disciplinary Committee by Commission staff. The chair of the Grievance and Disciplinary Committee or his/her designee may issue subpoenas for the attendance of witnesses and for the production of books, papers, or other documentary evidence deemed necessary or material to the Grievance and Disciplinary Committee's investigation and review of the matter.

(2) Grievance and Disciplinary Committee Deliberation.

The Grievance and Disciplinary Committee shall deliberate to determine whether probable cause exists to believe that an applicant or respondent's conduct:

(a) is a violation of the Standards of Professional Conduct for Mediators or any other standards of professional conduct that are not in conflict with nor inconsistent with the Standards and to which the mediator, trainer, or manager is subject;

(b) is a violation of Supreme Court program rules or any other program rules for mediated settlement conference/ mediation programs;

(c) is inconsistent with good moral character (Mediated Settlement Conference Program Rule 8.E., Family Financial Settlement Conference Rule 8.F and District Criminal Court Rule 7.E);

(d) reflects a lack of fitness to conduct mediated settlement conferences/mediations or to serve as a trainer or training program manager (Rule VII above); and/or

(e) serves to discredits the Commission, the courts, or the mediation process (Rule VII above).

(3) Grievance and Disciplinary Committee Determination.

Following deliberation, the Grievance and Disciplinary Committee shall determine whether to dismiss a matter, make a referral, or impose sanctions.

(a) To dismiss. If a majority of Grievance and Disciplinary Committee members reviewing an issue of moral character, conduct, or fitness to practice or a complaint and eligible to vote finds no probable cause, the Grievance and Disciplinary Committee shall dismiss the matter and instruct Commission staff to:

(i) certify or recertify the applicant, if an application is pending, or to notify the mediator or training program by certified U.S. mail, return receipt requested, that no further action will be taken in the matter, or

(ii) notify the complaining party and the respondent that no further action will be taken and that the matter is dismissed.

(b) To refer. If after reviewing an application for certification or certification renewal or a complaint, a majority of Grievance and Disciplinary Committee members eligible to vote determines that:

(i) any violation of the program rules or Standards that occurred was technical or relatively minor in nature, caused minimal harm to a complainant, and did not discredit the program, courts, or Commission, the Grievance and Disciplinary Committee may:

(1) dismiss the complaint with a letter to the complaining party and respondent notifying them of the dismissal, citing the violation and advising the mediator to avoid such conduct in the future, or

(2) refer the respondent to one or more members of the Grievance and Disciplinary Committee to discuss the matter and explore ways that the respondent may avoid similar com-plaints in the future.

(ii) respondent's conduct involves no violations, but raises best practices or professionalism concerns, the Grievance and Disciplinary Committee may:

(1) direct staff to dismiss the complaint with a letter to the respondent advising him/ her of the Grievance and Disciplinary Committee's concerns and providing guidance;

(2) direct the respondent to meet with one or more members of the Grievance and Disciplinary Committee who will informally discuss the Grievance and Disciplinary Committee's concerns and provide counsel; or

(3) refer the respondent to the Chief Justice's Commission on Professionalism for counseling and guidance.

(iii) the applicant or respondent's conduct raises significant concerns about his/her fitness to practice, including concerns about mental instability, mental health, lack of mental acuity or possible dementia, or concerns about possible alcohol or substance abuse, the Grievance and Disciplinary Committee may, in lieu of or in addition to imposing sanctions, refer the applicant or respondent to the North Carolina State Bar's Lawyer Assistance Program (LAP) for evaluation or if the applicant or respondent is not a lawyer, to a physician, other licensed mental health professional, or to a substance abuse counselor or organization.

A complaining party shall have no right of appeal from a Grievance and Disciplinary Committee determination to dismiss a complaint or to refer a mediator pursuant to subsections (a) or (b) above.

Neither letters regarding conduct nor referrals are to be considered sanctions under Rule IX.E(10) below. Rather, such are intended as opportunities to address concerns and to help applicants and respond-

perform more effectively as mediators. There may, however, be instances that are more serious in nature where the Grievance and Disciplinary Committee may both make a referral and impose sanctions under Rule IX.E(10).

In the event that an applicant or respondent is referred to one or more members of the Grievance and Disciplinary Committee for counsel, to LAP, or to some other professional or entity and fails to cooperate regarding the referral, refuses to sign releases or to provide any resulting evaluations to the Grievance and Disciplinary Committee; or should any resulting discussions or evaluation(s) suggest that the applicant or respondent is not currently capable of serving as a mediator, trainer, or manager, the Grievance and Disciplinary Committee reserves the right to make further determinations in the matter, including decertification. During a referral under (iii) above, the Grievance and Disciplinary Committee may require respondent to cease practicing as a mediator, trainer, or manager during the referral period and until such time as the Grievance and Disciplinary Committee has authorized his/her return to active practice. The Grievance and Disciplinary Committee may condition a certification or certification renewal on the applicant's successful completion of the referral process. Any costs associated with a referral, e.g., costs of evaluation or treatment, shall be borne entirely by the applicant or respondent.

(c) To propose sanctions. If a majority of Grievance and Disciplinary Committee members eligible to vote find(s) probable cause pursuant to Rule IX.D(2) above, the Grievance and Disciplinary Committee shall propose sanctions on the applicant or respondent pursuant to Rule IX.E(10), except as provided for in Rule IX.D(3)(b)(i).

Within the 30-day period set forth in Rule IX.D(4) below, an applicant or respondent may contact the Grievance and Disciplinary Committee and object to any referral made or sanction imposed on the applicant or respondent, including objecting to any public posting of a sanction, and seek to negotiate some

other outcome with the Grievance and Disciplinary Committee. The Grievance and Disciplinary Committee shall have the authority to engage in such negotiations with the applicant or respondent. During the negotiation period, the applicant or respondent may request an extension of the time in which to request an appeal under Rule IX.D(4) below. Commission staff, in consultation with the Grievance and Disciplinary Committee chair, may extend the appeal period up to an additional 30 days in order to allow more time to complete negotiations.

Notification of any dismissal, referral, or sanction imposed pursuant to subsections (a), (b), or (c) above shall be by certified US mail, return receipt requested, and such service shall be deemed sufficient for purposes of these Rules. All witnesses and any others contacted by staff or committee member shall be notified, if feasible, of any dismissal.

(4) Right of Appeal. If a referral is made or sanctions are imposed, the applicant or respondent shall have 30 days from the date of the letter sent by U.S. certified mail, return receipt requested, transmitting the Grievance and Disciplinary Committee's findings and actions to appeal. Notification of appeal must be made to the Commission's office in writing. If no appeal is received within 30 days, the applicant or respondent shall be deemed to have accepted the Grievance and Disciplinary Committee's findings and proposed sanctions. The complainant does not have a right of appeal.

E. Appeal to the Commission.

(1) The Commission Shall Meet to Consider Appeals. An appeal of the Grievance and Disciplinary Committee's determination pursuant to Rule IX.D.(4) above shall be heard by the members of the Commission, except that all members of the Grievance and Disciplinary Committee who participated in issuing the determination on appeal shall be recused and shall not participate in the Commission's deliberations. No matter shall be heard and decided by less than three Commission members. Members of the Commission shall recuse themselves when they cannot act impartially. Any challenges questioning the neutrality of a member shall be decided by the Commission's chair.

(2) Conduct of the Hearing.

(a) At least 30 days prior to the hearing before the Commission, Commission staff shall forward to all parties, special counsel to the Commission, and members of the Commission who will hear the matter, copies of all documents considered by the Grievance and Disciplinary Committee and summaries of witness or other third party interviews and/or character recommendations.

(b) Hearings conducted by the Commission pursuant to this rule shall be *de novo*.

(c) Applicants, complainants, respondents, and any witnesses or others identified as having relevant information about the matter may appear at the hearing with or without counsel.

(d) All hearings will be open to the public except that for good cause shown the presiding officer may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing will be closed to the public over the objection of an applicant or respondent.

(e) In the event that the applicant, complainant or respondent fails to appear without good cause, the Commission shall proceed to hear from those parties and witnesses who are present and to make a determination based on the evidence presented at the proceeding.

(f) Proceedings before the Commission shall be conducted informally, but with decorum.

(g) The Commission, through its counsel, and applicant or respondent may present evidence in the form of sworn testimony and/or written documents. The Commission, through its counsel, and the applicant or respondent may cross-examine any witness called to testify by the other. Commission members may question any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The Commission shall consider all evidence presented and give it appropriate weight and effect.

(h) The Commission's chair or designee shall serve as the presiding officer. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and speedy investigation and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers, or other documentary evidence.

(3) Date of Hearing. An appeal of any sanction proposed by the Grievance and Disciplinary Committee shall be heard by the Commission within 180 days of the date the notice of appeal is filed with the Commission.

(4) Notice of Hearing. The Commission's office shall serve on all parties by certified U.S. mail, return receipt requested, notice of the date, time and place of the hearing no later than 60 days prior to the hearing and such service shall be deemed sufficient for purposes of these Rules.

(5) ***Ex Parte*** **Communications.** No person shall have any *ex parte* communication with members of the Commission concerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to Commission staff.

(6) Attendance. All parties, including applicants, complainants, and respondents, shall attend in person. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or to allow witnesses to testify by telephone or through video conference with such limitations and conditions as are just and reasonable. If an attorney or witness appears by telephone or videoconference, the Commission's staff must be notified at least 20 days prior to the proceeding. At least five days prior to the proceeding, the Commission's staff must be provided with contact information for those who will participate by telephone or video conference.

(7) Witnesses. The presiding officer shall exercise discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office and to all other parties at least 10 days prior to the hearing, the names of all witnesses who will be called to testify.

(8) Transcript. The Commission shall retain a court reporter to keep a record of the proceeding. Any party who wishes to obtain a transcript of the record may do so at his/her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of tapes, non-certified transcripts therefrom, or a record made by a court reporter retained by a party are not part of the official record.

(9) Commission Decision. After the hearing, a majority of the Commission members hearing the appeal may:

(a) find that there is not clear and convincing evidence to support the referral or imposition of sanctions and, therefore, dismiss the complaint or direct Commission staff to certify or recertify the mediator or mediator training program, or

(b) find that there is clear and convincing evidence that grounds exist to refer or to impose sanctions. The Commission may impose the same or different sanctions than imposed by the Grievance and Disciplinary Committee or make the same or a different referral. The Commission shall set forth its findings, conclusions, referral and /or sanctions, or other action, in writing and serve its decision on the parties within 60 days of the date of the hearing. Notification of the decision shall be sent by certified US mail, return receipt requested and such service shall be deemed sufficient for purposes of these Rules.

(10) Sanctions. The sanctions that may be proposed by the Grievance and Disciplinary Committee or imposed by the Commission include, but are not limited to, the following:

(a) Private, written admonishment;
(b) Public, written admonishment;
(c) Completion of additional training;
(d) Restriction on types of cases to be mediated in the future;
(e) Reimbursement of fees paid to the mediator or training program;
(f) Suspension for a specified term;
(g) Probation for a specified term;
(h) Certification or renewal of certification upon condi-tions;

(i) Denial of certification or certification renewal;
(j) Decertification;
(k) Prohibition on participation as a trainer or manager of a certified mediator training program either indefinitely or for a period of time; and
(l) Any other sanction deemed appropriate by the Grievance and Disciplinary Committee/Commission.

(11) Publication of Grievance and Disciplinary Committee/ Commission Decisions.

(a) Names of respondents who have been reprimanded privately or applicants who have never been certified and have been denied certification shall not be published in the Commission's newsletter nor on its web site.

(b) Names of respondents or applicants who are sanctioned under any other provision of Rule IX.E(10) above and who have been denied reinstatement under Rule IX.E(13) below shall be published in the Commission's newsletter and on its website along with a short summary of the facts involved and the discipline imposed. For good cause shown, the Commission may waive this requirement.

(c) Chief district court judges and/or senior resident superior court judges in judicial districts in which a mediator serves, the NC State Bar and any other professional licensing/certification bodies to which a mediator is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any sanction imposed upon a mediator except those named in Rule IX.E(11)(a) above.

(d) If the Commission imposes sanctions as a result of a complaint filed by a third party, the Commission's office shall, on request, release copies of the complaint, response and Commission/Grievance and Discipliniary Committee decision.

(12) Appeal. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions imposing sanctions or denying applications for mediator or mediator training program certification or certification renewal. An order

imposing sanctions or denying applications for mediator or mediator training program certification or certification renewal shall be reviewable upon appeal and the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed in the Superior Court in Wake County within 30 days of the date of the Commission's decision.

(13) Reinstatement. An applicant, mediator, trainer, or manager who has been sanctioned under this rule may be certified or reinstated as a certified mediator or training program or as an active trainer or manager pursuant to Rule IX.E(13)(h) below. Except as otherwise provided by the Grievance and Disciplinary Committee or Commission, no application for instatement may be tendered within two years of the date of the sanction or denial.

(a) A petition for reinstatement shall be made in writing, verified by the petitioner and filed with the Commission's office.

(b) The petition for reinstatement shall contain:

(i) the name and address of the petitioner;

(ii) the reasons why certification was denied or the moral character, conduct, or fitness concerns upon which the suspension or decertification or the bar to serving as a trainer or training program manager was based; and

(iii) a concise statement of facts claimed to justify certification or reinstatement as a certified mediator, certified training program or a trainer or program manager affiliated with a certified training program.

(c) The petition for reinstatment may also contain a request for a hearing on the matter to consider any additional evidence which the petitioner wishes to put forth, including any third party testimony regarding his or her character, competency, or fitness to practice as a mediator, trainer, or manager.

(d) The Commission's staff shall refer the petition to the Commission for review

(e) If the petitioner does not request a hearing, the Commission shall review the petition and shall make a decision within 60 days of the filing of the petition. That decision shall be final. If the petitioner requests a hearing, it shall be held within 180 days of the filing of the petition. The Commission shall conduct the hearing consistent with Rule IX.E(2) above. At the hearing, the petitioner may:

(i) appear personally and be heard;
(ii) be represented by counsel;
(iii) call and examine witnesses;
(vi) offer exhibits; and
(v) cross-examine witnesses.

(f) At the hearing, the Commission may call witnesses, offer exhibits, and examine the petitioner and witnesses.

(g) The burden of proof shall be upon the petitioner to establish by clear and convincing evidence:

(i) that the petitioner has rehabilitated his/her character; addressed and resolved any conditions which led to his/her denial of certification or suspension or decertification; completed additional training in mediation theory and practice to ensure his/her competency as a mediator, trainer or manager; and/or taken steps to address and resolve any other matter(s) which led to the petitioner's denial, suspension, decertification, or prohibition from serving as a trainer or manager;

(ii) the petitioner's certification will not be detrimental to the Mediated Settlement Conference, Family Financial Settlement, Clerk Mediation, District Criminal Court Mediation Program, or other program rules, or to the Commission, courts, or public; and

(iii) that the petitioner has completed any paperwork required for certification or reinstatement and paid any required reinstatement and/or certification fees.

(h) If the petitioner is found to have rehabilitated him or herself and is fit to serve as a mediator, trainer, or

manager, the Commission shall certify or reinstate the petitioner as a certified mediator or training program or as an active trainer or manager. Certification or reinstatement may be conditioned upon the completion of additional training and observations as needed to refresh skills and awareness of program rules and requirements.

(i) The Commission shall set forth its decision to certify or reinstate a petitioner or to deny certi-fication or reinstatement in writing, making findings of fact and conclusions of law. Notification of the decision shall be sent by cer-tified US mail, return receipt requested, within 30 days of the date of the hearing, and such ser-vice shall be deemed sufficient for purposes of these Rules.

(j) If a petition seeking certification or reinstatement is denied, the petitioner may not apply again pursuant to this section until two years have lapsed from the date the denial was issued.

(k) The General Court of Justice, Superior Court Division in Wake County, shall have jurisdiction over appeals of Commission decisions to deny certification or reinstatement. An order denying reinstatement shall be reviewable upon appeal, and the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed in the Superior Court in Wake County within 30 days of the date of the Commission's decision.

RULE X. MEDIATOR CERTIFICATION AND TRAINING COMMITTEE

A. Mediator Certification and Training Committee. The chair of the Commission shall appoint a standing committee entitled the Mediator Certification and Training Committee to review the mattersset forth in Rule X.B below. Members of the Certification Committee shall recuse themselves from discussing and deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest. Pursuant to Rule I.C(2) only Commission members may vote on matters before the Committee.

B. Matters to Be Considered by the Mediator Certification and Training Committee. The Mediator Certification and Training Committee shall review and consider the following matters:

(1) Appeals of staff decisions to deny an application filed by a person or mediator training program seeking certification or certification renewal based on deficiencies in the applicant's qualifications unrelated to moral character, conduct, or fitness to practice. Deficiencies relating to moral character, conduct, or fitness to practice shall be considered pursuant to Rule IX above.

(2) Complaints filed by a member of the Commission, its staff, court personnel, or any member of the public regarding the qualifications of an applicant for certification or certification renewal, or the qualifications of a mediator or mediator training program, its managers, or trainers, except that, complaints relating to the moral character, conduct, or fitness to practice of an applicant, mediator, trainer, or manager shall be considered pursuant to Rule IX above.

C. Staff Investigation of Qualifications.

(1) Information obtained during the certification or renewal process. Commission staff shall review all pending applications for certification and certification renewal to determine whether the applicant meets qualifications unrelated to moral character, conduct, or fitness to practice set out in program rules adopted by the Supreme Court for mediated settlement conference/mediation programs under the jurisdiction of the Commission and any guidelines or other policies adopted by the Commission for the purpose of implementing those rules. Commission staff may contact those reporting to request additional information and may consider any other information acquired during the review process that bears on the applicant's eligibility for certification or certification renewal.

(2) Complaints about mediator or mediator training program qualifications filed with the Commission. Commission staff shall forward written complaints about the qualifications of an applicant, certified mediator, certified mediator training program, or any trainer or manager affiliated with such program that do not pertain to moral character, conduct or fitness to practice filed by any member of the general public, the Commission, or its staff, to the Mediator Certification and Training Committee for investi-

gation. Copies of such complaints shall be served on the subject of the complaint by certified U.S. mail, return receipt requested, and such service shall be deemed sufficient for purposes of these Rules.

However, in instances where Commission staff cannot verify the allegations in the complaint or has otherwise verified that the applicant, mediator, or mediator training program meet qualifications for certification or certification renewal set forth in program rules and Commission policies intended to implement those rules, the Commission staff may refer the matter to the Mediator Certification and Training Committee's chair rather than to the Mediator Certification and Training Committee as set forth above. If after giving the complaint due consideration, the chair agrees with the staff's assessment of the matter, the chair may dismiss the complaint with notification to the complaining party. Such notification shall be by certified US mail, return receipt requested, and such service shall be deemed sufficient for purposes of these Rules. The complaining party shall have 30 days from the date of the notification to appeal the chair's determination to the full Mediator Certification and Training Committee. The appeal shall be in writing and directed to the Commission's office. If the chair disagrees with the staff's assessment, staff shall refer the matter to the Mediator Certification and Training Committee.

D. Investigation by the Mediator Certification and Training Committee.

(1) The Mediator Certification and Training Committee shall investigate all matters brought before it by staff pursuant to the provisions of Sections (1) or (2) above. The chair may in his/her discretion appoint members of the Mediator Certification and Training Committee to serve on a sub-committee to investigate a particular matter brought to the committee by Commission staff. The chair or his or her designee may issue subpoenas for the attendance of witnesses and for the production of books, papers, or other documentary evidence deemed necessary or material to any such investigation. The chair or designee may contact the following persons and entities for information concerning such application or complaint:

(a) all references, employers, colleges, and other individuals and entities cited in applications for mediator certification, including any and all other professional licensing or certi-

fication bodies to which the applicant is subject and any additional persons or entities identified by Commission staff during the course of its review as having relevant information about the applicant's qualifications;

(b) personnel affiliated with an applicant for mediator training program certification or certification renewal or personnel affiliated with a certified mediator training program and participants who attended or completed the training program; and

(c) all parties bringing complaints about the qualifications of an applicant for certification or certification renewal, a mediator, or a mediator training program (respondent) unrelated to moral character, conduct, or fitness to practice and any other person or entity with information about the respondent and identified by Commission staff or the Mediator Certification and Training Committee during the course of its review of the complaint.

All information in Commission files pertaining to the initial certification of a mediator or mediator training program or to renewals of such certifications shall be confidential, except as provided in N.C.G.S. § 7A-38.2(h) or these Rules.

(2) Probable Cause Determination. Those members of the Mediator Certification and Training Committee reviewing the matter and eligible to vote shall deliberate to determine whether probable cause exists to believe that the applicant or respondent:

(a) does not meet qualifications for mediator certification or certification renewal unrelated to moral character, conduct, or fitness to practice as set in program rules adopted by the Supreme Court for mediated settlement conference/mediation programs under the jurisdiction of the Commission or guidelines and other policies adopted by the Commission for the purpose of implementing those rules, or

(b) does not meet the qualifications for mediator training program certification or certification renewal as set forth in program rules adopted by the Supreme Court for mediated settlement conference/mediation programs under the jurisdiction of the Commission or guidelines and other policies adopted by the Commission for the purpose of implementing those rules.

If probable cause is found, the application for certification or certification renewal shall be denied or the respondent's certification shall be revoked.

(3) Authority of Mediator Certification and Training Committee to Deny Certification or Certification Renewal or to Revoke Certification.

(a) If a majority of Mediator Certification and Training Committee members reviewing a matter and eligible to vote finds no probable cause pursuant to Rule X.D(2) above, Commission staff shall certify or re-certify the applicant. If the investigation was initiated by the filing of a written complaint, the Mediator Certification and Training Committee shall dismiss the complaint and notify the complaining party and the respondent in writing that the complaint has been dismissed. Notification of dismissal shall be sent by certified US mail, return receipt requested, and such service shall be deemed sufficient for purposes of these Rules. A complaining party shall have no right of appeal from the Mediator Certification and Training Committee's decision to dismiss a complaint or to certify or recertify an applicant.

(b) If a majority of Mediator Certification and Training Committee members reviewing a matter and eligible to vote finds probable cause pursuant to Rule X.D(2) above, the Mediator Certification and Training Committee shall deny certification or certification renewal or revoke certification. The Mediator Certification and Training Committee's findings, conclusions, and denial or revocation shall be in writing and forwarded to applicant or respondent. Notification of the determination shall be sent by certified US mail, return receipt requested, and such service shall be deemed sufficient for purposes of these Rules.

(c) If the Mediator Certification and Training Committee denies certification or certification renewal or revokes certification, the applicant or respondent may appeal the denial or revocation to the Commission within 30 days from the date of the letter transmitting the Mediator Certification and Training Committee's findings and determination. Notification of appeal must be in writing and directed to the Commission's office. If

no appeal is filed within 30 days, the applicant or respondent shall be deemed to have accepted the Mediator Certification and Training Committee's findings and determination.

E. Appeal of the Denial to the Commission.

(1) The Commission Shall Meet. An appeal of a denial or revocation by the Mediator Certification and Training Committee pursuant to Rule X.D(2) above shall be heard by the members of the Commission, except that all members of the Mediator Certification and Training Committee who participated in issuing the determination that is on appeal shall recuse themselves from participating. No matter shall be heard and decided by less than three Commission members. Members of the Commission shall recuse themselves when they cannot act impartially. Any challenges raised by the appealing party or any other party questioning the neutrality of a member shall be decided by the Commission's chair.

(2) Conduct of the Hearing.

(a) At least 30 days prior to the hearing before the Commission, Commission staff shall forward to all parties, special counsel to the Commission, if appointed. and members of the Commission who will hear the matter, copies of all documents considered by the Mediator Certification and Training Committee and summaries of witness interviews and/or character recommendations.

(b) Hearings conducted by the Commission will be a *de novo* review of the Mediator Certification and Training Committee's decision.

(c) The Commission's chair or his/her designee shall serve as the presiding officer. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and speedy investigation and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers, or other documentary evidence.

(d) Special counsel supplied either by the North Carolina Attorney General at the request of the Commission or employed by theCommission may present the evidence in support of the denial or revocation of certification.

Commission members may question any witnesses called to testify at the hearing.

(e) The Commission, through its counsel, and the applicant respondent or his/her/its representative may present evidence in the form of sworn testimony and/or written documents. The Commission, through its counsel, and the applicant or respondent, may cross-examine any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The Commission shall consider all evidence presented and give it appropriate weight and effect.

(f) All hearings shall be conducted in private, unless the applicant or respondent requests a public hearing.

(g) In the event that the complainant, respondent, or applicant fails to appear without good cause, the Commission shall proceed to hear from those parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.

(h) Proceedings before the Commission shall be conducted informally but with decorum.

(3) Date of Hearing. An appeal of any denial or revocation by the Mediator Certification and Training Committee shall be heard by the Commission within 180 days of the date of the letter transmitting the Mediator Certification and Training Committee's findings and determination.

(4) Notice of Hearing. The Commission's office shall serve on all parties by certified U.S. mail, return receipt requested, notice of the date, time, and place of the hearing no later than 60 days prior to the hearing and such service shall be deemed sufficient for purposes of these Rules.

(5) ***Ex Parte*** Communications. No person shall have any *ex parte* communication with members of the Commission concerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to Commission staff.

(6) Attendance. All parties, including complaining parties, respondents, and applicants, or their representatives in the

case of a training program, shall attend in person. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or to allow witnesses to testify by telephone or through video conference with such limitations and conditions as are just and reasonable. If an attorney or witness appears by telephone or video conference, the Commission's staff must be notified at least 20 days prior to the proceeding. At least five days prior to the proceeding, the Commission's staff must be provided with contact information for those who will participate by telephone or video conference.

(7) Witnesses. The presiding officer shall exercise his/her discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office at least 10 days prior to the hearing the names of all witnesses who will testify for them.

(8) Transcript. The Commission shall retain a court reporter to keep a record of the proceeding. Any party who wishes to obtain a transcript of the record may do so at his or her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of tapes, non-certified transcripts therefrom, or a record made by a court reporter retained by a party are not part of the official record.

(9) Commission Decision. After the hearing, a majority of the Commission members hearing the appeal may:

(a) find that there is not clear and convincing evidence to support the denial or revocation and, therefore dismiss the complaint or direct commission staff to certify or recertify the applicant, or

(b) find that there is clear and convincing evidence to affirm the committee's findings and denial or revocation. The Commission shall set forth its findings, conclusions, and denial determination in writing and serve it on the parties within 60 days of the date of the hearing by certified U.S. mail, return receipt requested. Such service shall be deemed adequate for purposes of these Rules.

(10) Publication of Mediator Certification and Training Committee/Commission Decisions.

(a) Names of applicants for mediator certification or names of mediator training programs that are denied certification or certification renewal or who have had their certification revoked pursuant to this rule shall not be published in the Commission's newsletter or on its web site and the determination shall not be generally publicized.

(b) Chief district court judges, senior resident superior court judges, or Clerks in districts which the mediator serves, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any revocation of certification or denial of a renewal.

(11) Appeals. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions denying an application or revoking a certification. An order denying or revoking certification pursuant to this rule shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed in the Superior Court in Wake County within 30 days of the date of the Commission's decision.

(12) Reinstatement of Certification. A mediator or training program whose certification renewal has been denied or whose certification has been revoked under this rule may be reinstated as a certified mediator or mediation training program pursuant to Rule X.E(12)(g) below. An application for reinstatement may be tendered at any time the applicant believes that he/she/it has become qualified to be reinstated.

(a) A petition for reinstatement shall be made in writing, verified by the petitioner, and filed with the Commission's office.

(b) The petition for reinstatement shall contain:

(i) the name and address of the petitioner;

(ii) a concise statement of the reasons upon which the denial of certification renewal or revocation was based; and

(iii) a concise statement of facts claimed to justify certification renewal or reinstatement as a certified mediator or mediator training program.

(c) The petition seeking reinstatement may also contain a request for a hearing on the matter to consider any additional evidence that the petitioner wishes to put forth.

(d) The Commission's staff shall refer the petition to the Commission for review.

(e) If the petitioner does not request a hearing, the Commission shall review the petition and shall make a decision within 90 days of the filing of the petition. That decision shall be final. If the petitioner requests a hearing, it shall be held within 180 days of the filing of the petition. The Commission shall conduct the hearing consistent with Rule X.E(2) above. At the hearing, the petitioner may:

(i) appear personally and be heard;
(ii) be represented by counsel;
(iii) call and examine witnesses;
(iv) offer exhibits; and
(v) cross-examine witnesses.

(f) At the hearing, the Commission may call witnesses, offer exhibits and examine the petitioner and witnesses.

(g) The burden of proof shall be upon the petitioner to establish by clear and convincing evidence that:

(i) the petitioner has satisfied the qualifications that led to the denial or revocation, and

(ii) the petitioner has completed any paperwork required for reinstatement and paid any required reinstatement and/or certification fees.

(h) If the petitioner is found to have met the qualifications and is entitled to have his/her/its certification reinstated, the Commission shall so certify.

(i) If a petition for reinstatement is denied, the petitioner may apply again pursuant to this section at any time after the qualifications are met.

(j) The Commission shall set forth its decision to certify a mediator or mediator training program or to deny cer-

tification in writing, making findings of fact and conclusions of law, and serve the decision on the petitioner by certified U.S. mail, return receipt requested, within 60 days of the date of the hearing. Such service shall be deemed sufficient for purposes of these Rules.

(k) The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions to deny reinstatement. An order denying reinstatement shall be reviewable upon appeal, and the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of review shall be filed in the Superior Court in Wake County within 30 days of the date of the Commission's decision.

XI. OTHER STANDING COMMITTEES

A. Superior Court Oversight Committee. The Commission's chair shall appoint a standing committee on Superior Court Oversight, including the Mediated Settlement Conference (MSC), Clerk Mediation, and Farm Nuisance Mediation programs. The Superior Court Oversight Committee shall support and monitor these programs to insure that each operates effectively pursuant to the rules for each program. The Superior Court Oversight Committee shall consider and make recommendations to the Commission regarding statutory or program rule changes. Members of the Superior Court Oversight Committee shall recuse themselves from discussing or deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest. Pursuant to Rule 1.C(2) only Commission members may vote on matters before the Superior Court Oversight Committee.

B. District Court Oversight Committee. The Commission's chair shall appoint a standing committee on District Court Oversight, including the Equitable Distribution and Other Family Financial Cases (FFS) and District Criminal Court (DCC) programs. The District Court Oversight Committee shall support and monitor these programs to insure that each operates effectively pursuant to the rules for each program. The District Court Oversight Committee shall consider and make recommendations to the Commission regarding statutory or program rule changes. Members of the District Court Oversight Committee shall recuse themselves from discussing or deliberating on any matter in which they cannot act impartially or about which they have a con-

flict of interest. Pursuant to Rule 1.C(2) only Commission members may vote on matters before the District Court Oversight Committee.

C. Executive Committee. The Commission's chair shall appoint an Executive Committee of the Commission. The Executive Committee shall consider matters related to legislation, finances and budget, personnel, and emergent matters when necessary. Members of the Executive Committee shall recuse themselves from discussing or deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest. Pursuant to Rule 1.C(2) only Commission members may vote on matters before the Executive Committee.

XII. INTERNAL OPERATING PROCEDURES.

A. The Commission may adopt and publish internal operating procedures and policies for the conduct of Commission business.

B. The Commission's procedures and policies may be changed as needed on the basis of experience.

In the Supreme Court of North Carolina

Order Adopting Amendments to the Rules Implementing The Prelitigation Farm Nuisance Mediation Program

WHEREAS, Section 7A-38.3 of the North Carolina General Statutes establishes a statewide program to provide for prelitigation mediation of farm nuisance disputes prior to bringing of civil actions involving such disputes, and

WHEREAS, N.C.G.S. § 7A-38.3(e) enables this Court to implement section 7A-38.3 by adopting rules and amendments to rules concerning said mediated settlement conferences,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3(e), the Rules Implementing the Prelitigation Farm Nuisance Mediation Program are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of April, 2014.

Adopted by the Court in conference the 23rd day of January, 2014. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules of the North Carolina Supreme Court Implementing the Prelitigation Farm Nuisance Mediation Program amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

Hudson, J., Recused.

s/Beasley, J.
For the Court

REVISED RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING THE PRELITIGATION FARM NUISANCE MEDIATION PROGRAM

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RULE 1. SUBMISSION OF DISPUTE TO PRELITIGATION FARM NUISANCE MEDIATION

A. Mediation shall be initiated by the filing of a Request for Prelitigation Mediation of Farm Nuisance Dispute (Request) (Form AOC-CV-820) with the clerk of superior court in a county in which the action may be brought. The Request shall be on a form prescribed by the North Carolina Administrative Office of the Courts (NCAOC) and posted on the NCAOC's website at www.nccourts.org. The party filing the Request shall mail a copy of the Request by certified U.S. mail, return receipt requested, to each party to the dispute.

B. The clerk of superior court shall accept the Request and shall file it in a miscellaneous file under the name of the requesting party.

RULE 2. EXEMPTION FROM N.C.G.S. § 7A-38.1

A dispute mediated pursuant to N.C.G.S. § 7A-38.3, shall be exempt from an order referring the dispute to a mediated settlement conference entered pursuant to N.C.G.S. § 7A-38.1.

RULE 3. SELECTION OF MEDIATOR

A. TIME PERIOD FOR SELECTION. The parties to the dispute shall have 21 days from the date of the filing of the Request to select a mediator to conduct their mediation and to file Notice of Selection of Agreement.

B. SELECTION OF CERTIFIED MEDIATOR BY AGREEMENT. The clerk shall provide each party to the dispute with a list of certified superior court mediators serving the judicial district encompassing the county in which the

Request was filed. If the parties are able to agree on a mediator from that list to conduct their mediation, the party who ator from that list to conduct their mediation, the party who filed the Request shall notify the clerk by filing with the clerk a Notice of Selection of Certified Mediator by Agreement (Notice) (Form AOC-CV-821). Such Notice shall state the name, address and telephone number of the certified mediator selected; state the rate of compensation to be paid the mediator; and state that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation. The Notice shall be on a form prepared and distributed by the NCAOC and available on the court's website.

C. COURT APPOINTMENT OF MEDIATOR. If the parties to the dispute cannot agree on selection of a certified superior court mediator, the party who filed the Request shall file with the clerk a Motion for Court Appointment of Mediator (Motion) and the senior resident superior court judge shall appoint a certified superior court mediator. The Motion shall be filed with the clerk within 21 days of the date of the filing of the Request. The Motion shall be on a form prepared and distributed by the NCAOC (Form AOC-CV-821). The Motion shall state whether any party prefers a certified attorney mediator, and if so, the senior resident superior court judge shall appoint a certified attorney mediator. The Motion may state that all parties prefer a certified non-attorney mediator, and if so, the senior resident judge shall appoint a certified non-attorney mediator. If no preference is expressed, the senior resident superior court judge may appoint any certified superior court mediator.

As part of the application or annual renewal certification process, all mediators shall designate those judicial districts for which they are willing to accept court appointments. Each designation shall be deemed to be a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated district and will not charge for travel time and expenses incurred in carrying out his/her duties associated with those appointments. A refusal to accept an appointment in a judicial district designated by the mediator may be grounds for removal from that district's court appointment list by the Commission or by the senior resident superior court judge.

The Commission shall furnish to the senior resident superior court judge of each judicial district a list of those certified superior court mediators requesting appointments in that district. Said list shall contain the mediators' names, addresses and telephone numbers and shall be provided electronically through the Commission's website at www.ncdrc.org. The Commission shall promptly notify the senior resident superior court judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

D. MEDIATOR INFORMATION DIRECTORY. To assist parties in learning more about the qualifications and experience of certified mediators, the Dispute Resolution Commission (Commission) shall post a list of certified superior court mediators on its website at www.ncdrc.org accompanied by contact, availability and biographical information, including information identifying mediators who wish to mediate farm nuisance matters.

RULE 4. THE PRELITIGATION FARM MEDIATION

A. WHEN MEDIATION IS TO BE COMPLETED. The mediation shall be completed within 60 days of the Notice or the date of the order appointing a mediator to conduct the mediation.

B. EXTENDING DEADLINE FOR COMPLETION. The senior resident superior court judge may extend the deadline for completion of the mediation upon the judge's own motion, upon stipulation of the parties or upon suggestion of the mediator.

C. WHERE THE MEDIATION IS TO BE HELD. The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree to a location, the mediator shall be responsible for reserving a neutral place in the county where the action is pending and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, *pro se* parties and other persons required to attend.

D. RECESSES. The mediator may recess the mediation at any time and may set a time for reconvening, except that such time shall fall within a 30 day period from the date of the order appointing the mediator. No further notification

E. DUTIES OF THE PARTIES, ATTORNEYS, AND OTHER PARTICIPANTS. Rule 4 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

F. SANCTIONS FOR FAILURE TO ATTEND. Rule 5 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

RULE 5. AUTHORITY AND DUTIES OF THE MEDIATOR

A. AUTHORITY OF MEDIATOR.

(1) Control of Mediation. The mediator shall at all times be in control of the mediation and the procedures to be followed. The mediator's conduct shall be governed by Standards of Professional Conduct for Mediators (Standards) promulgated by the Supreme Court.

(2) Private Consultation. The mediator may communicate privately with any participant prior to and during the mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) Scheduling the Mediation. The mediator shall make a good faith effort to schedule the mediation at a time that is convenient for the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the mediation.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of mediation;

(d) The fact that the mediation is not a trial, the mediator is not a judge and that the parties may pursue their dispute in court if mediation is not successful and they so choose;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the mediation;

(g) The inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(l);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to determine timely that an impasse exists and that the mediation should end.

(4) Scheduling and Holding the Mediation. It is the duty of the mediator to schedule the mediation and to conduct it within the timeframe established by Rule 4 above. Rule 4 shall be strictly observedby the mediator unless an extension has been granted in writing by the senior resident superior court judge.

(5) No Recording. There shall be no stenographic, audio or video recording of the mediation process by any participant. This prohibition precludes recording either surreptitiously or with the agreement of the parties.

RULE 6. COMPENSATION OF THE MEDIATOR

A. BY AGREEMENT. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator, except that no administrative fees or fees for services shall be assessed any party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

B. BY COURT ORDER. When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of $150, except that no administrative fees or fees for services shall be assessed any party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

C. INDIGENT CASES. No party found to be indigent by the court for the purposes of these Rules shall be required to pay a mediator fee. Any mediator conducting a mediation pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigency and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the mediation or, if the parties do not settle their cases, subsequent to the trial of the action. In ruling upon such motions, the judge shall apply the criteria enumerated in N.C.G.S. § 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

D. POSTPONEMENT FEE. As used herein, the term "postponement" shall mean reschedule or not proceed with a mediation once a date for the mediation has been agreed upon and scheduled by the parties and the mediator. After a mediation has been scheduled for a specific date, a party may not unilaterally postpone the mediation. A mediation may be postponed only after notice to all parties of the reason for the postponement, payment of a postponement fee to the mediator and consent of the mediator and the opposing attorney. If a mediation is postponed within seven business days of the scheduled date, the fee shall be $150. If the mediation is postponed within three business days of the scheduled date, the fee shall be $300. Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 6.B.

E. PAYMENT OF COMPENSATION OF PARTIES. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the mediation.

F. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the senior resident superior court judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of monetary sanctions by a resident or presiding superior court judge.

COMMENTS TO RULE 6

Comment to Rule 6.B.

Court-appointed mediators may not be compensated for travel time, mileage or any other out-of-pocket expenses.

Comment to Rule 6.D.

Though Rule 6.D provides that mediators "shall" assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, unexpected and unavoidable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite settlement. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

Comment to Rule 6.E.

If a party is found by a senior resident superior court judge to have failed to attend a mediation without good cause, then the court may require that party to pay the mediator's fee and related expenses.

Comment to Rule 6.F.

If the Prelitigation Farm Nuisance Mediation Program is to be successful, it is essential that mediators, both party-selected and court appointed, be compensated for their services. Rule 6.F is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 6.B (hourly fee and administrative fee) and 6.D (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 6 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 7. WAIVER OF MEDIATION

All parties to a farm nuisance dispute may waive mediation by informing the mediator of their waiver in writing. The Waiver of Prelitigation Mediation in Farm Nuisance Dispute (Waiver) shall be on a form prescribed by the NCAOC (Form AOC-CV-822). The party who requested mediation shall file the Waiver with the clerk and mail a copy to the mediator and all parties named in the Request.

RULE 8. MEDIATOR'S CERTIFICATION THAT MEDIATION CONCLUDED

A. CONTENTS OF CERTIFICATION. Following the conclusion of mediation or the receipt of a Waiver signed by all parties to the farm nuisance dispute, the mediator shall prepare a Mediator's Certification in Prelitigation Farm Nuisance Dispute (Certification) on a form prescribed by the NCAOC (Form AOC-CV-823). If a mediation was held, the Certification shall state the date on which the media-tion was concluded and report the general results. If a mediation was not held, the Certification shall state why the mediation was notheld and identify any parties named in the Request who failed, without good cause, to attend or participate in mediation or shall state that all parties waived mediation in writing pursuant to Rule 7 above.

B. DEADLINE FOR FILING MEDIATOR'S CERTIFICATION. The mediator shall file the completed Certification with the clerk within seven days of the completion of the mediation, the failure of the mediation to be held or the receipt of a signed waiver of mediation. The mediator shall serve a copy of the Certification on each of the parties named in the Request.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

Commission may specify a curriculum for a farm mediation training program and may set qualifications for trainers.

In the Supreme Court of North Carolina

Order Adopting Amendments to the Rules Implementing Mediation in Matters Before the Clerk of Superior Court

WHEREAS, Section 7A-38.3B of the North Carolina General Statutes establishes a statewide system of mediations to facilitate the resolution of matters pending before Clerks of Superior Court and,

WHEREAS, N.C.G.S. § 7A-38.3B(b) enables this Court to implement section 7A-38.3B by adopting rules and amendments to rules concerning said mediations.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3B(b), the Rules Implementing Mediation In Matters Before the Clerk of Superior Court are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of April, 2014.

Adopted by the Court in conference the 23rd day of January, 2014. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules Implementing Mediation in Matters Before the Clerk of Superior Court amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

Hudson, J., Recused.

s/Beasley, J.
For the Court

RULES IMPLEMENTING MEDIATION IN MATTERS BEFORE THE CLERK OF SUPERIOR COURT

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RULE 1. INITIATING MEDIATION IN MATTERS BEFORE THE CLERK

A. PURPOSE OF MANDATORY MEDIATION. These Rules are promulgated pursuant to N.C.G.S. § 7A-38.3B to implement mediation in certain cases within the clerk's jurisdiction. The procedures set out here are designed to focus the parties' attention on settlement and resolution rather than on preparation for contested hearings and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in other settlement efforts voluntarily either prior to or after the filing of a matter with the clerk.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES. In furtherance of this purpose, counsel, upon being retained to represent a party to a matter before the clerk, shall discuss the means available to the parties through mediation and other settlement procedures to resolve their disputes without resort to a contested hearing. Counsel shall also discuss with each other what settlement procedure and which neutral third party would best suit their clients and the matter in controversy.

C. INITIATING THE MEDIATION BY ORDER OF THE CLERK.

(1) Order by The Clerk of Superior Court. The clerk of superior court of any county may, by written order, require all persons and entities identified in Rule 4 to

attend a mediation in any matter in which the clerk has original or exclusive jurisdiction, except those matters under N.C.G.S. Chapters 45 and 48 and those matters in which the jurisdiction of the clerk is ancillary.

(2) Content of Order. The order shall be on a North Carolina Administrative Office of the Courts (NCAOC) form and shall:

(a) require that a mediation be held in the case;

(b) establish deadlines for the selection of a mediator and completion of the mediation;

(c) state the names of the persons and entities who shall attend the mediation;

(d) state clearly that the persons ordered to attend have the right to select their own mediator as provided by Rule 2;

(e) state the rate of compensation of the court appointed mediator in the event that those persons do not exercise their right to select a mediator pursuant to Rule 2; and

(f) state that those persons shall be required to pay the mediator's fee in shares determined by the clerk.

(3) Motion for Court Ordered Mediation. In matters not ordered to mediation, any party, interested persons or fiduciary may file a written motion with the clerk requesting that mediation be ordered. Such motion shall state the reasons why the order should be allowed and shall be served in accordance with Rule 5 of the North Carolina Rules of Civil Procedure (N.C.R.Civ.P.) on non-moving parties, interested persons and fiduciaries designated by the clerk or identified by the petitioner in the pleadings. Objections to the motion may be filed in writing within five days after the date of the service of the motion. Thereafter, the clerk shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(4) Informational Brochure. The clerk shall serve a brochure prepared by the Dispute Resolution Commission (Commission) explaining the mediation process

and the operations of the Commission along with the order required by Rule 1.C(1) and 1.C(3).

(5) Motion to Dispense With Mediation. A named party, interested person or fiduciary may move the clerk of superior court to dispense with a mediation ordered by the clerk. Such motion shall state the reasons the relief is sought and shall be served on all persons ordered to attend and the mediator. For good cause shown, the clerk may grant the motion.

(6) Dismissal of Petition For the Adjudication of Incompetence. The petitioner shall not voluntarily dismiss a petition for adjudication of incompetence after mediation is ordered.

RULE 2. DESIGNATION OF MEDIATOR

A. DESIGNATION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES. The parties may designate a mediator certified by the Commission by agreement within a period of time as set out in the clerk's order. However, the parties may only designate mediators certified for estate and guardianship matters pursuant to these Rules for estate or guardianship matters.

The petitioner shall file with the clerk a Designation of Mediator within the period set out in the clerk's order; however, any party may file the designation. The party filing the designation shall serve a copy on all parties and the mediator designated to conduct the mediation. Such designation shall state the name, address and telephone number of the mediator designated; state the rate of compensation of the mediator; state that the mediator and persons ordered to attend have agreed upon the designation and rate of compensation; and state under what rules the mediator is certified. The notice shall be on a NCAOC form.

B. APPOINTMENT OF MEDIATOR BY THE CLERK. In the event a Designation of Mediator is not filed with the clerk within the time for filing stated in the clerk's order, the clerk shall appoint a mediator certified by the Commission. The clerk shall appoint only those mediators certified pursuant to these Rules for estate and guardianship matters to those matters. The clerk may appoint any certified mediator who has expressed a desire to be appointed to mediate all other matters within the jurisdiction of the clerk.

Except for good cause, mediators shall be appointed by the clerk by rotation from a list of those certified mediators who wish to be appointed for matters within the clerk's jurisdiction, without regard to occupation, race, gender, religion, national origin, disability or whether they are an attorney.

As part of the application or annual certification renewal process, all mediators shall designate those counties for which they are willing to accept court appointments. Each designation shall be deemed to be a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated county and will not charge for travel time and expenses incurred in carrying out his/her duties associated with those appointments. A refusal to accept an appointment in a county designated by the mediator may be grounds for removal from said county's court appointment list by the Commission or by the clerk of that county.

The Commission shall furnish to the clerk of each county a list of those superior court mediators requesting appointments in that county who are certified in estate and guardianship proceedings, and those certified in other matters before the clerk. Said list shall contain the mediators' names, addresses and telephone numbers and shall be provided electronically through the Commission's website at www.ncdrc.org. The Commission shall promptly notify the clerk of any disciplinary action taken with respect to a mediator on the list of certified mediators for the county.

C. MEDIATOR INFORMATION DIRECTORY. The Commission shall maintain for the consideration of the clerks of superior court and those designating mediators for matters within the clerk's jurisdiction, a directory of certified mediators who request appointments in those matters and a directory of those mediators who are certified pursuant to these Rules. Said directory shall be maintained on the Commission's website at www.ncdrc.org.

D. DISQUALIFICATION OF MEDIATOR. Any person ordered to attend a mediation pursuant to these Rules may move the clerk of superior court of the county in which the matter is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be designated

or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATION

A. WHERE MEDIATION IS TO BE HELD. The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree to a location, the mediator shall be responsible for reserving a neutral place in the county where the action is pending and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, *pro se* parties, and other persons required to attend.

B. WHEN MEDIATION IS TO BE HELD. The clerk's order issued pursuant to Rule 1.C(3) shall state a deadline for completion of the mediation. The mediator shall set a date and time for the mediation pursuant to Rule 6.B(5) and shall conduct the mediation before that date unless the date is extended by the clerk.

C. EXTENDING DEADLINE FOR COMPLETION. The clerk may extend the deadline for completion of the mediation upon the clerk's own motion, upon stipulation of the parties or upon suggestion of the mediator.

D. RECESSES. The mediator may recess the mediation at any time and may set times for reconvening which are prior to the deadline for completion. If the time for reconvening is set before the mediation is recessed, no further notification is required for persons present at the mediation.

E. THE MEDIATION IS NOT TO DELAY OTHER PROCEEDINGS. The mediation shall not be cause for the delay of other proceedings in the matter, including the completion of discovery, the filing or hearing of motions or the hearing of the matter, except by order of the clerk of superior court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATIONS

A. ATTENDANCE.

(1) Persons ordered by the clerk to attend a mediation conducted pursuant to these Rules shall physically

attend until an agreement is reduced to writing and signed as provided in Rule 4.B or an impasse has been declared. Any such person may have the attendance requirement excused or modified, including the allowance of that person's participation by telephone or teleconference:

(a) By agreement of all persons ordered to attend and the mediator, or

(b) By order of the clerk of superior court, upon motion of a person ordered to attend and notice of the motion to all other persons ordered to attend and the mediator.

(2) Any person ordered to attend a mediation conducted pursuant to these Rules that is not a natural person or a governmental entity shall be represented at the mediation by an officer, employee or agent who is not such person's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the matter.

(3) Any person ordered to attend a mediation conducted pursuant to these Rules that is a governmental entity shall be represented at the mediation by an employee or agent who is not such entity's outside counsel and who has authority to decide on behalf of such entity whether and on what terms to settle the matter; provided, however, if under law proposed settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.

(4) An attorney ordered to attend a mediation pursuant to these Rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.

(5) Other persons may participate in the mediation at the discretion of the mediator.

(6) Persons ordered to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for mediation sessions before the completion deadline and shall keep the mediator informed as to such prob-

lems as may arise before an anticipated session is scheduled by the mediator.

B. FINALIZING AGREEMENT.

(1) If an agreement is reached at the mediation, in matters that, as a matter of law, may be resolved by the parties by agreement, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. The parties shall designate a person who will file a consent judgment or one or more voluntary dismissals with the clerk and that person shall sign the mediator's report. If agreement is reached in such matters prior to the mediation or during a recess, the parties shall inform the mediator and the clerk that the matter has been settled and, within 10 calendar days of the agreement being reached, file a consent judgment or voluntary dismissal(s).

(2) In all other matters, including guardianship and estate matters, if an agreement is reached upon some or all of the issues at mediation, the persons ordered to attend shall reduce its terms to writing and sign it along with their counsel, if any. Such agreements are not binding upon the clerk but they may be offered into evidence at the hearing of the matter and may be considered by the clerk for a just and fair resolution of the matter. Evidence of statements made and conduct occurring in a mediation where an agreement is reached is admissible pursuant to N.C.G.S. § 7A-38.3B(g)(3).

All written agreements reached in such matters shall include the following language in a prominent place in the document:

> "This agreement is not binding on the clerk but will be presented to the clerk as an aid to reaching a just resolution of the matter."

C. PAYMENT OF MEDIATOR'S FEE. The persons ordered to attend the mediation shall pay the mediator's fee as provided by Rule 7.

D. NO RECORDING. There shall be no stenographic, audio or video recording of the mediation process by any participant. This prohibition precludes recording either surreptitiously or with the agreement of the parties.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATION OR PAY MEDIATOR'S FEE

Any person ordered to attend a mediation pursuant to these Rules who fails without good cause to attend or to pay a portion of the mediator's fee in compliance with N.C.G.S. § 7A-38.3B and the Rules promulgated by the Supreme Court of North Carolina (Supreme Court) to implement that section, shall be subject to contempt powers of the clerk and the clerk may impose monetary sanctions. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the mediation.

A person seeking sanctions against another person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all persons ordered to attend. The clerk may initiate sanction proceedings upon his/her own motion by the entry of a show cause order. If the clerk imposes sanctions, the clerk shall do so, after notice and a hearing, in a written order making findings of fact and conclusions of law. An order imposing sanctions is reviewable by the superior court in accordance with N.C.G.S. § 1-301.2 and N.C.G.S. § 1-301.3, as applicable, and thereafter by the appellate courts in accordance with N.C.G.S. § 7A-38.1(g).

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) Control of the Mediation. The mediator shall at all times be in control of the mediation and the procedures to be followed. The mediator's conduct shall be governed by Standards of Professional Conduct for Mediators (Standards) promulgated by the Supreme Court.

(2) Private Consultation. The mediator may communicate privately with any participant or counsel prior to, during and after the mediation. The fact that private communications have occurred with a participant before the conference shall be disclosed to all other participants at the beginning of the mediation.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) The costs of the mediation and the circumstances in which participants will not be taxed with the costs of mediation;

(c) That the mediation is not a trial, the mediator is not a judge, and the parties retain their right to a hearing if they do not reach settlement;

(d) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(e) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(f) The inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.3B;

(g) The duties and responsibilities of the mediator and the participants; and

(h) That any agreement reached will be reached by mutual consent and reported to the clerk as provided by rule.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediation should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

(4) Reporting Results of Mediation.

(a) The mediator shall report to the court on a NCAOC form within five days of completion of the mediation whether or not the mediation resulted in a settlement or impasse. If settlement occurred prior to or during a recess of a mediation, the mediator shall file the report of settlement within five days of learning of the settlement and, in addition to the other information required, report who informed the mediator of the settlement.

(b) The mediator's report shall identify those persons attending the mediation, the time spent in and fees charged for mediation, and the names and contact information for those persons designated by the parties to file such consent judgment or dismissal(s) with the clerk as required by Rule 4.B. Mediators shall provide statistical data for evaluation of the mediation program as required from time to time by the Commission or the NCAOC. Mediators shall not be required to send agreements reached in mediation to the clerk, except in estate and guardianship matters and other matters which may be resolved only by order of the clerk.

(c) Mediators who fail to report as required pursuant to this Rule shall be subject to the contempt power of the court and sanctions.

(5) Scheduling and Holding the Mediation. It is the duty of the mediator to schedule the mediation and conduct it prior to the mediation completion deadline set out in the clerk's order. The mediator shall make an effort to schedule the mediation at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the mediation. Deadlines for completion of the mediation shall be strictly observed by the mediator unless said time limit is changed by a written order of the clerk of superior court.

RULE 7. COMPENSATION OF THE MEDIATOR

A. BY AGREEMENT. When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. BY ORDER OF THE CLERK. When the mediator is appointed by the clerk, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $150 that is due upon appointment.

C. PAYMENT OF COMPENSATION. In matters within the clerk's jurisdiction that, as a matter of law, may be resolved by the parties by agreement the mediator's fee

shall be paid in equal shares by the parties unless otherwise agreed to by the parties. Payment shall be due upon completion of the mediation.

In all other matters before the clerk, including guardianship and estate matters, the mediator's fee shall be paid in shares as determined by the clerk. A share of a mediator's fee may only be assessed against the estate of a decedent, a trust or a guardianship or against a fiduciary or interested person upon the entry of a written order making specific written findings of fact justifying the taxing of costs.

D. CHANGE OF APPOINTED MEDIATOR. Parties who fail to select a certified mediator within the time set out in the clerk's order and then desire a substitution after the clerk has appointed a certified mediator, shall obtain the approval of the clerk for the substitution. The clerk may approve the substitution only upon proof of payment to the clerk's original appointee the $150 one time, per case administrative fee, any other amount due and owing for mediation services pursuant to Rule 7.B, and any postponement fee due and owing pursuant to Rule 7.F, unless the clerk determines that payment of the fees would be unnecessary or inequitable.

E. INDIGENT CASES. No person ordered to attend a mediation found to be indigent by the clerk for the purposes of these Rules shall be required to pay a share of the mediator's fee. Any person ordered by the clerk of superior court to attend may move the clerk for a finding of indigence and to be relieved of that person's obligation to pay a share of the mediator's fee. The motion shall be heard subsequent to the completion of the mediation or if the parties do not settle their matter, subsequent to its conclusion. In ruling upon such motions, the clerk shall apply the criteria enumerated in N.C.G.S. § 1-110(a), but shall take into consideration the outcome of the matter and whether a decision was rendered in the movant's favor. The clerk shall enter an order granting or denying the person's request. Any mediator conducting a mediation pursuant to these Rules shall waive the payment of fees from persons found by the court to be indigent.

F. POSTPONEMENTS.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with mediation once the

mediator has scheduled adate for a session of the mediation. After mediation has been scheduled for a specific date, a person ordered to attend may not unilaterally postpone the mediation.

(2) A mediation session may be postponed by the mediator for good cause beyond the control of the movant only after notice by the movant to all persons of the reasons for the postponement and a finding of good cause by the mediator. A postponement fee shall not be charged in such circumstance.

(3) Without a finding of good cause, a mediator may also postpone a scheduled mediation session with the consent of all parties. A fee of $150 shall be paid to the mediator if the postponement is allowed or if the request is within two business days of the scheduled date the fee shall be $300. The person responsible for it shall pay the postponement fee. If it is not possible to determine who is responsible, the clerk shall assess responsibility. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B. A mediator shall not charge a postponement fee when the mediator is responsible for the postponement

(4) If all persons ordered to attend select the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services or any postponement fee) or willful failure of a party contending indigent status to promptly move the clerk of superior court for a finding of indigency, shall constitute contempt of court and may result, following notice and a hearing, in the imposition of any and all lawful sanctions by the superior court pursuant to N.C.G.S. § 5A.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Commission may receive and approve applications for certification of persons to be appointed as clerk of court mediators.

A. For appointment by the clerk as mediator in all cases within the clerk's jurisdiction except guardianship and estate matters, a person shall be certified by the Commission for either the superior or district court mediation programs;

B. For appointment by the clerk as mediator in guardianship and estate matters within the clerk's jurisdiction, a person shall be certified as a mediator by the Commission for either the superior or district court programs and complete a course, at least 10 hours in length, approved by the Commission pursuant to Rule 9 concerning estate and guardianship matters within the clerk's jurisdiction;

C. Submit proof of qualifications set out in this section on a form provided by the Commission;

D. Pay all administrative fees established by the NCAOC upon the recommendation of the Commission; and

E. Agree to accept, as payment in full of a party's share of the mediator's fee, the fee ordered by the clerk pursuant to Rule 7.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the above qualifications or has not faithfully observed these Rules or those of any county in which he or she has served as a mediator or the Standards. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators seeking certification pursuant to these Rules for estate and guardianship matters within the jurisdiction of the clerk of superior court shall consist of a minimum of 10 hours instruction. The curriculum of such programs shall include:

(1) Factors distinguishing estate and guardianship mediation from other types of mediations;

(2) The aging process and societal attitudes toward the elderly, mentally ill and disabled;

(3) Ensuring full participation of respondents and identifying interested persons and nonparty participants;

(4) Medical concerns of the elderly, mentally ill and disabled;

(5) Financial and accounting concerns in the administration of estates and of the elderly, mentally ill and disabled;

(6) Family dynamics relative to the elderly, mentally ill and disabled and to the families of deceased persons;

(7) Assessing physical and mental capacity;

(8) Availability of community resources for the elderly, mentally ill and disabled;

(9) Principles of guardianship law and procedure;

(10) Principles of estate law and procedure;

(11) Statute, rules and forms applicable to mediation conducted under these Rules; and

(12) Ethical and conduct issues in mediations conducted under these Rules.

The Commission may adopt Guidelines for trainers amplifying the above topics and set out minimum time frames and materials that trainers shall allocate to each topic. Any such Guidelines shall be available at the Commission's office and posted on its website.

B. A training program must be certified by the Commission before attendance at such program may be used for compliance with Rule 8.B. Certification need not be given in advance of attendance. Training programs attended prior to the promulgation of these Rules or attended in other states may be approved by the Commission if they are in substantial compliance with the standards set forth in this Rule.

C. To complete certification, a training program shall pay all administrative fees established by the NCAOC in consultation with the Commission.

RULE 10. PROCEDURAL DETAILS

The clerk of superior court shall make all those orders just and necessary to safeguard the interests of all persons and may supplement all necessary procedural details not inconsistent with these Rules.

RULE 11. DEFINITIONS

A. The term, clerk of superior court, as used throughout these Rules, shall refer both to said clerk or assistant clerk.

B. The phrase, NCAOC forms, shall refer to forms prepared by, printed and distributed by the NCAOC to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the NCAOC. Proposals for the creation or modification of such forms may be initiated by the Commission.

RULE 12. TIME LIMITS

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the N.C.R.Civ.P.

In the Supreme Court of North Carolina

Order Adopting Amendments to the Rules Implementing Mediation in Matters Pending in District Criminal Court

WHEREAS, Section 7A-38.3D of the North Carolina General Statutes establishes a statewide system of mediations to be implemented in participating district court judicial districts in order to facilitate the settlement of criminal matters within the jurisdiction of those districts, and

WHEREAS, N.C.G.S. § 7A-38.3D(d) enables this Court to implement section 7A-38.3D by adopting rules and amendments to rules concerning said mediations.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3D(d), the Rules Implementing Mediation In Matters Pending in District Criminal Court are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of April, 2014.

Adopted by the Court in conference the 23rd day of January, 2014.The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules Implementing Mediation in Matters Pending in District Criminal Court amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

Hudson, J., Recused.

s/Beasley, J.
For the Court

RULES IMPLEMENTING MEDIATION IN MATTERS PENDING IN DISTRICT CRIMINAL COURT

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RULE 1. INITIATING VOLUNTARY MEDIATION IN DISTRICT CRIMINAL COURT.

A. PURPOSE OF MEDIATION. Pursuant to N.C.G.S. § 7A-38.3D, these Rules are promulgated to implement programs for voluntary mediation of certain cases within the jurisdiction of the district criminal courts. These procedures are intended to assist private parties, with the help of a neutral mediator, in discussing and resolving their disputes and in conserving judicial resources. The chief district court judge, the district attorney and the community mediation center shall determine whether to establish a program in a district court judicial district. Because participation in this program and in the mediation process is voluntary, no defendant, complaining witness or any other person who declines to participate in mediation or whose case cannot be settled in mediation, shall face any adverse consequences as a result of his/her failure to participate or reach an agreement and the case shall simply be returned to court. Consistent with N.C.G.S. § 7A-38.3D(j) a party's participation or failure to participate in mediation is to be held confidential and not revealed to the court or the district attorney.

B. DEFINITIONS.

(1) Court. The term "court" as used throughout these rules, shall refer both to a criminal district court judge or his/her designee, including a district attorney or designee, or personnel affiliated with a community mediation center.

(2) Mediation Process. The term "mediation process" as used throughout these rules, shall encompass intake,

screening and mediation through impasse or until the case is dismissed.

(3) District Attorney. The term "district attorney" as used throughout these rules, shall refer to the district attorney, assistant district attorneys and any staff or designee of the district attorney.

C. INITIATING THE MEDIATION.

(1) Suggestion by the Court. In districts that establish a program, the court may encourage private parties to attend mediation in certain cases or categories of cases. In determining whether to encourage mediation in a case or category of cases, the judge or designee may consider among other factors:

(a) whether the parties are willing to participate;

(b) whether continuing prosecution is in the best interest of the parties or of any non-parties impacted by the dispute;

(c) whether the private parties involved in the dispute have an expectation of a continuing relationship and there are issues underlying their dispute that have not been addressed and which may create later conflict or require court involvement;

(d) whether cross-warrants have been filed in the case; and

(e) whether the case might otherwise be subject to voluntary dismissal.

(2) Multiple Charges. Multiple charges pending in the same court against a single defendant or pending against multiple defendants and involving the same complainant or complainants may be consolidated for purposes of holding a single mediation in the matter. Charges pending in multiple courts may be consolidated for purposes of mediation with the consent of those courts.

(3) Timing of Suggestion. The court shall encourage parties to attend and participate in mediation as soon as practicable. Since there is no possibility of incarceration resulting from any agreement reached in

mediation, the judge is not required to provide a court-appointed attorney to a defendant prior to his/her mediation.

(4) Notice to Parties. The court shall provide to parties who have agreed to attend mediation notice of the following either orally or in writing on a North Carolina Administrative Office of the Courts (NCAOC) approved form: (1) the deadline for completion of the mediation process; (2) the name of the mediator who will mediate the dispute or the name of the community mediation center who will provide the mediator; and (3) and that the defendant may be required to pay the dismissal fee set forth in Rule 5.B(2). In lieu of providing this information orally or in writing, the court may refer the complaining witness and defendant to a community mediation center whose staff shall advise the parties of the above information.

(5) Motion for Mediation. Any complainant or defendant may file an oral or written request with the court to have a mediation conducted in his or her dispute and the court shall determine whether the dispute is appropriate for referral. If in writing, the motion may be on a NCAOC form.

(6) Screening. A mediator as defined by Rule 7 below or a community mediation center to which the parties are referred for mediation shall advise the court, if it is determined upon screening of the case or parties, that the matter is not appropriate for mediation.

RULE 2. PROGRAM ADMINISTRATION.

Pursuant to N.C.G.S. § 7A-38.3D(c), a community mediation center may assist a judicial district in administering and operating its mediation program for district court criminal matters. The court may delegate to a center responsibility for the scheduling of cases and the center may provide volunteer and/or staff mediators to conduct the mediations. The center shall also maintain files in such mediations; record caseload statistics and other information as required by the court, the Dispute Resolution Commission (Commission) or the (NCAOC), including tracking the number of cases referred to mediation and the outcome of those mediations; and, in accordance with N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m), oversee the dismissal process for cases resolved in mediation.

RULE 3. APPOINTMENT OF MEDIATOR

A. AUTHORITY TO APPOINT. When the parties have agreed to attend mediation, the court shall appoint a community mediation center mediator by name or shall designate a center to appoint a mediator to conduct the mediation. The mediator appointed shall be certified pursuant to Rule 7 of these rules or shall be working toward certification under the supervision of the center to whom the dispute is referred for mediation.

B. DISQUALIFICATION OF MEDIATOR. For good cause shown, a complainant or defendant may move the court to disqualify the mediator appointed to conduct their mediation. If the mediator is disqualified, the court or designee shall appoint a new one to conduct the mediation. Nothing in this provision shall preclude a mediator from disqualifying him or herself.

RULE 4. THE MEDIATION.

A. SCHEDULING MEDIATION. The mediator appointed to conduct the mediation or the community mediation center to which the matter has been referred by the court for appointment of a mediator, shall be responsible for any scheduling that must be done prior to the mediation, any reporting required by these rules or local rules and the maintenance of any files pertaining to the mediation.

B. WHERE MEDIATION IS TO BE HELD. Mediation shall be held in the courthouse or if suitable space is available, in the offices of a community mediation center or at any other place as agreed upon between the mediator and parties.

C. EXTENDING DEADLINE FOR COMPLETION. The court may extend the deadline for completion of the mediation process upon its own motion or upon suggestion of community mediation center staff.

D. RECESSES. The mediator may recess the mediation at any time and may set times for reconvening. If the time for reconvening is set before the mediation is recessed, no further notification is required for persons present at the mediation. In recessing a matter, the mediator shall take into account whether the parties wish to continue mediating and whether they are making progress toward resolving their dispute.

E. NO RECORDING. There shall be no stenographic, audio or video recording of the mediation process by any participant. This prohibition precludes recording either surreptitiously or with the agreement of the parties.

RULES 5. DUTIES OF THE PARTIES.

A. ATTENDANCE.

(1) Complainant(s) and defendant(s) who agree to attend mediation will physically attend the proceeding until an agreement is reached or the mediator has declared an impasse.

(2) The following may attend and participate in mediation:

(a) Parents or guardians of a minor party. Parent(s) or guardian(s) of a minor complainant or defendant who have been encouraged by the court to attend. However, a court shall encourage attendance by a parent or guardian only in consultation with the mediator and a mediator may later excuse the participation of a parent or guardian if the mediator determines his/her presence is not helpful to the process.

(b) Attorneys. Attorneys representing parties may physically attend and participate in mediation. Alternatively, lawyers may participate indirectly by advising clients before, during and after mediation sessions, including monitoring compliance with any agreements reached.

(c) Others. In the mediator's discretion, others whose presence and participation is deemed helpful to resolving the dispute or to addressing any issues underlying it, may be permitted to attend and participate unless and until the mediator determines their presence is no longer helpful. Mediators may exclude anyone wishing to attend and participate, but whose presence and participation the mediator deems would likely be disruptive or counter-productive.

(3) Exceptions to Physical Attendance. A party or other person may be excused from physically attending the mediation and allowed to participate by telephone or through any attorney:

(a) by agreement of the complainant(s) and defendant(s) and the mediator, or

(b) by order of the court.

(4) Scheduling. The complainant(s) and defendant(s) and any parent, guardian or attorney who will be attending the mediation will:

(a) Make a good faith effort to cooperate with the mediator or community mediation center to schedule the mediation at a time that is convenient for all participants;

(b) Promptly notify the mediator or community mediation center to which the case has been referred of any significant scheduling concerns which may impact that person's ability to be present for mediation; and

(c) Notify the mediator or the center about any other concerns that may impact a party or person's ability to attend and participate meaningfully, *e.g.*, the need for wheelchair access or for a deaf or foreign language interpreter.

B. FINALIZING AGREEMENT.

(1) Written Agreement. If an agreement is reached at the mediation, the complainant and defendant are to insure that the terms are reduced to writing and signed. Agreements that are not reduced to writing and signed will not be deemed enforceable. If no agreement is reached in mediation, an impasse will be declared and the matter will be referred back to the court or its designee.

(2) Dismissal Fee. To be dismissed by the district attorney, the defendant, unless the parties agree to some other apportionment, shall pay a dismissal fee as set by N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m) to the clerk of superior court in the county where the case was filed and supply proof of payment to the community mediation center administering the program for the judicial district. Payment is to be made in accordance with the terms of the parties' agreement. The center shall, thereafter, provide the district attorney with a dismissal form, which may be an

approved NCAOC form. In his or her discretion, a judge or his/her designee may waive the dismissal fee pursuant to N.C.G.S. § 7A-38.3D(m) when the defendant is indigent, unemployed, a full-time college or high school student, is a recipient of public assistance or for any other appropriate reason. The mediator shall advise the parties where and how to pay the fee.

RULE 6. AUTHORITY AND DUTIES OF THE MEDIATOR

A. AUTHORITY OF THE MEDIATOR.

(1) Control of Mediation. The mediator shall at all times be in control of the mediation process and the procedures to be followed. The mediator's conduct shall be governed by Standards of Professional Conduct for Mediators (Standards) promulgated by the Supreme Court.

(2) Private Consultation. The mediator may communicate privately with any participant or counsel prior to and during the mediation. The fact that previous communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) Inclusion and Exclusion of Participants at Mediation. In the mediator's discretion, he or she may encourage or allow persons other than the parties or their attorneys, to attend and participate in mediation, provided that the mediator has determined the presence of such persons to be helpful to resolving the dispute or to addressing issues underlying it. Mediators may also exclude persons other that the parties and their attorneys whose presence the mediator deems would likely be or which has, in fact, been counter-productive.

(4) Scheduling the Mediation. The mediator or community mediation center staff involved in scheduling shall make a good faith effort to schedule the mediation at a time that is convenient for the parties and any parent(s), guardian(s) or attorney(s) who will be attending. In the absence of agreement, the mediator or community mediation center staff shall select the date for the mediation and notify those who will be

participating. Parties are to cooperate with the mediator in scheduling the mediation, including providing the information required by Rule 5.A(4).

B. DUTIES OF THE MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) That the mediation is not a trial and the mediator is not a judge, attorney or therapist;

(c) That the mediator is present only to assist the parties in reaching their own agreement;

(d) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(e) Whether and under what conditions communications with the mediator will be held in confidence during the mediation;

(f) The inadmissibility of conduct and statements as provided in N.C.G.S. §7A-38.3D(i);

(g) The duties and responsibilities of the mediator and the participants;

(h) That any agreement reached will be by mutual consent;

(i) That if the parties are unable to agree and the mediator declares an impasse, that the parties and the case will return to court; and

(j) That if an agreement is reached in mediation and the parties agree to request a dismissal of the charges pending in the case, the defendant, unless the parties agree to some other apportionment, shall pay a dismissal fee in accordance with N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m), unless a judge in his or her discretion has waived the fee for good cause. Payment of the dismissal fee shall be made to the clerk of superior court in the county where the case was filed and the community mediation center must provide the district attorney with a dismissal form

and proof that the defendant has paid the dispute resolution fee before the charges be dismissed.

(2) Disclosure. Consistent with the Standards of Professional Conduct for Mediators (Standards), the mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. Consistent with the Standards, it is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediation should conclude. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

(4) Reporting Results of Mediation. The mediator or communitymediation center shall report the outcome of mediation to the court or its designee in writing on a NCAOC approved form by the date the case is next calendared. If the criminal court charges are on the court docket the same day as the mediation, the mediator shall inform the attending district attorney of the outcome of the mediation before close of court on that date unless alternative arrangements are approved by the district attorney.

(5) Scheduling and Holding the Mediation. It is the duty of themediator and community mediation center staff to schedule the mediation and conduct it prior to any deadline set by the court or its designee. Deadlines shall be strictly observed by the mediator andcenter staff unless the deadline is extended orally or in writing by a judge or his/her designee.

RULE 7. MEDIATOR CERTIFICATION AND DECERTIFICATION.

The Commission may receive and approve applications for certification of persons to be appointed as district criminal court mediators. For certification, an applicant shall:

A. At the time of application, be affiliated with a community mediation center established pursuant to N.C.G.S. § 7A-38.5 as either a volunteer or staff mediator and have received the center's endorsement that he or she possesses the training, experience, and skills necessary to conduct district court criminal mediations.

B. Have the following training and experience:

(1) Have both:

(a) Attended at least 24 hours of training in a district criminal court mediation training program certified by the Commission; and

(b) Have a four-year degree from an accredited college or university or have four years of post high school education through an accredited college, university or junior college or four years of full-time work experience, or any combination thereof; or have two years experience as a staff or volunteer mediator at a community mediation center; or

(2) Be a mediated settlement conference or family financial settlement mediator certified by the Commission or be an Advanced Practitioner Member of the Association for Conflict Resolution.

C. Observations and Mediation Experience:

(1) Observe at least two court-referred criminal district court mediations conducted by a mediator certified pursuant to these rules or for a one-year period following the initial adoption of these rules, observe any mediator who is affiliated with a community mediation center established pursuant to N.C.G.S. § 7A-38.5 and who has mediated at least 10 criminal district court cases.

(2) Co-mediate or mediate at least three court-referred district criminal court mediations under the observation of staff affiliated with a community mediation center whose criminal district court mediation training program has been certified by the Commission pursuant to Rule 9 of these Rules.

D. Demonstrate familiarity with the statutes, rules, and practice governing district criminal court mediations in North Carolina.

E. Be of good moral character, submit to a criminal background check within one year prior to applying for certification under these Rules and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court of North Carolina. Applicants

for certification and re-certification and all certified district criminal court mediators shall report to the Commission any pending criminal matters or any criminal convictions, disbarments or other disciplinary complaints and actions or any judicial sanctions as soon as the applicant or mediator has notice of them.

F. Commit to serving the district court as a mediator under the direct supervision of a community mediation center authorized under N.C.G.S. § 7A-38.5 for a period of at least two years.

G. Comply with the requirements of the Commission for continuing mediator education or training.

H. Submit proof of qualifications set out in this Section on a form provided by the Commission.

Community mediation centers participating in the program shall assist the Commission in implementing the certification process established by this Rule by:

(1) Documenting Sections A-F for the mediator and Commission;

(2) Reviewing its documentation with the mediator in a face-to-face meeting scheduled no less than 30 days from the mediator's request to apply for certification;

(3) Making a written recommendation on the applicant's certification to the Commission; and

(4) Forwarding the documentation for Sections A-F and its recommendation to the Commission along with the mediator's completed certification application form.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the above qualifications or has not faithfully observed these Rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule. Certification renewal shall be required every two years.

A community mediation center may withdraw it's affiliation with a mediator certified pursuant to these Rules. Such disaffiliation does not revoke said mediator's certification. A media-

tor's certification is portable and a mediator may agree to be affiliated with a different center. However to mediate under this program in the district criminal court, a mediator must be affiliated with the community mediation center providing services in that court. A mediator may be affiliated with more than one center and provide services in the county served by those centers.

RULE 8. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators seeking certification as district criminal court mediators shall consist of a minimum of 24 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of district court criminal mediation;

(3) Agreement writing;

(4) Communication and information gathering;

(5) Standards of conduct for mediators including, but not limited to the Standards adopted by the Supreme Court;

(6) Statutes, rules, forms and practice governing mediations in North Carolina's district criminal courts;

(7) Demonstrations of district criminal court mediations;

(8) Simulations of district criminal court mediations, involving student participation as mediator, victim, offender and attorneys which shall be supervised, observed and evaluated by program faculty;

(9) Courtroom protocol;

(10) Domestic violence awareness; and

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing district court mediations in North Carolina.

B. A training program must be certified by the Commission before attendance at such program may be deemed as satis-

fying Rule 8. Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Commission if they are in substantial compliance with the standards set forth in this Rule.

C. Renewal of certification shall be required every two years.

RULE 9. LOCAL RULE MAKING. The chief district court judge of any district conducting mediations under these Rules is authorized to publish local rules, not inconsistent with these Rules and N.C.G.S. § 7A-38.3D, implementing mediation in that district.

In The Supreme Court of North Carolina

Order Adopting Amendments to the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases

WHEREAS, Section 7A-38.4A of the North Carolina General Statutes codifies a statewide system of court-ordered mediated settlement conferences to be implemented in district court judicial districts in order to facilitate the resolution of equitable distribution and other family financial matters within the jurisdiction of those districts, and

WHEREAS, N.C.G.S. § 7A-38.4A(o) provides for this Court to implement section 7A-38.4A by adopting rules and amendments to rules concerning said mediated settlement conferences,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.4A(o), Rules Implementing Settlement Procedures in Equitable Distribution and other Family Financial Cases are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of April, 2014.

Adopted by the Court in conference the 23rd day of January, 2014. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules Implementing Settlement Procedures in Equitable Distribution and other Family Financial Cases amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

Hudson, J., Recused.

s/Beasley, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

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RULE 1. INITIATING SETTLEMENT PROCEDURES

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to N.C.G.S. § 7A-38.4A, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the court pursuant to these Rules.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party to a district court case involving family financial issues, including equitable distribution, child support, alimony, post-separation support action or claims

arising out of contracts between the parties under N.C.G.S. §§ 50-20(d), 52-10, 52-10.1 or 52B shall advise his or her client regarding the settlement procedures approved by these Rules and, at or prior to the scheduling conference mandated by N.C.G.S. § 50-21(d), shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. ORDERING SETTLEMENT PROCEDURES.

(1) Equitable Distribution Scheduling Conference. At the scheduling conference mandated by N.C.G.S. § 50-21(d) in all equitable distribution actions in all judicial districts, or at such earlier time as specified by local rule, the court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to these Rules, unless excused by the court pursuant to Rule 1.C(6) or by the court or mediator pursuant to Rule 4.A(2). The court shall dispense with the requirement to attend a mediated settlement conference or other settlement procedure only for good cause shown.

(2) Scope of Settlement Proceedings. All other financial issues existing between the parties when the equitable distribution settlement proceeding is ordered, or at any time thereafter, may be discussed, negotiated or decided at the proceeding. In those districts where a child custody and visitation mediation program has been established pursuant to N.C.G.S. § 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules only in those cases in which the parties and the mediator have agreed to include them and in which the parties have been exempted from, or have fulfilled the program requirements. In those districts where a child custody and visitation mediation program has not been established pursuant to N.C.G.S. § 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules with the agreement of all parties and the mediator.

(3) Authorizing Settlement Procedures Other Than Mediated Settlement Conference. The parties and

their attorneys are in the best position to know which settlement procedure is appropriate for their case. Therefore, the court shall order the use of a settlement procedure authorized by Rules 10-12 herein or by local rules of the district court in the county or district where the action is pending if the parties have agreed upon the procedure to be used, the neutral to be employed and the compensation of the neutral. If the parties have not agreed on all three items, then the court shall order the parties and their counsel to attend a mediated settlement conference conducted pursuant to these Rules.

The motion for an order to use a settlement procedureother than a mediated settlement conference shall be submitted on a North Carolina Administrative Office of the Courts (NCAOC) form at the scheduling conference and shall state:

(a) the settlement procedure chosen by the parties;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral; and

(d) that all parties consent to the motion.

(4) Content of Order. The court's order shall (1) require the mediated settlement conference or other settlement proceeding be held in the case; (2) establish a deadline for the completion of the conference or proceeding; and (3) state that the parties shall be required to pay the neutral's fee at the conclusion of the settlement conference or proceeding unless otherwise ordered by the court. Where the settlement proceeding ordered is a judicial settlement conference, the parties shall not be required to pay for the neutral.

The order shall be contained in the court's scheduling order, or if no scheduling order is entered, shall be on a NCAOC form. Any scheduling order entered at the completion of a scheduling conference held pursuant to local rule may be signed by the parties or their attorneys in lieu of submitting the forms referred to hereinafter relating to the selection of a mediator.

(5) Court-Ordered Settlement Procedures in Other Family Financial Cases.

(a) By Motion of a Party. Any party to an action involving family financial issues not previously ordered to a mediated settlement conference may move the court to order the parties to participate in a settlement procedure. Such motion shall be made in writing, state the reasons why the order should be allowed and be served on the non-moving party. Any objection to the motion or any request for hearing shall be filed in writing with the court within 10 days after the date of the service of the motion. Thereafter, the judge shall rule upon the motion and notify the parties or their attorneys of the ruling. If the court orders a settlement proceeding, then the proceeding shall be a mediated settlement conference conducted pursuant to these Rules. Other settlement procedures may be ordered if the circumstances outlined in subsection (3) above have been met.

(b) By Order of the Court. Upon its own motion, the court may order the parties and their attorneys to attend a mediated settlement conference pursuant to these Rules in any other action involving family financial issues and in contempt proceedings in all family financial issues.

The court may order a settlement procedure other than a mediated settlement conference only upon motion of the parties and a finding that the circumstances outlined in subsection (3) above have been met. The court shall consider the ability of the parties to pay for the services of a mediator or other neutral before ordering the parties to attend a settlement procedure pursuant to this section and shall comply with the provisions of Rule 2 with reference to the appointment of a mediator.

D. MOTION TO DISPENSE WITH SETTLEMENT PROCEDURES.

A party may move the court to dispense with the mediated settlement conference or other settlement procedure

ordered by the judge. The motion shall state the reasons for which the relief is sought. For good cause shown, the court may grant the motion. Such good cause may include, but not be limited to, the fact that the parties have participated in a settlement procedure such as non-binding arbitration or early neutral evaluation prior to the court's order to participate in a mediated settlement conference or have elected to resolve their case through arbitration under the Family Law Arbitration Act (N.C.G.S. § 50-41 *et seq.*) or that one of the parties has alleged domestic violence.

COMMENT TO RULE 1

Comment to Rule 1.C(6).

If a party is unable to pay the costs of the conference or lives a great distance from the conference site, the court may want to consider Rules 4 or 7 prior to dispensing with mediation for good cause. Rule 4 provides a way for a party to attend electronically and Rule 7 provides a way for parties to attend and obtain relief from the obligation to pay the mediator's fee.

RULE 2. DESIGNATION OF MEDIATOR

A. DESIGNATION OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY AGREEMENT OF THE PARTIES. The parties may designate a certified family financial mediator certified pursuant to these Rules by agreement by filing with the court a Designation of Mediator by Agreement at the scheduling conference. Such designation shall: state the name, address and telephone number of the mediator designated; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the designation and rate of compensation; and state that the mediator is certified pursuant to these Rules.

In the event the parties wish to designate a mediator who is not certified pursuant to these Rules, the parties may nominate said person by filing a Nomination of Non-Certified Family Financial Mediator with the court at the scheduling conference. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the nomination and rate of compensation, if any. The court shall approve said nomination if, in the court's opinion, the nominee is

qualified to serve as mediator and the parties and the nominee have agreed upon the rate of compensation.

Designations of mediators and nominations of mediators shall be made on a NCAOC form. A copy of each such form submitted to the court and a copy of the court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

B. APPOINTMENT OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY THE COURT. If the parties cannot agree upon the designation of a mediator, they shall so notify the court and request that the court appoint a mediator. The motion shall be filed at the scheduling conference and shall state that the attorneys for the parties have had a full and frank discussion concerning the designation of a mediator and have been unable to agree on a mediator. The motion shall be on a form approved by the NCAOC. Upon receipt of a motion to appoint a mediator, or failure of the parties to file a Designation of Mediator by Agreement with the court, the court shall appoint a family financial mediator, certified pursuant to these Rules, who has expressed a willingness to mediate actions within the court's district.

In making such appointments, the court shall rotate through the list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation or whether the mediator is a licensed attorney. The district court judges shall retain discretion to depart in a specific case from a strict rotation when, in the judge's discretion, there is good cause to do so.

As part of the application or certification renewal process, all mediators shall designate those judicial districts for which they are willing to accept court appointments. Each designation shall be deemed to be a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated district and will not charge for travel time and expenses incurred in carrying out his/her duties associated with those appointments. A refusal to accept an appointment in a judicial district designated by the mediator may be grounds for removal from that district's court appointment list by the Commission or by the chief district court judge.

The Commission shall furnish to the district court judges of each judicial district a list of those certified family financial mediators requesting appointments in that district. That list shall contain the mediators' names, addresses and telephone numbers and shall be provided electronically through the Commission's website at www.ncdrc.org. The Commission shall promptly notify the district court judges of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

C. MEDIATOR INFORMATION. To assist the parties in designating a mediator, the Commission shall assemble, maintain and post on its website a list of certified family financial mediators. The list shall supply contact information for mediators and identify court districts that they are available to serve. Where a mediator has supplied it to the Commission, the list shall also provide biographical information, including information about an individual mediator's education, professional experience and mediation training and experience.

D. DISQUALIFICATION OF MEDIATOR. Any party may move a court of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. WHERE CONFERENCE IS TO BE HELD. The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree to a location, the mediator shall be responsible for reserving a neutral place in the county where the action is pending and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, *pro se* parties, and other persons required to attend.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date. The mediator is authorized to assist the parties in establishing a discovery schedule and completing discovery.

The court's order issued pursuant to Rule 1.C(1) shall state a deadline for completion of the conference which shall be not more than 150 days after issuance of the court's order, unless extended by the court. The mediator shall set a date and time for the conference pursuant to Rule 6.B(5).

C. EXTENDING DEADLINE FOR COMPLETION. The district court judge may extend the deadline for completion of the mediated settlement conference upon the judge's own motion, upon stipulation of the parties or upon suggestion of the mediator.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set during the conference, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions or the trial of the case, except by order of the court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(b) Attorneys. At least one counsel of record for each party whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.B or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance by:

(a) agreement of all parties and persons required to attend and the mediator; or

(b) order of the court, upon motion of a party and notice to all parties and persons required to attend and the mediator.

(3) Scheduling. Participants required to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator, and a scheduling conflict with another court proceeding thereafter arises, participants shall promptly attempt to resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on June 20, 1985.

B. FINALIZING AGREEMENT.

(1) If an agreement is reached at the conference, the parties shall reduce the essential terms of the agreement to writing.

(a) If the parties conclude the conference with a written document containing all of the terms of their agreement for property distribution and do **not** intend to submit their agreement to the court for approval, the agreement shall be signed by all parties and formally acknowledged as required by N.C.G.S. § 50-20(d). If the parties conclude the conference with a written document containing all of the terms of their agreement and intend to submit their agreement to the court for approval, the agreement shall be signed by all parties but need not be formally acknowledged. In all cases, the mediator shall report to the court that the matter has been settled and include in the report the name of the person responsible for filing closing documents with the court.

(b) If the parties reach an agreement at the conference for property distribution and do not later intend to submit their agreement to the court for approval, but are unable to complete a final document reflecting their settlement or have it signed and acknowledged as required by N.C.G.S. § 50-20(d), then the parties shall summarize their understanding in written form and shall use it as a memorandum and guide to writing such agreements as may be required to give legal effect to its terms. If the parties later intend to submit their agreement to the court for approval the agreement must be in writing and signed by the parties but need not be formally acknowledged. The mediator shall facilitate the writing of the summary memorandum and shall either:

(i) report to the court that the matter has been settled and include in the report the name of the person responsible for filing closing documents with the court; or, in the mediator's discretion,

(ii) declare a recess of the conference. If a recess is declared, the mediator may schedule another session of the conference if the mediator determines that it would assist the parties in finalizing a settlement.

(2) In all cases where an agreement is reached after being ordered to mediation, whether prior, during the mediation or during a recess, the parties shall file their consent judgment or voluntary dismissal(s) with the court within 30 days of the agreement or before the expiration of the mediation deadline, whichever is later. The mediator shall report to the court that the matter has been settled and who reported the settlement.

(3) A settlement agreement resolving the distribution of property reached at a proceeding conducted under this section or during its recesses which has not been approved by a court shall not be enforceable unless it has been reduced to writing, signed by the parties and acknowledged as required by N.C.G.S. § 50-20(d).

C. PAYMENT OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule VII.

D. NO RECORDING. There shall be no stenographic, audio or video recording of the mediation process by any participant. This prohibition precludes recording either surreptitiously or with the agreement of the parties.

COMMENT TO RULE 4

Comment to Rule 4.B.

N.C.G.S. § 7A-38.4A(j) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which agreement on all issues has been reached should be disposed of as expeditiously as possible. This rule is intended to assure that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep confidential the terms of their settlement, they may timely file with the court closing documents which do not contain confidential terms, *i.e.*, voluntary dismissal(s) or a consent judgment resolving all claims. Mediators will not be required by local rules to submit agreementsto the court.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES OR PAY MEDIATOR'S FEE

Any person required to attend a mediated settlement conference or to pay a portion of the mediator's fee in compliance with N.C.G.S. § 7A-38.4A and the rules promulgated by the Supreme Court of North Carolina (Supreme Court) to implement that section who fails to attend or to pay without good cause, shall be subject to the contempt powers of the court and monetary sanctions imposed by a judge. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief

sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order.

If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence.

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be followed. The mediator's conduct shall be governed by Standards of Professional Conduct for Mediators (Standards) promulgated by the Supreme Court.

(2) Private Consultation. The mediator may communicate privately with any participant during the conference. However, there shall be no *ex parte* communication before or outside the conference between the mediator and any counsel or party on any matter touching the proceeding, except with regard to scheduling matters. Nothing in this rule prevents the mediator from engaging in *ex parte* communications, with the consent of the parties, for the purpose of assisting settlement negotiations.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge and the par-

ties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.4A(j);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutualconsent.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) Reporting Results of Mediation.

(a) The mediator shall report to the court the results of the mediated settlement conference and any settlement reached by the parties prior to or during a recess of the conference. Mediators shall also report the results of mediations held in other district court family financial cases in which a mediated settlement conference was not ordered by the court. Said report shall be filed on a NCAOC form within 10 days of the conclusion of the conference or of being notified of the settlement and shall include the names of those persons attending the mediated settlement conference if a conference was held. If partial agreements are reached at the conference, the report shall state what issues remain for trial. Local rules shall

not require the mediator to send a copy of the parties' agreement to the court.

(b) If an agreement upon all issues was reached, the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal(s) and the name, address and telephone number of the person(s) designated by the parties to file such consent judgment or dismissal(s) with the court as required by Rule 4.B(2). The mediator shall advise the parties that consistent with Rule 4.B(2) above, their consent judgment or voluntary dismissal is to be filed with the court within 30 days or before expiration of the mediation deadline, whichever is longer, and the mediator's report shall indicate that the parties have been so advised.

(c) The Commission or the NCAOC may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.

(d) Mediators who fail to report as required by this rule shall be subject to sanctions by the court. Such sanctions shall include, but not be limited to, fines or other monetary penalties, decertification as a mediator and any other sanctions available through the power of contempt. The court shall notify the Commission of any action taken against a mediator pursuant to this section.

(5) Scheduling and Holding the Conference. The mediator shall schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless changed by written order of the court.

A mediator selected by agreement of the parties shall not delay scheduling or holding the conference

because one or more of the parties has not paid an advance fee deposit required by that agreement.

RULE 7. COMPENSATION OF THE MEDIATOR AND SANCTIONS

A. BY AGREEMENT. When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator. The terms of the parties' agreement with the mediator notwithstanding, Section E. below shall apply to issues involving the compensation of the mediator. Sections D and F below shall apply unless the parties' agreement provides otherwise.

B. BY COURT ORDER. When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of $150, which accrues upon appointment.

C. CHANGE OF APPOINTED MEDIATOR. Pursuant to Rule 2.A, the parties may select a certified mediator or nominate a non-certified mediator to conduct their mediated settlement conference. Parties who fail to select a mediator and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. The court may approve the substitution only upon proof of payment to the court's original appointee the $150 one time, per case administrative fee and any other amount due and owing for mediation services pursuant to Rule 7.B and any postponement fee due and owing pursuant to Rule 7.F.

D. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fees shall be paid in equal shares by the named parties. Payment shall be due and payable upon completion of the conference.

E. INABILITY TO PAY. No party found by the court to be unable to pay a full share of a mediator's fee shall be required to pay a full share. Any party required to pay a share of a mediator fee pursuant to Rules 7.B and C may move the court to pay according to the court's determination of that party's ability to pay.

In ruling on such motions, the judge may consider the income and assets of the movant and the outcome of the action. The court shall enter an order granting or denying the party's motion. In so ordering, the court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a settlement conference pursuant to these rules shall accept as payment in full of a party's share of the mediator's fee that portion paid by or on behalf of the party pursuant to an order of the court issued pursuant to this rule.

F. POSTPONEMENTS AND FEES.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for a session of the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A conference session may be postponed by the mediator for good cause only after notice by the movant to all parties of the reasons for the postponement and a finding of good cause by the mediator. Good cause shall mean that the reason for the postponement involves a situation over which the party seeking the postponement has no control, including but not limited to, a party or attorney's illness, a death in a party or attorney's family, a sudden and unexpected demand by a judge that a party or attorney for a party appear in court for a purpose not inconsistent with the Guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts or inclement weather such that travel is prohibitive. Where good cause is found, a mediator shall not assess a postponement fee.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause provided that the mediator was notified of the settlement immediately after it was reached and the mediator received notice of the settlement at least 14 calendar days prior to the date scheduled for mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of $150 shall be paid to the mediator if the postponement is allowed, except that if the request for postponement is made within seven calendar days of the scheduled date for mediation, the fee shall be $300. The postponement fee shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

(5) If all parties select the certified mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

COMMENTS TO RULE 7

Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage or any other out-of-pocket expenses associated with a court-ordered mediation.

Comment to Rule 7.D.

If a party is found by the court to have failed to attend a family financial settlement conference without good cause, then the court may require that party to pay the mediator's fee and related expenses.

Comment to Rule 7.F.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Commission may receive and approve applications for certification of persons to be appointed as family financial mediators. For certification, a person must have complied with the requirements in each of the following sections.

A. Training and Experience. Each applicant for certification must demonstrate that she/he has a basic understanding of North Carolina family law. Applicants should be able to demonstrate that they have completed at least 12 hours of education in basic family law (a) by attending workshops and programs on topics such as separation and divorce, alimony and post-separation support, equitable distribution, child custody and support and domestic violence; (b) by engaging in independent study such as viewing or listening to video or audio programs on those family law topics; or (c) by demonstrating equivalent experience, including demonstrating that his or her work experience satisfies one of the categories set forth in the Commission's Policy on Interpreting and Implementing the First Unnumbered Paragraph of FFS Rule 8.A, *e.g.*, that the applicant is an experienced family law judge, board certified family lawyer and, in addition, shall:

(1) Be an Advanced Practitioner member of the Association for Conflict Resolution (ACR) and have earned an undergraduate degree from an accredited four-year college or university, or

(2) Have completed a 40-hour family and divorce mediation training approved by the Commission pursuant to Rule 9, or, if already a certified superior court mediator, have completed the16-hour family mediation supplemental course pursuant to Rule 9, and have additional experience as follows:

(a) as a member in good standing of the NC State Bar or as a member similarly in good standing of the bar of another state and a graduate of a law school recognized as accredited by the North Carolina Board of law Examiners, with at least five years of experience after the date of licensure as a judge, practicing attorney, law professor and/or mediator or a person with equivalent experience; or

(b) as a licensed psychiatrist pursuant to N.C.G.S. § 90-9 *et seq.*, with at least five years of experience in the field after the date of licensure; or

(c) as a licensed psychologist pursuant to N.C.G.S. § 90-270.1 *et seq.*, with at least five years of experience in the field after the date of licensure; or

(d) as a licensed marriage and family therapist pursuant to N.C.G.S. § 90-270.45 *et seq*., with at least five years of experience in the field after date of licensure; or

(e) as a licensed clinical social worker pursuant to N.C.G.S. § 90B-7 *et seq*., with at least five years of experience in the field after date of licensure; or

(f) as a licensed professional counselor pursuant to N.C.G.S. § 90-329 *et seq*., with at least five years of experience in the field after date of licensure; or

(g) as an accountant certified in North Carolina with at least five years of experience in the field after date of certification.

B. If not licensed to practice law in one of the United States, have completed a six- hour training on North Carolina legal terminology, court structure and civil procedure provided by a trainer certified by the Commission. Attorneys licensed to practice law in states other than North Carolina shall complete this requirement through a course of self-study as directed by the Commission's executive secretary.

C. If not licensed to practice law in North Carolina, provide three letters of reference to the Commission as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice and experience as required by Rule 8.A.

D. Have observed as a neutral observer with the permission of the parties two mediations involving custody or family financial issues conducted by a mediator who is certified pursuant to these rules, or who is an Advanced Practitioner Member of the ACR or who is a NCAOC custody mediator. Conferences eligible for observation shall also include those conducted in disputes prior to litigation of family financial issues which are mediated by agreement of the parties and which incorporate these Rules.

If the applicant is not an attorney licensed to practice law in one of the United States, s/he must observe three additional mediations of civil or family cases or of disputes prior to litigation which are conducted by a mediator certi-

fied by the Commission and are conducted pursuant to an order of a court or agreement of the parties incorporating the mediation rules of a North Carolina state or federal court. All such conferences shall be observed from their beginning to settlement or impasse. Observations shall be reported on an NCAOC form.

All observers shall conform their conduct to the Commission's Requirements for Observer Conduct.

E. Demonstrate familiarity with the statutes, rules and standards of practice and conduct governing mediated settlement conferences conducted pursuant to these Rules.

F. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. An applicant for certification shall disclose on his/her application(s) any of the following: any pending criminal matters or any criminal convictions; any disbarments or other revocations or suspensions of any professional license or certification, including suspension or revocation of any license, certification, registration or qualification to serve as a mediator in another state or country for any reason other than to pay a renewal fee. In addition, an applicant for certification shall disclose on his/her application(s) any of the following which occurred within 10 years of the date the application(s) is filed with the Commission: any pending disciplinary complaint(s) filed with, or any private or public sanction(s) imposed by, a professional licensing or regulatory body, including any body regulating mediator conduct; any judicial sanction(s); any civil judgment(s); any tax lien(s); or any bankruptcy filing(s). Once certified, a mediator shall report to the Commission within 30 days of receiving notice any subsequent criminal conviction(s); any disbarment(s) or revocation(s) of a professional license, other discipli-nary complaints filed with, or actions taken by, a professional licensing or regulatory body; any judicial sanction(s); any tax lien(s); any civil judgment(s) or any filing(s) for bankruptcy.

G. Submit proof of qualifications set out in this section on a form provided by the Commission.

H. Pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

I. Agree to accept as payment in full of a party's share of the mediator's fee, the fee ordered by the court pursuant to Rule 7.

J. Comply with the requirements of the Commission for continuing mediator education or training. (These requirements may include advanced divorce mediation training, attendance at conferences or seminars relating to mediation skills or process and consultation with other family and divorce mediators about cases actually mediated. Mediators seeking recertification beyond one year from the date of initial certification may also be required to demonstrate that they have completed eight hours of family law training, including tax issues relevant to divorce and property distribution and eight hours of training in family dynamics, child development and interpersonal relations at any time prior to that recertification.) Mediators shall report on a Commission approved form.

Certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule. No application for recertification shall be denied on the grounds that the mediator's training and experience does not meet the training and experience required under Rules which were promulgated after the date of his/her original certification.

K. Once certified, agree to make reasonable efforts to assist mediator certification applicants in completing their observation requirements.

L. No mediator who held a professional license and relied upon that license to qualify for certification under subsection 8.A(2) above shall be decertified or denied recertification because that mediator's license lapses, is relinquished or becomes inactive; provided, however, that this subsection shall not apply to any mediator whose professional license is revoked, suspended, lapsed, relinquished or becomes inactive due to disciplinary action or the threat of same, from his/her licensing authority. Any mediator whose professional license is revoked, suspended, lapsed,

relinquished or becomes inactive shall report such matter to the Commission.

If a mediator's professional license lapses, is relinquished or becomes inactive, s/he shall be required to complete all otherwise voluntary continuing mediator education requirements as adopted by the Commission as part of its annual certification renewal process and to report completion of those hours to the Commission's office annually.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators certified pursuant to Rule 8.A(2) shall consist of a minimum of 40 hours of instruction. The curriculum of such programs shall include the subjects in each of the following sections:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques typical of family and divorce mediation;

(3) Communication and information gathering skills;

(4) Standards of conduct for mediators including, but not limited to the Standards adopted by the Supreme Court;

(5) Statutes, rules and practice governing mediated settlement conferences conducted pursuant to these Rules;

(6) Demonstrations of mediated settlement conferences with and without attorneys involved;

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty;

(8) An overview of North Carolina law as it applies to custody and visitation of children, equitable distribution, alimony, child support and post separation support;

(9) An overview of family dynamics, the effect of divorce on children and adults and child development;

(10) Protocols for the screening of cases for issues of domestic violence and substance abuse; and

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing family financial settlement procedures in North Carolina.

B. Certified training programs for mediators certified pursuant to Rule 8.A(2) shall consist of a minimum of 16 hours of instruction. The curriculum of such programs shall include the subjects listed in Rule 9.A. There shall be at least two simulations as specified in subsection (7).

C. A training program must be certified by the Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these Rules or attended in other states or approved by the ACR with requirements equivalent to those in effect for the Academy of Family Mediators immediately prior to its merger with other organizations to become the ACR may be approved by the Commission if they are in substantial compliance with the Standards set forth in this rule. The Commission may require attendees of an ACR approved program to demonstrate compliance with the requirements of Rules 9.A(5) and 9.A(8) either in the ACR approved training or in some other acceptable course.

D. To complete certification, a training program shall pay all administrative fees established by the NCAOC in consultation with the Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES.

Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the court may order the use of those procedures listed in Rule 10.B unless the court finds: that the parties did not agree upon the procedure to be utilized, the neutral to conduct it or the neutral's compensation; or that the procedure selected is not appropriate for the case or the parties. Judicial settlement conferences may be ordered only if permitted by local rule.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES.

In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) Neutral Evaluation (Rule 11), in which a neutral offers an advisory evaluation of the case following summary presentations by each party.

(2) Judicial Settlement Conference (Rule 12), in which a district court judge assists the parties in reaching their own settlement, if allowed by local rules.

(3) Other Settlement Procedures described and authorized by local rule pursuant to Rule 13.

The parties may agree to use arbitration under the Family Law Arbitration Act (N.C.G.S. § 50-41 *et seq.*) which shall constitute good cause for the court to dispense with settlement procedures authorized by these rules (Rule 1.C(6)).

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) When Proceeding is Conducted. The neutral shall schedule the conference and conduct it no later than 150 days from the issuance of the court's order or no later than the deadline for completion set out in the court's order, unless extended by the court. The neutral shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the neutral shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the court.

(2) Extensions of Time. A party or a neutral may request the court to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. The court may grant the extension and enter an order setting a new

deadline for completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(3) Where Procedure is Conducted. Settlement proceedings shall be held in any location agreeable to the parties. If the parties cannot agree to a location, the neutral shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

(4) No Delay of Other Proceedings. Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions or the trial of the case, except by order of the court.

(5) Inadmissibility of Settlement Proceedings. Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

(a) In proceedings for sanctions under this section;

(b) In proceedings to enforce or rescind a settlement of the action;

(c) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or

(d) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this subsection, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this section or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties and in all other respects complies with the requirements of Chapter 50 of the North Carolina General Statutes. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, other neutral or neutral observer present at a settlement proceeding under this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(6) No Record Made. There shall be no stenographic or other record made of any proceedings under these Rules.

(7) Ex Parte Communication Prohibited. Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(8) Duties of the Parties.

(a) Attendance. All parties and attorneys shall attend other settlement procedures authorized by Rule 10 and ordered by the court.

(b) Finalizing Agreement.

(i) If agreement is reached on all issues at the neutral evaluation, judicial settlement con-

ference or other settlement procedure, the essential terms of the agreement shall be reduced to writing as a summary memorandum unless the parties have reduced their agreement to writing, signed it and in all other respects have complied with the requirements of Chapter 50 of the North Carolina General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to its terms. Within 30 days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the court by such persons as the parties or the court shall designate.

(ii) If an agreement is reached upon all issues prior to the neutral evaluation, judicial settlement conference or other settlement procedure or finalized while the proceeding is in recess, the parties hall reduce its terms to writing and sign it along with their counsel, shall comply in all respects with the requirements of Chapter 50 of the North Carolina General Statutes and shall file a consent judgment or voluntary dismissals(s) disposing of all issues with the court within 30 days, or before the expiration of the deadline for completion of the proceeding, whichever is longer.

(iii) When a case is settled upon all issues, all attorneys of record must notify the court within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s).

(c) Payment of Neutral's Fee. The parties shall pay the neutral's fee as provided by Rule 10.C(12), except that no payment shall be required or paid for a judicial settlement conference.

(9) Sanctions for Failure to Attend Other Settlement Procedure of Pay Neutral's Fee. Any person required to attend a settlement procedure or pay a neutral's fee in compliance with N.C.G.S. § 7A-38.4A and the rules promulgated by the Supreme Court to implement that section who, fails to attend or to pay the fee without good cause, shall be subject to the contempt powers of the court and monetary sanctions imposed by the court. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, neutral fees, expenses and loss of earnings incurred by persons attending the procedure. A party to the action, or the court on its own motion, seeking sanctions against a party or attorney, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

(10) Selection of Neutrals in Other Settlement Procedures.

Selection by Agreement. The parties may select any person whom they believe can assist them with the settlement of their case to serve as a neutral in any settlement procedure authorized by these rules, except for judicial settlement conferences.

Notice of such selection shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures at the scheduling conference or the court appearance when settlement procedures are considered by the court. The notice shall be on a NCAOC form as set out in Rule 2 herein. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

If the parties are unable to select a neutral by agreement, then the court shall deny the motion for authorization to use another settlement procedure

and the court shall order the parties to attend a mediated settlement conference.

(11) Disqualification of Neutrals. Any party may move a court of the district in which an action is pending for an order disqualifying the neutral; and, for good cause, such order shall be entered. Cause shall exist, but is not limited to circumstances where, the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) Compensation of Neutrals. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding and making and reporting the award shall be compensable time. The parties shall not compensate a settlement judge.

(13) Authority and Duties of Neutrals.

(a) Authority of Neutrals.

(i) Control of Proceeding. The neutral shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the Proceeding. The neutral shall make a good faith effort to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral. In the absence of agreement, the neutral shall select the date and time for the proceeding.Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the court.

(b) Duties of Neutrals.

(i) The neutral shall define and describe the following at the beginning of the proceeding:

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The admissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(1) and Rule 10.C(6) herein; and

(e) The duties and responsibilities of the neutral and the participants.

(ii) Disclosure. The neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(iii) Reporting Results of the Proceeding. The neutral evaluator, settlement judge or other neutral shall report the result of the proceeding to the court in writing within 10 days in accordance with the provisions of Rules 11 and 12 herein on a NCAOC form.The NCAOC, in consultation with the Commission, may require he neutral to provide statistical data for evaluation of other settlement procedures.

(iv) Scheduling and Holding the Proceeding. It is the duty of the neutral to schedule the proceeding and conduct it prior to the completion deadline set out in the court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral unless said time limit is changed by a written order of the court.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. NATURE OF NEUTRAL EVALUATION. Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of the merits of the case, settlement value and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case, after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. PRE-CONFERENCE SUBMISSIONS. No later than 20 days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than 10 days prior to the date established for the neutral evaluation conference to begin, any party may, but is not required to, send additional written information to the evaluator responding to the submission of an opposing party. The response furnished to the evaluator shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator, if he or she deems it necessary, may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) Evaluator's Opening Statement. At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

(2) Oral Report to Parties by Evaluator. In addition to the written report to the court required under these rules, at the conclusion of the neutral evaluation conference, the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of the merits of the case, estimated settlement value and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefor. The evaluator shall not reduce his or her oral report to writing and shall not inform the court thereof.

(3) Report of Evaluator to Court. Within 10 days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the court using a NCAOC form, stating when and where the conference was held, the names of those persons who attended the conference and the names of any party or attorney known to the evaluator to have been absent from the neutral evaluation without permission. The report shall also inform the court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the evaluation conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state the name of the person(s) designated to file the consent judgment or voluntary dismissals with the court. Local rules shall not require the evaluator to send a copy of any agreement reached by the parties to the court.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties at the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions. If the parties do not reach a settle-

ment during such discussions, however, the evaluator shall complete the neutral evaluation conference and make his or her written report to the court as if such settlement discussions had not occurred. If the parties reach agreement at the conference, they shall reduce their agreement to writing as required by Rule 10.C(8)(b).

RULE 12. JUDICIAL SETTLEMENT CONFERENCE

A. SETTLEMENT JUDGE. A judicial settlement conference shall be conducted by a district court judge who shall be selected by the chief district court judge. Unless specifically approved by the chief district court judge, the district court judge who presides over the judicial settlement conference shall not be assigned to try the action if it proceeds to trial.

B. CONDUCTING THE CONFERENCE. The form and manner of conducting the conference shall be in the discretion of the settlement judge. The settlement judge may not impose a settlement on the parties but will assist the parties in reaching a resolution of all claims.

C. CONFIDENTIAL NATURE OF THE CONFERENCE. Judicial settlement conferences shall be conducted in private. No stenographic or other record may be made of the conference. Persons other than the parties and their counsel may attend only with the consent of all parties. The settlement judge will not communicate with anyone the communications made during the conference, except that the judge may report that a settlement was reached and, with the parties' consent, the terms of that settlement.

D. REPORT OF JUDGE. Within 10 days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the court using a NCAOC form, stating when and where the conference was held, the names of those persons who attended the conference and the names of any party or attorney known to the settlement judge to have been absent from the settlement conference without permission. The report shall also inform the court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the settlement conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state the name of the person(s) designated to file the con-

sent judgment or voluntary dismissals with the court. Local rules shall not require the settlement judge to send a copy of any agreement reached by the parties to the court.

RULE 13. LOCAL RULE MAKING

The chief district court judge of any district conducting settlement procedures under these Rules is authorized to publish local rules, not inconsistent with these Rules and N.C.G.S. § 7A-38.4, implementing settlement procedures in that district.

RULE 14. DEFINITIONS

A. The word, court, shall mean a judge of the district court in the district in which an action is pending who has administrative responsibility for the action as an assigned or presiding judge, or said judge's designee, such as a clerk, trial court administrator, case management assistant, judicial assistant and trial court coordinator.

B. The phrase, NCAOC forms, shall refer to forms prepared by, printed and distributed by the NCAOC to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the NCAOC. Proposals for the creation or modification of such forms may be initiated by the Commission.

C. The term, family financial case, shall refer to any civil action in district court in which a claim for equitable distribution, child support, alimony or post separation support is made or in which there are claims arising out of contracts between the parties under N.C.G.S. §§ 50-20(d), 52-10, 52-10.1 or 52B.

RULE 15. TIME LIMITS

Any time limit provided for by these rules may be waived or extended for good cause shown. Time shall be counted pursuant to the North Carolina Rules of Civil Procedure.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING JUDICIAL DISTRICT BARS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 24, 2014.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning judicial district bars, as particularly set forth in 27 N.C.A.C. 1A, Section .1000, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .1000, Model Bylaws for Use by Judicial District Bars

.1013 Selection of Nominees for District Court Judge

Unless otherwise required by law, the following procedures shall be used to determine the nominees to be recommended to the governor pursuant to NC Gen. Stat. §7A-142 for vacant district court judgeships in the judicial district.

(a) Meeting for Nominations:

....

(b) Candidates:

...

(c) Voting: Each district bar member eligible to vote pursuant to NC Gen. Stat. § 7A-142 may vote for up to ~~three~~ five candidates. Cumulative voting is prohibited. Proxy voting is prohibited.

(d) Submission to Governor: The ~~three~~ five candidates receiving the highest number of votes shall be the nominees to fill the vacancy on the district court and their names, and vote totals, shall be transmitted to the governor. In the event of a tie for ~~third~~ fifth place, the names of those candidates involved in the tie shall be transmitted to the governor together with the names of the ~~two~~ four candidates receiving the highest number of votes.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments

to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 2014.

Given over my hand and the Seal of the North Carolina State Bar, this the 17th day of February, 2014.

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 6th day of March, 2014.

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 6th day of March, 2014.

s/Beasley, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING JUDICIAL DISTRICT BARS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 25, 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 judicial district bars, as particularly set forth in 27 N.C.A.C. 1A, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0900, Organization of the Judicial District Bars

.0902 Annual Membership Fee

If a judicial district bar elects to assess an annual membership fee from its active members pursuant to N.C.G.S. §84-18.1(b), the following procedures shall apply:

(a) Notice to State Bar.

...

(e) Members Subject to Assessment. Only those lawyers who are active members of a judicial district bar may be assessed an annual membership fee. ~~A lawyer who joins a judicial district bar after the beginning of its fiscal year shall be exempt from the obligation to pay the annual membership fee for that fiscal year only if the lawyer can demonstrate that he or she previously paid an annual membership fee to another judicial district bar with a fiscal year that runs coterminously, for a period of three (3) months or more, with the fiscal year of the lawyer's new judicial district bar.~~

(f) Members Exempt from Assessment.

(1) A person licensed to practice law in North Carolina for the first time by examination is not liable for judicial district bar membership fees during the year in which the person is admitted;

(2) A person licensed to practice law in North Carolina serving in the United States Armed Forces, whether in a legal or nonlegal capacity, is exempt from judicial district bar membership fees for any year in which the member serves some portion thereof on full-time active duty in military service;

(3) A lawyer who joins a judicial district bar after the beginning of its fiscal year is exempt from the obligation to pay the annual membership fee for that fiscal year only if the lawyer can demonstrate that he or she previously paid an annual membership fee to another judicial district bar with a fiscal year that runs coterminously, for a period of three (3) months or more, with the fiscal year of the lawyer's new judicial district bar.

~~(f)~~ (g) Hardship waivers.

...

[Re-lettering remaining paragraphs.]

.0903 Fiscal Period

To avoid conflict with the assessment of the membership fees for the North Carolina State Bar, each judicial district bar that assesses a membership fee shall adopt a fiscal year that is not a calendar year. Any judicial district bar that assesses a mandatory membership fee for the first time after December 31, 2013, must adopt a fiscal year that begins July 1 and ends July 30.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 25, 2013.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of February, 2014.

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 6th day of March, 2014.

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 6th day of March, 2014.

s/Beasley, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING JUDICIAL DISTRICT BARS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 25, 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 judicial district bars, as particularly set forth in 27 N.C.A.C. 1A, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0900, Organization of the Judicial District Bars

.0902 Annual Membership Fee

If a judicial district bar elects to assess an annual membership fee from its active members pursuant to N.C.G.S. §84-18.1(b), the following procedures shall apply:

(a) Notice to State Bar.

...

(e) Members Subject to Assessment. Only those lawyers who are active members of a judicial district bar may be assessed an annual membership fee. ~~A lawyer who joins a judicial district bar after the beginning of its fiscal year shall be exempt from the obligation to pay the annual membership fee for that fiscal year only if the lawyer can demonstrate that he or she previously paid an annual membership fee to another judicial district bar with a fiscal year that runs coterminously, for a period of three (3) months or more, with the fiscal year of the lawyer's new judicial district bar.~~

(f) Members Exempt from Assessment.

(1) A person licensed to practice law in North Carolina for the first time by examination is not liable for judicial district bar membership fees during the year in which the person is admitted;

(2) A person licensed to practice law in North Carolina serving in the United States Armed Forces, whether in a legal or nonlegal capacity, is exempt from judicial district bar membership fees for any year in which the member serves some portion thereof on full-time active duty in military service;

(3) A lawyer who joins a judicial district bar after the beginning of its fiscal year is exempt from the obligation to pay the annual membership fee for that fiscal year only if the lawyer can demonstrate that he or she previously paid an annual membership fee to another judicial district bar with a fiscal year that runs coterminously, for a period of three (3) months or more, with the fiscal year of the lawyer's new judicial district bar.

~~(f)~~ (g) Hardship waivers.

...

[Re-lettering remaining paragraphs.]

.0903 Fiscal Period

To avoid conflict with the assessment of the membership fees for the North Carolina State Bar, each judicial district bar that assesses a membership fee shall adopt a fiscal year that is not a calendar year. Any judicial district bar that assesses a mandatory membership fee for the first time after December 31, 2013, must adopt a fiscal year that begins July 1 and ends June 30.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 25, 2013.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of April, 2014.

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. *It is noted that this matter was previously considered by the Court and approved by order dated March 6, 2014. Subsequently, it was brought to the Court's attention that the amendment of Rule .0903 as originally submitted contained a technical error, that being a reference to "July 30" rather than "June 30" as the terminal day of the fiscal year prescribed in the proposed amendment. This*

order is intended to rescind the order approving the erroneous rule and to approve the corrected version of the rule appearing above.

This the 10th day of April, 2014.

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 10th day of April, 2014.

s/Beasley, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterlymeeting on October 25, 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 membership, as particularly set forth in 27 N.C.A.C. 1A, Section .0200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0200, Membership—Annual Membership Fees

.0201 Classes of Membership

(a) Two Classes of Membership

Members of the North Carolina State Bar shall be divided into two classes: active members and inactive members.

...

(c) Inactive Members

...

(2) Inactive members of the North Carolina State Bar may not practice law, except as provided in this rule for persons granted *emeritus pro bono* status, and are exempt from payment of membership dues during the period in which they are inactive members. For purposes of the State Bar's membership records, the category of inactive members shall be further divided into the following subcategories:

(A) ~~Retired/nonpracticing~~ Non-practicing

This subcategory includes those members who are not engaged in the practice of law or holding themselves out as practicing attorneys and who ~~are retired,~~ hold positions unrelated to the practice of law, or practice law in other jurisdictions.

(B) Retired

This subcategory includes those members who are retired from the practice of law and who no longer hold themselves out as practicing attorneys. A retired member must hold himself or herself out as a "Retired Member of the North Carolina

State Bar" or by some similar designation, provided such designation clearly indicates that the attorney is "retired."

~~(B)~~ (C) Disability inactive status

[Re-lettering 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 October 25, 2013.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of February, 2014.

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 6th day of March, 2014.

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 6th day of March, 2014.

s/Beasley, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING TRANSFER TO INACTIVE STATUS

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 24, 2014.

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 transfer to inactive status, as particularly set forth in 27 N.C.A.C. 1D Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

.0901 Transfer to Inactive Status

(a) Petition for Transfer to Inactive Status

…

(b) Conditions Upon Transfer

No member may be voluntarily transferred to disability-inactive status, retired/nonpracticing status, or emeritus pro bono status until:

(1) the member has paid all membership fees, ~~surcharges,~~ Client Security Fund assessments, late fees, and costs assessed by the North Carolina State Bar or the Disciplinary Hearing Commission, as well as all past due fees, fines and penalties owed to the Board of Continuing Legal Education;

…

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 2014.

Given over my hand and the Seal of the North Carolina State Bar, this the 20th day of February, 2014.

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 6th day of March, 2014.

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 6th day of March, 2014.

s/Beasley, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING SUSPENSION

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 24, 2014.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning 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

.0903 Suspension for Failure to Fulfill Obligations of Membership

(a) Procedure for Enforcement of Obligations of Membership

Whenever a member of the North Carolina State Bar fails to fulfill an obligation of membership in the State Bar, whether established by the administrative rules of the State Bar or by statute, the member shall be subject to administrative suspension from membership pursuant to the procedure set forth in this rule; provided, however, that the procedures for the investigation of and action upon alleged violations of the Rules of Professional Conduct by a member are set forth in subchapter 1B of these rules and that no aspect of any procedure set forth in this rule shall be applicable to the State Bar's investigation of or action upon alleged violations of the Rules of Professional Conduct by a member.

(1) The following are examples of obligations of membership that will be enforced by administrative suspension. This list is illustrative and not exclusive:

(A) Payment of the annual membership fee, including any associated late fee ~~and the surcharge~~ as set forth in G.S. 84-34;

…

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 2014.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of February, 2014.

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 6th day of March, 2014.

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 6th day of March, 2014.

s/Beasley, J.
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 January 24, 2014.

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.

…

(d) Requirements for Reinstatement

(1) Completion of Petition

…

(6) Payment of Fees, Assessments and Costs The member must pay all of the following:

(A) a $125.00 reinstatement fee or $250.00 reinstatement fee if suspended for failure to comply with CLE requirements;

(B) all membership fees, Client Security Fund assessments, ~~judicial surcharges~~ and late fees owed at the time of suspension and owed for the year in which the reinstatement petition is filed;

…

(h) Denial of Petition.

When a petition for reinstatement is denied by the council in a given calendar year, the member may not petition again until the following calendar year. The reinstatement fee, costs, and any fees paid pursuant to paragraph (d)(6) shall be retained. However, the State Bar membership fee, Client Security Fund assessment, ~~judicial surcharge~~ and district bar membership fee assessed for the year in which the application is filed shall be refunded.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 2014.

Given over my hand and the Seal of the North Carolina State Bar, this the 20th day of February, 2014.

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 6th day of March, 2014.

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 6th day of March, 2014.

s/Beasley, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 25, 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 continuing legal education program, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Education Program

.1518 Continuing Legal Education Program

(a) Annual Requirement

...

(b) ...

(c) Professionalism Requirement for New Members. Except as provided in paragraph (d)(1), each active member admitted to the North Carolina State Bar after January 1, 2011, must complete the North Carolina State Bar ~~New Admittee~~ Professionalism for New Admittees Program (~~New Admittee Program~~ PNA Program) in the year the member is first required to meet the continuing legal education requirements as set forth in Rule .1526(b) and (c) of this subchapter. CLE credit for the ~~New Admittee~~ PNA Program shall be applied to the annual mandatory continuing legal education requirements set forth in paragraph (a) above.

(1) Content and Accreditation. The State Bar ~~New Admittee~~ PNA Program shall consist of 12 hours of training in subjects designated by the State Bar including, but not limited to, professional responsibility, professionalism, and law office management. The chairs of the Ethics and Grievance Committees, in consultation with the chief counsel to those committees, shall annually establish the content of the program and shall publish the required content on or before January 1 of each year. To be approved as a ~~New Admittee~~ PNA Program ~~CLE activity~~, a sponsor must satisfy the annual content requirements. At least 45 days prior to the presentation of a ~~New Admittee~~ PNA Program, a sponsor must submit a detailed description of the program to the board for

approval. Accredited sponsors shall not be exempt from the prior submission requirement and may not advertise a ~~New Admittee~~ PNA Program until approved by the board. ~~New Admittee~~ PNA Programs shall be specially designated by the board and no course that is not so designated shall satisfy the ~~New Admittee~~ PNA Program requirement for new members.

(2) Evaluation. To receive CLE credit for attending a ~~New Admittee~~ PNA Program, the participant must complete a written evaluation of the program which shall contain questions specified by the State Bar. Sponsors shall collate the information on the completed evaluation forms and shall send a report showing the collated information, together with the original forms, to the State Bar when reporting attendance pursuant to Rule .1601(e)(1) of this subchapter.

(3) Format and Partial Credit. The ~~New Admittee~~ PNA Program shall be presented in two six-hour blocks (with appropriate breaks) over two days. The six-hour blocks do not have to be attended on consecutive days or taken from the same provider; however, no partial credit shall be awarded for attending less than an entire six-hour block unless a special circumstances exemption is granted by the board. The PNA Program may be distributed over the Internet by live web streaming (webcasting) but ~~No~~ no part of the program may be taken online (via the Internet) on demand. The program may also be taken as a prerecorded program provided the requirements of Rule .1604(d) of this subchapter are satisfied and at least one hour of each six-hour block consists of live programming.

(d) Exemptions from Professionalism Requirement for New Members.

(1) Licensed in Another Jurisdiction. A member who is licensed by a United States jurisdiction other than North Carolina for five or more years prior to admission to practice in North Carolina is exempt from the ~~New Admittee~~ PNA Program requirement and must notify the board of the exemption in the first annual report sent to the member pursuant to Rule .1522 of this subchapter.

(2) Inactive Status. A newly admitted member who is transferred to inactive status in the year of admission to the State Bar is exempt from the ~~New Admittee~~ PNA Program requirement but, upon the entry of an order transferring the member back to active status, must complete the ~~New Admittee~~ PNA Program in the year that the member is subject to the requirements set forth in paragraph (a) above unless the member qualifies for the exemption under paragraph (d)(1) of this rule.

(3) Exemptions Under Rule .1517. A newly admitted active member who qualifies for an exemption under Rule .1517 of this subchapter shall be exempt from the ~~New Admittee~~ PNA Program requirement during the period of the Rule .1517 exemption. The member shall notify the board of the exemption in the first annual report sent to the member pursuant to Rule .1522 of this subchapter. The member must complete the ~~New Admittee~~ PNA Program in the year the member no longer qualifies for the Rule .1517 exemption or the next calendar year unless the member qualifies for the exemption under paragraph (d)(1) of this rule.

.1520 Accreditation of Sponsors and Programs

(a) Accreditation of Sponsors. ….

(b) ~~Presumptive~~ Program Approval for Accredited Sponsors.

(1) Once an organization is approved as an accredited sponsor,

the continuing legal education programs sponsored by that organization are presumptively approved for credit; however, ~~and no~~ application must be made to the board for approval. At least 50 days prior to the presentation of a program, an accredited sponsor shall file an application, on a form prescribed by the board, notifying the board of the dates and locations of presentations of the program and the sponsor's calculation of the CLE credit hours for the program.

(2) The board may at any time revoke the accreditation of an accredited sponsor for failure to satisfy the requirements of Rule .1512 and Rule .1519 of this subchapter, and for failure to satisfy the Regulations Governing the Administration of the Continuing Legal Education Program set forth in Section .1600 of this subchapter.

~~(2)~~(3)The board ~~may~~ shall evaluate a program presented by an accredited sponsor and, upon a determination that the program does not satisfy the requirements of Rule .1519, notify the accredited sponsor that ~~any presentation of the same~~ the program, ~~the date for which was not included in the announcement required by Rule .1520(e) below,~~ is not approved for credit. Such notice shall be sent by the board to the accredited sponsor within 45 days after the receipt of the ~~announcement~~ application. If notice is not sent to the accredited sponsor within the 45-day period, the program shall be presumed to be approved. The accredited sponsor may request reconsideration of ~~such a~~ an unfavorable accreditation decision by submitting a letter of appeal to the board within 15 days of receipt of the notice of disapproval. The decision by the board on an appeal is final.

(c) Unaccredited Sponsor Request for Program Approval.

…

~~(e) Program Announcements of Accredited Sponsors. At least 50 days prior to the presentation of a program, an accredited sponsor shall file an announcement, on a form prescribed by the board, notifying the board of the dates and locations of presentations of the program and the sponsor's calculation of the CLE credit hours for the program.~~

~~(f)~~ (e) Records...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 25, 2013.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of February, 2014.

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 6th day of March, 2014.

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 6th day of March, 2014.

s/Beasley, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 25, 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 continuing legal education program, as particularly set forth in 27 N.C.A.C. 1D, Section .1600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1600 Regulations Governing the Administration of the Continuing Legal Education Program

.1602 Course Content Requirements

(a) Professional Responsibility Courses on Stress, Substance Abuse, Chemical Dependency, and Debilitating Mental Conditions

….

(d) Skills and Training Courses - A course that teaches a skill specific to the practice of law may be accredited for CLE if it satisfies the accreditation standards set forth in Rule .1519 of this subchapter with the primary objective of increasing the participant's professional competence and proficiency as a lawyer. The following are illustrative, non-exclusive examples of subject matter that may earn CLE credit: legal writing; oral argument; courtroom presentation; and legal research. A course that provides general instruction in non-legal skills shall NOT be accredited. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: learning to use ~~computer hardware, non-legal~~ software for an application that is not specific to the practice of law (e.g. word processing)~~,~~; ~~or~~ learning to use office equipment (except as permitted by paragraph (e) of this rule); public speaking; speed reading; efficiency training; personal money management or investing; career building; marketing; and general office management techniques.

(e) Technology Courses—A course on a specific information technology product, device, platform, application, or other technology solution (IT solution) may be accredited for CLE if the course satisfies the accreditation standards in Rule .1519 of this subchapter; specifically, the primary objective of the course must be to increase the participant's professional competence and proficiency as a lawyer. The

following are illustrative, non-exclusive examples of courses that may earn CLE credit: electronic discovery software for litigation; document automation/assembly software; document management software; practice management software; digital forensics for litigation; and digital security. A course on the selection of an IT solution or the use of an IT solution to enhance a lawyer's proficiency as a lawyer or to improve law office management may be accredited if the requirements of paragraphs (c) and (d) of this rule are satisfied. A course that provides general instruction on an IT solution but does not include instruction on the practical application of the IT solution to the practice of law shall not be accredited. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: generic education on how to use a tablet computer, laptop computer, or smart phone; training courses on Microsoft Office, Excel, Access, Word, Adobe, etc. programs; and instruction in the use of a particular desktop or mobile operating system. No credit will be given to a course that is sponsored by a manufacturer, distributor, broker, or merchandiser of the IT solution. A sponsor may not accept compensation from a manufacturer, distributor, broker, or merchandiser of an IT solution in return for presenting a CLE program about the IT solution. Presenters may include representatives of a manufacturer, distributor, broker, or merchandiser of the IT solution but they may not be the only presenters at the course and they may not determine the content of the course.

(f) ~~(e)~~ Activities That Shall Not Be Accredited ...

[Re-lettering remaining paragraphs.]

.1604 Accreditation of Prerecorded Simultaneous Broadcast, and Computer-Based Programs

(a) Presentation Including Prerecorded Material. ...

(b) Simultaneous Broadcast. An active member may receive credit for participation in a live presentation which is simultaneously broadcast by telephone, satellite, live web streaming (webcasting), or video conferencing equipment. The member may participate in the presentation by listening to or viewing the broadcast from a location that is remote from the origin of the broadcast. The broadcast may include prerecorded material provided it also includes a live question and answer session with the presenter.

(c) Accreditation Requirements.

….

(e) Computer-Based CLE. Effective ~~for courses attended on or after July 1, 2001~~ January 1, 2014, a member may receive up to ~~four (4)~~ six

hours of credit annually for participation in a course on CD-ROM or CONTINUING LEGAL EDUCATION PROGRAM online. A CD-ROM course is an educational seminar on a compactdisk that is accessed through the CD-ROM drive of the user's personalcomputer. An online course is an educational seminar available on aprovider's website reached via the Internet.

(1) A member may apply up to ~~four~~ six credit hours of computer basedCLE to a CLE deficit from a preceding calendar year. Any computer-based CLE credit hours applied to a deficit from a preceding year will be included in calculating the maximum of ~~four (4)~~ six hours of computer-based CLE allowed in the preceding calendar year. A member may carry over to the next calendar year no more than ~~four~~ six credit hours of computer-based CLE pursuant to Rule .1518~~(c)~~(b) of this subchapter. Any credit hours carried over pursuant to Rule .1518~~(c)~~(b) of this subchapter will ~~not~~ be included in calculating the ~~four (4)~~ six hours of computer-based CLE allowed in any one calendar year.

(2) ...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North

Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 25, 2013.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of February, 2014.

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 6th day of March, 2014.

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 6th day of March, 2014.

s/Beasley, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly-meeting on January 24, 2014.

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

.1725 Areas of Specialty

There are hereby recognized the following specialties:

(1) bankruptcy law

(a) consumer bankruptcy law

(b) business bankruptcy law

(2) ...

(11) trademark law.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 2014.

Given over my hand and the Seal of the North Carolina State Bar, this the 17th day of February, 2014.

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 6th day of March, 2014.

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 6th day of March, 2014.

s/Beasley, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 24, 2014.

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 .1800, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1800 Hearing and Appeal Rules of the Board of Legal Specialization

.1803 Reconsideration of Failed Examination

(a) Review of Examination.

...

(c) Denial of Petition by Chair. The director of the specialization program shall review the petition and determine whether, if all grading objections of the petitioner are decided in the petitioner's favor, the petitioner's grade on the examination would be changed to a passing grade. If the director determines that the petitioner's grade would not

be changed to passing, the director shall notify the chair who may deny the petition on this basis.

~~(e)~~(d) Review Procedure.

[Re-lettering remaining paragraphs.]

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 2014.

Given over my hand and the Seal of the North Carolina State Bar, this the 17th day of February, 2014.

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 6th day of March, 2014.

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 6th day of March, 2014.

s/Beasley, J.
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 October 25, 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 .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

.0118 Certification Committee

(a) ...

(c) The committee shall advise and assist the board in carrying out the board's objectives and in the implementation and regulation of this plan by advising the board as to standards for certification of individuals as paralegals. The committee shall be charged with actively administering the plan as follows:

(1) upon request of the board, make recommendations to the board for certification, continued certification, denial, suspension, or revocation of certification of paralegals and for procedures with respect thereto;

~~(2) administer procedures established by the board for evaluation of applications for certification and continued certification as a paralegal and for denial, suspension, or revocation of such certification;~~

~~(3)~~ (2) ~~administer examinations and other testing procedures, if applicable, investigate references of applicants and, if deemed advisable, seek additional information regarding applicants for certification or continued certification as paralegals~~ draft and regularly revise the certification examination; and

~~(4)~~ (3) perform such other duties and make such other recommendations as may be delegated to or requested 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 amendmentsto the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 25, 2013.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of February, 2014.

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 6th day of March, 2014.

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 6th day of March, 2014.

s/Beasley, J.
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 January 24, 2014.

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 .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

.0105 Appointment of Members; When; Removal

(a) Appointment. The council shall appoint the members of the board, provided, however, after the appointment of the initial members of the board, each paralegal member appointed for an initial term shall be selected by the council from two nominees determined by a vote by mail or online of all active certified paralegals in an election conducted by the board.

(b) …

.0108 Succession

Each member of the board shall be entitled to serve for one full three year term and to succeed himself or herself for one additional three year term. Each certified paralegal member shall be eligible for reappointment by the council at the end of his or her term without appointment of a nominating committee or vote of all active paralegals as would be otherwise required by Rule .0105 of this subchapter. Thereafter, no person may be reappointed without having been off of the board for at least three years.

.0119 Standards for Certification of Paralegals

(a) …

(b) Notwithstanding an applicant's satisfaction of the standards set forth in Rule .0119(a) or (b), no individual may be certified as a paralegal if:

(1) the individual's certification or license as a paralegal in any state is under suspension or revocation;

(2) the individual's license to practice law in any state is under suspension or revocation;

(3) the individual has been convicted of a criminal act that reflects adversely on the individual's honesty, trustworthiness, or fitness as a paralegal, or has engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, provided, however, the board may certify an applicant if, after consideration of mitigating factors, including remorse, reformation of character, and the passage of time, the board determines that the individual is honest, trustworthy, and fit to be a certified paralegal; or

(4) the individual is not a legal resident of the United States.

(e) Qualified Paralegal Studies Program. A qualified paralegal studies program is a program of paralegal or legal assistant studies that is an institutional member of the Southern Association of Colleges and Schools or other regional or national accrediting agency recognized by the United States Department of Education, and is either

(1) approved by the American Bar Association;

(2) an institutional member of the American Association for Paralegal Education; or

(3) offers at least the equivalent of 18 semester credits of coursework in paralegal studies as prescribed by the American Bar Association Guidelines for the Approval of Paralegal Education.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 2014.

Given over my hand and the Seal of the North Carolina State Bar, this the 17th day of February, 2014.

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 6th day of March, 2014.

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 6th day of March, 2014.

s/Beasley, J.
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 October 25, 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, Rules Governing Continuing Paralegal Education

.0201 Continuing Paralegal Education (CPE)

(a) Each active certified paralegal subject to these rules shall complete 6 hours of approved continuing education during each year of certification.

(b) Of the 6 hours, at least 1 hour shall be devoted to the areas of professional responsibility or professionalism or any combination thereof.

(1) A professional responsibility course or segment of a course shall be devoted to (1) the substance, the underlying rationale, and the practical application of the Rules of Professional Conduct; (2) the professional obligations of the lawyer to the client, the court, the public, and other lawyers, and the paralegal's role in assisting the lawyer to fulfill those obligations; or (3) the effects of substance abuse and chemical dependency, or debilitating mental condition on a lawyer's or a paralegal's professional responsibilities; or (4) the effects of stress on a paralegal's professional responsibilities.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 25, 2013.

Given over my hand and the Seal of the North Carolina State Bar, this the 17th day of February, 2014.

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 6th day of March, 2014.

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 6th day of March, 2014.

s/Beasley, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING REGISTRATION OF INTERSTATE AND INTERNATIONAL LAW FIRMS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 25, 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 registration of interstate and international law firms, as particularly set forth in 27 N.C.A.C. 1E, Section .0200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1E, Section .0200, Registration of Interstate and International Law Firms

.0201 Registration Requirement

No law firm or professional organization that ~~which~~ (1) maintains offices in North Carolina and one or more other jurisdictions, or (2) files for a certificate of authority to transact business in North Carolina from the North Carolina Secretary of State, may do business in North Carolina without first obtaining a certificate of registration from the North Carolina State Bar provided, however, that no law firm or professional organization shall be required to obtain a certificate of registration if all attorneys associated with the law firm or professional organization, or any law firm or professional organization that is in partnership with said law firm or professional organization, are licensed to practice law in North Carolina.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 25, 2013.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of February, 2014.

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 6th day of March, 2014.

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 6th day of March, 2014.

s/Beasley, J.
For the Court

HEADNOTE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

CONSTITUTIONAL LAW—Continued

trial on the basis that defendant's Sixth Amendment Confrontation Clause rights were violated. Even if admission of the challenged testimony and exhibits was erroneous, any error was harmless beyond a reasonable doubt because defendant testified in his own defense that the seized substance was cocaine and that he had been selling it. **State v. Williams, 64.**

Confrontation Clause—expert testimony—based on non-testifying analyst's report—Defendant's Sixth Amendment right to confront witnesses against him in a drug possession case was not violated by the admission of an expert's opinion testimony that the substance seized from defendant's car was cocaine, even though the expert did not personally test or observe the testing of the substance. Defendant had the opportunity to cross-examine the expert witness at trial. Furthermore, even assuming admission of the expert's opinion violated defendant's rights under the Confrontation Clause, the alleged error was harmless given that defendant told a law enforcement officer that the substance was cocaine and defense counsel elicited testimony that the substance appeared to be cocaine. The unanimous decision of the Court of Appeals was reversed. **State v. Ortiz-Zape, 1.**

Confrontation Clause—expert opinion—independent analysis of testing performed by another analyst—The Court of Appeals erred in a possession of cocaine case by reaching the merits of defendant's argument that the admission of expert opinion that a substance was cocaine based upon an independent analysis of testing performed by another analyst in the laboratory violated the Confrontation Clause. Defendant did not present timely objections at trial and failed to allege plain error on appeal. Even if he had presented timely objections, he would not have been entitled to a new trial. **State v. Brent, 73.**

Confrontation Clause—laboratory analysis—The Confrontation Clause rights of a defendant in a cocaine prosecution were not violated where the SBI agent who performed the laboratory analysis did not testify, but another agent presented an independent opinion formed as a result of her own analysis of the first agent's testing. The laboratory report was not admitted. As in *State v. Ortiz-Zape*, the testifying agent presented an independent opinion formed as a result of her own analysis, not mere surrogate testimony, and defendant was able to conduct a vigorous and searching cross-examination. **State v. Brewington, 29.**

Effective assistance of counsel—counsel's argument—statutory rape—second-degree rape—The Court of Appeals erred by holding that defendant received ineffective assistance of counsel based on trial counsel's failure to argue that defendant could not, consistent with double jeopardy principles, be sentenced for both statutory rape and second-degree rape when the convictions stemmed from a single act of sexual intercourse with the same victim. Any such argument would have been unsuccessful because it is the General Assembly's intent for defendants to be separately punished for a violation of both statutes arising from a single act of sexual intercourse when the elements of each offense are satisfied. **State v. Banks, 652.**

Full Faith and Credit Clause—Uniform Enforcement of Foreign Judgment Act—The Court of Appeals did not err in a breach of contract case by holding that the Full Faith and Credit Clause precluded the use of intrinsic fraud to defeat a foreign monetary judgment pursuant to North Carolina's Uniform

CONSTITUTIONAL LAW—Continued

Enforcement of Foreign Judgment Act (UEFJA). The defenses to a foreign judgment under the UEFJA are limited by the Full Faith and Credit Clause to those defenses that are directed to the enforcement of the foreign judgment, and N.C.G.S. § 1A-1, Rule 60(b) of the North Carolina Rules of Civil Procedure has no applicability. **DocRx, Inc. v. EMI Servs. of N.C., LLC, 371.**

Right to confront witnesses—lab report—State's notice of intent— *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, had no impact on the continuing vitality of N.C.G.S. § 90-95(g) (notice of intent to introduce a lab report without calling the chemist). A valid waiver of defendant's constitutional right to confront the chemical analyst occurs when the State satisfies the requirements of N.C.G.S. § 90-95(g)(1) and defendant fails to file a timely written objection. **State v. Whittington, 186.**

Right to confront witnesses—laboratory analysis—surrogate testimony— Defendant's Sixth Amendment right to confront the witnesses against him in a cocaine prosecution was violated by the admission of lab reports through the testimony of a substitute analyst. The testifying analyst recited the testing analysts' opinions rather than providing her own independent opinion. **State v. Craven, 51.**

CORPORATIONS

Breach of fiduciary duty—insufficient evidence—agency—piercing the corporate veil—The trial court erred in an action resulting from a failed business venture by denying defendant Corinna Freeman's (Corinna) motions for directed verdict and judgment notwithstanding the verdict on plaintiff's breach of fiduciary duty claim. Plaintiffs never became shareholders, plaintiffs did not establish that Corinna owed them a special duty as creditors, and plaintiffs' injury was the same as the injury suffered by the company. The decision of the Court of Appeals affirming the trial court's denial was reversed and the matter was remanded to that Court for application of the piercing the corporate veil doctrine to plaintiffs' agency claims. **Green v. Freeman, 136.**

DISCOVERY

Medical review privilege—failure to establish medical review committee—The trial court did not err in a medical malpractice case by concluding that the Quality Care Control Reports, notes taken by the Cumberland County Health System, Inc. (CCHS) Risk Manager, and the Root Cause Analysis Report were not protected by N.C.G.S. § 131E-95(b). Defendant CCHS failed to demonstrate the existence of a medical review committee within the meaning of the statute, and thus, the documents were not shielded from discovery. **Hammond v. Saini, 607.**

ELECTIONS

Non-Voting Rights Act districts—race as dominant factor—not established—Plaintiffs failed to establish that race was the dominant factor in drafting electoral districts that were not drawn as Voting Rights Act (VRA) districts, and the trial court's application of the rational basis test was appropriate where the court's findings of fact supported its conclusions of law. The trial court found both racial and non-racial motivations, with neither category predominant in the establishment of the districts. Although plaintiffs argued that the evidence cited by the trial court was pretextual and implausible and contended that other evi-

ELECTIONS—Continued

dence more favorable to their position was persuasive, plaintiffs did not contend that the evidence credited and cited by the trial court was not competent. **Dickson v. Rucho, 542.**

Redistricting—N.C. Constitution—Good of the Whole clause—Plaintiffs' argument that redistricting plans violated the "Good of the Whole" clause found in Article I, Section 2 of the Constitution of North Carolina failed because the claim was not based upon a justiciable standard, and because acts of the General Assembly enjoy "a strong presumption of constitutionality." **Dickson v. Rucho, 542.**

Redistricting—N.C. Constitution—Whole County Provision—Plaintiffs did not successfully argue that that the trial court erred when it failed to find that redistricting plans following a census violated the Whole County Provision of the North Carolina Constitution. Plaintiffs contended that the plan violated *Stephenson v. Bartlett*, 355 N.C. 354, (*Stephenson I*) because it divided counties and traversed county lines to an unnecessary extent. Plaintiffs did not produce an alternative plan that better complied with a correct reading of *Stephenson I's* fifth and sixth factors than the plans enacted by the General Assembly. **Dickson v. Rucho, 542.**

Redistricting—proportionality—not a dispositive factor—In an action concerning the setting of new electoral districts after the 2010 census, the General Assembly's consideration of rough proportionality was merely a means of avoiding voter dilution and potential Voting Rights Act liability, not an attempt to trade the rights of some minority voters against the rights of other members of the same minority class. Proportionality was not a dispositive factor, but merely one consideration of many described in the materials and other contributions from numerous organizations, experts, and lay witnesses. **Dickson v. Rucho, 542.**

Redistricting—race as predominant factor—strict scrutiny—truncated facts—nothing to gain on remand—In an action concerning the setting of new electoral districts after the 2010 census, whether the predominant factor in the formation of the districts could fairly be described as race and whether strict scrutiny was the appropriate standard of review could not be determined because of the trial court's truncated findings of fact. The trial court's error in concluding as a matter of law that the General Assembly was motivated predominantly by race was not fatal because plaintiffs could gain nothing on remand. **Dickson v. Rucho, 542.**

Redistricting—Voting Rights Act—compelling state interest—Because the Supreme Court of the United States and the United States Congress have indicated without ambiguity that they expect states to comply with the Voting Rights Act, state laws passed for the purpose of complying with the Act must be capable of surviving strict scrutiny, indicating that such compliance is a compelling state interest. Moreover, the General Assembly's desire to comply with the Voting Rights Act is justifiable for other reasons, including that elections are a core state function, that establishing voting districts is an essential component of holding elections, and that a state is subject to federal mandates in addition to those found in the Voting Rights Act and the Fourteenth Amendment. **Dickson v. Rucho, 542.**

PROBATION AND PAROLE—Continued

whether defendant had violated a condition of his probation by committing a criminal offense. Accordingly, the trial court reasonably exercised its discretion in revoking defendant's probation and activating his previously earned sentence. **State v. Murchison, 461.**

SEARCH AND SEIZURE

Motion to suppress—drugs—totality of circumstances—no probable cause for search warrant—The trial court did not err in a drugs case by granting defendant's motion to suppress items seized under a search warrant. The totality of circumstances revealed that the affidavit failed to provide a substantial basis for the magistrate to conclude that probable cause existed. The information available to law enforcement officers from an anonymous tip and from the officers' corroborative investigation was deficient, and the affidavit's material allegations were conclusory. **State v. Benters, 660.**

Motion to suppress—exigent circumstances—It was not error for the trial court to deny defendant's motion to suppress evidence of marijuana plants seized without a warrant from an area outside of defendant's home. Exigent circumstances justified the seizure of the plants to prevent their destruction. The plants were outside of defendant's home in small, transportable pots; there was a vehicle in the driveway, indicating someone may have been in the home; and it may have been dangerous to leave an officer behind while the other applied for a warrant. **State v. Grice, 753.**

Motion to suppress—plain error review—Admission of evidence of marijuana plants seized without a warrant from an area outside of defendant's home did not amount to plain error. Even assuming the admission was erroneous, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings because defendant acknowledged that the marijuana was his. **State v. Grice, 753.**

Motion to suppress—plain view doctrine—officers' access to contraband—It was not error for the trial court to deny defendant's motion to suppress evidence of marijuana plants seized without a warrant from an area outside of his home in view of his driveway. The investigating officers had a lawful right of access from the driveway to the marijuana plants, which were approximately fifteen yards away in an unfenced area bordering a wood line. Even assuming the plants were in the home's curtilage, the officers did not violate the Fourth Amendment by traveling from one portion of the curtilage to another to seize the plants that were in plain view. The seizure was a minimal intrusion on defendant's property rights when balanced against the State's interest in seizing contraband. **State v. Grice, 753.**

Police dog—nuzzling bag open—instinctive or directed—remanded for determination—A police dog's instinctive action, unguided and undirected by the police, that brings evidence into plain view is not a search within the meaning of the Fourth Amendment or Article I, Section 20 of the North Carolina Constitution. When a dog is simply being a dog, if it acts without assistance, facilitation, or other intentional action by its handler, it cannot be said that a State or governmental actor intends to do anything. If, however, police misconduct is present, or if the dog is acting at the direction or guidance of its handler, then it

UTILITIES—Continued

and those findings were supported by competent, material, and substantial evidence in view of the entire record. The Commission's findings not only demonstrated that the Commission considered the impact of changing economic conditions upon customers, but also specified about how that factor influenced the Commission's decision to authorize a 10.2% return on equity. These findings were supported by the evidence before the Commission, including public witness testimony, expert testimony, and a Stipulation of Agreement between Duke Energy and the Public Staff. **State ex rel. Utils. Comm'n v. Cooper, Att'y Gen., 741.**

General rate case—errors—improper costs submitted—corrective steps taken—The Utilities Commission's findings in a general rate case were supported by substantial evidence in the record, including the testimony of witnesses for both Duke and the Public Staff acknowledging that errors occurred and that corrective steps were taken to resolve the errors. An intervenor did not show that the Commission allowed Duke to recover any improper costs from ratepayers. **State ex rel. Utils. Comm'n v. Cooper, Att'y Gen., 741.**

General rate case—single coincident peak cost-of-service methodology—just and reasonable—substantial evidence supporting finding—Although an intervenor in a general rate case argued that the Utilities Commission's order authorized preferential treatment of the industrial class to the detriment of the residential class, there was substantial evidence in the record to support the Commission's finding that the use of single coincident peak (1CP) cost-of-service methodology allocated costs equitably. The Commission considered all the evidence presented by the parties, explained the weight given to the evidence, and concluded that the use of 1CP methodology was "just and reasonable" in light of the specific characteristics of Duke's system. It is not the function of the Supreme Court to determine whether there is evidence to support a position the Commission did not adopt. **State ex rel. Utils. Comm'n v. Cooper, Att'y Gen., 741.**

North Carolina Utilities Commission—electric service rate—cost-of-service study—approval of adjustments—authority—The North Carolina Utilities Commission (Commission) did not err by approving certain adjustments made by Dominion North Carolina Power to a study of the costs of providing retail electric service to a large industrial customer. The Commission's determination that it would be unfair to make further adjustments to the cost-of-service study to account for the customer's interruptible contract was not in excess of its statutory authority or jurisdiction and there was substantial evidence in the record to support the Commission's findings. **State ex rel. Utils. Comm'n v. Cooper, Att'y Gen., 430.**

North Carolina Utilities Commission—electric service rate—return on equity—impact on consumers—An order by the North Carolina Utilities Commission (Commission), which authorized a 10.2% return on equity (ROE) for Dominion North Carolina Power, failed to meet the statutory requirement that the Commission make findings of fact regarding the impact of changing economic conditions on customers when determining the proper ROE for a public utility. The portion of the Commission's order in which it authorized the 10.2% ROE was reversed and remanded for additional findings of fact in light of *State ex rel. Utils. Comm'n v. Cooper*, 366 N.C. 484. **State ex rel. Utils. Comm'n v. Cooper, Att'y Gen., 430.**

WORKERS' COMPENSATION—Continued

Termination of temporary disability payments—inability to earn same wages as before injury—failure to show work-related injury—The Industrial Commission did not err in a workers' compensation case by terminating plaintiff's temporary disability payments and awarding defendants a credit for all disability payments made to plaintiff after 22 December 2010. Plaintiff did not show that his inability to earn the same wages as before his injury resulted from his work-related injury. **Medlin v. Weaver Cooke Constr., LLC, 414.**